

REDISTRIBUTING DEMOCRACY: AN INQUIRY INTO AUTHORITY, DISCRETION AND THE POSSIBILITY OF ENGAGEMENT IN THE WELFARE STATE

Lorne Sossin*

This article considers in whose interest and for what end public officials wield the vast discretion which welfare state statutes accord them. Discretionary authority is endemic to the welfare state and yet, in practice, few people identify a stake in the under-scrutinized and far-reaching judgments public officials are routinely called upon to make. The author argues that in order for such discretionary authority to be accepted as both legitimate and just, it must be validated publicly through democratic forms of public administration. This requires administrators to adopt a proactive role in fulfilling the normative basis underlying welfare state statutes.

Through a detailed analysis of the Income Tax Act, the author seeks to illustrate how administrative discretion has been artificially depoliticized in the welfare state, and the deleterious consequences this has for the socio-economically disadvantaged. With a view to constructing an alternative basis for administrative relationships, the author sketches a "theory of engagement" which is aimed at fostering dialogue and interdependence between officials and those affected by their discretionary authority.

Dans cet article, l'auteur se demande dans l'intérêt de qui et à quelle fin les fonctionnaires exercent le vaste pouvoir discrétionnaire que les lois de l'État-providence leur confèrent. Le pouvoir discrétionnaire est endémique dans l'État-providence et pourtant, en pratique, rares sont les gens qui considèrent avoir un rôle à jouer dans les décisions non vérifiées et de grande portée que les fonctionnaires sont appelés à prendre couramment. D'après l'auteur, pour que le pouvoir discrétionnaire soit considéré comme légitime et juste, il doit être entériné publiquement grâce à des formes démocratiques d'administration publique. Pour ce faire, il faut que les administrateurs et les administratrices adoptent un rôle proactif dans l'application des principes normatifs qui sous-tendent les lois de l'État-providence.

Grâce à une analyse détaillée de la Loi de l'impôt sur le revenu, l'auteur cherche à illustrer comment la discrétion administrative a été artificiellement dépolitisée dans l'État-providence et à exposer les conséquences néfastes de cette dépolitisation sur les personnes défavorisées sur le plan socioéconomique. Afin de donner un autre fondement aux relations avec l'administration, l'auteur ébauche une «théorie de la participation» qui vise à favoriser le dialogue et l'interdépendance entre les fonctionnaires et les personnes qui sont touchées par leur pouvoir discrétionnaire.

* Lorne Sossin, LL.B., Ph.D., Associate in Law, Columbia University, School of Law. I would like to thank Anne Alstott, Richard Briffault, Neil Brooks, Julia Hanigsberg and Ron Manzer for their helpful comments. I would also like to acknowledge the financial support of the Social Science and Humanities Research Council of Canada, the Canada-U.S. Fulbright Foundation and Columbia Law School.

Had they realized what enemies they were making it is unlikely they would have acted any differently—they were not cautious people. They were sometimes intolerant, always impatient, but they were also idealists and all of them were proud of their work and they were not reluctant to identify themselves at dinner parties as Tax Officers....being a Tax Officer was the most pleasant work imaginable, like turning a tap to bring water to parched country.

Peter Carey¹

I. INTRODUCTION

In the early 1980s, Elizabeth Symes, a Toronto lawyer, claimed the money she paid her nanny, Mrs. Simpson, as a business expense. For the first two years of this practice, Revenue Canada accepted Symes' assessment of her income tax liability, as they were also authorized to do. Then they reversed themselves. Revenue Canada officials had decided (on what basis we do not know) that nanny expenses were personal expenses and could not be claimed as business deductions, and reassessed her tax liability accordingly (retroactively providing her with a child care tax credit), as they were also authorized to do. Symes challenged this reassessment in the courts and the case attracted national media attention.² For the first time in its history, cameras were trained on the Supreme Court of Canada to cover the hearing of the case. However, in all the televised constitutional excitement about class and gender, equality rights and tax codes, the real issue of the *Symes* case was hopelessly obscured — namely, in whose interest and for what end public officials wield the vast discretion which welfare state statutes accord them?

In this paper, I argue that the exercise of discretion by public officials, in order to be accepted as both legitimate and just, must be validated publically on the basis of its substantive content.³ The apparatus of the welfare state calls upon its officials to make myriad discretionary judgments in the performance of their duties, judgments which shape the social, political and economic fabric of our society. Liberal democratic institutions are confronted with the task of legitimating these judgments which otherwise would appear autocratic. Within the public sphere of the welfare state, however, the practice of public administration is still depicted as a domain of technocrats who apply pre-determined rules to particular settings in an impartial fashion. No matter how great the gulf between this "ideal" and the day-to-day reality of running complex bureaus and

¹ P. Carey, *The Tax Inspector* (London: Faber and Faber, 1991) at 124.

² *Symes v. M.N.R.*, [1993] 4 S.C.R. 695. For a brief history of the litigation, see A. Macklin, "Comment: *Symes v. M.N.R.*: Where Sex Meets Class" (1992) 5 C.J.W.L. 498. The Supreme Court held, 7-2, that Revenue Canada's reassessment disqualifying Symes' deduction of her nanny expenses did not violate the *Charter of Rights and Freedoms* [hereinafter *Charter*], and properly interpreted the *Act*. For a sampling of editorial reactions, see "Subsidizing Child Care" *Toronto Star* (January 3, 1994) A14; "The Law Should Treat All Children Equally" *Vancouver Sun* (January 3, 1994) A11; "Some Men Never Seem to Understand" *Calgary Sun* (December 21, 1993) A4; and "Child-Care Fumbling in High Court" *Ottawa Citizen* (December 18, 1993) A10.

³ Previously, I argued that instrumental rationality is an insufficient basis for explaining or justifying the exercise of administrative discretion. Through an approach grounded in theories of practical reason and communicative action, I concluded that democratic forms of administration were both possible and necessary to conceptualize. See L. Sossin, "The Politics of Discretion: Toward a Critical Theory of Public Administration" (1993) 36 Can. Pub. Admin. 364.

agencies, this is the only vision of public administration that is deemed to be politically viable. This is so because the discretionary authority of unelected officials is generally understood only in opposition to democratic accountability and the rule of law. Discretion is seen, on this view, primarily as a threat to be contained. I argue that it is precisely in order to enhance the substance of democracy and the rule of law that discretion must be exposed, rehabilitated and expanded.⁴ Discretion represents an important and long under-valued means of integrating human relations into the administration of public authority. The question is not whether to allow discretion (because it is both endemic and indispensable to the functioning of the welfare state), but rather what kind of discretion should be fostered, and whose participation should be sought.

This paper is divided into four sections. In the first section, I outline how the political and social questions inherent in the exercise of administrative discretion have been subsumed in an artificially depoliticized public realm. In the second section, I explore the anatomy of discretion, and argue that it is foremost a social act which reflects normative priorities in relationships of power. The bureaucrat is called upon to perform the role of mediator in these relationships: she must make a judgment rooted in the particular circumstances of diverse individuals and groups, and yet one which remains consistent with generalizable principles. The third section of this study elaborates on the nature of discretion using tax administration in Canada as an illustration. I show how the broad norms and sweeping discretion contained in the *Income Tax Act* fail to guide the collection and enforcement of income tax, resulting in those advantaged by the market being advantaged again by the skewed administration of the *Act*. Those low-income taxpayers who have the most to gain from tax officials taking a purposive and proactive role in the collection of revenue and redistribution of income are disengaged from the administrative process entirely. Those high-income taxpayers with the most to lose from more progressive forms of administration have been able to integrate their strategic agenda into the administrative process itself. Thus, the administration of the income tax has come to reinforce and exacerbate socioeconomic inequality in Canada. In the last part of this section, I illustrate the relationship between how administrative discretion in the *Act* is interpreted and the redistributive potential of the income tax system through a brief analysis of the General Anti-Avoidance Rule enacted as a part of the tax reform of the late 1980s. In the fourth and final section, I examine the possibility of validating discretion in a more democratic fashion in order to engage taxpayers in a rejuvenated public realm. What I term the "theory of engagement" focuses legal and political discourse on the content of discretion rather than its jurisdictional boundaries, in the hope of fostering a discursive space for reflecting on the nature, scope and purposes of administrative judgments. To the degree that this would enmesh a more diverse set of interests in the administrative process, and a principle of interdependence and mutuality in administrative relations, I believe it would counter the alienation which has become synonymous with how we think of "bureaucracy" in the welfare state.

⁴ This discretion-centred approach to administrative action enjoys a growing following; see M. Adler & S. Asquith, eds., *Discretion and Welfare* (London: Heinemann, 1981); and most recently, K. Hawkins, ed., *The Uses of Discretion* (Oxford: Clarendon Press, 1992).

II. DEPOLITICIZING THE PUBLIC REALM

The very hallmark of modernity is a social self-consciousness about the structures by which society is organized; it is this that is absent in the administration of the welfare state. Rather than agitate for new avenues of participation and empowerment, citizens have come to assume their own powerlessness in the structures of public authority. The constituency which actively seeks to reform those structures along democratic lines is marginal at best. Our experience with bureaucracy is typified by the absence of participation and the irrelevance of real life situations to bureaucratic encounters; the only form of administration we know is "the organization of social projects as issues of technical coordination".⁵ Bureaucracy under the welfare state is more than merely a particularly dominating type of political apparatus — it embodies (quite literally) the interventionist ambitions of the state. Bureaucracy is not just a mechanism to intervene in the structures of socioeconomic inequality, but is itself embedded in those structures.⁶ As Jurgen Habermas emphasizes, the administration of the welfare state is far more than a means to an end:

The legal-administrative means of translating social-welfare programs into action are not some passive, as it were propertyless medium. They are connected, rather, with a praxis that involves the isolation of facts, normalisation and surveillance, the reifying and subjectivating violence of which Foucault has traced right down to the most delicate capillary tributaries of everyday communication. The deformations of a lifeworld that is regulated, fragmented, monitored, and looked after are surely more subtle than the palpable forms of material exploitation and impoverishment; but internalized social conflicts that have shifted from the corporeal to the psychic are not therefore less destructive.⁷

We approach administrative encounters now expecting to be treated as mere cases to be administered. Protest is manifested only by disengaging even more from the administrative process. Joshua Cohen has written that the public exerts its influence over public bureaucracies in a "siege-like" manner by withdrawing legitimation.⁸ The administrative process from which this disengagement occurs is, however, intimately tied to the fulfillment of the normative goals of the welfare state.

By at least partially "de-commodifying" the market through income security, unemployment insurance, old-age pensions, subsidized health-care and regulated collective bargaining, the welfare state promised the possibility of the amelioration of poverty and deprivation.⁹ Simultaneously, the welfare state held out the promise to

⁵ I.M. Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990) at 76.

⁶ G. Esping-Anderson, *The Three Worlds of Welfare Capitalism* (Cambridge: Polity Press, 1990) at 23, where he writes that the welfare state is "an active force in the ordering of social relations".

⁷ J. Habermas, *The Philosophical Discourses of Modernity* (Cambridge, Mass.: MIT Press, 1990) at 362.

⁸ See J. Cohen, "Deliberation and Democratic Legitimacy" in A. Hamlin & P. Pettit, eds., *The Good Polity* (Oxford: Basil Blackwell, 1989) at 17-35.

⁹ Esping-Anderson, *supra* note 6 at 3, "The outstanding criterion for social rights must be the degree to which they permit people to make their living standards independent of pure market

business and investors of sustained, stable growth with intense public intervention to regulate everything from competition to labour. As a result of this cross-fertilization between the needs of capitalist growth and the needs of social justice, the already blurred boundary between public regulation and private accumulation seems perennially on the verge of collapse. The welfare state thus finds itself in its classic double-bind: it is obligated to sustain and further capitalist expansion while maintaining enough distance to intervene in that expansion on behalf of those disadvantaged by it.¹⁰ As public and private institutions increasingly commingle, public discourse becomes more and more tied to the welfare of the socioeconomic status quo, and less open to political struggle.¹¹

I believe there is a way out of this conundrum, and it rests in the attribute liberal democrats seem to fear most — administrative discretion. Discretion is both a pervasive and deeply political feature of the welfare state, yet it is exercised absent any meaningful public awareness or participation. We tend not to know the range of choices open to officials, nor what factors go into the judgments that are made, nor the implications that those decisions have on the equity, justice or fairness of legal and political institutions.

This dearth of political analysis and public debate is part of a curious and more threatening phenomenon. As economic welfare has come increasingly to be undertaken as the responsibility of the state, politics has been reduced more and more frequently to distributive issues. Such issues might include how high capital gains exemptions should be or how long welfare cheques should be disbursed to the able-bodied, but the basic tenets of the economic order and its claim to social justice are simply accepted as given. It is not in the interest groups' interests to question the administrative structures by which they are privileged.

As consumers first,¹² and clients second,¹³ citizens approach public officials in a spirit of calculation seeking the best deal they can get. Politics is first fragmented, then forces. It is in this sense that social rights diminish citizen's status as commodities." See also D. Ashford, *The Emergence of the Welfare States* (Oxford: Basil Blackwell, 1986).

¹⁰ The ambivalence of the state towards economic growth and socioeconomic inequality, and its autonomy from social and economic conflict have been the subject of debate for the past twenty years; see R. Miliband, *The State in Capitalist Society* (London: Weidenfeld and Nicholson, 1969); F. Block, "The Ruling Class Does Not Rule" (1977) *Socialist Revolution* 7; C. Offe, "The Capitalist State and the Problem of Policy Formation" in L. Linberg *et al.*, eds., *Stress and Contradiction in Modern Capitalism* (Lexington, Mass: D.C. Heath, 1973).

The need of the welfare state to reconcile its contradictory mission is one explanation that has been advanced to explain the increasing focus on due process rights in administrative settings. See E. Tucker, "The Political Economy of Administrative Fairness: A Preliminary Enquiry" (1987) 25 *Osgoode Hall L.J.* 555.

¹¹ The entanglement of public administration in market relations cuts both ways. Some observers have argued that "public" functions of social and economic regulation in the welfare state have been increasingly transferred to "private" corporations, which, merely because they are private, should not be exempt from the procedural rights and entitlements that govern public bodies and agencies. See *e.g.* A. Hutchinson, "Mice Under a Chair: Democracy, Courts and the Administrative State" (1990) 40 *U.T.L.J.* 374.

¹² The "consumer" focus has become especially popular in the early 1990s as the managerial restructuring philosophy of business in the 1980s has been increasingly advocated for the public service; see *e.g.* R. Lacasse, "Leadership and the Creation of a Service Culture" (1991) 34 *Can. Pub. Admin.* 474.

¹³ Often, though not always, the distinction between whether people view themselves as consumers or clients in the welfare state is a distinction based on our power relationship to the state

absorbed in this process of acquisitive bargaining. The result is a depoliticization of the public sphere. Iris Young's depiction of the politics fostered by what has come to be known as "interest group pluralism" captures this point:

In its process of conflict resolution, interest-group pluralism makes no distinction between the assertion of selfish interests and normative claims to justice or right. Public policy dispute is only a competition among claims, and 'winning' depends on getting others on your side, making trades and alliances with others, and making effective strategic calculations about how and to whom to make your claims. One does not win by persuading a public that one's claim is just.¹⁴

Moreover, it is not only our political *consciousness* that has become fragmented, but also the public *conscience* of the welfare state as a whole. Normative issues are collapsed into strategic bargaining, and the distribution of entitlements dictates political negotiations to the exclusion of convictions regarding social justice. Potentially reflexive legal structures are similarly reduced to increasingly dense networks of rules and regulations well-suited to contractual relationships (and, most of all, to contractual entities such as corporations), but unable to legitimate a wide range of contextually motivated discretionary judgments. Legalization drains whatever pockets of political resistance may remain.¹⁵ If one is stymied by bureaucratic red-tape, or a state benefit to which one feels entitled, the first impulse (albeit only for those with resources sufficient to contemplate it) is to seek redress through legal channels. Save for rare exceptions, litigation serves to remove the possibility of political protest — even the most celebrated of court cases is at most a spectator sport. Paradoxically, it is when the discretionary judgments of officials are challenged in court that they come to light, and yet in the glare of this light that they are put out of reach of public input. Returning for a moment to the example of *Symes*, rather than pressuring Revenue Canada to act less sexist, or federal and provincial governments to fund daycare better, the individuals and groups affected by Revenue Canada's discretion were put in the position of waiting to see what the court would decide. In the case of *Symes*, this was both metaphorically and literally true, as the largest audience of viewers for the daytime hearing turned out to be women at home with children (including both mothers and child-care workers).

Though communicative channels between officials and those affected by their decisions are few, and access to them unequal, it would be unfair to say democracy does not permeate administrative settings in a variety of ways. Public officials are bound by laws enacted and revised by elected officials, and are, theoretically at least, accountable to members of the cabinet or other political appointments. Therefore, democracy should

— people dependent on welfare, UI or other forms of state assistance are more likely to view themselves as clients. As Kathy Ferguson has observed, "[b]ureaucratic discourse does not, of course, produce poor people, but it does produce *clients*; that is, it produces individuals whose subjectivity is molded and shaped by the parameters of the discourse, whose attitudes and behaviour are created within a field of interaction that is bounded by institutions." K. Ferguson, *The Feminist Case Against Bureaucracy* (Philadelphia: Temple University Press, 1984) at 136.

¹⁴ Young, *supra* note 5 at 71.

¹⁵ For two quite different approaches to the depoliticizing effects of legislation, see J.M. Conley & W.M. O'Barr, eds., *Rules versus Relationships: The Ethnography of Legal Discourse* (Chicago: University of Chicago Press, 1990); and M. Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Wall & Thompson, 1989).

be understood as a spectrum rather than as a threshold that is or is not crossed.¹⁶ Administration can no more be absolutely free from democracy than it can be absolutely determined by democracy. What I advocate in this paper is the striving towards a form of administration sufficiently democratic so as to engage the population in the administrative process. Where precisely this might occur on the spectrum is difficult to say. Accepting that this spectrum has a place in administrative settings is controversial in and of itself; it presupposes that the issue to be determined is not *how much* government should be tolerated but rather *what kind* of government should be sought.

Calls to infuse *more* democracy in administrative settings, and examples of cases where this has been attempted have become increasingly popular in the last decade or so.¹⁷ However, the literature on public administration continues to embrace an agenda dedicated first and foremost to efficiency and technical expertise.¹⁸ Private sector managerial techniques have been embraced along with the belief that the public sector must pursue the bottom line with as much vigor as any large corporation.¹⁹ In short, there is little or no internal critique of the purposes of public administration, and the deceptive dichotomy between politics and administration remains alive and well in these settings. Kathy Ferguson characterizes this conceptual stagnancy bluntly: "[t]he literature of public administration is theoretically impoverished, politically dangerous, and, all too frequently, morally bankrupt."²⁰

One of the most trenchant attempts to overcome this sterility of critical thought on public administration was provided by Gerald Frug in his article, "The Ideology of Bureaucracy in American Law".²¹ Frug set about the task of excavating the underlying fear of bureaucratic domination which, in his view, is common to all welfare state democracies:

Each model of bureaucratic legitimacy is a story designed to tell its listeners: "Don't worry, bureaucratic organizations are under control." All of administrative and corporate law can, in my view, be understood as an expression of one of these stories or of a combination of them.²²

However, the deeper problem of administrative legitimacy, he argues, requires more than constructing "illusions" to convince the population that bureaucratic authority is

¹⁶ See F. Cunningham, *Democratic Theory and Socialism* (Cambridge: Cambridge University Press, 1987) at 25-31.

¹⁷ See J. Handler, "Discretion: Power, Quiescence, and Trust" in Hawkins, *supra* note 4 at 331-60; J. Handler, "The Conditions of Discretion: Autonomy, Community, Bureaucracy" (1986) 34 U.C.L.A. L.R. 67; J. Forester, ed., *Critical Theory and Public Life* (Cambridge, Mass.: MIT Press, 1985); and H. Kass & B. Catron, eds., *Images and Identities in Public Administration* (London: Sage, 1990).

¹⁸ See D. Cameron, "The Discipline and the Profession of Public Administration: An Academic's Perspective" (1982) 25 Can. Pub. Admin. 496; and D. Savioe, "Studying Public Administration" (1990) 33 Can. Pub. Admin. 389.

¹⁹ See D. Osborne & T. Gaebler, *Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector* (New York: Penguin, 1993) at 280-310.

²⁰ Ferguson, *supra* note 13 at 80.

²¹ G.E. Frug, "The Ideology of Bureaucracy in American Law" (1984) 97 Harv. L.R. 1276; for a critical review of Frug's typology, see T. Jones, "Administrative Law, Regulation, and Legitimacy" (1989) 16 J. Law & Soc. 410.

²² Frug, *ibid.* at 1284.

under the control of democratic institutions. What these illusions are intended to conceal is the tension produced by administrative involvement in social relations between people's individual and communal interests:

All the stories of bureaucratic legitimation, in short, share a common structure: they attempt to define, distinguish, and render mutually compatible the subjective and objective aspects of life. All the defenses of bureaucracy have sought to avoid merging objectivity and subjectivity — uniting the demands of commonness and community with those of individuality and personal separateness — because to do so would be self-contradictory.²³

Frug concludes that it is the subject/object distinction itself that is the reason why the project of bureaucratic legitimation has, in a sense, no alternative but to rely on deception. He believes the way out of this quagmire is to expose the deception:

[t]he ideology that reassures us that bureaucracy is legitimate is demobilizing because it conceals the need to reorder American society to bring to life better versions of the ideal of human freedom. Critical theory seeks to undermine this ideology by exposing the false consciousness through which people understand the world. Such an exposure is itself an act of liberation.²⁴

In my view, the focus on false consciousness mistakenly assumes that true consciousness, were it to be attained, would solve the problem. However, the danger is not that people are deceived about the true nature of bureaucracy (though this is certainly often true), but that bureaucracy is closed off to them as a conduit of political participation. Indeed, only when some democratic, communicative structures are in place can the “true” nature of bureaucracy be uncovered. It is only through a rejuvenated public sphere that administration can be understood as something other than legitimated domination. In other words, the focus on the individual consciousness of the subject has to shift onto the intersubjective, discursive structures through which public discourse is filtered.²⁵

As Pierre Schlag has observed, those structures are designed so as to preclude normativity from shaping public discourse, at least where administrative action is concerned.²⁶ Schlag questions whether moral values such as honesty, sincerity, loyalty, honor or craft are applicable or even intelligible in bureaucratic settings. He provides the following two lists of characteristic traits of bureaucratic interaction and asks whether it is possible to determine which of the competing characteristics is closest to “doing the right thing”:

Bureaucratic Morality I:

It's not my job.

Some other department.

I don't make the rules, I just follow them.

I'm sorry, this is not the proper form.

I wish I could, but I simply can't....do that....answer that question.

²³ *Ibid.* at 1287.

²⁴ *Ibid.* at 1295.

²⁵ For a discussion of this “linguistic turn” in social and political theory, see S. Benhabib, *Critique, Norm and Utopia* (New York: Columbia University Press, 1986).

²⁶ P. Schlag, “Normativity and the Politics of Form” (1991) 139 U. Pa. L. Rev. 801 at 881-82.

Come back tomorrow.
 Oh, I wouldn't have said that.
 I'm sorry, your file is not in here.

Bureaucratic Morality II:

I really shouldn't be telling you this, but if....
 No one will check on this.
 You can't do it that way, but if you call it this instead....
 Technically, it doesn't comply but....
 Well, it's really supposed to be done that way, but what really matters is....
 I'm sorry, your file is not in here.²⁷

Schlag concludes that the norms we might select would have to be driven almost exclusively by context, but even once such responses were contextualized, they would not neatly correspond to any legitimate public virtues. We simply have no normative bearings from which to navigate through forms of administrative interaction that are so embedded in strategic and instrumental discursive structures. I agree with Schlag's analysis of the vacuum of normativity in the public discourse about administrative authority and decision-making (which itself, of course, is a normative statement about that authority).²⁸ In order to remedy these normative deficits, I argue it is necessary to approach administrative discretion as a social act capable of being redeemed in the public realm. The normative priorities of administering the welfare state, can be revealed only by first removing discretion, from its artificial political and legal isolation. This isolation of discretion, therefore, must be overcome if its transformative potential is to be realized.

III. THE ANATOMY OF DISCRETION

While discretion is now said to have "emerged from the shadows", its form, content and control remain the subject of continuing debate.²⁹ Discretion is an exercise of authority, and as such, must be capable of being justified by law.³⁰ It is, simultaneously, an act of choice — a judgment — but not one made in the abstract; it is a social rather than an individual judgment.³¹ Discretion is shaped both by organizational boundaries inside the bureaucracy (officials seeking to fulfill the role expected or required of them)

²⁷ *Ibid.*

²⁸ The dearth of normative content in the public sphere is not limited to the bureaucratic setting. Schlag contends (*ibid.* at 931-32) that "[n]ormative legal thought is at once an abstraction of and indistinguishable from the operations and practices of bureaucracy."

²⁹ Handler in Hawkins, *supra* note 4 at 331. Robert Rabin notes that controlling discretion continues to be "the principal concern of the state". See R. Rabin, "Legitimacy, Discretion, and the Concept of Rights" (1983) 92 Yale L.J. 1174.

³⁰ See C. Friedrich, "Authority, Reason and Discretion" in R.E. Flathman, ed., *Concepts in Social and Political Philosophy* (New York: MacMillan Publishing Co., 1973) at 167-81.

³¹ See M. Feldman, "Social Limits to Discretion: An Organizational Perspective" in Hawkins, *supra* note 4 at 163; see also, in the setting of legal discretion, L. Abt & I. Stuart, eds., *Social Psychology and Discretionary Law* (New York: Van Nostrand Reinhold Company, 1979).

and by boundaries outside the bureaucracy (officials reacting to external pressures). Most of all, discretion is shaped by the need to attain the results desired by others.³²

Broadly construed, discretion comes into play whenever an official makes a choice among possible courses of action. Therefore, discretion is never wholly absent in administrative settings, no matter how dry or technical the task in question appears.³³ For the purposes of clarity, I have identified three distinctive layers of administrative discretion: 1) communicative discretion (interaction between officials and individuals/groups); 2) interpretive discretion (determining what policy or statutory directives mean and what assumptions are integrated into such interpretations); and 3) legal discretion (instances where policy or statutory directives mandate officials to make discretionary determinations).³⁴ In each of these overlapping and interlocking layers, there is significant opportunity to engage more segments of society in the administrative process.

Discretion, ever since Alfred Dicey's denunciation that it represented the "antithesis of law", has been defined in relation to the legal boundaries within which it is deemed legitimate.³⁵ K.C. Davis, one of the pioneers of research into the relationship between law and discretion, illustrates the normative flavour of the line held to divide discretion from law:

Discretion is a tool only when properly used; like an axe, it can be a weapon for mayhem or murder. In a government of men and of laws, the portion that is a government of men, like a malignant cancer, often tends to stifle the portion that is a government of laws. Perhaps nine-tenths of injustice in our legal system flows from discretion and perhaps only one-tenth from rules.³⁶

While Davis' statement that discretion was widespread and deserved as much attention as statutory authority was groundbreaking, his vision of how to legitimate human judgment is hardly an appealing one. Either discretion must be reduced to a neutral(ized) force under the control of supervisory institutions (courts) or discretion

³² For a discussion of these competing pressures, see C. Offe, "The Divergent Rationalities of Administrative Action" in *Disorganized Capitalism: Contemporary Transformations of Work and Politics*, ed. by J. Keane (Cambridge, Mass.: MIT Press, 1985) at 300.

³³ This idea is developed in D. Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Oxford: Clarendon Press, 1986).

³⁴ These categories are drawn from those developed in my earlier study. See Sossin, *supra* note 3 at 384-86.

³⁵ See A.V. Dicey, "The Development of Administrative Law in England" (1915) 31 L.Q. Rev. 148. The law/discretion dichotomy, always on shaky ground, made far more sense when it was first disclosed that it does under the welfare state. Jeffrey Jowell, among others, questions the principal assumption on which this vision of administrative law is built — that judges and bureaucrats are not alike: "an organization charged with implementing vague legislation will itself be an agent in the clarification and elaboration of legislative policies. In this sense, bureaucracies are law makers themselves". J. Jowell, *Law and Bureaucracy: Administrative Discretion and the Limits of Legal Action* (Port Washington, New York: Dunellen Publishing Company, 1975) at 14. Allan Hutchinson echoes this point: "Administrators not only make far more law than legislators, but they resolve far more disputes than judges....The legal process has played a major role in distorting this reality". See A. Hutchinson, "The Rise and Ruse of Administrative Law and Scholarship" (1985) 48 Mod. L. Rev. 293 at 301-02.

³⁶ K.C. Davis, *Discretionary Justice: A Preliminary Inquiry* (Baton Rouge: Louisiana State University Press, 1969) at 25.

becomes a “malignant cancer” spreading throughout the body politic. Thus the focus, so fleetingly on discretion itself, is immediately shifted to the judiciary, the physicians of the administrative process, on the watch for bad cells. According to Frug, this obsession with judicial review is what “defines, perpetuates, explains, justifies, and reassures us about bureaucratic organization.”³⁷

Legal theorists have assisted the judiciary in the attempt to understand discretion (including the judge’s own discretion) as something to be confined, and therefore rendered safe, by statutory authority. The well-worn metaphor used often to capture this ideal was first offered by Ronald Dworkin: “Discretion, like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction.”³⁸

I find the emptiness in the centre of the doughnut an un compelling representation for discretion’s porous potential. Discretion is shaped by far more than the formal legal structures which surround and legitimate it. A sponge is a closer representation of the understanding of discretion I am advancing. In a sponge, there are a variety of holes and substance in between, and the two are impossible to disentangle. The sponge, however, can absorb and retain the fluids with which it comes into contact. This is how I believe the relationship between discretion and law ought to be viewed — not simply as a particular form of authority — but as a potential forum for politics.

Seyla Benhabib argues that the ideal of a communicative community is intimately tied to the “viability and desirability of a *democratic public ethos*”; public discourse is thus primarily concerned with “*institutional justice*.”³⁹ As Benhabib points out, however, unequal relations of power makes the formation of consensus through public discourse highly problematic:

The presence of power relations between the parties casts doubt on whether they were motivated by the force of the better argument alone....There is indeed a relation between the idea of a true consensus and that of a voluntary, sincere agreement between parties, unaffected by force, coercion, and manipulation.⁴⁰

While it is, I believe, correct to assert that all individuals possess the intuitive capacity to reason practically and therefore participate in political decision-making, it is naive to assume communicative skills are distributed equally in society.⁴¹ The danger

³⁷ Frug, *supra* note 21 at 1285-86.

³⁸ R. Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1977) at 31.

³⁹ Benhabib, *supra* note 25 at 282-83.

⁴⁰ *Ibid.* at 286.

⁴¹ Jowell, *supra* note 35 at 198. Jowell concluded after a study of citizen participation in urban renewal that even when the agency has the onus to solicit opinions from the public, the lack of communicative skills or the lack of time and energy to mobilize such skills, precluded a wide range of views and experiences to shape the outcome:

Effective participation generally requires middle-class verbal skills, a requirement emphasized when the main mechanism for participation is the public hearing. In Madison Park we discovered that many people were unable either to involve themselves in any aspect of community affairs or to participate in community or governmental organizations. Feelings of skepticism, hostility, lack of interest, or being overwhelmed by personal problems all contributed to this lack of desire, or incapacity, to attend a forum such as a public hearing or even to take advantage of administrative availability

which is heightened under the welfare state is that the very size and complexity of bureaucracy will tend to lead to discretion further exacerbating those unequal relations. Joel Handler sets out this problem in the following terms:

The modern welfare state has changed the relationship of the citizen to the state. Instead of the old liberal vision of the individual asserting his independence from the state, we now see interdependence. We see relationships that are both continuous and discretionary....The result of this change is that large numbers of citizens, of necessity, have to deal with the discretionary powers of officials on a more or less continuous basis, but, because of the maldistribution of wealth and power, they lack the capacity to deal with government in these situations. The result is familiar. Discretion becomes professionally or bureaucratically dominating. There is a loss of both substantive and procedural rights.⁴²

However, at the same time as those without resources experience discretionary powers as dominating, those with no shortage of resources may bring their influence to bear on how, and in whose interests, discretion is exercised. While Habermas was surely right when he asserted, "[m]oney and power can neither buy nor compel solidarity and meaning",⁴³ they certainly can and do skew the communicative potential of a contemporary public sphere. Nowhere is this more prevalent than in the sphere of the income tax, to which I shall now turn, where inequalities of resources and inequalities of administration go hand in hand.

IV. DISCRETION AND AUTHORITY: THE CASE OF TAX ADMINISTRATION

The purpose of this section is to outline the statutory authority, discretionary ambit, and a sample of the operational functions of the tax administrator in Canada; in other words, I shall attempt to sketch what choices income tax officials are called upon to make and what gives them the legal and political authority to exercise their discretion.⁴⁴ Tax administrators wear a number of hats; they act as law enforcement officers, adjudicators, regulators, negotiators, policy-formulators, policy-implementers, policy interpreters, legal interpreters, accountants, detectives, public relations officers, prosecutors and public tax planners, just to scratch the surface. Often, of course, they are called upon to appear as a combination of these simultaneously. What all these functions, whether complementary or contradictory, have in common, is that they require tax officials to make important discretionary judgments which directly impact the equity, fairness and justice of the tax system. No matter how technical and routine much of the tax official's

or consultation. The most genuinely open rule-making procedures are thus of limited value in soliciting the opinions, at least through conventional channels, of many individuals, particularly the poor and the unorganized.

⁴² J. Handler, "Discretion in Social Welfare: The Uneasy Position in the Rule of Law" (1983) 92 Yale L.J. 1270 at 1276. In another passage of interest, Handler describes the ineluctable trend towards routinization, claiming at 1271 that "[v]olume is the cardinal enemy of discretion". Handler is here critiquing the professionalization of welfare administration as social work advocated by William Simon. See W. Simon, "Legality, Bureaucracy and Class in the Welfare System" (1983) 92 Yale L.J. 1198.

⁴³ Habermas, *supra* note 7 at 363.

⁴⁴ This section is adapted from L. Sossin, *Revenue, Ideology and Legitimacy: The Politics of Canadian Tax Administration* (Ph.D. Dissertation, University of Toronto, 1993) at 138-91.

authority appears, I argue virtually all their discretionary judgments have a normative dimension.

This section is not intended as an exhaustive survey of all the activities in which tax administrators engage. Rather, I intend to present a broad sampling of the activities involved in enforcing and administering the *Income Tax Act*⁴⁵ to demonstrate the diversity of administrative action and serve to provide a brief overview of the tax process. In order to contextualize this description of tax administration, I have included a brief case study on a particular sphere of administrative discretion in order to highlight the artificially depoliticized nature of the administration of the income tax: an examination of the General Anti-Avoidance Rule, which confers on tax administrators the statutory authority to curb the illegitimate use of the provisions of the *Act* for the purpose of sheltering business, investment and property income from taxation.

What I wish to illustrate is that the roles that the administrators in the welfare state are called upon to perform cannot be neatly compartmentalized in the popular understanding of bureaucratic subservience to democratic political institutions, nor can they properly be legitimated on the basis of norm-free, rule-based technical expertise. The nature of the income tax system of self-reporting and self-assessment has led to an uneasy blend of trust and sanction built into the administration and enforcement of the *Act*.⁴⁶ Once each year, all individual and corporate taxpayers are obliged to estimate their tax liability and file a tax return,⁴⁷ and this action (or the absence of this action) triggers virtually all other statutory powers for tax administrators. The most scrutinized and problematic task of the tax administrator is enforcing the *Act*—that is, supervising and policing the self-assessment system. In order to accomplish this task, a wide array of regulatory powers are provided by the *Act*. These powers are typically defined broadly, and their application is left to administrators.⁴⁸

Though the visibility of what I have termed “legal discretion” has historically declined,⁴⁹ its pervasiveness throughout the *Act* remains impressive. For example, fifty-eight sections in the *Act* contain the expression “the minister may”. Other grants of

⁴⁵ R.S.C. 1952, c. 148, as amended by S.C. 1970-71-72, c. 63, and as subsequently amended [hereinafter the *Act*]. Section 220(1) of the *Act* provides: “The Minister shall administer and enforce this Act and control and supervise all persons employed to carry out or enforce this Act and the Deputy Minister of National Revenue for Taxation may exercise all the powers and perform the duties of the Minister under this Act”.

See Regulation 900 for a list of those powers delegated to specific Revenue Canada officials. Other major statutory responsibilities which will not be addressed in this study include: the administration of certain aspects of the Unemployment Insurance Plan and the Canadian Pension Plan, International Tax Treaties and provincial taxes collected by the federal government as part of Federal-Provincial fiscal arrangements.

⁴⁶ See generally on administrative powers, V. Krishna, *The Fundamentals of Canadian Income Tax*, 3d ed. (Toronto: Carswell, 1989) at 923-1006.

⁴⁷ See ss. 150(2) & 151 of the *Act*.

⁴⁸ For example, the preface to the powers of inspection, set out in s. 231.1(1), stipulates, “An authorized person may, at all reasonable times, for any purpose related to the administration or enforcement of this Act, a) inspect, audit, or examine the books and records of a taxpayer....”

⁴⁹ William Innes concludes that “[t]he year 1948 seems to have been the high water mark in terms of the introduction of extremely broad Ministerial powers into the *Act*”. W. Innes, *Tax Evasion in Canada* (Toronto: Carswell, 1987) at 5.

discretion are somewhat more structured:⁵⁰ for example, the minister has the authority to repay amounts to a taxpayer provided that “the Minister is satisfied that it would be just and equitable to do so”.⁵¹ Other sections allow a previous rule to be superseded where, “in the opinion of the Minister, the circumstances of a case are such that it would be just and equitable”.⁵² The minister is further empowered to modify a consequence of applying a provision of the *Act* where he “is satisfied that [to do otherwise] would impose extreme hardship on the taxpayer”,⁵³ while still other sections instruct the official to act “as the Minister considers reasonable in the circumstances”.⁵⁴

While discretion is pervasive throughout Canadian income tax administration, most of it is less explicit, couched in the language setting out the statutory authority and administrative duties of tax officials — the realms I term “interpretive discretion” and “communicative discretion”. It is within these areas that the substantive choices officials make are subjected to virtually no normative scrutiny in the public sphere. And yet, it is also within these same areas that the equity, fairness and justice of the tax system is realized or frustrated.

The *Income Tax Act* gives to tax officials significant discretion to initiate and participate in civil and criminal prosecutions arising out of compliance violations. Apart from the failure to file a return, the filing of false information, and the failure to report cash transactions, the vast majority of compliance offences under the *Act* are committed by self-employed individuals and corporations in Canada. Salaried taxpayers, who account for approximately 75 percent of Canadian taxpayers, have their taxes deducted at source by the employer.⁵⁵ For them, there is “little or no opportunity to avoid complying with the law”.⁵⁶ For the other 25 percent of individuals and corporations earning income from property, business, and/or investments, a wide array of tax credits, business deductions, property depreciation, rollovers, capital gains allowances and tax expenditures are built into the *Act* so as to privilege those who invest capital in economic activities. In the words of Neil Brooks, “[t]he most striking feature of the Canadian tax system is its discrimination in favour of the rich and owners of property and against everyone else. The overall tax system is viciously regressive”.⁵⁷

⁵⁰ The following examples are borrowed from those cited in J. Stacey, “Applying Ministerial Discretion to Benefit Taxpayers” in *1990 Conference Report: Report of Proceedings of the Forty-Second Tax Conference* (Toronto: Can. Tax Found., 1991) 4:29 at 4:30-32.

⁵¹ *Act*, s. 164(4.1).

⁵² Ss. 66(14.4), 85(7.1), 93(5.1), 96(5.1) & 164(4.1).

⁵³ See, e.g. s. 161(6).

⁵⁴ See, e.g. s. 70(9).

⁵⁵ While employees must comply with the source deduction program, enforcement activities are required to monitor the remittances of employers. In 1988, 1,233,727 employers had active accounts with Revenue Canada’s source deduction files. In that year, approximately \$200 million was assessed in additional taxes as a result of Revenue Canada’s auditing of these employers. See Department of National Revenue, “Taxation: Revenue Programs and Source Deductions” in *Report of the Auditor General* (Ottawa: Supply and Services, 1989) at 395-402 [hereinafter *Auditor General*].

⁵⁶ W. Farlinger (Wood Gordon), *Report on Revenue Canada, Taxation* (Ottawa: Supply and Services, 1985) at 18:19 [hereinafter *Taxation Report*].

⁵⁷ N. Brooks, “Future Directions in Canadian Tax Law Scholarship” (1985) 23 *Osgoode Hall L.J.* 441 at 470.

While the effect of the tax system may be regressive, the premise of the income tax, and the justification for progressive rates of taxation, remains to redistribute income in order to lessen the gap between rich and poor.⁵⁸ What seems apparent in reviewing the various powers and duties of tax officials, however, is that they are curiously restrained in applying the discretionary power with which the *Act* provides them to assure compliance with the income tax. Tax officials are equipped to be, and perceived as, far more powerful than they actually act in practice — at least with respect to the segment of Canadian society earning income from business, investment and property (of which the overwhelming majority of Canada's wealthiest citizens are part). I argue the failure of Canadian tax officials to use their discretion to fulfil the redistributive mission of the income tax is both a product of the exclusively strategic communication between advantaged taxpayers and tax officials combined with the complete disengagement of disadvantaged taxpayers from any meaningful communication at all with tax officials.

A. *The Enforcement Process: Investigations, Audits and Prosecutions*

Approximately one-third of Revenue Canada's resources are dedicated to the enforcement process.⁵⁹ Enforcement, however, covers a wide range of activities, all of which leave issues of contextual application and equity up to the discretion of the responsible officials. These include: the traditional audit consisting of checking over the figures provided by a taxpayer and requesting or verifying additional records to ensure the taxpayer is accurately assessing tax liability; an office examination and post-assessment, which resembles an audit but does not require an on-site visit by a department official; computerized matching of information submitted by a taxpayer; pursuing compliance from delinquent taxpayers (explored in a separate discussion below); or, finally, a full-scale investigation of the taxpayer's records and books.

Despite the broad range of powers at the tax official's disposal to enforce compliance with the income tax, both the incidence and emphasis on these powers has been declining. This is the result, in part, of the campaign to roll back the use of these powers in the 1980s, which I have discussed elsewhere,⁶⁰ and also may be seen as part of the larger trend toward binding, structuring and legalizing the exercise of administrative discretion in the welfare state. The preference for taxpayer rights in the face of what was

⁵⁸ The result of the progressiveness of the income tax and the regressiveness of other aspects of the tax system, notably sales taxes such as the GST, is that income distribution in Canada has remained remarkably static since World War II. The wealthiest quintile of Canadians has consistently accounted for between 41 and 43 percent of total income earned annually in Canada while the poorest quintile has accounted for between 3.6 and 5 percent of the total. See J.H. Perry, *A Fiscal History of Canada — The Postwar Years*, Canadian Tax Paper No. 85 (Toronto: Can. Tax Found., 1989) Table 28:1 at 752.

⁵⁹ *Auditor General*, *supra* note 55, Table 24.1 at 556.

⁶⁰ See L. Sossin, "Squeezing Blood from Stones: The Income Tax Industry in Canada" (1992) 8 J.L. & Social Pol'y 178 at 181-86. Allegations of tax auditors working to fill "quotas" and tales of harassment led to a task force (organized by the Progressive Conservatives, then in opposition) which roamed the country in early 1984 touching off a groundswell of opposition to income tax enforcement practices. The opposition led the Minister to resign and a change in enforcement philosophy to accompany the Conservatives into government later that year. See P. Beatty, *Progressive Conservative Task Force on Revenue Canada* (Ottawa: Supply and Services, 1984).

perceived as draconian enforcement measures resulted in a boom in tax avoidance in the late 1980s.⁶¹

Ensuring full and fair compliance in the self-assessment income tax system is well within the statutory powers of Revenue Canada.⁶² However, such normative goals do not appear to guide the exercise of discretion, nor are administrative judgments justified on the basis of achieving full compliance. Rather, as the following examination of the investigatory, auditing and prosecutorial powers of tax officials demonstrates, the overriding objective of tax enforcement would seem to enforce compliance as little as practicable while still curbing flagrant fraud.

1. Investigations

Section 231 of the *Act* contains the investigative powers of Revenue Canada, outlining the broad powers of inspection and examination at the disposal of tax officials. A vast scope of discretion is created by this section.⁶³ Further to any examination, an authorized officer is empowered, for purposes related to the administration and enforcement of the *Act*, to enter into any premises to inspect any documents related to a taxpayer's liability.⁶⁴ The *Act* also gives the Department the power to inspect the inventory of a taxpayer and generally examine any property of the taxpayer that is material to the ascertainment of a taxpayer's liability or the verification of other documents. The department has the authority to examine not only all relevant books and records but also all relevant documents which ought to have been included in the books and records produced for examination.⁶⁵ Further, the department is authorized to demand the production of a specific piece of information pertinent to the examination that they suspect or know is being withheld.

Section 231.1(1)(c) summarizes the scope of this authority, providing that for purposes related to the administration and enforcement of the *Act*, an authorized person may, "enter any premises or place where business is carried on, property is kept, or

⁶¹ This was merely one aspect of the larger neoconservative assault on Canada's tax system. See N. Brooks, "The Changing Structure of the Canadian Tax System: Accommodating the Rich" (1993) 31 *Osgoode Hall L.J.* 137. See also M.P. Marchak, *Ideological Perspectives on Canada*, 3d ed. (Toronto: McGraw-Hill Ryerson, 1988).

⁶² There is some judicial support for this mandate as well. In *Vestey v. I.R.C. (Nos 1 and 2)*, Lord Wilberforce held "[w]hen Parliament imposes a tax, it is the duty of the commissioner to assess and levy it on and from those who are liable at law" quoted in J.M. Evans, "Standing to Challenge Unlawful Tax Expenditures" (1981) 3 *Canadian Taxation* 7.

⁶³ See *Canadian Bank of Commerce v. A.G. Canada*, [1962] S.C.R. 729, in which the demand for information on a commercial bank's client who was being audited by the Department was upheld on the basis of the expansive scope of the administrative discretion contained in this section.

⁶⁴ Section 231 of the *Act* defines "documents" as money, securities, books, records, letters, telegrams, vouchers, invoices, accounts and financial statements. Certain documents, such as those pertaining to solicitor-client privilege are exempt, though correspondence between a client and accountant usually may be seized.

⁶⁵ For a good summary of all these powers, and what rights are retained by the taxpayer being inspected or whose books are being examined, see R. MacKnight, "Revenue Canada Demands for Information" in *Dealing with Revenue Canada: The Art of Avoiding Expensive Mistakes* (Toronto: The Canadian Institute, 1990) at s. VIII [hereinafter *Dealing with Revenue Canada*].

anything is done in connection with the business, or where the books or records should be kept".⁶⁶ Where entry is denied to an authorized officer, a warrant may be issued. In order to obtain a search warrant from a Federal Court judge, the investigator or authorized official must have reasonable grounds to believe both that an offence has taken place, and that evidence material to that offence can be found in identifiable places. The government sponsored report on Revenue Canada, compiled in 1985, rendered an apt analogy, "in some respects, these powers are more extensive than the powers with which police forces are armed to combat criminal activity".⁶⁷ However, while much of the police's energies are devoted to protecting those who own property from those who steal it, the target of the tax official's enforcement powers is the owner of property. Thus it is no surprise that those who complain about Revenue Canada's abuses of authority tend to be advantaged in the market, while those who complain about police abuses tend to be disadvantaged in the market. It is also no surprise that those who complain about Revenue Canada have been a far more effective lobbying group than those who complain about the police.

The trend to confine administrative discretion in the income tax setting has been strongest and most successful with respect to enforcement issues. The tax official's powers to search and seize relevant evidence, and to compel taxpayers (especially corporate entities) to produce evidence, have all been severely curtailed by judicial review, especially under the *Charter*.⁶⁸

⁶⁶ See also B. Morris, "Preparing and Maintaining Books, Records, and Income Tax Returns", *ibid.* at 21.

⁶⁷ *Taxation Report*, *supra* note 56 at 5:14. In a similar vein, see also D. Bowman, "The Abuse of Power Under the Income Tax Act" (1980) 2 Canadian Taxation 95.

⁶⁸ The search and seizure section was specifically rewritten to bring it into conformity with s. 8 of the *Charter* which states, "Everyone has the right to be secure against unreasonable search and seizure". For a discussion of the implications of this section on the investigative powers under the *Act*, see A. Reid & A. Young, "Administrative Search and Seizure Under the Charter" (1985) 10 Queen's L.J. 392; see also I. Pitfield, "Search and Seizure and the Income Tax Act" (1981) 29 Can. Tax J. 30; D. Bowman, "Search and Seizure and the Charter of Rights and Freedoms" (1983) 31 Can. Tax J. 676; and Law Reform Commission of Canada, *Search and Seizure under the Income Tax Act* (Study Paper) by N. Brooks & J. Fudge (1985).

Despite this legislative precaution, investigative powers under the *Act* have been alleged to contravene s. 8 of the *Charter*. In *R. v. McInlay Transport Ltd.*, [1990] 1 S.C.R. 627, a transport company refused a demand for documents alleging that such a demand amounted to an unreasonable search and seizure under the *Charter*. The court accepted that, given the nature of the demand, it did represent a search and seizure, but that such powers were reasonable to ensure compliance with the *Act*, though this, Wilson J. speaking for the court emphasized, should be construed as proportional to the degree of privacy the party in question is entitled to expect. In *Baron v. Canada*, [1993] 1 S.C.R. 416, the Supreme Court struck down s. 231.3 of the *Act* as violating ss. 7 & 8 of the *Charter* because it removed from judges the discretion not to proceed with a search warrant. See also the companion case of *Kourtesis v. M.N.R.*, [1993] 2 S.C.R. 53.

Though this power remains valid, its use already had been greatly circumscribed due to earlier judicial scrutiny. In *James Richardson & Sons Ltd v. M.N.R.*, [1984] C.T.C. 345 (S.C.C.), the court further circumscribed the parameters of legitimate enforcement, holding that such demands for information had to relate to specific persons subject to genuine and serious inquiry. "Fishing expeditions", in which information would be demanded in the hopes of its revealing some basis for further investigation, were effectively prohibited. This not only made the need for

2. The Audit

The audit remains the most feared, visible, protracted and often confrontational form of interaction between a taxpayer and Revenue Canada. Approximately \$952 million of additional revenue is assessed annually through auditing activities.⁶⁹ This itself is only a small fraction of what is estimated to be recoverable.⁷⁰ Revenue Canada itself has set out broad principles intended to guide the audit process, which stipulates that “[c]ategorizing taxpayers for audit purposes should be done on a rational and impartial basis. Taxpayers of any group should be satisfied that the audit program is based on fair and non-discriminatory criteria”.⁷¹

Auditing yields approximately \$360 thousand per person year spent on enforcement.⁷² The number of completed audits, examinations and investigations has declined measurably since the mid-1980s. However, the additional taxes assessed over this period have risen 107 percent.⁷³ According to the Auditor-General, this is due to the “strategy of targeting its enforcement effort so as to obtain high levels of additional tax assessed while still achieving a visible presence throughout the taxpayer population”.⁷⁴

Files are selected for audit after an initial screening involving both a computer scan for irregularities and the judgment of tax officials. Certain audit projects might also target a particular occupational classification in order to test compliance among certain groups, and a general policy of random auditing of 10,000 returns annually has been proposed but not implemented.⁷⁵ What is consistent is that audits generally target particular income brackets. For example, close to half of all audits conducted are directed to returns disclosing income of over \$3 million. Audits of low and middle income individual taxpayers comprise less than 2 percent of the total audits undertaken annually.⁷⁶ Generally, only one return in eight is even a potential candidate for an audit.⁷⁷ However, every dollar spent on auditing a tax return of a taxpayer whose revenues exceeded \$12 million brings in approximately \$17 in additional tax.⁷⁸

Another type of audit, the office examinations (post-assessing and matching), yields additional tax assessments as well. These examinations consist in searching for irregularities in returns from the same taxpayer for different years, or from figures within

specificity in demands for information more acute, but more broadly rendered the recurring phrase added on to power-conferring provisions — “for purposes related to the administration and enforcement of the *Act*” — a meaningful limitation on the statutory authority of the department.

⁶⁹ *Auditor General*, *supra* note 55 at 553-55.

⁷⁰ *Ibid.*

⁷¹ Revenue Canada, Information Circular 71-14R3, “The Tax Audit”, June 18, 1984 at 3.

⁷² *Auditor General*, *supra* note 55 at 555.

⁷³ *Ibid.* at 563.

⁷⁴ *Ibid.*

⁷⁵ See “Auditing Squad Would Help Find Tax Dodgers” *Globe & Mail* (29 May 1990) B3. In the United States, approximately 50,000 returns are randomly selected for an audit annually. Finally, in 1994, citing a \$3 billion drop in income tax receipts, the present Minister of Revenue, David Anderson, has authorized a 50 percent increase in the number of random audits carried out in Canada. See J. Daw, “How Ottawa Will Mine Underground Economy” *Toronto Star* (20 February 1994) F3.

⁷⁶ See *Taxation Report*, *supra* note 56 at 18:20.

⁷⁷ *Ibid.* 17:16.

⁷⁸ *Ibid.* 17:17.

a return that do not correlate with other data on the return. In 1989, approximately 37,000 returns were examined, resulting in additional tax assessments totalling approximately \$57 million.⁷⁹

Given these figures, it is difficult to appreciate the department's apparent unwillingness to dedicate more resources to the audit process. While the neoconservative campaign against enforcement in the 1980s accounts for some of the decline, the percentage of returns audited annually had already been steadily decreasing throughout the 1970s.⁸⁰ What these numbers indicate is that Revenue Canada's bark is far more intimidating than its bite. Administrative judgments such as when, who and how to audit are where the normative mission of the income tax collide with, and are subsumed by the need (desire?) to avoid an antagonistic climate with the business and investing community. Declawed enforcement seems to serve as an unofficial and unwritten tax incentive to those with significant amounts of money to spend (and earn) in Canada.

Despite what I contend is significant and revealing restraint on the part of Revenue Canada in the enforcement sphere, there remains a widespread perception among the tax practitioner community (and, by extension, the high-income taxpayers they serve) that the enforcement powers granted to tax administrators are excessive. The joint submission of the Canadian Institute of Chartered Accountants and the Canadian Bar Association to the Progressive Conservative Task Force on Revenue Canada in the mid-1980s exemplifies this view:

Revenue Canada, Taxation must have broad enforcement powers. But a balance must be struck between the necessity for effective tax administration and the protection of taxpayers from undue and unreasonable interference. In our view, the *Income Tax Act* provides inadequate restraints on Revenue Canada, Taxation's enforcement powers.⁸¹

While the *Act* may not, in the eyes of some observers, sufficiently restrain Revenue Canada, the courts arguably do. *Charter* arguments are being raised more often and covering a broader range of the tax process than ever before.⁸² Even absent the *Charter*, courts have not shied from awarding damages to compensate taxpayers for damages suffered as a result of improper auditing procedures.⁸³

3. Prosecutions

In addition to auditing, Revenue officials are accorded a broad range of special investigative powers to facilitate the enforcement of the *Act* and, specifically, to gather relevant evidence for civil and criminal prosecutions. The *Income Tax Act* creates civil penalties (ss. 162 & 163) and criminal penalties (ss. 238 & 239) for essentially similar activities. Indeed, one of the most far-reaching discretionary powers of the tax official

⁷⁹ See Revenue Canada, *Taxation: 1990-91 Estimates, Part III* (Ottawa: Supply and Services, 1990) at Figure 25 [hereinafter *1990-91 Estimates*].

⁸⁰ See, e.g. R. Hasson, "Tax Evasion and Social Security Abuse — Some Tentative Observations" (1980) 2 Canadian Taxation 106; see also Revenue Canada, *Inside Taxation, 1979* (Ottawa: Supply and Services, 1980).

⁸¹ *Taxation Report*, *supra* note 56 at 21:34.

⁸² See A. Butler, "Making Charter Arguments in Civil Tax Cases: Can the Courts Help Taxpayers?" (1993) 41 Can. Tax J. 847.

⁸³ See *O.P. Chhabra v. The Queen*, [1989] 2 C.T.C. 13 (F.C.T.D.).

is the decision, faced with *prima facie* evidence of a tax offence, whether to proceed with a civil or criminal investigation for tax evasion.

Only 2.7 percent of Revenue Canada's current budget is expended on tax evasion investigations.⁸⁴ Though the number of corporate and individual tax filers has increased steadily during the latter half of the 1980s, the number of investigations conducted has notably shrunk. These investigations, assigned to a Special Investigations branch within Revenue Canada, are characterized in an explicitly crime-control framework.⁸⁵ Like the auditing branch of tax enforcement, the budgetary cuts to Special Investigations have had clear effects. Between 1984 and 1989, the number of cases identified by Revenue Canada for prosecution shrunk by 20 percent.⁸⁶ The number of actual prosecutions declined as well, from 163 to 103 per annum over the same period. One factor that has remained relatively constant is the rarity of a jail term following a conviction for tax evasion — between two and six jail sentences are imposed annually.⁸⁷

The decision to bring a prosecution for tax evasion is made under the authority of the Department of Justice on the recommendation of the Department of National Revenue, Taxation.⁸⁸ Most routine charges of tax evasion are pursued as summary offences,⁸⁹ though this exercise of prosecutorial discretion is rarely subjected to serious scrutiny. I have argued elsewhere that this is due to the widespread social indifference towards tax evasion as a "real crime" and to the widespread endorsement of tax avoidance as a desirable goal of self-assessment.⁹⁰ It is the policy of the department not to recommend prosecutions for tax evasion under \$100,000 unless other factors are involved,⁹¹ though the amount of revenue lost to tax evasion annually in Canada is somewhere between 5 and 20 percent of potential revenue.⁹² While prosecutions which are pursued carry the potential of a maximum ten-year jail sentence if convicted, the average incarceration of convicted tax evaders is approximately ten months.⁹³

It is clear that, for Revenue Canada, Special Investigations is seen as largely a deterrent force and not, as Edward Greenspan has suggested, "police officers in ordinary suits".⁹⁴ However, interestingly, like their police counterparts, Special Investigation

⁸⁴ 1990-91 Estimates, *supra* note 79 at 27.

⁸⁵ Revenue Canada, *Taxation Operation Manual*, Special Investigations (Ottawa: Supply and Services, 1989) at 1110 (Policy) [hereinafter *Operation Manual*].

⁸⁶ 1990-91 Estimates, *supra* note 79 at 46.

⁸⁷ *Ibid.*

⁸⁸ See *Auditor General*, *supra* note 55 at 561.

⁸⁹ *Operation Manual*, *supra* note 85 at 1117.3.

⁹⁰ L. Sossin, "Welfare State Crime in Canada: The Politics of Tax Evasion in the 1980s" (1992) 12 Windsor Y.B. Access Just. 98 at 118-25.

⁹¹ These other factors may include the fact that the taxpayer is a repeat offender, that there has been tampering of evidence or intimidation of witnesses, or that there is evidence that the offender has been counselling others on the practice of tax evasion. See *Operation Manual*, *supra* note 85 at 1117.2.

⁹² See S. Berger, "The Unrecorded Economy — Concepts, Approach, and Preliminary Estimates for Canada" in Statistics Canada, *Canadian Statistical Review*, monthly, catalogue no. 11-003E cited in G. McCracken, "Preventing Tax Evasion Through Enforcement: The Government Perspective" in *Income Tax Enforcement, Compliance and Administration: Corporate Management Tax Conference, 1988* (Toronto: Can. Tax Found., 1988) [hereinafter *Conference*] 2:1.

⁹³ *Auditor General*, *supra* note 55 at 561.

⁹⁴ See E. Greenspan, "Tax Evasion is a Crime!" in *Conference*, *supra* note 92 at 1:6.

officials generally are led to suspected evaders by public informants.⁹⁵ Indeed, over 50 percent of cases investigated were initiated by sources outside the department.⁹⁶ This public watchdog or whistle-blowing role receives scant attention, however, and may be one reason so few prosecutions are made.

The use of the term "wilfully" in s. 239 indicates that, as in other areas of criminal law, some inquiry must be conducted into the state of mind of the offender, thus making it both more complicated and more difficult to establish, given the resources at the investigator's disposal.⁹⁷ In addition, the burden of proof for such convictions is proof beyond a reasonable doubt, and the onus of proof falls to the prosecutor to discharge. Apart from these criminal penalties, the *Income Tax Act* also provides for a number of civil penalties related to tax evasion.⁹⁸ It has also been established that the same taxpayer

⁹⁵ In a letter from Revenue Minister Otto Jelinek to MP Jim Fulton, it was confirmed that \$134,000 was spent between January and November, 1991 on the informant program. See *Toronto Sun* (2 December 1991) 2.

⁹⁶ See McCracken in *Conference*, *supra* note 92 at 2:13.

⁹⁷ S. 239(1) of the *Act* provides:

Offences — Every person who has

a) made, or participated in, assented to or acquiesced in the making of, false or deceptive statements in a return, certificate, statement or answer filed or made as required by or under this Act or a regulation,

b) to evade payment of a tax imposed by this Act, destroyed, altered, mutilated, secreted or otherwise disposed of the records or books of account of a taxpayer,

c) made, or assented to or acquiesced in the making of, false or deceptive entries, or omitted, or assented to or acquiesced in the omission, to enter a material particular, in records or books of account of a taxpayer,

d) wilfully, in any manner, evaded or attempted to evade, compliance with this Act or payment of taxes imposed by this Act, or

e) conspired with any person to commit an offence described by paragraphs (a) to (d), is guilty of an offence and, in addition to any penalty otherwise provided, is liable on summary conviction to

f) a fine of not less than 50 percent, and not more 200 percent, of the amount of the tax that was sought to be evaded, or

g) both the fine described in paragraph (f) and imprisonment for a term not exceeding 2 years.

⁹⁸ See generally, E. Harris, "Civil Penalties Under the Income Tax Act" in *Conference*, *supra* note 92 at 9:1. Civil penalties for tax evasion are far more common than criminal prosecutions, though the justification for this preference is unclear. Any taxpayer who has failed to file a return of income for a taxation year is liable to a penalty equal to either 5 percent of the unpaid taxes or 1 percent each month that the amount remains outstanding. If a taxpayer fails to file for three consecutive years, the penalty rises to 10 percent of the unpaid amount, according to s. 163(1). Penalties are also provided for taxpayers who fail to provide required information or their Social Insurance Number on a form. Even bounced cheques are made subject to a fine. Filing a tax return with false information is also made subject to penalty. S. 163(3) sets out that the burden of proof in any appeal from a civil penalty is on the Minister.

Certain sections establishing criminal liability in the *Act* give rise to civil liability, such as s. 239 dealing with wilful tax evasion. Anyone held to have violated this section dealing with tax evasion is subject to a fine between 50 and 200 percent of the tax evaded. However, the caselaw has established that any ambiguity arising out of civil penalties will be resolved in favour of the taxpayer. For instance, as the Saskatchewan Court of Appeal affirmed in *The Queen v. Paveley*,

can be subject to both civil and criminal sanctions, even for the same transaction in some cases.⁹⁹

Tax officials are asked to make all of these determinations without any clear normative mandate regarding the priorities in combatting tax evasion (i.e. should deterrence take precedence over punishment, concerns of equity over those of privacy, and so forth). Thus, it is a question not merely of the budgetary constraints that have weakened the enforcement potential of the department, but also of the department's priorities in allocating those resources. Because those priorities are not set out in the *Act*, officials are made to navigate through a murky balance of public authority and taxpayer rights.¹⁰⁰ The result is a kind of interpretive stalemate that is symptomatic of the depoliticization of the income tax system in Canada.

B. *The Tax Collection Process*

Judith Woods concluded a review of the statutory authority of Canadian income tax officials by declaring, "Revenue Canada's right to issue assessments which are deemed to be valid and immediately become debts to Her Majesty is an awesome power".¹⁰¹ However, once again in the context of tax collection, one finds the practical realities of how that authority is applied exacerbate the socioeconomic inequality that the income tax is advertised to ameliorate.

While it is the obligation of all individual and corporate Canadian taxpayers to estimate their tax liability, the department is under no obligation to accept that estimate as disclosing the correct amount of tax payable. The department is thus given the legal discretion to confirm the validity and correctness of the taxpayer's return.¹⁰² Canada's self-assessment system of income taxation involves taxpayers computing their own tax burden based on a form or forms which are filled out by, or on behalf of, a taxpayer.¹⁰³ Processing taxpayer returns accounts for just under half of Revenue Canada's total

76 D.T.C. 6415, "if there is a reasonable interpretation which will avoid the penalty in any particular case we must adopt that construction. If there are two reasonable constructions we must give the more lenient one."

⁹⁹ See Revenue Canada, Information Circular 73-10R3, "Tax Evasion", February 13, 1987.

¹⁰⁰ J. Gourlay, "Tax Abuse: A View From Revenue Canada" (1980) 2 Canadian Taxation 123.

¹⁰¹ Woods, "Tax Collection Procedures" in *Dealing with Revenue Canada*, *supra* note 65 at 3.

¹⁰² S. 152(7) of the *Act* states: "The Minister is not bound by a return or information supplied by or on behalf of a taxpayer and, in making an assessment, may, notwithstanding a return or information so supplied or if no return has been filed, assess the tax payable under this Part."

¹⁰³ Approximately two-thirds of all Canadians use the T1 General return. The average time it takes to prepare one's own income tax return is estimated to be 5.5 hours. The T1 returns must be filed by April 30 of the year in question before fines and interest will be applied. T1 Special is personalized to the taxpayer's circumstances based on previous returns. Corporations use the T2 return which must be filed according to the corporation's own fiscal period. The T3 return applies to Trusts or those acting in a fiduciary capacity on behalf of trusts (for example, executors). The number of individual returns filed throughout the 1980s increased, rising from approximately 15 million in 1980 to approximately 18 million by the end of the decade; corporate returns increased more dramatically, rising from approximately 500,000 in 1980 to approximately 900,000 in 1989. See *1990-91 Estimates*, *supra* note 79 at figures 6 & 7. I have rounded the numbers for greater simplicity. See also F. Vaillancourt, *The Administrative and Compliance Costs of the Personal Income Tax and Payroll Tax System in Canada*, Canadian Tax Paper No. 86 (Toronto: Can. Tax Found., 1986) at 83.

expenditures.¹⁰⁴ Many of the routine activities of processing tax returns, such as opening the envelopes and endorsing cheques, have now been computerized, and more will no doubt be in the future. Indeed, the era of the paperless tax return is more or less already upon us.¹⁰⁵

After a return is filed, 80 percent of taxpayers can expect some form of communicative interaction with a tax official. The heightened emphasis on "customer service" after the events of the 1980s has increased both the symbolic relevance and the scrutiny of this administrative function. The department's current philosophy with respect to taxpayer contact is thus understandably geared aggressively towards cooperation and away from confrontation.¹⁰⁶

The most common subject of communication between Revenue Canada and a taxpayer is the assessment of the taxpayer's income tax.¹⁰⁷ An assessment of tax represents the calculation of a taxpayer's liability to the government and people of Canada.¹⁰⁸ While the assessment of the tax official fixes a taxpayer's liability, it is, technically, the notice of assessment that gives rise to a taxpayer's legal obligation to pay her or his taxes.¹⁰⁹ Once this notice of assessment has been sent, a reassessment, as set out in s. 152(2), may take place within three years, and any such reassessment nullifies all previous assessments for the taxation year in question. If any fraud or misrepresentation on a return is uncovered, a reassessment may occur at any time.¹¹⁰

¹⁰⁴ See *1990-91 Estimates*, *supra* note 79 at figure 2. The cost to collect Canada's income tax rose from \$.4 billion at the beginning of the 1980s to \$.9 billion at the beginning of the 1990s.

¹⁰⁵ *1990-91 Estimates*, *supra* note 79 at 22. However, if the U.S. example is any guide, computerized filing may be as much a part of the problem as the solution. Currently, 10 percent of American taxpayers file through computer, and fraud has increased more than 25 percent within this group. See R.D. Hershey Jr., "I.R.S. Finds Fraud Grows as More File by Computer" *New York Times* (21 February 1994) A1.

Returns, once received, are forwarded to assessors and data entry operators; many common errors, whether made by the taxpayer, the assessor or the data entry operator, are flagged by the computer on which the data is recorded. After processing and assessing are complete, a notice, showing either a refund or an amount owing, is mailed to the taxpayer, and the return is stored in the taxroll division of the taxation centre.

¹⁰⁶ See Revenue Canada, *Taxation Operation Manual*, Collections, 2217.2(1990), reproduced in Sossin, *supra* note 3 at 386-87.

¹⁰⁷ The *Act* confers on the Minister the duty to assess income tax, and by virtue of regulation 900(1) these powers have been delegated to tax officials throughout the offices of Revenue Canada. See Revenue Canada, Information Circular 75-7R3, "Reassessment of a Return of Income", July 9, 1984; see generally, D. Smith, "Reassessments, Waivers, Amended Returns and Refunds" in *Conference*, *supra* note 92 at 8:1.

¹⁰⁸ While tax may be assessed as often as circumstances require, s. 152(1) stipulates that such assessments should be carried out with "all due dispatch". It is, in fact, the delay in processing tax refunds for low-income taxpayers that has spawned the parasitic income tax rebate discounting industry which provides these taxpayers with an advance against the eventual value of the refund from which the provider then extracts a sizable fee. See Sossin, *supra* note 60.

¹⁰⁹ For a discussion of this typically arcane distinction, see *Pure Spring Co. Ltd. v. M.N.R.* (1946), 2 D.T.C. 844. See also Smith in *Conference*, *supra* note 92 at 8:11.

¹¹⁰ A reassessment may take place for a variety of reasons. These include: 1) reassessment if the taxpayer or the taxpayer's representative understates the tax payable by omitting information required on a return; and 2) reassessment if the tax payable is understated through repeated or obviously incorrect actions by the taxpayer or the taxpayer's representative. Reassessment will

Another frequent occasion for communication and confrontation between Revenue Canada and the taxpayer is when a taxpayer defaults on a debt to the government. The powers of Revenue Canada to collect unpaid taxes are greater than those available to ordinary creditors. Delinquent accounts are resolved either through arranging or deferring payment, providing security in lieu of payment, writing off the delinquent account, or pursuing payment through legal action.¹¹¹

Ultimately, it is within the discretion of a Revenue Canada official, by virtue of sections 223 and 224 of the *Act*, either to garnish wages, to set off the outstanding debt against refunds owed in the future, or as a remedy of last resort, to register a certificate with a Federal Court judge enabling the delinquent taxpayer's assets to be seized once a writ of execution is ordered. Approximately 3,000 such certificates are issued annually.¹¹² Approximately 10 to 15 percent of returns filed annually are received by the department with a balance owing the government. All of these will be subject to some collections activity.¹¹³ Approximately 1 percent of these are not easily resolved and

not generally occur when: 1) the understatement of tax for a year should have been apparent to the department considering the degree of examination and audit that the return received; and 2) if the amount of tax involved is very small. If there is a matter about which the taxpayer and department disagree, a waiver may be filed by taxpayer, which lifts the time restrictions on Revenue Canada's authority to reassess the taxpayer's liability. What emerges from a review of this process is its scrupulous legality; virtually every contingency is both foreseen and accommodated in the regulations or in Revenue Canada's policies arising out of these regulations.

¹¹¹ The information circular "Collection Policy" states, "If within 30 days from the date of mailing of the Notice of Assessment, a taxpayer does not make full payment or satisfactory arrangements for payment, a request for payment in full will be mailed to the address of record. If no response to the request for payment is received, a demand for payment will be mailed to the address of record. This demand will inform the taxpayer that legal action may result if payment or arrangement are not made within 15 days." Revenue Canada, Information Circular No. 75-16R, "Collection Policy", January 11, 1982 at para. 9.

¹¹² *Taxation Report*, *supra* note 56 at 21:30.

¹¹³ In 1985, amendments to the *Act* altered the collections process slightly. Among the series of limitations placed on the department's freedom to pursue outstanding debts, s. 225 now provides that collections will not be enforced on delinquent accounts where an appeal had been made until after a court decision had been rendered, so that taxpayers wishing to dispute an assessment or reassessment no longer have to pay or put up security for the amount the department determines is their liability. The safeguard in the amendments is that if an appeal is launched without grounds, or merely to delay or obstruct the collections process, the department may levy a penalty of 10 percent of the disputed tax. Furthermore, if the collection is perceived to be in jeopardy, the department maintains the discretion to enforce payment irrespective of other limitations. See also J. Woods, "Tax Collection Procedures" in *Dealing with Revenue Canada*, *supra* note 65 at section XV.

Given the vast sums of money that are often involved in disputed assessments, and the length of the appeal process, this represents a considerable windfall to many high-income taxpayers and an incentive for legal advisers to devote their considerable resources to devising arguments that are capable of sustaining, if not winning, appeals. The expense and uncertainty of any tax litigation, moreover, makes it an unfeasible route of redress for many lower-income taxpayers. Thus it is far more likely that high-income taxpayers benefit from any strengthening of taxpayer rights in the appeal process.

require extended collections activity.¹¹⁴ A certain proportion of this group will prove to be unrecoverable.

C. *The Appeal Process*

While there are many administrative duties which call on the tax official to make legal determinations, the most explicit occur in Revenue Canada's Appeals Branch. Perhaps the most critical and sensitive task allotted to the tax administrator is handling objections and appeals from the department's own assessments.¹¹⁵ Every taxpayer has the right to dispute an assessment or reassessment by filing a notice of objection and to have it considered and responded to by the Appeals Branch of the department.¹¹⁶ The Appeals Officer who decides an objection will have had no other part in the assessment or reassessment of the return. The only limitation on this right is that a notice of objection must be filed within 90 days of the date of mailing of the notice of assessment.

The number of objection notices filed in Canada has varied. In 1984, as the tax protest crested, a high-water mark of 57,000 objection notices were filed out of 16 million returns filed.¹¹⁷ This represented a 100 percent increase from 1981.¹¹⁸ Even this relatively high rate of objection, however, represents an incidence of objection four times less frequent than that of the United States,¹¹⁹ where tax litigation has become something of a national pastime. Of the 57,000 objections filed in 1984, approximately 1,416 resulted in appeals to the Tax Court of Canada.¹²⁰ The department does not appeal every case it loses. Rather, a decision will be appealed, generally, in hopes of clarifying a significant point of law, to test a matter of policy or principle, to set a precedent, to resolve conflicting decisions by the Tax Court, to reverse a Tax Court decision that the department feels was wrongly decided, or because the amount of tax involved suggests

¹¹⁴ *Ibid.* at 21:7.

¹¹⁵ See generally, L. Dollinger, *Income Tax Appeals: Law and Practice* (Toronto: Butterworths, 1981).

¹¹⁶ See Revenue Canada, Information Circular No. 80-7, "Objections and Appeals", June 30, 1980 at para. 2. See also the *Declaration of Taxpayer Rights* which informs all taxpayers of their right to "Impartial Review" of their tax assessment.

¹¹⁷ See *Taxation Report*, *supra* note 56 at 20:1.

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.* at 20:27. In addition to the normal channel of appeal from a decision regarding an Objection, Revenue Canada has also inaugurated a "Problem Resolution Program" as part of its Public Affairs Branch, to deal with complaints relating to Revenue Canada's activities apart from those dealing with the assessments specifically. See Revenue Canada, *Inside Taxation*, 1988-89 at 18.

On January 1, 1991, a new appeals process was instituted by the *Tax Court of Canada Act*. Whereas it was previously possible to bring an appeal either to the Tax Court or the Federal Court of Canada—Trial Division, now the Tax Court has exclusive original jurisdiction to hear appeals from disputes arising under the *Act*. These disputes may arise from assessments of income tax but also from penalties, fines, determinations of capital and non-capital loss refunds. Historically, the ratio of cases settled in favour of the taxpayer to those settled in favour of the department is about even. See S.C. 1988, c. 61. For an explanation of the new procedures, see generally, J. Campbell, "Income Tax Assessments — Objections and Appeals" in *Dealing with Revenue Canada*, *supra* note 65 at section XII.

such a course of action would be desirable.¹²¹ Thus, tax officials (since 1967, the Department of Justice has handled income tax litigation on behalf of Revenue Canada) are often called upon to justify their decision-making, whether regarding the interpretation of a provision or the issuing of a reassessment. Such justificatory action, however, is aimed at the courts rather than its constituency of taxpayers.

D. *Interpretation Bulletins, Information Circulars and Advance Rulings*

Perhaps more than any other administrative branch in the welfare state, the income tax bureaucracy has sought to disseminate justifications for its administrative judgments. The goal behind these initiatives has been to make the self-assessment collection system more predictable, uniform and accessible. The Department of National Revenue initiated a program in 1970 to provide Interpretation Bulletins and Information Circulars to the public, though no part of the *Act* expressly mandates such information be provided to the public (though the “public” to whom most seem addressed are the estimated 10,000 accountants, lawyers and “tax professionals” who advise and act on behalf of taxpayers in Canada).¹²² Interpretation Bulletins are often written in technical language and tailored to the tax practitioner and corporate taxpayer community and, by extension, to the privileged segment of taxpayers they represent. Even more specialized is the volume of technical explanations accompanying the Finance Department’s annual amendments to the *Income Tax Act*.

Well over 500 Interpretation Bulletins have been issued by the department since 1970, typically revealing the department’s interpretation of a specific ambiguous or controversial section or area of the *Act*. These guidelines for interpretation do not have the force of law and cannot be applied rigidly, but they serve to structure the exercise of administrative discretion and guarantee at least a measure of uniformity and predictability in the application of the *Act*. It is, however, a principle of administrative law that an administrative body may not bind itself to or fetter its discretion by non-statutory rules.¹²³ That a definable boundary exists between the substance of these rules and the remaining “holes” where discretion resides is, as I discussed earlier, the legal fiction made necessary by the need to legitimate the authority delegated to tax officials on strictly jurisdictional grounds.

Interpretation Bulletins, therefore, are careful to focus on the guidance to Revenue Canada provided by judicial pronouncements on the particular section of the *Act* under

¹²¹ See *Operation Manual*, Objections and Appeals, *supra* note 85 at 7017.3. The appeals process also provides for two procedural routes within the Tax Court, known as the informal procedure and the general procedure. The informal procedure does not incorporate discovery or the legal rules of evidence and generally sheds the trappings of a formal court of law, all of which remain a feature of the general procedure. The choice as to which procedural route applies depends on the amount of tax in question (amounts under \$7,000 usually attract the informal procedure). The taxpayer is provided with an element of choice. The department cannot force a taxpayer to opt for the informal procedure. Depending on the circumstances, the tax court can mandate that the general procedure govern the trial.

The tax court may resolve the dispute by allowing the appeal, or vacating, varying or referring the assessment back to the department. Costs are not awarded for appeals to the tax court making such appeals somewhat more risky proposition. Adverse decisions of the Tax Court of Canada against the taxpayer or the Department of National Revenue can be appealed to the Federal

scrutiny. While Interpretation Bulletins clarify the Department's interpretive judgments in particular areas of the *Act*, Information Circulars are typically more general and procedurally oriented. They usually concern a certain class of taxpayer or realm of tax administration and tend to be more policy focused.

Another form utilized by Revenue Canada to disseminate information about tax administration is Advance Rulings. An Advance Ruling is a written statement provided to a taxpayer stating what tax consequences, in the department's view, a particular proposed transaction or series of transactions would give rise to.¹²⁴ The ruling states how the department would interpret specific sections of the existing Canadian income tax law with relation to the circumstances of the taxpayer. It may be favourable or unfavourable to the taxpayer and is binding on the department subject to changes in the law or misrepresentations on the part of the taxpayer.

The department is under no legal obligation to provide Advance Rulings and may refuse a request for a variety of reasons, including doubt as to whether the proposed transaction is being seriously contemplated, issues of credibility arising from the past record of the taxpayer, and whether the circumstances are definite enough and sufficiently within the purview of the department for an accurate ruling to be given. Between 10 and 13 percent of Advance Ruling requests are refused. When a request is refused, reasons will generally not be given. Unlike the United States, no appeal from this determination is provided. If a request is granted, the cost of the ruling is borne by the taxpayer, currently at \$80 per hour. If an Advance Ruling is of general relevance, it may be published at the discretion of the department and with the permission of the taxpayer.

Between 1970 and 1983, approximately 101 Advance Rulings were published.¹²⁵ By the mid-1980s, however, a backlog of cases and long delays in the ruling process had rendered the practice virtually moribund. Advance Rulings have, however, recently been revamped and appear to be gaining in prominence. Advance Rulings not only show the dependence of Canada's self-assessment system on the efficiency of the department, but also illustrate the importance of Revenue Canada's adjudicatory role. Each assessment in some way puts the official in the position of weighing the merits of evidence and choosing the most compelling interpretation of the legal provision in question. Once again, however, this service is primarily for the benefit of corporate or individual high-income taxpayers; its circulation is generally restricted to the tax practitioner community.

Court of Appeal on prescribed grounds. These grounds include: 1) the failure to observe principles of natural justice or exercise its jurisdiction; 2) an error in law, whether or not that error appears on the face of the record; and 3) a decision based on an erroneous finding of fact made in a capricious or perverse manner. Appeals from the Federal Court of Appeal are permitted, with leave, to the Supreme Court of Canada. See also R. McMechan & G. Bourgard, *Tax Court Practice* (Toronto: Carswell, 1992).

¹²² See Revenue Canada, Information Circular No. 70-1, "Announcement — Information Circulars and Interpretation Bulletins", August 25, 1970. Prior to 1970, Public Information Bulletins were occasionally issued by the Department to alert taxpayers to new legislation or interpretation problems. See *Taxation Report*, *supra* note 56 at chapter 22.

¹²³ See S.A. de Smith, *Judicial Review of Administrative Action*, 4th ed., J.M. Evans, ed. (London: Stevens & Sons, 1980) at 311-17.

¹²⁴ See Revenue Canada, Information Circular No. 70-6R2, "Advance Income Tax Rulings", September 28, 1990 at para. 3.

¹²⁵ See *Report*, *supra* note 56 at chapter 23.

In a sense, Advance Rulings, Information Circulars and Interpretation Bulletins are issued so as to normalize the exercise of discretion. For example, in the *Symes* case, in which the scope of business deductions is under scrutiny, the Interpretation Bulletin dealing with this provision explains that there is no fixed boundary to what will be accepted as a business expense but that, in the past, legitimate expenses included club memberships, theatre tickets, the cost of a cruise, private boxes at sporting facilities, entertaining clients at night clubs, hospitality room rentals and so forth.¹²⁶ These expenses are referred to as “legitimate” because they had been challenged and upheld in court. In the case of newly introduced provision of the *Act*, the tax official is left to fend for herself in justifying the exercise of discretion. This was the case with respect to the recently enacted General Anti-Avoidance Rule, which, as I shall now discuss, presented a unique opportunity to see the regressive effect of confining discretion in action.

E. *A Velvet Fist in an Iron Glove: Discretion and the General Anti-Avoidance Rule*

The key both to understanding the current experience of alienation in the practice of tax administration and to imagining the possibility of revitalizing administrative action more generally lies, I have maintained, in the exercise of discretion, and its potential permeability to popular participation in the income tax administrative process.

The area in which discretion has played perhaps the most substantial and controversial role in Canadian tax administration is that of the anti-avoidance provisions in the *Income Tax Act*.¹²⁷ Beginning with the former s. 6 in the *Income War Tax Act*,¹²⁸ the officials of the Revenue Department have had the authority to alter a person’s tax liability if unreasonable economic activity was engaged in so as to avoid taxes.¹²⁹ This power, however, has been qualified by the principle that people have the right to arrange their legal affairs so as to minimize their tax burden within the confines of the law.¹³⁰ Avoidance thus exists in a nebulous zone between licit and illicit behaviour — on the boundary of the law — with Revenue Canada given the ambitious task of patrolling this boundary, and determining what forms of tax avoidance are acceptable and what forms are not.

It has not been uncommon for anti-avoidance provisions in the *Act* to be neither applied nor interpreted at all.¹³¹ The current s. 67 is an example of an under-utilized part

¹²⁶ Revenue Canada, Interpretation Bulletin No. IT-518, “Income Tax Act: Food, Beverage and Entertainment Expenses”, March 28, 1989.

¹²⁷ For a good overview to Canada’s experience with anti-avoidance legislation, see V. Krishna, “GAAR: The Ultimate Tax Avoidance Weapon” (1988) 16 Can. Curr. Tax C75. See also V. Krishna, *Tax Avoidance: The General Anti-Avoidance Rule* (Toronto: Carswell, 1990).

¹²⁸ *Income War Tax Act*, S.C. 1917, c. 28, as am.

¹²⁹ See B.J. Arnold & J.R. Wilson, “The General Anti-Avoidance Rule — Part I” (1988) 36 Can. Tax J. 829 at 843-48.

¹³⁰ *Duke of Westminster v. Inland Revenue Commissioners*, [1936] A.C. 1 (H.L.). This principle has also been “entrenched” in the *Declaration of Taxpayer Rights* under the subheading, “You Have the Right to Every Benefit the Law Allows”.

¹³¹ For example, the former s. 55(1) enacted as part of the 1972 tax reform package allowed officials to ignore the artificial reduction of capital gains for the purpose of tax avoidance. This section was never invoked and eventually repealed in 1988. See Arnold & Wilson, *supra* note 129

of the *Act* designed to curb avoidance. It states plainly,

In computing income, no deduction shall be made in respect of an outlay or expense in respect of which any amount is otherwise deductible under this Act, except to the extent that the outlay or expense was reasonable in the circumstances.

This section allows for potentially pervasive discretion in reassessing claims to ensure the reasonableness of every deduction claimed. However, the section in practice has been reserved as a last resort for only the most extreme cases of tax avoidance which cannot be countered by any other provision in the *Act*.¹³² This may serve as a utilitarian justification for revealing when to invoke the section, but hardly constitutes a set of criteria for determining reasonableness in the circumstances. It also points to the tension between the specialist's expertise, on which the legitimacy of administrative authority rests, and the practical reasoning faculties (and gut intuitions) of tax officials on which the administrative judgments rest.

Due to the inadequacy of these restraints on tax avoidance and the judicial activism in restricting Revenue Canada's endeavours to combat avoidance,¹³³ the government tabled a new, General Anti-Avoidance Rule ("GAAR") as part of Michael Wilson's major tax reform package of June 18, 1987.¹³⁴ This measure was also designed to address the alleged widespread incidence of tax avoidance since the Progressive Conservatives came to power in 1984.¹³⁵ It was hoped GAAR would stem the circular process of taxpayers, with the aid of expensive tax advice, uncovering and exploiting tax loopholes, followed by the Department of Finance and Revenue Canada plugging such loopholes, or what J. Harvey Perry termed, the "sterile confrontation".¹³⁶ One trial judge at the Tax Court of Canada has remarked that it is precisely the inevitability of this cycle that

at 841; see also D. Dodge, "A New and More Coherent Approach to Tax Avoidance" (1988) 36 Can. Tax J. 1.

¹³² See B.J. Arnold, D.K. McNair & C.F. Young, *Materials on Canadian Income Tax*, 8th ed. (Toronto: De Boo, 1989) at 567-71.

¹³³ Judicial attempts at curbing unacceptable avoidance had little overall coherence. Some of the more prominent doctrines which had been developed included the "sham transaction" doctrine, the "form and substance" doctrine, the "step transaction" doctrine, and the "ineffectual transaction" doctrine. However, perhaps the most significant judicial innovation in interpreting anti-avoidance legislation was the "object and spirit" doctrine by which interpreting the *Act* was to be done according to "the scheme of the Act, the object of the Act and the intention of Parliament". This, in effect, paved the way for more discretion in Revenue Canada's enforcement and application of the *Act* as well as more dialogue about what the object and the spirit of the *Act* is. See E. Driedger, *The Construction of Statutes*, 2d ed. (Toronto: Butterworths, 1983) quoted in *Stubart Investments Ltd. v. The Queen*, [1984] C.T.C. 294 (S.C.C.) [hereinafter *Stubart* cited to C.T.C.]; see also *R. v. Alberta & Southern Gas Co. Ltd.*, [1977] C.T.C. 388; and Arnold & Wilson, *supra* note 129 at 849 fn. 40. See also Krishna, *Ultimate Weapon* *supra* note 127 at 837-46.

¹³⁴ Canada, Department of Finance, *The White Paper: Tax Reform 1987* (Ottawa: Department of Finance, 1987) at 137-44.

¹³⁵ See Canada, Department of Finance "New Measures to Prevent Tax Avoidance" Release No. 87-9, January 15, 1987; see also Canada, Department of Finance, *Explanatory Notes to Legislation Relating to Income Tax* (Ottawa: Department of Finance, 1988); D. Nathanson, "The Proposed General Anti-Avoidance Rule" 1987 *Conference Report* (Toronto: Can. Tax Found., 1988) at 9:1.

¹³⁶ J.H. Perry, *supra* note 58 at 337.

rendered the application of common-sense interpretations to the provisions of the *Income Tax Act* problematic: "The plug is too often like an amoeba: the moment it is put in place, it is transformed into a new loophole, thus creating a never-ending downward spiral of complexities which in turn creates a new realism which is not real at all but which is nevertheless clothed with legality".¹³⁷

The introduction of GAAR was also seen as a reaction to the Supreme Court's decision in the *Stubart* case, where the use by Revenue Canada of a business purpose test (invalidating a tax-minimizing transaction unless it arises out of a legitimate business undertaking) to challenge avoidance transactions was partially disapproved of by the courts, and in which the principle of interpreting the *Act* with reference to common-sense rules was articulated.¹³⁸ The draft legislation, proposed initially by Wilson in the summer of 1987, stated that a transaction resulting in the reduction, avoidance or deferral of tax was to be ignored unless it was carried out for a *bona fide* business purpose. Where the rule applied, the tax consequences were to be determined as was reasonable in the circumstances. It was, in other words, to be left up to the discretion of revenue officials to determine the reasonableness of a transaction. A flurry of criticism from tax practitioners followed, some claiming that GAAR represented merely a misconceived band-aid,¹³⁹ others that the rule offended the constitution and/or the rule of law,¹⁴⁰ and virtually all claiming that the rule would result in uncertainty and an unfavourable climate for commercial transactions.¹⁴¹

A pervasive fear among tax practitioners was that the new rule would vest too much discretionary authority in the hands of Revenue Canada both to interpret the new rule and then to apply it.¹⁴² Thus, it was not the content of administrative discretion that came under attack, but its very existence in the context of the income tax. Interestingly, and somewhat ironically given the climate of the tax community in the early 1980s, one of the most frequently heard complaints against the GAAR was that it was not necessary at all; the problem, rather, was that anti-avoidance measures already in place were not being applied aggressively enough.¹⁴³

¹³⁷ See *Moloney et al. v. The Queen* (1989), 43 D.T.C. 5099 at 5111 per Joyal J.

¹³⁸ See also V. Morgan, "Stubart: What the Courts Did Next" (1987) 35 Can. Tax J. 155. See also H. Kellough, "A Review and Analysis of the Redrafted General Anti-Avoidance Rule" (1988) 36 Can. Tax J. 23.

¹³⁹ W. Goodman, "What Has Canada To Gain From the Proposed General Anti-Avoidance Rule?" in *Tax Reform 1987 — The New Regime* (Toronto: Insight Conference, July 22, 1987).

¹⁴⁰ C. Starrock, "Tax Reform and Anti-Avoidance Proposals", 1987 *British Columbia Tax Conference* (Toronto: Can. Tax Found., 1988).

¹⁴¹ B.J. Arnold & J.R. Wilson, "The General Anti-Avoidance Rule — Part 2" (1988) 36 Can. Tax J. 1133.

¹⁴² *Ibid.* See also V. Krishna, *supra* note 46 at 838; Krishna notes that while the U.S. and Britain have general anti-avoidance provisions, both were developed through case-law and judicial doctrines and neither relies as heavily on administrative discretion. He writes, "[t]he Rule, purportedly intended to combat tax avoidance, does much more. The Rule shifts the focus of control of fiscal activity away from the public processes of the courts and towards the hidden and unaccountable administrative processes of Revenue Canada" at 833-34.

¹⁴³ See Joint Committee on Taxation of the Canadian Bar Association and the Canadian Institute of Chartered Accountants, *Submission to the Minister of Finance and the Minister of National Revenue on the Income Tax Reform Proposals of June 18, 1987* (Toronto: The Committee, December 14, 1987) at 57.

Given the complexity of the issues involved and the insularity of the tax practitioner community, few other public comments on the new rule were forthcoming or sought, despite the fact that the rule was meant to apply almost exclusively to the wealthiest Canadian individuals and corporations for the express purpose of preventing this group from defrauding the public treasury.¹⁴⁴

In an article outlining the various gains wealthy Canadians made in the tax reforms of the 1980s, Neil Brooks singles out the GAAR as an example of something that appears at first glance not to serve the interests of high-income taxpayers.¹⁴⁵ However, Brooks offers two caveats to this statement: first, he argues that blatant loopholes need to be plugged in order to legitimate the regressiveness of the overall tax system; and secondly, he observes that the loopholes left unplugged are gaping, such as the postponement (referred to as an "effective repeal") of the 21 year deemed disposition rule, expected to provide a multi-billion dollar windfall to Canada's richest families.¹⁴⁶

In response to this powerful constituency of high-income taxpayers, and in the absence of any competing constituency advocating more aggressive anti-avoidance enforcement, the anti-avoidance rule was redrafted and presented by the Progressive Conservatives on December 16, 1987. The reference to a business purpose test was replaced by a non-tax purpose test, and an exception was added to provide that only transactions involving a misuse or abuse of provisions of the *Act* could trigger the application of the rule. More criticism and some minor technical changes followed. The relevant parts of s. 245, which came into force September 13, 1988, read,

(2) Where a transaction is an avoidance transaction, the tax consequences to a person shall be determined as is reasonable in the circumstances in order to deny a tax benefit that, but for this section, would result, directly or indirectly, from that transaction or from a series of transactions that includes that transaction.

(3) An avoidance transaction means any transaction

(a) that, but for this section, would result, directly or indirectly, in a tax benefit, unless the transaction may reasonably be considered to have been undertaken or arranged primarily for bona fide purposes other than to obtain the tax benefit.

(4) For greater certainty, subsection (2) does not apply to a transaction where it may reasonably be considered that the transaction would not result directly or indirectly in a misuse of the provisions of this Act or an abuse having regard to the provisions of this Act, other than this section, read as a whole.

Despite the somewhat technical language of the rule, its potential implications are relatively straightforward. One accountant provided the following cogent interpretation of the legislation:

The actual words of s. 245 are relatively simple. It is the application of the section to particular situations that gives rise to uncertainty. In ordinary language, the GAAR says that where taxpayers have used an avoidance transaction to reduce tax or to obtain other

¹⁴⁴ I. Rosen, "Overview of the General Anti-Avoidance Rule" in *The World According to GAAR* (Toronto: Canadian Bar Association, March 30, 1990) at 2-5.

¹⁴⁵ Brooks, *supra* note 61 at 141 fn. 7.

¹⁴⁶ See N. Brooks & L. McQuaig, "For the Rich, Life's a Loophole, Then They Die" (December 1992) *This Magazine* 13. See also L. McQuaig, *Behind Closed Doors* (Toronto: Viking, 1987).

tax benefits, the Minister of National Revenue may make reasonable readjustments to counteract those benefits. The GAAR is not to apply to transactions carried out for bona fide purposes (which do not include obtaining a tax benefit). Similarly, it does not apply unless there is some associated misuse or abuse of the *Act* taken as a whole.¹⁴⁷

Revenue Canada officials seemed to have had their discretion vastly enhanced by the changes to the GAAR; they now have to determine not only what constitutes an avoidance transaction, but also what sort of transaction is geared solely for a tax benefit and, more ambiguous still, what sort of avoidance transaction constitutes a misuse or abuse of the *Act*.

In response to the fears expressed by tax practitioners that a wide ambit of discretion would lead to the inequitable application of the GAAR across the country and uncertainty in the business community, Revenue Canada undertook a number of measures to clarify the impact of the GAAR and to confine the department's discretion in defining and applying the rule. In October of 1988, the department released an information circular, followed by a more detailed supplement, outlining hypothetical situations where the rule might be applied. Providing numerous scenarios in which the rule would and would not apply, the circular also stipulated that any use of the rule would have approval from the head office of Revenue Canada "[i]n order to ensure that the rule is applied in a consistent manner."¹⁴⁸ The equally important discretionary choice not to apply the rule, however, appears subject to no checks.

As Brian Arnold observes in his comprehensive study of the GAAR, "The primary effect of the circular will be to reassure taxpayers and their advisers that Revenue Canada intends to apply the general anti-avoidance rule in a *measured and conservative manner*."¹⁴⁹ [emphasis added] The circular also promises that advance rulings will be given with respect to the application of the GAAR and that Revenue Canada will publish such rulings or, when this is not possible, publish a summary of the facts and the ruling.

All of these measures indicate attempts to legitimate the increase in legal discretion accompanying the introduction of the GAAR; where possible this new authority has been the subject of policy statements such as the circular and the explanatory notes appended to the legislation when it was introduced; where this is not possible, the added assurance that such an exercise of discretion would require head-office approval seems geared to augment the perception that officials will not be given free reign to apply the rule. In short, Revenue Canada and the Conservative government have done everything possible to ensure that the discretion built into the GAAR is exercised *according to the law*. [emphasis added] Indeed, both Revenue Canada and the tax practitioner community have expressed a desire to see a case involving the GAAR come before the courts so that

¹⁴⁷ R. Brown *et al.*, "GAAR and Tax Practice: More Questions than Answers" 1989 Conference Report: Report of the Proceedings of the Forty-First Tax Conference (Toronto: Can. Tax Found., 1990) at 11:2.

¹⁴⁸ Revenue Canada, Information Circular No. 88-2, "General Anti-Avoidance Rule: Section 245 of the Income Tax Act", October 21, 1988 at 1.

¹⁴⁹ B.J. Arnold & J.R. Wilson, "The General Anti-Avoidance Rule — Part 3" (1988) 36 Can. Tax J. 1369.

judicial guidance can be sought on precisely what discretionary boundaries ought to govern the GAAR, and whether those called for by it are constitutional.¹⁵⁰

A GAAR committee has been established within Revenue Canada to review cases referred for possible application of the rule. Its deliberations are private, and neither taxpayers nor their representatives can make personal presentations to the committee. By the end of 1990, forty such cases had been scrutinized; the application of the rule was recommended in fourteen of them.¹⁵¹ The introduction of the rule has further insulated the “expert cultures” that dominate the administration of the income tax in Canada. The following remarks by one tax practitioner reveal the distorted nature of communication in this “expert” interaction:

Many of us have had the experience of a telephone call from a rulings officer advising us that the matter on which a ruling has been requested has been transferred to the mysterious GAAR committee. Depending on one’s nature, the immediate response is a feeling of either shame or pride — shame because someone thinks you are abusing the Act; pride because you have uncovered a loophole that technically works. Whatever the feeling, it is of short duration. There follows discussions between the rulings officer and the practitioner where the words “object and spirit” are repeated, sometimes aggressively, every 30 seconds by both sides.¹⁵²

The GAAR is an example of how discretion in the income tax setting operates as a velvet fist in an iron glove — no matter how vast or powerful the authority vested in tax officials, the process of legitimating that authority, insulated from public scrutiny and public comment outside the tax practitioner community, ensures that the enforcement of this anti-avoidance provision will be effectively handcuffed. Though it is perhaps too early to offer conclusions, the GAAR seems not to have stemmed the cycle of tax planning and loophole plugging, as it was intended to do, so much as to have added a broad new arena of discretion for that depoliticizing process to absorb.¹⁵³ The potential for smoke, in short, seems more likely than the possibility of fire.

¹⁵⁰ *Ibid.* The first case considering the constitutional validity of GAAR appears to be on its way. In *Longley v. M.N.R.*, [1992] 4 W.W.R. 213, an appellate court granted standing to a politician seeking to challenge the constitutionality of the section.

¹⁵¹ J. Stacey, “Revenue Canada’s Administration of the General Anti-Avoidance Rule: An Update”, in *Report of the Proceedings of the Forty-Second Tax Conference* (Toronto: Can. Tax Found., 1991) at 4:4.

¹⁵² *Ibid.* at 4:5.

¹⁵³ An early example of this process is *The Queen v. Friedberg*, 92 D.T.C. 6031, leave to appeal to S.C.C. allowed [1992] 3 S.C.R. viii, which considered the way in which certain gains and losses from investments in gold futures were calculated, the Federal Court of Appeal found that Generally Accepted Accounting Principles (GAAP), unless prohibited expressly under the *Act*, were to be accepted as legitimate practices for the purposes of GAAR. Thus, the expertise of the accounting community is deemed to substitute for the discretion of tax officials. See Current Cases: T.E. McDowell, “On GAAPS and GAAR: *The Queen v. Friedberg*” (1992) 40 Can. Tax. J. 162.

For other cases in which GAAR has been held not to be contravened, see also *Goulard v. M.N.R.*, [1992] 1 C.T.C. 2396 (T.C.C.); and *Canada v. Irving Oil*, [1991] 1 C.T.C. 350 (F.C.A.); for an early and rare example of where a violation of GAAR has been upheld, see *Moloney v. Canada*, [1989] 1 C.T.C. 213 (F.C.T.D.) aff’d [1992] 2 C.T.C. 226 (F.C.A.).

Arnold concludes his study of the GAAR by outlining the broad principles to which the administration and implementation of the GAAR ought to conform. These stipulate, among other things, that the application of the GAAR should be consistent with other anti-avoidance provisions, that it should employ an objective rather than subjective approach concerning the results of a transaction, that it should apply as a provision of last resort, that taxpayers should be entitled to a secure route of appeal, and that it should be broadly and consistently interpreted with clarity and certainty in mind. In the final analysis, however, it is the instincts of tax officials which will determine how much, if any, life will be breathed into the GAAR. The following remarks by a practitioner on this point are instructive:

It is clear that Revenue Canada has no difficulty in determining that virtually all transactions are tax avoidance transactions; and if the department comes to the conclusion that GAAR does not apply, it does so by determining that the particular transaction is not a misuse or abuse of the provisions of the Act. Another observation is that, not surprisingly, and much like the attitude of the courts in tax avoidance cases prior to the enactment of GAAR, the repugnancy index, or smell factor, is important.¹⁵⁴

What remains unclear, of course, is what type of smells are welcome to tax officials and what kind are offensive — what instincts, in other words, are called upon to make these determinations? The practitioner quoted above states plainly that “Revenue Canada officials and practitioners have a duty to fill the present vacuum with a reasoned and reasonable dialogue”.¹⁵⁵ The dialogue advocated here (exclusively between tax practitioners and tax officials), on the subject of when the rule will be applied and when it will not be, seems to be reasonable to the extent that the norms of right and equity embodied in the anti-avoidance provision are left out of the technical discussions about particular suspect transactions. In the absence of a meaningful public discourse about the relationship between social justice and tax administration, the application of the GAAR amounts to little more than a legitimization mechanism so that the widespread incidence of avoidance and evasion of the income tax does not appear officially sanctioned. The popular disengagement from the administrative process is what allows such legitimization measures to succeed.

V. THE THEORY OF ENGAGEMENT

“Engagement” is a complex and suggestive term. It conjures up images of attraction and entanglement, and I deploy it here in both senses. My goal in this section is to sketch a theoretical framework for a democratic form of public administration that captures the complexity of what it means for taxpayers to be(come) engaged in administrative action. What I term the theory of engagement takes as its fundamental premise that people will accept a judgment as legitimate when they believe that the means by which the decision was rendered were just. However, procedural justice is simply one side of this coin. People not only seek the right to be heard, but also desire a just determination to be made. This theory is also predicated on the belief that the decisions which are most capable of legitimization are those in which the stake of each person, group and community, is clear.

¹⁵⁴ Stacey, *supra* note 151 at 4:9.

¹⁵⁵ *Ibid.* at 4:3.

The income tax setting, as illustrated above, provides a telling case study of the limits of engagement in the welfare state. Every Canadian is affected by the income tax system. It lies at the heart of the redistributive efforts of the welfare state (though a progressive tax on wealth would signify more of a commitment in this direction);¹⁵⁶ it serves as a barometer of state intervention in both the economic affairs and social relations of the nation. While the administration of the income tax has important social and political dimensions, as I have tried to demonstrate, there remains a powerfully private dimension to its collection and enforcement. Overseeing the self-assessment system provides tax officials with invasive powers into the lives of every taxpayer, especially on those earning income from business or property. Though I would argue that all taxpayers have a stake in how tax officials exercise their legal, interpretive and communicative discretion, the income tax also exemplifies why it is not possible to assume that all citizens can or should be allowed to take part in all administrative decisions which have a public dimension. Rather, what is necessary is that those affected are engaged in (and by) the discretionary judgments which public officials are called upon to make.

But how can this concept of engagement be concretized? I have argued that administrative authority without normative justification is a central reason for the alienation and disenchantment with welfare state bureaucracy (even on the part of those who clearly derive material and social benefits from a depoliticized public sphere). I have also contended that exercises of administrative discretion infuse human relations into the administrative process — this is, I believe, one of the reasons why discretion is so vehemently feared by those concerned with legitimating public authority. Statutory jurisdiction aside, what gives one person the authority to decide if another's business deductions are reasonable?

This is the question which the constitutional analysis in the *Symes* case obscured. There is no dearth of opinions regarding the question at stake in *Symes*, what is lacking is any communicative channel within the administrative process that actually determines what is a business expense and what is a personal expense. Perversely, in *Everywoman's Health Centre Society (1988) v. The Queen*, in which an abortion clinic sought to be registered as a charitable organization for the purposes of the *Act*, Revenue Canada argued that the lack of any public consensus on abortion made it unsafe for tax officials to conclude that the clinic was "beneficial to the community".¹⁵⁷ Tax officials will do all that they can, it appears, not to appear in the public realm at all. Is this because these

¹⁵⁶ See M. Maloney, "The Case for Wealth Taxation" (1991) 34 Can. Pub. Admin. 241.

¹⁵⁷ *Everywoman's Health Centre Society (1988) v. The Queen* 92 D.T.C. 6001 (F.C.A.). The Federal Court of Appeal ruled that Revenue Canada could not simply refuse to exercise their discretion because an issue was controversial. The registration of charities has proved to be a continual quandary for tax officials, who are mandated under the *Act* to determine what kinds of organizations are charitable according to a common law test which vests broad discretion in their determinations. There are approximately 62,000 registered charities which are exempted from paying income tax and for whom private donations are deductible or creditable to the donor. See N. Brooks, *Charities: The Legal Framework* (Ottawa: Secretary of State, 1983); and F. Woodman, "The Tax Treatment of Charities and Charitable Donations since the Carter Commission: Past Reforms and Present Problems" (1988) 26 Osgoode Hall L.J. 537; and Revenue Canada, Information Circular No. 87-1, "Registered Charities — Ancillary and Incidental Political Activities", February 25, 1987.

officials make decisions randomly? Or is it because they lack the legitimacy to express values?

Administrative discretion that is depoliticized in this fashion can be legitimated solely on the basis of expertise, impartiality, and instrumental reason; any form of administration which depends on substantive justifications for discretionary judgments is thus effectively precluded. We are left only the option of submission or withdrawal in our confrontation with the tax official; neither dialogue nor engagement seem possible in the current scheme.

If taxpayers were permitted to carry on a public discussion with officials about the priorities and principles which ought to guide discretionary decision-making, what would this criteria look like? They could not be premised on an ideal of everyone determining each other's tax liability in concert as this would undermine the democratic underpinnings of the self-assessment system itself. Such criteria would have to assimilate, rather than ignore, the technical complexities of maintaining administrative systems. John Keane's skeptical remarks are apposite here:

Undifferentiated conceptions of liberty also need to be abandoned, for they too have an overly simplified view of social and political life. They suppose that there are one or two procedural rules for enabling all citizens to determine how they wish to live. An influential example is the abstract and unworkable principle that all citizens must 'make the decisions which affect their lives'...It rightly acknowledges that liberty is the capacity of continuous initiative in social and political affairs. But it overlooks some elementary points about life as it is (and would be) in complex democratic systems. It forgets that not all citizens can be in the same place at the same time to make such decisions...¹⁵⁸

Keeping these concerns in mind, is it nonetheless possible to imagine what a participatory public sphere would look like? Jean Cohen has offered the ethical conditions she believes necessary for ideal public discourse: 1) fully public communicative processes unconstrained by political or economic force; 2) anyone capable of speech or action who potentially will be affected by the norms under dispute must be able to participate in the discussion; 3) no subject can be taboo in the discourse including reserves of power, wealth, tradition and authority; and 4) the content of the discourse must give rise to generalizable interests, and the resulting consensus must remain subject to further criticism.¹⁵⁹ Ideal public discourse in the welfare state is clearly a long way off—though if it is to be even approximated, it is first necessary to stake out the direction in which it must proceed.

Ideal speech situations, though aimed at forging communal bonds, are also, arguably, predicated on them already existing. As Steven Winter has pointed out, without a commonality of ways of understanding and living in the world, normative agreement is impossible.¹⁶⁰ In this sense, what Winters terms legal norms that are "persuasive" (the

¹⁵⁸ J. Keane, *Democracy and Civil Society* (London: Verso, 1988) at 12.

¹⁵⁹ J. Cohen, "Discourse Ethics and Civil Society" in D. Rasmussen, ed., *Universalism and Communitarianism: Contemporary Debates in Ethics* (Cambridge: MIT Press, 1990) at 85-86.

¹⁶⁰ S.L. Winter, "Contingency and Community in Normative Practice" (1991) 139 U. Pa. L. Rev. 963. See also M. Dan-Cohen, "Law, Community and Communication" (1989) Duke L.J. 1654.

result of consensus) and those that are “prescriptive” (the result of legal sanctions), both presuppose the existence of a community which recognizes and accepts the conditions under which participation and dissent can take place. He concludes:

You will have noticed, no doubt, that whether the participants set out to resolve their controversy through strategic interaction or through dialogue and “communicative action”, the conditions of success are exactly the same. In either case, effective and efficient resolution will be a function of the degree to which they share internalizations and the capacity for imagination. In either case, community is the practical precondition for meaningful communication.¹⁶¹

In the diverse and differentiated societies of contemporary welfare states like Canada, requiring such a consensus at the outset would seem to negate the very possibility of democratic administration.¹⁶² However, by virtue of necessarily being part of the web of welfare state administration (and this is especially in evidence in the case of the income tax system), all individuals and groups, regardless of their identities and loyalties, share an essential communality. Everyone interacts with the state as a taxpayer, though to be sure, the benefits and burdens of that interaction are not distributed equally. Therefore, while community may be a pre-requisite of participants seeking to resolve a dispute among themselves, it may be presupposed when one talks about the administration of the welfare state. Hence, the conditions of success for strategic communication in the administrative setting are not the same as those for “communicative action”. Officials are always implicitly mediating between competing visions of those affected by their judgments, but the demands of legitimacy dictate that this mediation happens largely in isolation.¹⁶³ Because the communication that is permitted to occur — for example in appeals from and litigation arising out of reassessments — those with greater socioeconomic resources are afforded a greater discursive voice in the public sphere. This is the danger that the case of the administration of the income tax makes plain.

If the goal of engagement is to design and validate discretion which involves those affected by administrative authority, full, active participation in public discourse would seem the ideal method to achieve this goal. This may be so, but it is an ideal hopelessly removed from the exigencies and realities of the welfare state and its fragmented political culture. On the one hand, people cannot be everywhere at once. On the other hand, the mere act of participation does not assure engagement. For example, I have voted in elections as a reflection of my interest in, and identification with, the values espoused by the candidates, but I have also voted in elections where I was unaware of who the candidates were. Similarly, I have refrained from voting as a protest resulting

¹⁶¹ Winter, *ibid.* at 1000.

¹⁶² Drucilla Cornell has emphasized that “dialogue demands shared experience, a place to begin, a way of knowing that our conversational partner is with us, and yet the sense of common history and shared experience is continually corroded by liberal individualism...No meeting of the minds is possible because the mind itself has sunk into the schizophrenic state of total dissociation.” D. Cornell, “Toward a Modern/Postmodern Reconstruction of Ethics” (1985) 133 U. Pa. L. Rev. 291 at 366.

¹⁶³ Some have argued, however, that it is precisely its political insulation from both courts and legislatures that makes bureaucracy such an indispensable feature of the democratic polity. The bureaucracy is well-positioned to foster public deliberation. See M. Seidenfeld, “A Civic Republican Justification for the Bureaucratic State” (1992) 105 Harv. L. Rev. 1511.

from how passionately I felt a part of the process, and I have refrained from voting because the lacklustre campaigns did not seem worth the effort. I know people who pay taxes because they believe in the public goods and services they are purchasing (admittedly not a populous group) and people who pay taxes because they are compelled to by law and for no other reason. Participation and engagement may be contradictory phenomena just as often as complementary.

The remedy is not encouraging more people to vote from their heart, or to pay taxes joyously, but rather to involve more people's passions and perspectives in the politics of taxation, including its administrative incarnations.

A useful example is that of literacy. A commonly shared goal among societies is to promote a literate population. However, is this goal attained when everyone in a society *can* read and write, or when everyone in a society *does* read and write? Surely it is not only the ability to read and write that is at issue, and yet clearly people cannot be compelled to engage in literate activity. Moreover, it is also clear that because of unequal distribution of life opportunities, some people will be taught and encouraged to read and write in circumstances where others will not. Finally, there must be available material that is worth reading, that captures a particular reader's curiosity, interest or passion. Thus, what is required to establish a literate society may be categorized as: 1) capacity; 2) opportunity; and 3) desire.

Democratic participation in administrative discretion is analogous. For there to be the capacity to engage, there must be a public sphere in which people can interact, communicate and recognize each other as citizens, and additionally as members of diverse, overlapping and sometimes conflicting communities (of class, race, gender, sexual orientation, religion, ethnicity, language, age and so forth). For there to be opportunity for engagement, those affected by discretionary acts must be aware of the decision, its motivations, and its impact on them and the community at large. Finally, for there to be the desire to engage, there must both be a recognition on the part of officials that without the participation of those affected by their discretion, the judgment made by the official cannot be fully legitimate, and a corresponding recognition by the individual/citizen that such participation is a measure of her freedom and power. Engagement, like any act of democratic participation, requires a leap of faith.

The danger, of course, is that quiescence can be a gesture of solidarity (I participate in the process through my trust in an official's judgment) or a sign of resignation (the process will be the same irrespective of my participation). Handler argues that "mechanisms of power include not only the control of information and socialization processes, but also fatalism, self-deprecation, apathy, and the internalization of dominant values and beliefs — the psychological adaptations of the oppressed to escape the subjective sense of powerlessness."¹⁶⁴ However, Handler sees this type of quiescence in the welfare services setting resulting from a denial of participation and an absence of political consciousness — what Paulo Friere referred to as a "culture of silence".¹⁶⁵ Many of the changes to the administration process which an ethos of engagement would likely bring about would thus be intangible.

While engagement signifies a relationship that is not always easily empirically verifiable, there are a number of concrete implications that instituting democratic forms of administration would engender. I shall allude to just a few.

¹⁶⁴ Handler, *supra* note 4 at 337.

First, if officials are to be relied upon to make important judgments which are redeemed in the public sphere, they would have to be required to produce some form of reasons for much of their decision making which they need not record now. The goal of preserving such judgments, however, would not be to provide evidence to a supervisory body such as a court (though this may be a relevant consequence in the short-term), but rather to provide insights to other officials in analogous circumstances. Discretionary judgments could thus be rendered less arbitrary and more easily defensible on precedent. Therefore, what may be needed to disseminate such judgments within and between administrative structures is the establishment of an administrative equivalent to a body of jurisprudence. Nicola Lacey has argued that the "normative enterprise" of jurisprudence, with its appreciation of the empirical aspects of moral and political questions lends itself naturally to the setting of administrative discretion.¹⁶⁶ Douglas Morgan has termed such a body of prudential experience "administrative phronesis" from the Aristotelian principle of conjoining knowledge of legal principles and the judgment to apply them properly in the circumstances.¹⁶⁷

Unlike traditional common law jurisprudence, however, such a compendium of critical, administrative thought would have to be made readily accessible to the population (subject to certain protections to ensure confidentiality such as those employed when Revenue Canada issues an advance ruling). If decisions are to be justified normatively by recourse to criteria which includes fairness, trust and compassion, a jurisprudence of administrative justice allows for standards of uniformity and equity to be established. As Drucilla Cornell points out, "[d]ialogic universality foresakes any pretense to permanence ... Ethical ideals do not exist outside of history or apart from their intersubjective determination".¹⁶⁸ The record should also indicate whether the decision was the result of consensus, compromise or compelled by the circumstances. It is here that technological advances may be most beneficial, as the recording, storage, cross-referencing and retrieval of large amounts of data is becoming an increasingly routine and undaunting proposition.

The goal of developing an administrative jurisprudence corresponds to making the normative mission of bureaucrats explicit. The flimsiest legal fiction for some time has been that public officials act in neutral, apolitical and impartial ways. However, no truth has yet emerged to take the place of this fiction. In other words, if officials cannot act neutrally, in whose interest and for what purpose should they act?

¹⁶⁵ P. Friere, *Pedagogy of the Oppressed* (New York: Continuum, 1993).

¹⁶⁶ N. Lacey, "The Jurisprudence of Discretion: Escaping the Legal Paradigm" in Hawkins, *supra* note 4 at 384.

¹⁶⁷ See D. Morgan, "Administrative Phronesis" in Kass & Catron, *supra* note 17 at 74. Phronesis is distinguished in Aristotelian thought from the two other species of reason, "techne" and "episteme". "Techne" refers to the rationality of means or instrumentalism; "episteme" refers to the rationality of the laws of the universe which are unchanging and eternal. "Phronesis", on the other hand, refers to the practical reason through which humans discover the ends to which they aspire. It mediates between the universal and the particular, between abstract principles of right, and actual circumstances of life. For a discussion of "phronesis" and its application to ethics under modernity, see Cornell, *supra* note 162 at 305.

¹⁶⁸ Cornell, *ibid.* at 378.

The “dialogic” approach advocates an approach to bureaucratic relationships that confronts the question of power head on.¹⁶⁹ This approach does not merely support the goal of public deliberation in administrative settings, but additionally appreciates the potential of discretion to infiltrate the structures of power upon which many people find themselves dependent. William Simon has harkened back to the governing philosophy of welfare officials in the early New Deal, where this jurisprudence of “interdependence” between clients and officials was born:

The social workers repudiated the classical idea of independence in favour of what they termed “interdependence” and sought to develop a jurisprudence that did justice to the values of both autonomy and solidarity. They portrayed mutual dependence, not only as an inescapable reality, but also as a morally valuable and fulfilling aspect of the human condition. They argued for a kind of security that might be enhanced by the willingness of individuals to become vulnerable to each other and by the openness of the social process to collective reassessment and revision... The social workers interpreted poverty as a social failure. They invoked the term “right” to express their view that a responsible society should guarantee its members a minimally adequate income and that it should teach them to regard this minimum as a matter of entitlement.¹⁷⁰

I believe a similar ethos can be developed in other branches of bureaucracy. No institution of the welfare state can be neutral given the state’s interventionist stance in economic and social relations. In the income tax setting, for example, the ever-widening gap between high and low-income earners should similarly be seen as a “social failure”. The way to incorporate these values in administrative practices is to allow those practices to be structured more reflexively — in other words, to design an administrative process capable of learning and adapting. A reflexive administration is one able to regulate itself by recourse to social, political and economic, as well as technical, forms of knowledge.¹⁷¹

The second concrete change which the aspiration to engagement involves relates to the statutory boundaries which seek to contain and confine discretion. Corresponding to the need for clearer normative mandates and a broader ambit of discretion, the nature and goal of the statutes which grant administrative authority will also have to be significantly more focused. Statutes should set the goals for the administration to achieve, and provide administrators with a purposive mandate. In other words, it is necessary to create the statutory space for officials to act purposefully,¹⁷² according to

¹⁶⁹ See J. Handler, “Dependent People, the State, and the Modern/Postmodern Search for the Dialogic Community” (1988) 35 U.C.L.A. L.R. 999. Handler states at 1000-01 that “[t]he modern/postmodern search for the dialogic community rejects classic liberalism, the promise of governing human relationships through formalism, as well as the epistemological aggrandizement of positivism. Instead, it seeks to break down hierarchy, to explicitly introduce values, commitments and intuitions into the discourse of action, and to create the conditions whereby people talk to each other. In law, the dialogic community would be located in the areas of discretion. It asks: In these spaces, what are the conditions necessary for community?”

¹⁷⁰ Simon, *supra* note 42 at 1199.

¹⁷¹ On the development of reflexiveness as a goal of legal-bureaucratic systems, see N. Luhmann, “The Self-Reproduction of Law and its Limits” in G. Teubner, ed., *Dilemmas of Law in the Welfare State* (New York: Walter de Gruyter, 1985); and G. Teubner, “Substantive and Reflexive Elements in Modern Law” (1983) 17 Law & Soc. Rev. 239.

¹⁷² This is, of course, already incumbent on officials to do. The point is they now must do so in a statutory vacuum. For example, see Galligan, *supra* note 33 at 5, where he remarks, “[t]he

an explicit set of shared values and priorities.

While the normative mandate should be spelled out with precision, the confines on administrative discretion should be less rigid (beyond practical constraints such as budget caps and limits on available resources). The ability of the proliferation of rules now in place in virtually every regulatory and administrative setting to effectively govern administrative action is, at best, highly doubtful,¹⁷³ and nowhere is this more true than in the administration of the income tax.

One occasionally comes across someone older who is nostalgic for less complicated times (for example, when the *Income Tax Act* could be lifted with one hand). Statutes were slim, but abuses were many. However, it is by no means clear that abuses can be cured by increasing complexity and thoroughness in regulations and statutory language. Indeed, some contend it is the very complexity of the *Act* that serves as an incentive for abuses.¹⁷⁴

The creation of democratic forms of administration signals a return to the simplicity, accessibility and manageability of statutes of old, and yet would, at least ideally, be able to curb abuses through more flexible and responsive driven discretion, in which an engaged citizenry would have a more active and informed stake.

While most of the measures I have outlined focus on systemic concerns, at the heart of any attempt at democratizing administration must be the official herself. It is axiomatic that the bureaucracy cannot be transformed unless bureaucrats themselves are transformed. Clearly, the technocratic, merit-based system of hiring and advancement is not well suited to a bureaucratic corps legitimated partially on the basis of its practical reasoning, intuitive capabilities, compassion, trustworthiness and intersubjective skills. Roberto Unger's portrayal of a "modern" bureaucrat's pathologies illustrates this point well:

First, there is the sentiment of unreality. The social relationships of bureaucratic life are completely severed from the relationship each individual has to nature. There is no natural basis for the definition of personality to community....Then there is the sentiment of isolation. Individuals know each other and interact as occupants of particular roles, who have well-defined skills and from whom the performance of definite tasks is expected....To these affections one must add the sentiment of self-abasement. The performance of the bureaucratic role is carried out under a double constraint. It is an expression of a particular side of the personality to the exclusion if not the prejudice of other sides. And the interests that the bureaucratic job serves are

point is that...powers are conferred in order to serve and achieve certain ends and goals, no matter how difficult they may be to discern, or no matter how vaguely they may be stated, officials must seek them out and direct their actions toward them in ways which are rational and reasonable." However, if the idea is for officials to achieve "certain ends", they should not be vaguely stated or difficult to discern.

¹⁷³ The dilemma of rule-making in the administrative context has spawned a growing and critical literature. See, e.g. R. Baldwin, "Why Rules Don't Work" (1990) 53 Mod. L. Rev. 321; R. Baldwin & J. Houghton, "Circular Arguments: The Status and Legitimacy of Administrative Rules" (1986) Pub. L. 239; and C.S. Diver, "The Optimal Precision of Administrative Rules" (1983) 92 Yale L.J. 65. The picture is not entirely bleak, however; see P. Strauss, "The Rulemaking Continuum" and E.D. Elliott, "Re-inventing Rulemaking" (1992) 41 Duke L.J. 1463, 1490 respectively.

¹⁷⁴ See R. Couzin, "Simplification and Reform" (1988) 26 Osgoode Hall L.J. 433.

always partial and subjective. They are not universal or objective ideals, nor in the end are they likely to be mistaken for such ideals. Thus, it is difficult to recognize any lasting worth in the performance of one's roles. All of them will seem, and they will be, to a greater or lesser extent, a diminishment of what I shall describe as the attributes of the self.

Many subtle hypotheses have been fashioned to explain the changes and conflicts that characterize the history of bureaucratic institutions. Sometimes mysterious laws of economic growth, of technological renewal, or of the organization of power have been invoked. But perhaps the main explanation is much more simple. Men want to be human, and the bureaucracy does not satisfy their humanity.¹⁷⁵

How then can new forms of administrative life under the welfare state reclaim the bureaucrat's "humanity"? Of course, calls for a bureaucracy more representative of the gender, class, racial and ethnic make-up of society are neither new nor unproblematic. Nor is the view that administrators should be viewed, first and foremost, as citizens themselves.¹⁷⁶ However, what often becomes lost in this ideal of civic homogeneity, Iris Young explains, are the voices of marginalized voices,

If we give up the ideal of impartiality, there remains no moral justification for undemocratic processes of decisionmaking concerning collective action. Instead of a fictional contract, we require real participatory structures in which actual people, with their geographical, ethnic, gender, and occupational differences, assert their perspectives on social issues within institutions that encourage the representation of their distinctive voices....

This ideal of the civic public....excludes women and other groups defined as different, because its rational and universal status derives only from its opposition to affectivity, particularity, and the body. Republican theorists insisted on the unity of the civic public; insofar as he is a citizen every man leaves behind his particularity and difference, to adopt a universal standpoint of the common good or general will.¹⁷⁷

If engagement is the aim of administration, and the litmus test of its legitimacy, then public officials cannot simply serve as neutral arbiters for formal public deliberation. Officials, like the social workers in welfare service agencies, must be enmeshed in and vulnerable to the process of consensus formation. Democratic administration ought to integrate diverse individuals and groups into a "civic republic" while still affirming the

¹⁷⁵ R. Unger, *Knowledge & Politics* (New York: The Free Press, 1975) at 173-74.

¹⁷⁶ See T. Cooper, "Public Administration in an Age of Scarcity: A Citizenship Role for Public Administrators" in J. Rabin & J. Bownman, eds., *Politics and Administration: Woodrow Wilson and American Public Administration* (New York: Marcel Dekker, 1984) at 297-314.

¹⁷⁷ Young, *supra* note 5 at 116-17. See also N. Fraser, "Women, Welfare, and the Politics of Need Interpretation" (1987) 2 *Hypatia: A Journal of Feminist Philosophy* 103. Republican thought, however, has tried to address this critique by redefining the very terms of the debate. For example, Cass Sunstein has observed "[r]epublican thought is characterized by a belief in universalism, a term that I will use in a somewhat idiosyncratic sense. The republican commitment to universalism amounts to a belief in the possibility of mediating different approaches to politics, or different conceptions of the public good, through discussion and dialogue. The process of mediation is designed to produce substantively correct outcomes, understood as such through the ultimate criterion of agreement among political equals. It is because of the belief in universalism that republican approaches posit the existence of a common good." C. Sunstein, "Beyond the Republican Revival" (1988) 97 *Yale L.J.* 1539 at 1554.

diversity of those identities. By emphasizing practical over instrumental reason, justification over coercion, and consensus over recourse to rules, tax administration could assume a transformative mantle in ameliorating social, political and economic oppression. While ameliorating such domination is, I believe, a necessary consequence of political engagement, engagement in the tax process is still a valuable goal independent of its impact on socioeconomic inequality. It is in this sense that the theory of engagement remains rooted at least partially in republican soil. Consider Frank Michelman's description of citizenship in the ideal republic:

In the strongest versions of republicanism, citizenship — participation as an equal in public affairs, in pursuit of a common good — appears as a primary, indeed constitutive, interest of the person. *Political engagement is considered a positive human good because the self is understood as partially constituted by, or as coming to itself through, such engagement.* This view opposes the “pluralist” view in which the primary interests of individuals appear as pre-political, and politics, accordingly, as a secondary instrumental medium for protecting and advancing those “exogenous” interests.¹⁷⁸ [Emphasis added]

Finally, regardless of all the beneficial changes democratic administration might foster, it remains to be seen how such an arrangement may be implemented, and what resistance its implementation may arouse: to invoke a tired yet still true maxim, “the best place to start is everywhere”. Democratizing public administration is generally associated with decentralizing administrative structures. Smaller, less constrained administrative units or cells may interact more personally and more freely with citizens. However, I do not mean to imply that large or complex public organizations are exempt from, or impervious to, increasing popular input and control. Cunningham justifies the vagueness of much democratic theory on these grounds:

The reason for not identifying institutional or other means by which control might be achieved as essential for it to be democratic is that these means are highly context bound and indefinite in number. No attempt to specify in advance of actual efforts to expand popular control those means which are truly democratic could account for all the contingencies, and the attempt could discourage innovation. A similar point may be made about degrees of involvement. At one extreme, people may be said partly to control an outcome when their ‘activity’ is no more than to refrain from inhibiting someone else from doing it. At another extreme, people may be directly involved in all stages of whatever process is needed to secure the outcome.¹⁷⁹

Without meaning to limit the horizon of possibilities, there are a variety of tested means for officials and those affected by their discretionary decisions to exchange views: these include formal hearings, panels, town-hall meetings, community outreach programs, e-mail networks, public television and radio shows, phone and mail campaigns, and so forth. A glimpse of what this might mean in the income tax context was provided by the Fair Tax Commission established by Ontario when the NDP came to power in 1990. In addition to public hearings and soliciting submissions from different sectors of society, the Commission sent “animators” into various parts of the province to stimulate

¹⁷⁸ F. Michelman, “Law’s Republic” (1988) 97 Yale L.J. 1493 at 1503.

¹⁷⁹ Cunningham, *supra* note 16 at 28.

a grass-roots debate on the priorities of the tax system. One journalist offered the following description of this ambitious undertaking:

While people may not have grasped all the complex nuances of the tax system, they are quick to decide whether they are being treated fairly, the commission found. The commission wants them to develop the knowledge to effectively argue for the changes they think are necessary to make the system fairer....At the same time, the commission is ensuring that businesses, labour unions and a wide spectrum of community organizations can also make their views heard. The commission has attempted to involve as many tax experts as possible in its research campaign.¹⁸⁰

While all available channels of communication should be exploited to fit the specific context, the emphasis must be on administrators actively intervening to ensure that unequal distribution of resources does not undermine equality of access to information or means of communication. As the case of tax administration exemplifies, the most important discretionary authority officials have is the power to choose with whom to communicate.

In his recent study, "Administrative Democracy",¹⁸¹ Frug contends that the absence of serious thought devoted to democratizing bureaucracy reflects the extent to which the dependency on experts has engendered fear and distrust of allowing public policy to fall under public control.¹⁸² Frug canvasses the ways in which democracy may be fostered within bureaucratic settings including: restructuring internal organization to provide for a more democratic workplace, creating more effective public control over government administration, decentralizing political power, inserting a "democratic voice" (citizens' forums) in decentralized authority, and transforming bureaucratic culture itself to accommodate more public participation. He offers the following optimistic conclusion:

Democratic systems, when they are successful, learn how to accommodate expertise: they neither automatically reject it nor automatically defer to it. At present, judges and politicians are the people with the most expertise with this kind of engagement with experts; administrative democracy is an attempt to expand this experience to the public at large.¹⁸³

While not disputing Frug's aspiration to make administrative decision making more democratic, Carolyn Tuohy addresses the problematic lack of congruence between democratizing administrative structures on the one hand (thereby providing the means for participation), and making them genuinely more democratic on the other (thereby ensuring the substantive impact of the participation). For example, simply inserting randomly selected "ordinary citizens" to serve on citizens' forums supervising a

¹⁸⁰ R. Mackie, "NDP Awaiting Reports on Changes to Tax System" *Globe & Mail* (15 February 1992) A6.

¹⁸¹ J. Frug, "Administrative Democracy" (1990) 40 U.T.L.J. 559. For a critique of this article, see C. Tuohy, "Bureaucracy and Democracy" (1990) 40 U.T.L.J. 598.

¹⁸² *Ibid.* at 583-84. Frug elaborates that, "Even if the size of an entity is small...even if the level of general education is high...even if solving the problem in question plainly requires the kind of judgment that expertise cannot possibly provide...democracy is commonly thought not to be an option. People are too lazy (or too busy), it is said; they won't participate. Meetings will go on forever; no decisions will ever be made."

¹⁸³ *Ibid.* at 585.

particular bureau strikes Tuohy as ineffective compared with strengthening the organized interests that already operate within a particular policy arena. Her conclusion indicates a preference for reforming institutional structures rather than reconceiving public administration:

In highly structured and politically imbalanced policy arenas (that is, in most circumstances), it is unlikely that the amorphous and decentralized model he [Frug] proposes would lead to a wider canvassing of interests, or to a more equitable weighing of interests, or to a broader experience of genuine political participation, or to a restriction on the scope of bureaucratic culture. These ends are more likely to be served by institutional changes that carefully take account of the structure of interests and seek to redress imbalances.¹⁸⁴

Such skepticism is well-founded. None of the proposals I have outlined guarantee a "more democratic" public administration; however, they do seek to foster a debate on what a more democratic form of administration may mean. What seems to me clear, though, is that "bureaucracies not only implement the values of their community, they also embody them",¹⁸⁵ and that democracy is both an element and a condition for social justice.¹⁸⁶ Before we can realize democratic administration, therefore, we must know what the values of the community are which we wish the bureaucracy to embody, and we must actualize the link between democracy and justice. As Frug concluded, "the term 'participatory democracy' does not describe a fixed series of limited possibilities of human organization but the ideal under which the possibilities of joint transformation of social life are collected."¹⁸⁷

Returning again to the case of Symes and her challenge to Revenue Canada's interpretation of a "business expense", I would conclude that no dialogue was possible between Symes and her assessors regarding the most just and fair interpretation of a "business expense", because no participatory discursive space exists where such administrative judgments can be substantively justified. Where the public sphere should be alive with debate, there is a void, plastered over and concealed from view by the courts and legislatures. Like most appeals involving the exercise of administrative discretion under the welfare state, *Symes* was notable more for what it could not say, than for what it did say (in the end, the interpretation of Revenue Canada was upheld). This paper has attempted to look behind the plaster and fill in the void: to give discretion a voice in the politics of the welfare state, and to give the politics of the welfare state a voice in discretion.

¹⁸⁴ Tuohy, *supra* note 181 at 604-05.

¹⁸⁵ D. Divine, "A Political Theory of Bureaucracy" (1978) 57 *Pub. Admin.* 155.

¹⁸⁶ Young, *supra* note 5 at 91.

¹⁸⁷ Frug, *supra* note 21 at 1296.