
The Development of the Tax Court of Canada: Status, Jurisdiction, and Stature

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INTRODUCTION

The Tax Court of Canada evolved over many decades from modest roots into a highly regarded superior court of record. Over time, the court's jurisdiction expanded to encompass a broad range of taxing statutes. Its procedures became flexible enough to offer inexpensive and simple processes for straightforward disputes involving small amounts, while at the same time providing an effective forum for resolving high-stakes complex cases. The present-day court is lauded by the general public and practitioners alike for the quality of its judgments and judges.

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This article traces the historical development of the court¹ to its current status and jurisdiction, and describes how this evolution led to the court's respected stature in the community.

STATUS

To appreciate the court's present status, it is useful to identify landmarks that helped to shape the court into its current form.

Early History

At the inception of The Income War Tax Act, 1917, appeals of assessments of income tax lay to a board of referees to be appointed by the governor in council to act as a court of revision.² A taxpayer or the minister of finance could appeal a decision of the board to the Exchequer Court of Canada.³ By 1923, the board still had not been constituted to hear any cases,⁴ and so it was abolished. Thereafter, appeals lay first to the minister of finance and then to the Exchequer Court of Canada.⁵ The Exchequer Court employed formal processes that could be cumbersome and expensive in some cases.

In 1946, the government proposed legislation to create an administrative body that was designed to resolve appeals more quickly and inexpensively.⁶ The Income Tax Appeal Board, the precursor to the Tax Court of Canada, was born.⁷

1 This article does not provide a comprehensive history of the Tax Court of Canada, which has been admirably described elsewhere. For a detailed review of the history of the court, see Gordon Bourgard and Robert McMechan, "The History of Tax Appeals," in *Tax Court Practice* (Toronto: Carswell) (looseleaf), chapter 22; and the comments of former Chief Justice Alban Garon in "Tax Court of Canada 20th Anniversary Symposium" (2005) vol. 53, no. 1 *Canadian Tax Journal* 135-75, at 135-39 ("20th anniversary symposium"). We recommend these articles to readers for a greater appreciation of the historical developments outlined here.

2 SC 1917, c. 28, sections 12 and 13.

3 *Ibid.*, at section 17.

4 Bourgard and McMechan, *supra* note 1, at 22-4.

5 An Act To Amend The Income War Tax Act, 1917, SC 1923, c. 52, section 7, enacting sections 12, 14, and 15 of The Income War Tax Act, 1917.

6 Canada, House of Commons, *Debates*, June 27, 1946, at 2923, cited in Bourgard and McMechan, *supra* note 1, at 22-8.

7 An Act To Amend the Income War Tax Act, SC 1946, c. 55, section 22, enacting the third schedule to the Income War Tax Act (RSC 1927, c. 97). The short-lived Income Tax Advisory Board, responsible for hearing objections to the exercise of discretion by the minister of national revenue pursuant to his powers under the Income War Tax Act and providing advice to the minister in this respect, was also created at this time: see SC 1946, *supra*, section 22, enacting the fifth schedule to the Income War Tax Act. The board did not have the power to overturn discretionary decisions by the minister of national revenue. Statutory reforms in 1948 abolished this body, together with several of the discretionary powers of the minister: see An Act To Amend the Income War Tax Act, SC 1948, c. 53, section 15.

The board was created as a court of record.⁸ Apart from setting an age limit of 65 years,⁹ the legislation did not prescribe qualification requirements for board members, with the exception of the chair and the assistant chair, who were required to be either judges of a superior court or lawyers of 10 years' standing.¹⁰ In practice, however, board members were lawyers, except for one accountant (who served for only eight months), and while other accountants were invited to serve as members of the board, they all declined.¹¹ Members were appointed for a fixed term of 10 years, but could be reappointed if not disqualified by age.¹²

Decisions of the Income Tax Appeal Board could be appealed to the Exchequer Court of Canada.¹³ At the time, however, the legislation did not specify the precise status of the appeal. In *H. Goldman v. MNR*, Thorson P of the Exchequer Court held that such an appeal, whether by the taxpayer or the minister of national revenue, was a trial *de novo* and the parties could raise whatever facts and issues they wished.¹⁴ The result was that original appeals to the board were stripped of much importance and tax litigation procedure became laden with duplication and high costs.

In 1958, among other changes, the board was renamed the Tax Appeal Board,¹⁵ recognizing the expansion of its jurisdiction to include appeals under the Estate Tax Act.¹⁶

Recommendations of the Carter Commission

In 1966, the Royal Commission on Taxation (the Carter commission) lamented the difficulty that the government encountered in attracting qualified persons to serve as members of the board, as a result of the members' insecurity of tenure and lack of status as true judges, and a perception that the board was inferior to the Exchequer Court, owing to the decision in *Goldman*.¹⁷ These factors contributed to the board's pronounced lack of prestige.

The Carter commission recommended some changes to remedy the situation. Among other things, it proposed to create a single tax court, independent of government, with exclusive original jurisdiction to hear appeals in cases involving income

8 SC 1946, *supra* note 7, third schedule to the Income War Tax Act, section 7(3); and Bourgard and McMechan, *supra* note 1, at 22-9.

9 SC 1946, *supra* note 7, third schedule to the Income War Tax Act, section 2(2).

10 *Ibid.*, section 2(1).

11 Canada, *Report of the Royal Commission on Taxation*, vol. 5 (Ottawa: Queen's Printer, 1966), 112-13.

12 SC 1946, *supra* note 7, third schedule to the Income War Tax Act, sections 2(3) and (4).

13 SC 1946, *supra* note 7, section 22, enacting the fourth schedule to the Income War Tax Act.

14 [1951] CTC 241, at 247 (Ex. Ct.).

15 An Act To Amend the Income Tax Act, SC 1958, c. 32, section 22.

16 SC 1958, c. 29, section 23.

17 *Supra* note 11, at 116. The commission further stated, *ibid.*, at 166, "We deplore the appeal by trial *de novo*, for it constitutes unnecessary duplication."

tax, transaction taxes (sales and excise taxes and excise duty), and customs tariffs.¹⁸ The Exchequer Court would have appellate jurisdiction over the decisions of the new court. Judges of the new court would be selected from lawyers exclusively, although the commission conceded that “it would be highly desirable to draw on the experience of other specialists, as assistants to the [new] Court.”¹⁹ Other recommendations included granting the new court governance over its own procedures and providing rights of discovery to litigants.

In the alternative, the Carter commission recommended certain changes to the Tax Appeal Board to improve its independence and prestige:

[W]e recommend that [the Tax Appeal Board] should be removed from its close association with the Minister of National Revenue, possibly to come under the Department of Justice. . . .

We feel that several steps should be taken to enhance the prestige of the Board, including granting its members the title, distinction and tenure of judges, enabling it to publish its own decisions, [and] giving it sole original jurisdiction in appeals under the statutes assigned to it.²⁰

Tentative Legislative Changes

The government of the day did not accept the primary recommendation of the Carter commission. It considered that an inexpensive and informal appeal to an administrative tribunal, as initially conceived in 1946, remained in the public interest. It also believed that the precedents, procedures, and rules developed by the Tax Appeal Board made the board more formal and cumbersome than originally intended.²¹ Thus, in 1970, the government introduced legislation establishing the Tax Review Board.²²

Hailed as a “taxpayer’s court,”²³ the Tax Review Board was designed to combine accessibility, informality, and effectiveness at minimal cost. It was an administrative tribunal that did not constitute a court of record²⁴ and was placed under the responsibility of the minister of justice in order to promote a sense of independence from the Department of National Revenue.²⁵ Its members had tenure of office (subject to good behaviour) until the age of 70 years.²⁶ Its procedures emphasized informality, as shown by a lack of prescribed forms for pleadings, the non-application of legal or

18 Ibid., at 166. See also 20th anniversary symposium, *supra* note 1, at 136-37.

19 *Supra* note 11, at 166.

20 Ibid., at 165.

21 Bourgard and McMechan, *supra* note 1, at 22-16.

22 Tax Review Board Act, SC 1970-71-72, c. 11.

23 20th anniversary symposium, *supra* note 1, at 137.

24 Tax Review Board Act, *supra* note 22, section 8; and Bourgard and McMechan, *supra* note 1, at 22-18.

25 Bourgard and McMechan, *ibid.*, at 22-16 to 17.

26 Tax Review Board Act, *supra* note 22, sections 3(2) and (3).

technical rules of evidence, the taxpayer's right to appear personally or to be represented by counsel, a prohibition of awards of costs against a litigant, and a clear statutory direction that "appeals shall be dealt with by the Board as informally and expeditiously as the circumstances and considerations of fairness will permit."²⁷ The legislation did not prescribe qualification requirements for board members, with the exception of the chair and the assistant chair, who were required to be either judges of a superior court or lawyers of 10 years' standing.²⁸

The Tax Review Board shared original jurisdiction to hear income tax appeals with the Federal Court Trial Division.²⁹ Appeals from decisions of the board lay to the Federal Court Trial Division.³⁰ As a consequence, a large measure of duplication remained in tax litigation procedure.

In 1972, the chair of the Tax Review Board publicly acknowledged that many complex cases decided by the board would be appealed to the Federal Court Trial Division by the losing party, and that taxpayers often used an appeal to the board as a "testing ground" to discover, at minimum expense, the merits of the Crown's argument.³¹ Clearly, the board lacked the status of a superior court of record, and its mandate to eschew formality rested uneasily with its responsibility to decide high-stakes appeals by large corporations.

Fulfilling the Vision of the Carter Commission

In 1983, the government reported to the House of Commons that the general public wrongly perceived the Tax Review Board to be a branch of the Department of National Revenue, lacking judicial independence.³² This prompted the government to take steps to fulfill the vision of the Carter commission, culminating in the creation of the Tax Court of Canada by the enactment of the Tax Court of Canada Act.³³ The legislation changed the status of the board to a formal court of record (but at that time not a superior court of record).³⁴

Subject to transitional provisions that permitted members of the Tax Review Board to continue in office as judges of the court,³⁵ the statute required any person appointed as a judge of the court to have been a judge of a superior court or a barrister

27 Ibid., section 9(2).

28 Ibid., section 4(2).

29 An Act To Amend the Income Tax Act, SC 1970-71-72, c. 63, sections 169 and 175.

30 Ibid., section 176.

31 K.A. Flanigan, "Tax Review Board: Function and Procedures," in *Report of Proceedings of the Twenty-Fourth Tax Conference*, 1972 Conference Report (Toronto: Canadian Tax Foundation, 1973), 508-18, at 510.

32 House of Commons, *Debates*, June 28, 1983, at 26891, cited in Bourgard and McMechan, *supra* note 1, at 22-19.

33 SC 1980-81-82-83, c. 158, as amended.

34 Ibid., section 3.

35 Ibid., section 24.

of 10 years' standing.³⁶ Judges were given security of tenure (subject to good behaviour) until the age of 70.³⁷

Evolution of the Court into a Superior Court of Record

Section 20 of the Tax Court of Canada Act authorized the court to make its own rules of procedure, subject to the approval of the governor in council. The Tax Court of Canada Rules Committee was formed to assist the court in fulfilling that mandate. Responsibility for regulating the pleadings, practice, and procedure in the court was delegated to the rules committee. In 1990, the general procedure rules and the informal procedure rules were promulgated.³⁸

The rules committee currently consists of the chief justice, the associate chief justice, three judges of the court designated by the chief justice, the chief administrator of the Courts Administration Service,³⁹ a representative designated by the attorney general of Canada, and two lawyers designated by the attorney general of Canada. The rules committee is empowered to create, amend, vary, or revoke the various rules applicable to proceedings before the court, including rules relating to the discovery process (including production and oral examination for discovery), the taking of evidence, pre-trial conferences, and the awarding and regulation of costs in the court. Separate rules of varying length and complexity now exist for most statutes under which the court has jurisdiction to hear appeals.

In 1994, the Tax Court of Canada Bench and Bar Committee was formed, initially composed of the chief justice, the associate chief justice, four lawyers of the Canadian Bar Association, and two lawyers from the Department of Justice.⁴⁰ Thereafter, the bench and bar committee met regularly and developed a number of initiatives designed to improve the litigation process, including pre-trial conferences to hasten settlements, electronic filing of documents, and status hearings held by teleconference rather than in open court.⁴¹ Early in its mandate, the committee even explored the possibility that certain informal procedure appeals could be heard by teleconference, but issues such as the inability of the judge to see the witnesses precluded this proposal from taking root.

36 Ibid., section 4(3).

37 Ibid., section 7.

38 Tax Court of Canada Rules, SOR/90-688, October 1, 1990: General Procedure (1990) vol. 124, no. 22 *Canada Gazette* Part II 4376-4463, as amended (herein referred to as "the general procedure rules"); Informal Procedure, *ibid.*, at 4464-76, as amended (herein referred to as "the informal procedure rules").

39 The Courts Administration Service is governed by the Courts Administration Service Act, SC 2002, c. 8.

40 Barbara A. Burns and Ian S. MacGregor, "Resolving Tax Disputes: A Justice Perspective," in *Report of Proceedings of the Forty-Sixth Tax Conference*, 1994 Conference Report (Toronto: Canadian Tax Foundation, 1995), 33:1-16, at 33:3.

41 Ian S. MacGregor, "Significant Fiscal Developments from a Justice Perspective," in *Report of Proceedings of the Fifty-Third Tax Conference*, 2001 Conference Report (Toronto: Canadian Tax Foundation, 2002), 6:1-15, at 6:12.

The leadership of various chief justices, including former Chief Justice Donald Bowman, has been an important driver in fostering the establishment of such committees and encouraging dialogue between the court and its various stakeholders. This is demonstrated not only in the initiative to create functioning committees, but also in the nurturing of those committees over time to ensure the fulfillment of their mandate.

The presence of functioning bench and bar and rules committees along with other features of the present-day court, including the strict qualification requirements for judges and a history of strong, non-politicized judicial appointments, paved the way for the court to be recognized in 2003 as a superior court of record,⁴² on a par with its peers.

JURISDICTION

Initially, the Tax Court of Canada held non-exclusive original jurisdiction to hear income tax appeals, shared with the Federal Court Trial Division. As a statutory court, it lacked the inherent jurisdiction of superior courts. On January 1, 1991, legislative amendments entered into force conferring on the court exclusive original jurisdiction over income tax appeals.⁴³ Since then, the court's jurisdiction has expanded beyond that of its predecessors.

At the inception of the Tax Court of Canada, the statutory jurisdiction of the court included appeals under the Income Tax Act, the Canada Pension Plan, the Petroleum and Gas Revenue Tax Act, and part III of the Unemployment Insurance Act, 1971.⁴⁴ The statutory amendments broadened the court's jurisdiction to also include appeals under other parts of the Unemployment Insurance Act (later replaced by the Employment Insurance Act), the Old Age Security Act, the War Veterans Allowance Act, and the Civilian War Pensions and Allowances Act (later replaced by the Civilian War-related Benefits Act).⁴⁵

Currently, the court also has jurisdiction to hear certain appeals arising under part IX of the Excise Tax Act (goods and services tax appeals), the Excise Act, 2001 (appeals involving alcohol and tobacco taxes), and part V.1 of the Customs Act (appeals involving assessments for garnishments and non-arm's-length transfers in respect of uncollected duties), as well as under the Air Travellers Security Charge Act, the Softwood Lumber Products Export Charge Act, and the Cultural Property Export and Import Act.⁴⁶

42 Courts Administration Service Act, *supra* note 39, section 60. See also 20th anniversary symposium, *supra* note 1, at 138.

43 An Act To Amend the Tax Court of Canada Act and Other Acts in Consequence Thereof, SC 1988, c. 61, section 4.

44 Tax Court of Canada Act, *supra* note 33, section 12.

45 SC 1988, *supra* note 43, section 4.

46 Tax Court of Canada Act, RSC 1985, c. T-2, as amended, section 12. Unless otherwise indicated, subsequent references to the Tax Court of Canada Act are to this version of the statute.

The court has also expanded in terms of its constitution. In addition to the chief justice and associate chief justice, the court now consists of 20 judges and 3 supernumerary judges.

General Procedure and Informal Procedure

There are two procedures for appeals under the Income Tax Act: the informal procedure and the general procedure. Generally, taxpayers wishing to appeal an assessment to the court may institute proceedings under the general procedure. Taxpayers may, however, elect to proceed under the informal procedure in limited circumstances.⁴⁷ Judges of the court hear appeals brought under both the informal procedure and the general procedure.

General Procedure

The basic requirements and elements of the general procedure are set out in sections 17 to 17.8 of the Tax Court of Canada Act as well as the general procedure rules. While the statutory provisions governing the general procedure are relatively brief, the rules committee has developed an extensive set of rules to augment the legislative framework.

The general procedure is similar to the formal civil litigation process, and involves document production, examinations for discovery, and the application of evidentiary and other procedural rules similar to those applicable in provincial superior courts.⁴⁸ Taxpayers may be self-represented or be represented by counsel.⁴⁹ The general procedure permits costs to be awarded to the Crown.⁵⁰

Appeals from decisions of the court under the general procedure lie to the Federal Court of Appeal.

47 Section 17 of the Tax Court of Canada Act provides that the general procedure applies in respect of any proceedings over which the court has jurisdiction, subject to, *inter alia*, section 18.29.

The latter provision states that the informal procedure applies to appeals under part I of the Canada Pension Plan; parts IV, VII, and VII.1 of the Employment Insurance Act; the Old Age Security Act (to the extent that a ground of the appeal involves a decision or determination as to income); and the War Veterans Allowance Act or part XI of the Civilian War-related Benefits Act (from an adjudication of the Veterans Review and Appeal Board as to what constitutes income or as to the source of income).

48 Section 17.3 of the Tax Court of Canada Act provides that where the aggregate of the amounts at issue in an appeal is below a stated threshold, oral examination for discovery shall not be held unless both parties consent or a party applies for it and the court determines that the case could not be properly conducted without one. There is an exception where a party requests to examine the other party's nominee even though the threshold is not met and the party making the request agrees to submit its own nominee to oral discovery and to pay the other party's costs in respect of such discovery.

49 Tax Court of Canada Act, section 17.1. Note that under rule 30(2) of the general procedure rules, a corporation bringing an appeal under the general procedure must be represented by counsel except by leave of the court to be represented by an officer of the corporation.

50 Tax Court of Canada Act, section 17.5.

Informal Procedure

The informal procedure is somewhat similar to a provincial small claims court process and is intended to enhance access to the court for taxpayers where the amounts at issue are small. It also may be an option for appeals that could otherwise be brought under the general procedure in certain cases.⁵¹ In contrast to the general procedure, there are no mandatory forms for filing a notice of appeal, and taxpayers may choose, in addition to self-representation and representation by counsel, to be represented by an agent.⁵²

Most of the rules governing the informal procedure have been legislated by Parliament and are contained in the Tax Court of Canada Act. They are designed to create a flexible, efficient, and expeditious process. To illustrate, the court is not bound by any technical or legal rules of evidence in conducting a hearing, and appeals are to be dealt with by the court as informally and expeditiously as the circumstances and considerations of fairness permit.⁵³

In general, the Crown must file its reply to a notice of appeal within 60 days of receiving a copy of the notice of appeal from the court, and the court must fix a hearing date within 180 days of the filing deadline for the reply, unless it is of the opinion that such a deadline would be impracticable in the circumstances.⁵⁴ Judgments are generally rendered within 90 days of the conclusion of the hearing; unlike judgments rendered under the general procedure, they have no precedential value.⁵⁵ Thus, the court is not bound by the strict rules of stare decisis on an appeal under the informal procedure.⁵⁶ In contrast to the general procedure, there is no rule under the informal procedure permitting costs to be awarded to the Crown.

Appeals of decisions of the Tax Court of Canada under the informal procedure lie to the Federal Court of Appeal; however, they are more restricted than those

51 Section 18(1) of the Tax Court of Canada Act provides that the informal procedure is available where the aggregate of all amounts at issue is equal to or less than \$12,000 (or where the amount of the loss determined under subsection 152(1.1) of the Income Tax Act [RSC 1985, c. 1 (5th Supp.), as amended] is equal to or less than \$24,000) and the taxpayer elects in its notice of appeal (or at a later time as permitted under the rules) to proceed under the informal procedure.

Section 18(2) of the Tax Court of Canada Act provides that a taxpayer may elect to proceed under the informal procedure where the only subject matter of the appeal is the amount of interest assessed under the Income Tax Act or the validity of a suspension referred to in subsection 188.2(2) of the Income Tax Act. Section 18.29(3) of the Tax Court of Canada Act provides that, in some cases, it is mandatory to proceed under the informal procedure in respect of certain applications (including an application for an extension of time under section 167 of the Income Tax Act and section 304 of the Excise Tax Act [RSC 1985, c. E-15]).

52 Tax Court of Canada Act, sections 18.14 and 18.15(1). See also rule 4 under the informal procedure rules and rules 5 and 21(1) under the general procedure rules.

53 Tax Court of Canada Act, section 18.15(3).

54 Tax Court of Canada Act, sections 18.16(1) and 18.17(1).

55 Tax Court of Canada Act, sections 18.22(1) and 18.28.

56 *Mourtzis v. The Queen*, 94 DTC 1362, at 1364 (TCC).

under the general procedure. Section 27 of the Federal Courts Act provides for limited grounds of appeal from a decision of the court under the informal procedure, primarily based on an alleged violation of the rules of natural justice.⁵⁷

In certain circumstances, an appeal brought under the informal procedure may be transferred to the general procedure by the court; in limited circumstances, such transfer is required.⁵⁸

The Tax Court of Canada Act further provides that, subject to the rules of the court, any judge may sit and act at any time and at any place in Canada, and shall constitute the court wherever the judge so sits or acts.⁵⁹ This provision permits informal procedure hearings to take place in very informal settings and in remote areas of the country. As noted by former Chief Justice Alban Garon, this flexibility improves access to justice:

[O]ne of the priorities for the Tax Court of Canada is that it be accessible to all Canadians. As evidence in support of this statement, the court currently sits in 68 Canadian cities. The court sits in all kinds of places: courthouses (of course), hotels, conference rooms, rectories, etc. The court has even sat in a taxpayer's kitchen when the taxpayer could not otherwise attend the hearing.⁶⁰

While the informal procedure has evolved to be an efficient and relatively inexpensive process, it is not always perfectly comprehensible to those without legal training. A practice has developed in which it is accepted that both the judge and the Crown owe a special duty to taxpayers who are not represented by legal counsel. For example, in *Poulton v. R.*, Bowman J stated, "I cannot emphasize too strongly that it is of consummate importance that the court in the informal procedure be vigilant to ensure that the unrepresented taxpayer not be deprived of procedural fairness."⁶¹

57 Federal Courts Act, RSC 1985, c. F-7, as amended. Specifically, section 27(1.3) provides that the only ground for appeal from an informal procedure decision is that the Tax Court of Canada (1) acted without or beyond its jurisdiction, or refused to exercise its jurisdiction; (2) failed to observe a principle of natural justice, procedural fairness, or other mandatory procedure; (3) erred in law in making a decision or an order (whether or not the error appears on the face of the record); (4) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the materials before it; (5) acted, or failed to act, by reason of fraud or perjured evidence; or (6) acted in any other way that was contrary to law.

58 Tax Court of Canada Act, section 18.11. For example, the court may order that the general procedure applies on application of the attorney general. Sections 18.11(2), (3), and (5) and sections 18.12 and 18.13 describe the circumstances in which the court shall order that the general procedure applies. In general, these include circumstances in which it appears to the court that the aggregate of all amounts at issue exceeds \$12,000 or the amount of loss at issue exceeds \$24,000, as well as circumstances where the issue or outcome is common to, or likely to affect, other appeals.

59 Tax Court of Canada Act, section 14(1).

60 20th anniversary symposium, *supra* note 1, at 138.

61 [2002] 2 CTC 2405, at paragraph 17 (TCC), cited with approval by the Federal Court of Appeal in *Burton v. The Queen*, 2006 DTC 6133, at paragraphs 12-13 (FCA). Bowman J later

The result has been a recognized success, since self-represented taxpayers obtain their day in court and usually leave with a sense that justice has been served.

The informal procedure also removes many self-represented taxpayers from the general procedure, which is ill suited to deal with a large number of litigants who are unfamiliar with formal civil procedure and whose issues do not require a full civil trial to resolve.

Although judgments rendered under the informal procedure are not binding on the court, they may nonetheless have persuasive value. In *Mourtzis v. The Queen*, Bowman J commented as follows:

I regard [section 18.28 of the Tax Court of Canada Act] as being of very limited application. I am prepared to accept it insofar as it means nothing more than this: If I do not choose to follow the decision of one of my brethren in an informal procedure, I am not bound by the strict rules of *stare decisis*. If that section is interpreted to mean that counsel is not entitled to refer to informal procedure cases or that I am not permitted to cite them or follow them if I choose to do so, then I regard that as a most unreasonable interpretation of the Act and, indeed, I would regard it as an unwarranted attempt by Parliament to interfere with my judicial independence and with the independence of the bar in this country to refer to such authorities if they see fit to refer to them.⁶²

Proposal To Merge Judicial Functions of the Tax Court of Canada and the Federal Court

One issue that has been extensively debated relates to the Tax Court's statutory jurisdiction. Among other things, the court cannot conduct a judicial review of the exercise of discretion by the minister of revenue. Many people questioned whether benefits might be obtained by merging the Federal Court with the Tax Court of Canada, suggesting that access to justice could be improved if a single court dealt with most federal tax-related matters, other than criminal prosecutions.

The auditor general of Canada commented on this issue in a 1997 report on the Federal Court and the Tax Court. The report recommended the consolidation of the registries of the Federal Court and the Tax Court to realize cost savings, and a merger of the judicial function of both courts.⁶³ While there was some support for this proposal, there were many stakeholders who strongly opposed the idea of a full

reaffirmed his statement in *Poulton*, in *Ritonja v. The Queen*, 2006 DTC 3140, at paragraph 17 (TCC). Recently, Rip J has expanded upon the notion that taxpayers are not to be deprived of procedural fairness, by suggesting strongly that some form of legal aid be provided, when appropriate, and that practitioners consider pro bono service in respect of informal procedure matters: *Pytel v. The Queen*, 2010 DTC 2663, at paragraphs 42-45 (TCC).

62 Supra note 56, at 1364.

63 Office of the Auditor General of Canada, *Report on the Federal Court of Canada and the Tax Court of Canada* (Ottawa: Public Works and Government Services Canada, 1997), at paragraphs 13 and 15.

merger of judicial functions, on the basis that the efficiency of a specialized court for tax cases should be preserved.⁶⁴

Ultimately, the minister of justice decided to keep the judicial functions of each court separate but to merge their administrative functions.⁶⁵ Parliament enacted the Courts Administration Service Act⁶⁶ to establish a common body that provides administrative services to the Federal Court of Appeal, the Federal Court, the Court Martial Appeal Court, and the Tax Court of Canada. As noted above, the reforms also changed the status of the Tax Court to that of a superior court of record, reflecting its improved reputation in the general community and amongst legal practitioners.

Jurisdiction of the Court Today

Over the past 20 years, the jurisdiction of the court has expanded in terms of the types of statutory appeals falling within its purview. At the same time, the court has met its mandate to be a trial-level court composed of a highly specialized judiciary able to deal effectively with often complex issues involving significant amounts under the general procedure, while still promoting access to justice through the informal procedure.⁶⁷

STATURE

The court has garnered respect from both the general public and the tax community.

From the perspective of the general public, the accessible and flexible procedures available under the informal procedure allow for relatively straightforward appeals to be heard regardless of location or the amount at issue. At the same time, the general procedure permits more complex tax appeals to be determined in accordance with a formal process better suited to complex cases involving sophisticated taxpayers where the amounts at issue or the principles involved are significant.

Over time, the court has consistently demonstrated that it is a fair, neutral arbiter. The court's judges admirably navigate complex and often daunting provisions

64 Ibid., at paragraph 16.

65 Letter to Bernard Amyot, president of the Canadian Bar Association, from the Honourable Rob Nicholson, minister of justice, dated July 2, 2008. In the letter, the minister of justice stated, “[S]uch major policy reform would require comprehensive legal and policy analysis and broad consultations within government and among all interested stakeholders, including the courts, before legislative amendments could be considered.”

66 Supra note 39.

67 When the legislative amendments were presented to the Senate Committee on Banking, Trade and Commerce in 1988, it was clarified that although appeals brought under other non-tax statutes were being transferred to the Tax Court of Canada, such transfers were done for logistical and efficiency reasons. The primary intention was to create a trial-level court where all of the judges worked in tax matters on a full-time basis: see Denis Lefèvre, assistant deputy attorney general, Tax Law, Department of Justice, testifying before the Senate Committee on Banking, Trade and Commerce, reported in Canada, *Proceedings of the Standing Senate Committee on Banking, Trade and Commerce*, 33rd Parl., 2d sess., issue no. 75, 22-23, September 13, 1988.

of various taxing statutes to ensure that justice is done. On this point, Bowman J stated:

I don't regard statutory interpretation as a very arcane sort of thing. You decide what is the commonsense answer and you interpret the legislation accordingly, or you find authority to state your conclusion. But essentially, in deciding tax cases—whether we're talking about the *Shell Canada* case or the *Radage* case, the poor little fellow who gets caught up in the toils of section 60 and whether he can deduct alimony or not—you look at it as a practical matter and then say, "What is my job here? My job here is to decide if he is in accordance with the law and in accordance with common sense and with compassion." And if you do that, you have a 50-50 chance of being upheld in Appeal.⁶⁸

Within the tax community, the court has been recognized for the superior quality of its judges and the decisions that they render. Judicial appointments to the court reflect its status as a prestigious institution and include private practitioners at the height of their practice.

In respect of its judgments, the court has been acknowledged for its role as the court of first instance that must deal with novel, difficult, and potentially far-reaching cases, and its ability to arrive at the correct result in very challenging circumstances.⁶⁹ In particular, the court has played a significant role in developing tax law. For example, the court has helped to shape the jurisprudence interpreting the general anti-avoidance rule (GAAR) in section 245 of the Income Tax Act.⁷⁰ In this regard, Brian Arnold observed:

In cases like *McNichol* and *Equilease* and *OSFC*, the Tax Court has established many of the essential features of a GAAR analysis, and these features have been endorsed by the Federal Court of Appeal. These include the finding that a tax benefit doesn't involve a very high threshold; the finding that, when you judge the primary purpose of an avoidance transaction, it is an objective test, not a subjective test; and the fact that the tax benefit doesn't have to be derived by the same persons who arrange the avoidance transaction. Most importantly, the court has established that the notion of abuse under subsection 245(4) requires the identification of a statutory scheme that the transaction has abused.⁷¹

68 20th anniversary symposium, supra note 1, at 151.

69 See the comments of Brian Arnold, *ibid.*, at 148-49, discussing *Cudd Pressure Control Inc. v. The Queen*, 95 DTC 559 (TCC); *aff'd*, 98 DTC 6630 (FCA); leave to appeal to the Supreme Court of Canada dismissed [1998] SCCA no. 599; and *Edwards v. The Queen*, 2002 DTC 1856 (TCC); *aff'd*, 2003 DTC 5667 (FCA). See also Chrystelle Chevalier Gagnon and Lisa Handfield, "Survey of Tax Appeals" (March 2010) vol. 18, no. 3 *Canadian Tax Highlights* 1, in which the authors studied certain appeals heard under the general procedure between January 1, 1998 and November 1, 2009, and found that the Federal Court of Appeal disagreed with the result reached by the Tax Court of Canada in approximately 18 percent of those cases.

70 *Supra* note 51.

71 20th anniversary symposium, supra note 1, at 143.

The leadership of former Chief Justice Bowman throughout his many years of service with the court fostered the empowerment of judges to develop the law as they see fit. This atmosphere of empowerment in decision making at the Tax Court of Canada continues today. For example, the decisions of Miller J in *Canada Trustco Mortgage Company v. The Queen*⁷² and of Little J in *McLarty v. The Queen*,⁷³ both upheld on appeal to the Supreme Court of Canada, provide an important contribution to the interpretation of GAAR and the development of the law relating to contingent and absolute liabilities, respectively. More recent is the decision of Woods J in *Garron Family Trust et al. v. The Queen*,⁷⁴ which changed the legal test governing the residence of trusts. While it remains to be seen whether the decision will be upheld on appeal,⁷⁵ it provides another example of the significant role played by the judges of the Tax Court in developing tax law in Canada.

Outside the courtroom, judges of the court have been active participants in the legal community. This has been exemplified by former Chief Justice Bowman, who has been a frequent speaker at public events and heavily involved in young practitioners' events and programs.

CONCLUSION

The respect that the Tax Court commands in the community is deserved. It is the product of a long evolution involving statutory reform, jurisdictional expansion, and improved procedures. It derives in part from the court's willingness to engage the general public and practitioners, and reflects strong leadership by successive chief justices and associate chief justices. The court's decisions are trend setting. While tax law is ever dynamic, the judges of the court have proved their ability to keep up with the changing times and will continue to shape tax law in Canada. The court is well positioned for a bright future.

72 2003 DTC 587 (TCC); aff'd. 2004 DTC 6119 (FCA); aff'd. 2005 DTC 5523 (SCC).

73 2005 DTC 217 (TCC); rev'd. 2006 DTC 6340 (FCA); rev'd. 2008 DTC 6354 (SCC).

74 2009 DTC 1568 (TCC).

75 *Garron* is under appeal to the Federal Court of Appeal: see court file nos. A-419-09, A-420-09 (FCA).