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INSTITUT DE RECHERCHE EN DROIT PUBLIC
Faculty of Law
University of Montreal

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LEGISLATION, ADMINISTRATION AND INTERPRETATION PROCESSES IN FEDERAL TAXATION

by Professors

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PREFACE

The Royal Commission on Taxation first had the idea for this study and proposed it to the Institut de recherche en droit public, the Director of which was then Professor Jean Beetz. We wish to express our gratitude to the Commissioners and to Professor Beetz for the confidence they showed in us.

This work is essentially a joint production. It began in June 1963 and many people have helped with it.

Mr. Michael Pitfield, who was at that time attached to the Royal Commission on Taxation and who acted as liaison between the Royal Commission and the Institut de recherche en droit public, guided us in our research and our interviews and greatly facilitated our task.

To the members of the permanent staff of the Institut de recherche en droit public, particularly to Professor Pierre Carignan, we owe much more than we can say: their comments and suggestions have allowed us to improve the content and form of this study.

We must also thank Professor Jean-Louis Baudouin and Mr. Marc Lalonde who were kind enough to revise and comment on certain chapters; Miss Michèle Rivest, Miss Lucille Bertrand and Mr. François Chevrette who are, all three, students in the Faculty of Law and who prepared the bibliography and checked the references.

Thanks are due to many helpers who wish to remain anonymous. The people concerned are civil servants working in the federal capital, in Montreal

or Quebec. The patience and understanding they showed during the interviews they gave us made their help as agreeable as it was useful and this work has only been completed thanks to their invaluable aid. Their comments saved us from making many errors; we are entirely responsible for any remaining mistakes; this is perhaps the only thing for which we can claim exclusive paternity.

The authors have collaborated in the various parts of this study and are in entire agreement about the ideas and recommendations contained in it. However, Professor Desjardins worked mainly on the Introduction and Chapter 1; Professor Bertrand on Chapters 3, 4, 5, 6 and the Conclusion; and Professor Hurtubise on Chapters 2 and 5. Doctor Ouellette has participated in the research and drafting of Chapters 2, 5 and 6; his contribution was very helpful.

Robert J. Bertrand

Alice Desjardins

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Montreal, 1964.

TABLE OF CONTENTS

6.2. SPECIAL TRIBUNALS (Continued)

INTRODUCTION

Two world wars and a worldwide depression brought about a material change in the role of the state and, as a consequence, of taxation. Until the end of the last century, and even up to World War I, the state intervened as little as possible in economic life. Of course, it had to ensure the country's security and even undertake public works which the citizens were unwilling or unable to carry out themselves. It was also incumbent on it to institute tariff measures designed for the protection and encouragement of home industry and even to regulate capitalistic enterprise which, under the cloak of non-interventionism, was developing to the detriment of the public interest. Since World War I, particularly during the past twenty years, the state has played an ever increasing part in the economic life of the nation by efforts to achieve full employment and economic growth, to dampen business cycles and maintain price stability. Today, it is considered its duty to ensure to all its citizens a minimum of security and welfare.

This enlarged role of the state has brought about a new conception of taxation. Previously taxation was simply the means used by the state to meet expenditures which its limited role did not permit it to avoid. Today, it is rather regarded as a means of achieving economic policy objectives. Not only does it make it possible for the state to meet its day-to-day and sometimes even long-term expenditures, but also to pursue such macro-economic objectives as full employment, economic expansion, price stability and dampening of business cycles. Taxation can also have such social policy objectives as more equitable redistribution of wealth among the different classes of society or more rational reapportionment of the factors of production among the different economic sectors.

Because of its increasing importance, taxation has become a constant concern to the citizen. Government policy in the matter can influence the behaviour of taxpayers. Individuals are constantly adapting themselves to a changing environment, of which the tax system is one of the elements. It is precisely the fact that taxpayers react to fiscal changes that makes taxation a useful instrument of economic policy. The behaviour of individuals results from a series of decisions, many of which require consideration of the incidence of taxation. As the role of the state keeps expanding, so does that of taxation.

It is not surprising, therefore, that the Canadian Government should have instituted a Royal Commission with instructions to inquire into Canada's tax system and make recommendations for its improvement. It is on the basis of the Commission's inquiry that the present work has been prepared. It was conceived not as a detailed and complete review of the subject but as an introduction to the study of the legislative, administrative and judicial machinery of federal taxation. Its purpose is not to inquire into the effectiveness of the governmental machinery but simply to analyze the relations between the taxpayers and the Treasury in the light of the principles of equity and the requirements of civism. Civism requires the co-operation of the citizen with the state, while equity imposes on the state the obligation to respect the fundamental rights of the taxpayer.

Because of the scarcity of data concerning Canadian taxation, recourse had to be had to the experience of those who participated in the framing and administration of tax laws or contributed to their interpretation. Public documents, data gathered by the Canadian Tax Foundation and certain monographs have proved most useful. Finally, in order to facilitate

constructive criticism of the Canadian structure, the authors examined various publications dealing with foreign tax systems. Unfortunately they were unable to travel abroad in search of first-hand information from the administrators of those systems.

The origin and life of all tax legislation includes the following stages: preparation, administration and, finally, interpretation or application. The various parts of the present work correspond to these stages. However, before treating them, it is proper to examine the notion of tax or impost and deal with the question of the division of powers among Parliament, government and the courts in matters pertaining to taxation.

0.1. THE NOTION OF TAX OR IMPOST

In a history of the British House of Commons, Hilaire Belloc, had this to say:

> On rare occasions, this expanded Council when summoned, finding itself in the presence of the Government, would talk of other things than taxation. If the State was in peril, for instance, the representatives might counsel a remedy. But taxation was the main object of their coming. For the twin conceptions of private property and of liberty were, in the Middle Ages, so strong that our modern idea (which is the old Roman Idea) of a tax being imposed arbitrarily by the Government, and being paid without question, was abhorrent to those times. A tax was, for the men of the Middle Ages essentially a grant. The Government had to go to its subjects and say: "We need for public purposes so much: can you meet us? What can you voluntarily give us?" And the essential principle of the Representative Houses of the Clergy and of the Laymen all over Europe was a convocation for this purpose; taxation was in those distant days a voluntary subsidy to the needs of the King, that is, of the public services. 1/

This conception of taxation is now obsolete.

0.1.1. DEFINITION

In the British North America Act, 1867, 2/ the words "impost" or "tax"

are used in sections 53 and 54, but only the word "taxation" appears in sections 91 and 92. French legal terminology uses the words "taxe" and "impôt" indiscriminately. It is not inaccurate to render income tax by "impôt sur le revenu".

What is a tax? The Judicial Committee of the Privy Council has shown no undue haste in defining the term "tax". Originally, it chose to consider certain levies as taxes, without giving any reason for using the term.

In 1889, for instance, certain levies imposed by municipalities to pay for road and sewer construction were considered as taxes, though no reason was given for the use of the term. 3/ The notion that such levies might be considered as service charges seems never to have arisen.

Thirty years later, 4/ the Judicial Committee recognized that employer contributions under the terms of the British Columbia Workmen's Compensation Act were taxes. The tribunal gave no grounds for its decision and, moreover, it steered clear of drawing any distinction between a tax and a compulsory insurance premium levied by the state.

In the Unemployment Insurance case, 5/ the Judicial Committee refused to specify the nature of unemployment insurance contributions, because their Lordships did not consider this essential in order to reach a decision in the case.

Some years earlier, however, Lord Sumner 6/ had established two criteria applicable to taxes. In this case, the defendant, the Nova Scotia Car Works, had settled in Halifax after having been granted complete exemption from municipal taxes over a certain period of time. The city decided to improve the sewage system and to meet the cost of the work through taxation. The company refused to pay the tax, claiming immunity.

Thus, the issue was whether the payment claimed was a tax. Lord Sumner, speaking on behalf of the Judicial Committee, decided that it was, for the following reasons:

1. this levy was imposed by a higher authority; and
2. the levy was of a compulsory nature in that it did not require prior consent of the taypayer, except to the extent that, in a democratic system, the state acts by consent of the governed.

In 1931, Justice Duff of the Supreme Court of Canada developed these criteria in Lawson v. Interior Tree, Fruit and Vegetable Committee. 7/ British Columbia had passed a law setting up an agricultural board with power to regulate the marketing of certain farm products. To meet its operating expenses, the board was authorized to levy a charge, at a rate to be decided by itself, on the products marketed.

What should such a levy be termed? According to Justice Duff it was either a tax 8/ or a licence 9/. He was of the opinion that this levy was indeed a tax because the charge:

1. was sanctioned by law and any person refusing to pay the levy could be prosecuted;
2. was imposed on the authority of the legislature, either directly or through an intermediary, the intermediary in this case being a government board; and
3. was levied for public purposes.

Justice Duff interpreted section 92(9) of the B.N.A. Act quite literally and decided that the imposition of the levy was not a valid exercise of the province's power to license, since such power may only be exercised "in order

to the raising of a Revenue for Provincial, Local or Municipal Purposes". The legislation challenged was intended to regulate trade at the provincial level and the purpose of the levy was to meet the expenses of the board responsible for such regulation. The power to license could not be exercised in this case. It was therefore determined that the levy was a tax and as such was ultra vires the provincial legislature, because it was an indirect tax which increased the cost of consumer goods.

These criteria, set down by Lord Sumner and developed by Justice Duff, still prevail. 10/

It should be noted that a few years later the Judicial Committee of the Privy Council reversed this restrictive interpretation of the provincial licensing power in Shannon v. Lower Mainland Dairy Products Board. 11/ The reasoning ran as follows: since the provinces have the power to regulate local trade, they cannot be denied the use of the usual method of doing so, that is, by the issue of permits against payment of charge. Provincial licensing powers may, therefore, serve both to regulate trade and to raise revenues. The fee collected for the licence is justified subsidiarily as a service charge.

0.1.2. SERVICE CHARGES

The notion of payment for services rendered 12/ put forward in respect of licensing 13/ cannot be opposed to that of taxation as stated in the judgment of Attorney-General for British Columbia v. Esquimalt and Nanaimo Railway Co. rendered in 1949. 14/

The circumstances of this case were as follows: in order to meet forest maintenance and protection expenditure, the legislature had set up a special

fund known as the "Forest Protection Fund", which was financed through government subsidies and compulsory contributions exacted from the owners of forest lands. The Attorney General for the Province argued, unsuccessfully, that the levy was not collected from all taxpayers and that it was not paid into general revenue, but was used for special purposes. The arguments were set aside on the grounds that the special fund included monies paid by the public and that a levy could not be distinguished from a tax by reason of the use to which the money was put.

0.1.3. NON-TAX NATURE OF DISTRIBUTION OF INCOME DERIVED FROM COMPULSORY POOLING OF CERTAIN PRODUCTS

The only powers conferred on the provinces by the Constitution are those to levy direct taxes within the boundaries of the province for provincial purposes 15/ and to license 16/ which means to give "permission to trade" 17/. As a result, when the provinces wished to regulate the marketing of agricultural products directly, they found themselves severely handicapped by their constitutional incapacity to levy an indirect tax. British Columbia managed to go around this obstacle by getting the Supreme Court of Canada to draw a distinction between the levy of a tax and the distribution of income derived from the compulsory pooling of certain products.

The story of this development in case law goes back to 1929. At that time British Columbia was faced with the following economic problem: a number of farmers were selling liquid milk for consumption, in preference to processed milk (i.e., butter, cheese), because liquid milk brought in better returns, required a smaller capital investment and less effort. To avoid flooding the liquid milk market, other farmers were obliged to

sell milk in the form of dairy products, the price of which was depressed at that time by international market conditions. In response to representations from the less fortunate farmers, the legislature in 1929 adopted an Act empowering a provincial agricultural board to levy on each farmer selling liquid milk an adjustment levy to be distributed to farmers who had sold milk in the form of dairy products. The system thus consisted in taking part of one farmer's profit to give it to another in the form of a subsidy. In this way, the government hoped to stabilize the market by forcing farmers to sell both liquid and processed milk.

In the Crystal Dairy decision this was declared to be a tax, because it was compulsory, sanctioned by the Act and imposed in the public interest. This tax was judged to be indirect, because it tended to cause a rise in consumer prices. The tax was therefore declared ultra vires the British Columbia Legislature. 18/ Although the province had power to regulate local trade 19/, it could not exercise this power through unconstitutional means. The economic problem remained unsolved.

The Legislature decided to set up a corporation, The Milk Clearing House Ltd., with exclusive power to buy all dairy products in the area concerned (Lower Mainland), and to pay the producers, each month, a price based on a complicated equalization formula. 20/ The corporation, according to the Board's lawyers, was running a business, making purchases at the lowest possible price and selling at a higher figure.

The Supreme Court of Canada felt differently and found the procedure invalid on the grounds that it was a disguised method of getting around the Crystal Dairy case. The corporation's relationship with the farmers was no different from that of the earlier government board. The legislation setting up the corporation was therefore ruled unconstitutional.

The 1957 judgment in re The Farm Products Marketing Act, R.S.Q. 1950, chapter 131, as amended 21/, of the Supreme Court of Canada again asserted that any licensing system for the purpose of adjustment among producers was ultra vires the province, since such a system required the imposition of an indirect tax. Seven judges out of eight, however, felt that a combination of the pool system and the sharing of the sales income, on a provincial basis, was a valid exercise of the local powers to regulate business. 22/

British Columbia then organized a mandatory pooling system for milk products, with distribution of sales proceeds, according to the type of product sold, after deduction of operating costs. This pooling system was found to be valid in Crawford and Hillside Farm Dairy Ltd. v. Attorney-General of British Columbia. 23/ The availability of this type of procedure has greatly reduced the interest of the 1957 amendment to the Federal Agricultural Products Marketing Act 24/ under which the Governor General in Council may delegate powers of indirect taxation to provincial boards. 25/

0.1.4. FEDERAL TAXES

It follows from the foregoing that a tax is a state levy for public purposes which the taxpayer is obliged to pay. The courts have paid little heed to determining whether or not monies thus collected are paid into general revenue or whether these monies represented fair value for services rendered.

The Canadian taxpayer is subject to the following federal taxes:

1. The personal income tax, the corporation income tax and the gift tax, all three enacted by the Income Tax Act 26/ and the Old Age

Security Act 27/. The Income War Tax Act was introduced in 1917 to finance the war effort.

2. The estate tax instituted by the Estate Tax Act, 28/ which came into force on January 1, 1959, replacing the Dominion Succession Duty Act which had existed from June 4, 1941, to December 31, 1958.

3. The sales and excise tax imposed by the Excise Act, 29/ the Excise Tax Act 30/ and the Old Age Security Act. 27/

4. The customs duties levied under the Customs Tariff Act. 31/

What about postal revenues? 32/ Are they taxes? The courts have not had to answer this question, no doubt because this field clearly comes within federal jurisdiction and the federal government has the right to "The Raising of Money by any Mode or System of Taxation". 33/ It could be argued that postage stamps are a form of tax, on the basis of the decision reached by the Judicial Committee in Attorney-General for Quebec v. Reed. 34/ In that case law stamps were found to be an indirect form of taxation. 35/ As to postal revenues derived from money orders, it is difficult to classify them. 36/

The greater part of federal government revenue stems from taxes. Other revenues 37/ include earnings of the Bank of Canada paid by it into the general fund, interest on loans made to other governments, interest, dividends and surpluses provided by the Crown corporations, income from various funds and from bonds held by the state, fees for services rendered by the state and for the issue of licences and exploration permits. 38/

0.2. SEPARATION OF TAXATION POWERS

The powers of the state are legislative, executive and judicial. The doctrine of separation of powers, first laid down by Montesquieu, 39/ states that, in order to avoid tyranny, these powers should not belong to the same organ of the state. This doctrine was inspired by a study of the English Constitution under which, in principle, the legislative power belongs to Parliament, the executive power to the government, and the judicial power to the courts. Nevertheless, even under the British Constitution, the King, on the executive level, acts on the advice of the Cabinet Ministers who are at the same time Members of Parliament and are responsible to it. The Canadian Constitution, both on the federal and on the provincial levels, copied on that point the Constitution of the United Kingdom. In the particular field of taxation, the theory of separation of powers has suffered another important derogation, the effect of which is to attenuate the principle of "Taxation by Parliament only".

The basic principle is that the Crown may not impose a tax without the consent of Parliament. This principle dates back to 1215 when the Common Law was embodied in the Magna Carta. In 1689, the Bill of Rights reiterated this principle in the following terms:

> Levying money for or to the use of the Crown by pretence of prerogative without grant of Parliament for longer time, or in other manner than the same is or shall be granted, is illegal. 40/

Thus all taxes require parliamentary approval. Taxes are a form of penalty 41/ since they deprive the citizen of a part of his property for the benefit of the state. However, the House of Commons, in England as in Canada, does not itself prepare the budget; it approves, rejects or amends it. The Crown prepares it. 42/

Parliament can delegate its legislative powers 43/ including, of course, its power to tax, to other agencies. In Canada, as a general rule, no statute directly delegates power to tax to anyone whomsoever, whether the Governor General in Council, the Minister of National Revenue, or the Minister of Finance. 44/ Section 117(1)(i) of the Income Tax Act 45/ departs from this rule by empowering the Governor General in Council to define for purposes of deduction the term "dependants", which can have the effect of altering the amount of tax payable by some taxpayers. Moreover, some authorities claim there is in fact a delegation of the power to tax each time that Parliament grants discretionary power in respect of exemptions, allowances, liability to tax or the treatment of undistributed income, since the taxpayer's liability is left very largely to the discretion of the Minister and his staff.

Does this procedure respect the principle that the power to tax belongs exclusively to Parliament? The Winnipeg Taxpayers Association submitted a memorandum to the Special Committee of the Senate of Canada which had been set up in 1945 to review the Income War Tax Act and the Excess Profits Tax Act, 1940, 46/ the purport of which was to urge the abolition of ministerial discretionary powers. The Association, indeed, recalled the famous cry of the Middlesex insurgents: "Where discretion begins, law, liberty and security end".

Is it true, however, that discretion does amount to delegation of legislative authority? In Pure Spring Co. Ltd. v. M.N.R., 47/ Justice Thorson stated that section 62 of the Income War Tax Act, 1927, granting discretionary powers to the Minister of National Revenue to allow expenses or refuse them as unreasonable, in effect conferred an administrative and

quasi-legislative power on the Minister. The learned judge expressed himself in the following terms:

> When the Minister makes his discretionary determination that an expense is to be disallowed as excessive he does an administrative act, but, in my view, his determination is more than that. He is acting in respect of a policy which Parliament has indicated but not defined. It has left the limits of the field in which he is to operate to be defined by him in his discretion; the Minister's determination is thus really a definition of policy. The effect is that his determination renders the expense which he disallows subject to tax, which otherwise would be deductible and free from tax. Parliament has thus, in effect, conferred a power of tax imposition upon the Minister. This makes his determination not only an administrative act but also a quasi-legislative one. (Emphasis added)

Although the present Income Tax Act has abolished the bulk of ministerial discretion, it is not entirely absent from all sections. 48/ Since discretionary power, exercised in accordance with the rules of equity and justice, is not subject to review by the courts, and since validly enacted regulations are unassailable, it can thus be argued that, to a certain extent, the power to tax is vested in the Minister.

This delegation, as we shall see later, is an unavoidable "evil" in a modern state in a great many cases. The solution to the problem does not lie in demanding complete abolition of delegation, but rather in finding effective means of controlling any necessary delegation of powers. This question, which presents a very real problem, will be discussed more fully in Chapter 2.

A question also arises concerning the internal regulations issued but seldom published by the Department of National Revenue. These instructions drawn up for the guidance of tax assessors contain numerous provisions affecting the amount of tax citizens are called upon to pay.

However, these regulations cannot be used against the taxpayer in appeal cases, since they are not admissible in court. 49/ Although they are sometimes referred to as quasi-administrative legislation, such regulations do not violate the traditional principle of "Taxation by Parliament only".

REFERENCES

1/ H. BELLOC, The House of Commons and Monarchy, London, George Allen & Unwin Ltd., 1920, p. 23.

2/ British North America Act, 1867, 30 Vict., Statutes of the United Kingdom, 1867, ch. 3.

Section 53. Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons.

Section 54. It shall not be lawful for the House of Commons to adopt or pass any Vote, Resolution, Address, or Bill for the Appropriation of any Part of the Public Revenue, or of any Tax or Impost, to any Purpose that has not been first recommended to that House by Message of the Governor General in the Session in which such Vote, Resolution, Address, or Bill is proposed.

Section 91.3. The raising of Money by any Mode or System of Taxation.

Section 92.2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.

3/ Cité de Montréal v. les Ecclésiastiques du Séminaire de St-Sulpice de Montréal, (1889) 14 A.C. 660 at p. 663.

4/ Workmen's Compensation Board v. C.P.R., (1920) A.C. 184 at p. 190. In "Legislative Frontiers and the Quebec Workmen's Compensation Act 1931", an article written by H.A. LOVETT and published in (1934) 1 D.L.R. 753 at p. 758 the author claims this point was not a issue in the decision. Extracts from legal argument quoted on pages 186-187 lead us to think otherwise.

5/ A-G. for Canada v. A-G. for Ontario et al., 1937, A.C. 355, p. 356.

6/ City of Halifax v. Nova Scotia Car Works, 18 D.L.R. (1914), 649; (1914) A.C. 992.

7/ Lawson v. Interior Tree, Fruit and Vegetable Committee, (1931) 2 D.L.R. 193 at p. 197.

8/ British North America Act, 1867, s. 92(2), 30 Vict., Statutes of the United Kingdom 1867, ch. 3.

9/ Ibid., s. 92(9).

10/ In Re Unearned Increment Tax Act, (1953) 1 D.L.R. p. 657 (Alberta Supreme Court Appellate Division).

11/ Shannon v. Lower Mainland Dairy Products Board (1938) A.C. 708 at p. 721, (1938) 4 D.L.R. 81. In this same judgment, at p. 721, the Judicial Committee of the Privy Council defined a licence as follows: "A licence itself merely involves a permission to trade..." Furthermore, section 92(9) says nothing about a licence having to be direct or indirect.

12/ The constitutional law of India has formulated an interesting distinction between "a tax" and "a fee". Durga Das BASU, Shorter Constitution of India, S.C. Sarkar & Sons (Private) Ltd., Calcutta, 1960, p. 508, expresses the idea as follows:

1. A tax is an imposition made for a public purpose, without reference to any service rendered by the State or any specific benefit to be conferred upon the taxpayer. The object of the levy is to raise the general revenue.

2. A fee is a payment levied by the State in respect of services performed by it for the benefit of the individual. It is levied on a principle just opposite to that of a tax. While a tax is paid for the common benefits conferred by the Government on all taxpayers, a fee is a payment made for some special benefit enjoyed by the payer and the payment is usually proportional to the special benefit. The money raised by a fee is set apart and appropriated specifically for the performance of the service for which it has been imposed and is not merged in the general revenues of the State.

3. While in the case of a tax, there is no quid pro quo between the taxpayer and the State, the amount of the fee is based upon the expenses incurred by the State in rendering the services (though in the case of a particular fee, the amount may not be arithmetically commensurate with the expenses). In any case, in assessing a fee, no account is taken of the varying abilities of the different assessees.

13/ Shannon v. Lower Mainland Dairy Products Board, (1938) A.C. 708, or (1938) 4 D.L.R. (A.C.) 81. See also Reference re The Farm Products Marketing Act (1957) S.C.R. 198.

14/ Attorney-General of British Columbia v. Esquimalt and Nanaimo Railway Co. (1950) A.C. 87.

15/ British North America Act, 1867, s. 92(2), 30 Vict., Statutes of the United Kingdom 1867, ch. 3.

16/ Ibid., s. 92(9).

17/ Supra Cf. note 11.

18/ Lower Mainland Dairy Products Sales Adjustment Co. v. Crystal Dairy, (1933) A.C. 168.

BORA LASKIN in Canadian Constitutional Law, 2nd ed., Toronto: The Carswell Company Ltd., 1960, p. 713, criticizes the decision reached by the Judicial Committee as follows:

18/ (continued)

> "An examination of the Crystal Dairy case shows that the Privy Council devoted more attention to the question whether the marketing levies were direct or indirect taxes than to the question whether they were taxes at all.... Section 92(2) stipulates that it is direct taxation within the province 'in order to the raising of a revenue for provincial purposes'. An equalization scheme or one for adjustment of returns as between classes or groups of producers subjected to marketing regulation is a far cry from any association with the raising of revenue for provincial purposes."

See also: LASKIN, Provincial Marketing Levies: Indirect Taxation and Federal Power, 13 U. of T., L.J. (1959-60) 1.

19/ The Citizens Insurance Company of Canada, v. Parsons, (1881-82) 7 A.C. 96. This right in the matter of dairy products was recognized in Shannon v. Lower Mainland Dairy Products Board, (1938) 4 D.L.R. 81; (1938) A.C. 708.

20/ Lower Mainland Dairy Products Board v. Turner's Dairy Ltd., (1941) 4 D.L.R. 209 at p. 214.

21/ In the Matter of a Reference respecting The Farm Products Marketing Act, (1957) S.C.R. 198; R.S.Q. 1950, c. 131 as amended.

22/ In Australia, this distinction had already been recognized since 1933, Cf. W.A. WYNES, Legislative, Executive and Judicial Powers in Australia, third edition, The Law Book Co. of Australia Pty, 1962, p. 232, as well as decisions quoted by this author.

23/ Reference Re Milk Industry Act of B.C., Crawford, Hillside Farm Dairy Ltd. and Hay Bros. Farms Ltd. v. Att.-Gen. of B.C., City of Vancouver and Fraser Valley Milk Producers Association, (1960) 22 D.L.R. (2nd ed.) 321. The decision turned on sections 41(a), (d), (e), (f), (h), (i), (j), (k), (l), (m), (n), (o), (p), (q), (t), of the Milk Industry Act. In Milk Board v. Hillside Farm Dairy, 43 W.W.R. (1963) 131, the British Columbia Court of Appeal held section 44 of the same Act to be valid, in accordance with the same principles as in the Crawford decision.

24/ An Act to amend the Agricultural Products Marketing Act, 5 Eliz. II, S.C. 1957, c. 15; BORA LASKIN, Canadian Constitutional Law, 2nd ed., Toronto: The Carswell Company Ltd., 1960, p. 712.

25/ It is far from clearly established that the Federal Government does have indirect taxation power for provincial purposes. Cf. B.H. KELLOCK The British North America Act - An Apparent Gap in Legislative Authority, 16 Faculty of Law Rev. (1958) 1. MAX MENDELSOHN, Indirect Taxes for Provincial Purposes, (1964) 52 Themis - p. 298.

26/ Income Tax Act, R.S.C. 1952, c. 148 and amendments.

27/ Old Age Security Act, R.S.C. 1952, c. 200, s. 10, as amended by An Act to amend the Old Age Security Act, 7-8 Eliz. II, S.C. 1959, Supra 1.1.2.5.2.

28/ Estate Tax Act, 7 Eliz. II, S.C. 1958, c. 29 and amendments.

29/ Excise Act, R.S.C. 1952, c. 99 and amendments.

30/ Excise Tax Act, R.S.C. 1952, c. 100 and amendments.

31/ Customs Tariff, R.S.C. 1952, c. 60 and amendments.

32/ Post Office Act, R.S.C. 1952, c. 212.
Traditionally, the Post Office is self-supporting. Usually it succeeded very well until it started showing slight deficits in recent years. However, between 1947 and 1961, it realized an overall profit of $59 million. Post Office revenues are paid into the General Revenue.

33/ British North America Act, 1867, section 91(3), 30 Vict., Statutes of the United Kingdom 1867, c. 3.

34/ Att.-Gen. for Quebec v. Reed, (1884) 10 A.C. 141.

35/ It should be noted that in this decision, however, the Judicial Committee of the Privy Council did not examine the meaning of the word "taxation" in detail. The Committee considered that law stamps were taxes and concentrated on the question of whether these stamps constituted an indirect tax or not. The provincial Act was then found to be ultra vires. Matters did not rest there. Cf. W.H.P. CLEMENT, The Law of the Canadian Constitution, 3rd ed., Toronto: The Carswell Company Limited, 1916, p. 665.

36/ The study of a decision such as the one reached in the case of the A.G. of Canada v. Registrar of Titles of Vancouver Land Registration District, (1934) 4 D.L.R. 764, turns up some surprises. A mandatory charge under a provincial registration act was judged valid as a "fee". This term is without legal meaning as far as provincial taxation powers are concerned, unless the judges were making a reference to "licence fees". See W.H.P. CLEMENT, The Law of the Canadian Constitution, 3rd ed., Toronto: The Carswell Company Limited, 1916, p. 665.

37/ "An Analysis of the Revenues and Expenditures of the Government of Canada, The National Finances", 1962-63, Canadian Tax Foundation Toronto, p. 43; The Royal Commission on Government Organization (Glassco Commission), vol. 1, p. 127.

38/ E.g., The Agricultural Products Marketing Act, R.S.C. 1952, c. 6 as amended by 5-6 Eliz. II, S.C. 1957, c. 15.

39/ C.H. MONTESQUIEU, De l'Esprit des Lois, livre II, c. 6.

40/ SIR IVOR JENNINGS, Parliament, 2nd ed., Cambridge: at the University Press, 1957, p. 283.

41/ MAXWELL, On the Interpretation of Statutes, 11th ed., Roy Wilson and Brian Galpin, London, Sweet & Maxwell Ltd., 1962, p. 278. Surely the services which the citizen receives in exchange for taxes compensate for their unpleasantness.

42/ W. F. WILLOUGHBY, W. W. WILLOUGHBY & S. M. LINDSAY, The System of Financial Administration of Great Britain, Washington: Brookings Institution, 1929, p. 38.

43/ Reference re Regulations (Chemicals) under War Measures Act, (1943) S.C.R. 1; (1943) 1 D.L.R. 248; A.-G. of N.S. et al. v. A.-G. of Canada, (1951) S.C.R. 31; (1950) 4 D.L.R. 369 P.E.I. Potato Marketing Board v. H.B. Willis Inc., (1952) 2 S.C.R. 392; (1952) 4 D.L.R. 146.

44/ There is no presumption whatsoever in this field. If the law does not explicitly delegate the power to tax, such power does not exist. In The King v. Wright et al., 59 N.S.R. (1927) 443, the Special War Revenue Act levied a 5% tax on automobiles manufactured in or imported into Canada. This tax was payable by the importer or the manufacturer. Moreover, the Act authorized the Minister to "make such regulations as he deems necessary or advisable for carrying out the provisions of this Part." Using this section as authority, the Minister made a regulation according to which if the manufacturer of a car body mounted the latter on a chassis belonging to a customer, the tax would be calculated on the over-all value of the body and chassis. The regulation was declared void because the Minister could not go beyond the powers allowed under the Act itself. In England, a similar decision was given in Attorney-General v. Wilts United Dairies, 127 L.T.R. (1922) 822 at p. 823. The House of Lords declared a regulation ultra vires, adding "that a tax could not be imposed on the subjects of a country, except under the authority of a specific Act."

45/ Income Tax Act, R.S.C. 1952, c. 148. The section reads as follows:

> "117 (1) The Governor in Council may make regulations ...
> (i) defining the classes of persons who may be regarded as dependent for the purposes of this Act..."

46/ The Senate, Proceedings of the Special Committee, No. 6, meeting on Tuesday, December 11, 1945, p. 30.

47/ Pure Spring Co. Ltd. v. The Minister of National Revenue, (1946) Ex. C.R. p. 471 at p. 479.

48/ Income Tax Act, R.S.C. 1952, c. 148, ss. 12(2), 13(2), 21(4), 109(4).

49/ See chapter 5, of this study, infra.

PART ONE

THE LEGISLATIVE MACHINERY

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CHAPTER 1—THE ELABORATION OF TAX LEGISLATION

Tax legislation requires several months of preparation before it is given Royal Assent. This chapter describes each phase of this lengthy process, as carried out first at the administrative and executive level, where the budget is prepared and the ensuing legislation blocked out, then at the legislative level where it is submitted to Parliament and passed.

1.1. THE PREPARATION OF TAX LEGISLATION

Contrary to the practice of the United States and certain European countries, where the budget bears mainly on government expenditures, in the United Kingdom and Canada it determines government policy in respect of taxation. 1/

In Canada, as in the United Kingdom, several departments are involved in the production of the budget, but the final taking of decisions rests with the Minister of Finance. The outstanding feature of the procedure is the secrecy of the budget whereby the public, and to a large extent even Members of the Cabinet, are kept out of the picture.

On June 29, 1963, after the first Gordon budget, the "Financial Post" published an article entitled "We can learn from the U.S. how to introduce taxes" which contained the following passage:

> In the U.S. maximum publicity is given to proposed tax changes, in contrast with the secrecy shrouding them here. This gives taxpayers time to rearrange their affairs, but many Canadian tax men do not think this is necessarily a bad thing.

The United States system would thus appear to be the reverse of that used in Britain and in Canada. But, in fact, to judge their respective merits, each system must be viewed in its proper constitutional context. The two are so utterly different that it is essential to take a close look at the United States system before broaching the question of the secrecy of the Canadian budget.

1.1.1. THE UNITED STATES SYSTEM 2/

As head of the Executive, the President of the United States is responsible for the taxation policy submitted to Congress, but the actual job of preparing revenue estimates and proposing changes in the tax structure falls on the Treasury Department. The Secretary of the Treasury is the President's spokesman before Congress.

The President himself may put the whole taxation programme before Congress in a special message or on the occasion of one or more of his three annual messages. On the other hand, he may merely divulge the spending estimates, making but few references to financing the expenditures and leaving it to the Secretary of the Treasury to tell Congress at a later date how it is proposed to do this. When the Secretary of the Treasury submits the tax proposals, these emanate from his department and are therefore less binding on the other government departments. When the President presents a programme, however, as has been the tendency of late, other government departments are consulted to a much greater extent.

Although Congress bears the full responsibility for the formulation and passing of tax legislation, the Executive plays a vital part in drafting the finance programme, which is drawn up by the staff of the Treasury Department 3/ following discussions with the other departments.

However, in order to maintain good relations with Congress, the Secretary of the Treasury seeks the assistance of the Tax Committee of the House of Representatives and of the Senate and of the Joint Committee Staff of Congress. 4/ The public is also called upon to play a part at this stage.

1.1.1.1. INTERDEPARTMENTAL CONSULTATION

In principle, the administration as a whole, and not just the Treasury Department, is responsible for the tax programme. For this reason, senior officials of various government bodies are consulted, including the Bureau of the Budget 5/, the Council of Economic Advisors, the Board of Governors of the Federal Reserve System, and also occasionally other bodies such as the Securities and Exchange Commission, the Department of Commerce, the Department of State, and the Department of Agriculture.

1.1.1.2. CONSULTATION WITH INFLUENTIAL MEMBERS OF CONGRESS

When drawing up his tax programme, the Secretary of the Treasury or his representative consults influential members of Congress, especially those prominent in the Committees on Taxation of the House of Representatives and of the Senate. Later the President consults them himself for the same purpose, but the prime responsibility for these contacts rests with the Secretary of the Treasury. If the President's party is in control of neither House, such consultations may serve but little purpose, but they usually help to bring about some measure of agreement on certain points in the programme. At the worst, they shed light on the respective positions taken; at the best, they result in complete agreement.

These consultations add flexibility to the system, as is shown by the following example. The original draft of the 1950 Revenue Bill contained tax reductions. After study by the Senate Committee on Finance, it was completely changed because of the economic repercussions of the Korean War. Such a radical change could not have been effected without the agreement of the Secretary of the Treasury and of the principal members of the two Committees on Taxation.

1.1.1.3. THE PART PLAYED BY THE PUBLIC

In the performance of its duties, the administration usually takes public opinion into account. As will be seen the public can express its views, both formally and informally, to the various levels of the administration. All suggestions received are sent to the Treasury Department.

The administration pays close attention to all the letters and reports it receives. According to Mr. Roy Blough 6/, such mail seldom contains new ideas but it does give the government an idea of the points likely to evoke criticism.

In addition, some government departments have services (Public Advisory Groups) to deal with representations from the public and provide information. The Business Advisory Council of the Department of Commerce is an example. Lastly, when they can, senior civil servants attend the seminars organized by various of the more important trade and professional associations to discuss tax legislation.

Occasionally special steps are taken to sound public opinion on tax legislation. Thus, in 1939, the Under Secretary of the Treasury asked the public to write to the department or to meet its representatives. About

1,000 letters were received and 83 interviews were arranged with a total of 281 persons. It is true that at that particular time there was much criticism of the tax laws. According to some, dissatisfaction stemmed from the hostility shown by the Roosevelt administration to private enterprise. Thus, the circumstances were somewhat exceptional but the administration is always open to listen to the verbal representations of members of the public.

1.1.1.4. THE ROLE OF CONGRESS 7/

Whilst the tax programme is actually drawn up by the Secretary of the Treasury and submitted by him or by the President to the two Houses, the final decision, both in fact and in law, rests with Congress.

In tax matters, the initiative rests with the Ways and Means Committee of the House of Representatives. Its first step, when introducing a Bill, is to consider the advisability of holding a public hearing. Should a hearing be held, the first witness called is usually the Secretary of the Treasury. The duration of the sitting depends on the contents of the Bill, on the number of persons who wish to be heard and on the Committee itself. The Committee is assisted by the Joint Committee on Internal Revenue Taxation. 8/

Once the public hearing is over, the Committee on Ways and Means holds an Executive session behind closed doors, at which only the officials on the Committee staff are admitted; the public, the press and other members of Congress being excluded. The purpose of this privacy is to enable Committee members to speak their minds openly without fear of public opinion in order to arrive at a truly objective decision. Press releases

are generally sent out at the end of each sitting. Usually Committee decisions, even the provisional ones, are published as soon as made. Once the Committee has finished its work, a Bill is drafted by the Legislative Counsel of the House and submitted to the House of Representatives for debate. Time for debate is sometimes limited and frequently there is agreement not to amend the Bill in order to preserve its balance.

After passage through the House of Representatives, the Bill is sent to the Senate. The Senate Committee on Finance may, if it wishes, hold a public hearing, but it always holds an Executive session to review the Bill. By this time the Bill is sufficiently advanced to be subjected to detailed discussion and criticism.

The Bill then goes before the whole Senate. If it is amended, it is returned to the House of Representatives which may reject the Bill, accept the amendments or disagree with the Senate, in which case a Committee of Referees is appointed to seek a compromise.

When the Bill is passed by the Senate, the President has ten days in which to approve it or exercise his veto. If he fails to take action, the Bill becomes law, without his signature, on the expiry of the time limit, provided Congress is still in session; if Congress is no longer in session the Bill dies.

If the President vetoes the Bill, it goes before both Houses once again. It then becomes law, without the presidential signature, if, in each House, it is supported by a two-thirds majority, failing which it is rejected.

1.1.1.5. ADVANTAGES AND DISADVANTAGES

The obvious advantage of the United States system is that it affords the public an opportunity to participate in drawing up tax legislation.

However, the system also has its drawbacks. In the first place, attempts are frequently made to settle particular problems when the Bill is discussed and the consequent amendments, forced through by pressure groups, impair the Bill's overall consistency. 9/ The separate consideration of revenues and of appropriations is another weakness of the system, leading to unforeseen deficits or surpluses. 10/ Lastly, the process is so slow that it may drag out for upward of six months.

In fact, Roy Blough 11/ is quite impressed by the merits of the Canadian system, about which he writes as follows:

> Tax students are often fascinated with the taxing process as it has been developed in the United Kingdom and Canada, where it seems to work much better than here. The hope is sometimes expressed that we might develop something of the kind for the federal government. The fact is, however, that the basis for success in those countries is the parliamentary system of government, which is constitutionally not available to us and would not necessarily work well under our conditions. In improving the taxing process it is necessary to build on our own foundations in the light of our own conditions and traditions.

By the same token, we must seek to improve our own system within the context of Canada's constitution and traditions.

1.1.2. THE CANADIAN SYSTEM

In Canada, the budget is usually brought down between March 15 and April 15. 12/ About six months ahead of time, that is, during the previous October, the Minister of Finance takes a look at the revenue

estimates which are based on the assumption that there will be no change in the taxes. Expenditures are estimated by the Treasury Board and submitted to the House about three months before budget day, that is to say, toward the end of December. 13/

The Minister of Finance is then in a position to decide whether or not to bring down a balanced budget, whether the surplus or deficit should be large or small, whether to increase or reduce the taxes, and whether to change the tax structure. Decisions taken at this stage are by no means final but are subject to reconsideration in the light of circumstances.

Without doubt, the key man in this process is the Minister of Finance, as is evidenced by section 9 of the Financial Administration Act: 14/

> The Minister has the management and direction of the Department of Finance, the management of the Consolidated Revenue Fund, and the supervision, control and direction of all matters relating to the financial affairs of Canada not by law assigned to any other Minister.

It would, however, be a mistake to believe that the budget in Canada is a one-man show; the Minister of Finance obtains assistance from the administration, from the public and from his Cabinet colleagues.

1.1.2.1. RESPONSIBILITIES OF THE VARIOUS GOVERNMENT DEPARTMENTS AND AGENCIES

Within the Department of Finance the Taxation Division is chiefly responsible for advising the Minister on matters of taxation policy. It reviews and analyzes requests for changes in existing tax laws and for exemptions and makes estimates of probable revenues from taxation. 15/

The Minister, however, is also helped by the Financial Affairs, Economic Analysis and External Aid Division, and by the Economic Affairs, Industry Tariffs and Trade Division, which both supply valuable data.

However, the Department of Finance is not alone in planning the taxation policy. It seeks the advice of many other government departments and agencies.

Owing to the close connection between fiscal and monetary policies, one of the first bodies consulted by the Department of Finance is the Bank of Canada, which was set up to regulate credit and currency and to promote the economic and financial welfare of the country. 16/ It is now recognized that ultimately the Bank of Canada must accept the government's monetary policy, though it is free to select the means of carrying it out. 17/ In addition to its responsibilities in regard to the monetary policy, the Bank administers the public debt and acts as the government's financial agent. This last duty warrants further consideration since the Bank, in its role as financial agent, supplies the government with the funds it requires over and above the revenues provided by taxes and other sources.

The Department of Finance is kept well informed of any decision taken at the Bank, since the Deputy Minister of Finance is an ex officio, though non-voting member of the Bank's board of directors and executive committee.18/ Furthermore, the Minister of Finance is free to meet directly with the Governor of the Bank as often as he wishes. 19/ Also, officials of the Department's Taxation Division frequently meet with those of the Bank's Research Department.

The Department of Finance relies also on the assistance of the Dominion Bureau of Statistics which collects, analyzes and publishes data on trade, industry, finance, agriculture, manpower and population, and on the advice of the Economics and Research Branch of the Department of Labour which carries out research on the economic and social aspects of labour, thus complementing the work done by the D.B.S.

The Department of Finance is also assisted by various other departments. It consults the Department of National Revenue continuously and, where a sales or excise tax is involved, it also consults the Economics Director of the Department of Trade and Commerce and the Economics Division of the Department of Agriculture. In matters concerning customs duties, it consults the International Trade Relations Division of the Department of Trade and Commerce, 20/ as well as the Economics Division of the Department of External Affairs.

In theory, the Treasury Board has authority to concern itself with any matter regarding finance and budget estimates. 21/ In practice it plays a major part in drawing up estimates of expenditures, but it is not concerned with raising revenues and consequently has no share in developing taxation policies.

The Legislation Section of the Department of Justice is responsible for drafting finance bills. 22/ Usually an official of this section attends all consultations in order to draw attention to any legal problems which might arise out of projected legislation, such as constitutional conflicts or inconsistencies with existing federal or provincial laws. When drafting the bill, the Legislation Section keeps in touch with the Department of Finance to make sure that the proposed wording correctly interprets the

Minister's intentions and it consults the Department of National Revenue in order to avoid as far as possible any administrative difficulties in connection with the enforcement of a new tax.

1.1.2.2. THE PART PLAYED BY THE PUBLIC

In the matter of tax legislation, effective public intervention is limited to the pre-budget period, extending usually from July to February. Later, the public has no further opportunity to intervene, other than through its elected representatives, since there are no public hearings before Parliament such as exist in the United States. However, it may happen that, after being passed at the first reading, a bill is held over until the next session, in order to give the public an opportunity to make representations on its technical aspects. For example, the Income Tax Act, an amendment to that Act adopted in 1961, 23/ and the Estate Tax Act, were handled in this way. Sometimes before introducing a bill the government makes its purport known in order to sound out public opinion. 24/

Questions, comments and suggestions are sent to the Department of Finance by individuals, firms and, more frequently, by associations. Certain associations are concerned with the particular interests they represent, whilst others, such as the Joint Committee of the Canadian Institute of Chartered Accountants and the Canadian Bar Association, are concerned with improving the tax laws in the public interest. The question arises as to whether the submissions presented by the various associations fully reflect the opinions of their members and whether arrangements for meetings with government officials are adequate and produce satisfactory results. In an attempt to settle this point, a survey was conducted to obtain the opinions of various associations who had made representations to the government in the past. 25/

1.1.2.2.1. PREPARATION AND PRESENTATION OF SUBMISSIONS

The survey revealed that some of the points put forward in the submissions of associations have been raised either by their members, by their executive committee or by a committee specially appointed for the purpose. Sometimes the services of experts are retained. The submission is then approved by the executive and in certain cases it is discussed at a general meeting.

Submissions to the government are made in different ways. Usually meetings with government officials take place between the ninth and the third month before the budget, that is, between July and January. It sometimes happens that the interested parties abandon certain positions in the light of objections or considerations put forward by the officials. If the problem is merely technical, the officials deal with it but, if there are political implications, the delegations may be asked to meet with the Minister. In such cases the Minister, flanked by half a dozen of his senior officials, receives the delegations some two months before the next budget, that is, during January or February.

None of the associations surveyed complained of any lack of consideration on the part of the Minister or of his officials, but the Canadian Electrical Manufacturers Association did feel that the meetings were often too short.

> In the presence of Cabinet members, there are usually some questions asked and answers given, but time usually does not permit so much discussion.

When delegations have taken care to send in a submission at least two

weeks ahead of time, they do not need to go into their case in detail, but can concentrate on essentials, thus saving time and making the most of the meeting. According to the Association of Canadian Distillers:

> This procedure has been most helpful in that the time allotted for the interview was devoted to open and frank discussion on the points raised, rather than verbal reading of the brief.

In order to assess better the value of meetings between the government and various associations, a statement made by a Toronto newspaper has been confronted with views expressed by various Canadian associations. In its issue of July 11, 1963, the Globe and Mail stated: 26/

> ...groups have presented formal...briefs to the government, and the government has received them in a formal...fashion. There has been little of the down-to-earth conversation that irons out problems or sparks new ideas.

Hereunder are opinions expressed by various associations:

(a) The Association of Canadian Distillers

> Federal Cabinet Ministers are very busy men. While they have to receive delegations, they prefer them small, with intelligent,concise briefs. That part of the Globe and Mail story was taken out of context. It could have been written for any one of several reasons: Two examples are quoted below.
>
> (1) A group appeared before a Cabinet Minister, was so large that by the time the introductions had been made, and the brief read out, the time allotted for the interview had expired, leaving little or no time for discussion.
>
> (2) It is probable, and this has happened, that an organization, without careful preparation or study of their problem, have insisted upon presenting a brief asking for the impossible. A submission of this nature rarely leaves room for discussion and they usually fall flat, much to the consternation of an overaggressive delegation.

(b) The Canadian Metal Mining Association

The mining industry is more fortunate than others as there is a federal Department of Mines and we keep in close touch with the Minister, the Deputy Minister and the principal officials of that Department. There is, therefore, a minimum of formality and a maximum of serious discussions in our meetings.
For these reasons we regard the present procedure as quite satisfactory. Very rarely have we run into a situation such as that described in the quotation that you give from the Globe and Mail.

(c) The Canadian Construction Association

Superficially, these procedures are very satisfactory, but the results are disappointing. Both parties are very appreciative of the lack of formality, although obviously decorum is maintained throughout. We believe that the government makes a sincere effort to hear and understand the problems of our industry whilst the meetings are on.... Our meetings with the senior officials (as opposed to those with the Minister) are really down-to-earth....

(d) The Canadian Lumbermen's Association

We venture to suggest that the present procedure is not entirely satisfactory. We have noted the Globe and Mail's remarks. We feel that our discussions with government officials could be less formal. However, it is very easy to criticize the government, whereas we should sometimes be more critical of ourselves. We know that there are various groups in our industry which make representations to the government, which makes it difficult for the government to give us all the attention we should like. In other words, we fell that there should be but one spokesman for the industry and that the government should recognize this spokesman as the official representative of the industry as a whole.

(e) The Canadian Medical Association

The formality and regularity of submissions by certain organizations is, I believe, the reason

(e)(continued)

for the view of the Globe and Mail. If they were to present themselves less frequently, reserving their appearances to those of real importance, I do not believe that there would be any lack of "down-to-earth" conversation or helpful discussion, particularly with the powerful senior departmental officials.

(f) Canadian Petroleum Association:

In our view this kind of communication is slightly too formal for the parties concerned to become thoroughly aware of the problems faced by each; we rather agree with the Globe and Mail's comment. Owing to the time factor (the Minister is usually very busy and usually has an appointment calendar that is quite well-filled) it is not possible to spend a couple of hours or half a day discussing the points raised in the brief. Sometimes, of course, the points will not require this length of discussion, but on many occasions they will. What is frequently involved is the matter of "educating" the government representatives in the actual working of the points under discussion. Frequently these are of a rather technical nature, well understood by the industry representatives, but not within the general field of knowledge of the Government representatives. It is suggested that it is frequently this lack of knowledge and understanding, and, consequently appreciation, of the detailed points involved that prevent action by the Government to correct inequities or anomalous situations. We should point out that the Minister is usually first to admit that he is not an expert and relies on his staff. The staff does not usually have the practical experience which would give a clear grasp of the points involved and the resulting problem.

(g) The Canadian Rehabilitation Council for the Disabled

The answer to your question 3..., I believe, depends entirely on who happens to be the government official who is contacted and the nature of the formal brief presented. From my own personal experience, a request for change relating to the fiscal policy is received more formally than a request for a special concession to a special group, where the minister involved may feel free to enter into "down-to-earth" conversation.

(h) The Canadian Pharmaceutical Association

I cannot say that this kind of communication between government and those outside of government is entirely satisfactory.

> On the other hand, I am of the opinion that such formal lines of communication could bring about satisfactory responses if both parties reviewed the problem with frankness and without bias.... Possibly it is difficult for government to be absolutely frank in its discussion of its view of the overall problem and its inter-relationship to other problems confronting the many aspects of government work. Possibly, too, it is difficult for those outside of a business group or a professional organization to appreciate that such groups or organizations do in fact very often present themselves with other than a vested interest. It may be that on too many occasions opinions are formed prior to the setting up of communications and both parties lack the desire to alter their opinions.

The last two quotations contain a suggestion that government officials avoid committing themselves on the basic facts at issue. This appears to be the case. Actually, the purpose of the meetings is to give interested parties an opportunity of being heard. The government officials ensure that they have fully understood the suggestions put to them, but they do not reveal what they think of them. In the words of A. K. Eaton:

> As a rule the Minister of Finance will have some of his officials with him in receiving delegations. Their main function is to listen, ask questions and seek information, but not to argue the pros and cons of the case being heard. 27/

Frequently submissions are made in writing only. Parties who live far from Ottawa sometimes have to be content with this form of approach. In the words of The Saskatchewan Association of Rural Municipalities:

> Except when our problem is such that it warrants a trip to Ottawa to press the matter it seems we have to depend on written submissions.
> We only hope that the Federal Ministers realize this, and will give all our submissions the respect and attention that they would give if we were there to present them personally.

1.1.2.2.2. ATTENTION GIVEN TO THE SUBMISSIONS BY THE GOVERNMENT

Whether or not submissions are followed up with a meeting, the main thing is that they should not be simply pigeon-holed. The Canadian Construction Association made the following complaint in this connection:

> ...Results seem to be scanty and it is only after repeated submissions have been made frequently about the same point that we eventually get something done.

In fact, the government does pay attention to all submissions. These are first examined by an official of the Taxation Division. If the matters brought up are involved, they may give rise to discussions between the officials of various departments or to the drafting of a memo for the attention of the Minister. The suggestions are then assembled in what is known as the Black Book and are given two separate and thorough examinations.

The first of these is carried out by about thirty officials of the Departments of Finance and National Revenue. Each suggestion is discussed at greater or lesser length in committee 28/ with a view to obtaining a majority or unanimous view. Each official, however, is allowed to register a dissident opinion. 29/

The Black Book is then examined at a series of meetings chaired by the Minister of Finance. The Minister of National Revenue attends these meetings and each Minister is usually accompanied by five of his officials. The Department of Justice also sends a representative to comment on the legal implications of the suggestions.

Discussion at these meetings centres on the opinions expressed by officials at the former meetings and on the implications of the suggestions

in terms of revenue. The Minister of Finance decides which recommendations are to be adopted. In arriving at a decision, the Minister must take into account both the technical and the political aspects of the problem.

1.1.2.2.3. APPRECIATION

The survey reveals that the non-committal attitude of the government and its slowness to act have led the associations to feel that their meetings with the officials, and more particularly their meetings with the Minister, are sometimes a waste of time.

Can anything be done to overcome official reticence and lentor? Many of the recommendations bearing on tax policy may be excellent for one type of budget but unacceptable for another. 30/ Whatever the case, the Minister cannot reveal his thoughts without betraying the principle of budget secrecy. 31/ Neither can he be expected to commit the Cabinet in matters which it has not had the opportunity to consider.

Furthermore, a suggestion put forward by an association may have repercussions in many other sectors of the economy and, for this reason, may require further thought and consideration. 32/ Again, on the assumption that the complaint made by the Canadian Construction Association is well founded, the question arises whether the trouble lies not so much with faulty procedures as with a shortage of competent staff. It may be that the officials of the Taxation Division are swamped with work, in which case the government should do something to remedy the situation.

Public consultation is mentioned in several submissions to the Royal Commission on Taxation. 33/ Some suggest that a committee be formed to make a year-round study of recommendations sent in by the public with a

view to amending the existing tax laws. The question is to know whether such a committee would really do better than the officials of the Department of Finance. To begin with, if the staff is too small, it should be increased. Is it advisable to form a committee besides? Those in favour propose that a certain number of officials would be specifically responsible for carrying out this work. The committee would receive delegations, read submissions and, if need be, suggest reforms. For example, in April 1964, the Minister of Finance, Walter Gordon, after delivering his Budget Speech, 34/ asked the public for technical suggestions in the light of his proposals concerning corporations having a degree of Canadian ownership. Had such a committee existed at the time, it would have dealt with the public's recommendations.

According to Donald H. Huggett, 35/ 50% of the committee membership should be drawn from outside the civil service and should include representatives of the Canadian Tax Foundation, the Canadian Institute of Chartered Accountants and the Canadian Bar Association. The Canadian Bar Association, on the other hand, feels that the committee should be made up entirely of government officials. This seems to be the better solution. True, the public wishes to be heard, but it wishes to be heard by the government. Furthermore, one should avoid giving a vote to persons who might be tempted to attach too much weight to the views of their more influential clients. 36/

With a view to encouraging public participation in the working out of tax legislation, it is recommended that:

> A permanent committee be set up, to be named The Tax Advisory Committee. This committee, composed of civil servants, would hear representations from the public, study any briefs submitted, and report thereon to the Minister of Finance. Subject to the Minister's consent, its reports could be published.

1.1.2.3. THE DECIDING AUTHORITY

The ordinary Cabinet procedure is for each minister to handle the day-to-day business of his department and to bring matters which may have serious political implications to the attention of his colleagues. The minister himself decides whether or not to take up any particular matter with the Cabinet. According to Sir Ivor Jennings: 37/

> The Minister who refers too much is weak; he who refers too little is dangerous.

A few days before the Cabinet meeting, the minister who wishes to take a matter up with his colleagues sends them a memorandum outlining the problem and indicating his proposed line of action. This practice gives the other ministers the time to consider the point at issue and, if necessary, to draft a memorandum of their own. Ultimately, the Cabinet takes all important decisions. 38/

The procedure just described applies only partially to the budget proceedings. Actually, the Cabinet reviews the estimates of expenditures; it decides whether there will be a surplus or a deficit, and whether taxes should be raised or lowered. As far as circumstances permit, all these matters are considered by the Cabinet about two months before budget day. 39/ However, the Cabinet is seldom informed about new taxes, 40/ the suppression of old taxes or about changes in the rates and coverage of taxes until just a few days before the public itself is informed. 41/

Such portions of the Budget Speech as deal with changes to the tax structure are prepared by the Minister of Finance himself. He is assisted in this task by a number of his senior officials. These officials,

together with the Prime Minister, are generally the only persons privy to what he is going to reveal to the Cabinet. 42/ However, under certain circumstances, the Minister of Finance may discuss certain points with one, some or all of his colleagues.

In law, the Cabinet is not bound to accept the proposals of the Minister of Finance. It may even throw out the budget, 43/ but, as Sir Ivor Jennings points out, 44/ such an action would normally bring about the resignation of the Minister of Finance. In practice, the Minister almost always has the last word. Although he reveals the general purport of the budget speech to his colleagues, he does not hand them copies of his speech. Furthermore, the Cabinet has at the most a few days and sometimes only a few hours in which to study and discuss the proposed measures. Lastly, the text of the speech must be sent to the Bank of Canada 45/ by the evening of the day on which it is delivered, and must otherwise be ready for publication.

The budget procedure gives the Minister of Finance powers of decision denied the other ministers in the running of their respective departments. Actually, it is common practice to say that the Minister of Finance "informs" his colleagues of the measures he is recommending in the Budget Speech. 46/

Comparison between the Canadian and United States systems reveals that the Minister of Finance plays a more decisive part in budgeting than does the Secretary of the Treasury, or even the President himself. The financial proposals put forward by the latter may be rejected by Congress, which is independent of the Executive, whereas the Canadian system of

ministerial responsibility makes it almost certain that the contents of the Budget Speech will become law, since a majority vote in the House is almost a foregone conclusion. To put it in a nutshell, the President of the United States or the Secretary of the Treasury proposes taxes, whereas the Minister of Finance announces them.

1.1.2.4. BUDGET SECRECY

In preparing his budget, the Minister of Finance consults neither the Cabinet nor the public to any great extent. On the contrary, extraordinary precautions are taken to ensure absolute secrecy. In the departments concerned, all papers, even rough notes, are kept securely under lock and key, and no typist is given more than two consecutive pages of the speech to type.

On budget day special arrangements ensure that the public will be quickly and correctly informed of the contents of the budget. To eliminate the risk of leakage, reporters assemble in the Railway Committee Room at 2 p.m. and they remain there until the speech has been delivered. 47/ They are immediately given copies of the speech, press releases and explanatory notes, and at about 5 p.m. they are joined by as many as a dozen government officials who explain the proposed measures and answer questions. Thus, by the time the speech is over, the reporters are well briefed. Before this practice was introduced, reporters were very pressed for time and the morning papers often contained dangerous mistakes.

Advance knowledge of the contents of the Budget Speech is thus limited to some fifteen to twenty senior government officials and the Members of the Cabinet. All are bound to absolute secrecy.48/ In Britain, any failure

to maintain secrecy has been followed by dire consequences. In the Thomas case in 1936 the Secretary of State for the Colonies was forced to resign over a leakage of information concerning the tax on tea. In order to avoid a meeting during the Easter recess, the Cabinet was informed of the contents of the budget some ten days prior to budget day. A leakage occurred which led to the resignation of J. H. Thomas, the Secretary of State for the Colonies. 49/ More recently, when Sir Hugh Dalton was Chancellor of the Exchequer, he stopped to speak to a reporter as he was entering the House to make his speech and he happened to say "Your tobacco is going to cost you less when I am through". The reporter published the news on the spot and Dalton was forced to resign.

In 1963 Canada's Minister of Finance, the Honourable Walter Gordon, was assisted in preparing his budget by experts who were not civil servants. In spite of the fact that these experts had taken the oath and that there was no leakage of information, the matter was debated in the Commons and caused considerable stir.

If it is argued that the secrecy which surrounds Cabinet meetings is responsible for the constitutional practice 50/ of keeping the budget secret, the practice can be defended on the grounds put forward by Lord Melbourne in the following passage: 51/

> What Minister will ever hereafter give his opinion freely and unreservedly upon the matters before him if he feels that he is liable, at any distance of time, to have those opinions brought to light and to be himself arraigned at the bar of the public for having held them? And how can the public affairs be satisfactorily conducted unless the sentiments of Ministers be declared in their fullest extent and without the least bias either of apprehension or of precaution?... If the arguments in the Cabinet are no longer to be protected by an impenetrable veil of secrecy, there will be no place left in the public councils for the free investigation of truth and the unshackled exercise of the understanding.

The aim of Cabinet secrecy is, according to Lord Melbourne, to promote good government and to protect the ministers, who may reveal nothing of what transpires at the meetings, including any discussion of the budget. It does not follow from this, however, that the Minister of Finance should withhold information concerning important financial measures from his colleagues until the very last minute and thus place them, so to speak, before an accomplished fact.

In budgetary matters, this precaution is intended to stem leakages of information by allowing the smallest possible number of persons to know of the proposed tax measures. 52/ Budgetary secrecy and the retroactivity of finance acts to budget day are two means of preventing individuals and corporations from making improper profits or reducing the effectiveness of the proposed legislation by last minute transactions.

We shall now consider, for each type of tax, the dangers avoided by the maintenance of budget secrecy.

(A) Sales or Excise Taxes

In the case of sales or excise taxes, foreknowledge of an impending rise or fall in taxation may lead to an acceleration or a postponement of purchases by unlicensed buyers. In either case, the outcome may be undesirable.

For instance, in 1957 the public was led to believe that the excise tax on cars was about to be lowered. During his electoral campaign, Mr. Diefenbaker 53/ promised that if he were elected to power he would abolish or reduce the excise tax on cars and that he would eliminate, completely or substantially, all unfair excise taxes. After the election,

the Honourable Mr. Fleming, then Minister of Finance in the Diefenbaker Conservative government, made a statement to the press which was interpreted as foreshadowing a tax reduction. A rumour, picked up by the press, 54/ suggested that the tax on cars would be reduced. The rumour slowed down the sale and production of cars and increased the unemployment which prevailed in the automobile industry. General Motors of Canada, Chrysler and Ford announced that they would be obliged to lay off personnel, particularly in their Oshawa and Windsor factories. The situation gave rise to a long debate in Parliament. 55/ The incident shows that mere speculation can provoke economic difficulties. Clearly, if the government announced tax changes in advance, the repercussions might be even more disastrous.

On the other hand, the public tends to step up its purchases when a tax increase is expected. Unlicensed dealers will stock merchandise in the hope of making an additional profit when the tax goes on. The government would then lay itself open to charges that it was favouring a particular group of taxpayers. Furthermore, the manufacturing industries concerned would have to deal with a sudden rush of orders quite unrelated to any overall increase in demand, which is undesirable from the point of view of industrial stability.

Finally, whether it is proposed to raise or to lower the tax, the reaction of the market, unless it is anticipated with considerable accuracy, is likely to upset revenue estimates.

(B) Corporation Income Tax

Foreknowledge of impending changes in the rate of corporation income

tax, as opposed to changes in the administration of the tax, can have considerable influence on the stock market and enable individuals and corporations to make improper profits. At one time, the Budget Speech used to be delivered at about 3 p.m. but, owing to the reaction of the stock market to changes in corporation taxes, and to the differences in Stock Exchange closing time, Mr. Ilsley, who was Minister of Finance in 1942, decided to postpone the speech until 8 p.m. The practice has been since maintained.

(C) Personal Income Tax

Advance knowledge of impending changes in personal income tax and exemptions does not appear to present much danger. It is true that an individual who knows that his allowable deductions are going to be changed might take steps to reduce his tax burden. However, it might even be a good thing for taxpayers to have advance knowledge of pending changes. For instance, a person might, in the month of February, have donated the sum of $1,000 to a charitable organization. In calculating how much he would give, he no doubt took into consideration the fact that the gift was deductible for income tax. Supposing that, in March, the Minister abolished retroactively the allowance for charitable donations, it would seem that the taxpayer would have good grounds for complaint.

(D) Estate Tax

There would seem to be no objection to advance knowledge of changes in estate tax. A person whose estate is likely to be affected can always calculate how much tax would become due were he to die immediately. In fact, however, he does not know when he will die, what his estate will be worth at that time, nor whether the estate tax will be changed in the meantime.

(E) Conclusion

It is clear from the foregoing that secrecy, even when respected, does not entirely protect the public from the risks it is sought to guard against. In practice, unfounded rumours or well-inspired forecasts may produce undesirable results. The more certain it is that tax changes are contemplated, the more these undesirable effects are likely to occur. This, no doubt, is why secrecy is essential in the Canadian system, whereas it is not in the United States. In Canada the measures recommended in the Budget Speech are virtually certain of becoming law. Thus, anyone who has advance knowledge of the contents of the speech knows just where he stands. In the United States, on the other hand, in spite of the slow procedure and the publicity which surrounds the development of tax laws, uncertainty often reigns right up to the last minute, for Congress is not bound to adopt the tax measures recommended to it by the Executive.

In addition, those risks against which the public is protected by the rule of secrecy exist only when there is a change in sales, excise or corporation taxes. Therefore, it is solely in such fields that secrecy is essential. However, it must be borne in mind that all parts of the budget form an integral whole, that its general trend can often be anticipated and that, if one part is revealed, the other more secret part may be surmised more easily. For these reasons, we recommend that:

> The rule of secrecy should be strictly maintained with regard to changes in sales, excise or corporation taxes. The Minister of Finance should submit the other tax measures to the Cabinet whenever he considers that he can do so without endangering the secrecy of the rest of the Budget. In such cases, there is no reason why the Cabinet should refrain from announcing the measures to the public in advance, whenever there is an advantage in doing so.

1.1.2.5. LEGISLATIVE TECHNIQUE IN TAXATION

The basic pattern of the budget is not the sole concern at this stage. There remains to be determined the manner of drafting the ensuing legislation.

Taxes may be expressed in such a way as to make the taxpayer aware of the burden he is to bear or so as to conceal the burden as much as possible. They may be intended either to swell the general revenue funds or to be allocated to specific uses so that the taxpayer can establish a relationship between the various taxes and the services provided by the state.

Also, in drawing up the bills and the relevant regulations, words may be ascribed their dictionary meaning or may be defined in the statute. Their clauses may be drafted in general terms or spelled out in detail.

1.1.2.5.1. PUBLICATION OR CONCEALMENT OF THE TAX BURDEN

Let us first consider the extent to which the burden of various taxes is apparent or more or less concealed from the ordinary public.

There is no real problem in the matter of the estate tax. In fact, if the estate is in excess of $40,000, the heirs are more than likely to know what to expect.

As regards excise tax, the situation is different. The taxpayer often does not know how much he pays the Treasury, for the tax is usually included in the retail price of the article. However, it would be pointless to develop a system to inform the purchaser of the price of the

article before tax and of the rate of tax on the latter. In fact, to be fully informed the taxpayer would have to know the actual incidence of the tax. This, however, is unfeasible, since manufacturers and merchants anxious to maintain or to increase their volume of business may absorb a part of the tax and reduce their prices accordingly. They themselves are unaware of the extent to which they do this, for it is impossible for them to determine the level at which competition would force them to set their prices in the absence of taxation.

With regard to income tax, the individual and the corporation know exactly the amount of tax paid, but neither can be certain whether income would have been the same had there been no income tax. In this area, however, it should be noted that the deduction of taxes on wages at the source, whilst it does not conceal the amount paid, makes the actual payment much easier. What happens is that the taxpayer gets to thinking in terms of take home pay. What is of interest to him is not the gross salary paid by his employer but the amount of his cheque or the cash in his pay envelope. Although he knows what his taxes are, he is not so conscious of paying them. The advantage of the method is that collection is made easy and efficient and that concealment and fraud are more difficult. However, it is not possible to extend the scope of this technique. Payments to non-wage earners are usually not pure profit and those who make such payments are usually too numerous for the system of deduction at source to be administratively feasible.

From the foregoing it follows that, though the wage earner should perhaps be made more aware of the amount deducted at source, it would otherwise be pointless for the legislator to concern himself about the

publication or concealment of the tax burden. However, as regards income taxes, deduction from salaries and wages at the source should be maintained.

1.1.2.5.2. ALLOCATION OF TAX RECEIPTS TO GENERAL REVENUE OR TO SPECIFIC EXPENDITURES

Since the taxpayer is unaware of the total burden of all the direct and indirect taxes he pays, he cannot determine the relationship between the amount he pays and the value of the services he receives from the state. However, he can be told how the government spends the revenue from a particular tax or from taxes in general.

It is possible to set aside the revenue derived from a particular tax for specific purposes. For instance, part of the revenue from individual and corporate income tax and from excise taxes in statutorily set aside for old age security. 56/ In fact, of course, there is no guarantee that the revenue from a tax will be just sufficient to cover the expenditure to which it is appropriated. In any case, the legislator usually only resorts to this procedure when he feels that he can thus sugar the pill for the electorate by drawing its attention to such politically acceptable expenditures as education, health and social security. What the taxpayer needs to realize is not only the relationship between particular taxes and services provided by the state, but also how the tax dollar is apportioned to the various items of budget expenditure.

Following the Budget Speech the mass news media comment on various items of government income and expenditure. This gives the taxpayer an opportunity to discover how his tax dollar is being spent but, at the time he is paying his taxes, he will rarely remember the proportion of revenue allocated to the various expenditures. For this reason, we recommend the following:

A table showing the proportion of the tax dollar going to the main items of expenditure should be included either on the income tax returns or on the assessment notices.

1.1.2.5.3. STATUTORY DEFINITIONS

When the statute fails to provide a definition, the meaning of archaic expressions, of technical terms, or of words taken from a local dialect or a foreign language can be determined in court by experts. However, according to well established precedents 57/, this does not apply to ordinary words to which Parliament is presumed to have ascribed their ordinary meaning. In such cases, when the courts are asked for a ruling, they use the dictionary definitions to which they automatically refer. 58/

Though it is difficult to discuss them in a general way, statutory definitions often provide certain advantages. Each case must be considered on its merits. Definitions may define, restrict or amplify the meaning of a word or, as the next section will show, make the law itself more specific. 59/

1.1.2.5.4. SPECIFIC VERSUS GENERAL LEGISLATION

The increasing complexity of tax legislation is one of the chief problems facing the Canadian taxpayer. This can be illustrated by referring to the 1917 Act 60/ concerning income tax, which comprised only twenty-four short sections requiring eleven pages in the statute book, whereas the present Act 61/ contains one hundred and forty-four sections taking up over two hundred pages of the statutes. Certain provisions, such as section 83A (exploration, prospecting and development expenses) and section 85I (amalgamation of corporations) are so detailed and contain so

many subsections and references that only an expert can understand them at first reading. By itself, section 11 (deductions allowed in computing income) is eleven pages long.

Various associations have touched upon this problem in their submissions to the Royal Commission on Taxation. The Financial Executives Institute of Canada 62/ and the Edmonton Chamber of Commerce 63/ have both complained that legislation is too complex and suggested that the Acts should be drafted in simpler language. On this subject, the Canadian Manufacturers' Association expressed its views in the following terms:

> Your consideration and reporting on the changes which may be made to achieve greater clarity, simplicity, and effectiveness in the tax laws or their administration will undoubtedly be welcome to all taxpayers. In recent years the Income Tax has become highly complex and many of its provisions are difficult even for tax lawyers and accountants to comprehend. Much of the complexity is perhaps inevitable, and much is due to the necessity of blocking loopholes for tax evasion.... Nevertheless, the Association feels that an examination of the Act with a view to bringing about greater simplicity and making it more understandable, is most desirable. 64/

The Canadian Bar Association 65/ expressed the hope that consideration would be given to the problem of determining whether tax legislation should be drafted in terms of broad principles or whether it should be spelled out in detail. In the first place, it is important to note that the two types of legislation are not different in nature, but merely in degree, and that the line of demarcation is by no means easy to draw. For example, it is difficult to say when a general principle has been so spelled out that it ceases to be general, or vice versa. Again, one rule may seem quite broad when compared to a second, but quite detailed when compared to yet a third.

Basically, one has to choose between two approaches to the drafting of legislation and the choice cannot be made without taking into account the subject matter of the law. Specific legislation may sometimes be necessary in view of the complexity both of the matter dealt with and of our social institutions. 66/ Such legislation may be incorporated directly into the Act or it may take the form of regulations enacted under the Act. In dealing with situations which are in a state of flux, delegated legislation usually provides the better approach in that it is not a drain upon Parliament's time. However, the point at issue in this section is not to question whether the rules for determining tax liability should be contained in the Act itself or in regulations, but to question whether these rules, wherever they may be found, should be stated in terms of broad principles or be spelled out in detail. The two approaches must be examined in order to determine if at all possible which policy will best serve the interests of both government and public.

As a matter of principle, tax legislation taken generally, that is, including regulations, should be drafted as far as possible in terms of general principles and interpreted to cover a broad field of taxation and exclude the possibility of tax avoidance. 67/ The method of drafting legislation is thus closely linked with the method of interpreting legislation.

As pointed out in a subsequent chapter, our Canadian courts interpret tax legislation restrictively. 68/ As a consequence of this approach to interpretation, certain individuals and corporations escape the tax net. To overcome this obstacle, legislation tends to become progressively more detailed. A case in point is the tax on furs under the former section 80A

of the Excise Tax Act. 69/ Given a broad interpretation of the section, it is clear that the legislator had no intention of excepting any sheepskin which could be used for fur, not even a Merino type skin. Yet this was not the decision adopted by the Supreme Court:

> A consideration of all the evidence and of the authorities and dictionary definitions to which we were referred, brings me to the conclusion that neither in technical terms nor in common speech nor in that of those who deal in such products would the skin of a mature merino sheep with the wool or hair attached to it be described as a fur.
>
> The evidence shows that while "persian lamb" has long been described as a fur, it is distinguished from the pelts of other types of lamb or sheep. In the Encyclopaedia Britannica (1952) Vol.20 at page 475, domestic sheep are grouped into six types. The Merino sheep is placed in the "Fine-Wool type", while the only breeds placed in the "Fur type" are Karakul and Romanov, the former [Karakul] including "persian lamb". 70/

In the words of the Supreme Court, the decision might have gone the other way had the Excise Tax Act contained the following definition:

> "fur" means the skin of any animal, whether fur-bearing, hair-bearing, or wool-bearing, that is not in the unhaired condition.

Detailed legislation and restrictive interpretation combine to form a vicious circle which is the base of the Canadian tax system. The legislator is constantly forced to resort to technical amendments in order to stop up the gaps opened in the Act by the ingenuity of taxpayers, and the Act becomes progressively more complex as one amendment follows upon another. Furthermore, specific rules drawn up to prevent certain practices constitute an open invitation to adopt other practices which will achieve similar ends. The result is a game of hide-and-seek between the tax collector and the taxpayer, leading to a waste of time, energy and money.

On the other hand, it is quite true that the use of general terms can lead to ambiguity and uncertainty, resulting in litigation. But this difficulty can easily be overcome by filling in with a system of advance rulings 71/ whatever gaps may have been left by the broad principles. The Department responsible for the daily enforcement of the tax laws is perfectly competent to fill in any gaps left by the legislator in accordance with the principles he has enacted. Since the law is what the courts say it is, if the latter were unencumbered with detailed legislation, they might be more inclined to interpret more broadly and thus adapt the law to the changing needs of our modern age. By combining legislation in terms of general principles with a broad interpretation of the law, the present desperately embarrassing situation would be avoided and the wish of many taxpayers for simpler and clearer statutes would be fulfilled. The law should be worded as clearly as possible, since many individuals and small businesses cannot afford the services of experts. Since taxpayers are required to assess themselves, the authorities should make the task as easy as possible. Our present tax laws are so complex that expert knowledge and experience are commonly required to understand them.

In order to simplify the Acts and prevent avoidance, we therefore recommend that:

> Tax legislation be drafted in terms of broad principles, rather than in terms of detailed and specific rules. This does not purport to be a strict requirement which must necessarily be followed in every case, but a goal to be aimed at, though there may be exceptions. Furthermore, such a reform should not be contemplated in isolation, since it will only prove of value provided it is considered in conjunction with subsequent recommendations concerning a broader judicial interpretation of tax laws and the introduction of a system of advance rulings or interpretative regulations.

1.1.2.6. DRAFTING OF TAX LAWS

Bills involving the imposition of a tax or the use of public funds must be preceded by a resolution placed before the House of Commons in committee of the whole. 72/ This long-standing procedure is based on the rule that, when a burden is imposed on the people, Parliament should have all the time needed for full discussion so as to avoid coming to a hasty decision. 73/ As a general rule, resolutions cover only the general outline of the bills of which they give notice. They are drafted by the Department of Finance and they do not call for the same legal exactness as the bills themselves. Sometimes there are exceptions. When a new tax is to be applied immediately, say, the day after the Budget speech, the resolutions are drafted by the same officials and in the same form as the bills which are to follow.

How and by whom are bills drafted? In the case of non-finance bills, the member of the House of Commons or of the Senate who introduces a private member's bill must have it drafted himself. 74/ On the other hand, all bills introduced by the government are drafted by the Legislation Branch Section of the Department of Justice. This is good practice because, if each department were to draft its own bills, lack of uniformity and even conflicts and contradictions between statutes could result. Sometimes, even before the Department of Justice is approached, the department which is planning a bill draws up an explanatory memorandum for the Cabinet Committee on Legislation, presided over by the Attorney General. This Committee was established in 1952, and its function is to see to it that bills which the government will not proceed with are not

unnecessarily drafted. 75/ The Legislation Section only drafts bills approved by the Committee. To help out, the department proposing the measure sends a brief explaining the draft legislation in detail. 76/

Although only the government may present a bill involving the use of public funds or the imposition of a tax, the Cabinet Committee on Legislation does not deal with finance bills because of the secrecy which surrounds the preparation of the budget. Such bills are always drafted by the Legislation Section of the Department of Justice. This is often done before the resolutions are sent to the House of Commons. Experience has shown that it is best to draft the bills in advance. Certain difficulties only come to light during drafting, and it may be necessary to change the resolution, a step which would be embarrassing if this were already before the House. Thus, in actual practice, the bills are drafted after the resolutions, but before the Budget Speech is delivered. Bills thus drafted, however, are not final.

1.2. INTRODUCTION AND ADOPTION OF TAX LAWS

1.2.1. PROCEDURE IN THE HOUSE OF COMMONS

1.2.1.1. THE BUDGET SPEECH

1.2.1.1.1. ANNUAL BUDGETS

In Canada as in the United Kingdom, government expenditures must be approved once a year. 77/ In the United Kingdom, tax laws are voted each year; in Canada, they remain on the statute book until they have

been amended or repealed. The explanation of this difference is that traditionally the British Parliament votes tax laws for one year only in order to compel the Crown to convene Parliament at least once a year, whereas in Canada such a precaution is unnecessary since section 20 of the British North America Act, 1867 prescribes that Parliament be convened at least once a year.

The practice of bringing down a yearly budget goes back to the days when the state was far less concerned with regulating the economic life of the country. The policy at that time was to keep taxes as low as possible and to avoid influencing the general economy. Such a policy is out of date in modern times and it is recognized that government should take action to regulate economic activity. To this end, one of government's techniques is fiscal policy.

To be effective, fiscal policy must be readily adaptable to changes in the economic situation. These conditions, however, are not very compatible with the well-established tradition of bringing down the budget once a year. Of course, it goes without saying that, if unemployment threatens, Parliament can always—at any time during the year—vote supplementary expenditures. The difficulty becomes acute, however, when economic activity has to be slowed down, whether to prevent inflation or to lessen an unfavourable balance of payments. To overcome this difficulty

certain countries have adopted new ways of rendering taxation more flexible. In the United Kingdom, for instance, Parliament has authorized the Chancellor of the Exchequer to increase or reduce, by no more than 10%, customs duties, excise taxes and sales taxes at any time during the year without obtaining prior approval from Parliament. This authority is valid for one year only unless it is renewed. 78/

In order to give more flexibility to the direction of taxation policy, we recommend that:

> Consideration be given by Parliament to the adoption of similar measures in Canada but also applicable to income taxation.

It would be out of the question to bring down more than one full budget a year except in extraordinary circumstances, such as outbreak of war. It must be borne in mind that Parliament has many things to attend to besides taxes and that it is therefore logical that all the discussions on one subject be concentrated into one period of the session. Moreover, the Department of Finance's Taxation Division would hardly be able to cope with preparing more than one budget a year.

In certain quarters it is felt that expenditures should be planned for periods extending beyond one year. A period of three years or more is mentioned. In his submission to the Royal Commission on Banking and Finance, Mr. Steele, an Assistant Deputy Minister of Finance and the Secretary of the Treasury Board, pointed out the advantages of such a practice in the following words:

> To improve the quality of the management process, and to give a better indication of the kind of expenditure levels and structure we are likely to have in advance of the immediate year ahead, are the objective we see in developing this forecasting technique... 79/

1.2.1.1.2. THE PATTERN OF THE BUDGET

The budget is usually brought down between the middle of March and the middle of April. 80/ The Minister of Finance informs the House ahead of time of the day set aside for the purpose. On that day, at about 8 p.m., he rises and proposes: "That Mr. Speaker do now leave the chair for the House to go into Committee of Ways and Means". 81/ In support of his motion, he delivers the Budget Speech.

In the United Kingdom the Budget Speech follows rather simple lines. A memoir on the British financial system describes it as follows:

> "The English budget is merely the speech of the Chancellor of the Exchequer when, soon after the close of the financial year, which is on the 31st of March, he lays before the House of Commons the financial result of the year just expired, the estimates of income and expenditure for the year just commencing, and proposals for an increase or diminution of taxation, or other changes in financial administration, which the Government recommended to the approval of Parliament." 82/

In Canada the speech is somewhat more elaborate. It has become customary to divide it into four parts:

1. In the first part, the Minister of Finance reviews the economic conditions of the country and, if he sees fit, discusses particular economic problems, drawing from a White Paper which he has tabled some days before. This document contains a preliminary review of the government accounts for the fiscal year ending March 31st and a general economic review including some of the more comprehensive economic indicators established by the Dominion Bureau of Statistics, the Bank of Canada and other government agencies. 83/

2. The second part contains a statement of government revenue and expenditure during the past fiscal year. The Minister compares the estimates of revenue and expenditure made the previous year with the actual figures and states whether the year ended with a deficit or with a surplus.

3. The third part of the speech usually contains an estimate of revenue and expenditure for the coming financial year. Normally by this time the Committee of Supply has already begun its review of the estimates. However, since the government always introduces supplementary budgets during the year, the Minister must take these additional expenditures into account when estimating financial requirements for the coming year. His forecasts are therefore based on a number of hypotheses, some economic, some financial. On the economic side, for instance, it may be that the Gross National Product is estimated at so many billions of dollars, that price levels are expected to remain fairly stable, or that an average harvest is forecast. On the financial side, the Minister may assume that the tax structure and rates will remain unchanged.

In comparing receipts with expenditures the Minister forecasts a surplus or a deficit on the basis of the hypotheses considered and analyzes its possible repercussions on the economy. The conclusions he reaches may lead him to propose changes in the tax structure. Taking these changes into account but otherwise retaining on the other points the hypotheses considered above, he gives a revised estimate of revenue for the coming year.

The Minister may also propose amendments to the tax statutes with a view to improving them. He usually gives no indication of amendments that

are of a purely technical nature; these become known when the bill comes before the House for its first reading.

4. The fourth part of the Budget Speech is a statement of proposed amendments to the tax laws given in the form of resolutions. Such resolutions are not usually final. Their wording is as follows: "resolved that it is expedient to introduce a measure to amend the Income Tax Act and to provide among other things ..." In practice the resolutions are rarely amended, though they may be in an extraordinary situation such as occurred in 1963.

The resolutions affecting customs and excise are worded in the same way as the bill which will be later introduced in the House. The reason for this different approach is that, traditionally, customs and excise provisions are made retroactive to the day after budget day, and the officials of the Department act accordingly, not by virtue of any law but solely in anticipation of a retroactive enactment. 84/ The purpose of this extraordinary precaution is to prevent speculation. Not only must a customs or excise tax never be announced ahead of time, 85/ but it must be exigible the moment it is made public.

1.2.1.2. THE BUDGET DEBATE

The Budget Speech is delivered by the Minister of Finance following a motion that the House go into Committee of Ways and Means. Prior to 1955 there was no time limit on debates on this motion, but that year Regulation No. 58 imposed an eight-day limit on budget debates and determined the days on which any sub-amendment or amendment or the main motion had to be put to the vote. Regulation 58 was amended in 1962 and the

budget debate shortened to six days. Sub-amendments, if any, are put to the vote on the second day, amendments on the fourth day and the main motion on the sixth day. 86/

As a result of the principle of Cabinet solidarity, defeat of the main motion would be a vote of non-confidence that would bring about the fall of the government. If the motion is adopted, the Speaker leaves the chair and the Deputy Speaker, who is chairman of the House Committees, presides. The House then goes into Committee of Ways and Means. Often the sitting, hardly begun, is adjourned in accordance with the regulations, to enable the House to consider any matters listed on the Order Paper. The sitting may be resumed several days or even several weeks later. 87/

In committee, the resolutions are examined one by one. Debates in committee are usually conducted in a more easygoing manner than debates in the House. The Minister explains each resolution and answers any questions put to him. He is assisted in this by departmental experts, though only he can actually address the House. When all the resolutions relating to a same tax statute have been adopted, they are immediately reported to the House so that the bill may be tabled. 88/

When the report has been adopted the Minister of Finance rises and asks to table the bill. If the motion is passed, the bill is read for the first time. Copies of the English and French texts are handed to the Members of Parliament throughout the following days. In accordance with the rules of the House, 89/ the three readings of the bill must take place on different days except in special or emergency circumstances. There is usually a few days' interval between the first two readings of a

finance bill. When the bill has been read for the second time, the Minister of Finance moves that the Speaker leave the chair for the House to go into Committee of the Whole to examine it in detail. Since the content of each section has already been passed upon by the Committee of Ways and Means—such is the case particularly in customs and excise legislation—review by the Committee of the Whole is usually fairly short 90/ and the sections are adopted one by one. Report is then made to the House, where the bill is read for the third time.

1.2.1.3. BUDGETARY INITIATIVE

The initiative in appropriations and taxation rests solely with the Crown.

No bill appropriating public funds may be passed by the House of Commons without the Governor General's recommendation. This is provided by section 54 of the British North America Act, 1867 91/ which gives the Cabinet absolute control over public expenditures since, in practice, the Governor General acts on the advice of the Cabinet. When the Privy Council approves an appropriation bill, a petition forwarded by the House's legal adviser asks the Governor General for his recommendation. The recommendation, in the form of a letter to the House, is communicated to the Privy Council. Before the House goes into Committee of the Whole on the bill, a notice of motion is given citing this recommendation. 92/ The motion itself is, by constitutional usage, introduced by a minister of the Crown, usually the Minister of Finance. This rule, which goes back to the time when both the requesting and the allocating of appropriations were done by the Crown, 93/ has the effect of preventing abuses which might occur if private members could initiate action in the matter.

The procedure is simpler in the case of imposition of a new tax, the Governor General's recommendation not being required. According to the customs and rules of the House,94/ all motions must be introduced by a minister of the Crown, usually the Minister of Finance. When a bill is brought in, the House cannot increase the rate nor alter the incidence of the tax, 95/ though it may move to reduce it 96/ or, without diminishing its yield, to change its basis. 97/ In fields where the initiative rests with the Crown, the influence of the Minister of Finance is preponderant. 98/ In practice, the House does not amend resolutions or bills unless the Minister of Finance concurs in the amendment. He may on occasion concede a point to the Opposition, for instance, when the government is in a minority position or a budget resolution is markedly unpopular. As for the members of his political party, he is assured of their support. Rather than vote against the instructions of his Whip, a member of the party will arrange to be absent, knowing that the balance of power between parties will be maintained through the "pairing" system. 99/

1.2.2. THE PROCEDURE IN THE SENATE

1.2.2.1. THE THREE READINGS

When a bill of whatever nature has gone through third reading in the House of Commons, a message 100/ is sent to the Senate together with a copy of the bill, whereupon the Speaker advises the Senate that he has received the message and the bill which is then read for the first time. With Senate approval, the second reading may take place immediately; otherwise, the bill is deferred to a later sitting. Second reading is

always moved by the sponsor of the bill who, in support of his motion, delivers a speech covering the overall nature of the measure and its effects. In the Senate the debate is usually shorter and less heated than in the House of Commons.

After the motion has been passed the bill is given second reading and, if it has to do with taxation, is referred to the Standing Committee on Banking and Commerce for detailed consideration. This committee, whose quorum is nine, consists of some fifty senators and is authorized to hear experts and witnesses.

> In the realm of taxation it is rather ironical that, although the House stands on its authority as the originator of all money legislation, tax bills receive their most rigid scrutiny in the Senate Banking and Commerce Committee. The Committee holds hearings during which the Minister of Finance and his officials appear and this procedure is much more productive of detailed explanation than are the debates in the House of Commons. 101/

Its task finished, the Committee, through its chairman, sends a report to the Senate recommending adoption of the bill with or without amendment. When the report has been adopted, the Speaker of the Senate asks that a time be fixed for the third reading, which may take place forthwith, failing which the bill goes on the agenda of the next sitting. 102/ If there are amendments the House of Commons is so informed by message. When there are amendments and the House accepts them, the adoption of the bill is made known to the Senate. If both Houses stand on their positions, the bill lapses at prorogation unless one of them requests a conference with a view to reaching an understanding. 103/ Rule 22 of the House of Commons provides that representatives of each House may meet to discuss the possibility of a compromise. If their discussions prove fruitful they notify each other by messages.

Whatever vicissitudes have attended its adoption by the Houses, every bill must receive Royal Assent. 104/ This is given in the Senate Chamber in the presence of the Governor General, the members of the Senate and the members of the House of Commons. The latter remain standing at the bar of the Senate. The Clerk of the Senate reads out the titles of the bills which have been passed by the Houses and asks the Governor General whether he assents to them. The latter nods assent, 105/ whereupon the Clerk recites the customary words:

> On behalf of Her Majesty, His Excellency the Governor General assents to these bills. 106/

The bill then becomes law and takes effect immediately unless some other effective date has been set.

1.2.2.2. POWER OF THE SENATE TO AMEND FINANCE BILLS

To become law a bill must be voted by Parliament, which consists of the Queen, the Senate and the House of Commons. Sections 17 and 91 of the British North America Act, 1867 place the Senate on the same footing as the House of Commons. The only restriction imposed on the Senate is contained in section 53:

> 53. Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons. 107/

Does this provision apply to a bill which, though providing for the expenditure of money or the imposition of a tax, deals mainly with some other subject? Although the House of Commons considers such a bill a money bill, the question is a controversial one. 108/ In the United

Kingdom, under the Parliament Act of 1911, the Speaker decides whether or not a bill is a money bill. 109/ In Canada, the Speaker does not possess this power, perhaps because of his not being as independent of the government as his British counterpart. The difference may also be explained by the method of election of the Speaker. In Canada he is selected from the ranks of the government party; the Prime Minister proposes his appointment and the motion is seconded by a member of his own party. It is otherwise in England, where on a change of government the parties often agree to continue the same Speaker in office. A motion to that effect is then made by a member of the government and seconded by a member of the opposition.

Although under section 53 certain bills can originate only in the House of Commons, each House has a right to veto. 110/ The Senate can thus reject finance bills. Logically it should likewise have power to amend them. Nevertheless, on December 20, 1867, the House of Commons denied it this right by passing Rule 63 which is still in force:

> 63. All aids and supplies granted to Her Majesty by the Parliament of Canada, are the sole gift of the House of Commons, and all bills for granting such aids and supplies ought to begin with the House to direct, limit and appoint in all such bills the ends, purposes, considerations, conditions, limitations and qualifications of such grants, which are not alterable by the Senate.

The Senate did not concede defeat. In 1918 it appointed a select committee to determine its legislative powers in respect of finance bills. 111/ This committee reported as follows:

> The Senate has and always had since it was created the power to amend bills originating in the Commons appropriating any part of the revenue or imposing a tax by reducing the amounts therein, but has not the right to increase the same without the consent of the Crown.

Nevertheless, it can be maintained that consent of the Crown is not necessary in any case. Section 54 of the British North America Act, 1867 does not apply to a finance bill. As for section 53, it states that such a bill must originate in the House of Commons. It may be argued that it does not prevent the Senate from amending the bill by either increasing or diminishing the amount involved. On the other hand, it may be maintained that a bill which the Senate has amended by increasing the amount of the tax would no longer be the bill that originated in the House of Commons.

There have been instances of finance bills being amended in the Senate at the request of the government. In 1953, for example, certain government officials proposed to the Committee on Banking and Commerce that, for administrative reasons, the effective date of an excise tax bill be deferred. The House accepted the amendment. 112/ In 1960-61 the Senate amended the Income Tax Act and, when the bill was referred back to the House of Commons, the Speaker questioned the Senate's right to amend, whereupon the Minister of Finance stated that the amendment had been made at his own request in accordance with a long-standing practice. 113/ Sometimes also, on its own initiative, the Senate amends a finance bill, particularly in the field of income tax. The House of Commons may accept such amendments, with the proviso that its acceptance is not to be considered a precedent, the House of Commons being alone entitled to amend bills imposing a tax. Beauchesne's Parliamentary Rules and Forms contains the following form:

> That the Clerk do carry back the Bill to the Senate and acquaint Their Honours that the House hath agreed to their amendments, the Minister of Finance accepting the said amendments with a protest against the right of the Senate to make amendments to money bills. 114/

On the other hand, in 1961-62 the House of Commons turned down a tariff act amendment suggested by the Senate, pointing out that this was a money bill and the Senate had no right to amend it. Consequently the bill lapsed. 115/

1.2.3. PUBLIC PARTICIPATION

Parliamentary procedure does not provide for direct participation of the public in the working out of tax legislation, except on invitation of the Senate before the Standing Committee on Banking and Commerce, which may receive submissions and hear witnesses.

However, action is available to the public through lobbying. Thus, in the case of imposition of a new tax, groups may exert pressure on the Minister of Finance, his officials or members of Parliament. Telegrams, letters and briefs come to the Minister in large numbers. Sometimes, instead of going to the Minister, people present their arguments to his departmental officials, who are his closest advisers, or to members of Parliament. Members of the Opposition are usually ready to listen to complaints from the public and to criticize the government. However, they have little influence except in special circumstances, as when the government is in a position of minority. Government backbenchers do not usually bring such matters before the House but they take them up in party caucus. It is difficult to assess the effectiveness of this type of approach but it undoubtedly gives the Minister of Finance some idea of the public's reaction to his proposals.

1.2.4. CONCLUSIONS AND RECOMMENDATIONS

The issues in a parliamentary debate are either political or technical.

A decision of a political nature bears, for example, on the advisability of budgeting for a surplus or for a deficit of defining the tax base, or of transferring part of the tax burden from one section of society to another. In theory, the House of Commons decides such questions; in practice, though, its role is limited to sanctioning the decisions of the Minister of Finance.

Traditionally, the Senate is primarily a reviewing body. It accepts the principle that it cannot amend a money bill in such a way as to increase the proceeds of a tax. And if it wants to effect an amendment that will reduce the tax burden, it will proceed cautiously so as not to upset the balance of the budget as drawn up by the Minister of Finance. 116/ For some years past, however, it has devoted itself to consideration of major political questions. It is desirable that it should continue to do so, its influence having proved beneficial. It did set up several committees of inquiry, 117/ some of whose recommendations have inspired new legislation. 118/ In the particular field of taxation a select committee of the Senate, 119/ instructed in 1945 to review income tax legislation, recommended the creation of an income tax appeal board, as well as several other reforms. 120/

Parliamentary procedure makes no provision for public participation in decisions of a political nature. It would indeed be inconceivable to substitute the views of organizations who are not privy to the overall purposes of the budget for those of the Minister of Finance assisted by advisers and experts from his department. Moreover, the public should not be given the hope of being able to modify policy announced in the Budget Speech. Once pressure groups knew they could get the Minister to

revise his stand, pressure campaigns would be organized even more and with even less regard for the public weal. On the other hand, the possibility must be considered of his not having foreseen all the implications of his political decisions. In order to give interested organizations the opportunity of pointing out the economic and fiscal consequences of certain reforms, the following recommendation is submitted:

> When the Minister of Finance deems it necessary or advisable he may, prior to the budget speech, refer consideration of political questions to the Advisory Committee on Taxation, the setting up of which is recommended above. 121/ This Committee could invite the public to make suggestions or submit briefs.

Since many suggestions made to the Advisory Committee would for various reasons be rejected, adoption of this proposal would not be open to the objection that it would make it possible to forecast important items of the budget with any certainty.

As for decisions of a technical nature, the problem is different. Since it is difficult to distinguish between technical and political issues, the Senate is wary of placing its own judgment against that of the House of Commons. Furthermore, as the budget is usually brought down about half way through the session, it is quite late in the session when money bills reach the Senate. Though the Senate's daily agenda is not as full as that of the Commons, the Senate has fewer sittings available for the discussion of taxation measures.

As it operates at present, the House of Commons is not an appropriate body for the discussion of technical aspects of tax legislation, all the implications of which are often apparent only to the expert. With

few exceptions, its members are not sufficiently conversant with the matters dealt with and, as the House cannot summon experts to testify, they must be content with sketchy explanations supplied by the Minister of Finance. Members of Parliament, whether from the government or the opposition side, should be enabled to obtain information speedily. The Library of Parliament should make available to them not only the books required for their research work but also a qualified staff to direct them to sources of information and provide them with needed explanations.

Besides, a body composed of a chairman and two hundred and sixty-four members is too large to discuss measures requiring detailed consideration. 122/ The House of Commons should therefore set up a finance committee equipped with a permanent secretariat and a staff of research workers and instructed to review the technical aspects of tax legislation. Such a committee, presided over by a member of the party in power other than the Minister of Finance and his parliamentary secretary, should be composed of a limited number of well informed members. The fact of its perhaps being less detached from party considerations, as is the Standing Committee on Banking and Commerce, 123/ would not necessarily impair its usefulness. In addition to make a thorough investigation of the technical aspects of the tax laws, it could on occasion serve as a link between the legislator and the public. It is therefore recommended:

> That the House of Commons set up a parliamentary committee patterned after the Standing Committee on Banking and Commerce and instructed to study the technical aspects of finance bills. Such a committee, presided over by a member of the party in power other than the Minister of Finance and his parliamentary secretary, and provided with a permanent secretariat and a research staff, should, when it sees fit, summon witnesses, receive briefs and hear representations from the public.

This, however, should not be allowed to protract the proceedings of the lower House unduly, as apparently happens in the United States. 124/ Unwarranted delays should be avoided, especially when excise taxes or customs duties are being imposed or increased, as on such occasions the officials of the Department of National Revenue act, from the day after the Budget Speech, as if the bill had been passed, knowing from experience that Parliament will give it retroactive effect. And the Senate, before whom such bills come much later, hesitates to amend them for fear of causing administrative difficulties. It is therefore better that any needed amendments be made in the House of Commons and as soon as possible after the Budget Speech. In that field there can be no question of waiting for public reaction.

It is otherwise in respect of taxes on income or on estates. The present system does not allow the public time to make itself heard, since the contents of bills become known only several days after the Budget Speech has been delivered, when the lower House has adopted the report of the Committee on Ways and Means. How much time would be needed for the public to form an opinion and to be consulted by the Finance Committee? Whether five, eight or ten days would prove adequate, only experience can tell. Representatives of the political parties might come to a prior agreement on the time the Committee should be allowed to spend on the bills. Certainly the business of the House would not be unduly delayed if the Committee were given up to ten days to complete its work. 125/ We therefore recommend:

> That all Budget resolutions be worded as they are intended to appear in the bill with which they are concerned, in the same way as is done at present with regard to resolutions affecting the customs and excise Acts; 126/ or, in the alternative, that there be a lapse of ten days between the first and second readings of finance bills embodying resolutions which were not originally worded in bill form or, more specifically, of bills amending the Income Tax and Estate Tax Acts.

REFERENCES

1/ W.F. WILLOUGHBY, W.W. WILLOUGHBY & S.M. LINDSAY, The System of Financial Administration of Great Britain, Brookings Institution, Washington, 1929, p. 226. There are various explanations of the origin of the word "budget". According to A STUDY GROUP OF THE ROYAL INSTITUTE OF PUBLIC ADMINISTRATION, Budgeting in Public Authorities, George Allen & Unwin Ltd., London, 1959, p. 13, the term "budget" derives from the old French word "bougette" meaning a bag or purse. It was used in England to describe the white leather bag containing the seal of the Court of Exchequer in medieval times. Later, the term was used to describe the bag containing the proposals of the Chancellor of the Exchequer for the financing of government expenditures. When the time came round "the bougette was opened" and the tax proposals were read. Little by little the term came to designate the proposals themselves. Hugh DALTON in Principles of Public Finance, Routledge & Kegan Paul Ltd., London, 1954, p. 213, gives another version; the word "budget" has been traced back to an anonymous pamphlet entitled The Budget Opened which attacked Walpole's policies as Chancellor of the Exchequer and described him as a buffoon opening a bag full of tricks and deceits. Cf. also Miss D.M. Gill, "The Treasury 1660-1714", English Historical Review, 1931, (an article quoted in Ursula K. Hicks, Public Finance, 2nd ed., Nisbet, Welwyn; Cambridge University Press, 1953, p. 34, note 2).

2/ For further information on the American system, see Roy BLOUGH, The Federal Taxing Process, Prentice Hall Inc., New York, 1952.

3/ The Treasury tax staff includes various groups of civil servants who are responsible for drawing up the taxation programme. For further details, cf. ibid., p. 97.

4/ The Joint Committee on Internal Revenue Taxation, established in 1926, consists of 5 members from the Ways and Means Committee and 5 others from the Senate Finance Committee; the majority party has 3 members, the minority party 2. The Committee is aided by a group of experts, the Joint Committee Staff, whose duty is to advise the members when tax laws are under study. As such legislation is complex, the members of these committees prefer to have their own specialists rather than to rely on government experts who would be drawn, in this case, from the Treasury Department. Ibid., p. 63.

5/ The main function of the Bureau of the Budget is largely to collect and evaluate the estimates submitted by the various departments. It thus fulfils a function similar to that of the Treasury Board in Canada. Because of the important economic repercussions, the Bureau of the Budget also deals with fiscal policies including methods of taxation. In this, its role differs greatly from that of the Canadian Treasury Board. Ibid., p. 99.

6/ Ibid., p. 106.

7/ Ibid., p. 61.

8/ Supra, note 4.

9/ Ibid., pp. 474-475.

10/ MORGAN GUARANTY TRUST COMPANY, The Federal Budget - There Must Be a Better Way, (April 1964), The Morgan Guaranty Survey, 3.

11/ Roy BLOUGH, op. cit., p. 477.

12/ Over the last fifteen years, eleven budgets have been brought down during this period. Exceptions were in 1953 when the budget was brought down in February, and in 1958, 1961 and 1963 when it was brought down in June.

13/ The Royal Commission on Government Organization made a detailed study of the preparation of the Estimates. (CANADA - ROYAL COMMISSION ON GOVERNMENT ORGANIZATION - Report, Queen's Printer, Ottawa, 1962, vol. 1, pp. 127 on).

14/ R.S.C., 1952, c. 116 and amendments.

15/ CANADA, Administration of the Government of Canada, Queen's Printer, Ottawa, 1963, p. 187.

16/ Bank of Canada Act, R.S.C., 1952, c. 13 and amendments.

17/ E.P. NEUFELD, Bank of Canada Operations and Policy, University of Toronto Press, Toronto, 1958, p. 10. Also BANK OF CANADA, Annual Report of the Government to the Minister of Finance and Statement of Accounts for the year 1962, p. 61.

18/ Bank of Canada Act, R.S.C. 1952, c. 13 as amended by 2-3 Eliz.II, S.C. 1953-1954, c. 33, section 5(2). It will also be noticed that the Minister of Finance appoints the twelve Directors of the Board with the assent of the Governor in Council.

19/ CANADA, House of Commons Debates, 26th Parliament, 1st Session, 1963, Vol. II, June 13, 1963, p. 1000.

20/ The Department of External Affairs is also responsible for organizing meetings between delegates from the Departments of Finance and National Revenue and representatives from other countries for the negotiation of treaties dealing with such matters as tax exemptions. On this see E.H. SMITH, Making Canada's Tax Treaties, (1962) Canadian Tax Journal 289.

21/ Financial Administration Act, R.S.C. 1952, c. 116, section 5(1).

22/ "In actual fact, it is only in the most exceptional circumstances that the drafting of any item of legislation is commenced before such time as the basic principles on which it is to be based have received full and careful study by the Minister of Finance in concert with the senior officials of his Department and of the Department of National Revenue." Donald S. THORSON, Some Problems of Tax Drafting, (1959) Canadian Tax Journal 462, at p. 463.

23/ In 1960, The Honourable Donald Fleming, then Minister of Finance, announced in the House of Commons that this procedure would be followed to amend the provisions of the Income Tax Act concerning profit sharing plans. See CANADA, House of Commons Debates, 24th Parliament, 3rd Session, Vol. III, March 31, 1960, p. 2683.

24/ E. A. DRIEDGER, The Preparation of Legislation (1953) 31 Can. Bar Rev., 33 at p. 45.

25/ Where no other source is shown, the following passages are quotations from letters sent to the authors by the associations. For further information see Appendix A.

26/ Preparing the Budget, The Globe and Mail, July 11, 1963, p. 6. The article is reproduced in full in Appendix B.

27/ The Annual Process of Tax Changes, Report of Proceedings of the Twelfth Annual Tax Conference convened by the Canadian Tax Foundation, Toronto, Canadian Tax Foundation, 1958, pp. 172-174.

28/ At these meetings, a study is also made of suggestions from employees of the Department of National Revenue and especially from the Legal Branch which carries out a continuous review of the way tax laws are being interpreted by courts of law.

29/ The Annual Process of Tax Changes, Report of Proceedings of the Twelfth Annual Tax Conference convened by the Canadian Tax Foundation, Toronto, Canadian Tax Foundation, 1958, pp. 172-175.

30/ Claude M. ISBISTER, Tax Briefs to Governments, (1962) 27 Canadian Tax Papers 35, p. 36.

31/ See infra 1.1.2.4.

32/ Claude M. ISBISTER, Tax Briefs to Governments, (1962) 27 Canadian Tax Papers 35, p. 37.

33/ FINANCIAL EXECUTIVES INSTITUTE OF CANADA, Brief submitted to The Royal Commission on Taxation, January 23, 1964, p. 10; EDMONTON CHAMBER OF COMMERCE, Brief submitted to the Royal Commission on Taxation, August 19, 1963, p. 7 and p. 12; THE BRITISH COLUMBIA HOTELS ASSOCIATION, Brief submitted to the Royal Commission on Taxation, August 14, 1964, p. 7; TAX EXECUTIVES INSTITUTE INC., Brief submitted to the Royal Commission on

33/ Taxation, October 30, 1963, p. 6; Donald R. HUGGETT, Brief submitted to the Royal Commission on Taxation, August 7, 1963, p. 53; THE CANADIAN BAR ASSOCIATION, Brief submitted to the Royal Commission on Taxation, January 11, 1963, p. 10; CANADIAN MANUFACTURERS' ASSOCIATION, Brief submitted to the Royal Commission on Taxation, April 17, 1963, p. 20.

34/ CANADA: House of Commons Debates, 26th Parliament, 2nd Session, Vol. 109, no. 20, March 16, 1964, p. 1028.

35/ Supra, note 33.

36/ Roy BLOUGH, The Federal Taxing Process, Prentice Hall Inc., New York, 1952, p. 29; Louis EISENSTEIN, The Ideologies of Taxation, The Ronald Press Co., New York, 1961, p. 15.

37/ Sir Ivor JENNINGS, Cabinet Government, 3rd ed., Cambridge University Press, 1959, p. 234.

38/ Elisabeth WALLACE, Readings in British Government, University of Toronto Press, Toronto, 1948, p. 246; Herbert MORRISON, Government and Parliament, A survey from the inside, 2nd ed., Oxford University Press, London, 1959, p. 8; H. J. LASKI, Reflections on the Constitution, Viking Press Inc., 1951, p. 120.

39/ "The basic budgetary decisions of the broad budgetary pattern are necessarily taken almost always at least a month before the Budget Speech. If significant changes develop in the meantime there can be modifications, but in the preparation of the budget the general line of policy is that the Minister and the government reach decisions as to the broad pattern of what the budget shall be like very early in the calendar year, assuming the budget is coming down, as is the normal case, in late March or early April, and then the last several weeks are largely devoted to the highly technical aspects of these budgetary estimates, including the drafting of bills...the basic decisions on the pattern of the budget are taken not absolutely irrevocably but are substantially taken 4 to 7 weeks before the actual date of the budget." Extract from testimony of Mr. TAYLOR, Canadian Deputy Minister of Finance before the Royal Commission on Banking and Finance at the Ottawa hearing, Vol. 58 (English version), January 1963, 7344 at p. 7356.

40/ The Cabinet would obviously be called on to discuss not only the principle but also the terms of any law whose side effect would be the levying of a tax such as, for example, an act setting up a social security plan.

41/ In a public statement published on July 10, 1963, by La Presse in an article under the title: Nomination imminente des enquêteurs fédéraux sur le biculturalisme, the Honourable Lester Pearson stated that, in the present government, the Cabinet was informed about the contents of the budget a few days before it was brought down.

42/ Procedure in Great Britain is almost the same. See A STUDY GROUP OF THE ROYAL INSTITUTE OF PUBLIC ADMINISTRATION, Budgeting in Public Authorities, George Allen and Unwin Ltd., London, 1959, p. 121.

43/ In Great Britain during the Labour Government of 1945-1951, the Cabinet rejected a change in the tax on crude oil proposed by the Chancellor of the Exchequer. See John P. MACKINTOSH, The British Cabinet, Stevens & Sons Limited, London, 1962, p.383.

44/ Sir Ivor JENNINGS, Cabinet Government, 3rd ed., Cambridge University Press, 1961, p. 238.

45/ In practice, copies of the budget speech are sent in sealed envelopes to all offices of the Bank of Canada before the speech is made. These envelopes are not opened until 9:00 p.m. by which time the Minister of Finance has delivered a large part of his budget speech to the Commons.

46/ John P. MACKINTOSH, The British Cabinet, Stevens & Sons Limited, London, 1962, p. 383.

47/ The Annual Process of Tax Changes, Report of Proceedings of the Twelfth Annual Tax Conference convened by the Canadian Tax Foundation, Toronto, Canadian Tax Foundation, 1958, pp. 172-189.

48/ Finance Ministers are sometimes closely watched in the last weeks before the budget is drawn up. The following anecdote is taken from The Annual Processes of Tax Changes, ibid., p. 182: when he was Minister of Finance, Mr. Abbott bought a car three weeks before Budget Day. The reporters concluded that the excise tax would not be changed that year. In his speech, the Minister announced that the tax would be reduced from 25% to 10%.

49/ This incident illustrates the wisdom of Ramsay MacDonald when in 1930 he made arrangements for the Cabinet to be told about the provisions of the budget on the morning of the Monday on which it was to be brought down instead of on the Friday before. John P. MACKINTOSH, The British Cabinet, Stevens & Sons Limited, London, 1962, p. 400.

50/ This policy was introduced by Gladstone when he was Chancellor of the Exchequer. "In the past when each tax had separate treatment, the Cabinet had reviewed them as they came up. During Gladstone's period as Chancellor after 1859, all taxation had been consolidated in a single Budget and explained to the Cabinet only a few days before the announcement in the House. Kimberley (The Kimberley Papers, p. 22) thought that the practice of laying the Budget proposals so late before the Cabinet that there is practically no opportunity to discuss them arose when Gladstone was Chancellor of the Exchequer under Palmerston. (ctd.)

50/ ctd. They were always quarrelling, and Gladstone kept his Budgets back to the last moment in order to prevent Palmerston from... getting the Cabinet to object to them." JOHN P. MACKINTOSH, ibid., p. 306.

51/ D. N. CHESTER, The Development of the Cabinet, (1955-56), 9 Parliamentary Affairs, the Hansard Society, 43 at p. 45.

52/ This practice betrays a lack of confidence in the discretion of the ministers. It is interesting to note that, moved by this same lack of confidence, Brougham succeeded in persuading Grey, who was Prime Minister of Great Britain at that time, to forbid members of the Cabinet to visit their clubs. Ibid., p. 45.

53/ The Ottawa Citizen, May 20, 1957, and The Toronto Telegram, May 30, 1957, quoted in CANADA: House of Commons Debates, 23rd Parliament, 1st Session, 1957-58, Vol. 2 , p. 1747.

54/ Ibid., pp. 1721-1755, 2002-2022.

55/ Ibid., pp. 418-9, 1395, 1807-1842, 2207, 2381, 2408, 3751.

56/ An Act to Provide for Old Age Security, R.S.C. 1952, c. 200 section 10, as amended by the Act to amend the Old Age Security Act, 7-8 Eliz. II, S.C. 1959, c. 14.

57/ See, among others, The Queen v. Emma Wilhemina Kaufmann, 54 DTC 1009; (1954) Ex. C.R. 91; The Queen v. Kool Vent Awnings Limited, (1954) Ex. C.R. 633; Universal Fur Dressers and Dyers Ltd. v. The Queen, (1956) S.C.R. 632.

58/ S. L. PHIPSON, On The Law of Evidence, 10th ed., by Michael V. Argyle, Sweet and Maxwell Ltd., London, 1963, p. 36, numbers 60-70.

59/ E. A. DRIEDGER, The Composition of Legislation, Ottawa, The Queen's Printer, 1957, p. 42.

60/ Income War Tax Act, 7-8 Geo. V, S.C. 1917, c. 28.

61/ Income Tax Act, R.S.C. 1952, c. 148 and amendments.

62/ FINANCIAL EXECUTIVES INSTITUTE OF CANADA, Brief submitted to the Royal Commission on Taxation, January 23, 1964, p. 2.

63/ EDMONTON CHAMBER OF COMMERCE, Brief submitted to the Royal Commission on Taxation, August 19, 1963, p. 7.

64/ CANADIAN MANUFACTURERS' ASSOCIATION, Brief submitted to the Royal Commission on Taxation, April 17, 1963, p. 19.

65/ CANADIAN BAR ASSOCIATION, Brief submitted to the Royal Commission on Taxation, April 19, 1963, pp. 2 and 3.

66/ George T. TAMAKI, Publication of Interpretative Regulations, Report of Proceedings of the Fifteenth Annual Tax Conference convened by the Canadian Tax Foundation, Toronto, Canadian Tax Foundation, 1961, 202 at p. 216.

67/ Jacques BARBEAU, Interpretative Tax Regulations, (1961) IX Canadian Tax Journal 192; Roy BLOUGH, The Federal Taxing Process, Prentice-Hall, New York, 1952, p. 153.

68/ See infra, 6.1.

69/ As amended by An Act to amend the Excise Tax Act, 14-15 Geo.VI, S.C. 1950-51, c. 28, section 2, this section reads as follows:

"80A. (1) There shall be imposed, levied and collected, an excise tax equal to fifteen per cent of the current market value of all dressed furs, dyed furs and dressed and dyed furs,

(i) imported into Canada, payable by the importer or transferee of such goods before they are removed from the custody of the proper customs officer; or

(ii) dressed, dyed, or dressed and dyed in Canada, payable by the dresser or dyer at the time of delivery by him."

70/ Universal Fur Dressers and Dyers Ltd. v. The Queen, (1956) S.C.R. 632,at p. 634.

71/ See infra, 5.2.

72/ R. MacGregor DAWSON, The Government of Canada, 4th ed., University of Toronto Press, Toronto, 1963, p. 338.

73/ J. G. BOURINOT, Parliamentary Procedure and Practice, 2nd ed., Dawson Brothers Publishers, Montreal, 1892, pp. 530-31.

74/ E. A. DRIEDGER, The Preparation of Legislation, (1953) 31 Can. Bar Rev. 33.

75/ Ibid., p. 46.

76/ E. A. DRIEDGER, The Composition of Legislation, Queen's Printer, Ottawa, 1957, p. XX.

77/ A.V. DICEY, Introduction to the Study of the Law of the Constitution, 10th ed., Macmillan & Co. Ltd., London, 1960, p. clxxxiii.

78/ Finance Act, 1961, 9-10 Eliz. II, U.K. Statutes 1961, c. 36, s. 9. - Cf. O. Hood PHILLIPS, Constitutional and Administrative Law, 3rd ed., Sweet & Maxwell, London, 1962, p. 570.

79/ CANADA - ROYAL COMMISSION ON BANKING AND FINANCE, Minutes of Proceedings, January 7, 1963, Vol. 58 (English version), pp. 7344, 7345 and 7350.

80/ Supra, note 12.

81/ Sometimes the motion is that the House should form itself into a Committee of Supply. Arthur BEAUCHESNE, Rules and Forms of the House of Commons of Canada, 4th ed., The Carswell Co. Ltd., Toronto, 1958, p. 22, no. 267. For a definition of the committees see R.M. DAWSON, The Government of Canada, 4th ed., revised by Norman Ward, University of Toronto Press, Toronto, 1963, p. 383.

82/ W. F. WILLOUGHBY, W.W. WILLOUGHBY & S.M. LINDSAY, The System of Financial Administration of Great Britain, Brookings Institution, Washington, 1929, p. 265.

83/ For an example, consult the Budget Papers which were tabled by The Honourable Walter L. Gordon, for the guidance of Parliament at the time of the 1963-64 budget. CANADA, House of Commons Debates, 26th Parliament, 1st Session, Vol. 2, June 13, 1963, p. 1085.

84/ In Bowles v. Bank of England (1913) 1 Ch. 57, the practice whereby authorities deducted taxes before the law was passed was declared illegal. The British Parliament immediately passed a law to remedy this situation. See Provisional Collection of Taxes Act, 3-4 Geo. V, U.K. Statutes 1913, c. 3.

85/ Supra, 1.1.2.4.

86/ As an example, here is what happened in the 1963 debate. At 8:00 p.m. on June 13, the budget speech was delivered and this was followed by a very general speech from the Opposition's financial critic. On June 19 the debate was resumed and the Opposition proposed an amendment; there were no amendments to the amendment that year. The debate continued on June 20 and 21. On June 24 the amendment was defeated. The debate continued on June 25 and 26 (5th and 6th days). At 4:45 p.m. on June 26, the Speaker stopped the discussion and put the main motion to the vote.

87/ In 1963 in particular the motion was passed on June 26 and the session was not resumed until July 16 following, three weeks later.

88/ As an example, in 1963 the resolutions concerning the Customs Tariff were studied by the Committee of Ways and Means on July 16; the bill giving effect to them had its first reading the same day. The resolutions concerning excise tax were studied by the committee on July 23, 24 and 25; the first reading of the bill was on July 25. The resolutions on the Income Tax Act were studied by the Ways and Means Committee on July 19, 22 and 23; the bill had its first reading on October 2.

89/ Arthur BEAUCHESNE, op. cit., p. 263, S.O. 75.

90/ As an example, on July 19, 1963, bill No. C-87 amending the Customs Tariff was passed in a few minutes by the House of Commons Committee of the Whole. Bill No. C-90 amending the Excise Tax Act was studied in committee on July 25, 30 and 31. Bill No. C-95 amending the Income Tax Act was studied in committee on October 30 and 31 and on November 1, 6, 7 and 8.

91/ "It shall not be lawful for the House of Commons to adopt or pass any Vote, Resolution, Address, or Bill for the Appropriation of any Part of the Public Revenue, or of any Tax or Impost, to any Purpose that has not been first recommended to that House by Message of the Governor General in the Session in which such Vote, Resolution, Address, or Bill is proposed."

92/ The notice of motion used to say nothing about this. The Minister of Finance had also to read the recommendation. Nowadays this is unnecessary as the notice is drawn up in these terms:

> "Government Notice of Motion: That the House do go into Committee of the Whole at its next sitting to consider the following proposed resolution which has been recommended to the House by His Excellency:"

CANADA, House of Commons Debates, 26th Parliament, 1st Session, Vol. 1, May 21, 1963, p. 81.

93/ F.H. LAWSON and B.G. BENTLEY, Constitutional and Administrative Law, Butterworths, London, 1961, p. 133; A.V. DICEY, Introduction to the Study of the Law of the Constitution, 10th ed., Macmillan and Co. Ltd., London, 1960, p. 315.

94/ Arthur BEAUCHESNE, op. cit., p.220, no. 263; p. 223, no. 269.

95/ Arthur BEAUCHESNE, op. cit., p.224 on, no. 276.

96/ See the decision of the Deputy Speaker in CANADA, House of Commons Debates, 23rd Parliament, Vol. 3, December 12, 1957, p. 2401. The House of Commons reversed this decision the next day, December 13, 1957, ibid., p. 2339.

97/ Arthur BEAUCHESNE, op. cit., pp. 222-223, no. 268

98/ See supra, 1.1.2.3.

99/ W.F. DAWSON, Procedure in the Canadian House of Commons, University of Toronto Press, Toronto, 1962, p. 188.

100/ The Houses communicate by messages. Cf. R.M. DAWSON, The Government of Canada, 4th ed., revised by Norman Ward, University of Toronto Press, Toronto, 1963, p. 338.

101/ "Fact and Opinion: Committees Rejuvenate Parliament" (1959) 7 Canadian Tax Journal 276.

102/ When a money bill is not studied by the Committee on Banking and Commerce for more than a day, three or four days are usually needed to pass it. For example, here is the time taken by each money bill passed by the Senate in 1963:

Excise Tax - Bill C-90

First and second readings: August 2
Third reading: August 2
Royal assent: August 2

Customs Tariff - Bill C-87

First reading: July 22
Second reading: July 23
Referred to committee: July 23
Adoption of committee report: July 24
Third reading: July 25
Royal assent: July 31

Income Tax: Bill C-95

First reading: November 19
Second reading: November 20, 21, 26
Referred to committee: November 26
Adoption of committee report: December 3
Third reading: December 4-5
Royal assent: December 5

103/ W.F. DAWSON, Procedure in the Canadian House of Commons, University of Toronto Press, Toronto, 1962, pp. 235-236.

104/ J.G. BOURINOT, Parliamentary Procedure and Practice, 2nd ed., Dawson Brothers, Montreal, 1892, p. 645. Royal assent to laws for expenditure is governed by a different procedure. Ibid., p. 572.

105/ The Governor General would no more exercise his right of veto than would the Sovereign in the United Kingdom. See E.C.S. WADE and G.G. PHILLIPS, Constitutional Law, 6th ed., Longmans, Green & Co., 1960, p. 125.

106/ CANADA, SENATE, Minutes of Proceedings, 14 Eliz. II, Wednesday, June 30, 1965, p. 255.

107/ It is, therefore, not surprising that, in his Speech from the Throne, the Governor General expresses himself in this way:

"Members of the House of Commons, you will be asked to appropriate the funds required for the public service and for the payments authorized by Parliament."

108/ A. TODD gives a restricted meaning to the words Money Bills:

> "Money Bills (...) are of the three kinds, viz., Tax Bills, Bills of Supply and Bills of Appropriation."

Cf. A. TODD, The Parliamentary Government in England, 2nd ed., Longmans, Green and Co., London, 1887, t.1, p. 815.

109/ E.C.S. WADE and G.G. PHILLIPS, Constitutional Law, 6th ed., Longmans, London, 1960, p. 126.

110/ A different situation exists in England. Cf. Ibid., p. 16.

111/ CANADA, SENATE, Report of the Special Committee to Determine the rights of the Senate in Matters of Financial Legislation, 1923, Queen's Printer, Ottawa, 1963.

112/ CANADA, House of Commons Debates, 21st Parliament, 7th Session, Vol. 5, April 29, 1953, p. 4515.

113/ CANADA, House of Commons Debates, 24th Parliament, 3rd Session, Vol. 6, July 18, 1960, p. 6412.

114/ ARTHUR BEAUCHESNE, Rules and Forms of the House of Commons of Canada, 4th ed., The Carswell Company Limited, Toronto, 1958, p. 386, form No. 59.

115/ See ROBERT A. MACKAY, The Unreformed Senate of Canada, rev. ed., (The Carleton Library, No. 6) McClelland and Stewart Ltd., Toronto, 1963, p. 93.

116/ CANADA, SENATE, Debates, 22nd Parliament, 3rd Session, August 10, 1956, p. 1099.

117/ As an example see CANADA, SENATE, Proceedings of the Special Committee on Manpower and Employment, 1960-61, Ottawa, Queen's Printer, 1960-61. For general reference see Robert A. MACKAY, op. cit., p. 78.

118/ As an example, cf. CANADA, SENATE, Proceedings of the Special Committee on Land Use in Canada, 1957-62, Queen's Printer, Ottawa, 1957-62. Some of these proceedings were the basis of the Agricultural Rehabilitation and Development Act, 9-10 Eliz. II, S.C. 1060-61, c. 30.

119/ CANADA, SENATE, Proceedings of the Special Committee Appointed to Examine into the Provisions and Workings of the Income War Tax Act, 1946, Queen's Printer, Ottawa, 1947.

120/ Infra, 6.2.3.1.

121/ Supra, 1.1.2.2.3.

122/ There is, in fact, in the House a practice whereby each member has the right to speak on the whole or on each of the budgetary resolutions and on each section of the bill; theoretically, this may be done simply by catching the Speaker's eye. (See W.F. DAWSON, Procedure in the Canadian House of Commons, University of Toronto Press, Toronto, 1962, p. 103). In practice, each party Whip gives the Speaker a list of members wishing to speak and the Speaker goes by this. The Whip exercises a certain control over the speeches of the members of his party; he avoids useless repetition and rules out certain speeches which are judged undesirable. He cannot, however, ensure the cohesion of the debate.

123/ See Robert A. MACKAY, The Unreformed Senate of Canada, rev. ed., (The Carleton Library, No. 6) McClelland and Stewart Ltd., Toronto, 1963, p. 89.

124/ Supra, 1.1.1.5.

125/ Fact and Opinion, (1954) 2 Canadian Tax Journal p. 202.

126/ It is possible that the discussions of these resolutions by the Committee of Ways and Means will take longer. On the other hand, the study of the bill will take less time because the text will already have been studied. In this connection, the reader may refer to notes 86 and 88 above. He will see there that in 1963 Bill C-95 amending the Income Tax Act was studied in committee for seven days while the study of the resolutions took only three days. The study of Bill C-90 amending the Excise Tax Act took three days as did the study of the resolutions. There are two plausible hypotheses: either it takes much longer to study the bill on income tax, or the study of a bill takes longer when its text differs from the text of the resolutions which gave rise to it.

CHAPTER 2—THE TECHNIQUES OF TAX LEGISLATION

2.0. INTRODUCTION: THE EXTENSION OF EXECUTIVE POWER

One of the most striking features of modern government is the tendency to constantly augment the powers of the Executive at the expense of those which belong to the legislative and judicial authorities. In countries having well established democratic constitutions, this extension of executive authority has not gone entirely unopposed. Nonetheless, during the two World Wars, the British and Canadian Parliaments had to yield much of their authority to the Executive. Though these powers were largely taken back, once hostilities ceased the Executive has retained a great deal more power than it had before. Supporters of the "laissez-faire" doctrine are continuously protesting against the "new despotism" evidenced by an ever larger number of public corporations and the increasing use of delegated legislation and ministerial discretion by the Executive.

It must be admitted that the legislative branch has lost much of the real power and prestige that it had in the eighteenth and nineteenth centuries. It is also true, however, that unlike the Executive the legislative authority has made little effort to adapt itself to the new functions of modern government. As a consequence, whenever the legislative branch finds that it is unable to determine a policy because of the highly technical considerations involved, whenever regulations must cope with a rapidly changing scene, or whenever a high degree of flexibility is called for, the legislative branch is inevitably moved to leave the determination of the policy to be followed to executive discretion or to resort to the device of delegated legislation.

It is therefore appropriate at the beginning of this chapter to consider the legal and practical problems raised by these two types of executive action, taking into account the requirements of administrative efficiency on the one hand, and of equity on the other.

2.1. MINISTERIAL DISCRETION

The Parliament of Canada has followed the general tendency to allow a minister to act, in certain circumstances, in accordance with the dictates of his own judgment and conscience. This is so, particularly in tax legislation. Although the technique of ministerial discretion is sometimes necessary, it has its dangers. The question to be determined is whether there are sound reasons for resorting to the discretion of the Minister of National Revenue, and whether the individual citizen faced by discretionary power has the necessary means of control to protect his rights.

2.1.1. THE ARGUMENTS IN FAVOUR OF MINISTERIAL DISCRETION

There are both historical and practical reasons for the use of ministerial discretion in Canadian tax legislation, and in the Income Tax Act in particular.

2.1.1.1. HISTORICAL REASONS

The first Income Tax Act, 1/ passed in 1917, contained no more than a dozen discretionary clauses in its orginal form. By the time of the statutory revision in 1927 2/ various amendments to the Act had raised the number to about twenty.

From 1935 to 1946 Mr. F.C. Elliot, a champion of ministerial discretion and a powerful figure in the government of the day, was Commissioner of

Income Tax—later known under the 1943 Act 3/ as the Deputy Minister of National Revenue, Taxation Division.

Mr. Elliot held office in difficult times. The depression and the war which followed forced the government to raise taxation higher and higher using every possible means, with the result that the taxpayer resorted to every loophole that he could find in the statutes. In order to overcome these manoeuvres and in order to speed up changes in legislation and permit greater flexibility in administration, numerous amendments were introduced conferring discretionary powers on the Minister. In fact, by 1945, there were about sixty discretionary clauses in the Income War Tax Act and another fifty in the Excess Profits Tax Act.

2.1.1.1.1. PROPOSED INCOME TAX ADVISORY BOARD

The marked increase in the number of discretionary powers aroused public opinion, giving rise to vigorous expressions of dissatisfaction. In the face of this criticism, the government set up a Senate Committee on October 31, 1945, to study the Income War Tax Act and the 1940 Excess Profits Tax Act and to make appropriate recommendations.

The Committee, which consisted of eighteen senators, received twenty-three briefs in all, including one from the Canadian Bar Association, another from the Canadian Institute of Chartered Accountants, and a third from Deputy Minister Elliot. Most of the briefs voiced complaints to the effect that too many discretionary powers were vested in the Minister of National Revenue and that the appeal procedures then available were ineffective. In its report, dated May 28, 1946, 4/ the Committee recommended the establishment of a Tax Appeal Board, whose functions would include exercising control over ministerial discretion.

The government accepted only part of the Committee's recommendations; for the rest it deferred to the opinions expressed by Deputy Minister Elliot. The latter favoured 5/ the establishment of a commission which would act as a court of first instance for appeals in income tax matters, though as to questions of law only. He also suggested that an advisory body be set up to counsel the Minister of National Revenue in the exercise of his discretionary powers, though its recommendations would not be binding on the Minister. Thus it was that, under section 22 of An Act to amend the Income War Tax Act, 6/ two bodies were constituted: the Income Tax Appeal Board to deal with tax litigation, and the Income Tax Advisory Board to advise the Minister in the exercise of his discretionary powers. It was felt that discretionary powers should be vested in a responsible minister sitting in the Lower House and answerable for the exercise of such powers. 7/

2.1.1.1.2. THE ABOLITION OF MINISTERIAL DISCRETION

The establishment of these two bodies, while very useful, nonetheless did not solve all the problems. A committee comprising senior officials of the Departments of Finance, National Revenue and Justice was therefore set up to consider a complete overhaul of the existing system. The committee proposed the repeal of the Income War Tax Act, substituting for it a new, modern and more clearly worded statute in which the best in the old Act would be adapted to the new circumstances. The new text was drawn up with great care, and Bill 454 (reintroduced at the following session as Bill 338 and later passed into law as the Income Tax Act) was laid before the House on July 12, 1947.

When introducing the Bill, the Honourable Douglas Abbott, who was Minister of Finance at the time, stated 8/ that the question of ministerial

discretion had been treated with particular care in the new draft. In fact the Bill contained only two discretionary clauses, neither of which concerned assessment. One clause required the Minister's consent to any change in a taxpayer's financial year, and the other gave the Minister power to determine tax liability when several trusts were set up in favour of a single beneficiary. The Minister of Finance explained the methods used to eliminate discretion:

> In cases where some degree of flexibility is felt necessary we provide that rules shall be determined by regulations fixed by order in council, which will be subject to review by the courts and will not involve the objectionable principle of ministerial discretion, as is the case in the existing law. Possibly the house would be interested in the method adopted in eliminating discretions. This has been done by converting the discretion into a rule of law dependent on a question of fact....
>
> In practice the department in making an assessment may disallow a certain portion of an item of expense as being unreasonable in the circumstances. If the taxpayer is dissatisfied with the assessment on the basis used by the department he can appeal the assessment and the new income tax appeal board will pass judgment on the case, that is, the court will decide whether the department has acted reasonably. The government is prepared to give this system a thorough trial. It may be found, however, that certain discretions may have to be reinstated if experience shows that the subject matter is not appropriate to judicial determination. 9/

With discretion to all intents and purposes eliminated, the Income Tax Advisory Board could serve no useful purpose and it was dropped from the new statute. 10/

The Bill was held back until the following session in order to give representative bodies and professional associations time to study it and to express their opinions.

2.1.1.1.3. THE REINTRODUCTION OF MINISTERIAL DISCRETION

The new Bill and the special attention given to ministerial discretion constituted a sincere effort by the government to defer to the taxpayer's

will and do away with discretionary powers. Nonetheless, when the Bill was being debated in 1948, the Minister of Finance, the Honourable Douglas Abbott, testifying before the Standing Committee on Banking and Commerce, expressed doubts on the outcome of the new experiment in the following words:

> Bill 338 has retained very few of these cases where the minister is to exercise discretionary power. It is possible that we have gone too far in this direction. There are some situations where ministerial discretion is the only fair way to have certain questions settled. It is a device which avoids the rigidity of a written statute, and it is a means whereby real cases of hardship may be avoided. Frequently the law cannot anticipate all the situations which may arise, and in the absence of ministerial discretion there is no alternative to enforcing the letter of the law. 11/

Even before the new Bill became law, the Minister of Finance, by drawing attention to the advantages of discretion at a time when a Bill to eliminate it was being debated, was clearly suggesting that he had little faith in the new formula and that it would probably be found to be impracticable. It was as if he were excusing in advance a return to ministerial discretion. Under such circumstances, it is scarcely surprising to note that the final draft of the statute as passed on June 30, 1948 12/ contains several discretionary powers such as: section 12(2) dealing with reasonable expenses, section 13(2) dealing with income not derived chiefly from farming, and section 21(4) relating to the attribution of income to a single spouse in husband and wife partnerships, in addition to those already mentioned as included in the original draft of Bill 454 in 1947. As a result of subsequent amendments, including that of 1963,13/ the present Income Tax Act contains some fifteen grants of discretionary power. It cannot but be concluded that government, in spite of its good intentions, has felt obliged, for practical reasons, to fall back on a moderate use of ministerial discretion.

2.1.1.2. PRACTICAL REASONS

While it is essential to safeguard the rights of the citizen, it is also important that the government should collect the taxes imposed by Parliament. To be able to do this, it needs a statute which can be applied without too much difficulty. Even then, there will be situations where ministerial discretion is the only means of plugging loopholes and of preventing tax dodging. There will be cases in which it will be impossible to devise a text of law that can be made to cover all the situations that might develop in a modern state. For instance, it is difficult to imagine how one could incorporate into a statute regulations spelling out the criteria for reasonable expenses (section 12(3) of the Income Tax Act) in such a way as to be equally applicable to millions of people of all social classes engaged in every type of business. Certain provisions of the Income Tax Act, such as section 13(2), are basically aimed at plugging loopholes. 14/ The Tax Appeal Board 15/ has held that section 21(4) answers the same purpose. Several other provisions, such as section 56(1), were added as occasion demanded or, to use the words of the Tax Appeal Board, "in the interests of administrative expediency". 16/

The purpose of the new section 138A is to preserve the status quo in certain intricate situations and to plug a loophole which would have allowed some people to deprive the Treasury of considerable amounts of money through manipulation among various companies of securities often owned by directors of family businesses.

Certainly, the use of discretionary powers by the Minister of National Revenue has always been criticized 17/ and this is still a favourite topic for speeches at Bar conventions. It should be noted, however, that the

United Kingdom committee set up to review ministerial powers in 1932 stated in its report 18/ that there was nothing essentially wrong with the practice but that it could lead to serious abuses if it were not protected by effective safeguards.

In briefs submitted to the Royal Commission on Taxation several influential bodies 19/ came out against ministerial discretion or asked that it be kept to a minimum. The grounds for criticism were varied: it trespassed upon the theory of the separation of powers, it violates the rule of law, it puts the taxpayer and the Department on an unequal footing since the latter is both judge and party, it creates uncertainty, and so on.

These criticisms obviously reflect the interests of taxpayers who would like to deprive the Department of such an effective weapon. At the same time, however, they take no account of the problems faced daily by officials whose difficult task it is to collect taxes and for whom discretion is sometimes the only way of ensuring that the Act is administered efficiently.

It is true that the use of ministerial discretion constitutes an infringement of the theory of separation of powers, but this theory is in no way sacrosanct. Professor Friedman regards it as "a theoretical absurdity and a practical impossibility". 20/ Similarly, the use of ministerial discretion is not the only impingement upon the rule of law. Even today the Crown enjoys many privileges and immunities about which people are little concerned. 21/

Moreover, if one accepts that government must govern and that leadership in a modern democracy should come from the Executive, 22/ one cannot insist on complete equality as between government and the citizen. The process of assessment implies certain decisions on questions of fact which have to be made by some authority or other. The legislator, for

reasons of administrative efficiency, has decided to entrust this duty to the Minister who is responsible for collecting taxes. But this Minister is also answerable before Parliament for his actions. In some circumstances, the interests of the state are best served in this manner.

2.1.1.3. CONCLUSION

Under the circumstances, it does not appear that the number of discretionary clauses contained in Canada's tax legislation is dangerously high. There are about ten in the Estate Tax Act, 23/ about the same number in the Excise Tax Act, 24/ about twenty in the Excise Act 25/ which can be attributed to the highly technical nature of the subject, and about fifteen in the Income Tax Act. 26/

However, these clauses do not all have a direct bearing on assessment. It also remains to be determined whether all these powers are actually used and to what extent. 27/ Any discretionary powers which are not used should be abolished. Any that are little used, might be replaced by substituting orders in council or regulations. The establishment of a system of advance rulings might also be considered now that there seems to be a more favourable attitude towards such rulings. 28/

The conclusion to be drawn from all this is that the government has made an honest attempt to abolish ministerial discretion but that experience has shown this to be impossible. Consequently, it is pointless to continue asking for the suppression of discretion and it would be wrong to refuse systematically to have recourse to it when experience shows that in certain circumstances it is the only practicable formula. The problem lies elsewhere. On the assumption that new administrative methods are necessary but involve new dangers, what matters is that new means of protection are developed

to safeguard the right of the citizens. Therefore, the whole problem consists in determining whether the necessary means are available to give the Canadian taxpayer effective control over the exercise of ministerial discretion.

2.1.2. THE CONTROL OF MINISTERIAL DISCRETION

An ancient English decision 29/ defined discretion as "a science or understanding to discern between falsity and truth, between right and wrong, between shadow and substance, between equity and colourable glasses and pretenses, not to do according to will and private affections". In Sharp v. Wakefield 30/ Lord Halsbury had this to say about ministerial discretion:

> "Discretion" means when it is said that something is to be done within the discretion of the authorities, that that something is to be according to the rules of reason and justice, not according to private opinion: Rooke's Case (5 Rep. 100 a); according to law, and not humour. It is to be, not arbitrary, vague and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself: Wilson v. Rastall (4 T.R. at p. 757).

The essence of discretion, therefore, is that it is neither absolute nor arbitrary. It is subject to controls that are of two general kinds: judicial and political.

2.1.2.1. JUDICIAL CONTROL

There are only two forms of judicial control: appeals, and recourse to the power of supervision and control of the higher courts.

2.1.2.1.1. APPEALS

The taxpayer who intends to contest a discretionary decision before the courts will first consider the possibility of appealing. The tax laws, with

the exception of the Excise Act, 31/ grant the taxpayer a right of appeal to the Tax Appeal Board 32/ or to the Tariff Board 33/ and thence to the Exchequer Court, 34/ and finally to the Supreme Court of Canada.

A clear distinction would be drawn at once between the decision taken by the Minister of National Revenue in the exercise of his discretionary powers and the assessment proper. 35/ An appeal under section 59 of the Income Tax Act is an appeal against the whole assessment and not merely against the decision taken by the Minister, 36/ although the decision may have been an important factor in the assessment.

The war years having made almost inevitable the extensive use of vast discretionary powers, numerous decisions taken by the Minister of National Revenue were contested before the courts, giving rise to considerable jurisprudence in this aspect of taxation law. Important judgments 37/ were handed down, setting out the ground rules to be followed by the Minister in the exercise of his discretion.

The scope of these rules, however, is limited, since they do not go beyond the exercise of ministerial discretion or, in other words, the guidelines to be followed by the Minister in arriving at a decision. This limitation is inherent in the very nature of discretion. Since Parliament refers certain matters to the judgment of the Minister and not to that of the courts, it follows that the latter have no jurisdiction to consider whether the decision taken by the Minister is good or bad, neither can they substitute their opinion for his.

> His reason is not to be judged of by a Court by the standard of what the ideal reasonable man would think. He is the actual man trusted by the Legislature and charged with the duty of forming a belief, for the mere purpose of determining whether

> he should proceed to collect what is strictly due by law; and no other tribunal can substitute its standard of sufficient reason in the circumstances or its opinion or belief for his. 38/

However, in exercising his discretion, the Minister must follow "proper legal principles". This expression, first used by Justices Duff and Davies in Pioneer Laundry and Dry Cleaners v. M.N.R., 39/ was used also by the Judicial Committee of the Privy Council 40/ on appeal and has since been considered as the basic rule to be followed by the Minister in the exercise of his discretion. 41/

The meaning of this rule was defined to a certain extent by Lord MacMillan in Fraser v. M.N.R. 42/ using the following words which have been frequently quoted by the Tax Appeal Board:

> The criteria by which the exercise of a statutory discretion must be judged have been defined in many authoritative cases, and it is well settled that if the discretion has been exercised bona fide, uninfluenced by irrelevant considerations and not arbitrarily or illegally, no court is entitled to interfere even if the court, had the discretion been theirs, might have exercised it otherwise.

In practice, therefore, and in order to make his case, the appellant must prove that the Minister's decision was based on false legal principles, 43/ or was influenced by irrelevant consideration, 44/ or was arbitrary because it was based on insufficient evidence. 45/ Only if the appellant succeeds in this can the courts intervene. 46/

2.1.2.1.2. SUPERVISORY JURISDICTION OF THE HIGHER COURTS

Besides appeal, another way of obtaining judicial relief against ministerial discretion is through recourse to the supervisory jurisdiction of the superior courts over inferior tribunals by means of prerogative writs, and

more particularly the writ of certiorari. These enable the upper courts to review the judgments handed down by the lower courts where there has been lack or excess of jurisdiction. It is rather surprising to note that taxpayers have very rarely made use of this method of controlling ministerial discretion in tax matters. In Pure Spring v. M.N.R., 47/ however, Judge Thorson states that the lawyer acting for the appellant corporation had submitted that the taxpayer had obtained writs of mandamus and certiorari against the Minister's decision and that appeal under the provisions of the Act was merely an additional protection which did not preclude recourse to prerogative writs.

2.1.2.1.2.1. RIGHT OF RECOURSE

It is generally recognized that a lower court is one whose jurisdiction is limited with regard to either matter or persons. But what is a court? The word has acquired a somewhat broad meaning in jurisprudence and is now taken to include any body having power to give decisions which affect the rights of citizens and which, without being a court in the proper sense of the word, nevertheless renders decisions of a judicial nature 48/ or is obliged to act judicially. 49/ Such courts are considered to be inferior tribunals subject to the supervision and control of the superior courts. Numerous authorities could be quoted on this subject. In King v. Electricity Commissioners, 50/ Lord Atkin expresses himself as follows:

> Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs.

The same principle has been expressed in a Canadian judgment, Bruton v. Regina City Policemen's Association: 51/

> It is not necessary to hold that the "Board" is a"court" because, whether it is or is not, it certainly exercises judicial functions and in so doing it should be bound by those principles which have been laid down for the guidance of courts proper.

According to this principle, municipal councils, 52/ licence commissioners, 53/ a superior court judge acting as persona designata, 54/ and even ministers of the Crown 55/ when making decisions, either of a judicial nature in themselves, or subject to the obligation of being made judicially, are considered to be inferior tribunals subject to the control of the superior courts.

There is no doubt whatever that, when exercising discretionary powers conferred on him, the Minister of National Revenue renders decisions which affect the rights of citizens. Whether such decisions have a judicial character depends on the circumstances in each case. For instance, it has been held 56/ that a decision rendered by the Minister under section 13(2) of the Income Tax Act is a judicial decision. In the past there has been a lot of controversy over the distinction to be drawn between administrative, quasi-judicial and judicial functions. The possibility of foreseeing with a minimum of certainty in what cases the courts will intervene depends upon the extent to which doctrine and case law will agree on specific norms. At present, some authors 57/ go so far as to state that the courts bring to the matter a purely functional approach and decide a priori whether to intervene.

A body which has to render a decision based on facts or on law may be obliged to act judicially, even if it is not bound to follow all the procedures of a court of justice in order to reach its decision. It is sufficient that, having studied the evidence, it is required to decide in favour of one or the other of the opinions submitted. 58/ In fact, it is not even

necessary that there should be any lis inter partes, any contention between the parties. It is sufficient that the body in question is required to come to a decision simply on the facts before it, on the basis of the evidence presented, and outside all considerations of policy or expediency. 59/

This is precisely the manner in which the Minister of National Revenue must exercise certain of his discretionary powers. He must come to a decision in accordance with proper legal principles, basing himself solely on the facts put before him by the officials of his Department and without being governed by considerations of expediency. In practice, although he is not obliged by law to do so, the Minister quite frequently sends the taxpayer a draft assessment, which is tantamount to inviting the taxpayer to put forward his side of the case. Should he do this, a lis inter partes arises and the Minister is in the position of having to decide in favour of one or other of the points of view submitted to him.

But whether or not a draft assessment has been sent to the taxpayer, and whether or not it has been contested, the Minister must always base his decision solely on the evidence before him. He is, therefore, obliged to act judicially and in doing so he becomes a lower court subject to the supervisory jurisdiction of the superior courts.

What is subject to supervision in such a case is the manner in which the Minister uses his discretion and not the assessment itself, as would be the case were an appeal taken. However, since the Minister's decision is not known until the assessment is mailed and since, irrespective of any court action which may be taken, the tax is payable within thirty days following the date of mailing of the assessment, 60/ one may well ask what advantages can be derived from this type of supervision.

From a practical point of view, obtaining of a writ of certiorari against a ministerial decision can be extremely valuable. Obviously the Department, unaccustomed as it is to receiving this type of writ, would be disconcerted and this puts the taxpayer in a good bargaining position. Another advantage of this procedure is that the upper courts can be asked to intervene on several grounds. De Smith 61/ divides these grounds into two main categories: failure to exercise discretion and abuse of discretion.

2.1.2.1.2.2. FAILURE TO EXERCISE DISCRETION

It can be claimed that there has been failure to exercise discretion for any or all of three reasons: unauthorized sub-delegation, 62/ decision dictated by a third party, 63/ and making of hard and fast rules of a general nature. 64/

According to the principle delegatus non potest delegare, discretion can be exercised only by the authority in whom it has been vested. However, section 900 of the Income Tax Regulations 65/ authorizes the Minister of National Revenue to delegate certain of his powers to the Deputy Minister of National Revenue (Taxation Division) or to the District Directors (Taxation Division). It would seem that a careful scrutiny of the delegated powers might, in some instances, reveal grounds for intervention.

An authority in whom discretion has been vested may not have its decisions dictated by another authority. For instance, if in a certain case the Prime Minister were to dictate to the Minister of National Revenue how he should exercise his discretion, there would be grounds for asking for a writ of certiorari.

A lower court may not compromise its discretion by giving an undertaking

in advance that it will rule in such or such a way. Certainly the Minister can set out certain guidelines in advance and there is nothing to prevent him from giving advance rulings, but under present law such policies or decisions can offer no guarantee since they cannot bind the Minister nor prevent him from coming to a contrary decision, 66/ nor prevent him from altering them as he sees fit.

2.1.2.1.2.3. ABUSE OF DISCRETION

Although the courts make a point of repeating that it is not their function to consider in appeal the merits of the decisions taken by the Department, it is their rule that discretion must not be exercised for illegitimate purposes, that it must not be influenced by irrelevant considerations, and that it must not be used in an unreasonable manner.

The concept of illegitimate purposes is approximately equivalent to the French concept of détournement de pouvoirs. 67/ Since it must be assumed that any power conferred by Parliament is necessarily limited, and that it is unlikely that Parliament intended that the Department should itself determine the limits of its powers, the courts generally consider illegitimate the use of a power for any and other than the precise purpose for which it was given. It follows that if the Minister uses his discretion for some purpose which, while not necessarily illegal, is nonetheless not the purpose for which the discretion was given to him, his decision can be set aside. 68/

It is a well established principle of British and Canadian law that superior courts can revise ministerial decisions if these have been influenced by considerations which are not relevant to the purpose for which the discretion was granted, or if they have disregarded major relevant considerations. 69/ For instance, a writ of mandamus was granted against the

Industrial Relations Board of Nova Scotia which had refused to certify a union on the grounds that the secretary-treasurer of the union was a Communist. 70/ A similar situation could easily crop up in the taxation field. It is no secret that relations between the officers of the Taxation Division and certain taxpayers are not always entirely frank and cordial. Certain taxpayers and certain tax specialists are known to be expert in finding loopholes for tax avoidance. Since departmental officials are only human, it is not impossible that they might wilfully reach a decision detrimental to a certain taxpayer, feeling that this was a way to recover part of the taxes avoided, and perhaps deriving some personal satisfaction from the fact. There is no doubt that the superior courts could intervene in such a case.

Jurisprudence has long held that the fact of a departmental act being unreasonable is not in itself a sufficient cause for annulment. 71/ On this point most of the relevant cases have had to do with regulations drawn up by elected public bodies such as municipal councils. 72/ Since the Judicial Committee of the Privy Council invalidated a railway regulation drawn up by the New Zealand Minister of Transport on the grounds that it was unreasonable, 73/ it is no longer certain that the principle also applies to regulations and decisions emanating from ministers of the Crown. Furthermore, in a recent judgment, 74/ the Manitoba Appeal Court found that a regulation made by the Manitoba Optometric Society forbidding its members to exercise their profession as employees of a corporation was unreasonable and invalidated it on these grounds. One may conclude from this that, should the Minister come to an obviously unreasonable decision in the exercise of his discretion, an appeal might succeed on the grounds that it was ultra vires the power conferred on the Minister by the statute.

To sum up, discretion can be exercised only by the authority in whom it has been vested; this authority may not surrender its powers to another, or allow another to dictate its decisions; the authority must act in good faith and observe the basic principles of law; it must not allow irrelevant considerations to sway its decision; it must not pursue ends which are not relevant to the letter and to the spirit of the statute conferring discretion; and it must not act in an unreasonable or arbitrary manner.

In imposing these limitations on the use of discretion, jurisprudence has sought to eliminate the dangers of bias and arbitrary decisions. One may ask, however, whether the appeal procedure and the supervisory jurisdiction of the courts are sufficient to guarantee citizens against all the dangers which may arise from the use of ministerial discretion. There is room for doubt. By its very nature, discretion includes the possibility of error. The courts are concerned only with the legality of an act, and not with its merits. It may very well happen that the Minister may come to a perfectly legal decision which is nevertheless unfair. Recourse to the law is not always the most appropriate means of adjusting human relationships. Another form of control—political control—may sometimes prove to be more valuable.

2.1.2.2. POLITICAL CONTROL

Political control over ministerial discretion is exercised mainly by Parliament itself, by its members through their representations, and by pressure of public opinion.

2.1.2.2.1. PARLIAMENTARY CONTROL

Since Parliament cannot possibly pass all the detailed legislation required for the proper government of the country, it must delegate some of

its authority to the Executive. At the same time, however, the people have every right to expect Parliament to maintain close scrutiny over the manner in which such delegated authority is exercised. Because the political machinery set up for this purpose in the Eighteenth century and even earlier is no longer adequate for the needs of the Twentieth century, there has naturally been a decline not only of parliamentary control over the Executive, considered as a political body, but also of the Executive's control over the bureaucracy. 75/

Parliament's inability to maintain adequate supervision over the activity of the administration is very much a problem of parliamentary reform. Special parliamentary committees can undoubtedly help solve the problem. The Scrutiny Committee set up in Great Britain to supervise delegated authority is an example and a highly successful one. The establishment of a similar committee to supervise the exercise of ministerial discretion might well be worth considering.

The question period during which members of the House are free to ask questions of the ministry on various matters of public administration is another form of parliamentary control. It is ill adapted, however, for supervising the exercise of discretion by the Minister of National Revenue, owing to the confidential and technical nature of the subject. In any case, a study of Hansard will show that most of the questions asked are of purely local interest. Members of Parliament seem to be far more concerned with obtaining a list of their electors employed by the Post Office than in exercising supervision over the activity of the departments. Motions of adjournment and of non-confidence can be a much better means of exercising control over the administration. Parliament is a forum where government

activities can be brought to light and criticized. There is every reason that it should be used more thoroughly as an instrument for the control of ministerial discretion.

2.1.2.2.2. THE PART PLAYED BY MEMBERS OF PARLIAMENT

Members of Parliament can render valuable services in another way. The increase in the number and variety of government activities has somewhat changed the function of Members of Parliament. In view of the considerable influence they wield they have become the protectors of those citizens who feel they have been unjustly treated by the administration. In this respect they can be likened to the Scandinavian Ombudsman in that they act as the watchdogs of the people against possible abuses by the administration.

Usually Members of Parliament send a letter to the Minister drawing attention to the matter in which the constituent claims to have been unjustly treated, or criticizing the action taken by the Department. It is difficult to say whether such interventions are very effective, but there is no doubt that they cannot be ignored. If the Member in question is a back-bencher he can make his voice heard at the party caucus and if he sits with the Opposition his party will be only too pleased to give the matter publicity and embarrass the government.

2.1.2.2.3. THE PART PLAYED BY PUBLIC OPINION

Another form of political control is provided by lobbies, pressure groups and professional associations, such as the well-known and influential Canadian Bar Association. Again, one of the best guarantees against the abuse of ministerial discretion is an alert press and public opinion, fully conscious of the rights of the citizen. The first concern of a government

or the Ministers of the Crown is to avoid criticism and make sure of re-election. Extremely sensitive to public opinion, they are unlikely to adopt a policy which would entail sacrificing the rights of their constituents for the sake of administrative efficiency. For this reason the indifference of the public is far more dangerous than bureaucratic aspirations.

> We cannot escape the growth of administrative discretion in the world in which we live, but it may be open to doubt whether we have the energy and public spirit necessary for its effective control. 76/

2.1.2.3. CONCLUSION

Can one conclude from the foregoing that existing judicial and political forms of control give the citizen sufficient protection against possible abuses of the powers vested in the officials of the Department of National Revenue? There is no doubt that the taxpayer's best guarantee is still to be found in the courts. But the courts can only supervise the legality of the use of ministerial discretion and not the merits of the decisions taken. As for political control, it is undoubtedly valuable but its efficacy is difficult to estimate and the average Canadian has little faith in it.

2.1.3. GENERAL CONCLUSION AND RECOMMENDATIONS

Experience has shown that in certain areas ministerial discretion is the only way of preventing tax avoidance and ensuring proper administration of the law. On the other hand, it would seem that the Canadian taxpayer is not in the position to exercise complete and effective protection of his rights.

In order to avoid the dangers inherent in ministerial discretion it is not suggested that discretion should be abolished. On the contrary, appropriate measures of control should be instituted. It is considered that a

new body should be created which, while purely advisory, would exercise some review of the merits of the decisions taken by the Minister. The existence of such a body would create the atmosphere of security and confidence necessary to still unrest by making sure not only that justice is done but also that justice seems to be done.

Several alternatives come to mind. The supervisory body could be a kind of Ombudsman or parliamentary commission whose field would be restricted to taxation matters. The various members of the Tax Appeal Board could be assigned by turn for set periods to advise the Minister regarding the use of his discretion. However, perhaps the simplest and most democratic solution would be to ressurect the Income Tax Advisory Board recommended by the Senate Committee in 1946.

In view of the increasing use made of ministerial discretion in recent years, especially since 1963, it is considered that the creation of an Income Tax Advisory Board would be well received by Canadian taxpayers.

The Board, set up on a permanent basis, could be composed of three or five members selected from outside the civil service and not necessarily lawyers or accountants. It might well include representatives of the Canadian Tax Foundation, the Canadian Bar Association, the Canadian Institute of Chartered Accountants, and the general public. Its members should be appointed for a term of five or ten years by the Governor in Council, after consultation with the associations concerned. It would be given access to all departmental records. The Committee would assist the Minister in the exercise of his discretion but its recommendations would obviously not be binding on the Minister, whose word would be final. Theoretically, the Minister could ignore the advice of the Commission but, as pointed out by

the Honourable Douglas Abbott 77/ in reference to the old Income Tax Advisory Board, he would not do so without being absolutely sure that the Board was wrong.

The institution of such a Board would improve the administration of the tax laws, would promote co-operation between government officials and taxpayers, and would ensure constant supervision over the exercise of ministerial discretion. We therefore recommend that:

1. Discretionary powers may be resorted to whenever the Department, after the most careful consideration, is convinced that they are essential in certain cases to ensure the proper administration of the law, but always on condition that appropriate measures of control are instituted at the same time.

2. An Income Tax Advisory Board, on the lines of the body suggested by the 1946 Senate Committee, should be set up to advise the Minister of National Revenue in the exercise of his discretion.

2.2. DELEGATED LEGISLATION

Canadian law derives from two main sources: common law and statute law, the latter being divided into three classes: acts of parliament and of provincial legislatures, orders in council and Proclamations of the Sovereign acting under the Prerogative and Orders and Regulations directly authorized by statute. It is the latter class, referred to as delegated legislation, product of the exercise by an administrative authority of legislative power vested in it by a legislative authority, that is dealt with here.

The term "delegated legislation" includes orders in council, orders or regulations emanating from the Executive, as well as regulations made by municipal councils and public corporations. However, this survey will cover only regulations as defined in section 2 of the Regulations Act 78/ and adopted under federal tax statutes.

The modern practice of granting legislative powers to the Executive originated in England in 1854 with the Poor Law Act. 79/ Today it is a commonplace that the legislative function has become one of the main activities of the Executive. In point of fact, a larger volume of legislation in Canada emanates from the Executive than from Parliament.

Therefore the use of this system, strongly criticized in times past, 80/ is no longer challenged. The need is seen of yielding to practical considerations and acknowledging that the state cannot function efficiently without granting extensive legislative and judicial power to its executive branch.

Parliament's lack of time to consider in detail the great number of bills coming before it, the highly technical nature of some of them, the need of flexibility and, on occasion, a state of national emergency, are so many reasons for the use of delegated legislation.

Moreover, it should be pointed out that in England the Donoughmore Report 81/ did not object to the use of this device, which it regards as potentially dangerous but as useful and even unavoidable. Lord Heward himself, whose stringent criticism of delegated legislation is remembered, 82/ has admitted its necessity.

The question therefore is not of doing away with a method of legislation so commonly used and obviously beneficial, but rather of affording

the public adequate protection against possible abuses of power. With this in mind, we shall examine the existing means of control over delegated legislation and consider how they could be reformed so as to increase their effectiveness.

2.2.1. CONTROL OF DELEGATED LEGISLATION

Delegated legislation is subject to both political and judicial control.

2.2.1.1. JUDICIAL CONTROL

One of the functions of judicial control is to exercise close supervision over delegated legislation. In the absence of legislative provisions to the contrary, all orders in council and regulations issued by the Executive are subject to judicial control in respect of both form and substance. The courts may therefore be called upon to determine whether the Executive has complied with the procedure prescribed by law for the adoption of the delegated legislation and whether any of its provisions are not illegal or ultra vires the powers delegated by the legislative to the administrative authority.

2.2.1.1.1. PROCEDURAL DEFECTS

Because of the still embryonic state of Canadian administrative law, procedural requirements for the enactment and implementation of delegated legislation are still somewhat rudimentary. According to the Regulations Act, 83/ orders and regulations must, unless otherwise provided, 84/ be forwarded to and registered by the Privy Council and published in the Canada Gazette within thirty days of their adoption. However, a regulation is not invalidated by the sole fact of these formalities not having been observed.85/

Moreover, by section 7 of the Act, a regulation must be submitted to Parliament within fifteen days after its publication in the Canada Gazette or, if Parliament is not then sitting, within fifteen days of the opening of the ensuing session.

The judicial consequences of failure to submit a regulation to Parliament are still difficult to determine, the Canadian courts not yet having had occasion to deal with the matter. It is likely that, considering the very liberal view of the legislator as regards failure to publish a regulation or forward it to or having it registered by the Privy Council, its submission to Parliament would be regarded as a mere formality not affecting its validity. 86/ In the United Kingdom, doctrine seems to favour such an interpretation 87/ but the courts are divided. 88/

Such are the rules of procedure applying generally to the mass of delegated legislation enacted under federal laws, including tax statutes. Mention should be made, however, of an important provision found both in the Income Tax Act 89/ and in the Estate Tax Act. 90/ According to it, no regulation made under these Acts shall come into force until it has been published in the Canada Gazette but, once published, the regulation if it so prescribes shall apply to a period preceding its publication.

2.2.1.1.2. SUBSTANTIVE DEFECTS

It is here that judicial control is called upon to play its most useful supervisory role by determining whether the Executive really had the power to make a given regulation and, if so, whether it exercises this power properly.

In order to exercise legislative power, an executive authority must be authorized to do so by the legislator. Failing such authorization or in

the event of the Executive having exceeded the legislative powers vested in it, the regulations made are ultra vires, null and void, since any regulation made by the Executive must draw its authority from the law. 91/ The legality or validity of regulations thus lies at the mercy of the judicial authority which must decide whether, in a given case, the Executive acted without authorization or exceeded its power. It is in fact possible that the Executive has attempted to exercise a legislative power it did not possess or made improper use of the power delegated to it.

In the first place, the Executive may act without statutory authorization, either because the enabling statute was repealed 92/ or is ultra vires the delegating authority, 93/ or because the delegated legislation went beyond the provisions of the enabling statute. 94/

Despite the considerable volume of delegated legislation enacted under the various federal tax laws, the validity of a regulation is rarely challenged in court. This is a tribute to the ability and conscientiousness of the officials charged with drafting tax regulations. However, the few judgments reported 95/ all relate to cases where it was claimed that the tenor of the delegated legislation exceeded the terms of the enabling statute.

The vulnerability of a regulation may vary according to whether the enabling enactment is expressed in general or in specific terms. In the former case, it merely provides that the Governor General in Council may make such regulations as he deems necessary and expedient for the carrying out of any provision of the Act. 96/ Legislation authorized in terms so broad and general obviously escapes to some extent control by the courts 97/ in so far as it does not contravene any other provision of the Act. 98/

In tax matters, however, Parliament usually states its intention by listing the subject to which the regulations may apply and adding a basket clause. 99/ Judicial control thus becomes easier, but terminological questions take on added importance.

In the second place, it may happen that though empowered to make regulations the Executive exercises its power improperly. Like ministerial discretion, delegated legislation may be used for illegitimate purposes, be influenced by irrelevant considerations, be applied in a biased or discriminatory manner or in violation of the principles of natural justice. In such circumstances the validity of ensuing regulations could well be contested in court. 100/ As to a regulation being unreasonable, it is less certain that this in itself would render it invalid. 101/ All would depend on the court's attitude. But an "activist" judge would probably find it difficult to resist the temptation to hold such a regulation void and ultra vires, on the assumption that Parliament could not have wished the powers it delegated to be used in an unreasonable manner. 102/

The ever increasing complexity of the problems of public administration in general, and of administration of tax legislation in particular, also raises the question of subdelegation, which the administrators feel is often approached in too strictly legalistic a manner by the judicial power. It will be admitted, however, that when Parliament delegates a given power to A its intention, in the absence of a specific provision authorizing a subdelegation, is that the power be exercised by A and not by B: delegatus non potest delegare. This explains the marked tendency of the courts not to recognize subdelegation and to consider that a power must be exercised only by the person or agency to whom it has been granted and by no one else. 103/ Apparently, though, this rule is much less rigidly applied in

time of war or national emergency, for obvious reasons. 104/ This could account for the Supreme Court's judgment in reference re: Regulations (Chemicals) under the War Measures Act 105/ which held that the Governor in Council acting under the War Measures Act could validly subdelegate to other agencies its power to issue orders and regulations.

In the matter of subdelegation, the intention of Parliament may be expressed in a statute either specifically 106/ or by implication. It cannot reasonably be expected that a minister should exercise personally all the powers which the law confers on him. It is sufficient that they be exercised on his behalf by an official for whom he is responsible to Parliament. A broad interpretation that recognizes practical necessities and administrative channels is in such circumstances desirable and far more realistic than a restricted one.

To sum up, the judicial power can play a useful, if secondary, role as a means of control over delegated legislation. Since it considers only the legality of a regulation and not its expediency, and its intervention can only be requested by means of appeals or of writs of prerogative after the delegated legislation has come into force, it cannot provide the citizens with as much protection as could be otained through political control.

2.2.1.2. POLITICAL CONTROL

Canada is not the only country that has been faced with the problem of political control of delegated legislation. The United Kingdom and the United States, among others, have set up political control systems which seem to operate satisfactorily and which Canada would be well advised to take pattern by with a view to improving its own system. It is therefore appropriate to examine those countries' methods of political control over delegated legislation before setting down Canada's endeavours in that field.

2.2.1.2.1. THE UNITED KINGDOM

Since the appearance of the report by the "Committee on Ministers' Powers", 107/ Britain has developed a very efficient and thorough system for political control of delegated legislation.

There are three phases of supervision: prenatal control, parliamentary control properly speaking, and postnatal control.

2.2.1.2.1.1. PRENATAL CONTROL: THE ADVISORY COMMITTEE 108/

One of the most interesting of recent constitutional developments in Great Britain is the establishment of "advisory bodies" to which proposed regulations are first submitted. A close scrutiny of each of these advisory committees would be impractical because of their great number. 109/ This is obviously a typically British phenomenon.

The committee's functions are to assist and advise the minister in the exercise of his legislative powers. Before publishing any regulation, the minister submits a draft to the committee which may hear witnesses if it so desires. It then reports back to the minister, who places the regulation before Parliament together with the committee's report. The advantage of the procedure is that the minister must either accept any amendments contained in the report or satisfy Parliament that he has good reasons for not doing so.

The committee is much more than a commission on enquiry hearing submissions. It is a policy-making body. Its members, selected from outside the government, are all persons of distinction.

2.2.1.2.1.2. PARLIAMENTARY CONTROL 110/

A few decades ago, it was fashionable for British commentators to draw attention to the lack of parliamentary control over the Executive in general and over delegated legislation in particular. No doubt, the volume of delegated legislation has increased to such an extent during recent years that it is difficult for Parliament to practice constant supervision. But valuable work is performed, nevertheless, on three occasions:

- during discusssion of the statutes authorizing delegation;
- when regulations are submitted to the House;
- at question period.

1. Discussion of the statutes authorizing delegation:

This gives the members an opportunity to study the merits of the procedure from the point of view of the constitutional principles involved. Opposition to the practice of delegated legislation is said to have been most active in Parliament 111/ during the first thirty years of the Twentieth century. By contrast, Parliament's attention in recent years has been directed less to the principle of delegated legislation, which is now accepted, and more to its practice. Since the practice is now considered to be unavoidable, its merits or desirability are no longer discussed and attention is focused on the regulations themselves.

It is difficult to assess the overall impact of debates on draft bills authorizing delegation, but it can be said that, even if the bills themselves are not always amended, such discussion has promoted greater care in the drafting of the bills. In this sense, one can claim that effective political control is being exercised.

2. The laying of regulations before Parliament:

This is a much more effective method of control than the preceding one. Laws which delegate legislative authority frequently, though not always, provide that delegated legislation will be submitted to Parliament according to one or other of the following procedures:

(a) Some regulations are simply laid before Parliament:

This procedure excludes effective control since the members may not ordinarily ask for annulment of the regulation. The procedure is merely a method of publishing the regulation and of informing the House, whose members can then put appropriate questions to the minister concerned. 112/

(b) Some regulations laid before Parliament are liable to annulment within forty days:

Under this procedure—the most frequently used 113/—regulations may be attacked by any member who moves "for a humble prayer" that the regulations be annulled. In recent years such motions for annulment have given rise to important debates. Following such a debate, ministers frequently withdraw the regulation and submit it later in another form.

(c) Some regulations are subject to approval by resolution:

Parliamentary debate being required in such cases, this procedure affords the greatest measure of control. The provision may take one of two forms. It may state that delegated legislation "shall be of no effect unless it is approved by resolution of

each House of Parliament", or that delegated legislation "shall cease to have effect on the expiration" of a stipulated period "unless at some time before the expiration of that period it has been approved by resolution of each House of Parliament". Whilst the first form is the most frequently used, the second is more usual in the case of financial regulations emanating from the Treasury. 114/

It should be noted that until 1946 delegated legislation subject to this last clause or to procedures (a) and (b) came into force at its inception, thus before it was laid before Parliament. Since 1946 the Statutory Instrument Act requires that, in all such cases, the regulations be submitted to Parliament before coming into force and that they state both the date of their submission to Parliament and their effective date.

(d) The draft regulation is subject to approval by resolution:

In the three preceding cases, the regulation was already made. In this case the regulation is only in draft form. 115/

(e) Some draft regulations are liable to annulment within forty days:

This is the least frequently used procedure.

(f) Some regulations do not require laying before Parliament:

The practice of requiring the laying of delegated legislation before Parliament goes back to the Nineteenth century. The omission of such a requirement is now becoming increasingly

rare but still occurs occasionally without apparent reason especially, it seems, in the case of regulations which affect individuals, such as "The Exchange Control Act", 1947.

3. The Question Period:

Questions regarding regulations are frequent. They give members an opportunity to obtain further particulars if the wording of the regulation is not clear. They also serve to bring certain regulations to the attention of the public.

2.2.1.2.1.3. POSTNATAL CONTROL: THE SCRUTINY COMMITTEE 116/

One of the most important innovations regarding control of departmental legislation is the setting up of the House of Commons Select Committee on Statutory Instruments, better known as "The Scrutiny Committee". The establishment of such a committee had been recommended in 1932 by the Ministers' Powers Committee, but was not formed until 1944. The Scrutiny Committee is more concerned with the way in which the administration exercises its legislative power than with the merit of individual orders or regulations. It is more interested in the form than in the substance. Its chairman is usually a member of the Opposition, since its main function is one of criticism.

The Committee's role is to examine all regulations laid before the House and to decide whether there are any grounds for bringing them to the attention of the House. 117/ The Committee must, before bringing any regulation to the attention of the House, give a hearing to the officials of the department concerned.

The Committee's existence has a valuable preventive effect in that departments are more careful and cautious in the preparation of regulations because they know that these will fall under the critical eye of the Committee. The fact that only 2% of all the regulations examined have had to be brought to the attention of Parliament 118/ is an indication of the Committee's preventive effect.

The Scrutiny Committee has been particularly critical of the obscure or ambiguous wording of certain regulations, of the practice of legislation by reference, of sub-delegation, and of retroactive regulations.

Some regulations are not seen by the Committee, since certain Acts do not required that they be laid before Parliament.

The Committee gets through a lot of work and its efficiency is beyond question. From its inception in 1944 until the end of the 1947-48 session, the Committee scrutinized 3,200 regulations, made 60 reports and drew the attention of the House to 55 regulations. During the 1951-52, 1952-53 and 1953-54 sessions, the Committee examined 930, 690 and 595 regulations respectively. From 1954-55 to 1959-60 the Committee reviewed an average of 450 regulations per year. 119/

Since 1924 the House of Lords has had its own "Special Orders Committee". This body, however, has more limited responsibilities, since it considers only those regulations which call for the approval of the Lords. The Committee is responsible for ensuring that regulations subject to approval actually do get the special attention they were intended to receive. As in the case of the Scrutiny Committee, a hearing must be given to the department's officials before a report is made. Because the Special Orders Committee is concerned with only a small number of regulations, its impact

is not very marked. This is regrettable, as the business of checking delegated legislation is particularly suited to the more serene atmosphere of the Upper House.

To sum up, Britain has taken important steps to improve the effectiveness of its political control over delegated legislation. The idea of prenatal and postnatal control is a particularly attractive one. In the United States, attempts have been made to reach the same goal but by a different approach.

2.2.1.2.2. THE UNITED STATES

Political control over delegated legislation is exercised in the United States by means of prior consultation, of prior publication of draft regulations, of symposiums, of public hearings, and by various other means.

2.2.1.2.2.1. PRELIMINARY PUBLICATION

Section 4 of the American Administrative Procedure Act, 1946, requires that every draft regulation be first published in the Federal Register, the United States equivalent of the Canada Gazette. The notice must state the date, place and nature of the regulation, the Act to which it refers and the substance of the draft regulation. This publicity constitutes an invitation to interested parties to submit representations.

All regulations, however, are not subject to this procedure. For instance, though the rules classed as interpretative, such as those issued by the Internal Revenue Service, are excepted by section 4 of the Administrative Procedure Act, the practice of the Treasury Department is to publish them beforehand in the Federal Register. Notice is given that before they

are adopted the Commissioner of Internal Revenue will give consideration to written representations received in duplicate within thirty days. 120/ More and more government agencies not technically obliged to do so are voluntarily inviting the public to participate in regulation making. 121/

Although prior publication of draft regulations may in the end prove quite costly and productive of delay, it allows the administration to give the public an opportunity to submit their views.

2.2.1.2.2.2. CONSULTATIONS, SYMPOSIUMS AND PUBLIC HEARINGS

It is the practice in the United States to subject draft regulations drawn up by government agencies to the criticism and comments of specialists and interested organizations. 122/ Such consultations may run from simple telephone conversations to the holding of symposiums. 123/ The comments made are carefully studied by the government agency concerned.

These consultations and symposiums have led to the instituting of advisory committees for the purpose of counselling the administration regarding the exercise of its legislative functions. Some of these committees are set up temporarily to draw up certain specific regulations; others are more or less permanent, and their composition is provided by statute. 124/

The consultation method makes it possible for persons and organizations affected by certain draft regulations to participate in their preparation. The value and effectiveness of this system depend on how representative and well organized are the groups invited to present their views, on their influence, their interest and the diligence they bring to the making of regulations.

Though section 4 of the Administrative Procedure Act does not make the holding of public hearings compulsory, the practice of hearings is becoming more widespread. 125/ Hearings differ from the consultations discussed above in that they are publicly announced ahead of time and that any interested party may testify.

British administrative practice has no equivalent to these public hearings. Their value lies in that they provide an opportunity for individuals and organizations, which would otherwise not be consulted, to share in the making of regulations. The measure has a useful psychological impact, inasmuch as the parties concerned can put forward their point of view. This explains the conclusion arrived at in the Report of the United States Attorney General's Committee on Administrative Procedure (1941) to the effect that: "The Committee believes that the practice of holding public hearings in the formulation of rules...should be continued and established as standard administrative practice, to be extended as circumstances warrant into new areas of rule-making". 126/

2.2.1.2.2.3. OTHER MEANS OF CONTROL

Other means of control over delegated legislation, besides the three principal ones mentioned above, include parliamentary control proper and publication of regulations.

By contrast with United Kingdom practice, parliamentary control proper is practically non-existent in the United States. Congress is not considered to have the same supervisory role as the British Parliament. Public opinion and the courts are thus the main controlling agencies in the United States.

To conclude this general survey, it should be added that regulations, once in force, are published in the Daily Federal Register and in the Code of Federal Regulations.

The principal advantage of the Code is that it provides interested parties with readily accessible information concerning the nature and precise scope of each regulation and a reference to the law under which it was made. One of its features is a parallel table of statutory authorities and rules listing, on the left, the provisions of the statutes authorizing the delegation of power and, on the right, the regulations made under these provisions. In an era when it is often impossible to know what the law is unless one knows what the regulations are, the Code constitutes a valuable tool which Canadian jurists might well envy.

2.2.1.2.3. CANADA

In this country, political control over subordinate legislation is fairly straightforward. The best way to illustrate it is to describe the procedures followed.

A regulation may be decided upon either by the Governor in Council or by a minister, according to the requirement of the Act delegating the power. Whatever the origin, the draft regulation must be submitted to the Clerk of the Privy Council, who refers it to the Deputy Minister of Justice. The Department of Justice makes sure that the draft does not go beyond the authority delegated under the Act, that it is in keeping with the Canadian Bill of Rights and, if necessary, it also corrects the wording. 127/ The draft is then returned to the Clerk of the Privy Council who may ask the officials of the department concerned to revise or correct it, as necessary.

The regulation-making authority then sends three English copies and one French copy of the regulation to the Clerk of the Privy Council within seven days of the regulation being adopted. 128/ The Clerk enters the regulation in his register, numbers it and sets the date on which it will come into effect, 129/ unless the regulation-making authority has power to set another date for its entry into effect.

Generally speaking, the regulation must then be published, both in in French and in English, in the Canada Gazette within thirty days after it is made 130/ and laid before Parliament within fifteen days of its publication in the Canada Gazette or within fifteen days after the commencement of the next ensuing session. 131/ However, section 9 of the Regulations Act authorizes the Governor in Council to exempt, by regulation, any regulation or class of regulations from the provisions of the Act, that is, from registration, publication in the Canada Gazette and laying before Parliament. However, regulations made under a taxation statute are not subject to this exemption.

It is thus apparent that at this stage no prior consultation has been required and no public hearing held. Though the regulation has been published in the Canada Gazette, no provision has been made to allow citizens and representative organizations to be heard officially. The preparation of delegated legislation is therefore a purely internal matter in which the public is not invited to participate. It may happen, however, that a minister will unofficially consult whomever he chooses.

As has been noted, the regulation is laid before the House. But it must be clearly understood that this is no more than a publicity measure. Debate or true political control is not easy, though members may, at any

time, enter "questions on the order paper seeking information from ministers of the Crown...." 132/ The Commons has no committee for the special purpose of examining such regulations. 133/

The setting up of such a committee along the lines of the United Kingdom Scrutiny Committee was once considered, but the plan was rejected because, in the view of the Prime Minister of the time, regulations were sufficiently discussed by the Cabinet and this procedure adequately replaced parliamentary control. 134/ Thus, the second fact which emerges is that political control is exercised by the Cabinet. Outside of questions, parliamentary control is negligible.

2.2.1.3. CONCLUSION

Since a modern state cannot function without entrusting important legislative powers to its administrative officials, it is necessary to protect the citizen against bureaucratic absolutism. Judicial control over delegated legislation seems to function fairly satisfactorily but, as it embraces only the legality of regulations and not their merit, it devolves mainly on the political institutions to scrutinize their contents and ascertain their equity as well as their expediency. This type of control, because of lack of adequate machinery, is practically non-existent in Canada. In this regard, the citizen does not enjoy the protection to which he is entitled.

2.2.2. THE FUTURE OF DELEGATED LEGISLATION

In view of the continued growth of delegated legislation, particularly in the field of taxation, it is appropriate to point out the deficiencies of the Canadian system of political control and to suggest certain reforms.

2.2.2.1. THE PROBLEMS

In Canada, control over delegated legislation reveals the following defects: 1 - lack of prior official consultation; 2 - publication of regulations in the Canada Gazette usually only after they have been adopted; 3 - inadequate parliamentary control.

The provisions under which Parliament has delegated certain legislative powers in the taxation field are section 117 of the Income Tax Act, section 57 of the Estate Tax Act, and section 38 of the Excise Tax Act. Certain differences which exist between sections 117 of the Income Tax Act and 57 of the Estate Tax Act, on the one hand, and section 38 of the Excise Tax Act, on the other hand, should be noted.

In the first place, the Income Tax Act and Estate Tax Act give authority to make regulations to the Governor in Council and not just to a single minister, whereas the Excise Tax Act confers this authority directly upon the Minister of National Revenue or the Minister of Finance. It has been claimed 135/ that the procedures followed in the United Kingdom and the United States are not so necessary in Canada, since our regulations are generally made by the Governor in Council, resulting in a more effective control of the administration. If we accept this argument, section 38 of the Excise Tax Act should at the very least be amended accordingly.

Another point is that section 117(1)(j) of the Income Tax Act confers on the Governor in Council authority to make regulations "generally to carry out the purposes and the provisions of this Act". But subsection (j) is preceded by a list of specific subjects concerning which the Governor in Council may make regulations. The same is true of the Estate Tax Act.

Section 38 of the Excise Tax Act, on the other hand, contains just one general provision (subsection 1) authorizing the Minister of Finance or the Minister of National Revenue, as the case may be, to make such regulations as he deems necessary or advisable for carrying out the provisions of the Act. It is becoming increasingly unusual, in Canadian legislation, to delegate powers as vague as those conferred by section 38 of the Excise Tax Act. Parliament normally attempts to indicate the areas in which delegated authority should be wielded. There seems to be no good reason why this rule has not been followed in the case of the Excise Tax Act.

Apart from these questions which concern the drafting of the statutes, there is the lack of adequate administrative and parliamentary machinery to ensure effective control over the exercise of delegated powers in the taxation field.

In point of fact, the briefs submitted to the Royal Commission on Taxation mention no flagrant cases of abuse of power or arbitrary action on the part of those, be they individuals or bodies, who wield the power to legislate by regulation in the taxation field. This, no doubt, is an indication of the high quality of Canadian public administration as well as of the vigilance of the public and private organizations concerned. Nevertheless, the Commission's attention has been drawn to a number of matters which require new machinery or new procedures.

There is dissatisfaction over the absence of official consultation prior to the adoption of tax regulations. 136/ It is said that certain regulations lack coherence 137/ and clarity. 138/ It has also been pointed out that certain provisions in the current statutes could well be embodied in the regulations and vice versa. 139/

2.2.2.2. SUGGESTED REFORMS

One could deal with the various complaints laid before the Commission on a piecemeal basis. The Commission could be content with recommending that certain regulations be clarified and inconsistencies eliminated. This would do away with the most obvious complaints. Such removal of surface blemishes, however, would leave the root of the trouble untouched.

What is necessary is to take a good look at the way in which delegated tax legislation is conceived, adopted and exercised with particular regard to the absence of prior consultation and the inconveniences and difficulties which arise from the subsequent amendment of faulty regulations.

However, before suggesting changes in the present system, certain preliminary observations may be helpful.

1. In the first place, the problems raised before the Commission regarding delegation are not peculiar to the tax field. Lack of coherence and clarity, absence of prior consultation, inadequate publicity, these are all problems which beset the exercise of delegated authority by any government department. 140/ This is a general problem but the tax field lends itself in a special manner to a close control of the exercise of delegated authority. Furthermore, although the mandate of the Royal Commission on Taxation is necessarily restricted, it would be unrealistic to consider reforms in tax administration without a thought for the implications of such reforms for the rest of the federal administration.

2. There can be no question of simply introducing into Canadian public law the practices established in the United States or in the United Kingdom. First, there is the risk of creating institutions which do

not conform to the tradition of British parliamentary government or of ministerial responsibility as developed in Canada. The danger is particularly obvious in the case of United States institutions which were planned for a completely different constitutional context. As for the British system, it allows many regulations to be made directly by the ministers or by various commissions, without prior approval of the Queen in Council, whereas in Canada the reverse is usually the case.

3. The introduction of new machinery does not necessarily guarantee better administration and there is the danger of setting up new institutions which are out of all proportion with the problem to be remedied. In this connection it may be as well to look very carefully at the suggestion put forward by the Canadian Bar Association that a permanent advisory committee on taxation be set up and given very wide powers.

4. Finally, note must be made of the backwardness of Canada's administrative law, by comparison with that of Great Britain and the United States, in the matter of control over delegated legislation. Apart from the publication required by the Regulations Act and the review made by the Minister of Justice to meet the requirements of the Canadian Bill of Rights, there is no statutory evidence of any effort to ensure effective control over the exercise of delegated legislative power.

In the light of the above remarks, recommendations may be made for reforms in three main areas: prior publication, prior consultation and parliamentary control.

2.2.2.2.1. PRIOR PUBLICATION

Although prior publication of delegated legislation and prior consultations go hand in hand, these two stages should be distinguished.

Prior publication of regulations is virtually unknown in Canadian federal law. A rare example might be the public notice that the Board of Broadcast Governors must give before making a recommendation to the Department of Transport on regulations affecting licence holders or concerning the operation of broadcasting stations. 141/

Nevertheless, prior publication of draft regulations is a great advance on the present system and has been requested by numerous organizations appearing before the Royal Commission on Taxation and other commissions. Such publication permits the authorities to sound public opinion and obtain the views of interested parties. These representations to the authorities may be made informally or by means of special procedures such as public hearings.

However, prior publication of tax regulations does give rise to certain objections which must be considered.

(a) Some draw attention to the need for secrecy before the passing of tax regulations. Speculation and undesirable activities contrary to the general interest during the period between publication of draft regulations and their adoption are feared.

This objection carries more weight in the taxation than in other fields. However, it is not an absolute bar to adoption of the principle of prior publication. First, such publication would only apply to draft regulations;

not to bills and not to the budget. Under the Canadian system, the power to tax belongs only to Parliament and taxes are imposed by legislation and not by regulation, although certain regulations may effectively result in a tax being imposed, particularly under the present Excise Tax Act. If the present excise tax were replaced by a general tax at the consumer level, a large part of the delegated legislation producing the effect noted above would be eliminated. If, on the contrary, the present excise tax were maintained, many regulations could be given prior publication without inconvenience or harm to the public interest. The need for prior secrecy seems to have been exaggerated and publication ought to be the general rule. For cases where prior publication might be contrary to the public interest, a provision could be incorporated into the present Regulations Act 142/ authorizing the Governor in Council to prohibit prior publication of a particular regulation. 143/ However, such cases should be exceptions and, rather than forbid prior publication, the Governor in Council might authorize the publication of the regulation with retroactive effect as of the time of publication.

(b) The need to respect the government's political function has also been put forward as an objection to prior publication.

In this regard a clear distinction must be made between parliamentary legislation and true delegated legislation. There are no grounds for requiring the publication of finance bills before they are submitted to Parliament. Contrary to what happens in the case of delegated legislation, bills are debated by Parliament in full session and both the Commons and the Senate have elaborate procedures for this purpose. The Opposition may raise all sorts of objections to a bill and public opinion is much more

awake to what is going on in Parliament than to obscure regulations published in the Canada Gazette. To give prior publication to these bills, as recommended by the Canadian Bar Association,144/ would be unrealistic, unprofitable and at odds with our parliamentary and constitutional tradition.

Contrary to what happens when Parliament passes an act, no publication or debate precedes the inception of delegated legislation. There would be some advantage in having draft regulations published as is done in the United States. For this purpose Part II of the Canada Gazette could be reorganized along the lines of the United States Federal Register. Publication of each draft regulation should be accompanied by an indication of the date of public hearings, should these be adopted, or of a closing date (thirty days from publication seems reasonable) for making representations to the minister or agency concerned. Daily publication would appear to be unnecessary in Canada.

2.2.2.2.2. PRIOR CONSULTATION

Prior publication means that the public is given an opportunity to be heard before a regulation becomes effective. Public participation can be ensured in several ways: public hearings open to any interested party; consultative committees made up of experts and representatives of interested groups; or individual presentation of its views by any party or organization to the minister concerned.

2.2.2.2.2.1. PUBLIC HEARINGS

The procedure by public hearings has been particularly favoured in United States administrative law. The British statutes provide that, in certain cases, 145/ a minister shall consult certain interested bodies

before making a regulation, but the principle of public hearings open to all interested parties is not yet commonly accepted.

Where regulations are to be given prior publicity in Canada, consultation should preferably take the form of public hearings. Such hearings give taxpayers equal opportunity to be heard. They bring into the open the interests affected by the draft regulations and provide an opportunity for genuine debate. Public hearings also minimize the impact of hidden pressures and ensure that the minister or the Governor in Council is fully acquainted with all aspects of the problem before adopting the regulation. They would also tend to reduce the number of representations and campaigns undertaken by taxpayers hit by some unforeseen repercussion of a new regulation.

It could be argued that this procedure would slow down the administration and increase its costs and that there has been no abuse of delegated legislative powers. However, the very real possibility of abuse cannot be tolerated and the alleged inconveniences would not offset the substantial advantages to be obtained from prior publication and public hearings.

As for the conduct of the hearings, one could adopt the rules contained in section 4 of the American Administrative Procedure Act. 146/ Such hearings would be somewhat similar to those of a House committee considering a bill. There would be no need to give the chairman of the public hearing power to question witnesses under oath, to require the production of documents, nor to allow the cross-questioning of witnesses by third parties. In short, the procedure should be quite informal, since the sole object of the hearing is to give everyone an opportunity to be heard. Needless to say, the procedure of the hearings would not be subject to prerogative writs.

The chairman of the public hearings should be a senior official (the director of a division or better) of the department concerned, and be appointed by the minister. It would be best if the same official were always appointed and were assisted by a legal counsel and other experts.

By contrast with the British system, such public hearings would give everyone an opportunity to be heard, but their purpose would be similar to that of the consultations provided for under British administrative law. In this connection, the following quotation is very much to the point:

> Under the New Towns Act, 1946, section 1(1), the Minister, before he makes an order designating an area as the site of a proposed new town, must consult "with any local authorities who appear to him to be concerned". In Rollo v. Minister of Town and Country Planning, the view was expressed by Bucknill, L.J., that in that section "consultation" means that: "on the one side the Minister must supply sufficient information to the local authority to enable them to tender advice, and on the other hand, a sufficient opportunity must be given to the local authority to tender that advice". There must therefore be a real consultation, and presumably if that were absent, any delegated legislation subsequently made would be invalid as having been made in a manner contrary to that provided for in the enabling statute, but this does not mean that those parties who have been consulted can complain or challenge the validity of the order if their views, expressed in the course of such consultation, are not accepted by the Minister. The direct control effected by this device of consultation may therefore be worthless, but in practice few Ministers will be so regardless of public opinion as to ignore serious views carefully advanced in the course of statutory consultations of this kind. 147/

2.2.2.2.2.2. ADVISORY COMMITTEE

The Royal Commission on Taxation has received suggestions, notably from the Canadian Bar Association and the Canadian Institute of Chartered Accountants, to the effect that a permanent advisory committee be constituted, wholly or partly of officials or of experts from outside the government.

Despite the fact that advisory committees are numerous in Britain, it is not felt that such a suggestion should be accepted. If the committee were composed exclusively of officials, it would amount to giving another title to persons who already have the duty of advising the minister concerned. This is after all the prime function of the Deputy Ministers of Finance and of National Revenue and of their assistants. There might be some advantage in assigning certain senior officials more exclusively to the analysis of legislation and of tax regulations, but it is hard to see the need for setting up an official and permanent advisory committee within a department for this purpose.

Were such an advisory committee composed exclusively of experts drawn from outside the department, several situations might arise.

In a situation where prior publication of regulations and public hearings were practised, the advisory committee would add little. The experts could just as easily express their views at the public hearings where others would have an opportunity of contesting them.

In a situation where prior publication is practised but where no public hearings are held, the value of an advisory committee remains doubtful. Why require the taxpayer to make his representations to an advisory body whose members are drawn from outside the government when, in fact, he wished to address his comments to the government itself? The chances are that he would have to make the same representations twice.

Finally, where neither prior publication nor public hearings are practised, some use might be made of an advisory committee of outside experts to scrutinize draft tax regulations. However, this formula seems

vastly inferior to the system of prior publication and public hearings. It amounts to giving a small group of experts a privileged part to play in the drafting of tax legislation. While advisory committees are useful in specific areas in which the government acts somewhat as an arbitrator between opposing interests, the situation in the tax field is usually very different since opposition to pressure groups seeking preferential treatment is generally very dispersed. In making use of advisory committees, one runs the risk of favouring powerful interests, without due regard for the public good.

Lastly, a joint advisory committee composed of government officials and outside experts 148/ has been proposed.

It is felt that this suggestion should be rejected. It is difficult to imagine how such a mixed committee could operate. There is no objection to officials and experts or representatives of private organizations meeting now and then to discuss specific problems. But this is a far cry from institutionalizing such meetings in the form of a permanent advisory committee. In any event, the effectiveness of such a committee is open to doubt, since the loyalty of the government officials would be divided between the department and the permanent committee.

2.2.2.2.2.3. MINISTERIAL CONSULTATION

As a rule, the minister is free to discuss a draft regulation with whomever he chooses. While it is certainly not suggested that this practice be abandoned, it is obviously totally inadequate. Consultation is necessarily spasmodic and there is a risk that the parties consulted may be favoured by contrast with those who were not.

2.2.2.2.3. PARLIAMENTARY CONTROL

In the past, the Canadian Government's attitude to parliamentary control over delegated legislation has been that, since most regulations have to be approved by the Governor in Council and published in the Canada Gazette, there is no need to institute specific parliamentary control.

Should this point of view continue to be acceptable, at the very least section 38 of the Excise Tax Act 149/ should be amended to ensure that regulations made under the Act be passed by the Governor in Council and not by the Minister of Finance or of National Revenue.

Considering the scope and complexity of delegated legislation nowadays, including delegated tax legislation, it is no doubt time that the Canadian Government change its traditional stand regarding parliamentary control over such legislation. The United Kingdom, Australia and the Canadian Province of Manitoba have thought it advisable to set up permanent parliamentary committees to review delegated legislation. The need for scrutiny committees at the federal level is quite as pressing.

Both the Commons and the Senate should set up standing committees to pass upon the whole body of delegated legislation.

Their terms of reference could be based on those of parliamentary committees in the United Kingdom and in Manitoba. They would not be concerned with government policy behind the delegated legislation, such matters being reserved for debate in the House or in the Senate under existing procedures. The committees would be chiefly concerned with the following matters:

1. The imposition of a tax or the introduction of a government expenditure by means of a regulation.

2. The denial of resort to the courts.

3. Retroactivity without the specific authorization of the enabling statute.

4. Unreasonable delay in the publication of the regulation or in its submission to the House.

5. Any ambiguity or contradiction in the regulations.

6. Unusual or unforeseen use of the powers conferred by the enabling statute.

Having reviewed the regulation, the committee would report to Parliament and it would be free to recommend an annulment or an amendment.

On the other hand, there seems to be little need to change the present method of laying regulations before Parliament. If a procedure requiring prior notice and public hearings were adopted, the introduction into Canada of the complicated United Kingdom system of laying regulations before Parliament would not materially improve the system.

It has been argued against the setting up of permanent committees that these would not sit continuously. 150/ This is not a serious drawback and, if necessary, the standing committees could always obtain permission to meet between sessions.

2.2.2.3. CONCLUSION

To sum up, effective control over delegated tax legislation could be

exercised by means of the following procedures:

1. Prior publication, when not contrary to the public interest, of all draft regulations.

2. Public hearings chaired by a senior official of the department concerned at which all interested parties could be heard.

3. Regulations to be made by the Governor in Council and not by any single minister.

4. Publication of regulations in the Canada Gazette, and submission to the House according to present procedure.

5. Scrutiny of regulations by standing scrutiny committees of the House and of the Senate.

2.2.3. RECOMMENDATIONS

We therefore recommend that:

1. It be required that delegated tax legislation be given prior publication in Part II of the Canada Gazette, subject to the proviso that the Governor in Council be authorized to prohibit prior publication of a particular regulation.

2. Following such publication, the public be given an opportunity to make representations before the regulations are adopted; such opportunity to take the form of public hearings open to all interested parties. The hearings to be quite informal and held under the chairmanship of a senior officer of the Department of National Revenue, or placed under the auspices of the Tax Advisory Board suggested in section 1.1.2.2.3.

3. A permanent scrutiny committee of the House of Commons or of the Senate should subject regulations to a final and critical examination. The committee should have limited terms of reference and should recommend to Parliament that each regulation be upheld, annulled or amended as the case may be.

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49/ Lapointe v. l'Association de bienfaisance et de retraite de la Police de Montréal, (1906) A.C. 535. Giroux v. Maheux, (1947) B.R. 163.

50/ (1924) 1 K.B. 171 at p. 205.

51/ (1945) 3 D.L.R. 437 at p. 450.

52/ The Mayor of Sorel v. Armstrong, (1876) 20 L.C.J. 171.

53/ Kearney v. Desnoyers, (1901) 10 B.R. 436. The King v. Woodhouse, (1906) 2 K.B. 501.

54/ Plante v. Forest, (1936) 61 B.R. 8.

55/ Errington v. Minister of Health, (1935) 1 K.B. 249. The King v. Minister of Health, (1939) 1 K.B. 232.

56/ M.N.R. v. Grieve Estate, (1960) Ex. C.R. 11.

57/ GRIFFITH and STREET, Principles of Administrative Law, London, Pitman, 1963, p. 149. S.A. de SMITH, Judicial Review of Administrative Action, London, Stevens & Sons Ltd., 1959, p. 35.

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59/ Rex v. Manchester Legal Aid Committee, ex parte R.A. Brand & Co. Ltd., (1952) 2 Q.B. 413 at p. 431. Rex v. Statutory Visitors to St. Lawrence's Hospital, Caterham, ex parte Pritchard, (1953) 2 All E.R. 766 at p. 768.

60/ Income Tax Act, R.S.C. 1952, c. 148, s. 51(1).

61/ S.A. de SMITH, op. cit., pp. 173 and 188.

62/ Allingham v. Minister of Agriculture and Fisheries, (1948), 1 All E.R. 780. Levi Abrahams v. The Queen, (1881) 6 S.C.R. 10.

63/ The Murray Co. Ltd. v. District of Burnaby, (1946) 2 D.L.R. 541. Evans v. Donaldson, (1909), 9 C.L.R. 140.

64/ Rex v. Torquay Licensing Justices, ex parte Jack Brockman, (1951) 2 K.B. 784 at p. 788.

65/ Income Tax Regulations, P.C. 1954-1917 of December 8, 1954, s. 900, SOR, consolidation 1955, Vol. II, p. 1891.

66/ D.L. KEIR and F.H. LAWSON, Cases in Constitutional Law, 4th ed., Revised, Oxford, The Clarendon Press, 1959, p. 334.

67/ C.J. HAMSON, Executive Discretion and Judicial Control, London: Stevens and Sons Ltd., 1954, p. 166.

68/ Roberts v. Hopwood, (1925) A.C. 578 at p. 610. La Corporation du Comté d'Arthabaska v. Patoine, (1886) 9 L.N. 82 (Que.) Yates (Arthur and Co. Pty. Ltd. v. Vegetable Seeds Committee, 72 C.L.R. (1945-46) 37.

69/ The Queen v. Vestry of St. Pancras, 24 Q.B.D. (1890) 371. O'Connor v. Jackson, (1943) 4 D.L.R. 682. Roncarelli v. Duplessis, (1959) S.C.R. 121 at p. 140.

70/ Smith and Rhuland Ltd. v. The Queen, on the Relation of Andrews et al, (1953) 2 S.C.R. 95, confirming (1952) 29 M.P.R. 377.

71/ Wilson v. Esquimalt and Nanaimo Ry., (1922) 1 A.C. 202. Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation, (1948) 1 K.B. 223.

72/ City of Montreal v. Beauvais, (1910) 42 S.C.R. 211 at pp. 216-217. Cité de Lévis v. Bégin, (1926) S.C.R. 65.

73/ Rex v. Broad, (1915) A.C. 1110 at p. 1122.

74/ Ritholz et al v. Manitoba Optometric Society, (1960) 21 D.L.R. (2d) 542.

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76/ J.A. CORRY, Administrative Law in Canada, Proceedings, Canadian Political Science Association, 1933, p. 207.

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78/ Regulations Act, R.S.C. 1952, c. 235.

79/ The Poor Law Act, 4-5 Will. IV, Statutes of the United Kingdom, c. 76.

80/ J. FINKELMAN, Government of Civil Servants, (1939) 17 Can. Bar Rev., 166 at p. 176. F. SCOTT, Constitutional Adaptation to Changing Functions of Government, (1945) II Canadian Journal of Economics and Political Science 329 at p. 334.

81/ Report of the Committee on Ministers Powers, 1932, London, Cmd. 4060, p. 115.

82/ Lord HEWARD of Bury, The New Despotism, London, Ernest Ben, 1945, p. 81.

83/ Regulations Act, R.S.C. 1952, c. 235, s. 3 and following.

84/ Ibid., s. 9(3).

85/ Ibid., s. 5(1) and s. 6(3).

86/ Elmer A. DRIEDGER, Subordinate Legislation, (1960) 38 Can. Bar Rev.1, p. 13.

87/ GRIFFITH and STREET, op. cit., p. 111. H.W.R. WADE, Administrative Law, Oxford, The Clarendon Press, 1961, p. 261.

88/ Bailey v. Williamson, (1873) L.R. 8 Q.B. 118. Starey v. Graham, (1899) 1 Q.B. 406 at p. 412. The Queen v. Sheer Metalcraft, (1954) 1 Q.B. 586 at p. 590.

89/ Income Tax Act, R.S.C. 1952, c. 148, s. 117(2).

90/ Estate Tax Act, 7 Eliz. II, S.C. 1958, c. 29, s. 57(2).

91/ Reference Re Regulations (Chemicals) under War Measures Act, (1943) R.S.C. 1, 13, or (1943) 1 D.L.R. 248 at p. 256.

92/ Section 20 of the Interpretation Act, R.S.C. 1952, c. 158, however, states that a regulation based on a repealed statute which has been replaced remains in force unless it is inconsistent with the new statute.

93/ Birks v. City of Montreal, (1955) S.C.R. 799.

94/ City of Verdun v. Sun Oil Co., (1952) S.C.R. 222.

95/ The King v. Wright et al, (1927) 59 N.S.R. 443. M.N.R. v. Shawinigan Water and Power Co., (1953) 3 D.L.R. 351. The Queen v. Laboratoire Marois, (1958) R.S.C. 425 or 12 DTC 1116. Charos v. M.N.R., (1962) 16 DTC 273. Edward S. Touzeau v. M.N.R., (1963) 17 DTC 1. Egedio Pevato v. M.N.R., (1964) 18 DTC 279.

96/ Ex.: Excise Act, R.S.C. 1952, c. 99, s. 125.

97/ D.J. HEWITT, The Control of Delegated Legislation, Sydney, Butterworth, 1953, p. 9. The King v. Wright and Others, (1927) 59 N.S.R. 443.

98/ G.H.C. Investments Ltd. v. M.N.R., (1961) C.T.C. 187, or 15 DTC 1120.

99/ Ex.: Income Tax Act, R.S.C. 1952, c. 148, s. 117(1). Estate Tax Act, 7 Eliz. II, S.C. (1958) c. 29, s. 57(1).

100/ Supra, 2.1.2.1.2.3. of this study. Elmer A. DRIEDGER, loc. cit., p. 14.

101/ Ibid., p. 15. GRIFFITH and STREET, op. cit., p. 115.

102/ H.W.R. WADE, op. cit., p. 260.

103/ Ellis v. Dubowski, (1921) 3 K.B. 621. Allingham v. Minister of Agriculture and Fisheries, (1948) 1 All E.R. 780. Att.-Gen. of Canada v. Brent, (1955) 3 D.L.R. (Ontario Court of Appeal 587,(1956) R.S.C. 318. Pecover v. Bowker and Governors of the University of Alberta, (1957) 8 D.L.R. (2d) (Alberta Supreme Court) 20. Vine v. National Dock Labour Board, (1957) A.C. 488. Regina v. Joy Oil Co. Ltd., (1964) 41 D.L.R. (2d) (Ontario Court of Appeal) 291.

104/ H.W.R. WADE, op. cit., p. 263.

105/ Supra, note 89.

106/ See 2.1.2.1.2.2. of this study.

107/ Report of the Committee on Ministers Powers, 1932, London, Cmd. 4060.

108/ J.A.G. GRIFFITH, Delegated Legislation: Some Recent Developments, (1948) 12 M.L.R. 297 at p. 311. WADE, op cit., p. 273.

109/ G. MARSHALL and G.C. MOODIE, Some Problems of the Constitution, London, Hutchinson University Library, 1961, pp. 106-107.

110/ H.W.R. WADE, op. cit., p. 275. WADE and PHILLIPS, Constitutional Law, 6th ed., London, Logmans, 1960, p. 579. LAWSON and BENTLEY, Constitutional and Administrative Law, London, Butterworth, 1961, p. 62. HANSON and WISEMAN, Parliament at Work, London, Stevens, 1962, p. 203. K.C. WHEARE, The Machinery of Government, extract of WALLACE, Readings in British Government, Toronto, University of Toronto Press, 1948, p. 288. GRIFFITH and STREET, op. cit., p. 84.

111/ GRIFFITH and STREET, op. cit., p. 83.

112/ For instance, The Agricultural Act, 10-11, Geo. VI, 1947, c. 48, which confers on the Minister the power to draw up plans for land development, prescribes that: "Any scheme under this section shall be laid before Parliament forthwith after being made".

113/ Since 1947, the provision is generally drafted as follows: "Any power conferred by this Act to make regulations shall be exercisable by statutory instruments which shall be subject to annulment in pursuance of a resolution of either House of Parliament".

114/ By the end of 1944, the British statutes contained 70 acts calling for approval by resolution, and from 1944 to 1959 no less than 135 acts required this procedure.

115/ Clauses requiring this procedure are rare and are generally worded in this way: "Before any order is made under this section, a draft thereof shall be laid before each House of Parliament and the order shall not be made until the draft has been approved by resolution of each House".

116/ GRIFFITH and STREET, op. cit., p. 92. WADE, op. cit., p. 276. WADE and PHILLIPS, op. cit., p. 581. LAWSON and BENTLEY, op. cit., p. 62. HANSON and WISEMAN, op. cit., p. 302. GRIFFITH, Delegated Legislation: Some Recent Developments (1948) 12 M.L.R., pp. 297 et seq.

117/ The following extract from the minutes of a meeting of this Committee lists these grounds in detail:

MINUTES OF THE PROCEEDINGS OF THE SELECT COMMITTEE ON STATUTORY INSTRUMENTS UPON 7th NOVEMBER 1961

Session 1961-62
Thursday, 2nd November, 1961

Ordered, That a Select Committee be appointed to consider every Statutory Instrument, every Scheme or Amendment of a Scheme requiring approval by Statutory Instrument, and every Draft of such an Instrument, Scheme or Amendment, being an Instrument, Scheme, Amendment or Draft which is laid before the House and upon which proceeding may be or might have been taken in the House in pursuance of any Act of Parliament, with a view to determining whether the special attention of the House should be drawn to it on any of the following grounds:

(i) that it imposes a charge on the public revenues or contains provisions requiring payments to be made to the Exchequer or any Government Department or to any local or public authority in consideration of any licence or consent, or of any services to be rendered, or prescribes the amount of any such charge or payments;

(ii) that it is made in pursuance of an enactment containing specific provisions [excluded] it from challenge in the courts, either at all times or after the expiration of a specified period;

(iii) that it appears to make some unusual or unexpected use of the powers conferred by the Statute under which it is made;

(iv) that it purports to have retrospective effect where the parent Statute confers no express authority so to provide;

(v) that there appears to have been unjustifiable delay in the publication or in the laying of it before Parliament;

(vi) that there appears to have been unjustifiable delay in sending a notification to Mr. Speaker under the proviso to subsection (1) of section four of the Statutory Instruments Act, 1946, where an Instrument has come into operation before it has been laid before Parliament;

(vii) that for any special reason its form or purport calls for elucidation; and if they so determine, to report to that effect.

Reported by D.C.M. YARDLEY, A Source Book of English Administrative Law, London: Butterworths, 1963, pp. 41-42.

118/ WADE, op. cit., p. 578.

119/ GRIFFITH and STREET, op. cit., p. 99.

120/ Kenneth Culp DAVIES, Administrative Law Treatise, St. Paul, Minn., West Publishing, 1958, Vol. I, No. 6.02.

121/ David C. EBERHART, The Federal Register System—What to Expect and How to Find it, (1961) 47 American Bar Assn. Journal, 1069 at p. 1071.

122/ Bernard SCHWARTZ, An Introduction to American Administrative Law, 2nd ed., London, Pitman, 1958, pp. 56 et seq.

123/ DAVIES, op. cit., Vol. I, No. 6.02.

124/ Bernard SCHWARTZ, op. cit., p. 58.

125/ SCHWARTZ, op. cit., p. 63.

126/ As reported by SCHWARTZ, op. cit., p. 67.

127/ Regulations made under s. 9 of the Regulations Act (R.S.C. 1952, c. 235) P.C. 1954-1787, 18 November 1954, SOR, Consolidation 1955, Vol. III, p. 2935, s. 4.

128/ Regulations Act, R.S.C. 1952, c. 235, s. 3(1).

129/ Ibid., s. 4.

130/ Ibid., s. 6.

131/ Ibid, s. 7.

132/ Standing Orders of the House of Commons, 1962, s. 39(1).

133/ Ibid., s. 65. The Senate is in the same position: Rules of the Senate, 1953, s. 77.

134/ Canada, House of Commons Debates, 21st Parliament, 2nd Session, Vol. 3, 1950, p. 3136 (Mr. St-Laurent).

135/ E. A. DRIEDGER, op. cit., p. 14.

136/ See brief submitted to the Royal Commission on Taxation by the Canadian Bar Association, January 11, 1964, p. 10.

137/ See brief submitted to the Royal Commission on Taxation by the Toilet Goods Manufacturers Association, April 23, 1963, p. 2.

138/ See brief submitted to the Royal Commission on Taxation by the Tax Executives Institute Inc., October 30, 1963, pp. 2-3.

139/ See brief submitted to the Royal Commission on Taxation by the Canadian Bar Association, January 11, 1964, p. 7.

140/ See, for example, the briefs submitted to the Royal Commission on Pilotage by the Shipping Federation of Canada, Inc., June 25, 1963, pp. 87-88, and the Federation of St. Lawrence River Pilots, July 1963, pp. 177-178.

141/ Broadcasting Act, 7 Eliz. II, S.C. 1958, c. 22, s. 11(2).

142/ Regulations Act, R.S.C. 1952, c. 235.

143/ See: The Administrative Procedure Act of the U.S.A. (1946), s. 4. See GARNER, op. cit., p. 583, which prescribes prior publication: "Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts. - (.....)"

144/ Brief submitted to the Royal Commission on Taxation by the Canadian Bar Association, January 11, 1964, p. 12.

145/ E.g., New Towns Act, 9-10 Geo. VI, 1946, c. 68, s. 1(1).

146/ The Administrative Procedure Act of the U.S.A., (1946) s. 4: Rule-Making, U.S.C.A., Tit. 5, section 1003, p. 454. See Appendix C.

147/ GARNER, op. cit., p. 70.

148/ Brief submitted to the Royal Commission on Taxation by the Canadian Institute of Chartered Accountants, December 13, 1963, p. 78.

149/ Excise Tax Act, R.S.C. 1952, c. 100.

150/ Vol. 87 of the transcript of the Commission hearings, p. 7482.

PART TWO

THE ADMINISTRATIVE MACHINERY

Administration of the Tax Statutes is the responsibility of the Department of National Revenue. The organization and essential machinery of that Department are explained in the next two Chapters.

CHAPTER 3—THE ADMINISTRATION OF INCOME TAX AND ESTATE TAX LEGISLATION

The Taxation Division of the Department of National Revenue is responsible for the administration of income and estate taxes. In this chapter, information will be found on the origin and organization of that Division, along with a description of its machinery. The question of whether the requirements of equity are met in the operation of that machinery will also be examined.

3.0. THE TAXATION DIVISION OF THE DEPARTMENT OF NATIONAL REVENUE

Before describing the organization of the Taxation Division of the Department of National Revenue, a brief explanation of how the Department came into being should be given.

3.0.1. ORIGIN AND FUNCTIONS OF THE DEPARTMENT OF NATIONAL REVENUE

Prior to Confederation, the Department of Finance was responsible for both the development of tax policies and the collection of taxes. As early as 1868, however, the second function, i.e., tax collection was divided between two new departments: Customs created under An Act constituting the Department of Customs 1/ and Inland Revenue under An Act constituting the Department of Inland Revenue. 2/ The former was given the responsibility of collecting custom duties, then the main source of government revenue, and tolls from the use of public canals; the latter was given the task of levying, inter alia, excise duties, internal taxes and stamp duties.

In 1887, by an Act respecting the Department of Customs and the Department of Inland Revenue, 3/ the two departments were made into administrative divisions "under the control and supervision of the Minister of Trade and Commerce, or of the Minister of Finance" at the discretion of the Governor General in Council. About five years later, the Governor General decided in favour of the Minister of Trade and Commerce.

In 1897, both these administrative units once again became departments. In 1918, the two departments were combined into one under the name of Department of Customs and Inland Revenue. In 1921, the name was changed to Department of Customs and Excise and in 1927 to Department of National Revenue. 4/ Since 1924, that Department rather than Finance has been collecting income and corporation profits taxes.

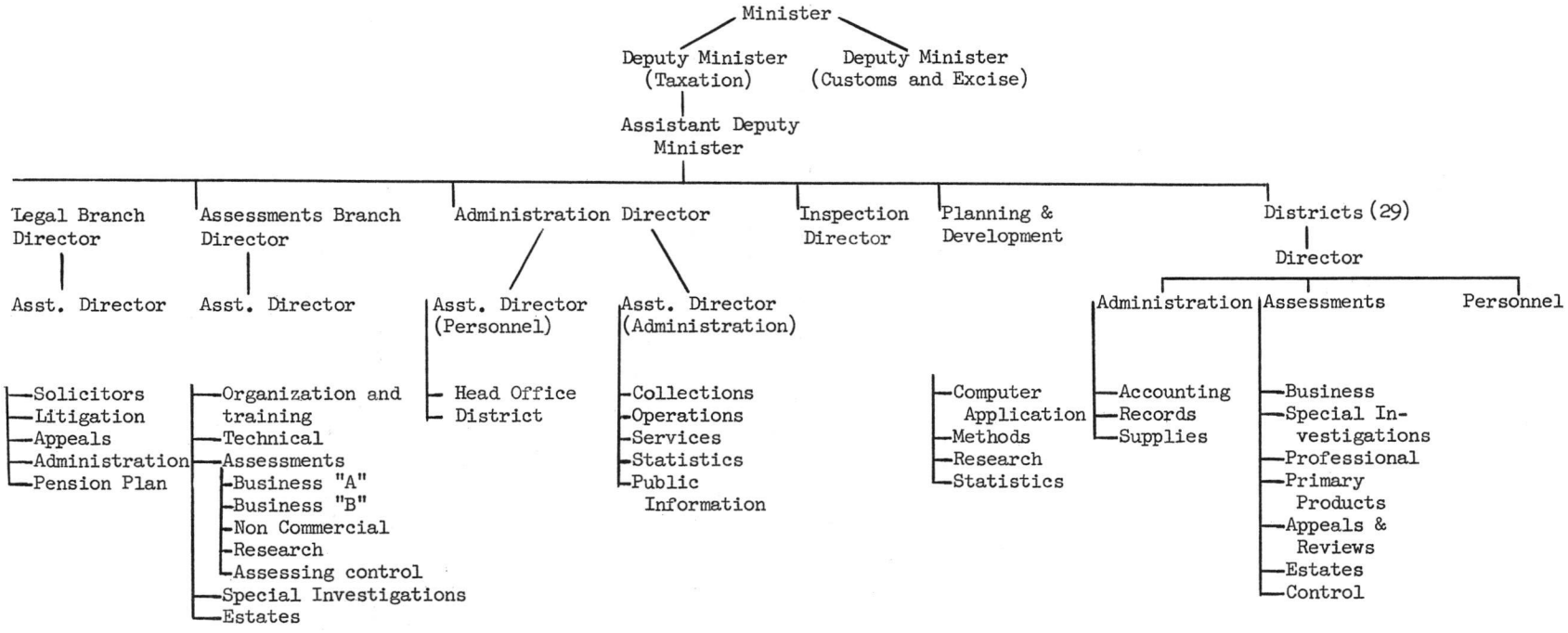
3.0.2. ORGANIZATION

The Department of National Revenue comprises two divisions, each under a Deputy Minister: Customs and Excise, which will be the subject of the following chapter, and Taxation. The Taxation Division has a Head Office, located in Ottawa, a Taxation Data Centre, also in Ottawa, and twenty-nine district offices spread across the country. The organization chart on the next page shows at a glance the various branches and sections of the Taxation Division.

Head Office is divided into five branches namely Administration, Assessments, Inspection, Legal, Planning and Development. The scope of each is described in the following terms in "Organization of the Government of Canada" : 5/

> The Administration Branch is responsible for the accounting and collection of taxes, the preparation and maintenance of taxrolls, the provision of office space and equipment, and the handling of advertising and other public information. This Branch is also responsible for the administration of the personnel policies of the Taxation Division.
>
> The Assessments Branch interpret the various Acts under which assessments are levied and formulate policies and procedures for the carrying out of these in a standard and uniform manner in all areas. All assessing is done by personnel of this Branch.
>
> The Inspection Branch carries out the inspection of all phases of the operations of all offices including the Head Office of the Division and reports to the Deputy Minister concerning the operations of these offices.

Organization of the Department of National Revenue



The Legal Branch, in co-operation with the Department of Justice, conducts litigation and other legal work for the Crown in respect of the assessment and collection of taxes. This Branch is responsible for all legal rulings required for any reason and especially those prepared at the request of the other branches.

The Planning and Development Branch has as its function the development of long-range plans to improve the operating efficiency of the Taxation Division. To assist in this function, this Branch is responsible for the development of statistics pertaining to the operation of the Taxation Division.

In the Taxation Data Centre and in each of the twenty-nine district offices there are three sections: Personnel; Administration, which deals more particularly with accounts and files; and Assessments, which is mainly responsible for auditing returns of taxpayers, issuing any reassessments, examining Notices of Objection and conducting special investigations in cases of tax evasion.

The five Head Office directors, the Director of the Taxation Data Centre and the twenty-nine District Office Directors are directly accountable to the Deputy Minister for Taxation. The manner in which work is apportioned between Head Office, the Taxation Data Centre and district offices will be explained later when a study is made of the administrative machinery.

3.1. INCOME TAX ADMINISTRATIVE MACHINERY

Under the Canadian system, every taxpayer is required to declare his income, determine the taxable portion thereof and calculate the amount of tax payable thereon. 6/ In so doing, he uses a form prepared for this purpose by the Department. The main return forms 7/ are:

1. T1 Short: for use by all individuals except those required to use form T1 General;

2. T1 General: for use by individuals (a) in business as proprietors or partners, including farmers and fishermen; (b) receiving professional fees, commissions or rents; (c) with investment income over $2,500 and (d) claiming foreign tax credits or capital cost allowance 8/;

3. T2: for use by corporations;

4. T3: for use by estates, trusts or agencies.

After a return has been filed with the Department, it is checked, or audited, an investigation is made, if needed, an assessment is prepared accordingly and, finally, tax is collected. Each step of this administrative procedure, shown at a glance on the chart on the following page, will now be described. 9/

3.1.1. QUICK ASSESSMENT

While the taxpayer is initially required to file a return of income, the assessment is nevertheless prepared by the Minister. In this connection, Section 46 of the Income Tax Act provides that:

> (1) The Minister shall, with all due despatch, examine each return of income and assess the tax for the taxation year and the interest and penalties, if any, payable.
>
> (2) After examination of a return, the Minister shall send a notice of assessment to the person by whom the return was filed.
>
> ...
>
> (6) The Minister is not bound by a return or information supplied by or on behalf of a taxpayer and, in making an assessment, may, notwithstanding a return or information so supplied or if no return has been filed, assess the tax payable under this Part.

Upon receiving a tax return, the Minister prepares a quick assessment which may be, but is not necessarily, final. 10/ He does so after a

ASSESSMENT PROCEDURES

	1	2	3	4-5	6	7	8	9
	Coding	Assessment	Classification (According to coding for assessment purposes)	Screening and Auditing	Revision	New Assessment	Issue of New Assessment Notice	Collection
All Returns	1-By Category According to main source of gross income and 2-For Assessment Purposes according to ceilings and 3-Additional coding of a Special Group of Returns only	Quick Assessment (without examination of files) Assessment notice sent to taxpayer	1-Above the ceilings: Without discretion: R-1 2-Below the ceilings: a) Without discretion: R-2 b) At the discretion of the district: R-3 c) Without additional examination: A	1. Field 2. Desk 3. Nominal With returns for previous years in hand				
	Taxation Data Centre for T1's, District Office for T2's and T3's		District Office					

summary examination of the return and without reference to the taxpayer's file. In the case of T2 and T3 returns, this quick assessment is issued by the district office; in the case of T1 Shorts or T1 Generals, it has been issued by the Taxation Data Centre ever since the introduction of electronic computers. This explains why taxpayers are required to send their T1 Shorts or Generals directly to the Taxation Data Centre rather than the district office. A few days before issuing the Notice of Assessment, the Taxation Data Centre ordinarily sends the taxpayer's file to the district office. In this way, the district office is able to provide taxpayers with the explanation of any discrepancy between the Notice of Assessment and the return.

In 1963, about five and a half million T1 Shorts and one and a half million T1 Generals 11/ are reported to have been filed by taxpayers. As these figures imply, the Taxation Data Centre has a tremendous task to perform each year. Remittances must be cashed and accounts kept. Moreover, returns must be subjected to a summary examination which requires a permanent staff assisted by a large number of casual employees, especially at peak periods. Clerks and assessors are divided into teams. Clerks are all submitted to intensive training for one week, after which their work is carefully checked for another week. Each team, under the supervision of an assessor grade 3 or 4, includes about sixteen clerks, grades 1 and 2, experienced and senior clerks acting as reviewers. A group of clerks grade 2 re-examine about 10% of the returns to check on the output of the various teams, discover any patterns of errors and correct them as early as possible. Certain teams examine the more simple T1 Shorts; others are assigned the more difficult ones, i.e., those filed by immigrants, claiming dividend tax credits, medical expenses or exemptions for dependants other

than the taxpayer's spouse or children. Finally, a third group of teams examine T1 Generals.

After the returns have been examined, the information is punched on cards for processing by electronic computers. The Taxation Data Centre has two IBM 1400 and one IBM 7074, in addition to the several machines used to transfer the data on magnetic tape. From the information supplied by the taxpayer, the amount of tax payable or refundable is calculated by mechanical process in each case. In case of errors, the punch cards are rejected by the machines. An Inspection Section then makes the necessary corrections and enters the required explanation in the taxpayer's Notice of Assessment.

Automation benefits the Department as well as taxpayers by making it possible to provide a much faster service to those entitled to refunds. Early in April 1964, the waiting period was only two or three weeks.

As far as the Department is concerned, automation, by greatly reducing the need for junior staff and opening the way to specialization, makes it possible to effect scale economies. Supervision needs are reduced through elimination of several avenues of errors. It also presents marked advantages for statistical compilation and research. In 1963, it was possible to store the information contained in nearly six million T1 forms on about forty spools of magnetic tape. File maintenance and accumulation for long periods no longer present a problem. There is, however, a practical limitation to the efficiency of electronic machines to the extent that their operating pace depends largely on the rate at which the required data is supplied to them. With a large number of spools, information cannot be as readily obtained and this reduces somewhat the efficient operation of the machines.

There would be significant implications if, in spite of this, the Department were to build up a file covering much more than ten years for every taxpayer or a special class of taxpayers. The taxpayer cannot indefinitely maintain a complete record of all his activities without being inconvenienced. Since the onus of proof lies with him, he would find himself all the more at a disadvantage in that the reassessment would relate to a more distant period. As a matter of principle, the Minister's power to reassess a taxpayer is limited to the four previous years, but there is no time limit where fraud or misrepresentation, albeit innocent, is involved. 12/ In the past, the Department kept T1 Generals for ten years and did not go beyond that for lack of records. With automation, lack of space which prevented the Division from keeping files indefinitely is no longer a factor. Equity, however, demands that there be a provision to protect a bona fide taxpayer who, through error or carelessness, made an incorrect return years previously.

3.1.2. AUDITING RETURNS

As mentioned above, notices of assessment are issued after a summary examination of tax returns. This time-saving procedure is possible because the Department may subsequently re-examine a return and, where necessary, issue a reassessment. Paragraph 4 of Section 46 states that:

> (4) The Minister may...
> (a) at any time, if the taxpayer or person filing the return
> (i) has made any misrepresentation or committed any fraud in filing the return or in supplying any information under this Act, or
> (ii) has filed with the Minister a waiver in prescribed form within 4 years from the day of mailing of a notice of an original assessment or of a notification that no tax is payable for a taxation year, and

> (b) within 4 years from the day referred to in subparagraph (ii) of paragraph (a), in any other case,
> re-assess or make additional assessments, of assess tax, interest or penalties under this Part, as the circumstances require.

Every year, thousands of tax returns are re-examined by district offices after notices of immediate assessment have been issued. The types of returns that are audited as well as the nature and extent of such audit will now be considered.

3.1.2.1. RETURNS SUBJECT TO AUDIT

Tax returns are not all audited. This amounts to saying that all taxpayers are not given the same close attention by the Department, a form of discrimination which can be justified if implemented on a rational basis. It is therefore important to know how returns are selected for audit purposes.

As a general rule, T1 Shorts are not subject to audit. Where these are concerned, the immediate assessment is therefore final. This is readily understandable, since it has been learned from experience that almost nothing is to be gained by scrutinizing returns of persons whose only source of income is salary or wages. Additional expenditures thus incurred would greatly exceed any additional tax that might be collected.

Even T1 Generals and T2's are not all audited. Because of the reduced staff available a rational selection is effected. Only such examinations as are most likely to produce favourable results by way of increased revenue are carried out. For this purpose, a classification is made of the T1 Generals and T2's, the former in the Taxation Data Centre and the latter in district offices. In both cases, the classification guide is the main source

of income. For instance, a T1 General of an individual receiving $6,000 in dividends and $5,000 in rentals falls in the third category; on the other hand, if he received $6,000 in rentals and $5,000 in dividends, the return would fall into the second.

TAX RETURN CATEGORIES

T1 Generals	T2's
(a) Salary or wages	(a) Personal corporations
(b) Real estate rentals	(b) Farming and fishing
(c) Investments	(c) Merchandising
(d) Farming or fishing	(d) Finance and services
(e) Professional	(e) Manufacturing
(f) Business	(f) Construction and public utilities
(g) Commission sales	

All tax returns from personal corporations are subject to audit. 13/ For every other T2 or T1 General category, the Assessing Manual prepared by Head Office for use by assessors sets limits varying between $2,500 and $100,000. Returns are classified as being over or below the limits depending on whether or not the gross amount of income is in excess of the limit set for their category. "Over the limit" returns, known as R-1, are all audited in accordance with a Head Office directive. When it comes to "below the limit" returns, a distinction must be made between R-2, R-3 and "A" returns.

R-2 returns are those for which the calculation of tax implies a knowledge of information contained in previous years' returns, viz., when a taxpayer wishes to deduct from the current year's income business deficits incurred in former years 14/ or when authors, 15/ farmers or fishermen 16/ average their taxes on the basis of their income for a given period. On instructions from Head Office, all R-2 returns are audited.

In addition to requiring district offices to audit R-1 and R-2 returns, Head Office occasionally directs them to undertake a special programme under which returns of a given class of taxpayers are examined. Such special programmes are usually based on the occupation of taxpayers and cut across the limits. District offices may also undertake special programmes of their own. Head Office does not restrain them in this respect. In all cases where Head Office does not require them to make an audit, district offices are given a free hand. The only discretion enjoyed by the districts thus lies in being able to make a greater number of audits than they are required to. For example, out of 100 T1 Generals, the Quebec District Office examines about twenty on orders from Head Office and one or two others on its own. "A" returns are those not examined; they are kept for the record in the files of the taxpayers concerned.

Any differentiation in the treatment of taxpayers, if it is to be fair, must have a rational basis. This is a simple matter of natural justice. In the case of R-2's, there is no real discrimination, since examination of past returns is necessary to do justice to the taxpayer. In the case of R-1's, the basis seems to be reasonable, considering the staff at the disposal of the Department and past experience. Furthermore, the ceilings are not subject to frequent change and, since they remain the same throughout the taxation year, all taxpayers are on an equal footing. The one exception to this last statement is that the ceiling in the general classification for agriculture is set much higher for western farmers. 17/ This is easily explained by the fact that the Canadian Wheat Board is the only purchaser of wheat, barley and oats in the Canadian West for commercial purposes. Consequently, the incomes of farmers in this part of Canada are much more easily checked than those of farmers in other parts of the country.

Regarding the R-3's, which are very few in number, selection is on the basis of certain factors: substantial capital gains, large differences in inventories at the start and end of the financial year, substantial adjustments in the capital account, profit margins and so forth. This method of selection also seems reasonable, because the most frequent indications of concealment of income or tax evasion are relied on in selecting returns "below the limits" for mandatory examinations. Certain taxpayers complain of a hostile attitude on the part of the Department. They claim that they are sometimes denied the presumption of honesty to which they are entitled until proof of the contrary. 18/ Obviously, the assessor cannot be blamed for selecting for further investigation the returns submitted by taxpayers belonging in a category where income concealment is more prevalent. The advent of automation makes it possible to consider the selection of R-3's by scientific sampling methods based on pre-established criteria. The responsibility for selecting R-3's would thus be largely assumed by Head Office.

3.1.2.2. TYPES OF AUDIT

Returns subject to audit are not all examined with the same care or in the same manner. Some are subjected to a nominal audit while others are examined more thoroughly either at the district office or at the taxpayer's home or place of business.

3.1.2.2.1. SUMMARY AUDIT

A nominal audit is a review that is carried out with greater dispatch and less thoroughness than the others. As a rule, it does not require that the taxpayer be contacted or that the immediate assessment issued by the Taxation Data Centre be changed.

It would serve no purpose for the Department to examine the return of a taxpayer with the same care every year, but when his returns have been submitted to "nominal audit" for several years, a more thorough examination of his affairs becomes increasingly desirable. Such thorough examination is carried out either at the district office or at the taxpayer's home or place of business.

3.1.2.2.2. DESK AUDIT AT THE DISTRICT OFFICE

The time required for a desk audit carried on at the district office ordinarily varies from a few hours to half a day.

A satisfactory examination of the last return filed by a taxpayer must be made in the light of the transactions carried out during the two previous years. As the Act empowers the Minister to reassess or make an additional assessment within four years from the day of mailing of a notice of an original assessment, the file made available to the assessor contains the returns of the six previous years. In 1964, it contained the returns for 1957 to 1963 inclusive. Only on special request to the Chief Assessor may the returns of earlier years be consulted. 19/ As a rule, such a course is practical only when fraud is suspected, with the attendant possibility of a special investigation being required. The reason for such a control is more a concern for greater efficiency than the protection of the taxpayer. At any rate, the staff of the Department is sworn to secrecy and files are made available only to officials who need them in the exercise of their duties.

When the assessor needs information or documents, he gets in touch with the taxpayer. For example, let us assume that a return refers to a substantial capital gain in connection with a transaction. To ascertain

whether a capital gain rather than taxable income is involved, the circumstances of the purchase, ownership and sale of the property must be looked into. Similarly, where a taxpayer reports that he has disposed of property at a price which is unduly low, it must be ascertained whether the purchaser and the vendor were dealing at arm's length. 20/ To avoid the necessity of having to make a correction later on, the assessor will ordinarily endeavour to obtain complete and precise information before issuing a reassessment.

In order to obtain the required information, the assessor sends a letter to the taxpayer asking him to submit the necessary explanation within a given time, for example, a fortnight. If the taxpayer does not reply, the assessor repeats his request by registered mail and requires a reply within fifteen days. If the second letter does not produce any result, he sends a demand to the taxpayer in accordance with subsection 2 of section 126. 21/ The taxpayer is thereupon required to supply the necessary information or be liable to a fine or a maximum imprisonment of six months. 22/ He usually chooses to comply rather than make himself liable to such penalties. The assessor may obtain what he wants without having to send a demand to the taxpayer. He then prepares a proposed reassessment in which the data is presented so as to favour the Department and this is sent to the taxpayer with the advice that it will be acted upon within fifteen days. This amounts to inviting him to make representations or supply the information. If a taxpayer does not act upon it the reassessment is issued accordingly. 23/

Even when the assessor obtains the full information, the facts may be subject to different interpretations. In such cases, the assessor and the taxpayer may come to a compromise. Such an attitude is not unlike the behaviour of two individuals who may prefer to resolve a litigation by a

sure settlement rather than by an unsure judicial award. It should be recognized, however, that in negotiating the compromise the assessor seems to be in a better position than the taxpayer. Indeed, if a reassessment is issued, the onus of proof lies with the latter. Moreover, the assessor may, if he deems fit, examine transactions for the four preceding years and even beyond that if there has been misrepresentation. Finally, taxpayers may want to waive their rightful claims when the amount at issue is not worth the cost and effort of litigation before the Appeal Board or the Exchequer Court. 24/ Nevertheless, the assessor is generally under the impression that any taxpayer who accepts to pay considers himself lucky to get out of it so cheaply.

3.1.2.2.3. FIELD AUDIT

A field audit is that which is carried out at the taxpayer's home or office rather than at the district office. As the field assessor is authorized by the Minister he may exercise the powers described in sub-section 1 of section 126 of the Income Tax Act: 25/ he may enter into the premises, examine the books, records and other documents and any property described in any inventory or balance sheet. He may not make a search or question under oath. He may not peruse documents without the taxpayer's knowledge and take them away without the latter's consent. Where he suspects fraud or any other serious offence and feels that a seizure should be made, he refers the case to the Special Investigation Unit. 26/

When audits are made at his home, the taxpayer usually offers no resistance but, as may be expected, his co-operation is more passive than spontaneous. The question must be asked whether greater respect should not be shown for a person's home. Even though there is no evidence of abuse,

is it not an abnormal situation for an assessor to be able, with the sole authorization of the Minister, to thrust himself upon the taxpayer as long and as often as he sees fit in the performance of his duties? Since the integrity of the home should be preserved as far as possible, the following recommendation is made:

> Exercise of the powers described in paragraphs (a) and (b) of subsection (1) of section 126, as in the case of the powers described in subsection (3) of the same section, should be subject to approval by a judge of the Exchequer Court of Canada or of a Superior or County Court. It should be possible, however, to grant written approval, upon ex parte application, to any officer of the Department of National Revenue.

When addressing himself to the task on hand, the assessor has already acquainted himself with the taxpayer's return for the six previous years. He is often in a position to know whether all the transactions have been recorded in the books, through information obtained in the course of audits carried out with respect to other taxpayers. Such cross-checks are very helpful in revealing fraud and form the starting point of many special investigations. No abuse of power is involved here. Indeed, section 126 is drawn up in very broad terms and the powers conferred by it may be used "for any purpose related to the administration or enforcement of this Act". Furthermore, even if the books and records of a taxpayer were examined solely for the purpose of administering the Act where he is concerned, it would be difficult to prevent the assessor from making use of the information obtained in the course of an audit of another taxpayer's place.

The assessor first makes a quick examination of the books and records to obtain an idea of the taxpayer's accounting system. He is familiar with the devices most frequently used to suppress income under the various accounting systems. In the light of his experience, he makes a detailed

examination of all transactions carried out during a given two or three month period. For that given period, he examines expenditures, purchases and sales, bank and cash accounts. For such a spot-check, November and December are the months preferred, since by this time of the year the taxpayer has a pretty good idea of the level of his taxable income. It is therefore a time when a businessman is more tempted to suppress part of his income. In addition, the assessor examines all cheques issued by the taxpayer very carefully to see whether a capital outlay has been deducted from income as an expense.

If the spot-check shows that the taxpayer's return is in accordance with the facts, the assessor discontinues his examination. If, on the other hand, the spot-check reveals that something is wrong, he then examines the whole accounting system very closely. He checks whether each transaction has actually been recorded in the appropriate books, whether they balance, whether the accounting adjustments have been made, whether misrepresentations have been made regarding the nature of the transactions, for example, whether a distinction has been made between capital transactions and those of an income nature.

Whether making a spot-check or a complete audit, the assessor asks the taxpayer for any information he needs. While he does not have the power to demand the answers, he usually obtains them so that it is seldom necessary to proceed by demand. The length of an audit may vary, depending among other things on the accounting system and the size of the business. A spot-check may take one or two days, whereas a complete audit may require from a week to a month. After completion of the audit, the assessor proceeds to a reassessment, if necessary. Before doing so, however, he usually brings the proposed assessment to the taxpayer's knowledge.

3.1.2.3. SELECTION OF THE TYPE OF AUDIT

Returns subject to audit are submitted to a summary examination or to a more thorough examination either at the district office or at the taxpayer's place. A screening is made to determine the type of audit to be carried out in each case.

The screening policy is laid down by the district office, with Head Office making suggestions of a general nature. For instance, Head Office may draw attention to signs which may point to a desk or to a field audit. With these suggestions, group heads under the direction of the Chief Assessor, and sometimes even the Director, lay down the district office policy. As a rule, the criteria selected bear a close relationship to the techniques for analyzing financial statements. While they are widely similar to the factors used in determining the R-3 returns, they are more specific and numerous. The list contains no less than twenty-five to thirty signs having to do with either the statement of profit and loss or the balance sheet. In choosing between a summary audit and a more thorough examination, the nature of any previous audits and the evasion signs are taken into account. The same practice is followed when it comes to determining whether a thorough audit should be made at the district office or at the taxpayer's place. However, in the latter event, the size and turn-over of the business and the absence of any field examination during the four preceding years are determining factors which help to decide in favour of an audit at the taxpayer's home or place of business.

The actual screening is done in the district office by group heads, assessors grade 4 or 5 with approximately ten years' experience. This requires an examination of the taxpayers' file; otherwise it is often

impossible to assess the information contained in the last return filed. After this screening has been completed, the files are apportioned between the various teams of assessors and the group heads make suggestions regarding audit techniques. The programme is occasionally changed during the year, for example because of staff reductions or work delays. A second screening is then proceeded with.

According to the Taxation Division statistics for the two fiscal years ending 31 March, 1962 and 1963, nearly 70% of the audits were carried out in summary fashion. The majority of the more thorough examinations were made at the taxpayer's place, in the case of the T2 returns, and at the district office, in the case of T1, T2 and gift tax returns. Reassessments were far less numerous for T2's than for T1, T3 and gift tax returns, a situation which is no doubt due to the fact that financial statements of corporations are prepared by accountants.

3.1.2.4. AUDIT REVIEW

Whatever type of audit he carried out, the assessor, after completing his work, prepares a report and submits a proposed assessment to a reviewer for approval. As a rule, the reviewer has ten years of experience and does not belong to the same section as the assessor, so that there is no employer-employee relationship between the two officers. The reviewer's task is not to communicate with the public but to examine the file de novo. Once this work is finished, he either approves the proposed assessment or returns it to the assessor. There is seldom any disagreement between the two officers where a desk audit is concerned.

3.1.3. SPECIAL INVESTIGATIONS

Every district taxation office has a special investigation unit that

AUDITS BY TYPES FOR FISCAL YEARS

AUDITS	Ending 31 March, 1962			Ending 31 March, 1963		
	Number of Audits	Number of Additional Assessments	Number of Tax Reductions	Number of Audits	*Amount of Additional Tax	*Amount of Tax Reduction
Of T1, T3 and gift tax returns						
Summary	146,738	5,347	2,956	161,236	506	559
At the district office	51,797	25,588	8,246	50,433	6,905	1,467
At the taxpayer's	25,095	12,715	2,636	25,099	20,941	623
Total	223,630	43,650	13,838	236,768	28,352	2,649
Of T2						
Summary	72,629	369	3,828	79,108	82	3,645
At the district office	15,346	2,234	3,639	13,960	1,534	7,006
At the taxpayer's	18,773	5,819	1,728	20,411	37,966	12,257
Total	106,748	8,422	9,195	113,479	39,582	22,908
GRAND TOTAL	330,378	52,072	23,033	350,247	67,934	25,557

Source: Statistics supplied by Taxation Division.

* In thousands of dollars.

deals only with cases of fraud. This unit is more closely dependent upon Head Office than the others, because of the potentially vexatious nature of the very extensive powers wielded by its members.

An isolated act rarely leads to a special investigation. Most often, an attempt is made to discover a whole course of conduct amounting to fraud. Such a course of conduct may be deduced, for instance, from a taxpayer's standard of living in relation to his declared income or from a change in value of his net worth during a given period. Many special investigations are initiated as a result of information discovered in the course of audits or investigations relating to other taxpayers.

3.1.3.1. TYPES OF SPECIAL INVESTIGATIONS

There are three types of special investigations: some are carried out with a search warrant, others without such a warrant and a third group under the Inquiries Act. 27/

3.1.3.1.1. INVESTIGATIONS WITHOUT A SEARCH WARRANT

Over 85% of the special investigations are carried out without a search warrant. With the close co-operation of assessors, special investigators proceed as in the case of an audit at the taxpayer's home or place of business. Cross-checks are made through audits at the taxpayer's creditors or customers.

Special investigators are specifically authorized by the Minister to exercise the powers described in subsections (1),(5) and (7) of section 126. They may therefore enter into the taxpayer's premises, audit his books, examine the condition of his property, seize documents and question witnesses under oath. These powers are extraordinarily wide, more extensive

even than those conferred on members of the R.C.M.P. Employees assigned to special investigations are undoubtedly conscious of their responsibilities. Nevertheless, the fact that such exorbitant powers are not controlled in any way opens the door to abuse. Quite unconsciously and through a certain professional bias, investigators may be inclined to interpret the wish of a citizen to insist on his human rights as a lack of co-operation or even an acknowledgment of guilt. Except in cases of imminent danger, the government must respect these rights and is not justified to violate them for reasons of administrative efficiency. Furthermore, as special investigations may lead to criminal prosecutions, it is important that a citizen be assured a minimum of protection. For these reasons, the following recommendation is made:

> Exercise of the powers described in subsections (1) and (7) should, as in the case of the powers described in subsection (3) of the same section, be subject to approval by a judge of the Exchequer Court of Canada or of a Superior or County Court. Of course, it should be possible to grant an authorization to any officer of the Department of National Revenue upon ex parte application. Moreover, the Income Tax Act should expressly recognize that any taxpayer questioned under oath should be protected against his own testimony and have a right to counsel.

3.1.3.1.2. INVESTIGATIONS WITH A SEARCH WARRANT

A search warrant is obtained, upon ex parte application, from a judge of the Exchequer Court or of a Superior or County Court. 28/ Between 1 April 1958 and 31 March 1963, 359 warrants were issued and 2,929 special investigations initiated. This procedure is therefore used in approximately 12% of the cases. It is resorted to when a substantial fraud is suspected or obstinate resistance is expected on the part of the taxpayer.

Upon completion of the search, the investigator draws up a list of the books and records seized and, on request, delivers a copy of the list to

the taxpayer. The latter is advised by registered mail that he may, at any time, consult his books and records at the district office. There is nothing to be said against such a procedure, but the Act should make it mandatory. 29/ In order to prevent any possibility of abuse, the following recommendation is made:

> The Act should require the special investigator to make a list at the time of seizure, to deliver a certified copy thereof to the taxpayer and to return the books and records seized within a reasonable time. The Act should also recognize the taxpayer's right to consult the books and records seized or obtain a copy thereof.

The auditing work is done at the district office and ordinarily requires about six to twelve months.

3.1.3.1.3. INVESTIGATIONS CONDUCTED UNDER THE INQUIRIES ACT

Under subsection (4) of section 126, the Minister of National Revenue may authorize any person "to make such inquiry as he may deem necessary with reference to anything relating to the administration or enforcement of this Act".

The Department seldom proceeds in this manner. Nevertheless, the procedure followed in an investigation of this type was the subject matter of a litigation in the case Lafleur v. Guay. In that case, the facts as related by Mr. Justice Roger Brossard, then of the Superior Court, were as follows:

> By an order dated 28 December, 1960, the Deputy Minister of National Revenue for Taxation 30/ authorized the defendant, one of the officers of the Division, to conduct an investigation into the "affairs" of the petitioner for purposes relating to the administration or enforcement of the Act.

> The defendant began to hold his hearings on 10 January, 1961 in the Income Tax Building, Montreal, after having summoned a certain number of witnesses to appear at different dates and times. Some of the witnesses have already been heard. The petitioner was neither summoned to appear, nor officially advised of the holding of the inquiry.
>
> However, as the petitioner had been advised that the defendant had been appointed and had taken up his duties, his attorneys presented themselves before the defendant during the first hearing held by the latter, in order to represent the petitioner; the defendant, pretending to act in accordance with a practice of the Department of National Revenue, did not allow the attorneys for the petitioner to be admitted at the hearings he held in his capacity of investigating commissioner; the petitioner's attorneys then asked the defendant to take note of their objections and protests and withdrew; hence this petition. It was admitted that the defendant knew, at the time of his refusal, the capacity of the attorneys for the petitioner and knew also that they would appear before him in order to represent the petitioner. 31/

Through an injunction, Lafleur asked that the defendant cease to hold his inquiry illegally and thus inflict on him an irreparable prejudice by refusing him access to the hearings. As the petitioner could not successfully invoke the Inquiries Act or the Income Tax Act, the crux of the problem was whether he could avail himself of paragraph (e) of section 2 of the Canadian Bill of Rights: 32/

> Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to
>
> ....
>
> (e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;

More particularly, the question was whether the inquiry conducted by the defendant tended to define the rights and obligations of the taxpayer

Lafleur. The question was answered in the affirmative by Mr. Justice Brossard and it would appear useful, at this point, to quote at length from his judgment:

> Indeed, the duties of the defendant are limited, under subsection 4 of section 126 of the Income Tax Act, to conducting an inquiry, the defendant having no judicial or quasi-judicial power to render decisions which might be directly binding on the petitioner, the Minister or the Deputy Minister; but this inquiry can have but one purpose: that of enabling the Minister or Deputy Minister to decide and determine whether the person whose affairs are being investigated has violated the Income Tax Act; as a matter of fact, its purpose cannot be to find out whether such person has complied with the Act; as good faith is always presumed and a person is deemed not to be guilty in the absence of proof to the contrary, it is obvious that the purpose of the inquiry is to find out, to determine and to decide whether the taxpayer is guilty of having violated the Act; the inquiry can have no other conceivable object or purpose. On the other hand, it is obvious that such an inquiry would be useless if the information obtained by the investigator could not be communicated to the Minister or Deputy Minister in the form of a report or otherwise in order to enable the latter to exercise his duties of supervision and administration of the Act.
>
> Now, the powers and duties of the Minister and the Deputy Minister are exceptionally wide and extensive, bordering on the arbitrary and a contempt for the taxpayer's fundamental right to the protection of the law with respect to his property and person.
>
> As for the taxpayer's property, under section 46, the Minister may according to subsection 4, if he is of the opinion that the taxpayer is guilty of any misrepresentation, make an assessment which may be different from that which he made on the basis of the taxpayer's return; according to subsection 6, he is not bound by the taxpayer's returns and may, notwithstanding the taxpayer's returns, assess the tax payable; according to subsection 7, his assessment is deemed to be valid and binding notwithstanding any error, defect or omission therein or any proceeding relating thereto. Under section 51, the taxpayer is required, within thirty days from the day of mailing of the Minister's Notice of Assessment, to pay the amount of assessment thus set by the Minister, who may, on the other hand, when he is of the opinion that the taxpayer is attempting to avoid payment of taxes, direct that all taxes, penalties and interest be paid forthwith upon assessment. Under section 56, the Minister may assess a penalty of at least 25% of the amount which he believes the taxpayer has evaded or sought to evade.

On the other hand, the objections or appeals the taxpayer is entitled to make against the Minister's decisions, under sections 58, 59 and 60 of the Act, are largely illusive since, notwithstanding an objection or appeal, the taxpayer is nevertheless required to pay immediately any tax, interest and penalties arbitrarily assessed by the Minister or Deputy Minister; under the said section 51 and sections 118, 119, 120 and 121, the taxpayer may therefore be prosecuted and his property seized notwithstanding an objection or appeal on his part; the taxpayer may therefore be deprived of his property on an arbitrary decision of the Minister or Deputy Minister until a final judgement has been rendered, under section 101, ordering the Minister to refund the tax, interest and penalties to the taxpayer. It can be seen from this that not only the purpose but also the effect of an investigation under subsection 4 of section 126 may be to enable the Minister or Deputy Minister to determine the obligations of the taxpayer, which may have the effect of depriving him of the use and enjoyment of his property and, possibly, of entailing his bankruptcy.

As for the person of the taxpayer, the Minister may, under sections 131 et seq of the Act, as a result of information obtained in the course of the inquiry, lay complaints before courts of penal jurisdiction for offences which, according to testimony received during the inquiry, might have been committed by the taxpayer. Indeed, if such procedures are taken, the taxpayer will be able to defend himself before the courts, but his means of defence may have been considerably weakened by the fact that, because of the investigating commissioner's right to force people to testify against the taxpayer under oath and on pain of contempt of court, witnesses who might have given false testimony at the time of the inquiry could, to some extent, be intimidated before the court of penal jurisdiction by the threat of a confrontation with their first testimony. It is essentially this hearing of witnesses required to appear before the defendant and required to testify under oath on pain of contempt of court which, in the opinion of the court, makes the inquiry one the purpose of which is to enable the Minister or Deputy Minister to determine and define the obligations of the petitioner with the aforementioned consequences.

For these reasons, the court is of the opinion that the inquiry before the investigating commissioner constitutes a hearing the object of which is the defining of the taxpayer's obligations, that because of such hearing the freedom and property of the taxpayer are threatened and that consequently, under section 2, subsection (e) of the Canadian Bill of Rights, the hearing must of necessity be impartial.

In the opinion of the court, the hearing before the defendant cannot, because of the circumstances and the aforementioned arbitrary powers of the Minister, be impartial if the taxpayer against whom it is directed is denied leave to be present or

> be represented by counsel when witnesses required to testify under oath are heard, and if he is thereby denied the right to make, before the investigator, such representations as may be necessary for the protection of his rights and to offer evidence liable to enlighten the commissioner and, through him, the Minister in a fair and impartial manner. How can an inquiry in which the investigator risks hearing only one side of a case be impartial? And how can the good faith of the Minister not risk to be abused by the one-sided nature of such an inquiry?
>
> The in camera procedure advocated by the defendant is largely similar to that adopted by the police in the search for criminals, but it is different on two vital points: in the case of a search by the police, a crime has been committed or at least there is reason to believe that a crime has been committed and no one is required to testify under oath before the police; it can also be likened, to a certain extent, to an investigation held before a coroner, but it is also different on two vital points: before the coroner, as before the police, a crime has been committed or there is reason to believe that a crime has been committed and, before a coroner, any person may appear and be accompanied by counsel if he believes that his interests may be affected by the investigation.
>
> The procedure advocated by the defendant violates infinitely more than the rights of the taxpayer to the freedom of his person and the protection of his property; the court would be tempted to compare it with certain methods of compulsory and secret delation practised on a wide scale in the countries said to be ruled by dictatorships; in a democratic country no more than in a dictatorship can the State be justified, in the name of what it considers to be the commonweal, to deprive the individual of the protection of the law with respect to his person or property. 33/

Mr. Justice Brossard's decision was confirmed by the Court of Queen's Bench but reversed by the Supreme Court. In an eight to one judgment the court of last instance held that Lafleur could not avail himself of paragraph (e) of section 2 of the Canadian Bill of Rights because the inquiry conducted into his actions could in no way determine his rights or obligations. On this point, the more pertinent extracts from the notes of Justices Abbott and Cartwright are given below:

> Abbott J.: - The power given to the Minister under s. 126(4) to authorize an enquiry to be made on his behalf, is only one of a

> number of similar powers of enquiry granted to the Minister under the Act. These powers are granted to enable the Minister to obtain the facts which he considers necessary to enable him to discharge the duty imposed on him of assessing and collecting the taxes payable under the Act. The taxpayer's right is not affected until an assessment is made. Then all the appeal provisions mentioned in the Act are open to him.
>
> The fact that a person authorized to make an investigation on behalf of the Minister is given certain limited powers of compelling witnesses to attend before him and testify under oath, does not, in my opinion, change the nature of the enquiry. That view was admirably expressed by Mr. Justice Hyde whose words I adopt: [As a purely administrative matter where the person holding the inquiry neither decides nor adjudicates upon anything, it is not for the Courts to specify how that inquiry is to be conducted except to the extent, if any, that the subject's rights are denied him. The taking of sworn statements is a common everyday occurrence. The deponent is frequently examined in subsequent Court proceedings where the interest of another may be affected by the statements of that witness. I know of no requirement in law that any person likely to be affected in such a way is entitled to be present with counsel when such a sworn statement is originally made, and I see little distinction from the proceeding in issue.] 34/
>
> Cartwright J.: - Generally speaking, apart from some statutory provision making it applicable, the maxim "audi alteram partem" does not apply to an administrative officer whose function is simply to collect information and make a report and who has no power either to impose a liability or to give a decision affecting the right of parties. 35/

With all due respect to the highest court of the country, it seems that a technicality or even a fiction of law prevented it from looking at the reality of things, as was pointed out by the only dissenting judge, Mr. Justice Hall:

> It is urged that the requirement of acting judicially is absent here because Guay as Commissioner was not required to make a decision, that he was merely to conduct an inquiry and to make a report to the Deputy Minister who had authorized and named him to make the inquiry. I do not read the terms of Guay's appointment authorized by s. 126 of the Income Tax Act as excluding the making of recommendations arising out of the inquiry. I think it is implicit to the inquiry that some judgment on the facts and information obtained would be made by Guay in his report to the Deputy Minister. If the Deputy Minister (who is said to be the person who would make the decision) had himself conducted the inquiry, he would have

> been required to act judicially in the sense that he must act fairly and impartially. See St. John v. Fraser, (1935) S.C.R. 441. Surely when the powers are given to a subordinate, the requirement of acting judicially is even stronger. One cannot ignore the reality of the situation that in such cases the decision is made by the subordinate but put out in the name of the Deputy Minister. 36/

When preparing or amending an assessment, the Minister or Deputy Minister certainly affects the rights of the taxpayer concerned, inasmuch as every assessment is enforceable notwithstanding an appeal. Mr. Justice Hall is certainly right in concluding that if the Minister or the Deputy Minister had conducted the inquiry, subsection (e) of section 2 of the Canadian Bill of Rights would have found application. In view of the Supreme Court decision, the provision could be sufficiently cleared up if the legislator were to dissociate the power of decision and the power of inquiry, i.e., let one person decide on the strength of information gathered by another. It would also be possible to get round the provision if the decision, although rendered on behalf of the Minister or the Deputy Minister, were actually made by the person entrusted with the inquiry. If human rights are to be effectively protected, one must look at the reality of situations without being blinded by a technicality or fiction of law. For that reason, the following recommendation is made:

> The Income Tax Act should be amended so that inquiries conducted under subsections (4) and (8) of section 126 be governed by section 13 of the Inquiries Act. Moreover, the Income Tax Act should expressly give any person whose conduct is being subjected to an inquiry the right to an impartial hearing, and more particularly the right to attend the hearings, to be represented by counsel, to cross-examine witnesses and to obtain a copy of the evidence.

3.1.3.2. EFFECTIVENESS OF SPECIAL INVESTIGATIONS

When an investigation is completed, the District Director sends

a report to Head Office usually to recommend either a prosecution or a fine, or both. Head Office re-examines the file and weighs the evidence, mindful of the fact that the onus probandi lies with the Department in cases of fraud. Special investigators act only when there are strong reasons to suspect fraudulent conduct, which would explain the limited number of special investigations and the fact that they are nearly always acted upon.

According to the statistics of the Taxation Division, criminal prosecutions are infrequent. There were only eighty-six prosecutions in the five years ending 31 March 1963. This represents about 3% of the total number of special investigations undertaken during the five year period. In the last twelve months of that period, seventeen prosecutions were instituted; in all, twenty-eight charges were laid: nineteen for making false or deceptive returns, 37/ five for avoiding or wilfully attempting to avoid compliance with the Act or payment of tax 38/ and four for having participated as agent, officer or director of a corporation in an offence committed by such corporation. 39/

Rather than instituting a criminal prosecution, the Department most often prefers to levy a fine itself under subsection (1) or subsection (2) of section 56. Under the former provision, the penalty is a minimum of 25% and a maximum of 50% of any additional tax; under the latter, it is set at 25%. Administrative policy is to apply the former subsection to taxation years prior to 1960 and the latter to subsequent years. Fines levied by the Minister under the former subsection were 25% or a slightly higher percentage, with the 50% maximum being applied in very serious cases, particularly repeaters. It would therefore appear that the authorities have not misused their discretion. For instance, it would not appear that

RESULTS OF SPECIAL INVESTIGATIONS

for the fiscal year ending 31 March

	1959	1960	1961	1962	1963	Total
Criminal prosecutions						
Number	15	15	25	14	17	86
Fines *	111,415	462,404	82,650	100,612	91,850	848,931
Tax and interest *	905,775	1,201,646	543,043	1,367,631	5,058,214	9,076,309
Penalties (Section 56)						
Number	261	361	421	266	884	2,193
Amount *	968,560	902,506	1,916,475	1,349,331	1,229,674	6,366,546
Tax and interest *	5,751,593	4,699,654	9,443,418	7,309,315	6,864,580	34,073,559
No prosecution or penalty						
Number of files	103	98	110	65	312	688
Tax and interest *	1,959,687	3,622,422	6,292,610	3,667,102	959,680	16,501,501
Total						
Number of files	379	474	556	345	1,213 **	2,967
Amount payable *	9,697,030	10,888,632	18,283,196	13,793,991	14,203,998	66,866,848

Source: Statistics of the Taxation Division.

* Every amount, expressed in dollars, was rounded up to the nearest digit.

** The substantial increase in the number of special investigations during the fiscal year ending 31 March 1963 is attributable to two western district offices where an endeavour was made to collect tax from persons receiving tips. No fewer than 746 investigations of this type were conducted during that year.

taxpayers liable to the same penalties were sentenced to fines of different amounts. In spite of this, discretion here is unwarranted. Not only is there no need for it but, even in the absence of blackmail on the part of the Department, it may in itself put undue pressure upon the taxpayer. As a compromise, the taxpayer may decide to pay a 25% fine for fear of incurring the maximum 50% penalty should he decide to go before the courts. For that reason, the following recommendation is made:

> Section 56 of the Income Tax Act should be amended so that the amount of fine no longer be left to the Minister's discretion. Either a standard rate should be set or the Act should define circumstances (e.g., repetition of an offence) under which the highest fine should be levied.

3.1.4. EFFECTS OF AN ASSESSMENT

The issuing of an assessment does not prevent the Minister from making another. As for the taxpayer, he may object but, whether or not he objects, the tax is payable notwithstanding an appeal.

3.1.4.1. TIME LIMIT FOR A REASSESSMENT

Under section 46, the Minister may reassess within a period of four years from the day of mailing of a notice of original assessment or of a notification that no tax is payable for a taxation year. Furthermore, no time limit applies where the taxpayer has waived the benefit thereof, committed fraud or supplied erroneous information. A great deal of latitude is therefore left to the Department especially if account is taken of the interpretation given to section 46 in the Taylor case. In his decision, Mr. Justice Cameron stated:

> It is to be noted also that the section refers to "any misrepresentation" and it would be improper, therefore,

> to construe that term as excluding a particular sort of misrepresentation such as an innocent misrepresentation. I have reached the conclusion that the words "any misrepresentation", as used in the section, must be construed to mean any representation which was false in substance and in fact at the material date, and that it includes both innocent and fraudulent misrepresentations. 40/

Section 46 has been strongly criticized. 41/ Some would relieve taxpayers of all liability after one year instead of four. Such criticism ignores the facts of administration and more particularly staff shortages. Every year only 25% to 30% of returns subject to audit are thoroughly examined either at the district office or at the taxpayer's. The remainder are submitted only to a summary examination. As the Minister may go back four years, he is able to carry out a thorough audit of each file once every four years. Were the assessment to become final and conclusive at the end of one year, certain files would not receive sufficient attention and all taxpayers would not be afforded the same treatment.

Whether the Minister's right to reassess is limited to one or to four years, the interpretation given by the Exchequer Court to section 46(4)(a)(i) in the Taylor Case allows the assessor to re-open a taxpayer's files on finding the most harmless mistakes in his returns for previous years. As a matter of equity some time limit must be set and a four year limit appears reasonable. However, some provision should be made to protect the taxpayer who, through error or oversight, made some innocent misrepresentation in a return filed and assessed more than four years previously. We therefore recommend that:

> Section 46(4) of the Income Tax Act be amended in such a way that the Minister cannot reassess after four years have elapsed since the date of the original assessment, in cases where the taxpayer is able to satisfy the court that he filed his return in all good faith and sincerity.

3.1.4.2. THE OBJECTION PROCEDURE

On pain of forfeiting his right of appeal to a court, the taxpayer must file a Notice of Objection with the Minister within ninety days from the day of mailing of the Notice of Assessment. The notice must be in duplicate and set forth the reasons for the objection and all pertinent facts. Service must be by registered mail addressed to the Deputy Minister of National Revenue for Taxation, Ottawa. 42/

This 90-day time limit seems overly rigid. Indeed, without complicating the Department's task, it is possible to extend a more equitable treatment to taxpayers. In accordance with the recommendation of the Canadian Bar Association and the Canadian Association of Chartered Accountants, 43/ the following reform is suggested:

> The Income Tax Act should be amended to enable the taxpayer to apply to the Tax Appeal Board or the Exchequer Court, as the case may be, for extension of the time limit or authorization to file a Notice of Objection or a Notice of Appeal after the time limit has expired, subject to such conditions as may be deemed reasonable by the Board or Court for example, by justifying his delay or establishing sound defence grounds.

In practice, the taxpayer files a Notice of Objection only after having exhausted all possibilities of administrative review, as described in Chapter 5. 44/ However, at that stage, the review is left to departmental discretion. Things are different after a Notice of Objection, for then the administrative review described in subsection (3) of section 58 of the Income Tax Act applies. 45/

3.1.4.3. DUE DATE OF AMOUNT ASSESSED

Subsection (1) of section 51 of the Income Tax Act reads as follows:

> The taxpayer shall, within 30 days from the day of mailing of the notice of assessment, pay to the Receiver General of Canada any part of the assessed tax, interest and penalties then remaining unpaid, whether or not an objection to or appeal from the assessment is outstanding.

That provision has been subjected to well-deserved criticism inasmuch as the legislator shows therein greater severity for a taxpayer than for a person convicted of a criminal offence. Indeed, criminal sentences are suspended in the event of an appeal. On the other hand, where tax is concerned, taxpayers must, notwithstanding an appeal, pay not only the tax and interest but also the penalty levied under section 56 for conduct implying mens rea or gross negligence. Furthermore, as the assessment puts the burden of proof on the taxpayer, the latter must, to avoid the fine, prove either that he failed to pay the tax unintentionally or that he did not commit gross negligence. So that taxpayers may be treated with justice, the following recommendation is made:

> Section 56 should be amended so that the onus probandi lies with the Department in case the matter should be referred to a court. Moreover, section 51 should be amended so as to enable a taxpayer to provide security in lieu of payment, where he objects or appeals to the courts. The times for payment, giving security and serving a Notice of Objection should then be made to coincide.

3.1.5. TAX COLLECTION

Tax collection is effected by several methods and may give rise to extensions and the payment of interest.

3.1.5.1. COLLECTION METHODS

Income tax on remuneration 46/ paid to employees is collected by employers by way of deductions at the source. Persons receiving less than one quarter

of their income from sources other than remuneration are required to pay tax on such other income by way of instalments. Finally, following reassessment, any additional tax is payable in a lump sum, but the Department accepts arrangements from its debtors.

3.1.5.1.1. TAX DEDUCTION AT SOURCE

Deduction of tax at the source is an economic necessity. Government expenditures are spread throughout the year so that revenue must come in regularly. If taxes were paid once a year or even quarterly, the government would at certain times of the year be forced to borrow substantial amounts on a short-term basis and such massive borrowings would risk dislocating the whole credit machinery.

Any person, upon becoming another's employee, is required to file form TD1 with his employer showing the nature and amount of any personal exemptions to which he may be entitled. That person must also file a new form within seven days of any event affecting his personal exemptions. Any wage earner who omits to file form TD1 is liable to be treated, for tax deduction purposes, as if he were a single person without dependants. 47/

No deduction need be made if, according to form TD1, the total remuneration received or receivable during the taxation year does not exceed the amount of personal exemptions claimed. Moreover, no tax is deductible where at any time in the year an employee does not work or reside in Canada. 48/ In all other cases, employers determine the amount deductible using the tables distributed by the Department of National Revenue. Such tables are prepared in accordance with the following general formula:

$$\frac{r(ip-e)-c}{p} = t$$

t: amount of the deduction for a given pay period

r: the highest tax rate applicable

i: gross income for pay period

p: number of pay periods in the year

e: the sum of the annual personal exemptions claimed by the employee in form TD1, the deduction authorized for pension purposes and the minimum $100 deduction for charitable gifts and medical expenses

c: constant to correct application of the highest tax rate to the total amount of taxable income.

Source: Circular A-1 (Rev. 5-65) issued by the Technical and Methods Section of the Taxation Division.

In this formula, t is established on the assumption that during the taxation year, r and e will not vary from one pay period to another. It should be pointed out, however, that the amount of the deduction may be determined by a different method, with the consent of the Minister and that, in certain circumstances, such amount may even be determined by the Minister himself. 49/

The employer makes the deduction on behalf of Her Majesty and holds the funds in trust until paid over to the Receiver General of Canada. Consequently, no payment for which the employer is liable may be offset against an amount which he could personally claim from Her Majesty. The amount deducted is deemed to have been paid to the employee. Under subsection (13) of section 123 of the Income Tax Act:

> The receipt of the Minister for an amount withheld or deducted by any person...is a good and sufficient discharge of the liability of any debtor to his creditor with respect thereto to the extent of the amount referred to in the receipt.

The employee may therefore not sue his employer for the difference between the net wages and the gross wages agreed upon by contract. Furthermore, the employer needs only to have made the deduction with intent to comply with the Act in order to be protected from an action at law. 50/

The employer is required to pay over the full amount to the Receiver General of Canada not later than the fifteenth day of the month following that during which the remuneration was paid to the employee. 51/ The Department has a very strict policy in this matter: a first delay is immediately notified to the employer in a letter wherein his co-operation is requested. If another delay occurs within twelve months, the Department levies a penalty of 10% of the tax deducted but not remitted, in addition to claiming interest at the rate of 10% per annum. 52/ If the employer has omitted to deduct the tax, he is liable to a penalty of 10% of the amount that should have been deducted. In the latter case, interest at the rate of 10% per annum is calculated on the amount of the penalty. 53/ In extreme cases, the Department goes to court to have the delinquent sentenced to a fine with or without imprisonment. 54/

Before the last day of February the employer is required to complete form T4 Summary showing the total wages paid and tax deducted. On the same date, he is also required to complete form T4 Supplementary in five copies for each employee, showing the gross wages and remuneration paid, the personal exemptions claimed, the length of employment and finally the amount of tax deducted at source. Two copies are sent to the District Taxation Office, and two others are delivered to the employee who is required to attach one to his tax return; the fifth is retained by the employer.

When judging the equity of the system of tax deductions at source,

one should not consider the number of tax refunds made after the end of the taxation year. Many refunds can be explained by the occurrence of completely unforeseeable events. Furthermore, certain taxpayers, when completing form TD1, do not report all their personal exemptions, perhaps wishing to save a goodly amount for the Spring of the following year.

Employers complain of the burden which they thus have to bear. 55/ Should the government compensate them for this burden, as is done by the Province of Quebec in the case of the sales tax collected by retailers? Offhand, it seems unfair for the employers to assume the costs relating to the tax payable by their employees. However, it would be difficult to estimate with any degree of precision the marginal cost so incurred, in view of the fact that, in any event, they make deductions at source for other purposes such as unemployment insurance, sickness insurance, life insurance, pension funds and Canada Savings Bonds. It must also be considered that they probably pass on to the public a portion at least of such costs in the form of increased prices and deduct them from income for tax purposes.

From the wage earner's point of view, the method followed in determining the amount of the deduction is subject to criticism. Indeed, it is based on unrealistic assumptions. Thus, it is assumed that the deduction for medical expenses, charitable donations and professional dues will not exceed the $100 minimum. Also, it fails to take into account any changes which may occur from one pay period to another in the amount of salary or personal exemptions. For these reasons, a great many wage earners are subject to deductions which are too high. It would certainly be possible to improve the formula so as to take account, for each pay period, of changes

which have occurred since the beginning of the year in the amount of salary and personal exemptions. However, the use of a more complicated formula would unreasonably increase the work of employers, forcing them to keep an up-to-date accounting of the wages paid to each wage earner and, in the case of a new employee, to make inquiries regarding his previous salary. Especially when it is considered that wage earners often receive other income which is not subject to tax deduction, for example, rents, interest or dividends, it does not seem that the formula in present use should be overly complicated.

It would nevertheless seem desirable to alleviate the present situation by introducing two measures of relief. Where a wage earner is entitled to deduct more than $300 for charitable donations, professional dues or medical expenses in excess of 4% of his estimated taxable income he should be authorized to declare such expenses in a form TD1 Supplementary. Where medical expenses have been incurred during the previous year, the wage earner should certify, on the form, that they had not already been deducted. Under such circumstances, the amount deductible should be determined in advance, having regard to all deductions allowed by the Act for purposes of calculating the tax. Moreover, when a wage earner has not received any wages for a period of at least three months in the year, he should be authorized to determine his wages for the whole year, in a form TD1 Supplementary, on the assumption that for the remaining pay periods his present salary will remain unchanged. At the same time, he should also certify the amount of tax already deducted at source. On the strength of this information, the employer should then use the tax tables for the year to determine the balance due and divide the amount obtained by the number of pay periods

still to come. This would give him the amount of the deduction to be made for each of those periods. In this way, a taxpayer who works only six months in a year, say for the last six months, would be subject to a proper deduction. In order to avoid disproportionate deductions, the following recommendation is made:

> The Income Tax Regulations should be amended so that a wage earner who, during the year, has received no salary for a period of at least three months or who, for tax calculation purposes, is already entitled to deduct more than $300 for professional dues, charitable donations or medical expenses in excess of 4% of taxable income, be allowed to adjust his deductions at source by certifying these facts in a form TD1 Supplementary.

3.1.5.1.2. TAX INSTALMENTS

Any tax which is not deducted at source must be paid directly to the Department by the taxpayer. In this respect, the rules vary according to whether the taxpayer is an individual or a corporation.

When an individual has been subjected to a deduction at source on at least three quarters of his income, he must pay the balance of his tax not later than 30th April of the following year. 56/ Where a taxpayer receives at least one quarter of his income from a source other than remuneration, he must, not later than 31st March, 30th June, 30th September and 31st December, pay an amount equal to one quarter of the tax, calculated at the rate for the year, either on the estimated taxable income for the current year, or on the assessed income for the previous year. Any balance must be paid before May 1st of the following year when all information is available to make the required adjustments. 57/ Finally, an exception to the rule is made in favour of an individual whose main source of income is farming and fishing; he is allowed by the Act to pay his tax in two instalments. Such

individual must, before December 31st, pay a first amount equal to two thirds of the tax, as calculated at the rate for the year, either on the estimated taxable income for the current year, or on the assessed income for the preceding year, and the balance not later than 30th April of the following year. 58/

In the case of a corporation, the taxation year coincides with the fiscal period of the business. The tax is calculated at the effective rate for the calendar year in which the fiscal period ends. 59/ It is payable by monthly instalments spread over a twelve-month period beginning four months after the beginning of the fiscal period. If the fiscal period starts on June 1st, each instalment must be made not later than the last day of each month from the following October. During the first ten months, the corporation is required to pay an amount equal to one twelfth of the tax, as calculated at the rate for the taxation year, either on the estimated taxable income for the said fiscal period, or on the assessed income for the preceding fiscal period; in each of the last two months, that is the fifteenth and sixteenth months following the end of the its taxation year, it is required to pay one half of the balance of tax, as calculated at the rate for the taxation year, on the taxable income determined for the same year. 60/ Thus, the corporation is able to determine this balance precisely having had three months to close its accounts, i.e., June, July and August.

3.1.5.1.3. PAYMENT OF ADDITIONAL TAX AS A RESULT OF REASSESSMENT

When a reassessment is prepared, a notice constituting a request for payment is immediately sent to the taxpayer. Upon receipt of a copy of that notice, the Collection Section immediately opens an account under the taxpayer's name. The tax is payable, even if the taxpayer decides to file

a Notice of Objection in respect of the reassessment and go to court. The Minister may order that all taxes, penalties and interest be paid forthwith upon assessment, if he is of the opinion that the taxpayer is attempting to avoid payment. 61/ If the Minister suspects that the taxpayer is on the verge of leaving Canada, he may also prescribe an immediate seizure of his property. 62/ In all other cases, the tax is payable to the Receiver General of Canada within thirty days of mailing of the Notice of Assessment. 63/ On the thirty-first day, a letter is sent to the taxpayer to demand payment and, if he has not complied on the forty-sixth day, a second letter is sent by the Department, this time by registered mail, to repeat the demand with more firmness. In practice, the Department does not proceed to a seizure under section 121 until the sixty-first day and the taxpayer is often allowed a longer period.

According to information obtained from the Quebec District Office, approximately 50% of the assessments are paid either before or as a result of the first letter sent by the Department, 25% as a result of the registered letter and 25% after a garnishee or saisie-arrêt 64/ or following arrangements between the Department and the taxpayer.

3.1.5.2. EXTENSIONS

A taxpayer unable to discharge his liability within the allotted time may ask for an extension. Even though the government needs its revenue promptly, it is in the Department's interest to accept reasonable arrangements. Except under extreme circumstances, nothing would be gained by driving the taxpayer to bankruptcy. To make the best possible use of its discretion, the Department must make a detailed examination of every proposed arrangement having regard to the amount of tax payable, the value

of the taxpayer's assets and his income level. Circumstances, however, may vary ad infinitum so that it would be difficult to require the Department to establish and publish guidelines in such matters.

Where the Department agrees to an extension it may see fit to require security 65/ and it does so, especially when the taxpayer proposes an arrangement for a period of one year or more or contests the claim before the courts. 66/ In the latter case, the department should have no discretion and the taxpayer should be authorized by law to defer payment of tax by providing security. 67/

3.1.5.3. PAYMENT OF INTEREST

When a taxpayer makes the required tax instalments within the time limits set by the Act no interest is payable. Under the Act also, no interest is payable where the instalments are based on the taxable income of the previous year even if such income is less than that of the taxation year. On the other hand, outstanding amounts bear simple interest at the rate of 6% per annum. 68/ If a taxpayer elects to base his instalments on an estimated income for the taxation year, and the actual amount exceeds his estimation he may be liable to interest since, under subsection (4) of section 54:

> ...he shall be deemed to have been liable to pay...instalment computed by reference to the taxable income for
> (a) the preceding year, or
> (b) the taxation year,
> whichever is the lesser.

Interest payable to the Department is calculated so as to favour the taxpayer. All amounts are first rounded up to the lower multiple of ten. Thus, interest on $1,005 is calculated on $1,000. Furthermore, any payments

made by taxpayers prior to the fifteenth of each month are deemed to have been made on the first of the month and any payments made after the fifteenth are deemed to have been made on the fifteenth. Finally, the Department does not bother to claim interest when the amount is less than $5.

It was suggested in a submission to the Royal Commission on Taxation that when an additional assessment is levied, the taxpayer should not be required to pay interest before the mailing of the Notice of Reassessment. 69/ A second 70/ submission recommended that the taxpayer be relieved from payment of interest for the period described in former subsection (6) of section 54, 71/ i.e.:

> ...in respect of the period beginning 12 months after the day fixed by this Act for filing the return of the taxpayer's income upon which the taxes are payable or 12 months after the return was actually filed, whichever was later, and ending 30 days from the day of mailing of the notice of the original assessment for the taxation year.

The above recommendation is contained in modified form in a third submission. 72/ It suggested that, in cases not involving fraud, the old subsection (6) of section 54 be restored, but with a reference to a period commencing twenty-four months after the date prescribed for filing the return or after the date of actual filing, whichever is later, and ending thirty days after the mailing of a Notice of Assessment respecting the tax unpaid for the taxation year. Finally, a fourth submission 73/ stated that interest should not run from the date of the Notice of Objection to the date of final judgment, assuming that the Act were to allow the taxpayer to defer payment of the tax by providing security. 74/ All things considered none of these suggestions deserves to be acted upon. It should be remembered that, under the present system, the taxpayer determines the

taxable portion of his income and calculates the tax payable. If he makes a mistake, even a bona fide mistake, it is normal that he should suffer the consequences. Furthermore, as emphasized previously, 75/ it is not unreasonable to allow the Department a period of four years to make all the necessary audits. As a delay cannot be ascribed to the Department, there is no reason for the government to waive the interest. Finally, since interest is charged in disputes between individuals, the same should apply in disputes between the department and taxpayers.

3.2. ESTATE TAX ADMINISTRATIVE MACHINERY

When an estate comes into being, the executor is required to supply the Department with the required information within six months of the date of death. Failing an executor or if the executor fails to act, the obligation falls on every successor who is then allowed an additional period of ninety days. 76/ Under subsection (2) of section 11, the Minister may, by a demand sent by registered mail, require any person to supply the appropriate information; failure to reply is punishable by a fine. 77/

It is doubtful whether a large estate can come into being without the Department knowing about it. The Taxation Division may be advised of the fact by its own filing unit or by a provincial department. Moreover, when financial institutions such as banks, credit unions or trust companies learn of a taxpayer's death and want to effect or allow to be effected the assignment, delivery or transfer of property in which the deceased had an interest, they must, according to the value of the property, either advise the Minister of National Revenue or obtain his authorization. 78/ Thus, the Department normally obtains the required information concerning any property transferred by death along with any outstanding income tax returns. 79/

There are three types of information return forms to be filed with the Department: ET60 for estates having a net value in excess of $40,000; ET61 for those having a net value of less than $40,000, and ET62 for property situated in Canada belonging to deceased persons domiciled abroad. Forms of the latter category are intended for Head Office and should be sent there; the others are to be filed with Director-Taxation for the district where the deceased filed his last income tax return or the district in which he resided at the time of death.

After receiving the information, the Department prepares an assessment and collects the tax.

3.2.1. THE ASSESSING PROCEDURE

According to the statistics of the Quebec District Office, there are at least ten ET61 forms filed for every ET60 form. However, since no tax is payable on estates with a net value of less than $40,000, examination of form ET61 is a rather simple process which takes an average of about thirty minutes.

Examination of form ET60 is a much more thorough process which takes, as a rule, from two to three days. Within fifteen days after receiving such a form, the district office makes a preliminary examination and, where necessary, sends a letter requiring any missing documents or information. If a reply is not received within thirty days, the request is repeated. The Department's policy is not to send a demand before a period of about five months from the date of death has elapsed. In practice, the Department does not have to resort to such a procedure: it obtains the required information either from the heirs or from the executor. When the

file is complete, the property must be valued, a task necessitating frequent exchanges of views or information between federal and provincial officers. The value of the real estate is determined by the district office. In the case of goodwill, a business or private company shares, all the district office does is to gather the information and send it to Head Office. Whether a valuation is made at Head Office or at the district office, the Department's policy is to notify the heirs of any change in their own valuation and to supply them with the required explanations. The heirs then are allowed to present their views. 80/ The assessor may accept their claims and change his proposed valuation or assessment. If he does not change his mind, he notes the claims advanced by the heirs and refers the file to Head Office for approval. In 25% to 30% of the cases reviewed in Ottawa, changes are made prior to the issuance of the assessment.

After the proposed assessment has been approved, the file is returned to the district office where a Notice of Assessment is issued. The period allowed for objecting is ninety days from the date of mailing of the Notice of Assessment by registered mail. Under the Act, 81/ a notice sent to the executor is deemed to have been sent to all the parties concerned. Such a procedure sacrifices equity to administrative efficiency. 82/ Accordingly, the following recommendation is made:

> The Act should be amended so that any person who is liable to pay any amount of tax, but has not received the required notice, be granted leave either by the Exchequer Court or by the Tax Appeal Board (or any agency substituted therefor), to file a Notice of Objection after expiration of the time allowed by justifying his delay or establishing the validity of his claims.

In actual fact, Notices of Objection are seldom filed. They give rise to an administrative review procedure which is described in Chapter 5. 83/

3.2.2. THE COLLECTION PROCEDURE

The tax becomes payable six months after the death of the deceased. From that date, simple interest is charged at the rate of 5% per annum. As for income tax, the interest is calculated so as to favour the taxpayer. 84/ As the Department seldom takes less than four or five months to settle a file, interest is nearly always payable where the return is filed more than two months after the date of death and, after examination, the Department claims an additional amount.

When payment of the tax is not forthcoming, the Department claims it. As a first step, a letter is ordinarily sent to the notary or solicitor. The letter is mailed at least seven months after the date of death, but never before a complete month has elapsed after the mailing of the Notice of Assessment. If no reply is received within thirty days, the Department sends a follow-up letter. If this fails to bring results during the next month, the Department contacts the executor in the same tactful manner. The Department's policy is to refrain from instituting legal action until after four notices have been sent at intervals of at least one month. In the great majority of cases, the final state is not reached. Before such extreme measures are taken, either the tax has been paid or an extension has been granted by the Department. Under an express provision of the Act, 85/ the Minister may allow an extension where he feels that payment in full of the tax would inflict undue hardship.

3.3. RESPECT FOR EQUITY IN THE ADMINISTRATIVE MACHINERY

There remains to examine whether the income tax and estate tax administrative machinery respects the fundamental requirements of equity.

3.3.1. EQUALITY BEFORE THE LAW

Under the Canadian Bill of Rights, 86/ citizens are equal before the law. Application of this principle requires that all taxpayers in identical circumstances should be treated in the same manner by the Department. Inequality of treatment between various classes of taxpayers, however, is not tantamount to an injustice where such discrimination can be explained rationally and where all are treated in the same way within one group. This is why a rational selection of tax returns for audit purposes is fully justified. 87/

The Department endeavours to give equal treatment to all. It shows this concern mainly by publishing an assessing guide, sending Head Office circulars to all district offices and distributing to its officers an administrative manual which deals with internal procedure and departmental policy. To ensure, among other things, a uniform interpretation of these texts, seminars are held in Ottawa from time to time for the benefit of certain officers discharging similar duties in the various district offices. 88/ But Head Office does not confine itself to issuing directives and promoting a uniform interpretation thereof; it makes sure also that they are being followed. This is done by examining sample files from the various district offices and by dispatching field inspectors every year to check the work being done. Inspections take anywhere from one week to over three weeks. The files examined are chosen at random. The district office must then account for any departure, however minor, from the established standards. On receipt of an inspection report, the Deputy Minister for Taxation may see fit to have a meeting with the District Director for a review of the administrative policy. As can be seen from these various

steps, the Department sees to it that the Act is applied in the same way across Canada. In the pursuit of this objective, the Department gets help from businesses with multiple subsidiaries, large accounting firms and tax experts. In their transactions with the Department, these organizations do not fail to take advantage of the slightest differences that may exist between the practices of the various districts with which they are dealing.

Nevertheless, Quebec taxpayers are extended a special treatment often at the expense of equity. This situation stems from the fact that the Province of Quebec is governed by Civil Law, whereas the other provinces are under Common Law. Thus, the existence of a legal system of community as to property undoubtedly benefits the citizens of the Province of Quebec with regard to estate tax. On the other hand, Common Law, as distinct from Civil Law, allows commercial partnerships to be formed between husbands and wives, with the result that they may divide between them any profits resulting from the operation of a business, for income tax purposes. As these examples show, the situation benefits sometimes Quebec, sometimes the other provinces.

In this respect, an anomaly should be corrected. Under the Civil Code, the only donations that may be made between husband and wife, during the marriage, are gifts of a usual nature. All other donations are absolutely void. Gift tax is nevertheless collected whether or not the transaction is valid. If the court cancels the gift on the death of the donor, the property given is held by the Department to form part of the estate for estate tax purposes. In all equity, such property should not be subjected to two consecutive taxes. Moreover, if the donation has taken place at least three years before death, the Department should not have it both ways and be able to claim, under the system described in subsection (2) of section 9

of the Estate Tax Act, whichever of the two taxes is the greater. For that reason, the following recommendation is made:

> Any gift made by a person at least three years prior to his death and subject to gift tax should not be considered, in the event of cancellation, to form part of the estate of the deceased in the calculation of estate tax.

3.3.2. AUDI ALTERAM PARTEM

Under the rule known as audi alteram partem, all persons coming within the jurisdiction of a court should have the opportunity of being heard.

In view of the fact that special investigations have much in common with criminal investigations, this principle should be scrupulously applied. As revealed in Lafleur v. Guay , 89/ such is not the case. On the other hand, the Department is willing to listen to taxpayers in ordinary cases. Chapter 5 describes in detail how taxpayers can obtain revision of an administrative ruling. 90/

3.3.3. NEMO JUDEX IN CAUSA SUA

According to the old saying Nemo judex in causa sua, no person who is prejudiced or has an interest in a ruling being handed down one way or another should be called upon to pronounce judgment. This legal safeguard is true in the field of taxation as in any other.

At first glance, it would appear that assessors may be personally interested in the results of their investigations or decisions. It is current practice in the Department to rate an assessor for promotion purposes according to the amount of extra taxes brought in through his audits or investigations. Of course, this is not the only criterion on which

promotion is based, but it is a very important one. Some people 91/ feel that the Department attaches too much value to it.

In view of the fact that this yardstick exists, it stands to reason that the assessor has a personal interest in his rulings. There are, however, other factors that mitigate the dangers of this situation. An assessor comes under a group supervisor, and under a senior assessor who reviews assessments before they are sent out, and these senior assessors are less concerned with finding additional revenue. Sooner or later they will be called upon to pass an opinion on the judgment of the assessor in question, and if he makes too many errors—even in favour of the Department—this may well prejudice his chances of promotion. The assessor, therefore, finds himself in the position of having to collect the maximum of taxes while avoiding errors or judgment which would subsequently be corrected either by his supervisor or the review officer. The same performance standard is used when rating the efficiency of a group of assessors or even of a district office. Abuses which may arise from this situation can be corrected by appeals within the Department and before the courts.

Another point is that, with the passage of the years, assessors are likely to acquire bias and to consider every taxpayer, if not as an outright criminal, at least as attempting to conceal part of his income and avoiding tax. 92/ The special investigations officials are the most likely to acquire this attitude. There is no doubt that such bias does exist, and that it has its good side since a biased assessor is more likely to notice signs of dissimulation or cheating. To prevent such bias from leading to abuse, the taxpayer must always have recourse to the courts.

3.3.4. LEGITIMATE EXERCISE OF POWERS CONFERRED BY THE ACT

In the exercise of such powers, the Department should avoid any abuse and especially it should not seek purposes other than those assigned by the Act or consider factors alien to the object of the Act.

In this respect, a practice which is widespread among assessors led to criticism. 93/ It consists of threatening a taxpayer who files a Notice of Objection with reassessing him with respect to items previously ignored or with respect to some of his previous years' returns. From the Department's standpoint, such a procedure simplifies administration and does not affect equity since a sort of compensation is thereby obtained. However, the practice is indefensible in law. It may also run counter to equity by leading a completely innocent taxpayer to accept unfair treatment in order to avoid long and costly dealings with the Department. Unfortunately, no text of law could do anything to prevent abuses of this kind.

REFERENCES

1/ 31 Vict., S.C. 1868, c. 43.

2/ 31 Vict., S.C. 1868, c. 49.

3/ 50-51 Vict., S.C. 1887, c. 11, s. 1.

4/ The Department of National Revenue Act, 17 Geo. V, S.C. 1926-27, c. 34, s. 5.

5/ CANADA (Department of Public Printing and Stationery) Organization of the Government of Canada, Ottawa, Queen's Printer, 1965, p. 257.

6/ Income Tax Act, R.S.C. 1952, c. 148, ss. 44 and 45.

7/ Other forms in less frequent use are: T-2016 (Insurance Companies); T-2017 (Redemption of Shares); T-2024 (Dividends arising out of Designated Surplus); and T-2026 and T-2027 (Undistributed Income).

8/ An individual claims a capital cost allowance when he wishes to deduct from his income depreciation or amortization as allowed under Part XI or Part XVII of Income Tax Regulations, Statutory Orders and Regulations, Consolidation, 1955, Vol. II, pages 1892 and 1906 as amended by: P.C. 1955-599, April 27, 1955, SOR/55-156, Can. Gaz. Part II, Vol. 89, p. 1309; P.C. 1955-1679, November 9, 1955, SOR/55-424, Can. Gaz. Part II, Vol. 89, p. 1309; P.C. 1955-1679, November 9, 1955, SOR/55-424, Can. Gaz. Part II, Vol. 89, p. 1861; P.C. 1957-243, February 21, 1957, SOR/57-64, Can. Gaz. Part II, Vol. 91, p. 211; P.C. 1957-718, May 27, 1957, SOR/57-194, Can. Gaz. Part II, Vol. 91, p. 521; P.C. 1958-1666, December 12, 1958, SOR/58-491, Can. Gaz. Part II, Vol. 92, p. 1417; P.C. 1960-225, February 25, 1960, SOR/60-95, Can. Gaz. Part II, Vol. 94, p. 281; P.C. 1960-1475, October 28, 1960, SOR/60-492, Can. Gaz. Part II, Vol. 94, p. 1390; P.C. 1961-24, January 11, 1961, SOR/61-22, Can. Gaz. Part II, Vol. 95, p. 113; P.C. 1961-326, March 3, 1961, SOR/61-87, Can. Gaz. Part II, Vol. 95, p. 354, P.C. 1961-1170, August 16, 1961, SOR/61-366, Can. Gaz. Part II, Vol. 95, p. 1327; P.C. 1961-1686, November 23, 1961, SOR/61-517, Can. Gaz. Part II, Vol. 95, p. 1739; P.C. 1962-99, January 25, 1962, SOR/62-41; Can. Gaz. Part II, Vol. 96, p. 152; P.C. 1962-586, April 19, 1962, SOR/62-153, Can. Gaz. Part II, Vol. 96, p. 477; P.C. 1962-834, June 12, 1962, SOR/62-215, Can. Gaz. Part II, Vol. 96, p. 649; P.C. 1962-1196, August 24, 1962, SOR/62-331, Can. Gaz. Part II, Vol. 96, p. 957; P.C. 1962-1204, August 29, 1962, SOR/62-337, Can. Gaz. Part II, Vol. 96, p. 967; P.C. 1963-1524, October 17, 1963, SOR/63-397, Can. Gaz. Part II, Vol. 97, p. 1110; P.C. 1964-142, January 30, 1964, SOR/64-46 Can. Gaz. Part II, Vol. 98, p. 151; P.C. 1964-233, February 13, 1964, SOR/64-67, Can. Gaz. Part II, Vol. 98, p. 207; P.C. 1964-578, April 23, 1964, SOR/64-167, Can. Gaz. Part II, Vol. 98, p. 513; P.C. 1964-833, June 4, 1964, SOR/64-210, Can. Gaz. Part II, Vol. 98, p. 587; P.C. 1964-1857, December 4, 1964, SOR/64-483, Can. Gaz. Part II, Vol. 98, p. 1346; P.C. 1965-156, January 28, 1965, SOR/65-55, Can. Gaz. Part II, Vol. 99, p. 180; P.C. 1965-1118, June 18, 1965, SOR/65-263, Can. Gaz. Part II, Vol. 99, p. 939; P.C. 1965-1652, September 8, 1965, SOR/65-419, Can. Gaz. Part II, Vol. 99, p. 1524.

9/ Most of the information on these administrative procedures was obtained in the course of interviews with the staff of the Quebec District Office.

10/ Income Tax Act, R.S.C. 1952, c. 148, s. 46(4).

11/ Figures and information contained in 3.1.1. were provided by the Taxation Data Centre.

12/ Income Tax Act, R.S.C. 1952, c. 148, s. 46(4) as amended by 8-9 Eliz. II, S.C. 1960, c. 43, s. 15(1); Minister of National Revenue v. Taylor, 61 DTC 1139.

13/ The term "personal corporation" is used as defined in s. 68 of the Income Tax Act.

14/ Income Tax Act, R.S.C. 1952, c. 148, s. 27(1)(e), as amended by 7 Eliz. II, S.C. 1958, c. 32, s. 12(1).

15/ Ibid., s. 80.

16/ Supra, reference No. 11.

17/ Consideration is at present being given to the question of deciding whether the same limit should apply to all farmers across Canada.

18/ The British Columbia Beef Cattle Growers' Association, Brief submitted to the Royal Commission on Taxation, March 1963, pp. 6 and following.

19/ In 1964, the Archives had all T1 Generals from 1953 to 1957 inclusive and all T2 forms since 1917.

20/ The Income Tax Act, R.S.C. 1952, c. 148, s. 139, ss. 5, 5a, 5b, 5c, 5d and 6, as amended by 2-3 Eliz. II, S.C. 1953-54, c. 57, s. 31(1) and by 9-10 Eliz. II, S.C. 1960-61, c. 49, s. 38(7) defines taxpayers who do not deal at arm's length.

21/ See infra at Appendix E of this study for the wording of this section.

22/ See infra at Appendix E, s. 131(2) of the Income Tax Act.

23/ The opportunities afforded to a taxpayer to have an administrative decision revised before filing a notice of objection are set out in detail in 5.3.2.1.1.

24/ See infra the recommendation contained at the conclusion of 6.3.1.2.1.

25/ See the wording of the section in Appendix E infra.

26/ See infra 3.1.3.

27/ Inquiries Act, R.S.C. 1952, c. 154.

28/ See s. 126 of the Income Tax Act in Appendix E infra.

29/ The Canadian Bar Association, Brief submitted to the Royal Commission of Taxation, January 11, 1964, p. 17; The Canadian Institute of Chartered Accountants, Brief submitted to the Royal Commission on Taxation, December 1963, p. 82.

30/ Under Section 116(1) of the Income Tax Act "the Deputy Minister of National Revenue for Taxation may exercise all the powers and perform all the duties of the Minister under this Act."

31/ (1962) S.C. 254, p. 256.

32/ Act for the Recognition and Protection of Human Rights and Fundamental Freedoms, 8-9 Eliz. II, S.C. 1960, c. 44.

33/ Lafleur v. Guay, (1962) S.C. 254, pp. 269-272.

34/ Guay v. Lafleur, (1965) S.C.R. 12, pp. 16 and 17.

35/ Ibid., p. 18.

36/ Ibid., pp. 19 and 20.

37/ Income War Tax Act, 8-9, Geo. VI, S.C. 1944-45, c. 43, s. 80(1); Income Tax Act, 11-12, Geo. VI, S.C. 1947-48, c. 52, s. 120(1)(a); Income Tax Act, R.S.C. 1952, c. 148, s. 132(1)(a).

38/ Income Tax Act, R.S.C. 1952, c. 148, s. 132(1)(d).

39/ Income Tax Act, 11-12 Geo. VI, S.C. 1947-48, c. 52, s. 122; Income Tax Act, R.S.C. 1952, c. 148, s. 134.

40/ Minister of National Revenue v. Taylor, 61 DTC 1139, p. 1144.

41/ George J. Smith, Brief submitted to the Royal Commission on Taxation, August 14, 1963, p. 7; The Institute of Accredited Public Accountants of Ontario, Brief submitted to the Royal Commission on Taxation, October 1963, p. 4.

42/ Income Tax Act, R.S.C. 1952, c. 148, s. 58(1) and (2), amended by 7 Eliz. II, S.C. 1958, c. 32, s. 21 and 7-8 Eliz. II, S.C. 1959, c. 45, s. 14.

43/ The Canadian Institute of Chartered Accountants, Brief submitted to the Royal Commission on Taxation, December 1963, p. 81; The Canadian Bar Association, Brief submitted to the Royal Commission on Taxation, January 11, 1964, p. 37.

44/ See infra, 5.3.2.1.1.

45/ See infra, 5.3.2.1.2.

46/ According to s. 100(1)(d) of Income Tax Regulations:

"remuneration" includes any payment in respect of (i) salary or wages; (ii) a superannuation or pension benefit (including an annuity payment made pursuant to or under a superannuation or pension fund or plan); (iii) a retiring allowance; (iv) a death benefit; (v) a benefit under a supplementary unemployment benefit plan, or (vi) a deferred profit sharing plan or a plan referred to in section 79C of the Act as a revoked plan.

Income Tax Regulations, P.C. 1961-1785, December 14, 1961, SOR/61-544, Section 1(1), Can. Gaz. Part II, Vol. 95, No. 24, December 27, 1961, p. 1831.

47/ Sections 100(1)(c) and 107 of Income Tax Regulations, P.C. 1961-1785, December 14, 1961, SOR/61-544, Section 1(1), Can. Gaz. Part II, Vol. 95, No. 24, December 27, 1961, pp. 1831 and 1835. See also Appendix E, subsections 2 and 3 of section 123 of the Income Tax Act.

48/ Section 104 of Income Tax Regulations, ibid., p. 1834.

49/ Sections 102 and 103 of Income Tax Regulations, P.C. 1961-1785, December 14, 1961, SOR/61-544, Section 1(1), Can. Gaz. Part II, Vol. 95, No. 24, December 27, 1961, p. 1831; P.C. 1963-175, February 4, 1963, SOR/63-53, Sections 1 and 2, Can. Gaz. Part II, Vol. 98, No. 3, February 12, 1964, p. 50; P.C. 1964-2009, December 23, 1964, SOR/65-9, Sections 1 and 2, Can. Gaz. Part II, Vol. 99, No. 1, January 13, 1965, p. 11; P.C. 1965-1167, June 23, 1965, SOR/65-274, Sections 1 and 2, Can. Gaz. Part II, Vol. 99, No. 13, July 14, 1965, p. 969.

Section 106, Income Tax Regulations, P.C. 1961-1785, December 14, 1961, SOR/61-544, Section 1(1), Can. Gaz. Part II, Vol. 95, No. 24, December 27, 1961, p. 1831.

50/ Section 108, Income Tax Regulations, P.C. 1961-1785, December 14, 1961, SOR/61-544, Section 1(1), Can. Gaz. Part II, Vol. 95, No. 24, December 27, 1961, p. 1831. See also, Appendix E, s. 47(3) and s. 123(1), (4), (12) and (13) of the Income Tax Act.

51/ Ibid.

52/ See s. 123(9) of the Income Tax Act at Appendix E of this study.

53/ See s. 123(8) at Appendix E.

54/ See s. 131(2) at Appendix E.

55/ James A. Smith, Brief submitted to the Royal Commission on Taxation, December 1962, p. 12.

56/ Income Tax Act, R.S.C. 1952, c. 148, s. 47(2).

57/ Ibid., s. 49.

58/ Ibid., s. 48.

59/ Ibid., s. 139(2).

60/ Ibid., s. 50(1).

61/ Ibid., s. 51(2).

62/ Ibid., s. 122.

63/ Ibid., s. 51(1).

64/ Ibid., s. 120(1).

65/ Ibid., s. 116(4).

66/ Wolfe D. Goodman, Brief submitted to the Royal Commission on Taxation, February 1963, p. 19.

67/ See supra, recommendation at the end of 3.1.4.3.

68/ Income Tax Act, R.S.C. 1952, c. 148, s. 54(1), (2) and (4).

69/ Julius M. Scharing, Brief submitted to the Royal Commission on Taxation, April 1963, p. 8.

70/ Imperial Oil Limited, Brief submitted to the Royal Commission on Taxation, August 1963, C-9 and C-10.

71/ Income Tax Act, R.S.C. 1952, c. 148 s. 54(6), repealed by 3-4 Eliz. II, S.C. 1955, c. 54, 11.

72/ Brief submitted to the Royal Commission on Taxation by the Canadian Institute of Chartered Accountants, December 12 and 13, 1963.

73/ P.C. Forsyth, Brief submitted to the Royal Commission on Taxation, December 1963, pp. 13 and 14.

74/ See supra 3.1.4.3. and 3.1.5.2.

75/ See supra 3.1.4.1.

76/ Estate Tax Act, 7 Eliz. II, S.C. 1958, c. 29, s. 11.

77/ Ibid., s. 51.

78/ Ibid., s. 47, as repealed and replaced by 8-9 Eliz. II, S.C. 1958, c. 29, s. 12.

79/ Income Tax Act, R.S.C. 1952, c. 148 s. 44(1)(b).

80/ See infra, 5.3.2.2.1. concerning the opportunities offered to the taxpayer to obtain a revision of an administrative decision before the assessment is sent.

81/ Estate Tax Act, 7 Eliz. II, S.C. 1958, c. 29 s. 12(1), (2) and (3) and s. 22(1).

82/ The Canadian Institute of Chartered Accountants, Brief submitted to the Royal Commission on Taxation, December 1963, p. 4 of Appendix B.

83/ See infra 5.3.2.2.2.

84/ See infra 3.1.5.3.

85/ Estate Tax Act, 7 Eliz. II, S.C. 1958, c. 29, s. 16.

86/ Canadian Bill of Rights, 8-9 Eliz. II, S.C. 1960, c. 44.

87/ See supra 3.1.2.1. and 3.1.2.3.

88/ Recently, in October 1963, the Director, the Chief Assessor, the administrative officers and the staff of each of the twenty-nine Canadian Districts met for a week of study and conferences in the Montreal area. Meetings of this kind have also been held in the past for tax collectors. CANADA: HOUSE OF COMMONS STANDING COMMITTEE ON ESTIMATES, Minutes of Proceedings and Evidence, No. 5, Ottawa, The Queen's Printer and Controller of Stationery, 1959, p. 109.

89/ See supra 3.1.3.1.3.

90/ See infra 5.3.2.1. and 5.3.2.2.

91/ L.C. FOSTER, Brief submitted to the Royal Commission on Taxation, May 13, 1963, p. 3; E. LANGEMAN, Brief submitted to the Royal Commission on Taxation, April 11, 1963, p. 8; FRANCIS LORENZEN, Brief submitted to the Royal Commission on Taxation, October 22, 1963, p. 1.

92/ THE B.C. BEEF CATTLE GROWERS ASSOCIATION, Brief submitted to the Royal Commission on Taxation, March 1963, p. 7.

93/ L.C. FOSTER, Brief submitted to the Royal Commission on Taxation, May 13, 1963, p. 2.

CHAPTER 4--THE ADMINISTRATION OF EXCISE LEGISLATION

This chapter contains a brief description of the organization of the Customs and Excise Division of the Department of National Revenue and examines the administration of the Excise Tax Act, and the Excise Act. It considers the extent to which the Department follows the principles of natural justice or equity in collecting the taxes in question. 1/

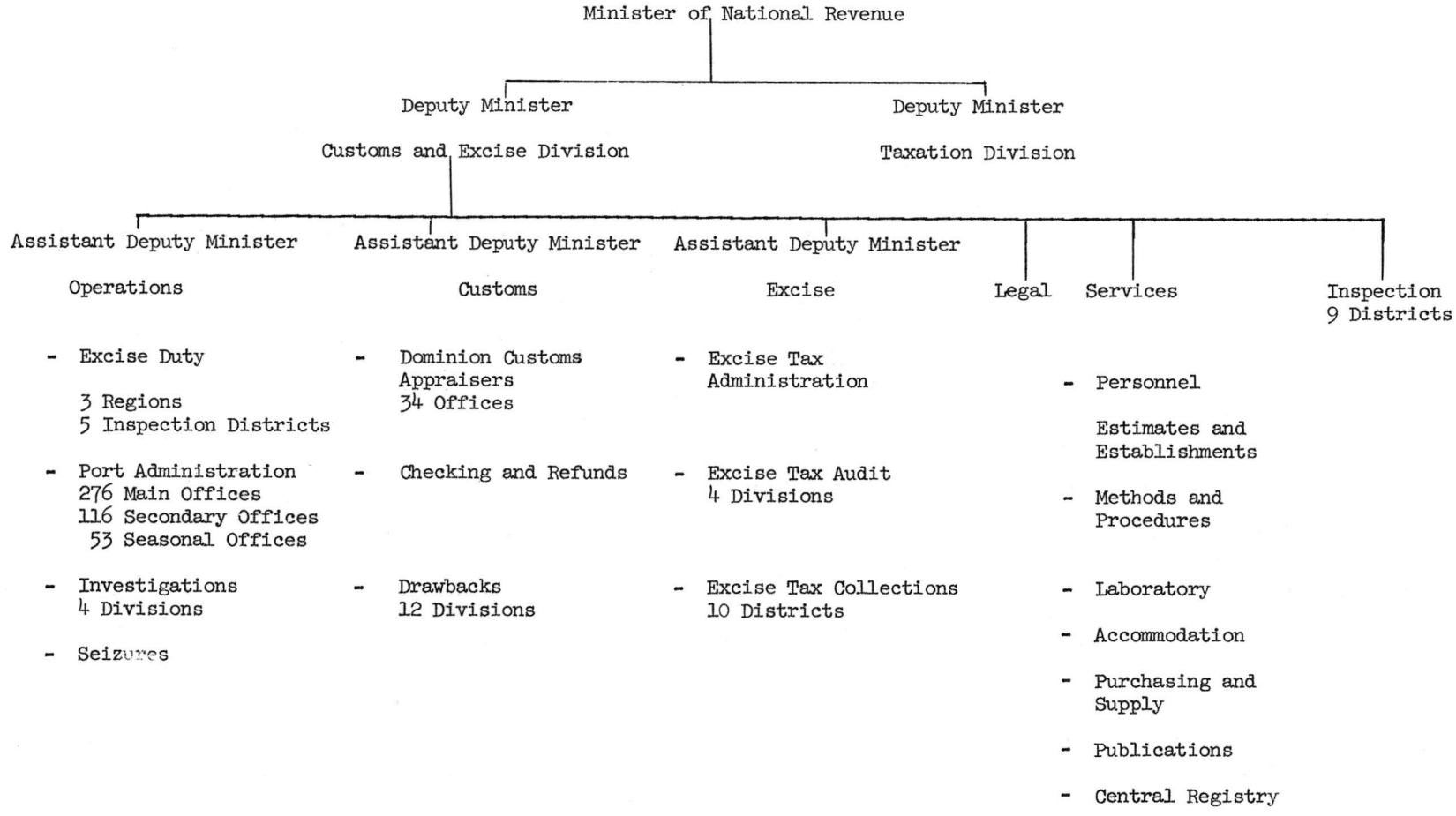
4.0. ORGANIZATION OF THE CUSTOMS AND EXCISE DIVISION OF THE DEPARTMENT OF NATIONAL REVENUE

The Taxation Division— described in the preceding chapter—is concerned solely with the collection of personal and corporate income tax, estate tax and part of the old age security tax. 2/ The Department of National Revenue has a second division, the Customs and Excise Division, which collects customs and excise duties, excise taxes and part of the old age security tax. This division attends to the administration of the Customs Act, 3/ the Customs Tariff, 4/ the Excise Tax Act, 5/ and the Excise Act. 6/ Although customs matters do not fall directly within the terms of reference of the Royal Commission on Taxation, it is nonetheless necessary to say a few words about the organization of the Customs Sub-Division because, besides collecting customs duty, it also collects excise tax on imported goods.

The chart on the next page gives a rough idea of how the Customs and Excise Division is organized.

The Division comprises three major sub-divisions: Customs, Excise and Operations, and each is headed by an Assistant Deputy Minister. The minor sub-divisions— Services, Legal and Inspection— are each run by a senior civil servant.

ORGANIZATION OF THE CUSTOMS AND EXCISE DIVISION



4.0.1. THE CUSTOMS SUB-DIVISION

This sub-division comprises the following branches:

(a) The Dominion Customs Appraisers Branch supplies information to tax collectors and import businesses, prepares and issues decisions on the appraisal and classification of imports for tariff purposes. It is also responsible for drafting and applying regulations made under the Customs Act 7/ and the Customs Tariff. 8/

(b) The Drawbacks Branch checks claims for the return of taxes and duties paid on goods re-exported or used in the production of articles for domestic consumption or for export. This branch applies the relevant regulations and provides interpretations and instructions on drawback procedure.

(c) The Checking and Refunds Section checks import statements and supporting documents to ensure uniform and accurate interpretation of the law and to see that decisions and regulations are properly applied. This section checks and approves claims for the return of overpaid customs duties or excise taxes. It also issues and circulates internal instructions.

4.0.2. THE EXCISE SUB-DIVISION

This sub-division comprises three branches:

(a) The Administration Branch interprets the Excise Tax Act and its Regulations. It supplies auditors and taxpayers with information in the form of decisions. It interprets tax exemptions, classifies goods for tax purposes, establishes the basis for taxation, determines the status of manufacturers and wholesalers with regard to their privileges, exemptions and obligations under the Excise Tax Act. The Administration Branch operates only from Head Office in Ottawa.

(b) The Audit Branch examines the books of licensed businesses to ensure proper administration of the Act and Regulations and payment of sales and excise taxes. It checks and approves refunds and undertakes special enquiries. Head Office in Ottawa keeps a tight rein on the work of the 25 Audit Offices forming four Divisions: The Eastern, the Central, the Western, and the Pacific, whose main offices are located in Montreal, Toronto,. Calgary and Vancouver.

(c) The Collection Branch exacts and supervises the payment of sales and excise taxes and is responsible for issuing manufacturers' and wholesalers' licences under the Excise Tax Act. 9/

4.0.3. THE OPERATIONS SUB-DIVISION

This sub-division comprises four branches:

(a) The Excise Duty Branch is responsible for the administration of the Excise Act, 10/ including interpretation, administration and inspection. It controls the operations of licensed establishments, in particular those of distilleries, breweries and tobacco factories. It investigates whenever any contravention of the Excise Act and Regulations is suspected. Head Office in Ottawa co-ordinates and supervises the work of the five Inspection Districts and the three Regions: The Eastern, the Central and Western with offices at Montreal, Toronto and Vancouver.

(b) The Port Administration Branch directs internal and outside operations with regard to control of imported goods at the time of entry, warehousing or transportation.

(c) The Investigations Branch deals with violations of the Customs and Excise Acts. Its job is to undertake investigations, collect necessary

evidence and assist Crown Prosecutors in the cases of violation of the various Customs and Excise statutes. This branch has four divisions: Eastern, Ontario, Central and Western.

(d) The Seizures Branch, as its name implies, is concerned with seizures which may arise following the above violations.

4.0.4. THE SERVICES BRANCH

This branch comprises several sections supplying common services required for the effective operation of the three sub-divisions above-mentioned. Such services include personnel, estimates and establishments, methods and procedures, purchasing and supply, central registry, laboratory and accommodation.

4.0.5. THE LEGAL BRANCH

The Legal Branch handles legal matters arising from the administration of the statutes by the Customs and Excise Division. It advises on the interpretation of the statutes, on tax liability in individual cases, on seizures and on fines. It takes part in drafting the Acts and Regulations and directs the work of the prosecutors or agents appointed by the Department of Justice to represent the Crown in court proceedings. It should be noted that, when cases are taken to court, the lawyers of the Department of Justice take charge.

4.0.6. THE INSPECTION BRANCH

This branch is responsible for the annual inspection and internal audit of all the Customs offices. This office reports directly to the Deputy Minister of Customs and Excise who is thus up to date on what is going on in the main, secondary or seasonal offices.

A comparison of the organization of the Taxation and of the Customs and Excise Divisions shows that the former is geographically decentralized, each District Director being responsible for assessments, audits and collections in his district, whereas in the latter Head Office maintains closer control over District and Divisional operations. The Customs and Excise Division is organized on a functional basis—for example, as to audits or collection—whereas regional Taxation Divisions handle most of the stages in the administration of the Acts. The differences in the organization of the two divisions is due to the way in which the Acts they administer are drafted. The Department has considerable scope in administering the Excise Tax Act, 11/ which is drafted in general terms, and closer central control is necessary for uniformity of interpretation and administration. The taxation statutes are much more explicit and uniformity of interpretation and administration presents much less of a problem.

Having briefly described organization of the Customs and Excise Division, the next step is to examine how the division administers the Excise Tax Act. 12/

4.1. ADMINISTRATION OF THE EXCISE TAX ACT

The legal basis of the excise tax is contained in the Act itself and in the Regulations enacted under its provisions. 13/ In some areas, the Regulations are much more significant than the provisions of the Act. The latter is very strict and, in its statement of principles, even rigid. If the Act were applied literally, it would be disastrous for business. However, the Department has taken a liberal view and adopted regulations which are much fairer and more easily applied than the Act itself. A comparison of the method of determining the tax according to the Act 14/ and according

to Regulations 15/ is proof of this. Over and above the provisions of the Act and of the Regulations, a body of administrative practices has been developed which also mitigates the rigours of the Act. For example, there is no time limit to the right of the Department to assess taxpayers, but in actual practice where fraud is not involved the Department does not usually go further back than the date of the previous audit.

Since the administration of the Excise Tax Act is highly specific, it is important in this study to distinguish between what is required by the Act, by Regulations and by departmental practice.

4.1.1. PURPOSES OF THE EXCISE TAX ACT

The Act imposes the five different taxes described in Parts I to VI.

Part I deals with the tax on insurance premiums other than marine insurance premiums. This Part is administered by the Department of Insurance and not by the Department of National Revenue.

Part II, repealed in 1963 by Chapter 12 of the Statutes of Canada, sections 2 and 8, imposed duty on all exports of electric power from the 31st of August 1961 to 30th of June 1963.

Part III, repealed in 1953, 16/ imposed a stamp duty on cheques and on transfers of securities.

Part IV imposes excise taxes on the goods listed in Appendices I and II, including among others: cosmetics, toilet articles, jewellery, phonographs, radio and television receivers, pipes, cigars, cigarettes and manufactured tobacco. These items are liable to excise tax at rates which vary with each type of article. However, the rates are shown in Appendices I and II against each type of article listed.

Part V imposes an excise tax on playing cards and on wines. The first tax is 20 cents per pack and the second varies according to the alcoholic and carbonic gas content.

Part VI imposes a sales or consumers tax of 8 per cent 17/ on the selling price of all goods produced, manufactured or imported into Canada, sold by a licensed wholesaler or retained by him for his own use. By exception, however, the tax is not payable on partly manufactured goods supplied by one licensed manufacturer to another or on goods imported or purchased by a licensed wholesaler. 18/ It should be noted also that certain goods are, in certain circumstances, exempted from the sales tax, particularly under Schedule III of the Act.

The main functions in the administration of the Excise Tax Act are, of course, the issuing of licences, the audit of the taxpayer's books and the collection of taxes.

4.1.2. LICENSING

4.1.2.1. OBJECT

By regulating and granting licenses, the state maintains control over the manufacture and sale of taxable goods. Without such control the excise tax cannot be efficiently collected. Licensing enables the Department to maintain a list of businesses subject to excise tax, to trace any delay in payment of the tax and to check sales to which conditional exemptions could apply.

Every manufacturer or producer must obtain a licence, 19/ whereupon he must pay tax at the appropriate rate on the selling price of his goods,

unless the provisions of subsection 2 of section 30 apply. Failure to apply for the licence required under sections 34 and 43 constitutes an offence punishable by a fine not exceeding one thousand dollars. 20/ The granting of a wholesale merchant's licence is at the Department's discretion 21/ and the licensed wholesaler then assumes the rights and duties provided in the Act and in the Regulations.

There are three kinds of licences:

(a) a manufacturer's sales tax licence under section 34;

(b) a wholesaler's sales tax licence under section 35;

(c) a manufacturer's excise tax licence under section 43.

The first type of licence begins with the letter S, the second with the letter W and the third with the letter E.

4.1.2.2. MANUFACTURER'S LICENCE

The Department may learn of the existence of an unlicensed manufacturer either at the time he applies for a licence or as a result of its own investigations. The Department's main sources of information include telephone books, trade association membership lists, lists of holders of provincial licences, the Canada Gazette and the provincial equivalents, registrations of companies or corporations at the Registry Office of the Judicial Districts, and the newspapers. The Department also receives information from its customs appraisers who may notice that a business is importing semi-finished goods 22/ and paying the excise tax on entry, instead of quoting a licence number. An investigator may come across a similar situation when examining the books of a licensed manufacturer who sells semi-finished products to unlicensed firms.

From information obtained in this way, district collectors draw up lists of names which are later compared with the list of licensees. The Department then gets in touch with the unlicensed businesses. Head Office in Ottawa initiates proceedings by sending two or three letters at intervals of three to four weeks. If there is no reply, the file is sent to District Office which sends a collector or investigator to the premises. On visiting the establishment of the unlicensed firm, the officer determines whether the business is such that, pursuant to sections 34 and 43, it should hold a licence. If the business is exempt, the officer makes his report and the case is closed. The Act provides that:

> The Minister may grant a licence to any person applying therefor..., but he may direct that any class of small manufacturer or producer selling his product exclusively by retail shall be exempt from payment of consumption or sales tax on goods manufactured or produced by him and persons so exempted are not required to apply for a licence. 23/

The Minister has exercised this power and he classes as small manufacturers those whose annual taxable sales do not exceed three thousand dollars ($3,000). 24/ Certain classes of custom manufacturers, such as tailors, opticians, dentists and blacksmiths, are also exempt under the above-mentioned section. 25/ Since exempted manufacturers have to pay sales tax when they purchase or import the materials they use 26/ they are not required to obtain licences or pay tax on their sales.

If the officer discovers that the business visited is not exempted and that the manufacturer should have a licence, he requires the latter to send in his application. No doubt, the Department could prosecute the manufacturer and have him fined for the Act provides that:

> Every person who fails to apply for a licence as required by any provision of this Act is guilty of an offence and liable to a penalty not exceeding one thousand dollars. 27/

This 1958 provision 28/ does not appear to have led as yet to the imposition of any fine.

Applications for a licence are submitted on form L 15, 29/ to be filled in by the owner, partner, agent or official representative of the business. He must supply the information requested: the name, address and nature of the business, the date on which operations began, whether it has subsidiary or associated firms, and the main taxable items produced. Four copies of this form are sent to the District Excise Tax Office or directly to the Department of National Revenue, Customs and Excise Division, in Ottawa. If the form is filed with the District Office, a copy of it is passed on to Head Office. The latter, after examining it, sends the original and one copy of the licence to the District Director. The latter signs both copies of the licence and sends the original to the manufacturer. The time lag between the receipt of form L 15 and the mailing of the licence is short, scarcely a week, or—in other words—slightly more than the time needed to write back and forth. If the application is really urgent, the District Office may obtain the licence number from Head Office by telephone and pass it on to the manufacturer. The licence would follow a few days later.

4.1.2.3. WHOLESALER'S LICENCE

For a wholesaler's licence, 30/ the application procedure 31/ and the form (L 15) are the same as for a manufacturer's licence, but the applicant has to give certain additional information to establish the amount of the

bond required by the Act: 32/ for example, he must indicate the total value of sales of taxable goods over the last year or the last three months.

4.1.2.3.1. CONDITIONS FOR OBTAINING A WHOLESALER'S LICENCE

The holding of a licence is optional to a wholesaler. His position is thus quite different from that of the manufacturer. A licence enables him to purchase goods without paying the tax and, consequently, to maintain his inventory at a lower cost. However, he will have to pay tax on his non-exempt sales, based on the cost price of the goods.

Two statutory conditions must be filled before a wholesaler's licence is granted: there must be a sufficient volume of exempted sales and a bond must be posted.

A) Volume of Exempted Sales: the Act provides that:

> ...if a wholesaler was not in possession of a licence on the 1st day of September, 1938, no such licence shall be issued to him...unless fifty per cent of his sales for the three months immediately preceding his application were exempt from the sales tax under the provisions of this Act. 33/

This provision distinguishes between wholesalers and to be fair it should be justifiable on a rational basis. Such a justification does seem to exist. The purpose of a wholesaler's licence is, in effect, to save the Department having to make too many refunds. An unlicensed wholesaler who sells goods under tax-exempt conditions may apply for a refund of the tax he has paid on such goods. 34/ If more than fifty per cent of the sales of a business, which is not a manufacturing business as defined in the Act, are exempt, the business would obtain refunds amounting to more than half of the taxes paid at the time of purchase. This would increase the work of

the Department, to say nothing of the additional burden imposed on the taxpayer. Thus, it seems logical to adopt the statutory fifty per cent dividing line as a basis for the distinction between wholesalers.

Under section 35 of the Excise Tax Act, the Minister has discretion to grant or to refuse a wholesaler's licence. In actual practice, the Department grants licences when the requirements of the Act and of the Regulations have been met. Departmental practice used to add one further condition, namely, no wholesaler's licence was granted when the volume of business did not exceed $5,000 quarterly. The reason given was that the Department's costs for administration, auditing and collection would be much greater than any possible saving accruing to the business from holding a licence. It appears that nowadays licences are not automatically refused to a small wholesaler. The Department attempts to dissuade the applicant by drawing attention to the obligations imposed on licensees and by pointing out the fact that the cost of meeting the requirements of the Act and Regulations would be greater than any financial advantage to be derived from holding a licence.

B) Bonding: The question of the bond to be put up by wholesalers will be discussed later. For the present, it is sufficient to note that a bond has to be posted. The law provides that:

> The wholesaler or jobber applying for such licence shall give security that the said wholesaler or jobber and any person other than the said wholesaler or jobber who acquires from or against him the right to sell any goods whether as a result of the operation of law or of any transaction not taxable under this Act, shall keep adequate books or accounts for the purposes of this Act, and shall render true returns of sales as required by this Act, or any regulations made thereunder and pay any tax imposed by this Act upon such sales. 35/

4.1.2.3.2. PROCEDURES

The formal conditions for applying for a wholesaler's licence are the same as for a manufacturer's licence. If Head Office finds that the conditions of the Act and Regulations have been met and that the application is in order, it advises the applicant of the fact, and informs him that his licence will be issued on production of a bond as required by Regulations. 36/ Once the bond is furnished, a licence is issued in the same way as a manufacturer's licence.

4.1.2.3.3. BOND OR SURETY

The Act specifies that:

> Such security shall be for an amount of not more than twenty-five thousand dollars and not less than two thousand dollars. 37/

Within these limits, the amount of surety is determined by the Regulations, which state that it has to equal twice the amount of sales tax payable on the three largest monthly totals of taxable sales during the last calendar year. 38/ In the case of a first application, the bond is calculated on the value of taxable sales over the three preceding months. It then has to equal double the tax payable for this period. The amount of the bond required is either specified in a notice sent from Head Office before the licence is issued or set by the District Office.

The Department accepts two types of surety or bond: the wholesaler may deposit Government of Canada Bonds, which must be fully registered both as to principal and interest, and accompanied by a deed of transfer in favour of the Receiver General of Canada. 39/ The applicant may also

furnish security by chartered bank or by bond of a guarantee company in the form prescribed by the Department of National Revenue. 40/

The wholesaler must not only furnish the initial bond as prescribed but he must also maintain it at the level prescribed in the Regulations, 41/ that is, at double the amount of tax payable on the three highest totals of monthly taxable sales in the preceding calendar year. The District Collection Office reviews all bonds once a year, generally in the month of February or March, and it may find that a particular bond should be increased or that it can be reduced.

4.1.2.3.3.1. INCREASE IN AMOUNT OF SURETY

If the surety has to be increased, the District Collection Office sends the wholesaler a registered letter giving him two or three weeks in which to provide the additional surety. If the licensee does not do so within the time allowed, the Audit Branch is advised and, as soon as possible, it audits the licensee's books, makes an inventory of his stock, recommends cancellation of the licence and determines tax payable on all goods then in the possession of the licensee. 42/ The tax is collected as soon as the assessment has been made.

4.1.2.3.3.2. REDUCTION OF SURETY

If the District Office finds that the surety can be reduced, it usually makes no move and does not notify the licensee of the fact. Usually the wholesaler or the firm which has put up the bond gives notice that he or it wishes to reduce the amount of the surety or guarantee. When Canada Bonds have been given as surety, the Department returns the excess bonds after an audit of the books to ensure that there are no

arrears of tax. When a firm has supplied a bond the Department accepts a reduced amount on request of the company. This notice is sent to Head Office which keeps a record of all current sureties.

4.1.2.4. CANCELLATION OF LICENCES

4.1.2.4.1. MANUFACTURER'S LICENCE

Although the Act 43/ requires every manufacturer to be licensed, cancellation of a licence does not necessarily entail loss of manufacturer's status. For example, a manufacturer might be exempted from holding a licence as a result of a change in the total of his taxable sales or in the nature of his business. However, licences are cancelled usually as a result of loss of manufacturer's status, notably following a change in proprietorship or in name, cessation of business or of manufacturing, bankruptcy, liquidation or an arrangement under the Bankruptcy Act, 45/ sale of assets or death of the proprietor. The auditor himself, during a periodic audit, may note that there is no further need for a licence. He may recommend cancellation and Head Office would consequently notify the District Office that the licence should be cancelled.

Formalities for cancellation are fairly straightforward. When the taxpayer himself asks for it because of a change in his status, the Audit Branch carries out an audit of the books on the premises, taxes the current inventory, reports to Head Office indicating the assessment and recommends the cancellation of the licence. The taxpayer is then advised that his licence was cancelled as of the date of the audit. Thus, cancellation is, in a way, retroactive to the date of the audit. The auditor used to make a list of the main suppliers and advise them that their customer's licence had

been cancelled as of a particular date. This was obviously intended to prevent fraud and to remind the supplier of his duty to pay tax on goods subsequently sold to his customer. The practice was almost completely abandoned because it proved too burdensome for the Department to inform all the persons concerned. Now, the licensee is merely advised at the time of the audit not to use his licence number for future purchases.

It should be noted that there is no protection for the bona fide supplier who is not notified that a licence has been cancelled. It is, of course, true that the Department publishes an annual list of all licensees and it also publishes a quarterly supplement containing any change in the list. While granting that suppliers should keep themselves informed by means of these publications and that they cannot plead ignorance of any change published, they nonetheless are responsible for uncollected tax when a licence has been retroactively cancelled or even when a cancellation is not published until three months later. We therefore recommend that:

> The Act be amended in such a way as to free from responsibility the supplier who has made a bona fide sale of goods to a customer without charging tax, on the strength of a licence whose cancellation was not published at the time of the sale.

Two consequences flow from the cancellation of a manufacturer's licence; he has to pay tax on the inventory held at the time of the audit and has to pay sales tax on his subsequent purchases.

4.1.2.4.2. WHOLESALER'S LICENCE

The licence granted under Section 35 may be rescinded for cause, notably for failure to comply with the provisions of the Act or of the Regulations. 46/ The District Office may recommend cancellation of the

licence for failure to produce the monthly report; in actual practice, a delay of more than two months is not tolerated. Failure to provide adequate security within the allotted time has the same result. A sixty-day notice of cancellation of a bond from a guarantee company involves cancellation of the wholesaler's licence if another bond is not substituted.

Failure to provide sufficient security is the commonest cause of cancellation. Notification that increased security is required is generally sent out about the beginning of March. If the bond is not forthcoming by the 1st of April, a second notice is sent out giving the licensee 5 to 10 days in which to meet the requirements of the Act and of the Regulations. Failure to comply obliges the District Collection Office to recommend cancellation of the licence. Notification of such recommendation is sent immediately to the auditors, the customs collectors, the excise tax collectors and to the Director General of Collections in Ottawa. The local licensing officer makes a double recommendation: he suggests that the licence should be cancelled and that the wholesaler's books should be audited. The auditor handling the audit makes the final recommendation in his report to Head Office, which, in turn, approves his report and notifies District Office of the date of cancellation.

Cancellation of a wholesaler's licence entails an assessment of his inventory at the time of audit and forfeiture of his right to obtain a new licence for two years. 47/

As mentioned earlier in this section, licences have but one purpose, which is to give the state control over the manufacture and sale of taxable goods. Periodic audits of the licensee's books constitutes another aspect of this control and the second stage in applying the Excise Tax Act. 48/

4.1.3. AUDITS

4.1.3.1. SCOPE

The Excise Tax Act requires manufacturers, producers, importers and wholesalers to pay a tax. This tax is expressed either in terms of a given amount by quantity or by unit, such as the tax on wines, or in terms of a percentage of the price of the goods established in accordance with the provisions of the Act and of Regulations.

Since there are various types of tax, numerous exemptions, and several ways of calculating the tax basis, and short of maintaining direct and rigid control of operations, the only means the Department has of ensuring that the tax has been paid and that it was calculated according to the provisions of the Act is by audit. Thus, the audit essentially consists in an examination of the taxpayer's accounts to check the calculations of the tax and ensure that the proper tax is paid.

4.1.3.2. FREQUENCY OF AUDITS

At present there are about 46,000 licensees in Canada and some 25,000 audits were carried out during the fiscal year ending March 31, 1964. The Department's policy is to audit the books of each licensee at least once every two years on average. At present, the usual period of time between two audits varies from 18 to 30 months, but the Department sometimes makes more frequent audits at the request of the licensees themselves or on its own initiative, for instance when a business closes down, changes its name or goes into bankruptcy.

In the case of a new licensee, the policy is to audit his books for excise tax purposes six months after the issue of the licence. This

special treatment is to the advantage of the taxpayer, inasmuch as the audit reveals whether his accounting system is adequate and provides the taxpayer with an opportunity to obtain information on the tax aspects of his business. The audit also prevents the repetition of mistakes made during the first six months, thus reducing the likelihood of future assessments, fines and interest charges.

Licensees found guilty of fraud by the courts are audited more frequently than every two years. The auditor may, on examining the books, observe inadequate accounting procedures or suspect fraud or concealment without being able to prove it conclusively. In such a case, he may recommend that the Minister require the licensee to keep his records or accounts in a particular way. 49/ The auditor will also recommend a new audit within six months or a year.

4.1.3.3. AUDITORS

Most audits are entrusted to grade two 50/ or grade three 51/ auditors. However, certain more difficult audits are handled by grade four auditors with many years of experience in the Department.

4.1.3.3.1. ASSIGNMENT OF DUTIES

The country is divided into four audit divisions, each of which keeps a card index of all licensees in the area. This index contains a certain amount of information, notably the dates of previous audits and the names of the officials who carried them out. The division's quarterly work programme is based on this index. Audits away from the large centres of population, requiring the auditors to travel, are arranged geographically by groups. The Divisional Director or Assistant Director assigns audits to his subordinates.

In assigning work, consideration is given to the ability of the auditors, to their experience in special fields, to the nature of the businesses to be audited, to the type of books kept, to the methods of calculating tax and to the particular difficulties that the auditor may encounter. In practice, the Department does not assign the same file to the same auditor twice in a row, if the previous audit has resulted in a tax refund. This procedure is intended to avoid fraud or collusion between a licensee and a departmental official. Each auditor usually has enough work in hand to keep himself busy for a month or six weeks. An average audit takes two or three days of work; the most simple ones take about half a day, while one involving more complex problems may require from two weeks to two months.

4.1.3.3.2. THE POWERS OF THE AUDITOR

The auditor has right of access to all documents he may require for his audit in order to ensure proper application of the Excise Tax Act.

> Every person required...to keep records or books of account shall, at all reasonable times, make the records and books of account and every account and voucher necessary to verify the information therein available to officers of the Department of National Revenue and other persons thereunto authorized by the Minister and give them every facility necessary to inspect the records, books, accounts and vouchers. 52/

In the case of income tax, the right of access to books and records may be exercised at any time 53/ but, in the case of excise, only at a reasonable time. The Act does not give the excise auditor the right to search, but it provides for the following penalty:

> Every person who fails to comply with subsection 3 54/ and every person who in any way prevents or attempts to prevent an officer of the Department of National Revenue or an authorized person from having access to, or from inspecting, records or books of account...is guilty of an offence and liable on summary conviction to a penalty of not less than two hundred dollars and not more than two thousand dollars or to imprisonment for a term of not more than six months or to both such penalty and such imprisonment. 55/

This last power, even if it departs from common law, is nonetheless necessary for the proper administration of the Act. If, in the absence of a court order, the taxpayer were able to refuse examination of his books, the procuring of a warrant following such refusal would cause delays which would enable a dishonest taxpayer to tamper with his books or to arrange for documents to vanish. Delays of this kind would promote dishonesty and do the Department irreparable harm. Honest taxpayers who open their books for audit as a matter of course would find themselves at a disadvantage by comparison with dishonest competitors who, by avoiding part of the tax, could sell at lower rates. If the Department had to obtain a warrant every time an audit was made, it would have to apply to the courts some 25,000 times each year. Such a procedure could only result in the automatic delivery of warrants and the virtual disappearance of any judicial control over this procedure. The end result would be the same as under the present arrangement. Giving such right of access to departmental officers is more readily accepted in the matter of excise tax than it is in that of income tax because in the first case the Department is concerned only with businesses, whereas in the second the private homes of taxpayers are also involved.

It should be noted that right of access and inspection may be exercised only against those parties who are liable to pay or to collect

the taxes provided for under the Act. 56/ Thus, the departmental officers have no right of access to the books of parties who are not producers, manufacturers or licenced wholesalers. Whenever an inquiry on the premises of a third party is necessary to the audit of a taxpayer's books, the Minister has to designate an official to make the inquiry or investigation. 57/ This procedure is identical with the one for income tax 58/ and the designated party then has the power and authority of a commissioner appointed under the Inquiries Act. 59/ The Department very rarely avails itself of this procedure.

In addition to his right of access, the investigator is also entitled to seize documents:

> Where, during the course of an audit or inspection, it appears to an officer of the Department of National Revenue or any other person authorized by the Minister to inspect records or books that there has been a violation of this Act, the officer or authorized person may seize, take away and retain any record or book kept pursuant to subsection (1) and any account or voucher submitted to verify the information contained therein until they are produced in any court proceedings. 60/

The Department's power to seize, remove and keep records for whatever purpose or time it sees fit appears to be unlimited. In fact, the auditor may seize any document he considers relevant and retain possession of it until it is produced in court. This power of seizure is so sweeping as to infringe on the taxpayer's basic rights. The Act grants him no access to the seized documents, and does not provide for their return in the event that legal proceedings are not instituted within a reasonable delay. It is true that it is departmental practice to allow the taxpayer to examine his documents and to regain possession of them as soon as possible. But rights as basic as the free exercise of one's profession and the preparation of

a full and complete defence should not be subjected to departmental discretion. As the Act is presently worded, an unscrupulous official could override the taxpayer's fundamental rights with impunity and prevent him from pursuing his business unhindered or from presenting a complete defence. We therefore recommend that:

> Subsection 4 of section 55 of the Excise Tax Act be amended in such a way as to grant the taxpayer access to seized documents and ensure their prompt return in the event that legal proceedings are not instituted within a stipulated time.

4.1.3.4. AUDIT PROCEDURE

The actual audit amounts to an examination of the licensee's books in the light of accounting principles and techniques. The auditor inspects the entries or records in the books: ledger, journal, sales and excise tax accounts, and so forth. He checks bills of sale, sees that they are numbered consecutively and examines credit notes and shipping documents. The auditor checks the excise tax records and compares them with those kept by the Collections Branch.

4.1.3.4.1. DETERMINATION OF TAXABLE SALES

The audit reveals the licensee's gross sales, a portion of which, however, may well be exempt of tax. 61/

The auditor then checks the exemption certificates required by the Regulations 62/ and ensures that the general exemptions claimed are specifically provided for under the Act. 63/

In addition to checking the figure of taxable sales, the official ascertains that tax has been paid on certain operations or transactions

which, though not actually sales, are nonetheless regarded as such for tax purposes.

For example, a licensed wholesaler may obtain goods for his own use or for rental to others. 64/ Again, a manufacturer may produce goods for his own use, rather than for sale. In these cases, the wholesaler must pay the tax on duty-paid value or on the cost price of the goods.

In the case of a manufacturer, the determination of the tax may present some difficulty, since there is neither transfer of property nor lease and, consequently, no sales price. In such cases, and in all other cases where the taxable value is hard to establish, the Minister determines the amount of tax payable at his complete discretion. 65/

Standards governing the use of ministerial discretion in the more common cases 66/ are to be found in Regulations. 67/ By and large, the value set by the Minister is the sum of the cost of raw materials and of labour, plus a percentage for overhead, office expenses and profit. One does not have to be an expert to realize that the value set in this way is very close to the market value of the manufactured items.

The Department's method of assessment does not work to the disadvantage of the taxpayer who produces articles for his own use. He is treated in the same way as anyone else. The assessment of goods produced by a manufacturer for his personal use is only one aspect of a much wider problem: that of assessing the tax basis.

4.1.3.4.2. ASSESSMENT

Once the gross amount of taxable sales has been checked, the next step is to ensure that the licensee has calculated his tax on the right basis.

4.1.3.4.2.1. IMPORTER

In the case of an importer, the sales tax, calculated on the duty-paid value, is payable at the time of importation or of removal from bond. 68/ The Act defines the term duty-paid value as being:

> ...the value of the article as it would be determined for the purpose of calculating an ad valorem duty upon the importation of such article into Canada under the laws relating to the Customs and the Customs Tariff whether such article is in fact subject to ad valorem or other duty or not, plus the amount of the Customs duties, if any, payable thereon; 69/

Thus, assessment for sales tax purposes is wholly subordinate to assessment for customs purposes. Since assessment procedures for customs purposes is excluded from the scope of this study, the customs assessment is accepted in this chapter as definitely establishing the basis for charging sales tax on imported goods. It should be mentioned, however, that in calculating the sales tax the value of containers and packaging has to be added to the duty-paid value. 70/

4.1.3.4.2.2. LICENSED WHOLESALER

The licensed wholesaler obtains purchased or imported goods without having to pay tax providing they are not for his own use or for rental to others. 71/ He must pay the tax, however, when such goods are sold on a non-exempt basis, as for example to an unlicensed purchaser. Tax becomes payable on delivery. 72/

Tax is charged on the duty-paid value of imported goods or on the purchase price of other goods, including any excise duty on goods sold in bond. 73/ The Act is explicit: tax is charged on the purchase price. 74/

According to the letter of the law, the wholesaler may only use the actual cost method 75/ which consists in showing on the duplicate of each taxable sales invoice the actual cost or duty-paid value of each taxable item appearing on the invoice. The total of such duty-paid values and actual cost or purchase prices is the figure on which tax must be calculated and paid each month. To obtain the gross amount of taxes payable, the tax rate in the Act 76/ is simply applied to this total. This statutory method is very accurate, but it can become very burdensome for the wholesaler dealing with a large number of invoices. It is quite impracticable when dealing with sales comprising a host of miscellaneous items whose prices are subject to frequent changes. To overcome this difficulty, the Department, by an extra-statutory concession, 77/ allows wholesalers who wish to do so to calculate the purchase price or tax basis by applying an overall discount to their total net sales. This method, which will be dealt with in the section on refunds, 78/ is described as follows in the Regulations:

> A reconstructed trading statement to be prepared covering the entire wholesale business for the two preceding fiscal years, by adding to the inventory, at the commencement of the period, the two years' domestic purchases at cost and the duty paid value of imported goods, and deducting the inventory at the close of the period, thus determining the taxable cost of goods sold. The taxable cost, so determined, is to be deducted from gross sales for the two year period. The remainder, representing gross profit for tax purposes is to be expressed as a percentage of gross sales for the two year period. This percentage is then to be deducted from the monthly total of taxable sales, including sales tax, and the tax payable is to be computed at the current rate on the remainder. The entire wholesale business must be taken into consideration in the calculation of the discount and not only certain portions of it. 79/

4.1.3.4.2.3. MANUFACTURER

In the case of goods produced or manufactured in Canada, the producer or manufacturer must pay tax on delivery or at the time when property

in the goods passes. If the sales price is payable by instalments, the tax must be paid pro rata when each instalment becomes payable in accordance with the terms of the contract. 80/ The tax is calculated on the sales price of the goods. The expression sales price is defined as the aggregate of:

> (i) the amount charged as price before any amount payable in respect of any other tax under this Act is added thereto,
> (ii) any amount that the purchaser is liable to pay to the vendor by reason of or in respect of the sale in addition to the amount charged as price (whether payable at the same or some other time) including, without limiting the generality of the foregoing, any amount charged for, or to make provision for, advertising, financing, servicing, warranty, commission or any other matter, and
> (iii) the amount of excise duties payable under the Excise Act whether the goods are sold in bond or not, 81/

The cost of the container and packaging must be added to this total. 82/

What seems to be a fairly clear and simple statutory provision raises major problems of administration, however, when it comes to ensuring that the Act is applied fairly. Strict enforcement of the Act would lead to considerable inequality of treatment of taxpayers.

The manufacturer often sells identical goods at different prices, depending on who is the purchaser and on the importance or the size of the order. A strict enforcement of the Act would mean that different taxes would be charged on similar goods depending on the size of a middleman's purchases or on market conditions. Similarly, the manufacturer in a vertically integrated business selling direct to the public would pay more tax than the manufacturer who deals with wholesalers or middlemen since, assuming the retail price to be the same in both cases, the tax would be higher in the first case because of its being computed on the retail rather than the wholesale price.

In an attempt to eliminate such inequalities, the Department allows the licensed manufacturer, by extra-statutory concession and in certain circumstances, to calculate his tax in accordance with what is known as the unlicensed wholesale branch method. 83/ The use of this method in the case of direct sales from the manufacturer to the consumer has been criticized, because it is considered unfair to certain businesses. 84/ This method allows the manufacturer who complies with regulation requirements to calculate his tax not on his sales price, but on the recognized wholesale price or, if there is no recognized wholesale price, on the wholesale value established by the Deputy Minister.

4.1.3.4.2.3.1. ESTABLISHED WHOLESALE PRICE

By established wholesale price is meant the price at which the manufacturer regularly sells his taxable goods of like quality in like circumstances to bona fide independent wholesalers. The term also applies to the price established by the largest dollar volume of sales to bona fide independent wholesalers when taxable goods of like quality, quantity, value and packaging are sold at different prices. 85/ The established wholesale price is the price defined as above less the manufacturer's cash discount and prepaid transportation costs in accordance with the provisions of the Regulations. 86/ When selling to unlicensed wholesalers, the manufacturer has to pay the tax on his selling price regardless of the established wholesale price. On sales to retailers, however, he may pay it either on the established wholesale price or on his actual selling price. He will choose the latter course when selling to a retailer— as he might to a large retail store— at less than the wholesale price.

4.1.3.4.2.3.2. DETERMINED WHOLESALE VALUE

When a manufacturer has no established wholesale price for his taxable sales, the Deputy Minister may himself determine the value to be used as a basis for calculating tax. The values determined by the Deputy Minister for some 28 categories of merchandise have been published in circulars. These categories include candy, soft drinks, wines, luggage, fur articles, furniture and so on. A single example will suffice to illustrate the method of calculating the tax.

In Circular ET 31 dated 17 April 1959 covering candy, the Department allows manufacturers to take a discount on the sales price in order to obtain the tax basis if their sales are made directly to retailers or to consumers. In cases where the wholesaler is by-passed and the sale is made to a retailer, a discount of 17 per cent of the selling price is allowed. The sales price less the discount is assumed to include the tax. Thus, if a manufacturer sells $100 worth (tax included) of candy to a retailer, the value for sales tax purposes is $83 after the discount of 17 per cent has been deducted. Since the $83 includes the tax, the actual amount of the latter can be obtained by a simple rule of three, i.e., 11/111 of $83, or $8.23.

When the manufacturer sells his candy directly to the consumer, the above-mentioned circular allows him to deduct a discount of 35 per cent from his sales price. Once again, the net price includes the tax. On a $100 sale to a consumer the tax is $6.44.

4.1.3.4.2.4. EQUITY IN DETERMINING THE TAX BASE

The methods of calculating tax described in the Regulations 87/ place

all taxpayers in similar circumstances on an equal footing. This equitable result, however, is not guaranteed by law; it depends on the goodwill of the Department. The latter is assumed to be willing to deviate from the law in order to mitigate its harshness. As the Regulations are ultra vires, the manufacturer in respect of whom the Deputy Minister determines a wholesale value does not consider it in his interest to contest the decision since the courts, bound by the letter of the Act, would calculate the tax on the basis of the selling price.

Such a state of things is intolerable in a democracy. It places the taxpayer at the mercy of the officials by removing administrative rulings from any judicial or parliamentary control. 88/ Abuses may be infrequent, but they should not be allowed to occur at all. If a taxpayer believes, even mistakenly, that he has been wronged by an administrative decision, he should have access to some means of control.

Since implementing the Act is out of the question in such circumstances, the only possible solution is to amend it. We therefore recommend that:

> The tax basis should be determined by the Act itself in such a manner as to ensure equal treatment of all taxpayers who are in similar circumstances, without their having to rely on the goodwill of the Department.

4.1.3.4.3. CONTROL OF PAYMENT OF TAX

Once the auditor has established the total amount of taxable sales, has checked that this figure agrees with the records in the books and that the tax has been calculated in accordance with Regulations, he ensures that the tax has actually been paid.

4.1.3.4.3.1. SAMPLE AUDIT

The usual method is to make a sample check of customer accounts, invoices, entries in the tax account, purchases and exemption certificates. Usually, the sample consists of all invoices and all sales made during certain months of the period under audit. For example, the auditor might select the first and the last months of the period and perhaps one or two months in between. If he finds no clerical errors or misinterpretations, 89/ he assumes that the tax has been properly calculated and paid for the other months in the period. He then reports a nil assessment.

If, however, he finds a number of clerical errors, such as, the omission to charge or pay the tax, the absence of a certificate, or errors in bookkeeping, he assesses accordingly to correct the mistakes. Should such errors be frequent and involve large amounts, he may decide to take a larger sample and examine the invoices more closely. If, on the other hand, he comes across misinterpretations of the Act such as the use of the wrong discount for calculating the tax basis, he knows from experience that such errors are likely to be repeated regularly over the whole period under audit. In this event, he may adopt one of two courses: he may check all the transactions for the whole period, or, by agreement with the taxpayers, he may estimate the additional tax to be paid. In the latter case, the method used consists in calculating the percentage of additional tax to be paid on the net sales made during the sample months, and applying the above percentage to the total net sales for the whole period of the audit.

If the taxpayer does not agree to the use of this method of estimating the additional tax, the auditor gives him instructions and sufficient time to calculate the tax himself. For instance, he may ask him to go back over

all the invoices made during a specified period, in order to establish the total value of sales which should have been taxed but were not due to the misinterpretation of the Act. When the time is up, the auditor returns to the taxpayer, checks the work, makes the necessary corrections, and assesses accordingly. This procedure is rarely used. Usually the auditor makes every effort to obtain the taxpayer's agreement, even if it means making a fairly conservative assessment.

4.1.3.4.3.2. COMPLETE AUDIT

If there is any reason to suppose that the taxpayer is concealing sales, his books are given a thorough audit and, if necessary, transactions with customers and suppliers are checked. 90/ To this may be added information obtained from third parties.

Any taxpayer who defrauds the government of excise tax is guilty of an offence and liable on summary conviction to a penalty of not less than $100 and not exceeding $1,000, plus double the amount of taxes payable. 91/ In practice, the Department does not insist on the full penalty and rarely asks the courts to apply the maximum fine. It prefers to sue for a lesser amount and to obtain an admission of guilt in court. This procedure has the advantage of being less time-consuming, whilst effectively discouraging fraud. The Department may also start proceedings against the defrauder for making a false or deceptive statement 92/ or for attempting to evade tax. 93/ Prosecutions for deliberate attempts to evade tax, 94/ the penalty for which is imprisonment for a period not less than two and not more than twelve months, are very rare. There have been only three or four such cases within living memory. Prosecutions for false statements 95/ and for false entries in the books, 96/ are relatively more frequent. There were

about thirty during the fiscal year ending March 31, 1964. The Department prosecutes under section 54(2), rather than under section 60, because supporting evidence is easier to come by and the courts, reluctant to sentence taxpayers to imprisonment, are more exacting as to the proof submitted.

4.1.3.4.4. REPORT AND ASSESSMENT

Once the audit is over, the taxpayer is given details and an explanation of the assessment. In all cases where there has been a new assessment or where a credit has been granted, the auditor, in accordance with instructions from the Director of Audits in Ottawa, must send the licence holder a letter indicating the period audited, the amount of the new assessment, details or explanations concerning the latter and notice that the assessment or credit is subject to approval by Head Office and that, following such approval, an account for the amount of the assessment with accrued interest will be sent to him. This departmental practice is quite fair but is not prescribed by the Act or the Regulations. We therefore recommend that:

> The Act be amended to require the Department to send a formal assessment notice, with explanations thereof, to the taxpayer.

The Act sets no time limit on the Minister's right to assess past transactions. For income tax, the limit is four years as of the original assessment, except in cases of fraud or misrepresentation when there is no time limit. At the Customs and Excise Division, it is a well-established practice never to go back over a previous audit except in cases of fraud. Thus, in practice, assessments only cover transactions which have taken place since the last audit. However, in the case of fraud, the audit goes

back as far as possible, usually some five years, since beyond that time available records are frequently insufficient for a thorough audit. Although the licence holder is supposed to keep his records and supporting documents until the audit has been completed and the Minister has given written permission for their destruction, 97/ it is common business practice to destroy minor documents, such as; invoices, credit notes, and delivery receipts, after five years.

The departmental practice of not going back over previous audits should be embodied in the Act. We therefore recommend that:

> The Minister's right to assess past transactions be limited in the Act to the average period of time between two audits or, better still, to the period which has elapsed in each case since the last audit. There should, however, be no time limit in cases of fraud.

Examining officers make a report of their audits, containing their observations, notes and recommendations concerning the assessment. The original is sent to Ottawa for review, a copy is sent to the collection district and another kept in the files of the Audit Branch. In about 50 per cent of the cases, the auditors come up with assessments which, in large cities such as Montreal, average around $1,000.

4.1.3.4.5. REVIEW

The Review Section of the Audit Branch consists of 14 auditors, ranging from Grade 3 to 6. On average, each reviews 75 reports a week, or about one every half hour. They have just time enough to check the calculation of the tax and to read the auditor's remarks. Usually, some 4 to 5 per cent of reports are amended or changed as a result of this review. Once the review has been made and the report approved, the file is sent to the Collections

Branch at Head Office which notifies the collection district concerned. The latter, in turn, sends the taxpayer a bill indicating the amount of the assessment and penalty. At this point begins the collection procedure, which is the third stage in applying the Excise Tax Act.

4.1.4. COLLECTION

Sales and excise taxes, except for those on insurance premiums and electricity exports, 98/ may be collected in three ways: monthly, quarterly, or on assessment. However, the general rule is to collect these taxes each calendar month. In exceptional cases, the Department allows collections to be based on thirteen four-week months, but this is done only when the manufacturer's accounting methods are not easily adaptable to the calendar month.

4.1.4.1. QUARTERLY COLLECTION

Quarterly collection exists only for certain hospitals. 99/ This exception, sanctioned by a departmental decision, 100/ is justified because of the small number of taxable sales made by these institutions. In such cases, monthly collection would entail disproportionate administrative costs both for the Department and the hospitals. The situation is that hospitals which have a certificate from the Department of National Health and Welfare 101/ are exempted from paying sales tax on articles or goods bought for their own use and not for resale. 102/ Thus, hospitals must pay tax on articles sold to patients though, if the profit does not exceed 10 per cent, certified institutions still enjoy the exemption granted under the Act. 103/ Since the introduction of the government hospital and medical insurance plans, taxable sales by hospitals are very infrequent, and the departmental practice in this respect is quite justified.

4.1.4.2. MONTHLY COLLECTION

4.1.4.2.1. RETURN

The Act requires all persons liable to pay sales or excise taxes to make a monthly return of taxable sales made during the preceding month. 104/ This section is supplemented by Regulations which specify the information to be contained in the returns. 105/ The return must be made on the prescribed form and must show the total amount of taxable sales for the preceding month and the resulting tax payable, if any. 106/

If the return is not filed in time, the licensee may be prosecuted because:

> Every person required...to file a return, who fails to file the return within the time it is required to be filed, is guilty of an offence and liable to a penalty of not less than ten dollars and not exceeding one hundred dollars. 107/

In addition to these prosecutions, the manufacturer is subject to a fine of two-thirds of one per cent per month of the unpaid tax. 108/ Generally speaking, the Department overlooks delays up to the second week of the month. The collection officer either telephones or writes to the licensee to remind him to file his return. If this does not reach the Department within thirty days, a letter is sent to him reminding him of his negligence and warning him that he may be prosecuted. At this stage, he usually owes a second return. Ten days later, he is given by letter or telephone a final notice stating a fixed delay within which to file his returns.

In practice, the Department does not decide to institute legal proceedings until two or three months have elapsed. There is then a

further delay of a month or two before the charge is laid, whilst Head Office in Ottawa asks the Department of Justice to appoint an ad hoc attorney or agent.

However, the Department acts much more quickly in the case of a second offence by a manufacturer who has already been convicted under the Act. 109/ A special list is kept of licensees who have already been prosecuted and, in their case, proceedings are instituted immediately after the first notice. The fine is set at something more than the minimum ($10) but in no case does it exceed $100.

Each month about 10 per cent of the 46,000 licensees in Canada are late filing their monthly returns, but prosecutions only number about 150 to 200 per month.

The Minister may set a later date for the filing of a return or the payment of the tax. 110/ He thus has discretion in effect to set aside the consequences of delay or negligence, such as the fine and prosecution. An extension of the time for filing a return is granted on the recommendation of the District Director of Collections or of his assistant.

The recommendation goes to the Director of Collections at Head Office. The latter, after approval, submits it to the Assistant Deputy Minister (Excise), who actually exercises the ministerial discretion in these matters.

About 90 per cent of cases involving extensions are quite simple ones. For instance, a taxpayer may have mailed his return on time, but the post-mark date is that of the first or second day of the following month. The following are the chief reasons for which the Minister grants extensions; the manufacturer has a clean record, he has met his obligations regularly

in the last two years, and he has a valid excuse for the delay, as for example, the employee who usually makes out the return is ill and has had to be replaced.

4.1.4.2.2. PAYMENT

Another situation arises when the return is submitted on time but payment of the tax is not forthcoming. The collections clerk immediately sends a formal demand for payment by registered mail if a large amount is involved. This letter demands payment of the amount due within a fixed delay. If the licensee does not pay up after one or two letters have been sent, the file is given to a financial investigator who sees the taxpayer at his home or at his office. The purpose of the meeting is to determine the taxpayer's financial situation and the reasons for the delay. In his report to the Chief Collector, the investigator recommends what steps should be taken to recover both the tax and the fine incurred. The Act provides that:

> ...upon default in payment of the tax...payable...within the time prescribed...there shall be paid in addition to the amount of the default a penalty of two-thirds of one per cent of the amount in default in respect of each month or fraction of a month during which the default continues. 111/

4.1.4.2.2.1. SEIZURE

To recover the tax, the Minister may seize one of the licensee's accounts receivable by simply sending a registered letter to the taxpayer's debtor, instructing him to pay the account to the Receiver General of Canada and not to his creditor. 112/ A debtor who obeys this instruction clears his account with his creditor, as the Minister's acknowledgment of payment is a good and valid receipt for the amount paid to the Receiver General. 113/ Should the debtor ignore the Minister's request and pay the

creditor, he remains personally responsible to the Receiver General of Canada for the amount thus paid. 114/

The Minister may also hold responsible for the amount of the tax any sums owing to the taxpayer held by an assignee whether it be a chartered bank, a finance company or a factor. Here again, a registered letter is sent, but the assignee is required to pay only an amount equal to the tax payable on the transaction giving rise to the debt assigned. The assignee is required to pay the above sum to the Receiver General only when he has himself received payment on account of the assigned debt after having received notice from the Minister. 115/

A debtor or assignee who fails to comply with the Minister's demand is liable to a fine equal to the amount payable plus an amount between $25 and $1,000. 116/ These penalties are over and above the personal liability which the creditor may incur and are very rarely applied.

If a defaulting licensee is, or subsequently becomes, a creditor of the Crown for any reason, the Minister may offset the two debts. 117/

Recommendations made in the financial investigator's report assist the Director of Collections in deciding whether to follow the procedure just described or take the case to the Exchequer Court.

4.1.4.2.2.2. EXCHEQUER COURT

In resorting to the Exchequer Court, two procedures are open to the Minister. He may institute an action according to the normal procedure: summons, appearance, defence, reply, examination, hearing, judgment, and execution on the debtor's goods. This procedure is usually followed when

there is some doubt as to the validity of the assessment or a possibility that the action will be contested.

The Minister may also register a certificate in the Exchequer Court after having notified the taxpayer by registered letter, fifteen days beforehand, that a certain amount is payable in respect of taxes. 118/ Registration of such a certificate has exactly the same effect as an Exchequer Court judgment, and execution may be initiated immediately after registration. The practice of the Department is not to proceed in this way unless there is not the least doubt that the tax is due and payable and there is no possibility of the liability being contested. This is the case, for instance, when a monthly return has been filed but the amount declared has not been paid. Whilst this practice is very fair, it is pointed out that the Act 119/ is drafted in such a way that any departure from it could pass unnoticed. Since the certification procedure is, in a manner of speaking, a fast way of obtaining a judgment by default, the taxpayer should be given an opportunity to contest the Department's allegations before the courts. The law should provide a procedure for opposing certificate registration. It is true that the licensee, on receiving the registered letter, may apply to the Department for an administrative review. Nevertheless, it must not be overlooked that the Deputy Minister is both judge and litigant in certification matters: he decides that taxes, interest, and fines are due and he executes his decision, once registered, in the same way as a judgment. We therefore recommend that:

> The Act be amended to enable taxpayers to oppose registration of the certificate in court by presenting complete defence.

In addition to the seizures and civil procedures described above, the Minister may institute criminal proceedings in the criminal courts against a defaulting licensee in order to obtain a conviction fining the licensee in an amount equal to the amount of tax payable plus an amount varying from $25 to $1,000. 120/ In practice, defaults of payment are relatively infrequent. Each month, five to ten per cent of all licensees in Canada neglect to pay on time and the Department prosecutes some 60 to 80 defaulters a month before the criminal courts. 121/ The certificate registration procedure is used in approximately the same number of cases, about fifteen a week. The normal Exchequer Court procedure is little used: in the whole of Canada, less than fifteen prosecutions a year are instituted in the Exchequer Court.

The collection procedure is basically the same when the tax is paid on other than a monthly basis. 122/ It differs slightly in the case of an assessment.

4.1.4.3. COLLECTION AFTER ASSESSMENT

The section on collection, 123/ has already described the assessing procedure. The auditor's report and accompanying assessment are subject to confirmation by Head Office and, whilst the taxpayer is advised of the assessment in detail, he knows that it only becomes final after review by Head Office. The taxpayer will know the exact amount to be paid when he receives a statement from Head Office in the form of a formal demand for payment showing separately the amounts of tax and penalties.

If payment is not forthcoming within the fifteen following days, he is sent a letter giving him 10 or 15 more days in which to settle his account.

Altogether, after the formal demand, the taxpayer has thirty days in which to settle his account, during which time he may decide to adopt one of the three following courses: pay, ignore the demand or get in touch with the Department.

In the first case, his file is shelved, and in the second it is given to the financial investigator, who will recommend either a seizure 124/ or legal proceedings.

Frequently, taxpayers cannot pay their debt to the Receiver General of Canada without putting their business in financial jeopardy. In such cases, they may ask the District Director of Collections for an extension of time.

While the authority to make arrangements is not expressly provided for in the Act, it is a necessary consequence of administering the law. Arrangements are entirely at the Department's discretion and are not subject to any public control. Presumably, the Minister may lay down general policy in the matter.

Most arrangements approved by the Department allow the taxpayer to spread his payments over a three-month period, if his financial position does not enable him to pay right away. Arrangements for longer periods are rarely made, and very few go beyond six months. Extensions are granted only on condition that current taxes are paid on time during the whole period of the arrangement. If this condition is not observed, the arrangement lapses and the balance due becomes payable immediately.

In excise tax matters, there are no provisions similar to those which allow a taxpayer to contest an income tax assessment. However, according

to departmental practice, a letter sent to the Excise Tax Director is sufficient to trigger an administrative review of the assessment and to make the Department choose litigation in the Exchequer Court in preference to registration of a certificate or a seizure. This practice should be incorporated in the Act so as to ensure the taxpayer's right to be heard. We therefore recommend that:

> The Act be amended to provide formal objection or appeal procedures in assessment matters similar to those provided in matters of income tax.

4.1.5. REFUNDS

4.1.5.1. CONDITIONS

Tax refunds may be made under the provisions of the Act 125/ and of the Regulations. 126/ Applications for tax refunds must be made in duplicate on Form N-15 as prescribed in the Regulations, and must be submitted within the two years following the occasion giving rise to them. If there have been several transactions giving rise to separate refunds, the applications may be submitted together on a single form.

Apart from cases involving overpayment or payment in error by a licensee, applications for refunds usually come from unlicensed businesses. These may buy tax-paid merchandise and later make a tax-exempt sale, of which there are four types:

(a) Sales to licensed manufacturers or wholesalers. 127/

(b) Exports or ships' stores. 128/

(c) Sales to provincial governments 129/ or, under certain conditions, to municipalities. 130/

(d) Sales to certified, tax-exempt institutions. 131/

Applications for refunds made out in duplicate go to the District Auditing Office (Refunds Section) where they are processed by clerks.

4.1.5.2. EXAMINATION

Claims are very rarely fully processed in the district office. This only happens in the case of minor refunds, 132/ in which case the clerk requires that all documents in support of the application be sent to him. The clerk may also telephone the purchaser to ensure that the goods were bought under tax-exempt conditions and that they were not subsequently returned.

Most requests for refunds are examined at the claimant's office. The official examines invoices, purchase orders, exemption certificates, delivery receipts and even credit notes, to ensure that the purchaser did not subsequently return the goods. Besides examining the validity of the claim under the exemptions provided by the Act, the official must determine how much tax was paid by the claimant himself. He must, as it were, determine the cost of the goods sold including the tax but not including non-taxable costs such as transportation, freight, insurance or brokerage.

4.1.5.3. BASIS OF REFUND

There are two ways of determining the cost price or basis on which the tax was paid: direct cost and estimated cost.

4.1.5.3.1. DIRECT COST METHOD

Each item which is the subject of a claim may be examined and its purchase price determined through the supplier's invoices. In this case, it is sufficient to exclude non-taxable items, such as discounts, freight or

transportation. This gives a purchase value which includes customs duties, but not brokerage, insurance or demurrage. If the amount of tax paid appears separately on the document, there is no problem in determining the amount of the refund. Otherwise, the tax is 11/111 of the invoice amount. The amount of the refund can be found by applying a simple rule of three.

4.1.5.3.2. DETERMINATION OF COST PRICE

Instead of examining each item, the cost price may be established by deducting a blanket discount from the claimant's selling price. This method is similar to that used by licensed wholesalers in calculating the tax 133/ and it is used, at the taxpayer's option, when requests for refunds are fairly numerous. In order to establish the discount, the claimant's financial statements for the two preceding years are examined and a comparative table of profits and losses drawn up. Using net sales, inventory and purchases, cost of goods sold for each year is established. From such costs items which are not included in the cost of the goods for tax purposes are subtracted. The gross profit for each year is then obtained by subtracting the purchases from total sales. The cost of goods sold in tax-exempt transactions is then readily obtained by deducting the average gross profit from exempted sales made during the period on a percentage basis. The refund is then determined by applying the rule of three.

An example will better serve to explain the procedure. The net sales of a business for a given period are $1,000,000. The inventory was $100,000 at the beginning of the period, and $150,000 at the end. Since $850,000 has been spent on purchases during the period, the cost of goods sold was $800,000. If this cost includes non-taxable items, such as the expenses mentioned above, they are deducted to determine the taxable cost price.

If these expenses amounted to $50,000, the taxable cost price would then be $750,000 and the gross profit would be 25 per cent. If the firm applies for a tax refund on $10,000 of tax-exempt sales, the taxable cost price of the goods would be $7,500 on the basis of an estimated gross profit of 25 per cent. Since the tax is included in the purchase price, it amounts to 11/111 of this figure, or $743.24. The firm is therefore entitled to a tax refund of $743.24.

Once these calculations have been made, a sampling of the sales involved in the claim is made in order to ensure that the percentage obtained is representative and is applicable to such sales. The choice between the two methods of calculating the cost price is left to the taxpayer. However, once a method is chosen, the taxpayer must continue to use if for at least a year.

The blanket discount method must be used for a business as a whole, and not for individual departments within it. This policy greatly simplifies the Department's work but it can lead to unfairness. Actually the method takes for granted that either the rate of profit or taxable cost price is the same for all goods sold, or that sales giving rise to an application for a refund are statistically representative of the overall business. In order to reduce any unfairness as much as possible, we recommend that:

> The Regulations be amended to enable taxpayers to establish a discount for the operations of individual departments, provided that their accounting system is such that adequate estimates of the discounts applicable to each department can be made.

Processing an application for a refund of less than $200 requires on average about three hours' work by an auditor or clerk. Applications for

refunds in excess of this amount take roughly a day, since a summary of operations must be made to determine the taxable cost price. Some 45,000 applications for refunds, to a total value of $49,000,000, were submitted during the fiscal year ended March 31, 1964.

4.1.5.4. REVIEW

When the auditor has finished his examination and is satisfied that the claim is valid and the amount correct, he signs a certificate on the application form submitted by the taxpayer. This certificate states that the application has been approved after audit, and it mentions the basis on which the refund was calculated. The auditor gives his reasons if the application is rejected in whole or in part. The certified or corrected application is then sent to the Refunds Section at Head Office, where it is reviewed. This section, consisting of five auditors and six clerks, reviews all applications for refunds. Experience has shown that there is very little to be gained from a detailed review of refunds of less than $200. Consequently, the review is purely nominal in these cases. Applications for refunds of over $10,000 are reviewed by the head of the section, and those between $5,000 and $10,000 are left to his assistant.

During the fiscal year ended March 31, 1964, the total value of all applications was reduced by some 9.6 per cent following local audits and reviews by Head Office. The Refunds Section at Head Office reduced some 830 applications or about ten per cent of all reductions effected for a total gain of $401,000 or less than one per cent of all refunds claimed.

4.1.6. REMISSION

It can happen that when an assessment has been made and the fine

established in accordance with the Act, the amount thus determined remains wholly or partially unpaid. The taxpayer may obtain a total or partial remission of his debt under certain specified conditions. Tax remissions are the exclusive province of the Treasury Board, but the Minister may, in a way, remit the fine for failure to file a return or to pay the tax on time. 134/

4.1.6.1. REMISSION OF FINE

The Minister may, in writing, set a later date for the filing of a return or the payment of all or part of the tax and, in such a case, the penalty or monthly interest is set aside. 135/ This power is often used to avoid injustices which might come about from a strict application of the Act. It is also of value when negotiating with a taxpayer. For instance, in the case of a debatable assessment, the taxpayer may prefer not to chance going to court because of the high legal costs. On its side, the Department might also consider the legal costs too high in relation to the amount in dispute and feel uncertain about the court's decision. In such cases, both parties have every reason to reach an agreement, one agreeing to pay the tax and the other foregoing the fine. Postponements of the date for filing a return or paying a tax are approved and the new date set by the Assistant Deputy Minister, on the recommendation of the Director General of Collections. If this involves the remission of a fine of over $1,000, the Minister himself sets the new date on the recommendation of the two officials just mentioned.

The Minister usually accepts the recommendations of these officials. Since the remission of a fine is a discretionary exception to the general rules determining the taxpayer's liability, any possibility of political

pressure must be avoided in such matters. This power of exception is such as to offer political dangers 136/ and, for this reason, some form of control is desirable. The publication of decisions to remit fines would greatly reduce the chance of political pressure being brought to bear on the Minister or on his officials. We therefore recommend that:

> The Minister include, in his Department's Annual Report, an adequately detailed accounting of all fines over a certain amount remitted during the preceding financial year and resulting from the exercise of his discretionary power to set a later date for filing a return or paying the tax.

4.1.6.2. REMISSION OF TAXES

There are statutory provisions which allow the Treasury Board to remit taxes or to declare that collection is impossible due to the failure to collect during the last five or ten years and to the fact that the taxpayer's financial position is unlikely to improve. The Treasury Board derives these powers from sections 22 and 23 of the Financial Administration Act. 137/ The Director General of Collections is responsible for recommending necessary tax remissions. The Treasury Board consents to about 60 remissions of excise tax a year. Most tax remissions occur in cases where the Department considers that it has some responsibility, in equity if not in law, for part of the financial burden imposed on the taxpayer by an assessment. An instance would be where the taxpayer has paid his taxes in accordance with incorrect information given by a departmental official during a previous audit. Here the taxpayer can obtain remission of tax if he can prove that he was given incorrect information. This very fair policy on the part of the Department should not be allowed to obscure the fact that a remission of tax is essentially a discretionary measure fraught with the same danger of

political pressure as in the case of a remission of a fine. We therefore recommend that:

> The details of all Treasury Board decisions to remit taxes be published in the Canada Gazette and in an appendix to the Annual Report of the Department of National Revenue.

4.1.7. RULINGS

4.1.7.1. SCOPE

No study of the administration of the Excise Tax Act would be complete without a short description of the procedure concerning administrative decisions, or rulings. A ruling is simply a reply to a taxpayer's request for information. It is essentially an expression of the stand taken by the Department with regard to a particular problem or question submitted by the taxpayer. The courts are not bound by rulings except, obviously, when ministerial discretion is involved, such as when the Minister, in a difficult case, determines the amount of tax to be paid. 138/ From a strictly legal point of view, rulings are not binding on the Crown. The Department is always free to go back on its rulings and even to reassess a taxpayer who has acted in good faith in accordance with the information given him. In practice, the Department considers itself bound by the previous decisions which, taken as a body, amount to a sort of internal case law. The consequences of the reversal of a decision with regard to the taxpayer's liability will be discussed later.

4.1.7.2. PROCEDURE

The inquiry underlying a ruling may come from the Department itself (usually from the Audit Branch) or from a taxpayer who writes directly to

Head Office. The inquiry is made by ordinary letter giving the details of the problem and accompanied by plans, specifications or samples where an item is to be classified for tax purposes, or by financial reports and a market analysis where an appraisal of the taxation basis is required. The initial inquiry often leads to lengthy correspondence between the taxpayer and the Department, in which the Department asks for additional information or details. In this connection, there have been complaints about the Department's delay in answering inquiries, 139/ but this may be due to the fact that the division which issues rulings sends out about 20,000 letters a year and has, in the last two years, given between 16,000 and 18,000 rulings.

The Administration Branch is subdivided into two sections: Interpretation and Appraisal.

The Interpretation Section is made up of three subsections, each of which has three referees. Each section specializes in a particular field, as does each of the referees. For instance, one referee is an expert on construction materials, while another specializes in food and pharmaceutical products. In about 95 per cent of cases, there is no outside review of a subsection ruling. Difficult or doubtful cases are referred to the Section Head, to the Assistant Director, or to the Director of the Division.

Rulings on the administration of the Act may be classified in two categories: individual and general. The former concerns the individual taxpayer only, while the latter applies to all or part of an industry.

Earlier rulings are placed in a file which the referees consult before replying to the taxpayers. If a precedent is followed or confirmed, only the party requesting the information is advised of the ruling. On the

other hand, if after consultation with the Supervisor, the Assistant Director or the Director, it is decided to reverse a previous ruling, the party who made the request is advised and the new ruling is sent to all the audit and collection offices in the country, as well as to all parties who had been advised of the old ruling.

The Appraisal Section is made up of six people, each specialized in a particular industry. Their task is limited to determining wholesale prices 140/ and reasonable or fair prices. 141/

When the Department changes its stand as regards appraisal or interpretation and reverses a previous ruling, the practice is to require that the tax be paid only from the date of the new ruling. A problem then arises in the case of taxpayers who continued to rely on the previous ruling because they had not been notified of the change in the Department's policy. In such cases, the Department is partly responsible and finds itself in an embarrassing position when claiming payment of tax or penalty. 142/ Such situations should be avoided. The best way would be to publish the Department's rulings.

4.1.7.3. PUBLICATION OF RULINGS

In its brief submitted to the Royal Commission on Taxation, the Canadian Bar Association 143/ suggested that the secrecy surrounding rulings is apt to give some taxpayers the impression that other taxpayers are being favoured. The Canadian Manufacturers' Association's brief recommended that rulings be published. 144/ The chief objection to their publication issues from the obligation to treat certain information as confidential. Presumably the taxpayer counted on absolute secrecy when he asked the Department

for information. The case is quite different when an association requests information on behalf of its members. Since such information usually appears in the association's review or periodical, there can be no objection to the Department publishing the rulings. If it wishes, the Department may even incorporate in the Regulations any ruling of general application.

When an inquiry contains confidential information, such as the description of a new article soon to be marketed, the publication of the ruling might cause serious harm to the inquirer, since the Department's reply might have to mention confidential information necessary for defining the application of the ruling. The Department cannot be asked to play the part of censor and to remove, for publication purposes, all confidential information appearing in the ruling. If it did, the publication of rulings could make them misleading for the public, since they would be dissociated from the facts giving rise to them.

The same type of argument applies to the publication of rulings on appraisal questions. Since the inquirer supplies his financial statements, the rulings are based on confidential information. To publish such information is out of the question.

In short, by not publishing individual rulings containing confidential information, the Department acts in a most responsible way. However, the objection on the grounds of the confidential nature of rulings could be overcome to some degree were the Department to ask each inquirer if he objected to its publication.

In the case of general rulings likely to affect all or part of an industry, the Department has a duty to ensure that all interested manufacturers or

businesses are able to obtain the information quickly or that they be advised of the terms of these rulings. It has been mentioned that the Department advises all businesses of changes in rulings given them previously. By maintaining a file of rulings and placing the inquirer's name on each file, the Department ensures that the new ruling will be brought to the attention of at least some of the interested parties. It must be admitted that the system is rather rudimentary and the use of punch-cards and IBM equipment would be much more appropriate.

When the Department issues several rulings about the same topic or concerning a single industry, it often sends the businesses concerned a circular usually bearing on appraisal matters. We therefore recommend that:

> The Department publish a monthly summary of general rulings issued during the previous month.

While the Customs and Excise Division is careful to respect the confidential nature of the taxpayer's file, it is not obliged to do so by an express provision of the Excise Tax Act. 145/ The departmental practice should be made obligatory by a provision similar to section 133 of the Income Tax Act, 146/ which reads as follows:

> 133. (1) Every person who, while employed in the service of Her Majesty, has communicated or allowed to be communicated to a person not legally entitled thereto any information obtained under this Act or has allowed any such person to inspect or have access to any written statement furnished under this Act is guilty of an offence and liable on summary conviction to a fine not exceeding $200.
>
> (2) Notwithstanding subsection (1) the Minister may, under prescribed conditions
>
> (a) communicate or allow to be communicated information obtained under this Act, or
>
> (b) allow inspection of or access to any written statement furnished under this Act

> to the government of any province in respect of which information and written statements obtained by the government of the province, for the purpose of a law of the province that imposes a tax similar to the tax imposed under this Act, is communicated or furnished on a reciprocal basis to the Minister.

However, the Excise Tax Act and the Income Tax Act should allow the Department's two divisions to work closely together in cases of fraud or concealment. At the present time, each division pursues its own investigations and there is little exchange of information between the two. The farthest that either will go is to advise the other that fraud may be practised in a particular case.

4.2. ADMINISTRATION OF THE EXCISE ACT

4.2.1. PURPOSE OF THE ACT

The Excise Act 147/ imposes excise duties on spirits or alcohol, on Canadian brandy, and on beer, tobacco, cigars and cigarettes. These duties are expressed in dollars and cents for each unit of measurement adopted. For instance, the excise duty in the case of spirits is as follows:

> On every gallon of the strength of proof distilled in Canada, except as hereinafter otherwise provided, thirteen dollars, and so in proportion for any greater or less strength than the strength of proof and for any less quantity than a gallon. 148/

The duties are listed in the Appendix to the Act. 149/ Duties on alcohol or spirits vary according to the uses to which they are put: they are higher for spirits sold for consumption than for those used in pharmaceutical preparations and in the production of chemical compounds. Moreover, spirits used in producing vinegar, toilet preparations or cosmetics are exempt from excise duty.

The relatively high level of excise duty, especially where alcohol is concerned, making it profitable to defraud the Treasury, the government has adopted a policy not only of imposing very severe penalties for all violations of the Act but of maintaining strict control over the production of goods subject to excise duty. This policy is largely a result of the historical circumstances in which excise duties originated and developed. The Excise Act is one of the few tax laws which attributes such a marked criminal character to all violations. Historically, attempts to avoid payment of excise duty were considered comparable to smuggling, which was looked upon as a crime. It is not surprising, therefore, that the Act is administered and applied much like the criminal law itself.

The administration of the Excise Act 150/ is very similar to that of the Excise Tax Act. 151/ Both these Acts are based on a system of licensing, of periodic tax collection and auditing of the licensee's books or transactions. The administrative organization is similar, since the Excise Act is administered by three regional Districts. However, there is one important dissimilarity: excise duties are administered on a basis of physical control over production, whereas an accounting audit of operations serves as a basis for the administration of excise taxes.

The most important aspects of administering the Excise Act are licensing and direct control over production and collection.

4.2.2. LICENSING

Many sorts of licences are issued under the Excise Act, 152/ including among others: licences for distillers, brewers, tobacco packers, tobacco manufacturers, cigar manufacturers, bonded manufacturers of pharmaceutical

products, culinary essences, perfumes and vinegars, druggists and bonded warehouses, such as those of the Quebec Liquor Board, which receives alcohol without paying the excise duty until it leaves the warehouse.

Licensing is mandatory 153/ and anyone engaging in an industry or business subject to excise without obtaining a licence commits a criminal offence punishable by fine and imprisonment. 154/ Moreover, goods and equipment on the premises are subject to seizure 155/ and double the amount of the excise duties and licensing fee becomes payable. 156/ The only persons who, while being engaged in a business subject to excise, are exempted from obtaining a licence are tobacco farmers or planters. 157/ However, the tobacco they produce may only be disposed of, sold or offered for sale to licensees or exporters. 158/

Applications for a licence are made on the forms prescribed by the Minister 159/ and must contain all the information required by the Act and the Regulations, such as plans and specifications of the premises and a complete description of the apparatus and equipment used in production. Application forms are sent to the District Office, which sends an officer to inspect the premises. 160/ The inspector's report is checked and approved by the District Director, who sends the file to Head Office, which approves it and returns it to the District Director, who then issues the licence, after the licensee has posted a bond 161/ in an amount which varies according to the type of licence and the size of the business. 162/ The licensee must also pay the statutory fee before the licence is issued, which varies from $2.00 for a retail druggist or a chemist using a still 163/ to $250 for a distiller's licence. 164/ Licence fees are about $50 for brewers, bonded manufacturers, tobacco or cigar manufacturers and tobacco packers. 165/ The licence for producers of methylated spirits costs $1.00. 166/

The Minister has full discretion in the granting of licences, since the Act states that:

> The Minister may for any reason that he deems sufficient in the public interest refuse to issue any licence or to grant any privilege authorized by this Act, or may suspend, cancel or revoke a licence granted or any privilege given by this Act. 167/

The Minister's decision to cancel, revoke or refuse to issue a licence is not subject to review by the courts. Such sweeping powers seem hardly necessary for the proper administration of the Excise Act. They are clearly contrary to the citizen's fundamental right to engage in, and to continue in, an activity of his choice. We therefore recommend that:

> The Act be amended so as to allow the Minister to cancel a licence only for good cause and to give the courts authority to weigh the validity and importance of the reasons adduced by him.

In point of fact, the Minister rarely revokes a licence except for violation of the Act, or because premises have become unfit for the exercise of effective control over production.

The 900 or so licences issued in Canada expire on March 31st of each year 168/ and a new application must be submitted under the same conditions as for a first application except that it is not necessary to give plans, specifications or descriptions of premises unless there have been changes since the previous licence was issued.

The purpose of licensing is to ensure strict supervision over the production of excisable goods and to facilitate the collection of excise duties.

4.2.3. DIRECT CONTROL OVER PRODUCTION

Departmental regulations cover the books which licensees must keep and the information that is to be entered in them. 169/ Broadly speaking, not only must all purchases and sales of taxable products and raw materials be entered, but a daily record must be kept of processing operations. A resident or visiting departmental official is given a daily record of all transactions, from which he makes a daily report. The licensee also supplies a monthly report of his operations 170/ duly signed and attested. 171/ The signers are obliged to answer all relevant questions. Any employee may be questioned. The official makes sure that all operations have been recorded in the books and, in particular, the weight of all raw materials used in production.

4.2.3.1. DISTILLERS

In a distillery, the officer records the quantities of raw materials placed in the fermentation vats. Once fermentation has ended, the product must flow into sealed containers connected to the vats by sealed lines. Here the product is weighed and sampled and the amount of duty calculated. From this point on, the alcohol is stored in bond and remains under the continuous supervision of the Department's officers. The warehouse has two locks and the key to one is kept by the official. No alcohol can leave the warehouse until the duty thereon has been paid.

4.2.3.2. BREWERIES

The procedure differs slightly in the case of breweries, who pay duty as soon as fermentation has ended. There are no bonded warehouses for breweries, although before it is marketed beer must be aged for about five weeks to give the yeast time to settle.

Distillers and brewers are treated differently as regards the payment of duties mainly because the former keep the alcohol for several years before marketing it. Brewers, on the other hand, keep much smaller inventories since the aging period is much shorter. The different approach in the case of these two industries is thus justifiable on rational grounds.

4.2.3.3. TOBACCO FACTORIES

The control procedure for tobacco, cigar or cigarette manufacturers is very similar to that for distilleries. Incoming tobacco shipments are weighed and sampled, and an allowance is made for moisture content. Production is followed step by step. The finished product may be warehoused and duty is paid, as the packaging proceeds, through the manufacturer's purchases of the stamps which he is required to affix to the packages.

Tobacco packers must obtain a specific permit to purchase a determined amount of tobacco and another to dispose of it. Officers pay regular, sometimes daily, visits to the enterprise to check permits, purchases, inventories, sales and the book entries required by law. Stamps are not required in the case of sales to licensed manufacturers, but they are in all other cases. By auditing the purchases of stamps and the purchases and sales of tobacco, the official checks whether the books have been properly kept and duty fully paid. An allowance of about 20 per cent is made for loss sustained in the course of processing. This percentage varies with efficiency generally ascribed to each type of business and with the moisture content of the tobacco purchased.

4.2.3.4. BONDED MANUFACTURERS

In the case of a bonded manufacturer who uses alcohol in the preparation

of toiletries, cosmetics or pharmaceutical products, the commodity (in this case, alcohol) on which duty has not been paid is kept in a sealed location which can be opened only in the presence of an excise officer. When alcohol is required, the manufacturer calls in an excise officer— at a cost of $3.50 an hour to a minimum of $7.00—who issues the required quantities and supervises its use.

4.2.4. COLLECTION

In view of the control exercised over all stages of the manufacture of goods subject to the Excise Act, 172/ collecting duty poses no problem. In practice, it is paid day by day or through periodic purchases of stamps, as in the case of tobacco. The data in the monthly report are compared with the copies of the daily record sent to the District Office. Duty on monthly operations is thus easily determined and compared with the payments made.

Duty on spirits is calculated according to one of the five methods listed in section 137 of the Excise Act. In short, duty is calculated either on input or on output, and whichever method gives the highest duty is used. 173/ The Excise Act sets minimum quotas for distillers and manufacturers of tobacco or cigars. 174/ If the minimum figure is not reached by the "input-output" method, the Minister may assess the duty to be paid and collect it on the shortages.

Those provisions of the Excise Act 175/ which are most subject to criticism are sections 64 and following, which concern the powers and duties of excise officers.

Section 66 authorizes superior officers and officers designated by the Governor in Council to administer oaths, conduct enquiries, summon any person and question him under oath.

Section 70 empowers officers to enter any building used for carrying on a business subject to excise. They may inspect the apparatus, break down partitions or remove floors, walls or ceilings to determine whether these conceal any apparatus or goods subject to excise and they may inspect and measure the apparatus and take samples.

Under section 71, they may even break into an establishment and confiscate or seize goods. All these powers are much wider than those found in criminal law. The Act gives excise officers a blank search warrant without limit as to time.

These powers are also much vaster than those given to income tax officers. 176/ As has been recommended in the case of the latter, these powers should be limited since it does not appear to be necessary to have such wide powers in order to administer a tax law. The administration of the Act is no doubt greatly facilitated, but the basic rights of citizens should not be trampled upon in the interests of administrative efficiency. In practice, these powers are not used by the Department's officers, but by the R.C.M.P. Nevertheless, the fact that they have not been abused by the administration in the past does not justify the existence and retention of legislative provisions which are so apt to violate basic freedoms. The same applies to the provisions concerning the writ of assistance issued by a judge of the Exchequer Court of Canada. 177/ The writ amounts to a blank search warrant made out to an officer and valid at any place and any time so long as the officer remains in the service of the Department. Section 79 goes farther: it allows the officer to delegate his authority.

Such wide powers, no doubt, facilitate the administration of the Excise Act but they are repugnant to accepted legal principles.

If the state chooses to treat violations of the Excise Act as criminal offences, it should impose the same procedures and the same respect for the rights of man as are found in criminal law. We therefore recommend that:

> The powers granted to excise officers and recognized by sections 70 to 79 of the Excise Act, should only be exercised under the authority of a specific warrant of limited duration issued in accordance with ordinary criminal procedure of law.

4.3. EQUITY IN THE ADMINISTRATION OF THE EXCISE LAWS

The question now is whether the administration of the excise laws is being carried out in the light of the principles of natural justice and particularly in accordance with the spirit of the Canadian Bill of Rights. 178/

4.3.1. EQUALITY BEFORE THE LAW

Both the law and the administration should mete equal treatment to all taxpayers who are in a similar position. Observance of this principle does not preclude distinctions drawn on a rational basis or differential treatment of classes of taxpayers. In the matter of licences, the distinction in favour of small manufacturers can be justified on national grounds. So does the classification of wholesalers as licensed and non-licensed although this has been the subject of lively criticism. 179/ To qualify for a licence, it is required that at least 50 per cent of sales be tax-exempt. Arbitrary though this requirement is, one could not invoke the principle of equality as an argument for a different percentage.

As far as auditing is concerned, all licensees get the same treatment since it is a matter of policy within the Department to audit every two years. Exceptionally, a more frequent audit may be made at the licensee's request, as well as in cases of previous conviction or when fraud is suspected.

This distinction is also justifiable rationally and it does not run counter to the principle of equality.

In the matter of collections, only certain institutions, such as hospitals, are granted special conditions of payment. This is fully justified on the grounds of the special exemptions granted to these institutions. The principle of equality before the law is most likely to be violated in the matter of remission of taxes and of fines. While there are certain guidelines governing departmental policy concerning remissions, unequal treatment nevertheless remains a real possibility and it must be admitted that large businesses, with their tax specialists and powerful lobbies, are in a much better position than smaller businesses. 180/ To overcome this, it has been suggested that more publicity be given to tax remissions so as to enable all taxpayers to invoke previous decisions of the Department. It is also for this purpose that the publication of rulings has been recommended. 181/

On the national level, there are several safeguards which ensure that taxpayers get the equal treatment to which they are entitled. In the first place, Head Office maintains constant supervision over the main operations of districts or regions. The practice of reviewing all assessments and all requests for refunds ensures not only that uniform procedures are followed throughout the country but that the Act is administered and interpreted in the same way across the nation. It is with this object that departmental rulings are centralized and communicated to all districts. Their publication would provide an additional guarantee of equality of treatment. A similar end is served by the circulars issued by the Department, by the directives issued by Head Office to senior and other officers of each region and by the

occasional gathering of senior officers at seminars held in Ottawa. It should be noted, however, that the Customs and Excise Division has published no handbook or guide for the use of its officers. Such a manual should be issued to ensure better application of the principle of equality before the law.

4.3.2. "AUDI ALTERAM PARTEM"

This principle requires that persons affected by departmental decisions should have at least one chance to state their case before a competent authority. In other words, anyone who is called upon to make a decision affecting the interests of another person should be prepared to hear the arguments and opinions of that person. The following chapter, dealing with the departmental review of appeals, will provide several examples of the application of the audi alteram partem principle. For the time being, it is pointed out that, at the time of the audit, the departmental official explains the grounds for his assessment, thus giving the taxpayer an opportunity to state his case.

The letter which the Department writes to the licensees after the audit is an implicit invitation to taxpayers who disagree with the proposed assessment to make representations to District or to Head Office. When legal proceedings are instituted, the audi alteram partem principle is obviously observed. In the same way, taxpayers are advised, by registered letter, whenever the Department proposes to register a certificate in the Exchequer Court. The notice gives the taxpayer time to present his case. However, in view of the legal consequences of registration, the taxpayer should be able to contest it at law. As previously recommended, formal procedures to this effect should be made available.

The taxpayer should, also, have a proper opportunity to prepare a good and valid defence. For this purpose, he must be given access to documents seized by the Department. In practice, the Department respects this right, but the recommendation is made that it be given statutory protection in the Act itself.

4.3.3. "NEMO JUDEX IN CAUSA SUA"

No man should be judge in his own case. As in the income tax matters, it appears at first glance that auditors have a personal stake in the outcome of the Department's case. Judging from the annual reports made by each auditing division at Head Office, it would seem that the efficiency of individual auditors is measured by the additional revenues resulting from their work. They even vie with each other in collecting additional taxes. Under such circumstances, the possibility that auditors may have a personal interest in the result of their decisions cannot be ruled out. However, their zeal is tempered by their desire to have their assessments accepted by Head Office without any reductions, as the annual report on each auditor's work mentions all changes made in the amounts of his assessments.

There is grave danger in measuring the efficiency of a tax auditor by the extra revenue collected as a result of his work. 182/ However, this is not the only criterion used by the Department. Promotion from grade 2 to grades 3 and 4 requires the passing of examinations.

4.3.4. LEGITIMATE EXERCISE OF STATUTORY POWERS

The authority conferred on the Department by law must not be abused; it must not be wielded for any end other than that for which it was granted; and it must not be used for reasons unrelated to the administration of the

Act. It is in order to ensure observance of this rule by diminishing the political pressures likely to be exerted on the officials that it was suggested that particulars of taxes and fines remitted be published.

By and large, this principle is observed in the administration of the excise law. It should be noted, however, that the Minister has used his power to make regulations 183/ which run counter to the Act. 184/ His action in so doing was dictated by considerations of equity, even though jurisprudence disregards equity as a factor in the interpretation of tax laws. 185/ Though the Regulations which permit the payment of tax on a basis other than that specified in the Act make the collection of taxes and the administration of the Excise Tax Act more equitable, 186/ they are nonetheless ultra vires. If considerations of equity have led the Department to adopt a policy which departs from the letter of the law, it must follow that it is high time that the Act be amended, since otherwise departmental rule, rather than the rule of law, will prevail.

4.3.5. OTHER APPLICATIONS OF EQUITY

The departmental practice of not assessing retroactively beyond two years, except in cases of fraud, is based on equity. But it should be incorporated in the statute.

The case should be mentioned here of licensees who believe themselves tax-exempt on the strength of a proper certificate but are nevertheless liable to be taxed under the Act. The conditional exemptions granted by the Act can give rise to such situations, since they are conditional on the use of the goods sold. 187/ If a particular item, a tractor for instance, can be put to several uses, the licensee must rely on the purchaser's

statements in deciding whether to charge tax or to accept the exemption certificate signed by the purchaser. Even though he acts in good faith, the vendor is liable for the tax if the purchaser makes a false declaration regarding the use of the item purchased. Granted that the vendor has a legal claim for the tax against the purchaser, 188/ but his tax liability is nonetheless determined by factors over which he has no control, such as a change in the use of the goods occurring after the sale has been made. It would obviously be fairer not to saddle him with the liability, but to introduce into the Act a provision under which the vendor would act as the agent of the state in receiving statements made by purchasers with regard to exemptions. Provided the vendor acted in good faith, the state's only recourse would be against the purchaser. This suggestion has been put forward on various occasions. 189/ Any purchaser making a false statement should be liable to a fine or to imprisonment. Provided the penalties are sufficiently severe and clearly specified on the exemption certificate, it is unlikely that fraud would be attempted on a large scale and the provision should not complicate the administration of the Act to any real extent. Another method would be to do away with all conditional exemptions and to replace them with conditional refunds. Any purchaser at present entitled to a conditional exemption would henceforth pay the tax at the time of purchase but would be able to claim a refund on production of an appropriate declaration to the Department.

REFERENCES

1/ The present chapter is based on information and data obtained from the staff of the Customs and Excise Division.

2/ Old Age Security Act, R.S.C. 1952, c. 200 and amendments.

3/ R.S.C. 1952, c. 58 and amendments.

4/ Customs Tariff, R.S.C. 1952, c. 60 and amendments.

5/ R.S.C. 1952, c. 100 and amendments.

6/ R.S.C. 1952, c. 99 and amendments.

7/ R.S.C. 1952, c. 58 and amendments.

8/ R.S.C. 1952, c. 60 and amendments.

9/ R.S.C. 1952, c. 100 and amendments.

10/ R.S.C. 1952, c. 99 and amendments.

11/ R.S.C. 1952, c. 100 and amendments.

12/ R.S.C. 1952, c. 100 and amendments.

13/ Excise Tax Act, R.S.C. 1952, c. 100, s. 38.

14/ Excise Tax Act, R.S.C. 1952, c. 100, s. 29(1)(f) and s. 30(1).

15/ Canada, Department of National Revenue, General Sales and Excise Tax Regulations, April 1961, Circular No. ET 1, Nos. 21 to 28.

16/ An Act to amend the Excise Tax Act, 1-2 Elizabeth II, S.C. 1952-53, c. 35, s. 20.

17/ A 3 per cent Old Age Security Tax is collected over and above sales tax, making a combined tax of 11 per cent. Old Age Security Act, R.S.C. 1952, c. 200, s. 10, as amended by: An Act to amend the Old Age Security Act, 7-8 Elizabeth II, S.C. 1959, c. 14, s. 1.

18/ Excise Tax Act, R.S.C. 1952, c. 100, s. 30(2)(a) to (f) as amended: 7-8 Elizabeth II. S.C. 1959, c. 23, s. 5(2).

19/ Excise Tax Act, R.S.C. 1952, c. 100, s. 30(1) as amended by 7-8 Elizabeth II, S.C. 1959, c. 23, s. 5(1). However, small manufacturers are not obliged to obtain a licence, but must pay purchase tax. S. 34(2) as amended by 7-8 Elizabeth II, S.C. 1959, c. 23, s. 6.

20/ Excise Tax Act: Ibid., s. 43A, added by 7 Elizabeth II, 1958, c. 30, s. 5.

21/ Excise Tax Act: Ibid., s. 35, as amended by 7 Elizabeth II, S.C. 1958, c. 30, ss.3 and 1, 7-8 Elizabeth II, S.C. 1959, c. 23, s. 7.

22/ Bulk importation of pharmaceutical or cosmetic products, for example.

23/ Excise Tax Act: op. cit., s. 34(2) as amended by 7-8 Elizabeth II, S.C. 1959, c. 23, s. 6.

24/ Canada, Department of National Revenue, General Sales and Excise Tax Regulations, April 1961, Circular No. ET 1, No. 2(2).

25/ Ibid., Regulation 2(4).

26/ Ibid., Regulation 2(6).

27/ Excise Tax Act: op. cit., s. 43A. See note 28.

28/ An Act to amend the Excise Tax Act, 7 Elizabeth II, S.C. 1958, c. 30, s. 5.

29/ Canada, Department of National Revenue, General Sales and Excise Tax Regulations, April 1961, Circular No. ET 1, No. 1.

30/ Excise Tax Act: op. cit., s. 35 as amended by Elizabeth II, S.C. 1958, c. 30, ss.3 and 1; 7-8 Elizabeth II, S.C. 1959, c. 23, s. 7.

31/ General Sales and Excise Tax Regulations: op. cit., No. 1.

32/ See infra under 4.1.2.3.3.

33/ Excise Tax Act, R.S.C. 1952, c. 100, s. 35(1) as amended by S.C. 1963, c. 12, s. 4.

34/ Excise Tax Act: op. cit., s. 46 as amended by 7-8 Elizabeth II, S.C. 1959, c. 23, s. 9; 2-3 Elizabeth II, S.C. 1953-54, c. 56, s. 10; 12 Elizabeth II, S.C. 1963, c. 12, s. 5. See under 4.1.5.

35/ Excise Tax Act: op. cit., s. 35(2).

36/ General Sales and Excise Tax Regulations: op. cit., No. 3.

37/ Excise Tax Act: op. cit., s. 35(3).

38/ General Sales and Excise Tax Regulations: op. cit., No. 3(1).

39/ General Sales and Excise Tax Regulations: op. cit., No. 3(2).

40/ Op. cit., idem; No. 3(3).

41/ Op. cit., idem; No. 3(1).

42/ Excise Tax Act: op. cit., s. 35(7).

43/ Excise Tax Act: op. cit., s. 34, as amended by 2 Elizabeth II, S.C. 1953, c. 23, ss. 6 and 43, as amended by 7 Elizabeth II, S.C. 1958, c. 30, s 4 and 5, and by 7-8 Elizabeth II, S.C. 1959, c. 23, s. 8.

44/ See supra under 4.1.2.2.

45/ R.S.C. 1952, c. 14.

46/ Excise Tax Act: op. cit., s. 35(6).

47/ Excise Tax Act: op. cit., s. 35(6).

48/ Op. cit.

49/ Excise Tax Act: op. cit., s. 55(5).

50/ University graduates in Commerce, Finance or Accounting with at least 3 years' experience in auditing.

51/ Same qualifications as the preceding with 3 or 4 years' additional experience in excise tax auditing with the Department.

52/ Excise Tax Act: op. cit., s. 55(3).

53/ See supra, c. 3, under 3.1.9.1.

54/ See supra, note 51.

55/ Excise Tax Act: op. cit., s. 55(7).

56/ Excise Tax Act: op. cit., s. 55(7), (3), (1).

57/ Excise Tax Act: op. cit., s. 59.

58/ See supra, c. 3, under 3.1.9.3.

59/ R.S.C. 1952, c. 154.

60/ Excise Tax Act: op. cit., s. 55(4).

61/ Sections 30(2), 32, 44, 46 and 47 of the Excise Tax Act provide many instances of exceptions.

62/ General Sales and Excise Tax Regulations: op. cit., No. 11.

63/ Notably in Schedule III of the Excise Tax Act: op. cit., as amended by 8-9 Elizabeth II, S.C. 1960, c. 30, s. 2; 9-10 Elizabeth II, 1960-61, c. 47, s. 8(1); 11-12 Elizabeth II, S.C. 1962-63, c. 6, s. 3(3)(5)(6).

64/ Excise Tax Act: op. cit., s. 30(1d) added by 7 Elizabeth II, S.C. 1959, c. 23, s. 5(1).

65/ Excise Tax Act: op. cit., s. 31(1).

66/ For example: machines and accessories, printed matter, tools and various articles made by the manufacturer for his own use.

67/ General Sales and Excise Tax Regulations: op. cit., Nos. 23, 24 and 25.

68/ Excise Tax Act: op. cit., ss. 30(1)(b) and 29(1)(f).

69/ Op. cit., s. 29(1)(a).

70/ Op. cit., s. 29(3)(b) as amended by 7-8 Elizabeth II, S.C. 1959, c. 23, s. 4(2).
General Sales and Excise Tax Regulations: op. cit., No. 26.

71/ Excise Tax Act: op. cit., s. 30(2), as amended by 7-8 Elizabeth II, S.C. 1959, c. 23, s. 5(2).

72/ Op. cit., s. 30(1)(c) as amended by 7-8 Elizabeth II, S.C. 1959, c. 23, s. 5(1).

73/ Op. cit.

74/ Excise Tax Act: op. cit., s. 30(1)(c) and (1)(d) as amended by 7-8 Elizabeth II, S.C. 1959, c. 23 s. 5(1).

75/ General Sales and Excise Tax Regulations: op. cit., No. 28(4).

76/ Now, generally 11 per cent. Excise Tax Act: op. cit., s. 30(1), as amended by 7-8 Elizabeth II, S.C. 1959, c. 23, s. 5(1); and Old Age Security Act, R.S.C. 1952, c. 200, 7-8 Elizabeth II, S.C. 1959, c. 14, s. 1(1).

77/ By extra-statutory concession is meant any departure from the letter of the law deliberately allowed or instituted by the Department.

78/ See infra under 4.1.5.3.2.

79/ General Sales and Excise Tax Regulations: op. cit., No. 28(7).

80/ Excise Tax Act: op. cit., s. 30(1)(a).

81/ Op. cit., s. 29(1)(f).

82/ Op. cit., s. 29(3)(a) as amended by 2-3 Elizabeth II, S.C. 1953-54, c. 6, s. 6(2). General Sales and Excise Tax Regulations: No. 28.

83/ Op. cit., Regulation No. 21.

84/ Submission presented to the Royal Commission on Taxation by Avon Products of Canada Ltd., on April 23, 1963, p. 12.

85/ Op. cit., Regulation No. 21(2g).

86/ General Sales and Excise Tax Regulations: op. cit., No. 27.

87/ General Sales and Excise Tax Regulations: op. cit., Nos. 21 and 28.

88/ Brief submitted to the Royal Commission on Taxation by the Canadian Bar Association, dated January 11, 1964, p. 79.

89/ For example, a mistake regarding the tax liability of certain sales.

90/ See supra under 4.1.3.3.2.

91/ Excise Tax Act: op. cit., s. 55(9).

92/ Op. cit., s. 54(2).

93/ Op. cit., s. 60.

94/ Op. cit., s. 60.

95/ Op. cit., s. 54(2).

96/ Op. cit., s. 55(9).

97/ General Sales and Excise Tax Regulations: op. cit., No. 4(2).

98/ Excise Tax Act: op. cit., Parts I and II.

99/ There are about 40 in the Montreal Collection District alone.

100/ Excise Tax Act: op. cit., s. 48(5) added by 5 Elizabeth II, S.C. 1957, c. 26, s. 5, Circular No. ET 159, dated January 2, 1962, s. 19.

101/ A list of these hospitals is given in Circular No. ET 160, dated January 31, 1964.

102/ Excise Tax Act: op. cit., s. 47, as amended by 7 Elizabeth II, S.C. 1958, c. 30, s. 6; 2 Elizabeth II, S.C. 1963, c. 12, s. 6. General Sales and Excise Tax Regulations: op. cit., No. 43.

103/ Circular No. ET 159, dated January 2, 1962, s. 10.

104/ Excise Tax Act: op. cit., s. 48, as amended by 5 Elizabeth II, S.C. 1957, c. 26, s. 5.

105/ General Sales and Excise Tax Regulations: op. cit., No. 12.

106/ Excise Tax Act: op. cit., s. 48(3), as amended by 5 Elizabeth II, S.C. 1957, c. 26, s. 5.

107/ Op. cit., s. 54(1).

108/ Op. cit., s. 48(4) as amended by 5 Elizabeth II, S.C. 1957, c. 26, s. 5. For income tax, interest is at 6 per cent per annum. Income Tax Act, R.S.C. 1952, c. 148, s. 54(1).

109/ Excise Tax Act: op. cit., s. 54(1).

110/ Op. cit., s. 48(5), as amended by 5 Elizabeth II, S.C. 1957, c. 26, s. 5.

111/ Excise Tax Act: op. cit., s. 48(4) as amended by 5 Elizabeth II, S.C.

112/ Op. cit., s. 50(6).

113/ Op. cit., s. 50(7).

114/ Op. cit., s. 50(8).

115/ Op. cit., s. 50(9).

116/ Op. cit., s. 53(1).

117/ Op. cit., s. 50(8a) as amended by 2-3 Elizabeth II, S.C. 1953-54, c. 56 s. 11.

118/ Op. cit., s. 50(4).

119/ Op. cit., s. 50(4).

120/ Op. cit., s. 53(1).

121/ Under s. 53 of the Excise Tax Act.

122/ See supra under 4.1.4.2.

123/ See supra under 4.1.3.4.4.

124/ See supra under 4.1.4.2.2.1.

125/ Excise Tax Act: op. cit., ss.46 and 47, as amended by 2-3 Elizabeth II, S.C. 1953-54, c. 56, s. 10; 7-8 Elizabeth II, S.C. 1959, c. 23, s. 9.

126/ General Sales and Excise Tax Regulations: No. 14.

127/ Op. cit., Regulation No. 14(1a) and (1b)

128/ Excise Tax Act: op. cit., ss.44 and 46(7), as amended by 2-3 Elizabeth II, S.C. 1953-54, c. 56, s. 10; Regulations, op. cit., Nos. 41 and 42.

129/ Op. cit., s. 46(2) as amended by 7-8 Elizabeth II, S.C. 1959, c. 23, s. 9; and Regulations, op. cit., No. 47.

130/ Op. cit., s. 32(1), and Schedule III, Regulations, op. cit., No. 45.

131/ Op. cit., s. 47, as amended by 7 Elizabeth II, S.C. 1958, c. 30, s. 6; 12 Elizabeth II, S.C. 1963, c. 12, s. 6; and Regulations, op. cit., Nos. 43-44.

132/ That is, around $10 or $20.

133/ See above under 4.1.3.3.2.2.

134/ Excise Tax Act: op. cit., s. 48, as amended by 5 Elizabeth II, S.C. 1957, c. 26, s. 5. See supra under 4.1.4.2.

135/ Op. cit., s. 48(5), as amended by 5 Elizabeth II, S.C. 1957, c. 26, s. 5.

136/ Brief submitted to the Royal Commission on Taxation by E. Langemann, August 12, 1963, p. 3.

137/ R.S.C. 1952, c. 116.

138/ Excise Tax Act, op. cit., s. 31(1).

139/ Brief submitted to the Royal Commission on Taxation by the Edmonton Chamber of Commerce, August 19, 1963, p. 21.

140/ See supra under 4.1.3.4.2.3.2.

141/ Excise Tax Act: op. cit., ss. 31 and 37.

142/ See supra under 4.1.6.

143/ Brief submitted to the Royal Commission on Taxation by The Canadian Bar Association, January 11, 1964, p. 80.

144/ Brief submitted to the Royal Commission on Taxation by The Canadian Manufacturers' Association, January 6, 1964, p. 42.

145/ Excise Tax Act: op. cit.

146/ R.S.C. 1952, c. 148, s. 133(1) as amended by 11-12 Elizabeth II, S.C. 1962-63, c. 8, s. 26.

147/ R.S.C. 1952, c. 99 as amended.

148/ Excise Act, op. cit., c. 99, Schedule, s. 1(1), as amended by 7-8 Elizabeth II, R.S.C. 1959, c. 13.

149/ R.S.C. 1952, c. 99 as amended.

150/ Op. cit.

151/ R.S.C. 1952, c. 100 as amended.

152/ R.S.C. 1952, c. 99 as amended.

153/ Excise Act, op. cit., s. 10.

154/ Excise Act, op. cit., s. 158, 178, 179, 233, 234 and 261.

155/ Excise Act, op. cit., s. 86, 158(2), 180(2), 234 and 261.

156/ Excise Act, op. cit., s. 159, 178(2), 235.

157/ Excise Act, op. cit., s. 226.

158/ Excise Act, op. cit., s. 232(3).

159/ Excise Act, op. cit., s. 13.

160/ Excise Act, op. cit., s. 17.

161/ Excise Act, op. cit., s. 19.

162/ Excise Act, op. cit., ss.129(1), 131(1c), 136(6), 169(1).

163/ Excise Act, op. cit., ss.136(5), 133.

164/ Excise Act, op. cit., s. 132.

165/ Excise Act, op. cit., ss.170(1), 186, 201 and 228.

166/ Excise Act, op. cit., s. 257.

167/ Excise Act, op. cit., s. 8(1).

168/ Excise Act, op. cit., s. 12(1).

169/ Excise Act, op. cit., s. 31 and Regulations applicable to various industries, e.g., distilleries, breweries or tobacco manufacturers.

170/ Excise Act, op. cit., ss.36 and 37.

171/ Excise Act, op. cit., ss.38 and 39.

172/ R.S.C. 1952, c. 99 as amended.

173/ Excise Act, op. cit., s. 137(1a), 213 and related Regulations.

174/ Excise Act, op. cit.

175/ R.S.C. 1952, c. 99 as amended.

176/ See supra, c. 3.

177/ Excise Act, op. cit., ss.76 and 79.

178/ An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms 8-9 Elizabeth II, S.C. 1960, c. 44.

179/ Brief submitted to the Royal Commission on Taxation by The Canadian Electrical Manufacturers Association, December 4, 1963, p. 9.

180/ Brief submitted to the Royal Commission on Taxation by C. Beadnall, August 14, 1963, p. 1.

181/ Brief submitted to the Royal Commission on Taxation by The Canadian Manufacturers' Association, January 6, 1964, p. 42; E. Langemann, August 12, 1963, p. 6.

182/ Briefs submitted to the Royal Commission on Taxation by:
- E. Langemann, August 12, 1963, p. 8.
- M. C. Foster, May 23, 1963, p. 3.
- Francis Lorenzen, November 8, 1963, p. 7.

183/ Excise Tax Act, 1952, R.S.C. c. 100 as amended, s. 38(1).

184/ The determination of the taxable selling price, for instance.

185/ Partington v. Att.-Gen., (1869-70) L.R. 4, H.L. 100.
Tennant v. Smith, (1892) A.C. 150.

186/ R.S.C. 1952, c. 100 as amended.

187/ A list of conditional exemptions appears in Schedule III of the Excise Tax Act: op. cit.

188/ Excise Tax Act: op. cit., s. 68(1), as amended by 7-8 Elizabeth II, S.C. 1959, c. 23, s. 10.

189/ Briefs submitted to the Royal Commission on Taxation by:
- Edmonton Chamber of Commerce, August 19, 1963, p. 23;
- The Canadian Construction Association, January 17, 1964, p. 119;
- The Canadian Manufacturers' Association, January 6, 1964, p. 46;
- The Canadian Electrical Manufacturers Association, December 4, 1963, p. 18;
- The Canadian Institute of Chartered Accountants, December 12 and 13, 1963, p. 113.

PART THREE

THE INTERPRETATIVE MACHINERY

The implementation of tax legislation gives rise daily to difficult problems of interpretation which bring out, on the one hand, the necessity of administrative efficiency and, on the other, the costliness, slowness and rigidity of judicial procedures. Fortunately, the possibility of resorting to the courts does not prevent the existence and development of administrative machinery tending to clarify the law, lessen the risks of business and reduce the volume of litigation.

CHAPTER 5 - DEPARTMENTAL INTERPRETATION OF TAX LEGISLATION

Whether a statute is recent or long-standing, its administration raises problems of interpretation. It is open to the administering authority to give an official construction of it by means of interpretative regulations. It may also, at the request of a taxpayer, state in advance its position regarding him, thus enabling him to consider the tax consequences of steps he contemplates taking in the conduct of his affairs. Finally, in such a complex field as taxation, the administering authority must review its own decisions. Hence the need of considering successively such things as interpretative regulations, advance rulings, and departmental review of administrative decisions.

5.1. INTERPRETATIVE REGULATIONS

The practice of issuing interpretative regulations, non-existent in Canada, has been followed in the United States, apparently with considerable success. Its adoption in Canada has been recommended in submissions to the Royal Commission on Taxation. 1/ Before considering this possibility, it is proper to inquire into what is meant by interpretative regulations and how they operate in the United States system.

5.1.1. DEFINITION

Interpretative regulations are prepared and published by the Department for the purpose of facilitating the interpretation of legislation. In practice, they are considered binding on the Department. However, not having force of law, they are not binding on the taxpayers or on the courts.

Interpretative regulations should not be confused with advance rulings nor with delegated legislation. Unlike advance rulings, they are more closely related to regislation than to adjudication. Consequently they are published and have general application. Interpretative regulations also differ from legislative regulations in that, resulting from administrative practice, they are without force of law and tend solely to clarify the law. Legislative regulations, on the other hand, resulting from a delegation of legislative power, have force of law and develop or modify the law. 2/ Though the line separating the two is clear enough in theory, it is at times somewhat blurred in practice. Indeed, whereas the power to make interpretative regulations may be inferred from the functions of the Department such regulations are sometimes issued in pursuance of specific legislative authorization. 3/ Besides, when the Department, by means of interpretative regulations, fills a gap in a statute or imparts a meaning to vague or ambiguous terms, it comes close to changing the law. This is particularly true when the courts, in construing a statutory provision, take account of interpretative regulations, as United States courts usually do.

5.1.2. THE UNITED STATES SYSTEM

In the United States, interpretative regulations are issued under section 7805 of the United States Internal Revenue Code which states that the Commissioner of Inland Revenue, with the approval of the Secretary of the Treasury, may issue any rule or regulation considered necessary for the administration of the Act. 4/ In the opinion of Professor Davis, this section is simply declaratory:

> The great bulk of Treasury Regulations under the tax laws clearly are interpretative rules, not legislative rules,

> despite the provisions of § 7805 that "the Secretary or his delegate shall prescribe all needful rules and regulations for the enforcement of this title..." Without the grant of power by § 7805, the power of the Secretary or his delegate would be the same; this is because the provision from the beginning has been understood as something less than a delegation of power to issue rules which would be binding upon the courts. 5/

In order to properly understand the system used in the United States, it is necessary to consider first how interpretative regulations are made and, next, how they are viewed by the courts.

5.1.2.1. DRAFTING INTERPRETATIVE REGULATIONS

According to information supplied by the Treasury Department, 6/ three divisions of the Office of the Chief Counsel of the Internal Revenue Service participate in the making of interpretative regulations: the Legislation and Regulations Division, the Technical Planning Division and the Office of Legislative Counsel. The Legislation and Regulations Division employs some 55 lawyers and 40 clerical assistants, the Technical Planning Division about 25 experts and 10 secretaries, and the Office of Tax Legislative Counsel about 15 lawyers and 10 secretaries. As these officials devote about half their time to drafting regulations, it is estimated that this work would require the full-time services of some 50 specialists and 30 assistants.

Interpretative regulations are submitted to public discussion. The draft regulations are all published in the Federal Register in order to give the public an opportunity to submit comments and suggestions. Lawyers and accountants make regular use of this opportunity and regulations are frequently amended or withdrawn as a result of their representations. 7/

Eventually, all interpretative regulations are published in the Federal Register and in the Code of Federal Regulations. Each regulation is related to a particular section of the U.S. Internal Revenue Code and is numbered with the prefix: 1, 20 or 25, followed by the number of the section which is being interpreted, depending on whether the particular section refers to income, estate or gift tax. Generally speaking, all regulations are drafted along similar lines. First, the basic idea of the provision is interpreted and expressed in simple terms which the layman can understand. Secondly, the immediate legal implications of the application of the section interpreted are defined and amplified. Examples are frequently given to explain how provisions apply to sets of circumstances most likely to arise in practice. Then, the application of the provision to more unusual or more difficult cases is considered. It is apparent that this procedure has led to the publication of an impressive number of interpretative regulations.

5.1.2.2. THE AUTHORITY ATTACHED TO INTERPRETATIVE REGULATIONS

Though interpretative regulations do not have force of law, it must not be thought that the United States courts systematically disregard them. Not only do they take account of them but a judge hesitates to depart from them when faced with technical matters with which he may not be very familiar. Besides, when difficulties arise in interpreting a statute, the courts willingly let themselves be guided by the interpretative regulations, just as they take into account extraneous matters liable to throw light on the subject before them. 8/ Except for very serious reasons, the courts usually accept these regulations as long as they are reasonable and in line with the Code. In so doing they are not abdicating their authority but

are merely exercising common sense and due modesty. In 1933, Judge Cardozo laid down the following principle:

> ...administrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the command is indefinite and doubtful.... 9/

It should be noted that interpretative regulations are given greater weight when they were drafted soon after the enactment of the statute to which they relate, or again when they have been applied over a long period of time.

United States courts attach particular authority to interpretative regulations issued soon after the passing of the relevant legislation. 10/ They also take into account that such regulations reflect the opinion of officials who played an important part in drafting the statute and implementing it. This attitude of theirs goes back for more than 75 years. In 1933, Judge Cardozo expressed it as follows:

> The practice has peculiar weight where it involves a contemporaneous construction of a statute by the man charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new. 11/

A review of the jurisprudence shows that the courts have long attached particular weight to interpretative regulations applied over a considerable period of time. 12/ This attitude is justifiable. Many years may pass before a legislative provision receives judicial interpretation and, meanwhile, since life continues its course, the Department applies the interpretative regulations it has formulated. These regulations having throughout the years acquired a presumption of validity, the courts hesitate to

replace them with their own interpretation of the law. Thus, in 1938, the United States Supreme Court enunciated the following principle:

> Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law. 13/

However, an interpretative regulation, even if it is contemporaneous with the statute to be construed and has been followed for a long time, is unhesitatingly set aside by the courts when it runs counter to the law. Indeed, the Supreme Court of the United States did reject a regulation that had stood for sixteen years. 14/ The Department should therefore resist any temptation to take unto itself, by means of an interpretative regulation, what it has vainly sought from the legislator.

5.1.3. ADVANTAGES AND DISADVANTAGES

Briefs submitted to the Royal Commission on Taxation by the Canadian Manufacturers' Association, 15/ The Canadian Institute of Chartered Accountants, 16/ and the Canadian Bar Association, 17/ have urged the adoption of a system of interpretative regulations in Canada, one of their arguments being that, by filling in gaps in the law they give its provisions more definiteness and clarity. In the words of Professor W. G. Leonard of Queen's University:

> In my view, it is evidence of retarded, mediaeval-type thinking to defend any wilful proliferation of taxpayer uncertainties in areas where feelings of uncertainty and uneasiness could be reduced by the publication of official interpretations of doubtful or difficult matters. Persistent refusal to define boundaries except on request, and then only in private, is a serious cause of needless confusion which we can ill afford. 18/

According to some authors, the practice of interpretative regulations would reduce business risks and help keep litigation to a minimum by making

taxpayers aware of the tax consequences of contemplated transactions. On this point Roger Blough wrote:

> Sound administrative interpretation of tax law should make it possible to hold litigation to a minimum by making the tax consequences of a prospective transaction more clear. Rulings on such transactions make the tax consequences even more certain. If the result of minimizing litigation actually is to be achieved, however, the regulations must be comprehensive and must firmly cover the issues, and the courts must uphold the regulations. Under these circumstances the piecemeal interpretation by judicial decision is avoided. Otherwise, uncertainty about the meaning of the statute may continue indefinitely, with regulations giving the taxpayer more matters to litigate. 19/

Finally, the publication of interpretative regulations would introduce an element of fair play into the administration of the tax laws which would have the psychological effect of stimulating public confidence in the impartiality of law enforcement.

In spite of these arguments, the net effect of the use of interpretative regulations would be apparently unfavourable. Certainly, the officials responsible for making the regulations would be faced with a delicate and difficult task. As they would not be fully independent, their impartiality, if not their good faith, could be questioned. They could be suspected of systematically favouring the Department in doubtful cases. Moreover, they would have to be highly skilled draftsmen to prepare definite rules consistent with the statute and adapted to the ever changing complexities of the business world. In view of all these requirements, they might sometimes find themselves unable to do better than draft rules too vague to have any practical value. Finally, it would be necessary to assign a large number of experts to the work of preparing the interpretative regulations and keeping them up to date at a time when the Department of National Revenue is suffering from a shortage of qualified staff.

To the problems of drafting the regulations must be added those of administering them. It is doubtful whether the regulations can supply all the clarification and security expected of them. Taxpayers might find themselves faced with even more complications, as the number of regulations must inevitably increase and the public will call for new regulations to interpret existing ones. Officials and taxpayers could easily be deluged by a flood of loose-leaf pages required to keep the regulations up to date.

Secondly, to allow the Department to publish interpretative regulations would amount to giving it quasi-legislative authority. Even if the regulations do not have force of law, it has been shown that in the United States the courts tend to give them considerable weight. It is therefore to be feared that in practice the taxpayers, insensible to legal subtleties, confuse such administrative regulations with the statute and believe themselves obliged to observe them. If the courts confirm the interpretative regulations, few citizens will, except in extreme cases, go to the considerable expense of attempting to have them declared invalid. But if, by chance, a regulation is amended or rescinded, the taxpayer who has accepted it in all confidence in the conduct of his business will be rightly dissatisfied.

Finally, a system of interpretative regulations might restrict the Department in its negotiations with the taxpayer. It is in the latter's interest that responsibility for judging each particular case be left with the officials. Differences arising between the Department and a taxpayer can often be resolved through unofficial negotiations. The Department should leave room for the human element and for a moderate and intelligent exercise of administrative judgment. This can only be done when the officials are not bound by rigid regulations, some of which might be unfair to the taxpayer.

> ...it is essential to a proper administration of the statutes that a flexible discretion be vested in the administrative authorities. 20/

If it is really desired to reduce the volume of litigation, efforts should be made to settle most of the cases through unofficial negotiations. To that end, officials should be trusted and be left some latitude to administer the law according to their own judgment and sense of fairness. If they are tied down by interpretative regulations, the taxpayer's only recourse is to contest the regulation before the courts. But would he dare enter such an unequal contest? In most cases he would resign himself to acceptance of the departmental interpretation and swell the ranks of dissatisfied citizens.

For these various reasons, it would seem that a system of interpretative regulations would be more harmful than helpful to both the Department and the taxpayer. If it is desired to enlighten the taxpayer as to the tax consequences of their plans, it is possible to do so by means of advance rulings. However, it is doubtful whether the Department, which is already suffering from a shortage of qualified staff, could set up at one and the same time services for advance rulings and interpretative regulations. There is also a possibility that the two services might overlap. If advance rulings became available in Canada, taxpayers would make use of them to determine the official view of the tax consequences of their future transactions and, having done so, would feel safe in acting accordingly. One may well ask what additional benefits could be expected in most cases from interpretative regulations.

5.2. ADVANCE RULINGS

An advance ruling is a statement given by the Department to a taxpayer

informing him how it will interpret the law in respect of a definite transaction which he is contemplating. In Canada, the Minister of National Revenue sometimes issues advance rulings, 21/ but this is simply an administrative practice for which there are no set rules or formalities and the rulings are applied entirely at the discretion of the Department.

Several organizations 22/ have asked the Royal Commission on Taxation to look into the question of setting up a section within the Department of National Revenue to supply taxpayers with written rulings setting out the interpretation which the Minister would give to the law as applied to a given situation. Most of them went so far as to ask for the institution of the United States system in which such advance rulings amount to a definite understanding between the Department and the taxpayer which is binding before the courts. Before taking a stand on the subject, it will be useful to consider briefly how the system operates in the United States.

5.2.1. THE UNITED STATES SYSTEM

Until 1935 the Internal Revenue Service did not give advance rulings. From that year on, it has done so, but only in the rare cases where the law required it. Legislation was enacted in 1938 granting the Commissioner power to enter into closing agreements. 23/ For the first time, United States citizens could ascertain the tax consequences of future transactions. However, the procedure was slow and complicated. Approval had to be given by the Commissioner, the Chief Counsel and the Secretary and Assistant Secretary of the Treasury. Requests for rulings were so numerous at the beginning of the Second World War that it became necessary to simplify the procedure. Since then, the Internal Revenue Service has been giving advance rulings without going through the long procedure required for closing agreements. 24/

Three types of rulings are now available to the U.S. taxpayer:

a) Revenue Rulings:

A "ruling" is a written statement issued to a taxpayer or his authorized representative by the National Office which interprets and applies the tax laws to a specific set of facts. Rulings are issued only by the National Office. The issuance of rulings is under the general supervision of the Assistant Commissioner (Technical) and has been largely redelegated to the Tax Rulings Division.

A "Revenue Ruling" is an official interpretation by the Service which has been published in the Internal Revenue Bulletin. Revenue Rulings are issued only by the National Office and are published for the information and guidance of taxpayers, Internal Revenue Service officials, and others concerned. 25/

b) Determination Letters:

A "determination letter" is a written statement issued by a district director in response to an inquiry by an individual or an organization, which applies to the particular facts involved the principles and precedents previously announced by the National Office. Determination letters are issued only where a determination can be made on the basis of clearly established rules as set forth in the statutes, Treasury decisions or regulations, or by rulings, opinions, or court decisions published in the Internal Revenue Bulletin. Where such a determination cannot be made, such as where the question presented involves a novel issue, or the matter is excluded from the jurisdiction of a district director by the provisions of paragraph (c) of this section, a determination letter will not be issued. 26/

c) Closing Agreements:

Under section 7121 of the Code and the regulations thereunder the Commissioner, or any officer or employee of the Internal Revenue Service authorized in writing by the Commissioner, may enter into and approve a written agreement with any person relating to the liability of such person (or of the person or estate for whom he acts) in respect of any internal revenue tax for any taxable period. Such agreement, except upon a showing of fraud or malfeasance, or misrepresentation of a material fact, shall be final and conclusive. 27/

Theoretically, rulings are not binding on the Commissioner unless given in the form of closing agreements. In practice, however, rulings are

not revoked retroactively unless there has been misrepresentation or omission of facts. 28/

> Thus, a ruling or determination letter will be modified or revoked prospectively only if (1) there has been no misstatement or omission of any material facts, (2) the facts which develop are not materially different from the facts on which the ruling was based, (3) there had been no change in the applicable law and (4) the taxpayer acted in good faith in reliance upon the ruling, and retroactive revocation would be to his detriment. 29/

The great majority of rulings concerning future transactions are given in the form not of closing agreements or of determination letters, but of advance rulings issued by the National Office of the Internal Revenue Service. The Commissioner, in whom the authority is vested, delegates his authority to the Assistant Commissioner (Technical), who in turn delegates it to the Tax Ruling Division. All rulings are issued from Washington, in the interests of co-ordination and uniformity. The Tax Ruling Division comprises eight branches: Corporation Tax, Individual Income Tax, Exempt Organization, Pension Trust, Reorganization and Dividend, Estate and Gift Tax, Excise Tax and Employment Tax. The Division employs about 270 experts, most of whom are accountants or lawyers, together with some 100 secretaries, a few engineers and some economists. In 1958 the Division received 45,170 requests for rulings, 30/ issued 36,000 rulings of which 32,000 went to taxpayers and 4,000 to revenue agents. 31/

What steps does the taxpayer take to obtain an advance ruling? Usually he begins by sounding out the administering authority about his chances of obtaining the ruling and whether it is likely to be favourable. Afterwards, he files a request to which he appends a copy of every document relating to the question. This request must be filed in duplicate and be signed by the

taxpayer himself or by his agent, who must be qualified to represent him before the Internal Revenue Service. It must contain a detailed statement of the facts, of the reasons for the transaction and of the arguments submitted by the applicant. With the request or later, a hearing may be applied for. The most important part of the request is the statement of facts, which will be reproduced in any ruling issued. Later, when the tax return is filed, the transaction will be looked into carefully to ascertain that all facts are in accordance with those contained in the ruling. It follows that the facts must be fully and frankly disclosed, and that any departure from the original facts submitted must be brought to the attention of the Service for a new ruling before the return is checked.

On receipt of a request, the Director of the branch concerned assigns the case to one of the experts on his staff. Who signs the ruling? That depends upon the novelty or complexity of the case or the amount involved. In fairly simple cases, the Section Supervisor signs it on behalf of the Branch Director; but in the majority of cases the signing is done by the Divisional Director, the Assistant Commissioner (Technical) or the Commissioner. At each stage, the draft may be reconsidered and the Chief Counsel may be consulted. Owing to the number and complexity of the cases submitted, it is usual to wait for one to three months for a ruling, and in especially difficult cases the delay may be even a year. 32/

Theoretically, the issue of rulings is discretionary. In practice, however, rulings are refused only in the following cases:

(1) in hypothetical cases;

(2) where the identical issue is involved in a return of the taxpayer already filed and where the prior year is still open;

(3) where the determination requested is primarily one of fact, such as (a) determination of the market value of property, (b) whether compensation is reasonable in amount, (c) whether a transfer is one in contemplation of death, (d) whether retention of earnings and profits by a corporation is for the purpose of avoiding surtax on its stockholders, and (e) whether a transfer is within sections 1551 or 269 of the 1954 Code; or

(4) where the determination requested involves policy matters under consideration by the Service. 33/

In 1958, 687 revenue rulings were published in the Internal Revenue Bulletin. 34/ Current practice is to publish all that are considered to be of general interest. Revenue officers, the taxpayers and their advisers may then refer to them as guides. Uniform administration of the Code is thus facilitated.

Such is the basic machinery for the issue of advance rulings in the United States. The advantages and disadvantages of adopting this procedure in Canada may now be considered.

5.2.2. THE SITUATION IN CANADA

Advance rulings have not yet been instituted in Canada and the law makes no provision for them. Any interpretation that may be given by a revenue officer must be accepted simply for what it is: his opinion, always subject to review by a senior official and in no way binding on the Department. 35/

Prior to the setting up of the Royal Commission on Taxation, there often had been talk in tax circles of the possibility of introducing the

United States advance ruling procedure into Canada. On February 6, 1959, the Canadian Bar Association and the Canadian Institute of Chartered Accountants submitted a joint brief to the Minister of Finance and the Minister of National Revenue containing the following recommendations:

(1) That the Income Tax Act be amended to authorize the Minister of National Revenue through his designated officers to make Advance Rulings on the request of taxpayers as to the tax assessment which would result from specific prospective transactions.

(2) That in setting up the necessary administrative machinery the following principles be adopted:

(a) One central agency should be responsible for all Advance Rulings.

(b) Advance Rulings should be issued only for specific prospective transactions based upon full disclosure of all relevant facts and of all business reasons therefor, and, where of general application, should be published.

(c) For all assessing purposes, an Advance Ruling should bind the Income Tax Department against making any assessment less favourable to the applicant, where:

(i) there has been no misstatement or omission of material facts on the application;
(ii) the facts subsequently developed are not materially different from the facts on which ruling was based;
(iii) there has been no change in the applicable law;
(iv) the taxpayer has acted in good faith in reliance on the ruling and a retroactive revocation would be to his detriment.

(d) Any Advance Ruling should be without prejudice to any of the rights of the applicant. 36/

5.2.2.1. ADVANTAGES

In support of this recommendation, these two well-known professional bodies submitted that the taxpayer is entitled to know the tax consequences

of his intended transactions, that this procedure would help to counteract the ambiguity of the present state of the law and that, in any event, it is no more difficult for the Department to give an advance ruling on a future transaction than to make an assessment once the transaction is through. In their opinion, advance rulings would have the following advantages:

(1) Advance knowledge of tax liability arising out of the specific transaction reduces business risk and thereby tends to encourage investment and business activity.

(2) Advance Rulings tend to provide certainty as to the law and thereby aid business and other elements of the economy upon the normal activity on which the tax system is dependent.

(3) An Advance Ruling tends to discourage transactions which are likely to result in expensive and fruitless tax controversies.

(4) An Advance Ruling facilitates the correct computation of taxes by taxpayers and thereby promotes voluntary compliance.

(5) Requests for Advance Rulings are an important source of information as to the tax-thinking of taxpayers and tax practitioners for the assistance of the authorities and laying the ground work for fair and economical tax administration.

(6) Requests for Advance Rulings facilitate the work of assessment by providing information much earlier than would otherwise be obtained.

(7) Publication of such Advance Rulings when of general application would promote uniformity of assessment and avoid multiplicity of applications on the same point. 37/

5.2.2.2. DISADVANTAGES

On the other hand, in the light of experience gained in the United States, the difficulties involved can be easily anticipated. Jacques Barbeau has summarized them as follows:

(1) Advance tax ruling precedents will complicate rather than simplify the law and practice of income taxation in Canada.

(2) Advance tax ruling precedents may add to rather than counteract the ambiguities now existing under the Income Tax Act.

(3) Rulings may enlarge rather than limit the scope of taxation.

(4) The interpretation of advance ruling precedents will give rise to the same problems as are now encountered in the interpretation of the Income Tax Act.

(5) The cost of administration of such a procedure both to the taxpayer and to the Government may not warrant the adoption of such a procedure at this time. 38/

It remains to be seen whether the advantages outweigh the disadvantages.

5.2.2.3. CONCLUSIONS

It should be stated at the start that the various associations which have asked the Royal Commission on Taxation to introduce a system of advance rulings are agreed that the present policy of the Department of National Revenue regarding advance opinions has been given satisfactory results. In general, there have been no complaints that the Department has refused to express an opinion or that it has gone back on such an opinion at the time of assessment. Therefore, there seems to be no good reason for doing away with the present practice of allowing taxpayers or their agents to consult National Revenue officials and obtaining their views on the tax consequences of proposed transactions. Secondly, any advance ruling procedure should be considered together with other suggested reforms of the Canadian tax system. Alone, it cannot solve all the problems which beset the administration of the tax laws. For instance, the publication for taxpayers of the assessors' guide and the reduction of ministerial discretion are two other potent means of counteracting the lack of precision of tax legislation.

A careful sifting of the arguments put forward in favour of advance rulings leaves only one of these—lessening of business risk—that carries any real weight. Even if the legislator reduced ministerial discretion to a minimum and made the law as clear as possible, areas of uncertainty would still remain, which would tend to increase business risk. Businessmen are naturally hesitant to engage in transactions of which they cannot determine the tax consequences. 39/ Supposing they assume the risk and find that their estimates of the tax consequences were wrong, they are penalized to the tune of interest at an effective rate of 12% on unpaid taxes. The argument is that, with advance rulings, businessmen could be fully informed regarding the tax liabilities attached to their proposed transactions and that this would be a valuable stimulus to the economy.

One of the arguments against advance rulings is that they would complicate rather than simplify the interpretation of tax legislation. This may sound somewhat paradoxical, their purpose being precisely to clarify the taxpayer's legal situation. So far as taxpayers may resort to rulings given in other cases, the ever increasing number of advance rulings would necessarily complicate the interpretation of tax law, because the rulings themselves would have to be interpreted.

Little weight can be attached to the objection that the Department would tend to apply the law more strictly under a system of advance rulings. There is no reason why the Department should adopt a more stringent policy for advance rulings than it does when assessing a completed transaction.

Some consideration should be given to the objection that a system of advance rulings would be expensive for both State and taxpayer. The argument presupposes that a large number of taxpayers would take advantage of

the advance ruling system to obtain a prior settlement of their tax problems. The answer to this is that recourse to advance rulings should be exceptional. Furthermore, it is easy to exaggerate the cost of such a system. As far as the Department is concerned, it should not cost much more to come to a decision on a future transaction than it does to assess one that has been completed. There would, of course, be the additional cost of checking that the completed transaction was in accordance with the facts set forth in the request for the ruling. There would probably be some additional costs for the taxpayer also, but the latter is free to decide whether an advance ruling would be worth its cost.

The introduction of advance rulings in Canada would bring up the practical problem of recruiting and training a staff to issue them. If the Canadian system were patterned after the United States experience, a comparable service would require a staff of not less than roughly 30 revenue officials 40/ devoted entirely to the preparation of advance rulings. According to the Report of the 9th Conference of the Canadian Tax Foundation, it would appear that the staffing problem is the main reason why senior National Revenue officials entertain misgivings about starting a system of advance rulings 41/ in Canada. Even ministers have expressed such doubts. For instance, in 1963, Honourable Walter Gordon, Minister of Finance, had this to say in the House of Commons:

> Speaking personally, and only personally, I could not agree more with the hon. Member. I should like to see the day when any taxpayer or a businessman can go to the department and ask for a prospective ruling. I am not suggesting that at the moment because my hon. friend the Minister of National Revenue would point out to me that his department is badly understaffed and simply could not handle it. Perhaps the answer to it is to give him sufficient staff to deal with these matters in the way which has been suggested, but I am afraid that cannot be done right away. It takes trained and expert staff to handle these matters, and such people cannot be picked up off the street in a week or two. 42/

In the light of the foregoing review, it is possible to come to certain conclusions concerning the introduction of advance rulings in Canada.

1. Recourse to an advance ruling system results in a reduction of business risk. This can be demonstrated theoretically, using the U.S. experience as a model. The objections, on the other hand, are by no means conclusive. The principal objection lies in the difficulty of recruiting a competent and experienced staff in short order. Consequently, it appears to be both possible and desirable to introduce an advance ruling system in Canada, provided that this is done on a step-by-step basis.

Use of the system should be restricted, at least initially. Instead of following the U.S. system of listing the cases where advance rulings may not be sought, it might be advisable to adopt the more restrictive course of listing the cases in which advance rulings will be given. For instance, during the early stages the use of the procedure could be limited to those cases where the law vests discretionary powers in the Minister and where the proposed transaction involved a specified minimum difference of, say, $5,000 or $10,000 in the amount of taxable income.

Considering that the introduction of an advance ruling system would reduce business risks and considering also the problem of recruiting the necessary staff to run the service properly, we recommend that:

> Advance rulings be introduced, but that they be restricted, at first, to cases where the law vests discretionary powers in the Minister and where the transaction involves a difference of a specified minimum amount in the calculation of taxable income. As and when the staff can be enlarged with the addition of experienced and competent personnel, the scope of the advance ruling system could be extended.

2. It is essential to forestall frivolous or improper use of the system, such as would make it into a vast game of hide-and-seek, in which the taxpayer brings up the same case in various disguises until he finds the best dodge for avoiding taxation. To achieve this end, the Department might charge a fee for its services, which fee would increase in proportion to the amount of taxable income involved in the case. Obviously advance rulings are of little interest to the ordinary taxpayer. They are chiefly of value to firms doing business on a large scale. It is reasonable that this special category of taxpayers should be called upon to pay for the services they require. The fee system would tend to eliminate frivolous requests for rulings and help pay for the cost of running the service.

Proper use of the advance ruling service must be ensured and improper recourse to the procedure prevented. We therefore recommend that:

> A specified minimum fee be charged for advance rulings. The fee should be proportionate to the amount by which the taxable income would vary.

3. The somewhat complex closing agreement arrangements should not be integrated into the system at first. Advance rulings would thus take the form of written opinions provided by the Department on proposed transactions. During the first few years at least, there should be no formal requirement that advance rulings be definitely binding on the Minister. As they would not be appealable, there would be all the flexibility required in the experimental stage of the system. We therefore recommend that:

> There should be no appeal from advance rulings. Furthermore, during the early stages, rulings should not in theory be binding on the Minister, although in practice he may abide by them.

4. Following the U.S. pattern, all advance rulings should be given from a central office in Ottawa. It is clear that to ensure the maximum degree of compatibility among decisions all rulings should emanate from a single office. It is felt that if the policy which has just been suggested were adopted, the whole service could be set up initially with a staff of about 10 employees, or maybe even fewer.

The system should operate as a well integrated whole. We therefore recommend that:

> All advance rulings be issued from a single office located in Ottawa.

5. Misgivings have been expressed in some quarters regarding the publication of advance rulings. It is felt by some that new and perfectly legal ways of reducing costs might thus be revealed to competitors. 43/ Others are in favour of publishing advance rulings none the less. 44/

Probably, the fairest policy would be to publish on a selective basis. The selection, however, would not depend on the wish of certain taxpayers to keep for themselves any way they may have found of avoiding tax. To the contrary, the aim would be to publish and circulate decisions which can clarify certain aspects of the law. The policy would be much the same as that justifying the publication of the Assessors' Guide. It is not suggested that all rulings should be published, but only those which are of general interest.

To promote a better understanding of tax legislation on the part of the public, we recommend that:

> Advance rulings which are of general interest or which clarify certain aspects of the law be published.

6. With regard to the procedure for obtaining advance rulings, no concrete suggestions were contained in any of the briefs submitted to the Royal Commission on Taxation. It would seem that the procedure followed in the United States might very well be adopted in Canada. We therefore recommend that:

> At least during the first experimental stage, the advance ruling procedure be patterned on the United States system.

5.3. DEPARTMENTAL REVIEWS

The tax laws confer on the Minister of National Revenue the powers needed to carry them out. This being a very complex business, the Minister cannot personally exercise all the powers conferred upon him. In any case, his concern is with political and parliamentary matters rather than with administration. Consequently, the law permits him to delegate his powers to others. They are therefore actually exercised by an official and, the broader the power is, the higher is the rank of the official wielding it or the stricter the internal control over the exercise of the power.

When a taxpayer wishes to protest a departmental decision, his only recourse in some cases is the possibility of having it reviewed by the authority responsible for it. This is so in case of ministerial discretion or administrative latitude. In other cases he may apply to the courts but even then there is no bar to his making representations beforehand to the Department.

5.3.1. THE NATURE OF DEPARTMENTAL REVIEWS

Department review of a decision consists in its examination, at the request of a taxpayer, by a superior officer of the official who made the

decision. It is often sufficient to apply to his immediate superior, though it is possible to go right on through the departmental hierarchy up to the Minister. The public avail themselves of these possibilities to the extent that the officials maintain good relations with them. This presupposes that the taxpayer will have the opportunity of presenting his case without incurring undue expense or inconvenience. When the number of taxpayers making representations is large, the Department may set up a special section to handle the reviews. A specialized section of this kind has been set up by the Taxation Division of the Department of National Revenue. At every departmental level the review is carried out expeditiously and without formality. It ends up in either confirmation, modification or invalidation of the original decision. As there is no publicity, the appellants cannot invoke any form of stare decisis.

The principal drawback of departmental reviews is that they are not equally available to all. In the absence of a special service such as the one in the Taxation Division, it is not easy to find out which official is responsible for the decision. The internal organization and administrative machinery of the Department is not widely understood. Many taxpayers therefore have to go to considerable trouble or to enlist the aid of specialists. This difficulty is accentuated by the tendency of many civil servants to assume a minimum of personal responsibility, preferring to rely on definite instructions or, when none are available, to ask for them or simply refer the file and the decision to higher authority. What often appears to be official obstinacy or lack of understanding is frequently nothing more than passive obedience of specific instructions of which the taxpayer is totally unaware. In such circumstances, it is often useless to apply to the immediate superior, for either he is bound by the same instructions or is the

author of the instructions communicated by his subordinate. In the latter case it is possible to obtain satisfaction but the chances are slim, as the official has already made up his mind. Here again applies the adage: Nemo judex in causa sua.

Interviews with senior officials may sometimes produce no results. They cannot spare the time to go into fine detail and have to rely on the sound judgment of their subordinates. As to deputy ministers and assistant deputy ministers, the greater their confidence in their subordinates, the less inclined they will be to interfere with their decisions. Similarly, a minister rarely interferes with the decisions of his deputies, preferring to follow their recommendations. A minister and his senior officials will not intervene except in case of an obvious error of judgment or of patent inequity. Such errors are usually found and put right before the taxpayer approaches the senior departmental levels.

Furthermore, the centralization of administrative authority places taxpayers on an unequal footing. The taxpayer who has been unable to obtain satisfaction at the district level has no alternative but to turn to Ottawa. This constitutes a decided disadvantage for taxpayers located far from the capital, particularly those resident in the Maritimes or in the Western provinces. It is true that reviews can be conducted by mail, but it is clearly preferable for the taxpayer or his agent to go to Head Office and present his case personally. Even officials admit that cases presented personally spring from anonymity into life. For a Vancouver taxpayer, this is costly both in time and in money.

Although the services of a lawyer or an accountant are not essential for a departmental review, the taxpayer may feel that without help he is at

a disadvantage in facing departmental officials who are experts in their field. But the services of a lawyer or an accountant are beyond the means of many taxpayers.

However valuable it may be, departmental review is in no way a panacea.

5.3.2. DEPARTMENTAL REVIEW PROCEDURES

Procedures differ according to whether the matter is one of income tax, estate tax, excise tax or excise duty.

5.3.2.1. INCOME TAX

In the field of income tax, two distinct situations arise: before and after a notice of objection has been filed.

5.3.2.1.1. BEFORE NOTICE OF OBJECTION

During an audit, 45/ an assessor may make various decisions which affect the liability of the taxpayer, and the latter may even be given notice of the proposed assessment. If he has any objections to the proposed assessment, he must sometimes make them to Head Office. He must always do so when the objection bears on a point of law, as all the Department's lawyers are at Head Office. In such circumstances, he is usually represented by a lawyer or an accountant and when he lives in a distant part of the country he will incur heavy travelling expenses to discuss his case with the appropriate officials. Outside these circumstances, Head Office is usually unaware that a particular audit is being made. At this stage, the discussions normally take place in the District Office.

At District Office, the Group Head will usually have been consulted by the Assessor and will therefore be acquainted with the case. For this

reason, there is little chance of obtaining from him a review of a difficult case as, if he has already taken a stand, he will probably not reverse it unless a patent error has come to light as a result of additional information. The taxpayer has a better chance of succeeding if the case is less difficult and if he deals with a more senior official. In practice, a proper administrative review can only be obtained at the level of the Chief Assessor, or perhaps of the Group Head. Undoubtedly, the taxpayer is free to apply to the District Director but, in practice, the Director tends to rely on the judgment and experience of his Chief Assessor. When the Chief Assessor is asked for an opinion on a somewhat difficult case, he is likely to discuss it with his Director or ask for instructions from Head Office. In such a case, the decision does not actually emanate from the Chief Assessor and there is little chance of obtaining satisfaction by applying to the District Director. The taxpayer is always up against the problem of determining who made the decision. When this has been determined, he can apply further up the ladder of the departmental hierarchy.

If the assessor's decision has not been communicated to the taxpayer prior to assessment, it is made known to him when the official notice of assessment is mailed. The taxpayer is then free, prior to filing his notice of objection, to take the steps at district level just described. He is not obliged to do so, but it would seem that, in practice, taxpayers only file a notice of objection after having contacted the appropriate authorities at district level and exhausted the various possibilities of departmental review.

It is thus seen that no formal procedure exists for review prior to notice of objection.

5.3.2.1.2. AFTER NOTICE OF OBJECTION

Notice of objection is addressed to the Minister and sent to Head Office. Head Office then sends a copy to the District Office concerned. As soon as the District Office receives its copy, it sends the file to the Appeal Section for a de novo review by an assessor having approximately the same experience as a Group Head.

On receiving a notice of objection, the Minister sends an acknowledgment to the taxpayer and suggests that he communicate with the District Office. The taxpayer usually accepts this suggestion, makes an appointment with the assessor and puts forward his arguments in support of his claims. If the case is of some consequence, the Chief Assessor may attend the interview, but it is more frequent for the case to be put before him after the meeting. In at least 75 to 80 per cent of objection cases, contact is established between the Appeal Section and the taxpayer, either on the Section's own initiative with a view to obtaining additional information or on the initiative of the taxpayer who thus makes his first move in answer to the Minister's suggestion.

In 20 to 25 per cent of objection cases, only points of law are at issue, so the review takes place at Head Office because all modifications of departmental practice and interpretation are of the exclusive competence of the Legal Branch. The taxpayer must then start a lengthy correspondence or ask for an interview for himself or his attorney. This second possibility has little attraction for taxpayers living in the Maritimes or the Western provinces.

When the issue is one of fact, the review begins in the District Office. After reviewing the file, the assessor draws up a reasoned report recommending

rejection or acceptance, in whole or in part, of the taxpayer's claims. This report is made to the Chief Assessor when it deals with problems of little importance or the solution of which has become obvious as a result of additional information supplied by the taxpayer. The Chief Assessor may approve, amend or reject the recommendation. In the latter event the assessor draws up and sends to the Legal Branch another report containing recommendations in line with the views of the Chief Assessor. In cases of some consequence, for instance, if some principle of taxation is at stake or if the dispute concerns speculation in real estate and the facts are somewhat involved, the Chief Assessor sends a report to the Legal Branch at Head Office.

In the Legal Branch, the work of reviewing the reports is divided among four sections according to the district where the case originated. One section deals with appeals from Toronto, another from the Province of Quebec, a third from the four western provinces and the fourth from the Maritimes and from Ontario, except Toronto. There are three main reasons for this geographic distribution. First, the work is about equally divided among sections. Secondly, Quebec civil law accounts for the existence of a special section for that province. Finally, since the hearings of the Tax Appeal Board are arranged on a geographical basis, it is logical that the preparatory work should be organized similarly.

Each section is composed of five lawyers, three assessors and a clerical staff. The cases are distributed among the three assessors by one of them who acts as head of the team. There is no specialization between groups, and assessors are liable to be given cases on any subject. Each assessor then reviews his cases and the reports submitted by the assessment section of the district concerned. This may entail correspondence with the District,

sometimes asking for further information from the taxpayer. At this stage, the taxpayer or his agent may have an interview with the assessor. Frequently, especially when a legal point is in dispute or if the taxpayer is represented by a lawyer, one or more of the section lawyers are asked to attend the meeting held under the chairmanship of the senior assessor. The decision is signed by the latter and sometimes also by the lawyers. The complete file is then sent to the Director of the Legal Branch or to his assistant, who usually abide by the opinions of their senior lawyers. Theoretically, the taxpayer is free to approach the Assistant Deputy Minister, the Deputy Minister or even the Minister, but they almost always uphold the opinions of the Director of the Legal Branch. It is at the latter level, therefore, that the final review takes place.

According to the statistics, about 10 per cent of taxpayers facing increased assessments file a notice of objection. For the year ending March 31, 1962, 46,656 assessments were increased and 5,009 notices of objection were filed. During that same year, the Department considered 4,993 notices of objection. Of these, 25 per cent were withdrawn by the taxpayers, 48 per cent were settled at district level, 16 per cent were settled at Head Office level, and about 10 per cent went to court. During the past five years about 10 per cent of cases involving a notice of objection were taken to the Tax Appeal Board or to the Exchequer Court. It appears, therefore, that the departmental review procedure works very well.

5.3.2.1.3. DEPARTMENTAL REVIEW DELAYS

At the District, two to three months may elapse between receipt of a notice of objection and the drawing up of a final report by the special assessor. At Head Office, however, six to eight months may elapse between receipt of the appeal assessor's report and the final closing of the file.

No time limit is stipulated within which the Minister must make known his decision. In the words of the Act:

> Upon receipt of the notice of objection, the Minister shall with all due despatch reconsider the assessment and vacate, confirm or vary the assessment or re-assess and he shall thereupon notify the taxpayer of his action by registered mail. 46/

As delay could be harmful to the taxpayer, the Act provides that:

> Where a taxpayer has served notice of objection to an assessment...he may appeal to the Tax Appeal Board...to have the assessment vacated or varied...after 180 days have elapsed after service of the notice of objection and the Minister has not notified the taxpayer that he has vacated or confirmed the assessment or re-assessed;... 47/

In short, the Minister has six months from service of the notice of objection in which to make his review before the taxpayer can start proceedings before the appeal courts. In practice, however, taxpayers are careful not to precipitate matters and prefer to await the Minister's decision even if this means a delay of eight to ten months. Delays of this kind may seem somewhat excessive, but it must not be overlooked that the taxpayers are partly responsible, since they tend to take their time in supplying the information and documents requested of them. A recommendation has been put forward 48/ by the Canadian Bar Association to the effect that the taxpayer should be given the right to a departmental review within sixty days of filing his notice of objection and that the taxpayer's objection be deemed to be allowed if he has not received notification from the Minister within ninety days of filing his notice of objection. The time limits suggested in these two recommendations are too short and too inflexible to permit an efficient review satisfactory to both parties and the recommendation should not be accepted. All that could be accomplished

within sixty days would be some form of interim review. If the second suggestion were adopted, the result would be that more assessments would be confirmed by the Minister resulting in a greater number of notices of appeal, and final settlement of cases would tend to occur after the Minister has sent his notification and before the case comes to court. The best way to reduce the above delays is to increase the staff dealing with reviews rather than to amend the Act in such a way as to oblige the staff to come to hasty decisions.

5.3.2.1.4. RECOMMENDATIONS

An efficient departmental review procedure helps to reduce the number of court cases. With a view to developing such a system, the Canadian Bar Association put forward the following recommendation:

> That it be a rule of assessing practice that, before any re-assessment is issued, the assessor write the taxpayer, setting out details of the proposed changes and the reasons for them, and giving the taxpayer a reasonable time in which to make representations against the proposed re-assessment. 49/

This recommendation deserves most favourable consideration. It should be possible, however, to go a step further, as the legislator can very well authorize a practice considered advisable. We therefore recommend that:

> The Act require the Department to give the taxpayer notice of any proposed re-assessment and assure him of an adequate opportunity to be heard.

Because of its being efficient and useful, the present procedure of departmental review after notice of objection should be retained. It should not, however, be left in the hands of the assessor who conducted the review ordered by the Department before the notice of assessment. 50/ We therefore recommend that:

Reviews prior to and subsequent to notice of assessment be undertaken independently one of the other.

On the one hand, access to a departmental review such as that offered by the Legal Branch in Ottawa is not equally convenient for all citizens across the country. On the other hand, whatever drawbacks there may be to decentralizing the Legal Branch can be largely overcome by an inspection system. We recommend that:

The reviewing operations at present carried out by the four sections of the Legal Branch be transferred to regional offices located in four or five areas across the country. Recourse to the regional office should provide the taxpayers with some ultimate and final departmental review at present available only from the Legal Branch in Ottawa.

5.3.2.2. ESTATE TAX

Departmental review procedures for estate taxes, whether applied before or after assessment, are very similar to those for income tax, except that they are much more centralized.

5.3.2.2.1. BEFORE ASSESSMENT

Having received a return and obtained the appropriate supporting documents and information, the assessor appraises the estate and applies the Act. A well established practice requires the Department to notify the heirs or executors of any amendment it proposes to make in the return, whether in the appraisal or in the application of the statutory provisions. At this stage, the executor or the representative of the heirs has an opportunity of making representations to the assessor or to his immediate superior. Usually, however, the taxpayer can hardly expect a fresh approach to his problems without going to the Chief Assessor or to the District Director.

If the assessor decides to abide by his original assessment, he draws up a summary of the case presented by the heirs or their representative and attaches it to a copy of his draft assessment. Unlike the case of income tax, the proposed assessment is submitted to Head Office for approval. The taxpayer concerned may then get in touch with Head Office, but usually they do not, until they have received a notice of assessment. Once the draft assessment has been approved or amended at Head Office, it is returned to the District Office which sends out the assessment notice.

In order to give legal sanction to an established practice, we recommend that:

> The Act be amended in such a way that, where a proposed assessment differs from the return, the assessor be obliged to notify the heirs or executors and to give them an opportunity of making representations.

5.3.2.2.2. AFTER ASSESSMENT

After assessment, the heirs or executors have 90 days in which to file a notice of objection. 51/ Departmental review procedures after a notice of objection has been filed are identical with those for income tax. However, in view of the small number of returns and the even more limited number of objections, 52/ the machinery for dealing with reviews cannot be decentralized to the same extent. However, it would be a great help for the taxpayers and little trouble for the Department to organize the review machinery on a regional basis. We therefore recommend that:

> The reviewing operations for estate taxes at present carried out by the four sections of the Legal Branch be transferred to regional offices located in four or five areas across the country. The departmental review offered by these offices, just like that at present offered by the Legal Branch in Ottawa, would be final.

5.3.2.3. THE EXCISE TAX ACT

There is no formal procedure for objecting to excise tax assessments, but a departmental review can be obtained by recourse to a more senior official in the hierarchy of the Department.

Before the auditor's report is sent to Ottawa, the taxpayer may communicate with the Regional Director of Audits in order to put forward his arguments against the proposed assessment. The Regional Director may, on his own authority, assign a special auditor of considerable experience to review the assessment and advise the original auditor. The latter, however, remains fully responsible for his report and is free to accept or to reject the advice given to him. If this first review fails to settle the dispute, the taxpayer may submit his case anew to the Regional Director.

If the original report has already been sent to Head Office, the taxpayer is referred to the Director of Audits there. The latter may, if the case is somewhat difficult, consult the Director of Administration regarding the interpretation to give to a particular statutory provision or regulation, or on the policy to be followed in the circumstances. The taxpayer also is free to consult the Director of Administration about particular tax problems facing him. He may travel to Ottawa himself or have an attorney represent him.

Taxpayers sometimes go directly to the Assistant Deputy Minister for an interview. Besides a lawyer for the Department, the Assistant Deputy Minister usually asks his three chief assistants--the Director of Administration, of Audits and of Collections--to attend the meeting. For his part, the taxpayer usually brings his lawyer or accountant with him. He states his case

and the Department asks for additional information or explanations. After the interview, the officials discuss the case as presented, and come to a decision, which is passed on to the taxpayer by the Director of Administration. Reconsideration by the Assistant Deputy Minister exhausts, to all intents and purposes, the taxpayer's opportunities for obtaining a departmental review, as the Deputy Minister and the Minister rely, in practice, on the opinions of their advisers.

Chapter 4 recommends that provision be made for the adoption in the matter of excise of the formal procedure of objection followed in income tax matters. 53/ As a corollary, we make the following recommendation:

> That the Act require the Department to notify the taxpayer of the details and grounds of any proposed assessment and, before the assessment is issued, provide him with an opportunity to present his objections. In acknowledging receipt of the notice of objection, the Minister should invite the taxpayer to make representations. Review of departmental decisions should be entrusted to a special service. The functions of control and review should be decentralized, but decentralization should be tempered by issue of directives and inspection of results.

5.3.2.4. THE EXCISE ACT

In the matter of excise duty, there is no formal procedure for obtaining a departmental review nor for filing an objection. Obviously there is no need for objection procedures, since:

> All such duties and licence fees shall be recoverable with full costs of suit as a debt due to Her Majesty, in any court of competent jurisdiction. 54/

The taxpayer can introduce his defence when brought before the courts.

The Act 55/ authorizes the officers of the Department to seize and detain all goods on which duty should have been paid. The owner of the

goods then has one month in which to state that he intends to claim them. Failing such action, the goods are deemed to be forfeited to the Crown. If the owner takes action, the Department must have the seizure confirmed and validated by the courts. The Department then files an information and the owner of the goods can put his case before the court.

In view of the fact that the State has chosen to deal with excise duties as though they were matters of criminal law, and considering that production is physically controlled, there is little point in setting up formal departmental review procedures, since any dispute between the Department and the taxpayer must be settled in court. However, in matters involving discretion, such as fixing duty in cases of undervaluation, 56/ the decision is taken by Head Office and, theoretically at least, there is a possibility of having the decision reconsidered by applying to a more senior official. However, since such decisions are necessarily taken by very senior officials, such as a Director or Assistant Deputy Minister, the chances of obtaining a genuine review by the Deputy Minister or the Minister are rather remote.

In view of the quasi-criminal concept underlying the Excise Act, 57/ the right of the taxpayers is best safeguarded by judicial means. From this point of view, the safeguards provided under the present Act appear to be satisfactory, but there is nevertheless much to be said for having certain facilities for departmental review. In purely departmental matters, such as the inspection of premises and equipment to determine whether they meet with the requirements of the regulations, taxpayers should be informed that they can ask for reconsideration of the decision taken by the original official by applying to the Regional Director or to Head Office. We therefore recommend that:

The Act be amended to make it mandatory for the Minister to grant taxpayers formal reconsideration of discretionary and administrative decisions in accordance with procedures similar to those used in the administration of income taxes.

5.3.3. CONCLUSIONS

The practice of departmental reviews should be encouraged, as it helps to pinpoint the facts and to reconcile the views of the taxpayers and the Department.

In the light of the terms of reference of the Royal Commission on Taxation, it was not considered relevant to examine the desirability of enacting review procedures extending throughout the government. However, in the absence of a statute of general application, the tax laws should be amended so as to give taxpayers the right to departmental review. The amendments recommended above tend to establish uniform procedures in all tax matters, though in many fields their only effect is to institutionalize existing practices.

REFERENCES

1/ Brief of the Vancouver Board of Trade, August 15, 1963, p. 13, and bri brief of the Canadian Manufacturers' Association, February 19, 1963, p. 19.

2/ See supra 2.2.

3/ Kenneth Culp DAVIS, Administrative Law Treatise, 1958, St. Paul, Minn: West Publishing Co., Vol. 1, 300 at p. 304.

4/ Jacques BARBEAU, Interpretative Tax Regulations, (1961) IX Canadian Tax Journal, 192 at p. 195.

5/ Kenneth Culp DAVIS, op. cit., Vol. 1, p. 300.

6/ Information and figures supplied by Charles R. Simpson, Director, Legislation and Regulations Division, Office of the Chief Counsel, Internal Revenue Service. See also Federal Tax Regulations, 1965, Vol. 2, Part 601, p. 1643.

7/ Edward SAUNDERS, Publication of Interpretative Regulations, 1961, Report of Proceedings of the Fifteenth Annual Tax Conference, Canadian Tax Foundation, 202 at p. 207.

8/ See infra 6.1.2.

9/ Norwegian Nitrogen Products Co. v. United States, 53 S.Ct. 350 at p. 358. This decision by Judge Cardozo was cited with approval in United States of America v. Leslie Salt Co., 76 S.Ct. 416 at p. 424.

10/ United States v. Hill, (1886) 7 S.Ct. 510 at p. 517. National Lead Co. v. United States, (1919) 40 S.Ct. 237 at p. 239.

11/ See supra note 9.

12/ Smythe v. Fiske, (1874) 90 U.S. 374 at p. 392. Robertson v. Downing, (1887) 8 S.Ct. 1328 at p. 1330.

13/ Helvering v. Winmill, (1938) 59 S.Ct. 45 at p. 46.

14/ Koshland v. Helvering, (1935) 56 S.Ct. 767. See also Social Security Board v. Nierotko, (1945) 66 S.Ct. 637.

15/ Brief dated February 13, 1963, p. 19.

16/ Brief dated December 1963, p. 79.

17/ Brief dated January 11, 1964, pp. 27 and 28.

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19/ Roy BLOUGH, The Federal Taxing Process, New York: Prentice-Hall, Inc., 1952, pp. 154-55.

20/ Randolph E. PAUL, "Use and Abuse of Tax Regulations in Statutory Construction", 49 Yale Law Journal (1939-40), 660 at p. 683.

21/ This has been confirmed by J. G. McEntyre, Deputy Minister of National Revenue, in Report of Proceedings of the Ninth Annual Tax Conference, Canadian Tax Foundation, Toronto, 1955, pp. 135-138.

22/ Briefs submitted to the Royal Commission on Taxation by: The Canadian Bar Association, January 11, 1964, pp. 29-33, Transcript of Proceedings pp. 7535-7554; Canadian Association of Real Estate Boards, November 7, 1963, pp. 24-38 and Transcript pp. 5093-5099; Canadian Construction Association, January 17, 1964, p. 38 and Transcript p. 8429; Independent Petroleum Association of Canada, December 5, 1963, p. 10; Newfoundland Board of Trade, August 7, 1963, p. 13 and Transcript pp. 2099-2103; Vancouver Board of Trade, August 15, 1963, p. 14; Canadian Chamber of Commerce, January 18, 1964, pp. 49-50; Canadian Tax Foundation, January 24, 1964, p. 3; Canadian Electrical Manufacturers Association, December 4, 1963, p. 5, and Transcript pp. 6077-6083.

23/ Revenue Act of May 28, 1938, c. 289, ss 801, 52 Stat. 573; sec. 7121 of the Internal Revenue Code, 1954, Federal Tax Regulations, 1965, Vol. 2, Part 301, sec. 7121, p. 1156.

24/ Dan J. FERRIS, "Advance Rulings—U.S. Experience", 1959, Report of Proceedings of the Thirteenth Annual Tax Conference, Toronto: Canadian Tax Foundation, 98 at p. 101. Mr. Ferris is the Assistant Director of Tax Rulings Division, Internal Revenue Service, Washington.

25/ Federal Tax Regulations, 1965, Vol. 2, Part 601.201 (a)(2) and 601.201 (a)(5), pp. 1671-1672.

26/ Ibid., Part 601.201 (a)(3), p. 1671.

27/ Ibid., Part 601.202 (a)(1), p. 1689.

28/ Confirmed by sec. 12, Rev. Rul. 54-172, Cum. Bull. 1954-1, 394.

29/ A. TANNEBAUM, "How to Obtain Treasury Department Rulings", Vol. 33, No. 5, Taxes; The Tax Magazine, (1955), pp. 346-347.

30/ Jacques BARBEAU, "Advance Tax Rulings", 3 Can. Bar Journal, (1960) 6 at p. 14.

31/ The majority of these rulings were advance rulings, but the Tax Ruling Division also issues rulings on completed transactions. See Dan J. FERRIS, loc. cit., 98 at p. 101.

32/ Dan J. FERRIS, loc. cit., p. 103.

33/ A. TANNEBAUM, loc. cit., p. 347.

34/ Jacques BARBEAU, loc. cit., supra note 30, at p. 14.

35/ Woon v. M.N.R., (1950) C.T.C. 263.

36/ Amendments suggested to the Income Tax Act (1960) 3 Can. Bar Journal 91, at p. 116.

37/ Ibid., p. 115.

38/ J. BARBEAU, loc. cit., supra note 30, at p. 16.

39/ No concrete example of a transaction falling through because of uncertainty concerning its tax consequences has been quoted in briefs submitted to the Royal Comission on Taxation.

40/ The U.S. Tax Rulings Division has a staff of 270 experts serving a population which is ten times that of Canada.

41/ Report of Proceedings of the Ninth Annual Tax Conference, Canadian Tax Foundation, Toronto, 1955, p. 126; see in particular the views expressed by J. G. McEntyre on pp. 135 et seq.

42/ Canada, House of Commons Debates, 1963, 26th Parliament, 1st Session, Vol. 3, p. 2494.

43/ Transcript of proceedings concerning the brief submitted to the Royal Commission on Taxation by the Canadian Electrical Manufacturers Association, pp. 6084 et seq.

44/ Transcript of proceedings concerning the brief submitted by the Canadian Bar Association, p. 7544.

45/ See supra 3.1.2.

46/ Income Tax Act, R.S.C. 1952, c. 148, s. 58(3).

47/ Ibid., s. 59(1).

48/ Brief submitted to the Royal Commission on Taxation by the Canadian Bar Association, January 11, 1964, p. 39.

49/ Ibid., p. 37.

50/ See supra 3.1.2.

51/ Estate Tax Act, S.C. 1958, 7 Eliz. II, c. 29, s. 22.

52/ During the year ended March 31, 1962, 5,009 notices of objection were filed, of which 118 only were in respect of death duties.

53/ See supra 4.1.4.3.

54/ Excise Tax Act, R.S.C. 1952, c. 99, s. 109(2).

55/ Ibid., ss. 101 and 102.

56/ See supra 4.2.4.

57/ R.S.C. 1952, c. 99 and amendments.

CHAPTER 6—JUDICIAL INTERPRETATION OF TAX LEGISLATION

The system of review of administrative decisions, described in the preceding chapter, was established with the view of ensuring just treatment of all taxpayers. It is not, however, the only remedy at the disposal of the taxpayer who considers himself aggrieved. Whether or not he has exhausted the various possibilities of administrative review, he has the right to appeal from a decision of the Minister of National Revenue, unless the latter acted in the exercise of his discretionary power.

In taxation, as in other matters, the question whether litigation should be dealt with by the ordinary courts or by special tribunals is determined by statute. In making his choice the legislator weighs the advantages and drawbacks of each system. At present, two special tribunals—the Tariff Board and the Tax Appeal Board—have jurisdiction in tax cases. Conceived as quasi-judicial bodies, both actually exercise judicial functions, in particular that of final determination, subject to appeal to a higher court, of any issue falling within their respective competence. Two ordinary courts of justice also have jurisdiction in the matter: the Exchequer Court and the Supreme Court. The first-named, besides acting as a court of first instance, serves as a court of appeal from decisions rendered by either Board. Its own decisions are subject to appeal to the court of last resort—the Supreme Court of Canada.

Before examining the role of the special tribunals and the ordinary courts, we shall describe their respective methods of interpretation of tax legislation.

6.1. THE INTERPRETATION OF TAX LEGISLATION

Under our type of judicial system, the function of the courts is not merely to apply general rules to particular cases. In so doing, they also give precision to the law because, in accordance with the principle of stare decisis, they are bound by their own decisions. It follows that a government department administering tax laws must take into account all the judgments interpreting them. It can act according to its own lights, however, in areas which have not yet been covered by a judicial ruling.

The courts have no difficulty interpreting provisions which are clearly spelled out in the Acts. Unfortunately, these are rare in the tax statutes, since in this field rules are often ambiguous and nearly always are complex. It follows that it is important to define the role of the courts and to determine whether they approach tax laws in the same manner as they handle legislation in the other branches of law.

6.1.1. THE FUNCTION OF THE COURTS

The traditional theory is that the function of the courts is strictly "judicial", a word derived from the latin jus dicera. On the face of it, the function assigned to the courts is to state the law. To state the law is to interpret the laws and regulations that are in force, and this includes making sure that the laws or regulations invoked are intra vires.

The traditional concept, however, rather over-simplifies things. Obviously, the judge cannot substitute himself for the lawmaker, but the interpretation of law is—at least within certain limits—legislation. Judge Frankfurter of the United States Supreme Court defines these limits as follows:

> The vital difference between initiating policy, often involving a decided break with the past, and merely carrying out a formulated policy, indicates the relatively narrow limits within which choice is fairly open to courts and the extent to which interpreting law is inescapably making law....
>
> ...In those realms where judges directly formulate law because the chosen lawmakers have not acted, judges have the duty of adaptation and adjustment of old principles to new conditions. But where policy is expressed by the primary law-making agency in a democracy, that is by the legislature, judges must respect such expressions by adding to or subtracting from the explicit terms which the lawmakers use no more than is called for by the shorthand nature of language. 1/

Dean Griswold, of the Harvard Law School, expresses the same idea in these words:

> The notion that courts act merely mechanically, and have no function but to declare the law as it has been enacted by the legislature is not one which will withstand analysis. It is inevitable that the courts will have to exercise discretion and judgment. Indeed, that is what they are for. It is true that their discretion will be effective over much narrower points than that of the legislature; and it is also true that the basic policy decisions must be made by the legislature. 2/

Finally, here is a view expressed by Professor W. Friedmann:

> The English, as much as the American, Canadian or Australian judge, whether he interprets a statute or applies a common law precedent, is faced with the perennial problems: how to balance the need for stability and certainty, embodied in the principle of stare decisis, with the need for the constructive adaptation of the law to changing social needs; how to balance the certainty aimed at, if not always achieved, by a strict adherence to the letter of the law, with individual justice. The conflict can never be finally resolved. Changing climates of public opinion, fluctuations in the strength of political and social pressures, differences of personality, and the sheer limitless variety of individual situations calling for a solution, constantly pose the problem anew. 3/

Since the interpretation of tax legislation bristles with difficulties, one might think a priori, that the creative role of the courts is far greater in this field of law than in any other. In fact, experience

proves that the contrary is true. This paradoxical situation arises from the fact that in taxation matters the courts depart to a certain extent from the standard rules of interpretation.

6.1.2. THE USE OF EXTRINSIC AIDS

It is a standard rule of interpretation that the intention of the legislator must be sought within the Act itself. However, if ambiguity subsists, the question arises as to whether the courts may be guided in their interpretation by extrinsic facts, such as the prior state of the law, preparatory studies and materials, parliamentary debates, or the legal, economic or social background.

Since the Heydon case in 1584, 4/ the English courts, in their efforts to interpret the law correctly, have taken into consideration the prior state of the law, the gaps in exterior legislation and suggested remedies. This is a teleological approach, in which the intention of the legislator is sought in sources beyond the letter of the law. According to the rules of interpretation derived from Heydon's case, the courts are not barred from taking pre-legislative studies and materials and parliamentary debates into consideration.

These sources were excluded at a later date. Mr. Justice Willes in Millar v. Taylor (1769) refused to consider the parliamentary background or Act, for the following reasons:

> The sense and meaning of an Act of Parliament must be collected from what it says when passed into a law; and not from the history of changes it underwent in the house where it took its rise. That history is not known to the other house, or to the sovereign. 5/

In Salkeld v. Johnson (1848), the court refused to refer to the report of a Commission of Enquiry which had led go the enactment of the Act under consideration. The following is an extract from the judgment of Mr. Justice Pollock:

> We shall not, therefore, refer to the Report of the Real Property Commissioners published shortly before the passing of this act, and to which it is supposed to have owed its origin, in order to explain its meaning; not conceiving that we can legitimately do so, however strongly we may believe that it was introduced in order to carry into effect their recommendation to establish a new statute of limitations for tithes. 6/

Since these decisions were handed down British law on the subject has developed very little. The question is summed up as follows, in Halsbury's The Laws of England:

> Even when words in a statute are so ambiguous that they may be construed in more than one sense, regard may not be had to the bill by which it was introduced, or to the fate of amendments dealt with in either House of Parliament, or to what has been said in Parliament.
>
> Reference may not be made for the purpose of ascertaining the meaning of a statute to the recommendations contained in the report of a Royal Commission or of a departmental committee or in a White Paper which shortly preceded the statute under consideration because it does not follow that such recommendations were accepted by the legislature. On the other hand, reports of commissions preceding the enactment of a statute may be considered as showing the facts which must be assumed to have been within the contemplation of the legislature when the statute was passed. 7/

In the United States, the courts at first followed the British tradition, but in United States v. Freight Association (1896), Peckman, J., advanced different reasons from those invoked by Mr. Justice Willes for refusing to consider legislative debates. He said:

> There is a general acquiescence in the doctrine that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute

> passed by that body. The reason is that it is impossible to determine with certainty what construction was put upon an Act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did, and those who spoke might differ from each other; the result being that the only proper way to construe a legislative Act is from the language used in the Act and, upon occasion, by a resort to the history of the times when it was passed. 8/

During the past half century, however, American law has developed very rapidly. The situation is summed up as follows in the Corpus Juris Sedundum:

> In construing a statute, resort to extrinsic facts is permitted where its language is ambiguous, but is generally not permitted where the language is plain and unambiguous, although it has been held that even in such case consideration of persuasive evidence is not precluded.
>
> Where the language of a statute is ambiguous, the courts will take into consideration all the facts and circumstances existing at the time of, and leading up to, its enactment, such as the history of the times, contemporary customs, the state of the existing law, the evils to be remedied, and the remedy provided.
>
> In order to determine the legislative intent in case of ambiguity, resort may be had to the history of the statute, or the history of the proceedings attending its actual passage through the legislature, and the action, if any, with reference thereto by the governor; but, generally, the plain meaning of a statute cannot be affected by resort to its history.
>
> As a general rule where a statute is ambiguous resort may be had to legislative debates and reports of committees or commissions as an aid to construction, but such materials will not be considered where the language of the statute is plain and unambiguous. 9/

It is clear from the above that the bar on the consideration of extrinsic facts has been removed in the United States. Indeed, in 1947, Judge Frankfurter expressed himself as follows:

> If the purpose of construction is the ascertainment of meaning, nothing that is logically relevant should be excluded.

> In the end, language and external aids, each accorded the authority deserved in the circumstances, must be weighed in the balance of judicial judgment. 10/

Canadian courts, on the other hand, adhere closely to British custom and to the rules of interpretation based on the Heydon case, but with some reservations, regarding the consideration of pre-legislative material and parliamentary history. 11/ In this connection the decision in A.-G. of Canada v. The Reader's Digest Association (Canada) Ltd. deserves special attention. 12/ In this case, the Reader's Digest Association argued that an amendment to the 1956 Excise Tax Act was unconstitutional. The amendment levied a 20% tax on the advertising income of periodicals printed for publication in Canada:

> (i) containing editorial material at least twenty-five per cent of which is the same or substantially the same as editorial material contained in one or more copies of a particular non-Canadian periodical, whether in the same or in some other language, and
>
> (ii) containing any advertising material that is not contained in such non-Canadian periodical.... 13/

In its brief, the Reader's Digest Association argued that:

> The principal basis of Respondent's action is that the impugned statute, while in form a taxing statute, was not intended for the raising of money, but that the true object or intent of the statute was to benefit one segment of the publishing industry in Canada at the expense of another. Respondent takes the position that if the true object and intent of the statute were achieved its success would be measured inversely by the revenue which it yields. 14/

To support its argument, the Association referred to the Budget Speech delivered in the House by the Minister of Finance. 15/ It also pointed out that the House of Commons gave the bill its first, second and third readings on the same day and that no amendment was introduced by the Senate. Its

efforts were in vain. The Crown, invoking the traditional rules of interpretation, objected to this type of evidence and was unanimously upheld by the Supreme Court of Canada.

Regarding pre-legislative studies and materials, there is still some debate as to whether or not the intention of the legislator may be sought in the report of a Commission of Enquiry. In two of its decisions, 16/ the Privy Council took notice of such evidence. However, one decision was in a Reference Case on a point of constitutional law where there was no lis inter partes, and in neither case was any objection made to the introduction of this type of evidence. Objection was made, however, in two inter partes cases taken before the Supreme Court. In Home Oil Distributors Ltd. v. A.-G. of B.C., only two of the six judges expressed opinions on the matter and both took the Royal Commission report into consideration:

> ...as being a recital of what was present to the mind of the legislature, in enacting the principal Act, as to what was the existing law, the evil to be abated and the suggested remedy. 17/

In A.-G. of Canada v. The Reader's Digest Association (Canada) Ltd., Mr. Justice Cartwright expressed his views on the point as follows:

> I have reached the conclusion that there is no decision which requires us to hold that a report of a Royal Commission made prior to the passing of a statute and relating to the subject-matter with which the statute deals, but not referred to in the statute, is admissible in evidence in an action seeking to impugn the validity of that statute. In my opinion the general rule is that if objected to it should be excluded. 18/

Locke, J., concurred with Cartwright, J., and the seven other judges did not touch upon the issue. Clearly, the position of the Supreme Court of Canada on the matter remains somewhat uncertain.

The courts have taken the legal, economic and social background of an Act into consideration on numerous occasions. 19/ For example, in A.-G. of Alberta v. A.-G. of Canada, an Albertan law taxing banks was found to be ultra vires. In this case, Mr. Justice Duff calculated that the tax was exorbitant to the point of undermining the banking system set up by federal legislation and transferring control of the banks to the Legislature of Alberta. He added:

> This view of the effect of the legislation is greatly strengthened by the obvious relation of the Bill to the scheme of legislation to which the other Bills already discussed belong. This relation between the Bill in question and the Social Credit legislation as a whole enables us in some degree to understand a measure which would otherwise be simply incomprehensible. 20/

The above outline of the general rules of interpretation shows that, even in cases where the letter of the law leaves room for doubt, the courts will not consider the parliamentary history of the legislation, though they will take notice of other extrinsic facts. 21/ More particularly, the courts are willing to consider the prior state of the law, the evils to be remedied and the remedies proposed.

6.1.3. THE LITERAL INTERPRETATION OF TAX LAWS

In passing upon the constitutionality of a tax law, the courts abide by the general rules of interpretation, but they depart from these rules when applying the law to individual cases. In effect, even in cases of ambiguity, the courts refuse to seek the intention of the legislator outside the letter of the tax statute. English jurisprudence is very definite on this point:

> In a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about

> a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used. 22/

In Estate of David Fasken v. M.N.R., Mr. Justice Thorson adopted the same view:

> It is the letter of the law, and not its assumed or supposed spirit, that governs. The intention of the legislature to impose a tax must be gathered only from the words by which it has been expressed, and not otherwise. 23/

6.1.3.1. REASONS FOR THIS SPECIAL APPROACH

Why this special approach to tax law? According to Sir Charles E. Odgers:

> The reason may have been that taxation was regarded more or less in the light of a penalty or that taxes were originally imposed to benefit certain privileged persons, generally those in favour at court. 24/

It goes without saying that this outdated conception of taxation cannot today justify a departure from the general rules of interpretation. A different explanation was provided by Mr. Justice Brodeur in Canadian Northern Railway Co. v. The King:

> Law imposing taxation should always be construed strictly against the taxing authorities, since it restricts the public in the enjoyment of its property. 25/ [Emphasis added]

Here it seems that taxation is viewed as a form of expropriation for which the services rendered by the State are an indemnity, although not necessarily proportional to the contribution of each taxpayer. Seen in this light, tax statutes must be interpreted literally to protect the individual from the State. Such an approach was well suited to a "laissez-faire" mentality.

However, the days of economic liberalism are passed. The concept that taxes restrict the public in the enjoyment of its property is also outmoded. In fact, it might be said that the use of taxes for the maintenance of peace and order enables the public to enjoy its property more fully. Again, the taxpayer does not always receive services in exchange for taxes paid, since a goodly proportion of tax revenues are used to redistribute income among the citizenry. As Lord Halsbury once pointed out in an English judgment:

> All exemptions from taxation to some extent increase the burden on other members of the community.... 26/

For such reasons, taxes must be looked upon as an exigency of life in organized society and as a requirement of equalizing justice. There no longer seems to be sufficient reason for purely literal interpretation of tax statutes. On the contrary, though it may have suited the days of "laissez-faire", today it appears to be totally out of harmony with a modern concept of taxation.

6.1.3.2. CONSEQUENCES OF THIS SPECIAL APPROACH

What have been the consequences of the literal interpretation of tax statutes?

As the courts do not take into consideration extrinsic elements, they refuse to follow the rules of interpretation flowing from Heydon's Case, for example. They prefer to use a method of restrictive interpretation of the law.

> Before a condemnation to pay a tax is made, a clear and unambiguous enactment must first be found. 27/

> There is no equitable construction of a taxing statute in favour of the Crown, the exact meaning of the words used in the Act must be adhered to. 28/

Does this approach always favour the taxpayer, as is suggested by Mr. Justice Brodeur in Canadian Northern Railway Co. v. The King? 29/ By no means, since one interpretation of an ambiguous provision may favour one group of taxpayers, whereas the other may favour other groups. As Dean Griswold has pointed out, the chances are that the decision in such cases will go in favour of the taxpayer who first took the matter before the courts:

> ...under modern conditions, it can very frequently be said that no construction of a particular taxing provision is actually in favour of taxpayers generally. Many provisions in an income tax statute, for example, work both ways. What is favourable to one taxpayer, may be unfavourable to another. For example, in Gould v. Gould itself, the decision that the alimony was not taxable to the wife produced by almost necessary consequence the result that the same alimony was not deductible by the husband. We must be very careful that decisions on such matters do not go simply by a rule of thumb in favour of the taxpayer who happened to appear first in court. 30/

Another point is that, when the statute is explicit, the taxpayer cannot invoke any consideration of equity, however exorbitant the tax burden he must bear.

> If there be any unfairness, then it is a matter for appropriate legislation. This Board has no authority to take this into account if the language of the statute is clear and unambiguous as is the case here. 31/

> It has long been established that, whatever construction may be put on a taxing statute, it is not open to an equitable construction but must be strictly construed.... If there is any inequity caused by a strict interpretation of the law, it will be for Parliament to remedy the situation if it thinks it desirable, but it is not for this Board to attempt to give the legislation a liberal interpretation.... 32/

Finally, the literal interpretation of tax statutes has resulted in a running battle of wits between the lawyers who frame the statutes and those who are retained to defend the taxpayers' interests. As fast as the former attempt to close loopholes, the latter finds new ones, giving rise to problems of tax avoidance.

6.1.4. TAX AVOIDANCE

Tax avoidance, tax evasion and fraud all tend to minimize the amount paid by the taxpayer. Tax avoidance is not illegal since the techniques employed ensure that the letter of the law is observed, however much its spirit may be flouted. Evasion and fraud are illegal as contrary to the letter as well as the spirit of the law.

6.1.4.1. THE ATTITUDE OF THE COURTS

If the boundary between avoidance and evasion were the spirit of the law or the intention of the legislator, any action contrary to the declared policy of the State would constitute evasion, or fraud if *mens rea* were proved. Such a dividing line may seem sharp in theory, but in practice it is very blurred. While the courts will readily admit that an act is contrary to a given policy, they find it very difficult to determine the exact nature and scope of the policy declared.

The courts have avoided the difficulty by following the rule of literal interpretation, using the letter of the law to distinguish between avoidance and evasion. Whatever contravenes the letter of the law is evasion; it becomes fraud if *mens rea* can be proved. On the other hand, an act which is within the letter of the law, but contrary to the spirit of the statute constitutes avoidance. In such cases the taxpayer escapes taxation.

In the view of the courts, the taxpayer is neither legally nor morally obliged to pay as much tax as possible. When faced with alternative courses of action, he is free to choose whichever course is least onerous. English jurisprudence is explicit on this point:

> No man in this country is under the smallest obligation, moral or other, so to arrange his legal relations to his business or to his property as to enable the Inland Revenue to put the largest possible shovel into his stores. The Inland Revenue is not slow—and quite rightly—to take every advantage which is open to it under the taxing statutes for the purpose of depleting the taxpayer's pocket. And the taxpayer is, in like manner, entitled to be astute to prevent, so far as he honestly can, the depletion of his means by the Revenue.... 33/

> Every man is entitled if he can to order his affairs so as that the tax attaching under the appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however unappreciative the Commissioners of Inland Revenue or his fellow taxpayers may be of his ingenuity, he cannot be compelled to pay an increased tax. 34/

> My Lords, the highest authorities have always recognized that the subject is entitled so to arrange his affairs as not to attract taxes imposed by the Crown, so far as he can do so within the law, and that he may legitimately claim the advantage of any express terms or of any omissions that he can find in his favour in taxing Acts. In so doing he neither comes under liability nor incurs blame. 35/

The Canadian courts follow the English tradition:

> A statute levying a tax cannot be extended by implication beyond the clear import of its terms, and the terms of a taxing statute cannot be extended to frustrate the efforts of a taxpayer to avoid taxation, for example, by a trust settlement. 36/

It follows that a taxpayer may legally enter into a series of transactions for the purpose of reducing his tax burden, providing that he respects the letter of the law. The maxim that one may not do indirectly what he is forbidden to do directly does not apply in tax law. Lord Russell's dictum on this point has been frequently quoted:

> ...If the doctrine means that you may brush aside deeds, disregard the legal rights and liabilities arising under a contract between parties, and decide the question of taxability or non-taxability upon the footing of the rights and liabilities of the parties being different from what in law they are, then I entirely dissent from such a doctrine. 37/

Here again, the Canadian courts follow British precedent. 38/ It results that, in the absence of a specific or contrary provision in the Act, the Department of National Revenue must accept all the legal consequences of a genuine, though not of a simulated transaction,and it must determine the tax liability of the parties in accordance with the rights and obligations which the law ordinarily attaches to such a transaction. 39/

6.1.4.2. THE COURSE ADOPTED BY THE LEGISLATOR

The higher the tax, the keener the search for loopholes. No sooner is a loophole extensively used, than the officials of the Department of National Revenue press the Minister of Finance to introduce an ad hoc amendment to close the gap.

In this battle of wits, the legislator is not always successful. This can be seen by reference to some examples from the Income Tax Act.

6.1.4.2.1. INDIRECT PAYMENTS OR TRANSFERS

Under sections 137(2) and 137(3), 40/ indirect payments or transfers are subjected to taxation. In transactions between persons who do not deal at arm's length, any benefit conferred by one party upon another is taxed as a gift or as income, depending on whether the benefit conferred is in the form of capital or of income.

These provisions set up objective criteria which the courts can easily apply. Avoidance is made more difficult. But, as the provisions

are subject to restrictive interpretation, the loophole has not been completely plugged. M.N.R. v. Sheldon's Engineering Co. Ltd. 41/ is a case in point.

It should be emphasized that, where avoidance of sections 137(2) and 137(3) is still possible, it is not because of any defect in the criteria set up by the legislator, but because of the method of interpretation used.

6.1.4.2.2. DEDUCTIONS IN RESPECT OF ARTIFICIAL TRANSACTIONS

Section 137(1) is intended to disallow deductions in respect of artificial transactions and reads as follows:

> In computing income for the purposes of this Act, no deduction may be made in respect of a disbursement or expense made or incurred in respect of a transaction or operation that, if allowed, would unduly or artificially reduce the income. 42/

This provision must be interpreted in conjunction with section 12(2) which reads as follows:

> In computing income, no deduction shall be made in respect of an outlay or expense otherwise deductible except to the extent that the outlay or expense was reasonable in the circumstances.

If the word "unduly" in section 137(1) means "illegally", the provision is absurd, but if the word means "unreasonably", the provision is merely a useless repetition of section 12(2). Since the Act does not define the word "unduly", the provision could probably have been of little value had it not also contained the word "artificial". The following interpretation of the section was given by Mr. Justice Ritchie of the Exchequer Court in Shulman v. M.N.R.:

> While the language of section 137(1) is not as clear and explicit as, on first examination, it appears to be, I do not regard any of it as surplus. In my opinion the word "that"

> relates to "deduction". I interpret "unduly" as relating to quantum and meaning "excessively" or "unreasonably". In the context found here, "artificially" means "unnatural",—"opposed to natural" or "not in accordance with normality".
>
> I construe subsection (1) as though it read:
>
> In computing income for the purpose of this Act no deduction that if allowed would unduly or artificially reduce the income may be made in respect of a disbursement or expense made or incurred in respect of a transaction or operation.
>
> In considering the application of section 137(1) to any deduction from income, however, regard must be had to the nature of the transaction in respect of which the deduction has been made. Any artificiality arising in the course of a transaction may taint an expenditure relating to it and preclude the expenditure from being deductible in computing taxable income.
>
> In my opinion, the primary object of injecting Shultup into the management setup was to reduce the income tax payable by the appellant on his professional income. 43/

According to this interpretation, no deductions may be allowed in respect of artificial transactions, and it would appear that a transaction is artificial if it is not in accordance with standard business practice, or at least would not be in accordance with such practice if its primary purpose were not to reduce tax liability. Should this interpretation be generally accepted, a loophole in the Act will have been closed. It should be noted, however, that the provision applies to the deductions made in computing net income, such as professional expenses, but not to deductions made in computing taxable income, such as medical expenses and charitable donations. This is due to the restrictive interpretation given to the words "in computing income..." 44/

Thus, section 137(1) sets up objective criteria also and, if avoidance is still possible, the fault again lies solely with the method of interpreting tax statutes.

6.1.4.2.3. DIVIDEND STRIPPING AND ASSOCIATED CORPORATIONS

The Act has been amended on various occasions in an effort to prevent dividend stripping and avoidance of the associated corporation provisions. In spite of these amendments, however, loopholes were still found. To plug these, Parliament in 1963 enacted section 138A 45/ which vests discretion in the Minister of Finance. Thus, by not discharging their moral responsibility to seek the intention of the legislator where the law is ambiguous, the courts have led Parliament to vest discretionary power in the Minister.

Such a solution is a poor compromise, particularly in the light of the general principle of law that one should not be both judge and party in the same case. To remedy this situation, W. M. Carlyle has recommended what he calls "A simple business purpose test".

> The problem, of course, is how to phrase it. It should be stated simply. It should present an objective test. By comparison, the 1963 amendments are complicated and the test they pose is subjective as they require the judge to determine "that none of the main reasons" for the several corporations is to reduce taxes. Apart altogether from the lack of realism in such a test (for one of the main reasons may be to reduce taxes but it may be coupled with a valid business reason), the 1963 amendments require a judge to try to determine motivation rather than the business result. I suggest the judge be asked to look at the facts and to answer the objective question whether the main benefit which might have been expected to accrue was reduction of liability for tax under section 39.
>
> The judge would examine the facts and weigh in his own mind the several results or benefits arising from or which might be expected to arise from the separate existence of the corporations. It has been my experience that, if the main benefit which might be expected to accrue is the reduction of taxes, the creation of the extra corporations is invariably artificial and has no valid business substance. You are all aware of corporate partnerships and also the Rube Goldberg corporate relationships which have no meaning except to propagate the enjoyment of the 21% rate. These I suggest could not pass the proposed test. Furthermore, if a judge was confronted with a series of corporations each having their profits

> balanced delicately on or near the $35,000 line, he would be bound to rule in favour of the Crown.
>
> On the other hand, in the bona fide case, I suggest such a test would enable the taxpayer to explain to a Court the circumstances of the creation and existence of each of his corporations and their respective business activities. If each corporation produces or is likely to produce some practical business result as well as the advantage of the 21% rate, I think that, under such a rule, a judge should recognize the commercial facts of life and would relegate the tax benefit to a secondary position. If the business benefit and the tax benefit appear to be at or near a balance then, of course, he would have to rule for the taxpayer. I think that this test is capable of producing results acceptable to both the thoughtful taxpayer and the thoughtful tax administrator. I think we should give this—or some variation of the business purpose test—a try. 46/

In other words, W. M. Carlyle proposes that the criteria used by Mr. Justice Ritchie in Shulman v. M.N.R. 47/ be applied to associated corporations.

6.1.4.2.4. SECTION 138

In its effort to curb tax avoidance, Parliament has enacted not only a number of specific provisions, but also a general provision in the form of section 138 which reads as follows:

> Where the Treasury Board has decided that one of the main purposes for a transaction or transactions...was improper avoidance or reduction of taxes that might otherwise have become payable under this Act...the Treasury Board may give such directions as it considers appropriate to counteract the avoidance or reduction.

The provision has not yet been interpreted by the courts and its import is thus difficult to determine. It appears to suffer from the following weaknesses:

(a) The intention of the taxpayer must be considered. No doubt such intention may be deduced from the circumstances surrounding one or

a pattern of transactions. Furthermore, it is sufficient under this section that one of the main intentions of the taxpayer be to reduce his taxes. This is a subjective test and difficult to apply.

(b) It is unreasonable to blame a taxpayer for taking taxation factors into account in managing his property when, quite independently of this factor, the transaction or transactions in question are in accordance with normal business practice.

(c) The provision implies that there are proper ways of avoiding tax and that in such cases the provision cannot be invoked. Furthermore, the word "improper" in subsection 6 does not necessarily mean "illegal". The legislator has thus taken pains to point out that tax avoidance may be improper without necessarily contravening any other provision of the Act. At the same time, however, the Act gives no definition of what is meant by the words "improper avoidance or reduction of taxes". Since these words must be interpreted restrictively, the scope of the section may be very limited. If, on the other hand, the words were given a broad interpretation, the scope of the provision would be very extensive. The application of the provision could, then, become somewhat arbitrary since it is very unlikely that it would be used other than in exceptional circumstances.

(d) Under subsections (4) and (5), the decisions of the Treasury Board are subject to appeal to the Exchequer Court. In exercising the power conferred on them by Parliament, the Ministers who are members of the Treasury Board are exposed to judicial censure. The fear of censure is perhaps one of the principal factors that has so far prevented the government from making use of section 138.

(e) Lastly, since one should not be both judge and party, the exercise of discretionary power by the Minister must be recognized as little more than a stop-gap measure.

6.1.5. CONCLUSIONS AND RECOMMENDATIONS

From the foregoing it may be said that, in accordance with the general rules of interpretation, the courts take into consideration certain extrinsic elements while rejecting others. For example, they refuse to consider the parliamentary background of an Act. In this respect they follow British rather than American usage. This stand is reasonable up to a point. In the United States a bill can be thrown out without bringing about the fall of the government. It follows that party discipline need not be so strict and that, when bills are being discussed, Members of Congress are able to express their views more freely than they can in a parliamentary democracy. Thus, the situation in the United States is very different from that in Canada where rejection of a government bill can bring on an election, where party discipline is very strict, and where statements made by Ministers, Members of Parliament, and even Senators, are more likely to be influenced by political considerations. When elected representatives are not free to speak their minds fully, much circumspection must be exercised in seeking the intention of the lawmaker in their speeches.

Having conceded this point, it would still appear that the rule excluding parliamentary background goes much too far. In their efforts to determine the intention of the legislator, the courts should consider whatever is pertinent and cogent. 48/ There is no doubt whatever that, in certain exceptional circumstances, the intention of the legislator can be

inferred from the history of the bill. When the Minister of Finance delivers the Budget Speech, for instance, surely it can be said that he is expressing the intention of the legislator. To all intents and purposes, he alone is responsible for all statutes amending the tax structure. For example, the purpose of the 1956 amendment to the Excise Tax Act is clearly stated in Hansard, especially in the speech delivered by the then Minister of Finance, Mr. Harris. 49/ One cannot see why, in a case such as this one, the courts do not consider or pretend not to consider the parliamentary background of the Act. However, this rule of interpretation does not apply solely to tax laws. Furthermore, it is doubtful whether the courts will ever take the initiative of changing this rule and it is equally unlikely that Parliament will ask them to do so.

The recommendations put forward in this chapter will be limited to the rules of interpretation as they concern tax law only. Where a taxation provision is ambiguous, the courts do not seek the meaning most in keeping with the spirit of the law. On the grounds that they are protecting the rights of the people, they do not exercise their customary prerogatives of discretion within the limits of the law. Abdicating their responsibilities in this way, the courts do not do away with discretion in taxation matters, but merely transfer its exercise to others less qualified to make good use of it. As a result of his inability to prevent tax avoidance in one way, the legislator resorts more and more readily to increasing the discretionary powers of departmental bodies and officials. The answer to this problem does not consist in reintroducing, increasing, lessening or abolishing discretion, but in setting up clear-cut, objective criteria wherever possible, and reinvesting the courts with their proper powers of judgment.

Since the restrictive interpretation of tax statutes is based on an old and well-established rule, there is little hope that the courts will reverse their stand without being expressly invited to do so by the legislator. In the words of Mr. Justice Frankfurter, it is not within their power to make "a decided break with the past". 50/ Legislative action is imperative. We therefore recommend that:

> Both the Income Tax Act and the Excise Tax Act should contain a provision stipulating that their contents are to be broadly interpreted; that, in case of ambiguity, the courts must seek the meaning most in keeping with the purpose of the Act; and that, in order to determine this purpose they may consider the prior state of the law, the weaknesses of prior legislation and the remedies proposed to overcome such weaknesses.

This reform would go to the root of the evil. Restrictive interpretation would be abolished not only as regards general provisions establishing a tax but also as regards subsequent ad hoc amendments designed to prevent avoidance of the general provisions. It would permit the Canadian courts to evolve in the pattern of their American counterparts. In the United States, judges feel less and less obliged to follow blindly the literal interpretation rule in tax cases, 51/ as is witnessed by the following quotation from Mr. Justice Stone in White v. United States:

> We are not impressed by the argument that, as the question here decided is doubtful, all doubts should be resolved in favour of the taxpayer. It is the function and duty of courts to resolve doubts. We know of no reason why that function should be abdicated in a tax case more than in any other where the rights of suitors turn on the construction of a statute and it is our duty to decide what that construction fairly should be. 52/

This new approach to interpretation will not of itself be adequate to abolish tax avoidance by means of artificial transactions. A definite provision, which can be applied to all cases, is required. We therefore

recommend that:

> The Income Tax Act should contain a provision to the effect that in computing tax all artificial transactions which have the effect of reducing the amount of tax payable should be disregarded. Such transactions should be defined as transactions which while legally valid are contrary to normal business practice or would be contrary to normal business practice if their purpose were not to reduce the tax payable. This provision would make sections 138 and 138A obsolete and these should be repealed.

This reform would generalize the use of the business purpose test applied to the interpretation of section 137 by Mr. Justice Ritchie in Shulman v. M.N.R. 53/ It should be noted that this test was recently applied in an English court. 54/ It has been in use in the United States for well over a quarter of a century. 55/

6.2. SPECIAL TRIBUNALS

Before enquiring into the Tariff Board and the Tax Appeal Board, some general observations about special tribunals will be in order.

6.2.1. GENERAL OBSERVATIONS

What are the reasons for the existence of special tribunals? On what principles do they operate? Are they subject to control by the ordinary courts? Each of these points merits examination.

6.2.1.1. REASONS FOR THE EXISTENCE OF SPECIAL TRIBUNALS

The necessity of special tribunals may be open to question in view of the many advantages afforded by the ordinary courts. In the first place, these exist already and do not have to be set up specially; as a result, uniformity is maintained within the judicial system and duplication is avoided. The courts have well established procedures, their conduct can

be anticipated with some degree of certainty, and their independence and impartiality are hallowed by long tradition. Thanks to centuries of experience, their method of administering justice has attained a high standard of fairness. On the other hand, the courts are essentially traditional and their approach to new problems is often very conservative. In addition, their learned and intricate procedures involve long delays and excessive costs. Thus, they are not readily accessible to persons of modest means who dare not stake large sums on endless litigation the outcome of which is necessarily uncertain. Because of these drawbacks, there is a growing tendency to refer disputes between the government and the citizens to special tribunals.

Special tribunals are one of the by-products of the tendency toward government intervention; they have become increasingly numerous as a result of the advent of the welfare state. By analogy with French terminology, they are sometimes called administrative tribunals, not because they render administrative decisions—in fact, their decisions are often judicial or quasi-judicial—but because they are preferred to the ordinary courts for administrative reasons. 56/

Recourse to special tribunals is comparatively inexpensive. Usually there are no legal costs and frequently the services of a lawyer are not required. This is a distinct advantage, since many people are deterred from applying to the ordinary courts by the prospects of high judicial and extra-judicial costs. Special tribunals are also lighter on the public purse, since salaries and pensions are lower and premises can be used for other purposes.

Another attractive feature of special tribunals is that they are speedy. Since they are not bound by traditional methods of procedure and evidence, they can adopt simple basic rules that will shorten the time spent on each case. The fact that, should a bottleneck occur, additional judges can be readily appointed, sometimes on a temporary basis, is another point in their favour.

Another excellent feature of these tribunals is that they can be composed of specialists in a given field. For obvious reasons, the judges appointed to the ordinary courts, however knowledgeable and willing they may be, cannot be fully conversant with all branches of law; they may find themselves on unfamiliar ground when called upon to try cases involving matters calling for a high degree of specialized technical knowledge. Whilst the courts are already specialized to a certain extent (for example, bankruptcy and Admiralty), special tribunals of experts who bring their knowledge and experience to the bench can render valuable services and increase public confidence in and respect for the judicial system.

Special tribunals also have the merit of being flexible. They can adopt simpler, more informal procedures. What justice may lose in majesty, it gains in efficiency. Again, special tribunals are less bound by the rigidities of precedent, which so often paralyzes the ordinary courts and restricts the development of law.

However, the special tribunals also have their weaknesses and drawbacks, the most striking of which is the little publicity their decisions attract. Some are not published at all; others, published in abridged form, are not readily accessible or not sufficiently widely distributed. As these tribunals do not follow the traditional rules of evidence,

questions of fact are not sufficiently well elicited. Other regrettable features are their lack of prestige and the slight interest taken by the Bar in appointments to such tribunals.

6.2.1.2. THE CONDUCT OF SPECIAL TRIBUNALS

Like ordinary courts, special tribunals must abide by certain principles, particularly the principles of natural justice embodied in the Canadian Bill of Rights. 57/

6.2.1.2.1. OBSERVANCE OF THE PRINCIPLES OF NATURAL JUSTICE

Special tribunals must abide by the principle that one cannot be both judge and party in the same case. Special tribunals should have no interest in the litigation. 58/

> Now one of those principles which must guide a person in a judicial position is that he must not be both accuser and judge. If there is on a tribunal anybody who is an accuser and who, although he is accuser, acts also as judge, his presence on that tribunal is fatal to its jurisdiction and it is of no importance that had he been absent the decision would have been the same. The mere presence of a person who is an accuser and judge vitiates the decision of the tribunal.... One principle is that anybody is disqualified to act on any judicial matter in reference to which he has any pecuniary interest or any real bias. This is undoubtedly the law but the bias which disqualified must be in connection with the litigation in question.... It must be a real bias.... The mere possibility of a bias will not disqualify. 59/

Special tribunals must also observe the audi alteram partem rule; they must hear both parties, 60/ allow each party to cross-examine the other's witnesses, and ensure that nothing is communicated to the Board of which the other party is not aware. 61/

6.2.1.2.2. OBSERVANCE OF THE PRINCIPLES LAID DOWN IN THE FRANKS REPORT

In 1955, the British Lord Chancellor set up a Committee on Administrative Tribunals and Enquiries under the chairmanship of Sir Oliver Franks. The Committee's mandate was to investigate and make recommendations concerning the constitution and operation of tribunals other than the ordinary courts. The Committee submitted its report in 1957, 62/ and most of its recommendations were accepted by the government and embodied in the Tribunal and Enquiries Act, 1958.

The public, says this Committee, must not be given the impression that special tribunals act in secret. They should, therefore, act in the open, announce the date and whereabouts of their sittings and admit the public, except in special cases where the litigant asks to be heard in camera or when such action is dictated by the public interest. They should be required to give grounds for their decisions. Two benefits stem from this practice. In the first place, the public tends to accept unfavourable decisions more readily when they are acquainted with the grounds on which they are based and, secondly, where grounds are recorded, litigants can apply for a writ of prerogative and call on the higher courts to determine whether it appears from the record that the decision was fair and sound. Moreover, these decisions should be published. Our jurisprudence would thus have the benefit of a considerable body of case law and the approach of the tribunals to future cases could be more readily assessed. There can, however, be no question of publishing all the decisions handed down by special tribunals, their number being too great. Publication should be restricted to those which are of general interest.

Litigants should have ready access to special tribunals. To ensure this, judicial and extra-judicial costs should be kept relatively low. Moreover, their procedures should be simple, intelligible, clear and uniform, so that all parties can be well aware of their rights and make full use of them. 63/

Members of special tribunals should be especially capable and well versed in the particular branch of law practised in their court. They should be known for their skill, experience and ability in this field of law where their decisions will have the force of res judicata. Intelligence and ability to learn are not enough; such persons must be fully conversant with their particular branch of law before being appointed to a tribunal.

In all countries of the world, the independence of the judiciary is considered to be a prerequisite of justice. The independence of special tribunals is just as essential as that of the ordinary courts. Their members should be independent of government, both as regards security of tenure and remuneration. Consequently, their salaries must be paid out of the Consolidated Revenue Fund and not be voted annually by Parliament.

To preserve the independence of tribunals, their members should not be appointed by or upon the recommendation of a minister with direct interest in the cases they will try. It is preferable that all appointments to the judiciary be left to the Minister of Justice, who by tradition is endowed with a special role among the Members of the Cabinet. It is a matter of constitutional practice that he enjoys somewhat more freedom than other ministers in order to free him from political pressures. His particular status enables him to be more impartial and to act more in

keeping with the best interests of justice when making appointments to the judiciary, thus ensuring that members of special tribunals will enjoy the measure of independence they must have.

In most cases, appointments to special tribunals are of limited duration, usually five or ten years. This fact might influence the behaviour of members who, for considerations of status or salary, are anxious to be reappointed, thus unconsciously tending to deliver decisions acceptable to the department responsible for reappointments or, at least, being wary of criticizing the administration. In view of this, members of special tribunals should enjoy the same privileges as those granted to the judges of the higher courts, and their removal should be left to Parliament only.

The fear has been expressed that government might exert undue influence over special tribunals by means of suggestions regarding judicial policy or interpretation. 64/ It is normal that government should supply the special tribunals with information which they may find useful and which they might otherwise not have. If such information is provided with discretion, it is unlikely to be considered as a form of pressure.

Physical environment exercises a subtle, yet real, influence on human beings. The administration of justice in a particular setting may help to create an atmosphere of confidence, of independence and of impartiality. This is why special tribunals should not sit in premises occupied by the department concerned and why the minor officials of the tribunal should not be employees of that department. Similarly, a minister who has an interest in the decisions of the special tribunals should not act as a link between them and Parliament, nor be responsible to Parliament for them.

6.2.1.3. JUDICIAL CONTROL OF SPECIAL TRIBUNALS

Control is exercised by virtue of the supervisory powers of superior courts and by means of appeals proper.

The superior courts do not derive their powers of supervision and control from the statutes but from common law, 65/ which authorizes them to revise the decisions handed down by the lower courts in cases of want or excess of jurisdiction or error in the exercise of jurisdiction in the form of a violation of the principles of justice, and in cases of decisions dictated by a third party, or taken in pursuit of illegal ends or influenced by irrelevant considerations. On various occasions, the legislator has attempted to block this form of control by means of the so-called privative clauses aimed at denying access to a writ of prerogative, but the courts have in most cases held that such provisions do not deprive them of their power of revision, 66/ since, according to jurisprudence, they do not apply in such cases as when the lower court exceeds its jurisdiction. The argument is that it then ceases to be a court and the privative clause no longer applies to it. Opinions may differ concerning resistance by the superior courts to the will of the legislator, but there is much merit in having a mechanism of control which can ensure that the special tribunals stay within their jurisdiction and exercise it properly.

The second form of control is the appeal to the ordinary courts. The right of appeal does not exist as a matter of course; it is granted by statute. To permit appeals to a whole hierarchy of superior courts constitutes a return to legalism and formalism, with all that this implies in terms of delay and expense. Consequently, to enable special tribunals to achieve the purposes for which they are set up, they should be independent

of the ordinary courts, except in the matter of writs of prerogative granted in cases of want or excess of jurisdiction.

However, other approaches to judicial revision might be considered, such as recourse to special appeal tribunals. The psychological value of appeals for both litigant and tribunal cannot be denied. Knowing that their decisions are liable to scrutiny and reversal, members of tribunals will naturally tend to be more careful and prudent. The same may be said of appeal judges who realize that their decisions will be interpreted and applied by the lower courts in different circumstances. One of the advantages of appeals is that they introduce uniformity in the jurisprudence of the courts of first instance. There is no reason to believe that a system of special appeal tribunals, whilst retaining the special characteristics which make them preferable to the ordinary courts, could not provide similar services. Such a system, if simple and efficient, would sustain public confidence in the special tribunals at little expense, for not only must justice be done but it must also appear to be done.

6.2.2. THE TARIFF BOARD

The Tariff Board is both an advisory and a judicial body. In the first capacity, it conducts investigations; in the second, it hears appeals in matters pertaining to customs and excise.

6.2.2.1. BACKGROUND

The Tariff Board was not the first parliamentary body instituted to enquire into the tariff. Ad hoc committees of Cabinet Ministers were set up in 1893, 67/ in 1897 and in 1907 to collect data and receive representations. However, they were not empowered to summon witnesses or require information.

In 1912, the Minister of Finance, Sir Thomas White, introduced a bill 68/ establishing an advisory Tariff Commission. Mindful of its electoral promises, the government wished to protect the preparation of the tariff from political influences and to provide Canada with a permanent fact-finding board to advise the Minister of Finance on tariff questions. However, the government was unable to accept certain amendments proposed by the Senate and the bill was dropped.

On April 7, 1926, an advisory board on Tariff and Taxation was established by order of the Governor in Council. 69/ The Board's duties were to conduct enquiries, receive representations from the public and report thereon to the Minister of Finance. The Board did not act on its own initiative, but on instructions from the Minister. To him were addressed all petitions for enquiries. When he referred the petition to the Board, it would hold a hearing at which petitioners could submit their case either directly or through an attorney. Those opposing the petition could present their views. The Board's report could weigh not only the implications of the requested tariff amendment for the petitioners themselves but also its possible consequences for the Canadian economy as a whole. By the end of 1929, the Board received 156 references from the Minister of Finance and held 194 public hearings. All took place in Ottawa. 70/

This first, purely advisory, Tariff Board was abolished in 1930 71/ following the accession to power of the Conservative Party. On May 15, 1931, Prime Minister Bennett tabled a bill establishing a new Board. 72/ The Prime Minister justified 73/ his action by pointing out that no law authorized the order setting up the 1926 Board and that he was putting it on a legal basis. The 1931 bill was modelled to a large extent on the one

of 1912. 74/ The new Board was to perform the following duties:

> First, to conduct enquiries into certain matters pertaining to tariffs and to report to the minister; second, to hold certain enquiries under the Customs Tariff Act; third, to hold certain enquiries under the Combines Investigation Act; fourth, to exercise the powers and perform the duties of the Board of Customs.

The duties of the new Board were much the same as those of its predecessor, but with the addition of certain judicial functions. The new Board was made into a Court of Record, with power to administer oaths and to summon witnesses. It took over the duty of hearing appeals, which until then had been carried out by the Board of Customs. 75/ The purpose behind this judicial provision was to relieve the Commissioner and Assistant Commissioner of Customs, who were members of the Board of Customs, from the necessity of hearing appeals against their own decisions. The Tariff Board Act 76/ received royal assent on August 3, 1931, and after several amendments on minor points it became Chapter 261 of the Revised Statutes of Canada, 1952.

6.2.2.2. ORGANIZATION

6.2.2.2.1. COMPOSITION

When the Tariff Board was first established in 1931, it comprised three members, one of whom was Chairman and another Vice-Chairman. 77/ Membership was increased to five in 1956 and to seven in 1961. 78/ When the Board is acting in its advisory capacity, the Chairman may appoint one or several members to exercise its powers. 79/ As a tribunal, its powers may be exercised by three or more of its members. 80/

The members are appointed by the Governor in Council, that is to say, by the Cabinet. In such a matter, the opinion of the Minister of Finance

and that of the Minister of National Revenue would naturally carry considerable weight.

No qualifications are specified by the Act for appointment to the Board. Presumably, anyone over 70 would be debarred under the following provision:

> A member ceases to hold office upon reaching the age of seventy years. 81/

Apart from the above age limit, anyone could be appointed to the Board, whatever his qualifications, his experience or his profession. Three of the seven members serving at present are lawyers.

In the words of the Act:

> Each member holds office during good behaviour for such term not exceeding ten years as may be fixed by the Governor in Council at the time of his appointment but may be removed for cause at any time by the Governor in Council. 82/

However, under another provision of the Act, the Governor in Council may make a temporary appointment of a qualified person to act as a member of the Board. 83/

The limited term of office, with possibility of removal by Order in Council, is scarcely suitable for an advisory body and not at all for a tribunal. Both, and more particularly a tribunal, should be completely independent of the government. Whilst in practice no members have ever been removed and all appointments have been for a ten-year term, some appointments have not been renewed at the end of the term. With a view to ensuring full independence of the Board, we recommend that:

> The Act place the Commissioners on the same footing as judges in the matter of employment security, salary and pension.

6.2.2.2.2. ADMINISTRATIVE AND SUPPORTING STAFF

The Tariff Board is served by a secretariat and a team of research workers. The duties of the Secretary and Assistant Secretary include publication of notices and rulings in the Canada Gazette, circularizing this information to those whose names are registered on the mailing list and, generally, organizing the Board's public hearings. The Board has its own team of economists and statisticians who conduct research into economic matters and undertake statistical analyses. At the present time, it employs two statisticians and ten economists.

6.2.2.3. ROLE OF THE TARIFF BOARD

The Board has a twofold role: that of an advisory body and that of a judicial body.

6.2.2.3.1. ADVISORY BODY

6.2.2.3.1.1. SCOPE

In the days when customs duties were collected solely for revenue purposes, there was little question of tariff policy. More recently, the tariff has become an instrument of economic policy serving to regulate Canada's economic development rather than an instrument of public finance. In view of this development, the need arose to create a non-departmental body which could undertake thorough investigations, since it was felt that Parliament was not an appropriate body to carry out unbiased and scientific surveys.

Theoretically, the Tariff Board can play an advisory role in various fields.

In the first place, the Governor in Council may request the Board to enquire into combines which are detrimental to consumers, or to conduct investigations authorized by the Combines Investigations Act, 84/ since one of the ways of reducing the effects of domestic combines is to remove tarrif barriers and thus permit or stimulate competition from abroad. The Tariff Board has never exercised the powers it possesses, as all investigations relating to combines have so far been conducted by the Restrictive Trade Practices Commission.

In the second place, the Governor in Council may request the Tariff Board's advice on any matter relating to trade and commerce. In the words of the Act:

> It is also the duty of the Board to inquire into any other matter or thing in relation to the trade or commerce of Canada that the Governor in Council sees fit to refer to the Board for inquiry and report. 85/

There is only one instance of the Governor in Council having referred a commercial enquiry to the Board under this section. This occurred on April 26, 1939. 86/

Thirdly and lastly, the Minister of Finance may request the Tariff Board to enquire into all matters in relation to any goods that:

> ...if brought into Canada or produced in Canada, are subject to or exempt from duties of customs or excise. 87/

The very general terms used by the legislator empower the Board to enquire into all matters relating to the production, manufacture, cost or price of goods produced in Canada or imported into the country, as compared with those of other countries. The Board is thus able to collect the data it requires to advise the Minister of Finance in customs matters.

The Minister has frequently asked the Board for advice. Up to December 31, 1963, it conducted, at his request, 133 enquiries, of which 26 were undertaken since 1949. During the past three years it received three requests and conducted seven enquiries, two of which lasted several years. The most extensive enquiry undertaken by the Board was that on chemical products, where 1150 persons appeared before it during 175 days of public hearings and the transcript ran to 38,000 pages.

6.2.2.3.1.2. PROCEDURES FOR ENQUIRIES AND INVESTIGATIONS

With the single exception noted above, only the Minister of Finance has consulted the Tariff Board. He does so by letter asking the Board to enquire into and report on a certain matter and to include appropriate recommendations in its report. From receipt of this letter to submission of its report, the Board is absolutely free to conduct its enquiry without further contact with the Minister.

Its first official action is to publish a notice in the Canada Gazette stating its terms of reference and mentioning the tariff items to be reviewed. A copy of the notice is also sent to all persons, corporations, firms or associations appearing on the Board's mailing list. This list, numbering at present 800 to 900 names, is open to anyone interested in receiving the Board's notices and decisions.

All interested parties are free to make representations or submit briefs at public hearings. A notice published in the Canada Gazette gives the dates on which hearings are to be held and all other information required. Normally, the Board requires that requests for tariff changes be submitted 45 to 60 days prior to the date set for the hearing and that

briefs supporting such requests be received 15 to 30 days before that date.

The Board may, on its own initiative, summon witnesses and require them to give evidence or to produce such items or documents as it deems requisite. However:

> No person is compellable, against his will, to attend to give evidence or to produce documents or other things, at any place outside of the province in which he is served with the summons.... 88/

Witnesses, whether voluntary or summoned, can be questioned by the other participants. Also, the Board is authorized to hear evidence on a confidential basis. Information so obtained may not be revealed under pain of a fine of a thousand dollars or of not more than twelve months' imprisonment. 89/ It cannot, therefore, be divulged to Parliament or to the Minister of National Revenue. This procedure, well suited to the Board's requirements when acting in its capacity as an advisory body but not as a judicial body, ensures a greater degree of public co-operation since those who appear before it may be quite willing to reveal information concerning their business to an independent body provided it is kept from their competitors.

During an enquiry, a complete stenographic record is kept of the proceedings at public hearings. A copy of the transcript and of all non-confidential information received must accompany the report submitted to the Minister of Finance. The whole must be laid before Parliament by the Minister within fifteen days after the opening of the next session, or within fifteen days after the making of the report if Parliament is then in session. 90/

6.2.2.3.1.3. PERFORMANCE

It has been charged that the Board's hearings are protracted and its reports long in coming. There is no doubt that business conditions can change very quickly and that the circumstances at the time a report is submitted may well be different from what they were when the enquiry was launched or the hearings held. Also, it must be recognized that a thorough and comprehensive enquiry requires considerable time. All interested parties must be given an opportunity to be heard. The informality of hearings may tend to slow proceedings, but the advantages far outweigh the sacrifice in time. The delay between the hearings and the submission of the report can be due to the difficulty of the problem involved and the need of thorough analyses. It would seem that the only way to hasten the submission of reports without sacrificing the quality of the enquiries is to supply the Board with additional staff.

In all other respects the Tariff Board, as an advisory body, operates in a satisfactory manner. It has the freedom of action required to conduct its enquiries scientifically and impartially. Without losing the initiative the Minister of Finance can, by leaving a matter to the Board, shield himself from undue pressures. In bringing down his annual budget, he usually takes into consideration the recommendations made by the Board during the year. In practice, he cannot disregard the advice of this specialized and independent body without exposing himself to questioning and criticism in the House.

Since the Board carries out its advisory duties very competently and serious consideration is given to its opinion, it might be beneficial to extend its scope to the entire field of taxation. It would then be necessary

to add to its research staff a number of accountants, lawyers and experts in tax administration.

6.2.2.3.2. JUDICIAL BODY

Besides being an advisory body, the Tariff Board is also a Court of Record. 91/

6.2.2.3.2.1. JURISDICTION

As a result, the Tariff Board hears appeals against decisions taken by the Department of National Revenue in matters pertaining to customs and excise. Its decisions are final, barring appeal to a superior court. It derives its jurisdiction from the Excise Tax Act 92/ and from the Customs Act. 93/

6.2.2.3.2.1.1. JURISDICTION IN EXCISE MATTERS

Jurisdiction in excise tax matters is conferred on the Tariff Board by the Act:

> Where any difference arises or where any doubt exists as to whether any or what rate of tax is payable on any article under this Act and there is no previous decision upon the question by any competent tribunal binding throughout Canada, the Tariff Board constituted by the Tariff Board Act may declare what amount of tax is payable thereon or that the article is exempt from tax under this Act. 94/

The Tariff Board is, therefore, competent to determine whether an article is subject to sales tax, to excise duty or to both. It may also determine to which articles an exemption applies. It is competent to settle differences over the rate of tax payable or over the classification of particular items for excise purposes. It will be recalled that, whereas

there is but one rate of sales tax, the rate of excise duty varies according to the categories of goods specified in Parts I to V of the Act. 95/

The Tariff Board is not authorized to settle a dispute when another competent tribunal has already handed down a decision which is binding throughout Canada. Presumably, the Board is not bound by the decisions of the provincial courts but, when it or the Exchequer Court or the Supreme Court of Canada has ruled on the status of an item as regards tax or on the rate of tax applicable, the Board cannot reopen the question.

The jurisdiction of the Tariff Board under the Excise Tax Act 96/ has been considered by the Supreme Court of Canada in Goodyear Tire and Rubber Co. of Canada Ltd. v. T. Eaton Co. Ltd. 97/ The T. Eaton Co. entered into a contract with a tire manufacturer who was to make a special line of tires to be sold exclusively by Eaton's under their own trade name. Who was, for the purposes of the Excise Tax Act, 98/ the manufacturer of the tires, the rubber company or the Eaton Co. itself? The answer to this question would determine whether the tax should be paid on Eaton's purchase price or on its selling price. 99/ The other tire manufacturers attended the hearing and argued against the principle of Eaton's being able, by paying less tax than they, to sell identical goods at a lower price whilst making the same profit. The Board ruled in their favour, and so did the Exchequer Court to which the case was appealed. 100/ However, the decision of the Exchequer Court was quashed by the Supreme Court of Canada, which ruled that the Board had no jurisdiction in the matter. In the words of Justice Fauteux:

> Whether or not a particular article is one in respect of which a tax is imposed raises a question of general concern throughout Canada and is a matter justifying notice being given to third parties so that they may be heard if they so elect. But whether a particular person is the person liable for the payment of a

> tax imposed in respect of an article is an issue between that person and the Crown. To permit third parties to intervene in such an issue would be a departure from the general system of the law. The intention of Parliament to do so would have to be indicated in explicit terms, which, in my view, has not been done under the section. 101/

This Supreme Court decision sets limits to the Tariff Board's jurisdiction, holding in effect that the Tariff Board is competent to hand down decisions in rem and to declare whether or not an article is subject to tax and which rate of tax applies, but is not competent to decide which person is liable for payment of the tax.

Three courses are open to the taxpayer who wishes to dispute his liability to the Crown. He may: (a) pay the tax under protest and file a petition of right for a refund; 102/ (b) ask the Department to take proceedings against him for non-payment of tax, which will give him an opportunity to present his defence; or (c) bring suit in a provincial Supreme Court for a declaration that the taxes claimed by the Crown are not owing. 103/

As a result of the ruling of the Supreme Court, many issues between the taxpayer and the Department lie outside the jurisdiction of the Tariff Board. Therefore, in view of the need of an expeditious and inexpensive tribunal with full original jurisdiction in all issues arising from the implementation of the Excise Tax Act, we recommend that:

> The jurisdiction of the Tariff Board or of any other body created to succeed it be extended to permit taxpayers to appeal from all decisions by the Department involving liability in the matter of excise taxes.

6.2.2.3.2.1.2. JURISDICTION IN CUSTOMS MATTERS

Under the Customs Act 104/ and the Customs Tariff 105/ all goods

imported into Canada must be appraised for customs purposes and classified under one of the items of the tariff. This is usually done at the port of entry by a federal customs appraiser at the time the goods imported are declared. Disagreements between the importers of goods and the Department of National Revenue over appraisals and classifications are frequent. According to the new section 43 introduced into the Customs Act 106/ in 1962, the appraiser's decision is final, unless the importer, within 90 days of filing his customs declaration, sends a written appeal to another appraiser. Within 90 days following receipt of the second appraisal, the importer may send a written request to the Deputy Minister of National Revenue for Customs and Excise for a new appraisal. The Deputy Minister's decision may be appealed to the Tariff Board within 60 days:

> A person who deems himself aggrieved by a decision of the Deputy Minister
>
> (a) as to tariff classification or value for duty,
> (b) made pursuant to section 42, or
> (c) as to whether any drawback of Customs duties is payable under section 11 of the Customs Tariff or as to the rate of drawback so payable,
>
> may appeal from the decision 107/ to the Tariff Board by filing a notice of appeal in writing with the secretary of the Tariff Board within sixty days from the day on which the decision was made.

Under this provision, the Tariff Board acts as a tribunal of appeal in case of disputes between a taxpayer and the Deputy Minister of National Revenue for Customs and Excise concerning tariff classification, value for duty and drawbacks.

The Act 108/ also authorizes the Deputy Minister to seek the opinion of the Tariff Board on any question concerning the appraisal or classification of goods. Such requests for an opinion entail the same procedure and provide the same possibilities of appeal as all cases heard by the Board.

Since customs duties are only indirectly related to excise taxes, the jurisdiction of the Board in the field of customs will not be explored here in detail. It is sufficient to note that the Board is competent to determine the duty-paid value of imported goods and that this valuation serves as a basis for calculating excise and sales taxes. 109/

6.2.2.3.2.2. PROCEDURE

The procedure followed by the Tariff Board is free of charge and informal.

Taxpayers may appeal to the Board without incurring any legal costs. Also, they may submit their case in person. They have done so from 1959 to 1963 in one appeal out of three. But as the Department is always represented by a lawyer, it is becoming increasingly customary for appellants to retain the services of an attorney or an accountant.

To obtain a hearing it is sufficient to send the Board an ordinary letter setting forth the grounds of the dispute. This letter is usually accompanied by a copy of the decision being appealed. Though the Board is allowed to consider hypothetical cases, it does so only if the petitioner shows that his rights have been affected by a decision of the Deputy Minister of National Revenue for Customs and Excise.

The Board gives at least three weeks' notice of the hearing in the Canada Gazette, 110/ usually suggesting a date for it. As soon as the date proposed has been accepted by the parties, it publishes the notice of hearing six or eight weeks in advance and communicates it to all persons, firms, corporations and associations registered on its mailing list. Though free to hold hearings anywhere, it always holds them in Ottawa because, following

a highly commendable practice, third parties are allowed to enter an appearance and it is not known till the last minute who they will be and from what part of Canada they will come. Since those who reside far from the capital may be faced with heavy travelling expenses, we recommend that:

> With the consent of the parties, written submissions be allowed in addition to or instead of oral hearings, this to be done either by procedural rules adopted by the Board or pursuant to a legal provision similar to section 9(1) of the Income Tax Act.

At the hearings the parties present their statement of facts and arguments. The Board is not bound by the rules of evidence followed in ordinary courts. Although it admits confidential evidence under the seal of secrecy in the course of an enquiry, it is not appropriate that it should do so when sitting as a court. In any case, if one of the parties objects to evidence that has been given, the Board, while admitting the evidence, notes the objection in case the Exchequer Court should be called upon to deal with the matter on appeal.

So far, the Tariff Board has not availed itself of its right to establish rules of procedure, 111/ wishing to keep its proceedings informal. However, the proper conduct of a judicial hearing requires a certain amount of procedure. In order not to be caught unprepared, the parties need to know something of the facts and arguments to be presented by the other side. If third parties intend taking a stand opposed to that of the principal parties, they should be required to supply a summary of their case in advance. We therefore recommend that:

> In the performance of its judicial functions the Tariff Board should adopt rules of procedure requiring all parties and interveners in an appeal to give the Board and the other parties a summary of their case and of the arguments they propose to submit at the hearing.

The Tariff Board's decisions are final and not subject to appeal except on points of law. The Board is thus the sole arbiter of the facts. It should be noted in this connection that it is particularly competent to deal with technical matters, its membership comprising not only lawyers but also various other specialists.

Until 1949 the Tariff Board has stated the grounds for its decisions in two or three cases only. Since then it does so in most cases, and this has made it possible to gauge its attitude on a particular issue. Though its only decisions of interest in this regard are those which have been handed down since 1949, a compendium of all its rulings to date is to be published by the Queen's Printer shortly. It is intended to publish an addendum to this record every two or three years. It is to be hoped that this will be done, perhaps under the direction of the Board's secretary. In any event this new method of publishing the Board's decisions should not supplant their publication in the Canada Gazette, as required by the Act, 112/ and their circularization to the mailing list.

Decisions favourable to the taxpayers may bring about numerous applications for refunds. 113/ In general, a refund may be claimed within two years from the date of payment of the tax. 114/ In the case of a decision of the Tariff Board, it must be claimed within twelve months. 115/

6.2.2.3.2.3. PERFORMANCE OF THE BOARD

The Tariff Board can boast of a very satisfactory record as a judicial body. Very few of its decisions have been reversed on appeal. Of 338 decisions handed down since 1949, only 28 have been appealed to the Exchequer Court and seven to the Supreme Court of Canada. In six of these the Supreme Court confirmed the Board's findings and in one case it ruled that the Board

lacked jurisdiction. 116/ However, this record should not be attributed mainly to the way in which the Board performs its functions; it results rather from the Department's possession of such extensive powers that no court can do otherwise than decide in its favour. In view of this situation, it is not sufficient that the Board should, in respect of facts, be absolutely independent of the government. To ensure public confidence, the legislator should guarantee the Commissioners' independence by granting them in every respect the status enjoyed by judges. 117/

In the matter of procedure, it is proper that tax cases should be dealt with originally by an expeditious tribunal with a minimum of costs to the petitioner. The Tariff Board fills this purpose better than an ordinary court could do. However, it is possible to do still better. In the first place, as pointed out above, 118/ petitioners could be spared certain costs of travel. In the second place, certain delays could be shortened.

The following table shows the average time elapsed between the date of the initial notice given the Board and the date of the hearing, also between this last date and the date of the judgment.

DURATION OF APPEALS BEFORE THE TARIFF BOARD
1959-1963

YEAR	AVERAGE TIME FROM NOTICE OF APPEAL TO HEARING	AVERAGE TIME FROM HEARING TO DECISION
1959	1 year 97 days	58 days
1960	3 years 14 days	98 days
1961	1 year 300 days	52 days
1962	1 year 141 days	54 days
1963	1 year 13 days	36 days

(Source: Statistics supplied by the Secretary of the Tariff Board.)

It will be noted that the waiting time for the decision after the hearing has been shortened from 58 days in 1959 to 36 days in 1963. In

this, the Board is far more expeditious than the other courts, particularly the Income Tax Appeal Board, and one can only hope that it will be able to maintain its good record. However, an average time of one year and 13 days between the notice of appeal and the hearing seems to be too long. The delays cannot be blamed on the hearings themselves, since hearings usually take only half a day, sometimes a whole day, and only occasionally two or three days. They are due in part to the small number of lawyers among the members of the Board, one of whom must be sitting on the Board when it hears appeals, and in part to the practice of arranging for appeals to follow each other in order to provide for a full week of hearings.

6.2.2.4. CONCLUSIONS

In conclusion, it should be noted that it is not sufficient to improve the functioning of the Tariff Board. Its structure should be altered as well.

In the first place, the advisory and judicial functions of the Board should be separated. However useful to the exercise of their judicial or quasi-judicial functions may be the experience acquired by the Board's members in the course of their enquiries, it is somewhat inappropriate that a body should pass upon the interpretation or application of legislation which it has itself recommended to Parliament. We therefore recommend:

> That the advisory functions and the judicial functions of the Tariff Board be dissociated; and that its advisory functions, broadened as suggested above 119/ so as to embrace the whole field of taxation, be transferred to the proposed Tax Advisory Board. 120/

Furthermore, because of its being a good way to improve the functioning of the Tariff Board, we recommend that:

> The judicial functions at present exercised by the Tariff Board and the Tax Appeal Board be transferred to a tribunal having original jurisdiction in respect of all tax disputes arising between a taxpayer and the Department of National Revenue.

In order to preserve the features of the Tariff Board in the merger, the new body should comprise two divisions, one for income tax and one for customs and excise. Each division should be reasonably autonomous, particularly as regards rules of procedure, to ensure that the Customs and Excise Division can continue to hear appeals in the very satisfactory manner instituted by the Tariff Board. The tribunal would be given original jurisdiction in appeals against a decision of the Minister except when he was exercising a discretionary power. Its findings would be final and appealable only on points of law. It would thus be sole arbiter of the facts. The distinction between points of fact and of law would be based on English precedents in the matter. The findings of the Commissioners of Inland Revenue are final on all points of fact. Their decisions can be appealed only on points of law or on mixed points of fact and law.

6.2.3. THE TAX APPEAL BOARD

6.2.3.1. BACKGROUND

In 1917, 121/ the Governor in Council was empowered to appoint an arbitration board or revisory tribunal to hear tax appeals. The power was never used, however, and the provision was abrogated in 1923. 122/ The Exchequer Court therefore had, until 1948 exclusive original jurisdiction in income tax matters.

At that time in disputes between a taxpayer and the Department of National Revenue the procedure was as follows:

1. The taxpayer calculated his income, filed a return and paid the tax thereon.

2. An assessment notice was then sent to him confirming the amount paid or indicating the amount of tax still outstanding.

3. The taxpayer who wished to contest the assessment before the Exchequer Court then sent a notice of appeal to the Minister of National Revenue during the month following the date of mailing of the assessment notice.

4. Upon receipt of the notice of appeal, the Minister considered the assessment and decided whether to confirm it or to re-assess.

5. Within one month following the Minister's decision, the taxpayer could send a notice of objection.

6. Within the following month, the taxpayer had to put up a warranty of at least $400 to cover court costs.

7. The Minister then sent his reply to the taxpayer and within the next two months he sent to the Exchequer Court all the documents that it would require to hear the appeal.

8. The decision of the Exchequer Court could be appealed to the Supreme Court if the sum involved was over $500 and it might even be taken to the Judicial Committee of the Privy Council, with the latter's consent.

On October 31, 1945, a special committee of the Senate was appointed for the purpose:

> ...of examining into the provisions and workings of the Income War Tax Act and The Excess Profits Tax Act, 1940, and to formulate recommendations for the improvement, clarification and simplification of the methods of assessment and collection of taxes thereunder...and the provisions of the said Acts by redrafting them if necessary. 123/

The Senate Committee recommended that an expeditious and inexpensive court be set up to settle all disputes concerning assessments, whether on points of fact or of law, or over the exercise of the Minister's discretionary powers. 124/

After considering the report, the government set up not one but two agencies: 125/ the Income Tax Appeal Board and an Income Tax Advisory Board.

The first-named was given judicial powers and concurrent original jurisdiction in matters of income tax. The purpose of the other agency, as is indicated by its name, was to advise the Minister in the exercise of his discretionary powers.

Later on, a committee of senior civil servants drawn from the Departments of Finance, National Revenue and Justice was formed to consider the advisability of overhauling existing legislation. Following the recommendations of this committee, the Income War Tax Act was abrogated and the Income Tax Act 126/was drawn up and passed. Since the new Act abolished most of the earlier discretionary powers, the Income Tax Advisory Board lost its raison d'être, the provision authorizing its creation remained a dead letter and no appointments were made. However, the Income Tax Appeal Board was set up and from its inception operated very much as it does at present.

PERFORMANCE OF THE TAX APPEAL BOARD
1949-1963

	1949-59	1960	1961	1962	1963	TOTAL
Notices of Appeal*	4260	474	466	440	484	6124
Appeals heard or otherwise settled to Dec. 31, 1963	4251	459	441	366	173	5690
Appeals outstanding on Dec. 31, 1963 **	9	15	25	74	311	434
Cases in suspense on Dec. 31, 1963	5	14	14	33	14	80
Live cases	4	1	11	41	197	354

* 2 - 3 : 1
** 4 - 5 : 3

(Source: Data supplied by the Registrar of the Tax Appeal Board.)

The Board heard its first case on February 12, 1949. Up to the 31st December 1963, it received as shown by the above table, 6124 notices of appeal. Of these, 3060 were decided in favour of the Minister of National Revenue, 2531 in favour of the appellants, and decisions were still pending in the remaining 99 cases. Of the 434 cases outstanding, 80 were in suspense awaiting decisions from higher courts on identical or related subjects, and 11 were postponed for various reasons such as the preparation of written briefs or the discussion of terms for a compromise. The Board's usefulness will be realized when it is considered that from 1917 to 1947 the Exchequer Court heard only 150 cases bearing on income tax. 127/

6.2.3.2. ORGANIZATION

6.2.3.2.1. COMPOSITION

The establishment originally provided for the Tax Appeal Board was a chairman and at least two and not more than five other members, one of whom could be appointed assistant chairman. Until February 1, 1954, the Board comprised a chairman and two other members. On that date, the appointment of an assistant chairman brought the total membership to four. With the appointment of a fifth member on May 9, 1957, the Board attained for the first time to the full strength originally provided for it. In 1960, 128/ the initial establishment was raised from five to six. In 1961, the appointment of a sixth member completed the makeup of the Board as it now stands.

The suggestion has been made in briefs submitted to the Royal Commission on Taxation 129/ that membership of the Board be increased so as to step up the turnover of hearings and cut down delays. But in view of the fact that, in 1963, the Board settled 532 appeals while receiving only 484

new cases, that the average number of appeals heard by each member over the course of the last five years is much lower than the number heard by the judges of the ordinary courts, and that an improved procedure for administrative reviews should contribute to cutting down appeals to the Board, there seems to be no need to increase membership unless there is to be a change in the role of the Board.

Year	Hearings	Decisions	Number of Members
1959	279	232	5
1960	299	245	5
1961	260	256	5-6
1962	236	227	6
1963	240	285	6

(Source: Data supplied by the Registrar of the Tax Appeal Board.)

As regards qualifications required, 130/ no person may be appointed to the Board if he has reached the age of 65. No person may be appointed chairman or assistant chairman unless he is (a) a judge of a superior court of Canada or of a superior, county or district court of a province, or (b) a barrister or advocate of at least ten years' standing at the bar of a province. A judge appointed to the post of chairman or assistant chairman may not hold office more than 90 days unless he has within that time resigned from his office as judge or has been appointed to the Board for a period of less than two years and has been granted leave of absence without pay from his office as a judge. Thus, the first chairman of the Tax Appeal Board was Judge R. T. Graham of the King's Bench Court for Saskatchewan and his appointment as chairman was for two years less one day, dating from January 1, 1949. The other members of the Board are not required to have had legal training. However, the eleven people appointed to the Tax

Appeal Board since its establishment up to January 1, 1964, included one judge and nine lawyers, eight of whom were K.C.'s or Q.C.'s. The only member of the Board who had no legal training held office for about eight months. The composition of the Board largely explains why it has formed an attitude more closely resembling that of the ordinary courts than of the Tariff Board.

In no case may the term of office of a member exceed ten years. The Governor in Council—by which is meant the Cabinet—makes the appointments, sets the duration of the term and decides on its renewal. 131/ As the Minister of National Revenue is a member of the Cabinet and is considered the Minister responsible for the Tax Appeal Board, 132/ his opinion in the matter would carry the greater weight. This situation should not be allowed to continue, since it affects the independence of the Board and violates the principle of nemo judex in causa sua, the Minister of National Revenue being a party in the cases heard by the Board.

Certain obstacles to the recruitment of members are inherent in the organization of the Board itself. Difficulty has been experienced in persuading jurists who are versed in tax law to join the Board. Their reluctance to do so results either from financial causes or from insecurity of tenure and lack of prestige attaching to the office.

The salaries paid to members of the Board compare favourably with those received by judges of the superior courts. The chairman is paid $22,000, the assistant chairman $19,000, and the members $18,000 a year. 133/ But as taxation is one of the most highly specialized and remunerative fields of law, the financial sacrifice entailed in accepting an appointment to the Board might be compensated by an adequate pension at retirement.

The Civil Service Superannuation Act 134/ applies to the Board members, 135/ but the pension plan it provides was conceived for civil servants who are normally recruited at a much younger age than are members of the Board. In the case of a member appointed to the Board at the age of 55 who was not previously covered by the Civil Service Superannuation Act, his ten-year appointment will only bring him an annual pension equal to one-fifth of his salary. Clearly, such conditions do not attract the ablest jurists into service with the Board.

The lack of security of office for more than a ten-year period is also a deterrent. A lawyer of 55 years of age or more would hesitate to accept an appointment to the Board, as his mandate would not be renewable. At 54, he would hesitate just as much, as his term would probably not be renewed when he is 64. In fact, the Governor in Council is not obliged under any circumstances to renew an appointment. The prospect of having to return to the exercise of their profession, of reopening an office, of building up another practice at the end of their term of office deters many lawyers from accepting an appointment to the Board.

Members of the Board do not enjoy sufficient prestige. They are not allowed the title of honourable or the other distinctions related to the office of judge. Besides, as will be explained further on, 136/ the Act 137/ and jurisprudence 138/ minimize the role of the Board. Finally, the Board does not publish its decisions itself, as do the Exchequer Court and the Supreme Court, and for that reason is looked upon as an inferior tribunal. In such circumstances, hope of being appointed some day to the bench deters some distinguished members of the bar from accepting appointment to the Board.

With a view to placing the Board on the same footing as a superior court and to facilitate the recruitment of members by making the office more attractive to the best candidates, we recommend that:

> Sections 86 and 96 of the Income Tax Act be amended so as to make appointments to the Board permanent, to grant the members the same distinctions and pension as are enjoyed by judges of superior courts and to make their retirement compulsory at the age of 75. The chairman of the Board should, as at present, be chosen from among the members of the bench or the bar and, if coming from the bench, retain his title of judge with all the benefits pertaining thereto, or from the bar be named a judge on becoming chairman. Furthermore, the Board should publish its decisions itself through the Queen's Printer.

6.2.3.2.2. STAFF

As the Tax Appeal Board operates very much like an ordinary court, it requires the services of an administrative staff. The Act 139/ provides for the appointment of a registrar and a deputy registrar and it describes their duties. 140/ The registrar's duties are about the same as those filled in Quebec by the clerk or the prothonotary of the Superior Court. He is responsible for preparing the records and the roll of appeals and he advises the parties of the date and place of hearings. He sees that the parties are advised of judgments and transmits to the registrar of the Exchequer Court copies of all documents submitted to the Tax Appeal Board, together with a transcript of the proceedings. 141/

Should the foregoing recommendation be implemented, the Board's decisions would be published by the registrar. They are now published by private organizations, notably in the series Dominion Tax Cases and Tax Appeal Board Cases. The legal provision covering this reads as follows:

> The Registrar shall, under the control and direction of the Chairman, make available for publication all decisions of the Board. 142/

6.2.3.3. ROLE

The Tax Appeal Board has a judicial role and is a court of record. 143/

6.2.3.3.1. JURISDICTION

The jurisdiction of the Tax Appeal Board is provided for by the Income Tax Act and the Estate Tax Act. Despite its name and the terminology used by the legislator, the Board is not an appeal court but a court of original jurisdiction specializing in income tax and estate matters. However, the taxpayer may, if he prefers, take his case directly to the Exchequer Court. 144/

In the matter of income tax, the Board may maintain the assessment, vacate it, vary it, or refer it back to the Minister for further examination. 145/ However, it has no jurisdiction over assessments made prior to 1946. The same restriction exists as regards the Excess Profits Tax Act, 1940. 146/ Neither has it jurisdiction in respect of assessments made pursuant to a directive given under section 138 of the Income Tax Act. 147/ If, despite the above recommendation, 148/ this section is maintained, the Board should obtain jurisdiction in the matter. The legislator should raise its status so that it may no longer be regarded as an inferior court. 149/

As regards estate taxes, the Board may likewise vacate or vary an assessment. 150/ Its powers therein are the same as in the matter of income tax:

> The provisions of the Income Tax Act regulating all matters in connection with an appeal under section 59 of that Act shall, mutatis mutandis, apply for the purpose of regulating all matters in connection with an appeal under this section.

The above quotation is from section 23 of the Estate Tax Act, 1958, effective January 1, 1959. 151/ The Board's jurisdiction covers all assessments made under that Act but not those which relate to deaths occurring prior to January 1, 1959, and made under the Succession Duties Act. 152/

6.2.3.3.2. PROCEDURE

The steps and time limits involved in appealing to the Board are regulated mainly by the Income Tax Act 153/ to which the Estate Tax Act 154/ makes reference. However, the Board has, with the approval of the Governor in Council, 155/ issued rules of practice and procedure governing appeals to the Tax Appeal Board. 156/ They are given in Appendix F. It should be noted that these rules facilitate exercise by the taxpayers of their right to a hearing.

The appellant must first file with the Board the notice of objection prescribed by the Act. He may then submit his case to the Board from the time when the Minister confirms the assessment or, failing a decision by the Minister, from the one hundred and eighty-first day after the filing of his notice of objection. When the Minister confirms the assessment or re-assesses and gives notice thereof by mail to the appellant, the latter must present his case not later than ninety days after the date of posting of such notice. 157/ To lodge an appeal with the Board, the taxpayer must file with the registrar or send him by registered mail a notice of appeal 158/ substantially in the form prescribed in the appendix to the Rules of Practice. 159/

Upon filing of notice of appeal, the taxpayer must pay the registrar of the Board a fifteen dollar fee but:

> ...if the appellant receives any of the relief sought on the ultimate disposition of the appeal by the Tax Appeal Board, the Exchequer Court of Canada or the Supreme Court of Canada, as the case may be, the fee shall be returned to the appellant after the ultimate disposition of the appeal but not otherwise. 160/

The Board also follows the practice of reimbursing the fee if, before the appeal is heard, the Minister recognizes the claims of the appellant in whole or in part and the appeal is withdrawn. It has been suggested 161/ that the fifteen dollar fee payable upon filing of the notice of appeal could be abolished. If the purpose of the fee is to provide the Crown with revenue, it would be better to do away with it altogether or to increase it, since the amount collected is insignificant. However, the objective being a fee high enough to eliminate frivolous or unwarranted appeals and low enough not to prevent anyone who feels he has a good case for appealing, it is considered that the fifteen dollar fee should be maintained.

Upon receipt of the notice of appeal, the Registrar of the Board forwards one copy to the Deputy Minister of National Revenue who must immediately send copies of all the documents relating to the assessment to the Board. 162/ Among other things, the Minister provides the Board with photostat copies of the appellant's income tax returns, of the notice of assessment, of any financial statements attached to his returns and of the notification from the Minister of the decision reached upon reconsideration of the assessment after notice of objection. In practice, however, the Board asks the Department to supply it and the appellant with a reply to the taxpayer's notice of appeal, such reply to set forth the Department's position. So far, the Department has always acceded to this request but its lawyers usually do so only a day or two before the hearing, its lawyers waiting to receive notice of the hearing before drafting their reply. In

1963, the Board sought to amend its rules so as to oblige the Department to send its reply to the Board, with a copy to the taxpayer, within a month or six weeks. The Department having opposed this new rule, it has not as yet been sanctioned by the Governor in Council. Since justice requires that the taxpayer be not taken by surprise, the following recommendation, based on section 99 of the Income Tax Act, is submitted:

> The Act be amended to oblige the Minister to give the taxpayer, within 30 days, a reply admitting or denying the facts stated in the notice and setting forth the facts, the legal provisions and the reasons on which the Department proposes to rest its case.

Instead of holding a hearing, the Board or its chairman may order the submission of pleadings in writing. 163/ In such event, the facts alleged should be attested by affidavit. 164/ In practice, the Board holds a hearing. When it does not, it is usually because the parties, though agreed as to the facts, differ with each other on points of law.

Unlike the Tariff Board, 165/ the Tax Appeal Board holds sittings throughout the country. It decides the time and place for the hearing of each appeal so as to avoid inconvenience and expense to the appellant. Its policy is to hold its hearings in a city where there is a district tax office. These offices are located in the major cities and in most cases this suits both parties. Besides, the proximity of a district tax office is of help when additional information is required. The frequency of hearings depends, obviously, on the number of appeals to be heard. The table hereunder indicates why many hearings are scheduled in Montreal and in Toronto, where the Board holds annually a minimum of five or six hearings and sometimes more. 166/ Hearings are also held each year in Vancouver in the spring and fall and the Board makes an annual visit to the Maritimes. So far, it has not held any hearings in the Yukon Territory.

NOTICES OF APPEAL BY PROVINCE
1956, 1962 and 1963

YEAR	NWT.	B.C.	ALTA.	SASK.	MAN.	ONT.	QUE.	N.B.	N.S.	PEI.	NFLD.	TOTAL
1956	0	59	59	6	12	164	55	7	5	4	2	373
1962	1	48	38	15	16	177	126	7	9	1	2	440
1963	0	48	34	15	14	218	141	6	7	1	0	484

(Sources: 1956 and 1962: R.S.W. Fordham, Canadian Tax Appeal Board Practice, 3rd ed., C.C.H. Canadian Ltd., Montreal, 1964, p. 236.
1963: Registrar of the Tax Appeal Board.)

Once the place and time of the hearings have been set, the Registrar advises the Minister and appellant by registered letters. The rules of practice 167/ require a fifteen-day notice, but the Registrar usually gives six weeks' notice to make sure that no requests for adjournment are made close to the date of hearing. 168/ The Department cannot be blamed for delays because its policy is never to request an adjournment, but to advise the court that it is ready in cases where an adjournment is requested by the appellant.

The first appeals brought before the Board in 1949-50 were heard by all three members and the decisions were handed down by the Board. However, the Act was amended in 1950 169/ to enable one or more members to hear appeals and to hand down decisions in the name of the Board. In the words of the Act: 170/

> The Chairman or the Board may direct that an appeal be heard and determined on behalf of the Board by any member or members thereof and the member or members so nominated shall have, for the hearing and determination of the appeal, all the powers of the Board.

> The member or members nominated to hear and determine an appeal may, at any stage, refer the appeal to the Board and the Board shall then in its discretion hear and determine the appeal or determine the appeal on the report of the said member or members if the report was made after hearing the parties.

Actually, most of the cases are heard and decided by one member on behalf of the Board.

Subject to the provisions of the Act and of the Rules of Practice, the Chairman of the Board sets the procedure to be followed. 171/ The appellant begins by making a brief statement of his claims; he submits his documentary evidence, then questions his witnesses, who may be cross-examined by the Department's lawyer. The latter then produces his documents and questions his witnesses, who also may be cross-examined. Once all the evidence has been produced by both sides, the parties or their representatives submit argument and refute the contentions of the other party, unless the Board requests the parties to submit their arguments in writing. The fact that, with a single exception, all the members of the Board have been lawyers has been largely responsible for the adoption of procedures similar to those used in the ordinary courts. In the words of Mr. R. S. Fordham: 172/

> When the Board first began to function, the idea was prevalent that its sittings partook of the nature of round-table conferences at which the appellant and the respondent, or their representatives, made their submissions in an entirely informal way and without regard to the rules of evidence. As will appear later, this was an entirely erroneous conception and differs widely from the procedure actually followed at hearings before the Board, which largely follows court procedure.

Hearings are held in open court or in camera as the Board sees fit. However, if the appellant asks that his case be heard in camera, the Board must accede to his request. 173/ Prior to February 1960, the appellant's

name and other details which might identify him were excluded from the judgment. Since then, however, the Board has adopted the practice followed by the other courts of giving in the judgment the name of the appellant and the essential facts of the case. This is as it should be, since justice must not only be done but also appear to be done. Furthermore, important though it is not to divulge unnecessarily information given in confidence, 174/ it is pointless to attempt to maintain secrecy in the Board's decisions at all costs, since in the event of an appeal the Exchequer Court and the Supreme Court will state the names of the parties and the main facts of the issue. Finally, this new procedure simplifies the work of the members and is a step in the progress of the Board toward the status of a true court.

At every hearing a stenographer takes down all the proceedings, including the evidence and the arguments submitted by the parties or their lawyers. His notes become part of the record forwarded to the Exchequer Court should the decision be appealed. 175/ They are also useful to the Board when it renders its decision in writing, which it usually does. In fact, decisions are rendered orally, on the spot, in not more than 15 per cent of the cases.

The Registrar of the Board must send a copy of the decision by registered mail to both the Minister of National Revenue and the appellant. 176/ If no appeal is made to the Exchequer Court, the decision of the Tax Appeal Board is final and binding on the parties. It should be noted, however, that the Board's decision only has the force of *res judicata* for the actual assessment under appeal. The Minister may, in theory at any rate, assess the taxpayer for another year without regard to the legal principal established by the Board's decision and the taxpayer has the faculty of applying to the Board anew, resting his case on the principle of *stare decisis*.

The Board's decisions do not have force of res judicata as regards third parties. In dealing with them the Minister may disregard decisions of the Board that are favourable to them. Actually, this rarely happens. On the contrary, he often waits for the result of a test case before taking his stand. Whatever view the Department takes, it cannot affect the third party's right to have recourse to the Board, invoking the principle of stare decisis if it is applicable.

6.2.3.3.3. ROLE OF TAX APPEAL BOARD

The Senate Committee set up in 1945 177/ recommended that an inexpensive and expeditious court be instituted to hear taxpayer's appeals against income tax assessments. This Board having now been in operation for fifteen years, it is in order to consider how it actually operates.

Except for a fee of $15, returnable if he wins his case, an appellant to the Board incurs no legal costs. 178/ As the Board moves about the country, his travelling expenses are small. He can further reduce costs by appearing in person. 179/ However, since the Minister is always represented by a lawyer and the procedure at the hearing is similar to that followed in the ordinary courts, most appellants retain the assistance of an attorney or an accountant, as is shown by the following table:

TAXPAYERS REPRESENTED AT HEARINGS, 1961-1963

Year	Hearings	Taxpayers Represented
1961	260	247
1962	236	231
1963	240	211

(Source: Data supplied by the Registrar of the Tax Appeal Board.)

A firm of tax lawyers may require a fee of $500 to file a notice of objection and represent the taxpayer before the Board. This, however, cannot be avoided. It would be unrealistic indeed to supply taxpayers with a lawyer at government expense or incite them to do without one. It is sufficient that the law affords the taxpayer an opportunity of appearing before a court in person. On the whole, recourse to the Tax Appeal Board is an inexpensive as circumstances permit.

Is the Tax Appeal Board as expeditious as it should be? The table hereunder shows the average time lapse between the date of the initial notice to the Board and the date of the hearing and between the latter date and that of the judgment.

AVERAGE WAITING PERIOD FOR
TAX APPEAL BOARD DECISIONS

Year	From Notice of Appeal to Hearing	From Hearing to Decision
1961	7-3/4 months	10¼ months
1962	7½ months	10 months
1963	6½ months	7 months

NOTE: The above data are based on the waiting period for decisions handed down during the second semester of the years listed.

The figures for these three years show a gradual improvement. The figures for earlier years are not comparable, nor can they be used as the basis of a proper projection, since the Board comprised fewer members and the illness of certain members led to delays.

An average waiting period of from six to seven months between the notice of appeal and the hearing does not seem too long for a Board which

travels throughout the country and which cannot be expected to sit far from the capital merely to hear a single appeal. As to the waiting period for the decision after the hearing, it is about the same as in the Exchequer Court but much longer than in the Superior Courts and the Supreme Court of Canada. Considering that stenographic transcriptions are quickly available, that hearings usually take somewhat less than a full day and that the members hand down an average of forty to fifty decisions a year, a waiting period of seven months does seem too long, even after taking into account the fact that members must do a good deal of travelling. One way to remedy this could be to provide the Board with a larger research staff.

The independence of the Board is not sufficiently protected against the influence of the Minister of National Revenue. When a member's term of office expires the Governor in Council decides whether it should be renewed, and the Minister of National Revenue being a party to its decision, may exercise, albeit unknowingly, some influence on the behaviour of the members of the Board. Even the possibility of his interference must be avoided. Therefore, as recommended above, 180/ members should be appointed on the same terms and conditions as judges of the ordinary courts.

Rightly or wrongly, interference by the Minister of National Revenue may be responsible for the Board's failure, in 1963, to obtain adoption of a new rule of practice. 181/ Be that as it may, the Board should have in this respect the same latitude as the Exchequer Court. Therefore, taking pattern by section 88 of the Exchequer Court Act, 182/, we recommend that:

> Section 87 of the Income Tax Act be amended to permit of the rules of practice established by the Board being made effective without the approval of the Governor in Council, and to contain the following provisions:
>
> > Copies of such rules and orders shall be laid before both Houses of Parliament within ten days after the opening of the session following their adoption.

> All such rules and orders and every portion of the same not inconsistent with the express provisions of any Act shall have and continue to have force and effect as if herein enacted, unless during such session an address of either the Senate or House of Commons is passed for the repeal of the same or any portion thereof, in which case the same or such portion shall be and become repealed; but the Governor in Council may, by proclamation, published in the Canada Gazette, or either House of Parliament may, by resolution passed at any time within thirty days after such rules and orders have been laid before Parliament, suspend any rule or order made under this Act; and such rule or order shall, thereupon, cease to have force and effect until the end of the then next session of Parliament.

6.2.3.4. CONCLUSION

In addition to seeking to ensure the Board's independence, the above recommendations tend to enhance its status with a view to facilitating the recruiting of members and to make of it a court of first instance with jurisdiction in the whole field of federal taxation, embracing the present jurisdiction of both the Tax Appeal Board and the Tariff Board. In order to preserve certain features of these Boards, the new court could comprise two divisions, one for income and estate taxes, and the other for customs and excise.

6.3. COURTS OF JUSTICE

Two courts of justice have jurisdiction in federal tax matters: the Exchequer Court and the Supreme Court of Canada.

6.3.1. THE EXCHEQUER COURT

The Exchequer Court was established in 1875 183/ to hear and determine actions in which the government is a party. It is a court that can sit and act anywhere in Canada 184/ and does sit in most of the larger cities.

Under the Act, this court has exclusive original jurisdiction in some matters 185/ and a concurrent jurisdiction with the provincial courts in other fields. 186/ Some Acts, in particular the Income Tax Act, the Estate Tax Act, and the Excise Tax Act, give the Exchequer Court both original jurisdiction and jurisdiction in appeal.

6.3.1.1. ORIGINAL JURISDICTION IN TAX MATTERS

6.3.1.1.1. INCOME TAX ACT

The Income Tax Act gives the taxpayer the choice of appealing from the Minister's assessment either to the Tax Appeal Board or to the Exchequer Court. In one field, however—that of assessments made under section 138 of the Income Tax Act—the Exchequer Court has exclusive jurisdiction. As noted above, 187/ this exception to the general rule constitutes an anomaly.

In all cases where jurisdiction is concurrent the taxpayer, whether appealing to the Tax Appeal Board or to the Exchequer Court, must, after serving the notice of objection prescribed in the Act, 188/ proceed within the same time limit. If he appeals to the Exchequer Court he must serve the notice upon both the Minister and the Registrar of the Court, and it 189/ must contain a statement of the facts and arguments he intends to submit. It must be served on the Minister in duplicate in the form prescribed by the rules of practice. The copy he serves upon the Registrar must be accompanied by a fee of $15.

Within 60 days from receipt of the notice (which period may be extended by the Court or one of its judges), the Minister must produce before the Court and serve on the appellant a reply admitting or denying the facts alleged and containing such facts and arguments as the Minister intends to

rely on. 190/ In short, this procedure is similar to filing a defence in a civil action.

Like the Tax Appeal Board, the Exchequer Court can dismiss the appeal or allow it in whole or in part. In the latter event, it may vacate the assessment, vary it or refer it back to the Minister for reconsideration and re-assessment. 191/ Unlike the Tax Appeal Board, the Exchequer Court can order payment or refund of the tax, interest, penalties and costs. However, when the Tax Appeal Board rules against him, the Minister, unless he appeals to a higher court, always refunds the tax, interest and penalties already paid by the taxpayer, so that the distinction referred to above is of no significance except as regards payment of costs. There are no legal costs in cases taken to the Tax Appeal Board, whereas in the Exchequer Court costs frequently exceed $400 and are payable by the loser. The taxpayer may incur expenses running into thousands of dollars because he will have to pay, in addition to lawyer's fees, the legal costs awarded to the Department. This probably explains why, from 1917 to 1947, only 150 income tax appeals 192/ were heard by the Exchequer Court, though it then had exclusive original jurisdiction in the matter.

An appeal to the Exchequer Court is a formal proceeding; the rules of procedure applying to that Court must be followed and the hearing is conducted in the same manner as hearings before ordinary civil courts. Does this mean that it dispenses justice much more slowly than does the Board of Appeal? On the basis of the judgments handed down in 1961, 1962 and 1963, the average waiting period between the notice of appeal and the hearing in the Exchequer Court was at least twice as long, but between the hearing and the judgment it was shorter there than in the Board of Appeal. 193/

DELAYS IN THE EXCHEQUER COURT

Year	Average Delays Between Notice and Hearing	Average Delays Between Hearing and Judgment
1961	15½	6½
1962	18-3/4	7
1963	16¼	6-3/4

NOTE: Delays in months, based on judgments handed down during 1961, 1962 and 1963.

(Source: Registrar of the Exchequer Court.)

6.3.1.1.2. ESTATE TAX ACT

The provisions of the Estate Tax Act 194/ in respect of the jurisdiction of the Exchequer Court are approximately the same as those of the Income Tax Act. 195/ Moreover, section 24 of the Estate Tax Act states:

> The provisions of the Income Tax Act regulating all matters in connection with an appeal under section 60 of that Act shall, mutatis mutandis, apply for the purpose of regulating all matters in connection with an appeal under this section.

The procedure is thus the same in estate tax as in income tax cases.

6.3.1.1.3. JURISDICTION IN RESPECT OF EXCISE TAX

As noted above, 196/ the Tariff Board may declare that an article is subject or not subject to excise tax and, if it is, determine what rate is applicable, but it is not competent to decide whether a given person should or should not pay it.

As to the Exchequer Court, the Excise Tax Act 197/ expressly grants it the following jurisdiction:

> All taxes or sums payable under this Act shall be recoverable at any time after the same ought to have been accounted for and paid, and all such taxes and sums shall be recoverable, and all rights of Her Majesty hereunder enforced, with full costs of suit, as a debt due to or as a right enforceable by Her Majesty, in the Exchequer Court or in any other court of competent jurisdiction.
>
> Every penalty incurred for any violation of the provisions of this Act may be sued for and recovered
>
> a) in the Exchequer Court of Canada or any court of competent jurisdiction.

Whether or not the Tariff Board has jurisdiction, a taxpayer who wishes to take his case to the Exchequer Court may either pay the tax under protest and proceed by petition of right, claiming the refund of the tax paid, 198/ or refuse to pay the tax and present his defence to the action taken against him by the Department before that Court.

6.3.1.1.4. JURISDICTION IN RESPECT OF EXCISE DUTIES

The Excise Act contains the following provision:

> All such duties and licence fees shall be recoverable with full costs of suit as a debt due to Her Majesty, in any court of competent jurisdiction. 199/

In this field, the jurisdiction of the Exchequer Court is established by the following provisions of the Exchequer Court Act: 200/

> 17. The Exchequer Court has exclusive original jurisdiction in all cases in which the land, goods or money of the subject are in the possession of the Crown....
>
> 29. The Exchequer Court has and possesses concurrent original jurisdiction in Canada
>
> (a) in all cases relating to the revenue in which it is sought to enforce any law of Canada, including actions, suits and proceedings by way of information to enforce penalties and proceedings by way of information in rem, and as well in qui tam suits for penalties or forfeiture as where the suit is on behalf of the Crown alone; ...

6.3.1.2. APPELLATE JURISDICTION

The decisions of the Tax Appeal Board and of the Tariff Board may be appealed to the Exchequer Court.

6.3.1.2.1. APPEALS FROM DECISIONS OF THE TAX APPEAL BOARD

The Registrar of the Tax Appeal Board mails the Board's decision to the Minister and the taxpayer who may then, within 120 days, appeal to the Exchequer Court. 201/ An appeal is instituted by serving notice of appeal in duplicate upon the other party and filing a copy thereof with the Exchequer Court and the Tax Appeal Board. 202/ The Registrar of the Court then receives from the Registrar of the Tax Appeal Board the record of the case, that is to say, the documents filed and a transcript of the proceedings. 203/

The Exchequer Court may, on appeal, restore an assessment vacated or varied by the Tax Appeal Board. 204/ On the whole, it operates as if the case had come to it directly in its capacity of court of first instance. 205/ In 1951, in Goldman v. M.N.R., 206/ Mr. Justice Thorson, noting the absence of any specific provision in the Act, ruled that the creation of the Tax Appeal Board had not affected the jurisdiction previously exercised by the Exchequer Court. Before the Tax Appeal Board was established, a taxpayer who objected to an assessment would first appeal to the Minister, who would re-examine the assessment and either vary it or confirm it. If the taxpayer was not satisfied he could appeal the assessment 207/ to the Exchequer Court, which ruled on points of fact as well as of law. 208/ The following are extracts from Judge Thorson's notes in the above-mentioned case:

> There are, I think, several reasons for accepting the submission of counsel for the appellant that the appeal to this Court from a decision of the Income Tax Appeal Board, whether

by the taxpayer or the Minister, is a trial de novo of the issues involved therein. While there are several descriptions of the proceedings as an appeal and while it is true that on the appeal the Registrar of the Income Tax Appeal Board is required by section 91(1) of the Income Tax Act to transmit to the Registrar of this Court "all papers filed with the Board on the appeal thereto together with a transcript of the record of the proceedings before the Board" there is no provision that the appeal must be based on such record. On the contrary, section 89(3) requires the appellant to set out in the notice of appeal a statement of the allegations of fact, the statutory provisions and reasons which he intends to submit in support of his appeal and section 90(1) calls upon the respondent to serve and file a reply to the notice of appeal admitting or denying the facts alleged and containing a statement of such further allegations of fact and of such statutory provisions and reasons as he intends to rely on. There is nothing in these provisions to restrict the parties to the allegations of fact made before the Board. Additional facts or even different facts may be alleged. Then section 91(2) provides that upon the filing of the material referred to in section 91(1) or 91A and of the reply required by section 90, "the matter shall be deemed to be an action in the Court and, unless the Court otherwise orders ready for hearing". This section is almost identical with section 62(2) of the Income War Tax Act. Its purpose is to give the parties the benefits of the proceedings in an action to establish their respective allegations which would not be available in an ordinary appeal. There would be no purpose in these provisions if Parliament intended that the appeal should be heard on the basis of the record before the Income Tax Appeal Board. They contemplate that the issues as defined by the statement of facts and the reply should be tried by this Court according to the processes of an action in this Court. This necessitates a trial de novo. While this view lends itself to the possibility that the taxpayer or the Minister may make a different case or defence in this Court from that made before the Board and it may seem anomalous that Parliament should permit this there is nothing in the Act to bar it. The freedom of the Court to deal with the issues raised before it, without regard to the proceedings before the Board, is further indicated by the provision in section 91(3) that any fact or statutory provision not set out in the notice of appeal or reply may be pleaded or referred to in such manner and upon such terms as the court may direct and by the power given to the court by section 91(4) of disposing of the appeal by dismissing it, vacating or varying the assessment or referring it back to the Minister.

All these considerations lead to the conclusion that the appeal to this Court from a decision of the Income Tax Appeal Board, whether by the taxpayer or by the Minister, is a trial de novo of the issues involved, that the parties are not restricted to the issues either of fact or of law that were before the Board but are free to raise whatever issues they wish even if

> different from those raised before the Board and that it is the duty of the Court to hear and determine such issues without regard to the proceedings before the Board and without being affected by any findings made by it. 209/

On this point, the Supreme Court ruled to the same effect as Judge Thorson in Campbell v. M.N.R.in 1953 210/ and recently in Smith et al v. M.N.R. 211/

In 1953, in Simpson v. M.N.R. 212/ Judge Thorson ruled that the burden of proof lay with the taxpayer even if the Minister was appealing from a decision of the Board in favour of the taxpayer. Thus, the taxpayer must prove the facts alleged just as if the Tax Appeal Board had never given a decision, and the Minister's assessment is presumed to be valid until proved otherwise. The taxpayer must, therefore, show that the Minister has erred in fact or in law and must also show why the assessment should be varied or vacated. The foregoing applies whether the appeal is by the taxpayer or by the Minister.

One advantage of the trial de novo theory is that it gives the taxpayer and the Minister an opportunity to present their evidence and set out their arguments with all the protection afforded by a formal action before the courts. It also enables them to correct the weaknesses in their respective earlier evidence and to conduct a more searching cross-examination of the witnesses, since the record contains an authentic copy of the evidence given before the Tax Appeal Board.

On the other hand, the trial de novo idea has distinct drawbacks: it involves added legal costs. Even when the evidence to be given before the Exchequer Court adds nothing to what was heard by the Appeal Board, the entire proof must be put in the record all over again. However, the parties may get together and, with the permission of the Court, file a

copy of the evidence heard by the Appeal Board to serve as evidence in the Exchequer Court.

The fact that on most occasions the trial has to be repeated in its entirety is hardly calculated to enhance the prestige of the Tax Appeal Board or the reputation of its members. On the other hand, the hearing before the Board provides each party with a way of learning the arguments and evidence of the other party before confronting him in a more final hearing. For instance, the Minister sometimes uses hearings before the Board as a sort of preliminary enquiry, not producing any witnesses himself but merely cross-examining those of the taxpayer before going to the Exchequer Court. 213/ This is regrettable because it causes the taxpayer to incur extra expenses, prolongs delays already long enough, and is not of a nature to enhance the judicial role of the Tax Appeal Board. We therefore recommend that:

> Decisions of the Tax Appeal Board (or of any new court set up in its stead) be final as to the facts and appealable only on points of law or mixed points of fact and law.

This recommendation, if accepted, would bring about a standardization of appeals. The result would be the same as the situation prevailing in the United Kingdom, where the Commissioners of Inland Revenue have exclusive jurisdiction in questions of fact.

In the matter of costs, it must be considered that the taxpayer appealing to the Tax Appeal Board incurs no legal costs. His only disbursement is a deposit of $15 which is refunded to him if judgment is rendered in his favour. However, when the Department appeals to the Exchequer Court from a decision favourable to the taxpayer, the latter risks incurring heavy expenses, especially if the Department is ready to

carry the case to the Supreme Court. Consequently, when the amount of tax involved is small and the Department appeals to the Exchequer Court from the Board's decision, the taxpayer often abandons his appeal and pays the tax demanded. This is a deplorable situation. The Department should not be allowed to use its right of appeal to force the taxpayer to submit. Since the purpose of the Department of National Revenue is not to collect as much revenue as possible at whatever cost, the public interest is the only valid ground for appealing from an original decision. The Department should, therefore, rest content, except where a matter of public policy is involved, with the decision of an independent court. There are undoubtedly cases where it is in the public interest to refer to higher courts questions of importance to taxpayers in general, but in such cases the state should bear the cost of any appeal by the Minister of National Revenue to the Exchequer Court or the Supreme Court. We therefore recommend that:

> When the Minister appeals from a decision of the Tax Appeal Board to the Exchequer Court, or of the Exchequer Court to the Supreme Court, the Crown should assume responsibility, whatever the outcome of the litigation, not only for the legal fees but also for the extra-judicial costs of the other party, subject to such costs being reasonable in the opinion of the Court.

The recommendation follows on certain suggestions 214/ placed before the Royal Commission on Taxation and introduces to Canada a practice similar in some respects to that followed in the United Kingdom.

6.3.1.2.2. APPEAL FROM DECISIONS OF THE TARIFF BOARD

Declarations of the Tariff Board may be appealed to the Exchequer Court. 215/ Leave to do so may be granted by this Court or a judge thereof to the party who requested the declaration, to the Deputy Minister of National Revenue for Customs and Excise, or to any person appearing before

the Court pursuant to law. Application for such leave must be made within 30 days of the Board's declaration or any additional time limit granted by the Court or one of its judges and be preceded by a seven-day notice to each of the other parties. When leave has been granted, the appellant must within the next 60 days deposit with the Registrar of the Exchequer Court the sum of $150 as security for costs. When this has been done, the appeal is set down for hearing and the parties are notified when the Court is ready to proceed.

Unlike appeals from decisions of the Tax Appeal Board, appeals from Tariff Board decisions are not trials de novo but are genuine appeals relating only to points of law or of fact and law combined.

6.3.1.3. CONCLUSIONS

It has been observed that original jurisdiction in tax matters is shared by several courts. The following table shows the distribution of cases among the Tariff Board, the Tax Appeal Board and the Exchequer Court:

DISTRIBUTION OF FIRST-INSTANCE CASES AMONG VARIOUS TRIBUNALS

	1959	1960	1961	1962	1963
Tax Appeal Board					
Appeals entered	490	474	466	440	484
Hearings	279	299	260	236	240
Tariff Board					
Appeals entered	47	49	50	42	40
Hearings	21	38	21	38	29
Exchequer Court					
Income and Estate Tax appeals entered	78	91	92	84	-
Customs and Excise					
Appeals entered	3	1	1	1	3

Some taxpayers will apply directly to the Exchequer Court because then the file will be transferred from the Department of National Revenue to the Justice Department. The Minister of National Revenue will be represented before the Exchequer Court by the lawyers of the Department of Justice or by agents appointed by it. A taxpayer who has already had all the administrative reviews offered by the government may hope to obtain a settlement out of court more easily with the lawyers of the Department of Justice than with those of the Department of National Revenue whose position he already knows.

In excise tax matters taxpayers could find it beneficial to go directly to the Exchequer Court. In the first place, an Exchequer Court judgment might produce a larger refund than would a declaration of the Tariff Board, since in the latter case only the taxes paid in the twelve preceding months may be refunded. 216/ In the second place, the Court sits anywhere in Canada whereas the Board hears appeals only in Ottawa. Also, interventions are much rarer in the Exchequer Court than before the Tariff Board. However it may be, almost all cases are taken in first instance to the Tariff Board rather than to the Exchequer Court. This marked preference is largely due to the fact that the Board's decisions are final as to facts and subject to appeal only on points of law.

In income and estate tax cases, more than 15 per cent of the appeals entered by taxpayers are made directly to the Exchequer Court. This is a profitable short-cut for taxpayers who feel sure that the principle at stake is such that the Minister will, if judgment is rendered against him, go to the Exchequer Court or the Supreme Court, and that by applying directly to the Exchequer Court they will save time, incur fewer costs and avoid having to disclose their arguments in advance.

Neither the subjective reasons for applying to one or other of the two courts of first instance, nor the number of appeals, warrant having two courts with concurrent original jurisdiction. Moreover, the existing system of shared jurisdiction produces a lack of uniformity in the judicial structure and a loss of stature for the more informal court, whose decisions may be appealed to the other, which also shares in its original jurisdiction. We therefore recommend that:

> The new Court recommended above 217/ which would result from the merger of the Tax Appeal Board and the Tariff Board become the only court of first instance for tax matters and that the Exchequer Court be deprived of its original jurisdiction in tax cases.

Adoption of this recommendation would leave the Exchequer Court only its appellate jurisdiction. It is not essential that an appeal should be heard by a court composed of more than one judge, as is the case in ordinary civil courts. Taxpayers who wish to take their case to a court made up of several judges could in due course appeal to the Supreme Court of Canada. Statistics show that, from 1959 to 1963 inclusive, some 60 decisions each year from the Tax Appeal Board and the Tariff Board were appealed to the Exchequer Court and about one-quarter of the decisions of the Exchequer Court were appealed to the Supreme Court. It appears, therefore, that the appellate jurisdiction of the Exchequer Court is worth maintaining, because it reduces the number of appeals to the Supreme Court. By analogy with a provision of the Excise Tax Act, 218/ we recommend that:

> Appeals to the Exchequer Court from decisions of the Tariff Board, of the Tax Appeal Board and of the new Court, which might be instituted to take their place, be made only by leave of the Exchequer Court or one of its judges.

The Exchequer Court now has authority to approve search warrants and to give to a registered certificate the force and effect of a judgment. 219/

As such powers are not incompatible with the role of an appellate court, they should not be taken away from the Exchequer Court.

6.3.2. THE SUPREME COURT

The Supreme Court of Canada, created in 1875, 220/ is the court of final jurisdiction in Canada. Its judgments are final and conclusive, and there are no appeals unless the cause of the action arose before December 23, 1949, the date on which appeals to the Judicial Committee of the Privy Council were abolished.

The legal principles governing appeals to the Supreme Court of Canada in tax matters are set forth in sections 82 to 86 of the Exchequer Court Act. 221/ Notice of appeal must be served within 60 days after the judgment of the Exchequer Court and a sum of $50 must be deposited at the same time as security. An extension of the delays may nevertheless be granted by a judge of that Court. Under sections 83 and 84, a judgment of the Exchequer Court can be appealed de plano in any action in which the actual amount involved exceeds $500. When the amount is less, appeal may still be made to the Supreme Court, if a judge of that Court authorizes it, (a) from an interlocutory judgment; (b) from a judgment in a case involving the constitutional validity of an act or relating to a matter which may affect future rights; (c) from a final judgment against the Crown when the principle affirmed could affect a number of cases where the aggregate amount claimed would exceed $500; and (d) from a final judgment against the Crown when, in the opinion of the Attorney General of Canada, the principle affirmed by the decision is of importance to the general public.

In principle, a judgment of the Supreme Court on an appeal is final and no further hearing is held except by express leave of the Court granted

on special application. It happened once, in a tax case, 222/ that after a first hearing by five judges and a majority judgment of three to two, the Court allowed a re-hearing before the nine Justices of the Court. The original decision was upheld. Such an occurrence is most exceptional and it can be said that for all practical purposes a Supreme Court decision puts an end to all litigation between the taxpayer and the Minister of National Revenue.

As the following table shows, fewer than 10 per cent of all appeals filed with the Supreme Court have a direct bearing on tax matters.

APPEALS TO THE SUPREME COURT
1959-1963

YEAR	TOTAL APPEALS	TAX APPEALS		
		FILED	HEARD	DECISIONS
1959	197	14	11	11
1960	192	13	5	5
1961	182	18	9	9
1962	210	15	10	10
1963	202	15	13	11

(Source: Registrar of the Supreme Court.)

In customs and excise matters, appeals to the Supreme Court are much more infrequent. Of the 23 decisions handed down by the Exchequer Court from 1949 to the end of 1963, only seven were appealed to the Supreme Court. 223/

In the case of appeals to the Supreme Court, judging from statistics, waiting periods are shorter than with the Exchequer Court. For the 35

decisions handed down from 1960 to 1963 inclusive, an average of nearly 18 months elapsed between the notice of appeal and the hearing, and one and one-half months between the hearing and the decision.

6.4. CONCLUSION

The object of the body of recommendations put forward in this chapter is to improve the operation of the organisms responsible for settling legal disputes which may arise between the Department and the taxpayer over his tax liabilities.

The creation of a court having exclusive original jurisdiction in all tax matters will not only simplify the judicial structure, but will also ensure the independence and status the court must have if it is to function properly. The new court should, however, retain the best features of the two Boards, in particular their informality, expeditiousness and inexpensiveness. The existence of two divisions within the court, one for taxation and the other for customs and excise, would make it possible to adopt special procedures for the Customs and Excise Division, such as the intervention of third parties, as is now done in the Tariff Board.

Appeal to the Exchequer Court, by leave of a judge thereof, from decisions of the new court should be allowed on points of law or on combined issues of fact and law. When the Minister appeals, he should be required to pay the legal and certain reasonable extra-judicial costs incurred by the taxpayer. The Supreme Court should remain the court of final jurisdiction and the general rules applying to appeals before that Court should apply equally fully to tax cases, though—as previously mentioned—these should be accepted only by leave from a judge of that Court.

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15/ An extract of the Budget Speech relating to the amendment of the Excise Tax Act is quoted in Appendix D to this study.

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17/ (1940) S.C.R. 444 at p. 447.

18/ A.-G. of Canada v. The Reader's Digest Association (Canada) Ltd., (1961) S.C.R. 775 at p. 791; 61 DTC 1273 at p. 1281.

19/ A.-G. for Canada v. A.-G. for Ontario, (1937) A. C. 326; A.-G. for Canada v. A.-G. for Ontario, (1937) A. C. 355; In the Matter of Three Bills Passed by the Legislative Assembly of Alberta. (1938) S.C.R. 100; (1938) 2 D.L.R. 81.

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22/ In Canadian Eagle Oil Company Limited v. The King, (1946) A. C. 119, p. 140, Viscount Simon quoted an extract from Cape Brandy Syndicate v. I.R.C. (1921) 1 K. B. 64 at p. 71.

23/ (1948) C.T.C. 265 at p. 275 (Exchequer Court).

24/ Sir Charles E. ODGERS, The Construction of Deeds and Statutes, 4th ed., London: Sweet & Maxwell Ltd., 1956, p. 327.

25/ 64 S.C.R. (1922), 264 at p. 275.

26/ The Commissioners of Inland Revenue v. James Forrest, (1890) 15 A. C. 334 at p. 340.

27/ Royal Trust Co. v. M.N.R., (1928-34) C.T.C. 74 at p. 78. For English cases see Cox v. Rabbitts, (1877-78) 3 A. C. 473 at p. 478; The Oriental Bank Corporation v. Wright, (1880) 5 A. C. 842 at p. 856; Thorley v. Massam, (1891) 2 L.R. 2 Ch. 613 at p. 623; Brunton and Others v. Commissioner of Stamp Duties for New South Wales, (1913) A. C. 747 at p. 759.

28/ J. B. Holden v. M.N.R., (1928-34) C.T.C. 116 at p. 125 (Exchequer Court).

29/ See supra note 25.

30/ Erwin N. GRISWOLD, op. cit., p. 74

31/ Johnson v. M.N.R., 50 DTC 470 at p. 472 (Tax Appeal Board).

32/ Hendershot Paper Products Limited v. M.N.R., 51 DTC 191 at p. 193 (Tax Appeal Board).

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34/ The Commissioners of Inland Revenue v. Westminister (Duke), (1936) A. C. 1 p. 19.

35/ The Commissioners of Inland Revenue v. Fisher's Executors, (1926) A. C. 395 at p. 412.

36/ William Harold Malkin v. M.N.R., (1938-39) C.T.C. 128 at p. 136 (Exchequer Court).

37/ The Commissioners of Inland Revenue v. Westminster (Duke), (1936) A. C. 1 at p. 25.

38/ Pioneer Laundry & Dry Cleaners Ltd. v. M.N.R., (1938-39) C.T.C. 411 (Privy Council); Army & Navy Department Store Limited v. M.N.R., (1953) C.T.C. 293 (Supreme Court of Canada).

39/ George T. TAMAKI, "Form and Substance Revisited", 10 Can. Tax J. (1962) p. 179.

40/ See Appendix E to this study.

41/ (1955) C.T.C. 174 (Supreme Court of Canada).

42/ The English version reads as follows:

> In computing income for the purposes of this Act, no deduction may be made in respect of a disbursement or expense made or incurred in respect of a transaction or operation that, if allowed, would unduly or artificially reduce the income.

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44/ No. 717 v. M.N.R., 60 DTC 389 (Tax Appeal Board).

45/ The section is quoted in extenso in Appendix E to this study.

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47/ See supra note 43.

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80/ Ibid., s. 1.

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92/ R.S.C. 1952, c. 100 as amended.

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117/ See supra 6.2.2.2.1.

118/ See supra 6.2.2.3.2.2.

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126/ 11-12 Geo. VI, S.C. 1948, c. 52, now R.S.C. 1952, c. 148.

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128/ Income Tax Act, R.S.C. 1952, c. 148, s. 86(1), as amended by 8-9 Eliz. II, S.C. 1960, c. 43, s. 27.

129/ Briefs submitted to the Royal Commission on Taxation by: The Canadian Bar Association, January 11, 1964, p. 40; The Canadian Institute of Chartered Accountants, December 12 and 13, 1963, p. 82.

130/ Income Tax Act, R.S.C. 1952, c. 148, s. 86.

131/ Ibid., s. 86(2) ss. 4.

132/ Organization of the Government of Canada, Ottawa: Queen's Printer, 1963, p. 320.

133/ An Act to amend the Income War Tax Act, 12 Eliz. II, S.C. 1963, c. 41, s. 3.

134/ R.S.C. 1952, c. 50.

135/ Income Tax Act, R.S.C. 1952, c. 148, s. 96.

136/ See supra 6.2.3.3.1., 6.3.1.1.1. and 6.3.1.2.1.

137/ Income Tax Act, R.S.C. 1952, c. 148 as amended, ss. 92(2), 98 and following. Before June 30, 1950, all appeals had to be heard by two members of the Board. Although subsection (2) of present section 88 was adopted at that date (14 Geo. VI, S.C. 1950, Vol. 1, c. 40, s. 29) authorizing a single member to act in the name of the Board, nonetheless the image of a minor judiciary function still attaches to the post of Board member.

138/ Goldman v. M.N.R., (1951) Ex. C.R. 274, and M.N.R. v. Simpson's Limited, (1953) Ex. C.R. 93.

139/ Income Tax Act, R.S.C. 1952, c. 148, s. 93.

140/ The words "registraire" and "sous-registraire" are anglicisms, but as they are used by the legislator it is impossible to avoid them.

141/ Ibid., s. 100(2).

142/ Ibid., s. 94(2).

143/ Ibid., s. 91(3).

144/ Ibid., s. 60(2).

145/ Ibid., s. 92(1).

146/ The Excess Profits Tax Act, 1940, 4 Geo. VI, S.C. 1940, c. 32, s. 14; Income War Tax Act, R.S.C. 1927, c. 97, s. 69(f), as enacted by 10 Geo. VI, S.C. 1946, c. 55, s. 15.

147/ Income Tax Act, R.S.C. 1952, c. 148, s. 92(2) and s. 138(4).

148/ See supra 6.1.4.2.4. and 6.1.5.

149/ See supra note 101.

150/ Estate Tax Act, 7 Eliz. II, S.C. 1958, c. 29, s. 23(1).

151/ 8-9 Eliz. II, S.C. 1960, c.29, s. 13(2).

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157/ Income Tax Act, R.S.C. 1952, c. 148, s. 59(1) as amended by 7 Eliz. II, S.C. 1958, c. 32, s. 22.

158/ Income Tax Act, R.S.C. 1952, c. 148, s. 89(1) as amended by 7 Eliz. II, C.S. 1958, c. 32, s. 36(1).

159/ See infra in Appendix F to this study; Rules of Practice No. 1 and Schedule.

160/ Income Tax Act, R.S.C. 1952, c. 148, s. 90(1), as amended by An Act to Amend the Income Tax Act, 1-2 Eliz., S.C. 1952-53, c. 40, s. 76.

161/ Brief submitted to the Royal Commission on Taxation on April 26, 1963, by Julius M. Scharing, p. 10.

162/ Income Tax Act, R.S.C. 1952, c. 148, s. 89(3) and s. 89(4), as amended by An Act to amend the Income Tax Act, 1-2 Eliz. II, S.C. 1958, c. 32, s. 22.

163/ Ibid., s. 91(1).

164/ See infra, Appendix F to this study; Rule of Practice No. 8.

165/ See supra 6.2.2.3.2.2.

166/ See infra, Appendix F, Rule of Practice No. 3.

167/ See infra, Appendix F, Rule of Practice Nos. 4 and 5.

168/ See infra, Appendix F, Rule of Practice No. 7.

169/ An Act to amend the Income Tax Act, 14 Geo. VI, S.C. 1950, c. 40, s. 29.

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171/ Ibid., s. 91(4).

172/ R.S.W. FORDHAM, Canadian Tax Appeal Board Practice, 3rd ed., 1964, CCH Canadian Limited, pp. 3 and 4.

173/ Income Tax Act, R.S.C. 1952, c. 148, s. 91(2).

174/ Income Tax Act, R.S.C. 1952, c. 148, s. 91(2), as amended by 11 Eliz. II, 1962, c. 8, s. 26.

175/ Ibid., s. 100(1), as amended by 7 Eliz. II, S.C. 1958, c. 32, s. 38.

176/ Ibid., s. 92(3).

177/ See supra, 6.2.3.1.

178/ Income Tax Act, R.S.C. 1952, c. 148, s. 90.

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180/ See supra, 6.2.3.2.1.

181/ See supra, 6.2.3.3.2.

182/ Exchequer Court Act, R.S.C. 1952, c. 98, ss. 87 and 88.

183/ Act to Establish a Supreme Court and a Court of Exchequer, 38 Vict., S.C. 1875, c. 11, which became the Exchequer Court Act, R.S.C. 1952, c. 98 and amendments.

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185/ Ibid., ss. 17 and 18.

186/ Ibid., ss. 26, 27, 28 and 29.

187/ See supra, 6.2.3.3.1.

188/ Income Tax Act, R.S.C. 1952, c. 148, s. 60(2), as amended by Eliz. II, S.C. 1958, c. 32, s. 22. See also supra, 6.2.3.3.2.

189/ Ibid., s. 98, as amended by 7 Eliz. II, S.C. 1958, c. 32, ss. 22 and 37.

190/ Ibid., s. 99(1).

191/ Ibid., s. 100(5).

192/ R.S.W. FORDHAM, Canadian Tax Appeal Board Practice, 3rd ed., 1964, CCH Canadian Limited, p. 3.

193/ See supra, 6.2.3.3.3..

194/ Estate Tax Act, 7 Eliz. II, S.C. 1958, c. 29, s. 24.

195/ Income Tax Act, R.S.C. 1952, c. 148, s. 60.

196/ See supra, 6.2.2.3.2.1.1.

197/ R.S.C. 1952, c. 100, s. 50(1) and s. 50(2).

198/ See supra, note 102.

199/ R.S.C. 1952, c. 99 and amendments, s. 109(2).

200/ R.S.C. 1952, c. 98 and amendments.

201/ Income Tax Act, R.S.C. 1952, c. 148, s. 60(1), as amended by 7 Eliz. II, S.C. 1958, c. 32, s. 22.

202/ Ibid., s. 98(1), as amended by 7 Eliz. II, S.C. 1958, c. 32, s.22.

203/ Ibid., s. 100(1), as amended by 7 Eliz. II, S.C. 1958, c. 32, s. 38.

204/ Ibid., s. 100(5).

205/ See supra, 6.3.1.1.1.

206/ (1951) Ex.C.R. 274 or (1951) C.T.C. 241. (This judgment of the Exchequer Court was confirmed by the Supreme Court, (1953) S.C.R. 211, which, however, did not rule on the point raised by Judge Thorson.)

207/ "What was before the Court was the assessment, not the decision of the Minister.... This shows that the appeal to this Court was an appeal from the assessment." Goldman v. M.N.R., (1951) Ex.C.R. 274, p. 276.

208/ "In Canada, of course, the situation is different, for the Court's appellate jurisdiction extends to questions of fact as well as to points of law. Consequently, the findings of fact by the Minister involved or implied in the assessment are not binding upon the Court and it may come to its own conclusions in respect of any of them." Bower v. M.N.R., (1949) Ex.C.R. 61 at p. 70, or (1949) C.T.C. 77 at p. 85.

209/ Goldman v. M.N.R., (1951) Ex.C.R. 274 at p. 279.

210/ (1953) 1 S.C.R. 3.

211/ 65 DTC, p. 5149.

212/ (1953) Ex.C.R. 93.

213/ Brief submitted to the Royal Commission on Taxation by the Canadian Bar Association on January 11, 1964, p. 41; Commissioner J. O. Weldon in Corman v. M.N.R., 64 DTC 506 at p. 512.

214/ Brief submitted to the Royal Commission on Taxation by the Board of Trade of Metropolitan Toronto on December 3, 1963, p. 23.

215/ Excise Tax Act, R.S.C. 1952, c. 100, s. 58.

216/ Excise Tax Act, R.S.C. 1952, c. 100, s. 57(4).

217/ See supra 6.2.2.4. and 6.2.3.4.

218/ Excise Tax Act, R.S.C. 1952, c. 100, s. 58.

219/ Income Tax Act, R.S.C. 1952, c. 148, s. 119(2) and s. 126(3).

220/ Act to Establish a Supreme Court and an Exchequer Court of Canada, 38 Vict. S.C. 1875, c. 11, now the Supreme Court Act, R.S.C. 1952, c. 259.

221/ R.S.C. 1952, c. 98.

222/ M.N.R. v. Consolidated Glass Limited, (1957) S.C.R. 167.

223/ Data supplied by the Secretary of the Tariff Board.

CONCLUSION

The study made of legislation, administration and interpretation processes in the field of federal taxation brought certain problems to light and led to the formulation of possible reforms. It is now appropriate to summarize the main recommendations, to explain the guiding principles, to establish their coherency and, finally, to compare the present system with the one suggested.

7.1. RECOMMENDATIONS RELATING TO THE LEGISLATION PROCESSES

A close study of the legislation processes revealed certain shortcomings. The public does not take sufficient part in the drafting of legislation, the technical aspects of bills are considered too superficially, delegated legislation and decisions made when exercising discretionary power are inadequately controlled, the tax policy lacks flexibility. In order to correct these shortcomings, we recommend that the confidential character of the budget be lessened, that an advisory tax board be established, that a standing committee on finance be set up within the House of Commons and that the Minister of Finance be enabled to change certain tax rates by means of administrative regulations.

7.1.1. LESSENING THE CONFIDENTIAL CHARACTER OF THE BUDGET

Apart from the Tariff Board, there is no body through which the public can take part in the drafting of legislation. This shortcoming is sometimes attributed to the secrecy surrounding the annual budget brought down by the Minister of Finance.

According to constitutional practice, not only is the public kept

in ignorance of budget preparations but the Minister of Finance only informs Members of the Cabinet at the very last minute. The object of these precautions is to prevent last minute transactions whereby individuals or companies might make unjustifiable profits and thus reduce the effectiveness of the measures taken. Absolute secrecy is undoubtedly justified in certain respects, but we decided to ascertain whether this rule should apply in all tax fields. In so doing, we arrived at the conclusion that, where personal income tax and the estate tax are concerned, the dangers from which it is sought to protect the public are non-existant. It should not be forgotten, however, that under certain circumstances the general trend of the budget can be foreseen and if part of it is divulged it will be easier to guess what the remainder contains. We therefore recommend that the rule of secrecy be not abolished but relaxed in the case of personal income and estate taxes. In this field, the Minister of Finance should be able to submit to the Cabinet the measures he advocates when he feels he can do so without providing clues to the remainder of the budget. Should this be the case, the measures proposed could be made public whenever the Cabinet considered it advisable (supra 1.1.2.4.). By lessening the confidential character of the budget in this way, public opinion could be tested quite freely in some cases.

7.1.2. ESTABLISHING AN ADVISORY TAX BOARD

We recommend the establishment of a board to be called the Advisory Tax Board under the Department of Finance (supra 1.1.2.2.3.). The members of the Board should be experts in the fields of taxation, public administration or administrative legislation and selected within the civil service or recruited from outside. To ensure the Board's independence.

and adequate continuity for its policies, however, the members of the board should be given the status of civil servants and appointed on a permanent basis or for a definite and fairly extensive period of time.

In this way, individuals or groups wanting to suggest changes would no longer be dealing with unidentified officials responsible for administering the Act, but with a permanent and purely advisory body. Although the members would be civil servants, their particular responsibility would be to hear representations from the public. They would consider the most interesting suggestions and report to the Minister of Finance regarding the value of the reforms proposed and, if necessary, the way in which they should be implemented.

If the Minister considered it appropriate to order a study or to initiate an inquiry, he could do so (supra 1.2.4.) but in such case he would have to table the reports in the House within a certain period of time unless the Board itself recommended otherwise. Whenever the Minister of Finance consulted the Board, the Governor in Council should be able to appoint one or more ad hoc members and add them temporarily to the permanent members. In this way, the services of experts who are not civil servants and do not wish to give up their profession could be used from time to time. This would promote the development of new ideas, and possibly new methods of analysis, within the advisory body. With or without assistance from outside, the Board would proceed in the same manner as the present Tariff Board (supra 6.2.2.3.1.) whose advisory function it would absorb. The main difference would be that the new body could be consulted not only on matters relating to customs but on any matter connected with taxation.

Delegated legislation and the exercise of ministerial discretion having to be controlled in advance, we think it desirable that the Advisory Tax Board be entrusted with this role. In this way, one and the same body would be responsible for examining all fiscal matters. The Board would be responsible for publishing draft regulations (unless otherwise specified by the Governor in Council), examining their content, hearing representations from the public and reporting on such matters in due course (supra 2.2.2.2. and 2.2.3.). It would also be of advantage to require the Minister of Finance to consult the Board before exercising any of his discretionary powers. Following such consultation, nothing would prevent him from ruling as he saw fit. As the Board would submit to the House an annual report on its activities in this field, however, the Minister might be called upon to answer questions in the House, in which case he would have to justify his conduct. It is therefore to be expected that, except for very serious reasons, the Minister would follow the advice he had received. With regard to ministerial discretion, as the courts only ascertain the legality of decisions, the Board's role would be to establish effective political control (supra 2.1.3.).

In brief, the Advisory Tax Board would advise the Ministers of Finance and National Revenue, and in so doing would serve as the official channel of communication between the community and the government. If relationships were structured in this way, citizens would feel that they are being heard and would take a greater interest in government activities. In our opinion this would lead to a better understanding of fiscal problems, hence, to better citizenship. We have made a minor recommendation in this respect which we shall repeat here for further guidance. In

order to educate taxpayers in civic matters, we think it desirable to send them, with their personal income tax return forms, a leaflet giving the distribution among the various purposes of the budget of every dollar paid in taxes the preceding financial year (supra 1.1.2.5.2.).

7.1.3. SETTING UP A STANDING COMMITTEE ON FINANCE

In the first part of the present study, we recommended that a finance committee be set up within the House of Commons. The committee should have a permanent secretarial staff and a team of researchers and should be chaired by a member of the ministerial party other than the Minister of Finance or his parliamentary secretary.

As there are a considerable number of members and only a small percentage of them are well informed on tax laws, the technical aspect of bills tabled in the House should not be discussed in committee of the whole until they have been studied by the Finance Committee. The latter could also serve as a channel of communication between the community and the legislator. The Committee should be able to call witnesses, receive briefs and hear representations from the public, should the need arise. In the case of the income and estate tax, the legislator could easily take the time to carry out such consultation. To give citizens and groups who are interested the time to form and express an opinion, a delay of approximately ten days between first and second reading of the bill would be sufficient. This delay might even be reduced if resolutions in the speech on the budget were expressed in definitive legal terms as is done at present in the case of customs, excise and the excise tax (supra 1.2.4.).

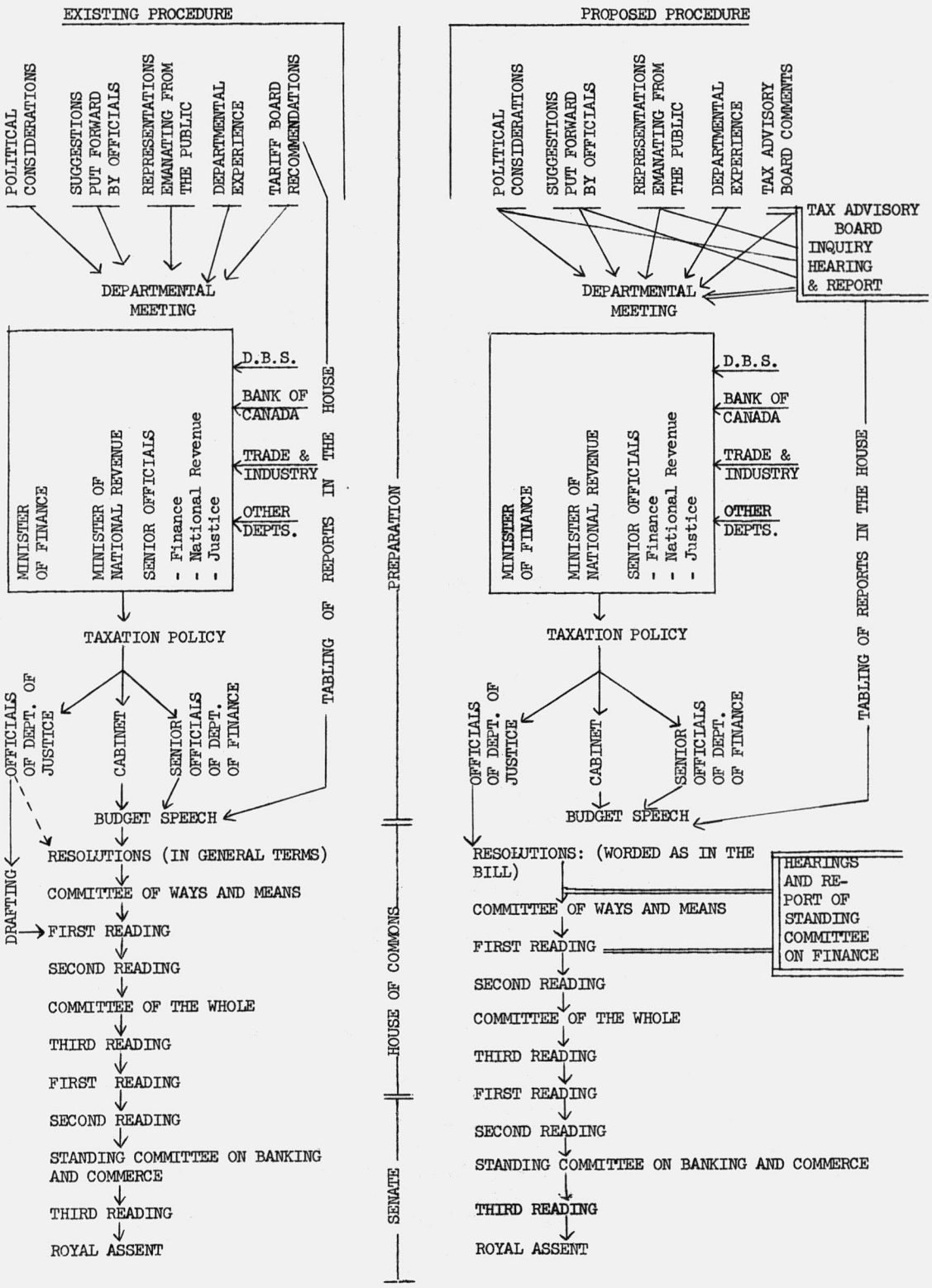
With regard to the political aspects of the measures advocated in the budget, these should continue to be discussed in the presence of all the Members of the House. In this respect, we recommend that members be assisted by placing researchers and instruments for research at their disposal. It is not desirable to institutionalize a means of communication between the public and Parliament for purely political matters. It would amount to creating a means of pressure which would enable certain groups to substitute their opinion for the judgment of the Minister of Finance surrounded by independent advisers.

In addition to studying the technical aspect of bills, it would be the Finance Committee's function to ensure parliamentary control over the basic content and the form of any regulations dealing with taxation, and to do so immediately after they have been voted. This measure is essential failing a scrutiny committee who would play this role not only with regard to taxation but in any other field (supra 2.2.2.2.3. and 2.2.3.).

7.1.4. CHANGING TAX RATES BY MEANS OF ADMINISTRATIVE REGULATIONS

As explained in the first part of the present study (supra 1.2.1.1.1.), the practice of an annual budget dates back to the time when governments let the economic forces take their course as much as possible. This practice presents a drawback at a time when taxation has become an instrument to control economic activity. To be fully effective, this instrument must be flexible, but this is impossible because of the extreme slowness of legislative machinery. To remedy this shortcoming, we advocate a technique used in Great Britain. We recommend that the Minister of Finance,

PREPARATION AND ADOPTION OF TAX LEGISLATION



N.B.: Proposed amendments indicated by double lines

without being specifically authorized by Parliament, be able to change the scale of tax rates up to 10% for customs, excise, sales tax and income tax at any time in any given year. He would be authorized to act by regulatory means through a delegation of power valid for one year but actually renewable from year to year. To give the Minister sufficient latitude this type of regulation would not come under the provisions for controlling delegated legislation advocated in the two preceding paragraphs, but it does not follow that it would be free from all parliamentary control.

7.2. RECOMMENDATIONS RELATING TO THE ADMINISTRATION PROCESSES

Part II of the present study describes the organization and operation of the Department of National Revenue.

We do not recommend any changes in the present administrative structures. In constitutions patterned on the British parliamentary system, it is the duty of Parliament to supervise the administration of the laws it has enacted. This duty, and the corresponding responsibility of individual ministers for the acts of their respective departmental officers, must not be allowed to cloud the vital question of the freedom of the administration from outside interference.

It is a matter of public interest that public administration should be free from all undue political interference, that is, from private pressures as distinct from the proper supervision of Parliament. Such freedom from interference can be ensured by appointing commissions to administer various laws. Though this is a fairly common practice in

Canada, there seem to be valid reasons against extending it to tax legislation. The laws enacted by Parliament are of a general nature and, in order to apply these fairly to individual cases, it is sometimes necessary to make exceptions. It is fundamental that any agency which decides whether an individual taxpayer should be exempted from the general rule must be answerable to a higher authority. Such high authority cannot be assigned to the courts, since it is not strictly speaking a judicial matter. It might be vested in civil servants, or in a special agency or in the elected representatives of the people. In the hands of civil servants, such authority could lead to administrative despotism. Yet, this is hardly justification for appointing a special tax Ombudsman. The very existence of such an office is unnecessary in the British parliamentary system so long as Members of Parliament perform the supervisory functions which are properly theirs. Furthermore, the Scandinavian definition of the role of an Ombudsman does not include the function of exercising the higher authority to exempt from general rules. In the last analysis, such authority must be exercised by the elected representatives of the people and, for this very reason, the administration of the tax laws cannot be entrusted to a commission which is entirely independent of Parliament. If, on the other hand, the Commission were subjected to the supervision and control of Parliament, it would no longer be distinguishable from a department. It follows that, as a matter of principle, the administration of tax laws should be in the hands of a minister responsible to Parliament. To ensure efficient parliamentary control, it is essential that the minister should be unable to dodge with impunity questions asked by Members of the House and it is necessary that the latter should be free to ask him pertinent questions

stimulated, if necessary, by published reports and prepared with the assistance of a research staff.

Having concluded that the administration of tax laws should be handled by a Department rather than by a Commission, the next step is to consider whether the responsibility should be shared by two departments, with legislating vested in the Department of Finance and the administering vested in the Department of National Revenue. On this point, administrative and political considerations are more significant than legal considerations. All the jurist can do is to review the facts and express a view which cannot be considered as definite and final since it is always subordinate to variable political and administrative factors. The separation of the two departments is peculiar to the Canadian system and deserves to be maintained. The reason for this separation is simple — despite the prominent role the Minister of Finance plays in drafting legislation there may be a difference between the objective he is seeking to achieve, and the objective that can actually be achieved under an act passed by Parliament at his request. In that case, if he were left to apply the legislation he might be inclined to interpret the act, not in the light of what it states but in the light of what he wanted to write into it. 1/ That is why we think it preferable to continue having two separate departments.

However, while it does not seem necessary to change the administrative structures, the satisfactory operation of the administration processes must be ensured. We therefore recommend that ministerial discretion be decreased, that the extraordinary powers of investigation granted the administration be controlled, that equality be assured to all with regard

to taxation, and that the taxpayer be guaranteed a fair hearing and every means of defence.

7.2.1. REDUCING MINISTERIAL DISCRETION

According to the policy advocated in the second chapter (supra 2.1.1.3. and 2.1.3.) there is no need to remove every trace of ministerial discretion from Canadian legislation. Under certain circumstances this is the only technique which can prevent the law being evaded and ensure its satisfactory administration. It should therefore be used without hesitation. Instead of resorting to ministerial discretion, however, it is preferable, whenever possible, to apply objective criteria.

From this standpoint we recommend that section 56 of the Income Tax Act (supra 3.1.3.2.) be amended. Under the said section any taxpayer who has evaded the tax authorities is liable to a penalty, to be set by the Minister, of not less than 25% and not more than 50% of the amount of the tax evaded. Except in very serious cases, the penalty is set at 25% or a little over. The fact that he might have to pay the maximum penalty, however, in itself constitutes a threat for any taxpayer accused of tax evasion. Even if he could challenge the tax authorities' claim before the courts with some hope of success, he may choose to compromise for fear that if he decided to argue his case his decision might be regarded as obstinacy and, if he lost his case, he might be made to pay the maximum penalty as a punishment. To avoid this undue influence, which can be exerted with or without the knowledge of the administration, the amount of the penalty should no longer be left to the discretion of the Minister—the act should provide for a uniform rate or define the particular circumstances (e.g., a repeated offence) that justify the highest penalty.

We also recommend that subsection (1) of section 8 of the Excise Act be amended. Under this provision the Minister may refuse, suspend or cancel a licence if he deems that it is in the public interest to do so and his decision is not subject to review by the courts, except in relation to its legality. As no person can operate an industry or a business governed by the Excise Act without a licence, the freedom citizens have to practice the activity of their choice is left to the discretion of the Minister in this particular sector of the economy. Whether or not there have been abuses this is an anomaly and should be corrected. As it is necessary to leave the administration a great deal of latitude in excise matters, the technique of ministerial discretion could be replaced by that of delegated legislation. The conditions under which licences can be obtained and the reasons for suspending or cancelling them would be defined in the regulations. The Minister would be responsible for applying the regulations, but the courts could substitute their decision for his by applying established objective criteria.

Limiting the cases of ministerial discretion in the act is not sufficient, however, and steps should also be taken to prevent the administration from exercising discretionary powers without a legal basis. This applies where determining the basis of calculation for excise dues is concerned. In this regard, if the act were to be applied strictly the same type of commodity would be subject to different rates depending on the position of the buyer or the quantity of goods purchased. For example, a vertically integrated firm that sells directly to the public would be at a disadvantage in relation to a competitor who does

business with middlemen. Caeteris paribus, the dues paid by the integrated firm would be higher because they would be calculated on the retail rather than the wholesale price. It is true that methods provided for such calculations in the General Sales Tax and Excise Regulations eliminate this inequality of treatment, but in so far as they correct the act they are ultra vires. The resulting situation is unacceptable under a democratic system. If a manufacturer were to contest in court the wholesale value determined by the deputy minister he would do so in vain as the court would not apply the regulations but the act and would calculate the tax on the price at which the goods were sold. As in the case of ministerial discretion the taxpayer is thus at the mercy of the administration whose decisions are free of any legal control. While abuses are few and far between they should nevertheless be prevented. To achieve this we recommend that the basis for calculating dues be written into the Excise Act in such a way that all taxpayers in the same situation will be on an equal footing (supra 4.1.3.4.2.3. and 4.1.3.4.2.4.).

7.2.2. CONTROLLING THE EXTRAORDINARY POWERS OF INVESTIGATION GRANTED THE TAX AUTHORITIES

The tax authorities must be able to exercise powers that exceed ordinary law in matters of investigation to enable them to administer the acts, but the said powers should be limited and subject to control.

To that end we recommend the amendment of subsection (1) of section 126 of the Income Tax Act (above 3.1.2.2.3., 3.1.3.1.1. and 3.1.3.1.2.) and subsection (4) of section 55 of the Excise Act (supra 4.1.3.3.2.). The said sections provide for auditing and seizing books, records or documents, examining property and questioning under oath. In our

opinion the exercise of these powers should be subject to prior approval by a justice of the Exchequer Court of Canada, of a superior court or a county court, or a member of the tax court we are suggesting (supra 6.2.2.4. and 6.2.3.4.; infra 7.3.4.). Upon ex parte request, such authorization could be granted in writing to any officer the minister might designate. In addition, any taxpayer called upon to provide information in reply to a questionnaire should, under the act, be protected against his own testimony and be able to retain a lawyer to assist him. Where books, records or documents are seized, the act should oblige the tax authorities to list such items, allow the taxpayer to consult or obtain a copy of them and, finally, to return them within a reasonable period of time unless proceedings are initiated.

We also recommend that among the powers granted the tax authorities under sections 70-79 of the Excise Act, the most stringent ones should only be exercised on the authority of a specific mandate, valid for a certain period of time and granted according to common criminal procedure (supra 4.2.4.).

7.2.3. THE TAXPAYER'S RIGHT TO AN IMPARTIAL INVESTIGATION

The taxpayer should be treated fairly and, as far as possible, this should begin at the administrative level. Any investigation initiated by the tax authorities should therefore be conducted in an impartial manner.

In this regard we recommend that the Income Tax Act be amended so that investigations initiated under subsections 4 and 8 of section 126

would be governed by section 13 of the Inquiries Act. In our opinion, the Income Tax Act should expressly recognize that any person who is being investigated is entitled to an impartial hearing and, in particular, is entitled to attend the hearings, to be represented by counsel, to cross-examine the witnesses and to obtain a transcript of the evidence (supra 3.1.3.1.3.).

This reform is all the more essential that all assessments are executory notwithstanding appeal and hence that, in establishing or modifying them the minister or deputy minister necessarily affects the taxpayer's rights and obligations. It so happens that the decision to establish or modify an assessment is often based on information collected during an investigation and, what is more, a decision rendered on behalf of the minister or deputy minister is, for all practical purposes, frequently taken by the person in charge of the investigation. If the spirit of the Canadian Bill of Rights and particularly subsection (e) of section 2 are to be respected the reality of situations must be taken into consideration and not a technicality or a fiction of the law, otherwise all the legislator would have to do to circumvent the said Bill would be to dissociate, at least in theory, the power to decide from the power to investigate.

7.2.4. EQUALITY IN RELATION TO TAXATION

Equality in relation to taxation implies first of all equality in relation to the law and regulations.

In this respect we recommend that an anomaly arising from the application of the Estate Tax Act which places the Quebec taxpayer at a disadvantage be corrected. Contrary to common law, civil law, except

for customary gifts considers donations made by one spouse to another in the course of their married life as void, but the tax on donations is levied despite the said provision. In our opinion, where the courts set aside a will, donations liable to taxation which a person makes at least three years prior to his or her decease, should not be considered part of the deceased's estate for purposes of calculating the estate tax (supra 3.3.1.). This reform is necessary because in all fairness the tax authorities should not levy the tax twice, nor should they bet on two horses by levying the tax they finally realize will produce the greatest amount of revenue of the two.

With regard to income tax, deductions at the source undermine the principle of equality when they are too substantial. We therefore recommend that the Income Tax Regulations be amended so that a salaried worker who, in the course of any one year, has received no salary for a period of at least three months or who, for purposes of calculating the tax, is entitled to deduct over $300.00 for professional dues, charitable donations and medical expenses in excess of 4% of his taxable income may, by certifying the facts in a TD1 supplementary form, obtain an adjustment of the deduction at the source (supra 3.1.5.1.1.).

While the act and regulations tend to put all taxpayers on the same footing, this is not sufficient—the tax authorities must treat them in the same way because a considerable number of problems and disputes are settled at the administrative level. To ensure the uniform application of the act, we recommend that the Department provide the staff of the Customs and Excise Division with a hand-book, as it does the personnel of the Income Tax Division (4.3.1.). We also recommend that decisions

relating to the excise tax be given more publicity (supra 4.1.7.3.). This reform is essential for when a decision favouring a group of industries is known to only a few of them the latter may be the only ones to proceed in such a way that they can take advantage of the decision and may thus have an undue advantage over their competitors on the economic level. In order to prevent such inequality the tax authorities should publish once a month a summary of all decisions of a general nature rendered the preceding month. For the same purpose, and also to prevent any undue political interference in the administration, we recommend that the Minister of National Revenue attach a note to his annual report explaining the remission from any penalty or tax exceeding a certain amount granted by virtue of a discretionary power (supra 4.1.6.1. and 4.1.6.2.).

7.2.5. THE TAXPAYER'S RIGHT TO A FULL AND COMPLETE DEFENCE

The best way to ensure that equity is respected at the administrative level is to enable the taxpayer to defend his case fully and completely before the courts. To that end we recommend that certain rules concerning procedure and evidence be amended.

The Income Tax Act and the Estate Act are far too strict in setting the time allowed for opposing or appealing a case. To correct this discrepancy we recommend that the taxpayer be allowed to obtain from the Exchequer Court or the Federal Tax Court (infra 7.3.4.) the authorization to produce, after the time allotted has expired, a notice of opposition or appeal, under reasonable conditions, for instance, by explaining satisfactorily why he is late and establishing satisfactory means for his defence (supra 3.1.4.2. and 3.2.1.).

In addition, we recommend that section 51 of the Income Tax Act be amended so that the tax authorities cannot require the immediate payment of the tax, interest and penalty while a case is still before the courts. In our opinion, any private individual who decides to take his case before the courts should, in the same period of time, only be required to pay the amount he owes the tax authorities, or a deposit if he is in opposition. Whenever a penalty is imposed under section 56 for behaviour implying mens rea and gross negligence, the issuing of an assessment should not have the effect of displacing the onus probandi thus obliging the taxpayer to prove that he inadvertently omitted to pay the tax or that he is not guilty of gross negligence (supra 3.1.4.3.).

In order to prevent any possibility of justice being denied, we recommend that subsection 4 of section 55 of the Excise Act (4.1.4.2.2.2.) be amended. Under these provisions registration by the Exchequer Court of a certificate issued by the Deputy Minister of National Revenue to the effect that a taxpayer owes the tax authorities a certain amount, has the same force and effect as a court decision. It is true that such registration cannot take place until fifteen days have elapsed following the date on which the notice of arrears was mailed and that the administration only resorts to this procedure when no conflict is anticipated. However, in view of the extraordinary character of the procedure, the act should allow the taxpayer concerned to oppose registration of the certificate by submitting a full and complete defence before the court.

We also recommend that a procedure which is equal to the irrefragable presumption of bad faith be removed from the Excise Tax Act (supra 4.1.2.4.1.). In all justice, a supplier who in good faith sells goods to a client

whose licence has been revoked without collecting the tax, should not be held responsible if notice that the licence has been revoked has not yet been published.

As it is difficult for anyone to prove or to justify things he has done four years earlier, we recommend that the Excise Tax Act be amended so that a taxpayer of good faith can only be assessed for transactions concluded during the two preceding years or since the last audit (4.1.3.4.4.). Actually, the administration proceeds in this manner but the taxpayer of good faith should be protected not merely by administrative practice but by a provision in the act.

Finally, we recommend that the regulations be amended so that taxpayers can establish the total rebate for each department of their firm when their accounting system enables them to do so to the satisfaction of the tax authorities (4.1.5.3.2.). At the present time when the excise tax, for refund purposes, is calculated according to the total rebate method, no one is allowed to show a rate of profit on sales subject to exemption lower than that on their operations as a whole. In these circumstances the total rebate method can be detrimental to certain taxpayers.

7.3. RECOMMENDATIONS RELATING TO INTERPRETATION PROCESSES

A review of the processes of interpretation points to the advantage there would be in setting up a system of advance ruling, in rendering administrative revision and decision procedures more standardized and formal, in drafting legislation in the form of general principles and interpreting such legislation liberally, and finally, in instituting a federal tax court with exclusive jurisdiction, in first instance, over all tax fields.

7.3.1. ESTABLISHING A SYSTEM OF ADVANCE RULING

In order to reduce the risks involved in the undertaking, we recommend that a system of advance ruling patterned on the United States system be set up.

Instead of limiting the cases in which issuance of an advance ruling shall be refused, as they do in the United States, we think it would be wise to proceed inversely and to specify the cases in which such ruling may be issued. At first, this procedure could be restricted to matters that come under the minister's discretionary powers and to operations that have the effect of substantially modifying the amount of taxable income. Subsequently, the field of application of the procedure could be extended according to the rate at which a qualified and experienced staff could be recruited. As the system would have to be tested the minister, at least during the first years, would not be tied down by advance rulings although it would be preferable that he abide by them. Moreover, advance rulings should not be subject to review at the taxpayer's request during the experimental period.

To eliminate trivial requests and prevent abusive use of the procedure, the tax authorities could charge a minimum amount for the service rendered which would increase in proportion to the difference involved in calculating the taxable income. All rulings should come from one body located at Ottawa and should be published whenever they are of general interest and highlight certain aspects of the legislation (supra 5.2.2.3.).

7.3.2. INSTITUTIONALIZING THE REVIEWING OF ADMINISTRATIVE DECISIONS

When administrative decisions are reviewed, this reduces the number of lawsuits and provides taxpayers who hesitate to contest the tax authorities' claims before the courts with an opportunity to be heard. For these reasons the administrative machinery should provide for efficient reviewing of the decisions arrived at. The various tax branches do not proceed in the same manner in this respect. We recommend that the present system be modified in order to standardize the procedure and make it more formal.

In matters of income tax, estate tax and excise duties, the act should oblige the administration to give the taxpayer detailed and motivated notice of any proposed assessment and provide him with a suitable opportunity to be heard before the assessment is issued. The Excise Act as well as the Income Tax Act and the Estate Act should provide a formal procedure for opposing an assessment. On receipt of notice from the taxpayer the minister should invite him to appear. To be entirely effective the review carried out after a notice of assessment should be distinct from any previous review and should be performed by a different assessor. In all fairness to the taxpayers residing in the Western and Maritime Provinces, reviewing should be decentralized. Where income tax is concerned, for instance, the final review should not be done by the central office but by four or five offices located in various parts of the country. As for the drawbacks of such decentralization, they would be offset by sending the offices instructions and inspecting the work accomplished (supra 4.1.3.4.4.; 4.1.4.3.; 5.3.2.1.4; 5.3.2.2.1. and 5.3.2.3.).

As the Excise Act provides for criminal sanctions, the courts are the only real safeguard for a citizen's rights in such matters. However, when purely administrative matters are concerned—the inspection of premises and equipment, for example—the taxpayer involved should be able to have the initial decision reviewed by applying to the regional director or to headquarters. The same recourse should be available to him when the tax authorities hand down a decision by virtue of a discretionary power (supra 5.3.2.4.).

7.3.3. DRAFTING LEGISLATION IN THE FORM OF GENERAL PRINCIPLES AND USING A LIBERAL METHOD OF INTERPRETATION

Under the general rules of interpretation the courts themselves have to look for the legislator's intention in the texts, but when there is ambiguity they may consider certain external factors such as legal precedents, defects in the legislation and the means found to remedy such shortcomings. The tax laws being highly complex it may seem a priori that the courts play a more creative role in this field of law than in any other. The contrary is true, however, for when a tax law has to be applied to a specific case, the courts depart from the general rules of interpretation; even where there is ambiguity they refuse to look for the legislator's intention anywhere but in the letter of the text.

This method of interpretation explains why the legislation in force is so confused and why it is so easy to get around for it encourages the jurists who draft the acts and the lawyers who defend the taxpayers to combine their ingenuity. More importance being attached to the letter than the spirit of tax laws, the taxpayer, who can usually achieve the same end by various legal means, selects the one whereby he will have the

smallest amount of tax to pay. Instead of engaging in a taxable transaction he may, in some cases, obtain exactly the same result by a series of operations and circumventing the law. The legislator may adopt specific provisions for the purpose of eliminating loopholes, but it takes the tax experts little time to discover a new hole in the network of tax laws. While the literal method of interpretation may provide opportunities to circumvent the tax laws, it is not to every taxpayer's advantage. When a provision is ambiguous, for instance, each meaning it can be given may favour certain groups of taxpayers to the detriment of all the others. What is more, when an individual is taxed by virtue of a provision whose meaning is clear, even if an exorbitant burden is imposed on him he cannot ask that his case be considered on the grounds of equity with any hope of success.

The method of strict interpretation was understandable at a time when taxation was likened to punishment and expropriation, but it is no longer suitable because present day society looks upon taxation as one of the requirements of community living and distributive justice. In order to render tax legislation less complex and to prevent the tax laws being circumvented, we recommend that where income tax and excise dues are concerned, the laws be drafted henceforth in the form of general principles (supra 1.1.2.5.4.) and given a broad interpretation (supra 6.1.5.). To that end, both the Income Tax and Excise Acts should contain a provision calling on the courts, where there is ambiguity, to look for the meaning which is the most consistent with the purpose of the act and to take into consideration legal precedents, their shortcomings and the ways found to remedy such weaknesses. The Income Tax Act should also contain a general

clause under which fictitious operations having the effect of reducing the amount of tax payable should not be taken into account when calculating the said amount. Such operations should be defined as being legally valid—but not in accordance with normal business practice—if their purpose were not to reduce the amount taxpayers have to pay the treasury. With a provision of this kind sections 138 and 138A would be useless and should be abolished.

The proposed reform goes to the root of the evil. It is designed to put an end to the restrictive interpretation of both the general provisions establishing taxes and the amendments preventing their evasion. It would henceforth enable the legislator to express himself more clearly and in simpler terms, and would thus satisfy many taxpayers who cannot afford the services of tax experts and have to prepare their own returns. As for the uncertainty which sometimes results from formulating the law in the form of general principles, the system of advance decisions would help to dispel it.

7.3.4. INSTITUTING A FEDERAL TAX COURT

It is desirable to have a court that can deal with all disputes arising between taxpayers and the tax authorities expeditiously and at little cost. We therefore recommend the establishment of a federal tax court having exclusive jurisdiction in first instance over all fields of federal taxation. This jurisdiction being divided between the Tariff Board, the Tax Appeal Board and the Exchequer Court at the present time, the reform would have the effect of eliminating the first two courts and leaving the Exchequer Court only its jurisdiction over appeals where

taxation is concerned. The new court would comprise two divisions, one for income and estate taxes and the other for customs and excise. While the members of the court could specialize in one particular field if they saw fit, they would not be obliged to do so (supra 6.2.2.3.2.1.1.; 6.2.2.4.; 6.2.3.4.; 6.3.1.3.).

To establish their prestige and ensure their independence, the members of the new body should receive the same salary and be entitled to the same pension as justices of the superior courts; like the latter they should be appointed on a permanent basis but required to retire at 75. The appointees need not necessarily be lawyers but the president of the court should be chosen essentially among the members of the magistrature or the Bar; in the former case they would retain their title of judge and all the related benefits, and in the latter they would attain to the magistrature (supra 6.2.2.2.1.; 6.2.3.2.1.).

The rules and orders of the new court should not be subject to approval by the Governor General in Council but only to parliamentary control under provisions similar to those of section 88 of the Exchequer Court Act (supra 6.2.3.3.3.). Each division of the court should enjoy a certain degree of autonomy, particularly where procedure is concerned. With regard to customs and excise matters the rules and orders should require the parties and intermediates to communicate to the Court and to everyone concerned a brief outline of the position they intend to take at the hearing and should also allow them to agree among themselves to submit written arguments in addition to or in place of their oral arguments (supra 6.2.2.3.2.2.). Finally, when a taxpayer decides to go to law in matters of income or estate tax, the act, or a rule if the latter is silent on

the subject, should require the tax authorities to take a position within thirty days. At that time the tax authorities should recognize or deny the facts alleged by the taxpayer and put forward the facts and points of law the defence intends to use (supra 6.2.3.3.2.).

Decisions handed down by the Tax Court should be published by the Queen's Printer. They should be final as far as facts are concerned and subject to appeal as regards legal points or points involving both fact and law. Appeals to the Exchequer Court should require authorization by the Court or one of the judges. Finally, when the Minister of National Revenue appeals a decision before the Exchequer Court or the Supreme Court of Canada, the government, regardless of the outcome of the dispute, should assume not only the legal expenses but all other expenses incurred by the taxpayer to the extent the court considers the amount to be a reasonable one (supra 6.2.3.2.1.; 6.3.1.2.1. and 6.3.1.3.).

Whether they bear on the processes of legislation, administration or interpretation, the recommendations made in this study tend as a whole to put law and justice before all other considerations in the vast segment of public law tax legislation represents. It is practically impossible to put all taxpayers on an entirely equal footing, but the different manner in which they are treated must be justified rationally and not arbitrarily. What is more, the government must see to it that every taxpayer renders unto Caesar what is due to Caesar. In order to accomplish this task satisfactorily, the government must exercise very extensive powers but before starting up powerful executory machinery they must give the taxpayer an opportunity to be heard. To proceed in any other way would amount to sacrificing individual freedom to administrative efficiency.

REFERENCE

1/ Report of Proceedings of the Tenth Annual Tax Conference, Canadian Tax Foundation, Toronto, 1956, pp. 267-8.

APPENDIX A

SURVEY OF ASSOCIATIONS WHO HAVE IN THE PAST APPROACHED THE GOVERNMENT ON QUESTIONS RELATED TO TAX LEGISLATION

The Department of Finance was good enough to supply the authors with a list of associations who have in recent years sent in submissions, either annually or at fairly regular intervals.

The following forty-six associations were listed: Canadian Petroleum Association, Association of Canadian Distillers, The Saskatchewan Association of Rural Municipalities, Canadian Rehabilitation Council for the Disabled, Canadian Automobile Chamber of Commerce, Inc., Canadian Automobile Sport Club, United Electrical, Radio and Machine Workers of America, Canadian Association of University Teachers, The Canadian Chamber of Commerce, Canadian Federation of Mayors and Municipalities, The Canadian Arthritis and Rheumatism Society, The National Council of Women of Canada, Canadian Library Association, Victorian Order of Nurses for Canada, Canadian Construction Association, Canadian Pulp and Paper Association, la Fraternité des Artisans de St-Jean-Port-Joli, Confectionery Association of Canada, The Canadian Pharmaceutical Association Inc., Canadian Electrical Manufacturers Association, The Canadian Bar Association, The Canadian Manufacturers' Association, Dominion Brewers' Association, Toilet Goods Manufacturers Association, College of General Practice of Canada, National Warm Air Heating and Air Conditioning Association, Canadian Lumbermen's Association, Fur Trade Association of Canada (Quebec) Inc., The Canadian Institute of Chartered Accountants, The Canadian Medical Association, The Board of Trade of Metropolitan Toronto, Canadian Federation of Agriculture, International Woodworkers of America, West Vancouver Board

of Trade, The National Concrete Products Association, Canadian Bottlers of Carbonated Beverages, Canadian Horticultural Council, Fisheries Council of Canada, Retail Merchants Association of Canada, Canadian Foods Processors' Association, Ontario Good Roads Association, Multiple Sclerosis Society of Canada, Canadian Institute of Plumbing and Heating, The Farm Equipment Institute, Fountain Fruit and Syrup Manufacturers Association, The Independent Petroleum Association of Canada.

The following questionnaire was sent to the above associations:

1. The complaints or suggestions listed in your briefs originate presumably from the members of your organization. From whom precisely may they come? Are these suggestions studied and selected at a higher level in your organization? If yes, by whom?

2. Once the brief is prepared, and your Association knows the date when it will meet the Minister of Finance, and civil servants assisting him, is the brief sent in, before the meeting, to allow the Government people to study it, or is it not? What procedure is followed during that meeting? Do you simply give information, or do you, and your experts, discuss precise points with the Minister and the civil servants?

3. Is this kind of communication between the Government and leaders of business and finance satisfactory, or is it too rigidly circumscribed? Would you agree with the Globe and Mail, (July 11th, 1963) when it says: "...groups have presented formal and stuffy briefs to the Government, and the Government has received them in a formal and stuffy fashion. There has been little of the down-to-earth conversation that irons out problems or sparks new ideas." Do you wish to make any suggestion at this stage?

4. Once the Budget resolutions are known to the public, may it happen that you wish to make new recommendations to the Government? Is the same procedure followed then? Is it satisfactory?

Replies were received from twenty-nine of the above associations, as well as from three unlisted associations as follows: The Canadian Electrical Association, The Canadian Importers and Traders Association Inc., and The Canadian Metal Mining Association.

APPENDIX B

TEXT OF AN EDITORIAL ENTITLED "PREPARING THE BUDGET" PUBLISHED IN THE "GLOBE AND MAIL", JULY 11, 1963

Prime Minister Lester Pearson told a press conference this week that traditional methods of producing Canadian Budgets are no longer adequate to the country's needs. They were developed for a simpler economy and do not serve the complexities of today.

The Budget is traditionally prepared by the Finance Minister in consultation with his senior civil servants and under a cloak of secrecy. Even the Cabinet is unaware of details until a few days before the Budget is presented to the House of Commons. Mr. Pearson suggested that he would be introducing changes in procedures which would enable the Government to consult with business before a Budget was prepared.

Mr. Pearson is on sound ground when he proposes an extension of the consultation between Government and business, and he should go further. There is no reason why extensive consultation should imperil the secrecy that is attendant upon the production of a Budget.

In the past, communication between governments and leaders of business and finance has been so rigidly circumscribed as to be of little use. The Canadian Manufacturers Association and other such groups have presented formal and stuffy briefs to the Government, and the Government has received them in a formal and stuffy fashion. There has been little of the down-to-earth conversation that irons out problems or sparks new ideas.

Mr. Pearson seems to suggest that he would improve on this sterility

by holding pre-Budget discussions with business. This is too limited an approach. Such conversations, to be effective, cannot be a once-a-year exercise. They should go on the year round, between changing and widely representative groups of businessmen and an executive committee of the Cabinet.

The reformation that is needed is two-pronged. Within the Cabinet there should be a committee of the policy makers—and in any Cabinet these men are few in number. On occasion this committee could be enlarged by the addition of certain senior civil servants and the Governor of the Bank of Canada. Such a committee could deal more expeditiously with public business than the full Cabinet, many of whose members are there for reasons of politics rather than ability.

This committee should then, throughout the year, assemble in Ottawa groups of business leaders from all over the country. It should meet with them in vigorous and informal work sessions, when Government policies, theories and problems could be debated, and business could be invited to present new ideas. This would be a practical method of bringing together the three groups—civil servants, business representatives and Government. The academic view of civil servants would be balanced by the practical views of businessmen; and the executive committee of the Cabinet would be furnished with broad information of both sorts on which to base policy.

What the Cabinet committee would then select for use in the Budget would be the committee's secret, until it was told in the House. These basic Budget decisions should be made by the committee, not by a Finance Minister working alone.

This broadening of the bases for both prior consultation and decisions is essential to the production of sound Budgets in the future. Budgets have too frequently been viewed by governments simply as methods of raking in spending money. Instead they should be instruments of fiscal and economic policy which reach constructively into every area of the economy.

In the rather narrow exercise of raising money, Finance Ministers in general have lost touch with the impact of various taxes on different parts of the economy and different regions of the country. The Royal Commission on Taxation is supposed to sort out the jungle they have created. But it will not stay sorted unless Budgets of the future are based on the broadest possible knowledge of Canadian needs and capabilities.

APPENDIX C

EXTRACT FROM THE ADMINISTRATIVE PROCEDURE ACT OF THE U.S.A., (1946)

Section 4: Rule-Making.

Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(a) Notice.—General notice of proposed rule-making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule-making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(b) Procedures.— After notice required by this section, the agency shall afford interested persons an opportunity to participate in the

rule-making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection.

(c) Effective dates.— The required publication or service of any substantive rule (other than one granting or recognizing exemption or relieving restriction or interpretative rules and statements of policy) shall be made not less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule.

(d) Petitions.— Every agency shall accord any interested person the right to petition for the issuance, amendment, or repeal of a rule.

. . .

Section 7: Hearings.

In hearings which section 4 or 5 requires to be conducted pursuant to this section.

(a) Presiding officers.— There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this Act; but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or

other officers specially provided for by or designated pursuant to statute. The functions of all presiding officers and of officers participating in decisions in conformity with section 8 shall be conducted in an impartial manner. Any such officer may at any time withdraw if he deems himself disqualified; and, upon the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification of any such officer, the agency shall determine the matter as a part of the record and decision in the case.

(b) Hearing powers.— Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpoenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommend decisions in conformity with section 8, and (9) take any other action authorized by agency rule consistent with this Act.

(c) Evidence.—Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance

with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule-making or determining claims for money or benefits or applications for initial licences any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(d) Record.— The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 8 and, upon payment of lawfully prescribed costs, shall be made available to the parties. Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary.

APPENDIX D

EXTRACT FROM THE BUDGET SPEECH DELIVERED BY THE HON. WALTER HARRIS, MINISTER OF FINANCE, MARCH 20, 1956

For several years past the publishers of Canadian magazines have made representations to the government regarding the increasing inroads of magazines from abroad both into their circulation in Canada and also into their sales of advertising. We have been able to help them to a small extent by some redistribution of routine government advertising. Nevertheless, their relative position has declined. A number of Canadian magazines have been abandoned and others have had to reduce the number of issues per year. Magazines from abroad have meanwhile extended their activities to such an extent that the long run continuation of Canadian magazines appears to be in jeopardy. Already, something like four-fifths of the magazines read in Canada are not Canadian, and the proportion has been creeping ominously upward.

Competition from abroad takes two forms. First, we have what may be described as normal imports; scores of magazines normally on sale in London, Paris, New York or elsewhere, are brought in and sold in Canada. Second, in a few cases, the publisher of a magazine abroad has arranged to put on sale in Canada an edition of his magazine that is quite similar to the magazine he sells in his home market but not identical with it. This special edition will usually differ from the home edition both because it prints a few pages of reading material about Canada and also because it sells some pages, often a great many pages, to Canadian advertisers.

We have been considering this problem for some time, and we have decided that, in this field, very exceptional measures can be justified—measures that certainly could not be justified in connection with any ordinary line of business or commerce. The publication and circulation of magazines by Canadians, for Canadians, telling about Canadians and what they are doing and what they have to sell, seems to us a basic and essential thread in the fabric of our national life. And I am talking now, not merely of the magazines that deal to a greater or lesser extent with broad political and economic affairs, but also about the magazines that circulate among housewives and businessmen and members of trade associations.

I wonder whether we could contemplate a time when we would not have a Canadian magazine, when there would not be an opportunity for persons with the talent and with the time to sit down and contribute an article of a critical nature on government or scientific matters or on some other topic, or if we could contemplate a time when our children could not read a magazine in which there would be Canadian stories based on Canadian history or Canadian fiction. I doubt very much, sir, if we could look to an occasion like that.

The government would be very reluctant, however, to interfere with the normal and traditional imports of ordinary magazines into our country but the special editions constitute a very special problem. They are relatively new arrivals on the scene. Each is essentially a by-product of some magazine published abroad and, being a by-product, its costs of production are well below the costs of a comparable purely Canadian magazine. It uses its advantage not only to enlarge its circulation but

also, and far more serious to Canadian publishers, to sell its advertising services, thus diverting revenues from Canadian publishing houses. In recent years this diversion has become very substantial.

Accordingly, we have decided to put a special excise tax on these special editions. It will be at the rate of 20 per cent and will be levied on all revenues they receive from advertising. It will not come into effect until January 1, 1957 so that those concerned may have time to adapt their affairs to it. The tax will apply to all special editions whether printed in Canada or abroad, in English or in French.

APPENDIX E

EXTRACTS FROM THE INCOME TAX ACT

47. (3) When an amount has been deducted or withheld under subsection (1), it shall, for all the purposes of this Act, be deemed to have been received at that time by the person to whom the remuneration, benefit, payment, fees, commissions or other amounts were paid. 1949 (2nd Sess.), c. 25, s. 21; 1951, c. 51, s. 15.

123. (1) No action lies against any person for withholding or deducting any sum of money in compliance or intended compliance with this Act.

(2) Every person whose employer is required to deduct or withhold any amount from his remuneration under section 47 shall, from time to time as prescribed, file a return with his employer in prescribed form.

(3) Every person failing to file a form as required by subsection (2) is liable to have the deduction or withholding from his salary or wages under section 47 made as though he were an unmarried person without dependants.

(4) Every person who deducts or withholds any amount under this Act shall be deemed to hold the amount so deducted or withheld in trust for Her Majesty.

(8) Any person who has failed to deduct or withhold any amount as required by this Act or a regulation is liable to pay to Her Majesty

(a) if the amount should have been deducted or withheld under subsection (1) of section 47 from an amount that has been paid to a person resident in Canada, or should have been deducted or withheld under section 109 from an amount that has been paid to a person not resident in Canada, 10% of the amount that should have been deducted or withheld, and

(b) in any other case, the whole amount that should have been deducted or withheld,

together with interest thereon at the rate of 10% per annum.

(9) Every person who has failed to remit or pay

(a) an amount deducted or withheld as required by this Act or a regulation, or

(b) an amount of tax that he is, by a regulation made under subsection (4) of section 109, required to pay,

is liable to a penalty of 10% of that amount or $10, whichever is the greater, in addition to the amount itself, together with interest on the amount at the rate of 10% per annum.

(12) Where this Act requires an amount to be deducted or withheld, an agreement by the person on whom that obligation is imposed not to deduct or withhold is void.

(13) The receipt of the Minister for an amount withheld or deducted by any person as required by or under this Act is a good and sufficient discharge of the liability or any debtor to his creditor with respect thereto to the extent of the amount referred to in the receipt. 1948, c. 52, s. 112; 1949 (2nd Sess.), c. 25, s. 44.

126. (1) Any person thereunto authorized by the Minister for any purpose related to the administration or enforcement of this Act may, at all reasonable times, enter into any premises or place where any business is carried on or any property is kept or anything is done in connection with any business or any books or records are, or should be, kept pursuant to this Act, and

(a) audit or examine the books and records and any account, voucher, letter, telegram or other document which relates or may relate to the information that is or should be in the books or records or the amount of tax payable under this Act,

(b) examine property described by an inventory or any property, process or matter an examination of which may, in his opinion, assist him in determining the accuracy of an inventory or in ascertaining the information that is or should be in the books or records or the amount of any tax payable under this Act,

(c) require the owner or manager of the property or business and any other person on the premises or place to give him all reasonable assistance with his audit or examination and to answer all proper questions relating to the audit or examination either orally or, if he so requires, in writing, on oath or by statutory declaration and, for that purpose, require the owner or manager to attend at the premises or place with him, and

(d) if, during the course of an audit or examination, it appears to him that there has been a violation of this Act or a regulation, seize and take away any of the records, books, accounts, vouchers, letters, telegrams and other documents and retain them until they are produced in any court proceedings.

(2) The Minister may, for any purpose related to the administration or enforcement of this Act, by registered letter or by a demand served personally, require from any person

(a) any information or additional information, including a return of income or a supplementary return, or

(b) production, or production on oath, of any books, letters, accounts, invoices, statements (financial or otherwise) or other documents,

within such reasonable time as may be stipulated therein.

(3) The Minister may, for any purpose related to the administration or enforcement of this Act, with the approval of a judge of the Exchequer Court of Canada or of a superior or county court, which approval the judge is hereby empowered to give upon ex parte application, authorize in writing any officer of the Department of National Revenue, together with such members of the Royal Canadian Mounted Police or other peace officers as he calls on to assist him and such other persons as may be named therein, to enter and search, if necessary by force, any building, receptacle or place for documents, books, records, papers or things which may afford evidence as to the violation of any provision of this act or a regulation and to seize and take away any such documents, books, records, papers or things and retain them until they are produced in any court proceedings.

(4) The Minister may, for any purpose related to the administration or enforcement of this Act, authorize any person, whether or not he is an officer of the Department of National Revenue, to make such inquiry as he may deem necessary with reference to anything relating to the administration or enforcement of this Act.

(5) Where any book, record or other document has been seized, examined or produced under this section, the person by whom it is seized or examined or to whom it is produced or any officer of the Department of National Revenue may make or cause to be made, one or more copies thereof and a document purpoting to be certified by the Minister or a person thereunto authorized by the Minister to be a copy made pursuant to this section is admissible in evidence and has the same probative force as the original document would have if it had been proven in the ordinary way.

(7) Every person thereunto authorized by the Minister may administer or receive an oath, affirmation or statutory declaration required to be given by or pursuant to this section.

(8) For the purpose of an inquiry authorized under subsection (4), the person authorized to make the inquiry has all the powers and authorities conferred on a commissioner by sections 4 and 5 of the Inquiries Act or which may be conferred on a commissioner under section 11 thereof. 1948, c. 52, s. 115.

131. (2) Every person who has failed to comply with or contravened subsection (1) of section 47, subsection (5) of section 123, section 125 or section 126 is guilty of an offence and, in addition to any penalty otherwise provided is liable on summary conviction to

(a) a fine of not less than $200 and not exceeding $10,000 or

(b) both the fine described in paragraph (a) and imprisonment for a term not exceeding 6 months.

137. (1) In computing income for the purposes of this Act, no deduction may be made in respect of a disbursement or expense made or

incurred in respect of a transaction or operation that, if allowed, would unduly or artificially reduce the income.

(2) Where the result of one or more sales, exchanges, declarations of trust, or other transactions of any kind whatsoever is that a person confers a benefit on a taxpayer, that person shall be deemed to have made a payment to the taxpayer equal to the amount of the benefit conferred notwithstanding the form or legal effect of the transactions or that one or more other persons were also parties thereto; and, whether or not there was an intention to avoid or evade taxes under this Act, the payment shall, depending upon the circumstances, be

(a) included in computing the taxpayer's income for the purpose of Part I,

(b) deemed to be a payment to a non-resident person to which Part III applies, or

(c) deemed to be a disposition by way of gift to which Part IV applies.

(3) Where it is established that a sale, exchange or other transaction was entered into by persons dealing at arm's length, bona fide and not pursuant to, or as part of, any other transaction and not to effect payment, in whole or in part, of an existing or future obligation, no party thereto shall be regarded, for the purpose of this section, as having conferred a benefit on a party with whom he was so dealing. 1948, c.52, s. 125.

138A.* (1) Where a taxpayer has received an amount in a taxation year,

(a) as consideration for the sale or other disposition of any shares of a corporation or of any interest in such shares,

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* Note: Applicable in respect of any amount received after June 13, 1963 (1963, c.21, s.26(2).)

(b) in consequence of a corporation having

(i) redeemed or acquired any of its shares or reduced its capital stock, or

(ii) converted any of its shares into shares of another class or into an obligation of the corporation, or

(c) otherwise, as a payment that would, but for this section, be exempt income,

which amount was received by the taxpayer as part of a transaction effected or to be effected after June 13, 1963 or as part of a series of transactions each of which was or is to be effected after that day, one of the purposes of which, in the opinion of the Minister, was or is to effect a substantial reduction of, or disappearance of, the assets of a corporation in such a manner that the whole or any part of any tax that might otherwise have been or become payable under this Act in consequence of any distribution of income of a corporation has been or will be avoided, the amount so received by the taxpayer or such part thereof as may be specified by the Minister shall, if the Minister so directs,

(d) be included in computing the income of the taxpayer for that taxation year, and

(e) in the case of a taxpayer who is an individual, be deemed to have been received by him as a dividend described in paragraph (a) of subsection (1) of section 38.

** (2) Where, in the case of two or more corporations, the Minister is satisfied

(a) that the separate existence of those corporations in a taxation year is not solely for the purpose of carrying out the business of those corporations in the most effective manner, and

(b) that one of the main reasons for such separate existence in the year is to reduce the amount of taxes that would otherwise be payable under this Act

the two or more corporations shall, if the Minister so directs, be deemed to be associated with each other in the year.

(3) On an appeal from an assessment made pursuant to a direction under this section, the Tax Appeal Board or the Exchequer Court may

(a) confirm the direction;

(b) vacate the direction if

(i) in the case of a direction under subsection (1), it determines that none of the purposes of the transaction or series of transactions referred to in subsection (1) was or is to effect a substantial reduction of, or disappearance of, the assets of a corporation in such a manner that the whole or any part of any tax that might otherwise have been or become payable under this Act in consequence of any distribution of income of a corporation has been or will be avoided; or

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** Note: Applicable to the 1964 and subsequent taxation years (1963, c.21, s.26(2).)

(ii) in the case of a direction under subsection (2), it determines that none of the main reasons for the separate existence of the two or more corporations is to reduce the amount of tax that would otherwise be payable under this Act; or

(c) vary the direction and refer the matter back to the Minister for reassessment.

APPENDIX F

RULES OF PRACTICE AND PROCEDURE IN APPEALS TO THE INCOME TAX APPEAL BOARD

1. An appeal to the Board shall be made in writing, signed by the appellant or his solicitor or agent, and shall as closely as may be follow the form set forth in the Schedule hereto, and shall set out a statement of the allegations of fact and the reasons which the appellant intends to submit in support of the appeal.

2. The Board may request of any party to the appeal additional information relative to the assessment or the appeal therefrom and such request shall be complied with in such time as shall be directed by the Board.

3. The Board may, having regard to all the circumstances including the matter of expense and convenience to the appellant, fix the time and place for the hearing of any appeal.

4. The Board shall give to the parties to the appeal at least fifteen days notice of the time and place of the hearing.

5. The Board may postpone the hearing of any appeal and, where the postponement is not to a definite date, the Board shall give to the parties to the appeal at least fifteen days' notice of the time and place of the postponed hearing.

6. Service of any notice, request or other document provided for in these rules may be effected on any party to the appeal by personal service

or by registered mail addressed in the case of the Minister to the Deputy Minister of National Revenue for Taxation at Ottawa, and in the case of the appellant to the address given in the Notice of Appeal.

7. (1) When an appeal has been set down for hearing, either party may make application to the Board for the appeal to be heard at a time or place other than appointed in the Notice of Hearing.

(2) Such application shall be made as promptly as possible after receipt of the Notice of Hearing and may be by telegram or in writing, addressed to the Registrar, Income Tax Appeal Board, Ottawa, Ontario.

(3) The application shall set out the reasons in support of the application and a copy thereof shall forthwith be sent by the applicant to the other party to the appeal.

(4) Such other party shall, as soon as possible after receipt of a copy of the application, notify the Board of his consent or opposition to the application and, if the latter, shall set out his reasons therefor.

(5) The Board may grant or refuse the application or fix such other time or place for the hearing as it deems advisable in the circumstances.

(6) Applications for postponement of a hearing, other than as under this rule provided, shall not be granted unless supported by reasons of urgency.

8. Where, pursuant to the provisions of the Act, the Board or Chairman has ordered that written submissions be filed in addition to or in place of an oral hearing, the facts set out therein shall be verified by affidavit.

SCHEDULE

FORM OF NOTICE OF APPEAL:

In re the Income Tax Act and.....
(Name of Appellant)

of the.....of.....
(City, Town or Village) (Name of City, Town or Village)

Province of.....

.....
(Appellant)

Notice of Appeal to the Income Tax Appeal Board is hereby given from the assessment dated the..... day of.....19.....

wherein a tax in the sum of $.....was levied in respect of income for the taxation year 19.....

Then complete the Notice of Appeal with

(1) A statement of allegations of fact,

(2) A statement of the reason to be advanced in support of appeal, and

(3) Address for service of notices, etc.

Dated at..... this..... day of..... 19....

.....
(Signature)