Docket: 2016-1633(IT)G, et al

BETWEEN:

THE ESTATE OF TERRY URBANOWSKI
and 78 related appeals as set out in Schedule A,

Appellants,

and

HIS MAJESTY THE KING,

Respondent.

Motion heard on March 6, 2023 at Winnipeg, Manitoba

Before: The Honourable Justice Steven K. D'Arcy

Appearances:

Counsel for the Appellants:	Jeff Pniowsky Matthew Dalloo
Counsel for the Respondent:	Lindsay Tohn

AMENDED ORDER

In accordance with my Reasons for Order;

The motion for an Order allowing the appeals of the 79 appellants named in the motion is dismissed, with costs.

A case management conference to determine timetables for the completion of all outstanding litigation steps for each of the remaining 75 Appellants shall be held on Tuesday March 12, 2024 at 2:00 p.m., at the Tax Court of Canada, Imperial Broadway Tower, 4th Floor, 363 Broadway Street, Winnipeg, Manitoba.

This Amended Order is issued in substitution of the Order dated January 17, 2024 in order to amend the Style of Cause, Schedule A and to include the words underscored in paragraph 3 hereof.

Signed at Vancouver, British Columbia, this 31st day of January 2024.

"S. D'Arcy"

D'Arcy J.

Citation: 2024 TCC 6
Date: 20240117
Docket: 2016-1633(IT)G, et al

BETWEEN:

THE ESTATE OF TERRY URBANOWSKI
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Appellants,

and

HIS MAJESTY THE KING,

Respondent.

AMENDED REASONS FOR ORDER

D'Arcy J.

[1] The Appellants have brought this motion for an Order allowing the appeals of each of the 79 Appellants (the "**79 Appellants**") named in this motion. I will refer to the appeals of the 79 named Appellants as the "**79 Appeals**".

[2] The 79 Appellants argue that the Court should allow the 79 Appeals because of a delay in the hearing of the appeals caused by the Respondent's conduct in the appeal of the three appellants in *Choptiany v. The King* ("***Choptiany et al.***").[1]

[3] During an October 12, 2022 case management conference, counsel for the Appellants noted that he intended to file this motion with respect to the 79 Appeals. I informed the parties during the hearing and subsequently ordered, that the motion would proceed as follows:

- The Appellants were to file their motion on or before November 14, 2022, returnable on March 10, 2023.

- The Appellants' motion record was to be filed on or before December 12, 2022.

[1] 2022 TCC 112.

- The Respondent's motion record was to be filed on or before January 23, 2023.

- The Appellants' reply submissions, if any, were to be filed on or before February 26, 2023.

[4] In a motion such as the one before the Court, the submissions must set out a party's complete argument. The Court does not allow a party to ambush the other party by raising an argument for the first time at the hearing of the motion.

[5] The Appellants filed their motion record on December 12, 2022. It contained four and a half pages of actual written submissions. The Appellants did not file any affidavit evidence to support the factual assertions made in their brief submissions.

[6] The Respondent's motion record included 10 pages of written submissions together with a lengthy affidavit that provided evidence to support the factual assertions made in his submissions.

[7] I am troubled by the fact that the Appellants filed sparse submissions in support of a motion in which the Appellants are asking the Court to allow 79 appeals, each involving different taxpayers who were assessed substantial gross negligence penalties. In such a situation, I would expect, at a minimum, that the Appellants file an affidavit containing factual information showing how the conduct of the Respondent in the *Choptiany et al.* appeals supports their position that the Court should allow the 79 Appeals.

[8] For example, paragraph 4 of the Appellants' written submissions states that the Appellants and the Respondent agreed to select three lead cases and that the decision of the lead cases would negate the need for multiplicity of proceedings having regard to the Appellants' common arguments. The Appellants filed no evidence to support this statement. In fact, as I will discuss, this statement is not supported by the facts placed before the Court by the Respondent.

[9] If I were to issue my Order based solely on the written submissions of the Appellants, I would summarily dismiss the motion since the Appellants have not provided the Court with evidence to support the factual assertions that form the foundation of their motion.

[10] However, the Respondent did provide the Court with an affidavit containing relevant facts. My Order is based on the facts contained in the affidavit, the Court's public files with respect to the 79 Appeals, and the relevant jurisprudence.

Background

[11] The 79 Appellants participated in either the *Fiscal Arbitrators* or the *DeMara Consulting* tax schemes (the "**Fiscal Arbitrators scheme**" and the "**DeMara scheme**"). It appears that some of the Appellants participated in both schemes.

[12] The Federal Court of Appeal, at paragraph 3 of its reasons in *Kim v. Canada,*[2] described the Fiscal Arbitrators scheme as follows:

> Mr. Kim was employed by Bombardier Inc. and he reported employment income of $81,568 in 2009 and $85,568 in 2010. He also claimed business losses of $256,375 in 2009 and $114,848 in 2010. Mr. Kim's claim for business losses appears to have been based on information that he received from DSC Lifestyle Services. This organization was associated with the tax preparer known as "Fiscal Arbitrators". The claimed business losses appear to have been based on Mr. Kim's unrealistic notion that his employment income was linked to an artificial legal entity and that it was possible to distinguish between this artificial legal entity and a human being. He could therefore have his artificial entity pay his real entity expenses which resulted in the losses that he had claimed.

[13] I found in *Bradshaw v. The Queen*[3] that the plan, as described by a representative of the Fiscal Arbitrators organization to Mr. Bradshaw, was patently absurd.

[14] The DeMara scheme was described by the Federal Court of Appeal in *Canada v. Rattai*[4] ("***Rattai***") at paragraph 1, as follows:

> DeMara Consulting Inc. (DeMara) promoted a program to clients (called members) under which DeMara prepared and filed income tax returns for members and their spouses. To become members, individuals were required to complete a confidentiality and non-disclosure agreement and to provide DeMara with detailed personal information including about personal living expenses and personal

[2] 2019 FCA 210.
[3] 2017 TCC 123. This was an appeal that I heard before I was appointed case management judge of the Fiscal Arbitrator appeals.
[4] 2022 FCA 106.

> debt/financing obligations. DeMara used this information to prepare T5 and T5008 forms and then prepared members' returns deducting the personal expenses as business losses and treating them as capital losses. DeMara also required members to appoint DeMara as their authorized representative with the Canada Revenue Agency (CRA).

[15] The principals of Fiscal Arbitrators and DeMara were criminally convicted for their actions in preparing income tax returns for a large number of taxpayers in which the taxpayers claimed fictitious business losses.

[16] The Minister has assessed hundreds of taxpayers for their participation in these schemes. The assessments denied the substantial fictitious business losses claimed by the taxpayers and imposed gross negligence penalties.

[17] Beginning around 2010 and continuing for the next 9 or 10 years, approximately 1,000 of these taxpayers (including the 79 Appellants) appealed the assessments to this Court. In the early 2010s, most of the appeals involved Fiscal Arbitrators.

[18] The taxpayers were located in all regions of the country. A large number of the appellants were self-represented before the Court.

[19] As is the Court's practice when dealing with a large group of appellants who have participated in the same scheme or tax shelter, a case management judge was appointed to manage the appellants who had participated in the Fiscal Arbitrators and/or DeMara scheme.

[20] Chief Justice Rip (as he then was) was the first case management judge for this group of appeals. My colleague, Justice Boyle, replaced Chief Justice Rip in late 2015. I then replaced Justice Boyle as case management judge in the fall of 2021.

[21] At various times since the appeals were filed, the Court has issued orders holding the appeals in abeyance.

[22] It appears that Chief Justice Rip issued the first Order on June 2, 2014. This Order applied to the appellant, Denis Anderson, docket 2010-3038(IT)G, and all other appellants listed in Schedule A to Chief Justice Rip's Order. Schedule A to the Order included 522 appellants.

[23] Chief Justice Rip ordered that all 522 appeals and "any future appeals having similar common or related questions of law or fact be stayed sine die."

[24] The 522 appellants named in Chief Justice Rip's Order had participated in either the Fiscal Arbitrators scheme or the DeMara scheme. Therefore, the Order stayed all future appeals relating to either scheme.

[25] The 522 appellants listed in Schedule A to the June 2, 2014 Order include 40 of the 79 Appellants. One other of the 79 Appellants was subject to a similar Order issued by Chief Justice Rip on June 24, 2014.

[26] It appears that Justice Boyle issued similar orders. For example, on November 25, 2016, Justice Boyle issued an Order staying the appeal of Judy Davey, docket 2016-1701(IT)G, who is one of the 79 Appellants. The Order states that Ms. Davey's appeal and "any future appeals having similar common or related questions of law or fact be stayed sine die."

[27] As a result, the appeals of any of the 79 Appellants who were not specifically mentioned in an order of Chief Justice Rip or Justice Boyle were stayed since they were appeals with respect to the Fiscal Arbitrators and/or DeMara schemes.

[28] Justice Boyle held a status hearing in Winnipeg in October of 2016 for 78 appellants who had participated in the Fiscal Arbitrators and/or DeMara schemes (the "**October 2016 Status Hearing**"). Counsel for the 79 Appellants represented all of the 78 appellants.

[29] During the status hearing, Justice Boyle noted that Chief Justice Rip, during his time as case management judge, had released a third of the appeals relating to the Fiscal Arbitrators scheme or the DeMara scheme from being held in abeyance. Justice Boyle noted that since becoming case management judge, he had released another third of the appeals from being held in abeyance.

[30] He indicated that he intended to release the appeals of the appellants before him from abeyance that day and provide dates for the completion of the litigation steps.[5]

[31] Counsel for the appellants then argued that only one appeal involving an appellant who had participated in the DeMara scheme should proceed and that the remaining appeals should be held in abeyance. He referred to the one appeal that should proceed as an informal lead case, since the decision in that appeal would not be binding on the other appeals.

[32] He stated that his legal argument was the same for all of the 78 appellants who were before the Court and this argument was not dependent on the facts of a particular appeal. When asked whether all of the appellants were only involved with DeMara, he noted that the appellants were involved with both the Fiscal Arbitrators and DeMara schemes, but that a significant portion were appellants involved only with DeMara.

[33] Counsel for the appellants noted that all of the appellants were only challenging the gross negligence penalties; they were not challenging the underlying assessments.[6]

[34] Counsel for the Respondent had reservations concerning the appellants' counsel's suggested approach at that time. He noted that appeals, such as the ones before the Court, are fact-based, meaning that each case will turn on its own facts. The Respondent's position was that there was no need for lead cases. He also noted that there were dozens of cases involving the Fiscal Arbitrators and DeMara schemes that had already been decided by this Court.

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[5] Affidavit of Jillian Rath, Exhibit A; Transcript of the October 28, 2016 proceedings, pages 5 to 11.

[6] Transcript of October 28, 2016 proceedings, pages 1-23.

[35] Counsel for the Respondent acknowledged that it was a unique situation to have 78 appellants represented by the same counsel. While the Respondent would accept informal lead cases, he would not agree to be bound by the lead cases. He noted that the result in such informal lead cases may affect the Respondent's risk assessment with any subsequent cases. He also noted that while counsel was located in Winnipeg, the appellants before the Court were located across the country.

[36] Counsel for the Respondent left it to the Court to decide how the Court wished to proceed, but wanted more than one test case so that the Court was presented with a "good cross section that is representative of the facts".[7]

[37] Justice Boyle then gave the parties 30 days to come to an agreement on lead cases with respect to the 78 appellants. In a letter dated December 8, 2016,[8] the parties identified the appeals of three taxpayers: two appeals by Sandra McPherson, which related to both the Fiscal Arbitrators and DeMara schemes; one appeal by Thor Choptiany, which related to the Fiscal Arbitrators scheme; and one appeal by Wayne Richter, which related to the DeMara scheme.

[38] While the parties referred to the appeals of the three named taxpayers as lead cases, I will refer to them as "informal lead cases" since they were not true lead cases. Lead cases are appeals in respect of which other appellants agree to be bound by the Court's finding in such appeals. The facts before me are that only one appellant agreed to be bound by the decision in the three informal lead cases. That appellant was Mr. Richter, who agreed that the decision in his informal lead case would determine the result in a second Fiscal Arbitrators/DeMara appeal that he had before the Court. This makes sense since gross negligence looks to the actions of the appellant and Mr. Richter was the appellant in both appeals.

[39] Justice Boyle issued an Order on January 11, 2017 (the "**January 2017 Abeyance Order**"), setting out a timetable for the completion of the litigation steps in the informal lead cases, and ordering that all other matters listed in Schedule A to his Order be held in abeyance pending the decision in the (informal) lead cases.[9] There are 78 appeals listed in Schedule A to the January 2017 Abeyance Order. The

[7] Transcript of the October 28, 2016 proceedings, pages 1 to 23.
[8] Affidavit of Jillian Rath, Exhibit B.
[9] Affidavit of Jillian Rath, Exhibit C.

schedule included appellants who appeared at the status hearing, plus four additional appeals.

[40] In an Order dated October 5, 2022, Justice Boyle granted the appellants' motion in the informal lead cases, allowing their appeals and vacating the gross negligence penalties.[10] He found that "[t]he Respondent has adopted and demonstrated a consistent pattern of non-compliance with this Court's Orders and Rules with respect to CRA's audits and investigations involving the Appellants."[11]

[41] These non-compliances were in respect of the Respondent's discovery nominee's failure to properly inform himself with respect to whether the CRA had instigated criminal investigations into the three appellants in the informal lead cases, as well as the failure of the Respondent to comply with Justice Boyle's orders with respect to disclosure of CRA investigations, such as criminal investigations of each of the three appellants, including CRA projects where the appellants were mentioned.

[42] Justice Boyle allowed the appeals under the Court's inherent jurisdiction to prevent an abuse of its process. In his reasons, my colleague emphasized that this is a remedy of last resort, but that the continuing failure of the Respondent to comply with the Rules of the Court and his orders justified allowing the appeals.

[43] At the time that I became case management judge, only 60 appeals remained before the Court with respect to appellants who had only participated in the Fiscal Arbitrators scheme. Approximately 185 appeals were before the Court that related to the DeMara scheme, although some taxpayers participated in both schemes. The appellants in these appeals were located in Vancouver, Calgary, Edmonton, Kelowna, Lethbridge, Nelson, Regina, Winnipeg, Ottawa, Prince George, Toronto and Windsor.

[44] Once I became case management judge, I decided to remove all of the outstanding appeals from abeyance, except for the appeals of the 78 appellants that were being held in abeyance under the January 2017 Abeyance Order and a number

[10] *Choptiany et al.*
[11] *Supra*, at paragraph 92.

of DeMara-related appeals that the Court was holding in abeyance until such time as the Federal Court of Appeal issued its decision in *Rattai*.

[45] Currently, none of the Fiscal Arbitrators/DeMara appeals are being held in abeyance. I released the appeals subject to the January 2017 Abeyance Order from abeyance once Justice Boyle issued his decision in *Choptiany et al.* in October of 2022, and I released the relevant DeMara appeals once the Federal Court of Appeal issued its decision in *Rattai* in June of 2022.

[46] As previously noted, a case management conference was held on October 12, 2022 with respect to the 79 Appeals, which resulted in the 79 Appellants filing this motion.

Position of the Parties

[47] Relying mainly on the decision of the Supreme Court of Canada in *R. v Jordan*[12] ("***Jordan***"), the Appellants argue that the 79 Appeals should be allowed because of a delay in the hearing of the appeals due to the actions of the Respondent in the informal lead cases.

[48] The Appellants argue that the selection of the informal lead cases and the holding of the 79 Appeals in abeyance was ordered by the Court on the understanding that this would be the most just and expeditious means of resolving the group of appeals, whereby the decisions of the lead cases would negate the need for multiplicity of proceedings having regard to the Appellants' common arguments.

[49] They argue that the delay in the hearing of the 79 Appeals is unjustified and prejudicial and was caused by a serious abuse of the Court's processes. Counsel for the 79 Appellants argued that if the Appellants' motion is not granted, then the CRA, having lost the three informal lead appeals while gaining advantage in a hundred others, will be rewarded rather than punished for years-long abuse and games-playing.

[50] In his written submissions, counsel for the 79 Appellants stated the following with respect to what would occur if I were to dismiss the motion before the Court: "This would be a repugnant result, effectively overturning the immensely important

[12] 2016 SCC 27.

ruling of this court in *Choptiany* thereby bringing the integrity of this court into disrepute."

[51] This is not an acceptable statement or argument to make before this Court. It is disrespectful. The fact that the Court's decision is not the decision that the Appellants hoped for is not repugnant and does not bring the integrity of the Court into disrepute. It is a decision that is based upon the facts in front of me and the applicable law.

[52] Counsel for the 79 Appellants seems to have forgotten that he is an officer of the Court. He must not make disrespectful statements that question the integrity and competence of the Court.

[53] The Respondent raises a number of arguments in support of his position that the motion should be dismissed:

- An appeal held in abeyance is an inactive appeal that inherently involves delay. This delay was the result of the Appellants requesting the appeals to be held in abeyance.

- With the exception of a second appeal by one of the Appellants in the informal lead cases, the Court's decision in *Choptiany et al.* was never intended to be dispositive of the 79 Appeals. The determination of whether an individual taxpayer is liable for the subsection 163(2) gross negligence penalty is dependent on the conduct of the individual taxpayer. As a result, the appeals are fact-based and each case will turn on its own facts.

- With the exception of the one appeal, the Respondent never agreed to be bound by the decision in the lead cases. This was made clear to the Court and the Appellants. The parties did not agree that any decision in the informal lead cases would negate the need for more litigation.

- Delay on its own is not sufficient to allow these appeals. The delay must result in an abuse of the Court's process.

- The *Jordan* principle is not applicable here—that case is about the right of any person charged with a criminal offence to be tried within a reasonable period of time pursuant to section 11(b) of the *Canadian Charter of Rights and Freedoms*. Its application is limited to criminal law.

- The Respondent did not maliciously or abusively delay the 79 Appeals. The Appellants offer no support for their allegation that the Respondent lost the lead appeals to gain an advantage in hundreds of others; the delay has no benefit to the Respondent.

- The abuse found in *Choptiany et al.* was not abuse in these appeals. The Respondent has gained no advantage as a result of the Court's decision in the *Choptiany et al.* appeals and has not abused the discovery process in these appeals. On the contrary, two of the Appellants have previously filed joint applications for hearing in their appeals, certifying that their appeals are ready for trial.[13]

Disposition of Motion

A. Preliminary Issues

[54] Four of the 79 appeals named in this motion were not subject to the January 2017 Abeyance Order. In particular, the appeals of Judy Davey, docket 2016-1701(IT)G; Heath Avery, docket 2016-5256(IT)G; Armin Mantei, docket 2016-3988(IT)G; and Michael Brouwer, docket 2019-614(IT)G were not subject to the January 2017 Abeyance Order.

[55] It is not clear to the Court how three of these appeals relate to the 78 appeals that were held in abeyance pursuant to the January 2017 Abeyance Order. The Appellants filed no factual information with respect to any of the four noted appeals.

[13] The two appeals in question are noted in paragraphs 22 and 23 of the Respondent's written submissions. The relevant joint applications for hearing are attached as Exhibit K and E to the Affidavit of Jillian Rath.

[56] The Court's file for the Davey appeal indicates the following:

- Ms. Davey lives in British Columbia, and was self-represented at the time that Justice Boyle issued the January 2017 Abeyance Order.

- The Court issued an Order on November 25, 2016 holding her appeal in abeyance.

- Her appeal appears to have been removed from abeyance shortly thereafter since, on May 3, 2017, the Appellant and the Respondent jointly submitted a timetable for the completion of the litigation steps.

- The Court issued a timetable Order on May 31, 2017.

- Ms. Davey retained the Rotfleisch & Samulovitch law firm around July 24, 2017.

- On July 25, 2017, the parties filed a request to amend the Court's May 31, 2017 timetable Order.

- The Court issued an Order on August 11, 2017, amending its previous timetable Order.

- The Court issued an Order on September 28, 2018, holding the appeal in abeyance.

[57] Ms. Davey's appeal was clearly active after the January 2017 Abeyance Order. This is a different situation than the situation of appellants subject to the January 2017 Abeyance Order. Ms. Davey's appeal appeared to be proceeding in a normal manner until the Court's abeyance Order in September 2018.

[58] Counsel for the Appellants has provided no facts or even argument to explain why Ms. Davey's appeal should be included with the appeals that were subject to the January 2017 Abeyance Order. For these reasons, the motion, as it applies to Ms. Davey's appeal, docket 2016-1701(IT)G, is dismissed.

[59] The Court's file for the Avery appeal indicates the following:

- Mr. Avery is located in British Columbia and was represented by counsel in British Columbia at the time that he filed his notice of appeal.

- On May 25, 2017, the parties jointly submitted a timetable for the completion of litigation steps.

- The Court issued a timetable Order on May 31, 2017 and a revised Order on December 11, 2017.

- The Court file indicates that the parties completed most litigation steps, including examinations for discovery.

- On October 16, 2018, Justice Boyle issued an Order adjourning the scheduling of the hearing of the appeal until the Court issued its judgment in five appeals that were then before the Court. These five appeals included the *Rattai* appeal, but did not include the informal lead cases.

- On May 23, 2019, the Court set the appeal down to be heard on March 23, 2020 in Victoria. The hearing of the appeal was adjourned to allow the Appellant to retain new counsel.

[60] This is another appeal that was clearly proceeding to hearing after the Court issued the January 2017 Abeyance Order. In fact, it was scheduled for hearing on two occasions.

[61] Since counsel for the Appellants has provided no facts or argument to explain why Mr. Avery's appeal should be included with the appeals that were subject to the January 2017 Abeyance Order, the motion, as it applies to Mr. Avery's appeal, docket 2016-5256(IT)G, is dismissed.

[62] The Court's file for the Brouwer appeal indicates that the notice of appeal was filed on February 5, 2019, two years after the January 2017 Abeyance Order. Since counsel for the Appellants has provided no facts or argument to explain how an appeal filed two years after the January 2017 Abeyance Order relates to the appeals subject to that Order, the motion, as it applies to Mr. Brouwer's appeal, docket 2019-614(IT)G, is dismissed.

[63] The appeal with respect to Armin Mantei was filed on September 28, 2016. On June 29, 2017, the Appellant was informed that his appeal would be held in

abeyance pending the outcome of the informal lead cases. Since this occurred approximately five months after the Court issued the January 2017 Abeyance Order, it is self-evident that it should be treated in the same manner as the appeals of the 79 Appellants.

[64] After this motion was filed by the 79 Appellants, a Consent to Judgment was filed in one of the appeals named in this motion – the appeal of Wayne Richter, docket 2018-4215(IT)G. As noted previously, Mr. Richter agreed to be bound by the decision in the informal lead cases. As a result, the motion as it applies to Mr. Richter's appeal is moot and is dismissed.

[65] Subsequent to the filing of this motion, the appeals of Joseph Caro, docket 2013-4053(IT)G; Thomas Bastien, docket 2013-4228(IT)G; and Henry De Boon 2014-957(IT)G were discontinued. The motion as it applies to these three appeals is moot and is dismissed.

B. The Remaining Appellants

[66] I will now address the motion as it applies to the remaining Appellants. My reasons apply equally to the Davey, Avery and Brouwer appeals. For simplicity, I will continue to refer to the appeals as the 79 Appeals and the Appellants as the 79 Appellants. However, my reasons that follow do not apply to the Richter appeal, the Caro appeal, the Bastien appeal and the De Boon appeal.

[67] In *R. v. Cunningham*,[14] Rothstein J. wrote for the Supreme Court of Canada:

> [18] Superior courts possess inherent jurisdiction to ensure they can function as courts of law and fulfil their mandate to administer justice (see I. H. Jacob, "The Inherent Jurisdiction of the Court" (1970), 23 *Curr. Legal Probs.* 23, at pp. 27-28). Inherent jurisdiction includes the authority to control the process of the court, prevent abuses of process, and ensure the machinery of the court functions in an orderly and effective manner. ...
>
> [19] Likewise in the case of statutory courts, the authority to control the court's process and oversee the conduct of counsel is necessarily implied in the grant of power to function as a court of law. This Court has affirmed that courts can apply a "doctrine of jurisdiction by necessary implication" when determining the powers of a statutory tribunal:

[14] 2010 SCC 10.

> . . . the powers conferred by an enabling statute are construed to include not only those expressly granted but also, by implication, all powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime . ...
>
> (*ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140, at para. 51)

Although Bastarache J. was referring to an administrative tribunal, the same rule of jurisdiction, by necessary implication, would apply to statutory courts.

[68] The Tax Court of Canada is both a superior court and a statutory court. As set out by Rothstein J., the Court possesses inherent and implied jurisdiction to control the process of the Court and prevent abuses of process.

[69] This Court and the Federal Court of Appeal have noted on numerous occasions that the allowing of an appeal by a motions judge on the basis of an abuse of process is a drastic step. As the Federal Court of Canada, Appeal Division noted in *Yacyshyn v. Canada* at paragraph 18, "…the dismissal of an appeal is a drastic and somewhat ultimate remedy reserved for the egregious case or when no other alternative and less dramatic remedy would be adequate." This statement applies equally to the allowing of an appeal on account of the conduct of the Respondent.[15]

[70] In my view, the current situation does not constitute an egregious case that justifies allowing the 79 Appeals. In fact, for the following reasons, the actions of the Respondent in *Choptiany et al.* do not in any way support the allowing of the 79 Appeals.

[71] In the first instance, I find that the Respondent's conduct in the *Choptiany et al.* appeals is not an abuse of process with respect to the 79 Appeals.

[72] The abuse of process in the *Choptiany et al.* appeals arose as a result of the Respondent's conduct during the examination for discovery of its nominee in the informal lead cases. This related to the disclosure of factual evidence in respect of the three appellants in the informal lead cases, and in particular, factual questions

[15] [1999] 1 C.T.C. 139, 99 D.T.C. 5133.

with respect to criminal investigations of the three appellants. This has no relevance to the 79 Appeals.

[73] Further, the Appellants have produced no evidence to show that the abuse that occurred at the discovery stage in the *Choptiany et al*. appeals relates to any discovery that has occurred in the 79 Appeals. In fact, it appears from the record that discovery has not occurred in most of the 79 Appeals.

[74] The only issue is whether the Respondent caused a delay in the hearing of the 79 Appeals and whether such a delay constitutes an abuse of process.

[75] The Appellants rely heavily on the Supreme Court of Canada's decision in *Jordan*. As previously noted, this decision relates to an accused charged with a criminal offence, and the right to be tried within a reasonable time under section 11(b) of the *Canadian Charter of Rights and Freedoms*. The *Jordan* decision is not relevant to appeals made under the *Income Tax Act*.

[76] The Appellants argue that a substantial delay in the hearing of the 79 Appeals occurred because a decision in the informal lead cases would have negated the need for proceeding in the 79 Appeals. The Appellants produced no factual evidence to support this claim.

[77] In fact, the evidence before the Court supports the Respondent's factual assertion that the informal lead cases were never intended to be dispositive of the 79 Appeals. The Respondent made it clear prior to the appeals being held in abeyance that he would not agree to be bound by the Court's decision in the informal lead cases.

[78] More importantly, the determination of a taxpayer's liability under subsection 163(2) for the gross negligence penalty is dependent on the facts in each particular appeal.

[79] Subsection 163(2) imposes a penalty on every person who, knowingly, or under circumstances amounting to gross negligence, has made or has participated in, assented to or acquiesced in the making of, a false statement or omission in a tax return.

[80] As the Federal Court of Appeal noted in *Wynter v. Canada*,[16] subsection 163(2) imposes a penalty either when the taxpayer has knowledge, or in circumstances amounting to gross negligence.

[81] The knowledge requirement is satisfied if the taxpayer had an actual intent to make a false statement or the taxpayer is wilfully blind. The Federal Court of Appeal explained that:

> A taxpayer is wilfully blind in circumstances where the taxpayer becomes aware of the need for inquiry but declines to make the inquiry because the taxpayer does not want to know, or studiously avoids, the truth. The concept is one of deliberate ignorance…
>
> …wilful blindness pivots on a finding that the taxpayer deliberately chose not to make inquiries in order to avoid verifying that which might be such an inconvenient truth. The essential factual element is a finding of deliberate ignorance, as it "connotes 'an actual process of suppressing a suspicion'" …

[82] The Federal Court of Appeal noted that gross negligence is distinct from wilful blindness. Gross negligence "…arises where the taxpayer's conduct is found to fall markedly below what would be expected of a reasonable taxpayer."[17]

[83] The key issue in the 79 Appeals is the determination of the application of subsection 163(2) to each of the 79 Appellants; this determination requires an inquiry into the knowledge, intention and conduct of the each appellant. As the Respondent correctly noted, it is a fact-based determination and each appeal will turn on its own facts. The facts in the informal lead cases would not be determinative of the application of subsection 163(2) to the 79 Appellants.

[84] The *Choptiany et al.* appeals highlighted the fact-specific nature of subsection 163(2) appeals. They were dismissed because of issues with respect to the discovery of facts that were specific to each of the three appellants, namely criminal investigations of each of the appellants.

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[16] 2017 FCA 195, paragraphs 13 and 17.
[17] *Supra*, paragraph 18.

[85] As noted, the Respondent clearly stated during the October 2016 Status Hearing that he would not be bound by the informal lead cases.

[86] During the October 2016 Status Hearing, counsel for the Appellants appears to state that if he loses the informal lead cases, he will not pursue the other appeals. He noted that he had no intention of conducting 65 separate trials since his argument was identical in each of the appeals.[18] It is not clear whether he was speaking for himself or for the 79 Appellants.

[87] Further, the Appellants have produced no evidence to support their claim that there was a delay in the hearing of the 79 Appeals that was unjustified and prejudicial. They put no factual evidence before the Court.

[88] In the last few years, large group appeals, such as the one before the Court, have become a common occurrence. In many instances, the group appeals involve thousands of appellants. It is simply impossible for the Court to hear all of these appeals at the same time.

[89] In order to ensure that the Court functions in an orderly and efficient manner, the Court has instituted procedures to manage such appeals, taking into account the resources of the Court; the fact that the Court is a transient court that travels across the country; and the fact that the appellants, in most group appeals, are located in all regions of the country. The Court's procedures ensure that each appellant is treated fairly and is provided with the opportunity to have their day in court.

[90] This is what occurred with the Fiscal Arbitrators and DeMara appeals. The Court first held all of the appeals in abeyance. This allowed the Court to determine the number and nature of the related appeals. At the time of the October 2016 Status Hearing, approximately two-thirds of the Fiscal Arbitrators/DeMara appeals had been released from being held in abeyance.

[91] Prior to the October 2016 Status Hearing, the Court heard and decided numerous appeals with respect to the application of subsection 163(2) to appellants who had participated in the Fiscal Arbitrators and DeMara schemes. The Federal

[18] Transcript of the October 28, 2016 proceedings, page 7.

Court of Appeal also heard and decided appeals with respect to each of these schemes.

[92] This allowed jurisprudence to be developed with respect to the underlying transactions and the various positions that the appellants were taking with respect to the application of subsection 163(2) to their fact-specific situations. As counsel for the Respondent noted, the jurisprudence from these decisions allows the Respondent to conduct a risk assessment with respect to any subsequent appeals. This would apply equally to appellants in such appeals.

[93] At the October 2016 Status Hearing, Justice Boyle informed the parties that his intention was to remove from abeyance the appeals of the 78 appellants before him and to provide dates for the completion of litigation steps, which would have allowed the appeals to proceed to being heard by the Court.

[94] The Appellant's counsel did not want this approach, but rather chose to proceed with informal lead cases and to delay the hearing of the 79 Appeals. Informal lead cases that would not be binding on the Respondent or on the 79 Appellants and would not be determinative of the 79 Appeals, since each of these appeals will be determined based on the particular facts of the appeal.

[95] Since the Court's decision in the informal lead cases would not be determinative of the 79 Appeals, such appeals would have continued to hearing regardless of the Court's judgment in the informal lead cases.

[96] In such a situation, the Respondent's actions in the informal lead cases did not constitute an abuse of process with respect to the 79 Appeals.

[97] The Appellants argue that the Respondent, by his actions in the *Choptiany et al.* appeals, has gained an advantage in a hundred other appeals. It is not clear to the Court what constitutes this advantage. The Appellants have offered no evidence to support this allegation. As previously noted, each appeal is fact-specific. Further, the Respondent bears the burden of proof to establish the facts supporting the assessment of a penalty under subsection 163(2) against each of the 79 Appellants. In such a situation, it is difficult to see how the disclosure of facts in the informal lead cases conferred an advantage on the Respondent.

[98] For the foregoing reasons, the motion of the 79 Appellants is dismissed, with costs.

[99] It is time for the 79 Appellants to proceed to a hearing of their appeals. This will require completion of the required litigation steps. A case management conference for each of the 79 Appellants will be held in Winnipeg on Tuesday, March 12, 2024 at 2:00 p.m. to determine timetables for the completion of all outstanding litigation steps.

These Amended Reasons for Order are issued in substitution of the Reasons for Order dated January 17, 2024 in order to amend the Style of Cause, Back Page, Schedule A and to include the words underscored in paragraphs 65 and 66 hereof.

Signed at Vancouver, British Columbia, this 31st day of January 2024.

"S. D'Arcy"

D'Arcy J.

SCHEDULE A

	Appeal	Appellant Name (Last name, first name)
1.	2012-4997(IT)G	Sachs, Harald
2.	2013-1179(IT)G	Hunt, Eamonn
3.	2013-1184(IT)G	Vassallo, Rita
4.	2013-1667(IT)G	Duczman, John
5.	2013-175(IT)G	Wood, James
6.	2013-1915(IT)G	Kowalski, Richard
7.	2013-1916(IT)G	Kowalski, Athena
8.	2013-2022(IT)G	Larouche, April
9.	2013-3587(IT)G	Gaspari, Peter
10.	2013-4037(IT)G	Bigness, Robert
11.	2013-4052(IT)G	Hergott, Jeffrey
12.	2013-4053(IT)G	Caro, Joseph
13.	2013-4055(IT)G	Blair, Paul
14.	2013-4058(IT)G	Blair, Deborah
15.	2013-4176(IT)G	Farough, Charles
16.	2013-4226(IT)G	Masse, Alan
17.	2013-4227(IT)G	Egglezos, Bill
18.	2013-4228(IT)G	Bastien, Thomas
19.	2013-4229(IT)G	Brouwer, Michael
20.	2013-4235(IT)G	Scholey, Debra
21.	2013-4243(IT)G	Hwong, Peter
22.	2013-4268(IT)G	Piper, Brian
23.	2013-4322(IT)G	Laporte, Dan
24.	2013-4325(IT)G	Dupuis, Rachelle
25.	2013-4395(IT)G	O'Connor, Jack
26.	2013-4396(IT)G	Leiper, William
27.	2013-4445(IT)G	Chin, Vun Kuan
28.	2013-4446(IT)G	Wong, Jacob
29.	2013-4447(IT)G	Marling, David
30.	2013-4454(IT)G	Predhomme, Michael
31.	2013-4458(IT)G	Thibert, Pauline

32.	2013-4498(IT)G	Marling, Angela
33.	2013-4515(IT)G	Adams, Michael
34.	20a13-4656(IT)G	Marontate, Robert
35.	2013-4657(IT)G	Christianson, Darla
36.	2013-4703(IT)G	Readner, Jordan
37.	2014-125(IT)G	Turner, Martin
38.	2014-148(IT)G	Bertozzi, Marcello
39.	2014-1665(IT)G	Chin, Vun Kuan
40.	2014-1784(IT)G	Isaacs, Mark
41.	2014-1785(IT)G	Morin, Cody
42.	2014-2070(IT)G	Marling, Angela
43.	2014-2199(IT)G	Urbanowski, The Estate of Terry
44.	2014-3403(IT)G	Van Tankeren, Erik
45.	2014-3720(IT)G	Kreutz, Justin
46.	2014-3904(IT)G	Tankeren, Sarai Van
47.	2014-4025(IT)G	Hwong, Peter
48.	2014-4056(IT)G	Ursulan, Judith
49.	2014-4073(IT)G	MacDonald, Todd
50.	2014-4074(IT)G	Jackson, Alysa
51.	2014-433(IT)G	Tavares, Eulin
52.	2014-436(IT)G	Tavares, Frank
53.	2014-4361(IT)G	Neaves, Aaron
54.	2014-649(IT)G	Cail, James
55.	2014-722(IT)G	Hybschmann, Nick
56.	2014-956(IT)G	Scanlan, Tracey
57.	2014-957(IT)G	De Boon, Henry
58.	2014-958(IT)G	Wilson, James
59.	2014-959(IT)G	Nellis, Mark
60.	2014-977(IT)G	Marontate, Denise
61.	2014-997(IT)G	Wong, Agnes
62.	2014-998(IT)G	Wong, Peter
63.	2016-1608(IT)G	Cail, Hazel
64.	2016-1701(IT)G	Davey, Judy
65.	2016-3530(IT)G	Van Tankeren, Erik
66.	2016-3988(IT)G	Mantei, Armin

67.	2016-5256(IT)G	Avery, Heath
68.	2016-667(IT)G	Urbanowski, Nicholas
69.	2016-668(IT)G	Mazur, Jonathan Robert
70.	2016-771(IT)G	Ursulan, Bryan
71.	2016-774(IT)G	Ursulan, Judith
72.	2016-789(IT)G	Wong, Agnes
73.	2016-790(IT)G	Wong, Jacob
74.	2016-793(IT)G	Toyad, Policarp
75.	2016-877(IT)G	Isaacs, Mark
76.	2016-879(IT)G	Mantei, Armin
77.	2018-4215(IT)G	Richter, Wayne
78.	2019-614(IT)G	Brouwer, Michael

CITATION:	2024 TCC 6
COURT FILE NO.:	2016-1633(IT)G et al.
STYLE OF CAUSE:	The Estate of Terry Urbanowski et al. v. His Majesty the King
PLACE OF HEARING:	Winnipeg, Manitoba
DATE OF HEARING:	March 6, 2023
AMENDED REASONS FOR ORDER BY:	The Honourable Justice Steven K. D'Arcy
DATE OF AMENDED ORDER:	January 31, 2024

APPEARANCES:

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Counsel for the Respondent:	Lindsay Tohn

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