

# **DRAFTING EFFECTIVE NOTICES OF OBJECTION**

**A PAPER PRESENTED AT THE  
2006 CICA COMMODITY TAX SYMPOSIUM**

**Ottawa, Ontario**  
October 16 - 17, 2006

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At MILLAR KREKLEWETZ LLP we believe our "hands-on" tax and trade knowledge, combined with our litigation skill, gives us a competitive advantage.

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**UNFORTUNATELY  
LEFT TO THE  
BOTTOM**

While Rob concedes that Tax and Trade is truly scintillating, what he really enjoys is spending time with his family, playing hockey, baseball, football and golf with his boys, and attempting to finish at least one household project he starts.

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## **PART I – OVERVIEW**

### **I - 1 INTRODUCTION**

Today, the Notice of Objection can be the most important part of a tax dispute.

Gone are the days when a taxpayer could raise new facts and arguments with impunity during any stage of an appeal process.

Today, many jurisdictions effectively require that all relevant issues, together with all of the relevant facts and reasons, be fully and adequately disclosed in the Notice of Objection document. Where an issue has not been properly disclosed, with proper facts and reasons, the taxpayer may risk legislative prohibition on any further appeal of the issue. In effect, the drafter of the Notice of Objection is required to get it all right, the first time.

At the same time, the cost of tax litigation is quickly placing a premium on drafting Notices of Objection that keenly focus the taxpayer's position on the key issues in the case, present compelling facts and give cogent reasons for the taxing authority to accede to the taxpayer's position, without needing to force the matter to court.

All of this underscores the importance of drafting an effective Notice of Objection.

### **I - 2 WHY IS THIS IMPORTANT TO ME ?**

Accountants and other advisors are often the first line of defence for clients facing tax audits and assessments. While work during a tax audit can often minimize a client's exposure, tax assessments are in many ways like the Seasons: often delayed, but usually inevitable.

This means that the real "tax dispute" is often only resolved through the administrative appeal process that is commenced with the drafting and filing of the Notice of Objection.

Whether faced with income tax, GST or provincial sales tax assessments, the taxpayer's advisor has a finite amount of time to identify the relevant issues, prepare the taxpayer's version of event, and establish the legal reasons that will form the basis for the administrative appeal (and often), any future judicial appeals.

Whether the Notice of Objection is the taxpayer's last glimmer of hope in a situation that is too small to be appealed to court, or merely the taxpayer's first step in a longer legal battle obviously

destined for the courts, the drafter of the Notice of Objection faces the same task: to convey the taxpayer's position on all relevant issues in the most favourable light possible; to marshal the most favourable facts, and to develop the most compelling reasons. At the same time, the Notice of Objection must both persuade the decision-maker and provide the necessary framework for any legal processes that follow.

Understanding technical rules for drafting Notices of Objection in the federal and provincial contexts, and the practical implications of drafting decisions that are made along the way, will be of critical importance to any advisor who agrees to take on the responsibility of dealing with a taxpayer's Notice of Assessment.

### I - 3 **BREAKDOWN OF THE PAPER**

In the next major section of the paper, we focus on the technical rules in the federal and provincial contexts for preparing and filing Notices of Objection.<sup>1</sup>

Following this is a compilation of some of the authors' thoughts on critical practical considerations in drafting effective Notices of Objection.

## **PART II – THE LEGAL REQUIREMENTS**

### II - 1 **FEDERALLY**

#### II - 1.1 **Notices of Objection under the ETA**

##### *II - 1.1(a) Basic Rules*

GST assessments under the *Excise Tax Act* (the "ETA") may be challenged pursuant to s. 301 to 306 of the ETA. The requirements for the content of Notices of Objection under the ETA are set out in two main provisions.<sup>2</sup> The first applies to Notices of Objection in general; the second applies specifically to Notices of Objection by "specified persons".

In general terms, ss. 301(1.1) of the ETA provides that a person who disagrees with an assessment may file a Notice of Objection in the prescribed form and setting out the "reasons for the objection and all relevant facts":<sup>3</sup>

301 (1.1) Any person who has been assessed and who objects to the assessment may, within ninety days after the day notice of the assessment is sent to the person, file with the Minister a Notice of Objection in the prescribed form and manner setting out the reasons for the objection and all relevant facts.



(Emphasis added)

More stringent rules apply to Notices of Objection for “specified persons”.<sup>4</sup>

A “specified person” is a listed financial institution described in any of paragraphs 149(1)(a) to (x) during the reporting period, or a person (other than a charity) whose threshold amounts (determined under ss. 249(1)) for the fiscal year that includes the reporting period and the immediately preceding fiscal year, each exceed \$6 million.<sup>5</sup>

By virtue of the first part of the definition, specified persons therefore include conventional providers of financial services (such as banks, credit unions, trust companies and investment dealers), but not persons deemed to be financial institutions only by virtue of paragraph 149(1)(xi). Specified persons also include, by virtue of the second part of the definition, persons (other than charities) who had a threshold amount (generally read as “taxable supplies”) over \$6 million in the assessment year, and prior fiscal year.

*II - 1.1(b) Requirements for Specified Persons*

Where a person is a “specified person” under the rules above, s. 301(1.2) requires that the Notice of Objection reasonably describe each issue to be decided, specify in respect of each issue the relief sought (expressed as the change in any relevant amount), and provide the facts and reasons relied upon in respect of each issue:<sup>6</sup>

301 (1.2) Where a person objects to an assessment in respect of which the person is a specified person, the Notice of Objection shall

- (a) reasonably describe each issue to be decided;
- (b) specify in respect of each issue the relief sought, expressed as the change in any amount that is relevant for the purposes of the assessment; and
- (c) provide the facts and reasons relied on by the person in respect of each issue.

(Emphasis added)

While not extensive, the jurisprudence (discussed below) has begun to shed some light on the meaning of some of these requirements.

*II - 1.1(c) Obligations on CRA*

On receipt of a Notice of Objection, the Canada Revenue Agency (the “CRA”) Appeals Division is required to reconsider the assessment and vacate, confirm the assessment, or make a reassessment, and to notify the taxpayer in writing of the decision.<sup>7</sup>

*II - 1.1(d) Limitations on Further Objections & Appeals*

These requirements for the content of a Notice of Objection give rise to some important limitations on objections and appeals, particularly those made in respect of assessments of specified persons.

In general, no objection may be made with respect to an issue for which the person has waived in writing the right to object to that issue.<sup>8</sup> In addition, specified persons are precluded from raising new issues or revising the relief sought in an objection to a reassessment made by the CRA Appeals Division,<sup>9</sup> although this restriction does not limit a person's right to object to a new issue raised for the first time in a reassessment by the CRA under ss. 301(3).<sup>10</sup>

301 (1.4) Notwithstanding subsection (1.1), where a person has filed a Notice of Objection to an assessment (in this subsection referred to as the "earlier assessment") in respect of which the person is a specified person and the Minister makes a particular assessment under subsection (3) pursuant to the Notice of Objection, except where the earlier assessment was made under subsection 274(8) or in accordance with an order of a court vacating, varying or restoring an assessment or referring an assessment back to the Minister for reconsideration and reassessment, the person may object to the particular assessment in respect of an issue

- (a) only if the person complied with subsection (1.2) in the notice with respect to that issue; and
- (b) only with respect to the relief sought in respect of that issue as specified by the person in the notice.

(1.5) Where a person has filed a Notice of Objection to an assessment (in this subsection referred to as the "earlier assessment") and the Minister makes a particular assessment under subsection (3) pursuant to the Notice of Objection, subsection (1.4) does not limit the right of the person to object to the particular assessment in respect of an issue that was part of the particular assessment and not part of the earlier assessment.

(Emphasis added)

What this means is that specified persons may generally only object to a reassessment in respect of an issue if the Notice of Objection properly set out the required information with regard to that issue, and only with respect to the relief that was originally specified in that Notice of Objection. This limitation does not apply when the objection is in respect of an issue that was raised by the CRA in a reassessment.

The limitations for specified persons are carried over into the provisions governing a specified person's right to appeal onward to the Tax Court of Canada (the "Tax Court").<sup>11</sup> Specifically, s. 306.1 of the ETA limits a specified person to appealing only those issues and relief as properly set out in the Notice of Objection (with the same exception for issues raised for the first time in a reassessment):

306.1 (1) Notwithstanding sections 302 and 306, where a person has filed a Notice of Objection to an assessment in respect of which the person is a specified person (within the meaning assigned by subsection

301(1), the person may appeal to the Tax Court to have the assessment vacated, or a reassessment made, only with respect to

- (a) an issue in respect of which the person has complied with subsection 301(1.2) in the notice, or
- (b) an issue described in subsection 301(1.5) where the person was not required to file a Notice of Objection to the assessment that gave rise to the issue

and, in the case of an issue described in paragraph (a), the person may so appeal only with respect to the relief sought in respect of the issue as specified by the person in the notice.

(Emphasis added)

In contrast, s. 306, which governs appeals for taxpayers other than specified persons, contains no such limitations on the subject matter of appeal, suggesting that other taxpayers are not similarly restricted with respect to the issues and the relief sought:

306. A person who has filed a notice of objection to an assessment under this Subdivision may appeal to the Tax Court to have the assessment vacated or a reassessment made after either

- (a) the Minister has confirmed the assessment or has reassessed, or
- (b) one hundred and eighty days have elapsed after the filing of the notice of objection and the Minister has not notified the person that the Minister has vacated or confirmed the assessment or has reassessed,

but no appeal under this section may be instituted after the expiration of ninety days after the day notice is sent to the person under section 301 that the Minister has confirmed the assessment or has reassessed.

As discussed below, recent jurisprudence bears out this distinction between objections and appeals by specified persons and by other taxpayers.

## *II - 1.1(e) Selected Jurisprudence*

Some recent GST case law has helped define the situations where specified persons may be taken to task for filing less than complete Notices of Objection.

### *II.1.1.e.1 Telus Communications*

In *Telus Communications*<sup>12</sup> the taxpayer, a “specified person,” attempted to raise a defence of due diligence against penalties in its amended notice of appeal to the Tax Court, but which it had not raised in its initial Notice of Objection.

The Federal Court of Appeal (the “FCA”) held that the Minister was not precluded from obtaining an order to strike out the new argument. In the FCA’s view, the Tax Court had no jurisdiction to deal with the issue, since the appeal involved a specified person, and the issue was not properly raised in the Notice of Objection.

The FCA also indicated that while a specified person has the right to object to any or all assessment issues, it is required to file a Notice of Objection that meets the requirements of ss. 301(1.2), namely that each issue be reasonably described, quantified, and supported by a statement of facts and reasons. Complying with these requirements is the only way to properly raise an issue in a Notice of Objection, and only properly raised issues may be appealed by specified persons:

Under section 302 of the Act, a person cannot appeal unless he first serves the Minister with a Notice of Objection within the prescribed time limits. This right of appeal is further restricted for specified persons by subsection 306.1(1) of the Act in that the specified person may appeal to the Tax Court only with regard to an issue properly raised in its Notice of Objection. An issue is properly raised in a Notice of Objection only by complying with subsection 301(1.2) (subject to exceptions in subsection 301(1.5) which as no application in this case).

(Emphasis added)

#### *II.1.1.e.2 British Columbia Transit*

In *British Columbia Transit*,<sup>13</sup> a case perhaps going a bit back the other way, the specified person taxpayer filed a Notice of Objection in respect of denied input tax credits (“ITCs”). On appeal to the Tax Court, the Crown argued that the taxpayer was barred by ss. 301(2.1) and s. 306, from arguing additional reasons that were not raised in the Notice of Objection.

The Tax Court emphasized that although the Crown alleged deficiencies with the taxpayer’s Notice of Objection in respect of providing the supporting facts and reasons, it did not allege deficiencies with the issue or the relief sought.

Moreover, the Tax Court noted that the taxpayer’s additional reasons neither changed the issue nor the relief as set out in the Notice of Objection and that the omission of the additional reasons from the Notice of Objection was not “fatal.”

The Tax Court also noted that the s. 306.1 referred only to the issues and the relief and that it would “prohibitively handcuff the large corporation to read these provisions as limiting the large corporation to only those facts identified at the Notice of Objection stage.”

By way of commentary, while *BC Transit* appears to do some back-tracking on the direction of the *Telus* decision, it may be significant that the Tax Court did not refer to *Telus* in its decision. To be frank, *BC Transit* may be a bit difficult to reconcile with the FCA’s statement in *Telus* that a specified person “may appeal to the Tax Court only with regard to an issue properly raised in its Notice of Objection”, and the FCA’s observation that “[an] issue is properly raised in a Notice of Objection only by complying with ss. 301(1.2)” – which of course emphasizes the need for

need for supporting facts and reasons.

It will be interesting to monitor the development of this case law, and the FCA's treatment of both the ETA and *Income Tax Act* (the "ITA") requirements, which may in fact attempt to do different things. For example, the stated purpose of ss. 306.1(1) of the ETA appears to be explained in the Explanatory Notes accompanying the provision, as follows:

New subsection 306.1(1) precludes "specified persons" (within the meaning of new subsection 301(1)) from appealing an assessment to the Tax Court of Canada if the issue to be decided was not specified in the notice of objection to the assessment in the manner required by new subsection 301(1.2). They are also precluded from revising the relief sought with respect to an issue.

(Emphasis added)

This may contrast with the Technical Notes for 165 (1.11) of the ITA (discussed further below) which seem to suggest a different possible intended meaning for the parallel income tax provision, suggesting that it was not intended for income tax purposes that Notices of Objection for large corporations contain all the possible facts and reasons which could be relied upon by a taxpayer.<sup>14</sup>

... it is not intended that notices contain all the possible facts or reasons which could be relied upon by a taxpayer. Additional facts or reasons may be raised by a taxpayer subsequent to the filing of a notice of objection.

One additional question is whether this statement of intent still contemplates that the taxpayer provide all facts and reasons at some point in the administrative appeal process, just not necessarily in the Notice of Objection document. Future jurisprudence may address this.

### *II.1.1.e.3 Peach Hill Management*

Finally, *Peach Hill Management*<sup>15</sup> provides a further contrasting situation featuring a taxpayer that was not a "specified person." In that case, the Minister argued that the taxpayers were barred from raising the issue of entitlement to GST rebates because they had failed to file proper Notices of Objection in respect of the issue. However, the Tax Court concluded that the taxpayers could appeal the rebate issue under the shelter of their original Notice of Objection because the rebate issue should have been dealt with by the assessor.<sup>16</sup>

Notably, in reaching this conclusion, the Tax Court stated that it was not aware of any case in which the requirement to set out "the reasons for the objection and all relevant facts" in a Notice of Objection – phraseology borrowed from s. 165 of the ITA – had been applied to bar an appellant from raising an issue on appeal from an assessment of income tax because it was not set out in the Notice of Objection as a "reason for the objection." Rather, "the universal practice

has been to permit any and all issues to be raised on appeal, whether set out in the Notice of Objection or not.” The Tax Court reasoned that if it were otherwise, then Parliament would not have stipulated the limitations in the “specified person” provisions of the ETA and the analogous “large corporation” provisions of the ITA.

## II - 1.2 Notices of Objection under the ITA

### II - 1.2(a) Basic Rules

The provisions of the ITA governing Notices of Objection and appeals are analogous to those described above in the ETA, with a few important differences. Again, there are two main provisions: one applies to taxpayers other than “large corporations,” the other applies more stringent requirements to “large corporations.”

Section 165 of the ITA provides that a taxpayer who objects to an assessment may serve on the Minister a Notice of Objection, in writing, setting out “the reasons for the objection and all relevant facts” within the stipulated time limit:

165. (1) A taxpayer who objects to an assessment under this Part may serve on the Minister a Notice of Objection, in writing, setting out the reasons for the objection and all relevant facts,
- (a) where the assessment is in respect of the taxpayer for a taxation year and the taxpayer is an individual (other than a trust) or a testamentary trust, on or before the later of
    - (i) the day that is one year after the taxpayer's filing-due date for the year, and
    - (ii) the day that is 90 days after the day of mailing of the notice of assessment; and
  - (b) in any other case, on or before the day that is 90 days after the day of mailing of the notice of assessment.

Subsection 165(1.1) sets out a number of restrictions to the subject matter of a Notice of Objection that effectively limit the reasons in the objection to those reasonably related to matters giving rise to the assessment or determination that were not conclusively determined by a Court:

- 165 (1.1) Notwithstanding subsection (1), where at any time the Minister assesses tax, interest, penalties or other amounts payable under this Part by, or makes a determination in respect of, a taxpayer
- (a) under subsection 67.5(2) or 152(1.8), subparagraph 152(4)(b)(i) or subsection 152(4.3) or (6), 161.1(7), 164(4.1), 220(3.4) or 245(8) or in accordance with an order of a court vacating, varying or restoring an assessment or referring the assessment back to the Minister for reconsideration and reassessment,
  - (b) under subsection (3) where the underlying objection relates to an assessment or a determination made under any of the provisions or circumstances referred to in paragraph (a), or
  - (c) under a provision of an Act of Parliament requiring an assessment to be made that, but for that provision, would not be made because of subsections 152(4) to (5),

the taxpayer may object to the assessment or determination within 90 days after the day of mailing of the notice of assessment or determination, but only to the extent that the reasons for the objection can reasonably be regarded

(d) where the assessment or determination was made under subsection 152(1.8), as relating to any matter or conclusion specified in paragraph 152(1.8)(a), (b) or (c), and

(e) in any other case, as relating to any matter that gave rise to the assessment or determination and that was not conclusively determined by the court, and this subsection shall not be read or construed as limiting the right of the taxpayer to object to an assessment or a determination issued or made before that time.

(Emphasis added)

These limitations are intended to prevent taxpayers from taking advantage of an assessment under the special circumstances described in the subsection to object to an unrelated matter which could not have been otherwise objected to because the time for objecting to a prior assessment or determination had expired.<sup>17</sup>

The restrictions in ss. 165(1.1) also require that the matters to which the reasons for the objection are required to reasonably relate not have been conclusively determined by a court, which appears codify the legal principle of *res judicata*.<sup>18</sup>

*II - 1.2(b) Requirements for Large Corporations*

Subsection 165(1.11) sets out special rules for objections by “large corporations”<sup>19</sup> (determined by reference to ss. 225.1(8)),<sup>20</sup> which parallel the requirements under the ETA for “specified persons” to specify certain additional information in their objections:<sup>21</sup>

165 (1.11) Where a corporation that was a large corporation in a taxation year (within the meaning assigned by subsection 225.1(8)) objects to an assessment under this Part for the year, the Notice of Objection shall

- (a) reasonably describe each issue to be decided;
- (b) specify in respect of each issue, the relief sought, expressed as the amount of a change in a balance (within the meaning assigned by subsection 152(4.4)) or a balance of undeducted outlays, expenses or other amounts of the corporation; and
- (c) provide facts and reasons relied on by the corporation in respect of each issue.

The relief sought for the purposes of paragraph 165 (1.11) (b) may be expressed as a change in the “balance” of the taxpayer as defined in ss. 152(4.4),<sup>22</sup> or the tax or any amount payable by the taxpayer for the year. The relief sought may also be expressed as change in the balance of undeducted outlays, expenses or other amounts of the taxpayer. However, this requirement is not intended to require a taxpayer to calculate all of the potential effects that interdependent or related issues may have on each other, but only that the relief sought in respect of a particular issue be quantified in isolation of any other issues raised in a Notice of Objection.<sup>23</sup>

Paragraph 165 (1.11) (c) requires a Notice of Objection to include a statement of facts and reasons in support of each issue. As alluded to above, the Technical Note to this provision appears to indicate no intention to preclude appeal by a large taxpayer where the objection did not include all possible facts or reasons which could be relied upon by a taxpayer.

*II - 1.2(c) Obligations on CRA*

On receipt of a Notice of Objection from any taxpayer, the Minister is required to, with all due dispatch, reconsider the assessment and vacate, confirm or vary the assessment or reassess, and notify the taxpayer of the same.<sup>24</sup>

*II - 1.2(d) Limitations on Further Objections & Appeals*

If the Minister confirms or reassesses the initial assessment, then pursuant to ss. 165(1.13), a large corporation may only object to an assessment in respect of an issue if, with respect to that issue, it complied with the information requirements in ss. 165(1.11) in the Notice of Objection, and only with respect to the relief sought in respect of that issue as specified in the Notice of Objection.

Again, as with the ETA, this limitation does not apply where the taxpayer objects in respect of an issue that is part of the new assessment and not part of the earlier assessment:<sup>25</sup>

165 (1.13) Notwithstanding subsections (1) and (1.1), where under subsection (3) a particular assessment was made for a taxation year pursuant to a Notice of Objection served by a corporation that was a large corporation in the year (within the meaning assigned by subsection 225.1(8)), except where the objection was made to an earlier assessment made under any of the provisions or circumstances referred to in paragraph (1.1)(a), the corporation may object to the particular assessment in respect of an issue

- (a) only if the corporation complied with subsection (1.11) in the notice with respect to that issue; and
- (b) only with respect to the relief sought in respect of that issue as specified by the corporation in the notice.

(1.14) Where a particular assessment is made under subsection (3) pursuant to an objection made by a taxpayer to an earlier assessment, subsection (1.13) does not limit the right of the taxpayer to object to the particular assessment in respect of an issue that was part of the particular assessment and not part of the earlier assessment.

Pursuant to ss. 169(2), a taxpayer (other than a large corporation) may appeal to the Tax Court within the specified time, but only to the extent that the reasons for the appeal can reasonably be regarded (1) where the assessment or determination was made under ss. 152(1.8), as relating to any matter specified in paragraph 152(1.8)(a), (b) or (c), and (2) in any other case, as relating to any matter that gave rise to the assessment or determination, and that was not conclusively determined by the Court.



Pursuant to ss. 169(2.1), a large corporation's right to appeal to the Tax Court is limited to the issues and the relief as set out in the Notice of Objection, unless it is a new issue raised for the first time in a reassessment by the CRA:

169 (2.1) Notwithstanding subsections (1) and (2), where a corporation that was a large corporation in a taxation year (within the meaning assigned by subsection 225.1(8)) served a Notice of Objection to an assessment under this Part for the year, the corporation may appeal to the Tax Court of Canada to have the assessment vacated or varied only with respect to

- (a) an issue in respect of which the corporation has complied with subsection 165(1.11) in the notice, or
- (b) an issue described in subsection 165(1.14) where the corporation did not, because of subsection 165(7), serve a Notice of Objection to the assessment that gave rise to the issue

and, in the case of an issue described in paragraph (a), the corporation may so appeal only with respect to the relief sought in respect of the issue as specified by the corporation in the notice.

#### *II - 1.2(e) Selected Jurisprudence*

Some selected jurisprudence is reviewed below to provide an additional understanding of these ITA provisions.

##### *II.1.2.e.1 Sherway Centre*

In *Sherway Centre Ltd.*,<sup>26</sup> the FCA considered the scope of ss. 165(1.1) and, in particular, when reasons may be considered as reasonably relating to a matter that gave rise to the assessment or determination. The FCA noted that the words used in ss. 165(1.1) suggest that Parliament was mindful of the complexities of the ITA and the variety of ways in which issues can interrelate.

Accordingly, Parliament “did not prescribe any specific type or manner of relationship (note 20: casual or otherwise) but left it to the Court to ascertain on the facts of each case whether the reasons for objection when considered in the light of the matter that gave rise to the assessment, where sufficiently related to justify a right to pursue the matter further” (citing *Chevron*, discussed below).

However, the FCA ultimately concluded that the right to object under ss. 165(1.1) could not be used to expand the taxpayer's ability to object to a reassessment beyond the limited scope specified under ss. 152(4.3).<sup>27</sup>

##### *II.1.2.e.2 Potash Corp. of Saskatchewan*

In *Potash Corp. of Saskatchewan Inc.*,<sup>28</sup> the Minister appealed the Tax Court's decision to permit the taxpayer, a large corporation, to amend its pleadings in respect of its appeal to include additional categories of resource income on the basis that it had sufficiently complied with ss.

165(1.11) by specifying in the Notice of Objection the issue to be decided by using the simple heading “Resource Allowances” and stating the amount in dispute as accurately as could be done at the time.

The result of the amendment was that the total amount at issue was somewhat greater than disclosed in the Notice of Objection.<sup>29</sup>

The FCA stated that while the requirement to “reasonably describe each issue to be decided” did not require a large corporation to describe each issue “exactly” in the Notice of Objection, it is required to describe it “reasonably” and what is reasonable will differ in each case depending on what degree of specificity is required to allow the Minister to know each issue to be decided.

The FCA concluded that it was unreasonable to simply say that the computation of “Resource Allowance” or “resource profits” was in issue, without further specifying the particular elements of their computation that required a determination by the Minister or by the Tax Court, as the case may be. The FCA allowed the Minister’s appeal while acknowledging the harsh result that a large corporation that discovers an error in an income tax return after it has filed a Notice of Objection or notice of appeal may find itself barred from taking proceedings to compel the Minister to correct the error. However, the FCA concluded that this was the result intended by Parliament in enacting the large corporation rules.<sup>30</sup>

#### *II.1.2.e.3 Newmount Canada*

In *Newmount Canada Ltd.*,<sup>31</sup> the taxpayer, also a large corporation, appealed from several assessments, raising a particular issue regarding a loan that was not described in any of its Notices of Objection. The Minister sought to have the Tax Court strike out the sections of the taxpayer’s notice of appeal that raised the issue of the particular loan on the basis that it was not described in the Notices of Objection as required by ss. 165(1.11) of the ITA.

The Tax Court described the application of sections 165 and 169 to large corporations as follows:

...simply applied, their terms ensure that whether at the objection or appeal stage, in challenging the Minister's assessment of its tax liability, a large corporation will be restricted to those issues described in accordance with subsection 165(1.11). The right to object to an assessment is rooted in subsection 165(1) which provides that a taxpayer "may", within the time permitted, serve on the Minister "...a Notice of Objection in writing, setting out the reasons for the objection and all relevant facts". Where that taxpayer is a large corporation, however, more stringent requirements apply: pursuant to subsection 165(1.11), where a large corporation objects to an assessment, it "... shall"

- (a) reasonably describe each issue to be decided;
- (b) specify in respect of each issue, the relief sought, expressed [in a certain manner]; and

- (c) provide facts and reasons relied on by the corporation in respect of each issue.

(Emphasis added)

The Tax Court also noted that although ss. 165(1.12) allows for deemed compliance where the large corporation submits certain missing information (required under paragraphs 165(1.11)(b) and (c)) within 60 days of receiving the Minister’s written notice of such deficiencies, no such allowance applies in respect of the issues themselves.<sup>32</sup>

The Tax Court concluded that the taxpayer was precluded from raising issues raised in its notice of appeal, but which were not raised in its Notices of Objection, and ordered that the relevant paragraphs be struck from the Notice of Appeal. Notably, the Tax Court characterized the large corporation requirements as specifying “prerequisites which must be satisfied before certain issues may be included in an appeal by a large corporation” and concluded it had no jurisdiction to entertain appeals in respect of issues where those statutory conditions have not been fulfilled.<sup>33</sup>

## II - 2 PROVINCIALY

Each of the retail sales tax provinces, plus Quebec, has its own statutory regime that permits taxpayers to challenge assessment of provincial taxes.

Generally, the applicable legislation in each province requires a taxpayer to set out minimum information regarding the issues, facts or reasons supporting the objection, which at the initial stage is typically referred to as an “appeal”. However, there are important differences between the provinces in terms of consequences of these requirements.

### II - 2.1 British Columbia

In B.C. a taxpayer’s objection to an assessment of tax by the Commissioner of Taxes under the *Social Services Tax Act* (the “SSTA”) is made by way of an “appeal” to the Minister of Provincial Revenue.<sup>34</sup> Section 118 of the SSTA governs the requirements for “notices of appeal” and provides that a person who wishes to dispute a tax assessment under one of the listed provisions may do so by serving a notice of appeal within the specified time limit:

118. (1) If a person

- (a) disputes a decision of the commissioner under section 5(2), 7(2), 43, 54(3), 58, 63, 80 to 90, 92(4), 102.2(2) or 103(11) or a valuation of the commissioner under section 4.1,

(a.1) disputes a cancellation or suspension of a registration certificate or a refusal to grant a registration certificate under section 92(6),

- (b) disputes an assessment made under section 115(1), (2), or (4.1) or 115.1(1),

- (c) disputes a penalty or interest imposed under section 115(5) or 117,
  - (d) disputes liability for the amount stated in a notice given under section 116(3), or
  - (e) disputes a disallowance of a refund applied for under section 112.5,
- the person or the person's agent may appeal to the minister in accordance with this section.
- (2) An appeal under this section must be made by serving a notice of appeal on the minister within 90 days after the date of the notice of the assessment, liability, penalty or decision.

Pursuant to ss. 118(3), the notice of appeal must set out the specified information, including the reasons for the appeal and all facts relative to it:

- 118(3) The notice of appeal must
- (a) be in writing,
  - (b) be addressed to the minister at Victoria, and
  - (c) set out clearly the reasons for the appeal and all facts relative to it. ...

Pursuant to ss. 118(4), on receiving a notice of appeal, the Minister is required to consider the matter, affirm, amend or change, as applicable, the assessment, decision, estimate, interest charge, penalty or the nature of the assessment, and to notify the appellant of the same.

Where a person is unsatisfied with the results of the appeal to the Minister, s. 119 authorizes a further appeal to the BC Supreme Court by way of originating application. Notably, on appeal the court is not limited to the evidence and issues that were before the Minister:

- 119 (4.1) An appeal under this section is a new hearing that is not limited to the evidence and issues that were before the minister.

Thus, in contrast to the “specified person / large corporation” situation reviewed in the federal context above, and the positions in other provinces (most notably Ontario, below), the requirement under the SSTA to set out the issues, reasons and facts at the administrative appeal stage will not preclude further judicial appeal of the assessment.

## II - 2.2

### Saskatchewan

In Saskatchewan a taxpayer’s Objection to an “estimate” of tax by the minister under the *Provincial Sales Tax Act* (the “PSTA”) is made by way of an appeal to the Board of Revenue Commissioners (the “Board”).<sup>35</sup>

Section 61 of the *Revenue and Financial Services Act* (the “RFSA”) governs the requirements for “notices of appeal” and provides that a person who wishes to dispute a tax estimate may do so by serving a notice of appeal to the Board within the specified time limit:<sup>36</sup>

61. (1) In this section and in sections 62 and 62.1, "appellant" means a collector or taxpayer who serves a notice of appeal to the Board of Revenue Commissioners in accordance with subsections (2) and (3).

(2) Where a collector or taxpayer, to whom a notice is served pursuant to section 60, disputes liability for the amount stated in the notice, he may, within one month after the date of service of the notice, serve a written notice of appeal on the Board of Revenue Commissioners.

(3) Service of a notice of appeal is required to be effected by:

- (a) personal service of the notice of appeal on the Secretary to the Board of Revenue Commissioners;  
or
- (b) mailing the notice of appeal, by registered post, to the Secretary, Board of Revenue Commissioners, Regina, Saskatchewan.

The notice of appeal must set out the "reasons for the appeal and all facts" relevant to the appeal:

61 (4) An appellant shall clearly set out in a notice of appeal served pursuant to this section the reasons for the appeal and all facts that he considers relevant to the appeal.

(emphasis added)

Pursuant to ss. 61(5), on receiving a notice of appeal, the Board is required to consider the matter (and may hold any hearing or make any investigation necessary to make a decision), affirm or amend the estimate, and to notify the appellant and the minister of the same.

Where a person is unsatisfied with the results of the appeal to the Board, s. 62 authorizes a further appeal to the Court of Queen's Bench for Saskatchewan in accordance with sections 21 and 23.

Section 21 provides that the court hearing an appeal shall hear and consider the cause based on the material which was before the board and on "any further material or evidence" that the court may permit:<sup>37</sup>

21. (1) Subject to subsection (2), a person aggrieved by a decision of the board made pursuant to section 20 may appeal to the court.

(2) Where another Act provides for an appeal from a decision of the board, the provisions of the other Act apply. ...

(11) On appeal, the facts are deemed to have been conclusively established by the findings of the board, except where a question is raised on the appeal that the finding of any particular fact or facts has been made by the board on evidence which does not warrant that finding.

(12) At the hearing of the appeal, the court shall hear and consider the cause based on the material which was before the board at the hearing conducted before it and on any further material or evidence that the court may, on any terms that it considers appropriate, permit. ...

(Emphasis added)

## Manitoba

Under recent legislative amendments in Manitoba, a taxpayer's Objection to an assessment or reassessment of sales tax by the director is now made by way of an appeal to the Tax Appeals Commission (the "Commission") under the *Tax Administration and Miscellaneous Taxes Act* (the "TAMTA").<sup>38</sup>

Section 56 of the TAMTA governs the requirements for such appeals and requires that an appeal to the Commission state which amounts and how much of these amounts are in dispute, the reasons for the appeal and provide substantiating documentary evidence.<sup>39</sup>

56.(1) An appeal to the Tax Appeals Commission must

- (a) be in writing and signed by the taxpayer;
- (b) state the name of the taxpayer and the reference number of the assessment or reassessment being appealed;
- (c) state which amounts are in dispute and, in each case, how much of the amount is in dispute;
- (d) state the reasons for the appeal and provide documentary evidence substantiating the taxpayer's position; and
- (e) be served on the Tax Appeals Commission and the director within 90 days after the notice of assessment or reassessment was served on the appellant.

Upon receipt of an appeal, the Commission is required to determine whether the appeal meets the requirements of the sections 55 and 56 of the TAMTA. If an appeal does not, the Commission must reject the appeal. However, if the appeal meets the requirements, the Commission may affirm, rescind or vary the assessment or reassessment and serve a copy of its decision on the director and taxpayer:

57.(1) Upon receipt of an appeal, the Tax Appeals Commission must determine whether it meets the requirements of sections 55 and 56. If it does not, the commission must reject the appeal. If it does, the commission may

- (a) exercise any of its powers of investigation and inquiry under The Tax Appeals Commission Act; and
- (b) affirm, rescind or vary the assessment or reassessment being appealed.

The commission must cause a copy of its decision to be served on the director and on the taxpayer or a person acting on the taxpayer's behalf.

(Emphasis added)

The Commission's ability to reject a deficient appeal under s. 57 suggests that, as a practical matter, it is important for a notice of appeal to meet the requirements specified in s. 56 to avoid being rejected and possibly miss the 90 day time frame for service.

Under sections 58 and 59 of the TAMTA, a taxpayer may appeal a decision of the Commission to the Court of Queen’s Bench by filing an application with the court within 90 days after the decision or order of the Commission being appealed is served on the appellant.<sup>40</sup>

58. The following matters may be appealed to the Court of Queen's Bench:

- (a) a decision or order of the director under section 10 to deny, suspend or cancel a tax authorization;
- (b) a decision of the Tax Appeals Commission under section 57.

59.(1) An appeal to the court must be made by filing an application with the court for an order under this section within 90 days after the decision or order being appealed is served on the appellant. ...

(5) The court may

- (a) affirm, rescind or vary the order or decision being appealed; and
- (b) make any order as to costs that the court considers appropriate.

II - 2.4

**Ontario**

Section 24 of the Ontario *Retail Sales Tax Act* (“RSTA”) governs the requirements for notices of Objection,<sup>41</sup> and remains the only provincial regime (other than Quebec) to maintain the sort of standard for issue disclosure that the GST and income tax legislation incorporates for specified persons and large corporations, respectively.

Specifically, section 24 provides that a person who objects to an assessment<sup>42</sup> made against the person or to a statement of disallowance<sup>43</sup> may, within the specified time limit of 180 days from the day of mailing of the statement or notice of assessment, serve a Notice of Objection. However, ss. 24(1.1) requires that a Notice of Objection “clearly describe each issue raised in the objection” and “fully set out facts and reasons” relied on by the person in respect of each issue.<sup>44</sup>

24 (1.1) The Notice of Objection shall,

- (a) clearly describe each issue raised by way of objection; and
- (b) fully set out the facts and reasons relied on by the person in respect of each issue.

Fortunately, the Ontario RSTA also provides for deemed compliance with the requirement to fully set out the facts and reasons where the taxpayer complies with a request from the Minister for the required information within 60 days.<sup>45</sup> (Note that if neither the taxpayer nor the Minister identify at an early stage what proves to be the key issue in the matter, this otherwise relieving provision would have little effect.)

Pursuant to ss. 24(4), upon receipt of the Notice of Objection, the Minister is required to reconsider the assessment or statement objected to and vacate, confirm or vary the assessment or statement, or reassess or serve a fresh statement, and to provide notice of the same.

It is important to note that the RSTA effectively prevents a taxpayer from raising issues in an objection to a reassessment and in an appeal unless they were properly raised in the initial Notice of Objection, other than new issues raised in a reassessment – generally paralleling the GST and income tax approaches referred to above. Specifically, paragraph 24(1.3) restricts the ability of a taxpayer to raise by way of objection to a reassessment or to a variation of the same under ss. (4) any issue that it is not entitled to raise under the appeals provision, s. 25:

24 (1.3) A person shall not raise, by way of objection under this section to a fresh statement or reassessment or to a variation of an assessment or statement under subsection (4), any issue that the person is not entitled to raise by way of appeal under section 25 in respect of the fresh statement or reassessment or of a variation of the assessment or statement.

With respect to court appeals, section 25 provides that a person may only raise by way of appeal those issues previously raised by the person in the Notice of Objection to the assessment being appealed and in respect of which the person has complied or was deemed to comply with the requirements in ss. 24 (1.1), with an exception for those issues that form the basis of a fresh statement or reassessment by the Minister but were not part of the initial assessment or statement:

25(1) When the Minister has given the notification required by subsection 24(4), the person who has served a Notice of Objection under that section may appeal to the Superior Court of Justice to have the assessment or statement so objected to vacated or varied, but no appeal under this section shall be instituted after the expiration of ninety days from the day notice has been mailed to such person under subsection 24(4).

...

(2.1) A person is entitled to raise by way of appeal only those issues raised by the person in a Notice of Objection to the assessment being appealed and in respect of which the person has complied or was deemed to have complied with subsection 24(1.1).

(2.2) Despite subsection (2.1), a person may raise by way of appeal an issue forming the basis of a fresh statement or reassessment or of a variation of an assessment or statement under subsection 24(4) if the issue was not part of the assessment or statement with respect to which the person served the Notice of Objection.

(Emphasis added)

This restriction on raising *issues* would not appear to be overridden by ss. 27(2), which permits the pleading of *facts* or statutory provisions even if not set out in the notice of appeal:

25 (2) 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.

This would appear to make it imperative for the purposes of the RSTA Notice of Objection and appeal provisions to have a clear understanding of the distinction between “issues” and “facts.”



## Prince Edward Island

The PEI *Revenue Administration Act* (the “RAA”) governs the requirements for Notices of Objection. Section 9 provides that a person who objects to an assessment made against the person by the Provincial Tax Commissioner (the “Commissioner”) may, within the specified time limit of 60 days from the date of service or mailing of the notice of assessment, serve a Notice of Objection setting out “all the reasons for the objection and all the relevant facts”:<sup>46</sup>

9.(1) Where a person considers that he is not liable to taxation under a revenue Act or disputes liability for the amount assessed against him, he may, within sixty days of the date of service or mailing of the notice of assessment serve on the Commissioner a Notice of Objection setting out the reasons for the objection and all the relevant facts.

Pursuant to ss. 9(3), upon receipt of a Notice of Objection, the Commissioner is required to reconsider the assessment or estimate and vacate, confirm or vary it, and to provide notification of the same.

If a taxpayer is dissatisfied with the decision of the Commissioner regarding the Notice of Objection, the taxpayer may appeal to the Island Regulatory and Appeals Commission (the “IRAC”) by serving, within the specified time limit, a notice of appeal stating “the grounds of appeal” and stating briefly “the facts relevant thereto”:

10.(1) If the taxpayer or collector is dissatisfied with the decision of the Commissioner under subsection 9(3), he may, within thirty days from the date of mailing of the decision, appeal to the Island Regulatory and Appeals Commission.

(2) Any appeal shall be commenced by serving upon the Commission a notice of appeal in writing setting out the grounds of the appeal and stating briefly the facts relevant thereto.

Like Ontario, however, recent amendments now provide that the grounds of appeal to the IRAC are effectively limited to the reasons raised by the taxpayer at the Notice of Objection stage:

10 (2.1) The grounds of an appeal set out in a notice of appeal shall be limited to the reasons raised by the taxpayer in a Notice of Objection filed under subsection 9(1).

...

(4) On the hearing of the appeal both the appellant and the Commissioner are entitled to appear and be heard and to submit further evidence.

...

(5.1) No grounds of appeal shall be considered by the Commission other than the grounds of appeal set out in the notice of appeal.

Note that cases decided prior to the addition of subsections 10(2.1) and (5.1) suggested that an appeal to the IRAC was a hearing *de novo*, such that the IRAC was not restricted to the issues

raised before the Commissioner and could adjudicate upon new issues provided they are raised by the appellant in the notice of appeal.<sup>47</sup>

This is likely no longer the case given the addition of the restrictions provided for just above.

If a taxpayer is dissatisfied with the decision of the IRAC, the taxpayer may appeal to the Appeal Division of the PEI Supreme Court pursuant to s. 13 of the *Island Regulatory and Appeals Commission Act*, which provides for a statutory right of appeal from a decision of the IRAC upon a question of law or jurisdiction:<sup>48</sup>

13. (1) An appeal lies from a decision or order of the Commission to the Appeal Division of the Supreme Court upon a question of law or jurisdiction.

(2) The appeal shall be made by filing a notice of appeal in the

Supreme Court within twenty days after the decision or order appealed from and the Civil Procedure Rules respecting appeals apply with the necessary changes.

....

It is not entirely clear whether this right of appeal would permit a taxpayer to raise additional grounds before a court on appeal, but given the limited right of appeal provided for, it is likely that the Supreme Court would view itself as having jurisdiction to consider an appeal of a matter only properly before the IRAC in the first place.

## II - 2.6 **Quebec**

Section 93.1.1 of the *Quebec Act Respecting the Ministère du Revenu* (the “ARMR”) governs the requirements for Notices of Objection in Quebec,<sup>49</sup> and the rules roughly parallel those for GST.

Accordingly, section 93.1.1 provides that a person may object to an assessment made under a fiscal law by notifying to the Minister, within the specified time frame,<sup>50</sup> a Notice of Objection setting out “the reasons for the objection and all relevant facts”:<sup>51</sup>

93.1.1 A person may object to an assessment under a fiscal law by notifying to the Minister, on or before the day that is 90 days after the day of sending of the notice of assessment, a Notice of Objection setting out the reasons for the objection and all relevant facts....

This section does not apply with respect of a reassessment under section 93.1.6 or an assessment issued in consequence of certain waivers filed under the ARMR.<sup>52</sup>

As with the federal legislation, above, there are more stringent requirements that apply to Notices of Objection to assessments in respect of certain taxpayers.

A Notice of Objection to an assessment under the *Act respecting the Quebec Sales Tax* (the “QSTA”) in respect of a specified financial institution or a person (other than a charity) whose threshold amount exceeds \$6 million for both the fiscal year that includes the period in dispute and the person’s preceding fiscal year must specify “the issue in dispute,” “the amount in dispute for each issue,” “the grounds for objection,” and “all the relevant facts”:<sup>53</sup>

93.1.2 A person who objects to an assessment described in the second paragraph shall specify in the Notice of Objection the issue in dispute, the amount in dispute for each issue and the grounds for objection and shall provide all the relevant facts.

An assessment to which the first paragraph refers is

- (a) an assessment under the Taxation Act (chapter I-3) in respect of a person who is a large corporation;
- (b) an assessment relating to amounts payable pursuant to the Act respecting the Québec sales tax (chapter T-0.1) in respect of
  - i. a specified financial institution within the meaning of section 1 of that Act; and
  - ii. a person, other than a charity during the period in dispute, whose threshold amount determined in accordance with section 462 of that Act exceeds \$6,000,000 for both the fiscal year that includes the period in dispute and the person's preceding fiscal year.

However, where the Notice of Objection does not include the information required, the Minister may accept the objection if the person provides the Minister with the information in writing within 60 days of the Minister's request.

The Minister may request that any missing information required under s. 93.1.2 and it “may” accept the objection if it receives this information within 60 days of the request.<sup>54</sup>

Pursuant to ss. 93.1.7, on receipt of a Notice of Objection, the Minister is required to reconsider the assessment and vacate, confirm or vary the assessment or made a reassessment, and send notice to the person by mail.

Section 93.1.10 provides for the appeal to the Court of Quebec of an assessment, where the person has notified a Notice of Objection under s. 93.1.1. However, a person who has objected to an assessment referred to in s. 93.1.2 (that is, a QSTA assessment in respect of a specified financial institution, and a person (other than a charity) whose threshold amount exceeds \$6 million for both the fiscal year that includes the period in dispute and the person’s preceding fiscal year), is limited to appealing only in respect of the issues specified in the Notice of Objection:

93.1.10 Where a person has notified a Notice of Objection under section 93.1.1, the person may appeal to the Court of Québec sitting for the district in which the person resides or for the district of Québec or of Montréal, according to the district in which the assessment would be appealable under article 30 of the Code

of Civil Procedure (chapter C-25) if it were an appeal to the Court of Appeal, to have the assessment vacated or varied after either

(a) the Minister has confirmed the assessment or reassessed; or

(b) 90 days have elapsed in the case of an objection referred to in section 12.0.3, or 180 days have elapsed in the other cases, following notification of the Notice of Objection and no decision has been sent by the Minister by mail.

A person who has objected to an assessment referred to in the second paragraph of section 93.1.2 may appeal only in respect of the issues specified in the Notice of Objection.

(Emphasis added)

## **PART III – PRACTICAL POINTERS FOR DRAFTING EFFECTIVE OBJECTIONS**

With the technical requirements described above in mind, what does the drafter of a Notice of Objection need to do to make his or her Notice of Objection truly effective?

While there are a multitude of possible perspectives, the compilation of thoughts set out below is one possible approach.

The discussion begins with the assumption that you have by now met with your client, understood the basic facts of the situation, properly identified the relevant legal issues, and researched the relevant legal principles.

You are ready to commit the taxpayer's position to writing: Where do you start?

III - 1

### **THE FIRST QUESTION: WHERE IS THE MATTER *REALLY* GOING?**

Much like how a lawyer addressing a group of professionals needs to know his or her audience, the first thing a drafter of a Notice of Objection needs to know is just where the tax dispute is expected to end up.

For example, is the tax dispute so small that there is no choice but to let it be decided by one last appeal to tax appeals? Or is the tax dispute so large or so important to the taxpayer that only the Supreme Court of Canada's final word will persuade the taxpayer to end its challenge?

It is important to attempt to gauge where the tax dispute is going because, as the adage goes, "different horses for different courses". That is, the type of Notice of Objection that one ultimately needs will differ (often quite greatly) with the expected method of resolution for the tax dispute.

Some specific situations and their implications for the drafting of Notice of Objection are reviewed below.

III - 1.1(a) *The Small File*

Whether a professional advisor likes to admit it or not, much will depend on the dollars at issue.

These days, even \$10,000 issues do not often end up in the Tax Court of Canada, at least not for full blown trials involving commodity tax professionals.

Thus, it will be important to recognize that in these instances, three separate realities will exist. First, these matters will not likely be proceeding beyond the first level of administrative appeal. Second, and following from the first observation, the Notice of Objection will be the taxpayer's last "kick at the can." And finally, following from one and two, there may be little room on the file, even if presenting significant legal issues, to bill the client for the analysis that one might prepare if the matter were before the Supreme Court of Canada or for that matter, to be working about the niceties of "effective" Notices of Objection discussed throughout this paper.

**Figure 1 - Small File Decision Making**

*Paris.* Kreklewetz Co. is a small Cabinet making company and is assessed for 2005 for RST on the basis of the amount of cabinets sold. The assessment is in the amount of an \$2,500 penalty under ss. 20(3) of the Ontario Act, plus interest. Kreklewetz claims that he was due diligent throughout.

The Supreme Court of Canada or for that matter, to be working cabinets on which RST was clearly collected and remitted by Kreklewetz. The greater issue is whether Kreklewetz can avoid the \$8,000 penalty on the basis of a due diligence defence, which has never before been accepted in Ontario.

*Tip.* The best that can be done in this Notice of Objection, and for Kreklewetz, is to clearly address the items that will be dealt with by Ontario tax appeals (statute barred amount; amount collected and remitted). While an argument might be made, in a paragraph or two, regarding the application of a "due diligence defence" for ss. 20(3) penalties, unless Kreklewetz wants to fund a court appeal out of his own pocket, and "on principal", there is no realistic chance of winning this at the objection stage, nor much economic sense in pursuing the matter into the Ontario courts.

Advise Kreklewetz of your views, and get his instructions to proceed on that basis.

In practice, then, the advisor faced with the smaller file will often be forced to provide a Notice of Objection that is economical in terms of both time and legal analysis, and which may sacrifice comprehensiveness in favour of focusing on a few main points that maximize the client's chances of success. (See Figure 1)

**III - 1.1(b) The "Let's Just have a Proper Audit" Appeal**

Closely related to the "small file" (and perhaps often a sub-set of that type of file) is the file where it appears that everything went wrong in the audit relationship, leading to an assessment that looks more like a shot-gun blast than a finely tuned assessment of taxpayer errors.

Here the advisor is often left attempting to piece together the audit findings, in an attempt to drill down to the actual tax that was assessable, and eliminating that which quite properly ought not to have been assessed (e.g., the statute-barred monies, and monies already remitted, etc. – see again Figure 1).

In these cases, Objections will also usually be straight-forward and to the point. There is no art in making the objection "effective", because "effective" in this case simply means pointing out to tax appeals the obvious error in the assessment and allowing tax appeals to reverse the obvious error(s). Often on this kind of file a very adequate objection will simply proceed to outline, in numeric order, the errors found in the assessment approach, the quantum affected, and a brief description of the error.

Tax appeals in all jurisdictions will then generally work to review and revise the assessment to get the right numbers assessed.<sup>55</sup>

III - 1.1(c) *Larger Files*

The general focus of this paper is directed to the “larger” file, where the professional advisor will have the time and resources available to fully address all aspects of the client’s particular problem.<sup>56</sup>

**Figure 2: The Large File Dilemma**

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*Facts.* An operator of a great lakes ship, traversing between the U.S. and Canada, is assessed Ontario RST for certain purchases of tangible personal property while in Ontario waters. Its accountants file a Notice of Objection, taking the position that the TPP is exempt from Ontario RST under s. 7(1)(30) of the Ontario Act (“Vessels of more than 1,400 cubic metres, repairs to such vessels, and machinery or equipment purchased to refit such vessels.”). The objection is denied, and a court appeal ensues.

Through the court process, the research undertaken by the tax litigation firm appointed to prosecute the appeal in the Ontario Courts uncovers prior case law suggesting the possibility that taxation of the TPP in this instance is unconstitutional, and beyond Ontario’s powers (i.e., making the exemption provision really a “Plan B” argument, since under the latter theory, no tax was exigible in the first place).

*Dilemma.* Neither the issue, the relevant facts nor the reasons were raised in the first instance, and the tax litigation firm is precluded from raising the issue on the appeal. The law firm has a positive obligation to disclose this in a full and frank manner to its client.

Larger files will generally have three things in common, and which set them apart, for these purposes, from either of the situations referred to above. First, there will usually be either difficult factual or difficult legal issues inherent in file, or both. Second, the file will involve assessment amounts which will make the further pursuit of the issue beyond the administrative appeal stage economically rational for the client. Finally, the client will often be a “specified person” or “large corporation”, invoking the

special federal rules that require identifying all relevant issues and providing the underlying supporting facts and reasons in the Notice of Objection itself.

Because of these attributes, it is this group of files that will be most challenging for the professional advisor seized with drafting the requisite Notice of Objection. Here, not only must the objection have an element of persuasiveness, but the drafter must also have an eye towards the likelihood that if tax appeals disagrees, the file will be handed off to another set of eyes (either in-house or external) to prosecute a judicial appeal on behalf of the client.

If the new set of eyes uncovers new possible issues, further uncomfortable and potentially embarrassing issues can arise with your clients. (See Figure 2).

III - 1.1(d) *Files Doomed from the Outset: Stuck in the Mud at Tax Appeals*

A final set of files worth noting are mid or large sized files with which most readers will have had some prior experience: these are the files where the objections seemed doomed to failure from the outset, and the only likely resolution of the matter will be in the Courts. While this could occur in many different situation, one obvious situation involves files where assessment

decisions appear to have been made in accordance to pre-existing tax policy, but which the taxpayer feels is still incorrect as a matter of law.

Here, while the tax appeals officer will no doubt give the file his or her utmost attention and bring to the file an objective viewpoint, there may equally be systemic and institutional

limitations on what tax appeals will ultimately be able to do. (See Figure 3).

**Figure 3: *Stuck in the Mud at Tax Appeals***

*Facts.* In March 2001, GST Policy and Interpretation issues a wide-ranging policy taking the position that diagnostic test kits purchased by Canadian laboratory testing businesses are GST taxable, and no longer zero-rated.

Labco files a GST refund claim in 2002, only to have it rejected.

It is fairly well understood that while treated as zero-rated in the years prior to 2001, and while many prior GST refunds had been paid out on that basis, the CRA is unwavering in its change in policy.

There is no question that GST Policy and Interpretation is acting with utmost good faith, in the strong tradition of that department, but Labco does have a legitimate right to ask whether the policy position is supported by the law.

*Reality.* No matter who is right as a matter of law, one thing is clear: there will not be much of an independent review from Tax Appeals.

Advise your client of this reality, and draft your Notice of Objection on that expected basis, and with a view to what will be required in the Tax Court of Canada.

Finally, consider Labco's options, and determine whether waiver of the 180 day appeal period might be warranted, so the matter can proceed directly to Court.

If the bedrock issue in the file is the legal position taken by the tax policy or interpretations branch of the taxing authority, which appears to have been correctly applied by the auditor, there may be nothing that tax appeals can be reasonably expected to do about the situation.

That realization is an important signal for an advisor, whose task at the Notice of Objection stage then

subtly shifts to that of "tax litigator": the Notice of Objection will, in effect, be only a template for the arguments that will be required to be met in the subsequent Notice of Appeal document for the court.

This situation also tends to be the high-water mark for non-lawyer advisors, as the realization should be that little meaningful input can be expected from tax appeals, and any opportunity that might have been available to sharpen the lines of the taxpayer's position through that back and forth interaction may simply be unavailable in these unique situations.

This Objection, above virtually all others, will also likely serve to limit the issues, facts and reasons that may be put before a Court on any subsequent appeal.



## III - 2 **THE FACTS**

After understanding where a tax dispute is expected to be headed, and assuming we are now contemplating a Notice of Objection that can be prepared with an appropriate degree of resources, where does one go from there ?

Assuming again that the key issues have been identified, at least in rough form in your mind or on paper, the drafting of the Notice of Objection, we submit, ought to invariably start with the facts. The reason ? In our view, the “facts” will usually determine the ultimate success or failure of virtually every tax dispute.

The balance of this section focuses on some practical points worth thinking about when preparing the taxpayer’s “facts”.

### III - 2.1 **Some Preliminary Pointers**

There are a couple of preliminary considerations to discuss, which are more drafting approaches than practical pointers.

### III - 2.2 **A Separate Facts Section**

First, every Notice of Objection will be required to give the taxpayer’s version of the “facts”, whether set out in a separately headed section, or interspersed throughout the “reasons” for the objection.

While we have discussed situations above where a drafter may find it useful to intersperse facts with reasons (e.g., the “Let’s have a Proper Audit” file), an effective Notice of Objection will generally contain a separate “Facts” section.

### III - 2.3 **Knowing the Legal Provisions You Need to Meet**

Second, in crafting the facts it is also critical to at least understand the legal requirements or conditions that one has to meet.

Consider the following provision, relevant to a food services company providing certain catering contracts on a GST exempt basis under Part III of Schedule V of the ETA:

**14.** A supply of food and beverages, including catering services, made to a person that is a school authority, university, or public college under a contract to provide food or beverages

(a) to students under a plan referred to in section 13; or

(b) in an elementary or secondary school cafeteria primarily to students of the school,

except to the extent that the food, beverages and services are provided for a reception, conference or other special occasion or event.

Whatever else that may be in that section, the “Facts” ought to include the following statements:

The taxpayer was a food services business providing catering services to a variety of customers, including [a school authority] [university] [public college]. The services were provided under a written agreement to provide food and beverages in a [elementary] [secondary] school cafeteria. The recipients of the cafeteria’s food and beverages were virtually all students of the school, with some staff and outside consumption. Cafeteria records indicated that over 50% of its customers were students. The agreement did not contemplate the provision of food or beverages for receptions, conferences, or other special occasions or events.

While facts like those set out above can be worked into the overall recitation of facts in numerous ways, they are all critical for operation of the legislative exemption provision, and should be set out in the Notice of Objection.

### III - 2.4 **“Preparing” the Facts**

Now on to what we believe is the most critical part of drafting the “Facts” section – the “preparation” of the facts.

### III - 2.5 **Facts, Not Evidence**

A critical thing to note about the “Facts” section is that a Notice of Objection is required to provide the “facts” relevant to each key issue, but not the “evidence” necessary to prove or establish that fact.

Technically, a “fact” is probably well defined as “a thing done; an action performed or an incident transpiring; an event or circumstance; an actual occurrence; an actual happening in time or space or an event mental or physical; that which has taken place.”<sup>57</sup>

In contrast, “evidence” generally refers to that which is used to prove or disprove an issue of fact:

Evidence, considered in relation to Law, includes all the legal means, exclusive of mere argument, which tend to prove or disprove any matter of fact, the truth of which is submitted to judicial investigation.<sup>58</sup>

Evidence includes “testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact.”<sup>59</sup>

Understanding the difference between “facts” and “evidence” is important, since it empowers the drafter of a Notice of Objection to engage him or herself in the artful preparation or crafting of a “Facts” section that goes beyond the simple regurgitation of the “evidence” provided by the taxpayer.

While getting the story out of the client and determining the ultimate legislative context of the file are important first steps, simply regurgitating what you have been told about the file, or rephrasing what is found to be the legal requirement for success is not enough to fully and adequately “prepare” the facts.

Rather, the preparation of the “Facts” section is the drafter’s opportunity to reorganize and reshape the evidential information provided by the client into an analytical framework that will establish the factual foundation for the legal reasons and arguments that follow.

A number of practical implications follow from this.

III - 2.5(a) *Not the Truth, Just the Facts*

One will find that many clients objecting to an assessment lack an understanding of the legal framework in which they find themselves.

Thus information flowing from the client to the advisor may often be truthful and evidentiary (i.e., it was a rainy day this morning), but completely irrelevant or immaterial to the task at hand of drafting the Notice of Objection.

On the other hand, the drafter of the Notice of Objection has the understanding, the ability, and perhaps the professional obligation, to prepare the facts so as to provide a

view of the facts that focuses the decision-maker on the relevant and the material, and dispenses with the irrelevant and the immaterial. (See Figure 4).

III - 2.5(b) *Advocacy & Putting the Proper “Spin” on the Facts*

When preparing the facts, drafters ought not to miss the opportunity of putting their own gloss or “spin” on the facts, if that proves helpful to the overall persuasiveness of the objection.

**Figure 4. Not the Truth, Just the Facts**

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*Client (on a Director’s Liability Issue):* “My business partner, the other director, was going through a nasty divorce in 1996. His boyfriend had us under a court order, too. We couldn’t deal with our line of credit. I wasn’t paying that much attention because I was the silent partner, and he was both doing the operations, and handling the admin or finance. I later bought him out, but now he’s suing us. During that time we filed all our returns, but not the GST owing. I think on one return we misstated an ITC by \$100. I asked him about what was going on from time to time. I didn’t always hear from him, but when I did, he never let on that there were any GST problems. Man, was that a nasty divorce! I was drunk most of the time anyway, and when I wasn’t drunk, I was too busy taking my executive MBA course to worry about the company.”

*The Facts:* “The company during that time was generally fully compliant with its GST obligations, other than its failure to remit GST with its properly filed GST returns. The person charged with operation, financial and GST compliance during the period in question was another director of the company (the “Inside Director”). The Director now assessed was an outside director with no access or control over GST accounting or reporting. The Director now assessed did make appropriate inquiries of the Inside Director, from time to time, but was never advised on any GST non-compliance by the company, and consistently of the impression that all GST obligations were being met.”

The Notice of Objection is by definition an adversarial document, and one that is prepared by the professional advisor as the taxpayer's advocate.

While no professional advisor ever ought to put him or herself in a position where they draft facts that they know are incorrect, the advisor as advocate is permitted to portray the facts in as positive a manner possible, so long as in the end result they are not misleading or otherwise incorrect.

This can be accomplished in a number of different ways, including through the use of the following techniques.

#### *III.2.5.b.1 Defined Terms*

While some terms will call out to be defined if only for the economical use of words (e.g., defining "Excise Tax Act" more simply as the "ETA"), the definition of other terms may assist in the overall presentation of the facts.

For example, if the issue is the exempt status of the goods or services provided by the GST registrant, instead of referring to the "exempt goods or services," refer to them instead as the "Exempt Goods", or "Exempt Supplies". Similarly, if the issue is whether there was a single supply of a composite good, or several multiple supplies, and the taxpayer is advocating the multiple supplies position, perhaps define what was happening in terms of those multiple supplies (e.g., instead of referring to the "catering services", refer to the "supply of Zero-rated Food and Zero-rated Beverages").

While definitional techniques are unlikely, by themselves, to sway a decision-maker, they are part of a consistent approach to the taxpayer's problem, which can play an important part in the way the decision-maker chooses to frame the issue in their own mind.

#### *III.2.5.b.2 Headings*

Like the use of "defined terms", headings and sub-headings can be used to subtly characterize the facts for the decision-maker, or at least focus the decision-maker on the relevance of the facts that follow (e.g., "Duly Diligent Actions of the Director"). As such, they can also be an effective tool for shaping the facts in the taxpayer's favour.

#### *III.2.5.b.3 Knowledge is Power - Compartmentalization of the Facts*

With the realization that some facts are more relevant and material than others comes the understanding that some unhelpful facts (see again Figure 4) may be capable of being

compartmentalized, and dealt with only on an as-needed basis: thus, the strategy of compartmentalizing only the facts that the issues and legal framework deem relevant.

For example, if the theory of the case, as in Figure 4, is that the “outside” directors are less liable for directors’ liability assessments than “inside directors”, one might compartmentalize the unhelpful facts about the “outside director” (drunk all the time, over-looking his directorship obligations in favour of personal educational interests), and focusing instead on the facts related to the “inside director”. Thus, in the Figure 4 situation, the suggested facts focus less on what the “outside director” was actually doing during the times in question, and more on the obvious non-compliance which arose because of the inactions of the “inside director” – the theory perhaps being that the outside director’s inquiries, from time to time, were appropriate of an “outside director” in the circumstances, and that what the “outside director” chose to do at other times was completely irrelevant.

While reasonable people may differ in opinion as to what is relevant and what is not, the drafter of the Notice of Objection has the first opportunity of addressing these issues, and can often help the taxpayer in the decisions that are made.

While pointed questions from tax appeals (or, during the discovery process, if the matter is litigated) may refocus the matter to facts not deemed relevant by the taxpayer (e.g., just what were you doing while the company’s financial ship was sinking ?), raising these sorts of factual points is arguably not the taxpayer’s obligation in the adversarial process.

*III - 2.5(c) Separation of Facts & Reasons*

Quite apart from any issues related to the compartmentalization or “spin” put on the facts, it is often worth revisiting whether the “Facts” section and the “Reasons” section contain, respectively, facts and reasons.

One tends to find that during the drafting process, facts blend in with reasons, and reasons blend in with the facts.

While reference to the facts in the “Reasons” section is permissible (and often helpful, in terms of linking the pertinent legal provisions to the relevant facts), reference to “new facts” is usually not preferred, and may only serve to demonstrate that the “new fact” – which is obviously necessary to support some aspect of the reasons – has come a bit late to the party, and may be subject to challenge by the revenue authority.

Similarly, the “Facts” section is for the “facts”, and while some allusion to the relevance of the facts is permissible, the drafter ought to strive to limit the “Facts” section to dealing with the facts, and not to allow “Reasons” or argument to begin to creep into the “Facts” – particularly since combining the two will only serve to reduce the objectivity that might otherwise be conveyed by a fairly represented facts section.

*III - 2.5(d) Rubbing the Clients Nose in the Fact*

Given the degree of shaping by the advisor that may be involved in setting down the facts, the facts must always return to the client for their specific acknowledgment that they have reviewed, confirmed, and provided comments (where necessary) on the same.

This step should be taken as a matter of course, because while the drafter has some obvious licence in presenting the facts in a taxpayer-friendly manner, it is the taxpayer’s ultimate responsibility to confirm what the fact are, and that they have (still) been fairly represented in the final Notice of Objection document. Advisors should not let their clients off the hook by failing to specifically obtain that confirmation.

Doing the same would also be likely viewed as part of the advisor’s professional obligations in the appeal process.

*III - 2.5(e) A Final Note – Objectivity of the Facts Section*

Every situation is different, and the degree to which a drafter can or ought to take poetic licence with the “Facts” section ought to be balanced with the overall impression conveyed by the “Facts” section so structured.

If the decision-maker’s decision is going to be entirely factually dependent (e.g., in determining whether the director’s actions “duly diligent”), this might militate towards presenting as “objective” a fact section as possible, without any obvious over-spin of the facts. Thus, while focusing the facts on the “Inside Director” and the “Outside Director” (including use of those defined terms) might be helpful, headings like “The Duly Diligent Director” and defined terms like the “Diligent Director” might be considered over-spin.

In the final analysis, therefore, some professional judgment ought to be brought to bear on the overall impression conveyed by the “Facts” section, and to the tailoring of the language to ensure a proper balance between conveyed objectivity of the facts and taxpayer friendly advocacy.

### III - 2.6 **Evidentiary Requirements & Burdens of Proof**

When setting out the facts, particularly in the “large file” situations where tax litigation may be expected, it is also useful to cast an eye to the implications of litigation.

While tax appeals officials may be prepared to consider a Notice of Objection based on an unsworn and untested Facts section, the same is not true of the Courts, where evidence must be laid to prove or establish one’s version of the “facts”. Further, even more troublesome reverse onus rules may be encountered which will force the taxpayer to effectively disprove the taxing authority’s version of events, which it may have even assumed out of thin air.

This section considers some of the issues inherent in meeting those evidentiary burdens.

#### III - 2.6(a) ***Burden of proof & the Taxpayer Reverse Onus***

The most important thing to recognize when assisting a taxpayer in challenging the validity of an assessment is that the onus is generally on the taxpayer to “demolish” the facts on which the Minister relied in making the assessment.<sup>61</sup> This is often referred colloquially as the taxpayer’s “burden of proof”, or “onus”.

##### ***III.2.6.a.1 The Reverse Onus***

While the issue often arises in the context of the tax court appeal, where the Crown Counsel charged with preparing the Minister’s case will specifically plead the specific facts assumed by the auditor in making the assessment, the advisor preparing an objection may also have caught wind of the auditor’s assumptions. Where it is clear what the Minister’s position or assumption are, the “Facts” section ought to pay some attention to the rebuttal of those assumptions, and to the demonstration that the actual facts of the matter are quite different from those assumed, or relied on, by the auditor.

In considering one’s drafting obligations in respect of the “reverse onus”, note that it only applies to assumptions of fact, and not to matters of law or formal reasons for the assessment position. Accordingly, where the auditor has assumed both factual and legal conclusions, only the underlying factual conclusions need to be positively dealt with.<sup>62</sup>

##### ***III.2.6.a.2 Qualifications to Reverse Onus***

In some instances, the initial onus to prove the facts underlying the assessment lies with the Minister, although it should be noted that the Federal Court of Appeal recently “firmly and strongly” reasserted the principle that “the burden of proof put on the taxpayer is not to be

lightly, capriciously or casually shifted,” given the policy rationale underlying the reverse burden.<sup>63</sup>

That being said, the Minister has an obligation to accurately disclose to the taxpayer all the facts on which the Minister relied in making the assessment.<sup>64</sup> This obligation is based on considerations of procedural fairness: the taxpayer must know the case that he or she has to meet.<sup>65</sup>

This suggests that it is open to the drafter of a Notice of Objection to obtain from the auditor written confirmation of any assumptions made by the auditor in raising the assessment, which might well be a useful strategy.<sup>66</sup>

A further discussion of the applicable law regarding the Minister’s use of assumptions, and the obligations on the various parties to deal with such assumptions, is beyond the scope of this paper.

*III - 2.6(b) Satisfying the Burden of Proof – The Applicable Standard*

Quite apart from the taxpayer’s obligations to demolish any assumptions of fact made on the audit, it is also important for the drafter of the Notice of Objection to recognize that the general obligation of any taxpayer putting forth a factual position is to be able to support that factual position, if put to the test.

In “proving” its case, a taxpayer will be required to tender evidence to establish a *prima facie* case that the Minister’s assumptions are not justified, and that the taxpayer’s version of the facts is the correct version.

At the end of the day, the “standard” to which a taxpayer will be held is the civil standard (“on a balance of probabilities”), which contrasts with the “criminal standard” (“beyond a reasonable doubt”).<sup>67</sup> What this really means is that when it comes time to prove its position in Court, a taxpayer must be capable of demonstrating, under the available evidentiary rules, that its position is more likely than the Crown’s position, balancing the two together.



If a taxpayer is not able to do that, and the facts go to a matter in issue, the taxpayer will invariably have its case dismissed,<sup>68</sup> which likely has some professional obligations for the drafter of a Notice of Objection.

III - 2.6(c) *How to Discharge the Burden of Proof*

Discharging a burden of proof means presenting credible, plausible and convincing evidence that the Court can accept in whole or in part.

It is not sufficient to “contest certain points here and there and to suggest certain interpretations of certain figures” presented by the auditor. Rather, it is essential to base one’s reasoning and arguments on relevant and, especially, real data from the business involved.”<sup>69</sup>

There is also some suggestion that the taxpayer must not only show that the assessment was not justified, but also to show what the correct assessment ought to have been.<sup>70</sup>

III - 2.6(d) *What is Evidence*<sup>71</sup>

A taxpayer can use a variety of evidence to establish its version of the facts.

First and foremost, available to the taxpayer are the sworn oral evidence of the taxpayers involved.

Here the drafter of a Notice of Objection will often be the first person to really test the cogency and persuasiveness of that oral evidence since the drafter has the initial opportunity to assess this evidence when gathering the “facts” from the client(s). Some questions that should be running through the drafter’s mind include: Do the facts make sense? Is the taxpayer’s story cogent and consistent? Are there any inconsistencies, or unexplained gaps in the information?

**Figure 5: Basic Evidentiary Difficulties**

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*Client (An inside director on a Director’s Liability Issue):* The Corporation in fact filed all of the monthly GST returns, on the dates specified.

*Advisor:* And do you have copies of the GST returns filed?

*Client:* No, we’ve looked but can’t find anything.

*Advisor:* And how do you know they were all filed on time?

*Client:* The former bookkeeper told me that.

*Advisor:* Where’s the bookkeeper now.

*Client:* Fired her. I think she’s in New Zealand.

*Advisor:* Do you have anything in writing from her to that effect, or could you get something in writing from her confirming that.

*Client:* Don’t have anything in writing on that, and can’t get anything, as I’ve lost track of her. You’ll just have to rely on what I’m telling you.

*Problem:* Establishing in a court of law that the Corporation in fact filed all of the monthly GST returns on time (especially to the extent the CRA takes the position that the GST returns were late or not filed) will be exceedingly difficult. There is no direct evidence available, and there may be little indirect (circumstantial) evidence. The only evidence on the point is the hearsay statement of the person most interested in the truth of that statement.

The drafter of the Notice of Objection has a real problem. If the matter is expected to proceed to Court, the client needs to know today that the case may lost on the evidence alone, and a decision made as to what “Facts” ought to be set out in the objection. Perhaps the focal point of the case has to turn on what the “reasonable belief” of the Director was, and for which his evidence as to what he was told could be properly admissible, as it would not go to the truth of the statement, but to the Director’s state of mind.

**Figure 6: Types of Evidence\***

**Direct evidence** – Proof of existence of a given thing by its actual production, or by the testimony or admissible declaration of one who has personally seen it. Direct evidence is generally superior to other divisions of evidence, as it admits only one chance of mistake: error of assertion.

**Circumstantial evidence** – Facts presented from which the existence of the main fact may be logically inferred. Circumstantial evidence admits two chances of mistake: error of assertion, error of inference. Arguably, the distinction between direct and circumstantial evidence has lost much of its significance (formerly, in cases that depended solely on circumstantial evidence, the jury required a special warning; this is no longer the case). In civil cases, circumstantial evidence is treated as any other kind of evidence. The weight accorded to it depends on the strength of the inference that can be drawn from it.

**Primary evidence** – The best or highest type of evidence that affords the greatest certainty of the fact in question. Examples are: production of the original document; admission of the contents of a document by the party against whom it is tendered.

**Secondary evidence** – Inferior or substitution evidence which, by its very nature, indicates that better evidence does or did exist. Examples are: a copy of a document; testimony of a witness who has read the document.

\*These definitions are taken from the CRA Investigations Manual Part 2 – Tax, Chapter 14.2.4 “Definitions of Evidence.”

If the drafter of the Notice of Objection has difficulty understanding (or believing) the taxpayer’s story, it will be a good bet that a decision-maker would as well, which may impact the advice you provide to your client, and the “facts” that ultimately make it into the Notice of Objection.

In considering the “evidence” available to support the facts, advisors will want to familiarize themselves with basic rules of evidence, as there is not much point relying on a fact that may be impossible to prove when the matter invariably moves on to trial. (See Figure 5).

Some (but not all of the) basic evidentiary rules are as follows.

*III - 2.6(e)*     **Relevancy**

Like an irrelevant fact is not pertinent to the Facts section of a Notice of Objection, irrelevant evidence will not be admitted at the hearing of the matter. Relevancy refers to the logical relationship of the proposed evidence and the principal fact to be established. If the proposed evidence (e.g., “October 1996 was a very rainy month”) lacks a traceable and significant connection with the principal fact (i.e., “I did all I could do as an outside director of the Company in question”), then relevancy will not be established, and the evidence will be excluded.

Another way of thinking about relevancy is to ask whether the evidence is a necessary link in a chain, going to a pertinent fact. If so, it will be admissible – even if it goes only to a point that would constitute circumstantial evidence that a fact in issue did or did not exist. (See Figure 6 and 7)

If the fact is logically relevant, then it is legally relevant and admissible, unless barred by some other rule of evidence.

III - 2.6(f) Exclusions under Evidence Law

III.2.6.f.1 Hearsay

A typical description of the hearsay rule is cited in Sopinka’s “The Law of Evidence in Canada” as follows:

Written or oral statements, or communicative conduct made by persons otherwise than in testimony at the proceeding in which it is offered, are inadmissible, if such statements or conduct are tendered either as proof of their truth or as proof of assertions implicit therein.

Figure 7: Relevance

The Issues:

Millar needs to prove that he directed the Office Manager to dispatch the October 1996 GST Return on behalf of Millar Kreklewetz LLP.

Millar can’t remember what he did yesterday, let alone what he did in October 1996, and accordingly, he cannot provide direct evidence of what he did or did not do in 1996.

Millar does know that every morning, he has a pre-set routine when he arrives in the office, and that without fail, assuming he has come in that day, he (1) stops for a coffee, (2) checks and responds to office e-mail, (3) reviews doomsdays for GST Returns, and deals with them accordingly.

Millar’s evidence as to his direction on the October 1996 GST return, while not the best evidence available, will be that (1) he has the pre-set routine referred to above, that (2) on October 31, 1996 he in fact did respond and deal with e-mail, his e-mail records confirming the same, and (3) he is therefore of the belief that he would have properly instructed the Office Manager to send out the GST return.

Question: Is Millar’s evidence as to his e-mail activities on October 31, 1996 relevant and admissible ?

Analysis: While the trial judge will have the last say, it looks as though Millar’s evidence on his e-mail activities that day, while circumstantial, is both relevant and admissible, being a link in the chain toward establishing that more likely than not, he would have addressed the GST return as part of his ordinary routine.

In other words, hearsay evidence is that which does not come from the personal knowledge of the witness, but is merely repetition of what the witness has heard others say.

Figure 8: Hearsay

Bald Statement at Trial by Millar: “The Office Manager told me that we mailed the GST Return on October 31, 1996.”

Possible Answers on Cross-examination of Office Manger, if available.

- The GST Return was in fact mailed on October 31, 1996 and to the CRA, properly addressed.
- The GST Return was in fact mailed on October 31, 1996, but I didn’t do the mailing, and am not sure where the new receptionist would have sent the GST Return.
- The GST Return was mailed in 1996, but I told him December 31 1996. Millar must have forgotten that, and has poor memory anyway !
- I told Millar that the GST Return was not mailed on October 31, 1996. He must be deaf too!

Rationale for Excluding Millar’s Statement: Without providing any comment on the truthfulness of Millar, and even under the assumption that Millar is doing his level best to recollect what was told to him, the dangers of allowing untested evidence militates towards excluding the statement all together.

Hearsay includes the offering by a witness of a document prepared by another person. It is, essentially, second-hand evidence and is generally excluded. The policy rationale for the exclusion stems from the inherent unreliability of hearsay evidence. There is no real or adequate opportunity to cross-examine either the veracity of the evidence, or the person responsible for the statement, and test of the truth of the facts offered. As such, there is no opportunity to examine the witness’s credibility, powers of

observation, memory, bias, etc. It also subjects the witness – and the evidence – to the penalties for perjury. (See Figure 8).

The law of evidence has evolved to allow certain exceptions to the rule generally excluding hearsay evidence.

These exceptions include:

- Admissions and confessions.
- Business or public records; those may be admissible under section 30 of the Canada Evidence Act.
- Expert opinions; conclusions of a person qualified as an expert in his field.

A drafter of a Notice of Objection must have an appreciation for which of the “Facts” will run into “hearsay” issues, and plan for the eventuality of proving them.

**III.2.6.f.2 Privilege**

The concept of “privilege” in the law of evidence means the right of some person or state to withhold evidence otherwise relevant and admissible from a court of law, or any other person.

The common law recognizes a number of privileges, such as Crown privilege, spousal privilege, privilege against self-incrimination and solicitor-client privilege.

A drafter of a Notice of Objection requires some understanding of privilege because the law of privilege can act both as a tool and a hindrance in making out a taxpayer’s case.

In some instances, the privilege can be used to shield unhappy facts or advice from tax appeals or the Crown.

In other instances the privilege may be used by the tax authority, or potential witnesses, to refuse disclosure of certain facts or evidence that would otherwise be subpoenaable by the taxpayer (e.g., a wife might determine not to provide evidence against or in favour of the taxpayer, in reliance on “spousal privilege”).

A short summary of each of these forms of privilege follows:

1. **Solicitor-Client Privilege.** Sopinka’s “The Law of Evidence in Canada” cites the following description of solicitor-client privilege:

That rule as to the non-production of certain communications between solicitor and client says that where...there has been no waiver by the client and no suggestion is made of fraud, crime, evasion, or civil wrong on his part, the client cannot be compelled and the lawyer cannot be allowed without the

**Figure 9: Admissions**

An admission is a statement, in oral or written form, that a fact or allegation against the person making it, is true.

An admission may be made by one who is not the accused of an offence or wrongful act, where an innocent person would deny the same.

A judicial admission is one made in the course of judicial proceedings, by pleading or otherwise. An extra-judicial admission is anything said outside the court, which is inconsistent with pleadings or testimony in court.

Admissions may be used against the person in the same manner as any other evidence.

Admissions are not statements that can be said to be against the person’s interests who uttered the statement, and as such, are sometimes admitted through hearsay evidence of other persons, and for the truth of those statements.

**Example:** Kreklewetz told me it was his ardent desire to fraudulently abscond with all of our GST trust monies.”

**Analysis:** The obviously hearsay statement might be held to be admissible, as against Kreklewetz, in a prosecution under s. 327 of the ETA. While a hearsay statement, the statement, if Millar is to be believed, is against Kreklewetz’s interests, and therefore presumably true. Generally speaking, if the Court is satisfied that a statement is true, it will be admissible. The evidence of Millar of Kreklewetz’s intent to commit a s. 327 offence.

These definitions are taken from the CRA Investigations Manual Part 2 – Tax, Chapter 2 – Definitions of Evidence.”

consent of the client to disclose oral or documentary communications passing between them in professional confidence, whether or not litigation is pending.

The basic rationale for the rule is that effectual legal assistance can only be given if clients are able to frankly and candidly disclose all material facts to their solicitors, which, in turn, is essential to the effective operation of the legal system. Recently, the Supreme Court elevated solicitor-client privilege to a “fundamental civil and legal right.”

Note that the party asserting the right to solicitor-client privilege must establish that the criteria for privilege exist, on the balance of probabilities.

Also note that the privilege belongs to the client, rather than the solicitor, and only the client may waive the privilege. Thus, communications to agents of the client is also protected, so long as the client’s agents are employed for the purpose of obtaining legal advice.

2. **Crown Privilege.** Crown privilege is sometimes referred to as public interest immunity. This form of privilege shields government agencies from disclosing documents and information in their possession. The basic rationale is the public interest in preventing damage to national security and international relations that could be caused by disclosure of state secrets and damage to the process of government decision-making.
3. **Spousal Privilege.** Spousal privilege protects communications made between spouses during the time of marriage. This form of privilege has a basis in statute (subsection 4(3) of the *Canada Evidence Act*) and in common law. The rationale includes the likelihood of bias with spousal evidence, the preservation of marital harmony, and the promotion of confidences between spouses.
4. **Privilege against Self-Incrimination.** The privilege against self-incrimination protects an individual from being compelled to testify against him or herself and can also preclude evidence discovered as a result of such testimony from being used against the person. This form of privilege is constitutionalized in the *Charter of Rights and Freedoms* (in particular, sections 7, 11, and 13 and also section 5(2) of the *Canada Evidence Act*). The basic rationale is related to broader fundamental principle that an individual should not be the source of proof against him or herself and that the onus is on the state to investigate and prove its own case.

### III.2.6.f.3 *Opinion Evidence*

The opinion of a person, not otherwise qualified as an expert, is another type of evidence potentially excluded by the law of evidence. Opinions cannot be offered as evidence, only direct observations of events, and no more. Any inference or conclusions to be taken from those observations is a matter solely for the court.

While the test for admissibility today has relaxed somewhat, with the courts having the freedom to receive opinion evidence if they wish, there is generally a high burden placed on the party wishing to admit non-expert opinion evidence.<sup>72</sup>

Expert opinions are an exception to the opinion rule, but are also generally subject to stringent requirements and pre-written and tendered expert reports.

**III.2.6.f.4 Evidence Obtained in Violation of the Charter**

Although at common law the manner in which evidence is obtained is generally not an impediment to its admissibility, the *Charter of Rights and Freedoms* imposes some important restrictions.

Subsection 24(2) of the *Charter* has the effect of excluding evidence that was obtained through a violation of constitutional rights if its admission would bring the administration of justice into disrepute.

*Charter* type exclusions could be something that a taxpayer could rely on to attempt to exclude unhelpful evidence that the Crown is attempting to bring into the particular case.

A full discussion of available *Charter* exclusions is well beyond this paper, although a useful starting point for understanding the application of the *Charter*'s search and seizure provisions to taxpayer information may be found in *R. v. Jarvis*, [2002] 3 S.C.R. 757.

**III - 2.7 The Use of Documents**

The use of supporting documents to buttress a taxpayer's version of the fact is another important consideration for the drafter of a Notice of Objection, as the judicial rules for the use and admission of documents can also be complex.

**III - 2.7(a) Classification of Documents**

Documents may generally be classified as: (1) public documents, which are typically proven by the introduction of copies; (2) judicial documents, which are proven in the same manner as public documents; and (3) private documents, which are traditionally proven by production of the original document and its evidential value is restricted to the parties.

**III - 2.7(b) Proof of Documents**

When a document is produced at trial, the primary requirement for its admission is that the document be "proved," unless it falls into one of the excepted categories.

"Proof" in this context has several meanings. First, proof may mean proof that the document is what it purports to be. In some cases, production of the document is sufficient for this purpose. Second, proof means that the document tendered in evidence is a correct copy of the original. For this type of proof, the witness need not have any knowledge with respect to the preparation of the original, only that he or she saw the original and that the copy is identical. Third, proof

means the extent to which the contents of the document are considered to establish the truth of the matter stated therein under the rules of evidence.

Proof is a necessary component to the issuance of documents, and an advisor crafting a Notice of Objection that intends to rely heavily on documentation has to understand that burden that will ultimately be on the taxpayer. (See again Figure 5).

Moreover, something called the “best evidence rule” stipulates that if an original document is available, one must produce it rather than a copy. While this rule is now generally limited to the contents of a document, this means that if a person wants to rely on the words used in a document, its must adduce primary evidence of its contents by producing the original document.

There are numerous exceptions to these rules at common law (e.g., secondary evidence may be admissible in circumstances involving the loss or destruction of documents, documents in possession of another party, and documents in possession of a third party) and for public documents which may be proved by copies. There are also specific statutory rules which will over-ride the common law rules in many instances: see for example ss. 291(1) of the ETA and sections 29 and 30 of the *Canada Evidence Act*, which address the subject of copies of documents.<sup>73</sup>

Finally, and as a general but not always consistent rule, by the time a matter makes it to court, most non-contentious documents (and facts) can be agreed to by the parties, which will dispense with the formal proof of the same. Thus, with the Crown’s prior agreement, any document may be entered as a court exhibit, without a witness.

*III - 2.7(c) Interplay between Documentary Evidence, and Oral Evidence*

As a general principle, documents cannot be cross-examined as they are considered to speak for themselves. Having said that, oral evidence may be necessary to prove the validity of a document by addressing its genuineness, authorship, or date of execution. Generally speaking, however, oral evidence would not be admissible to add to, vary or contradict a written transaction.

*III - 2.7(d) Documents Found by the CRA*

One aspect of the law of evidence which is often less helpful to the taxpayer is the treatment of documents found in possession of another party.

As a general rule, any document found in possession of a party or any document voluntarily surrendered by that party is presumed to be within his knowledge.<sup>74</sup> However, this is a rebuttable presumption of fact and it is open to the taxpayer to show that they actually never read the document in question, or do not have any knowledge of its content.

Documents obtained lawfully by a taxing authority can be used against the taxpayer provided they are produced in court by the officer who obtained them and the officer is capable of (1) identifying them, (2) describing how they came into his or her possession, and of (3) testifying that they are in the same condition as when obtained.

Employees of the taxpayer may also be subpoenaed by the Crown to place in evidence the records they maintained or have knowledge of.

*III - 2.7(e) Documents in Possession of Third Parties*

Likewise, documents obtained by the CRA (or a taxpayer) from third parties must be identified by the person to whom they belong. If they are corporation records, a responsible officer must be called as a witness. If the case is being contested, it may be necessary to call the person who has knowledge and control of the records as a witness.

Business records fall under the rules of s. 30 of the *Canada Evidence Act*, and ss. 30(3) of that Act would allow copies of business records to be introduced as evidence in those situations where it is not possible or reasonably practicable to produce the original.

*III - 2.7(f) Special Situations*

Some taxing legislation has rules dealing with the treatment of documentary evidence in certain special situations. For example, under s. 335 of the ETA, the sworn affidavit of a CRA officer may be used as evidence to prove the following:

- that a request, notice, or demand was sent by registered or certified mail to a particular person on a named day, provided the post office certificate of registration or a true copy accompanies the document;
- that the request, notice, or demand was served personally on a named day on a particular person;
- that a particular person has failed to file a return, application, or statement, or that it was filed on a particular day and not before;
- that a particular document is what it purports to be or is a true copy; or
- that a notice of appeal has not been received within the time allowed for appeal.

Applicable Rules of Court in the Tax Court of Canada, and the various provincial courts, will also impact the treatment of oral and documentary evidence.



Again, while all of these rules come into play, generally, at the time a tax dispute has proceeded into the judicial arena, a tax advisor charged with drafting the Notice of Objection that will ultimately form the basis for that legal appeal needs to be armed with a basic understanding of the requirements and limitations inherent in these rules.

*III - 2.7(g) Preservation of Supporting Documentation*

One word to the wise for drafters of Notices of Objection who rely on supporting documentary materials: take steps to ensure the client understands the need to preserve, and keep track of, the documentation.

The school of hard knocks has taught us, time and time again, that many a good case can be sunk, in the end, when the necessary supporting documentation either goes missing, or becomes too difficult for the client to track down. The time intervening between the drafting of a capable Notice of Objection, and the final resolution of the case at, perhaps, a federal or provincial court of appeal, often sees structural change within the client. From hirings and firings, to mergers, amalgamations and take-overs, to insolvency and CCAA proceedings, a large organization will often undergo significant change during the tax appeal process.

Unfortunately, the potential to lose (or lose track of) the case's significant documents arises at every iteration of change within the organization, so appropriate steps should be taken to safeguard the documents. Often up front work to assemble and copy the relevant documents will be necessary to preserve the case.

*III - 2.8 Time Spent vs. Results Achieved*

As a final note on the "Facts" section, and something which ought to be well foreshadowed by the time and attention given to the "Facts" section in this paper, it is our experience that the "facts" of any legal or tax problem – and indeed in any Notice of Objection – are the most critical aspect of the task.

If at the end of the day, the drafter has not found that he or she has spent at least as much time preparing and drafting the facts as researching, considering and drafting the issues and reasons, then that ought to give the drafter pause for thought.

Our experience also tells us that the time spent on the facts is generally time well worth spent, since invariably, the cases that turn out to be successful are those where the facts were well managed, and supported the legal route taken by the decision-maker to resolve the case.

III - 3

**THE ISSUES**

There are four essential points to be made about the requirement to set out the issues in a Notice of Objections.

First and foremost, professional judgment must be brought to bear in determining in any given case what the legal issues are that underlie a particular taxpayer’s tax dispute.

Second, and in the case of the larger taxpayer, or certain provincial taxing jurisdictions (e.g., Ontario and PEI), if that professional judgment is lacking or incomplete at the Notice of Objection stage, the failure to identify a key issue could become starkly evident as the matter progresses, and ultimately fatal to the on-going prosecution of the tax dispute. In considering this point, note the reality that the key issues in the case may not be (and are just as often not) as set out by the taxing authority on the audit. Moreover, there may be a number of different and sometime alternative issues.

**Figure 10: Phrasing the Issue**

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Consider again Figure 3. Assume that the legal requirement for zero-rating of Labco’s diagnostic test kits is as set out in paragraph 2(a) of Part I of Schedule VI:

2. A supply of any of the following:

(a) a drug included in Schedule C or D to the Food and Drugs Act, ...

Which of the alternative sets of issues below is better expressed for Labco’s purposes? Why ?

**Alternative 1:**  
Are the diagnostic test kits zero-rated for GST purposes?

**Alternative 2:**  
The issues are:

- (1) Whether there was a supply of the diagnostic test kits;
- (2) Whether the diagnostic test kits are a “drug” within the meaning of paragraph 2(a) of Part I of Schedule VI; and if so
- (3) Whether the drugs are included in Schedule C or D to the Food and Drugs Act.

**Alternative 3:**  
Are the diagnostic test kits drugs included in Schedule C or D to the Food and Drugs Act, and therefore zero-rated for GST purposes ?

*Out thoughts:* While there is no “right” answer, given the assumption that the case will be going to Court, our preference would probably be to leave the issue as generally defined as possible, thus we like Alternative 1. As between 2 and 3, we like 3 because it attempts to focus the issue on whether the kits fall within the list of Scheduled drugs, overlooking the primary issue of whether the kits are drugs in the first place. Alternative 2 looks like something the CRA or the Crown might want, as it places an obligation on the Appellant to address each and every square corner of the zero-rating provision.

Third, assuming that all the key issues are properly identified, the development of the “Issues” section must be done in connection with the other two sections, and help further define the pertinent legal context and the relevant facts – thus the very basic assumption at the outset of the

“Facts” section, that the drafter of the Notice of Objection has at least a basic understanding of what the issues, and reasons will look like.

Finally, just how a drafter of a Notice of Objection chooses to articulate an issue can often be as important as the preparation of the Facts section, or the development of legal reasons. In fact, how the issues are defined is often a key element to the taxpayer’s case, notwithstanding that most issue sections will be one or two paragraphs at most. Much like we suggested that “knowledge of the facts” contains a certain inherent power, so too is there power in the manner in which the question for the appeals branch (or the Court on a subsequent appeal) is phrased. (See Figure 10).

III - 4 **REASONS**

Much like how one decides to deal with the “Facts” of one case will be dependent on the unique circumstances of that case, the “Reasons” that one provides will also follow from the unique nature of the case, requiring that professional judgment be brought to bear in developing the “Reasons”.

In terms of the drafting and overall articulation of the “Reasons” in a Notice of Objection, however, we offer the following thoughts.

III - 4.1 **Is this really a legal issue?**

Is the case one where tax appeals will be called to make a legal decision?

If so, the drafter of the Notice of Objection needs to understand and include both an understanding of the tax authority’s administrative position (since tax appeals will no doubt be looking at that anyway), and the advisor’s views on the legality of that position based on available jurisprudence and statutory interpretation principles.

It goes without saying that the advisor needs to understand how to properly conduct legal research, and have access to appropriate search engines focusing on those points. Fortunately, most advisors will have access to search engines or software that provides both access to tax legislation, and tax jurisprudence.

Where one’s “tax case” involves other legal issues, non-tax principles may be called into play, however. And in these instances, it may be preferable to have either outside legal assistance, or internal legal advice. Search engines outside of the tax context may be required. (See Figure 11).

**Figure 11 Tax Issues vs. Non-tax Issues**

*Tax Issue:* SSTA was collected by auto dealers in BC but not remitted. Aco had an agreement with the Dealers to lease vehicles through them, and the contract incorrectly indicated that the SSTA amounts corrected were collected by Dealers as agent for Aco. In actual fact, there was no intention by the parties that that be the case, and never any instance where any dealer acted as agent.

BC assesses Aco as if it were principal, and demands remittance by Aco of the SST collected by the Dealers.

*Legal Issue:* Notwithstanding the *form* of agreement, what was the legal relationship between the parties ? Do contractual law principles shed any light ?

*Analysis:* Legal principles from the Law of Contract (and available jurisprudence) suggest that the form of the agreement cannot change the substance of the relationship. Aco may not be responsible for the SSTA, nor assessable for it.

While these principles and the underlying jurisprudence were not available on any existing tax search engines, the taxpayer’s advisor still needs to tap into this information.

III - 4.2 **Does Established Policy Exist?**

Where established policy exists, the practical reality is often that there are only a few available strategies in one’s Reasons.

If the matter is one that is unlikely to escalate to court following administrative appeal, the only realistically available strategy for a successful result at the administrative appeals stage is often to attempt to differentiate the taxpayer’s factual position from that to which the existing policy is aimed, in which case the reasons boil down to the following reason: “the policy does not apply to our situation”. The “Reasons” section is thus much less important than the development of the “Facts” section, which is meant, presumably, to distance the taxpayer’s situation from the factual situation towards which the existing tax policy is directed.

If the matter may be one that will likely head to Court, additional grounds, over and above the established tax policy, must be relied on, since the Courts are quite clear that they will not be bound by administrative policy.<sup>75</sup> In effect, an alternative legal position (i.e., alternative to that underlying the tax authority’s policy position) must be found, articulated and relied on. Again, appropriate tax and legal research will be required to adequately formulate one’s reasons.

III - 4.3 **The Use of “Principles of Statutory Interpretation”**

One useful tack in any “Reasons” section is to approach the fundamental legal issue like the Supreme Court of Canada would, using the “text, context, and purpose” of the taxing legislation to interpret its proper meaning (the “TCP” approach).

The TCP approach follows from Supreme Court of Canada case law going back over 20 years, starting with the seminal formation of the “modern approach” to statutory interpretation in

*Stuart Investments Ltd. v. The Queen*, where Estey J. cited E.A. Driedger, in his *Construction of Statutes*, at page 87, for the following rule:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Since that case, numerous Supreme Court decisions have returned to this concept as the preferred approach for interpreting tax, and all other statutes.

Most recently, the rule has been formulated by the Supreme Court in *Canada Trustco Mortgage Co. v. Her Majesty the Queen*, [2005] S.C.R. 601, as follows:

It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

As a result of the Duke of Westminster principle (*Commissioners of Inland Revenue v. Duke of Westminster*, [1936] A.C. 1 (H.L.)) that taxpayers are entitled to arrange their affairs to minimize the amount of tax payable, Canadian tax legislation received a strict interpretation in an era of more literal statutory interpretation than the present. There is no doubt today that all statutes, including the *Income Tax Act*, must be interpreted in a textual, contextual and purposive way. However, the particularity and detail of many tax provisions have often led to an emphasis on textual interpretation. Where Parliament has specified precisely what conditions must be satisfied to achieve a particular result, it is reasonable to assume that Parliament intended that taxpayers would rely on such provisions to achieve the result they prescribe.

The provisions of the *Income Tax Act* must be interpreted in order to achieve consistency, [page611] predictability and fairness so that taxpayers may manage their affairs intelligently. As stated at para. 45 of *Shell Canada Ltd. v. Canada*, [1999] 3 S.C.R. 622:

[Absent a specific provision to the contrary, it is not the courts' role to prevent taxpayers from relying on the sophisticated structure of their transaction, arranged in such a way that the particular provisions of the Act are met, on the basis that it would be inequitable to those taxpayers who have not chosen to structure their transactions that way. [Emphasis added.]

See also *65302 British Columbia*, at para. 51, per Iacobucci J. citing P. W. Hogg and J. E. Magee, *Principles of Canadian Income Tax Law* (2nd ed. 1997), at pp. 475-76:

It would introduce intolerable uncertainty into the *Income Tax Act* if clear language in a detailed provision of the Act were to be qualified by unexpressed exceptions derived from a court's view of the object and purpose of the legislation.

In our view, one can never go wrong with this tried and tested approach, and somewhere in one's Reasons, it would be advisable to consider the text, context and purpose of the legislative provisions that are pertinent to the issues under appeal.

This would include (1) reliance on dictionary or other jurisprudential or legislative definitions of the words at issue, (2) reliance on the overall context of the words, including the manner in which similar words or concepts are dealt with elsewhere in the same legislation or related regulations, and (3) detailed legal research into the "scheme" or "object" of the Act, and the "intention" of Parliament, which could include anything from review of technical and explanatory notes, to detailed research of the legislative or parliamentary Hansard, sub-committee records of the representatives of the government formulating and revising legislation tabled in the legislature.

All such materials are fair game in one's "Reasons" and are called for given the TCP approach mandated by the Supreme Court.

#### III - 4.4 **Canons & Maxims of Statutory Construction**

Augmenting use of the TCP would, in the appropriate instance, be reference to a number of so-called "canons" or "maxims" of statutory construction, which may be used as interpretative techniques in the appropriate case, and which are reviewed in further detail below.

##### III - 4.4(a) *Noscitur a sociis*

*Noscitur a sociis* translated literally means "know a thing by its associates".<sup>76</sup> Under this doctrine, the meaning of questionable or doubtful words or phrases in a statute may be understood with reference to the meaning of other words or phrases associated with it.

##### III - 4.4(b) *Ejusdem generis*

*Ejusdem generis* translated literally means "of the same class".<sup>77</sup> Essentially this means that where a generic term is used to complete an enumeration of terms, the generic term, while having a broader meaning, should be restricted to the same genus as those words.

In that regard, in *The Interpretation of Legislation in Canada*, Côté gives the following example:<sup>78</sup>

For example, an airplane is not a "vehicle" in the sense of the enumeration "automobile, van, truck or other vehicle because it is not part of the class of vehicles enumerated.

III - 4.4(c) *Pari Materia*

This doctrine provides that laws that deal with the same subject matter are presumed to be in *pari materia* – i.e., that they are read, construed and applied in a coherent manner. The doctrine can sometimes be invoked to suggest that words in one enactment may be defined by reference to the meanings of those same words in related enactments, so long as the two statutes are, in respect of that subject matter, in *pari materia*.

Consider again the example in Figure 3, dealing with the zero-rating of diagnostic test kits. One clear issue is the meaning of the word “drug”, undefined for ETA purposes, but dealt with extensively in the *Food and Drugs Act* (the “FDA”), which is specifically referred to and incorporated in the zero-rating provision itself. The *in pari materia* doctrine would suggest that the meaning of the word “drug” in paragraph 2(a) of Part I of Schedule V ought to be the same as the meaning of the word “drug” in the FDA.

III - 4.4(d) *Presumption Against Tautology*

The presumption against tautology is based on the premise that every word of a statute is presumed to make sense and it is presumed that the legislature does not pointlessly repeat itself; rather every word is presumed to have a specific purpose.<sup>79</sup>

[A]lthough a Parliamentary enactment (like parliamentary eloquence) is capable of saying the same thing twice over without adding anything to what has already been said once, this repetition in the case of an Act of Parliament is not to be assumed. When the legislature enacts a particular phrase in a statute the presumption is that it is saying something which has not been said immediately before. The rule that a meaning should, if possible, be given to every word in the statute implies that, unless there is a good reason to the contrary, the words add something which would not be there if the words were left out.<sup>80</sup>

III - 4.4(e) *Presumption Against Absurdity*

Perhaps related to the concept just above, the so-called “presumption” against absurdity comes from many sources, but is fairly put by *Driedger on the Construction of Statutes*,<sup>81</sup> and in the context of the presumption that Parliament is a careful drafter of legislation and the idealistic speaker:

It does not use words superfluously, or enact legislation deprived of meaning or futile in effect, or leading to absurd results.

III - 4.4(f) *Presumption Against Reading In*

The Federal Court of Appeal described the presumption against reading in additional words into an enactment in order to achieve a desired, but unexpressed meaning, in *The Queen v. Tom Baird & Associates Ltd.*:<sup>82</sup>

The basic principle of statutory interpretation that courts are not permitted to read words into legislation was eloquently stated in *Mangin v. I.R.C.*, [1971] A.C. 739 at 746 (H.L.):

Secondly, "... one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used": per Rowlatt J. in *Cape Brandy Syndicate v. Inland Revenue Commissioners*, [1921] 1 K.B. 64, 71, approved by Viscount Simons L.C. in *Canadian Eagle Oil Co. Ltd. v. The King*, [1946] A.C. 119, 140.

It was also supported by Major J. in *Friesen v. The Queen*, [1995] 3 S.C.R. 103 at 121:

It is a basic principle of statutory interpretation that the court should not accept an interpretation which requires the insertion of extra wording where there is another acceptable interpretation which does not require any additional wording.

III - 4.4(g) ***The Meaning at the Time of Enactment***

The general rule that a statute is to be interpreted in light of the problem that it was intended to address, which dates back to the 16<sup>th</sup> century,<sup>83</sup> has been stated by the Supreme Court of Canada as follows: "...when the language is ambiguous we must look to the history preceding it and the condition of things existent at the time of the enactment."<sup>84</sup>

III - 4.4(h) ***Remedial interpretation***

Furthermore, every Court is bound to give every enactment a "remedial" interpretation, and give its words "such fair, large and liberal construction and interpretation as best ensures the attainment of its objects".<sup>85</sup>

III - 4.4(i) ***Bilingual Legislation***

Section 133 of the *Constitution Act, 1867* provides that the statutes of Canada must be published and printed in both French and English. This has been interpreted by the courts to mean that the legislation has been enacted in both languages. Further, subsection 18(1) of Canadian *Charter of Rights and Freedoms* provides as follows:

The statutes, records and journals of Parliament shall be printed and published in English and French and both language versions are equally authoritative.

In Canada this has important implications, including the fact that both versions of the French and English legislation are equally authentic and neither can be paramount over the other; accordingly reference should be made to both the English and French version of the applicable legislation.

Where, however, bilingual legislation does not say the same thing, the "shared meaning" should be adopted.



From the school of hard knocks comes the following proposition: at the start of every tax dispute, gain an understanding of what the legislative rules says in both official languages.

III - 4.4(j) *The Interpretation Acts*

Every Canadian jurisdiction also has adopted an *Interpretation Act* respecting the interpretation of statutes and regulations which also sets out rules of construction.

Drafters of Notices of Objection need to be aware of the rules in these enactments, not the least of which are the rules for interpreting words like “may” and “shall”.

III - 4.5 **Semantics – The Banging Over the Head Strategy is Often Unhelpful**

While the Notice of Objection process is inherently adversarial in nature, most readers will appreciate that when it comes to navigating successful tax disputes for their clients, it is rarely if ever productive to engage in acrimonious discussions with a taxing authority.

So, too, is there a premium on the semantics used in attempting to convey a taxpayer’s position to an appeals officer. Rarely will matters be “absolutely” or “crystal” clear, or the auditor “dead wrong” or “completely off base”.

Many times there will be “some initial logic” in the auditor’s position, which will hopefully be found to be off-base in the clearer light of day, and having the benefit of all the additional work provided to tax appeals with the Notice of Objection.

The inference to be drawn, of course, is that often nothing is gained by attacking the audit, the auditor, the assessment, or the taxing authority, in a potentially offensive way, viewed from someone in the shoes of the tax appeals officer.

Notice of Objection can be effectively drafted to avoid poor use of semantics, and ensure that when read by a tax appeals officer, no offence is taken, thereby securing an objective starting point.

III - 4.6 **Plain Words**

While this may sound trite, there a premium in using plain words and simple sentences in the adversarial process. And where necessary, repeating the important concepts, perhaps in a slightly different way. Repetition of the key concepts, using simple words and sentences, will assist the decision-maker in understanding the fundamental points that the drafter is intending to make.

Simple words and sentences will also tend to force the drafter to fine-tune those same points, and refine the facts and reasons being set to paper.

An excellent resource for the use of plain English in the analytical and adversarial context is a book called *Plain English for Lawyers*, Richard C. Wydick, 5<sup>th</sup> Edition, and readers interested in that approach are commended to its review.

### III - 4.7 **Alternative Reasons or Arguments**

The last point with respect to the drafting of a “Reasons” section of a Notice of Objections is the consideration of the use of alternative reasons or arguments.

#### III - 4.7(a) *Availability of Alternative Reasons*

Alternative reasons or arguments – or “alternative pleadings” as they are referred to when made in the judicial context – are clearly a permissible form of presenting a taxpayer’s position to a taxing authority. As succinctly put by the Tax Court:<sup>86</sup>

There is nothing in the Rules of this Court, the Tax Court of Canada Act, or the Income Tax Act, precluding a party in an appeal to plead in the alternative. It may well be that a party may not be successful on his or her main argument but may be successful if an alternative argument is pleaded. For example, a taxpayer may argue that an amount of money received on the disposition of property ought not be included in computing income for the year since the amount was received for the account of another person, and if the amount was not received for someone else, the assessment should be reduced to take into account that the disposition was on capital account.

(Emphasis added)

Legislative provisions also, however, provide the Minister the ability to make similar “alternative arguments” to support the basis for the assessment, as for example ss. 298(6.1) of the ETA:

298 (6.1) **Alternative argument in support of assessment** — The Minister may advance an alternative argument in support of an assessment of a person at any time after the period otherwise limited by subsection (1) or (2) for making the assessment unless, on an appeal under this Part,

- (a) there is relevant evidence that the person is no longer able to adduce without leave of the court; and
- (b) it is not appropriate in the circumstances for the court to order that the evidence be adduced.

and ss. 152(9) of the ITA:

152(9) **Alternative basis for assessment** — The Minister may advance an alternative argument in support of an assessment at any time after the normal reassessment period unless, on an appeal under this Act

- (a) there is relevant evidence that the taxpayer is no longer able to adduce without the leave of the court; and

(b) it is not appropriate in the circumstances for the court to order that the evidence be adduced.

*III - 4.7(b) Advisability of Same*

While alternative reasons or argument are permissible, the better question is their ultimate advisability. While technically one would think that there ought to be no harm in providing a successive list of alternative positions, in practice one can find that alternative positions tend to water down the perceived strength of a taxpayer's primary position.

Again, in these situations, professional judgment need to be brought to bear, and a decision made as to the advisability of alternative positions.

In some instances they will be mandated by the facts, and positions of the Minister, but in other situations, a better strategy call may well be to win the dispute on the basis of the primary argument alone. Where that type of decision is made at the "Notice of Objection" stage, however, the risk is that the "Plan B" type arguments may ultimately be viewed by the tax litigators as the better of the two positions, perhaps militating against such strategies in all but the most extreme of cases.

## **PART IV – CONCLUSIONS**

The reader ought to be concluding at this point that the agreement with a client to take on the task of drafting and filing a Notice of Objection comes with tremendous obligations for the advisors.

Quite apart from the professional judgment that must be brought to bear on the tax dispute underlying the tax assessment, the advisor is faced with some specific challenges in drafting a truly compliant and effective Notice of Objection.

It is hoped that this paper has provided at least some insight into these challenges and the practical considerations facing the drafter in most situations, along with some possible approaches for improving upon their own good work.



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- 1 Readers are reminded not to rely on the information or commentary in this paper, as it is not meant to be entirely comprehensive of all of the requirements, but to consider the applicable requirements themselves.
- 2 The relevant administrative guidance is Canada Revenue Agency's *GST/HST Memorandum Series* Chapter 31, "Objections and Appeal" (January 1999).
- 3 The Notice of Objection should be made on Form GST159, "Notice of Objection (GST/HST)."
- 4 The "specified persons" sections in the Notice of Objection provisions were added by 1997, c. 10, s. 82.
- 5 Under ss. 249(1) a person's threshold amount for any fiscal year is calculated by reference to the total value of the consideration for taxable supplies (other than supplies of financial services, sales of capital property and zero-rated exports) made by that person (and any associates) in the immediately preceding fiscal year.
- 6 Notwithstanding this requirement, ss. 301(1.3) provides that where a Notice of Objection filed by a specified person does not include the information required by paragraph (1.2)(b) or (c) in respect of an issue to be decided that is described in the notice, the Minister may in writing request the person to provide the information, and the Notice of Objection shall be deemed to comply with those paragraphs in respect of the issue if the person submits the information in writing to the Minister, within 60 days after the request is made.
- 7 Pursuant to subsections 301(3) and (5).
- 8 Pursuant to ss. 301(1.6).
- 9 Please see *GST/HST Memorandum Series* Chapter 31, Objections and Appeals (January 1999).
- 10 Pursuant to ss. 301(1.5). Please see also *GST/HST Memorandum Series* Chapter 31, Objections and Appeals (January 1999). Pursuant to ss. 301(4), a taxpayer may waive reconsideration by the CRA and proceed directly to appeal to the Tax Court, in which case the CRA will confirm the assessment without reconsideration.
- 11 Pursuant to sections 302 and 306, a taxpayer who has filed a Notice of Objection may appeal to the Tax Court.
- 12 2005 FCA 159 (F.C.A.).
- 13 [2006] ETC 2893 (TCC).
- 14 Please refer to the *Technical Note* for subsection 165(1.11) (February 1995).
- 15 [1999] 2839 ETC (T.C.C.).
- 16 Pursuant to ss. 296(2.1) which requires the Minister, when assessing, to take into account any rebate to which the taxpayer is entitled, and to give effect to it, even though no rebate application has been made. The Tax Court concluded that the assessor was therefore bound to consider the question of entitlement to a rebate even though no had been applied for, and the question was therefore a live one at the objection stage.
- 17 Please refer to the discussion of the *Chevron Canada Resources* and *Sherway Centre Ltd.* decisions, below.
- 18 For discussion on this principle in the context of ss. 165(1.1), please see *Chevron Canada Resources Ltd.*, [1999] 1 F.C. 349 (FCA). In that case, the FCA held that ss. 165(1.1) precluded the taxpayer's entitlement to file notices of objection against the reassessments. The FCA noted that the rule of *res judicata* means that a party who omits to raise an issue which it could and should have raised in an earlier proceeding is "forever barred from raising it again." Furthermore, the FCA noted that ss. 165(1.1) does not operate to oust the rule of *res judicata* nor does it adopt this rule only in so far as it applies to matters specifically decided by the Court.

19 In terms of background, the FCA explained in the *Saskatchewan Potash Corp.* case, discussed below, that the large corporation rules were enacted with the intention to discourage large corporations from engaging in “full reconstruction” of their income tax returns for a particular year, after the objection or appeal process has started, based on developing interpretations and the outcome of court decisions involving other taxpayers, with the ultimate goal of determining and resolving tax liability in a timely way.

20 The subsection provides as follows:

For the purposes of this section and s. 235, a corporation (other than a corporation described in ss. 181.1(3)) is a “large corporation” in a particular taxation year if the total of the taxable capital employed in Canada of the corporation, at the end of the particular taxation year, and the taxable capital employed in Canada of any other corporation, at the end of the other corporation's last taxation year that ends at or before the end of the particular taxation year, if the other corporation is related (within the meaning assigned for the purposes of s. 181.5) to the corporation at the end of the particular taxation year, exceeds \$10 million, and, for the purpose of this ss., a corporation formed as a result of the amalgamation or merger of 2 or more predecessor corporations is deemed to be the same corporation as, and a continuation of, each predecessor corporation.

21 Notwithstanding ss. 165(1.11), where a Notice of Objection served by a large corporation does not include the information required under paragraphs (b) or (c) (i.e., the relief sought in respect of each issue, or the facts and reasons relied on in respect of each issue), the Minister may request in writing that the large corporation provide such information, and the large corporation will be deemed pursuant to ss. 165(1.12) to comply with paragraphs (b) or (c) if it submits the information in writing within 60 days after the request is made.

22 This includes a reference to a taxpayer's income, taxable, income, taxable income earned in Canada, loss for the year.

23 Please refer to the *Technical Note* for ss. 165(1.11) (February 1995).

24 Pursuant to ss. 165(3).

25 Pursuant to ss. 165(1.14), where the Minister reassesses or makes an additional assessment in response to an initial Notice of Objection, ss. 165(7) provides that a taxpayer may appeal to the Tax Court without serving a further Notice of Objection.

26 2003 FCA 26.

27 152 (4.3) provides as follows:

Notwithstanding subsections (4), (4.1) and (5), where the result of an assessment or a decision on an appeal is to change a particular balance of a taxpayer for a particular taxation year, the Minister may, or where the taxpayer so requests in writing, shall, before the later of the expiration of the normal reassessment period in respect of a subsequent taxation year and the end of the day that is one year after the day on which all rights of objection and appeal expire or are determined in respect of the particular year, reassess the tax, interest or penalties payable, or redetermine an amount deemed to have been paid or to have been an overpayment, under this Part by the taxpayer in respect of the subsequent taxation year, but only to the extent that the reassessment or redetermination can reasonably be considered to relate to the change in the particular balance of the taxpayer for the particular year.

28 2003 FCA 471, aff'd [2004] SCCA No. 42.

29 The Tax Court concluded that the taxpayer's failure to specify certain categories of the computation of resource profits did not bar it from having those additional items considered on appeal to the court.

30 The FCA also rejected the taxpayer's argument that the large corporation rules violate the right to a fair hearing as guaranteed in the *Canadian Bill of Rights*. The right to appeal had been lost because of the manner in which the taxpayer framed its Notices of Objection; having defined the issues to be decided, the FCA concluded that the taxpayer

effectively abandoned its right to appeal other issues and cannot now assert that its right to a fair hearing has been violated.

31 2005 TCC 143 aff'd 2005 FCA 431.

32 The Tax Court noted several other provisions which operate to limit the rights of large corporations to object and appeal to those issues originally identified and properly described in the Notice of Objection. The Tax Court referred specifically to subsections 165(1.13) and (1.14), which operate to limit the right of a large corporation to object to any further reassessments made in respect of the initial objection to only those issues properly described under ss. 165(1.11), except where new issues have been raised by the Minister in subsequent reassessments. Similarly, where a large corporation chooses to forego further objections under ss. 165(7) and to appeal to the Tax Court in accordance with ss. 169(1), ss. 169(2.1) operates to limit the issues which may be included in that appeal to those originally identified in compliance with ss. 165(1.11).

33 Accordingly, the Tax Court dismissed the taxpayer's addition arguments based on waiver and estoppel.

34 The relevant administrative guide is Consumer Tax Branch *Bulletin* No. GEN 003, "Appeals of Tax Assessments or Disallowed Refunds, Social Services Act, Hotel Room Tax Act, Tobacco Tax Act, Motor Fuel Tax Act," (revised April 2002) (the "Bulletin No. GEN 003"). According to Bulletin No. GEN 003, "Tax assessments and disallowed refund claims are subject to two levels of appeal: a first appeal to the Minister of Provincial Revenue, and a subsequent appeal to the courts."

35 Estimates of tax are made under s. 60 of the *Revenue and Financial Services Act*, which authorizes the Minister to make an estimate of taxes which a collector or taxpayer has failed to account for or to pay under a "revenue Act," which is defined in clause 47(1)(e)(ii) to include the PSTA. Where the Minister makes such an estimate, it is required to serve notice of the estimate.

36 Section 20 of the RFSA provides that the Board shall not hear an appeal unless a notice of appeal and a statement of reasons for the appeal are filed within the specified time limits, which the Board has the discretion to extend.

37 Section 22 provides for further appeal to the Court of Appeal.

38 Pursuant to s. 55 of the *Tax Administration and Miscellaneous Taxes Act*. The ability to appeal is limited to the amounts assessed under clauses 46(1)(a), (d), (e) and (g) and excludes interest and certain penalties, fees and charges. Part I of the TAMTA (which includes the provisions discussed) was added by 2005, c. 40, s. 85, effective July 1, 2005; the title of the act was formerly *The Revenue Act*.

Pursuant to s. 46, the Director may make an assessment or reassessment of a person's tax debt or any part of a person's tax debt, which may consist of the tax that a taxpayer is liable to pay or remit under a "tax Act," which is defined to include the *Retail Sales Tax Act*.

39 Formerly, the provisions governing Notices of Objection were contained in the RSTA itself. The RSTA provided for an initial objection to the Commission, followed by appeals to the Minister, and then to the Court. The Notice of Objection and notice of appeal to the Minister were required to set forth clearly the "reasons for the objection or appeal and any facts relative thereto," (pursuant to subsections 17.1(1) and (2), respectively, both repealed effective July 1, 2005) while the notice of appeal to the Court was required to set forth "the grounds of the appeal" (pursuant to ss. 19(2), also repealed effective July 1, 2005).

40 Pursuant to sections 58 and 59.

41 The relevant administrative guide is *Tax Appeals Branch Guide No. 5217*: "Ontario Taxes and Programs Objection and Appeals Procedures," (revised June 2001) (the "Tax Appeals Branch Guide No. 5217").

42 Under sections 18, 20 or ss. 19(1).

43 Under s. 20.

44 Note that this language, which was added in 1997, is considerably different from the equivalent provision as it when the Ontario Court of Appeal decided *Buchanan Forest Products Ltd. v. Ontario (Minister of Revenue)* (1993) 2 G.T.C. 7011 (Ont. C.A.). In that case, the appellant sought to argue a ground of appeal that was not raised in either the earlier trial or the objection to the assessment at issue. The Court of Appeal refused leave, explaining that the RSTA “is specific in requiring that the Notice of Objection set out ‘the reason for the objection and all relevant facts’. It is equally specific with respect to proceedings by way of appeal requiring the appellant to set out in the notice ‘a statement of the allegations of fact and the statutory provisions and reasons that he intends to submit in supporting his appeal’. To permit the appellant to introduce this ground now is to ignore the requirements of the Act and the obvious scheme to define the issues.”

45 Pursuant to ss. 24 (1.2), if the Notice of Objection is deficient in setting out the facts and reasons relied on by the person in respect of an issue, the Minister may request the person to provide the information, and the person is deemed to comply if paragraph 24 (1.1) (b) if they do so within 60 days after the request. According to *Tax Appeals Branch Guide* No. 5217, if the missing information is not provided within 60 days, the assessment under objection will be confirmed. *Tax Appeals Branch Guide* No. 5217 also states that a Notice of Objection which does not include enough information to identify a dispute will not be accepted, and will be returned for completion and resubmission if it can be served on time.

46 Section 3 permits the Commissioner to determine and assess and reassess any tax payable under a “revenue Act,” which is defined to include the *Revenue Tax Act*.

47 Please see *Provincial Tax Commissioner PEI v Maritime Dredging Ltd et al*, [1997] 5015 ETC (PEI Sup. Ct. App. Div.) A more recent case decided after the addition of subsections 10(2.1) and (5.1) the PEI Supreme Court Appeal Division in *Chapman Brothers Construction Ltd. v IRAC*, [2005] 5003 ETC also describes the hearing before the IRAC as “in the nature of a hearing *de novo*,” although the court did not refer specifically to ability of IRAC to consider issues not raised before the Commissioner.

48 The PEI Supreme Court Appeal Division in *Chapman Brothers Construction* determined that the standard of review is reasonableness *simpliciter*.

49 The requirement to notify a Notice of Objection under 93.1.1 does not apply to in respect of a reassessment under s. 93.1.6.

50 Pursuant to s. 93.1.1, the time frame for objecting to certain assessments may be greater than the 90 days depending on the particular fiscal law and provision on which the assessment is based.

51 “Fiscal law” is defined to include “any other Act imposing duties...” “Duties” are defined to include “taxes.”

52 Please see sections 93.1.7. .

53 These requirements also apply to assessments under the *Taxation Act* in respect of a person who is a large corporation.

54 In contrast, the federal legislation above deems the Notice of Objection to comply with the information requirements in respect of particular the issue if the person submits the information in writing within 60 days after the request is made.

55 Of course, most auditors would also entertain these types of revisions, putting a premium on maintaining good relationships between taxpayer and auditor during the audit process.



56 That is not to say that in smaller file situations clients are, or should, be given short shrift. We only mean to convey the reality that where smaller amounts are at issue, the client will rarely be satisfied paying professional fees equal to or exceeding the actual amounts at issue. That forces both the advisor and client to accept the reality that the professional time dedicated and spent on the matter must, at some point, bear a relationship to the amounts at issue, with will force in itself an economization of research, analysis, and words.

57 Black, Henry Campbell. *Black's Law Dictionary*. 6th ed. St. Paul, Minn.: West Pub. Co., 1990 ("Black's Law Dictionary").

58 *R. v. Whittaker*, [1924] 3 DLR 63 (Alta. S.C.).

59 See Black's Law Dictionary.

Also note that some provincial rules of civil procedure, such as Ontario's, stipulate that pleadings are to state material facts, but not the evidence by which those facts are to be proved: see for example Rule 25.06(1) of the Ontario *Rules of Civil Procedure*.

Courts have also struck out portions of pleadings that refer to matters which constituted evidence rather than pleading statement of material fact: see for example, *Clarke v. Yorkton Securities Inc.* (2003), 46 C.P.C. (5th) 294 (Ont. Sup. Ct. Jus.) and *Edward v. Ontario* (MNR) (1989), 33 CPC (2d) 277 (Ont. H.C.J.).

60 Evidence is material if it is offered to prove or disprove a fact in issue, tends to throw light on the matter in dispute, affect the outcome of the case or to help in establishing the guilt or innocence of the person. All material evidence is relevant, although not all relevant evidence is material.

61 See *Johnson v. MNR*, (1948) 3 DTC 1182 SCC, and *Hickman Motors Ltd.*, [1997] 2 SCR 336, cited in *Redash Trading Inc.* 2004 TCC 446. Hence the auditor's factual assumptions are taken as fact unless they are disproved or it is established that the Minister did not make the assumptions that are said to have been made, and the taxpayer will have the onus of proving that the Minister's assumptions are not true or that they were not made. Note that the reverse onus applies to both income tax and excise tax assessments, see *620247 Ontario Ltd.*, [1995] G. S. T. C. 22 (T. C. C.); and that notwithstanding the onus, it is also open to the taxpayer to attempt to establish by argument that, even if the assumed facts are true, they do not justify the assessment as a matter of law, see *Loewen*, 2004 FCA 146..

62 See by analogy, *Anchor Pointe*, 2003 FCA 294. Note that where the taxpayer is successful in prima facie rebutting the factual assumptions relied upon by the Minister in making the assessment, the burden shifts to the Minister to establish the correctness of those assumptions. In undertaking this task, the Minister bears the ordinary burden of any party to a lawsuit, namely to prove the facts which support its position on a balance of probabilities. However, where the burden has shifted to the Minister, and the Minister adduces no evidence whatsoever, the taxpayer is entitled to succeed. See, for example, *Hickman Motors Limited*, 97 DTC 5363 (S.C.C.).

63 *Orly Automobiles Inc.*, 2005 FCA 425.

64 There is some uncertainty as to when the Crown is required to communicate the assumptions relied upon in making the assessment in order to benefit from the reverse onus. In a recent case, the taxpayer argued that when the Crown relies on assumptions made and communicated to the taxpayer after the notice of reassessment, the Crown bears the onus of proving them. The Federal Court of Appeal noted that the cases supporting the proposition that the Crown must fully disclose to the taxpayer the precise findings of fact and rulings of law which underlie the assessment do not establish a specific time limit for doing so. The FCA went on to note that the purpose of the requirement of disclosure is to ensure that the taxpayer can properly and effectively exercise the right to object to the notice of assessment within the 90-day time period allocate by the ETA. In the vast majority of cases, the appropriate remedy is the seeking and compelling of disclosure. See *Orly Automobiles Inc.*

65 *Continental Bank of Canada*, [1998] 2 SCR 358.

66 Thus where the Minister has not plead the facts on which the Minister relied in making the assessment, the burden of proof lies with the Minister to prove those facts. In this case, the Minister would not benefit from any presumptions of fact, and the taxpayer therefore does not have any facts to demolish: see 9000-6560 *Quebec Inc.*, [2001] ETC 2847 (TCC).

67 Civil standard of proof refers to the degree of probability required to discharge the burden of proof civil actions is the standard of a balance of probabilities. This is standard is also referred to as “proof on a preponderance of probabilities,” or “proof on a preponderance of evidence.” In simple terms, the trier of fact must find that the existence of the contested fact is more probable than its nonexistence.

68 *Bergeron*, [2005] 2876 ETC (TCC).

69 2760-3125 Québec Inc, [2005] 2888 ETC (TCC).

70 *Club Immobilier International Inc.*, [2003] 2940 ETC: “The burden of proof was on the appellant; that responsibility means that it had not only to show on a balance of evidence that the assessment was in no way justified but also, and above all, to prove what the assessment ought to have been. In fact, if the appellant had shown what the real assessment should have been, this would have meant that the Department had erred during the audit and had therefore made an unjustifiable and groundless assessment.”

71 While all written material presented below is entirely our own, the evidentiary concepts, and some discussion on them, are drawn from Sopinka, et al., “The Law of Evidence in Canada” 2nd ed. 1999 (Buttersworth), and from CRA Investigations Manual Part 2 – Tax, Chapter 14.2.4 Definitions of Evidence. Our discussion of evidentiary concepts, and indeed the Law of Evidence, is meant to be a high-level overview of some selected relevant concepts, and not a comprehensive review or analysis of the same.

72 Generally speaking such evidence may be admitted if (1) the witness has personal knowledge; (2) the witness is in a better position than the trier of fact to form the opinion; (3) the witness has the necessary experiential capacity to make the conclusion; and (4) the opinion is a compendious mode of speaking and the witness could not as accurately, adequately and with reasonable facility describe the facts she or he is testifying about.

73 For examples in the ETA context, see *Betterest Vinyl* (1989), 52 CCC (3d) 441, where the BCCA held that admitting copies authenticated as true copies by the CRA did not offend the best evidence rule, and *The Queen v. Clarkson*, [1999] 2902 ETC.

74 Note the prior discussion on the exclusion of certain evidence found to have been improperly seized from a taxpayer in violation of the taxpayer’s Charter rights.

75 For a recent Supreme Court of Canada case putting administrative policy into its proper perspective, see *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, 2006 SCC 20. There, the Court indicated although administrative practice can be an “important factor” in case of doubt about the meaning of legislation, it is not determinative, citing itself *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at p. 37.

76 *Statutory Interpretation Theory and Practice*, Randal N. Graham (Toronto: Emond Montgomery Publications Limited, 2001) at p.87.

77 *Ibid.* at p.91

78 Pierre-André Côté, *The Interpretation of Legislation in Canada* Second Edition (Cowansville Québec: Les Éditions Yvon Blais Inc., 1992) at p. 264.

- 79 *Dreidger*, at page 159.
- 80 *Hill v. William Hill (Park Lane) Ltd.*, [1949] A.C. 530 (H.L.)
- 81 *Driedger on the Construction of Statutes*, Third Edition, Ruth Sullivan (Toronto: Butterworths, 1994) at pages 88 and 156-58.
- 82 *The Queen v. Tom Baird & Associates Ltd.*, (1997) 140 F.T.R. 295 (FCA) at pp.205-207 (1996) 120 F.T.R. 218 (FCTD) at pp.224-225. See also *Jake Friesen v. Her Majesty The Queen* [1995] 3 S.C.R. 103 at para 27 and Côté, Pierre-André, *The Interpretation of Legislation in Canada* Second Edition (Cowansville Québec: LesÉditions Yvon Blais Inc., 1992) at page 231 citing *Thompson v. Goad & Co.*, [1910] A.C. 409, at 420 per Lord Mersey.
- 83 *Heydon's Case*, (1584) 76 E.R. 637.
- 84 *Grand Truck Railway Co. of Canada v. Hepworth Silica Pressed Brick Co.* (1915) 51 S.C.R. 81.
- 85 *Interpretation Act*, section 12 R.S.C. 1985, c. I-21, as amended; *Barrie Public Utilities v. Canadian Cable Television Assn.*, [2003] 1 S.C.R. 476 at para. 20; *Bell ExpressVu Limited Partnership v. The Attorney General of Canada*, [2002] 2 S.C.R. 559 at para. 26.
- 86 See *General Motors Acceptance Corp. of Canada Ltd.*, [1999] 4 C.T.C. 2251(TCC). Note that alternative pleadings are now seemingly implied in the Tax Court Rules, which permit the pleading of inconsistent allegations where it is clear that they are being pleaded in the alternative:

Rule 51(2) – A party may make inconsistent allegations in a pleading where the pleading makes it clear that they are being pleaded in the alternative.

(3) An allegation that is inconsistent with an allegation made in a party's previous pleading or that raises a new ground of claim shall not be made in a subsequent pleading but by way of amendment to the previous pleading.