

Judicial system of Canada

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The legal remedies in the Canadian tax system

1. The instances (legal forms)

1.1. The constitutional framework

According to Canada's Constitution, particularly the *Constitution Act, 1867*, jurisdiction over the judicial system in Canada is divided between the federal government and the provincial governments. The provinces are given jurisdiction over "the administration of justice" in the provinces, which includes "the constitution, organization and maintenance" of the courts, both civil and criminal, in the province, as well as civil procedure in those courts. The power to appoint the judges of the superior courts in the provinces, which includes the provincial courts of appeal as well as the trial courts of general jurisdiction, is, however, given to the federal government, as is the obligation to provide for the remuneration of those judges and the authority to remove them.¹

The federal government is also given the authority under the Constitution to establish general courts of appeal and other courts to administer the laws of Canada. As such, the federal government has created the Supreme Court of Canada, as well as the Federal Court of Appeal, the Federal Court and the Tax Court of Canada. The Federal Court and Federal Court of Appeal deal with matters that fall under federal legislation. In addition, they have the power of judicial review with respect to decisions of federal administrative tribunals. The federal government also has, as part of its jurisdiction over criminal law, exclusive authority over the procedure in courts of criminal jurisdiction.

1.2. Organization of the courts

1.2.1. In general

The courts in Canada are organized into a four-tiered structure. The Supreme Court of Canada is at the highest level. It hears appeals from both the federal court system, headed by the Federal Court of Appeal and the provincial court systems, headed in each province by that province's Court of Appeal.

¹ See Supreme Court of Canada website, *About the Court, The Canadian Judicial System*, http://www.scc-csc.gc.ca/AboutCourt/system/index_e.asp.

The next level down consists of the Federal Court of Appeal and the various provincial courts of appeal.

The third level consists of the Federal Court, the Tax Court of Canada and the provincial and territorial superior courts of general jurisdiction. These latter courts are the only courts in the system with inherent jurisdiction in addition to jurisdiction granted by federal and provincial statutes.

At the lowest level are the courts typically described as provincial courts. These courts are usually divided within each province into various divisions defined by the subject matter of their respective jurisdictions such as a Family Division, a Criminal Division, etc.

There are approximately 750 court locations in Canada. The Supreme Court of Canada sits only in Ottawa, although teleconferencing facilities to locations across the country are available. The other three federally established courts, the Federal Court of Appeal, the Federal Court and the Tax Court of Canada, altogether have offices at seventeen permanent locations. The provincial and territorial courts sit at over 700 locations. These include 15 permanent provincial and territorial appellate court sitting locations - one in each province and territory except for Quebec and Alberta, which have two each.

1.2.2. The Supreme Court of Canada

The Supreme Court of Canada was constituted in 1875. The Supreme Court is a general court of appeal from all other Canadian courts of law. It, therefore, has jurisdiction over disputes in all areas of the law, including constitutional law, administrative law, criminal law and private law. In most cases, appeals are heard by the Court only if leave is first given. Such leave will be given by the Court when a case involves a question of public importance, or if it raises an important issue of law or of mixed law and fact, or if the matter is, for any other reason, of such a nature or significance as to warrant consideration of the Court. Leave to appeal to the Court may also be given by a federal or provincial appellate court.

The Supreme Court also has a special kind of "reference" jurisdiction, original in character, given by s. 53 of the *Supreme Court Act*. The Governor-in-Council may refer to the Court, for its opinion, important questions of law or fact concerning the interpretation of the Constitution, the constitutionality or interpretation of any federal or provincial legislation, or the powers of Parliament or of the provincial legislatures or their respective governments or any other important question of law or fact concerning any matter. In light of the broad scope of the Supreme Court of Canada's jurisdiction, the Canadian judicial system differs from that of many continental European and Latin and South American countries, where it is not unusual for there to be separate courts of last

resort for both constitutional law and administrative law cases in addition to a general court of appeal.

1.2.3. Federal Courts

The Federal Court of Appeal and the Federal Court are the successors of the appeal and trial divisions of the Federal Court of Canada, which in 1971 succeeded the Exchequer Court of Canada, which itself was created in 1875 and had jurisdiction only over revenue, the Crown in Right of Canada as litigant, industrial and intellectual property, admiralty and other subject matters regulated by federal legislation. The Federal Court also has the power of judicial review with respect to decisions of federal administrative tribunals and jurisdiction over claims in regards to several other matters falling within federal legislative jurisdiction, including inter-provincial transportation and communication undertakings, bills of exchange and aeronautics.

1.2.4. Tax Court of Canada

The Tax Court of Canada was established in 1983 and has as its primary responsibility the hearing of appeals in the area of income tax and goods and services tax. Its predecessor, the Tax Review Board, was an administrative tribunal.

1.2.5. Provincial and territorial superior courts

The superior courts of each province and territory include both a court of general trial jurisdiction and a provincial court of appeal. Their jurisdiction is not limited to matters over which the provincial governments have legislative jurisdiction. These courts have jurisdiction over disputes arising in many of the areas over which the federal government is granted legislative jurisdiction in the *Constitution Act, 1867* - for example, criminal law and banking. Moreover, the power to decide disputes in such areas does not have to be explicitly assigned to these courts by the federal government in order for these courts to have jurisdiction over them.

1.2.6. Provincial and territorial courts

Although at the bottom of the hierarchy, these courts handle the overwhelming majority of cases that come into the Canadian court system. They deal with a broad range of criminal matters, much of the litigation in the area of family law, and all of the civil litigation in which the amount at issue is relatively small.

1.2.7. Administrative Tribunals

Although not formally part of the Canadian judicial system, because they are not in a formal sense "courts", administrative tribunals are an important component of the system that has been created in Canada by the government to resolve

disputes. They operate in areas such as labour relations and human rights. These tribunals are normally given wide discretion and therefore the courts need to show deference to these tribunals in reviewing their decisions. In regards to some of these administrative tribunals, the courts are limited in their supervisory jurisdiction to ensuring that the tribunals do not exceed the jurisdiction given them by their enabling statutes.

2. Administrative phase²

A taxpayer has the right to an administrative appeal of a (re)assessment issued against them, which is called an objection. Such a (re)assessment could, for example, be issued following an audit, upon a taxpayer request for an adjustment or upon processing a tax return.

The time limit for filing a Notice of Objection is generally 90 days from the date the tax authorities mailed the Notice of (Re)assessment. It is possible to apply for an extension of time within one year of the date that the objection was supposed to be filed.

A Notice of Objection can be filed on the internet through the “My Account” feature, by writing a letter to the Chief of Appeals in the taxpayer’s area, or by using a form designated for this purpose.

An appeal against an income tax (re)assessment suspends collection of the tax owing, but does not stop the accumulation of interest. An appeal against an assessment regarding the goods and services tax does not suspend collection unless a request is made and there are justifications for the suspension of collection.

Once an objection is filed, it is usually assigned to an appeals officer within 6 months. The appeals branch is a completely separate division from the audit division. The appeals officer is to make a fair and impartial review of the matter.

As a result of the review, the appeals officer may uphold the (re)assessment by issuing a Notice of Confirmation or vary the (re)assessment by issuing a new reassessment.

3. The Courts

3.1. The Tax Court of Canada³

As indicated in 1.2.4. above, the Tax Court of Canada was established in 1983 with a view to dispensing justice in tax matters. The Court is independent of the

² For more information see *Resolving Your Dispute: Objection and Appeal Rights Under the Income Tax Act*, www.cra-arc.gc.ca/E/pub/tg/p148/p148-07e.pdf.

³ For more information see the Tax Court of Canada website at www.tcc-cci.gc.ca.

Canada Revenue Agency and all other departments of the government of Canada.

The Tax Court of Canada is a superior court to which individuals and companies may appeal to settle disagreements with the government of Canada on matters arising under legislation over which the Court has exclusive original jurisdiction. The Tax Court of Canada (under section 12 of the Tax Court of Canada Act) has exclusive original jurisdiction to hear and determine appeals and references to the Court on matters arising under the following Acts: *Income Tax Act*, *Employment Insurance Act*, Part IX of the *Excise Tax Act* (GST), *Canada Pension Plan*, *Old Age Security Act*, *Petroleum and Gas Revenue Tax Act*, *Cultural Property Export and Import Act*, *Customs Act* (Part V.1), *Air Travellers Security Charge Act*, *Excise Act, 2001*, *Softwood Lumber Products Export Charge Act, 2006*. It also has exclusive original jurisdiction to hear and determine appeals on matters arising under the *War Veterans Allowance Act* and the *Civilian War-related Benefits Act* and referred to in section 33 of the *Veterans Review and Appeal Board Act*. Most of the appeals made to the Court relate to income tax, the goods and services tax or employment insurance. There are approximately 26 judges. They must have practiced law for at least 10 years (or a combination of law and judicial work), but there is no specific requirement that they have a tax background. The judges live in Ottawa but attend hearings at various locations throughout the country.

3.2. The Federal Court of Appeal

An appeal from a decision of the Tax Court of Canada with respect to income tax and goods and services tax matters is made to the Federal Court of Appeal. The Federal Court of Appeal is a court established by Parliament in accordance with the provision of section 101 of the Constitution Act, 1867, "for the better administration of the laws of Canada".

The Court has the jurisdiction to hear and determine judicial review applications from the federal boards, commissions and tribunals set out in Para. 28(1)(a) through (p) of the *Federal Courts Act*. The Federal Court of Appeal also has the jurisdiction to hear and determine appeals from any final judgment, judgment on a question of law determined before trial, or interlocutory judgment of the Federal Court or the Tax Court of Canada pursuant to section 27 of the *Federal Courts Act*.

The Federal Court of Appeal also has a statutory appellate jurisdiction. For example, the Federal Court of Appeal has exclusive appellate jurisdiction over the Competition Tribunal, ¹the Canadian Radio-television and Telecommunications Commission and the Canadian Transportation Agency.

There is a Chief Justice and currently 13 additional judges. The Federal Court of Appeal is a bi-jural court, administering the two legal systems - common law and civil law. The Court is itinerant, in the sense that it sits and transacts business at

any place in Canada, to suit, as close in proximity as may be, the convenience of the parties.

3.3 The Supreme Court of Canada

An appeal from a decision of the Federal Court of Appeal on income tax and goods and services tax matters is made to the Supreme Court of Canada. It is comprised of a Chief Justice and eight puisne judges (puisne meaning ranked after), with a minimum of three judges coming from Quebec. The Court sits in Ottawa.

4. Appeal (with reference to point 3)

4.1. Tax Court of Canada

A taxpayer has 90 days from the date of the tax authorities' decision on review of the objection in which to appeal to the Tax Court of Canada. A taxpayer may also appeal to the Tax Court of Canada if the tax authorities do not respond to the Notice of Objection within 90 days in an income tax case or 180 days in a GST case. There are two types of procedures for appealing to the Tax Court of Canada: the General Procedure and the Informal Procedure.

4.1.1. General Procedure

Under this procedure, formal court procedures are closely followed and many procedural rules are applied throughout the appeal process.

When appealing under the General Procedure, a taxpayer may represent himself or be represented by a lawyer. A corporation must be represented by a lawyer unless the Tax Court of Canada grants a request allowing an officer of the corporation to represent it.

An appeal is commenced by submitting the original and two copies of a notice of appeal, together with the appropriate filing fee, to the Registry at a Tax Court office.

Under the General Procedure, the notice of appeal must follow a standard format. A party who files an appeal under the General Procedure must pay the following filing fees at the time of filing the appeal:

- where the amount in issue is less than CAD 50,000 the fee is CAD 250;
- where the amount in issue is CAD 50,000 or more but less than CAD 150,000 the fee is CAD 400; and
- where the amount in issue is CAD 150,000 or more the fee is CAD 550.

4.1.2. Informal procedure

The Informal Procedure is intended to minimize the legal steps involved in the appeal process. For income tax appeals the Informal Procedure is limited to cases in which the amount of federal tax and penalties in dispute for each taxation year, excluding interest, is CAD 12,000 or less. For GST appeals, on the other hand, there is no limit to the amount in dispute.

When the amount in dispute in an income tax case is greater than CAD 12,000, a taxpayer who wishes to choose the Informal Procedure must limit the amount under appeal to CAD 12,000; otherwise the General Procedure applies.

A taxpayer may represent himself or be represented by a lawyer or by an agent, such as an accountant or a relative. There is no required format for the notice of appeal; however, there are requirements as to the information that must be included. The filing fee for an informal procedure matter is CAD 100. It is reimbursed if the appeal is allowed.

4.1.3. Rules applicable to both types of appeal

Costs may be awarded to either party depending on the outcome. They can be party and party costs based on a tariff or a lump sum amount, or in special cases, the Court may award solicitor-client costs. In determining costs the Court may consider a number of factors including any settlement proposals made by either party. If the amount in dispute is more than CAD 7,000 in an informal procedure GST case, no costs can be awarded.

There are no special procedures for international tax cases. It should also be noted that there is no procedure for bringing hypothetical cases before the court. In order to appeal there must be a (re)assessment and the (re)assessment must have been previously objected to. Further there is no possibility to join cases in a class action. It can be arranged to have a number of related appeals heard at the same time. Alternatively, in some situations, a test case is chosen by the parties and the outcome is applied to cases being held in abeyance. There is no provision for an amicus curiae brief to be filed, however, the parties are free to call expert witnesses.

4.2. Federal Court of Appeal

An appeal from a decision of the Tax Court of Canada regarding income tax and goods and services tax can be filed with the Federal Court of Appeal. No leave to appeal is required. The appeal must be filed within 30 days, not including any days in July and August, after the pronouncement of the judgment or determination appealed from or within any further time that a judge of the Federal Court of Appeal may fix or allow before or after the end of those 30 days. The fee to issue a notice of appeal is CAD 50. An individual may represent himself or be represented by a lawyer. A corporation must be represented by a lawyer unless

the court gives leave for the corporation to be represented by an officer of the corporation.

There is a specified form that the notice of appeal must take, which is set out in the rules.

Costs may be awarded to either party depending on the outcome. They can be party and party costs based on a tariff or a lump sum amount, or in special cases, the Court may award solicitor-client costs.

There are no special procedures for international tax cases. It should also be noted that there is no procedure for bringing hypothetical cases before the court. In order to appeal there must be a (re)assessment and the (re)assessment must have been previously appealed to the Tax Court of Canada. It is possible to obtain certification to file a class action suit under the Federal Court rules, however, this is rarely used. Alternatively, in some situations, a test case is chosen by the parties and the outcome is applied to cases being held in abeyance. There is no provision for an *amicus curiae* brief to be filed, however, the parties are free to call expert witnesses.

4.3 Supreme Court of Canada

In order to appeal a decision of the Federal Court of Appeal to the Supreme Court of Canada, the taxpayer must apply to the Supreme Court of Canada for leave to do so. Leave can also be requested from the Federal Court of Appeal itself. The *Supreme Court Act* states that an application for leave to appeal may be granted if the Supreme Court of Canada finds that the case raises an issue of public importance and should be decided by the Supreme Court of Canada. The case must raise an issue that goes beyond the immediate interests of the parties to the case. Applications for leave to appeal are usually decided by a panel of three judges of the Supreme Court of Canada. An individual can be self-represented or have a lawyer. A corporation can only be represented by an officer if it previously obtained permission from a court to do so or the Supreme Court of Canada grants permission. There is a form to be used to file an application for leave to appeal, but a taxpayer can format it differently provided certain information is included. The application must be filed within 60 days of the date of the Federal Court of Appeal's judgment. There is a court fee of CAD 75 to file a leave application. The Court or a judge may appoint an *amicus curiae* in an appeal.

5. Procedure

5.1. Tax Court of Canada

With respect to informal procedure appeals the procedure is simplified. Once the notice of appeal is filed, the crown has 60 days to file a reply to the notice of appeal. The hearing is usually scheduled within 180 days. It is a public hearing.

With respect to General Procedure appeals the process takes somewhat longer. The crown again has 60 days to file a reply to the notice of appeal. There are then a number of interim steps before the appeal is heard such as the provision of lists of documents, examinations for discovery, status hearings, a pre-trial conference (in certain cases) and often a number of interlocutory motions. The examination for discovery may take the form of an oral examination or, at the option of the examining party, an examination by written questions and answers, but the examining party is not entitled to subject a person to both forms of examination except with leave of the Court. Once discoveries are completed and the parties have satisfied any undertakings arising from the examinations, a requisition for hearing is filed and a date is set by the court. The hearing is a public hearing. Unlike the informal procedure, lawyers are required to gown for the hearing. The rules of evidence and procedure are more strictly followed during the hearing.

Under either procedure the onus is on the taxpayer to prove that the tax authorities' assumptions of fact set out in the reply to the notice of appeal are incorrect. Although it is up to the parties to provide evidence the court may also ask questions of the witnesses and may address matters not referred to by the parties and may ask the parties to deal with specific matters. The government is represented by the Department of Justice lawyers. The hearing is heard before a single judge. There is no specific time set for hearing of the judgment. It is usually provided to the parties at a later date in writing or may be given orally after the hearing, followed by a written judgment.

5.2. Federal Court of Appeal

Once the appeal is filed, the crown has 10 days to file a notice of appearance or to cross-appeal. There are then a number of interim steps before the appeal is heard such as agreeing in writing as to the documents, exhibits and transcripts to be included in the appeal book and the preparation, service and filing of the appeal book and memorandums of fact and law. Once a hearing requisition is filed a date is set by the Court. At least 30 days before the hearing the parties are to file a joint book of authorities, or if they cannot agree, separate books of authorities. No new evidence is generally heard on appeal. The parties make oral argument before a panel of judges, usually 3. The hearing is in open court. The judges are very active and frequently ask the parties to address matters not referred to by either party. The tax authorities are represented by the Department of Justice. The hearing usually lasts ½ a day. No specific time is normally set for hearing the judgment. The standard of review with respect to findings of law is correctness. The court will not interfere with findings of fact unless the lower court judge made a palpable or overriding error. The Federal Court of Appeal can dismiss the appeal or give the decision that should have been given, or, in its discretion, refer the matter back for determination in accordance with such directions as it considers to be appropriate.

6. Decision (with reference to point 3)

There is no fixed structure for decisions of any of the courts. Decisions of the lower courts must be sufficiently intelligible to permit appellate review of the correctness of the decision. The findings of fact of the trial judge need to be clearly set out. The decision will be in the language of the hearing, which can be English or French. With regards to Federal Court of Appeal decisions the outcome depends on the majority. Dissenting opinions are also published. Decisions are not required to be a specific length. All decisions are made publicly available. It should be noted, however, that with respect to Tax Court decisions only general procedure decisions are precedential. Stare decisis applies to the other courts with respect to decisions of the same level or of a higher level.

7. Supreme Court of Canada

A panel of Supreme Court judges presides over each hearing. The panel must be composed of at least 5 judges. The standard of review of a decision of the Federal Court of Appeal is correctness. The Supreme Court provides a summary of the facts of the lower court in the decision. There is no particular structure that must be applied to all decisions. The decision can be in either French or English depending on the language of the trial. Dissenting decisions are also given and are published. Stare decisis applies to all Supreme Court decisions. All Supreme Court of Canada decisions are published. The Court may dismiss an appeal or give the judgment and award the process or other proceedings that the court whose decision is appealed against should have given or awarded. The court may also, in its discretion, order a new trial if the ends of justice seem to require it. Further, the court may, in its discretion, remand any appeal or any part of an appeal to the court appealed from or the court of original jurisdiction and order any further proceedings that would be just in the circumstances.