Tax Court of Canada

Cour canadienne de l'impôt

5th International Assembly of Tax Judges

Protection of the Taxpayer in Court

Panel Presentation:

Introduction of Topics

and

Privacy Protection of Taxpayers

Date: October 24th , 2014

Location: Federal Judicial Centre,
1 Columbus Cir NE,
Washington, D.C 20544

Presented by:

The Hon. Justice Randall S. Bocock
Judge, Tax Court of Canada
With valuable drafting assistance from
Stephen Hawkshaw, Esq.

Index

SECTION A:

SECTION B:

SECTION A

General Introduction: Protection of the Taxpayer in Court

What does this topic mean - why do taxpayers appear in court?

Generally taxpayers come to tax courts because such courts provide an independent, fair, and impartial review of the assessment decisions of fiscal authorities. Appearing in court is not without risks for the taxpayer. Tax disputes are complex, expensive and time consuming. Even where successful, a taxpayer's day in court may result in costs in excess of the relief sought. When unsuccessful, the taxpayer frequently faces the risk of being assessed costs.

Another risk is the risk to personal privacy and security of information. Tax disputes often involve sensitive financial and personal information. This information will be discussed in open court and entered into the court record which is generally available for the public to view. Any decision by the court will also be public.

Additionally, there is the risk that a taxpayer with a meritorious case may lose due to lack of knowledge of the law, rules of court, or rules of evidence. By example, the common law system is an opaque mix of statute and case law. Tax codes frequently put the onus of proof onto the taxpayer instead of the state. In addition, many collection remedies available to the state have been described by the Courts as draconian.

Finally, the expense of litigation causes many taxpayers to represent themselves or have a non-lawyer act as representative. Usually, the government is represented by state provided representatives who specialize in tax litigation. This also creates a significant mismatch in skill, knowledge, and ability to prepare a case.

Whose obligation is it to protect the taxpayer in court?

There are three parties in the court process. Arguably each has an obligation to protect the taxpayer, in some fashion in court. First, there is the taxpayer, who may or may not have counsel. Obviously it is counsel's role to protect the client. Second there is the state representative. Government counsel are required to advocate their position, but are also normally required to insure the process is fair and impartial as part of a duty to promote the cause of justice. This duty is slightly different than that of a legal counsel in private practice. This would include bringing relevant case law or evidence to the attention of the presiding judge that would aid the taxpayer's case. Government lawyers also (arguably) have the discretion to settle cases or to chose not to pursue a case.

Finally, judges are required to give a fair and impartial hearing as our court registry staff. The court is in a difficult position where it must maintain its impartiality, but also provide a fair hearing to ill-equipped parties. This includes both procedural fairness and substantive fairness.

Are tax courts responsible, appropriate or capable of the task?

Defining where and when a court should aid a taxpayer is a difficult proposition. It may vary based upon the type of taxpayer (self-represented, educational level, age, experience) or the type of case (simple versus more complicated). It may also vary based upon the particular tax provision or legislation at issue. Some collection remedies or procedural aspects of the certain legislation (in the Canadian tax context for example: the *Income Tax Act* time limits, proof of service, section 160 non arm's length transfers) are intentionally drafted in the FISC's favour. A result may appear unjust on the facts, but correct at law. Should judges accept that their hands are tied or do they push a more 'creative' solution, if permitted?

Courts are capable of protecting taxpayers through their control of the litigation process at trial, the rules of court, sanction for certain behaviours, and moral suasion of the bar either informally or *obiter dicta*. A significant limit to the power of the courts is funding. Courts may be independent, but if they do not control their own funding they must rely upon the bar or the government to fund programs such as duty counsel, *pro bono* or legal aid. Funding issues may also limit courts on accessibility issues, e-filing, filing deadlines and other trial resources for taxpayers who are coming to the court without a lawyer.

SECTION B:

Presentation: Protection of Taxpayer privacy, goodwill/reputation and confidential proprietary information

Since this topic is expansive and jurisdictionally specific, necessarily it will be limited in scope to the Canadian context in order to provide some issue identification and to prompt broader discussion. The paradox of personal information disclosure is clear:

> *By instilling confidence in taxpayers that the personal information they disclose will not be communicated in other contexts, Parliament encourages voluntary disclosure of this information. The opposite is also true: if taxpayers lack this confidence, they may be reluctant to disclose voluntarily all of the required information…*[1]

What is privacy?

United States Supreme Court Justice Louis Brandeis defined privacy as the "right to be let alone — the most comprehensive of rights and the right most valued by civilized men."[2] He was drawing on his earlier article on the same topic.[3] In a similar vein, but much later, the Supreme Court of Canada stated that privacy is "essential for the well-being of the individual"[4] and "[grounded] in man's physical and moral autonomy" and required to maintain the democratic state.[5] The right to privacy is highly contextual and "protean".[6]

However, a taxpayer seeking to protect his or her privacy while maintaining an action in a tax court is faced with an uphill battle. First, even though the protection of taxpayer information and privacy is fundamental to the operation of a self-administering tax system, there appears to be a general consensus among OECD countries that taxpayers have a low expectation of privacy concerning their tax information.[7]

---

[1] *Slattery (Trustee of) v Slattery*, [1993] 3 SCR 430, 106 DLR (4th) 212 at 444.
[2] *Olmstead v United States*, 277 US 438 at 479.
[3] Arguably first articulated by Warren & Brandeis in "The Right to Privacy" Harvard Law Review, Vol. IV December 15, 1890 No. 5. There are a number of privacy related torts in the U.S. which have very recently migrated north into Ontario – see *Jones v. Tsige*, 2012 ONCA 32 and *Hopkins v. Kay*, 2014 ONSC 321
[4] *R v Dyment*, [1988] 2 SCR 417, 55 DLR (4th) 503 at para 28.
[5] Ibid.
[6] *R v Tessling*, 2004 SCC 67, [2004] 3 SCR 432 at para 25.
[7] OECD, "Taxpayers' rights and obligations – A survey of the legal situation in OECD countries" (Paris: OECD, 1990).

Second, the privacy rights of individuals are generally superseded by the right of the public to open courts; the public is free to attend court proceedings and free to access the court record and exhibits that underlie a judicial decision.

Advancements in technology and threats to privacy

Privacy protection is afforded to litigants through "practical obscurity". Even though courts and records are open to the public, information is not easily available to the larger public as it presently tends to be in paper form, not easily searchable and copying limited by fees.

Technology has the capability to remove many such practical barriers to access. As courts shift to electronic filing and electronic dockets, leafing through paper files is and will no longer be necessary. Many courts have procedures that afford bulk electronic access to case files. While electronic access to courts and court records may help provide equality of access, providing information online may represent a tipping point from providing access to the public to publicly publishing information.

Tension and conflict of open and public process with privacy

> *In my view, curtailment of public accessibility can only be justified where there is present the need to protect social values of superordinate importance.*[8]

The right of the public to open courts is well established in most of common law and civil law world. In Canada (which is bi-jural to this extent) and elsewhere it has been codified. In order to enable scrutiny of judicial decision, the public requires transparency and access to court records. As such, it is rare for an individual's privacy rights to override the right to open courts in matters not involving sensitive child, family or state information.

In previous eras, the tension between taxpayer privacy and an open court system was not considered (by the Courts) to be an issue. In *Snider*, Justice Rand stated:

> The disclosure of a person's return of income for taxation purposes is no more a matter of confidence or secrecy than that, say, of his real property which for generations has been publicly disclosed in assessment rolls. It is in the same category as any other fact in his life and the production in court of its details obtained from his books or any other source is an everyday occurrence.
>
> The most confidential and sensitive private matters are daily made the subject of revelation before judicial tribunals and it scarcely seems necessary to remark on the relative insignificance to any legal

[8] *The Attorney General of Nova Scotia and Ernest Harold Grainger v. Linden MacIntyre*, 1982 CanLII 14 (SCC), [1982] 1 S.C.R. 175.

> or social policy of such a fact as the income a man has been able to produce.[9]

The combination of a low expectation of privacy in tax records and a correspondingly strong right of public access to courts means that taxpayer privacy almost always loses in a contest between the two.

Sealed files and records and closed sessions of the Court

> *In the darkness of secrecy, sinister interest and evil in every shape have full swing…*

Given the open court principle and the sealing of files and records, the holding of closed sessions of a Court is generally a rare occurrence and a matter of last resort. In order to obtain an order restricting public access to court and court records, a litigant must convince a judge that:[10]

> (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

In rare circumstances, court rules or statutory provisions may also allow an application for a closed court. Excluding the public from court is usually only justified when there is some pressing need such as the protection of children or victims of sexual crimes or to insure a fair trial. Even in courts such as family Court, where court records relating to child custody are not public by default, the court proceedings themselves tend to remain public.[11]

Since either the sealing of records or closed courts are seen as exceptional remedies, any shift by a tax court in a common law system to the routine sealing of records or closed courts would be challenged as a violation of the open court principle.

---

[9] *R v Snider*,[1954] SCR 479, 54 DTC 1129 at 484.
[10] *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41.
[11] See for example Court Services Division Policies and Procedure on Public Access to Court Files, Documents and Exhibits (MAG Ontario) at page 15 which is representative of court access policies across the country. Online at:
<http://www.attorneygeneral.jus.gov.on.ca/english/courts/policies_and_procedures/public_access/public_access_to_court_documents-EN.pdf>

Redaction

A far more common tool for protecting taxpayer privacy is redaction. Redaction is an effective tool for protecting personal identifiers such as, state benefit identification numbers, dates of birth, addresses, names of children, bank account numbers, or signatures. This form of information, while consistently present in customary documentary evidence, is not required for judicial decision-making and removing it does not conflict with the open court principle.

Redaction provides some protection against identity theft or stalking. However, the ability to cross-reference information in large databases may reduce the effectiveness of redaction. Commercial data aggregators (perhaps ironically owned by Lexis and Westlaw for instance) maintain extensive databases of personal information including court records and have the ability to search for matches between those databases.

Other measures for the protection of privacy

Self-help remedies by the parties

It is possible for counsel to craft agreed statements of fact and joint books of evidence which redact non-relevant areas that the parties wish to keep private. This requires cooperation between the parties and is further complicated in the case of self-represented clients.

Tiered Access

It is possible to preserve some aspects of practical obscurity by creating two copies of a court record. One full copy would be kept internally at the registry while a second redacted copy would be available to the public electronically. However, this comes with the administrative cost of maintaining two records and training staff with two protocols. It also raises the issue of who pays for and who does the redaction. If it is the responsibility of the parties, then the cost of going to court is increased. If it is the responsibility of the court, then this must be funded from the public purse.

Fees and Tracking Access

An additional tool to discourage frivolous access to court records is to charge a fee to non-parties and to track access to such files. Fees set up a financial barrier to access (and perhaps a funding mechanism for courts). Tracking access may discourage 'leaks' of sensitive information and allows courts to track who is looking at what. One issue with tracking access is whether or not courts can (or should) disclose who is looking at court records.[12]

---

[12] Most recently and most publicly this was an issue with former Minister Vic Toews. The court disclosed who had accessed the Minister's divorce filings: http://www.teresascassa.ca/index.php?option=com_k2&view=item&id=100:troubling-court-order-raises-privacy-concerns&Itemid=80#

Conclusion

Courts must be increasingly vigilant to insure that taxpayer accessibility and confidence in the confidentiality of sensitive personal information do not become greater impediments to taxpayers seeking to utilize tax court processes. Sensitive financial information in the present age may quickly and punitively be used for nefarious purposes. Courts, given their primary dedication to justice, should take reasonable steps to ensure they are not unwitting enablers of harm by inadvertent and unnecessary disclosure of sensitive personal information.

Bibliography

Case law on taxpayer privacy

R v. Snider, [1954] SCR 479, 54 DTC 1129

Glover [1981] 2 SCR 561, [1982] CTC 29. Kidnapping of child by non-custodial parent. Taxpayer's location known to CRA through tax returns. Custodial parent not entitled to information from CRA.

Gernhart v Canada, [2000] 2 FC 292, [2000] 1 CTC 192 (FCA). Charter privacy challenge involving the Tax Court Rules and public disclosure of taxpayer information.

R v McKinlay Transport Ltd, [1990] 1 SCR 627, [1990] 2 CTC 103. SCC jurisprudence on low expectation of privacy in taxpayer information.

Alberta (Attorney General of) v. Krushell, 2003 ABQB 252 Individual seeking bulk access to criminal dockets for commercial resale.

Secondary Sources

André Gallant, "The Tax Court's Informal Procedure and Self-Represented Litigants: Problems and Solutions" CTJ 2005 vol 53 no 2 333.

Beverley McLachlin, "Courts, Transparency and Public Confidence - To the Better Administration of Justice" [2003] DeakinLawRw 1; (2003) 8(1).

Chantal Bernier (Assistant Privacy Commissioner of Canada), Canadian Institute for the Administration of Justice National Roundtable (Montreal, May 28, 2010) online: < http://www.priv.gc.ca/media/sp-d/2011/sp-d_20111109_e.asp>

Colin Campbell, "Access to justice in income tax appeals" UNBLJ 63 (2012): 445

Former Chief Justice Bowman, “Pro Bono Representation, Legal Aid and the Self-Represented Litigant in the Tax Court of Canada” IATJ Newsletter vol. XII March 2014.

Freidland, Jonathon. “The Trouble with Tax” BBC (21 October 2003), online: http://www.bbc.co.uk/radio4/history/longview/longview_20031021.shtml. Discusses British view of taxpayer privacy when first income tax was implemented. See also <http://www.hmrc.gov.uk/history/taxhis1.htm

Daniel J. Solove, Access and Aggregation: Public Records, Privacy and the Constitution, 86 Minn. L. Rev. 1137 (2002). Paper on data aggregators.

Jennifer Stoddart (Privacy Commissioner of Canada) Open Courts and Privacy - Privacy Law in Canada Remarks at the Supreme Court of British Columbia Education Seminar
November 9, 2011 online: <http://www.priv.gc.ca/media/sp-d/2010/sp-d_20100528_cb_e.asp>

National Center for State Courts (USA)

The American State and Federal court systems have published extensively with regards to privacy and access to courts. It has been collected here:
<http://cdm16501.contentdm.oclc.org/cdm/landingpage/collection/accessfair>

Public Access to Court Records: Reducing the Risk of Disclosure of Personally Identifiable Information:
<http://cdm16501.contentdm.oclc.org/cdm/ref/collection/accessfair/id/206>

Canadian Judicial Counsel

The CJC also has a series of papers on the subject:

2003: <http://www.cjc-ccm.gc.ca/cmslib/general/news_pub_techissues_OpenCourts_20030904_en.pdf>

2005: <http://www.cjc-ccm.gc.ca/cmslib/general/news_pub_techissues_AccessPolicy_2005_en.pdf>

2013: <http://www.cjc-ccm.gc.ca/cmslib/general/AJC/Policy%20Framework%20to%20Accommodate%20the%20Digital%20Environment%202013-03.pdf>