The difficulties to be overcome in devising a satisfactory method of handling appeals from tax assessments are a challenge to the legal profession. In common with all taxpayers we are interested in questions of tax policy and principle. In that field our opinions will carry weight according to their merit, although lawyers are less well equipped by training and experience than are many others to contribute to ultimate wisdom. When, however, policy and principle have become fixed in a statute or regulation, problems of a different type arise. With respect to these, our legal background gives us a position of marked pre-eminence. The taxpayer and the tax collector inevitably disagree as to the meaning and application of the written word and it has become customary to settle their differences by an appeal or series of appeals. If any group should have helpful advice and comment to offer in that regard, it is ourselves.

The original appeal procedure survived unchanged for thirty years, but in the three years which have just passed new legislation has made provision for a quite different treatment of tax disputes. The new law was given effect to not quite two years ago and there has hardly been time to discern its faults and good features. My comments are perforce subjective to a rather undue degree.

The Committee of the Senate which met in November of 1945 to examine into the provisions and workings of the Income War Tax Act was heavily weighted with lawyers and its proceedings and conclusions are the clearest evidence of the chief com-

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plaint which our profession had with regard to the administration of the act. Whatever else might have been intended when the committee was set up, it gave overwhelming attention to the problem of redressing the balance between the Department of National Revenue and the taxpayer. Its most important conclusion was that the minister’s discretionary power of interpreting and applying the act must be modified. Its recommendation was that a board should be appointed to sit in appeal over the Minister of National Revenue.

The government acted promptly and affirmatively, but in its own way. A revised act was passed by Parliament in which the minister’s discretion was drastically curtailed. At the same time, the constitutional impossibility of subjecting a minister of the Crown acting in the exercise of a discretion conferred upon him by statute to control by a board was emphasized. An appeal tribunal was appointed notwithstanding (in name a board but constituted a court of record), with unlimited jurisdiction over questions of fact and of law. The government’s actions no doubt were intended for the best, but I feel very strongly that a situation is developing which, if not checked, will throw the whole appeal procedure into a thorough muddle.

At the risk of over simplifying and hence misinterpreting government policy, it may be said that the purpose of the legislation setting up the board was to give effect to a secondary ground of complaint voiced by the committee. Because of the heavy expense involved in proceedings before the Exchequer Court, the risk of being mulcted in costs, the inconvenience and the delays, less than 150 tax appeals had been decided by that court between 1917 and 1947. Not only did the Senate committee have its hatchet out for the minister’s discretion, but it was concerned with the little man and anxious to see that he should have more protection against oppression at the hands of His Majesty’s servants than he had previously enjoyed. The then Deputy Minister of National Revenue pointed out very sensibly that the size of the man had no direct relation to the importance of the question raised by his appeal, but the committee wanted a device which would provide a cheap and expeditious answer to the small taxpayer’s problems and it did not investigate the complications inherent in the board which it recommended.

Throughout the course of the hearings before the Senate committee, there was no criticism of the judges of the Exchequer Court, nor of the wisdom of their judgments. The faults of the court presumably lay in its machinery, but what was recom-
mended and created was a new tribunal which closely resembled the court it was to replace.

If it is asked why a new court was set up to do what an enlarged and streamlined Exchequer Court might have been able to do equally well, the most compelling reason, I think, is that the income tax acts not only deserve but demand a specialized tribunal to deal with the problems arising under them. The case for a separate court is best made by considering the appeals which have been before the Tax Appeal Board to date. Almost without exception they have been taken by individuals and businesses of modest size and they have frequently required an answer to be given to a question of fact. Where questions of law have been involved, they have usually been technical and of narrow application. In several cases, the taxpayer or the officials of the department, as the case may be, had either willfully or obtusely failed to read the plain words of the act and were duly corrected. Some technique to provide quick and inexpensive answers in such cases is essential to the proper functioning of a tax act and the record of the past makes it clear that the Exchequer Court was not providing this service. I suggest, therefore, that one should commend the creation of the board and deplore any steps which will detract from its proper functioning.

There is still the question of why it was thought that a board very similar to the existing court would be able to do what that court had apparently failed to do. There were a number of quite valid reasons for believing that the board would be successful. It would, for instance, have no other activities. It would follow a simplified procedure and others than members of the legal profession would appear before it on behalf of taxpayers.

Amendments to the statute made by Parliament last spring suggest, however, that the board is not living up to expectations at least in the matter of expediting the hearing of appeals. The original legislation contemplated that at least two members would constitute a board for the hearing and determination of an appeal. This has now been reduced to one. The change is a belated recognition of the physical difficulties which face a small group of three (as appointed) or even of five (as authorized) persons, who attempt to cope with tax appeals from one side of Canada to the other.

I have considerable doubt that the remedy will prove satisfactory. A board of three, or even of two, has the advantage over a single adjudicator that the tendency to err on the part of one will be checked by the criticism of the other. If the purpose of the
board is to provide a quick and inexpensive answer to tax questions, everything within reason should be done to minimize the occasion for appeals. Where the activities of a tribunal will be particularly concerned with questions of fact, it is even more advisable that two or more persons should bring their experience to bear on the questions which come before them.

The other amendment last spring was anomalous in that it might have been the expression of a desire to speed up the hearing of appeals or of a feeling that the board as appointed was inadequate in some way. A provision allowing appeals to be taken directly to the Exchequer Court is, in my opinion, a mistake and, if there is any place for it at all, the right should be in the discretion of the court, not of the appellant. It is very doubtful that a tribunal which can be passed over at will can achieve the degree of self-confidence and public esteem necessary for it to serve its proper purpose.

It is a difficult matter to attempt an appraisal of the merits of the board and of the degree to which it has fulfilled the expectations held out for it. Undoubtedly the members of the board have fulfilled the duties assigned to them with zeal and distinction. All who have appeared before the board have been accorded a full, fair and most courteous hearing. The board has displayed a complete freedom from any bias toward the official view and has not set itself up as possessing some public duty to find that tax is payable whenever there is ambiguity in the statute.

My criticisms are directed to the scheme underlying the board’s activities and my first comment related back to the department itself. The actions of its officials might appear to indicate that they are not particularly sympathetic to the idea of numerous appeals to the board. I might be wrong in this and even if I am not too far off, it is also quite possible that the policy of the department may be the right one. My personal opinion is, nevertheless, that every question of fact and of law should be allowed to come before the board within a reasonably prompt time after the assessment, if the taxpayer so desires. This is not to say that there should not be some method whereby the taxpayer and the officials of the department could attempt to settle their differences without resort to litigation. On the other hand, in the tax field, for the time being at least, I feel that there is a good reason for as many cases as possible coming up for hearing and judgment. If the department will neither give rulings nor publish its opinions on the meaning of the statute, how else will the public be able to gain any understanding of the act?
Statistics unfortunately are lacking on the activities of the board. To date, the board has given a decision in about 100 cases. How many judgments have been reserved and how many cases are awaiting argument, I do not know. Assuming that from 200 to 225 cases have been released to the board by the department, there are unofficial reports that well over a hundred appeals a month are filed with the department. How many of these are settled and how many are simply receiving routine attention or none at all is not public information. It should, however, be possible to reduce the period of delay following the filing of a notice of objection until the case is called by the board to much less than the four to six months which is now usual.

A second critical comment has already been mentioned. Three or even five individuals living in Ottawa and Montreal must find it difficult to give prompt attention to tax appeals at places convenient to the taxpayer. The policy that the board should go to the taxpayer was to have been one of its most valuable features and, to the extent that this proves to be impossible, the board will not function satisfactorily.

A third criticism of the operations of the board is with regard to the disposition of appeals from its decisions. The statute provides that an appeal shall be taken to the Exchequer Court. This will mean a trial de novo because the board keeps no transcript of the evidence which was heard by it. The alternative of keeping a full report of the proceedings of the board would involve the heavy expense of preparing a record for the appeal court. The amendment this spring, whatever might have been the reasons which prompted it, has the effect that a taxpayer who would appeal any adverse judgment of the board may open his proceedings with his appeal, so to speak. In passing, it might be suggested that the better advice to a substantial and litigious client would be to start with the board and spy out the government's case so that mistakes could be corrected and defences improved in preparation for a hearing before the Exchequer Court. Whatever the way the game is played, anything less conducive to establishing a strong and effective tax court can hardly be imagined.

Admittedly from the public point of view the appeal problem is not of immediate importance since the department has yet to appeal a decision of the board. It is a bit far fetched to assume that in all the cases it has lost, the department is willing to admit error. A factor in its restraint may be that the decisions of the

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1 Since the address was delivered the department has in fact appealed several adverse decisions.
board to date have been in respect of a dying statute, and few if any other taxpayers will have the opportunity of raising the same point. Decisions adverse to the government under the new act may receive different attention and there is a real risk that proceedings via the Tax Board instead of being cheap and quick may too often turn out to be only the start of long and expensive litigation.

At the beginning of my remarks, I suggested that the legal profession has a responsibility to come forward with comments and suggestions. For what they are worth, I have some proposals to offer which might provide a basis for discussion. First, with regard to the delay, which is not only an aggravation to taxpayers but a clog on the effectiveness of the board, I feel that the statute should be revised to do away with the meaningless reply by the minister to the taxpayer's notice of objection. The minister has already made the assessment and there is little expectation that the receipt of the document from a taxpayer saying that he does not agree with it will have any effect. Whatever purpose the reply was intended to serve by those who drafted the act in 1917, it has since become little more than a waste of time and paper. The taxpayer's first step, I suggest, should be a notice of appeal to the board to be sent by him to the board. The board, upon receiving the notice, should thereupon name the place and date of hearing to be determined by reference to its own calendar.

I do not know of any other instance in which one of the parties to litigation controls the appeal procedure as does the minister under our income tax acts. Section 54 of the Income Tax Act, with its provision that the taxpayer may appeal to the board if the minister does not reply to his notice of objection within 180 days, is merely fatuous, because the minister's reply has become an almost meaningless formality. In any event, under section 80 of the act, the board does not become seized of an appeal until the minister sees fit to forward the notice and relevant documents. I do not think that any appeal scheme can be really satisfactory until the appellate tribunal has full control of its own activities. The present arrangement is based on a wrong principle and assertions that there is no delay in sending appeals on to the board, which will be taken *cum grano salis*, will not make up for it.

There are, however, many cases in which the taxpayer's interest would be well served by discussions with departmental officials with a view to settlement or adjustment. A scheme of district appeal committees would be very helpful and something of that nature, I understand, already exists. I suggest that the depart-
mental machinery for handling appeals, the purpose it is intended to achieve, and the results which may be expected from it, should be given the fullest publicity.

Further steps toward improving the appeal technique must be determined by reference to a complex of factors. A board based in Ottawa cannot have the physical capacity to hear appeals in all parts of Canada. A board which functions through its individual members will run the continual risk of contradicting itself and the more frequently the members sit alone, the more difficult it will be to maintain the standard of its judgments. District boards with ad hoc members will raise similar problems. Behind all these questions stands the problem of further appeals from the board itself.

It will be recognized that these and other questions are all based on two assumptions: first, that the board should have complete jurisdiction to determine all questions of fact and of law arising under the act; the other, that it must be exclusively federal in its character and answerable only to the Exchequer Court. I am prepared to doubt the validity of each of these assumptions.

A board or tribunal, which need not be composed exclusively of lawyers, to settle disputes involving questions of fact and to apply the appropriate principle of law is a necessary part of the tax machinery. There could be at least one such board in each province, and in some provinces more, if circumstances warrant. The personnel of these boards need not be engaged on a full-time basis and might vary from one sitting to another. They would be remunerated on a per diem basis. It is obvious that I am thinking of a plan along the lines of the Commissioners of Income Tax in Great Britain and a study of their activities would be very helpful. With respect to questions of fact, I see no reason why as in Great Britain the decisions of the board should not be final. Questions of law could be referred to the high court of the province in which the dispute arose, or to the Exchequer Court as the appellant saw fit. I am not aware of any constitutional impediment to provincial courts trying issues involving payment of taxes to the Crown in the right of Canada, but practical considerations might be a bar. Not only is the law of income tax an unfamiliar subject in provincial courts, but uniformity in principle is most important and could easily be lost amongst eleven appellate courts.

An alternative procedure is that which the Tax Court of the United States has worked out and which, as I understand it, is
rather similar to the technique of our own Board of Pension Commissioners. The hearings of the court are conducted by single members sitting throughout the country. After completing their calendar, they return to Washington armed with the record of evidence and briefs of argument in each case which came before them. This material is reviewed by the full court or a panel of the court and the resulting judgment is in a very real sense the judgment of the court. This procedure might be referred to for the purposes of discussion as the American system, to distinguish it from the British system of local boards or committees, which are concerned with questions of fact and refer questions of law to the regularly constituted courts.

Each system, I have no doubt, gives reasonable satisfaction and the very sketchy outlines I have offered are hardly sufficient to provide a basis for choosing or preferring one to the other. The preference I have expressed for the British system may rest on no better reason than that I am familiar with it from a reading of tax cases. At the same time, I feel that it should tend to provide a quicker disposition of tax appeals and it avoids the duplication of courts.

I do not suggest that we should slavishly copy the example of either the United States or Great Britain, but I am sure that we can learn much from their experience to assist us in improving our own procedure. If we can come to any agreement on such matters to-day, a resolution will be in order. What is of first importance is to show our approval of the idea of a specialized tax tribunal and to warn the government that sporadic tinkering with its machinery, even though it is not yet entirely satisfactory, may do more harm than good.

The failure of a judge to perform promptly the duties of his position, unless he is prevented from doing so by substantial illness or by other circumstances over which he has no control, is one of the most grave breaches of that fidelity which every official owes to the sovereignty he is chosen to serve. (Commonwealth ex rel. Duff v. Keenan (1943), 347 Pa. 574)