Preparing and Arguing a Tax Appeal: Practical Tips

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PRÉCIS

Comme la plupart des champs de pratique, le litige fiscal fait non seulement appel à des notions théoriques mais également à des considérations pratiques. L'article qui suit porte avant tout sur de telles considérations. La juridiction des tribunaux, la question en jeu et le fardeau de la preuve sont examinés en première partie. Font ensuite l'objet de commentaires, les étapes qui précèdent l'audition, telles que les plaidoiries écrites et l'interrogatoire préalable. La dernière partie de l'article est consacrée aux aspects pratiques de l'audition, passant de l'allocution d'ouverture à l'organisation, à la présentation de la preuve documentaire et testimoniale, et à l'argumentation finale. Elle examine notamment les positions pouvant être soutenues lors de l'argumentation et l'utilisation de la jurisprudence.

ABSTRACT

Tax litigation, like most fields of practice, is concerned not only with theoretical concepts, but also with practical considerations. These considerations are the primary focus of this article. The first part of the article discusses matters related to the context of a tax appeal: the jurisdiction of the court, the issue to be resolved, and the burden of proof. Then there is a brief review of the various steps to be taken before the hearing, such as the filing of the pleadings and examinations for discovery. The remainder of the article deals with the hearing itself, from the opening statement to the organization and presentation of testimonial and documentary proof, and the preparation and presentation of the final argument, particularly the positions that can be put forth during the argument and the use of case law.

INTRODUCTION

Successful tax litigation is primarily the result of thorough preparation. A tax litigator must, on the eve of the trial, possess a detailed knowledge of the relevant facts as well as the applicable law. He must have already visualized how the hearing will proceed and have determined the strategy he will follow when presenting the evidence and final argument. It cannot

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be overemphasized that, in contrast to meetings or negotiations, there is no second chance to compensate for a bad hearing.[1]

The practical tips given in the following pages are directed mainly at tax litigators to assist them in reaching the desired level of efficiency. This article should, however, also be of interest to accountants or lawyers who, without being required to argue before the courts, are called upon to monitor the work of a litigator in a file or to act as a witness in a tax appeal. The suggestions offered here can increase the effectiveness of these other professionals in assisting counsel with the preparation and presentation of the appeal. In addition, a number of the observations made in this article apply equally to negotiations with the tax authorities, since, as in tax appeals, the ultimate goal is the same: to convince another person of the merits of the taxpayer's position. A good preparation, the use of effective tools of presentation, and certain basic strategies are the keys to success in both contexts.

The discussion is directed primarily to private practitioners, and tips are generally given in the chronological order in which the various steps should take place.[2]

The first part of the article reviews certain basic legal concepts, such as the jurisdiction of tribunals, the nature of a tax appeal, and the concept of the burden of proof, in order to permit a better understanding of the conduct of a tax appeal. The steps that precede a hearing and common mistakes to avoid are briefly reviewed in the second part of the article. The remainder of the article deals with the hearing itself, beginning with the opening statement. This is a very important component of counsel's presentation, since it represents the first contact with the judge and provides counsel with the opportunity to give the court an overview of his approach to the case and the evidence to be presented. Next, the article deals with the preparation and presentation of documentary and testimonial evidence, including evidence presented by expert witnesses. This part of the article also reviews the basic principles of cross-examination. The last topic discussed is the final argument and its various components. This review includes a discussion of which arguments may be raised, taking into account the content of the written pleadings previously filed with the court, and a commentary on the use of case law to support the argument.

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[1] The general principle is that new evidence can normally be presented before the Court of Appeal only where the court is satisfied that the evidence could not reasonably have been discovered before the end of the hearing, that it is wholly creditable, and that it is practically conclusive on an issue in the action: see *The Queen et al. v. Optical Recording Corporation*, 87 DTC 5248 (FCA); *Mercer v. Sijan* (1977), 14 OR (2d) 12 (CA); and rule 1102 of the Federal Court Rules, CRC 1978, c. 663, as amended.

[2] The article is not, of course, an exhaustive review of all possible issues that may arise in the context of an appeal, since such a review would be possible only in the context of a book; accordingly, certain subjects, such as adjournments, estoppel, requests to dismiss, and costs, although of interest, are not discussed here.

The article deals primarily with tax appeals instituted at the federal level, although there are occasional references to provincial statutory provisions. Unless otherwise indicated, the word "minister" refers to the minister of national revenue.

GENERAL CONTEXT IN WHICH A TAX APPEAL TAKES PLACE

Jurisdiction of Tribunals

Courts of competent jurisdiction generally do not have the power in the context of tax appeals to order the minister to refund a sum of money owed or to impose on the minister damages for improper conduct.[3] As a general principle, their jurisdiction is limited to the issue of the validity of the assessment being attacked once the relevant statutory provisions are applied to the evidence presented.

Federal Jurisdiction

The Tax Court of Canada has exclusive jurisdiction to hear appeals filed after December 31, 1990 under the Income Tax Act and part IX of the Excise Tax Act.[4] For appeals where the amount in issue exceeds $12,000 or a loss of $24,000,[5] a somewhat formalistic general procedure applies, unless the taxpayer agrees to reduce his claim to that amount. Tax appeals involving a sum below that threshold will normally be governed by an informal procedure when the taxpayer expressly makes a request to that effect.[6] This informal procedure is characterized mainly by the somewhat shortened delays that govern the various steps of the appeal and hearing.[7]

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[3] See *Chhabra v. The Queen*, 83 DTC 5328 (FCTD); *495187 Ontario Limited v. The Queen*, 94 DTC 6593 (FCTD); and *Nelson v. AG of Canada*, 96 DTC 6503 (FCTD).

[4] Tax Court of Canada Rules (General Procedure), SOR/90-688 (1990), vol. 124, no. 22 *Canada Gazette Part II* 4376-4463, as amended (herein referred to as "the TCC Rules (General Procedure)"). These rules apply to appeals filed before the Tax Court after December 31, 1990 which involve an amount of tax and penalty over $12,000 or a loss in excess of $24,000. Income Tax Act, RSC 1985, c. 1 (5th Supp.), as amended (herein referred to as "ITA"), section 169; Excise Tax Act, RSC 1985, c. E-15, as amended, section 302; and Tax Court of Canada Act, RSC 1985, c. T-2, as amended, section 12 (herein referred to as "TCCA"). The Tax Court also has jurisdiction to hear appeals under a number of other acts, such as appeals filed under the Unemployment Insurance Act, RSC 1985, c. U-1, as amended.

[5] The $12,000 amount includes tax and penalty. For appeals filed before September 1, 1993, the amount in issue and the loss were $7,000 and $14,000, respectively.

[6] Tax Court of Canada Rules (Informal Procedure), SOR/90-688 (1990), vol. 124, no. 22 *Canada Gazette Part II* 4474-76, as amended (herein referred to as "the TCC Rules (Informal Procedure)"). Under TCCA section 18, the taxpayer can make such a request in the notice of appeal. The rules also provide for a number of instances where the selection can be made later.

[7] In this respect, see TCCA sections 18.16 (60 days to file a response to a notice of appeal), 18.17 (hearing within 180 days of the expiry of the 60-day delay, and within 365 days when it is impossible, according to the court, to meet the 180-day delay), and 18.22 (judgment within 90 days after the end of the hearing except in special circumstances).

Under limited circumstances, the attorney general of Canada may request that an appeal involving an amount equal to or lower than $12,000 be governed by the general procedure.[8]

Appeals filed before January 1, 1991 are governed by the old system. For appeals filed before the Tax Court prior to that date, a relatively informal procedure applies and the decision of the Tax Court may be appealed via a de novo trial in the Federal Court—Trial Division. In this event, a complete hearing with witnesses will again take place before the Federal Court. That appeal will be subject to the rules of the Federal Court, which also retains its jurisdiction for appeals filed before January 1, 1991.[9]

As a general principle, only lawyers can act on behalf of a taxpayer in the case of appeals governed by the general procedure of the Tax Court and appeals filed before the Federal Court.

Provincial Jurisdiction

Tax appeals against assessments issued by provincial tax authorities are governed by a completely separate set of rules. Although the provincial rules are based on corresponding federal rules, they contain idiosyncrasies which should be reviewed before an appeal of a provincial tax assessment is conducted and filed.

Matter To Be Determined on Appeal

Following a tax hearing, the court must answer the following basic question: Is the tax assessed in the reassessment under attack too high, once the relevant statutory provisions have been applied to the facts adduced in evidence? In *Vineland Quarries and Crushed Stone Ltd. v. MNR*, Cattanach J referred to an earlier decision in the Exchequer Court in which that principle was clearly enunciated:

> In *Harris v. M.N.R.*, (1965) 2 Ex. C.R. 653 [64 DTC 5332], my brother Thurlow said at page 662:
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> > *On a taxpayer's appeal to the Court the matter for determination is basically whether the assessment is too high*. This may depend on what deductions are allowable in computing income and what are not but as I see it the determination of these questions is involved only for the purpose of reaching a conclusion on the basic questions [emphasis added].[10]

A court hearing a tax appeal is therefore solely concerned with the determination of the tax liability of a taxpayer. An assessment based on invalid

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[8] TCCA section 18.11.

[9] A detailed review of the jurisdictional and historical issues is beyond the scope of this article. For a detailed discussion on the subject, see the excellent book by Robert McMechan and Gordon Bourgard, *Tax Court Practice 1996* (Scarborough, Ont.: Carswell, 1996), particularly chapter 1; see also Wilfrid Lefebvre and Deen Olsen, "The Tax Litigation Process: An Update," in *Report of Proceedings of the Fortieth Tax Conference*, 1988 Conference Report (Toronto: Canadian Tax Foundation, 1989), 50:1-15.

[10] 70 DTC 6043, at 6045 (Ex. Ct.).

factual presumptions, even a repealed statutory provision, does not affect the ultimate tax liability of the taxpayer.[11]

The court will not strike down an assessment issued on an erroneous basis when it is apparent during the hearing that the amount of tax assessed is payable on a different basis.[12] In the decision of the Exchequer Court in *MNR v. Minden*, Thorson P stated in that respect:

> *In considering an appeal from an income tax assessment the Court is concerned with the validity of the assessment, not the correctness of the reasons assigned by the Minister for making it*. An assessment may be valid, although the reason assigned by the Minister for making it may be erroneous. This has been abundantly established [emphasis added].[13]

The right of appeal therefore exists in respect of the result of the calculation of income tax due, and not the manner in which the calculation is made. An additional consequence of that principle is that there is generally no right of appeal from a nil assessment—that is, an assessment by virtue of which no tax is levied.[14]

In *Vineland Quarries*, Cattanach J had to decide whether or not the minister could amend his written pleadings to take an alternative position in the event that the court dismissed his main argument. He described the minister's approach as follows:

> Here the Minister does not seek to increase the amount of the assessment. He seeks to maintain the assessment at the amount he assessed. However by his amendment to his Reply he seeks to ensure that, if the Court should find that the basis of his assessment was wrong, he might then, pursuant to a reference back, assess a considerably lesser amount on what he foresees the Court might say is the correct basis of assessment.[15]

And further on:

> In effect, the Minister says that for a reason he thinks to be correct he assessed the appellant to income tax at "X" dollars. The appellant says that the reason assigned by the Minister was incorrect. The Minister then says that if the Court should hold the basis for his assessment of "X" dollars erroneous then for what the Court might find to be the correct reason, he would assess the appellant at "X" minus "Y" dollars.[16]

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[11] ITA subsection 152(3) reads as follows: "Liability for tax under this Part is not affected by an incorrect or incomplete assessment or by the fact that no assessment has been made."

[12] To the extent, as will be discussed further in the text, that the minister has raised his new position in his written pleadings.

[13] 62 DTC 1044, at 1050 (Ex. Ct.). See also the decision of the Quebec Court of Appeal in *Al Nadler Inc. v. Québec (Deputy Minister of Revenue)*, DFQE 93 F-24. However, also consider the recent decision of the Court of Quebec in *Fourrures Yarrow Inc. v. Québec (Deputy Minister of Revenue)*, DFQE 93 F-79.

[14] See, for example, *The Queen v. Bowater Mersey Paper Company Limited*, 87 DTC 5382 (FCA).

[15] Supra footnote 10, at 6045-46.

[16] Ibid., at 6046. See also *Craddock and Atkinson v. MNR*, 68 DTC 5254, at 5259 (Ex. Ct.), aff'd. on other grounds, 69 DTC 5369 (SCC).

On the basis of the *Harris* case,[17] the court allowed the amendment:

> *This I think the Minister is entitled to do* and accordingly I would allow the motion and permit the Minister to amend his Reply to the Notice of Appeal as requested [emphasis added].[18]

More recently, the Federal Court of Appeal dismissed the taxpayer's appeal in *Riendeau v. The Queen*,[19] despite the fact that the minister had issued the assessment on the basis of a statutory provision that had been repealed at the time of the reassessment. According to the court, the minister could change his initial assessing position and rely, at the appeal level, on a different statutory provision:

> As the cases and statutory provisions which were cited by Cullen J. will show, liability for tax is created by the *Income Tax Act*, and not by a notice of assessment. A taxpayer's liability to pay is just the same whether a notice of assessment is mistaken or is never sent at all. In *Belle-Isle v. M.N.R.*, 63 DTC 347 (T.A.B.) Boisvert, Q.C., after quoting the texts of what are now section 166 and subsections 152(8) and 152(3) of the Act, stated, at page 349:
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> > Where the above texts are concerned, *it matters little under what section of the Act an assessment is made. What does matter is whether tax is due*.
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> See also *MNR v. Minden*, 62 DTC 1044 (Ex. Ct.), at page 1050:
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> > In the present case, the amounts assessed remained the same throughout. What is disputed is that the assessments were originally said to have been made on the basis of repealed subsection 74(5) of the Act which, the appellant says, rendered the assessments invalid notwithstanding that the Minister afterward corrected this mistake by confirming the assessments on the basis of sections 3 and 9 of the Act.
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> > *In our view, the Minister's mental process in making an assessment cannot affect a taxpayer's liability to pay the tax imposed by the Act itself. He may correct a mistake*. The trial judge was right in rejecting the appellant's argument and in determining that the Minister was entitled to confirm the reassessments in question [emphasis added].[20]

The minister may not, however, appeal from his own assessment and therefore, as a general principle, cannot adopt a position on appeal that would result in an increase if the assessment were accepted. Reference is

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[17] *Harris v. MNR*, 64 DTC 5332 (Ex. Ct.).

[18] Supra footnote 10, at 6046. But in *The Queen v. McLeod*, 90 DTC 6281 (FCTD), Collier J dismissed a motion for the amendment of pleadings filed by the minister on the basis that the minister was attempting to alter completely the grounds upon which the assessment had taken place. The minister's request, in the court's view, in effect constituted an attempt to circumvent the four-year limitation period then provided for in ITA subsection 152(4). The minister has filed an appeal from that decision to the Federal Court of Appeal, which has not yet rendered a decision on the matter.

[19] 91 DTC 5416 (FCA).

[20] Ibid., at 5417. See also the Tax Court decision in *Wiebe et al. v. MNR*, 88 DTC 1234, as well as *Craddock and Atkinson*, supra footnote 16, at 5259 (Ex. Ct.); and *The Queen v. Wesbrook Management Ltd.*, 96 DTC 6590 (FCA).

made on that point to the *Harris* case, where Thurlow J dismissed a motion to amend the Crown's pleadings on the basis that such an amendment would in effect represent an attempt on the part of the minister to appeal his own assessment:

> No appeal to this Court from the assessment is given by the statute to the Minister and since in the circumstances of this case the disallowance of the $775.02 while allowing $525 would result in an increase in the assessment the effect of referring the matter back to the Minister for that purpose would be to increase the assessment and thus, in substance, allow an appeal by him to this Court. The application for leave to amend is therefore refused.[21]

Counsel for the taxpayer should therefore object on appeal to any attempt by the minister to take a position that would have the effect, if accepted, of increasing the assessment being appealed.

Before moving on to the issue of burden of proof, it should be pointed out that a party does not generally have the right to raise new arguments, regardless of their merits, once the evidence in a case has been entered, particularly where the other party, had it known that these new arguments would be made, could have decided to adduce additional or different evidence.[22]

Burden of Proof

It is generally accepted, in the context of a tax appeal, that a taxpayer must adduce evidence before the Crown is called upon to do so[23] and that, despite certain recent judicial pronouncements,[24] he bears the burden of demonstrating that the assessment issued by the minister is invalid, failing which his appeal will be dismissed.[25] The burden that the taxpayer bears is one of balance of probabilities, meaning that at the end of the

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[21] Supra footnote 17, at 5337.

[22] Case law dealing with this issue will be reviewed under the heading "Organization and Presentation of Testimonial Evidence."

[23] This principle generally also applies in cases where penalties have been levied against the taxpayer and in cases where the minister files an appeal to the Federal Court—Trial Division of an adverse judgment from the Tax Court of Canada under the old procedure: see *Can-Am Realty Limited v. The Queen*, 94 DTC 6069 (FCTD); and *The Queen v. Taylor*, 84 DTC 6459 (FCTD).

[24] The Supreme Court of Canada indicated in *Corporation Notre-Dame de Bon-Secours v. Communaute Urbaine de Quebec et al.*, 95 DTC 5017, at 5021: "According to the general rule which provides that the burden of proof lies with the plaintiff, in any proceeding it is for the party claiming the benefit of a legislative provision to show that he is entitled to rely on it. The burden of proof thus rests with the tax department in the case of a provision imposing a tax obligation and with the taxpayer in the case of a provision creating a tax exemption." With respect, it is questionable that there can be a burden of *proof* in the context of the application or non-application of a statutory provision, since, as the word "proof" demonstrates, the concept applies in respect of evidence, and not argument.

[25] *Anderson Logging Co. v. The King* (1924), 52 DTC 1209 (SCC); *Johnston v. MNR* (1948), 3 DTC 1182 (SCC); *The Queen v. Fries*, 89 DTC 5240 (FCA), aff'd. on another point by the Supreme Court of Canada, 90 DTC 6662; and *Youngman v. The Queen*, 90 DTC 6322 (FCA). The burden remains that of the taxpayer, even in cases where the

(The footnote is continued on the next page.)

hearing, the invalidity of the assessment must be more probable than its validity.[26] It appears that this rule is the consequence of the particular nature of an assessment issued by the minister:

• The minister alleges, when assessing, that a certain number of facts exist and that once the relevant statutory provisions are applied to these facts, a particular result ensues.

• Under the law, an assessment is presumed to be valid notwithstanding any error, legal flaw, or omission. The assessment can, of course, be vacated or varied on appeal.[27]

• The taxpayer will generally be in a better position to adduce evidence of the relevant facts of which he may, in many instances, have exclusive knowledge.

From these characteristics of an assessment flows an important consequence: that any fact whose existence has been presumed by the minister in assessing will be accepted, unless it is challenged by the taxpayer in the course of his appeal. In that respect, Rand J of the Supreme Court of Canada stated in *Johnston v. MNR* that

> the proceeding is an appeal from the taxation; and since the taxation is on the basis of certain facts and certain provisions of law either those facts or the application of the law is challenged. *Every such fact found or assumed by the assessor or the Minister must then be accepted as it was dealt with by these persons unless questioned by the appellant*. If the taxpayer here intended to contest the fact that he supported his wife within the meaning of the Rules he should have raised that issue in his pleading, and the burden would have rested on him as on any appellant to show that the conclusion below was not warranted. *For that purpose he might bring evidence before the Court notwithstanding that it had not been placed before the assessor or the Minister, but the onus was his to demolish the basic fact on which the taxation rested* [emphasis added].[28]

Counsel should thus carefully review the pleadings prepared by the Justice department in the context of the appeal to ensure that any incorrect material allegation in the pleadings has been or will be challenged.

The taxpayer may have the assessment vacated in a number of ways: he may prove that the minister has not relied as he alleges on certain facts, that the facts upon which the minister did rely to assess are incorrect, or that the facts relied upon by the minister, even if they are accurate, do not have the result in law that the minister attributes to them. The Exchequer Court summarized as follows the various options available to a taxpayer in *MNR v. Pillsbury Holdings Ltd.*:

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[25] Continued . . .
minister files a de novo appeal to the Federal Court—Trial Division of an adverse Tax Court of Canada decision: see *MNR v. Simpson's Limited*, 53 DTC 1127 (Ex. Ct.).

[26] See *Pallan et al. v. MNR*, 90 DTC 1102 (TCC).

[27] ITA subsection 152(8).

[28] *Johnston*, supra footnote 25, at 1183.

> The respondent could have met the Minister's pleading that, in assessing the respondent, he assumed the facts set out in paragraph 6 of the Notice of Appeal by:
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> (a) challenging the Minister's allegation that he did assume those facts,
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> (b) assuming the onus of showing that one or more of the assumptions was wrong, or
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> (c) contending that, even if the assumptions were justified, they do not for themselves support the assessment.[29]

The minister does, however, have a duty to disclose the precise factual and legal basis of the assessment, in order to enable a taxpayer to be in a position to meet the burden that rests upon him, as underlined by Rand J in *Johnston*:

> It must, of course, be assumed that the Crown, as is its duty, has fully disclosed to the taxpayer the precise findings of facts and rulings of law which have given rise to the controversy.[30]

When the minister, after the issuance of the notice of assessment, relies on additional facts or adopts a subsidiary position, it is generally agreed that the burden to prove the correctness of those new facts or of this new position rests on the minister. As the Exchequer Court explained in *Pillsbury Holdings*:

> The Minister could, of course, as an alternative to relying on the facts he found or assumed in assessing the respondent, have alleged by his Notice of Appeal further or other facts that would support or help in supporting the assessment. *If he had alleged such further or other facts, the onus would presumably have been on him to establish them* [emphasis added].[31]

The minister has the burden of demonstrating that the levying of penalties was justified, wherever the taxpayer argues that penalties are inappropriate in the circumstances.[32]

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[29] 64 DTC 5184, at 5188 (Ex. Ct.). Although the court rendered its decision in a judicial context in that case, the same principles apply at the objection level: see the decision of the Federal Court—Trial Division in *The Queen v. Covertite Limited*, 81 DTC 5353.

[30] *Johnston*, supra footnote 25, at 1183. See also *First Fund Genesis Corporation v. The Queen*, 90 DTC 6337 (FCTD); *Commercial Hotel Ltd. v. MNR*, [1948] Ex. CR 108; *Brewster v. The Queen*, 76 DTC 6046 (FCTD); *Crown Trust Company v. The Queen*, 77 DTC 5173 (FCTD); and Charles MacNab, "The Burden of Proof in Income Tax Cases" (1978), vol. 26, no. 4 *Canadian Tax Journal* 393-410.

[31] *Pillsbury*, supra footnote 29, at 5188. See also the decision of the Federal Court—Trial Division in *Covertite*, supra footnote 29, and the decisions of the Federal Court in *Brewster*, supra footnote 30; *Wise et al. v. The Queen*, 86 DTC 6023 (FCA); *Smythe et al. v. MNR*, 67 DTC 5334 (Ex. Ct.); *Tobias v. The Queen*, 78 DTC 6028 (FCTD); and *Craddock and Atkinson*, supra footnote 16, at 5259. The same logic applies where the allegations of the minister are incomplete, as in the case where he has not allocated the various payments made: see *The Queen v. Farmparts Distributing Ltd.*, 80 DTC 6157 (FCA).

[32] ITA subsection 163(3). See also *Davis v. The Queen*, 84 DTC 6518 (FCTD); and *Kerr v. The Queen*, 89 DTC 5348 (FCTD). It has been decided that the minister bears the same burden in the context of the Excise Tax Act, despite the absence of a provision analogous in ITA subsection 163(3): see *Alex Excavating Inc. v. The Queen*, [1995] GSTC 57 (TCC).

Finally, the burden may be met and the facts alleged by the taxpayer may be presumed to be accurate, unless the minister adduces contrary evidence, in cases where an order to that effect has been made by the court following the minister's failure to file a reply to the notice of appeal within the required time and where the court is of the opinion that the failure of the minister may prejudice the taxpayer.[33]

There appears to exist, on occasion, some confusion, on the part of both the courts and the parties, over the distinction between the burden that a party bears to adduce convincing evidence of a material fact upon which it relies and a supposed "burden" as to the application or non-application of a taxing provision, depending upon its nature. The second "burden" is in fact an issue of statutory interpretation, rather than an issue related to the traditional concept of burden of proof that exists in civil cases.[34]

The party that bears the burden must generally adduce sufficiently clear and credible documentary and testimonial evidence to support those allegations that it has made which are material to its case. Should the evidence be insufficiently convincing or in such a state of confusion that the judge may not conclude clearly one way or the other, or where counsel fails to adduce evidence on a material fact, the taxpayer may lose since the burden of proof is his to bear.

STEPS PRECEDING THE HEARING

For present purposes, it is assumed that the various steps that precede the hearing of an appeal have already taken place. It is, however, useful to briefly summarize those steps that are essential for a thorough preparation for and presentation at the hearing.

The Notice of Appeal

Counsel has carefully set out his factual and legal allegations, including any subsidiary argument, in a notice of appeal. The notice of appeal, without being too detailed,[35] succinctly enumerates all essential and relevant facts[36] and responds to the factual allegations made by the minister.[37]

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[33] Rule 63(2)(b) of the TCC Rules (General Procedure). See *The Queen v. Carew*, 92 DTC 6608 (FCA); *Gestion Guy Ménard Inc. et al. v. MNR*, 93 DTC 244 (TCC); and *Kosowan v. MNR*, 91 DTC 32 (TCC). See, however, *Discovery Research Systems Inc. v. The Queen*, 92 DTC 1306 (TCC), where the court underlined that the "risk of non-persuasion" still belonged to the taxpayer as a result of the prescription of validity attached to the assessment under ITA subsection 152(8).

[34] See, as an example of the courts' distinguishing between the burden of proof and issues of law, the decision of the Tax Court of Canada in *Pinot Holdings Ltd. v. The Queen*, 96 DTC 1277.

[35] The more detailed a summary of facts is, the greater the risk that during the hearing the evidence may not correspond to each and every detail contained in the written pleadings.

[36] A notice of appeal to the Tax Court of Canada must contain the following information:

([36, 37] Continued on the next page.)

A Reply to a Notice of Appeal

A reply to a notice of appeal has been received, normally within the time period set out in the rules. The minister must have set out in the reply which of the facts alleged in the notice of appeal he admits or denies, or in respect of which he has no knowledge, as well as the facts upon which he relied in assessing.[38]

List of Documents

Counsel has prepared and filed a list[39] enumerating those documents upon which he expects to be relying during the hearing.[40] In certain cases, the list will also refer to documents that are relevant to an issue raised in the pleadings whether the party intends to adduce them during the hearing or not.[41]

Examination for Discovery

The opposing party or a third party has been discovered for the purpose of obtaining a complete disclosure of the information and the factual

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[36, 37] Continued . . .

- the address of the appellant and the assessment being appealed;
- a statement of the pertinent facts presented, where possible, as a series of paragraphs each of which contains only one pertinent fact;
- the issue to be decided;
- statutory provisions relied on;
- a summary of the reasons for such an appeal; and
- the conclusions.

See rules 21, 47, and 48 of the TCC Rules (General Procedure).

[37] As already discussed, any fact relied upon by the minister when assessing is deemed to be correct unless challenged by the taxpayer.

[38] Rule 49 of the TCC Rules (General Procedure). The facts that are alleged in the notice of appeal and are not denied by the minister and in respect of which he has not indicated a lack of knowledge are deemed to be admitted by the minister: see, for example, *Farm Business Consultants Inc. v. The Queen*, 93 DTC 1190 (TCC).

[39] Except for appeals governed by the TCC Rules (Informal Procedure), under which no list is necessary.

[40] By virtue of rule 81 of the TCC Rules (General Procedure), a list of documents must be prepared, filed, and served within 30 days of the closing of the pleadings, although in practice, the delay is more often than not ignored. The list must contain the documents known to all the parties at that time which might be used as evidence to establish or to assist in establishing any allegation of fact in any pleading filed by that party or to rebut or to assist in rebutting any allegation of fact in any pleading filed by any other party. The failure to file the list within the time frame may result in the dismissal of the appeal, where the appropriate motion is brought by the minister. (Rules 81 and 91(c) of the TCC Rules (General Procedure).) See, for example, *Zeppieri et al. v. The Queen*, 93 DTC 1204 (TCC).

[41] In the Federal Court, each party must, by virtue of rule 447 of the Federal Court Rules, supra footnote 1, prepare an affidavit of all documents that are relevant to the case even if the party does not intend to use the document(s) during the hearing. At the Tax Court of Canada level, the rules require that such an affidavit be filed only where one party specifically asks for it.

assumptions made by the minister in assessing the client[42] and in order to obtain as many admissions as possible for the purpose of narrowing the factual and legal issues to be debated during the hearing. The client has similarly been discovered,[43] and the transcripts of the client's examination have been obtained and indexed by counsel.

Other Steps

A number of other pre-hearing steps may be taken; for example:

• A notice to admit documents may be forwarded to the opposing party in order to facilitate the adducing in evidence of certain documents at the hearing.[44]

• The expert witness report must be served on the opposing party and filed within the time provided for in the rules.[45]

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[42] On the issue of which documents may be obtained in the context of an examination for discovery, see the decision of the Federal Court of Appeal in *In re MNR v. Huron Steel Fabricators (London) Ltd. and Fratschko*, 73 DTC 5347. In that case, the court indicated that, in the absence of a statutory exemption, any document or information used by the minister in assessing a taxpayer must be communicated to the taxpayer who requested it in the context of an examination for discovery. The court required the minister to transmit to the taxpayer's counsel the income tax returns of a third party upon which the minister had based his assessment of the taxpayer. See also *Amp of Canada, Ltd. v. The Queen*, 87 DTC 5157 (FCTD). A taxpayer will not, however, have the right to obtain third-party information obtained by Revenue Canada when it is clear that the information is not used by the minister to assess the taxpayer, even though the position of the third party, in respect of the issue under appeal, may be similar to the one in which the appellant finds himself: see *Oro Del Norte, SA v. The Queen*, 90 DTC 6373 (FCTD).

[43] Rules 92 to 100 of the TCC Rules (General Procedure). Under the general procedure, it is up to the corporation to be examined to choose the director, officer, agent, or employee, past or present, who will be examined. The person chosen must be well informed about the issues and the opposing party. If it is considered that the person chosen is not the one in the best position to provide the answers, he may address himself to the court in order that another person may be examined: see the decision of Jerome J in *Smith v. The Queen*, 81 DTC 5351 (FCTD); and rule 93 of the TCC Rules (General Procedure). A party may also file a motion before the court for the obtainment of an order that a second person be examined where the first examinee provided insufficient answers: see *Donald Applicators Ltd. et al. v. MNR*, 66 DTC 5124 (Ex. Ct.). The scope of the examination for discovery is very wide and may include any issue raised in the pleadings. The identity and conclusions of an expert used by the opposing party in the context of preparing for litigation may also be obtained, unless certain undertakings provided for in rule 95(3) are given. The failure by one of the parties to provide a response to a valid question may prevent the party from adducing in evidence the requested information: rule 96 of the TCC Rules (General Procedure).

[44] If the opposing party fails to respond within the delay prescribed in the rules, it will be deemed to have admitted, for the purposes of the appeal, the veracity of the facts or the authenticity of the documents referred to in the notice: rules 129 and following of the TCC Rules (General Procedure); rule 468 of the Federal Court Rules, supra footnote 1. By virtue of rule 468 of the Federal Court Rules, the notice must be made at least 30 days before the hearing, whereas under the TCC Rules (General Procedure) such a request may be made at any time.

[45] As discussed later, under the heading "Preliminary Transmission and Nature of the Expert's Report," the delays vary from one procedure and one court to another.

• The required subpoenas must have been served in order to ensure the presence of the necessary witnesses.[46]

Common Mistakes To Avoid

Although the following list is not exhaustive and detailed observations will follow, it is useful to caution against a number of mistakes that may be made during a hearing.[47]

• Counsel must, at all costs, avoid misleading the court in respect of the relevant facts. In his opening address to the court, counsel must summarize as accurately as possible the evidence to be presented. Any tendency to embellish the evidence, apart from being unethical, will quickly give counsel a bad reputation among the judges, who will become and will usually remain on the alert whenever he appears before them.

• Counsel should not waste the court's time. He must thus be well prepared and, for example, should not ask endless questions on secondary issues in examination-in-chief. He should cross-examine only when necessary and only on essential points. He should not refer to 30 cases when the first 3 references clearly and succinctly enunciate the principle he wishes the court to adopt.

• Counsel should not express his personal opinions and accordingly should avoid sentences beginning with the words "I think" or "I am of the opinion that." It is preferable to use expressions such as "our position is that" or "we strongly believe that."

• Counsel should not persist in pursuing an evidently weak or unfounded argument; otherwise, the court may discount his other, stronger arguments.

• If counsel cannot answer a question from the judge, he should say so and request a brief adjournment to research the point.

• Counsel should speak clearly and avoid frequent reference to his notes. He should look directly at the court while adducing evidence and during argument.

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[46] Although (under rule 141 of the TCC Rules (General Procedure)) it is possible to obtain from the court registrar a subpoena or a document ordering the person named therein to appear before the court on the date of the hearing, it may be preferable, in cases where it can reasonably be expected that the witness will attend, simply to send a letter to confirm the arrangements made with the witness in respect of his appearance. An otherwise friendly witness may become intimidated or hesitant upon the receipt of a subpoena, particularly if the purpose of the document is not clearly explained to him before it is issued.

[47] In addition to the points listed in the main text, the following tips should be kept in mind: counsel should always be extremely courteous in addressing the court, the registrar, or his opponent, and should also be courteous to the bailiff and the stenotypist; counsel should never remain seated while addressing the court; counsel should dress conservatively and avoid idiosyncratic behaviour and distracting gestures throughout the hearing, particularly when presenting the opening statement and final argument; and punctuality is, of course, essential.

OPENING STATEMENT

Components of the Opening Statement

The importance of a good opening statement cannot be overemphasized. The opening statement gives counsel the opportunity to tell his client's story, to show the court that the evidence to be presented will be logical and persuasive, and to demonstrate that he has a clear understanding of his case. Accordingly, after presenting himself to the court and explaining that the case at hand is an appeal from a tax assessment, counsel should summarize both the facts of the case and the evidence to be presented to the court. (Often, the summary of facts, a very important component of the opening statement, is either totally overlooked by counsel or dealt with in a less than satisfactory manner.)

Counsel should keep in mind that only a summary of facts and evidence is warranted at this stage. Too much detail could be harmful to the case, since it increases the risk that counsel may be wrong in respect of some of the information presented.[48] For a strong presentation, only the most important facts, and those of which counsel is most certain, should be included. This approach is recommended because, despite thorough preparation, counsel may not always have a complete picture of the facts surrounding the case, and the actual testimony of the witnesses may vary in some respect.

For example, suppose the case involves a taxpayer who bought a property, then learned from his engineer that extensive renovations would be required, and resold the property only a few months after acquiring it. It may be sufficient for counsel to state that the evidence will demonstrate that his client discovered only after acquiring the property that major renovations were needed and that he had to resell the property since he could not afford to renovate in the circumstances. It is not necessary at this stage to refer to the exact amount of money needed to be invested, the exact date of acquisition or sale, or even the nature of the damage to the property.

Once the facts are summarized, the court should be told how the relevant amount was treated by the taxpayer in his income tax return and how the minister varied the taxpayer's return in the notice of assessment. The next step for counsel is to summarize his position in law, taking into account the facts already summarized. Again, including too many details at this stage could negatively affect the outcome of the case. This portion of the statement could, for example, be limited to the following:

> Our position is that section 85.1 of the Act is applicable in the circumstances. Indeed, all of its requirements have been met, taking into account the facts of this case. More particularly, the evidence will clearly show that an exchange has taken place as contemplated by section 85.1 of the Act and that, accordingly, no tax results from the transaction.

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[48] See John Sopinka, *The Trial of an Action* (Toronto: Butterworths, 1981), 59.

When counsel is confronted with a number of issues in the same case, he should treat each issue separately and, for each question, summarize the facts and the position in law taken on each matter. Doing otherwise might confuse the court and diminish the effectiveness of the opening statement.

As a general principle, it is preferable to refer in the opening statement only to those documents that are central to the case. However, if the document is a key one, a reference to it should perhaps be accompanied by a summary of its content. For example, counsel could simply say:

> By the terms of this contract, the appellant has clearly become the owner of the property before December 31, 1985 and not during or after the 1986 taxation year, as contemplated by the minister.

Filing the Book of Documents

The opening statement provides counsel with the opportunity to file a book of documents.[49] Four copies of the book of documents should be prepared. One is for the court and filed as evidence as exhibit A-1 or R-1; the second is for the witnesses and remains at the witness box;[50] the third is for the Crown; and the last is for counsel. These copies should be distributed at the time of filing. There is no set phrase for the occasion, and counsel can simply say:

> With my colleague's consent, I would like to file under exhibit A-1, 30 documents relevant to the appeal.

Counsel should obtain his opponent's consent before this procedure, taking into account the ordinary rules of evidence, which will be reviewed later in this article. The opening statement is also the time to proceed with certain adjustments to the notice of appeal.

Amending the Notice of Appeal

It is possible to amend the notice of appeal when counsel becomes aware, after filing the written pleadings but before the closing of the evidence, that an additional argument should have been presented or simply that the client's position in law was erroneously stated. At the federal level, an amendment to the pleadings can generally be made before the closing of the pleadings—that is, before counsel has filed and served an answer to the reply or the time for the filing and serving of such an answer has

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[49] It is recommended to use a book or a spiral binder in which the documents are separated by tabs. In addition, every page of every document should be numbered. The fact that the documents are gathered in a binder, separated by tabs, and paginated should greatly facilitate the presentation, especially for appeals that involve a large number of documents. Counsel must be able to guide the court quickly and easily to the exact passage of a document that he is referring to at any point in his presentation.

[50] Some counsel prefer to file the witnesses' copy as an exhibit so that the court can mark up its personal copy.

expired.[51] An amendment can be made at any time before judgment with leave of the court.[52]

An amendment to the pleadings becomes necessary in a number of circumstances, the most frequent of which is the last-minute discovery of a new argument by counsel. It is important for counsel to add this new argument to the notice of appeal as quickly as possible; otherwise, he may be unable to include it in his closing argument. The general principle is that only those arguments that are found in the pleadings can be made in the closing argument. Since a party to the proceedings is entitled to prepare his case on the basis of the pleadings prepared by the opposite party, he should not be prejudiced by a last-minute change to the latter's position.

In *The Queen v. The Consumers' Gas Company Ltd.*,[53] the Federal Court of Appeal concluded that the Crown could not argue, in its closing argument before the Federal Court—Trial Division, that the amounts received by the taxpayer constituted income from a business, since the Crown's sole argument up to that point had been that the amounts, which were reimbursements of capital expenses, reduced available capital cost allowance. The Federal Court of Appeal emphasized that nowhere in the pleadings before the Trial Division had the income argument been made. In addition, it was not convinced beyond a reasonable doubt that, had the appellant known about the new argument, no new evidence would have been presented by it.[54] In its decision, the court also relied on *Lamb v. Kincaid*, where Duff J refused to distinguish between an argument raised at the trial judge level once the case is closed and one raised at the appeal level:

> Had it been suggested at the trial that the plaintiffs ought to have proceeded in the manner now suggested, it is impossible to say what might have proven to be the explanation of the fact that the plaintiffs did not so proceed. Many explanations occur to one, but such speculation is profitless; and I do not think the plaintiffs can be called upon properly at this stage to justify their course from the evidence upon record. A court of appeal, I think, should not give effect to such a point taken for the first time in appeal, unless it be clear that, had the question been raised at the proper time, no further light could have been thrown upon it.[55]

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[51] Rules 46 and 54 of the TCC Rules (General Procedure).

[52] Notwithstanding the time at which the motion for amendment is made, the court will normally take into account the motion's basis and whether or not dismissing the motion would prevent the parties from debating all relevant issues: see *Hudson Bay Mining Smelting Company Limited v. The Queen*, 97 DTC 89 (TCC); and *384238 Ontario Limited et al. v. The Queen*, 81 DTC 5098 (FCTD). See also *International Innopac Inc. v. The Queen*, 94 DTC 1942 (TCC); and *Urbanetics Inc. v. The Queen*, 95 DTC 5526 (FCTD).

[53] 84 DTC 6058 (FCA).

[54] In *Consumers' Gas*, ibid., the trial judge had authorized the Crown to plead this second argument despite the objections of taxpayer's counsel; it is not clear if the Federal Court of Appeal would have come to the same conclusion in the absence of such objections.

[55] [1907] SCR 516, at 539.

In *Kingsdale Securities Co. Ltd. v. MNR*, the Federal Court of Appeal stated:

> There are many other authorities to the same effect but unlike those cases in which the new ground was first raised on appeal, the alternative position was in this case raised during argument before the learned trial judge. However, at that time the cases for both parties had been closed, so that no further evidence could have been adduced by the Defendant at that stage to rebut the argument and the same principles should, therefore, apply. Presumably, the Defendant had led evidence which was material in defending the case pleaded against him. *Neither this Court nor the trial judge ought to be put in a position of deciding whether or not all possible evidence had been adduced to counter any argument made by the other party unless it is satisfied beyond all reasonable doubt that all requisite evidence had been adduced to enable the Defendant to rebut the Plaintiff's new position*. I am not so satisfied and thus, I do not think that the Appellant's submissions that declaratory trusts may have been created ought to be considered by this Court or need to have been considered by the learned trial judge [emphasis added].[56]

Unless it is clear that the evidence of the other party would have been exactly the same had it known of a new argument in advance, the argument will thus generally not be permitted once the pleadings are closed, regardless of its merits.[57]

Withdrawal of an Admission

It can become necessary to withdraw from a notice of appeal an erroneous admission of fact or law. Again, this withdrawal can be made with the consent of the opposite party or with the authorization of the court.[58]

The court, when asked, can either accept the amendment and grant the motion subject to certain conditions, or simply reject it (for example, on the grounds that it is superfluous or contrary to the interests of justice).[59] The court will usually grant a motion for withdrawal when the withdrawal causes no prejudice to the opposing party that cannot be compensated by money. In *Continental Bank Leasing Corporation et al. v. The Queen*, Bowman TCCJ stated:

> Courts subsequently have applied a more liberal test which permitted amendments or withdrawal of admissions where a triable issue of fact or law is

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[56] 74 DTC 6674, at 6681 (FCA).

[57] See also *The Queen v. Littler*, 78 DTC 6179 (FCA); *The Queen v. Transworld Shipping Ltd.* (1975), 61 DLR (3d) 304, at 314 (FCA); *Kingsdale*, supra footnote 56; *The Owners of the Ship "Tasmania" and Owners of Freight v. Smith and Others, Owners of the Ship "City of Corinth"* (1890), 15 AC 223, at 225 (HL); *Lamb v. Kincaid*, supra footnote 55; and *Bow River Pipe Lines Limited v. The Queen*, 96 DTC 1414 (TCC), where counsel attempted, after judgment, to raise a new argument on a motion to the court to reconsider the terms of its judgment.

[58] Rule 132 of the TCC Rules (General Procedure).

[59] Rule 54 of the TCC Rules (General Procedure).

thereby raised and where the amendment or withdrawal would not result in a prejudice to the opposing party that was not compensable in costs.[60]

Whether the withdrawal relates to a fact or a position in law, counsel should attempt to inform the opposite party as soon as possible of the impending motion and to obtain his consent. If no notice of the motion is forwarded to the opposite party before the hearing, the latter will have valid grounds to oppose it since he did not have proper time to prepare himself. An adjournment could also be requested by the opposite party to give him time to analyze the proposed amendment and prepare his response. Notwithstanding the court's decision on the motion, proceeding without prior notice could be interpreted by the court as the consequence of poor preparation on counsel's part or, even worse, of bad faith.

Filing of an Agreement on the Facts

Whenever possible, the parties should attempt to prepare an agreed statement of facts in order to streamline the issues to be debated before the court.

Even when the credibility of the taxpayer is not an issue, it may be wise not to underestimate the potential impact on the court of the testimony of the client. It is, in that respect, possible to file a partial agreement of facts and to have the client testify only on the facts not agreed upon.

ORGANIZATION AND PRESENTATION OF THE DOCUMENTARY EVIDENCE

Organization and Filing of the Evidence

As was explained earlier, it is preferable to present the documentary evidence in a book when making the opening statement. This approach should simplify things for both the parties and the court during the examinations and the argument.

With regard to the intended presentation of evidence, it is recommended that counsel communicate in advance with the opposite party with a view to determining the procedure to be followed. Counsel could otherwise find himself in the position of being forced to follow a strict filing procedure under which documents are introduced one by one during the hearing through the author of the document or someone who has sufficient knowledge of it. This procedure may considerably lengthen the proceedings, to the displeasure of everyone, including the court.

Even though most Crown counsel consent to the simplified procedure, since it better serves the interests of justice, there may be an occasional

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[60] 93 DTC 298, at 301 (TCC). See *Papp Estate v. MNR*, 63 DTC 1219 (SCC); and John Sopinka and Sidney N. Lederman, *The Law of Evidence in Civil Cases* (Toronto: Butterworths, 1974), 355. See also *Scannar Industries Inc. v. The Queen*, 94 DTC 6505 (FCA), where the court concluded that the trial judge had committed no error of law in refusing withdrawal on the basis that the admissions in question could not have been made through inadvertence and that they served to confirm the representation that the taxpayer had previously made to the minister.

refusal to collaborate. If that is the case, it is suggested that counsel table the book of documents for identification purposes without formally filing it as evidence since, as indicated earlier, all documents must, in the absence of consent, be adduced as evidence one by one. Counsel should advise the court that the formal procedure is being followed as a result of the Crown's refusal.

As each document is filed, counsel should refer to the tab in the book of documents corresponding to the document being presented. It will then be up to the opposing party to attempt to explain to the court why it is opposed to the use of the book of documents as a tool during the hearing.

As already noted, counsel can forward to the opposite party a formal motion to admit a fact or a document, as provided by the relevant rules. If the opposite party fails to respond to the motion within the required time frame, he will be deemed, for the purpose of the appeal only, to have admitted the facts or the authenticity of the document mentioned in the motion.[61] In practice, this kind of motion is made only when there is a potential debate on the authenticity of a document or when the parties refuse to collaborate.

If necessary, counsel may rely on certain provisions of the Canada Evidence Act[62] that facilitate the presentation of certain documents as evidence, such as business records,[63] books or records kept in any financial institution,[64] notarial acts in Quebec,[65] documents in respect of judicial proceedings,[66] official documents,[67] and certain other books and documents.[68] Under the CEA, the presentation of a document as evidence must be preceded by reasonable notice of at least seven days to the Crown.[69]

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[61] Supra footnote 41.

[62] RSC 1985, c. E-10, as amended (herein referred to as "CEA"), section 1.

[63] CEA section 30, which refers to records made in the usual and ordinary course of business.

[64] CEA section 29, which states that, in general, a copy of any entry in any book or record kept in any financial institution shall, in all legal proceedings, be admitted in evidence as proof and that an order of the court is needed before a book or record can be produced by an officer of a financial institution who is not implicated in any legal proceedings. See *Farris v. MNR*, 70 DTC 6179 (Ex. Ct.), where it was decided that bank records, including internal notes between branches, could be admitted as evidence under CEA section 29, even if in that case a witness confirmed at the hearing part of the content of the said notes.

[65] CEA section 27.

[66] CEA section 23.

[67] CEA section 26.

[68] CEA section 25, which refers to documents that are of so public a nature that they can be introduced as evidence by the proper custodian when no other act exists that renders its contents provable by means of a copy.

[69] CEA section 28, which refers to documents produced under CEA sections 23, 24, 25, 26, and 27.

This said, most documents relevant to a tax appeal are documents prepared by or for the taxpayer. They are therefore probably in the taxpayer's custody or can be obtained through the lawyer or accountant who prepared them. Accordingly, in the absence of consent from the Crown, counsel can get most of the relevant documents introduced as evidence in the context of his client's testimony.

On the rare occasion that a document is not in the custody of either the client, the lawyer, or the accountant and the document cannot, for whatever reason, be obtained before the hearing, it is always possible to have the court's registrar issue a subpoena duces tecum. This subpoena orders a third party who has custody of the relevant document to present himself in court with the document on the day of hearing.[70]

It is usually preferable to present the various documents chronologically, especially when the appeal involves only one issue of law. Since testimony also should provide a chronology of the relevant events, it will be easier for the court to follow the documentary evidence supporting the testimony when the documents are presented in the same order. When the appeal involves more than one issue, it is probably more efficient to separate the documents by issue, except when a number of documents are relevant to more than one issue.

It may be particularly useful to prepare a chart that summarizes the relevant information for the court where counsel intends to refer simultaneously in examination or argument to several pages of a document or to several documents. For example, if the argument of the appellant is that he has sold 20 properties in the last 15 years in the context of creating and increasing the value of a real estate portfolio, it could be helpful to prepare a chart illustrating that in the last 15 years the value of the portfolio has increased from $2 million to $8 million and that the equity also has increased from $300,000 to $4 million. These charts can either be inserted in the book of documents or filed separately, for increased effect.

Disclosure to the Opposite Party

Courts take a dim view of the trial-by-ambush tactics adopted by some counsel, who attempt to conceal the existence of a relevant document until the hearing. The general rule on this point is that a party has the right to know before the hearing which documents will be presented as evidence to support the position taken by his opponent, in order to give him the opportunity to organize his case and to avoid an adjournment that could be requested if the documents are not disclosed in time.

At the federal level, the rules provide that a document cannot be used as evidence during the hearing unless one of the following three conditions is met:[71]

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[70] Rule 141 of the TCC Rules (General Procedure). See also Léo Ducharme, *L'administration de la preuve* (Montréal: Wilson & Lafleur, 1986), 166.

[71] Rule 89 of the TCC Rules (General Procedure).

1) reference to the document appears in the pleadings, or in a list or an affidavit filed and served by a party to the proceeding;

2) the document has been produced by one of the parties, or some person being examined on behalf of one of the parties, at the examination for discovery; or

3) the document has been produced by a witness who is not, in the opinion of the court, under the control of the party.

A document may nevertheless be introduced in evidence even where none of the three conditions are met when

- the court otherwise directs;
- the other party consents in writing;
- the other party has waived the discovery of documents; or
- the document in question is used solely as a foundation for, or as part of, a question in cross-examination or re-examination.

Notwithstanding that the author has found no decision of the Tax Court dealing with the first exception, the Tax Court should normally permit the introduction of a surprise document only in the most exceptional circumstances, taking into account that the rules are clear on the subject. Where the court accepts the filing of the document, opposing counsel will request and normally obtain an adjournment to give him time to analyze the document and adjust his evidence as needed.

As indicated earlier, the CEA also provides that certain types of documents may not be filed as evidence unless reasonable notice of at least seven days is given to the other party.

In any case, where a document is discovered at the last minute, as already discussed, it is strongly recommended that written notice be sent to the other party as soon as possible, informing him of counsel's intention to file the new document in evidence. A copy of the document should be attached to the notice. If necessary, a party to a document will introduce it as evidence.

Another important principle of evidence is that when the contents of a private document have to be proven, the document cannot be adduced as evidence unless the author or a person who has sufficient knowledge of the document is present at the hearing for cross-examination on its contents. Indeed, parties have the right to test the veracity and the exactitude of a document in open court.[72] Of course, the parties may agree

[72] See the decision of Teitelbaum J in *Dand Auto Parts Limited et al. v. The Queen*, 90 DTC 6533 (FCTD), where the court refused to admit as evidence certain letters that contained important facts because the author of the letters was not available at the hearing for cross-examination. See also *Freda Feldstein v. MNR*, 69 DTC 5298 (Ex. Ct.); *Cox et al. v. MNR*, 85 DTC 320 (TCC); *No. 153 v. MNR*, 54 DTC 163 (TAB); and Sopinka, supra footnote 48, at 427.

otherwise, or a statutory exception may apply.[73] This principle applies equally to the minister and to the taxpayer.[74]

The principle will be applied by the court even in the absence of statutory rules. This point is well illustrated by the decision of the Tax Court in *Cox et al.*, where Judge Christie, the associate chief judge, refused to give any probative value to three letters emanating from third parties in which they gave their opinion on the value of lands, even though the court was not legally obligated, before January 1, 1994, to follow any technical and legal evidence rules:

> The authors of these documents were not called to testify at the hearing. I said then and I repeat now, *this type of evidence cannot be assigned any weight for the reason that the respondent was not afforded the opportunity of testing by cross-examination the expertise of the authors of the opinions or what they said in the documents referred to*. Subsection 14(2) of the *Tax Court of Canada Act* states that, notwithstanding the provisions of the Act under which an appeal is made to the Tax Court, it is not bound by any legal or technical rules of evidence in conducting a hearing for the purposes of that Act. I cannot, however, construe this as an unfettered license to disregard the laws of evidence. Indeed I believe that there is a positive duty on the Court to apply those laws if the nature of the subject matter before it for determination is such that in order for justice to be done they should be applied. This is especially true where cross-examination can be vital. *Cross-examination is described by Wigmore in his monumental work on the law of evidence as: "Beyond any doubt the greatest legal engine ever invented for discovery of truth*." Included in the subject matters of the kind mentioned are controversies over the value of property. Another common example is the intention of taxpayers at the time of disposition of property [emphasis added].[75]

It is possible, however, to file documents for identification purposes only without their contents being accepted as true.[76] For example, if a client indicates that he has decided to sue a third party after receiving a letter from that third party, it should be possible to produce the letter without the third party being present if the intent is not to prove the contents of the letter, but rather to prove that the letter was received and thus to prove the client's claim that the action was taken as a result of the letter. Notwithstanding this technique, it is important to remember that where consent is not an option, the author of a document of a private nature should be called as a witness if the document is to be adduced as evidence.

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[73] For example, the exceptions provided by certain articles of the Code of Civil Procedure for Quebec appeals.

[74] See, for example, *Taylor v. MNR*, 81 DTC 3 (TRB), where it was decided that documents from third parties could not be introduced as evidence to prove their content without the testimony of the third parties, since the minister's auditor did not have personal knowledge of the facts indicated in the documents.

[75] *Cox et al.*, supra footnote 72, at 321.

[76] See the decision of the Ontario Court of Appeal in *R v. Smith* (1990), 75 OR (2d) 753.

Organization and Presentation of Testimonial Evidence

Before dealing with the preparation and examination of witnesses per se, it should be pointed out that, where possible, the testimonies of one or two main witnesses, usually the client(s), should be corroborated by independent witnesses who have no direct interest in the outcome of the appeal.[77]

When choosing witnesses, it is important to remember that a non-expert witness will, in general, be able to testify only on facts of which he has a personal knowledge.[78] The ordinary witness, unlike the expert witness, is thus not permitted to give an opinion on a question that requires specialized knowledge.

Preparation and Examination of the Ordinary Witness

Before the hearing, counsel must review the written pleadings with his main witnesses, the documents identified in the list of documents of both parties, and the transcripts of the preliminary hearing. Counsel must also review with each witness the main parts of his testimony and point out to him which aspects should be highlighted. The object is to ensure that the witness's testimony is as efficient as possible. It does not assist a client's case if, during the examination-in-chief, a witness insists on a totally irrelevant fact simply because counsel has neglected to point out to him that the particular fact will have no impact on the decision of the court.

Counsel should also tell the witness how the hearing is expected to proceed. He must explain that the witness will undergo an examination-in-chief and that the questions that will be asked will not be leading.[79] He should warn the witness that he will be cross-examined and that counsel may have to re-examine him following the cross-examination. The witness must also understand that he must be polite to the judge and the other party's counsel at all times, that he must wait before answering a question if an objection is raised, and that he must look toward the judge when he answers a question, no matter who has asked it.

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[77] For example, see the comment in *Pietrow v. MNR*, 68 DTC 5008 (Ex. Ct.), with respect to the fact that the appellant had omitted to call his brother as a witness, even though the latter could have confirmed certain relevant facts. No rule of law requires such corroboration, and the court may give weight to the testimonial evidence of an appellant if it finds it credible, even if it is not corroborated: see *Weinberger v. MNR*, 64 DTC 5060, at 5062 (Ex. Ct.). This is particularly true when the testimony has not been challenged by a close cross-examination: see *Reicher v. The Queen*, 76 DTC 6001 (FCA); *Racine, Demers and Nolin v. MNR*, 65 DTC 5098, at 5112 (Ex. Ct.); and *Oelbaum v. MNR*, 68 DTC 5176 (Ex. Ct.). Compare *Voigt v. MNR*, 68 DTC 5113 (Ex. Ct.), where, following a detailed cross-examination, the court rejected the entire testimony of the appellant. The fact that a witness does not remember certain details after several years has been considered normal in a number of cases: see, for example, *Elgin Cooper Realties Ltd. v. MNR*, 69 DTC 5276, at 5277 (Ex. Ct.).

[78] Murray A. Mogan and Joseph A. Stainby, *Contesting Income Tax Assessments in Canada: A Practical Guide* (Don Mills, Ont.: CCH Canadian, 1981), 102 and following.

[79] That is, the questions will not suggest how the witness is expected to answer or require him to respond with a simple "yes" or "no."

As previously indicated, the witness must also be advised that

• he may not have the right to relate the words of another person because of the hearsay rule,[80] unless the statements sought to be reported are both necessary and reliable;[81] and

• once his cross-examination by the other party's counsel has begun, he cannot discuss his testimony with others until the cross-examination is over.

If it is expected that a testimony will contradict the terms of a written document, the Crown may raise the parole evidence rule.[82]

Counsel should phrase his questions so that they are simple and short in order to avoid confusing the witness. It is generally preferable to proceed in a chronological manner and avoid flashbacks. It may be advantageous to ask the witness to include factual background in his testimony, in order to give the court certain useful information about the client. On this point, counsel may wish to paint a flattering portrait of the witness in the first two or three minutes of the examination, particularly where the witness is the appellant. It is, of course, necessary to keep the questions relevant and short in order to avoid objections from the opposing counsel.

In many cases, it is preferable to deal with the weaknesses of the case during the examination-in-chief, since it is highly probable that the other party will raise them during the cross-examination. By taking the initiative, counsel may be able to present these weaknesses in a more favourable light. In addition, this tactic can diminish the impact of the cross-examination, which will seem to be repetitive if it focuses on the same points covered in the examination-in-chief.[83]

While the witness is being cross-examined, counsel can raise objections to hypothetical questions, questions that have already been answered, and questions that are confusing.[84] Counsel should also object to questions that infringe on solicitor-client privilege. Solicitor-client privilege

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[80] According to this rule, a person cannot report another person's words for the truth of their content. In practice, in the case of fiscal litigation, this issue of hearsay evidence has been discussed mainly in the context of the admissibility of documents and in the case of tax evasion trials: for example, see *In re The Queen v. Anisman*, 69 DTC 5199 (Ont. SC).

[81] The hearsay rule has been considerably relaxed in the past few years, and the courts now accept hearsay evidence if it satisfies both the necessity and the reliability requirements: see *R v. R (D)*, [1996] 2 SCR 291; *R v. U (FJ)*, [1995] 3 SCR 764; and in a tax context, *E. Edwards (Estate) v. MNR*, [1995] 1 CTC 2373 (TCC); *R v. Khan*, [1990] 2 SCR 531; and *R v. Smith*, [1992] 2 SCR 915.

[82] See, for example, *Murray v. Boyle*, [1992] 1 WWR 673 (Sask. CA). Under that rule, the terms of a written contract cannot be contradicted by testimony.

[83] Sopinka, supra footnote 48, at 67.

[84] The overruling of an objection by the court, like the court's decision to admit contested evidence, cannot be appealed immediately but will be allowed to form part of the

(The footnote is continued on the next page.)

applies not only to written and oral communications between the client and his counsel, but also to information or documents prepared by a third person, such as an accountant, at the request of counsel.[85] Federal courts do not recognize the existence of an accountant-client privilege in the context of proceedings involving the ITA.[86] If the client's accountant is called as a witness, and given the fact that the client can waive the privilege, it may not be prudent to raise an objection to a relevant question asked in cross-examination, since the court may then be led to think that the client has something to hide.

The witness is not required to answer irrelevant or vexing questions.[87] Questions concerning events that occurred after the events in issue may, however, be ruled admissible if they are directed at confirming or denying part of the testimony.[88]

Counsel must, however, avoid overprotecting the witness. In certain circumstances, it may be helpful to let the court become impatient with improper cross-examination.

Where an accountant or other professional testifies, either as an ordinary witness or as an expert witness, he should avoid, particularly in the course of the cross-examination, exhibiting a contemptuous or condescending attitude toward the opposing counsel or the court. It is not for the witness, for example, to judge the relevance of a question or to show exasperation if he is asked questions that he finds trivial or repetitive. Rather, it is up to counsel to object when and if he finds it proper to do so.

Counsel should warn the witness that certain questions concerning potentially unfavourable aspects of the case will likely be put to him in cross-examination, and that his responses must be candid; otherwise, he will risk losing his credibility. For example, suppose the case concerns the nature of the gain resulting from the disposition of property, and the opposing counsel asks the witness in cross-examination, "Were you aware at the time of the acquisition that you could resell the building at a profit?" A negative answer, particularly from an informed business person, could

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[84] Continued . . .
grounds of an appeal from the final decision of the court: see *The Queen v. Farmer Construction Ltd.*, 83 DTC 5272 (FCA); and *Attorney General of Canada v. SF Enterprises Ltd. et al.*, 90 DTC 6195 (FCA), where the court determined that the decision of a judge of first instance to the effect that the shareholders of a dissolved corporation can continue the appeal, could not be appealed immediately.

[85] See, for example, *Susan Hosiery Ltd. v. MNR*, 69 DTC 5278 (Ex. Ct.), where it was decided that documents prepared by the accountant at the request of the attorney were covered by the privilege.

[86] Ibid. See also *Missiaen v. MNR*, 68 DTC 5039 (Alta. SC).

[87] See rule 144(2) of the TCC Rules (General Procedure) regarding the control that the court may exercise in this respect.

[88] See, for example, *G.W. Golden Construction Ltd. v. MNR*, 67 DTC 5080 (SCC), where evidence of the sale by the taxpayer, many years later, of the balance of his real estate property was considered to be relevant.

ring false. A more realistic answer would be, for example, "Yes, of course, like any other investor, but I had no intention to resell the building at the time I bought it."

In re-examination, it is essential not to revisit clearly established points to avoid the risk of obtaining a slightly different answer.

Role and Preparation of the Expert Witness

The role of the expert is to give his opinion on a subject that requires specialized knowledge. As a general principle, expert evidence will be admissible only where it is relevant, necessary in assisting the court, and not rendered inadmissible by any exclusionary rules, and where the expert is properly qualified.[89] Particularly with respect to the testimony of accountancy experts, the ultimate decision of the court must, however, be founded on the law, not on the expert's opinion on the law:

> There is no doubt that the proper treatment of revenue and expenses in the calculation of profits for income tax purposes with a view to obtaining an accurate reflection of the taxable income of a taxpayer, is not necessarily based on generally accepted accounting principles. Whether it is so based or not is a question of law for determination by the Court having regard to those principles (see: *M.N.R. v. Anaconda Brass Ltd.* (1956) A.C. 85; see also *Associated Investors of Canada Ltd. v. M.N.R.* (1967) 2 Ex. C.R. 96 at pages 101 and 102).[90]

It is important for the expert to realize from the outset that his report and subsequent testimony should be as impartial as possible and that he should behave and present himself as an objective witness. A hearing is a procedure that is fundamentally different from negotiations, where no independent adjudicator is present and the expert can be more overtly partial.

In *Richards v. MNR*, Bonner TCCJ made the following comments concerning an auditor from Revenue Canada who had directly negotiated the value of the property in issue:

> [H]is demeanour and responses, particularly during cross-examination, led me to conclude that he viewed his role, to some extent at least, as that of an advocate for his Minister's cause. *It is the duty of an expert witness to give his honest opinion, period. When he assumes the mantle of an advocate the value of his testimony is severely decreased* [emphasis added].[91]

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[89] See *R v. Mohan*, [1994] 2 SCR 9. For a more detailed discussion on this point, and on expert evidence in tax appeals generally, see Michael G. Quigley, "Dealing with Expert Evidence in Tax Appeals" (1993), vol. 41, no. 6 *Canadian Tax Journal* 1071-1106.

[90] *Neonex International Ltd. v. The Queen*, 78 DTC 6339, at 6348 (FCA). See also *Ikea Limited v. The Queen*, 94 DTC 1112 (TCC); *Mandel v. The Queen*, 76 DTC 6316, at 6330 (FCTD); and *MNR v. Publishers Guild of Canada Ltd.*, 57 DTC 1017, at 1026 (Ex. Ct.). See also the recent decision in *Symes v. The Queen et al.*, 94 DTC 6001 (SCC), where the court referred to "generally recognized principles of commercial transactions."

[91] 86 DTC 1475, at 1476 (TCC).

In *Levinter v. MNR*, the same court referred to authors and case law on the subject of expert testimony:

> In The *Modern Law of Evidence* by Adrian Keane, 1985 edition, he said of Opinion Evidence at p. 377:
>
> > The danger is particularly acute in the case of opinions expressed by expert witnesses, of whom it has been said, not without some sarcasm, "it is often quite surprising to see with what facility and to what extent, their views can be made to correspond with the wishes or the interests of the parties who call them."
>
> In the case of *Whitehouse v. Jordan*, [1981] 1 W.L.R. 246 (H.L.) at page 256, Lord Wilberforce said:
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> > . . . expert evidence presented to the court should be, and should be seen to be, the independent product of the expert, uninfluenced as to form or content by the exigencies of litigation.[92]

While the method used to prepare an expert witness may vary from one counsel to the another, certain basic principles should be followed, taking into account the role played by the expert witness at the hearing. First, counsel should, of course, become well acquainted with his expert witness, by reviewing his educational background, his professional experience, his field of specialization, and his publications, particularly those that deal with the particular area of his expertise. Counsel must then review the relevant facts of the case with the expert witness, especially those that have been used in the preparation of the expert's report.

If the expertise relates to real estate valuation, counsel should go and see the property and any other comparable properties referred to by the expert. Counsel not only can then ascertain that his expert is sufficiently at ease with the facts, but also may be able himself to be more efficient in the examination-in-chief of his expert, as well as in the cross-examination of the Crown's expert.

When the concept of profit under section 9 of the ITA is in issue, as is often the case in tax appeals, the expert witness must understand, as previously indicated, that he must focus on generally accepted accounting principles (GAAP) or on generally accepted principles in commercial matters, and that it is counsel's role to convince the court in argument that there are no statutory provisions or jurisprudential principles to the contrary.[93] To that end, counsel must review the different applicable accounting principles with the expert; ascertain whether or not the accounting treatment he espouses is the only possible one under GAAP, if there exists more than one school of thought on the issue; and, if such is the case,

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[92] 87 DTC 318, at 320 (TCC).

[93] As previously mentioned, the profit of a business for a taxation year in the sense of ITA section 9 should normally be calculated on the basis of GAAP, unless there is a statutory provision or case law principle to the contrary.

determine the strengths and weaknesses of each school and the reasons why the expert decided to subscribe to one school rather than another.[94]

Whether a real estate valuation or GAAP are the issue, it is important for counsel to understand the methods that were used by the expert, their main characteristics, as well as their limits.[95] In this respect, counsel should not ignore his instincts and should use his common sense. If something in the report does not sound quite right, counsel should discuss it with the expert and obtain an explanation. Counsel should not hesitate to suggest some changes to the report, particularly to presentation. The report should be easy to read, be well organized, and have an introduction, an analysis, and a conclusion. Counsel should also review with his expert witness the report produced by the opposing party's expert, in order to be able to question its content during the examination-in-chief of his expert and to prepare the cross-examination.

Preliminary Transmission and Nature of the Expert's Report

The rules and cases generally provide that an expert witness will be allowed to testify only if a written summary of his opinion is prepared and transmitted to the other party within a certain time before the hearing. There exists a risk of confusion on that point, since one of four different delays may apply, depending on the nature of the appeal, as the following summary indicates:

Federal court	30 days[96]
Canadian court	
Old procedure	15 days[97]
Informal procedure	10 days[98]
General procedure	30 days[99]

With respect to content, even if the wording used in the different rules varies, it is generally recognized that the report must contain the essentials of the expert's reasoning in order to allow the court, in the absence of an objection, to render a decision on the basis of the report without having to hear testimony. The occasional tendency of counsel to put only the strict minimum in the expert's report has sometimes been criticized

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[94] The court will normally choose the method that gives the most accurate picture of the financial situation of the business: see, among others, *West Kootenay Power and Light Company Limited v. The Queen*, 92 DTC 6023 (FCA); and *Maritime Telegraph and Telephone Company, Limited v. The Queen*, 92 DTC 6191 (FCA). See, however, *The Queen v. Friedberg*, 92 DTC 6031 (FCA), where the court concluded that the taxpayer could choose an accounting method even if another accounting method reflected more accurately the operations of the corporation. The appeal from this decision to the Supreme Court was recently rejected (94 DTC 5507).

[95] Sopinka, supra footnote 48, at 68.

[96] Rule 482 of the Federal Court Rules.

[97] *Friedman et al. v. MNR*, 78 DTC 1599 (TRB).

[98] Rule 7 of the TCC Rules (Informal Procedure).

[99] Rule 145 of the TCC Rules (General Procedure).

by the courts, as illustrated by the comments of the Federal Court of Appeal in *Karam v. National Capital Commission*:

> I wish to add that a perusal of some of the affidavits of experts filed in this case leads me to believe that Rule 482 is being followed by some counsel, if at all, in the letter rather than the spirit. Indeed, in my view, the result is much less satisfactory than in the old days of voluntary exchange of valuation reports. I strongly suggest that, when an expert's affidavit does not contain a sufficiently detailed statement of the expert's reasoning so that the Court could, in the absence of attack, adopt that reasoning as its own and decide the question that is the subject of his evidence on the basis of it, the party should not be allowed to supplement it by verbal testimony until a supplementary affidavit is filed containing such reasoning and the other side and the Court have had an opportunity to consider it. (If that involves adjournments, costs thrown away should be assessed against the party at fault.)[100]

This said, in some cases, the courts have nevertheless shown some flexibility concerning the degree of detail needed. For example, Pinard J of the Federal Court—Trial Division refused in *Andrew Yager v. The Queen*[101] to accept the Crown's argument that the testimony of the taxpayer's accountancy expert should be excluded because the report was not sufficiently detailed. The court stated:

> Counsel for the defendant was therefore able to examine the valuation report itself before the hearing of the appeals, and in addition I consider that the report contains a sufficiently detailed analysis of factors pertaining to valuation of the plaintiff's shares, and a sufficiently detailed explanation of the reasoning of the expert witness "so that the Court could, in the absence of attack, adopt the reasoning as its own and decide the question that is the subject of his evidence on the basis of it. . . ." It is more a question here of weighing the evidence, and the objection must be dismissed.[102]

Requirement That a Witness Testify in Court and Main Exceptions

As a general principle, a witness must be heard in open court so that he can be cross-examined by the other parties.[103] A number of exceptions to this principle do, however, exist.

For example, it should generally be possible for counsel to file as evidence the transcripts of the examination for discovery made by a party other than the one represented by counsel, insofar as, without fault on the part of his client, the person who has been examined is no longer available. Specific rules permit the filing of such an examination in certain

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[100] [1978] 1 FC 403, at 406-7 (FCA).

[101] 85 DTC 5494 (FCTD). See also *Ivan's Auto Body Ltd. v. The Queen*, 94 DTC 1957 (TCC), where the court refused to accept an expert opinion because the report provided no detail as to the factual premises, analysis, or rationality.

[102] *Yager*, supra footnote 101, at 5496.

[103] See rule 144 of the TCC Rules (General Procedure). In the absence of consent from the other parties or of a specific statutory exception, it is generally impossible to introduce evidence by way of affidavit.

situations—for example, when the person who has been examined has since died or is unable to testify owing to a disability or an illness.[104] It will also generally be possible for a party, with the authorization of all parties or with the authorization of the court, to obtain the out-of-court sworn testimony of a person expected not to be in a position to attend the hearing—for example, because of a serious illness or a lengthy absence, or simply where it is in the interests of the administration of justice that such a procedure be followed.[105] Generally, however, the opposing party must be given the opportunity to cross-examine the witness during the out-of-court examination.

CROSS-EXAMINATION OF THE OTHER PARTY'S WITNESSES

Basic Principles

Cross-examination of a witness on any relevant fact is accepted as a general principle, and the determination of whether a fact is relevant or not is usually made on the basis of the written pleadings.[106] The purpose of a cross-examination is normally twofold: first, to establish facts favourable to counsel's case and, second, to discredit the witness.[107]

The first rule of a good cross-examination is for counsel not to ask questions unless he already knows the answer. Counsel otherwise runs the risk of a nasty surprise. The second rule, where counsel receives an unexpected unfavourable answer, is to move on to something else rather than put additional emphasis on the answer by asking other questions—unless, of course, counsel is confident that he can get the witness to retract or contradict his earlier testimony.

In contrast to the examination-in-chief procedure, in cross-examination counsel has the right, or even the duty, to ask leading questions. The questions should be formulated in such a manner as to obtain a "yes" or

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[104] Rule 119 of the TCC Rules (General Procedure).

[105] Rule 119(2) of the TCC Rules (General Procedure) provides that, once seized of such a request, the court will take into consideration the following elements in the exercise of its discretionary power to allow the request:

- the ability of the person who should be examined to conform to the directive;
- the eventuality that the person may be prevented from testifying at the hearing owing to disability, illness, or death;
- the possibility that the person may be outside the jurisdiction of the court at the time of the hearing;
- the travel expenses that would be incurred if the person were required to testify at the hearing;
- the necessity that the person testify in person; and
- other relevant factors.

[106] Ducharme, supra footnote 70, at 122.

[107] Roger E. Salhany, *Cross-Examination: The Art of the Advocate* (Toronto: Butterworths, 1991); and Sopinka, supra footnote 48, at 71.

"no" answer from the witness.[108] Counsel must guide the witness and call him to order in a polite but firm way if he does not answer the question.[109]

Counsel must avoid cross-examining for its own sake, since this will likely give the witness the opportunity to reinforce assertions made during the examination-in-chief. It is essential that counsel determine in advance which aspects have to be covered and which aspects the witness is in a position to reinforce. If the answer obtained on a particular point is the desired answer, counsel should move on to something else rather than ask further questions on the same subject and run the risk that the witness will qualify his previous answer.

During the cross-examination, counsel may look at the notes used by the witness during his testimony and ask questions about them.[110] This means that, in the context of a tax appeal, the taxpayer's representative is entitled, while cross-examining a departmental official, to review the report prepared by the auditor or the appeals officer, as well as any working papers, particularly where the departmental witness has referred to or consulted one of those documents in the course of the examination-in-chief. In this respect, counsel should endeavour to obtain a copy of these documents some time before the hearing, by means of a simple telephone call to the Crown counsel or an access request under the Access to Information Act, or at the examination for discovery of a departmental official. The documents can then be used in preparation for the hearing and in the course of the cross-examination.

Use of the Examination for Discovery of the Other Party

A party will generally be able to produce at the hearing excerpts from the examination for discovery of the other party.[111] This can be done directly by counsel, whether or not the person who was discovered has testified or will testify in open court.

These excerpts can be used in cross-examination, without advance notice to opposing counsel, to challenge the credibility of the witness, generally in the same manner as a prior inconsistent statement.[112] However, where counsel intends to adduce excerpts of the examination as part of its own case, rather than in the context of cross-examination, recent changes to the TCC Rules (General Procedure) require that advance notice be given to the other party.[113]

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[108] In fact, if the witness cannot reasonably answer the question with a "yes" or a "no," it is probably because the question was not properly formulated.

[109] For example, by saying to the witness, "Mr. A, would you please answer the question that was put to you by a 'yes' or a 'no.' "

[110] *R v. Mugford* (1990), 58 CCC (3d) 172 (Nfld. CA).

[111] Rule 100 of the TCC Rules (General Procedure).

[112] That is done by following the procedure prescribed by CEA section 10.

[113] See the Tax Court of Canada's new practice note, issued August 1, 1991, requiring a party who intends to read in from the discovery to serve on the adverse party written

(The footnote is continued on the next page.)

Should opposing counsel use excerpts from the examination of the party counsel represents, counsel is entitled to refer the court to other excerpts from the examination to qualify or explain the cited excerpts, so that they are not read out of context.[114]

Cross-Examination of the Expert Witness

Counsel may challenge the qualifications of a witness whom the other party wishes to have recognized as an expert witness. However, unless there are valid grounds to disqualify him, such a challenge could serve to emphasize his competence. A better result may be attained by not objecting to the qualifications of the witness, but instead challenging his credibility in cross-examination. (It is generally not possible to have a Crown witness disqualified on the basis that he is a departmental employee and consequently biased.)[115]

In most cases, it is not possible to completely discredit an expert witness in cross-examination. The usual strategy is to highlight the weaknesses of his approach, so that the court will prefer the testimony of counsel's own expert. For this reason, as previously discussed, it is essential that counsel be thoroughly familiar with the expert witness's report. Often, counsel will challenge certain facts on which the expert based his conclusions or will simply have him recognize that he based his opinion on certain facts and then refute the existence of this fact in cross-examination.[116]

Where the expert has already written or has already testified on the issue being debated and certain differences exist between his testimony and his articles or his earlier testimony, the articles or the earlier testimony can, of course, be used to contradict him. Counsel may also refer to works of other experts on the subject in cross-examining the witness, insofar as he himself knows the work in question and knows that the author is an authority on the subject.[117]

In valuation cases, there may be a further basis for challenging the opposing expert witness, provided that counsel's own expert witness is

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[113] Continued . . .
notice identifying the passages to be read in, no later than four days before the hearing. If the adverse party intends to request that the other passages that qualify or explain the evidence be read in, the adverse party shall serve written notice on the other party no later than two days before the hearing. In this way, insofar as counsel wishes to contradict a witness, it is necessary to draw his attention to the parts of the written document that will be used to contradict him and also to give him a chance to explain himself.

[114] Rule 100(3) of the TCC Rules (General Procedure).

[115] See *Fambau Limited v. MNR*, 82 DTC 1027 (TRB).

[116] For example, the cross-examination may proceed in this manner: "If I understand correctly, you are of the opinion that [state the position]. . . ." "Yes." "This opinion, of course, essentially depends on the presumption that all the facts indicated in the report are true." "Yes." "And these facts can be summarized as follows [enumerate the facts.]" "Yes." "Therefore, it is not unreasonable to think that if one or another of these factual presumptions were wrong, your opinion could be different."

[117] Salhany, supra footnote 107, at 123.

not in the same position. If the opposing witness has participated in negotiations preceding the hearing—for example, at the audit or objection level[118]—counsel may argue that his objectivity has been compromised. It will, however, be more difficult to attack the expert witness who has attended the negotiations only as an observer, without negotiating directly with the opposing party.[119]

PREPARATION AND PRESENTATION OF THE ARGUMENT

Components of the Argument and Order of Presentation

The case is closed and the court invites counsel to present his argument. While the order of presentation is a personal choice, an argument should normally include the four following components:

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[118] In the case of *Friedman et al.*, supra footnote 97, Mr. Cardin, at the time chair of the Tax Review Board, heard the testimony of the assessor of the Ministry of Revenue who had tried to negotiate the fair market value of the property with the taxpayer. The assessor had agreed to a value for the land, but not for the building. The board concluded, at 1602, that the assessor had disqualified himself as an expert witness in the case: "In my opinion the very fact that he negotiated with the appellants' accountants as to the value of the property shows in my mind a seed doubt [sic] as to the objectivity and the expertise of the witness's report and his conclusion which should be arrived at only on the basis of accepted evaluation methods. Notwithstanding the witness's knowledge in the field of evaluation, I believe that *Mr. Lussier [the assessor], though undoubtedly acting in good faith, has disqualified himself as an expert witness by admitting to having attempted to negotiate a fair market value of the subject property with the appellants*, an activity which, in my opinion, is not consistent with my concept of the role of an expert evaluator or an expert witness [emphasis added]."

[119] The courts more easily accept the fact that an expert witness took part in the negotiations if he only played the role of adviser or observer, rather than acted as the principal negotiator. For example, in *Frith v. MNR*, 91 DTC 1160, at 1169 (TCC), the court stated:

> The objectivity and expertise of a person who is offered to the Court as an expert witness are matters which can be tested under cross-examination. *If a qualified appraiser has, through the negotiation process, permitted himself to become an advocate for his client and has abandoned what should be his professional objectivity, the other party can be expected to bring that out in evidence. A court would not likely attach much weight to the opinion of such an appraiser. In the negotiation process, a qualified appraiser will have a better chance of retaining his objectivity if he attends only as an adviser and not as the principal negotiator for his client.* In fairness to the statements by the former Chairman in *Friedman*, it appears, that the qualified appraiser in that case attempted to negotiate the settlement himself.
>
> Having regard to the cost of litigation, parties should be encouraged to attempt settlement and, when the issue is property valuation, it is difficult to imagine *bona fide* settlement negotiations which do not involve the qualified appraisers who are advising the respective parties [emphasis added].

The court also stated, ibid.: "*The attendance and participation of qualified appraisers in the negotiations process does not, in itself, disqualify them from appearing as expert witnesses in the litigation which would result from failed negotiations.* To hold otherwise would add significant costs because, if the negotiations did not produce a settlement, then the parties would have to retain fresh experts for the resulting litigation. *As I have indicated above, it is not a question of disqualifying a person as an expert witness but a question of what weight the court should attach to his opinion* [emphasis added]."

1) a summary of counsel's theory of the case;

2) an examination of the relevant statutory provisions and the applicable case law;

3) an overview of the evidence and the testimony; and

4) an application of the legal principles and the case law to the facts of the case.

The third and fourth elements can easily be combined into one.

It is important that counsel's argument be concise, logical, and easy to follow, and that the evidence and the authorities support counsel's statements. Three tools will help counsel give those characteristics to his argument: his personal notes, the book of documents, and the book of authorities.

Counsel's personal notes must be precise, in respect of both the evidence and the authorities. It is therefore essential that they be prepared with the greatest of care. For example, counsel may indicate in his argument:

> The agreement dated October 13, 1986 clearly indicates that the transfer of property is immediate. I refer the court to a copy of the document found under tab 8, more particularly paragraph 12, on page 8 of the contract. The said paragraph reads as follows.

And:

> This fundamental principle has been recognized on several occasions by the courts. The seminal decision on point is the decision of the Federal Court of Appeal in *Canterra Energy v. The Queen*, which can be found at tab 3, where the court said the following, in the middle of the left-hand column.

(Counsel should, of course, go on to read the passage from the document or the decision only when the judge has located it.)

It is a good idea for counsel to prepare a written point-form summary (one to three pages) of his argument and to present it to the court. A few weeks or a few months later, when the court writes its decision, it will have this summary in hand for consultation. The summary need not be very detailed; three or four sentences followed by references will suffice. For example:

> Paragraph 73(5) of the ITA is clear and does not refer to any minimal period of detention of the shares.
>
> See: paragraph 73(5) of the ITA; *Orr v. MNR*, 89 DTC 557 (TCC), at 566.
>
> Even if the court came to the conclusion that paragraph 73(5) of the ITA is not clear, which is denied, it is submitted that reasonable ambiguity must be resolved in favour of the taxpayer.
>
> See: *Johns-Mansville Canada Inc. v. The Queen*, 85 DTC 5373 (SCC); and *Canterra Energy Ltd. v. The Queen*, 87 DTC 5019 (FCA).

Arguments That Can Be Made

As indicated earlier under the heading "Amending the Notice of Appeal," it is particularly important for counsel to ensure, at the time of writing

the notice of appeal and at the beginning of the hearing, that the notice contains all statutory provisions and legal arguments on which he rests his position. Unless the notice is amended before the evidence is introduced, the court will likely not permit an additional argument to be raised for the first time in argument at the end of the trial. (Consequently, it is appropriate for counsel to object if the other party, in this case the Crown, attempts to make a new argument in final argument.)

Use of the Case Law

Where possible, counsel should support his various contentions with doctrine and case law. With respect to case law, a decision is usually referred to for one of two purposes: for the principle that it establishes, without regard for its particular facts;[120] or as an example of a factual situation similar to that of the present case, in which the court decided in favour of the taxpayer. Counsel should closely study each decision he intends to rely on in argument and ascertain its subsequent interpretation by the courts, in order to prepare a comprehensive argument and to be in a position to answer questions that may be asked by the court. Counsel should also review the decisions on which opposing counsel will probably rely, in order to be able to deal with them more effectively in reply.

With respect to the binding nature of a precedent, a court must normally follow the legal principles established by a higher court, insofar as the portion of the decision cited is part of the ratio decidendi of the decision rendered by the higher court. This is usually referred to as the stare decisis rule. However, it can be argued that stare decisis has no application when the parties in the cited case appear not to have raised before the higher court an argument or a statutory provision that could have led the court to render a different decision.[121] If the decision relied upon is one of the court hearing the appeal or of a court of the same level, there is, strictly speaking, no binding obligation for the court to follow the previous decision. Nevertheless, in many cases, the court hearing the appeal will adopt the same approach in the interests of the administration of justice, until a higher court settles the issue.[122]

Useful Principles of Statutory Interpretation

Since this article deals primarily with procedure, and not substance, principles of statutory interpretation will not be reviewed in any detail. It is, however, appropriate to refer briefly to two useful principles of

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[120] For example, Estey J's observations on statutory interpretation set out in *Stubart Investments Limited v. The Queen*, 84 DTC 6305 (SCC).

[121] *Rakhit v. Carty*, [1990] 2 All ER 202 (CA).

[122] *Moore v. MNR*, 63 DTC 734 (TAB); and *Fred Padfield Ltd. v. MNR*, 76 DTC 1195 (TRB). Naturally, it is preferable not to proceed to the hearing of an appeal if an identical case is pending before a higher court, unless the present case offers better facts or there are additional arguments.

interpretation adopted by Canadian courts, including the Supreme Court of Canada in the *Stubart* case:[123]

1) administrative policy favourable to the taxpayer can be an important factor where the relevant statutory provision is ambiguous; and

2) reasonable ambiguity of a statutory provision must be resolved in favour of the taxpayer.

Favourable Administrative Policy

Where counsel's position is clearly not supported by the words found in the relevant statutory provision, it is usually not very useful to rely on favourable administrative practice, since, where a clear conflict exists, the courts must ultimately follow the law and not its interpretation by the minister.[124] It is, however, perfectly legitimate for counsel to rely on favourable administrative practice when it can be argued that his position is clearly supported by the unambiguous words of the statute or that the statute is reasonably ambiguous. Favourable administrative practice can be an important factor where the statute is ambiguous, as confirmed by the Supreme Court of Canada in *Nowegijick v. The Queen et al.*:

> Administrative policy and interpretation are not determinative but are entitled to weight and can be an "important factor" in case of doubt about the meaning of legislation: per de Grandpré J. in *Harel v. The Deputy Minister of Revenue of the Province of Quebec*, [1978] 1 S.C.R. 851 at p. 859.[125]

From a strategic viewpoint, counsel may argue as his main position that the statutory provision relied on is clearly in the client's favour, and then indicate to the court that, should it come to the conclusion that, contrary to counsel's main argument, the statutory provision is ambiguous, such ambiguity should be resolved by following the administrative position on the subject.

Reasonable Doubt Should Be Resolved in Favour of the Taxpayer

Another useful principle of interpretation for counsel is that in the case of reasonable ambiguity of a statutory provision, the doubt must be resolved in favour of the taxpayer. This principle was upheld by the Supreme Court of Canada in *Johns-Manville Canada Inc. v. The Queen*, where the court stated that its decision was

> consistent with another basic concept in tax law that where the taxing statute is not explicit, reasonable uncertainty or factual ambiguity resulting from lack of explicitness in the statute should be resolved in favour of the taxpayer.[126]

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[123] Supra footnote 120.

[124] See, for example, *Redclay Holdings Limited v. The Queen*, 96 DTC 1207 (TCC).

[125] 83 DTC 5041, at 5044 (SCC).

[126] 85 DTC 5373, at 5384 (SCC).

More recently, in the case of *Fries v. The Queen*, the Supreme Court again indicated that, since it was not convinced that certain payments were covered by a particular statutory provision, "the benefit of the doubt must go to the taxpayers."[127]

Again, as in situations in which a favourable administrative position exists, counsel may wish to raise this argument only as a subsidiary one, the main argument being that the statutory provision clearly supports the taxpayer's position.

CONCLUSION

The key to an efficient and, to some extent, an effective hearing is and will remain good preparation. It is hoped that the advice contained in this article will be useful to tax litigators, potential witnesses, and in-house lawyers and accountants who, without having to appear in court, may nevertheless be called upon to participate indirectly in the appeal or to monitor its conduct.

[127] Supra footnote 25, at 6662 (SCC). See, to the same effect, *Canterra Energy Ltd. v. The Queen*, 87 DTC 5019 (FCA), although it should be noted that the Supreme Court of Canada pointed out in *Notre-Dame de Bon-Secours*, supra footnote 24, that the benefit of the doubt approach is a residual one.