The Tax Court's Informal Procedure and Self-Represented Litigants: Problems and Solutions

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PRÉCIS

La procédure informelle de la Cour canadienne de l'impôt est généralement reconnue comme étant plus facile, plus rapide et moins coûteuse que la procédure générale. Cependant, des problèmes se posent toujours dans le cas des parties qui se représentent elles-mêmes, qui comptent pour 44 % de toutes les causes sur lesquelles le tribunal a rendu jugement en janvier 2005. À cause de l'absence de connaissance du processus judiciaire, un grand nombre de ces contribuables ne reçoivent peut-être pas un traitement juste en dépit des efforts des juges pour rendre le processus le plus équitable possible. Cet article s'inspire de nombreuses transcriptions de la Cour canadienne de l'impôt pour illustrer les problèmes en cause, en particulier en ce qui a trait aux règles de procédure et de preuve.

L'auteur formule trois principales recommandations. Premièrement, les quatre notions clés que sont le fardeau de la preuve, la pertinence, la crédibilité et la corroboration devraient être expliquées aux contribuables qui se représentent eux-mêmes, au début de l'audition. Deuxièmement, une intervention judiciaire plus grande dans les procédures est nécessaire, dans le cas de ces contribuables, pour réduire les délais, permettre la présentation de toute la preuve pertinente et permettre généralement un procès équitable. Troisièmement, pour insister sur les quatre notions clés citées ci-dessus et expliquer le rôle et les procédures de la Cour canadienne de l'impôt, le juge en chef de ce tribunal devrait émettre une ordonnance sur ces sujets et la remettre à toutes les parties qui ne sont pas représentées par avocat. Parmi les autres suggestions, mentionnons la divulgation complète et la tenue de conférences préparatoires lorsque les parties se représentent elles-mêmes.

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ABSTRACT

The informal procedure of the Tax Court of Canada is generally recognized as providing easier, speedier, and less expensive access than the general procedure. However, problems persist in the case of self-represented litigants, who accounted for 44 percent of all Tax Court cases decided in January 2005. Owing to their lack of knowledge of the judicial process, many of these taxpayers may not be receiving a fair outcome in spite of attempts by judges to make the process as balanced as possible. This article draws on numerous Tax Court transcripts to illustrate the issues involved, particularly in connection with rules of procedure and rules of evidence.

The author arrives at three main recommendations. First, the four key concepts of onus, relevancy, credibility, and corroboration should be briefly explained to all self-represented taxpayers before the start of the hearing. Second, greater judicial intervention in the proceedings is necessary in the case of self-represented taxpayers in order to reduce delays, permit the presentation of all the relevant evidence, and generally allow for a fair trial. Third, to emphasize the four key concepts noted above, and to explain the role and procedures of the Tax Court, an order or direction on these topics should be issued by the chief justice of the court and sent to all litigants who are not represented by a lawyer. Other ideas include full disclosure and pretrial conferences for cases with self-represented litigants.

KEYWORDS: COURTS ■ JUDICIARY ■ PROCEDURES ■ SELF ■ TAX COURT OF CANADA

CONTENTS

INTRODUCTION

> It cannot be denied that the barriers encountered by self-represented litigants both outside and inside the courtroom deprive them of access to justice. Our democratic principles, the Canadian Constitution, and the rule of law require that our justice system meet the needs of all people, including self-represented litigants.
>
> Chief Justice McLachlin, Supreme Court of Canada
> (2003) vol. 29, no. 3 *Manitoba Law Journal* 277-87, at 283

No one in the tax community would deny that taxpayers who proceed in the Tax Court of Canada through the informal procedure (which resembles the procedures used in small claims courts) are afforded easier, speedier, and less expensive access

than they would gain through the general procedure (which is comparable to traditional civil court procedures). This flexibility is formally provided by both the Tax Court of Canada Act[1] and the Tax Court of Canada Rules (Informal Procedure).[2]

All is not well with the informal procedure, however, particularly in the case of self-represented litigants. While some Tax Court judges might sometimes go the "extra mile" for the taxpayer during such proceedings, at other times it seems the taxpayer is simply at a disadvantage from the moment the hearing begins. This is often attributable to the self-represented litigant's lack of knowledge about the issues, his failure to bring documentary evidence or witnesses to support his case, or his general ignorance about the informal procedure. Not infrequently, the taxpayer's lack of understanding of Tax Court procedures and his evidential burden is illustrated by requests to the judge to deviate from the strict wording of the taxing statutes in favour of arguments based on the inequity of the taxpayer's situation.

The Tax Court's rules of procedure and rules of evidence are quite different for the general procedure and the informal procedure. The purpose of this article is to review the rules for the informal procedure to see if there are "unnecessary trappings"[3] carried over from the general procedure that work to the detriment of self-represented taxpayers. Thus, the article can be seen as a response to the broad invitation issued by the Department of Justice in 1997 to "explore . . . ways to make the litigation process more accessible and time- and cost-efficient for all parties involved"[4] and also to Justice Strayer's comment, in an address to the Tax Court of Canada Education Seminar held in May 2003, that "this is a topic of growing concern"[5] for courts in many Commonwealth jurisdictions.

The article begins with some recent data on taxpayer representation in Tax Court cases and a brief history of the development of the informal procedure. Following this, the rules of procedure and rules of evidence are discussed, using Tax Court transcripts[6] to paint a picture of the difficulties faced by taxpayers who elect the informal procedure and choose to represent themselves. The latter part of

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1 RSC 1985, c. T-2 (5th Supp.), as amended.

2 SOR/90-688, as amended (herein referred to as "the rules").

3 This expression was used by Robert Bertrand, infra note 17 and the accompanying text, in reference to comments of the Carter commission on procedures of the predecessor Tax Appeal Board.

4 Ian S. MacGregor and Natalie Goulard, "The Future of Tax Administration: Improving the Litigation Process," in *Report of Proceedings of the Forty-Ninth Tax Conference*, 1997 Conference Report (Toronto: Canadian Tax Foundation, 1998), 57:1-8, at 57:1. The authors add, ibid., "About 70 percent of appeals filed with the Tax Court of Canada are heard under the informal procedure and are largely concluded within a year." According to the Tax Court's own numbers for 2003, for income tax and goods and services tax matters alone, 1,906 appeals were filed in the informal procedure, as compared with 1,295 in the general procedure.

5 Infra note 111.

6 These transcripts were not selected on the basis of objective criteria but are used simply to add some practical context. When a Tax Court transcript is cited, the citation is from the Federal Court of Appeal since the transcript can be obtained from the case file for this court.

the article presents a few suggestions for reducing these difficulties, focusing, in particular, on how the Tax Court can help the self-represented taxpayer to better prepare for trial, and what the judge can do to assist the taxpayer once the hearing has started. It is hoped that, by raising these issues and proposing some solutions, this article will lead to further examination of the informal procedure, "[provoking] those who have daily to deal with the present procedures on behalf of their clients to consider whether those clients' interests are adequately protected, consistent with the legitimate needs of the Revenue."[7]

SELF-REPRESENTATION DATA

Self-represented taxpayers in the Tax Court are more common than is often realized. Data for cases decided in January 2005 are presented in table 1. Of the taxpayers with cases decided that month, 44 percent were self-represented and 56 percent were represented by either counsel or an agent. The percentage varied by the type of case. For income tax cases, 87 percent of taxpayers were self-represented in the informal procedure, and 20 percent were self-represented in the general procedure. Employment insurance cases, goods and services tax (GST) cases held under the informal procedure, and other cases fell in between.

It should be noted that the January 2005 data are used here for illustrative purposes only. Just before this article went to press, I received more comprehensive data from the Tax Court of Canada. Of the 4,175 appeals filed in 2004, a somewhat lower percentage than that reported above, 32 percent, involved self-representation. For income tax cases, the self-representation percentage was 37 percent overall, with 49 percent for the informal procedure and 16 percent for the general procedure.

HISTORY OF THE INFORMAL PROCEDURE

Issues associated with self-represented litigants in tax cases go back to at least 1950. In *Mr. C v. Minister of National Revenue*,[8] the Tax Appeal Board (which "evolved" to

7 Horst G. Wolff, "The Burden of Proof in Tax Disputes" (1970) vol. 18, no. 1 *Canadian Tax Journal* 1-18, at 18. This article focuses on the situation in Canada. For the situation in other fields of law and other countries, see, for example, D.A. Rollie Thompson, "No Lawyer: Institutional Coping with the Self-Represented" (2002) vol. 19 *Canadian Family Law Quarterly* 455-95; Gord MacDonald and Helena Birt, "Duty Counsel and the Self-Represented Litigant" (2002) vol. 19 *Canadian Family Law Quarterly* 497-527; D.A. Rollie Thompson and Lynn Reierson, "A Practising Lawyer's Field Guide to the Self-Represented" (2002) vol. 19 *Canadian Family Law Quarterly* 529-46; Marguerite Trussler, "A Judicial View on Self-Represented Litigants" (2002) vol. 19 *Canadian Family Law Quarterly* 547-81; Tiffany Buxton, "Foreign Solutions to the U.S. Pro Se Phenomenon" (2002) vol. 34, no. 1 *Case Western Reserve Journal of International Law* 103-47; and Paula Hannaford-Agor and Nicole Mott, "Research on Self-Represented Litigation: Preliminary Results and Methodological Considerations" (2003) vol. 24, no. 2 *Justice System Journal* 163-81, as well as the publications found in National Center for State Courts, *Self-Represented Litigation: Resource Guide* (Williamsburg, VA: National Center for State Courts, 2003) (available online at http://www.ncsconline.org/WC/Education/KIS_ProSeGuide.pdf).

8 50 DTC 206 (TAB).

TABLE 1 Taxpayer Representation in Cases Decided by the Tax Court of Canada in January 2005

Type of case	No. of cases by type of representation: Self	No. of cases by type of representation: Counsel or agent	Percentage of cases with self-represented taxpayers
Income tax—informal procedure	13	2	87
Income tax—general procedure	2	8	20
All income tax	15	10	60
Goods and services tax (GST) informal procedure	3	7	30
Employment insurance	7	10	41
Other[a]	3	1	75
All cases[b]	25	32	44

[a] Other cases include GST cases held under the general procedure (one), Canada Pension Plan cases (two), and old age security cases (one).

[b] The first two columns do not add because some cases fall into more than one category.

Source: Tax Court of Canada, online at http://decision.tcc-cci.gc.ca/en/2005/01.html.

become the Tax Court) seems to have been very frustrated by the fact that the taxpayer (who also happened to be a judge) failed to bring forward evidence to meet the evidential burden placed on him, namely, that of "demolishing" the minister's assumptions:[9]

> Those who have to sit in judgment in civil matters are not entitled to "assume" that everything has been done legally or to "assume" that anything has been done illegally. They are there to hear the evidence, and it is not part of their function or duty to tell any litigant whether he should or should not bring further witnesses in order to establish his case.[10]

One might have thought, after reading such a warning, that it would no longer have been possible for a taxpayer to appear before the board without sufficient evidence and expect a favourable outcome. Yet only a few years later, a member of the board rendered contradicting judgments in three similar appeals, which, according to one author, created "judicial inconsistencies leading to uncertainty and

9 *Hickman Motors Ltd. v. The Queen*, [1997] 2 SCR 336, at paragraph 93: "This initial onus of 'demolishing' the Minister's exact assumptions is met where the appellant makes out at least a *prima facie* case." Discussion of the onus of proof is beyond the scope of this article.

10 Supra note 8, at 210. Similar criticisms are to be found later in *Chartrand v. MNR*, 64 DTC 433, at 439 (TAB): "The courts are not supposed to assume; they are supposed to judge, and to judge according to the evidence."

confusion."[11] Specifically, the member relied on the lack of credibility in one case (although noting that the taxpayer's sworn evidence "impressed" him),[12] while allowing the deductibility of expenses in two other cases involving similar facts where there was a lack of corroborating evidence.[13]

It may have been the uncertainty and confusion created by these cases that led the board, in *No. 648 v. MNR*,[14] to send a clear message to taxpayers that if they or their representative chose not to bring enough credible and accurate evidence, they would suffer the consequences. As is indicated by the reasons in that case, the board was starting to get impatient with unprepared litigants.[15] Moreover, in stating that it would not hesitate to dismiss appeals if taxpayers did not follow the rules of evidence, the board was obviously struggling with the notion of flexibility. Indeed, the board did not appear, at that time, to be willing to deviate from the workings of a traditional court.[16]

The first important challenge to the board's rigidity came from the Royal Commission on Taxation (the Carter commission). The commission's main observation regarding the formality of the board was summarized by Robert Bertrand as follows:

> The Commission observed that the Board had fulfilled its original function of being an inexpensive and easily accessible tribunal. It has, however, become more formal over the years since its creation in 1946 and has assumed what some people felt were the unnecessary trappings of a court.[17]

In 1972, as a result of the Carter commission's work, the Tax Appeal Board became the Tax Review Board. This new and more informal "taxpayer's court" was not bound by any legal or technical rules of evidence, did not require written reasons for judgment, and allowed the taxpayer either to appear personally or to be represented by counsel or an agent.[18] A backlog of cases in the early 1980s led to

11 Gwyneth McGregor, "Unsupported Testimony" (1954) vol. 2, no. 1 *Canadian Tax Journal* 100-5, at 103. For another example of inconsistent results, see the two gambling cases cited by McGregor, ibid., at 105: *Di Cosimo v. Minister of National Revenue*, 51 DTC 372 (TAB), and *Tashdjian v. Minister of National Revenue*, 51 DTC 404 (TAB).

12 *Pearson v. MNR*, 54 DTC 12 (TAB).

13 *No. 120 v. MNR*, 53 DTC 374 (TAB); and *No. 132 v. MNR*, 53 DTC 447 (TAB).

14 59 DTC 425 (TAB).

15 Ibid., at 429.

16 Wilfrid Lefebvre, Ian MacGregor, and Deen C. Olsen, "Income Tax Litigation" (1995) vol. 43, no. 5 *Canadian Tax Journal* 1861-79, at 1863.

17 Robert J. Bertrand, "Transformation of the Tax Adjudication Process" (1970) vol. 18, no. 6 *Canadian Tax Journal* 475-82, at 476. See also Canada, *Report of the Royal Commission on Taxation*, vol. 5 (Ottawa: Queen's Printer, 1966), 114-16, 164-66, and 168.

18 Lefebvre et al., supra note 16, at 1863.

new legislation in 1983,[19] marking the end of the board and the beginning of the new Tax Court of Canada. As then Associate Deputy Minister, Department of Justice, Alban Garon observed,

> [t]he Tax Court of Canada will, like its predecessor, be a forum easily accessible to the taxpayer. The Minister of Justice, Mr. MacGuigan, dealt with that point in his speech in the House of Commons on June 28, 1983 in the course of the debate on the bill proposing the creation of the Tax Court of Canada: "I stress, however, that the Government does not want to make more difficult the taxpayer's access to this tribunal, nor does it want to introduce formality in the conduct of the board's proceedings—*quite the contrary*." The Minister then referred to the relevant provisions of the Tax Court of Canada Act supporting his statement.
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> In my view, it is not true that the creation of the Tax Court of Canada means the death of the informal tax court. The will of Parliament is clearly expressed in the provisions of the Tax Court of Canada Act. . . . This is a verbatim reproduction of the provisions in the Tax Review Board Act that made the Board an informal body. Why should the situation change?
>
> *The Tax Court of Canada will follow procedures similar to those used in small claims court, which are well known throughout Canada and whose efficiency and efficacy are widely accepted.* It is my belief that the system of the administration of justice in Canada has been improved by the creation of the Tax Court of Canada, and I am confident that the court will play a large role in the development of tax law and jurisprudence in Canada.[20]

Although it was intended that the new Tax Court would follow "procedures similar to those used in small claims court," it was only after steps were taken by the Progressive Conservative party in 1984 as the Opposition in the House of Commons that the informal procedure saw the light of day.[21] The informal procedure,

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19 See statistics for 1981 and 1982 cited by Wilfrid Lefebvre, "The Role of the Attorney General of Canada in Income Tax Litigation," in *Report of Proceedings of the Thirty-Fifth Tax Conference*, 1983 Conference Report (Toronto: Canadian Tax Foundation, 1984), 1014-18, at 1018.

20 Alban Garon, "The Tax Court of Canada," in the 1983 Conference Report, supra note 19, 964-67, at 966-67 (emphasis added). See also Lefebvre et al., supra note 16, at 1864. Alban Garon became a judge of the Tax Court of Canada in 1988 and was subsequently appointed associate chief justice (1999), chief judge (2000), and then chief justice (2003). On his retirement in February 2005, Donald Bowman was appointed chief justice of the Tax Court.

21 Lefebvre et al., supra note 16, at 1864: "[T]he Progressive Conservative party, then in opposition, formed a task force to examine Revenue Canada. In the course of its review (conducted with much publicity), the task force found evidence of delays in the Tax Court caused by the sheer volume of cases being brought forward. It recommended that a 'small claims tax tribunal' be instituted to hear, on a strictly informal basis, disputes relating to amounts less than $5,000. Although the recommendation was not accepted, it was one of the factors that led, in 1988, to the Act To Amend the Tax Court of Canada Act and Other Acts in Consequence Thereof, which was ultimately proclaimed in force effective January 1, 1991." See also Progressive Conservative Party of Canada, *Report of the Task Force on Revenue Canada* (Ottawa: Progressive Conservative Party, April 8, 1984), 53-54.

which was implemented in 1991, responded to the desire of both the Trudeau and the Mulroney governments to allow better access for self-represented taxpayers.[22]

Among the many provisions of the Tax Court of Canada Act enabling the informal procedure, section 18.15(4) is the starting point, dealing as it does with rules of evidence and rules of procedure:

> Notwithstanding the provisions of the Act out of which an appeal arises, the Court, in hearing an appeal referred to in section 18, is not bound by any legal or technical rules of evidence in conducting a hearing for the purposes of that Act, and all appeals referred to in section 18 shall be dealt with by the Court as informally and expeditiously as the circumstances and considerations of fairness permit.

A plain reading of section 18.15(4) indicates that, while some discretion would be given to Tax Court judges,[23] Parliament intended that the rules of evidence would be relaxed. Quite aside from the fact that Tax Court judges are "required" to balance the surrounding circumstances and considerations of fairness with the relaxing of the rules of evidence, it is clear from this provision that Parliament saw the need to shorten the delays caused by the growing number of appeals filed in the Tax Court, while at the same time respecting the informality of the whole process to allow taxpayers to represent themselves. The theory is that by ultimately reducing costs and delays, access to justice should be improved.

How have courts interpreted section 18.15(4) in the context of the informal procedure since 1991? Their response has varied for both matters of procedure and matters of evidence.

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22 Garon, supra note 20; and Lefebvre et al., supra note 16, at 1864. Three years before implementation of the new informal procedure, at an international conference for tax court judges, former Chief Justice Couture described the approach of the Tax Court of Canada as follows:

> Proceedings before the Court are informal. The Court is not bound by the legal and technical rules of evidence in conducting a hearing. This is part of the statute and we still don't know what it means, but we have to follow it. . . .
>
> [I]n Canada, while the Tax Court is a formal court of law, because we are so polite to taxpayers, there is a provision in the Act that any person, any agent can act on behalf of the taxpayer. The taxpayer can be represented by his neighbor, by a solicitor, barrister, notary, accountant, anybody that can walk and present himself in court is welcome before our court.
>
> There is an added feature to this. Because the taxpayer is being represented by a lawyer, it is not a guarantee that the representation will be excellent.
>
> [Laughter]. . . .
>
> Again, it confirms my belief that in Canada, we are exceedingly polite to taxpayers.

Reproduced in "The International Conference on Courts with Tax Jurisdiction Conducted by the United States Tax Court: Conference Transcript" (1988) vol. 8, no. 2 *Virginia Tax Review* 443-549, at 454 and 500-1.

23 *Selmeci v. The Queen*, [2002] 4 CTC 32, at paragraph 4 (FCA), per Malone JA; aff'g. [2001] 1 CTC 2420 (TCC), per Teskey J. Also see the extract from the Appeal Court's decision reproduced below at note 56.

RULES OF PROCEDURE[24]

With respect to procedural matters, a review of the jurisprudence shows that at times courts have tried to be accommodating and on other occasions have been more restrictive. As the Federal Court of Appeal has often reiterated over the past 10 years, there are limits at both ends of the spectrum.

At one end, there is the case of *Calwell v. The Queen*.[25] In that case, the Federal Court of Appeal found the Tax Court's refusal to grant an adjournment request, normally granted in "exceptional circumstances," to be a denial of natural justice.[26] The Tax Court was much more lenient toward a self-represented taxpayer in *Sykes v. Canada*.[27] After granting three adjournment requests (to cross-examine on an affidavit, to give the taxpayer "adequate opportunity to prepare himself," and for "reasons related to his [the taxpayer's] health"), the Tax Court judge eventually denied a fourth request (to give the taxpayer "more time to prepare").[28] In response, the taxpayer "chose to leave the courtroom, rather than participate in the argument of the motion."[29] While some judges might have rendered a decision with only the respondent's arguments in hand, the Tax Court judge in this case asked for representation in writing from both parties after the hearing. Both parties complied, but in his nine-page representation, the taxpayer again avoided dealing with the merits of his case. In the opinion of the Tax Court judge, the appellant was afforded "ample opportunity to prepare and present his argument on this motion."[30] In the end, the appeals for the taxpayer were allowed only in part.

At the other end of the spectrum lies *Schurman v. The Queen*.[31] In *Schurman*, the Federal Court of Appeal reminded the parties that granting an adjournment request is a matter of discretion for the Tax Court judge, and the fact that a litigant is

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24 As general background to this section, it is useful to quote the following comments of Chief Justice McLachlin of the Supreme Court of Canada, from an address she presented in 2002: "Unrepresented litigants encounter their first difficulties at the courthouse door. Court staff—already overburdened especially in large urban jurisdictions—face increasing numbers of self-represented litigants who ask for explanations of the legal process as it pertains to their cases. While court clerks have traditionally assisted lawyers and their staff by providing instructions as to the appropriate rule to follow or form to file, they are rightly hesitant to offer legal advice." See "Preserving Public Confidence in the Courts and the Legal Profession" (2003) vol. 29, no. 3 *Manitoba Law Journal* 277-87, at 283.

25 95 DTC 5615 (FCA), per McDonald JA.

26 Ibid., at 5617.

27 [1997] TCJ no. 1107.

28 Ibid., at paragraphs 2 to 3, per Bowie J.

29 Ibid., at paragraph 2.

30 Ibid., at paragraph 3.

31 [2004] 1 CTC 162 (FCA), per Décary JA. See also *Bullas v. The Queen*, 2002 FCA 181, at paragraph 2, per Evans JA; *Fortin v. Canada (MNR)*, [1997] FCJ no. 1222, at paragraph 2 (FCA), per Marceau JA; and *Paynter et al. v. The Queen*, 96 DTC 6578, at 6580 (FCA), per Strayer JA.

self-represented is of little relevance in the exercise of that discretion. The following analysis provides a useful summary of the court's view of self-represented litigants:

> In the case at bar, in view of the history of the case and of the little evidence which was before him, the Tax Court Judge cannot be faulted for having allowed the motion to dismiss. Adjournments are not granted on grounds of sympathy alone and the fact that a person is self-represented, while not irrelevant, will general[ly] bear very little weight. As noted by Pelletier J.A. in *Wagg v. R.*, [2003] F.C.J. No. 1115, 2003 FCA 303 (F.C.A.),
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> > [24] The decision to represent oneself is not irrevocable, nor is it trivial. Persons who undertake to represent themselves in matters of the complexity of the *Income Tax Act* or the *Excise Tax Act* must assume the responsibility of being ready to proceed when their appeal is called. . . .
> >
> > [25] Putting the matter another way, litigants who choose to represent themselves must accept the consequences of their choice:
> >
> > > [16] Thus, while the Court will take into account the lack of experience and training of the litigant, that litigant must also realize that, implicit in the decision to act as his or her own counsel is the willingness to accept the consequences that may flow from such lack of experience or training. (*Lieb v. Smith*, [1994] N.J. No. 199)
> >
> > [26] While the administrative requirements of the Court system cannot be allowed to stand in the way of a fair hearing, they are not irrelevant considerations when it comes to deciding what is reasonable in the circumstances. It is not in the interests of justice to have judges idle and courtrooms empty so as to permit litigants to do that which they were bound to do before their case was called. This can only lead to delays in deciding cases which are before the Court, lengthens the time that other litigants must wait for their court date, and adds to the cost of operating the court system.[32]

The Federal Court of Appeal reiterated the same principles in *Dionne v. Canada (Attorney General)*.[33] On appeal, the taxpayer's position was that the Tax Court judge should have adjourned the hearing, even though he was not asked to do so, to allow the taxpayer to retain a lawyer after it became clear that he did not understand "how the court operated."[34] It should be noted, however, that many taxpayers who elect the informal procedure choose it because they cannot afford a lawyer.

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32 *Schurman*, supra note 31, at paragraph 6.

33 2003 FCA 451, per Décary JA. For two more recent cases of this court on the rules of procedure and self-represented litigants, see *Sincère c. Canada (Procureur général)*, 2005 CAF 103, at paragraph 7 (French only), per Létourneau JA; and *Kumar v. The Queen*, 2005 FCA 32, at paragraph 6, per Evans JA.

34 *Dionne*, supra note 33, at paragraph 7. A similar argument was also rejected by the Federal Court of Appeal in two subsequent cases: *Wainberg v. Canada (Attorney General)*, 2005 FCA 19, per Pelletier JA; and *Sokolowska (Estate) v. The Queen*, 2005 FCA 26, per Nadon JA.

At the outset, the Tax Court judge did try to help the taxpayer. This is evident from the following passage of his judgment:

> At the hearing, I explicitly explained to the appellant the nature of the burden that he had and that, in order to discharge it, he would have to establish on the balance of evidence that his income was consistent with his claims, by means of documentation, evidence and plausible information.
>
> Not only did the appellant not adduce this evidence, he basically criticized the respondent's method of proceeding. Despite being cautioned that he needed to establish the accuracy of his claims, the appellant never adduced, produced or established anything whatsoever that would discredit the quality of the auditor's work.[35]

The Federal Court of Appeal also provided the following relevant facts, which add context to the denial of the taxpayer's appeal:

> Although the notice of hearing expressly informed the Applicant that "[Translation] all relevant documents in support of this appeal must be produced at the hearing of the appeal," the Applicant did not bring any documents to the hearing. He said to the Court, at page 61 of the transcript, "[Translation] What, was I supposed to come here with six cases of stuff?"
>
> A review of the transcript indicates that the Applicant believed that the Court was going to proceed with a new audit—although that does not explain why he still had not produced the relevant documents. The judge patiently explained to him, several times, what his burden of proof was. At one point (page 17 of the transcript) the taxpayer said: "[Translation] That's not at all what I expected this morning, because if I had known it was going to be like this, I would have gotten somebody, a lawyer, to represent me."[36]

The Federal Court of Appeal took the same approach in *Suchon v. The Queen*.[37] In *Suchon*, the taxpayer's application to reopen the hearing to permit reply evidence was dismissed, even though the court expressed sympathy for his situation. The taxpayer, who was self-represented, had realized too late that the "Crown's case may have contained inaccurate information."[38] Having considered the amount of time taken by the taxpayer to file his application, and the fact that the "alleged factual error appeared to be not a critical one,"[39] the court concluded that it was within the discretion of the Tax Court judge not to grant the application.

When dealing with the less controversial aspects of the rules of procedure, however, courts have a tendency to be more flexible. One such example is *Muska v.*

35 2003 DTC 1471, at paragraphs 11 to 12 (TCC), per Tardif J.

36 *Dionne*, supra note 33, at paragraphs 4 to 5.

37 [2002] 3 CTC 547 (FCA), per Sharlow JA.

38 Ibid., at paragraph 22.

39 Ibid.

The Queen,[40] where it was established, on the basis that the appeal was being heard under the informal procedure, that a lay person could act as both representative and witness at the taxpayer's trial.[41]

In some instances, it may not be clear to the taxpayer that the judge is actually facilitating the appeal. Taxpayers and other witnesses, being human, are not immune from deviating from the matter at issue. Often judges will jump into the arena to help the self-represented taxpayer present his or her testimony in the most accurate and efficient way, while at the same time trying to cull irrelevant evidence from the proceedings. For some self-represented litigants, it may seem that these interventions are inappropriate. The following excerpt illustrates this point:

> JUDGE: No, Mr. [Corroll], no, I'm trying to help you and you're. . . . Because, right now, with the information Doctor Rosenthal wrote, I probably can't write your appeal. . . . I'm trying to get answers to help you and you're fighting me.
>
> TAXPAYER: I'm not fighting you. They indicated to me initially that she was not eligible.
>
> JUDGE: No, never mind Revenue Canada, never mind Revenue Canada. This is you and me now, okay. I'm not married to Revenue Canada, I don't know anything about Revenue Canada and I don't care about Revenue Canada now, okay. I'm trying to get information from you. If you could help me, if you could help yourself, fine. If you don't want to, fine.[42]

In this regard, taxpayers should rest assured that, in the vast majority of cases, eliminating the superfluous and expediting the communication of the relevant evidence can help the debate. One could even suggest that, in this sense, the role of the judge is to serve as a catalyst; that is, the judge's involvement augments the efficiency of the court's procedures, along with clarifying the issues.

Although these interventions do make the procedures more expeditious (one of the major objectives of the Tax Court), there is still the danger of eliminating some relevant evidence in the process. It is not always clear, at a certain point in the hearing, what documents or parts of testimonies may be relevant to the ultimate outcome, and a person who is confronted with a roadblock in his or her attempt to submit a piece of evidence might retrench. On the flip side, it would also not be

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40 [1994] 1 CTC 365 (FCA), per Mahoney JA.

41 See also *Benitah v. The Queen*, [2003] 2 CTC 2567, at paragraph 14 (TCC), per Bowman ACJ: "The respondent called Mr. Benitah. Under section 146 of the *Tax Court of Canada Rules (General Procedure)* counsel would be entitled to cross-examine the opposing party. Under the informal procedure no similar rule exists although I should have thought that in appropriate circumstances the presiding judge could, in the informal rules, permit cross-examination of a witness who is an opposing party, even if that witness is not found to be adverse within the meaning of section 9 of the *Canada Evidence Act*."

42 Tax Court transcript, at 22, in the file for *Corroll v. The Queen*, 2002 FCA 388. See also *Byszewski v. The Queen*, [2001] 4 CTC 74 (FCA), per Evans JA.

wise to let taxpayers, or other witnesses, go on and on. Judges should try to find the middle ground.

Some judges initially let the taxpayer testify without intervening; then, if the taxpayer deviates from the issue, the judge stops him or her, explains what needs to be proved, and suggests how to achieve this, perhaps providing a few examples. If necessary, the judge might also examine the taxpayer by asking a series of direct and subjective questions.[43] In using this approach, the expectation is that the relevant evidence will come to light.[44] Some judges will wrap up the questioning of the taxpayer by asking whether there is anything he or she wishes to add. If the taxpayer then reveals new and relevant information, it is arguably worth providing this opportunity. Often, however, the taxpayer only repeats a point that he or she thinks is important.

GENERAL RULES OF EVIDENCE[45]

As seen earlier, section 18.15(4) of the Tax Court of Canada Act gives Tax Court judges the discretion to ignore "any legal or technical rules of evidence in conducting a hearing." The Federal Court of Appeal has, on a number of occasions, been quick to paint this discretion in a variety of colours.

On the darker side, the court has reiterated on several occasions that Tax Court judges are not obliged to ignore rules of evidence; they only have the discretion to do so, and it must be exercised judiciously.[46] The view that section 18.15(4) does not equate to an absence of the rules of evidence is not new.[47]

One Tax Court judge went even further, suggesting that "you should assume [in the informal procedure] that the ordinary rules of evidence will apply unless there

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43 Sometimes it is the judge who asks most of the questions; see, for example, the Tax Court transcript in the file for *Schurman*, supra note 31.

44 The approach described here is drawn from my reading of Tax Court transcripts, observation of several hearings, and discussions with some individuals in the tax community. For a specific example, see the Tax Court transcript in the file for *Dionne*, supra note 33.

45 Again, the comments of Chief Justice McLachlin, supra note 24, at 283, provide useful background to this section: "If a lawyer appears on behalf of an adversary, the self-represented litigant is frequently at an even greater disadvantage. The self-represented litigant's case may fail for lack of adequate proof. Even in forums such as small claims courts, where procedural rules are somewhat relaxed, self-represented litigants fortunate enough to obtain judgments might be denied instructions as to the available means for their enforcement."

46 *Erdmann v. The Queen*, 2002 DTC 7109, at paragraph 8 (FCA). See also the Tax Court transcript, at 61, in the file for *Suchon*, supra note 37: "[N]o way could I stretch the rules to allow a piece of hearsay evidence [. . .] where it's been objected to. Hearsay is the worst kind of evidence, and you would be asking me to decide a case on the basis of what somebody else said who is not even here, who can't even be—the credibility of whom cannot be questioned. It will be a long day before I'll permit that to be done."

47 *Cox et al. v. MNR*, 85 DTC 320, at 321 (TCC), per Christie ACJ. See also *G. Bousquet v. MNR*, [1983] CTC 2064 (TRB); and *Taylor v. MNR*, 81 DTC 3 (TRB); aff'd. on other grounds 84 DTC 6459 (FCTD), where the equivalent provision was section 9(2) of the Tax Review Board Act.

is a good reason for departing from them and the departure does not involve unfairness to the other side."[48] I agree with this statement, as long as it is borne in mind that the main purpose of an appeal is to find out "whether the assessment [or reassessment] is right or wrong."[49]

On the brighter side, the Federal Court of Appeal specified, in *Suchon v. The Queen*[50] and *Selmeci v. The Queen*,[51] that a Tax Court judge cannot reject evidence outright without at least applying the basic evidential rules.[52]

In *Suchon*, having acknowledged that there is no requirement in the informal procedure for a Tax Court judge to accept all of the evidence put forward by the taxpayer, the court went on to say:

> [I]t is an error for a Tax Court Judge in an informal proceeding to reject evidence on technical legal grounds without considering whether, despite the ordinary rules of evidence or the provisions of the *Canada Evidence Act*, the evidence is sufficiently reliable and probative to justify its admission. In considering that question, the Tax Court Judge should consider a number of factors, including the amount of money at stake in the case and the probable cost to the parties of obtaining more formal proof of the facts in issue.
>
> The Tax Court Judge must also consider whether the evidence sought to be adduced is relevant, in the sense that it could assist in resolving the issues in dispute. It is not an error, even in an informal proceeding, to reject irrelevant evidence. In this case, the Tax Court Judge did consider that question, and concluded that the documents referred to above were not relevant. In my view, he erred in that conclusion with respect to three of the four documents.[53]

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48 The Honourable Michael J. Bonner, "Practice in the Tax Court of Canada," in *1991 British Columbia Tax Conference*, vol. 1 (Toronto: Canadian Tax Foundation, 1991), tab 5, at 9.

49 The Honourable Donald George Hugh Bowman, Ian MacGregor, Al Meghji, the Honourable Karen R. Sharlow, Elaine S. Sibson, and Joanne E. Swyston, "Tax Tales: A Conversation with Judges and Counsel," in *Report of Proceedings of the Fifty-Fourth Tax Conference*, 2002 Conference Report (Toronto: Canadian Tax Foundation, 2003), 33:1-28, at 33:11, comment of Judge Bowman (then associate chief judge of the Tax Court) (who emphasized the point by noting, "I've said in open court—probably quite indiscreetly—that I wouldn't care if the assessor was dead drunk when he or she made the assessment"). According to MacGregor and Goulard, supra note 4, at 57:2, the Crown has a similar duty "to ensure the proper application of the statute, visible compliance, and as much as possible equal treatment of taxpayers in equal circumstances."

50 Supra note 37, at paragraphs 32 and 33.

51 Supra note 23 (FCA).

52 See, for example, *Hunter v. The Queen*, 2001 DTC 907, at paragraph 4 (TCC), per Bowman ACJ: "I agree that this evidence is irrelevant but in the informal procedure it is inappropriate that technical evidentiary roadblocks be put in front of litigants. The judges of this court are perfectly capable of ignoring irrelevant evidence." However, there comes a time when an essential rule of evidence, such as the rule preventing the presentation of new evidence before the Federal Court of Appeal, must be applied even in the presence of a self-represented litigant: *Methamen c. Canada*, 2005 CAF 106, at paragraph 2 (French only), per Létourneau JA.

53 Supra note 37, at paragraphs 32 to 33.

In *Selmeci*, the court warned that, before dismissing evidence on the basis of the hearsay rule, a Tax Court judge must first consider all the exceptions to that rule, including the necessity and reliability test.[54] Judges must also realize that the hearsay rule is "constantly being reviewed."[55] In this context, and with reference to the informal procedure, the court enunciated the following rule:

> By enacting subsection 18.15(4), Parliament did not intend to eradicate the normal rules of evidence under the Informal Procedure. Rather, the provision was intended to provide Tax Court Judges with the necessary flexibility to enable them to deal as informally and expeditiously with an appeal as the circumstances of the case and considerations of fairness allow (see, for example, *Ainsley v. R.*, [1997] F.C.J. No. 701 (Fed. C.A.)). However, it is open to judges to refuse to admit hearsay evidence where, in their opinion, its admission would not advance the statutory objectives prescribed in subsection 18.15(4).[56]

Selmeci was preceded by other decisions that laid the ground for some recent views expressed by the Federal Court of Appeal. In *Ainsley v. The Queen*,[57] the court confirmed the admissibility of documents without their author being present; however, in *Yakubu v. The Queen*,[58] the court emphasized that the veracity of such documents must still be assessed and their weight determined in light of the fact that they constitute hearsay.

Following these two decisions, the Tax Court, in *Brennan v. The Queen*,[59] admitted and relied upon medical reports without their authors' presence on the basis that the necessity and reliability conditions had been met. Nevertheless, the judge sought to clarify the law on hearsay evidence in the following comments:

> I do not of course regard the *Ainsley* decision as depriving a trial judge of an overriding discretion to assign little or no weight to hearsay evidence where such evidence would be of little probative value or where its admission would be unduly prejudicial to the opposing party, or where the nature of the evidence is such that it should be tested by cross-examination. Neither the judgment in *Ainsley* nor subsection 18.15(4) should be seen as requiring that so essential a bulwark of our legal system as the right to cross-examine be discarded in every case under the informal rules.[60]

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54 The court referred to *Khan v. The Queen*, [1990] 2 SCR 531 and *The Queen v. Smith*, [1992] 2 SCR 915, for this exception: *Selmeci*, supra note 23 (FCA), at paragraph 6.

55 Ibid., referring to *The Queen v. B (KG)*, [1993] 1 SCR 740, at 763, and *Starr v. The Queen*, [2000] 2 SCR 144, at paragraph 159.

56 Supra note 23 (FCA), at paragraph 9.

57 [1997] FCJ no. 701 (CA) (author of letter did not have to be called), per Stone JA.

58 [1998] 1 CTC 2649 (TCC), per Christie J.

59 [1998] 1 CTC 2143 (TCC), per Bowman J.

60 Ibid., at paragraph 9.

All of these principles, from *Ainsley* to *Brennan*, were applied a few years later by another Tax Court judge:

> Considering the age of Amédé Côté, in view of the fact that he lived just under 100 km from the place where the hearing was held and given the amount in question, namely $10,000, I am prepared to accept his affidavit as corroborating the testimony of Jenney Côté that he had indeed received a gift of $10,000 from Amédé Côté. Among the other circumstances that lead me to this conclusion, there is the fact that the evidence did not show that Garage and Jenney Côté had repeatedly failed to report income in the past. Moreover, it is interesting to note that the Minister did not see fit, in the circumstances, to make an assessment using the net worth method. If the Minister had thought that there had been such omissions on the part of Jenney Côté, he would in all likelihood have used that method of assessment.[61]

However, the application of the hearsay rule in the informal procedure did not always result in a favourable outcome for the taxpayer. For example, at the Tax Court level in *Calwell v. The Queen*,[62] a doctor's report critical to the taxpayer's case was not accorded much weight by the judge because the doctor was not called to testify.

On appeal, however, the Federal Court of Appeal overturned that judgment on the basis that the Tax Court judge failed to warn the taxpayer that the document would be given less weight because its author was not present at trial.[63] The Court of Appeal would have preferred that the availability of an adjournment and a subpoena at least be explained to the taxpayer. This concern resonated with the Tax Court in two subsequent cases.

In *Carmen v. The Queen*, while noting that the minister took steps to respect *Calwell*, the Tax Court judge pointed to the practical difficulties that remain in some cases:

> Since that decision [*Calwell*], the explanation of a taxpayer's rights with respect to subpoenas accompanies the notice of hearing. As a practical matter, in a disability tax credit case, it is a little unrealistic to expect an appellant to subpoena a doctor in Toronto to appear in Sudbury, and pay him or her up to $300 per day plus travelling expenses.[64]

In fact, it appears to be a little unrealistic to expect a taxpayer to subpoena anyone who requires to be paid, especially if the taxpayer has limited financial resources. While this limitation does not apply to all taxpayers who choose to

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61 *Garage A. Côté Baie St-Paul Inc. v. The Queen*, [2003] 3 CTC 2356, at paragraph 14 (TCC), per Archambault J. See also *1036705 Ontario Ltd. v. The Queen*, [2000] GSTC 73, at paragraph 11 (TCC), per Bowman J.

62 Unreported judgment dated November 22, 1994.

63 Supra note 25.

64 [1998] 2 CTC 2820, at paragraph 4 (TCC), per Bowman J.

proceed informally, financial resources are frequently a factor in the decision to self-represent. Yet Tax Court judges are often surprised when taxpayers decline the court's offer to adjourn so that a subpoena can be obtained.[65]

Would providing the taxpayer with subpoenas or adjourning the hearing for a year solve the problem? Apparently not, if *Corroll v. The Queen*[66] and *Kowalchuk v. The Queen*[67] are at all indicative. In *Corroll*, the taxpayer was sent subpoenas in advance of the hearing, but none were used owing to confusion on the taxpayer's part.[68] In *Kowalchuk*, the Tax Court judge expressed surprise that the taxpayer did not take advantage of a one-year adjournment to subpoena the doctor in question, or any other doctor for that matter:

> The trial in this matter was originally set down for the morning of June 18, 1995. Mrs. Kowalchuk acted on her own behalf. The Associate Chief Judge, bearing in mind the reasons in *Caldwell* [sic] *v. R.*, 95 D.T.C. 5615 (F.C.A.), explained to Mrs. Kowalchuk that she should endeavour to subpoena the physician who signed the disability tax credit certificate or some other medical person in order for the appeal to be properly conducted by her. The appeals were then adjourned *sine die* and later were scheduled for June 18, 1996. On that day Mrs. Kowalchuk informed me that she did not subpoena the physician who signed the disability tax credit or any other medical person and she stated she wished the appeals to proceed.[69]

In theory, one might save enough money in a year to be able to pay an expert witness, but the reality remains as expressed in *Carmen*. Fortunately for Mrs. Kowalchuk, after reviewing all the evidence tendered at trial regarding the physical impairment of her son, and especially her own testimony, the Tax Court judge allowed the appeal. After noting many examples of complications the son encountered in his daily activities, the judge concluded:

> There is no doubt that in cases such as these the Court should rule with a degree of compassion. This appeal has the additional complexity that it is often difficult to verify whether the basic activity of daily living of a particular infant is normal or not. Children develop at different rates. There is evidence by the Society for Manitobans with Disabilities Inc. that Duane's ailment does not markedly restrict his ability to perform basic activities of daily living. The report prepared by Ms. Howes stated that many of his skills are nearing his age level. However, his mother testified that in 1992 he required the presence of an individual at feeding time to ensure his safety in the

65 *Brennan*, supra note 59, at paragraph 10. In this instance, however, the Tax Court found, in light of all the other evidence, that even if the witness in question had been subpoenaed, that person's testimony would not have "added significantly to the case."

66 *Corroll*, supra note 42.

67 [1997] 1 CTC 2673 (TCC), per Rip J.

68 Tax Court transcript, at 16-27, in the file for *Corroll*, supra note 42.

69 Supra note 67, at 2675.

> event he choked. This is a borderline case and perhaps is one in which compassion tips the scale.[70]

A Tax Court judge's compassion and a mother's intimate knowledge of her son's challenges were sufficient ingredients to surmount the lack of corroboration and to discredit the Crown's expert witness. Similar reasoning guided another Tax Court judge in *Radage v. The Queen*,[71] as seen in his own recollection of the case:

> If . . . I interpret memorable to describe a case of which I personally have warm memories, then I could name scores. Most of them are small cases in the informal procedure where individuals, unrepresented by a lawyer, ignorant of the tax law and of the court procedures, and armed only with a sense of indignation at the injustice that they perceive to have been wrought upon them by unfeeling, arrogant and rapacious tax gatherers, choose to take up arms against the awesome might of the government. One such case was *Radage v. The Queen*, where I held that a disability tax credit should be allowed in respect of a young boy with serious learning problems on the basis that he had a severe and prolonged mental impairment. This involved deciding what "perceiving, thinking and remembering" meant and required my consulting authorities in the field[s] of psychiatry, psychology and philosophy.[72]

When it comes to lawyers, and especially those representing the Crown, they are often not accorded much compassion. For example, in *Bush Apes Inc. v. The Queen*,[73] most of the respondent's evidence was rejected on the basis that the auditor on the file was not called to testify, although there was testimony from another auditor. Citing *Vacation Villas of Collingwood Inc. v. The Queen*,[74] the Tax Court judge refused to accept hearsay evidence to refute the appellant's evidence since no explanations were given as to why the auditor on the file could not appear in court. It must also be noted that "a number of the assumptions of facts which were easily verifiable by the auditor [were] patently false."[75] Also helping the appellant's case were the fact that the appellant's witness "had a credible demeanour . . . [and] appear[ed] to be a modest man of very modest means," and the fact that he had not been cross-examined on all of the documentary evidence he presented at trial.[76]

Why did the Tax Court judge not permit the respondent to rely on hearsay evidence? Did he doubt the other auditor's honesty and abilities? Likely not, for

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70 Ibid., at 2677.

71 96 DTC 1615 (TCC), per Bowman J.

72 Associate Chief Justice Bowman (as he then was) in the section entitled "Notable Cases" of the booklet produced for the 20th anniversary of the Tax Court of Canada celebrated in the fall of 2003 ("Tax Court of Canada 1983-2003").

73 [2001] GSTC 72 (TCC), per Beaubier J.

74 [1996] GSTC 13 (FCA), per Stone JA.

75 Supra note 73, at paragraph 2.

76 Ibid., at paragraph 4.

reasons beyond questions of credibility and corroboration (discussed below). The Crown is represented by lawyers, and lawyers should know the law, the rules of procedure, the rules of evidence, and the need, for example, to subpoena important witnesses for the purpose of supporting their assumptions of facts. Also, lawyers representing the Canada Revenue Agency (CRA) are usually surrounded by an impressive team, involving litigation committees at regional offices and the head office, which review all adverse opinions, factums, and positions in respect of significant cases.[77]

CORROBORATION AND CREDIBILITY

The most commonly cited evidential problems for self-represented taxpayers are lack of credibility and corroborating evidence. These two principles often intertwine—the lack of credibility can be overcome by corroboration, and the lack of corroboration can lead to lack of credibility—but both can also be independent to some degree. Relying on several decisions from the Exchequer Court, Pierre Barsalou frames this relationship as follows:

> 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. . . . This is particularly true when the testimony has not been challenged by a close cross-examination.[78]

Turning first to corroboration, it is useful to bear in mind the warning advanced by Christina Tari in *Federal Income Tax Litigation in Canada*.[79] Tari notes that tax cases often fail because of "a lack of documentary evidence supporting the taxpayer's oral evidence [which is self-serving]."[80] First and foremost, when it becomes clear that there are gaps in the taxpayer's case—for example, when "the commercial documents recording a transaction directly contradict the taxpayer's oral testimony"[81]—it is only fair to ask the taxpayer to provide more evidence to explain

77 MacGregor and Goulard, supra note 4, at 57:2-4.

78 Pierre W. Barsalou, "Preparing and Arguing a Tax Appeal: Practical Tips" (1997) vol. 45, no. 2 *Canadian Tax Journal* 223-59, at 245, note 77. For the French version of this article, see Pierre Barsalou, « Conseils pratiques : Préparation et présentation d'un appel en matière fiscale » (1994) vol. 42, no. 1 *Revue fiscale canadienne* 108-49. See also William Innes and Hemamalini Moorthy, "Onus of Proof and Ministerial Assumptions: The Role and Evolution of Burden of Proof in Income Tax Appeals" (1998) vol. 46, no. 6 *Canadian Tax Journal* 1187-1211, at 1190, note 10: "If the court concluded that the taxpayer had failed to bring forward material evidence of which he or she had knowledge, that would justify a negative inference based on the minister's assumptions. The same would hold true if the court found the taxpayer's witnesses to lack credibility."

79 A. Christina Tari, *Federal Income Tax Litigation in Canada* (Markham, ON: LexisNexis Canada) (looseleaf).

80 Ibid., at section 11.15.1. Tari relies on *Bowes v. The Queen*, 91 DTC 5310 (FCTD) for this proposition.

81 Tari, supra note 79, at section 11.15.1.

these gaps. Nonetheless, even when there are no gaps per se, Tax Court judges often cite the taxpayer's self-interest in the case as a major concern. This concern is not new, and it arises from human nature itself: people may lie or distort the truth in order to achieve their objectives.[82] It is for this reason that, even in the informal procedure, taxpayers need to provide at least "some evidence,"[83] and it must be strong enough to convince the Tax Court judge.[84] Furthermore, both parties should try to find witnesses who can provide direct evidence from personal knowledge,[85] and, if possible, should ensure that all of the relevant documents are available to be produced in court. Although some documents might be impossible to obtain, this is usually rare, as Gwyneth McGregor suggested some 50 years ago:

> The attitude of the Courts will probably vary according to the type of case and the factor of whether the absence of proof is due to the carelessness of the appellant or to the sheer impossibility of obtaining it. In "expenses" cases, for instance, it may well be argued that there are few, if any, occasions when receipts for expenditure are *impossible* to obtain, though the process may be awkward or even difficult. There are of course plenty of perfectly honest citizens who wail that they simply cannot keep accounts and have no instinct or aptitude for figures. True; there are also a number of other people who have to do things for which they are not by nature fitted. . . . Life forces most people to acquire skills to fit daily living; and there is really nothing intrinsically difficult in keeping track of expenditures. Nor would there be anything unreasonable in a ruling that receipts should be presented for all expenses for which the taxpayer wishes to claim.[86]

How can a taxpayer overcome a lack of documentary evidence or witnesses? One solution, if the taxpayer is well organized, is to produce other evidence that may help corroborate the taxpayer's own testimony. For example,

> where the CRA assessed a taxpayer by refusing to allow a claim that 90 per cent of the taxpayer's use of his or her car was for business purpose[s], the taxpayer's oral testimony in support of that claim may not alone be sufficient evidence for the appeal to be allowed. However, where the taxpayer is unable to produce a log recording mileage, but can bolster or support his or her verbal testimony by an appointment book that corroborates the verbal testimony regarding business use of the car, the two

82 Barsalou, "Preparing and Arguing a Tax Appeal," supra note 78, at 245, warns the reader of the difficulties with "self-interest" as follows: "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."

83 *Ritchie v. The Queen*, 2000 DTC 6327, at paragraph 2 (FCA), per Malone JA. See also *Gendron v. The Queen*, 2002 DTC 7511, at paragraphs 1 to 2 (FCA), per Létourneau JA; and *Shery v. The Queen*, 2001 DTC 5226 (FCA), per Sharlow JA.

84 *D. Marcoux v. MNR*, [1991] 1 CTC 2643 (TCC), per Garon J.

85 *Vacation Villas of Collingwood Inc.*, supra note 74. See also *Taylor v. MNR*, supra note 47.

86 McGregor, supra note 11, at 104.

> pieces of evidence together may be sufficiently corroborative to persuade the Tax Court judge that the car was indeed used for 90 per cent for business purpose[s].[87]

Undoubtedly, there are more taxpayers who keep an appointment book than who take the time to record their mileage. There are also those who keep neither, thereby deepening the hole they have to climb out of. If, however, they are as skilled as the self-represented taxpayers in the following example, they could succeed in court through their cross-examining skills alone:

> [T]axpayers often proceed to trial without a lawyer; they rely on their own skills to succeed. Soon after I was appointed to the Tax Court, I realized that a well-prepared litigant could win his or her appeal without a lawyer.
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> A corporate taxpayer in Saskatoon appealed an assessment in which Revenue Canada had valued a property at much less than the taxpayer had. The corporation was represented by its shareholders, two elderly gentlemen, who also gave evidence. The taxpayer could not afford to hire a valuator. The Crown, on the other hand, did have the services of a valuator.
>
> The evidence was entered in a rather unorthodox manner: each of the shareholders questioned the other shareholder concerning the property in question. These men had done their homework; they knew the land values in the area and were able to relate it to the corporation's property.
>
> Then came the part that is memorable: with the consent of Crown counsel, each shareholder cross-examined the Crown's witness. They were able to pick apart the Crown's valuation. Their questions were probing, relevant and often contained humour. The cross-examination was as good as any done by a lawyer. After about 20 minutes of cross-examination, it was obvious to me and to Crown counsel that the taxpayer's appeal should succeed.[88]

Yet most would agree that not all self-represented litigants are as capable as these "two elderly gentlemen." In another case, for example, the taxpayer was unable to convince the Tax Court judge that the fair market value of property suggested by the taxpayer's expert witness should be preferred to the value proposed by the Crown's expert.[89] The court found that the opinion of the Crown's expert witness was based on accepted valuation principles and objective data, while the taxpayer's expert witness relied mainly on his knowledge of the region where the property in issue was situated. In this case, the issue was more a question of objectivity than of credibility.

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87 Tari, supra note 79, at section 11.17 (notes omitted).

88 Comments of Justice Rip on "Notable Cases," Tax Court of Canada anniversary booklet, supra note 72. Justice Rip did not name this or other cases in his reminiscence.

89 *Déziel v. The Queen*, [2003] GSTC 8, at paragraphs 11 to 57 (TCC), per Tardif J; aff'd. on other grounds 2004 FCA 116, per Pelletier JA. See, in contrast, *Kowalchuk*, supra note 67, where the taxpayer (the mother of a disabled child) successfully contradicted the Crown's expert witness.

Moving on to the question of credibility, it is obvious that where the taxpayer's case is neither credible nor reasonable, the court has no choice but to dismiss the appeal.[90] In some cases, the imposition of civil penalties may be warranted. On the other hand, where the taxpayer is credible as a witness, this might be sufficient to compensate for the absence of documentary evidence.[91] However, the taxpayer's credibility must first be assessed, and then weighed against other evidence.[92]

Sometimes the taxpayer's credibility is impugned because judges have heard the same excuse too many times:

> For example, until I joined the court, I had no idea how many floods there were in basements in Toronto or throughout Canada. Someone would say, "Oh, I lost all of my papers in a flood in the basement." Even in a dry summer, it seems that there are floods. So, keep your records together and don't make stupid allegations that you can't prove—and it's better not to say anything than to say something that you can't substantiate.[93]

ASSISTANCE FOR SELF-REPRESENTED TAXPAYERS

Given the above review of the operations of the Tax Court of Canada under the informal procedure, how can the difficulties faced by self-represented taxpayers be reduced? Can we avoid "unnecessary trappings" without prolonging the proceedings, while at the same time respecting the rules of evidence and procedure? The

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90 Tari, supra note 79, at section 11.21: "One of the factors that a Tax Court judge will consider is whether or not a taxpayer's assertion is reasonable or believable. Where a taxpayer's evidence is incredible, it may be disregarded, or more weight may be placed on the other evidence led during the hearing." See, for example, *Zsoldos v. Canada (Attorney General)*, 2004 FCA 338, at paragraph 8, per Malone JA; *Chamoun v. Canada*, [2004] FCJ no. 114, at paragraph 6 (CA), per Létourneau JA; *Murphy v. Canada (Minister of National Revenue)*, 2001 FCA 181, at paragraph 8, per Rothstein JA; *Biderman et al. v. The Queen*, 2000 DTC 6149 (FCA), per Létourneau JA; *Hébert c. La Reine*, 2004 CCI 760, at paragraph 46 (French only) (TCC), per Bédard J, quoting Beetz J in *Stoneham and Tewkesbury (United Districts) v. Ouellet*, [1979] 2 SCR 172; *Latulippe c. MNR*, 2004 CCI 567, at paragraph 31 (French only) (TCC), per Tardif J; *Laroche et al. v. The Queen*, 2003 DTC 1154 (TCC), per Garon CJ; and *Veselinovic v. MNR*, 93 DTC 1243 (TCC), per Sarchuk J.

91 See, for example, *Bullas*, supra note 31, at paragraph 3; and *Docherty v. MNR*, 91 DTC 537 (TCC), per Brulé J.

92 *Mongrain v. The Queen*, 2001 DTC 5407, at paragraph 4 (FCA), per Décary JA; aff'g. [2000] TCJ no. 153 (TCC), per Lamarre Proulx J.

93 Judge Bowman in Bowman et al., supra note 49, at 33:3. In such cases, the following comments of Justice Bonner, supra note 48, at 14-15, are particularly apt:

> You will note that the trial by ambush charge may still be made in respect of hearings under the informal procedure. However, you should be warned that Judges tend to develop a bit of a sixth sense for cases where one of the parties is being coy about the facts. Thus it happens again and again that Judges cite the well recognized rule to be
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> > the failure of a party or witness to give evidence which it was in the power of the party or witness to give and by which the fact might have been elucidated justifies the Court in drawing the inference that the evidence of the party or witness would have been unfavourable to the party to whom the failure was attributed.

solutions may lie in education, judicial intervention, and ensuring that all relevant evidence is before the court.

Education

The easy answer to the questions posed above is that self-represented taxpayers could be trained in presenting an effective, complete, and convincing argument. However, even lawyers often find that this is a difficult skill to acquire. That said, more information could be made available to self-represented litigants. Although there may be some concern that providing such information would amount to giving unscrupulous taxpayers tools for manipulating the truth, this is perhaps an unavoidable cost of attaining justice and fairness for the ethical majority.

Many books and articles on tax litigation have been published in the past 50 years. Most are addressed to lawyers, accountants, agents, and law students, but some are ostensibly aimed at self-represented litigants.[94] None of those I have reviewed seems to be effective in remedying the problem of unprepared taxpayers. These guides are either too long or too complicated, and thus discouraging for the ordinary reader. In addition, they do not focus on the major problems faced by self-represented litigants. In light of the issues related to evidence and procedure, discussed above, I suggest that four key concepts should be explained to all self-represented litigants in tax appeals, briefly and in lay person's terms; these concepts are onus, relevancy, credibility, and corroboration.

Explaining these four principles to a lay person is like explaining "beyond a reasonable doubt" to a jury; it is often difficult for a lay person to grasp these concepts, particularly from a short oral explanation.[95] However, this information

94 See, for example, Robert McMecham and Gordon Bourgard, *Tax Court Practice* (Toronto: Carswell) (looseleaf); Richard G. Fitzsimmons, *Resolving Tax Disputes*, 2d ed. (Toronto: CCH Canadian, 2004); Al Meghji and Steven Sieker, "A Contest of Unequals: Recent Developments in Tax Litigation," in the 1997 Conference Report, supra note 4, 11:1-35; Barsalou, "Preparing and Arguing a Tax Appeal" and "Conseils pratiques: Préparation et présentation d'un appel en matière fiscale," supra note 78; *Tax Litigation: Effective Preparation and Conduct*, papers delivered at an Insight seminar held on July 21, 1993 (Toronto: Insight Press, 1993); *Tax Litigation: Effective Preparation and Conduct*, papers delivered at an Insight seminar held on February 18, 1991 (Mississauga, ON: Insight Press, 1991); Hugh F. Gibson, "An Overview of Income Tax Litigation," in the 1983 Conference Report, supra note 19, 967-77; Guy Du Pont, "Procédures en matières fiscales : Nouveaux courants," ibid., 978-1014; Leslie G. Dollinger, *Income Tax Appeals: Law and Practice* (Toronto: Butterworths, 1981); Murray A. Mogan and Joseph A. Stainsby, *Contesting Income Tax Assessments in Canada—A Practical Guide* (Don Mills, ON: CCH Canadian, 1981); P.N. Thorsteinsson, "How To Settle an Income Tax Controversy, Through Litigation and Before," in *Report of Proceedings of the Thirtieth Tax Conference*, 1978 Conference Report (Toronto: Canadian Tax Foundation, 1980), 325-37; R.S.W. Fordham, *Canadian Tax Appeal Board Practice*, 3d ed. (Don Mills, ON: CCH Canadian, 1964); R.S.W. Fordham, *Canadian Income Tax Appeal Board Practice*, 2d ed. (Don Mills, ON: CCH Canadian, 1958); and R.S.W. Fordham, *Income Tax Appeal Board Practice* (Don Mills, ON: CCH Canadian, 1953).

95 In *The Queen v. Lifchus*, [1997] 3 SCR 320, the Supreme Court of Canada noted that in the past judges presiding over jury trials have often had a problem defining the concept of proof

should still be made available to self-represented litigants, both orally and in written form, if only to avoid the following problem:

> Taxpayers are often taken by surprise when they are told by the Tax Court judge that they must lead evidence to prove the appeal. This is particularly true where taxpayers are self-represented. Perhaps they expect that because it is the Crown who is the responding party, the Crown must somehow "prove" the assessment. There is, however, no requirement for the Crown to lead any evidence to prove the basis of the assessment as the result of a critical presumption that is prescribed in the Act.[96]

A documented explanation of the four concepts, of a length that respects efficiency and comprehensibility,[97] should be provided to all Tax Court litigants who are not represented by a lawyer, well in advance of the hearing. It would also be valuable for the judge to read a shorter version at the beginning of the hearing, to underline the importance of the four principles.[98]

While Tax Court judges often provide information about the court's proceedings during the hearing, usually they start by going through the minister's assumptions with the taxpayer, in order to clarify the matters in issue. The following examples illustrate attempts by various Tax Court judges to provide taxpayers with a framework for the hearings.[99]

"beyond a reasonable doubt" to juries made up of lay persons. The court, ibid., at paragraph 39, set out a "model charge," consisting of six short paragraphs, to explain this concept. However, to reassure skeptics, the court emphasized, at paragraph 40, "This is not a magic incantation that needs to be repeated word for word. It is nothing more than a suggested form that would not be faulted if it were used. . . . Any form of instruction that complied with the applicable principles and avoided the pitfalls referred to would be satisfactory." There is also no requirement that all juries be perfectly instructed; see *Jacquard v. The Queen*, [1997] 1 SCR 314, at paragraph 2: "[A] standard of perfection would render very few judges in Canada, including myself, capable of charging juries to the satisfaction of such a standard"; and *Malott v. The Queen*, [1998] 1 SCR 123, at paragraph 15: "A standard of perfection would be unattainable in most cases. Some have described a jury charge as an art rather than a science." See also *Charlebois v. The Queen*, [2000] 2 SCR 674, at paragraph 24. These comments are equally true for the instructions of Tax Court judges.

96 Tari, supra note 79, at section 7.9.

97 When explanations are too long, there is a risk of creating confusion in the mind of a lay person: *Jacquard*, supra note 95, at paragraphs 1 and 13. See also *Ménard v. The Queen*, [1998] 2 SCR 109, at paragraphs 27 to 30.

98 *Lifchus*, supra note 95, at paragraph 35, touches on that point in the criminal context: "Obviously it will be a great assistance to jurors if, at the beginning of the trial, they are advised of the applicable basic principles. If that procedure is followed, it would be helpful to advise the jury at this time, as well as at the conclusion of the trial, of the presumption of innocence and the burden of proof beyond a reasonable doubt which the Crown must meet."

99 D.W. Chodikoff provides the following summary of approaches that Tax Court judges may use to commence proceedings where the taxpayer is self-represented: "Some Judges may dispense with [an] opening statement and encourage counsel to proceed with the case; calling the first

The first example, from *Bériault*,[100] is both short and complicated. In a few sentences at the start of the proceedings,[101] the judge "explained" the following ideas: that the Tax Court is impartial, just, and independent of the government, any other institution, or any person; that, in tax matters, it is the taxpayer who has the onus of proof; and that it is likely helpful for the taxpayer himself or herself to testify. The judge also informed the taxpayer that the only document he had seen before presiding over the case was the reply to the notice of appeal. Such an introduction is probably not very useful to a self-represented litigant, although the taxpayer in this case did not ask any questions. I would expect that most people in this situation would simply nod and move on; some might even think, "It's gonna be a long day if I can't even understand the introduction!"

The second example, from *Suchon*, is also complicated but longer, running to six pages. The judge "briefly" started with the fact that the Tax Court is a "court of record . . . constituted by an Act of Parliament of Canada . . . [and] called statutory court," with jurisdiction to hear appeals under the Income Tax Act, "which is what your appeal is about." The judge then explained the burden of proof in tax matters (as opposed to criminal and other civil matters), the minister's presumptions, how to rebut them, why the burden is on the taxpayer, that courts "proceed on the basis of evidence," what type of evidence can be presented, arguments, the subject matter of the case, and the fact that a decision can be reserved or delivered from the bench.[102] While the principles of court procedure and evidence should be explained to taxpayers, there should be a more effective way of presenting them. Tax Court judges are, of course, thoroughly familiar with these concepts, but they still find it very difficult to explain them to a lay litigant. Many criminal court judges have encountered the same difficulty in framing their charges to juries, and their attempts have been criticized by the Supreme Court of Canada. In *The Queen v. Lifchus*,[103] the Supreme Court provided a partial solution by setting out a written description of the meaning of "beyond a reasonable doubt," so that trial judges could communicate the concept to jury members in an orderly, comprehensible, and efficient way.

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witness and letting the evidence speak to the issues of the appeal. Another variation on this opening is where the Trial Judge commences the appeal by working through the assumptions in the Respondent's Reply and by asking the Appellant if he/she agrees or disagrees with specific assumptions. A different approach adopted by some Judges is to review with the parties the Appellant's Notice of Appeal and then the Respondent's Reply in order to precisely narrow the central facts in dispute. Depending upon the Judge, this process can take the form of a three-way conversation between the Judge and the parties. Even though it is arguable that the rules are silent on this form of judicial intervention, the fact of the matter is that it can be an enormous time saver for you and your client." D.W. Chodikoff, "The Conduct of a Trial in the Tax Court of Canada," paper presented to the Tax Litigation conference held by The Advocates' Society in Toronto, January 18, 2001, 1-28, at 3.

100 Tax Court transcript in the file for *Bériault v. The Queen*, 2004 DTC 6522 (FCA).

101 Ibid., at 4-5.

102 Tax Court transcript, at 4-9, in the file for *Suchon*, supra note 37.

103 *Lifchus*, supra note 95.

In *Dionne*, the judge took more than five pages to explain onus of proof, how to prove a fact, how to cross-examine, the introduction of the minister's evidence, the onus for penalties, how to refute the Crown's assumptions, the judge's role, and the judge's independence from the government. However, this early intervention did not seem to help the taxpayer: the judge subsequently indicated his frustration by pointing out that he had already explained all the taxpayer's rights and responsibilities, and, indeed, had been "very, very, very, very" patient.[104]

The judge in *Selmeci* faced a similar problem. During the hearing, he described the procedure for presenting documentary evidence as follows:

> HIS HONOUR: Madam, it's your appeal. You have to provide me with what you think I need to determine that the assessment is wrong. If there is any documents that you want to present and make exhibits, you present them and make them exhibits. I sit here and listen. I will look at documents, I will make them exhibits. At the present time the facts assumed by the Minister on pages 2 and 3 of the Reply are presumed to be correct. Until you knock out on a balance of probability those facts, they stand. So any documents that you have that supports or denies the facts assumed by the Minister should be brought forth, identified, produced and made as [sic] an exhibit.
>
> THE WITNESS: I hand them over to you?
>
> HIS HONOUR: One at a time identify them and what they say. Let the lawyer see it. There may be an argument whether it's inadmissible.
>
> THE WITNESS: So I'm sorry, you want me to hand it over to you?
>
> HIS HONOUR: I don't want you to do anything. It's your appeal. If you have a document that you think is important to your appeal, individually first show it to the lawyer.
>
> THE WITNESS: All right.
>
> HIS HONOUR: He will say, "I consent" or he will say, "No, I'm not going to consent." You then will describe the document. We will hear his argument why I shouldn't accept it. I will rule whether the document becomes an exhibit or not.[105]

Eventually, the judge felt he had no choice but to ask the taxpayer to "sit down with the [Crown's] lawyer and go through all those documents" in order to identify the important ones, rather than "bumbling around there."[106]

These examples show that interventions by Tax Court judges in regard to key concepts can actually create further difficulties for taxpayers. It is not the purpose of this article to propose "model" introductory remarks for Tax Court judges (as

104 Tax Court transcript, at 53, in the file for *Dionne*, supra note 33. The original version is in French, and the comment reads as follows: « je vous ai donné tous les droits et je vous ai expliqué de façon très, très, très, très patiente la façon dont ça devait fonctionner ».

105 Tax Court transcript, at 20-21, in the file for *Selmeci*, supra note 23 (FCA).

106 Ibid., at 27.

the Supreme Court did for criminal court judges in *Lifchus*); further research and experience would be needed to achieve such a "work of art."[107]

Judicial Intervention[108]

The most apparent concern of judges when intervening is to uphold their duty of neutrality and avoid an apprehension of bias.[109] Of course, judges must be neutral and be seen to be neutral when presiding over a dispute between two parties, particularly private parties. The main reason for ensuring the appearance of neutrality when two private parties are involved can be framed as follows: in a free and

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107 See *Malott*, supra note 95, at paragraph 15 (referring to "an art rather than a science").

108 Like earlier sections of this article, the discussion that follows refers to tax litigation between the taxpayer and the government. For a cogent discussion on the notion of trial judges assisting self-represented litigants in a civil action between two private parties in Ontario, see the recent decision of the Superior Court of Justice in *Barrett v. Layton* (2004), 69 OR (3d) 385. The plaintiff in that case was seeking a mistrial for apprehension of bias on the basis of certain interventions by the trial judge in the proceeding in order to help a litigant unassisted by counsel. The motion for mistrial was dismissed by the judge. After raising the fact that there is "a strong presumption of judicial impartiality which arises when a disqualifying apprehension of bias is alleged" (ibid., at 390), the trial judge relied on the established case law, commentaries, and the applicable legislation to demonstrate that the adversarial system is not to be followed in its purest form when one party is not represented by counsel. The main reason for "[m]oderation of the adversarial system" is that "trials must not only be fair, they must appear to be fair to reasonable and informed observers of the trial process" (ibid., at 391). There must also be "a high degree of public confidence in this system of providing justice" (ibid., at 392). The trial judge also reiterated the "distinction between information which protects the right to a fair trial and advice which is counsel-like" (ibid., at 393), and addressed the fact that, though this was a civil case, he had relied mainly on criminal cases (ibid., at 394). For general discussions on the role of a trial judge, see Chief Justice McLachlin, supra note 24, at 283; Donald B. Houson and Melanie Sopinka, *The Trial of an Action*, 2d ed. (Markham, ON: Butterworths, 1998), 137-47; Canadian Judicial Council, *Commentaries on Judicial Conduct* (Montreal: Les Éditions Yvon Blais, 1991), 75-81; Peter McCormick, *Judges and Judging: Inside the Canadian Judicial System* (Toronto: Lorimer, 1990), chapters 5, 8, and 9; Canadian Institute for the Administration of Justice, *The Trial Process*, papers presented at a conference held in Toronto in November 1980 (Scarborough, ON: Carswell, 1981), 131-54. For a good review of the American view on judicial interventions in self-represented cases, see Richard Zorza, "The Disconnect Between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality When Parties Appear Pro Se: Causes, Solutions, Recommendations, and Implications" (2004) vol. 17, no. 3 *Georgetown Journal of Legal Ethics* 423-54.

109 See, for example, ibid. On neutrality in the Tax Court context, see *Selmeci*, supra note 23, at paragraph 5: "However, this discretion [to intervene] must be exercised in a manner that ensures that the litigant is afforded a full opportunity to present her case and to respond to the case against her, and that, in an attempt to assist an unrepresented litigant, the judge does not breach his duty of neutrality as between the parties (see *Poulton v. R.*, [2002] T.C.J. No. 81 (T.C.C. [Informal Procedure]) at para. 17 *et seq*)." On bias, see the more recent Tax Court decision in *Corsaut v. MNR*, 2005 TCC 112, at paragraph 13, per Bowman ACJ (as he then was): "While I believe that where a litigant is unrepresented, it is permissible for the trial judge to intervene more than he or she might where counsel are involved, there are limits. A judge cannot and should not simply take over the case. It can in some cases create an impression of bias."

democratic society, fairness and the appearance of fairness are essential to maintaining faith in the judicial system. However, since this sense of fairness can, in theory, be experienced only by individuals, in tax cases it should not matter whether "pure" neutrality is compromised in favour of the taxpayer (particularly a taxpayer who is not represented by counsel), provided that, ultimately, judges apply the law without being influenced by anything other than legal arguments.[110]

Tax Court judges who are concerned about "crossing the line" in interventions may find guidance in the following suggestions of Justice Strayer:

> [T]he test of impartiality should not be based on how the represented party or his counsel perceive the matter, but how an objective, disinterested knowledgeable person sitting in the courtroom would assess it. The judge is committed to fairness to all parties, and he must be alert to the potential unfairness of having one party represented by counsel and the other unrepresented, handicapped by lack of knowledge of rules of evidence, procedure, and substantive law. To my mind, the question is not whether the judge may and should assist the unrepresented party, but how this may be done in a way which is minimally intrusive on the case of the represented party and which does not involve, nor appear to involve, any prejudgment of the merits.
>
> It is perhaps unnecessary to add that such an assisting role for the judge is normally not called for in cases of true vexatious litigants. There is no need for a judge to help, and thereby encourage, a party who obviously has no claim of substance and whose motives are typically those of publicity or attracting attention to himself.
>
> It also needs to be said that the appearance of fairness has another aspect—that is, how the proceedings appear to the unrepresented party. To be consistent one must say that here too the test of fairness should be how the proceedings would appear to an objective bystander. But this does not absolve the judge or court officer from the duty of explaining to an SRL [self-represented litigant] why a decision has been taken that might appear to the untutored lay party as being special treatment for lawyers and their clients. We have evidence from many sources that nothing is more harmful to an unrepresented party's sense of fairness than the appearance that the rules are not being applied equally to both sides.[111]

Should it matter to the Crown whether the Tax Court judge asks most of the questions, rather than the taxpayer (or Crown counsel, for that matter)? As long as the Crown is permitted to question witnesses and to intervene during the judge's

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110 Nevertheless, I suggest that, even in the informal procedure, "as in any adversary process, the taxpayer who reacts vigorously and intelligently will do better than the taxpayer who reacts passively": Bruce Verchere and Guy Du Pont, "Income Tax Appeals: Practice and Procedure," in *Report of Proceedings of the Thirty-Third Tax Conference*, 1981 Conference Report (Toronto: Canadian Tax Foundation, 1982), 776-803, at 777. "Intelligent" reactions are often lacking in the case of self-represented taxpayers, simply because they are not educated in the law, the court's procedures, and the rules of evidence. However, the self-represented litigant can often avail himself or herself of the judge's expertise in tax law.

111 Address to the Tax Court of Canada Education Seminar held by the National Judicial Institute in Mont Tremblant, Quebec, May 22-24, 2003 (unpublished).

questioning, there should be no sense of "unfairness." The Crown's objective, in theory at least, is not to win at all costs. Rather, the Crown's goal, like the judge's, is to arrive at the truth—to determine whether the assessment or reassessment is correct according to the law. This is not to suggest that it would be sufficient or appropriate for Tax Court judges to ask all the questions. As the saying goes, two heads are better than one; therefore, judges should encourage relevant questions from both parties (and they usually do).

Some Tax Court judges do intervene in the questioning of witnesses. Clearly, when a taxpayer lacks credibility, the judge should ask him or her more questions. If, on the other hand, the taxpayer and his or her witnesses are credible but there is at least a small doubt as to why the minister assessed (bearing in mind that there is a "machine" behind most assessments),[112] more questions should be posed to counsel and witnesses for the Crown.

When one calls for more intervention, one is actually calling for more preparation on the part of judges before the proceeding begins. The problem with preparation is that some judges prefer to do their research after they have heard the parties' arguments, in order to concentrate on the main issues. In many cases, this approach can lead to greater efficiency; but when the intention is to help a self-represented litigant in his or her appeal, there will be less opportunity for intervention if the judge does not prepare for the case. It must be noted, however, that some judges have already expressed concern that insufficient time is available for preparation.[113] If this is the case, judges should be allowed more time for prehearing research, when needed, bearing in mind that this time will be made up during and after the trial. Also, to assist their preparation, judges should have prehearing memorandums produced by their law clerks for all cases to be heard under the informal procedure, unless the issues are obvious from the pleadings (if this is not already done). In this connection, in explaining why a good factum is important at the Federal Court of Appeal, Justice Rothstein observed that "[s]ome judges rely heavily

112 This "machine" is described in MacGregor and Goulard, supra note 4, at 57:2-4.

113 See Ian Greene, Carl Baar, Peter McCormick, George Szablowski, and Martin Thomas, *Final Appeal: Decision-Making in Canadian Courts of Appeal* (Toronto: Lorimer, 1998), 69, reporting on a national survey of appeal court judges: "On average, the judges said that they had enough time to prepare for the hearing three-quarters of the time. However, it was only in the smallest and less-pressured courts where nearly all the judges felt they had enough time to prepare adequately for all the cases. In the four biggest appeal courts—British Columbia, Ontario, Quebec, and Alberta—several judges on each court did not feel that they had enough time to prepare for most cases, but on the same courts at least as many judges felt that they had time to prepare adequately for all cases. This variation in response indicates value differences among the judges about what constitutes satisfactory preparation, and more broadly about the nature of the judicial role. For some judges, it is a case of zeroing in on the important points, which they feel they can easily pick out, and that reading all the materials carefully is a waste of time. For others, it is important to read all the materials carefully just in case something that's not obvious turns up. For still others, there are troublesome legal issues that they hope to resolve, and this means studying carefully some issues in the appeal materials that other judges might think unimportant."

on pre-hearing memoranda prepared by law clerks,"[114] which, in turn, are based entirely on the factum. This might also hold true for some judges at the Tax Court level, since the production of prehearing memorandums is in the job description of a Tax Court law clerk. Admittedly, however, there is a difference between a memorandum of facts and law found at the Federal Court of Appeal (which contains most, if not all, of the parties' arguments) and what a Tax Court judge has available before the trial—namely, a notice of appeal (usually fairly opaque) from the taxpayer and a reply (usually boilerplate)[115] from the Crown.

In the end, in cases involving self-represented taxpayers, judicial intervention can facilitate proceedings and the presentation of all the relevant evidence, and generally reduce delays (a main goal of the informal procedure), while also providing the taxpayer with a better chance of success. At a minimum, it is preferable for the self-represented litigant to know what the judge's concerns are during the trial, rather than when reading the judgment several weeks later.

As it now stands, however, some Tax Court judges still find it difficult to intervene effectively on behalf of self-represented litigants in such basic matters as the questioning of witnesses. Two examples illustrate this problem. The first is from the Tax Court transcript in *Suchon*:

> HIS HONOUR: You're going to have to ask him a question. This is the last time I'm going to try to phrase your question for you. You have to be sure what you're asking him. You can ask him first of all what he is suggesting that he did in that paragraph, if that's what you're trying to get out of him, what he's saying he did, how he approached it in this paragraph. And then, of course, after that you can ask him other questions, but you have to put specific questions to him. We could take all day in having him read letters and to set forth what his position was. . . .
>
> HIS HONOUR: Well, I guess the best thing to ask him, then, if that's what you're trying to find out, without putting words in your mouth, Mr. Suchon, is to ask him if this letter sets out the basis for the ultimate assessment.[116]

The second example comes from the Tax Court transcript in *Title Estate*:

> HIS HONOUR: Well, but—and I don't want to do Mr. Jason's job, but how far do you go with that statement? I mean again we could have a little discussion about the word "certifies."[117]

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114 The Honourable Marshall E. Rothstein, "Advocacy in the Federal Court of Appeal," in David W. Chodikoff and James L. Horvath, eds., *Advocacy & Taxation in Canada* (Toronto: Irwin Law, 2004), 26-37, at 27.

115 On replies and boilerplates, see, for example, *Stephen v. The Queen*, [2001] 2 CTC 2621, at paragraph 6 (TCC), per Bowman ACJ; and *Johnson v. The Queen*, [2001] 2 CTC 2034, at paragraphs 15 to 16 (TCC), per Bowman ACJ.

116 Tax Court transcript, at 23 and 34, in the file for *Suchon*, supra note 37.

117 Tax Court transcript, at 197, in the file for *The Queen v. Title Estate*, 2001 FCA 106.

It must be emphasized that intervention is a matter of judicial discretion. When a wide discretion is given, there is potential for a wide range of "fairness." However, this discretion may also be subject to restrictions imposed by higher courts to discourage frequent or unwarranted attempts by trial judges to enter the arena. While some interventions might still go too far, judges of the Tax Court and the Federal Court of Appeal should be guided by the following principles, expressed by the Supreme Court of Canada and other appellate courts:[118]

1. Trial judges are no longer required to refrain from intervening, as long as their actions cannot reasonably cast a doubt on their impartiality.
2. Interventions to help self-represented litigants are generally more acceptable than those for represented litigants.
3. In cases where the Crown is one of the parties, interventions by a trial judge should generally be accepted if the judge gives the Crown the opportunity to question the witness following the intervention.
4. In civil cases, a trial judge can suggest to the parties that a particular witness be called to testify.
5. In criminal cases (and, I would argue, particularly in tax cases), a trial judge can call a witness without the consent of the parties on the basis of the public's right to know whether an accused is guilty or innocent (and, in tax cases, whether taxpayers are paying their fair share of taxes).

It should be noted that most of these principles were articulated without specific reference to self-represented litigants in the Tax Court's informal procedure.

Ensuring That All Relevant Evidence Is Before the Court

The first step in regard to relevancy of evidence is for the taxpayer to know the case against him or her. While things have improved since the time when taxpayers did not even have the benefit of a reply to the notice of appeal,[119] the taxpayer is still in the dark in some instances.[120] Quite recently, in *Grant v. The Queen et al.*, the Federal Court of Appeal had to remind the Crown that this practice of not providing enough information was unacceptable:

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118 See the sources listed in note 108, supra.

119 Wolff, supra note 7, at 11.

120 Edwin G. Kroft, "Selected Issues in Administration, Appeals and Enforcement," in *1995 British Columbia Tax Conference* (Toronto: Canadian Tax Foundation, 1995), tab 14, at 41: "Success in tax litigation will depend ultimately on the ability of the taxpayer to shift the burden of proof by demolishing all of the assumptions made by the Minister in raising the assessment. However, in practice, Revenue Canada is not always clear about the assumptions upon which the assessment is made and in fact assumptions change throughout the tax dispute resolution process commencing during the audit all the way through to Tax Court." See also Thompson, supra note 7, at 479.

> Nevertheless as a general practice the pleadings should be complete so as not to confuse and entrap the unwary as pointed out by Bowman A.C.J. in the above passage [*Home et al. v. HM* [2002] TCJ 641, at paragraph 19]. The blanket denial of all allegations "in the Notice of Appeal and . . . in the documents attached to the Notice of Appeal," as asserted by the Respondent here, left obscure what was the central issue of the appeal.[121]

The next step is to ensure that the taxpayer brings all relevant documents and witnesses required to argue his or her case.[122] With respect to witnesses, as noted earlier, the Registrar now sends blank subpoenas to taxpayers; and, in some instances, cases are adjourned to allow important witnesses to testify for the taxpayer.[123] Although this assistance may be of little help in obtaining evidence from expert witnesses, since many taxpayers cannot afford to pay for such testimony, this is not as significant a problem as it might appear. A bigger problem is that some self-represented taxpayers do not even bring ordinary witnesses who can support their case, such as their accountant,[124] their spouse, their brother or sister, or their co-worker or employee, as the case may be. This failure seems to flow from misconceptions regarding onus, the rules of procedure, and the rules of evidence, such as those discussed above. In an attempt to ensure that taxpayers at least bring non-expert testimony, before trial the court sends self-represented litigants pamphlets stressing the importance of witnesses.[125] Yet many taxpayers still do not take seriously the warnings contained in the pamphlets. This can probably be explained in part by another misconception: that the employees of the Tax Court and the CRA are on the same team. This notion is thought to be so common that, as illustrated above, Tax Court judges often emphasize the court's independence from the CRA in their opening remarks; and one of the Tax Court's pamphlets states on the cover, "The Tax Court of Canada (TCC) is a federal court that is not affiliated with the Canada Customs and Revenue Agency (CCRA)."[126]

What more, then, can be done to ensure that taxpayers bring documents and witnesses to court? One obvious solution would be to force disclosure, following

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121 2003 DTC 5160, at paragraph 18 (FCA), per Strayer JA; aff'g. [2001] 3 CTC 2694 (TCC), per Hamlyn J.

122 As stated in *Gamus v. The Queen*, [2001] 3 CTC 2342, at paragraph 20 (TCC), per Bowman ACJ, "Unfortunately, as is frequently the case where an appellant is not represented by a lawyer, relevant evidence is not put forward and there is a limit to how much help the court should endeavour to give the litigant." In contrast, a solution that has been suggested in the context of family law cases is to make the court responsible for "actual gathering of documents, completion of court forms, questioning of witnesses and recording of evidence by a court official, if not a judge": Thompson, supra note 7, at 493. See also Trussler, supra note 7, at 572.

123 *Corroll*, supra note 42; and *Kowalchuk*, supra note 67.

124 See, for example, *Perlmutter v. The Queen*, 2003 FCA 404, at paragraph 7, per Noël JA; aff'g. 2002 DTC 2104 (TCC), per Lamarre J.

125 See, for example, "Your Day in Court" and "Pamphlet on Income Tax and GST Appeals."

126 "Pamphlet on Income Tax and GST Appeals."

the full disclosure rule in section 82 of the Tax Court of Canada Rules (General Procedure).[127] But what would happen if the self-represented litigant did not comply with this rule? Would we only raise further procedural barriers for many self-represented taxpayers?

A parallel solution could be to provide information on onus, relevancy, credibility, and corroboration, along with information about the Tax Court from the pamphlets, in a non-binding direction signed by the chief justice of the court. This direction would be sent to all taxpayers who are not represented by a lawyer. The reason for having a direction instead of a pamphlet is simple: a person will usually take a recommendation in a direction more seriously than one in a pamphlet. Of course, those who are against interventions by judges will be against this type of direction.

Another solution would be to copy rule 13 (pretrial conferences) of the Ontario Rules of the Small Claims Court, in order to fulfill some or all of the purposes set out in rule 13.02(1):

> (a) to resolve or narrow the issues in the action;
> (b) to expedite the disposition of the action;
> (c) to facilitate settlement of the action;
> (d) to assist the parties in effective preparation for trial; and
> (e) to provide full disclosure between the parties of the relevant facts and evidence.[128]

If small claims court procedures provide for pretrial conferences, there is no obvious reason why the Tax Court should not also do so for cases in the informal procedure.

Finally, the Tax Court could draw inspiration from several recent developments in the Ontario Small Claims Court, summarized here by Justice Zuker:

> The new Rules will create case management and mandatory settlement conferences. There will continue to be no examinations for discovery nor cross-examination on affidavits.[129]

CONCLUSION

In light of the above, it is obvious that the Tax Court's informal procedure can be improved. If steps were taken to eliminate a few of the potential traps facing self-represented litigants, it might happen that some taxpayers who barely fall within

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127 Supra note 2. For a general discussion on full disclosure in civil proceedings, see *Stinchcombe v. The Queen*, [1992] 1 WWR 97 (SCC).

128 See Justice Marvin A. Zuker, *Ontario Small Claims Court Practice, 2004-2005* (Toronto: Carswell, 2004), 298.

129 Ibid., at ix. This book is also a good reference for comparing jurisdictions with small claims courts (ibid., at xcix-ci, 1, and 2), to find statistics on the subject (ibid., at v and 1), and to learn about a variety of topics, including the right to counsel and self-representation, the poor person's court, destitute litigants, waiver of fees, unrepresented litigants, apprehension of bias, civil hearings, the self-representation trend, the role of the small claims court, how small claims courts differ from other courts, and the role of the clerk (ibid., at 1-42).

the general procedure would lower the amount in issue in order to qualify under the informal procedure. This would save time for the system as a whole. It must be acknowledged that implementing certain of the recommendations presented above could lengthen the hearing process in some cases. However, as long as backlogs were not created as a consequence of those changes, this would be a small price to pay to provide more fairness to self-represented litigants.

In summary, this article recommends the following initiatives. First, a few important concepts should be briefly explained to all self-represented taxpayers before the start of the hearing. These would include onus, relevancy, credibility, and corroboration. Second, judges should intervene more frequently at the evidential stage. Despite the concern that this could detract from the perception of judicial neutrality, intervention is often necessary in the case of self-represented taxpayers in order to reduce delays, permit the presentation of all the relevant evidence, and generally allow for a fair trial. Finally, steps should be taken to ensure that all relevant information is presented in court. In particular, greater disclosure is needed from the Crown before the trial. If full disclosure is to be forced on self-represented litigants, however, we must be very careful. The point is to lessen the burden on those who represent themselves, not to increase it. In my view, pretrial conferences would provide a better way of impressing upon taxpayers the need to support their claims. Another, simpler solution would be for the chief justice of the Tax Court to issue an order or direction explaining onus, relevancy, credibility, and corroboration, and briefly describing the court's role and procedures. This direction would be sent to all litigants who are not represented by a lawyer.