

## **Tax and the Courts**

By Justice Susan Glazebrook, DNZM<sup>1</sup>

### **Introduction**

It is a pleasure to be with you this afternoon, although somewhat of mixed pleasure for all of us I suspect, this being what is often been termed the graveyard shift and what is more the last session on a Friday.<sup>2</sup>

Having been so long out of the taxation field now, I thought the best thing I could do was avoid the substantive law and concentrate on a topic where I may be thought to have some expertise – tax and the courts. I have a few hobby horses on that subject that I am always happy to give an airing. And of course, by avoiding the substantive law, I avoid any possible problems with ill-advised comments on issues that could arise in future cases.

My address is divided into two parts. The first part deals with some rule of law issues in taxation law, procedure, and practice. The second part of the address deals with some more practical litigation issues, including advice to those who may find themselves giving expert evidence in court.

### **Rule of Law**

So, to the rule of law. This may seem a bit substantial especially for a Friday afternoon and, maybe, a bit divorced from the everyday reality of tax practitioners. However, because of the long shadow that tax law casts on all members and facets of society, it does raise issues of a constitutional nature.

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<sup>1</sup> Judge of the Supreme Court of New Zealand. This paper elaborates on an address given at the Chartered Accountants Australia and New Zealand “Tax Conference 2015” held in Auckland on 19 November 2015. Some of the paper also deals with similar themes to those highlighted in an earlier paper: see Susan Glazebrook “Taxation Disputes in New Zealand” (paper presented at the Australian Tax Teachers Association Conference, Auckland, 22 January 2013) available at <[www.courtsofnz.govt.nz](http://www.courtsofnz.govt.nz)>. I am grateful to Supreme Court clerks, Andrew Row, Henry Benson-Pope and Aidan Lomas for their invaluable assistance with this paper. The views expressed in the paper are my own and do not necessarily represent those of the Supreme Court.

<sup>2</sup> The address was given on the Friday afternoon at the end of a very full and informative conference programme.

A side-step into history shows that the constitutional issues surrounding taxes have played parts in watershed moments in both English and American legal and constitutional history. Magna Carta and the American War of Independence both, to some extent, involved issues of taxation. The Magna Carta (the Great Charter), which celebrated its 800<sup>th</sup> anniversary in 2015, contains clauses limiting King John's ability to levy particular taxes without the consent of the "common counsel".<sup>3</sup> Similarly, taxation legislation passed by the British Parliament between 1763 and 1775 in part precipitated the American War of Independence which, in turn, led to the Declaration of Independence in 1776. The American colonists believed that the British Parliament did not represent them and thus the British parliament had no right to levy taxes upon them. The sentiment of the times was encapsulated in 1765 by Boston politician, James Otis, saying "taxation without representation is tyranny".<sup>4</sup> The United States Declaration of Independence listed the numerous wrongs committed by the King and the wrongs included the imposition of "Taxes on us without our Consent".

So what do we mean by the rule of law? Lord Bingham provides eight constituent principles:<sup>5</sup>

1. The laws of the land should apply equally to all, save to the extent that objective differences justify differentiation.
2. Ministers and public officials at all levels must exercise the powers conferred on them in good faith, fairly, for the purposes for which the powers were conferred, without exceeding the limits of such powers and not unreasonably.
3. The law must afford adequate protection of fundamental human rights.
4. Means must be provided for the resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve.
5. Questions of legal right and liability should ordinarily be resolved by application of the law not the exercise of discretion.
6. Adjudicative procedures provided by the state should be fair.

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<sup>3</sup> See cls 12 and 14. See further A Arlidge and I Judge *Magna Carta Uncovered* (Hart Publishing, Oxford, 2014) at 67–72; as the authors explain the word "tax" did not come into general use in England until the fourteenth century. Instead, the Charter referred to "aids" and "scutage", feudal monetary obligations. The "common counsel" was defined in cl 14 as the "archbishops, bishops, abbots, earls and greater barons".

<sup>4</sup> Daniel A Smith *Tax Crusaders and the Politics of Direct Democracy* (Routledge, New York, 1998) at 21–23.

<sup>5</sup> Tom Bingham *The Rule of Law* (Allen Lane, London, 2010).

7. The rule of law requires compliance by the state with its obligations in international as in national law.
8. The law must be accessible and so far as possible intelligible, clear and predictable.<sup>6</sup>

So how does taxation law, procedure, and practice in New Zealand live up to these principles? I do not propose to undertake an exhaustive analysis of each of these eight principles but those most relevant to tax law will be addressed.

### *Legislation rewrite*

Taking the last principle first, I have to say that those involved with the project to rewrite the Income Tax Act 1976 took on board the need for the Act to be, as far as possible, intelligible, clear and predictable for taxpayers and their advisors.<sup>7</sup> This has involved not just rewriting the Income Tax Act in plain English; there have also been some innovative mechanisms in the Act such as flow charts to make the Act easier to understand.<sup>8</sup> But what has made the project so successful, I think, has been re-organising the Income Tax Act on a conceptual basis and grouping related issues into parts, with a structure that allows amendments to be added seamlessly.<sup>9</sup>

While it may be wildly optimistic to think that ordinary taxpayers will be able to understand everything about their taxation liabilities just by reading the Act, having a clearly set out and

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<sup>6</sup> A similar point was made by the European Court of Human Rights in *The Sunday Times v United Kingdom* (1979) 2 EHRR 245 (ECHR) at [49] where it said a “norm cannot be regarded as a “law” unless it is formulated with sufficient precision to enable the citizen to regulate his [or her] conduct: he [or she] must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.”

<sup>7</sup> For information on this, see generally Ivor Richardson “Simplicity in Legislative Drafting and Rewriting Tax Legislation” (2012) 43 VUWLR 517 and Working Party on the Reorganisation of the Income Tax Act 1976 *Second Report of the Working Party* (Preliminary Paper B31, September 1993). In moving the three-volume draft Bill to the Finance and Expenditure Committee, the Minister of Revenue at the time, Hon Wyatt Creech, said “the Income Tax Act 1976 is the largest, most complex and most frequently amended legislation on the statute book. The 1976 Act is poorly structured and extremely difficult to follow, even for people who are expert in tax legislation”: (23 September 1993) 538 NZPD 18362–18362.

<sup>8</sup> See, for example, Subpart BC of the Income Tax Act 2007 which contains a flowchart explaining how taxpayers can calculate and satisfy their income tax liabilities: Flowchart B2.

<sup>9</sup> Following the enactment of the Income Tax Act 1994, the Minister of Finance established the Rewrite Advisory Panel to consider and advise on issues arising during the rewriting process. Consequential amendments in line with the re-write process were made when the Income Tax Act 2004 and Income Tax Act 2007 were passed: see Rewrite Advisory Panel “Background to the Income Tax Act 2007” <<http://www.rewriteadvisory.govt.nz/>>. The Rewrite Advisory panel was disestablished in late 2014: Todd McClay “Rewrite panel now disestablished” (press release, 2 December 2014).

conceptually thought through piece of legislation will certainly help the rule of law by helping tax practitioners at least to understand the law and advise their clients properly. Clear legislation must also have made tax legislation easier to administer. In addition, disputes should be less likely to arise, and if they do, they may be more easily resolved. And certainly if disputes do come to court, it will mean fewer headaches for all involved including the judge.

When I gave this speech I made a plea that the Tax Administration Act 1994 was in dire need of a similar conceptual rewrite. It seems my plea may be answered. In the same month as my speech, the Revenue released a discussion document entitled “Making Tax Simpler: Towards a New Tax Administration Act”. I hope that this discussion will lead to a Tax Administration Act that better meets the principles of the rule of law.<sup>10</sup>

#### *Access to courts*

The next of Lord Bingham’s rule of law principles I will consider is ready access to the courts. This includes not only formal impediments to access to the courts but also procedural impediments.

There is no doubt that all government officials in New Zealand, including, of course, revenue officials, strive to work within the law and to keep within their proper legal sphere. But without proper access to the courts and other institutions like the Ombudsman, the ordinary citizen can do little to ensure the law is enforced where, despite their best efforts, officials do not act in accordance with the law.

In our system of law, court decisions have an important precedential effect (under the principle of stare decisis). This means that court decisions state the law for other taxpayers and thus they can have a much wider effect than on the immediate parties. If access to courts is restricted, then this important function is also restricted and uncertainties as to the true legal position remain. Uncertainty in the law can lead to a lack of confidence in the

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<sup>10</sup> See Inland Revenue *Making Tax Simpler: Towards a New Tax Administration Act: a Government Discussion Document* (November 2015); and the earlier foundational document Inland Revenue *Making Tax Simpler: A Government Green Paper on Tax Administration* (March 2015).

administration of tax legislation which does not aid compliance and, of course, our system of taxation depends heavily on voluntary compliance.

Over recent years there has been a marked decline in substantive taxation cases that have come before the courts. I use the term substantive to denote cases on a point of tax law as opposed to merely procedural cases. From 1993 to 2002 for example there were some 50 substantive cases a year in the Taxation Review Authority and some 20 cases a year in the High Court.<sup>11</sup> These figures declined from 2003 to 2008 onwards to some 10 cases a year in the Taxation Review Authority<sup>12</sup> and six cases a year in the High Court.<sup>13</sup> In the period 2008 to 2013, the average number of substantive cases in the Taxation Review Authority was some nine per year and the High Court dealt with roughly eight per year over the same period.<sup>14</sup>

In the period 2014 to 2015 the numbers have increased again slightly, but not to pre 2003 figures. There was an average of 12 substantive cases per year in the Taxation Review Authority and eight procedural. There was an average of 15 substantive cases in the High Court and 13 procedural.<sup>15</sup>

So what has caused the decline in substantive taxation cases? Some of it may well have to do with the rewrite process and the fact that the law is now easier to understand and apply. This would be positive for the rule of law.

Some of the decline may be due to the removal of perverse incentives to challenge assessments.<sup>16</sup> Prior to the penalty and use of money interest regime introduced in 1996,<sup>17</sup>

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<sup>11</sup> These figures were taken from William Young "Tax Disputes in New Zealand" (2009) 4 JATTA 1 at 11.

<sup>12</sup> Young, above n 11, at 11.

<sup>13</sup> See Glazebrook, above n 1, at 3.

<sup>14</sup> Glazebrook, above n 1, at 3.

<sup>15</sup> The substantive figures for these years include successful strike out applications that determined the case, as in William Young J's article, above n 11, at [11].

<sup>16</sup> See Mark Keating *Tax Disputes in New Zealand: A Practical Guide* (CCH New Zealand Ltd, Auckland, 2012) at 8-9.

taxpayers only had to pay half the tax in dispute and could defer the other 50 per cent until the case had been completed.<sup>18</sup> No interest was payable on the remainder and there was usually no risk of additional tax being imposed. Removing incentives to dispute assessments regardless of merit must have been positive for the rule of law, assuming the rule of law also has a substantive content – that is a requirement for laws that are sensible, fair (both to the state and the taxpayer) and well thought through.<sup>19</sup> I think there should be this substantive element, particularly in the case of taxation which relies on coercive state power (but which is also imposed for the public good).<sup>20</sup>

Some of the decline in taxation cases may be due to the success of the current dispute resolution regime whereby disputes can be resolved at an earlier stage, either through the disputes resolution processes themselves or through the ability for the Commissioner to settle cases.<sup>21</sup> This avoids the need for costly court proceedings and must be conducive to engendering taxpayer confidence in the law and must also be beneficial for the administration of the taxation system. Again all this would be positive for the rule of law as long as the resolution of disputes and any settlements are truly voluntary.

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<sup>17</sup> Regarding penalties, see, Keating, above n 16, at [408]–[409] and [1209]; and Tax Administration Act 1994, s 94A. Regarding use of money interest, see Tax Administration Act, s 120D. This provision was inserted on 26 July 1996 by s 36(1) of the Tax Administration Amendment Act (No 2) 1996. Under the regime, while unsuccessful taxpayers are required to pay interest on unpaid tax, successful taxpayers receive interest on overpaid tax from the IRD. However, there is a differential in interest rates payable by taxpayers and the Commissioner; current rates are around 9.21 per cent for taxpayers and 2.63 per cent for the Commissioner: see Taxation (Use of Money Interest Rates) Regulations 1998, ss 2–3. Thus, the cost of being wrong is high, and for some taxpayers the risk is too great to justify pursuing a dispute, regardless of its merits: Taxation Committee of the New Zealand Law Society and the National Tax Committee of the New Zealand Institute of Chartered Accountants *Joint Submission: The Disputes Resolution Procedures in Part IVA of the Tax Administration Act 1994 and the Challenge Procedures in Part VIIIA of the Tax Administration Act 1994* (4 August 2008) at Appendix A available at <www.nzica.com>.

<sup>18</sup> See Income Tax Act 1976 (repealed), s 34(2)(a) and (b) read with the definition of “deferrable tax” under s 34(1).

<sup>19</sup> See Lon Fuller *Morality of Law* (New Haven, Yale University Press, 1969) at 151–187 for a discussion of the substantive aims of law and morality.

<sup>20</sup> I do not wish to be drawn into an extensive discussion of jurisprudence. For an overview of the topic see: Jules Coleman and Scott Shapiro (eds) *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press, Oxford, 2002); and M D A Freeman *Lloyd’s Introduction to Jurisprudence* (8th ed, Sweet & Maxwell, London, 2008).

<sup>21</sup> For a full exposition of the New Zealand taxation disputes regime, see my previous paper: Glazebrook, above n 1, at 6–12. Prior to the introduction of the Tax Administration Act 1994, the Revenue had very limited ability to settle. However, with the Tax Administration Act’s introduction of the “care and management” provisions (s 6A), the Commissioner’s power to compromise and settle disputes has been acknowledged by the Courts: see *Auckland Gas Co Ltd v Commissioner of Inland Revenue* [1999] 2 NZLR 409 (CA) at 414-417; *Attorney-General v Steelfort Engineering Co Ltd* (1999) 1 NZCC ¶55-005(CA) at 61,036-61,038; and *Accent Management Ltd v Commissioner of Inland Revenue (No 2)* [2007] NZCA 231, (2007) 23 NZTC 21,366 (CA) at [13].

What is not so positive is the concern that the dispute resolution processes, even in simple cases, takes a lot of time, effort and therefore cost to complete.<sup>22</sup> When this is coupled with the new penalty and interest regime with its differential interest rates for taxpayers and the Revenue,<sup>23</sup> the concern is that taxpayers are “burnt off” by the taxation disputes process. This means that taxpayers may be forced to settle legitimate tax disputes as they cannot afford the time or money necessary to continue court proceedings. Certainly, the time and cost of the dispute resolution processes was one of the concerns coming out of the survey of tax practitioners reported on 19 November 2015 at the conference.

A taxpayer has no unilateral right to opt out of the dispute resolution procedures.<sup>24</sup> Before a case comes to court the whole of the disputes resolution process must be completed unless the Commissioner and the taxpayer agree to truncate it.<sup>25</sup> The Commissioner’s agreement will be forthcoming only in limited circumstances.<sup>26</sup>

The length and complexity of the dispute resolution process, the inability for unilateral opt out and possible burn off leads to the concern that access to the courts is at risk of being

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<sup>22</sup> The IRD has indicated that simple disputes take some 16 months to go through all of the pre-litigation stages of the process: Inland Revenue Department Standard Practice Statement “Timeliness in resolving tax disputes” (2002) 14 (2) Tax Information Bulletin. Keating refers to a hypothetical case where it was postulated that the dispute resolution process concerning a taxpayer’s 2008 income tax return, which was started in August 2011 would not finish until some two years later: Keating, above n 16, at 7–8. In addition to being expensive for litigants, Keating, at 236–238, maintains that adjudication costs the Revenue around \$20,000 per case and the comparable figures for the Taxation Review Authority are \$13,000 per case.

<sup>23</sup> See above at n 17.

<sup>24</sup> In 2010, the Revenue released an issues paper addressing a number of suggested changes to the disputes process and proposing a number of legislative changes: *Disputes: a Review, An Officials’ Issues Paper* (Inland Revenue and the Treasury, Wellington, July 2010) at [3.14]–[3.24]. In this issues paper, Inland Revenue argued that a unilateral opt-out would allow taxpayers to circumvent the conference phase, which would detract from the aim of avoiding court and the associated costs. Those disputes that do not meet the criteria for bilateral opt-out would, in the Revenue’s view, benefit from the adjudication process. However, Associate Professor Shelley Griffiths has expressed concerns about the current opt-out system and the New Zealand Bill of Rights Act 1990; she suggests that that to require the consent of the Commissioner, by way of the issue of a challenge notice, before a taxpayer can commence litigation, is inconsistent with s 27(3) of the New Zealand Bill of Rights Act, which sets out the right of every person to bring proceedings against the Crown in the same manner as between individuals: see Shelley Griffiths “Resolving New Zealand Tax Disputes: Finding the Balance Between Judicial Determination and Administrative Process” (paper presented at the ATTA Conference, Sydney, 17 January 2012) at 16–20.

<sup>25</sup> Tax Administration Act, s 89N(1)(c)(viii). This section was inserted in 2004 by the Taxation (Venture Capital and Miscellaneous Provisions) Act 2004, s 103(1).

<sup>26</sup> The Revenue has said that, provided that the taxpayer has participated meaningfully during the conference phase, it will agree to opting out of the disputes resolution process in certain circumstances, including if the dispute relates to \$75,000 or less unless it is part of a wider arrangement, and if the dispute turns on issues of fact only: Inland Revenue Department Standard Practice Statement 11/06 “Disputes Resolution Process Commenced by a Taxpayer” (2011) 23(9) Tax Information Bulletin at [203]–[223].

limited to cases where the Revenue decides a case is worth taking through to the courts or where there is a lot of money at stake. The cases chosen by the Revenue will reflect the Revenue's agenda rather than that of taxpayers generally. And it is not just cases involving a lot of money that can raise important questions of law; indeed, for ordinary taxpayers, the points of law raised in more run-of-the-mill cases are likely to be much more important in terms of their every day taxation affairs.

Access to the courts is particularly important in an area such as taxation which impacts on the relationship between the citizen and the state. It is also important for the development of the law, which occurs even within the confines of a statute-based system. Access to the courts is important most of all for the definitive interpretation of the law which provides certainty and ultimately aids compliance.

It is true that, at the end of the pre-litigation disputes resolution processes, there is a formal second look at the issues through the Disputes Review Unit (formerly the Adjudication Unit) (the Unit).<sup>27</sup> This is, however, not a true substitute for the courts. There are no oral hearings and no credibility findings. Also providing precedent for future taxpayers is not one of the Unit's roles. This is not just because the decisions are not published but also because, however independent the Unit is within the structure of the Revenue department, it is still not a court. The Unit is an internal administrative mechanism without the true independence of the courts (both in actuality and perception) and without the public scrutiny of its decisions in terms of the open justice principle, which again is so fundamental to our system of justice (and indeed of parliamentary democracy generally).

I note here that the access issues with the new disputes resolution regime have been exacerbated by the fact that access to the courts through judicial review proceedings outside the formal pre-litigation disputes resolution process has been almost entirely cut off by the Supreme Court, in a case called *Tannadyce Investments Ltd v Commissioner of Inland*

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<sup>27</sup> The adjudicator's role is to review unresolved disputes by taking a fresh look at a tax dispute and the application of law to the facts in an impartial and independent manner and provide a comprehensive and technically accurate decision that will ensure the correctness of the assessment. As stated above, in July 2013, the name was changed from the "Adjudication Unit" to the "Disputes Review Unit" and the Revenue said the change of name "reflects a slightly broader role and some additional oversight and review functions relating to the tax disputes resolution process that are performed internally". See Inland Revenue Department "Change of name for the Adjudication Unit to Disputes Review Unit" and "The Disputes Review Unit – its role in the dispute resolution process" <[www.ird.govt.nz](http://www.ird.govt.nz)>.

*Revenue*.<sup>28</sup> This decision has limited the availability of judicial review to cases where the disputes resolution process is just not available to be used.<sup>29</sup> There was, however, a very strong minority opinion which proposed a more liberal test and stressed the importance of judicial review to the rule of law and to ensuring that the executive operates within the law.<sup>30</sup>

Of course, I am not suggesting that there should be a return to the bad old days before the current disputes resolution regime was put in place.<sup>31</sup> At that time, if assessments or amended assessments were issued, taxpayers often had no idea of the basis of assessment. There was inconsistency around the country in the interpretation of the law and in dispute resolution practice. It was frequently impossible to get anyone other than the inspector involved to look at the matter. This meant that the often quirky views of the inspector could keep a client tied up in a dispute that could easily have been sorted out with an independent look. Often there was a refusal to meet face-to-face to sort things out and correspondence was not answered in a timely fashion, or sometimes at all.

So I do agree that the current New Zealand disputes resolution regime is better than the old system. The major advantage has to be that of identifying the basis of any proposed re-assessments at an early stage. And the ability to have the dispute looked at independently by the Unit is also an improvement, although this may arguably come too late in what is a complicated process. The review process may also be too formal in that it is very elaborate and can be seen as a duplication of work that should be done by the courts.

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<sup>28</sup> *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153. Sections 109 and 114 of the Tax Administration Act direct disputes through a statutory process.

<sup>29</sup> The majority of the Court (Tipping, Gault and Blanchard JJ) in *Tannadyce*, above n 28, disagreed with the earlier approach of the Court of Appeal in *Westpac Banking Corporation v The Commissioner of Inland Revenue* [2009] NZCA 24, [2009] 2 NZLR 99. The majority held, at [61], that “disputable decisions (which includes assessments) may not be challenged by way of judicial review unless the taxpayer cannot practically invoke the relevant statutory procedure. Cases of that kind are likely to be extremely rare”.

<sup>30</sup> The minority (Elias CJ and McGrath J) held that there will be exceptional circumstances where judicial review should be permitted: at [36]. The minority also emphasised that the Court should consider whether there would be any substantial prejudice to the taxpayer in requiring it to follow the statutory procedures: at [38]. In endorsing the minority’s approach in *Tannadyce*, above n 28, Andrew Beck stated that “A statutory provision that requires challenges to decisions to be brought in accordance with a specified procedure does not, in its terms, preclude the courts from investigating whether there has been an unlawful act on the part of the decision maker, nor should it be construed as precluding such an investigation. This is the very point at which cracks begin to appear in the rule of law”: Andrew Beck “Privative Clauses” [2012] NZLJ 91 at 93.

<sup>31</sup> See concurring discussion in Organisational Review Committee *Organisational Review of the Inland Revenue Department: Report to the Minister of Revenue (and on tax policy, also to the Minister of Finance) from the Organisational Review Committee* (1994) at 65–70.

Some simplification of the process could be considered. I think, however, that many of the concerns about the cost and sluggishness of the process and duplication could be addressed by the introduction of an automatic opt-out procedure for all disputes. In my view, it is important for the rule of law to allow a taxpayer to go directly to the courts and circumvent part or all of the dispute resolution processes and for this not to rely on permission of the Commissioner.

### *Search and Seizure*

I am still winding my way through my review of tax and the rule of law. The next aspect I will address (although I acknowledge it is more controversial) is that laws and practices must comply with fundamental human rights.<sup>32</sup>

I note in that regard that 2015, in addition to being a milestone year for the Magna Carta, also marks the 250 year anniversary of the case of *Entick v Carrington* – a formative English case on limiting executive power and the rule of law.<sup>33</sup> The case involved an unauthorised search and seizure of Mr Entick’s home by the King’s Messenger, designed to retrieve Mr Entick’s allegedly “seditious papers”. Mr Entick successfully sued the messengers for trespass.

Fast forwarding to the present, under the Tax Administration Act, the Commissioner has broad powers of search and seizure, including for searches without a warrant.<sup>34</sup> One commentator has suggested that “the search power is probably the widest enjoyed by any government department”.<sup>35</sup> Coupled with this, there has been increasing use of these search powers in recent years with the use of the general access power rising from only seven times in 2007 to 41 times in 2011.<sup>36</sup>

The statutory provisions do give the Commissioner the legal right to search. However, the issue is whether the laws really need to be that wide and whether, in that form, they are inconsistent with the right to be free from unreasonable search and seizure under the

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<sup>32</sup> In the New Zealand context this includes the New Zealand Bill of Rights Act 1990, as well as New Zealand’s international obligations.

<sup>33</sup> *Entick v Carrington* (1765) 2 Wils KB 275, 95 ER 807.

<sup>34</sup> See ss 16 and 17.

<sup>35</sup> Mike Lennard “Search and Surveillance in the Context of Tax Administration” (2013) 19 NJTLP 11 at 12.

<sup>36</sup> Lennard, above n 35, at 25.

New Zealand Bill of Rights Act 1990. Even if wide powers are needed, there is still the question, as Mike Lennard has raised, whether the increasing use of those search powers has been necessary in all of the cases involved.<sup>37</sup> In summary, it is arguable that the Commissioner's powers are too broad and insufficiently subject to oversight to satisfy rule of law concerns.

### *Equality before the law*

The next principle of the rule of law I will consider is that the law must apply equally to all. There are three aspects of taxation law, procedure and practice that might be seen as raising this rule of law issue.

The first relates to the differing legal status of binding rulings and the Commissioner's more general policy and interpretation statements.<sup>38</sup> In a practical sense, binding rulings are only intended to apply to, and worthwhile for, major high-risk transactions, due to the expense and time involved.<sup>39</sup> Those involved in major transactions can effectively, through the use of the binding rulings regime, purchase certainty of taxation treatment in relation to that transaction.

On the other hand, those following public policy and interpretation guidelines and statements, or indeed less formal indications of a Revenue position, have no such certainty.<sup>40</sup> This is mitigated somewhat by the fact that, where the Revenue changes its position to one less

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<sup>37</sup> Lennard, above n 35, at 26.

<sup>38</sup> A binding ruling is Inland Revenue's interpretation of how a tax law applies to a particular arrangement that they are then bound by when making their assessment: Inland Revenue Department "What is a binding ruling?" (2011) <[www.ird.govt.nz](http://www.ird.govt.nz)>. The binding rulings process was introduced pursuant to recommendations by the Organisation Review Committee, chaired by the late Sir Ivor Richardson: see Organisational Review Committee, above n 31, at Appendix D [38]. For the binding rulings process, see Part 5A of the Tax Administration Act.

<sup>39</sup> Shelley Griffiths "Revenue Authority Discretions and the Rule of Law in New Zealand" in C Evans (ed) *The Delicate Balance: Tax, Discretion and the Rule of Law* (IBFD, Amsterdam, 2011) at 160.

<sup>40</sup> As the IRD says in a statement on its website, "with the exception of the binding rulings regime, the law is not changed merely by the Commissioner giving a different view (whether published or otherwise)": Inland Revenue Department "Status of Commissioner's advice" (20 November 2012) <[www.ird.govt.nz](http://www.ird.govt.nz)>.

favourable for taxpayers, the Revenue will generally only apply the new position prospectively.<sup>41</sup>

The courts have, however, held that the Commissioner cannot be bound by public policy or other indications of a position because it would be inconsistent with the binding rulings regime and the general principle that the Commissioner cannot estop him or herself from enforcing the law.<sup>42</sup> So taxpayers who cannot afford binding rules are in a different position from those who can, raising equality concerns. Smaller transactions that are not suitable for binding rulings can still involve significant amounts of money. That there is no certainty of treatment even for those taxpayers who have followed the published guidance of the Commissioner risks creating disgruntled taxpayers, which again is not conducive to voluntary compliance.

Associate Professor Shelley Griffiths has suggested that the policy of fairness to the general body of taxpayers that is used to justify a failure to require a policy statement to be followed, seems inconsistent with the now available ability of the Commissioner to settle disputes with taxpayers (discussed below).<sup>43</sup> She says:<sup>44</sup>

While the Commissioner may have been a reluctant settler of tax disputes, the Court of Appeal has confirmed in strong terms that the Commissioner has the power to settle. If the reasoning that the Commissioner cannot be bound outside the binding rulings is that he has no power to depart from the strict application of the relevant statute, then that is very difficult to reconcile with a power to settle that derives from ss 6 and 6A.

This leads to the second matter that can raise equality issues: the Revenue's power to settle settlement power. Traditionally, the Revenue considered that it was not permitted to settle

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<sup>41</sup> In regards to published public statements the IRD says, "Where the change in view taken in a published public statement creates a less favourable position for taxpayers, the Commissioner will generally apply the new position prospectively from a stated date or income year or assessment period (as most appropriate)." However, prospective application will not be appropriate in exceptional circumstances. In deciding whether to amend an assessment under s 133 of the Tax Administration Act retrospectively, the Commissioner will consider factors such as the amount of revenue at stake, the number of taxpayers affected, and the resources necessary to identify, audit and reassess the relevant taxpayers: IRD, above n 40 at [16].

<sup>42</sup> See for example *Commissioner of Inland Revenue v Ti Toki Cabarets (1989) Ltd* [2001] 1 NZLR 147 (CA); and *Westpac*, above n 29, at [83]. This was in response to plaintiffs attempting to challenge assessments on the basis that they breached the plaintiff's "legitimate expectations" as to how their tax liability would be assessed.

<sup>43</sup> Shelley Griffiths "Tax as Public Law" in A Maples and A Sawyer (ed) *Taxation Issues: Existing and Emerging* (Centre for Commercial and Corporate Law, Canterbury Inc, 2009) at 231–232.

<sup>44</sup> At 231–232.

tax disputes on an unprincipled basis.<sup>45</sup> Therefore many disputes were litigated that may otherwise have been settled by way of a compromise between the parties.<sup>46</sup>

Growing dissatisfaction with this approach led to calls for the Commissioner to be granted a discretionary power over the administration of the tax regime.<sup>47</sup> This was achieved with the enactment of ss 6 and 6A of the Tax Administration Act which empowered the Commissioner to have “care and management” over the tax system. A number of Court of Appeal decisions have endorsed the power of the Commissioner to enter into compromise settlements.<sup>48</sup> However, unlike in Australia,<sup>49</sup> there is no comprehensive statement in New Zealand about how the Commissioner will exercise the discretion to settle.<sup>50</sup>

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<sup>45</sup> In light of case law to that effect: see for example *Brierley Investments Ltd v Bouzaid* [1993] 3 NZLR 655 (CA) at 659 where Richardson J said “the income tax legislation proceeds on the premise that in the interests of the community the Commissioner is to ensure that the income of every taxpayer is assessed and the tax paid ... The Commissioner cannot contract out of those obligations”. An example of the Revenue’s former policy not to settle can be gleaned from its practice statements: see, for example, Inland Revenue Department “Finalising agreements in tax investigations: standard practice statement INV-350” (1998) 10(8) Tax Information Bulletin 5.

<sup>46</sup> Keating, above n 16, at 311. As Keating at 309, states, “it is a fundamental constitutional principle that Parliament imposes tax while the Commissioner is merely responsible for collecting tax in accordance with the statute”. Even the Bill of Rights 1688, which forms part of New Zealand law by virtue of the Imperial Laws Application Act 1988, states that there is no “dispensing power” allowing the Crown to waive the collection of tax properly imposed by the legislature.

<sup>47</sup> See Keating, above n 16, at 311. See for example the Organisation Review Committee’s Report, above n 7, at [8.2] where the Committee recommended that the “IRD ... be entitled to enter into compromise settlements with taxpayers, rather than pursue the full amount of tax assessed, in cases where there are legitimate differences of view about the facts in dispute and the costs of litigation are high”.

<sup>48</sup> See for example *Auckland Gas Co Ltd*, above n 21; and *Accent Management Ltd v Commissioner of Inland Revenue*, above n 21, at [15].

<sup>49</sup> Since 1991, the Australian Federal Commissioner of Taxation has recognised the ability to negotiate settlements of tax disputes based on the “good management rule”: see Keating, above n 16, at 309. For the latest Code of Settlement, see Australian Tax Office “Practice Statement Law Administration: Code of settlement 2015/1” (15 January 2015). As the Code states at [5], in deciding whether to settle, the following factors must be considered: the relative strengths of the parties’ position; the cost versus the benefits of continuing the dispute; the impact on future compliance for the taxpayer and the broader community. The Code states that settlement will not generally be considered where: there is a contentious point of law which requires clarification; it is in the public interest to litigate; the behaviour is such that the Tax Office needs to send a strong message to the community.

<sup>50</sup> See Shelley Griffiths, above n 39, at 165 and 168; and Keating, above n 16, at 314 where the author says “despite the enactment of s 6A and the judicial endorsement of the Commissioner’s power to settle tax disputes, the IRD has been reluctant to develop a clear policy on the scope and application of that power.” Instead, the Commissioner has outlined a “non-exhaustive” list of factors “relevant” to the decision whether or not to settle: see Inland Revenue Department “Care and Management of the Taxes Covered by the Inland Revenue Acts – Sections 6A(2) and (3) of the Tax Administration Act 1994” (IS 10/07) (October 2010) at [157]. As Griffiths, above n 39, at 165 says, “[t]he question remains however whether the Commissioner should go further in setting out guidelines about settlement beyond paragraph in an interpretation statement on the ‘care and management’ function.”

One of the main rule of law issues with the settlement process arises due to the Commissioner's power to settle with some taxpayers while excluding others, thus engaging concerns about equality before the law. This issue was raised in *Accent Management Ltd v Commissioner of Inland Revenue*.<sup>51</sup> In that case the Revenue settled with some, but not all of the taxpayers who participated in the Trinity tax-avoidance arrangement. Those taxpayers who took on the Commissioner in court and lost argued that the Commissioner should have reached the same compromise with them as with those who had settled earlier. This argument was based on the principle that the Commissioner has a duty not to differentiate between taxpayers. The Court of Appeal upheld the ability of the Commissioner to offer different terms of settlement to some taxpayers but not to others.<sup>52</sup> In deciding to settle, the Court said that the Commissioner can take into account a range of relevant factors and in that case the Commissioner was legitimately influenced not just by the timing of settlement but also by the perception of the relative culpability of different taxpayers.<sup>53</sup>

I acknowledge that the Commissioner has stated that the Revenue will generally settle on an equivalent basis with all taxpayers who share the same circumstances.<sup>54</sup> The difficulty is that settlements may not be published and the Revenue's conception of "similar circumstances" may not be the same as other people's perception. In addition, the now very limited ability for judicial review<sup>55</sup> may inhibit access to the courts to test these issues.<sup>56</sup>

The final equality issue is procedural, but important, as it relates to access to the courts. This, as mentioned above, is that the Commissioner can circumvent and shorten the disputes resolution processes unilaterally but the taxpayer cannot do so, at least not without the agreement of the Commissioner.<sup>57</sup>

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<sup>51</sup> *Accent Management Ltd*, above n 21, at [20].

<sup>52</sup> Keating, above n 16, at 315 argues that a later case, *Miller v Commissioner of Inland Revenue* (2002) 20 NZTC 17,826 is inconsistent with the *Accent Management* case. I do not think this is the case. *Miller* dealt with a situation where had been a settlement that had failed in part (because the Commissioner had no Ministerial approval to settle). The comments made have to be read in that context.

<sup>53</sup> At [21].

<sup>54</sup> Inland Revenue Department, above n 50, at [159].

<sup>55</sup> *Tannadyce*, above n 28.

<sup>56</sup> See Griffiths, above n 39, at 167.

<sup>57</sup> See above n 25.

*Decisions in accordance with the law*

I move finally to the most basic element of the rule of law: that all matters should be decided in accordance with the law.

The first concern with this requirement in the taxation context is the so-called evidence exclusion rule. Until 2011, under this rule, the parties could only rely on facts and evidence contained in each other's statements of position.<sup>58</sup> The rule applied to exclude issues or propositions of law that had not been raised in the statements of position, except in very limited circumstances.<sup>59</sup> From August 2011, however, the rule only applies to issues and propositions of law.<sup>60</sup>

There is no doubt that the identification of the issues involved as early as possible can aid in resolving the dispute, for example, by ensuring that there is no trial by ambush and that all cards are on the table. This aspect of the exclusion rule is positive for the rule of law. But, more negatively, as Associate Professor Shelley Griffiths points out, in practice it has added to the length of the process and, therefore, the risk of burn off as both parties have taken "what has been called a 'kitchen sink' approach to the [statement of position] because of the perceived risk that anything omitted might turn out to be pivotal and it could not be brought in at a later stage".<sup>61</sup> This approach serves to obscure the issues truly in dispute.<sup>62</sup>

The main aspect that is not positive for the rule of law, however, is that the exclusion of legal issues continues into the litigation process. This risks a case being decided in some kind of alternative legal universe instead of in accordance with the law and what the courts believe to be the proper legal outcome of a case. This is not positive for the rule of law.<sup>63</sup>

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<sup>58</sup> For a more detailed summary of background to the so-called evidence exclusion rule, see my paper, Glazebrook, above n 1, at 7–8.

<sup>59</sup> See Keating, above n 16, at 181–187.

<sup>60</sup> See Tax Administration Act, s 138G(1).

<sup>61</sup> Griffiths, above n 24, at 11–12.

<sup>62</sup> Griffiths, above n 24, at 11–12.

<sup>63</sup> To the extent that the reason for the rule relates to efficiency and fairness concerns, there are mechanisms in the High Court Rules to ensure the efficient and fair conduct of litigation: see for example rr 7.77, 7.7 and 1.9 dealing with the amendment of pleadings. See also Andrew Beck and others *McGechan on Procedure* (online looseleaf ed, Thomson Reuters, updated to 9 November 2015) at [HR7.77.01]–[HR7.77.08].

The second concern arises with the binding rulings regime. The binding rulings regime can mean that a person's tax liability is decided otherwise than in accordance with the law. This occurs where rulings have been provided in particular cases based on an incorrect view of the law. However, there are benefits for the rule of law in certainty which must have been considered a suitable trade-off in rule of law terms when the binding rulings regime was brought into force.<sup>64</sup>

The third area where taxation liability may not be in accordance with the law is where a settlement has been entered into. By definition, a settlement risks matters being compromised on other than a strict legal basis. But again the legislature, in introducing the care and management provision, must have considered that the benefits to taxpayers and the effective and efficient administration of tax collection in allowing disputes to be settled outweighed those concerns.<sup>65</sup>

The final issue concerning the rule of law relates to general anti-avoidance provisions.<sup>66</sup> Some of the issues here are the uncertainty in the interpretation and application of those provisions and their ability to override specific provisions in the legislation<sup>67</sup> and even the possible override of New Zealand's obligations under double tax agreements.<sup>68</sup> In fact, I suspect that uncertainty is part of the design of such anti-avoidance provisions in that it discourages taxpayers from pushing the boundaries. But uncertainty has rule of law implications. Parliament obviously, however, sees these as outweighed by the greater public good of protecting the tax base.

On that note, I turn to the second part of the paper, looking at some general litigation issues.

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<sup>64</sup> See s 91A of the Tax Administration Act which states the purpose of the Part of the Act on binding rulings is to "provide taxpayers with certainty about the way the Commissioner will apply taxation laws".

<sup>65</sup> See for example the Organisational Review Committee's Report, above n 7, at [7.2.2] where the Committee said the objective to collect "all" tax is impossible to achieve. It went on to say at [9.4.2] that "it is not possible for the Chief Executive of IRD, operating within limited resources, to ensure that every cent of due taxes is collected. Explicit recognition of the management of limited resources in the efficient and effective collection of taxes is required".

<sup>66</sup> In New Zealand, see BG 1 of the Income Tax Act 2007.

<sup>67</sup> For more discussion on this, see my paper S Glazebrook "Statutory Interpretation and Tax Avoidance" (paper presented at "Tax Avoidance in the 21st Century" Conference, University of Melbourne (Vic), 17 May 2013) available at <[www.courts.govt.nz](http://www.courts.govt.nz)>. In that paper, at 29, I stated that "[a] purposive interpretation is required of both any specific provisions at issue and of the general provision. Reconciliation between the general and the specific is achieved by this means".

<sup>68</sup> Craig Elliffe *International and Cross-Border Taxation in New Zealand* (Thomson Reuters, Wellington, 2015) at 664–683.

## Litigation Issues

### *Judicial specialisation*

One possible reform that is mooted from time to time is the creation of a specialist tax court for all tax cases.<sup>69</sup> It is argued that this would reduce hearing times and costs for litigants, increase efficiency, improve the quality and predictability of adjudication in the courts, and provide consistency of decision making.<sup>70</sup> However, in a jurisdiction as small as New Zealand, the creation of a separate court dealing with all tax cases (including those that are currently dealt with in the High Court) is not really a viable option, particularly with the decline in tax cases being brought before the courts. Even in its heyday, the Taxation Review Authority could not support more than two judges and a small specialist taxation court runs the risk that the development of the law is concentrated in too few hands.

The alternative therefore is keeping the present system of a Taxation Review Authority but adding specialist judges within the general jurisdiction of the High Court. The Law Commission, in its review of the court structures, recommended that the High Court create specialist panels for certain areas of law, indicating that taxation, intellectual property, competition and admiralty law panels could be “an appropriate start”.<sup>71</sup> Cases in such a panel would be allocated to a judge in that panel in a fair manner, taking into account work-load and, probably, any particular expertise in particular cases. The Commission proposed to alleviate concerns of “panel packing” by ensuring that the system was transparent and that a panel sat just for a defined period.<sup>72</sup>

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<sup>69</sup> For a discussion of the pros and cons of specialist courts generally, see Susan Glazebrook “A Specialist Patent or Intellectual Property Court for New Zealand?” (2009) 12 JWIP 524. See also Michael Kirby “Hubris Contained: Why a Separate Australian Tax Court Should be Rejected” (2007) 42 TIA 161; D Graham Hill “What do we Expect from Judges in Tax Cases?” (1995) 69 ALJ 992; Sarang Vijay Damle “Specialize the Judge, Not the Court: A Lesson from the German Constitutional Court” (2005) 91 Va L Rev 1267; and Joyce Plotnikoff and Richard Woolfson “Review of the Effectiveness of Specialist Courts in Other Jurisdictions” (Department of Constitutional Affairs (UK) Research Series 3/05, May 2005).

<sup>70</sup> Taken from my paper, above n 67; the benefits were taken from the result of an international survey on specialised intellectual property courts and tribunals.

<sup>71</sup> Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004) at 267.

<sup>72</sup> At 267. See also Petra Butler “The Assignment of Cases to Judges” (2003) 1 NZJPIL 83 at 84.

The Law Commission did not deal with specialisation in appellate courts but one possibility is to have one specialist panel judge on any court hearing an appeal. A similar system has been adopted in the Court of Appeal of England and Wales, where one specialist sits with two other non-specialist judges to hear cases in certain specialist areas.<sup>73</sup> For a while our Court of Appeal operated such a system informally but I do not know if this is still the case.

The panel system, in my view, ensures the best of both worlds: there is specialist expertise but the specialist judges do other work and therefore do not become isolated from the general law. This is especially important in taxation because it is an area that touches on many other areas of law, including trust law, company law and general commercial law.

The recommendations of the Law Commission with regard to panels in the High Court have been included in the Judicature Modernisation Bill currently before Parliament. That legislation provides for a commercial panel<sup>74</sup> but it also leaves open the possibility of other panels in specialist areas.<sup>75</sup> The number of tax cases that make it to court is not high but some argue that this could actually point towards having a specialist taxation panel. Otherwise different non-specialist judges have to “re-invent the wheel” every time a case comes up, without the time or case-load to build up any expertise, and with all the attendant risks of the decisions suffering from the lack of expertise. It is true that there will normally be specialist counsel but this will not always be the case. In any event, specialist counsel do

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<sup>73</sup> This is the case for patent appeals, at least, and I assume the same is done in cases concerning other specialist areas such as taxation: International Intellectual Property Institute and United States Patent and Trademark Office *Study on Specialized Intellectual Property Courts* (25 January 2012) <[www.iipi.org](http://www.iipi.org)> at 121–126. This study notes that, although all of the judges of the High Court of England and Wales have formal jurisdiction in patents cases, in practice, only the High Court’s patent specialists (as judges of the Patents Court) will adjudicate these cases: at 124. In Australia, in the appellate division of the Federal Court, it is my understanding that there is an attempt to have at least one specialist panel judge on any court hearing on appeal: Michael EJ Black “The Federal Court of Australia: The First 30 Years – A Survey on the Occasion of Two Anniversaries” (2007) 31 *Melb U L Rev* 1017 at 1041–1043.

<sup>74</sup> Clause 18(1), Judicature Modernisation Bill.

<sup>75</sup> Clause 18(3) states that the Chief High Court Judge, in consultation with the Attorney-General and the Chief Justice, may “establish other panels of High Court Judges for the purposes of dealing with proceedings other than commercial proceedings”. In the Bill’s second reading, David Clendon (a Green MP), said in respect of specialist panels, “[t]he world has become more complex. The law is complex. The legal challenges and situations are complex. I think the idea of getting specialist panels of judges to build experience and familiarity with particular areas of law is a very positive one, and I think that will pay off to our mutual advantage”: (18 February 2015) 703 *NZPD* 1736. Currently the High Court runs four “lists”: the Commercial list, the Earthquake list, the Leaky Building list and the Judicial Review list. Most deal only with procedural issues. Courts of New Zealand “High Court Lists” <[www.courtsofnz.govt.nz/business/high-court-lists](http://www.courtsofnz.govt.nz/business/high-court-lists)>. See also High Court Rules, part 29; and Judicature Act 1908, ss 24A–24G and Geoffrey Venning, Chief High Court Judge “Access to Justice – A Constant Quest” (Address to the New Zealand Bar Association Conference, Napier, 7 August 2015) at 10 available at <[www.courtsofnz.govt.nz](http://www.courtsofnz.govt.nz)>.

not provide the whole answer; members of the bar with taxation expertise differ in their ability to explain the nuances of the law and any technical evidence to non-specialists.

I would, however, caution that the benefits of specialisation can be exaggerated. Rational people do not go to court for their own amusement or by choice. They do so because either the law, or its application to the particular facts, is unclear. This means that many of the points that end up in court will be ones that even a specialist will not be familiar with. Someone with prior specialist knowledge may be quicker to come up to speed than a non-specialist, but come up to speed they must. Also specialist judges are still judges. The longer they are on the bench, the further away from the coalface of advising clients they get. This necessarily affects their perspective and expertise.

I finish this section by highlighting some other innovative ways of dealing with expertise issues. One may be to consider a system of expert advisors to the courts.<sup>76</sup> Another method of integrating specialist advice may even be to have experts on the decision-making panel.<sup>77</sup>

### *Expert Evidence*

Turning to something of a much more practical nature: the role of expert witnesses. First, I will proffer some advice on appearing as an expert witness and then note some potential improvements the courts can make for expert witnesses.

So let us assume you have been approached to be an expert witness, what advice can I give?

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<sup>76</sup> For example, in the Intellectual Property Court, the Japanese solution (in addition to court appointed experts) has been to have both judicial research technical officials (working behind the scenes) and expert commissioners who take more a active role in the hearing itself, with parties able to challenge the advice given: Katsumi Shinohara “Outline of the Intellectual Property High Court of Japan” (May 2005) AIPPI Journal 131 available at < [http://www.ip.courts.go.jp/vcms\\_lf/200505.pdf](http://www.ip.courts.go.jp/vcms_lf/200505.pdf)>. Interestingly, s 99B of the Judicature Act 1908 allows the Court of Appeal or the Supreme Court to appoint a technical advisor to assist it by giving advice in an appeal where the proceedings involve a question arising from evidence relating to scientific, technical, or economic matters, or from other expert evidence”. For the provision of Court appointed experts in the High Court, see High Court Rules at [9.36]–[9.41]. See also Ellen Deason “Court-Appointed Witnesses: Scientific Positivism Meets Bias and Deference (1998) 77 OrLR 59.

<sup>77</sup> See, for example, s 77 of the Commerce Act 1986 where this occurs. The High Court must appoint a lay member with expertise in industry, commerce, economics, or accountancy (s 77(2)). The lay members are permitted to sit on High Court matters relating to enforcement, remedies and appeals regarding restrict trade practices and business acquisitions. Lay members of the High Court are appointed by the Governor-General and hold the position for five years with the possibility of reappointment: s 77(3).

Unless you are very used to appearing in court, the experience of being called to give evidence can be very daunting. Courts have their own, some would say arcane, procedures and they are a very unfamiliar environment for those not used to them. To ensure that you are as comfortable as possible, it is wise to visit the court room where you will be giving evidence so that you can get a feel for the room. It is also a good idea to watch a few cases and, in particular, where expert accounting evidence is called. If you have the opportunity to do any general training for expert witnesses, that would also be helpful.

The second piece of advice is probably the most important. You must remember your role. As an expert witness, you will be asked to confirm that you have read and abided by the Code of Conduct for Expert Witnesses.<sup>78</sup> This is not just a formality. You will be swearing this on oath in court. As a result, you must ensure that you have really taken it on board.<sup>79</sup>

The code begins by saying that an “expert witness has an overriding duty to assist the court impartially on relevant matters within the expert’s area of expertise”.<sup>80</sup> It then says that an expert witness is not an advocate for the party who calls him or her.<sup>81</sup> The importance of an expert being independent cannot be stressed enough. One of the most common complaints made by judges about expert witnesses is the concern about bias.<sup>82</sup> Most experts strive to achieve impartiality and independence. The difficulty is that bias can be subconscious.<sup>83</sup>

The adversarial system puts a number of pressures on witnesses which can create what is called “adversarial bias.”<sup>84</sup> Some commentators have said that adversarial bias is almost an

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<sup>78</sup> See sch 5 of the Judicature Act 1908.

<sup>79</sup> Whether codes are enough to dispel more subtle and subconscious biases is another question. As some commentators have stated, while these types of codes “are impeccable normative ideals, experts who have been exposed to the direct and more subtle pressures of adversarial criminal proceedings might be forgiven for experiencing, if not total bewilderment, at least mild cognitive dissonance”: P Roberts and A Zuckerman “Criminal Evidence” (2nd ed, Oxford University Press, Oxford, 2010) at 509.

<sup>80</sup> Clause 1; and as Cresswell J puts it “an expert witness in the High Court should never assume the role of an advocate” in *The Ikarian Reefer* [1993] 2 Lloyd’s Rep 68, [1993] FSR 563.

<sup>81</sup> Clause 2.

<sup>82</sup> For example, in the United States of America a study of federal judges found that a lack of independence by experts was the number one problem complained about with regard to expert witnesses: Molly Johnson, Carol Krafka and Joe Cecil *Expert Testimony in Federal Civil Trials: A Preliminary Analysis* (Federal Judicial Center, 2000) available at <[www.fjc.gov](http://www.fjc.gov)> at 6.

<sup>83</sup> David Bernstein “Expert Witnesses, Adversarial Bias, and the (Partial) Failure of the Daubert Revolution” (2008) 93 Iowa LRev 451 at 454–456.

<sup>84</sup> Emily Henderson and Fred Seymour “Expert Witnesses under Examination in the New Zealand Criminal and Family Courts” (March 2013) at 27, available at <<http://www.lawfoundation.org.nz>>.

“inevitable” consequence of the appointment of experts by partisans.<sup>85</sup> Adversarial bias may be present due to a number of factors: first, experts are briefed by one side and therefore will likely be given a narrative biased towards the side appointing them.<sup>86</sup> Secondly, there is the natural tendency to become part of the “team” and the wish to please those who appointed you;<sup>87</sup> and third, in addition to being part of a side, experts may be subject to rigorous challenge by the opposite side and, feeling under attack, may become defensive and aggressive and take more extreme positions than they would otherwise adopt. As one commentator has suggested, “[p]ermitting cross-examination on these opposing views is as likely to polarise them further as it is to eliminate or reduce areas of difference”.<sup>88</sup>

We all like to win and to please the clients who pay us and it is very easy to become an advocate rather than an expert. Resist the temptation. Your professional integrity and reputation is at stake. Remember that it is easy to be drawn in to advocacy subconsciously. You will be being briefed by one side. As indicated this will likely involve being fed the facts upon which your opinion will be based from a biased point of view. The best way to avoid this is always to try and envisage the counter arguments and alternative fact scenarios. And assess these with an open mind. If after doing this you maintain your original position, the exercise will have prepared you for cross examination. If you cannot maintain your original position, then modify it.

The requirements of the Code do not just relate to independence. There is also the need to stick to relevant matters and within your area of expertise.<sup>89</sup> Both of these requirements are vital. To ensure relevance, make sure you understand the case (and from both sides to the

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<sup>85</sup> Geoffrey L Davies “Current Issues - Expert Evidence: Court Appointed Experts” (2004) 23 CJK 367 at 368–371.

<sup>86</sup> Henderson and Seymour, above n 84, at 128–129.

<sup>87</sup> See for example the comment by the United States Supreme Court in the case of *Melendex-Diaz v Massachusetts* (2009) 129 S Ct 2527 where it said “[b]ecause forensic scientists are driven in their work by a need to answer a particular question related to the issues of a particular case, they sometimes face pressure to sacrifice appropriate methodology for the sake of expediency.” A forensic analysis responding to a request from a law enforcement official may feel pressure – or have an incentive – to alter the evidence in a manner favourable to the prosecution”; see also Paul Gianelli “Confirmation Bias” (2007) 22(3) Crim Just 60.

<sup>88</sup> Davies, above n 85, at 377.

<sup>89</sup> Clause 3(c).

extent possible).<sup>90</sup> Do not necessarily take at face value what the client or the lawyer says the case is about either. Think it through for yourself.<sup>91</sup>

You must also resist the temptation to give evidence on areas outside your area of expertise. While you may be able to fool others sometimes when professing expertise outside your true areas of expertise, sooner or later you will be caught out. And that will not be good for you professionally. It is especially important in tax cases to remember that you are there as accounting witnesses and not as experts on the law. Legal submissions are for counsel to make, not witnesses. This would not stop evidence being given on the practical implications of a particular interpretation of a provision, if that might assist the case. But on the whole stay away from the law if you do not want to irritate the judge.<sup>92</sup>

Other provisions of the Code that are of significance require experts to state any qualifications to their opinion<sup>93</sup> and also to identify clearly the facts and assumptions on which the opinion is based.<sup>94</sup> I would go further. Particularly in any valuation exercises, show how the valuation would be affected by different assumptions or facts. And, in particular, any facts or assumptions relied on by the other side, should these be accepted by the court.

The Code also requires experts to confer with experts from the other side if directed to do so by the court.<sup>95</sup> And to do so impartially and independently of the party calling you as a

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<sup>90</sup> See generally Evidence Act 2006 ss 7, 23, 24 and specifically s 25.

<sup>91</sup> As Lord Wilberforce puts it “[I]t is necessary that expert evidence presented to the court should be, and should be seen to be, the independent product of the expert, uninfluenced as to form or content by the exigencies of litigation. To the extent that it is not, the evidence is likely to be not only incorrect but self-defeating.” *Whitehouse v Jordan* [1981] 1 WLR 246 at 256–257.

<sup>92</sup> In *Commissioner of Inland Revenue v BNZ Investments Ltd* [2009] NZCA 47, the Court of Appeal considered that the expert witnesses dealt extensively with legal issues. In criticising the witness statements, at [28], the Court stated that such evidence poses the difficulty that “it invites a response from the Commissioner from another tax expert essentially providing counter submissions. We do not see it as helpful to the Court to have the roles of counsel and expert witnesses intermingled in this way”. The Court of Appeal endorsed an earlier comment of Simon France J’s in *Commissioner of Inland Revenue v Rabobank New Zealand Ltd* (2009) 24 NZTC 23,170 (HC) that “[h]ow a commentator thinks the case should be decided seems to me to be a classic example of irrelevant evidence. I consider there are considerable dangers, and potentially a great deal of wasted cost, in accepting the proposition that it is open to a party to file opinion evidence on the domestic law applicable to a case let alone how that law should be applied to the case.”

<sup>93</sup> Clause 4.

<sup>94</sup> Clause 3(d).

<sup>95</sup> Clause 6.

witness.<sup>96</sup> Again I would go further. You should try and confer even if not directed by the court. If this is not possible, at the least you should study carefully the briefs of the other side's experts and identify clearly the areas of agreement and disagreement. The more the areas of disagreement are isolated, the easier the task is for the judge.<sup>97</sup>

Additionally, make sure you are well prepared. Know your evidence and the possible areas of challenge. Know how your evidence fits into the case. When asked questions do not be rushed into an answer. Take time to think and do not fill silences for the sake of it. Do not be drawn into arguments and keep your cool. On the other hand, if a concession is justified, then make it. Do not be bullied into yes/no answers when the answer is more nuanced.<sup>98</sup> On the other hand if a yes or no will do then leave it at that; an answer is not improved by repetition or unnecessary verbiage.

Do not be afraid to say you do not know.<sup>99</sup> That is much better than giving an answer that may turn out to be wrong. It also avoids the follow up question that may prove your ignorance and be more damaging to your reputation than frankly admitting you do not know in the first place. Also, if you do not understand a question, then do not be afraid to ask for it to be rephrased.

When preparing your evidence start from the basics.<sup>100</sup> As an accounting or tax expert highly familiar with the case you have been briefed on, it is easy to get caught up in the technical aspects of your evidence, without remembering that, unlike you, a judge will not have been living with the case the way you have. Further, the judge will not have your expertise. This is, after all, why your evidence is being called. While you should not patronise, do start from the basics and give your evidence as simply and succinctly as you can.

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<sup>96</sup> Clause 7.

<sup>97</sup> The process whereby experts are called to give evidence together or are forced to work together is often referred to as "hot-tubbing" see: J Christian Nemeth and Lisa Haidostian "The 'Hot Tub' Method of Taking Expert Testimony Is Gaining Steam: What You Need to Know" (2014) 19(1) IBA Arb News 91; Gary Edmond "Secrets of the 'hot tub': expert witnesses, concurrent evidence and judge-led law reform in Australia" (2008) 27(1) CJQ 51; Professor Dame Hazel Genn "Getting to the truth: experts and judges in the 'hot tub'" (2013) 32(2) CLQ 275; and James Green "Apotex Inc v AstraZeneca Inc: IP experts take the plunge into the hot tub" (2012) 23(12) EIPR 874.

<sup>98</sup> Ryan Flax "The Litigation Consulting Report" (28 May 2013) A2L Consulting <[www.a2lc.com](http://www.a2lc.com)>.

<sup>99</sup> Craig Williams and Richard Honey "Expert Evidence and How to be a Good Witness" (2010) 10 JPL 1200 at 1207–1208.

<sup>100</sup> Williams and Honey, above n 99, at 1209.

The last issue that you, as expert witnesses, must consider is liability. I will only say a few words on this topic. In New Zealand there is an absolute privilege for witnesses.<sup>101</sup> This means that while acting as a witness you are free from any potential liability, put simply: you cannot be “sued”. The United Kingdom has, however, recently removed immunity for expert witnesses.<sup>102</sup> I make no comment on whether New Zealand could follow suit but, even if it does not you are still subject to any professional standards and could face disciplinary action for your actions as a witness.<sup>103</sup>

After having spent so much time advising you on being better expert witnesses, it is only fair that I now turn the microscope back onto the courts and consider what the courts can do to be better for expert witnesses.

One of the issues I previously mentioned was cross-examination. It is fair to say that cross-examination has a bad reputation amongst experts. Many experts say that it goes too far, feels like an ambush and obscures the truth.<sup>104</sup> It may be that judges should intervene more to avoid inappropriate cross examination.<sup>105</sup> But a more radical solution may be to consider whether there may be other procedures that can be employed to allow expert evidence to be challenged and tested in a more constructive manner.<sup>106</sup>

Another major complaint of expert witness, and indeed probably all those connected to courtroom work, is that of the time commitment to the court process.<sup>107</sup> While most experts are happy to put the time in to prepare and appear, it is the “wasted time” that irks expert witnesses the most.<sup>108</sup> While recognising that some delays may be due to unexpected factors

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<sup>101</sup> Dr Anna Sandiford *A to Z of New Zealand Law: Evidence – Forensic Evidence* (online looseleaf ed, Brookers) at 1.7(5)

<sup>102</sup> *Jones v Kaney* [2011] UKSC 13; see also Catherine Baksi “Expert witnesses lose 400-year-old immunity” *The Law Society Gazette* (online ed, London, 30 March 2011) available at <www.lawgazette.co.uk> and Kirsty Hughes “The Abolition of Expert Witness Immunity” (2011) 70(3) CLJ 516.

<sup>103</sup> *Meadow v General Medical Council* [2006] EWCA Civ 1390, [2007] 1 All ER 1 discussed with approval in *New Zealand Defence Force v Berryman* [2008] NZCA 392 at [67]–[68] and also *RIG v Chief Executive of the Ministry of Social Development* HC Auckland CIV-20080404-003461, 27 July 2009 at [74].

<sup>104</sup> Henderson and Seymour, above n 84, at 72–81.

<sup>105</sup> Henderson and Seymour, above n 84, at 81–82.

<sup>106</sup> For an example of other changes in other Court processes see Emma Davies, Emily Henderson and Fred Seymour “In the interests of Justice? The Cross-examination of Child Complainants of Sexual Abuse in Criminal Proceedings” (1997) PPL 217; Emily Henderson “Root or Branch – Reforming the Cross-Examination of Children” [2010] CLJ 460; and Emily Henderson “Bigger Fish to Fry: Should the Reform of Cross-Examination be Expanded beyond Vulnerable Witnesses” [2015] E&P 83.

<sup>107</sup> Henderson and Seymour, above n 84, at 82–85.

<sup>108</sup> Henderson and Seymour, above n 84, at 83–84.

and thus unavoidable, I suspect that organisation of cases on the basis of witness convenience (as against that of the courts or counsel) could assist. Further, where a delay is unavoidable, clear and prompt communication between the judge, counsel and the expert witness is a must.

## **Conclusion**

Taxation obligations permeate almost every facet of society. The central importance of tax collection to the functioning of government, means that it raises rule of law issues. This paper has touched on some of these and has also dealt with some litigation issues. It is often said that taxes are one of the two certainties in life (the other being death).<sup>109</sup> The important issues that taxation law and procedure present are not likely to disappear soon.

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<sup>109</sup> “In this world nothing can be said to be certain, except death and taxes” – Benjamin Franklin.