

Back to the Future: Is It Time To Put Revenue Canada into Commission?

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PRÉCIS

Le fait que Revenu Canada soit dirigé par un élu, le Ministre du Revenu national, a donné lieu à des perceptions de parti pris politique ou d'interventions et nuit aux initiatives conjointes fédérales-provinciales en matière d'administration fiscale. D'autres compétences, dont le Royaume-Uni, l'Australie, la Nouvelle-Zélande et les États-Unis, mettent leurs ministères du Revenu à l'abri du contrôle direct des politiciens.

Bien qu'un ministère traditionnel de l'État soit centralisé et politisé, il ne constitue qu'une entité gouvernementale parmi une multitude qui peut être décentralisée ou dépolitisée à divers degrés. D'autres compétences dont la forme de gouvernement est un système parlementaire, comme le Royaume-Uni, l'Australie et la Nouvelle-Zélande, imposent à leurs ministères du Revenu des conditions et des politiques communes de fonctionnement, mais permettent la prise de décisions plus indépendante et dépolitisée par des commissaires autonomes et non politisés. Bien que l'administration fiscale aux États-Unis soit quelque peu plus politisée, elle est assujettie à un contrôle politique moins direct que celle du Canada.

Les auteurs soutiennent que les propositions visant la dépolitisation de l'administration fiscale au Canada, datant de la Commission Carter, doivent être revues, tant pour accroître la confiance du public dans l'administration fiscale que pour faciliter des initiatives conjointes fédérales-provinciales.

ABSTRACT

The fact that Revenue Canada is directed by an elected political figure, the minister of national revenue, has raised perceptions of political bias or interference and arguably hinders joint federal-provincial tax administration initiatives. Other jurisdictions, including the United Kingdom, Australia, New Zealand, and the United States, insulate their revenue departments from direct control by politicians.

Although a traditional department of state is both centralized and politicized, it is only one of a spectrum of governmental entities that may be decentralized or depoliticized to varying degrees. Other jurisdictions with parliamentary systems of government, such as the United Kingdom,

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Australia, and New Zealand, impose common operating conditions and policies on their revenue departments but allow more independent, depoliticized decision making by autonomous and non-political commissioners. Although tax administration in the United States may be somewhat more politicized, it is subject to less direct political control than in Canada.

The authors argue that proposals to depoliticize the Canadian tax administration, dating from the Carter commission, should be revisited, both to increase public confidence in tax administration and to facilitate joint federal-provincial initiatives.

INTRODUCTION

Since Confederation, the Department of National Revenue and its predecessors have been headed by a minister who is a member of the federal Cabinet.¹ In this article we consider whether the time has come to move away from using a traditional department of state to administer the taxes imposed by Parliament. In 1966, the Carter commission² proposed an independent revenue commission. Putting a particular office “into commission” has a long history in England: the British prime minister invariably holds the position of First Lord of the Treasury—the most senior position in the Treasury Board, established in 1714.³ Our conclusion is that this proposal deserves further and serious review.

A less politicized form of tax administration is desirable in principle and would be well received by taxpaying Canadians. While most government departments engage in activity that involves contact with the public and that may have a significant impact on members of the public, few have the potential effect of the tax administration. In its role as tax collector, the government exercises both administrative and quasi-judicial functions in reviewing returns, making reassessments, and disposing of appeals at the pre-litigation stage. It also exercises enforcement powers similar in some respects to those of the police. These include the power to require the provision of information and, in certain cases, to search and seize; collection powers, including seizure of property and garnishment of wages; and, in conjunction with prosecuting attorneys, the power to lay criminal charges. In addition, taxpayers are required to disclose significant personal information to the revenue authorities, and are naturally concerned that such information not be misused by government.

In the event of a dispute between the tax authorities and a citizen, the citizen suffers lost time, expense, and inconvenience, whatever the outcome. Unlike government departments whose constituency is limited to a

¹ With a brief exception in the 1890s; see generally the appendix.

² See Canada, *Report of the Royal Commission on Taxation* (Ottawa: Queen’s Printer, 1966).

³ See S.A. de Smith, *Constitutional and Administrative Law* (London: Longman, 1971), 187.

particular social or economic group or a particular group of “clients,” tax administration affects, both in theory and in practice, virtually the entire adult population. It is necessary that the process not only be carried out but also be seen to be carried out in a fair, impartial, and non-political manner. However, some evidence suggests that this is not always the case:

- The auditor general’s review of an advance tax ruling given in respect of the acquisition by Petro-Canada of the Canadian assets of Petrofina⁴ suggests that the parties may have received preferential treatment, presumably because Petro-Canada was a Crown corporation.

- It has been suggested⁵ that Revenue Canada issued a favourable advance tax ruling in respect of the acquisition of Gulf Canada by Olympia & York Developments only as a result of direct intervention by the federal Cabinet.

- The Conservative Party Task Force on Revenue Canada,⁶ led by Perrin Beatty, attempted to fix blame for Revenue Canada’s shortcomings on its political masters. Although the task force drew public attention to genuine problems, it could not help but reinforce a conclusion that tax collection was connected to partisan politics.

- The results of a survey of Revenue Canada auditors carried out by the Professional Institute of the Public Service of Canada in the autumn of 1993⁷ suggested that many auditors felt there was “political interference” in the enforcement of tax laws. Nearly 80 percent of the auditors surveyed said they believed that the operations of Revenue Canada had been hindered by the “level of politicization” in the department, and more than 60 percent disagreed with the statement that Revenue Canada was serious about dealing with non-compliance. Specific comments included allegations that there was both direct interference from politicians in the administration of the Income Tax Act⁸ and indirect influence from senior Revenue Canada officials who were overly concerned about possible political consequences or political fallout in making enforcement decisions.

A secondary reason to consider a more non-politicized form of tax administration is related to the federal-provincial integration of tax administration, both existing and proposed with respect to the rationalization of consumption taxes. Some provincial governments have been willing to delegate certain tax administration functions to Revenue Canada (through the federal-provincial collection agreements); they may be willing to go

⁴ Canada, *Report of the Auditor General of Canada to the House of Commons* (Ottawa: Supply and Services, 1985), paragraphs 3.74 to 3.101.

⁵ Linda McQuaig, *Behind Closed Doors* (Toronto: Viking, 1987), 298.

⁶ Progressive Conservative Party of Canada, *Report of the Task Force on Revenue Canada* (Ottawa: Progressive Conservative Party, April 8, 1984).

⁷ The Professional Institute of the Public Service of Canada, *Auditing Group Opinion Survey*, presented to Revenue Canada April 1994 (n.p., n.d.).

⁸ RSC 1985, c. 1 (5th Supp.), as amended.

even further if they are satisfied that the administrator enjoys a greater degree of independence from the federal government and is less obviously identified with it.

Although greater autonomy for revenue institutions has been pursued in developing countries to improve the quality of the resources used in the revenue function and to combat patronage,⁹ these considerations fortunately appear to have less relevance in Canada.

DEPARTMENTAL CENTRALIZATION AND POLITICIZATION

A logical starting point in this inquiry is an examination of the departmental structure and its suitability for tax administration. A department of state, whether federal or provincial, is characterized by both centralization and politicization. It is centralized because it is a hierarchical body headed by a deputy minister who is, in turn, accountable only to the minister. The powers exercised by a department are the powers conferred upon the minister by the statute constituting the department, and the persons employed in the department exercise those powers under the ultimate direction of the minister. A department is also centralized in the sense that it is an integral part of the administration. Departments have no distinct legal personality and are subject to a common set of administrative rules and procedures within the administration. The actions of the departments are closely coordinated and supervised by central bodies, both political and non-political. At the federal level in Canada, the non-political coordinating bodies are the Privy Council Office and the Treasury Board. The function of political coordination and supervision is carried out by the federal Cabinet and the Prime Minister's Office.

This centralization is reinforced by the prime minister's power to appoint deputy ministers, which tends to produce a sense of loyalty to the government as a whole and confers a degree of independent authority on the deputy minister. The role of the clerk of the Privy Council in advising the prime minister on the appointment of deputy ministers also reinforces this centralizing tendency.

The same factors contribute to the politicization of the department. The head of the department, the minister, is a member of the Cabinet. She is immediately and directly accountable to Parliament and indirectly accountable to her party and to the electorate. The legitimacy of the minister's position derives from her status as a member of a government that enjoys the confidence of the legislature because it has (generally)

⁹ See Seth E. Terkper, "Ghana's Tax Administration Reforms (1985-93)" (May 23, 1994), 8 *Tax Notes International* 1393-1400, at 1394. This concern is also evident in the Katz commission report on the South African tax administration: see Republic of South Africa, *Interim Report of the Commission of Inquiry into Certain Aspects of the Tax Structure of South Africa*, December 9, 1994, and Marius van Blerck, "Reform of South Africa's Tax Collection Agencies" (December 11, 1995), 11 *Tax Notes International* 1558-59. South Africa's tax administration regime is discussed briefly under the heading "Survey of Tax Administrations," *infra*.

won the confidence of the voters in the last election. The departments, then, are the principal means by which the party in power carries out the political program on which it was elected and on which its continued tenure in office will in large part depend.¹⁰

These centralized and politicized departments occupy only one point on a spectrum of governmental entities distinguished by varying degrees of decentralization and depoliticization. Entities other than traditional departments, which occupy the rest of the spectrum, can be described generically as decentralized administrative structures. In practice, these structures may be constituted as boards, corporations, commissions, agencies, and the like, and may be established for a number of reasons:

1) Where a judicial or quasi-judicial function is exercised, the principle of the separation of powers will dictate a greater degree of autonomy from political control than is the case with a department. The Tax Review Board as it existed before it became the Tax Court is an example.

2) Decentralized agencies have been established in response to particular economic or business concerns when a specialized agency, somewhat insulated from political pressures, was needed. Examples of such agencies are the National Transportation Agency, which regulates railways and airlines, and the Canadian Radio-television and Telecommunications Commission, which regulates telecommunications. These agencies typically deal with licensing, rates, and other regulatory matters.

3) Where a particular program involves special interests, a more autonomous administrative body may allow representation of those interests. Examples of such bodies are the Canada Employment and Immigration Commission and the provincial workers' compensation boards.

4) Decentralized administrative agencies allow cross-delegation of powers between the federal and provincial governments. Certain agricultural marketing boards are probably the best example.

5) Where commercial or quasi-commercial activities are contemplated, a decentralized agency free from many of the procedural controls common to the public service generally has been thought to be appropriate. The classic examples of this type of agency are proprietary Crown corporations such as Petro-Canada and Canadian National Railways.

The degree of decentralization in a particular agency is subject to almost infinite variation and depends on a wide variety of factors. In almost all cases, however, the permanent staff of the agency are directly answerable not to a minister of the government but to a board, a commission, or an individual office holder less directly connected with the government.

The degree of decentralization is determined by the type of control exercised by the central government machinery. Such control is either horizontal or vertical. Horizontal control is control over certain common

¹⁰ René Dussault and Louis Borgeat, *Administrative Law: A Treatise*, 2d ed., vol. 1 (Scarborough, Ont.: Carswell, 1985), 83-86 and 89-91.

policies or conditions of operation—for example, policies establishing whether the agency staff are to be part of the public service and subject to all the attendant regulations, including the labour relations regime; hiring and classification practices; wage and benefit and dismissal procedures; and policies regarding the use of common purchasing or government services agencies. Vertical control is control over decision making—for example, a minister's ability to impose policy directives, to make and approve rules and procedures, and to make appointments or to dismiss; the requirement to report to Parliament; and the manner in which the agency is funded (whether by detailed appropriation, by block vote, or by fees or profits).

The existence of a high degree of horizontal control is not necessarily incompatible with vertical independence. For example, regulatory agencies may obtain all their personnel, facilities, and support services in the same manner as a government department but may, because of the type of tenure of their members or the legislative framework under which they exist, have a high degree of autonomy from central or political direction in decision making. In assessing any proposal for altering the status of federal tax administration, issues of both horizontal and vertical decentralization must be considered.

In a study of independent administrative agencies carried out for the Law Reform Commission in 1979,¹¹ considerable stress was laid on the role of independent agencies in insulating the particular process from political pressure:

The nature of the mandate and powers given an individual regulatory body may differ greatly depending upon the nature of the job to be performed and the political considerations conceived to be relevant at the time. . . . The same functions [of bodies created to perform a new administrative function] might, as well, have been performed within an existing government department were it not for the additional considerations of providing for impartiality and insulating the executive from both the lobbying tactics of applicants and political pressures resulting from the application of the guidelines. . . .

[T]he aim of “depoliticization” is a common theme throughout the regulatory area. Few people pretend that the matters to be regulated are free from content that is highly political. Recognition that the priorities of a given Minister or of the Cabinet of the day may not necessarily coincide with the long-term public interest of Canada as a whole lends strength to the view that the “public interest” is safer when left to be interpreted by an independent body who can weigh all legitimate conflicting interests including those of the executive from a less partisan perspective than would be taken either by Cabinet or Parliament as we know it.¹²

¹¹ Lucinda Vandervort, *Political Control of Independent Administrative Agencies*, A Study Paper Prepared for the Law Reform Commission of Canada (Ottawa: Supply and Services, 1979).

¹² *Ibid.*, at 19.

SURVEY OF TAX ADMINISTRATIONS

We begin with a brief survey of the way in which issues of horizontal and vertical decentralization and depoliticization have been addressed in the tax administrations of the United States, the United Kingdom, Australia, and New Zealand. These jurisdictions have been chosen for a number of reasons—the similarity of their legal, accounting, and general business environments to those of Canada; the general similarity of their tax systems; in the case of the United Kingdom, Australia, and New Zealand, a similar system of parliamentary government; and in the case of the United States and Australia, a similar federal system of government.

Mention should also be made, in passing, of South Africa. That country's Inland Revenue is currently a branch of the Department of Finance, headed by the commissioner of inland revenue. Inland Revenue is responsible for, among other things, the determination and application of tax policy and operational control. The receiver of revenue has overall responsibility for assessments, investigation of tax evasion and avoidance, and collection of outstanding taxes. Inland Revenue has no direct control over personnel and other administrative matters. As the result of a perceived crisis in revenue collection, the structure of tax administration in South Africa was reconsidered by the Katz commission. The Katz commission recommended the establishment of a newly constituted Inland Revenue as an independent agency answerable to a board representative of both national and provincial interests to serve as an impartial, expert, and efficient revenue collector.

In October 1995, the South African Ministry of Finance announced a proposed reorganization of the administration of taxes in South Africa into a single revenue department. It appears that the unified revenue department will be managed by an independent board of public servants, but will remain horizontally integrated with the South African public service. These reforms appear to be generally consistent with the analysis presented in this article. The proposals, while relevant to our inquiry, seem motivated more by concerns about administrative efficiency and avoidance of corruption than by the desire to attain freedom from direct political influence.

United Kingdom

In the United Kingdom, the administration of income tax (including corporations tax), capital gains tax, stamp duties, inheritance tax, and petroleum revenue tax falls under the "care and management" of the commissioners of inland revenue, who are referred to collectively as the Board of Inland Revenue.¹³ The commissioners (not to be confused with the general commissioners and special commissioners, who have a judicial or quasi-judicial function) are appointed by the Crown to hold office during pleasure, and have the powers necessary for executing all statutes

¹³ Taxes Management Act 1970 (UK) 1970, c. 9, section 1(1).

relating to inland revenue. The commissioners are specifically subject to the “authority, direction and control” of the Treasury and are required to obey all instructions in that respect issued by the Treasury.¹⁴ The board, in turn, appoints such officers as are necessary to carry out its duties. The department of government so constituted, generally referred to as “the Inland Revenue,” is, like its counterpart Her Majesty’s Customs and Excise (which is also administered by a board—namely, the Board of Customs and Excise), part of the Treasury. The Treasury is the British ministry of finance and (although technically also a collective body, the Lords Commissioners of the Treasury) in effect is directed by the Chancellor of the Exchequer.¹⁵

As part of the Treasury, the Inland Revenue is an integral part of the British central administration. Hiring, salaries, and other personnel matters and the provision of premises and equipment are handled in the same manner as they are for other central government departments. The Inland Revenue is funded through the Treasury spending estimates, and the Chancellor of the Exchequer is responsible and answers to Parliament for the Inland Revenue. In that sense, the Inland Revenue is subject to a high degree of horizontal control.

Although the Treasury has the ultimate direction and control of the Inland Revenue and has the statutory right to issue instructions, it plays no direct role in the administration of taxes by the Inland Revenue. In that respect, the members of the Board of Inland Revenue, all of whom are full-time civil servants, enjoy a considerable degree of independence. The distinctive legal status of the board, whose members are appointed by the Crown and hold positions created by statute (unlike most UK civil servants), means that the board exercises some powers and functions that in other departments would be exercised by the minister. The survival of such a quasi-independent body of civil servants (as more than a mere archaism, such as the Treasury) into the 20th century has been explained as follows:

It may seem surprising that a body of civil servants, whose activities touch most of the adult population, should enjoy such considerable measure of independence. Administrative boards were common in the last century but they have largely disappeared and been replaced by departments directly responsible to Ministers. Why have the Board of Inland Revenue and the Board of Customs and Excise survived? The explanation is almost certainly that a measure of independence for civil servants is acceptable where their function is to administer a detailed statutory code laid down by Parliament and where the citizen is provided with an avenue of appeal against their decisions to special tribunals or to the Courts. Few would deny that the statutes governing the Inland Revenue taxes are rich in detail, and there is little of any consequence in which the taxpayer lacks the right of appeal. Nevertheless, the Board is constantly taking decisions of one sort or another,

¹⁴ Inland Revenue Regulation Act 1890 (UK) 53 & 54 Vict., c. 21, section 1(2).

¹⁵ The position of first lord of the Treasury, the titular head of the Treasury commissioners, is traditionally held by the prime minister; that of second lord, by the chancellor.

even if most of them are appealable, and it takes them on its own authority and not, as in most departments, in the name of the Minister.¹⁶

This, the author points out, removes responsibility for the administration of taxes from the Chancellor of the Exchequer, and removes any suggestion that political influence might be brought to bear in respect of any particular taxpayer.

The Inland Revenue therefore combines a high degree of horizontal control with a much more limited degree of vertical control by the central government machinery. In particular, no direct control is exercised by a politician in matters of tax administration policy or in the application of tax laws to the case of a particular taxpayer. Although the Treasury has the ultimate statutory right to issue directions to the board, it appears that this right is not commonly used. In addition, the exercise of such a statutory right by the Treasury might be expected to attract attention and perhaps publicity at the political level. This, in turn, probably acts as a practical deterrent to any substantial use by the Treasury of its statutory powers except in extreme situations.

Australia

The Australian commissioner of taxation is statutorily charged with the general administration of the Taxation Administration Act and the Income Tax Assessment Act.¹⁷ The commissioner of taxation, as well as three second commissioners of taxation, is appointed by the governor general to carry out the administration and tax collection functions through the Australian Taxation Office and the deputy commissioners located in each of the states.

The commissioner is accorded a fair degree of discretion in the administration of various taxing statutes,¹⁸ subject to review by the courts. In addition, the commissioner may delegate any or all of his powers (other than the power to delegate) to any other person. Although the commissioner has broad powers with respect to administrative matters, the commissioner cannot alter the legislation to accommodate government policy. Government policy may play some role in areas where the legislation is uncertain, and the commissioner must make a decision as to how the legislation is to be applied in certain circumstances, but the government's role in the administration of taxes is limited to the enactment of legislation; the administration thereof is the exclusive domain of the commissioner. As a result, the federal treasurer has little or no direct ability to influence the administration of taxes.

¹⁶ Alexander Johnston, *The Inland Revenue* (London: Allen & Unwin, 1965), 21.

¹⁷ See section 3A of the Taxation Administration Act 1953, as amended, and section 8 of the Income Tax Assessment Act 1936, as amended.

¹⁸ For example, the commissioner is allowed to waive or reduce penalties pursuant to the Income Tax Assessment Act and to issue an order prohibiting a taxpayer from leaving Australia.

New Zealand

In New Zealand, the Inland Revenue Department, which is independent of the Treasury, administers income tax, land tax, goods and services tax, gift duties, and stamp duties. Although the minister in charge of the department is responsible to Parliament for its proper administration, his most crucial role is to decide what legislative proposals to introduce to Parliament and what subordinate legislation to submit to the governor general in council.

In principle, both the Treasury and the Inland Revenue Department may provide tax advice to Parliament. In practice, however, the Treasury has a monopoly on the function. The department was recently reorganized, and an official policy branch, under the control of a deputy commissioner, was established.

The commissioner of inland revenue, appointed by the state services commissioner as the head of the Inland Revenue Department, is statutorily charged with the overall leadership and operational direction of the department. The commissioner is autonomous, subject to some exceptions; occasionally, the law expressly reserves a particular function to another.¹⁹ The commissioner is subject to the minister's direction in determining what legislative proposals will be introduced to Parliament or put before the governor general. Aside from this, the commissioner may delegate to officers as he thinks fit all or any of his powers (except the power to delegate).

As in the United Kingdom, the officers enjoy a considerable amount of independence in the areas that have been delegated to them, subject to overall direction and control by the commissioner. The minister does not involve himself in the administration of taxes, and takes care to have no contact with the Inland Revenue Department with respect to decisions that relate to individual taxpayers. Thus, New Zealand's system of tax administration is characterized by a very limited degree of vertical control.

United States

Responsibility for the administration of income and related taxes in the United States lies with the Internal Revenue Service (IRS). Since its origin during the Civil War, the IRS has been a branch of the US Treasury Department. The administration and enforcement of the Internal Revenue Code is to be "performed by or under the supervision of the Secretary of the Treasury."²⁰ The IRS is directed by a commissioner of internal revenue in the Department of the Treasury; the commissioner is appointed by the president with the advice and consent of the Senate.²¹ Since a reorganization

¹⁹ For example, section 413(2) of the Income Tax Act 1976, as amended, provides that only the minister can authorize refunds in an amount exceeding a certain threshold.

²⁰ Internal Revenue Code, of 1986, as amended, section 7801(a).

²¹ *Ibid.*, section 7802(a); see also Anthony A. Santa Barbara, *Internal Revenue Service: Practice and Procedure* (New York: Practising Law Institute, 1977).

effected in 1952, only the offices of commissioner of internal revenue and chief counsel (who is also the assistant general counsel of the Department of the Treasury) in the IRS are political appointments. Before the 1952 reorganization, a substantial number of patronage appointments were made, with a perceived loss of efficiency and some problems with corruption.²²

It is difficult to compare the US system of tax administration with that of Canada, the United Kingdom, Australia, or New Zealand, all of which have parliamentary systems of government, because of the effect of the separation of powers under the US constitution. Because the US legislature is independent of the executive branch, federal government agencies and employees are subject to pressure and influence from the legislators. This is much less likely to happen under a system of parliamentary government, where legislators are effectively subject to their parliamentary leadership (if in government) or are relatively powerless (if in opposition). Notwithstanding the formal constitutional structure, however, there has been a substantial accretion of power in the presidency in the 20th century.

Historically, Congress has never exercised its full constitutional powers over the collection of taxes or in structuring the collection agency. In the main, it has legislated only to establish specific offices, such as Commissioner and collector, and has otherwise delegated its collection authority to the Department of the Treasury.²³

Although the commissioner of internal revenue reports to the secretary of the Treasury, who is a member of the president's cabinet, the relative unimportance of the cabinet as an institution within the American executive branch makes it difficult to generalize about the amount of direct control exercised over the IRS. The commissioner may be a political appointee, but large numbers of such appointments are made at the upper levels of the American bureaucracy and the degree of control that such appointees can exercise is not necessarily comparable to that which would be exercised by a minister over a department under the parliamentary system. In addition, the appointment of the commissioner of internal revenue is subject to confirmation by the Senate, which creates an opportunity for control and influence outside the executive branch. In the United States, therefore, the tax administration is at several removes from the political executive, though necessarily somewhat politicized at the highest level.

There appears to be no general perception in the United States that the IRS (however unpopular it or its actions may be) is unduly politicized.

PROPOSAL FOR THE REFORM OF CANADIAN TAX ADMINISTRATION

The proposal for a more non-politicized form of tax administration in Canada is not new. The final report of the Carter commission in 1966

²² John C. Chommie, *The Internal Revenue Service* (New York: Praeger, 1970), 31.

²³ *Ibid.*, at 32.

recommended that a Board of Revenue Commissioners be established as “a separate, non-political agency to administer all federal taxes.”²⁴ The report identified two grounds for the recommendation: first, “great possibilities [would arise] for a much closer integration of all the functions of tax administration,” and, second, “impartiality would be assured and any attempt to exert political influence on the collecting authority would be negated.”²⁵

The first ground appears to reflect the commission’s conclusion that responsibility for technical, as opposed to policy, aspects of tax legislation should be assumed by the new tax administration body. The commission envisioned the new board receiving representations from the public on technical matters and holding public hearings on matters referred by the Department of Finance and, in some cases, on proposed legislation. The commission also contemplated that the board would produce an annual evaluation of tax laws. The commission’s recommendation may also refer to a consolidation of the functions of the taxation and customs divisions of the Department of National Revenue.

The second ground reflects the commission’s view that because political influence is an essential element in tax policy making, the tax administration process should be insulated as much as possible from that influence. This should be the case not only in fact but in appearance, so that tax administration “should operate openly and independently and in the full knowledge of all taxpayers.”²⁶ The commission also felt that morale would be higher among civil servants if political influence were minimized.

In specific terms, the commission recommended that the functions of the Department of National Revenue be vested in the proposed board, which would be constituted in the same way as other regulatory commissions, such as the then-existing Board of Transport Commissioners or the Civil Service Commission. The board would report to Parliament through the minister of finance and would otherwise be subject, in the terms we have used, to a high degree of horizontal control by the central administration. The minister of finance would be given some supervisory authority over general administrative policy by way of a power to issue directives to the board, as with the Bank of Canada. Such directives would be a matter of public record; the commission evidently felt that this would effectively prevent the minister of finance from improperly interfering with the board’s independence in dealing with taxpayers.

These recommendations were linked with the Carter commission’s recommendations for an independent tax court, which have now been realized. The proposed board was never created. It is worth noting that the authors of the background study for the Carter commission on administrative

²⁴ *Supra* footnote 2, vol. 5, at 131-36 and 157.

²⁵ *Ibid.*, at 132.

²⁶ *Ibid.*

matters²⁷ rejected the idea of an independent revenue commission. The basis for this position was apparently the principle of democratic control in a parliamentary system:

In the last analysis, such authority [to exercise administrative discretion] must be exercised by the elected representatives of the people and, for this very reason, the administration of the tax law cannot be entrusted to a commission which is entirely independent of Parliament.²⁸

The authors of the study do not appear to have considered the experience of other countries with parliamentary governments, such as the United Kingdom or Australia, or to appreciate the perhaps more subtle constitutional position of a government agency that reports through a minister to Parliament rather than being headed by a minister who is responsible to Parliament.

The Carter commission cited independent regulatory commissions as a model for its proposed Board of Revenue Commissioners. A similar possible model is the Canada Employment and Immigration Commission, which exists within the federal Department of Employment and Immigration. Under part II of the Employment and Immigration Department and Commission Act,²⁹ that body consists of four commissioners—the deputy minister and associate deputy minister of the department, and one representative each for workers and employers. The commissioners hold office for a term of up to five years, but may be removed for cause. The commission is empowered to carry out such functions in relation to matters within the jurisdiction of the department as the minister or statutes provide. The commission is required to comply with directions given by the minister.

It is notable that the Canada Employment and Immigration Commission, like the taxation authority, functions in an area where the administration of the law has a potentially significant impact on a large number of individual Canadians. The commission was formed with the intention of removing some of its functions from direct ministerial control and of providing, through the external commissioners, input from outside the federal government structure. In some respects, therefore, the commission may provide a model for the tax administration function.

The arguments made by the Carter commission and others for a more depoliticized tax administration have not lost their force over the years; in fact, the Charter of Rights and Freedoms³⁰ has significantly lowered the threshold of public concern about individual rights and about the

²⁷ Robert J. Bertrand, Alice Desjardins, and René Hurtubise, *Legislation, Administration and Interpretation Processes in Federal Taxation*, Study for the Royal Commission on Taxation no. 22 (Ottawa: Queen's Printer, 1967), 441-44.

²⁸ *Ibid.*, at 442.

²⁹ RSC 1985, c. E-5, as amended.

³⁰ Part I of the Constitution Act, 1982, being schedule B of the Canada Act 1982 (UK) 1982, c. 11.

actions of the state and its servants since 1966. What is surprising is that the proposals have received little apparent serious consideration, notwithstanding that at least three of the jurisdictions with political systems and systems of taxation most similar to Canada—the United Kingdom, New Zealand, and Australia—have long operated formally depoliticized tax administrations along the lines discussed here.

To these considerations must now be joined contemporary proposals for closer integration of the federal and provincial taxing powers. A harmonized goods and services tax (GST) or a national sales tax will require a single, unified administrative structure, created by delegating federal powers either to the provincial tax administrations (as was proposed with respect to the harmonization of GST and the Quebec provincial sales tax) or to the federal tax administration (which has long been the case with respect to most personal and corporate income taxes). Delegation of tax administration to provincial bodies eliminates duplication of function, but raises the possibility of inconsistent policies and lack of uniformity on a national basis. Delegation to the existing Department of National Revenue eliminates these concerns, but engages the understandable reluctance of a province to delegate functions directly to a federal administration that may be directed by its political opponents. It is arguable that an independent federal revenue commission would offer a much more attractive alternative for provincial governments, and it could be made even more attractive if a mechanism were developed for direct or indirect provincial involvement in the naming of some members of the commission.³¹

It is our conclusion that the proposal for an independent revenue commission or similar body is even more persuasive today than it was in 1966 when proposed in the Carter commission's report. At the very least, it is an idea that deserves further and more detailed investigation.

APPENDIX

Two of the earliest statutes enacted by the first Parliament of Canada in 1867 created a Department of Customs and a Department of Inland Revenue.³² The former was responsible for the collection of customs duties, the latter for the collection of excise duties. In each case, the department was headed by a minister (Leonard Tilley in Customs and William Howland in Inland Revenue) who was a member of the federal Cabinet. The senior public servant in each department was described as a "commissioner" who in practice was a deputy minister (as that term is used today).

By 1907, the designation "commissioner" for the Department of Inland Revenue had been replaced by "deputy minister." The senior public servant in the Customs Department remained a commissioner; the title does not appear to have denoted any difference in function or status, except

³¹ In South Africa, the Katz commission also stressed the role in that country's quasi-federal system of an independent national agency to collect both national and provincial taxes. See *supra* footnote 9.

³² The Customs Act, 30-31 Vict., c. 6 and The Inland Revenue Act, 30-31 Vict., c. 8.

that, after 1907, the commissioner or acting commissioner of customs, together with other customs officers, constituted a Board of Customs, which acted as an administrative appeal tribunal (prior to the establishment of the Tariff Board).

The departments of Customs and Inland Revenue were merged in 1921.³³ The merged department was presided over by the minister of customs and excise, and its chief officer was the commissioner of customs and excise. The new department was responsible for the collection of customs and excise taxes, stamp duties, and other internal taxes, but not for the collection of income tax, which was administered by the Department of Finance. Responsibility for administering income tax was extended to the Department of Customs and Excise in 1924.³⁴

In 1927, the Department of Customs and Excise was replaced by the Department of National Revenue,³⁵ headed by the minister of national revenue. The new department had three “chief officers”—a commissioner of customs, a commissioner of excise, and a commissioner of income tax. By all appearances, the commissioners were deputy ministers in everything but name. In 1943,³⁶ all references to the commissioners were replaced by provision for a deputy minister of national revenue for taxation and a deputy minister of national revenue for customs and excise; each was to exercise the power and authority as if he were the deputy minister of a separate department of government charged with the management of the appropriate taxes. This structure remained unchanged until recently, when the separation between the Taxation and the Customs and Excise divisions of the department was eliminated and provision was made for a single deputy minister of national revenue.³⁷

With the exception of some periods between 1887 and 1897 when the Customs and Inland Revenue departments were temporarily made divisions of the Department of Trade and Commerce, each headed by a “controller,” there has always been a separate revenue department or departments. Except for short periods between 1892 and 1897, the revenue departments have always been headed by members of the federal Cabinet.³⁸

³³ The Department of Customs and Excise Act, 11-12 Geo. V, c. 26.

³⁴ 14-15 Geo. V, c. 37.

³⁵ The Department of National Revenue Act, 17 Geo. V, c. 34.

³⁶ 7 Geo. VI, c. 24.

³⁷ SC 1994, c. 13.

³⁸ See, generally, Dave McIntosh, *The Collectors: A History of Canadian Customs and Excise* (Toronto: NC Press, 1984), chapter 9.