

2011 TAX LAW FOR LAWYERS
National Tax Law CLE Program

**TAX DISPUTE RESOLUTION II:
THE CONDUCT OF TAX LITIGATION**

-and-

MATERIALS FOR *PRACTICE DILEMMAS*

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June 1, 2011
Niagara Falls

Canadian Bar Association

FOREWORD

This paper is largely extracted from chapter 4 of *Tax Court Practice*© with the permission of Carswell.¹ *Tax Court Practice*© is updated at least twice yearly and should be consulted for changes to the Court's Rules, governing legislation, and additional case annotations. This paper contains the *General Procedure Rules* of the Tax Court and selected annotations concerning pleadings, lists of documents and examinations for discovery. Portions of the paper are also relevant to points covered in the panel discussion: *Practice Dilemmas* – see, especially, the annotations concerning litigation and solicitor-client privilege, under Rule 82 of the *General Procedure Rules*.

Proposed amendments to the *Tax Court of Canada Rules (General Procedure)* were announced by the Court as effective January 18, 2010 by Practice Note No. 17. In an attempt to codify the practice which is now ongoing in the Tax Court of Canada and to streamline the process of hearings in litigation, the Court proposes to amend the Rules to provide for Litigation Process Conferences and costs consequences for early settlement offers. From January 18, 2010, practice in the Court will be governed by the proposed amendments until they receive approval of the Governor in Council.

First, the Status Hearing provided for in s. 125 of the *Rules* has been revamped. An initial Status Hearing can now be called approximately two months after the close of pleadings and could lead to a litigation schedule and further Status Hearings. Further Status Hearings may be continued or initiated later in the appeal by the Court or at the request of a party to move an appeal along that has not been case managed, or in any event, for the purpose of having the appeal set down for hearing. These further Status Hearings can take place before or after a joint application for hearing is filed. The Court may canvass whether settlement has been discussed, if the issues are/have been properly defined, whether the appropriate pre-trial steps in the appeal have been completed, what the approximate length of hearing will be and the appropriateness/desire to fix a date for hearing. An initial Status Hearing is likely if a case management judge has not been appointed or no litigation schedule Order has been issued.

New s. 126.1 of the *Rules* is the Tax Court's new Case Management rule. Case Management is designed to permit the Chief Justice to assign a judge to manage an appeal or group of appeals. The judge takes responsibility for progress of the appeal and all matters arising prior to the hearing.

¹ Two volume looseleaf service co-authored with Gordon Bourgard beginning in 1990.

New s. 126.2 of the *Rules* provides for Trial Management Conferences. This conference will take place after the appeal hearing date has been fixed and is a conference which is presided over by the assigned trial judge dealing with procedure at trial.

New s. 126.3 sets up a separate Settlement Conference which may take place on the Court's own initiative or at the request of either party at any time in the litigation of the appeal and includes requirements for the service of a settlement conference brief.

Section 147(3.1) is added to the rules to provide a specific costs rule to encourage early settlements before the beginning of the trial.

Consequential amendments are made to s. 127 and 128 of the *Rules* which deal with memoranda, directions and requirements of non-disclosure following a litigation process conference.

In new s. 146.1 the Court has created a Lead Case rule, intended to apply where there is more than one appeal which has common or related issues of fact or law. It allows the Court to specify one or more of the appeals as a lead case and proceed with a hearing while others are stayed pending a decision on the appeals heard by the Court. A Lead Case decision will now be communicated to appellants whose appeals are stayed and those appellants will now have to notify the Court as to whether they agree to be bound by the decision in whole or in part.

Finally, s. 6 of the *Rules* is amended to provide for videoconferences and to apply to the new Litigation Process Conferences.

April 13, 2011
Ottawa, Ontario

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Table of Contents

	<u>Page</u>
List of <i>Tax Court of Canada Act</i> Provisions	1
List of <i>General Procedure Rules</i>	1
Sections 43-53 - Pleadings	
s. 43 Pleadings Required or Permitted	13
Function of Pleadings.....	14
s. 44 Time for Delivery of Reply to Notice of Appeal.....	14
s. 45 Time for Delivery of Answer.....	15
s. 46 Close of Pleadings	15
s. 47 Form of Pleadings	15
s. 48 Rules of Pleadings - Applicable to Notice of Appeal.....	16
Contents of Notice of Appeal.....	16
s. 49 Rule of Pleadings - Applicable to Reply.....	16
Findings or Assumptions of Fact	17
Allegations of Misrepresentation or Fraud.....	18
Alternative Assumptions.....	18
Assumptions Based on Hearsay	18
Other Material Facts	18
Issues to be Decided	19
Statutory Provisions Relied On.....	19
Reasons the Respondent Intends to Rely On.....	19
Pleading Jurisdiction.....	19

s. 50 Rules Applicable to Answers	20
s. 51 Rules Applicable to all Pleadings	20
s. 52 Demand for Particulars	20
Particulars of an Allegation in a Pleading	21
s. 53 Striking out a Pleading	21
Pleading Treatment of Other Taxpayers	21

Sections 54-57 - Amendments

s. 54 When Amendments to Pleadings May be Made	21
s. 55 How Amendments Made	22
s. 56 Service of Amended Pleading	22
s. 57 Responding to Amended Pleading	22

Sections 78-91 - Discovery of Documents

s. 78 Interpretation	23
s. 79 Agreement to Limit Discovery	23
s. 80 Document in Pleading or Affidavit	23
s. 81 List of Documents (Partial Disclosure)	24
s. 82 List of Documents (Full Disclosure)	24
Documents Relating to Any Matter in Question	25
Relevance	25
Documents for which Privilege Claimed.....	26
Grounds of Objection	26
Confidentiality - Section 241 <i>Income Tax Act</i>	26
Disclosure Contrary to Foreign Law.....	30

Disclosure Contrary to Domestic Law.....	31
Informant's Privilege.....	32
Investigation Privilege.....	32
Other Confidential Communications.....	32
Negotiations and Settlements/Without Prejudice.....	34
Litigation Privilege.....	36
Solicitor - Client Privilege.....	42
Privilege for Communications with Accountants.....	48
Privilege for Accounting Records of a Lawyer.....	50
Specified Public Interest.....	50
Waiver of Privilege.....	50
Waiver - Inadvertent Disclosure of Documents.....	54
s. 83 Corporate Documents.....	56
s. 84 Description of Documents.....	56
Describing Privileged Documents.....	56
s. 85 Inspection of Documents.....	58
s. 86 Document in Possession of Non-Party.....	59
s. 87 List Incomplete.....	59
s. 88 Where Affidavit Incomplete/Privilege Improperly Claimed.....	60
s. 89 Use of Documents at Hearing.....	60
s. 90 Disclosure or Production not Admission of Relevance.....	60
s. 91 Effect of Failure to Disclose or Produce.....	61

Sections 92-100 - Examination for Discovery

s. 92 General	61
Implied Undertaking	61
Privilege Attaching to Discovery Statements.....	61
s. 93 Who May be Examined	62
Further Examination With Leave	63
s. 94 When Examination May be Held	63
Examination Before Delivering Reply	63
s. 95 Scope of Examination	63
Discovery of and About Experts	65
s. 96 Effect of Refusal	66
s. 97 Effect of Counsel Answering	66
s. 98 Information Subsequently Obtained	66
s. 99 Discovery of Non-Parties with Leave	67
s. 100 Use of Examination for Discovery at Hearing	68
Withdrawal of Discovery Admissions	69
Implied Undertaking	70

Sections 101-112 - Examinations Out of Court

s. 101 Application of Sections 102-112	71
s. 102 Mode of Examination	71
s. 103 Manner of Requiring Attendance	72
s. 104 Notice of Time and Place	72
s. 105 Production of Documents on Examination	73

s. 106 Re-Examination	73
s. 107 Objections and Rulings	74
s. 108 Improper Conduct of Examination.....	74
s. 109 Videotaping or other Recording of Examination.....	75
s. 110 Sanctions for Default or Misconduct by Person to be Examined.....	75
s. 111 Filing of Transcript.....	75
s. 112 Examination Where Person Outside Canada.....	76
Sections 113-118 - Examination by Written Questions	
s. 113 Questions.....	77
s. 114 Answers to Written Questions	77
s. 115 Objections to Written Questions	77
s. 116 Failure to Answer.....	77
s. 117 Improper Conduct of Written Examination	78
s. 118 Filing Questions and Answers	78
Table of Forms	79
Notice of Appeal.....	80
Answer.....	81
List of Documents (Partial Disclosure).....	82
List of Documents (Full Disclosure).....	83
Affidavit of Documents (Individual).....	84
Affidavit of Documents (Corporation).....	85
Questions on Written Examination	87
Answers on Written Examination	88

Appendix "A" - Sample Notice of Appeal (IP).....89
Appendix "B" - Sample Notice of Appeal (GP).....93