# 3
# The Fractured Jurisdiction of the Courts in Income Tax Disputes

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> *These Courts were very properly adapted to the customs, manners, genius and policy of a people upon their first settlement: but, like all other human jurisdictions, vary in the course and progress of time, as the Government and manners of a people take a different turn, and fall under different circumstances.*
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> —*Colebrooke v. Elliott* (1766) 3 Burr. Part IV 1859, at 1863

## Introduction

Consider the hypothetical case of Pat Leduc. Pat travels regularly for work between Calgary and Vancouver and maintains apartments in both cities. Pat files an income tax return as an Alberta resident. The Canada Revenue Agency (CRA), acting on behalf of the federal minister of national revenue ("the minister") as well as the BC and Alberta ministers of finance, carries out an audit of Pat's return. The CRA disallows various expenses and also concludes that Pat was a resident of British Columbia, not of Alberta. The CRA reassesses the additional federal and BC taxes and arrears interest. Pat objects to the reassessment and also requests, in the alternative, the cancellation of the arrears interest on the basis of the CRA's delay in carrying out its audit. The CRA rejects Pat's submissions, confirming the reassessment and refusing interest relief. Pat is aggrieved and wants to hear what a judge thinks of the matter. To which court must Pat go?

Like many taxpayers, Pat may naïvely assume that the Tax Court of Canada can resolve all issues raised in a single CRA assessment. Pat may also find the prospect of proceeding in the Tax Court particularly attractive because of the availability of the court's informal procedure, which aims to accommodate taxpayers who cannot afford counsel. Pat may then be astounded to learn that the so-called Tax Court of Canada actually does not have jurisdiction over a wide range of tax issues. Instead of going only to that court, Pat must commence proceedings in *three* different courts: (1) the

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Tax Court, with regard to the disallowed expenses; (2) the superior court of the taxing province (in Pat's case, the BC Supreme Court), with regard to residence; and (3) the Federal Court, with regard to interest relief.[1]

Alas, the annals of the Tax Court abound with examples of taxpayers like Pat who appear in court, often unassisted by counsel, seeking relief to which they may well be entitled but which the court may not be in a position to grant.

There has been extensive discussion among academics, practitioners, and the judiciary regarding where the jurisdictional boundaries fall between the Tax Court, the Federal Court, and the superior courts when it comes to income tax matters.[2] These discussions have included the recent 87-page decision by Monaghan J (as she then was) in *Dow Chemical*—a decision that (if upheld on appeal) has the potential to redraw some of the jurisdictional frontiers.[3] There has also been extensive discussion about the problems that the currently fractured jurisdiction over tax matters causes taxpayers, as well as increasingly clarion calls for reform.[4] There has been little discussion, however, of *why* jurisdiction is currently divided as it is among the Tax Court, the Federal Court,

1 The Federal Court would likely decline to entertain any judicial review of the decision to refuse interest relief until after a second review by the CRA, which, in general, would likely take place only after the disposition of the other tax issues. See *Tomaszewski v. Canada (Finance)*, 2010 FC 145.

2 In addition to the many reported cases cited in this chapter, see David M. Sherman, ed., *Practitioner's Income Tax Act*, 60th ed. (Toronto: Thomson Reuters, 2021), notes on subsections 152(1.01), 152(1.1), 169(1), and 171(1) (illustrative cases and bibliography); Colin Campbell, *Administration of Income Tax 2021* (Toronto: Thomson Reuters, 2021), at sections 13.1 and 13.3; David Jacyk, "The Dividing Line Between the Jurisdictions of the Tax Court of Canada and Other Superior Courts" (2008) 56:3 *Canadian Tax Journal* 661-707; David Jacyk, "The Jurisdiction of the Tax Court: A Tax Practitioner's Guide to the Jurisdictional Galaxy of Constitutional Challenges" (2012) 60:1 *Canadian Tax Journal* 55-92; Daniel Sandler and Allison Blackler, "(Can't Get No) Satisfaction? Look Beyond the Fairness Provisions," in *Report of Proceedings of the Seventieth Annual Tax Conference*, 2018 Conference Report (Toronto: Canadian Tax Foundation, 2019), 33:1-30, at 33:6-9, 33:11-14, 33:18, and 33:21-22; and Daniel Sandler and Lisa Watzinger, "Disputing Denied Downward Transfer-Pricing Adjustments" (2019) 67:2 *Canadian Tax Journal* 281-308.

3 *Dow Chemical Canada ULC v. The Queen*, 2020 TCC 139, under appeal to the Federal Court of Appeal, docket no. A-318-20. Some of the jurisdictional boundaries that may be affected by *Dow Chemical* are discussed below.

4 Sherman, supra note 2, notes on subsections 152(1.01) and 171(1); Colin Campbell, "Re: Unfinished Business? The Proposed Federal Court-Tax Court Merger," Correspondence (1998) 46:1 *Canadian Tax Journal* 228-32; "Tax Court of Canada 20th Anniversary Symposium" (2005) 53:1 *Canadian Tax Journal* 135-75, at 138-39 (comments of Garon CJ); *On-Line Finance & Leasing Corporation v. The Queen*, 2009 TCC 565, at paragraph 10 (Rip CJ); David Sherman, annotation to *Pine Valley Enterprises Inc. v. The Queen*, 2010 TCC 324 (Taxnet Pro); Guy Du Pont and Michael H. Lubetsky, "The Power To Audit Is the Power To Destroy: Judicial Supervision of the Exercise of Audit Powers" (2013), 61, supp. *Canadian Tax Journal* 103-21, at 120-21; Amir A. Fazel, "Suing the Canada Revenue Agency in Tort" (2019) 67:3 *Canadian Tax Journal* 581-611, at 609-11; and Campbell, supra note 2, at section 13.3.3.

and the superior courts. This chapter aims to fill this gap in the discourse by reviewing the underlying reasons for the fragmented jurisdiction—an exercise that may perhaps, in turn, help identify a path forward.

A review of the history of the dispute-resolution provisions of the Income Tax Act,[5] as interpreted and applied by the courts, reveals that today's allocation of jurisdiction is primarily the result of ad hoc, unplanned, organic evolution over the last 75 years, rather than of a comprehensive, thoughtful review of what kinds of disputes belong in which forum. Predictably, the result is a patchwork that is largely arbitrary and often contrary to effective tax dispute resolution. Parliament created the Tax Court and its predecessor entities—the Income Tax Appeal Board (1949-1952), the Tax Appeal Board (1952-1970), and the Tax Review Board (1970-1983)—to provide a credible and inexpensive forum for taxpayers to resolve disputes with the minister. To meet this objective, the Tax Court offers specialized judges and relatively informal procedural rules. The very purpose of the Tax Court is defeated when taxpayers—especially individual taxpayers who have relatively small amounts in dispute or who are acting without legal assistance—are obliged to pursue tax disputes in multiple forums with non-specialist judges and formal rules of procedure.

The time is long overdue for a comprehensive review and overhaul of jurisdiction among the Tax Court, the Federal Court, and the superior courts with respect to income tax matters, with a view to ensuring that taxpayers can obtain the benefit of accessible, effective, and independent dispute resolution as Parliament intended. One should be able to expect that once the Tax Court is seized of an appeal of an assessment, it should be able to deal with most, if not all, of the matters that arise in conjunction with, or as a result of, that assessment. In this way, the taxpayer and the minister alike can obtain an efficient resolution of all issues in a single process. If some matters arising from an assessment are to be excluded from the Tax Court's jurisdiction and moved to a different forum, there should be a compelling reason for doing so.

That said, such an expansion of the Tax Court's jurisdiction would also require consideration of the standards of review applied by the court to discretionary ministerial decisions. One recurring theme (sometimes intentional, sometime by happenstance) in Parliament's revisions of the Tax Court's jurisdiction over the years has been the maintenance of the Tax Court primarily as a court of non-deferential, de novo review—a role that enhances the status and public perception of the Tax Court as a forum where taxpayers can obtain an impartial adjudication of their disputes with the minister. To the extent that any re-allocation of authority would entail having the Tax Court review more discretionary decisions of the minister (such as decisions over interest relief), the

5 Income Tax Act, RSC 1985, c. 1 (5th Supp.), as amended ("the ITA"). This chapter focuses on income tax; however, its observations also largely apply to dispute resolution under the Excise Tax Act, RSC 1985, c. E-15, as amended, and some of the cases cited in this chapter are, in fact, cases related to the Excise Tax Act. However, a full discussion of jurisdictional issues in the context of the Excise Tax Act or other fiscal laws is outside the scope of this chapter.

court should be provided with statutory guidelines for decision making or a broader, equitable jurisdiction to deal with the matters that are subject to review. There exist ample precedents for such measures, such as those in section 166.2 of the Act with respect to the late-filing of objections.

This chapter begins with an overview of (1) the jurisdictional boundaries between the Tax Court, the Federal Court, and the superior courts with respect to income tax matters, and (2) the problems that such fragmentation creates for taxpayers. The chapter then chronicles the various governmental and judicial initiatives between 1946 and the present day that have incrementally and organically led to the current situation. It concludes with a proposal for a comprehensive re-evaluation of the role of the Tax Court in the resolution of income tax disputes.

## Overview of the Jurisdictional Boundaries

A comprehensive review of the jurisdictional divides between the Tax Court, the Federal Court, and the superior courts with respect to income tax is beyond the scope of this chapter.[6] That said, the lines currently stand, roughly, as follows:

### *The Jurisdiction of the Tax Court*

The ITA's grants of jurisdiction to the Tax Court can be grouped into seven basic categories, of which three make up the overwhelming majority of the Tax Court's income tax case load.

First (and by far most important), the Tax Court has exclusive jurisdiction over appeals of federal income tax assessments issued by the minister ("the appellate jurisdiction"). Case law over the years has narrowly circumscribed the appellate jurisdiction, limiting it to the quantum of a taxpayer's tax, interest, and penalty liability under the federal ITA in a given fiscal period. Subject to a number of often arbitrary exceptions (many of which are discussed below), the appellate jurisdiction does not allow the court to hear appeals of nil assessments, to decide disputes over tax balances that do not affect the federal tax liability for the year, to stay or vary assessments on the basis of the minister's misconduct (whether intentional or negligent) in matters relating to the assessment, or even to determine how much the taxpayer actually owes to the minister (or vice versa) after instalments, setoffs, or other payments or refunds due are taken into account.

Second, filling in some of the gaps in the appellate jurisdiction left by the case law, the ITA authorizes the Tax Court to hear appeals of certain "determinations" made by the minister. This category of jurisdiction ("the determination jurisdiction") includes determinations in respect of various refundable tax credits, losses incurred in a particular taxation year, eligibility for the disability tax credit, the fair market value of ecological

6 For a more complete review, see the various sources cited in supra note 2. Note also that a discussion of the first-instance jurisdiction of the Federal Court of Appeal in income tax matters is beyond the scope of this chapter.

gifts, and adjustments under the general anti-avoidance rule (GAAR).[7] The determination jurisdiction does not extend to all ministerial determinations, however, but only to those expressly set out in the ITA.[8] The rules and principles applicable to objections and appeals of assessments apply also to objections and appeals of determinations.[9]

Third, the Tax Court may, if the statutory requirements are met, authorize a taxpayer to file an objection or initiate an appeal against an assessment outside the 90-day limitation period ordinarily applicable ("the late-filing jurisdiction").[10]

The Tax Court's four remaining grants of jurisdiction, which are seldom invoked, are as follows:

1) The Tax Court may hear and decide any question of fact or law referred to it jointly by the taxpayer and the minister relating to an assessment, proposed assessment, determination, or proposed determination ("the reference jurisdiction").[11] Although the reference jurisdiction is potentially very broad and could address many of the problems caused for taxpayers by the limits on the appellate jurisdiction, the minister, as a matter of policy, seldom consents to referring questions to the Tax Court.[12]
2) The court has jurisdiction, similar to the reference jurisdiction, to hear and decide any question of fact or law referred to it by the minister, if the question is common to assessments or proposed assessments of two or more taxpayers, and

7 ITA subsections 152(1.1) and 169(1.1). Note that in the case of the fair market value of ecological gifts, the determination subject to appeal is technically made by the minister of the environment instead of the minister of national revenue.

8 *Canada v. Interior Savings Credit Union*, 2007 FCA 151, at paragraphs 20-21; rev'g 2006 TCC 411; and *Nagel v. The Queen*, 2018 TCC 32, at paragraphs 23-25; aff'd 2022 FCA 51.

9 ITA subsection 152(1.2).

10 ITA sections 166.2-167.

11 ITA section 173.

12 CRA policy on section 173 referrals appears in Canada Revenue Agency, *CRA Appeals Manual* (last revised March 2015) (Taxnet Pro). Referrals under section 173 must be approved by the director general of the Tax and Charity Appeals Directorate (section 7.2.3) and are considered appropriate when (among other prerequisites) (1) the CRA is "uncertain about the assessing position to take, despite having made a full factual enquiry at the audit stage," (2) the proposed question is clear, (3) the proposed question would resolve a dispute, (4) the taxpayer agrees on what action will be taken following the determination of the question, (5) the parties agree on the procedures to be followed with regard to the application, (6) the taxpayer is represented by counsel, *and* (7) there are no other issues or appeals pending that rely on the same set of facts (section 7.19.4.3). As a practical matter, these criteria can be very difficult to meet, if only because the CRA can be very reticent when it comes to admitting uncertainty about its assessing positions. See also Michael H. Lubetsky, "Income Tax Disputes Involving Loss Years: Pitfalls, Foibles, and Possible Reforms" (2019) 67:3 *Canadian Tax Journal* 499-531, at 510 and 528; Campbell, supra note 2, at section 14.1.1; and "Judges' Panel," in the 2018 Conference Report, supra note 2, 2:1-25, at 2:7-9.

arises out of the same or substantially similar transactions ("the common questions jurisdiction").[13]

3) The court has jurisdiction to appoint, on an application by the minister, a hearing officer to conduct an inquiry into the affairs of a taxpayer ("hearing officer jurisdiction").[14]
4) The court has jurisdiction to postpone the suspension of receipting privileges of registered charities that are facing revocation proceedings.[15] Note that the court does *not* have jurisdiction over the revocation proceedings themselves; appeals of revocation decisions are heard in first instance by the Federal Court of Appeal.[16]

### *The Jurisdiction of the Federal Court*

The grants of jurisdiction to the Federal Court that are relevant to income tax can be grouped into four basic categories.

First, section 18 of the Federal Courts Act[17] provides that the Federal Court has exclusive jurisdiction "to issue an injunction, writ of certiorari, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal" (an authority that will be referred to, in this chapter, as "the judicial review jurisdiction"). Through its judicial review jurisdiction, the Federal Court has exclusive authority to review any act or decision (or, in some cases, any inaction or indecision) of the minister that is not amenable to adjudication in the context of an appeal before the Tax Court.[18] A wide range of income-tax-related acts and decisions have been reviewed by the Federal Court over the years, including refusals of interest or penalty relief, failure or refusal to accept or process tax returns, refusals to accept late-filed elections or notices, issuances of improper or excessive audit queries or requirements, and miscalculation or failure to pay out refunds (which, in turn, can relate to a host of underlying issues, including the misapplication of payments, the withholding of benefits administered through the income tax system, and the miscalculation of refund interest).[19]

Second, section 17 of the Federal Courts Act grants the Federal Court concurrent jurisdiction with the superior courts over civil actions for damages against the minister,

13 ITA section 174.

14 ITA section 231.4.

15 ITA subsections 188.2(4) through (5).

16 ITA subsection 172(3).

17 RSC 1985, c. F-7, as amended (originally enacted as the Federal Court Act and renamed in 2002; SC 2002, c. 8, section 14).

18 Federal Courts Act, section 18.5, excludes from the judicial review jurisdiction matters that can be dealt with on appeal to the Tax Court.

19 Sherman, supra note 2, notes on subsection 171(1).

which can include claims for damages resulting from the abusive or negligent exercise of audit, assessment, or collection powers under the ITA.[20]

Third, sections 231-232 of the ITA confer on the Federal Court jurisdiction (in some cases exclusive jurisdiction, in some cases jurisdiction concurrent with the superior courts) over a variety of audit-related acts and processes, including the approval of requirements seeking information about unnamed third parties, the issuance of search warrants or compliance orders, and the review of documents in order to ascertain whether they are covered by solicitor-client privilege.

Finally, sections 222-225.2 of the ITA confer on the Federal Court concurrent jurisdiction with the superior courts over various collection-related acts and processes, including the filing of civil suits by the minister for the recovery of tax debts or the issuance of jeopardy orders.

### *The Jurisdiction of the Superior Courts*

In addition to the issues over which the superior courts share jurisdiction with the Federal Court (discussed above), the superior courts have exclusive jurisdiction over civil suits between taxpayers and third parties that may produce tax consequences (such as proceedings to rectify or rescind contracts or other legal acts)[21] as well as negligence suits against tax planners, tax-return preparers, or tax-shelter promoters.[22] In addition, the superior courts have (except in Quebec)[23] exclusive jurisdiction over matters that affect the determination of a taxpayer's provincial income tax liability and that operate independently of federal income tax liability (in particular, provincial residence, provincial tax credits, and the interprovincial allocation of income).[24]

The superior courts also have jurisdiction over bankruptcy proceedings,[25] which can entail a variety of income tax consequences.[26] A discussion of jurisdictional issues in the bankruptcy context is beyond the scope of this chapter.

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20 Ibid.

21 Ibid., notes on subsection 169(1).

22 Ibid., notes on subsection 118.1(1).

23 Exclusive jurisdiction over appeals of provincial income tax assessments in Quebec is held by the Cour du Québec, which is a provincially constituted court. On the constitutionality of this grant of jurisdiction, see *Delorme c. Agence du revenu du Québec*, 2018 QCCQ 3311; aff'd 2018 QCCA 1645; leave to appeal to the Supreme Court of Canada dismissed, docket no. 39445.

24 Sherman, supra note 2, notes on subsection 169(1). Note that in this chapter, the expression "interprovincial allocation of income" refers to the calculation of (1) "income earned in a [particular] province" under subsection 120(4) of the ITA (for individuals and trusts) and regulations 2600-2607, and (2) "taxable income earned in the year a [particular] province" under subsection 124(4) and regulations 400-413 (for corporations). Note also that for the purpose of this chapter, the term "province" generally encompasses Yukon, Nunavut, and the Northwest Territories, mutatis mutandis.

25 Bankruptcy and Insolvency Act, RSC 1985, c. B-3, as amended, sections 183(1) and (1.1).

26 ITA section 128. For an overview and a bibliography of sources, see Sherman, supra note 2, notes on section 128.

## Problems That the Current Structure Poses to Taxpayers

The courts' divided jurisdiction over income tax matters creates excessive costs and numerous traps for taxpayers that significantly hinder access to justice.

First, the Tax Court regularly encounters taxpayers who, acting with or without legal assistance, initiate appeals that raise bona fide issues, only to learn the hard way that the Tax Court has no jurisdiction over them.[27] Perennial sources of such disappointment include disputes over (1) interest relief,[28] (2) provincial income tax,[29] (3) whether amounts in issue have been paid (either directly or via employer withholdings),[30] (4) tax balances (such as tuition credits or losses) that affect other taxation years,[31] (5) remedies for when the minister has induced the taxpayer into error with respect to his, her, or its fiscal obligations,[32] and (6) remedies for when the minister has engaged in improper, abusive, or unlawful conduct.[33]

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27 The problem of taxpayers launching proceedings in the wrong court is hardly unique to the Tax Court; the Federal Court likewise manages its own "flow of unmeritorious applications for judicial review in the area of tax" (*JP Morgan*, infra note 33, at paragraph 29). On the subject of superior court proceedings that are dismissed on the basis that they raise matters properly dealt with in the Tax Court or the Federal Court, see Sherman, supra note 2, notes on subsection 169(1).

28 Sherman, supra note 2, notes on subsection 220(3.1) (bibliography and examples); see also *Sweetman v. The Queen*, 2020 TCC 36.

29 Sherman, supra note 2, notes on subsection 169(1) (examples); see also *Lathem v. MNR*, 80 DTC 1136 (TRB) (late-filing of objection covering the Manitoba property tax credit); *Stiege v. The Queen*, 91 DTC 808 (TCC) (Ontario property tax credits); *Corazza v. The Queen*, 92 DTC 1554 (TCC) (late-filing of objection); *Phillips v. The Queen*, 93 DTC 573 (TCC) (transferee liability for disallowed Alberta credits); *Gillespie v. The Queen*, 2003 TCC 538 (Manitoba education property tax credit); and *Jersak v. The Queen*, 2020 TCC 136 (Alberta family employment tax credit and Alberta climate leadership adjustment rebate).

30 Sherman, supra note 2, notes on subsection 171(1) (examples); see in particular *Brooks v. The Queen*, [1995] 1 CTC 2880 (TCC), at 2883 ("I am quite sure that Mr. Brooks has a legitimate claim either against Revenue Canada for refusing to acknowledge that amounts have been withheld or against his former employer for either failing to remit or having withheld, not remitted. However, this is not a matter which the Tax Court of Canada may determine. This would be an action against the Crown which could be brought in the Federal Court of Canada, Trial Division or an action which could brought in the Superior Court in the Province of Ontario for accounting or other matters."); *Anonby v. The Queen*, 2013 TCC 184 (review of prior jurisprudence); and *Andrew v. The Queen*, 2015 TCC 1, at paragraphs 78-80. See also Richard Yasny, "No Credit for Tax Withhold" (2013) 21:7 *Canadian Tax Highlights* 5-6.

31 Sherman, supra note 2, notes on subsection 152(1.1) (bibliography and list of examples); Lubetsky, supra note 12, at 508-10 and 518-28; and *Nagel*, supra note 8, at paragraphs 23-25 (tuition, textbook, and education tax credits).

32 For a review of the leading cases of this genre through to 1999, see Glen Loutzenhiser, "Holding Revenue Canada to Its Word: Estoppel in Tax Law" (1999) 57:2 *University of Toronto Faculty of Law Review* 127-64. For more recent cases, see those listed by Sherman, supra note 2, notes on subsection 169(1). See also *Western Smallware & Stationery Co. Ltd. v. MNR*, 72 DTC 6036 (FCTD) (reliance on prior approval and registration of pension plan); *Boisvert v. The Queen*,

(Notes 32 and 33 are continued on the next page.)

A second problem is the lack of clarity regarding the jurisdictional lines between the different courts when it comes to complex, novel, or unusual issues. Even competent and experienced counsel may be uncertain about the proper forum in which to institute a proceeding, and this can result in protracted and costly procedural wrangling or even the loss of the taxpayer's right to pursue a bona fide dispute altogether.[34] A particularly Kafkaesque illustration of this uncertainty occurred in *Boucher*, where a self-represented taxpayer disputed an assessment on the basis that her employer had withheld the amounts in dispute.[35] The taxpayer apparently first attempted to institute proceedings in the Federal Court. The Federal Court directed her to appeal to the Tax Court. The Tax Court heard and decided the appeal on the merits. The decision was appealed to the Federal Court of Appeal, which—conceding that "[t]here are contradictory decisions in the Tax Court

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91 DTC 748 (TCC) (reliance on CRA guide); *Abe Gitalis Real Estate v. The Queen*, 99 DTC 303 (TCC) (reliance on letter from CRA auditor); *Watanabe v. The Queen*, 99 DTC 822 (TCC) (reliance on CRA publication and verbal instructions with regard to pension contributions); *Moulton v. The Queen*, [2002] 2 CTC 2395 (TCC) (reliance on advice about pension buyback); *Connor v. The Queen*, 2009 TCC 319 (failure of auditor to advise of requirements to deduct support payments); *Gallant v. The Queen*, 2012 TCC 119 (error on a CRA form); *Almadhoun v. Canada*, 2018 FCA 112 (the CRA made a "serious" mistake in issuing child tax benefits to an ineligible refugee claimant who provided all of the information requested about her immigration status); and *Lalwani v. The Queen*, 2019 TCC 180, at paragraph 16 ("The appellant testified that he relied on incorrect advice given to him by CRA officers when he telephoned the Agency's help line. However, this court cannot be influenced by CRA's advice or interpretations."). In the GST context, see *Grondin v. The Queen*, 2015 TCC 169, at paragraphs 20-21; and *Panar v. The Queen*, 2000 CanLII 274 (TCC), at paragraph 16 ("Although it is clear that the Appellant acted to his detriment as a result of the representations made by Revenue Canada employees as to the relevant provisions of the Act, he cannot succeed.").

33 Du Pont and Lubetsky, supra note 4, passim (review of case law); Sherman, supra note 2, notes on subsection 171(1) (examples). See, in particular, *Main Rehabilitation Co. Ltd. v. The Queen*, 2003 TCC 454; aff'd 2004 FCA 403; leave to appeal to SCC dismissed, [2005] 1 SCR xii, at paragraphs 6-8 (FCA) ("[I]t is also plain and obvious that the Tax Court does not have the jurisdiction to set aside an assessment on the basis of an abuse of process at common law or in breach of section 7 of the Charter. . . . [W]hat is in issue in an appeal pursuant to section 169 is the validity of the assessment and not the process by which it is established."); and *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250, at paragraph 83 ("The Tax Court does not have jurisdiction on an appeal to set aside an assessment on the basis of reprehensible conduct by the Minister leading up to the assessment, such as abuse of power or unfairness.").

34 Recent examples include *Dow Chemical*, supra note 3 (the Tax Court, not the Federal Court, has jurisdiction over an adverse ministerial decision under subsection 248(10) of the ITA); *Bakorp Management Ltd. v. Canada*, 2019 FCA 195; rev'g 2013 TCC 94 (the Federal Court, not the Tax Court, has jurisdiction over an adverse ministerial decision under subsection 152(4.3) of the ITA); *Rosenberg c. Agence du revenu du Canada*, 2014 QCCA 1651, and *Rosenberg v. Canada (National Revenue)*, 2015 FC 549 (the Federal Court, not the superior courts, has jurisdiction to enforce an agreement curtailing ministerial audit action); and *Canada v. Interior Savings Credit Union*, 2007 FCA 151; rev'g 2006 TCC 411 (the Tax Court has no jurisdiction to adjudicate an appeal over a credit union's preferred rate account pool).

35 *Boucher v. Canada*, 2004 FCA 47.

on this very point"[36]—held that the Tax Court lacked jurisdiction over whether an employer made withholdings and that the taxpayer should instead have proceeded in the Federal Court.

A third problem is that not even the minister fully understands the jurisdictional lines. As a result, the minister at times either (1) directs taxpayers to the wrong court to resolve a particular issue and then moves to quash the taxpayer's proceedings on jurisdictional grounds,[37] or (2) raises ill-founded jurisdictional challenges against taxpayers who have in fact started proceedings in the correct court.[38] Most disturbing, perhaps, is that the minister's improper jurisdictional challenges have sometimes succeeded.[39]

Fourth, as shown above in the hypothetical case of Pat Leduc, taxpayers seeking a complete resolution to all contentious matters raised in an assessment may need to institute proceedings in multiple courts, which results in the wasteful duplication of proceedings and, in some cases, the effective denial of cost-effective remedies. Even more perniciously, different courts can sometimes have jurisdiction over different aspects of the same dispute, which creates not only the wasteful duplication of proceedings but also the potential for incoherent judgments. For example, the Tax Court has jurisdiction to vacate ITA penalties on the grounds of due diligence, while the Federal Court has jurisdiction to review refusals by the minister to cancel ITA penalties on discretionary grounds. Since taxpayers' diligence in complying with their fiscal obligations is relevant to the discretionary cancellation of penalties, the inquiries performed by the Tax Court and the Federal Court concerning penalties largely overlap, even though the applicable legal tests, the standards of review, and the kinds of evidence permitted will differ between the two courts.[40]

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36 Ibid., at paragraph 9.

37 *Mckim v. The Queen*, 2007 TCC 351, at paragraph 10; *3735851 Canada Inc. v. The Queen*, 2010 TCC 24, at paragraph 11; and *Weinberg Family Trust v. The Queen*, 2016 TCC 37, at paragraphs 10 and 15 ("It is unfortunate that the Canada Revenue Agency misdirected the Appellant to appeal to this Court but that error cannot change the legislation or give this Court jurisdiction to hear this appeal.").

38 *Martens v. The Queen*, 88 DTC 1382 (TCC) (refundable investment tax credit); *Mcfadyen v. The Queen*, 2008 TCC 441, at paragraph 42 (calculation of arrears interest); *Cooper v. The Queen*, 2009 TCC 236, at paragraphs 9 and 19 (calculation of arrears interest); *Shreedhar v. The Queen*, 2016 TCC 254 (calculation of arrears interest; see discussion in Lubetsky, supra note 12, at 522); and *Canada (Attorney General) v. British Columbia Investment Management Corp.*, 2019 SCC 63, at paragraphs 33-42 (liability of British Columbia Investment Management Corporation to federal taxation).

39 *Cheung v. The Queen*, 2006 TCC 171 (assessment to collect overpayment of child tax benefit, the incorrectness of which was acknowledged in *Surikov v. The Queen*, 2008 TCC 161, at paragraph 4); and *Nottawasaga Inn Ltd. v. The Queen*, 2013 TCC 377 (adjustment at issue offset by loss carryback, likely incorrect for reasons discussed in Lubetsky, supra note 12, at 521-23).

40 For a discussion of challenges caused by the interplay between the Tax Court and the Federal Court with regard to penalties, see Michael H. Lubetsky, "T1135 Penalty Relief" (2018) 26:6 *Canadian*

A fifth problem is the gaps left by the allocation of responsibility between the Tax Court, the Federal Court, and the superior courts, such that some issues effectively have no forum for effective adjudication. Well-known examples include disputes over various tax balances (such as unused tuition credits) that do not affect the tax due in the year they are disallowed.[41] Unless those balances fall within the parameters of the determination jurisdiction, they can be adjudicated only at some point in the future when they will have some effect on the amount of tax due. The passage of time, however, puts the taxpayer at an evidentiary disadvantage because of such factors as the misplacement or corruption of records, the fading of memory, and the death or unavailability of witnesses. Moreover, the ongoing uncertainty regarding a taxpayer's tax position can cause issues with creditors or investors, and it can complicate the distribution of an estate or the division of property upon marital breakdown. Although the reference jurisdiction of the Tax Court (and its analogous jurisdiction in the Federal Court) might, in theory, be used to fill these and other jurisdictional gaps, the minister's consent is required to refer a question of fact or law to the Tax Court or the Federal Court—consent that, as a policy matter, is rarely forthcoming.[42]

Sixth, the fragmented jurisdiction over tax matters can make it difficult to settle cases before the Tax Court insofar as the minister will sometimes decline to negotiate, or even to take positions on, matters outside the Tax Court's jurisdiction. For example, with respect to discretionary interest relief on amounts of tax in dispute before the Tax Court, the prevailing procedure today seems to be that the minister will decide on discretionary interest relief only after the tax issues are disposed of and the settlement concluded. As a practical matter, however, it can be difficult for the taxpayer—especially in longstanding disputes in which interest may exceed the amount of tax at issue—to decide whether to accept a settlement without knowing what the settlement will ultimately cost.

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*Tax Highlights* 1-2. Another example of different courts having carriage of different aspects of the same dispute is the following: If the minister reassesses provincial tax as a direct consequence of a federal adjustment and raises the provincial GAAR (though not the federal GAAR) as an alternative basis for the same provincial tax, the Tax Court will have jurisdiction over the primary assessment, and the applicable superior court may have jurisdiction over the alternative basis. See the pleadings in *Sim v. The Queen*, TCC docket no. 2015-2326(IT)G, and *Vysniauskas v. The Queen*, TCC docket no. 2015-2268(IT)G (both cases closed).

Yet another example is the following: If a taxpayer wants to sue the CRA for damages for intentionally issuing an inflated or unfounded assessment, the taxpayer must first seek to have the assessment vacated in the Tax Court before launching a civil claim in either the Federal Court or a superior court. See *Canada v. Roitman*, 2006 FCA 266; leave to appeal to the Supreme Court of Canada dismissed, [2006] 2 SCR xi; Du Pont and Lubetsky, supra note 4, at 115-16; and Fazel, supra note 4, at 609-10.

41 See sources cited supra note 31.

42 See supra note 12.

## The Origin of the Fractured Jurisdiction

A review of the evolution of the Tax Court, the Federal Court, and the superior courts reveals that the current attribution of jurisdiction over income tax matters has resulted from incremental decisions over a period of decades rather than from a thoughtful consideration of what kinds of disputes today belong in which court. Such a review reveals, in particular, the following factors:

- The Tax Court (like the various iterations of the board before it) has a long history of deciding appeals over matters that today are generally considered to fall outside the appellate jurisdiction—sometimes in obiter, sometimes on implied consent of the taxpayer and the minister. Matters adjudicated by the board and the Tax Court over the years have included (1) the determination of amounts available for carryover or other tax balances,[43] (2) collection issues,[44] (3) entitlement to refund interest,[45] and (4) provincial income tax issues.[46]

43 *Okalta Oils v. MNR*, 53 DTC 323 (TAB) (appeal dismissed on merits); aff'd 55 DTC 1029 (Ex. Ct.) (appeal dismissed on merits); aff'd on jurisdictional grounds [1955] SCR 824 (oil-drilling and exploration credit); *Joshi v. The Queen*, 2003 TCC 615 (tuition and moving credits; see discussion in Lubetsky, supra note 12, at 508-9); *Interior Savings* (TCC), supra note 8 (preferred rate account); and *Bakorp* (TCC), supra note 34 (adjustment under subsection 152(4.3) of the ITA).

44 See *Anonby*, supra note 30 (discussion of line of cases reversed by *Neuhaus v. Canada*, 2002 FCA 391, and *Boucher*, supra note 35).

45 *Luks v. MNR*, 57 DTC 384 (TAB), at 385 (claim for refund interest dismissed on merits); *Gauthier v. MNR*, 59 DTC 463 (TAB) (dispute over refund interest rate dismissed on merits); *Jugloff Estate v. MNR*, 59 DTC 525 (TAB) (same); *Bromley v. MNR*, 62 DTC 108 (TAB), at 114-16 (obiter dicta); *McMillen Holdings v. The Queen*, 87 DTC 585 (TCC), at 585-88 (obiter dicta) ("Both counsel agreed that the trial should proceed on its merits and subsequently they would submit written arguments in respect of the Court's jurisdiction."); *Yaremy v. The Queen*, [2000] 1 CTC 2393 (TCC), at paragraph 11 ("Because the Appellant represented himself and the Respondent's preliminary objection is technical, I will briefly respond to some of the Appellant's arguments and explain why I think the Minister has used the correct period to compute refund interest."); and *Lord Rothermere Donation v. The Queen*, 2009 TCC 70 (decision on merits).

46 *Bruser v. MNR*, 67 DTC 56 (TAB) (Alberta gross negligence penalties assessed with federal; resolved on consent); *Curtis v. MNR*, 71 DTC 468 (TAB), at 472 ("[T]he appeal in respect of the 1966 taxation year should be allowed, and the relevant assessment referred back to the Minister for deletion of the commissions totalling $15,000 and the Federal and Provincial penalties."); *Samet v. MNR*, 71 DTC 581 (TAB), at 585-86 (liability of US resident to Ontario income tax); *Hilton v. MNR*, 72 DTC 1073 (TRB) (Alberta versus British Columbia income allocation); *Fraser v. MNR*, 73 DTC 164 (TAB), at 169 ("All penalties [including BC gross negligence penalties] imposed by the respondent are hereby disallowed."); *The Queen v. McKay*, [1975] FC 127 (FCTD), at 148-49 (penalties) ("There remains the validity of the penalties imposed by the Minister pursuant to subsection 56(2) of the Income Tax Act and section 19 of the British Columbia statute. . . . The assessment of penalties for each of the years in question is vacated or set aside."); *Coffey v. MNR*, 77 DTC 198 (TRB) (interprovincial allocation of income); *Hoyt v. MNR*, 77 DTC 270 (TRB) (residence in New Brunswick); *Park v. MNR*, 79 DTC 687 (TRB) (residence in Newfoundland);

- Many of the limits on the appellate jurisdiction that prevent the Tax Court from dealing effectively with the disputes brought before it do not appear expressly in the ITA; they are entirely judge-made. These limits include the following: (1) the nil assessment rule, (2) the bar on granting remedies to taxpayers whom the minister has induced into error regarding their fiscal obligations, (3) the bar on granting remedies for unlawful conduct by the minister in the assessment process, and (4) the bar on reviewing discretionary ministerial decisions that affect the amount of tax assessed (a bar currently under review in *Dow Chemical*).
- Other limits on the appellate jurisdiction have resulted from what appear to be oversights by Parliament (such as providing for various benefits to be delivered through the income tax system without consideration of how disputes over those benefits will be resolved) or conscious decisions to apply band-aid solutions to systematic problems (such as the determination jurisdiction).
- The limits on the appellate jurisdiction have a number of loopholes that can arbitrarily confer on the Tax Court the jurisdiction to decide matters that it ordinarily cannot decide. For example, the Tax Court can decide disputes of provincial residence or interprovincial allocation of income if a taxpayer's position results in an increase (though not a decrease) of the Quebec abatement,[47] and the Tax Court can adjudicate refunds owed to the taxpayer if the refund happens to affect the amount of arrears interest payable on a tax debt in the same taxation year.[48]
- The allocation of exclusive judicial review jurisdiction to the Federal Court was done for reasons that had nothing to do with income tax administration and did not take into account the explosive expansion of judicial review in income tax matters, which did not begin until more than two decades later.

## Pre-1946: Tax Dispute Resolution Under the Income War Tax Act

Under the Income War Tax Act ("the IWTA")[49] before 1946, appeals of income tax assessments would be heard first by the minister (a precursor to today's objection procedure) and subsequently by the Exchequer Court.[50] Certain aspects of the Exchequer Court's jurisdiction back then are related to the Tax Court's jurisdiction today, including (1) the Tax Court's jurisdiction to review discretionary decisions of the minister as part of its appellate jurisdiction (which largely formed the basis of the decision in *Dow*

*Hazelwood*, 89 DTC 5537 (FCTD), at 5543 ("the penalty imposed by the defendant under both federal and provincial statutes is rescinded."); and *Fortin v. The Queen*, 1998 CanLII 221 (TCC) (Ontario versus Newfoundland residence).

47 *The Queen v. Lachance*, 94 DTC 6360 (FCA).

48 *Cooper*, supra note 38.

49 Income War Tax Act, RSC 1927, c. 97, as amended.

50 Gordon Bourgard and Robert McMechan, "The History of Tax Appeals," in *Tax Court Practice* (Toronto: Thomson Reuters) (looseleaf), vol. 2, chapter 22, at 4-6.

*Chemical*);[51] (2) its jurisdiction (or lack thereof) to order the repayment of refunds and adjudicate refund interest ("the refund jurisdiction"); and (3) its judicial review jurisdiction (or, arguably, lack thereof).

Concerning the review of discretionary decisions in the 1930s, Parliament began adding to the IWTA provisions that made numerous matters, including various deductions and allowances (such as depreciation and depletion), subject to ministerial discretion.[52] While many of these discretionary provisions were enacted to enable the minister to show leniency to taxpayers on equitable grounds, such leniency was rarely extended, and thus "[d]iscretion came to be regarded . . . as a taxing power rather than as a means of alleviating unfair burdens in specific cases."[53] A considerable debate took place before the courts over the degree to which the Exchequer Court could review the discretionary decisions by the minister that affected how much tax was due. Eventually, in *Pioneer Laundry*[54] and *Wrights' Ropes*,[55] the Privy Council held that the Exchequer Court could indeed review such discretionary decisions as part of its appellate jurisdiction. However, the standard of review over such decisions, as developed by the case law, was deferential, allowing for judicial intervention only when the minister had failed to exercise his discretion "on proper legal principles" and "in a fair and honest manner" and had, instead, exercised that discretion "against sound and fundamental principle," "arbitrarily or fancily," or after "tak[ing] into account matters which are not proper."[56] Notwithstanding the deferential standard of review, however, appeals against the minister's discretionary determinations under the IWTA became quite voluminous.[57]

In terms of the refund jurisdiction, section 66 of the IWTA conferred on the Exchequer Court the exclusive jurisdiction to "hear and determine all questions that may arise in connection with any assessment," as well as to "make any order as to payment of any tax, interest or penalty . . . as to the said Court may seem right and proper." Notwithstanding these apparently broad provisions, the Exchequer Court held that a taxpayer could *not* demand a tax refund in the context of an appeal of an assessment

51 *Dow Chemical*, supra note 3, at paragraphs 100-44.

52 H. Heward Stikeman, "Taxation Law: 1923-1947" (1948) 26:1 *Canadian Bar Review* 308-33, at 319-20; and Bourgard and McMechan, supra note 50, at 6.

53 Stikeman, supra note 52, at 320 and 333.

54 *Pioneer Laundry and Dry Cleaners, Ltd v. Minister of National Revenue*, [1940] AC 127 (PC).

55 *Minister of National Revenue v. Wrights' Canadian Ropes Limited* (1946), 2 DTC 927 (PC).

56 Stikeman, supra note 52, at 329.

57 Ibid., at 328 (list of leading cases), to which might be added *National Pet Corp. v. MNR* (1942), 2 DTC 580 (Ex. Ct.) (depreciation and depletion allowances); *D.R. Fraser & Company v. MNR* (1948), 49 DTC 521 (PC) (depletion); *Minister of National Revenue v. McCool*, [1950] SCR 80 (depletion); *Joggins Coal Co. Ltd. v. The Minister of National Revenue*, [1950] SCR 470 (depletion allowance); *McDougall Estate v. MNR*, 50 DTC 775 (Ex. Ct.) (depletion); and *Stock Exchange Building Corp. Ltd. v. Minister of National Revenue*, [1955] SCR 235 (depreciation). See also the sources cited infra note 77.

but, rather, had to commence, as a separate procedure, a petition of right.[58] Although the Exchequer Court had jurisdiction over petitions of right against the federal Crown, a petition could not be joined with an appeal of an assessment, because (1) a petition of right required as a preliminary step the obtaining of a "fiat" from the governor general and the payment of a petition fee,[59] and (2) an assessment from the minister was presumed valid and binding, and thus a petition of right could be commenced only after the assessment had been set aside through the appeal process.[60] As a practical matter, therefore, the appellate jurisdiction under the IWTA did *not* encompass a refund jurisdiction.

Concerning the judicial review jurisdiction, the law of judicial review was far less developed than it is today, and reported cases of proceedings against the minister (in any court) for writs of certiorari, mandamus, or prohibition with respect to the exercise of civil income tax powers were apparently non-existent during the period of the IWTA. Perhaps the most germane case from the period was *Nanaimo Community Hotel*,[61] decided in 1945. In this case, a taxpayer sought a writ of certiorari in the superior court against an adverse decision of the "board of referees," which was constituted in accordance with the Excess Profits Tax Act, 1940. The board of referees exercised powers on behalf of the minister to determine a taxpayer's "standard profits," any amount in excess of which was subject to tax.[62] The taxpayer sought to quash the board's decision on essentially procedural grounds—specifically, on the grounds that the board had acted without a quorum and had denied the taxpayer the opportunity to make full submissions. In a 3-2 decision, the BC Court of Appeal held that the Exchequer Court had exclusive jurisdiction to hear the matter by virtue of section 66 of the IWTA (which was incorporated by reference into the Excess Profits Tax Act), and thus the petition for a writ of certiorari in the superior court must be struck. In their reasoning, the judges in the majority held that the Exchequer Court, although its constituting legislation did not state as much, had the jurisdiction to grant certiorari in federal fiscal matters and thus could review any legal or procedural failings in the board of referees' decision. Presaging the debate that would take place some 60 years later over whether the Tax Court can vacate assessments on the basis of unlawful conduct by the minister, the justices in the majority also suggested that the appellate jurisdiction of the Exchequer Court may itself have been sufficiently broad to encompass the procedural challenges made by the taxpayer.[63]

58 *Hatch v. MNR* (1938), 1 DTC 447 (Ex. Ct.), at 455; and *Jason Mines v. MNR*, 52 DTC 1056 (Ex. Ct.), at 1058.

59 Petition of Right Act, RSC 1927, c. 158, sections 4-5.

60 *Davidson v. MNR* (1945), 2 DTC 718 (Ex. Ct.), at 719; and *Subsidiaries Holding Co. Ltd. v. MNR*, 56 DTC 1141 (Ex. Ct.), at 1146-48.

61 *Nanaimo Community Hotel v. Canada (Board of Referees)*, [1945] CTC 125 (BCCA).

62 Excess Profits Tax Act, 1940, SC 1940, c. 32.

63 *Nanaimo Community Hotel*, supra note 61, at 130-31 (Robertson JA) and 160-61 (Smith JA).

Even after *Nanaimo Community Hotel*, however, there seem to be no reported cases of the Exchequer Court hearing or deciding a proceeding that sought the issuance of a writ of mandamus, certiorari, or prohibition against the minister with respect to the exercise of civil powers pertaining to income tax administration. Whether the Exchequer Court would even have had jurisdiction over such a hypothetical proceeding remained an unsettled question for which authorities might have been found on both sides.[64] As discussed below, judicial review proceedings against the minister became a significant part of the income tax dispute resolution system only after (1) the transformation of the Exchequer Court into the Federal Court in 1970, (2) the *Nicholson* decision of the Supreme Court of Canada in 1977,[65] (3) the supplanting of the prerogative writs with "judicial review" proceedings in 1990, and (4) the enactment of the fairness provisions in 1991.

## 1946-1950: The Creation of the Income Tax Appeal Board and the Post-War Tax Reform

Parliament undertook a major overhaul of Canada's income tax regime following the Second World War in order to address various points of dissatisfaction, which included both the discretionary nature of the regime[66] and the ineffectiveness of the Exchequer Court (in which it was ponderous and costly to pursue litigation) as a forum for hearing tax appeals in first instance.[67]

Consequently, in 1946, the IWTA was amended to provide for the establishment of the Income Tax Appeal Board. This board was a court of record that would provide taxpayers with a relatively informal, inexpensive, and independent forum in which to appeal

64 *Belleau v. Canada (Minister of National Health and Welfare)*, [1948] Ex. CR 288 (per headnote: "[T]he Minister of National Health and Welfare is not an officer of the Crown within the meaning of section 30(c) of the *Exchequer Court Act*," and thus "the actions done by the Minister of National Health and Welfare and those by the Chief of the Narcotic Branch thereof acting upon the directions of the Minister in the administration of the Opium and Narcotic Drug Act, are not subject to review by the Exchequer Court if done in an administrative capacity."); *Pouliot v. Canada (Minister of Transport)*, [1965] 1 Ex. CR 330 (Exchequer Court had no jurisdiction to issue a writ of certiorari against the minister of transport); and *Jones et Maheux v. Gamache*, [1969] SCR 119 (Exchequer Court had jurisdiction to issue a writ of mandamus against the minister of transport; holding in *Pouliot* arguably reversed).

65 *Nicholson v. Haldimand-Norfolk Regional Police Commissioners*, [1979] 1 SCR 311.

66 John Willis, "Recent Trends in Canadian Income Tax Law" (1951) 9:1 *University of Toronto Law Journal* 42-68, at 47-48; and Bourgard and McMechan, supra note 50, at 7. For an extended critique, see the submissions and testimony of Gunnar Thorvaldson (then a Manitoba MLA) on behalf of the Income Tax Payers Association in Canada, Senate, *Proceedings of the Special Committee on the Income War Tax Act and Excess Profits Tax Act*, 20th Parl., 1st sess., no. 6, December 11, 1945, at 293-321.

67 Stuart Thom, "Appeal Procedure Under the Income Tax Act," address delivered to the 32d Annual Meeting of the Canadian Bar Association, September 20, 1950, at 2; Willis, supra note 66, at 44-45; and 20th Century Symposium, supra note 4, at 136.

assessments before going to the Exchequer Court.[68] The 1946 reform also provided for the creation of a second independent body—to be called the Income Tax Advisory Board—with the mandate to review the minister's discretionary decisions at the objection stage.[69] This second board was to be created to address the concern that the deferential standard of review applied to discretionary decisions on appeal offered insufficient protection for taxpayers.[70]

The Income Tax Advisory Board was never constituted, however, and two years later, with the overhaul of the IWTA and its transformation into the Income Tax Act in 1948 ("the ITA (48)"),[71] almost all of the minister's discretionary powers in the determination of tax were repealed and replaced with either specific factual criteria or standards based on reasonability.[72] Consequently, in a dispute with the minister over (for example) depreciation allowance, the Income Tax Appeal Board or the Exchequer Court would, in the exercise of their appellate jurisdiction, simply determine whether the amount of the allowance was "reasonable" without deference to the minister's opinion.[73]

The Income Tax Appeal Board commenced hearing income tax appeals in 1949 and briefly enjoyed exclusive jurisdiction over appeals in first instance, with the Exchequer Court hearing appeals from the board de novo.[74] The following year, however, Parliament amended the ITA (48) to allow taxpayers to bypass the board and appeal directly to the Exchequer Court.[75] The minister of finance (future Supreme Court of Canada Justice Douglas Abbott) explained that the amendment aimed to address "important cases" in which a taxpayer anticipated that a case was "going to the exchequer court anyway, no matter what the decision of the income tax appeal board may be."[76]

For appeals related to taxation years before 1948, the board transitionally continued to review the minister's discretionary decisions in accordance with the principles set out by the House of Lords in *Pioneer Laundry* and *Wrights' Ropes*.[77] Read as a whole,

68 Stikeman, supra note 52, at 330; and Bourgard and McMechan, supra note 50, at 8-9.

69 Bourgard and McMechan, supra note 50, at 10.

70 Canada, House of Commons, *Debates*, July 24, 1946, at 3825-26 (Abbott).

71 SC 1948, c. 52.

72 Willis, supra note 66, at 47-48; Bourgard and McMechan, supra note 50, at 11.

73 Stikeman, supra note 52, at 331.

74 Bourgard and McMechan, supra note 50, at 11-12. That appeals to the Exchequer Court were heard de novo was decided, on the basis of a textual analysis of the relevant provisions in the ITA (48), in *Goldman v. MNR*, [1951] Ex. CR 274, the reasoning of which was endorsed by the Supreme Court of Canada in *Smith v. Minister of National Revenue*, [1965] SCR 582.

75 SC 1950, c. 40, section 20; Bourgard and McMechan, supra note 50, at 12.

76 Canada, House of Commons, *Debates*, May 18, 1950, at 2617. See also Canada, Senate, *Proceedings of the Standing Committee on Banking and Commerce*, 21st Parl., 2d sess., June 2, 1950, at 24 (testimony of A.K. Eaton of the Department of Finance).

77 *Anger v. MNR*, 49 DTC 65 (TAB) (depreciation); *MacDonald Estate v. MNR*, 50 DTC 109 (TAB) (designation and valuation of gift); *Buehler v. MNR*, 50 DTC 119 (TAB) (designation and valuation

however, the 1946 and 1948 reforms confirm that Parliament envisioned that the newly created Income Tax Appeal Board would serve as a tribunal of independent and primarily non-deferential review. Such independence was consistent with the broader policy objectives of ensuring both that the board would provide an effective check on the minister's powers and that its reputation would be that of an independent forum not beholden to the minister.[78]

One difference between the Income Tax Appeal Board and the Exchequer Court with respect to jurisdiction over tax appeals concerned the refund jurisdiction. Section 92 of ITA (48)—apparently in order to clarify the ambiguities previously left by former section 66 of the IWTA—provided that "[the Exchequer] court may, in delivering judgment disposing of an appeal, order payment or repayment of tax, interest, penalties or costs by the taxpayer or the Minister." This provision was carried over to section 101 of the 1952 Income Tax Act ("the ITA (52)")[79] and thereafter to subsection 178(1) of the ITA, where it remained (as discussed below) until 1988.

Although no provision ever conferred an analogous refund jurisdiction on the board, the minister, as a matter of policy, sometimes elected not to raise jurisdictional challenges to taxpayers initiating appeals before the board over refunds. In *Otty*, for example,

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of gift); *Williamson v. MNR*, 50 DTC 147 (TAB) (chief occupation); *Dunkin v. MNR*, 50 DTC 194 (TAB) (depreciation; reference to amendments); *Colquhoun v. MNR*, 50 DTC 216 (TAB) (bad debt reserve); *McNeill v. MNR*, 50 DTC 258 (depreciation); *Acme Company v. MNR*, 50 DTC 332 (TAB) (disallowance of expense); *Georgia Hotel v. MNR*, 50 DTC 340 (TAB) (depreciation); *Mr. O v. MNR*, 50 DTC 368 (TAB) (depreciation); *Delta Flour Mills v. MNR*, 50 DTC 377 (TAB) (depreciation); *L'Imprimerie du Saguenay v. MNR*, 50 DTC 414 (TAB) (depreciation); *Stewart v. MNR*, 50 DTC 449 (TAB) (depreciation); *Hearn Brothers Lumber v. MNR*, 50 DTC 467 (TAB) (depreciation); *Helm v. MNR*, 51 DTC 39 (TAB) (depreciation); *No. 7 v. MNR*, 51 DTC 48 (TAB) (depreciation); *Ontario Sand and Gravel v. MNR*, 51 DTC 134 (TAB) (depreciation); *Simpson's Ltd. v. MNR*, 51 DTC 343 (TAB); rev'd 53 DTC 1127 (Ex. Ct.) (depreciation); and *Stovel Press v. MNR*, 51 DTC 295 (TAB); rev'd 53 DTC 1135 (Ex. Ct.) (depreciation).

78 Interestingly, with regard to subsection 13(2) of the ITA (48)—which was one of the few discretionary provisions that remained—the review of the minister's discretionary decisions performed by the board or the Exchequer Court evidenced little deference to the minister's determinations. See *No. 76 v. MNR*, 53 DTC 1 (TAB), at 3; rev'd 54 DTC 1062 (Ex. Ct.), at 1067 ("[T]he repeal by the *Income Tax Act 1948* of the provision to the effect that the determination of the Minister should be final and conclusive indicates that it was Parliament's intention that the decision of the Minister under subsection (2) of section 13 is to be reviewed on an appeal to this Court."); and *Grieve v. MNR*, 59 DTC 1186 (Ex. Ct.), at 1191-92.

The minister also enjoyed, under subsection 21(4) of the ITA (48), the discretion to allocate income from one spouse to another if they "were partners in a business." Appeals of assessments under this provision generally focused on the factual question, reviewed de novo, of whether the spouses were in fact partners in a business. On the other hand, if they were, the minister's decision to reallocate income was not considered reviewable. See *Klamzuski v. MNR*, 52 DTC 51 (TAB); *No. 246 v. MNR*, 55 DTC 188 (TAB); and *Wertman v. MNR*, 64 DTC 5158 (Ex. Ct.).

79 Income Tax Act, 1948, RSC 1952, c. 148, as amended. (Note that, somewhat counterintuitively, the ITA (52) was officially known as the "Income Tax Act, 1948" while the ITA (48) was officially known as the "Income Tax Act.")

where a taxpayer disputed an assessment on the grounds that he had made a $400 payment that had not been credited, the court documented the following exchange with the minister's counsel:

> After hearing the evidence brought forward by the taxpayer's representative and counsel for the Minister, I raised the question of the Board's jurisdiction before the commencement of argument, as the appellant was not objecting to the amount on which the tax had been assessed for 1949 but was objecting to the amount which the Minister claimed was the balance which the taxpayer still owed to the Crown. I pointed out to the parties that I doubted whether the Board had jurisdiction to hear a case of this nature, as the point involved was really one of collection of taxes and not of the manner in which a taxpayer had been assessed under the provisions of the Act.
>
> Counsel for the Minister advised me that, while he was not aware of what had been said to the taxpayer by the officials at the local office with respect to appealing the 1949 assessment, nevertheless the matter had been considered by officials at Head Office and it had been decided to raise no technical objection against the appeal, since it was felt that there should be some redress when a taxpayer was not satisfied with the department's efforts to deal with the matter in a case such as this. While continuing to express doubt as to the Board's jurisdiction, I unfortunately did not deal with the matter immediately, and the issue was not settled, with the result that argument proceeded on behalf of both parties without any argument being advanced by either party in connection with the jurisdiction of the Board.[80]

The board, in what was no doubt an exasperating result for the taxpayer, concluded that "the taxpayer should be given credit for the payment of the $400 in question," but it went on to dismiss the appeal, on the grounds that it was "convinced" that "this Board has no jurisdiction to deal with the matter."[81]

The board, in its early days, also adjudicated some appeals over the amount of refund interest payable to a taxpayer following an assessment.[82] In *Bromley*,[83] however, the board concluded that it had no jurisdiction to decide these kinds of cases either.

The difference in jurisdiction between the board and the Exchequer Court with respect to the refund jurisdiction passed largely without note until the 1987 case of *McMillen Holdings*,[84] discussed below.

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80 *Otty v. MNR*, 52 DTC 163 (TAB), at 163-64.

81 Ibid., at 166-67.

82 See sources cited supra note 45.

83 *Bromley*, supra note 45. See also *McGowan v. MNR*, 62 DTC 492 (TAB), in which the taxpayer challenged an assessment that applied a refund to an earlier year's tax liability that was alleged extinguished by a bankruptcy, and the Tax Appeal Board ruled that the taxpayer had to seek a remedy in the Exchequer Court or in the bankruptcy courts; and *Millinoff v. MNR*, 63 DTC 297 (TAB) (rate of interest on refund).

84 *McMillen Holdings*, supra note 45.

### 1950: The No Estoppel Rule

In 1950, the Exchequer Court issued its seminal decision in *Woon*.[85] *Woon* concerned a taxpayer who embarked on a series of transactions to acquire a company in reliance on a ruling, provided by the commissioner of taxation, that the transactions would not give rise to a deemed dividend under section 19.1 of the IWTA (an ancestor of subsection 84(2) of today's ITA). After the transaction had been concluded, the minister repudiated the ruling and issued an assessment that increased the taxpayer's income more than tenfold. The taxpayer appealed the assessment on the grounds, inter alia, that the minister was "estopped from alleging that section 19.1 is applicable."[86] After a review of the authorities, Cameron J held that "the assessment here under appeal was made pursuant to the terms of a statute and that, therefore, it is not open to the appellant to set up an estoppel to prevent its operation."[87]

*Woon* concerned a taxpayer assisted by sophisticated counsel who apparently enjoyed a direct line to the commissioner of taxation. The case seemingly did not anticipate the exponential increase in the complexity of income tax legislation or the extent to which ordinary taxpayers today rely on CRA guidance to ensure compliance. Nevertheless, the ratio in *Woon* has been applied over the years in a wide variety of cases—sometimes with expressions of considerable regret from the Tax Court judges[88]—in which individuals, acting without legal assistance, have taken tax positions pertaining to complex provisions of the ITA in reliance on published guidance, forms, or representations from CRA officials that turn out to be incorrect.[89] And although the minister may (and, in fact, routinely

85 *Woon v. MNR*, 50 DTC 871 (Ex. Ct.). While generally considered a seminal case, *Woon* was not the first Canadian decision to hold that estoppel cannot override the express provisions of tax legislation. See also *Western Vinegars v. MNR* (1937), 1 DTC 390 (Ex. Ct.), at 391; and *Attorney-General of Canada v. C.C. Fields & Company*, 1943 CanLII 68 (ONSC); rev'd 1943 CanLII 97 (ONCA).

86 *Woon*, supra note 85, at 872.

87 Ibid., at 874.

88 *Boisvert*, supra note 32, at 752 and 756; *Watanabe*, supra note 32, at 823; *Moulton*, supra note 32, at paragraph 11 ("The appellant argues with great conviction that he should be entitled to rely on advice given by the CCRA and relied upon by him in good faith. I agree that the result may seem a little shocking to taxpayers who seek guidance from government officials whom they expect to be able to give correct advice. Unfortunately such officials are not infallible and the court cannot be bound by erroneous departmental interpretations. Any other conclusion would lead to inconsistency and confusion."); and *Connor*, supra note 32, at paragraphs 19-20 and 22 ("As sympathetic as these circumstances appear to be, they do not permit me to find that the Additional Amounts are deductible. Mr. Connor is seeking relief for what in effect is an alleged misrepresentation of the law by the CRA. Unfortunately, this is not grounds to provide the deduction that he seeks. . . . The result in this case may be harsh to Mr. Connor, but the relief that he seeks cannot be provided. The appeal will be dismissed.").

89 See sources cited supra note 32.

does) grant interest relief in such situations,[90] the only recourse available to make a taxpayer whole is either an application for a remission order (a process that is "rarely successful and takes years"[91]) or a civil suit for damages in either the Federal Court or a superior court—a difficult and time-consuming process whose cost may well be wholly disproportionate to the amounts at issue.[92]

A particularly disturbing application of *Woon* occurred in *Taylor*,[93] which concerned a taxpayer accused of embezzlement. The investigator at Revenue Canada (the predecessor organization to the CRA) and her supervisor repeatedly offered—to both the taxpayer and his counsel—not to reassess the allegedly embezzled amounts as unreported income if the taxpayer pleaded guilty to criminal charges and paid restitution.[94] After the taxpayer, relying on these commitments, pleaded guilty and paid restitution, Revenue Canada reneged on its promises and reassessed the taxpayer for the full amounts with interest and penalties. The taxpayer appealed to the Tax Court. The court agreed that the requirements for promissory estoppel had been met, but it held that it had no jurisdiction to grant any remedy.

As discussed below, the ratio of *Woon* has been extended to the related doctrines of "officially induced error" and "abuse of process." On the other hand, it has arguably been attenuated in recent years by cases that have held that if the minister concludes a settlement agreement with a taxpayer regarding the amount of tax due in a particular year in the context of a dispute, the agreement may be binding on the minister.[95]

### 1955: The Nil Assessment Rule[96]

In *Okalta Oils*, decided in 1955, the Supreme Court of Canada eviscerated the appellate jurisdiction by establishing the "nil assessment rule." *Okalta Oils* concerned the disallowance by the minister of a credit for oil-drilling and exploration costs. The taxpayer owed no tax for the year because of other deductions, but because the credit could be

90 See *Information Circular* IC07-1R1, "Taxpayer Relief Provisions," August 18, 2017, at paragraph 26; and John A. Sorensen, "A Comprehensive Review of Penalty and Interest Relief Under the Income Tax Act," in *Report of Proceedings of the Sixty-Seventh Tax Conference*, 2015 Conference Report (Toronto: Canadian Tax Foundation, 2016), 41:1-49, at 41:30.

91 Sherman, supra note 2, notes on "Selected Remission Orders."

92 See Fazel, supra note 4, passim; Du Pont and Lubetsky, supra note 4, at 115-16.

93 *Taylor*, 95 DTC 591 (TCC); aff'd 97 DTC 5120 (FCA); leave to appeal to the Supreme Court of Canada dismissed, [1997] 3 SCR xiv. This summary of the *Taylor* case is reproduced in condensed form from Du Pont and Lubetsky, supra note 4, at note 32.

94 The Revenue Canada investigator apparently denied that the offer had been made to the taxpayer, but the court did not believe her testimony (*Taylor*, supra note 93, at 594 (TCC)).

95 *Canada v. CBS Canada Holdings Co.*, 2020 FCA 4, at paragraphs 24-37; and *Rosenberg v. Canada (National Revenue)*, 2016 FC 1376, at paragraphs 79-102 (review of case law). Given these cases, it is possible that a case like *Taylor*, supra note 93, would be decided differently today.

96 This section reproduces, in condensed form, the discussion in Lubetsky, supra note 12, at 506-9.

carried forward, the taxpayer appealed the assessment to the Income Tax Appeal Board, and from there to the Exchequer Court and then to the Supreme Court of Canada.

The board and the Exchequer Court both upheld the denial of the oil-drilling and exploration credit on its merits. The taxpayer then appealed to the Supreme Court, which dismissed the appeal from the bench. In very brief reasons that were issued subsequently, the court explained that the term "assessment" in section 69a of the IWTA (predecessor to section 169 of the ITA) referred only to an *amount* of tax due, and not the *process* through which an amount of tax due is ascertained. As a result, an assessment that claims no tax is not an assessment for the purposes of section 69a and cannot give rise to a right of appeal. In reaching this conclusion, the Supreme Court did not seem to consider whether denying the taxpayer the opportunity to obtain certainty about its entitlement to the oil-drilling and exploration credit while the matter was still timely promoted effective tax administration and the use of judicial resources, especially given that the board and the Exchequer Court had been perfectly willing and able to decide the case on its merits.[97]

The board and the Tax Court, who have borne for decades the disheartening task of advising taxpayers that justice is not available in their courtrooms because of the nil assessment rule, have repeatedly tried to prompt a reconsideration of *Okalta Oils*.[98] These efforts have been in vain, however, and the nil assessment rule has become settled law even though it leaves significant gaps in the tax-dispute-resolution system that cause traps and headaches for taxpayers.[99] The reference jurisdiction, established in 1971, had the potential to fill in some of these gaps, but it has failed to do so because of the minister's longstanding reluctance to consent to the referral of questions to the Tax Court.[100] As discussed below, Parliament created the determination jurisdiction in 1976—and has incrementally expanded it over the years—in order to fill some of the most pressing gaps created by the nil assessment rule.

It bears noting that in the domain of provincial income tax—which, as discussed below, falls under the jurisdiction of the superior courts—*Okalta Oils* is not binding and the nil assessment rule does not necessarily govern. In *Ocean Nutrition Canada*, for example, which concerned an appeal brought under Nova Scotia's income tax legislation, Robertson J, demonstrating a degree of practical thinking that was not evident in *Okalta Oils*, refused to follow the decision and held that the term "assessment," for the purposes of the provincial counterpart to section 169 of the ITA, included a nil assessment:

97 For a fuller critique of the court's reasoning, see Lubetsky, supra note 12, at 508.

98 The Federal Court of Appeal dashed attempts by the Tax Review Board, the Federal Court Trial Division, and the Tax Court to challenge *Okalta Oils* in *The Queen v. Garry Bowl Ltd.*, 74 DTC 6401 (FCA); rev'g 73 DTC 5525 (FCTD); rev'g 73 DTC 39 (TRB); *The Queen v. Bowater Mersey Paper Company Limited*, 87 DTC 5382 (FCA); rev'g 86 DTC 6293 (FCTD); and *Interior Savings*, supra note 8.

99 In addition to the many cases documented in this chapter, see also Lubetsky, supra note 12, passim.

100 See the discussion supra note 12.

> It strikes me as wrong that the respondent is able to say nil assessment and therefore you have no right of appeal and no jurisdiction to deal with the matter, even where there is significant financial cost associated with it. But had you been liable to pay as little as $10 tax then this right of appeal would exist.
>
> And it strikes me as wrong that because the respondent says the statute did not otherwise deal with this situation, you have no recourse.
>
> I agree that it is a nil assessment, but there was an assessment made. This is to say, I am using the plain wording of the Act, that an appeal may be taken of an assessment in respect of any question relating to the determination of the amount of tax payable. And, it would seem to me that how the province treated the tax credit goes to the heart of the tax payable. And, it seems to me there ought to be a right to appeal and the applicant should not be cut off from that access. This Court has broad jurisdiction in its interpretation of these sections of the Act. So, the right of appeal in this circumstance comes from s. 64(2), the appeal of an assessment question relating to the determination of an amount of tax payable.[101]

## 1963: Dividend-Stripping and Associated Corporation Rules (Bill C-95)

In 1963, Parliament enacted section 138A of the ITA (52). Section 138A contained two anti-avoidance rules that invested the minister with the discretion to issue "directions," namely: (1) that capital receipts be included in income in dividend-stripping transactions, and (2) that corporations be deemed to be associated with each other for the purposes of determining their eligibility for preferential tax rates applicable to smaller businesses.[102] The re-introduction of ministerial discretion into tax determination provoked vigorous objections from both government and opposition parliamentarians[103] as well as from the Canadian tax bar.[104] Section 138A was, however, ultimately adopted

101 *Ocean Nutrition Canada Ltd. v. Nova Scotia*, 2011 NSSC 493, at paragraphs 3-5.

102 SC 1963, c. 21, section 26.

103 Canada, House of Commons, *Debates*, June 19, 1963, at 1353-55 (Nowlan: "Have you ever heard, Mr. Speaker, of a more arbitrary power given to a minister, even to our genial friend the Minister of National Revenue (Mr. Garland)? Just consider what decisions he will have to make in this connection. This is power to tax, with a vengeance. . . . It is the most outstanding example of arbitrary power being vested in a minister that I have encountered since I first came to this house.") and 1353 (Diefenbaker: "Administrative lawlessness."); June 25, 1963, at 1571 (Benson: "I have learned in the past few days, Mr. Speaker, as a result of listening to the discussions in this house, that ministerial discretion here seems to be almost as unpopular as ministerial indiscretion at Westminster."); July 19, 1963, at 2424 (Horner); October 30, 1963, at 4192-93 (Nowlan); and October 31, 1963, at 4249 (Gordon). Canada, Senate, *Debates*, November 20, 1963, at 733-34 (McCutcheon); November 21, 1963, at 752-53 (Campbell); and November 26, 1963, at 761-62 (Thorvaldson: "[T]he rule of law regarding certain transactions has been abrogated, and it has been substituted by what is called 'ministerial discretion' ") and 771 (Bouffard).

104 Canada, House of Commons, *Debates*, October 24, 1963, at 3953 (Lambert); and Canada, Senate, *Debates*, November 26, 1963, at 762 (Thorvaldson).

on the understanding that it would serve as a temporary expedient that would be replaced in the context of the broader tax reform that would take place after the completion of the work of the Carter commission.[105]

Parliament was aware that taxpayers seeking to challenge a discretionary ministerial determination under the new provisions could do so on appeal to the Tax Appeal Board or Exchequer Court. However, Parliament was also aware that such challenges would be very difficult to make out because of the highly deferential standard of review.[106] Consequently, subsection 138A(3) authorized the board or the Exchequer Court to vary a direction, or else vacate a ministerial direction if it found certain facts to be present. The question of whether this non-deferential standard of review sufficiently protected taxpayers against the improper exercise of ministerial discretion came up repeatedly in the course of Parliament's deliberations, with Minister of Finance Walter Gordon assuring the House of Commons that the Tax Appeal Board or the Exchequer Court would have the ability to conduct its own, de novo assessments of the relevant facts and to vacate the minister's decisions if it disagreed with them.[107]

The solutions proposed by the Carter commission to address dividend stripping and the misuse of the preferential tax rates for smaller businesses (which included a 50 percent flat corporate tax)[108] did not find favour, and thus section 138A of the ITA (52) was carried over as subsections 247(1) to (3) of the ITA. The discretionary aspects of these provisions remained in effect until 1986 in respect of dividend-stripping,[109] and until 1988 in respect of associated corporations.[110] Appeals of ministerial directions made under the "associated corporation" rules, in particular, were voluminous over the two decades that the provision remained in force.[111]

105 Canada, House of Commons, *Debates*, July 22, 1963, at 2493 (Gordon); October 16, 1963, at 3637 (Gordon); October 30, 1963, at 4196 (Gordon); and October 31, 1963, at 4249 (Gordon). See also Canada, Senate, *Debates*, November 26, 1963, at 762 (Thorvaldson).

106 Canada, House of Commons, *Debates*, June 19, 1963, at 1354-55 (Nowlan); June 25, 1963, at 1571 (Benson); October 24, 1963, at 3952-53 (Lambert); October 30, 1963, at 4192-93 (Nowlan); and October 31, 1963, at 4249 (Gordon and Williams).

107 Canada, House of Commons, *Debates*, October 31, 1963, at 4249 (Gordon). Similar comments were made by Senator Salter Hayden, presenting the legislation to the Senate; see Canada, Senate, *Debates*, November 20, 1963, at 726 (Hayden).

108 See the presentation of Stuart D. Thom on the subjects of "integration" and "retained surplus" in the "Taxation of Corporations" panel in *Report of Proceedings of the Nineteenth Tax Conference*, 1967 Conference Report (Toronto: Canadian Tax Foundation, 1967), 39-69, at 55-56.

109 In 1986, subsection 247(1) was reformulated so as to replace the discretionary designation with a reasonability test, similar to the reforms of 1948 (SC 1986, c. 6, sections 125(1) and (3)). This provision, along with subsection 247(2), was repealed altogether in 1988, with the enactment of GAAR (SC 1988, c. 55, section 187(1).

110 SC 1988, c. 55, section 187(2).

111 *Kitchen Manufactured Homes v. MNR*, 68 DTC 610 (TAB); *Doris Trucking Co. Ltd. v. MNR*, 68 DTC 5204 (Ex. Ct.); *Alpine Furniture Co. Ltd. et al. v. MNR*, 68 DTC 5338 (Ex. Ct.); *Grimshaw*

## 1965: The Creation of the Late-Filing Jurisdiction (Bill C-118)

In 1965, Parliament enacted section 61A of the ITA (52), which allowed the Tax Appeal Board or the Exchequer Court to authorize a taxpayer to file an objection or an appeal beyond the usual time limit if the failure to act in a timely fashion was caused by "the death, incapacitating sickness or bankruptcy of a taxpayer."[112] Section 61A was carried over into section 167 of the ITA in 1971, which relaxed the criteria and authorized the board or the Exchequer Court to grant an extension whenever "in its opinion the circumstances of the case are such that it would be just and equitable to do so."[113]

Under section 61A of the ITA (1952), applications to late-file an objection or appeal would be heard de novo on the basis of evidence filed by the taxpayer. Such applications could not involve the review of any prior decision by the minister, since the minister at

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*Planing Mills v. MNR*, 69 DTC 207 (TAB); *Baycast Products Ltd. and Bay Bronze (1962) Ltd. v. MNR*, 69 DTC 267 (TAB); *Provident Finance v. MNR*, 69 DTC 311 (TAB); *Jordans Rugs et al. v. MNR*, 69 DTC 5290 (Ex. Ct.); *Abbotsford Building Suppliers v. MNR*, 70 DTC 1215 (TAB); *Ambassador Ventures v. MNR*, 70 DTC 1233 (TAB); *MNR v. Howson & Howson Ltd. et al.*, 70 DTC 6055 (Ex. Ct.); *Holt Metal Sales of Manitoba Ltd. et al. v. MNR*, 70 DTC 6108 (Ex. Ct.); *Heath & Sherwood Drilling v. MNR*, 71 DTC 338 (TAB); *Dominion Freehold Ltd. v. MNR*, 71 DTC 5261 (FCTD); *Loewen Enterprises Ltd. v. MNR*, 72 DTC 6298 (FCTD); *Classic's Little Books Inc. v. The Queen*, 73 DTC 5096 (FCTD); *The Queen v. Bobbie Brooks (Canada) Ltd.*, 73 DTC 5357 (FCTD); *Levitt-Safety (Eastern) Ltd. et al. v. MNR*, 73 DTC 5374 (FCTD); *Furnasman Ltd. et al. v. MNR*, 73 DTC 5599 (FCTD); *Pay-Less Meat Market Ltd. et al. v. MNR*, 73 DTC 5102 (FCTD); *Capital Garment Co. Inc. v. MNR*, 74 DTC 1164 (TRB); *Kitchener News Leaseholds v. MNR*, 74 DTC 1226 (TRB); *First Pioneer Petroleums Ltd. v. MNR*, 74 DTC 6109 (FCTD); *Industrial Trailer Rentals Ltd. v. The Queen*, 74 DTC 6577 (FCTD); *Debruth Investments Ltd. v. MNR*, 75 DTC 5012 (FCA); *The Queen v. Arthill Enterprises*, 75 DTC 5419 (FCTD); *Sandell Developments v. MNR*, 76 DTC 1293 (TRB); *Leggat Leasing (Hamilton) v. MNR*, 78 DTC 1035 (TRB); *A Schiel Construction v. MNR*, 79 DTC 366 (TRB); *The Queen v. Decker Contracting Ltd.*, 79 DTC 5001 (FCA); *The Queen v. Lenco Fibre Canada Corp.*, 79 DTC 5292 (FCTD); *Les Presses JMC v. MNR*, 81 DTC 872 (TRB); *Honeywood Limited et al. v. The Queen*, 81 DTC 5066 (FCTD); *The Queen v. Les Magasins Continental Ltée*, 81 DTC 5175 (FCA); *The Queen v. Covertite Limited*, 81 DTC 5353 (FCTD); *Warren Packaging v. MNR*, 83 DTC 1 (TRB); *Jabs Construction Ltd. et al. v. MNR*, 83 DTC 633 (TCC); *Kencar Enterprises Ltd. v. The Queen*, 87 DTC 5450 (FCTD); *Maritime Forwarding Ltd. et al. v. The Queen*, 88 DTC 6114 (FCTD); *Les Installations de l'Est Inc. v. The Queen*, [1990] 2 CTC 503 (FCTD); *Veltri & Son Limited et al. v. MNR*, 91 DTC 862 (TCC); *Rosner Management Inc. v. MNR*, 93 DTC 127 (TCC); *Saratoga Building Corp. et al. v. MNR*, 93 DTC 564 (TCC); and *McAllister Drilling Limited et al. v. The Queen*, 95 DTC 5001 (FCTD).

Ministerial directions issued under the "dividend stripping" rules were seldom issued and thus rarely litigated; however, see *Giguère v. MNR*, 72 DTC 1392 (TRB).

112 SC 1965, c. 18, section 14. Note that jurisdiction over applications to late-file objections lay with the board, not the Exchequer Court (ITA (52), paragraphs 61A(1) and (4)).

113 For discussion of the 1970 reform of the provision, see *Savary Beach Lands Ltd. and Savary Resort Properties Ltd. v. MNR*, 72 DTC 1497 (TRB); and *Tic Toc Tours Ltd. v. MNR*, 81 DTC 660 (TRB).

the time did not have the authority to authorize the late-filing of an objection. As discussed below, that power was conferred only in 1991.[114]

## 1970 Reforms: A New Board and a New Federal Court (Bill C-19/C-72)

In 1970, in two separate initiatives, Parliament replaced the Tax Appeal Board with the Tax Review Board, and the Exchequer Court with the Federal Court.

The reforms of the board aimed primarily to improve its accessibility to taxpayers, as well as to combat the public perception that it acted as an extension of the minister.[115] With respect to the allocation of jurisdiction, however, Parliament largely retained the pre-existing, two-track approach in which the board and the Federal Court Trial Division retained original, concurrent jurisdiction to hear appeals from assessments.[116] The Federal Court Trial Division was to serve as the court of record on tax appeals, while the board—stripped of its status as a court of record and with its procedures simplified—would provide an alternative venue offering more informal and inexpensive adjudication of tax disputes.[117] Appeals from the board would continue to be reheard de novo by the Federal Court Trial Division, and (in a new process) appeals from the Federal Court Trial Division would be heard on the record by the new Federal Court of Appeal.[118] As discussed above, the Federal Court Trial Division continued to enjoy the Exchequer Court's refund jurisdiction according to which it could order the minister to refund tax, interest, or penalties when disposing of an appeal.[119] No such jurisdiction, however, was conferred on the board.

The reforms pertaining to the judicial review jurisdiction—which, ironically, were undertaken for reasons having nothing to do with income tax administration—have had more profound and long-lasting effects on income tax dispute resolution. A key driver of the transformation of the Exchequer Court into the Federal Court was the growth of the federal administrative state, which, in turn, fostered a perceived need to create a uniform body of law to review federal administrative action.[120] To this end, as mentioned above,

114 See *Logan v. MNR*, 78 DTC 1647 (TRB) (explaining that the minister could not accept a late-filed objection without a court order).

115 Bourgard and McMechan, supra note 50, at 7.

116 Ibid., at 16-17.

117 Ibid., at 16-18; K.A. Flanigan, "Tax Review Board: Function and Procedures," in *Report of Proceedings of the Twenty-Fourth Tax Conference*, 1972 Conference Report (Toronto: Canadian Tax Foundation, 1973), 508-18, at 510-12.

118 The official name of the Federal Court of Appeal was the "Federal Court—Appeal Division." However, section 4 of the Federal Court Act authorized the alternative names "Court of Appeal" and "Federal Court of Appeal."

119 ITA (52) section 101, later carried forward to subsection 178(1) ITA.

120 See, generally, Ian Bushnell, *The Federal Court of Canada: A History, 1875-1992* (Toronto: University of Toronto Press, 1997), at 159-62.

section 18 of the newly enacted Federal Court Act conferred on the Federal Court Trial Division exclusive jurisdiction "to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal." As explained in Parliament by Minister of Justice John Turner in 1970, section 18 aimed to address the concern that, with the continued growth of federal administrative tribunals, a single, national court was needed—in place of various superior courts issuing diffuse (and potentially conflicting) decisions—to deal with challenges to orders that produce effects across the country.[121]

Section 28, however, largely pre-empted section 18 by creating a new right of action whereby the Federal Court of Appeal could review and set aside decisions or orders made by a federal board, commission, or other tribunal, except for decisions or orders of an administrative nature that were "not required by law to be made on a judicial or quasi-judicial basis."[122] Section 28 aimed to address concerns that the prerogative writs provided insufficient protection against the misuse of government authority. The Federal Court of Appeal was given first instance jurisdiction over this new right of action, because it was expected to be used primarily against decisions made by multi-person tribunals; as Minister of Justice Turner explained to the House, "it is better psychologically to have a three-man court sit in judgment over a three, five or seven-man board."[123] When a cause of action fell within the parameters of section 28, section 18 did not apply and the Federal Court Trial Division had no jurisdiction over the matter.[124]

Neither section 18 nor section 28 was enacted with a view to resolving income tax-related disputes. As matters stood in 1970, prerogative writ or analogous proceedings against the minister that might have fallen under either section were still very rare and almost never successful. As discussed below, it was through specific provisions in the new ITA, adopted in the following year, that Parliament addressed the handful of reported prerogative writ and analogous cases involving the minister in the 1960s.

As foreseen during the parliamentary proceedings leading to the enactment of the Federal Court Act,[125] the jurisdictional boundary between a prerogative writ proceeding in the Federal Court Trial Division and a section 28 proceeding in the Federal

121 Canada, House of Commons, *Debates*, October 28, 1970, at 678-80 (Turner).

122 Under the law of judicial review as it existed at the time, decision-making powers were broadly classified into those that were "judicial" and "administrative," and "administrative" decisions were sub-classified as "judicial in nature," "quasi-judicial in nature," or "purely administrative." In principle, the courts had no jurisdiction over "purely administrative" decisions. The wording of the new section 28 cause of action reflected this categorization and, essentially, aimed to ensure that "purely administrative" decisions would not be subject to Federal Court of Appeal review. See, generally, *Minister of National Revenue v. Coopers and Lybrand*, [1979] 1 SCR 495, at 500-2.

123 Supra note 121, at 681.

124 Federal Court Act, section 28(3).

125 Bushnell, supra note 120, at 175-81; Canada, House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, 28th Parl., 2d sess., no. 27, May 12, 1970, the brief and testimony of Professor George V. Nicholls.

Court of Appeal was often impossible to identify in practice[126]—a challenge that was further complicated by the different transitional rules that applied to the two sections[127] as well as by the fact that the French version of section 28 was materially different from the English.[128] The line between sections 18 and 28 was arguably moved and further blurred by the Supreme Court of Canada's landmark *Nicholson* decision in 1978, which recognized that administrative decision makers have a general duty of fairness whose breach could be actionable on judicial review.[129] In 1990—following two decades of controversy over the interplay of sections 18 and 28 (as well as other aspects of the Federal Court Act)—the general section 28 right of action was consolidated with the prerogative writs into a single procedure, known ever since as an "application for judicial review."[130] First-instance jurisdiction over applications for judicial review was assigned to the Federal Court Trial Division (except in the case of decisions made by a specified list of federal tribunals, jurisdiction over which remained with the Federal Court of Appeal).[131] This marked a significant expansion of the jurisdiction of the Federal Court Trial Division[132] and set the stage for the growth in judicial review—in tax and other matters—that has since followed.

## 1971: The ITA (Bill C-259)

Parliament transformed the ITA (52) into the ITA in 1971. Among many other innovations, the ITA included a number of new provisions that addressed the relatively small number of reported prerogative writ and analogous case decisions in the 1960s that involved the minister in income tax matters. All of these decisions endorsed a deferential view toward the exercise of the minister's audit and investigatory powers—a view that largely foreclosed the possibility of judicial review under either section 18 or 28 of the newly enacted Federal Court Act. Consequently, the new ITA included a variety of bespoke procedural protections for taxpayers.

126 For illustrations of the difficulty, see *Howarth v. National Parole Board*, [1976] 1 SCR 453; *Coopers & Lybrand*, supra note 122, at 499 ("The convoluted language of s. 28 of the Federal Court Act has presented many difficulties."); and Bushnell, supra note 120, chapter 18 and at 227-31 (discussion of the *Martineau* cases).

127 Federal Court Act, section 61.

128 Roderick A. Macdonald, "Legal Bilingualism" (1997) 42:1 *McGill Law Journal* 119-67, at note 153.

129 *Nicholson*, supra note 65; for discussion, see Bushnell, supra note 120, at 229-31.

130 Federal Courts Act, section 18(3).

131 SC 1990, c. 8, section 8. For discussion, see Bushnell, supra note 120, at 271-72 and 312-13.

132 Bushnell, supra note 120, at 313.

*Low*[133] and *Guay*[134] both concerned the minister's appointment of a hearing officer to conduct inquiries into a taxpayer's affairs. *Low* challenged, through an application for an order of prohibition in Ontario's superior court (then known as the Supreme Court), the minister's decision to appoint the hearing officer. *Guay* challenged, through an action for an injunction in the Quebec Superior Court, the hearing officer's decision to exclude the taxpayer's counsel. In both cases, the taxpayer lost on the basis that the power of the minister to appoint a hearing officer, or the power of the hearing officer to conduct an inquiry, was administrative in nature and thus not amenable to judicial review.[135] In reaction to these decisions, Parliament included in the new ITA various procedural protections for taxpayers facing inquiries, including the right to participate in the hearing and have counsel present,[136] and the requirement that the appointment of a hearing officer be done by the Tax Review Board on the application of the minister (that is, the now rarely invoked "hearing officer jurisdiction").[137]

*Bathville*[138] challenged, through a motion for replevin, a search and seizure carried out by the minister pursuant to a warrant granted in accordance with subsection 126(3) of the ITA (52). Ontario's superior court dismissed the motion for replevin, holding that the minister's powers to apply for a warrant to search premises and seize records were broad and did not require the minister to disclose (for example) particulars about the investigation. Parliament reacted to *Bathville* by adding to the new ITA stricter requirements for obtaining a search warrant[139] as well as provisions requiring ongoing judicial authorization for the retention of seized documents.[140]

Finally, *Canadian Bank of Commerce*[141] challenged in Ontario's superior court, through "an application for an opinion of the Court upon the question raised in a special case concurred in by the parties,"[142] a requirement issued by the minister. Essentially, the bank alleged that the requirement went beyond what was permitted by subsection 126(2) of

133 *In re Low*, 66 DTC 5198 (ONSC); aff'd 67 DTC 5060 (ONCA).

134 *Lafleur v. Guay and MNR*, 61 DTC 1059 (QCSC); aff'd 63 DTC 1098 (QCCA); rev'd on other grounds, [1965] SCR 12.

135 Ibid., at 17 and 21 (SCC); and *Low*, supra note 133, at 5061 (ONCA).

136 ITA subsection 231(15), which is found at subsection 231.4(6) of today's ITA.

137 ITA subsection 231(8), which is found at subsection 231.4(2) of today's ITA.

138 *Bathville Corporation v. Atkinson*, 64 DTC 5113 (ONSC); leave to appeal granted, 64 DTC 6330 (ONCA).

139 ITA subsections 231(4) to (5), which were the antecedents to the provisions found today at subsections 231.3(1) through (3) of the ITA.

140 ITA subsections 231(2) and (4).

141 *Canadian Bank of Commerce v. Attorney General of Canada*, 61 DTC 1264 (ONHC); aff'd 62 DTC 1014 (ONCA); aff'd [1962] SCR 729.

142 Ibid., at 1264 (ONHC).

the ITA (52) (the precursor to section 231.2 of today's ITA). The court held—in a decision unanimously confirmed by the Ontario Court of Appeal and the Supreme Court of Canada—that because the requirement was issued by the minister in good faith as part of a "genuine and serious inquiry into the tax liability of some specific person or persons," the requirement fell within the scope of the minister's powers.[143] Parliament was apparently not concerned about this decision, and subsection 126(2) was carried forward without modification to become (now former) subsection 231(3) of the ITA.[144]

Other new provisions in the ITA confirm that Parliament did not anticipate that the Federal Court's revamped judicial review jurisdiction would be applied often (or at all) in income tax matters. Paragraph 175(3)(a) of the ITA—which remained in effect until the Federal Court was deprived of its jurisdiction over tax appeals in 1988—expressly foreclosed the possibility of combining a tax appeal with a judicial review proceeding or civil action.[145] Moreover, the new ITA included as innovations the reference jurisdiction and the common questions jurisdiction, which offered complementary vehicles, outside the appeal or judicial review processes, for resolving questions of fact or law arising under the ITA.[146]

## 1972 and Following: The Liberalization of Provincial Income Tax Administration

Since 1962, the minister has administered the provincial income tax regimes of most provinces in accordance with a regime set out primarily in the Federal-Provincial Fiscal Arrangements Act.[147] Essentially, provinces that agree to participate in the framework ("the agreeing provinces"), which today include every province except Quebec and (for corporations) Alberta, enact provincial income tax legislation that imposes tax as a percentage of taxable income under the ITA and incorporates by reference most of the administration and enforcement provisions of the ITA. Each agreeing province then enters into a tax collection agreement ("TCA") whereby the federal minister administers and enforces the provincial income tax act on the province's behalf.[148] The income

143 Cartwright J, in his concurring opinion, added that once it is shown that the minister had issued the requirement in good faith as part of a genuine and serious inquiry into the tax liability of a specific person, the issuance was an administrative, rather than a judicial, act and thus is not subject to judicial review. Ibid., at 739 (SCC).

144 The Supreme Court walked back its holding in *Canadian Bank of Commerce* somewhat in *James Richardson & Sons v. MNR*, [1984] 1 SCR 614.

145 For an example of the convenience that can result from combining an appeal with judicial review into a single proceeding, see *TD Bank v. British Columbia (Commissioner of Income Tax)*, 2017 BCCA 159.

146 As originally enacted, the reference jurisdiction was conferred on the Federal Court and was not necessarily limited to questions "in respect of any assessment, proposed assessment, determination or proposed determination."

147 SC 1960-61, c. 58, as amended.

tax legislation of each agreeing province provides that whenever a federal reassessment is issued for whatever reason, a conforming provincial reassessment is generally also issued.[149] Consequently, as a practical matter, whenever an objection or appeal disposes of a federal income tax issue, any consequential or analogous provincial income tax issue is likewise resolved automatically. For aspects of provincial income tax that operate independently of federal income tax, provincial income tax legislation provides for an appeal to the province's superior court.

When the Federal-Provincial Fiscal Arrangements Act was initially enacted, the agreeing provinces had virtually no ability to customize their income tax regimes to their particular local circumstances. A taxpayer's provincial income tax was calculated as a simple percentage of federal income tax.[150] Consequently, the only provincial tax issues for which an appeal to the superior court was possible were those involving provincial residence or interprovincial allocation of income.[151] Such appeals, however, were rarely if ever initiated, presumably because provincial income taxes were generally lower and did not vary as much among agreeing provinces as they do today.[152] In the 1960s, indeed, there do not seem to be *any* reported decisions from the agreeing provinces pertaining to uniquely provincial income tax issues.

However, many of the agreeing provinces were dissatisfied with their inability to customize their income tax regimes to their particular circumstances. Consequently, starting in 1972, the federal government began allowing the agreeing provinces to create

148 For a detailed review of the history and operation of the regime, see *Gendis v. Canada (AG)*, 2006 MBCA 58; leave to appeal to the Supreme Court of Canada dismissed, [2007] 1 SCR ix.

149 For example, see Taxation Act, 2007, SO 2007, c. 11, schedule A, section 113; Income Tax Act, RSBC 1996, c. 215, section 30(1); Alberta Personal Income Tax Act, RSA 2000, c. A-30, section 51(2). See also *Knight v. The Queen*, 2012 TCC 118, at note 17.

150 Sohrab Abizadeh and Richard Hudson, "Trends in the Federal-Provincial Tax Collection Agreements: The Case of Alberta" (1983) 31:4 *Canadian Tax Journal* 653-64, at 656-57; and Alan Macnaughton, "Compliance and Administration Issues Under the Tax Collection Agreements" (1999) 47:4 *Canadian Tax Journal* 890-901, at 890-93.

151 In the case of Ontario, for example, see the Income Tax Act, 1961-1962, SO 1961-62, c. 60, section 19(2), as modified by SO 1962-63, c. 61, section 3.

152 In the early and mid-1960s, popular opinion generally precluded provinces from moving their tax rates too far out of line from those of other provinces. See A. Milton Moore and Donald I. Beach, *The Financing of Canadian Federation: The First Hundred Years*, Canadian Tax Paper no. 43 (Toronto: Canadian Tax Foundation, 1966), at 70-71, 75-76, and 80. By way of illustration: in 1966, all agreeing provinces charged between 9 percent and 10 percent for corporate income tax. See Sean A. Cahill, *Corporate Income Tax Rate Database: Canada and the Provinces, 1960-2005* (Ottawa: Agriculture and Agrifood Canada, 2007), at A-4 (note that Ontario was not an agreeing province for corporate taxes that year). Today, the top corporate rates for 2021 in the agreeing provinces range from 11.5 percent in Ontario and the Northwest Territories to 16 percent in Prince Edward Island. Canada, Canada Revenue Agency, "Corporation Tax Rates," online: www.canada.ca/en/revenue-agency/services/tax/businesses/topics/corporations/corporation-tax-rates.html (accessed February 11, 2022).

(with certain restrictions) their own tax credits.[153] Further liberalization followed in 1975, 1982, 1985, 1991, and 2001—a process that allowed the agreeing provinces to offer a wider range of tax credits, to impose flat taxes or surtaxes, and to calculate provincial income tax as a percentage of federal taxable income rather than of federal tax (which in turn permitted the creation of province-specific tax brackets).[154] Agreeing provinces also started enacting provincial equivalents to GAAR.[155]

As provincial income tax regimes grew to accommodate more and more local customization, however, the essentially moribund dispute-resolution system, applicable to questions of provincial residence or interprovincial allocation of income, was extended to provincial credits and other provincial customizations.[156] However, unlike Quebec, which allows for small tax disputes to be heard in its small claims court,[157] none of the agreeing provinces has provided taxpayers with an informal mechanism, akin to that available in the Tax Court, for disputing smaller provincial income tax assessments. Since the cost of litigating an appeal in a superior court tends to vastly exceed the value of most provincial income tax credits, disputes over such smaller matters effectively have no forum for resolution. As C. Miller J observed in *Young* (a case in which the CRA improperly denied the taxpayer an Alberta royalty rebate),

> [1] Ms. Murray [Crown counsel], in your submissions you said it seems unfair. It does not just seem unfair, it is unfair. The government has made a mistake and that mistake has cost Ms. Young 3, 4, 5 hundred—some amount of money that she would otherwise have been entitled to from the Alberta government. Regrettably Ms. Williams, the Crown is correct, as far as the jurisdiction of this court goes. There is nothing I can do about this, other than moan and rant and rave about it. . . .
>
> [3] What I would say though, is that when the Government of Canada makes a mistake like this, it should not insist that a taxpayer such as your daughter has to pursue lengthy and costly litigation to make the mistake right. . . . [I]t would be unconscionable

153 Abizadeh and Hudson, supra note 150, at 656-57; and Macnaughton, supra note 150, at 893.

154 Macnaughton, supra note 150, at 890-95; and Thomas J. Courchene and Arthur E. Stewart, "Provincial Personal Income Taxation and the Future of the Tax Collection Agreements," in Melville McMillan, ed., *Provincial Public Finances*, vol. 2, *Plaudits, Problems, and Prospects*, Canadian Tax Paper no. 91 (Toronto: Canadian Tax Foundation, 1991), 266-300, at 274-81.

155 In the case of Ontario, see Income Tax Act, RSO 1990, c. I.2, section 5.2, added with SO 1997, c. 43, schedule B, section 3.

156 In the case of Ontario, see, for example, SO 1981, c. 13, section 4 (occupancy cost credits and tax credits for election contributions); SO 1988, c. 73, section 8 (director liability); SO 1996, c. 24, section 17 (tax payable by mining reclamation trusts); SO 2004, c. 29, section 8 (Ontario health premium); SO 2007, c. 7, schedule 17, section 5 (Ontario child benefit); SO 2007, c. 11, schedule A, section 125(2) (enactment of the Taxation Act, 2007); SO 2008, c. 7, schedule S, section 33 (taxpayer's senior homeowners' property tax grant); SO 2009, c. 34, schedule U, section 27 (Ontario sales tax credit); SO 2010, c. 23, section 10 (Northern Ontario energy credit and Ontario energy and property tax credit); and SO 2020, c. 36, schedule 43, section 9 (Ontario trillium benefit).

157 Tax Administration Act, RSQ c. A-6.002, section 93.2 et seq.

> for the government to insist that your daughter has to now sue them in another court to get these few hundred dollars in such blatant circumstances.[158]

Indeed, the conferring of jurisdiction on the superior courts over the ever-increasing gamut of provincial income tax issues took place with so little fanfare that for many years, most taxpayers (and no small number of federal officials and judges) simply assumed that disputes over provincial tax assessments made by the federal minister could be appealed through the same process as ITA assessments. Throughout the 1970s (and in some cases even later), the Tax Review Board, the Federal Court Trial Division, and even the Tax Court heard and decided appeals pertaining to provincial income tax issues without the issue of jurisdiction being raised.[159] However, in situations where the minister raised the issue of jurisdiction, the Tax Court would almost invariably decide—sometimes reluctantly, and with laments about the resulting inconvenience to taxpayers—that it had no jurisdiction to deal with the appeal (or the provincial issues raised by the appeal).[160] As Mogan J wrote in 1991 in *Stiege*, in the course of quashing an appeal from a self-represented taxpayer over a $500 Ontario Tax Credit,

> With some regret, I will grant the Respondent's application and issue the requested order quashing the purported appeal herein. My regret is based on an assumption that most individuals residing in Ontario would not know that there was an Ontario Income Tax Act and a separate appeal to the Supreme Court of Ontario for disputes relating to matters arising under that Act. Such individuals have contact with only the federal Department of National Revenue concerning income tax matters: filing the tax return; subsequent inquiries; receiving a notice of assessment; serving an objection; receiving a reassessment or confirmation. At that point, most individuals would expect (as the purported Appellant herein) to follow the well-worn path of appeals under the federal Income Tax Act. It is regrettable that the Appellant must learn at this late stage in the proceedings that she has appealed to the wrong court.[161]

Ten years later, Rowe DJ made similar comments in *Wittmer*, dismissing an appeal concerning a reassessment to recoup a BC child tax benefit that had been overpaid to a mother owing to a software glitch:

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158 *Young v. The Queen*, 2009 TCC 423. It is not clear from the decision why C. Miller J proposed that the taxpayer file a negligence suit against the CRA in the Federal Court, rather than appeal the provincial assessment in the applicable superior court. One might speculate that the time limit for filing an appeal of the provincial assessment had expired.

159 See sources cited supra note 46.

160 See sources cited supra note 29.

161 *Stiege*, supra note 29, at 810. Bowman J (as he then was) cited this passage the following year in *Corazza*, supra note 29, at 1559-60.

> The irony is that, while the authority rests in the Minister to carry that out [*ie*, the re-assessment to recover the overpayment], if one were to complain, the Supreme Court of British Columbia is the one having the jurisdiction to hear and make the determination of the appeal which disputes it. I do not know how many people in British Columbia know that, probably .01 per cent, and I am sure it came as a shock to counsel as well as to myself.[162]

Indeed, it was not until about 2008 that the CRA began advising taxpayers of the correct court in which to file an appeal involving a provincial tax assessment. As McArthur J sardonically quipped in *Lin*, "While applause is in order for those responsible for instituting the new format, one wonders why it took over 20 years."[163]

A rather ironic exception to the rule according to which the Tax Court does not have jurisdiction over purely provincial income tax issues concerns cases in which a taxpayer claims to be resident of, or to allocate income to, Quebec or a place outside Canada, as opposed to an agreeing province. In such cases, the federal minister, on behalf of the agreeing province (or provinces) concerned, will assess provincial taxes but also refuse some or all of the taxpayer's Quebec abatement or provincial tax abatement under subsection 120(2) or 124(1) of the ITA, respectively. Since the Tax Court has jurisdiction over the refusal of these amounts, the court can, in effect, rule on the taxpayer's province of residence or allocation of income.[164]

## 1976: The Determination Jurisdiction (Bill C-22)

In 1976, Parliament started plugging the holes left in the appellate jurisdiction by the nil assessment rule by empowering the minister to issue "determinations" with respect to four types of refunds and three categories of losses. Taxpayers that disagreed with the minister's determinations could object to and appeal them in the same manner as for assessments. Whether the new provisions adequately addressed the problems caused by the nil assessment rule was the subject of considerable debate before the Senate Standing Committee on Banking, Trade and Commerce, which eventually recommended that the nil assessment rule be statutorily repealed.[165] The government did not adopt this suggestion, but it did propose revisions to partially address the standing committee's concerns.[166]

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162 *Wittmer v. The Queen*, [2002] 2 CTC 2097, at paragraph 2 (TCC).

163 *Lin v. The Queen*, 2008 TCC 577, at paragraph 9. In *Mckim*, supra note 37, which was a case involving Ontario versus Newfoundland residence, the taxpayer was awarded $100 in costs because the CRA had directed the taxpayer to the incorrect court.

164 *Lachance*, supra note 47 (allocation of income to Quebec); *Corporation AAA SA v. MNR*, 92 DTC 1794 (TCC) (section 124 abatement); see also *Thomson v. MNR*, 89 DTC 66 (TCC) (Quebec abatement).

165 Lubetsky, supra note 12, at 528-29.

166 Ibid.

Since then, the determination jurisdiction has inexorably grown as Parliament has expanded the lists of determinations subject to objection or appeal even in years where no tax is due, so that today it includes (among other things) the Quebec abatement (as of 1980),[167] the refundable investment tax credit (1983),[168] farm losses (1984),[169] limited partnership losses (1986),[170] the part XXI.2 trust tax credit (1988),[171] GAAR adjustments (1988),[172] the goods and services tax/harmonized sales tax (GST/HST) credit (1990),[173] the Canada child benefit,[174] the part XII.4 tax credit (1995),[175] the Canadian film or video production tax credit (1996),[176] the Canadian film or video production services tax credit (1998),[177] the refundable medical expense supplement (1998),[178] the First Nations abatement (2000),[179] the Canada workers benefit (2007),[180] the disability supplement (2007),[181] the school supplies tax credit (2016),[182] the carbon tax credit (2018),[183] the Canada training credit (2019),[184] the labour credit for journalism organizations not constituted as partnerships (2019),[185] the Canada emergency wage subsidy (2020),[186] the COVID-19 GST credit (2020),[187] and the labour credit for journalism organizations constituted as partnerships (2021).[188]

167 ITA subsection 120(2), added to paragraph 152(1)(b) by SC 1980-81, c. 48, section 85(1).

168 ITA subsection 127.1(1), added to paragraph 152(1)(b) by SC 1983-84, c. 1, section 84(1).

169 SC 1984, c. 1, section 84.

170 SC 1986, c. 55, section 59(1).

171 ITA subsections 210.2(3) and (4), added to paragraph 152(1)(b) by SC 1988, c. 55, section 136(1).

172 ITA subsection 152(1.11), added by SC 1988, c. 55, section 136(2).

173 ITA subsection 122.5(3), added to paragraph 152(1)(b) by SC 1990, c. 45, section 49(1).

174 ITA subsection 152(3.3), added by SC 1992, c. 48, section 15(2).

175 ITA subsection 127.41(3), added to paragraph 152(1)(b) by SC 1995, c. 3, section 46(1).

176 ITA subsection 125.4(3), added to paragraph 152(1)(b) by SC 1996, c. 21, section 39.

177 ITA subsection 125.5(3), added to paragraph 152(1)(b) by SC 1998, c. 19, section 42(1).

178 ITA subsection 122.51(2), added to paragraph 152(1)(b) by SC 1998, c. 19, section 42(1).

179 ITA subsection 120(2.2), added to paragraph 152(1)(b) by SC 2000, c. 19, section 44(1).

180 ITA subsection 122.7(2), added to paragraph 152(1)(b) by SC 2007, c. 35, section 48(1). Note that subsection 122.7(2.1) was subsequently added in 2020 (SC 2020, c. 13, section 3(1)).

181 ITA subsection 122.7(3), added to paragraph 152(1)(b) by SC 2007, c. 35, section 48(1).

182 ITA subsection 122.9(2), added to paragraph 152(1)(b) by SC 2016, c. 7, section 41(1).

183 ITA subsection 122.8(4), added to paragraph 152(1)(b) by SC 2018, c. 27, section 18(1).

184 ITA subsection 122.91(1), added to paragraph 152(1)(b) by SC 2019, c. 29, section 32(1).

185 ITA subsection 125.6(2), added to paragraph 152(1)(b) by SC 2019, c. 29, section 32(1).

186 ITA subsection 152(3.4), added by SC 2020, c. 11, section 3(1).

187 ITA subsection 122.5(3.001), added to paragraph 152(1)(b) by SC 2020, c. 5, section 5(1).

188 ITA subsection 125.6(2.1), added to paragraph 152(1)(b) by SC 2021, c. 30, section 40(2).

Perhaps the most storied expansion of the determination jurisdiction occurred following the *Tozzi* decision in 2010.[189] This was a case in which a taxpayer diagnosed with schizophrenia sought to appeal the denial of a disability tax credit (which, in turn, prevented him from opening a registered disability savings plan).[190] Because the taxpayer had no income tax to pay, Rip CJ dismissed the appeal on the basis of the nil assessment rule, lamenting the injustice of low-income taxpayers' being unable to bring all of their ITA-related claims before the Tax Court:

> It is simply not right for the Crown to act behind a nil assessment to prevent Mr. Tozzi from applying for a disability savings plan. It may well be that Mr. Tozzi has gone to the wrong court of law to seek a review of his claim. What he appears to want is for the Tax Court to review the administrative actions by officials of the CRA in not recognizing that he has a disability. This, as I have already indicated, is beyond this Court's jurisdiction. He may have redress in an application under section 18.1 of the Federal Courts Act, although Mr. Tozzi's agent complained that this is not practical because of his fear of substantial legal costs in the Federal Court. But his choice for financial reasons or otherwise to go to this Court, as opposed to another court does not grant this Court jurisdiction to hear his complaint. The simplest thing for Mr. Tozzi would be to do as he did: to appeal in the Informal Procedure to the Tax Court to resolve the issue. But the law does not permit this simple and reasonable step. Unfortunately, this Court can only consider the assessment of tax for 2008 and has no power to rule on the issue of Mr. Tozzi's eligibility as a beneficiary under a disability savings plan without at the same time adjusting the amount of tax assessed.
>
> Ideally, this Court should be a "one stop" Court for persons who have claims under the Act. However, it is not. Low income taxpayers see this Court as the court for all tax matters and attempt to seek satisfaction here. Low income taxpayers usually do not have the benefit of legal advice and go to the Tax Court because they believe that is the forum where they may seek redress. Unfortunately, the Tax Court does not have jurisdiction to hear all matters related to income tax. It may well be that Parliament and the draftsman of section 146.4 did not recognize the problem Mr. Tozzi has suffered and potentially other low income taxpayers may experience in the future because of the limited jurisdiction of the Tax Court.[191]

David Sherman brought the decision to the attention of the *Toronto Star*,[192] and Minister of Finance Jim Flaherty was subsequently grilled about the case by the House

189 *Tozzi v. The Queen*, 2010 TCC 545.

190 The taxpayer's disability is not reported in the Tax Court decision, but it appeared in the *Toronto Star* article cited infra note 192.

191 Supra note 189, at paragraphs 12-13.

192 James Daw, "Daw: Law Blocks Disabled from People's Tax Court," *Toronto Star*, November 5, 2010 (www.thestar.com/business/personal_finance/2010/11/05/daw_law_blocks_disabled_from_peoples_tax_court.html).

of Commons finance committee, where he pledged to "fix" the situation.[193] The fix came the following year with the enactment of subsection 152(1.01),[194] which requires the minister to issue notices of determination regarding a taxpayer's entitlement to the disability tax credit. This much-vaunted "fix," however, did not extend to the many other benefits or ministerial determinations—including most non-refundable tax credits that can be carried over from year to year (such as tuition credits)—for which the nil assessment rule continues to bar rights of appeal.[195]

### 1983: The Creation of the Tax Court (Bill C-159)

In 1983, the Tax Review Board was re-elevated to a court of record and reconstituted as the Tax Court. These reforms aimed primarily to address a popular perception that the board was an arm of the government rather than a forum for impartial, independent review of the minister's decisions.[196] The revisions made no significant changes to the court's jurisdiction over income tax matters.[197]

### 1984: Enactment of Subsections 85(7.1), 93(5.1), and 96(5.1) (Bill C-7)

Ministerial discretion continued its re-infiltration back into the ITA in 1984 with the enactment of subsections 85(7.1), 93(5.1), and 96(5.1), which authorized the minister to accept three specific kinds of elections beyond the applicable election period "where, in the opinion of the Minister, the circumstances of the case are such that it would be just and equitable" to do so.[198] These provisions were enacted with minimal parliamentary discussion as part of the technical tax legislation Bill C-7.

Bill C-7 did not specify any mechanism for the taxpayer to dispute a refusal by the minister to accept a late-filed election under these new provisions. However, given the state of the law in 1984, it may well have been assumed that if the minister issued or confirmed an assessment on the basis of a refused late election, the Tax Court would have jurisdiction to review the refusal under the principles set out in *Pioneer Laundry* and *Wrights' Ropes*. This would have been consistent with the Federal Court of Appeal's seminal decision in *Parsons* (handed down a few months prior to the introduction of Bill C-7), which held that a taxpayer cannot challenge an assessment through a section 18

193 Canada, House of Commons, Standing Committee on Finance, Evidence, 40th Parl., 3d sess., no. 47, November 23, 2010, at 9-10; and James Daw, "Flaherty Pledges To Open Tax Court to Disabled," *Toronto Star*, November 23, 2010 (www.thestar.com/business/personal_finance/spending_saving/2010/11/23/flaherty_pledges_to_open_tax_court_to_disabled.html).

194 James Daw, "Tax Court's Doors Opened to Disabled," *Toronto Star*, June 14, 2011 (www.thestar.com/business/2011/06/14/tax_courts_doors_opened_to_disabled.html).

195 See, for example, *Joshi*, supra note 43.

196 Bourgard and McMechan, supra note 50, at 19.

197 Ibid., at 20.

198 For more information about these provisions, see Sandler and Blackler, supra note 2, at 14-18.

proceeding in the Federal Court Trial Division and that the appellate jurisdiction of the Tax Court encompassed more than simply "questions of quantum and liability."[199] Moreover, the dividend-stripping and associated-corporation rules in section 247 of the ITA were still in force at the time, and, as discussed above, the Tax Court unquestionably had carriage of appeals that challenged the minister's discretionary determinations under these provisions.

When, however, the issue of the Tax Court's jurisdiction over ministerial refusals of Bill C-7 elections finally arose over 20 years later in *Vachon*, the Tax Court concluded—in perfunctory reasons that cited no Canadian tax jurisprudence—that "[t]he Tax Court of Canada does not have jurisdiction to entertain an application for the judicial review of a discretionary decision by the Minister to accept or refuse the rollover form under subsection 85(7.1) of the Act. This jurisdiction belongs solely to the Federal Court."[200]

The self-represented taxpayer in *Vachon* apparently did not advance arguments based on *Pioneer Laundry* and its progeny (which arguably justified a different result) or arguments concerning the lack of a clause foreclosing a right of objection or appeal (such as subsection 165(1.2), discussed below).[201] Since *Vachon*, however, disputes over the refusal of late elections have invariably been contested (rightly or wrongly) in the Federal Court on judicial review.[202]

*Vachon* may well have been decided differently if the case had come before the Tax Court closer to the time when Bill C-7 was enacted, or if the taxpayer had had the benefit of legal assistance (in which case she may have presented to the court the authorities that were ultimately dispositive on the jurisdictional issues in *Dow Chemical*). If *Dow Chemical* is upheld on appeal, the holding of *Vachon* and its progeny may well have to be revisited.

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199 *MNR v. Parsons*, 84 DTC 6345 (FCA), at 6346; aff'g 83 DTC 5329 (FCTD) (internal quotation marks omitted).

200 *Vachon v. The Queen*, 2006 TCC 669, at paragraph 37.

201 Notwithstanding its supposed lack of jurisdiction, the court did in fact review the minister's reasons for refusing to accept the taxpayer's belatedly proffered election and concurred with the minister that the conditions precedent for a rollover had not been fulfilled. The taxpayer thus received a reasoned decision on the merits.

202 *Bugera v. Canada (Minister of National Revenue)*, 2003 FCT 392; *S. Cunard & Company Limited v. Canada (Attorney General)*, 2012 FC 683, appeal to the Federal Court of Appeal discontinued, docket no. A-378-12; *R & S Industries Inc. v. Canada (National Revenue)*, 2016 FC 275; *Masson v. Canada (Attorney General)*, 2019 FC 887; and *Brent Carlson Family Trust v. Canada (National Revenue)*, 2021 FC 506. Note that some of these cases could not have been dealt with on an appeal to the Tax Court, because no assessment was issued to the taxpayer seeking to late-file an election. Note also that the ratio of *Vachon* was applied to a refused late election under subsection 96(5.1) of the ITA in *R & S Industries Inc. v. The Queen*, 2017 TCC 75, at paragraph 6.

See also *Govender v. The Queen*, 2010 TCC 486, where the Tax Court reiterated that it had no jurisdiction to review the refusal of the minister to process a request made under subsection 85(7.1)—although that statement was made in the context of a situation where the taxpayer's right to appeal to the Tax Court had clearly expired.

## 1988: The Federal Court Loses Jurisdiction over Tax Appeals (Bill C-146)

In late 1988, Parliament passed (with minimal debate) Bill C-146, which, inter alia, amended the ITA and the Tax Court of Canada Act to provide the Tax Court with exclusive jurisdiction over appeals under the ITA, with appeals from the Tax Court being heard on the record by the Federal Court of Appeal.[203] Starting in 1991, except in transitional situations, the Federal Court Trial Division's jurisdiction over tax appeals—whether in first instance or on a de novo appeal from the Tax Court—was extinguished.[204] The reference jurisdiction was also transferred from the Federal Court Trial Division to the Tax Court.

One aspect of Bill C-146 that apparently passed without comment by the parliamentarians was the repeal of subsection 178(1) of the ITA—which had conferred on the Federal Court Trial Division the power to order the minister to refund tax, interest, or penalties to a taxpayer when disposing of an appeal. The parliamentary record does not indicate why the Tax Court, which was taking over all of the functions of the Federal Court Trial Division as the front-line court for tax appeals, was not invested with the refund jurisdiction long enjoyed by the Federal Court Trial Division and the Exchequer Court before it. One might speculate that Parliament did not want to invite a reconsideration of *McMillen Holdings*, which had been decided by the Tax Court the previous year.[205] *McMillen Holdings* was an appeal over whether a taxpayer was entitled to interest from the minister on a dividend refund. The case was argued on the basis that the court had jurisdiction. Rip CJ, however, during oral argument, raised proprio motu the question of jurisdiction and requested post-hearing written submissions on the matter.[206] In his decision, Rip CJ observed that "[t]here appears to be no statutory provision authorizing this Court to direct the Minister to pay interest to a taxpayer on the refund amount,"[207] and then, following a review of authorities, he held that "this Court has no jurisdiction to order the Minister to pay interest or make an accounting."[208] One is left to speculate how the jurisdictional issue may have been addressed had the taxpayer initiated its appeal directly in the Federal Court, which still enjoyed the refund jurisdiction created by former subsection 178(1).

The quiet repeal of subsection 178(1) has not, however, brought clarity to the scope of the appellate jurisdiction. To the contrary, disputes involving a taxpayer's entitlement

203 The 1988 reforms also established the informal procedure in the Tax Court applicable to smaller cases. As is the case today, decisions rendered in informal procedure cases came with more limited appeal rights. See Tax Court of Canada Act, RSC 1985, c. T-2, section 18.24, as amended (originally added by RSC 1985, c. 51 (4th Supp.), section 5).

204 Bourgard and McMechan, supra note 50, at 23.

205 *McMillen Holdings*, supra note 45.

206 Ibid., at 588.

207 Ibid., at 588.

208 Ibid., at 592.

to refunds, or the effect of refunds or other offsets on tax-related balances, have continued to give rise to perhaps the most complex jurisdictional debates. For example, over the course of several years, the Tax Court issued inconsistent decisions regarding whether it had jurisdiction in appeals in which the minister assessed a taxpayer for tax that the taxpayer's employer had allegedly withheld—a debate that persisted until the Federal Court of Appeal weighed in on the matter in *Neuhaus* and *Boucher* (holding that such matters fell within the purview of the Federal Court, not the Tax Court).[209] In *Surikov*, which concerned whether the Tax Court had jurisdiction over an appeal of an assessment that sought to recover various credits, Bowie J lamented that "[t]he statutory scheme that governs the determination and redetermination of entitlement to payment of CCTB and GSTC is complex almost beyond belief. Certainly it would baffle any lay taxpayer."[210] The complexity increases when Parliament creates new federal benefits delivered through the income tax system, such as the former universal child-care benefit (UCCB)[211] or Canada emergency response benefit,[212] without specifying mechanisms for resolving disputes over them.[213]

Moreover, a potentially wide exception to the holding in *McMillen Holdings* was identified by Boyle J in *Cooper*, which concerned the amount of arrears interest that was payable on an undisputed tax liability that, the taxpayer argued, had been offset by a credit balance in his account.[214] In rejecting a motion from the minister to strike the taxpayer's appeal, Boyle J remarked that "[i]t is clear that the taxpayer's notice of appeal disputes the assessed amount of interest in the part XIII assessment. This is interest assessed as payable by him, the non-resident taxpayer. This Court has jurisdiction to hear such a claim."[215] In other words, the Tax Court has jurisdiction to determine a taxpayer's entitlement to a refund if it happens to offset, in whole or in part, an unrelated, interest-bearing tax debt in such a way as to affect the amount of arrears interest due.

Finally, it also bears noting that, notwithstanding the decision in *McMillen Holdings*, the Tax Court heard and decided on its merits a case involving nothing more than

209 See the sources cited supra note 44.

210 *Surikov*, supra note 39, at paragraph 5.

211 Universal Child Care Benefit Act, SC 2006, c. 4, section 168.

212 Canada Emergency Response Benefit Act, Part 2 of COVID-19 Emergency Response Act, SC 2020, c. 5.

213 For examples of cases in which disputes over UCCB claims were quashed by the Tax Court on jurisdictional grounds, see *Moïse v. The Queen*, 2009 TCC 187; *Fatima v. The Queen*, 2012 TCC 49; *Perron v. The Queen*, 2017 TCC 220; *Lavrinenko v. The Queen*, 2017 TCC 230; aff'd 2019 FCA 51; and *MacIntosh v. The Queen*, 2019 TCC 155 (although see also *Arab v. The Queen*, 2008 TCC 193, and *Pearson v. The Queen*, 2011 TCC 455, where the Tax Court adjudicated UCCB claims on their merits).

214 *Cooper*, supra note 38, at paragraph 24.

215 Ibid., at paragraph 19. It bears noting that the informal procedure decision in *Emcon Services Inc. v. The Queen*, 2008 TCC 501, decided the year before *Cooper*, seemed to go the other way.

the amount of a taxpayer's entitlement to refund interest in *Lord Rothermere Donation*, apparently without the question of jurisdiction ever being raised.[216]

### 1990: Waiver of RRSP Overcontribution Tax (Bill C-52)

In 1990, Parliament enacted subsection 204.1(4), which authorizes the minister to waive taxes in respect of overcontributions to registered retirement savings plans (RRSPs) if a taxpayer demonstrates that the overcontributions "arose as a consequence of reasonable error" and "reasonable steps are being taken to eliminate the excess."

Like Bill C-7 six years prior, Bill C-52 did not specify any specific mechanism for the taxpayer to dispute a refusal by the minister to waive the RRSP overcontribution tax, and the parliamentary record does not seem to record any discussion of the issue. Given the state of the law in 1990, however, it may well have been assumed that the Tax Court would have jurisdiction to review any such refusal along the lines set out in *Pioneer Laundry* and *Wrights' Ropes*, especially given that subsection 204.1(4)—in a manner similar to the associated-corporation rules—set out precise factual criteria that must be met for a waiver of tax to occur (that is, "reasonable error" and "reasonable steps"), and these criteria would provide the court with a benchmark for reviewing the minister's decision.

However, it apparently took over 25 years for the Tax Court to consider whether it had jurisdiction over ministerial refusals to waive tax on RRSP overcontributions. And in *Neubauer*—an informal procedure case with a self-represented taxpayer—Mogan DJ, citing no jurisprudence, held that

> [u]nder subsection 204.1(4), the Minister of National Revenue has discretion to waive the tax in subsection 204.1(2.1) if the excess amount or cumulative excess amount arose as a consequence of reasonable error, and reasonable steps were taken to eliminate the excess. If the Appellant is seeking to have the tax waived on the basis of reasonable error, this Court cannot exercise Ministerial discretion, and does not have jurisdiction to review the exercise of Ministerial discretion. The Appellant would have to make an application to the Federal Court Trial Division.[217]

*Neubauer* was reaffirmed in the subsequent informal procedure cases of *Lennox*,[218] *Lans*,[219] and *Hall*[220]—all of which also involved taxpayers appearing without legal counsel.[221] *Lans* was appealed to the Federal Court of Appeal, but the self-represented

216 *Lord Rothermere Donation*, supra note 45. See also *Yaremy*, supra note 45, at paragraph 11.

217 *Neubauer v. The Queen*, 2006 TCC 457, at paragraph 10.

218 *Lennox v. The Queen*, 2009 TCC 360, at paragraph 8.

219 *Lans v. The Queen*, 2011 TCC 121, at paragraphs 9-12; aff'd 2011 FCA 290.

220 *Hall v. The Queen*, 2016 TCC 221, at paragraphs 31-37.

221 The taxpayers in *Lans* and *Hall* were self-represented; the taxpayer in *Lennox* was represented by an agent who, judging by some LinkedIn searches, appears to have been a financial adviser.

taxpayer did not show up at the hearing, and the court rendered a brief decision confirming the judgment below.[222] Following these decisions, challenges to adverse ministerial decisions under subsection 204.1(4) (or under analogous provisions, enacted subsequently, applicable to tax-free savings accounts and the like)[223] are routinely heard in the Federal Court on judicial review.[224] *Dow Chemical* has questioned, however, whether the Federal Court is the proper forum for such matters, which suggests that this entire line of case law may well be reconsidered if the decision in *Dow Chemical* is upheld on appeal.[225]

## 1991 and 1992: The Fairness Package—Bill C-18 (1991)/ Bill C-93 (1992)

In 1991, Parliament enacted the "fairness package"—a suite of measures that, as the minister explained, aimed to "allow for common sense in dealing with taxpayers who, because of personal misfortune or circumstances beyond their control, are unable to meet our deadlines or comply with our rules."[226] The fairness package authorized the minister, on a discretionary basis and subject to various conditions, to (1) allow the filing of a notice of objection beyond the statutory deadline (section 166.1 of the ITA); (2) issue refunds for overpaid taxes or unclaimed refundable tax credits beyond the statutory limitation periods (subsections 152(4.2) and 164(1.5) of the ITA); (3) waive or cancel interest or penalties (subsection 220(3.1) of the ITA); and (4) allow the filing, amendment, or revocation of elections beyond the normal filing period (subsection 220(3.2) of the ITA).

All of these amendments had profound consequences—not all of them intended—for the allocation of jurisdiction between the Tax Court and the Federal Court.

Concerning the late-filing of objections, as discussed above, section 167 had previously conferred on the Tax Court jurisdiction to authorize the late-filing of an objection. The fairness package moved this jurisdiction to new section 166.2, which provided that if the minister failed to authorize the late-filing of a notice of objection under section 166.1, a taxpayer could seek authorization instead from the Tax Court. Such an application does not constitute a judicial review of the minister's failure to authorize a late objection. Rather, the Tax Court decides the matter de novo in accordance with

222 *Lans*, supra note 218 (FCA), at paragraphs 2-3.

223 ITA subsections 204.91(2) (RESPs), 207.06(1) to (2) (TFSAs), and 207.8(3) (EPSPs) and sections 206.4 (repealed) (RDSPs) and 207.64 (RCAs). See, for example, *Robitaille v. The Queen*, 2019 TCC 200, at paragraph 5: "Although I have no choice but to dismiss the Appellant's appeal for his 2016 taxation year, I would urge the Minister . . . to consider exercising her discretion under subsection 207.06(1) of the Act to cancel the Appellant's liability arising from the 'excess TFSA amount' for his 2016 and 2017 taxation years."

224 Sherman, supra note 2, notes on subsections 204.1(4) and 207.06(1).

225 *Dow Chemical*, supra note 3, at paragraphs 183-91.

226 Canada, Minister of National Revenue, "Fairness Package," *Press Release*, May 24, 1991.

the criteria set out in section 166.2, with no deference to any prior determination made by the minister.

With respect to the issuance of late refunds, the fairness package included a clause—subsection 165(1.2)—that precluded a taxpayer from objecting to a refund issued pursuant to subsections 152(4.2) and 164(1.5). The May 1991 technical notes explained that the clause aimed to ensure that the minister's issuance of a discretionary refund after the normal reassessment period would not provide a basis for the taxpayer to reopen the entire taxation year through an objection.[227] Consistent with this objective, the limitation imposed by subsection 165(1.2) as originally enacted applies only when the minister reassesses a taxpayer beyond the normal reassessment period and when no provision but subsection 152(4.2) can authorize the reassessment. If the normal reassessment period has not expired, or if the minister has relied on another provision of the ITA in reassessing the taxpayer beyond the normal reassessment period, subsection 165(1.2) should not foreclose the taxpayer's right to object and appeal.[228]

With respect to interest and penalty relief, subsection 165(1.2) did not—as originally enacted in 1991—apply to decisions regarding interest and penalty relief. Consequently, one might have expected that taxpayers could challenge ministerial refusals of interest or penalty relief (or inadequate amounts of interest or penalty relief) in the context of an otherwise validly launched Tax Court appeal—on essentially the same grounds as in *Pioneer Laundry* and *Wrights' Ropes*. Indeed, the Quebec courts, considering analogous provisions in Quebec's fiscal legislation, came to that very conclusion in two decisions issued in 1990 and 1992.[229] And in 1995, the Quebec Court of Appeal, in *Vézeau*, confirmed both of these decisions, observing quite sensibly that

> [t]o require a taxpayer to proceed by way of judicial review if he wishes to attack an assessment of interest is not a very satisfactory solution. That remedy is more limited, and if the taxpayer is, at the same time, attacking the tax or penalties assessed, it would be a cumbersome remedy.[230]

The following year, however, Parliament threw a proverbial spanner into the works of subsection 220(3.1). As originally enacted, the fairness package did not authorize the minister to issue reassessments beyond the normal reassessment period in order to give effect to a discretionary waiver or cancellation of interest. Parliament corrected this

227 Canada, Department of Finance, *Explanatory Notes to Legislation Relating to Income Tax* (Ottawa: Department of Finance, May 1991).

228 *Yaremy*, supra note 45, at paragraphs 9-10.

229 *Ouellet c. Québec (Sous-ministre du Revenu)*, [1990] RDFQ 80 (CQ); *Vézeau c. Québec (Sous-ministre du Revenu)*, [1992] RDFQ 100 (CQ); aff'd 1995 RDFQ 26 (CA).

230 *Vézeau*, supra note 229 (CA), at paragraph 42. Quebec's National Assembly reversed this decision in 1996 through amendments to section 94.1 of the Tax Administration Act, RSQ c. A-6.0002 (SQ 1996, c. 31, section 34).

apparent oversight the following year in Bill C-93. With this amendment, Parliament also extended subsection 165(1.2) to assessments issued pursuant to subsection 220(3.1). Presumably, in accordance with the explanations given the prior year, Parliament extended subsection 165(1.2) simply so that taxpayers would not be able to reopen a tax year beyond the normal reassessment period by objecting to a reassessment granting interest relief. There is no indication that Parliament intended, by extending subsection 165(1.2), to curtail the right to object to or appeal reassessments issued during the normal reassessment period or otherwise authorized under the ITA, or in any way to curtail the Tax Court's jurisdiction to decide issues put before it (including potentially discretionary relief of interest) in an otherwise properly instituted appeal.

Nevertheless, the Tax Court—in a series of informal procedure cases with self-represented taxpayers, starting with *Gretillat* in 1998—construed subsection 165(1.2) as ousting the court's jurisdiction over any discretionary interest and penalty-relief decisions by the minister, even decisions made or raised during the normal reassessment period when the minister does not need to rely on subsection 220(3.1) to issue an assessment.[231] It has since become generally accepted wisdom, rightly or wrongly, that because of subsection 165(1.2), the Tax Court has no jurisdiction over the discretionary relief of interest and penalties under any circumstances.[232]

Finally, regarding the minister's discretionary power to accept late elections under subsection 220(3.2), Parliament did not specify any particular remedy for the minister's refusal to accept a late election; however, for the reasons discussed above in the context of the Bill C-7 amendments, Parliament may have assumed that taxpayers would be able to put a refusal at issue in the context of an appeal of an assessment. Although the Tax Court has issued a number of decisions suggesting that it does not have such jurisdiction and that such matters lie within the purview of the Federal Court,[233] there apparently has been no attempt to date to reconcile these decisions with *Pioneer Laundry*, *Wrights' Ropes*, and their progeny. Once again, if *Dow Chemical* is upheld on appeal, it may well prompt a reconsideration of these decisions.

## 2002: Establishment of the Courts Administration Service (Bill C-30)

Parliament had occasion to reconsider the respective roles of the Tax Court and the Federal Court following the auditor general of Canada's 1997 *Report on the Federal Court*

231 *Gretillat v. The Queen*, 98 DTC 1483 (TCC); *Houde v. The Queen*, [2001] 2 CTC 2695 (TCC), at paragraphs 18-19.

232 *Dow Chemical*, supra note 3, at note 126, has suggested—without deciding the issue—that in the absence of the clause at subsection 165(1.2), the Tax Court may well have jurisdiction to review decisions over interest and penalty relief.

233 *Muscillo*, [1998] TCJ no. 179 (TCC appeal held in abeyance to allow subsection 220(3.2) request); *Coster*, [2003] TCJ no. 130; and *Dietrich v. The Queen*, 2005 TCC 326.

*of Canada and the Tax Court of Canada*,[234] which recommended, inter alia, the merger of the Tax Court and the Federal Court, with the continuation of the Tax Court Rules for use in tax cases.[235] The auditor general made this recommendation exclusively for the purpose of realizing operating synergies (such as more efficient use of courtrooms), not for the purpose of alleviating the problems that resulted from the division of jurisdiction between the Federal Court and the Tax Court.[236] Significant opposition to the proposed merger came both from the Tax Court and from the tax bar, and the Department of Finance and Revenue Canada were both reticent about the proposal, mainly for the reason that tax cases benefit greatly from having specialized judges and that taxpayers might lose access to specialized judges in the event of a merger.[237] The auditor general proposed addressing this concern with the creation of a "tax division" or a "tax list" within the framework of a unified Federal Court (a proposal that, in hindsight, might well have warranted greater consideration).[238]

Remarkably, nowhere does the AG report mention the divided jurisdiction between the Federal Court and Tax Court in income tax matters, or how the problems created by this divided jurisdiction might be addressed through a merger of the courts.[239] One might speculate that, given the state of the law in 1997—when the ITA was much simpler and judicial review proceedings against the minister were still somewhat of a novelty—the problems to taxpayers caused by the divided jurisdiction were simply not as pressing as they are today. Presumably, had the auditor general or Parliament turned their attention to the issue, the proposal to have a unified court with a "tax division" or "tax list" might at least have generated more discussion.

In the end, Parliament elected not to merge the Tax Court and Federal Court but, rather, to merge their registry services (along with those of the Federal Court of Appeal and the Court Martial Appeal Court) into what is now the Courts Administration Service. In the process, Parliament also elevated the Tax Court to a "superior court of

234 Office of the Auditor General of Canada, *Report on the Federal Court of Canada and the Tax Court of Canada* (Ottawa: Office of the Auditor General of Canada, April 1997) (herein referred to as "the AG report").

235 Ibid., at section 3.

236 Ibid., at paragraph 15. See also Campbell, supra note 4, passim.

237 AG report, at paragraphs 16, 200, and 205-11: "Merger is strongly opposed by the Tax Court and by most counsel appearing before that Court. They believe that the efficiency of the Tax Court would be lost and that the hearing of tax cases requires a specialized court. . . . [T]he Tax Court is adamantly opposed to merger and it believes that the disadvantages of merger outweigh any advantages."

238 Ibid., at paragraphs 218-21.

239 The closest the AG report gets to this issue is at paragraph 209, where it comments in passing that "[s]ome tax lawyers and Tax Court judges noted that certain current procedural difficulties would be eliminated by having taxation issues dealt with by judges of a superior court." Arguably, this passage refers to expanding the jurisdiction or enhancing the status of the Tax Court rather than merging the Tax Court with the Federal Court.

record" to match the Federal Court, although, as was repeatedly emphasized during the parliamentary proceedings, the elevation of status had no impact on the actual jurisdiction of the Tax Court.[240]

## 2004: Abuse of Process, Misfeasance in Public Office, and Charter Violations

In 2004, the Federal Court of Appeal handed down *Main Rehabilitation*, which held that "the Tax Court does not have the jurisdiction to set aside an assessment on the basis of an abuse of process at common law or in breach of section 7 of the *Charter*."[241] *Main Rehabilitation* concerned reassessments issued after an allegedly abusive and protracted audit that had been triggered by a false tip from a friend of the CRA official who supervised the audit. The taxpayer asked the Tax Court to "stay" the reassessments as an abuse of process. The Tax Court, in a decision upheld by the Federal Court of Appeal, struck the taxpayer's claim on the basis that "[t]he actions of the [CRA] during an audit are not relevant to an appeal to this Court regardless of whether the actions are described as discriminatory, unfair, in error, or abusive."[242] *Main Rehabilitation* shut down a school of thought—one to which the Federal Court of Appeal had suggested some openness the prior year in *Dwyer*[243]—that contends that the Tax Court can vacate or vary assessments issued by the minister that are the result of unlawful processes that violate or abuse the rights of the taxpayer.

*Main Rehabilitation* has gone on to be extensively cited in cases in which CRA officials have allegedly (and sometimes admittedly) engaged in egregiously abusive, unlawful, or even unconstitutional conduct in auditing and assessing taxpayers.[244] Its reasoning has also been applied to encompass other legal theories that might have been expected to confer on the Tax Court the jurisdiction to vacate or vary an assessment issued through abusive or unlawful conduct, such as misfeasance in public office[245] and officially induced error.[246] Following *Main Rehabilitation* and its progeny, taxpayers seeking legal remedies for abusive or unlawful conduct by the minister in relation to an assessment have had to seek remedies in other forums, either through judicial review before the Federal Court (which does not have the power to vacate reassessments)[247] or

240 Canada, House of Commons, *Debates*, October 1, 2001, at 1805 (Owen); Canada, Senate, *Debates*, March 7, 2002, at 1440 (Bryden).

241 *Main Rehabilitation*, supra note 33, at paragraph 6 (FCA). For a further discussion of the antecedents of *Main Rehabilitation*, see Du Pont and Lubetsky, supra note 4, at 108-12.

242 *Main Rehabilitation*, supra note 33, at paragraph 20 (TCC).

243 *Dwyer v. Canada*, 2003 FCA 322.

244 See the sources cited supra note 33.

245 *Ereiser v. Canada*, 2013 FCA 20.

246 *Milliron v. Canada*, 2003 FCA 283, at paragraph 8; *Klassen v. The Queen*, 2007 FCA 339, at paragraph 27; and *Chiltalia v. The Queen*, 2017 TCC 227, at paragraph 21.

247 *JP Morgan*, supra note 33, at paragraph 93.

through a civil action for damages in the Federal Court or a superior court (which is costly and requires the taxpayer to navigate various procedural and legal obstacles).[248]

In a footnote in *Dow Chemical*, Monaghan J remarked that "I do not believe my conclusion here conflicts with *Main Rehabilitation*," while acknowledging that "the distinction is a fine one."[249] If *Dow Chemical* is upheld on appeal, *Main Rehabilitation* and its progeny may receive a more careful (and no doubt welcome) reconsideration.

## Next Steps: A Comprehensive Reallocation of Jurisdiction

The foregoing narrative confirms that the jurisdictional boundaries between the Tax Court, the Federal Court, and the superior courts have emerged from a series of incremental decisions by Parliament and the courts over the past 75 years, made without careful consideration of all of the consequences and without anticipating the explosive growth that has occurred in the complexity of income tax administration and in the availability of judicial recourses against the state. The end result, as one might expect, are boundaries that are generally unclear, arbitrary, and counterproductive. Lower-income taxpayers suffer the most from this complexity in the form of unnecessary legal costs or an inability to effectively contest taxes that have been improperly assessed before the Tax Court.

A policy objective that has repeatedly arisen during the evolution of the Tax Court's jurisdiction is that the court not be perceived as an adjunct of the minister and thus be able to exercise its adjudicative functions without deference to the minister's discretionary determinations. As matters stand today, however, the allocation of jurisdiction between the Tax Court, the Federal Court, and the superior courts does not respect even that policy objective. On one hand, many non-discretionary income tax matters amenable to de novo review fall outside the Tax Court's jurisdiction (such as entitlement to tax refunds or questions of provincial residence), while, on the other hand, *Dow Chemical* has confirmed that the Tax Court does have—and in fact has always had—jurisdiction to review discretionary decisions of the minister that directly feed into the determination of tax due.

Moreover, for ordinary taxpayers without law degrees, whether a particular issue is subject to de novo as opposed to deferential review is an abstract question that hardly seems to justify having to incur the cost, inconvenience, and uncertainty of litigating ministerial decisions in multiple forums—especially in forums such as the Federal Court and the superior courts, which do not offer any kind of informal procedure appropriate for smaller cases. Indeed, the Tax Court—like the tax boards before it—has in fact a very long history of reviewing discretionary ministerial decisions that feed into assessments, as well as various other subject matters (such as provincial taxes or entitlement to refunds) that ostensibly fall outside its formal jurisdiction.

248 Du Pont and Lubetsky, supra note 4, at 115-16; Fazel, supra note 4, passim.

249 *Dow Chemical*, supra note 3, at note 141.

There have been numerous calls over the years—from, among others, two former chief justices of the Tax Court, the Canadian Bar Association, and numerous scholars and practitioners—to expand the jurisdiction of the Tax Court to allow taxpayers greater opportunities to resolve their disputes with the minister in a single forum.[250] Ten years ago, David Sherman wrote to then Minister of Justice Robert Nicholson calling for a wholesale expansion of the Tax Court's jurisdiction, noting that

> [o]ver the years I have reviewed and commented on dozens (if not hundreds) of Court cases that have run into arcane jurisdictional problems resulting from the Tax Court's limited jurisdiction. Such cases crop up almost every month.
>
> The problem is that the Tax Court has jurisdiction to determine only the correctness of a tax assessment, and virtually no other issue. This results in the Court being unable to address many issues that taxpayers bring forward. . . .
>
> The Tax Court's limited jurisdiction confounds even experienced counsel at times, particularly when a taxpayer objects to the way in which the Canada Revenue Agency has acted. . . .
>
> This state of affairs is unacceptable. *Taxpayers who deal with the Canada Revenue Agency should be able to appeal to a single Court* for their remedies in all dealings with the Agency.
>
> The Tax Court of Canada has proven itself as a successful, well-run, intelligently administered, compassionate and fair Court. It is neither "pro-taxpayer" nor "pro-CRA," but consistently reaches fair decisions. I study almost every one of the Court's judgments for purposes of my annotations and commentaries, and while no Court is perfect, the Judges of the Tax Court do an excellent job in hearing cases from the most basic self-represented taxpayer to the most sophisticated corporation, and in reaching decisions that are well grounded in the law. The Tax Court's judges have developed expertise in tax law and in the administration of the tax system.
>
> Where the Court has difficulty is where the taxpayer seeks a remedy outside the Court's jurisdiction. In literally hundreds of cases, I have seen a judge note, with regret, that the Tax Court has no jurisdiction to address a particular complaint.[251]

Unfortunately, Minister of Justice Nicholson responded that "the timing for such an ambitious set of legislative amendments is not opportune."[252]

If the time for reform was not "opportune" in 2011, it is certainly opportune now, as the inexorable increase in the ITA's complexity has made ever more acute the problems caused by the Tax Court's incomplete and fractured jurisdiction. The time is, in fact, long

250 See sources cited supra note 4.

251 "Sherman Writes to Justice Minister re Tax Court Jurisdiction" (2011) 33:21 *Canadian Taxpayer* 166-68, at 167-68 (emphasis in original).

252 Sherman, supra note 2, notes on subsection 171(1).

overdue for a comprehensive review of the allocation of jurisdiction among the Tax Court, the Federal Court, and the superior courts, with a view to expanding the jurisdiction of the Tax Court in order to provide taxpayers with the benefit of accessible, effective, and independent dispute resolution in a single forum for most, if not all, issues arising from an assessment (including from assessments that do not impose tax). Matters that the Tax Court could review and decide just as effectively as the Federal Court and the superior courts include the following: relief of interest and penalties, extensions of filing deadlines, entitlement to refunds, provincial income tax issues pertaining to the agreeing provinces, tax balances not covered by the determination jurisdiction, and remedies for taxpayers who reasonably rely on incorrect CRA advice or who are victimized by CRA officials' unlawful conduct.

Indeed, the long-neglected reference jurisdiction could allow the Tax Court to take carriage of many (if not all) of these and other matters with little more than a change in attitude from the minister. As Hershfield J noted in *Chan* (a case in which the Tax Court was asked, on an originating application, to ascertain the date when a notice of assessment was sent),

> [6] That is, the matter before me is neither an appeal of a tax liability nor, in reality, an application for an extension of time, and as such, a question of my jurisdiction to hear the application arises.
>
> [7] Neither party raised a question as to my jurisdiction to hear this matter. . . .
>
> [8] Regardless, all parties have signed pleadings filed with the Court. On that basis I believe it is appropriate to proceed on the basis that section 173 of the Income Tax Act and section 310 of the Excise Tax Act apply. Such sections allow the parties to request a determination of a question relating to an assessment. In essence I have been asked in signed pleadings to make a determination of a question relating to an assessment.[253]

Following the reasoning in *Chan*, a great many disputes pertaining to assessments or proposed assessments—including disputes that nominally fall outside the appellate jurisdiction, the determination jurisdiction, and the late-filing jurisdiction—can potentially be referred to and adjudicated by the Tax Court if the minister simply joins issue with the taxpayer instead of cynically denying the taxpayer access to justice through a motion to quash. Similarly, the Tax Court might better perform its own mission of delivering justice to taxpayers by not raising proprio motu the question of its jurisdiction when a taxpayer and the minister have signed pleadings and referred a matter to the court.

Indeed, given that many of the fetters on the appellate jurisdiction have resulted ultimately from the case law—including such cases as *Okalta Oils* (the nil assessment rule), *Woon* (estoppel), *Gretillat* (interest relief), *Neubauer* (RRSP overcontribution tax),

253 *Chan & Robert v. The Queen*, 2004 TCC 588, at paragraphs 6-8.

*Vachon* (late elections), and *Main Rehabilitation* (ministerial misconduct)—rather than from express provisions in the ITA, the Tax Court and the appellate courts above it might also start critically re-evaluating these precedents, with a view to allowing the Tax Court's jurisdiction to re-expand naturally. The Federal Court of Appeal could well decide to start this very welcome process in *Dow Chemical*.

That said, if the Tax Court is once again to get into the business of reviewing discretionary decisions from the minister, consideration should be given to the standards of review. In the United States, for example, the US Tax Court has jurisdiction to review various discretionary decisions from the Internal Revenue Service (IRS) on the highly deferential "abuse of discretion" standard. As some authors, as well as the national taxpayer advocate, have noted, the "abuse of discretion" standard results in a corpus of case law that is "decidedly one-sided in favor of the Service," and that arguably provides insufficient checks on IRS activity.[254] To preserve the independence and effectiveness of the Tax Court, the court should have a broader equitable jurisdiction to revise discretionary ministerial decisions de novo, potentially similar to the jurisdiction set out in former section 247 (with regard to dividend stripping and associated corporations) or in current section 166.2 (with regard to the late-filing of objections).

In addition, if the Tax Court's case load increases as a result of the expansion of its jurisdiction, consideration will need to be given to the size of the court and its resources. The size of the Tax Court has remained unchanged at 22 judges (including the chief justice and the associate chief justice) since 1990[255] while the court's workload has risen dramatically from year to year because of ever-increasing CRA audit activity and the growth of Canada's population; therefore, a careful evaluation and adjustment of the Tax Court's level of resourcing is long overdue.

254 I. Jay Katz, "An Offer in Compromise You Can't Confuse: It's Not the Opening Bid of a Delinquent Taxpayer To Play Let's Make a Tax Deal with the Internal Revenue Service" (2012) 81:7 *Mississippi Law Journal* 1673-1755, at 1738 et seq. (review of case law) (discussion of US Tax Court review of refusals of offers-in-compromise); Michael H. Lubetsky, "Interest Relief on Income Tax Debts: Canada Versus the United States" (2020) 68:4 *Canadian Tax Journal* 931-86, at 977-80 (review of interest-abatement decisions) and 981-82 (review of offers-in-compromise); National Taxpayer Advocate, *2016 Annual Report to Congress* (Washington, DC: Internal Revenue Service, Taxpayer Advocate Service, 2016), at 364-75: "Review of CDP [Collection Due Process] determinations for an abuse of discretion, except where the underlying liability is at issue, results in minimal scrutiny of the very IRS determinations that have the greatest impact on taxpayers"; and National Taxpayer Advocate, *National Taxpayer Advocate 2020 Purple Book* (Washington, DC: Internal Revenue Service, Taxpayer Advocate Service, 2020), (www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/ARC19_PurpleBook.pdf), at 88-92 (review of "innocent spouse" determinations).

255 SC 1990, c. 45, section 56, amending Tax Court of Canada Act, RSC 1985, c. T-2, section 4(1). In 2021, Parliament amended the Tax Court of Canada Act to allow the appointment of two new judges (SC 2021, c. 23, section 259). To date, these positions remain unfilled.

Income tax compliance, especially for individual taxpayers (such as the hypothetical Pat Leduc who opened this chapter), is challenging enough without having to navigate a byzantine network of courts in order to resolve relatively straightforward disputes with the minister. Back in 1946, Parliament recognized taxpayers' need for an accessible and credible forum in which to resolve disputes over their tax liabilities. Today, over 75 years later, taxpayers are still waiting for that need to be fully met. The time has come for the fetters on the appellate jurisdiction to be removed so that the Tax Court can fully perform its vital mandate to the public.

## Addendum: Dow Chemical

While this book was in the final stages of production,[256] the Federal Court of Appeal issued its decision in *Dow Chemical*.[257] Reversing the decision of Monaghan TCJ (as she then was) in the Tax Court below, the Federal Court of Appeal held that disputes with the minister over *downward* transfer-pricing adjustments can only be heard on judicial review in Federal Court, even though disputes over *upward* transfer-pricing adjustments are dealt with on appeal in the Tax Court.

Although the Federal Court of Appeal acknowledged that the line of jurisprudence including the Privy Council's decision in *Wrights' Ropes* "would appear to support"[258] the opposite result, the court perfunctorily dismissed this line of authority in a single paragraph on the basis that "the issue in this appeal relates to the jurisdiction of the Tax Court and the Federal Court, not the jurisdiction of the Exchequer Court as it related to appeals under the *Income War Tax Act*."[259]

With respect, the court's reasoning on this point is quite unsatisfactory given that the statutory grant of power to the Exchequer Court to dispose of appeals of assessments at the time of *Wrights' Ropes* was virtually identical to the grant of jurisdiction to the Tax Court today, as can be seen in the following table:

256 Two other recent developments merit mention. First, the Federal Court of Appeal confirmed *Nagel*, supra note 8 (TCC), with Monaghan JA remarking for a unanimous bench that "I have sympathy for Ms. Nagel. Navigating the system for appealing provincial and federal tax assessments can be challenging. However, I see no reason to interfere with the Tax Court's decision." (*Nagel*, ibid., at paragraph 27 (FCA).) Second, the two new Tax Court judge positions created by SC 2021, c. 23, section 259 have since been filled.

257 *Canada v. Dow Chemical Canada ULC*, 2022 FCA 70, under appeal to the Supreme Court of Canada, docket no. 40276.

258 Ibid., at paragraph 50.

259 Ibid.

| IWTA, schedule 4, subsection 3(4)[260] | ITA, subsection 171(1) |
|---|---|
| 3(4) The [Exchequer] court may dispose of the appeal,<br>(a) by dismissing it;<br>(b) by vacating the assessment;<br>(c) by varying the assessment; or<br>(d) by referring the assessment back to the Minister for further consideration and re-assessment. | 171(1) The Tax Court of Canada may dispose of an appeal by<br>(a) dismissing it; or<br>(b) allowing it and<br>(i) vacating the assessment,<br>(ii) varying the assessment, or<br>(iii) referring the assessment back to the Minister for reconsideration and reassessment. |

Perhaps more importantly, the *Wrights' Ropes* line of cases was followed by the Income Tax Appeal Board—the predecessor to the Tax Court—which in its early years reviewed dozens of discretionary ministerial decisions that affected the calculation of tax due under its appellate jurisdiction.[261] The statutory grant of jurisdiction to the board was likewise virtually identical to that given to the Tax Court today:

| IWTA, subsection 69B(1) | ITA, subsection 169(1) |
|---|---|
| 69B(1) Where a taxpayer has served notice of objection to an assessment under section sixty-nine A of this Act, he may appeal to the Income Tax Appeal Board constituted by the Third Schedule to this Act to have the assessment vacated or varied . . . | 169(1) Where a taxpayer has served notice of objection to an assessment under section 165, the taxpayer may appeal to the Tax Court of Canada to have the assessment vacated or varied . . . |

As discussed above, the board and Exchequer Court stopped reviewing discretionary decisions of the minister affecting the amount of tax due in the early 1950s because Parliament repealed most of the minister's discretionary powers—not because of any decision by Parliament to curtail the board or the Exchequer Court's jurisdiction over appeals.

Given that the statutory grant of jurisdiction to the Tax Court in the ITA to hear income tax appeals is—basically word-for-word—identical to that previously given to the Exchequer Court and to the Income Tax Appeal Board, Parliament presumably

260 *Wrights' Ropes*, supra note 55, was decided in December 1946, which was the year that schedule 4 of the IWTA was adopted as part of the first wave of post-war tax reform. Although the taxation years at issue in *Wrights' Ropes* antedated the enactment of schedule 4, there was no suggestion that the enactment of the schedule altered the scope of what the Exchequer Court could decide in the context of a statutory tax appeal. Indeed, as discussed below, *Wrights' Ropes* was followed by both the Exchequer Court and the newly created Income Tax Appeal Board in the ensuing years.

261 See the various sources cited in supra note 77.

intended at all times for an "appeal" to the Tax Court to have the same basic meaning and scope as one to the Exchequer Court or the board. The Federal Court of Appeal has, however, failed to give effect to this presumed intention of Parliament by summarily disregarding a well-established line of case law that—even if somewhat dated—was arguably still binding upon it. At a minimum, the court's decision not to follow the considered opinions as expressed in the *Wrights' Ropes* line of cases warranted more than a perfunctory consideration.

The court concluded by observing that the taxpayer may have to proceed in both the Tax Court and the Federal Court to have the question of its transfer-pricing-related tax liabilities fully determined.[262] As is typical in appellate decisions about the jurisdictional lines between the Tax Court and the Federal Court, there is no discussion about whether obliging the taxpayer to proceed in this fashion makes sense from a standpoint of good tax administration, access to justice, or efficient use of judicial resources.

Unless the Supreme Court of Canada decides to weigh in, *Dow Chemical* provides yet another example about how the time has come for a comprehensive review and overhaul of jurisdiction among the Tax Court, the Federal Court, and the superior courts with respect to income tax matters so as to allow taxpayers to have their disputes with the minister resolved as much as possible in a single forum.

262 *Dow Chemical*, supra note 257, at paragraph 91.