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## A Comparison of New Zealand Taxpayers' Rights with Selected Civil Law and Common Law Countries

Adrian J. Sawyer

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# **A Comparison of New Zealand Taxpayers' Rights with Selected Civil Law and Common Law Countries—Have New Zealand Taxpayers Been “Short-Changed”?**

*Adrian J. Sawyer\**

## **ABSTRACT**

*This article seeks to ascertain the breadth of rights that taxpayers enjoy in New Zealand in comparison with their counterparts in a number of common law and civil law jurisdictions. Such a comparison enables the wealth of experience that codification of rights in civil law countries can provide in comparison to the traditionally lower reliance on statutory protection in common law jurisdictions. From this comparative analysis common themes are distilled, as well as differences between New Zealand and various civil law and common law nations with respect to the legal position and state of taxpayers' rights. The author mounts a strong argument that New Zealand taxpayers have been short-changed—in comparison with the selection of civil and common law nations—from a legal (formalistic) perspective, and more recently from an informal point of view. This assertion is evidenced by the absence of a constitution protecting fundamental human rights, minimalist legal protection of rights through statutory means, and the poor attempt at providing a charter of taxpayer rights. Consequently, there is the possibility that a future*

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*government may ignore and override not only fundamental taxpayers' rights, but also fundamental human rights. The author concludes by strongly suggesting that it is better to prevent the undesirable from happening rather than resting in what may be a false comfort that a satisfactory level of taxpayers' rights will remain through administrative convention and informality.*

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#### I. INTRODUCTION AND BACKGROUND

Many countries are seeking to improve the service provided to the taxpayer, in part because modern tax systems require increased cooperation from the taxpayer if they are to operate efficiently and also as a result of changing attitudes towards the role of the tax administration vis-a-vis the taxpayer. This cooperation is more likely to be forthcoming if mutual trust exists between the taxpayer and the administration and if the taxpayer's rights are clearly enumerated and protected.<sup>1</sup>

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1. See ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, TAXPAYERS' RIGHTS AND OBLIGATIONS: A SURVEY OF THE LEGAL SITUATION IN OECD COUNTRIES para. 1.4 (1990) [hereinafter OECD SURVEY]. See also Jeffrey Owens, *Taxpayers' Rights and Obligations*, 1990 INTERTAX 554 (discussing and summarizing OECD SURVEY, *supra*); P. Gjesti, *Taxpayers' Rights and Obligations*, in

Taxpayers' rights, for individuals at least, should be seen in the broader context of human rights where there are established principles and an international collective understanding of fundamental human rights.<sup>2</sup> In particular, there are international and European covenants on human rights that have been adopted and widely ratified, including the International Covenant on Economic, Social and Cultural Rights,<sup>3</sup> the International Covenant on Civil and Political Rights,<sup>4</sup> the European Social Charter,<sup>5</sup> the European Convention on Human Rights and Fundamental Freedoms,<sup>6</sup> the European Community Treaty,<sup>7</sup> and various other U.N. agreements and treaties.<sup>8</sup> Organizations have been created to monitor and hear complaints concerning these covenants and conventions by citizens of member states. In sum, the process of stating and protecting human rights is largely internationalized to a commonly accepted standard in the developed world. Furthermore, almost all developed nations have legislated for basic fundamental rights through a constitution, which provides the highest level of protection that a legal system can offer.

The same conclusion cannot be reached for taxpayers' rights—a subset of human rights dealing with the tax

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ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, *THE ROLE OF TAX REFORM IN CENTRAL AND EASTERN EUROPEAN ECONOMIES* 77 (1991).

2. This idea was alluded to in the OECD SURVEY, *supra* note 1, para. 2.6, although I develop it further in this article.

3. International Covenant on Economic, Social and Cultural Rights, *adopted* Dec. 16, 1966, 993 U.N.T.S. 3.

4. International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, 999 U.N.T.S. 171.

5. European Social Charter, Oct. 18, 1961, 529 U.N.T.S. 89.

6. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221; 45 AM. J. INT'L L. 24 (Supp. 1953).

7. TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Feb. 7, 1992, O. J. (C 224) 1 (1992), [1992] 1 C.M.L.R. 573 (1992) [hereinafter EC TREATY]. The European Community is now known as the European Union. For a discussion on human rights in the European Union, see John P. Flaherty & Maureen E. Lally-Green, *Fundamental Rights in the European Union*, 36 DUQ. L. REV. 249 (1998).

8. This includes the Universal Declaration of Human Rights, G.A. Res. 217(III)A, U.N. GAOR (Resolutions, Part 1), at 71; U.N. Doc. A/810 (1948); 43 AM. J. INT'L L. 127 (Supp. 1949). For a useful collection of international human rights instruments, see generally RICHARD B. LILICH, *INTERNATIONAL HUMAN RIGHTS INSTRUMENTS: A COMPILATION OF TREATIES, AGREEMENTS AND DECLARATIONS OF ESPECIAL INTEREST TO THE UNITED STATES* (2d ed. 1990). See also American Convention on Human Rights (Pact of San Jose, Costa Rica) (Nov. 22, 1969) O.A.S.T.S. No. 36; 9 I.L.M. 673 (1970); 65 AM. J. INT'L L. 679 (1970); Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Pact of San Salvador), Nov. 17, 1988, O.A.S.T.S. No. 69; 28 I.L.M. 156 (1989).

administration and government on tax-related matters.<sup>9</sup> As the Organization for Economic Cooperation and Development (OECD) observes,<sup>10</sup> a clear statement of taxpayers' rights and accompanying protection will be positive in terms of enhancing taxpayers' collective levels of compliance and providing a mechanism for taming ever more powerful tax administrations. To date, no international statement of taxpayers' collective rights exists, and the release of such a statement is not imminent. Indeed, the OECD's report illustrates that its member nations have differing views on the rights they are willing to offer to their taxpayers.<sup>11</sup>

Many of the rights that taxpayers may enjoy arise in the context of basic human rights, a discussion of which is beyond the scope of this article. This article, however, will highlight the importance of providing rights for taxpayers both in dealing with revenue authorities and in relation to basic fundamental human rights. Consequently, it is opportune to ask the question, "Should there be a separate statement of taxpayers' rights in addition to statements of basic human rights?" The answer, submitted here, is in the affirmative and is twofold. First, many of the rights taxpayers should be able to enjoy are too specific to be set out in a higher level covenant or code of human rights or, for that matter, in a constitution, since they relate to dealing with the tax administration and associated issues.<sup>12</sup> Second, as will be demonstrated later in this article, not all nations in the OECD<sup>13</sup> provide for the same protection of their taxpayers. In

9. The subsequent discussion focuses upon natural persons as taxpayers and their rights, as distinct from corporate taxpayers and other non-natural person organizations, such as trusts, partnerships, and other forms of unincorporated entities.

10. See OECD SURVEY, *supra* note 1, para. 1.4.

11. See *id.* paras. 3.44-3.65 (discussing taxpayers' rights in member countries with references to tables containing taxpayers' rights and obligations).

12. However, there are many rights that taxpayers should be able to enjoy, such as the right to equality and to certainty of law, that are candidates for inclusion in a constitution, international covenant or convention, or both.

13. However, the OECD argues that notwithstanding the absence of a taxpayer charter, countries "attach equal importance to taxpayers' rights and that in practice taxpayers in such countries have rights similar to those set out in these charters." OECD SURVEY, *supra* note 1, para. 2.14. As this article will show, it is now difficult to retain confidence in the accuracy of this assertion. Furthermore, this is in addition to the fact that non-OECD member nations who rely on the levying and collection of tax revenues to fund government differ in respect of rights provided to their taxpayers. The 29 OECD member countries at the end of 1998 were: Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, Republic of Korea, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States.

short, in the absence of any international statement or covenant on taxpayers' rights, taxpayers cannot—and perhaps should not—expect consistent treatment in their affairs from nation to nation. While substantive tax legislation differs from country to country as a result of national sovereignty in determining tax policy and law, it is my contention that the basic taxpayer rights, as set out in Parts II and III of this article, should be substantially similar. For instance, while national human rights laws differ in legislative style, most developed countries and many developing nations have endorsed international covenants and conventions setting out basic human rights and freedoms, notwithstanding the underlying differences in substantive law between these nations.<sup>14</sup>

Why, therefore, have a readily accessible statement, either in the form of a charter, declaration, or code, setting out taxpayers' rights? The simple answer, in my view, is that it enables taxpayers to be aware of their rights and the obligations and standards that can reasonably be expected of them, which arguably is a fundamental right in itself. Furthermore, such a statement will assist in enabling taxpayers to meet their tax obligations with more certainty<sup>15</sup> and to be more confident when dealing with the revenue authority, including handling disputes. In an environment of globalization of trade, finance, and business activities, taxpayers are increasingly involved in activities that come to the attention of revenue authorities outside of their own country of principal residence.<sup>16</sup> That is, taxpayers are coming to the attention of revenue authorities in the countries in which they have a presence.<sup>17</sup> Generally accepted standards of tax administration conduct and taxpayers' rights, in my view, would serve to facilitate the growing phenomenon of globalization.

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14. See generally International Covenant on Economic, Social and Cultural Rights (1966), *supra* note 3, at 3; International Covenant on Civil and Political Rights (1966), *supra* note 4, at 171. A discussion of the differences in substantive laws is beyond the scope of this article.

15. Arguably, this is in itself a fundamental right.

16. For a general overview of economic globalization and its impact on taxation policy and taxpayers generally, see Jeffrey Owens, *Taxation Within a Context of Economic Globalization*, 52 BULL. FOR INT'L FISCAL DOCUMENTATION 290 (1998).

17. "Presence" means a potential or actual tax liability arising by virtue of the taxpayer's residency status or a permanent establishment, or income sourced in that jurisdiction. While a discussion of these important international tax principles is beyond the scope of this article, see generally RICHARD L. DOERNBERG, *INTERNATIONAL TAXATION IN A NUTSHELL* (3d ed. 1997); ARVID AAGE SKARR, *PERMANENT ESTABLISHMENT: EROSION OF A TAX TREATY PRINCIPLE* (Series on International Taxation No. 13, 1991); Richard J. Vann, *International Aspects of Income Tax*, in 2 TAX LAW DESIGN AND DRAFTING 718 (Victor Thuronyi ed., 1998).

The intent behind this article is to ascertain the breadth of rights that taxpayers in one common law country, New Zealand, enjoy in comparison to their counterparts in a number of common law and civil law jurisdictions. The comparison of selected civil law and common law jurisdictions enables the wealth of experience that codification of rights (or offering fundamental legislative protection) in civil law countries can provide in comparison to the traditionally lower reliance on statutory protection in common law jurisdictions. Given my experience with New Zealand's position on taxpayers' rights, this article is able to offer not only a valuable comparison of taxpayers' rights in a number of OECD member nations, including those of both civil law and common law extraction, but also a perspective on a nation internationally represented as a leading promoter and protector of human rights.<sup>18</sup> However, as this article will argue, New Zealand provides noticeably less protection in statutory form for taxpayers than an observer would reasonably expect, given the (overstated) high regard for New Zealand as both a protector of, and advocate for, highly developed universal human rights.<sup>19</sup>

An important limitation must be indicated at the outset. This article does not purport, and could not hope, to provide a comprehensive comparison and detailed statement of the current nature and state of taxpayers' rights in all developed civil law and common law nations, many of which are members of the OECD. Therefore, not only is this study limited to a subset of civil law

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18. See, e.g., *Fostering Human Rights*, CHRISTCHURCH PRESS, Oct. 29, 1998, at 4 (recent editorial concerning New Zealand's prominent role in globalizing human rights with respect to the United Nations Charter of Human Rights and Freedoms).

19. This argument is illustrated by the rather mediocre (average) score of a "B+" for New Zealand in terms of human rights in a review conducted by the New Zealand Human Rights Commission. See *NZ Gets a 'B-plus' on Human Rights*, CHRISTCHURCH PRESS, Feb. 20, 1999. For a useful review of New Zealand's human rights record to 1994, see Margaret Bedggood, *Constitutionalising Rights and Responsibilities in Aotearoa/New Zealand*, 9 OTAGO L. REV. 343, 343-44 (1998). For an in-depth discussion on human rights in New Zealand, see Colin Aikman, *New Zealand and the Origins of the Universal Declaration*, 29 VICT. U. WELLINGTON L. REV. 1 (1999); Don MacKay, *The UN Covenants and the Human Rights Committee*, 29 VICT. U. WELLINGTON L. REV. 11 (1999); Judge Anand Satyanad, *The Ombudsman Concept and Human Rights Protection*, 29 VICT. U. WELLINGTON L. REV. 19 (1999); Sir Kenneth Keith, *Roles of the Courts in New Zealand in Giving Effect to International Human Rights—With Some History*, 29 VICT. U. WELLINGTON L. REV. 27 (1999); Sir Geoffrey Palmer, *Human Rights and the New Zealand Government's Treaty Obligations*, 29 VICT. U. WELLINGTON L. REV. 57 (1999); Andrew S. Butler & Petra Butler, *The Judicial Use of International Human Rights Law in New Zealand*, 29 VICT. U. WELLINGTON L. REV. 173 (1999).

and common law nations,<sup>20</sup> but it also does not consider taxpayers' rights in nations in which both human and taxpayers' rights are likely to be an issue of grave concern, such as a number of developing (or emerging) nations and some former socialist or communist nations (or transition nations). Rather, this article will focus on New Zealand taxpayers' rights in the context of international standards of taxpayers' rights. The comparison draws upon the experience of a number of well-developed industrial common law and civil law countries.<sup>21</sup>

Part II of the article provides a brief summary of the status of taxpayers' rights in several civil law jurisdictions, namely Austria, Belgium, Denmark, France, Germany, Hungary, Japan, Luxembourg, the Netherlands, Spain, Sweden, and Switzerland. Part III considers the position in several common law nations, namely Australia, Canada, New Zealand, South Africa,<sup>22</sup> the United Kingdom, and the United States. The material in both Parts II and III will draw upon international comparative work prepared under the auspices of the International Bureau for Fiscal Documentation<sup>23</sup> and the OECD.<sup>24</sup> The discussion will focus on the main subject of this article—New Zealand—in Part IV, where a more in-depth analysis will be undertaken with respect to taxpayers' rights and obligations. Part V will distill from the preceding discussion common themes as well as differences between New Zealand and other OECD nations (comprising selected civil law and common law nations), with respect to the legal position and state of taxpayers' rights.

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20. This study is further limited largely to reviewing only a subset of OECD member nations. A number of European civil law nations that are OECD members are excluded from this comparative study, including the Czech Republic, Finland, Greece, Iceland, Ireland, Norway, Poland, Portugal, and Turkey. Other OECD member countries that are excluded are Mexico and the Republic of Korea.

21. All but one of the countries included in this study are current OECD members, the exception being South Africa.

22. South Africa has a mixed jurisdiction of civil law and common law. For the purposes of this article, it is treated as a common law nation, since its legal and cultural origins prior to it becoming a republic are as a former British Colony and member of the British Commonwealth.

23. See INTERNATIONAL BUREAU OF FISCAL DOCUMENTATION, LA PROTECTION DU CONTRIBUABLE [TAXPAYER PROTECTION] (1989) [hereinafter IBFD]. The contributing authors to this international study are: Kurt Delyhaye, Austria; Thomas Neuner, Belgium; Ole Bjørn, Denmark; Jean-Yves Mercier and Michel Noemie, France; Karl-Heinz Mittelsteiner and Albert J. Rädler, Federal Republic of Germany; Alain Steichen, Luxembourg; C.P.A. Geppart, Netherlands; Magín P. Mestres, Spain; Bruno Scherrer, Switzerland; Robin M. Ivison, United Kingdom.

24. See generally OECD SURVEY, *supra* note 1.



## II. TAXPAYERS' RIGHTS IN CIVIL LAW COUNTRIES

## A. A Comparative Analysis

It is a trite statement that civil law countries are categorized accordingly because of their common ideology and their greater reliance on, and higher judicial (and scholarly) respect for, codification of law in legislative form, including the elevation of fundamental aspects of law to constitutional status. Numerous other common characteristics exist, but a discussion is beyond this article.<sup>25</sup> The largest concentration of civil law nations within the OECD are in Europe, hence the comparison of taxpayers' rights in Austria, Belgium, Denmark, France, Germany, Hungary, Japan, Luxembourg, the Netherlands, Spain, Sweden, and Switzerland.<sup>26</sup> The information contained in Appendices A1 and A2 is intended to be illustrative rather than indicative of important taxpayer rights for a selection of civil law nations, which are provided through characteristic legislative protection rather than through reliance on the vagaries of administrative procedures.<sup>27</sup>

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25. See generally JOHN H. MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* (2d ed. 1985); HERBERT HAUSMANINGER, *THE AUSTRIAN LEGAL SYSTEM* (1998).

26. Luxembourg is a member of the OECD but did not contribute to the OECD report, see OECD SURVEY, *supra* note 1, para. 1.6, while Hungary did not become a member until 1996. Both countries, nevertheless, are civil law countries that offer important perspectives on taxpayers' rights and are therefore included in this comparative analysis. All of the European civil law nations reviewed are members of the European Union with the exception of Hungary and Switzerland. Japan, while not a European nation, adopted the civil law system in the late nineteenth century. See Hiroshi Oda, *Introduction, in JAPANESE COMMERCIAL LAW IN AN ERA OF INTERNATIONALIZATION* 1, 1 (Hiroshi Oda ed., 1994).

27. The two tables (Appendices A1 and A2) are developed from the comparative work of the IBFD, the OECD, and a feature on taxpayers' rights appearing in the 1997 issue of the Revenue Law Journal. See generally IBFD, *supra* note 23; OECD SURVEY, *supra* note 1; Daniel Deak, *Taxpayer Rights and Obligations: The Hungarian Experience*, 7 REVENUE L. J. 18 (1997) [hereinafter Deak (1997)]; Anders Hultqvist, *Taxpayers' Rights in Sweden*, 7 REVENUE L. J. 43 (1997) [hereinafter Hultqvist (1997)]; Ruud A. Sommerhalder, *Taxpayer Rights in the Netherlands*, 7 REVENUE L. J. 58 (1997). See also Koji Ishimura, *The State of Taxpayers' Rights in Japan*, 7 REVENUE L. J. 164 (1997) [hereinafter Ishimura (1997)]. The Revenue Law Journal feature has also been updated in part through a further publication on taxpayers' rights. See generally Daniel Deak, *Taxpayer Rights and Obligations: The Hungarian Experience, in TAXPAYERS' RIGHTS: AN INTERNATIONAL PERSPECTIVE* [hereinafter TAXPAYERS' RIGHTS] 200 (Duncan Bentley ed., 1998) [hereinafter Deak (1998)] (no significant changes noted on taxpayers' rights in Hungary, except for the extension of the jurisdiction of the Commissioner of the Protection of Privacy to fiscal matters in 1997); Anders Hultqvist, *Taxpayers' Rights in Sweden, in TAXPAYERS' RIGHTS, supra*, at 298 [hereinafter Hultqvist

The information in Appendices A1 and A2 may be summarized into several fundamental categories of taxpayers' rights that are constitutionally protected and available to taxpayers in eleven of the twelve civil law countries featured.<sup>28</sup> These categories are as follows:

- (1) the right to be informed, assisted, heard, and treated impartially;<sup>29</sup>
- (2) the right to a hearing and subsequent appeal against any decision of the tax authority concerning application and interpretation of the facts, the law, and administrative rulings when the taxpayer is directly concerned;
- (3) the right to pay no more than the correct amount of tax with respect to the taxpayer's share of the relative tax base and the taxpayer's personal circumstances;<sup>30</sup>
- (4) the right to certainty as to the tax consequences of the taxpayer's actions prior to undertaking such actions, although this is limited to the extent that complex tax systems will allow, and is subsequent to

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(1998)] (no significant changes noted on taxpayers' rights in Sweden); Ruud A. Sommerhalder & Edward B. Pechler, *Protection of Taxpayer Rights in the Netherlands*, in TAXPAYERS' RIGHTS, *supra*, at 310 (no significant changes noted on taxpayers' rights in the Netherlands). See also Koji Ishimura, *The State of Taxpayers' Rights in Japan*, in TAXPAYERS' RIGHTS, *supra*, at 227 [hereinafter Ishimura (1998)] (no significant changes noted on taxpayers' rights in Japan). In this publication, there was a feature on taxpayers' rights in Germany that has been used to update the data for Germany. See Claudia Daiber, *Protection of Taxpayers' Rights in Germany*, in TAXPAYERS' RIGHTS, *supra*, at 152. A study on Croatia is also included in this publication as an example of a developing country, which has paid little attention to protecting taxpayers' rights. See Hrvoje Arbutina, *Taxation in Croatia: Developments in the Field of Taxpayers' Rights and Obligations*, in TAXPAYERS' RIGHTS *supra*, at 138.

28. Japan excepted from this specific constitutional protection of taxpayers' rights.

29. This includes an entitlement for taxpayers to have up to date information on the operation of the tax system, access to representation by a qualified professional, knowing how their tax is assessed, being informed of their rights including appeal rights, and receiving courteous and efficient treatment. However, these rights are not necessarily available to taxpayers in Japan to the same extent. See Ishimura (1997), *supra* note 27, at 167-68.

30. In France, if a taxpayer has been shown to have exercised good faith, as opposed to bad faith (a common doctrine to civil law nations such as Austria, France, and Germany), only minimal monthly interest of 0.75% will be charged (in certain circumstances, nil), as opposed to interest at 0.75% plus a 40% (or 80% for abuse of law or fraud) penalty. See CLAUDE GAMBIER & JEAN-YVES MERCIER, FRANCIS LEFEBVRE'S TAXES IN FRANCE para. 893 (1990).

- taking action through limitations on the time in which an (re)assessment may be made;
- (5) the right to privacy such that tax authorities will not intrude into taxpayer's private lives unnecessarily, including limits on searches and seizure of property;<sup>31</sup>
  - (6) the right to confidentiality and secrecy of information provided to the tax authority and the right that such information will be used only as permitted by law;<sup>32</sup> and
  - (7) the right to arrange one's affairs in such a manner as to minimize liability to taxation, provided that such arrangement does not amount to fraud or contrived and artificial arrangements.

Japanese taxpayers' rights are not presented in any formal document. Furthermore, it has been asserted that taxpayers have very few stated rights in Japan and that the revenue authority has the upper hand.<sup>33</sup> Thus, in comparative terms Japanese taxpayers are in a demonstratively worse position than taxpayers in the other civil law nations reviewed here. Only the level of mutual trust and goodwill prevents a "meltdown" in Japanese taxpayer/revenue authority relations. In the prevailing conservative environment in Japan, in spite of widespread calls for improvement from academics and the *zeirishi*,<sup>34</sup> there remains a reluctance to legislate positively to protect taxpayers' rights.<sup>35</sup>

Traditional jurisprudence requires that any rights will be accompanied by corresponding obligations on the other party, in this situation the revenue authority.<sup>36</sup> However, in order to enable the revenue authority to provide taxpayers with an environment in which their rights may be protected and upheld, taxpayers have obligations. These obligations normally include providing returns or information, either directly or through the medium of third parties.<sup>37</sup> Taxpayers will lose many of these

31. Secrecy is of great importance to Luxembourg and Switzerland—it is pivotal to the operation of their legal and banking systems.

32. This also embraces issues of dissemination of knowledge, professional confidentiality (including privilege), and third party information.

33. See Ishimura (1997), *supra* note 27, at 167.

34. See *id.* at 165. *Zeirishi* are certified tax accountants who are actively involved in tax practice.

35. See *id.* at 210. Ishimura argues that the protection of taxpayers' rights has to be realized as an international obligation of the government in Japan.

36. See, e.g., Universal Declaration of Human Rights, *supra* note 8, art. 29(1); Bedggood, *supra* note 19, at 348-49.

37. See OECD SURVEY, *supra* note 1, at 33-43, tbls. 5-6 (for taxpayers' and third parties' obligations); *id.* at 44-46, tbl. 7 (for revenue authority obligations).

rights when they are justifiably suspected of tax fraud or evasion.<sup>38</sup> In such situations, taxpayers' rights in civil law nations will generally come under the fundamental rights of persons accused of criminal offenses.<sup>39</sup>

An additional common feature of these civil law nations is that each has ratified and endorsed the various European covenants and conventions on human rights and has membership in the European Union.<sup>40</sup> Consequently, at least in theory there is a higher level appeal mechanism above national appellate bodies for constitutional issues arising in the context of alleged infringements of a taxpayer's rights.

A further feature evident from Appendices A1 and A2 is the paramount role of legislation, including constitutional provisions, in creating obligations and rights. Administrative action that is not specifically provided for in legislation or in duly enacted ordinances and decrees is potentially unconstitutional and subject to challenge. Consequently, there are more stringent controls on the executive branch of government while the legislature enjoys a greater supremacy, although one commentator has asserted that there are weaknesses in either legal and constitutional protection<sup>41</sup> or unjustified breadth in administrative power available to revenue authorities. Access to an ombudsman (with either general or special tax jurisdiction) is becoming increasingly common, although Belgium, Germany, Hungary, Japan, and Switzerland<sup>42</sup> have yet to provide this feature.

One area where the rights of taxpayers are far from homogenous in the civil law countries, which are also members of the OECD, is in providing notification to the taxpayer of an information request—whether from a third party or another government—or notification of a proposed reassessment or audit. This is illustrated clearly at the bottom of Appendices A1 and A2.

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38. See *id.* para. 2.10.

39. See *e.g.*, GAMBIER & MERCIER, *supra* note 30, paras. 897-98.

40. The exceptions are Hungary and Switzerland, which are not members of the European Union, but have ratified the various European covenants and conventions, and Japan, which is not a European country but has ratified international covenants and conventions on human rights.

41. One example is Luxembourg. See IBFD, *supra* note 23, at 121 (noting that constitutional revision was imminent in 1989 and the establishment of a tax court envisaged).

42. At least this was the case at the time of the OECD comparative survey, see OECD SURVEY, *supra* note 1, para. 3.51, and as of 1996 in Hungary. See Deak (1997), *supra* note 27, at 42.

### B. Charters of Taxpayers' Rights

Apart from France<sup>43</sup> and Belgium,<sup>44</sup> no instances of a formal charter or declaration of taxpayers' rights exist in any of the OECD member civil law countries surveyed in this article.<sup>45</sup> In the two instances of taxpayers' charters, the legislative "backing" for each is noteworthy (although the forms of enactment differ) as well as is the specific and narrow subject area of each charter. At first instance this may seem surprising, yet on reflection, it should not be so. A common feature of eleven of the civil law nations reviewed in this article is that each is European and a signatory to the various treaties, covenants, and conventions of Europe, including the European Covenant on Human Rights and Fundamental Freedoms.<sup>46</sup> Furthermore, as a civil law nation, each country necessarily places a higher degree of reliance on constitutional provisions, including fundamental human rights that form part of each nation's constitution. The rights included in Appendices A1 and A2 represent either basic human rights with particular application to taxpayers, or important rights that are protected by legislation (*i.e.*, supported by covenants and conventions).

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43. In addition to a Taxpayer Charter (*charte du contribuable*), effective in 1987, there is legislation providing for freedom of access to administrative documents and motivation of administrative decisions. See OECD SURVEY, *supra* note 1, at 70, tbl. 15. This Taxpayer Charter was established by way of administrative practice and deals primarily with taxpayers' rights in the case of audits.

44. See Frans Vanistendael, *Legal Framework for Taxation*, in 1 TAX LAW DESIGN AND DRAFTING 15, 30 (Victor Thuronyi ed., 1996) (referring to the 1986 decision in Belgium to introduce a taxpayers' charter (Law of Aug. 4, 1986, B.S. 11.408 (Aug. 20, 1986))). This taxpayers' charter focuses on concerns relating to tax fraud with tax officials previously co-operating with the public prosecutor's office.

45. According to the OECD, only taxpayers in the Netherlands may take advantage of official mechanisms to access information, in this instance the Government Information (Public Access) Act, 1987 (Neth.). See OECD SURVEY, *supra* note 1, at 70, tbl.15.

46. See European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 6. Japan is the only exception—it is not a European nation.

## III. TAXPAYERS' RIGHTS IN COMMON LAW COUNTRIES

## A. A Comparative Analysis

In comparison with civil law nations, common law nations place a greater reliance on the role of common law, or judge-made law (as opposed to simple "interpretation") for the operation of the legal system.<sup>47</sup> This does not imply that statutory law is relegated in importance; indeed, as with civil law nations, statutory law (including constitutional provisions) occupies the highest position of legal status. Another common feature among common law nations is that many have their origin in the common law of England as it has developed since 1066, following colonization or settlement by immigrants of English extraction.<sup>48</sup>

The largest concentration of common law nations within the OECD are outside of Europe. The comparison of common law country taxpayers' rights undertaken in this article embraces the jurisdictions of Australia, Canada, New Zealand, South Africa, the United Kingdom, and the United States.<sup>49</sup> The information contained in Appendix B is intended to be illustrative rather than indicative of important taxpayers' rights by the selection of common law nations that subscribe to these rights through more reliance on both judicial protection and administrative procedures.<sup>50</sup>

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47. See MERRYMAN, *supra* note 25, at 1-5.

48. A.D. 1066 was the time of the Norman conquest and commencement of the development of early Anglo-Saxon law. Numerous other common characteristics exist, but a discussion is beyond the scope of this article. See *id.* at 3.

49. Note that New Zealand, also a common law nation, is considered in-depth separately in Part IV of this article but is included in Appendix B for completeness. South Africa is not a member of the OECD, although it is possible it will become a member in the medium term future. Nevertheless, South Africa offers a unique perspective of a nation that has radically reformed its human rights legislation, including taxpayers' rights, in the last few years following the move from apartheid to a democracy incorporating a new constitution, and has a mixed civil law/common law jurisdiction for its legal system. It should also be noted that the United Kingdom is not a uniform collection of nations (England, Scotland, Wales, and Northern Ireland) in terms of legal systems, since Scotland utilizes a civil law system, while England employs a common law system. The discussion in this article focuses on the system applicable in England.

50. This is based on the comparative work of the IBFD, the OECD, and a feature on taxpayers' rights appearing in the 1997 issue of the Revenue Law Journal. See IBFD, *supra* note 23, at 183-209; OECD SURVEY, *supra* note 1; Karen Wheelwright, *Taxpayers' Rights in Australia*, 7 REVENUE L.J. 226 (1997) [hereinafter Wheelwright (1997)]; Jinyan Li, *Taxpayers' Rights in Canada*, 7 REVENUE L.J. 83 (1997) [hereinafter Li (1997)]; Andrew Alston, *Taxpayers' Rights in New Zealand*, 7 REVENUE L. J. 211 (1997) [hereinafter Alston (1997)]; Bob

The information in Appendix B may be summarized into several fundamental categories of taxpayers' rights that are available to taxpayers in each of the six common law countries featured. These categories are as follows:

- (1) the right to be informed, assisted, heard, and treated impartially;<sup>51</sup>
- (2) the right to a hearing and subsequent appeal against any decision of the tax authority concerning application and interpretation of the facts, the law, and administrative rulings where the taxpayer is directly concerned;
- (3) the right to pay no more than the correct amount of tax with respect to one's share of the relative tax base and one's personal circumstances;<sup>52</sup>
- (4) the right to certainty as to the tax consequences of one's actions prior to undertaking such actions, although this is limited to the extent that complex tax systems will allow, and is subsequent to

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Williams, *Taxpayers' Rights in South Africa*, 7 REVENUE L.J. 1 (1997); Abe Greenbaum, *Taxpayer Bills of Right 1 and 2: A Charter to be Followed by the Rest of the World or Just Another Attack on the Tax Authority?*, 7 REVENUE L.J. 138 (1997). There was no discussion of the U.K. position on taxpayers' rights in the Revenue Law Journal feature. The Revenue Law Journal feature has been updated by a further publication in 1998 on taxpayers' rights. See Karen Wheelwright, *Taxpayer's Rights in Australia*, in TAXPAYERS' RIGHTS, *supra* note 27, at 57 [hereinafter Wheelwright (1998)] (no significant changes noted for Australia); Jinyan Li, *Taxpayers' Rights in Canada*, in BENTLEY, *supra* note 27, at 89, (no significant changes noted for Canada); Andrew Alston, *Taxpayers' Rights in New Zealand*, in TAXPAYERS' RIGHTS, *supra* note 27, at 267 (no significant changes noted for New Zealand); Robert C. Williams, *Taxpayers' Rights in South Africa*, in TAXPAYERS' RIGHTS, *supra* note 27, at 282 [hereinafter Williams (1998)] (no significant changes noted for South Africa, except for the enactment of the final constitution and the taxpayer charter of rights); Abe Greenbaum, *United States Taxpayer Bills of Rights 1, 2, and 3: A Path to the Future or Old Whine in New Bottles?*, in TAXPAYERS' RIGHTS, *supra* note 27, at 347 (the only important change being discussion on the third 'taxpayer bill of rights' for the United States). There is also a chapter on taxpayer rights in the United Kingdom that has been used to update the materials for the United Kingdom. See David Williams, *United Kingdom Tax Collection: Rights of and Against Taxpayers*, in TAXPAYERS' RIGHTS, *supra* note 27, at 331.

51. This includes an entitlement for taxpayers to have up to date information on the operation of the tax system, access to representation by a qualified professional, knowing how their tax is assessed, being informed of their rights including appeal rights, and receiving courteous and efficient treatment.

52. However, in the case of New Zealand, one-half of the tax in dispute must be paid up-front pending final resolution of the dispute.

- taking action through limitations on the time in which an (re)assessment may be made;<sup>53</sup>
- (5) the right to some degree of privacy such that tax authorities will not intrude into taxpayer's private lives unnecessarily, including limits on searches and seizure of property; however, the level of constitutional protection of basic rights, including privacy, is not homogenous across these countries;<sup>54</sup>
  - (6) the right to confidentiality and secrecy of information provided to the tax authority and the right that such information will be used only as permitted by law;<sup>55</sup> and
  - (7) the right to arrange one's affairs in such a manner as to minimize liability to taxation, provided that such arrangement does not amount to fraud, contrived and artificial arrangements, or tax avoidance.

Traditional jurisprudence requires that a right will be accompanied by a corresponding obligation on the other party, in this situation the revenue authority.<sup>56</sup> However, as is the situation for the selected civil law nations reviewed earlier, in order to enable the revenue authority to provide taxpayers with an environment in which their rights may be protected and upheld, taxpayers have obligations. These obligations normally include providing returns or information, either directly or through the medium of third parties.<sup>57</sup> Taxpayers will lose many of these rights when they are (justifiably) suspected of tax fraud or evasion, and avoidance.<sup>58</sup> In such situations, taxpayers' rights

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53. Certainty as reflected in a simple, as opposed to a complex, tax system is a right generally not available to taxpayers in the common law countries featured in this article. Also, non-statutory material is frequently elevated to a status close to legislation.

54. The extent of these rights is varied across the six nations surveyed, and it is difficult to arrive at any common consensus.

55. This also embraces issues of dissemination of knowledge, professional confidentiality, including privilege, and third party information. These rights of privilege are normally restricted to legal professional privilege although there are greater rights given to confidentiality of tax matters involving accountants in the United Kingdom and United States.

56. See generally Universal Declaration of Human Rights, *supra* note 8; Bedggood, *supra* note 19.

57. See OECD SURVEY, *supra* note 1, at 33-43, tbls. 5-6.

58. On occasions taxpayers may lose their rights—such as the right to the presumption of innocence and to a fair and competent audit—when there is no justifiable reason for suspicion of fraud, evasion, or avoidance by the taxpayer, with minimal opportunity for redress or punishment of the revenue authority. For instance, in New Zealand the recent debacle concerning a taxpayer by the name of



in common law nations will, like their civil law counterparts, generally come under the fundamental rights of persons accused of criminal offences.<sup>59</sup>

Access to an ombudsman (with either general or special tax jurisdiction) is becoming increasingly common, although Canada has yet to provide this feature.<sup>60</sup> One area in which the rights of

Henderson, who claimed a Goods and Services Tax (GST) refund of approximately \$60,000 for his business, and had this refund turn into a tax shortfall in the millions of dollars, is a poignant example of this situation. The tax shortfall was then reversed and the original refund claim accepted by the revenue authority, but this occurred after the Inland Revenue Department had bankrupted the taxpayer. While such issues would normally remain confidential, the internal strife within the Inland Revenue Department, and frustration felt by the taxpayer led him to discuss the case with a prominent opposition Member of Parliament (Rodney Hide), who then exposed the issue in Parliament. A judicial review of the Inland Revenue Department's audit process was sought, but this was refused by the Minister of Finance and Revenue at the time, notwithstanding evidence suggesting blatant lies by revenue authority officials (as a result of taped telephone conversations challenging various public statements by revenue officials), internal cover-ups, and the like. For a full exposition of the debacle, see the autobiography by the taxpayer concerned, DAVE HENDERSON, *BE VERY AFRAID: ONE MAN'S STAND AGAINST THE IRD* (1999).

In the context of the Inland Revenue Department's relationship with New Zealand taxpayers, see N.Z. COMMITTEE OF EXPERTS ON TAX COMPLIANCE, *TAX COMPLIANCE: REPORT TO THE TREASURER AND MINISTER OF REVENUE BY A COMMITTEE OF EXPERTS ON TAX COMPLIANCE* paras. 16.37-16.41 (1998). For a brief comment, see *Report Seeks Relaxation of IRD Secrecy*, CHRISTCHURCH PRESS, Feb. 24, 1999, at 9.

59. Furthermore, with respect to the rights of a person charged with a criminal offence, there are more variations across the common law nations than the civil law nations. For instance, the common law nations do not have access to the European Court of Justice or the European Court of Human Rights, the exception being the United Kingdom.

60. See OECD SURVEY, *supra* note 1, para. 3.51. Canada provides for protection of taxpayers through the Charter of Rights and Freedoms, see CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), the Declaration of Taxpayers' Rights, see Revenue Canada, *DECLARATION OF TAXPAYER RIGHTS* (1987)(visited Oct. 23, 1999) <<http://www.rc.gov.ca/~paulb/index98/english/t4116ed5.htm>> ("Index to Revenue Canada Services"), and the Fairness legislation of 1991 (this refers to amendments to the Income Tax Act, R.S.C. 1985, 5th Supp.) (Can.), discussed further in Part III.B of this article dealing with Canada), which goes some distance towards remedying the absence of an ombudsman for taxpayers. For an interview with new Australian tax ombudsman Catherine McPherson, see David Evans, *Catherine Wheels*, 33 *TAX'N IN AUST.* 300 (1998-99). Continued calls for a tax ombudsman in New Zealand are receiving a mixed reception, notwithstanding a 50% increase in complaints about the Inland Revenue Department in the last year. See Michael Rentoul, *Labour Wants Inquiry into IRD*, CHRISTCHURCH PRESS, Feb. 5, 1999, at 2. However, it is unlikely that New Zealand will get a specialist tax ombudsman in the light of the Commissioner of Inland Revenue's views expressed in his report to the Inquiry into the IRD recently conducted by the Finance and Expenditure Select Committee of the New Zealand Parliament. See FEC INQUIRY INTO THE POWERS AND OPERATIONS OF THE INLAND REVENUE DEPARTMENT: GOVERNMENT RESPONSE ON POLICY ISSUES AND INLAND REVENUE RESPONSE ON ADMINISTRATIVE ISSUES, pt. II, paras. 262-74 (visited Oct. 23, 1999) <<http://www.ird.govt.nz/resource/fec/briefings/parttwo.html>>

taxpayers are more homogenous in the common law countries (and clearly evidenced in Appendix B) than the civil law countries is the notification of the taxpayer of an information request (whether a request from a third party or another government) as well as the notification of a proposed reassessment or audit. Apart from the United States, minimal specified statutory rights are given to taxpayers—or in other words, minimal obligations are imposed on the revenue authorities. Therefore, for the eighteen nations surveyed, there appears to be more diversity in taxpayers' rights in the common law nations than in their civil law counterparts (Japan excepted), although taxpayers' rights in the civil law nations should not be considered to be completely homogeneous.

### B. Bills, Charters, and Declarations of Taxpayers' Rights

#### 1. Australia

The Australian Tax Office (ATO) formally introduced a Charter of Taxpayers' Rights (Charter) in 1997.<sup>61</sup> The introduction of this Charter followed widespread debate and public consultation on earlier proposals.<sup>62</sup> The Charter is a

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[hereinafter FEC]. The report of the FEC was doubled in the New Zealand Parliament on October 13, 1999. See FEC, INQUIRY INTO THE POWERS AND OPERATIONS OF THE INLAND REVENUE DEPARTMENT: REPORT OF THE FINANCE AND EXPENDITURE COMMITTEE (visited Oct. 13, 1999) <<http://www.gp.co.nz/wax/I-papers/ind-inquiry.html>>. Recommendation 19 requests the government to establish a specialist tax advisor position within the Office of the Ombudsman, with appropriate resources, to investigate matters of tax administration by the Inland Reserve Department. See Matthew Brocket, *Complaints Over IRD up 50% in Year*, CHRISTCHURCH PRESS, June 14, 1999, at 3. Notwithstanding this view, complaints to the ombudsman on the actions of IRD personnel have increased over 50 percent over the past two years. See *id.* However, one New Zealand ombudsman has not found the number of claims a problem given the size of the IRD. See *Ombudsman Finds No Problem with IRD*, CHRISTCHURCH PRESS, June 15, 1999, at 8. The New Zealand Privacy Commissioner, Bruce Slane, has also been critical of the actions of the IRD in relation to secrecy of taxpayer information. See Bruce Slane, *Tax Act Secrecy Rides Roughshod over Individual Rights*, INDEPENDENT, July 28, 1999, at 13.

61. AUSTRALIAN TAX OFFICE, THE TAXPAYERS' CHARTER: YOUR RIGHTS, YOUR OBLIGATIONS, HOW TO BE HEARD (1997) [hereinafter CHARTER]. An online version of the Charter is available at <<http://www.ato.gov.au/general/advanced/adv.htm>>. The Charter is an administrative document.

62. The Charter was one of the principal recommendations from the Joint Committee of Parliamentary Accounts. See JOINT COMMITTEE OF PARLIAMENTARY ACCOUNTS, REPORT 326: AN ASSESSMENT OF TAX (1993), cited in Wheelwright (1998), *supra* note 50, at 60. It was the Joint Committee's belief that formal statements about the obligations and responsibilities of taxpayers should be balanced with a formal acknowledgment of taxpayers' rights. These rights "are really no more than the currently unstated expectations of ordinary taxpayers and common law

glossy document written in plain English and laid out in manner that should assist taxpayers in understanding their rights as well as their obligations. Key aspects of the Charter include statements of legal rights and standards that taxpayers can expect from the ATO, including the right to fair treatment and an expectation that the ATO will inform taxpayers of their rights.<sup>63</sup> Complaints will be treated seriously, with clear statements of the available avenues for resolving disputes.<sup>64</sup> Important obligations required of taxpayers are also provided at the end of the Charter.<sup>65</sup>

Bentley observes that the Charter is premised on an environment of self-assessment, which necessitates that taxpayers are aware of their rights as well as their obligations.<sup>66</sup> The resulting document has administrative backing to supplement both existing rights provided for in legislation as well as various administrative rights. None of the legal rights stated in the Charter are new; each of the legal rights already existed, although the Charter provides a convenient mechanism to bring all such rights together in a form accessible to taxpayers.<sup>67</sup> While the legislative rights are enforceable under statute or common

rights of citizens in their dealings with the State." *Id.* at 308 (quoted in Wheelwright (1997), *supra* note 50, at 97).

63. See CHARTER, *supra* note 61, at 6-18.

64. See *id.* at 20.

65. See *id.* at 21.

66. See Duncan Bentley, *Formulating a Taxpayers' Charter of Rights: Setting the Ground Rules*, 25 AUSTL. TAX REV. 97, 98-100 (1996) [hereinafter Bentley (1996)]. For an earlier discussion by Bentley concerning how the then proposed Taxpayer Charter of Rights could be enforced in the light of experience in other countries, see Duncan Bentley, *A Taxpayer's Charter: Opportunity or Token Gesture?*, 12 AUSTL. TAX F. 1 (1995) [hereinafter Bentley (1995)]. For a more recent exposition on taxpayers' rights, including a discussion on the possible future directions of taxpayers' rights, see Duncan Bentley, *Definitions and Development*, in TAXPAYERS' RIGHTS, *supra* note 27, at 1; Duncan Bentley, *Classifying Taxpayers' Rights*, in TAXPAYERS' RIGHTS, *supra* note 27, at 16; Duncan Bentley, *An Overview of Taxpayers' Rights*, in TAXPAYERS' RIGHTS, *supra* note 27, at 35.

67. See Wheelwright (1997), *supra* note 50, at 263 (discussing the Joint Committee of Parliamentary Accounts' observations). These rights are accessible to taxpayers if the measurement bases of comprehensibility and location are utilized." However, I would argue that it is theoretically possible that the Charter may recast existing legal and administrative rights in a manner such as to bring into question whether these legal and administrative rights have been modified, creating a claim of estoppel against the Commissioner for the legitimate expectation that a taxpayer may rely on the rights as stated in the Charter. The ability for "administrative" law-making through delegation from the Legislature to the Executive brings into existence the possibility of sustaining this argument. Note also the provisions of the Commonwealth of Australia Constitution Act, enacting the Commonwealth of Australia Constitution of 1901. See Commonwealth of Australia Constitution Act, 1900, ch. I, 63 & 64 Vict., ch. 12 (Eng.); AUSTL. CONST., ch. I.

law, administrative rights cannot be enforced directly by judicial means but rather by administrative mechanisms—in this instance, the Special Problem Resolution Unit.<sup>68</sup> Access to the Tax Ombudsman is also an avenue for dissatisfied taxpayers.<sup>69</sup> Perhaps the strongest enforcement mechanism is the ATO's genuine undertaking that it intends to stand behind the Charter, foster a positive relationship with taxpayers, and resolve disputes by problem-solving rather than confrontation whenever possible.<sup>70</sup> Ideally, for the greatest protection of taxpayers, a comprehensive legal and administrative charter accompanied by legal backing is necessary.<sup>71</sup>

A large proportion of the rights represent second-order legal rules and first-order administrative rules.<sup>72</sup> These include the rights to fair and reasonable treatment, privacy, and confidentiality of information.<sup>73</sup> Suggestions have been made for a more extensive statement of legal and administrative rights, including the right to natural justice and the right to compensation for loss from actions taken by the ATO without lawful authority or cause.<sup>74</sup> While rights of this nature have not been included in the Charter, this should not be taken to mean that rights of this nature do not necessarily exist. Consequently, one critical aspect of the debate over what should be included in a charter, in my view, is the public benefit that arises to taxpayers who become aware of their actual rights when particular rights are included.

Second-order administrative rights, concerning details of the administrative process, are included in the Charter,<sup>75</sup> although third-order administrative rights (or aspirational rights), which are also included, cannot really be enforced by taxpayers.<sup>76</sup> Nonetheless, one commentator observes that the Charter falls well short in terms of the ramifications for U.S. revenue officials who undertake illegal acts.<sup>77</sup>

In addition to statements of rights that directly bind the ATO, access to information is another important feature of the system.

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68. See CHARTER, *supra* note 61, at 20.

69. See *id.*

70. See *id.* at 5.

71. See Bentley (1996), *supra* note 66, at 116.

72. Bentley develops this process of ordering legal and administrative rules as taxpayers' rights. See *id.* at 102. However, these are also first order legal rights. See *id.* at 103-05.

73. See *id.* at 102.

74. See *id.* at 106.

75. For a discussion on this type of rights, see *id.* at 109-10.

76. See *id.* at 110-11.

77. See Wheelwright (1997), *supra* note 50, at 264.

In Australia, the Freedom of Information Act<sup>78</sup> provides taxpayers with the right to request access to information that relates to their affairs, including reasons for decisions, albeit with some limitations.<sup>79</sup>

One further positive outcome of the Charter should be greater awareness by the taxpaying community of its rights, which would indirectly create the impetus for ATO officers to meet taxpayers' collective and individual expectations as expressed in the Charter.<sup>80</sup>

## 2. Canada

In Canada, the Charter of Rights and Freedoms<sup>81</sup> contains a number of substantive rights that directly affect taxpayers. These rights include equality rights,<sup>82</sup> the right to freedom of conscience and religion,<sup>83</sup> and the right to certainty of law.<sup>84</sup> Specifically in the context of taxation, the organization Revenue Canada released the Declaration of Taxpayer Rights (Declaration) in 1985.<sup>85</sup> This document, while only having administrative rather than legal backing, is aimed at improving Revenue Canada's credibility as well as taxpayers' collective perception of fairness in the tax system.<sup>86</sup> Without legal backing, however, the

78. See Freedom of Information Act, 1982 (Austl.).

79. In addition, taxpayers may use the Privacy Act to gain access to certain confidential information and can expect specified certain statutory protection of their private information which is held by the ATO. See Privacy Act, 1988 (Austl.)

80. A further positive aspect is the ATO's stated commitment to adopting a problem-solving approach rather than confrontation in dispute resolution. See CHARTER, *supra* note 61, at 5.

81. Canadian Charter of Rights and Freedom, *supra* note 60.

82. Taxpayers have been successful in invoking the Charter of Rights and Freedoms in the context of the deductibility of child care expenses, and various marital and spousal equivalent deductions. See Li (1997), *supra* note 50, at 129.

83. No Canadian taxpayers have successfully argued this right before a court. See *id.* at 130.

84. Li argues that certainty of law, being a fundamental aspect of the rule of law, applies to taxpayers with respect to tax legislation, but only to the extent that this applies to any other legislation according to the Canadian Constitution. See Li (1997), *supra* note 50, at 131; CAN. CONST. (Constitution Act, 1982), pt. I (Canadian Charter of Rights and Freedoms). She notes that no provision of Canadian tax legislation has been declared void for vagueness or uncertainty, although certainty is frustrated by the effects of retroactive legislation made effective from the date of ministerial announcement. See Li (1997), *supra* note 50, at 132-33.

85. See Revenue Canada, *supra* note 60. This document has no legal authority and provides no real protection for taxpayers. See Li (1997), *supra* note 50, at 85.

86. In a similar manner to the ATO in Australia, this document is available on Revenue Canada's website. See Revenue Canada, *supra* note 60. This

Declaration offers no legal protection; rather, it seeks to reshape the attitude of Revenue Canada in its dealings with taxpayers.<sup>87</sup>

The Declaration states that in dealings with Revenue Canada on tax matters, taxpayers are entitled to complete and accurate information about the Income Tax Act,<sup>88</sup> to courteous and considerate treatment, and to a presumption of honesty, unless there is evidence to the contrary. One fundamental right referred to in the Declaration is fair handling of a complaint.<sup>89</sup> Revenue Canada is also required to assist taxpayers in exercising the full range of their rights. Indeed, the Declaration refers to taxpayers' rights as they appear in the Charter of Rights and Freedoms and the Canadian Constitution.<sup>90</sup> In effect, this document serves a similar purpose to the Australian Charter, although it is less detailed in terms of enumerating taxpayers' rights and providing assistance to taxpayers seeking further information.

The Canadian Fairness legislation was released in 1991<sup>91</sup> with the intention of making the tax system "simpler, easier and fairer" and Revenue Canada "kinder and gentler."<sup>92</sup> The underlying intention of the legislation is to provide greater discretion to Revenue Canada, which Revenue Canada can exercise in favor of taxpayers. It is expected that this discretion will be utilized for amending returns beyond the statute of limitations in specific circumstances.<sup>93</sup> Therefore, Revenue Canada can permit the late filing of returns and certain elections in specified circumstances.<sup>94</sup> It can also waive or cancel interest or penalties when they result from Revenue Canada's undue delay or financial hardship, or from the first occurrence of late remittance of source deduction taxes.<sup>95</sup> Taxpayers may also apply for a judicial review of whether the Minister's actions are fair in exercising discretion under the legislation.<sup>96</sup> A further

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document represents only little more than one page containing a brief statement of taxpayers' rights.

87. See Li (1997), *supra* note 50, at 86.

88. Income Tax Act, R.S.C., 5th Supp. (1985) (Can.) [hereinafter *Income Tax Act (Can.)*].

89. See Li (1997), *supra* note 50, at 86.

90. CAN. CONST. (Constitution Act, 1982), pt. I (Canadian Charter of Rights and Freedoms). See Li (1997), *supra* note 50, at 86.

91. The legislation introduced a series of amendments to Income Tax Act (Can.). For a discussion of the changes, see Robert M. Beith, *Fairness Package*, 44 CAN. TAX FOUND. CONF. REP. 7:1 (1992).

92. Li (1997), *supra* note 50, at 135.

93. See Beith, *supra* note 90, at 72; Li (1997), *supra* note 50, at 135.

94. See Li (1997), *supra* note 50, at 135.

95. See *id.*

96. Canadian taxpayers may also utilize the Access to Information Act, R.S.C. ch. A-1 (1983) (Can.) and the Privacy Act, R.S.C. ch. P-21 (1983) (Can.) to

positive development is simplification of the appeals process, although it remains to be seen whether Revenue Canada's use of new terminology, which is now offering "services" to its "clients" (*i.e.*, taxpayers), will have long term benefits.<sup>97</sup>

Notwithstanding its good intentions, the Fairness legislation has been criticized for failing to improve substantive fairness in the tax system by not providing relief to taxpayers who are unfairly treated in certain circumstances.<sup>98</sup> Indeed, this legislation has been inconsistently applied in various District Taxation Offices without monitoring by Revenue Canada. Concurrent with this practice is a lack of public accountability for the amount of tax, interest, and penalties forgiven by Revenue Canada under this legislation.<sup>99</sup>

### 3. United States

The United States Omnibus Taxpayer Bill of Rights<sup>100</sup> of 1988 (TBR1) and its 1996 amendments (TBR2),<sup>101</sup> in conjunction with the latest revisions resulting from the Internal Revenue Service Restructuring and Reform Act of 1998 (IRSRRRA), appear to contain a statement of taxpayers' rights, although one commentator disagrees with respect to the former two legislative initiatives.<sup>102</sup> Abe Greenbaum argues that the title of the first two Taxpayer Bill of Rights statutes act as misnomers and their content does nothing to enhance or advance the rights of taxpayers.<sup>103</sup> In fact, Greenbaum concludes in very strong terms when he states:

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obtain access to their confidential information and to enforce the privacy of their confidential information.

97. See Li (1997), *supra* note 50, at 136. This issue also arose as part of the Committee of Tax Experts Review of the New Zealand tax system. See N.Z. COMMITTEE OF EXPERTS ON TAX COMPLIANCE, *supra* note 58, paras. 16.1-16.23.

98. Circumstances include situations of possible thoughtless or negligent conduct on behalf of Revenue Canada officials that have caused expense to a taxpayer. See Li (1997), *supra* note 50, at 136.

99. See *id.* at 137.

100. Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, 102 Stat. 3342 (codified in scattered sections of 26 U.S.C.) [hereinafter TBR1].

101. Taxpayer Bill of Rights 2, Pub. L. No. 104-168, 110 Stat. 1452 (1996) (codified in scattered sections of 26 U.S.C.) [hereinafter TBR2].

102. Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685 (codified in scattered sections of 26 U.S.C.) [hereinafter IRSRRRA]. See also Taxpayer Bill of Rights 3, Pub. L. No. 105-206, tit. 3, 112 Stat. 726 (1998) (codified in scattered sections of 26 U.S.C.) [hereinafter TBR3]. The third taxpayer bill of rights is further discussed in Greenbaum (1998), *supra* note 50, at 366-79.

103. See Greenbaum (1997), *supra* note 50, at 139. This fact, argues Greenbaum, distinguishes TBR1 and TBR2 from the legislative efforts in other

[T]he legislative initiatives in TBR1 and TBR2 operate in a too piecemeal and reactive fashion, when there was an opportunity to establish a comprehensive and coherent program of taxpayers' rights. It is tragic that an opportunity to advance taxpayers' rights was missed in favour of a legislative program which was designed primarily to promote an anti-government agenda.<sup>104</sup>

Other commentators discussing TBR1 and TBR2 have been far less critical; in fact, it would be more correct to suggest that in at least one instance they have been supportive of the changes.<sup>105</sup> One group of taxpayers that appears to be unfairly treated by TBR1 and TBR2 is third-party taxpayers.<sup>106</sup> A better attempt at expressing taxpayers' rights has been made in the Georgia state legislature with a proposed bill of rights.<sup>107</sup>

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nations, where taxpayer bills of rights or charters systematically establish specific rights and delineate limits on the tax administration. Greenbaum extends these comments to TBR 3 (or IRSRRA). See Greenbaum (1998), *supra* note 50, at 347-48.

104. See Greenbaum (1997), *supra* note 50, at 163.

105. See Rita A. Cavanagh, *The New Protections of the 'Taxpayers Bill of Rights 2': Useful Changes Across the Board*, 85 J. TAX'N 210, 214 (1996) (discussing TBR2); Gerald A. Kafka, *Taxpayer Bill of Rights Expands Safeguards and Civil Remedies*, 70 J. TAX'N 4, 9 (1989) (discussing TBR1); Gerald A. Kafka, *Taxpayer Bill of Rights 2 Offers Added Protection*, 57 TAX'N ACCT. 196, 202 (1996). However, in their comment on TBR1, Jones and Schleefer offer similar sentiments to Greenbaum, *supra* note 50, with comments such that TBR1 offers little in the way of remedy against heavy-handed IRS tactics, and that it is questionable whether it advances the position of taxpayers at all. At most, Jones and Schleefer argue, TBR1 is only marginally beneficial and will do little to restore confidence in the U.S. income tax system. See Kaplin S. Jones & Joan E. Schleefer, *Omnibus Taxpayer Bill of Rights: Cure for "Seizure Fever" or Election Year Placebo?*, 68 MICH. B. J. 480, 488-89 (1989); Kaplin S. Jones & Joan E. Schleefer, *Taxpayer Bill of Rights Requires More IRS Disclosure and Expands Civil Remedies*, 42 TAX'N FOR ACCT. 180, 184 (1989). Knight and Knight, arguing in the context of audits and dispute resolution with the Internal Revenue Service, conclude that TBR2 provides welcome relief to taxpayers who seek to resolve disputes with the IRS. See Lee G. Knight & Ray A. Knight, *Dispute Resolution with the IRS and Taxpayer Bill of Rights 2*, 13 AKRON TAX J. 27, 80 (1997). Knight and Knight's study focuses on the practical ramifications of TBR2 rather than the substantive issues and its overall context. See generally *id.*

106. See generally Scott Petersen, *The Rights of Third-Party Taxpayers Under the Taxpayers' Bill of Rights*, 1 J. SMALL & EMERGING BUS. L. 325 (1997) (arguing that the legislative history of the Taxpayers' Bill of Rights suggests that third party taxpayers were intended to receive protection). Third-party taxpayers are those taxpayers who have their assets taken to pay someone else's tax liability.

107. See Susan J. Swinson, *Legislative Review: Revenue and Taxation*, 10 GA. ST. U. L. REV. 215 (1993) (where key rights, set out in simple and non-technical terms, will embrace the rights of taxpayers and the obligations of the Commissioner during audits, appeal procedures, obtaining refunds and laying complaints, and the procedures for filing and enforcing liens). Taxpayers may also expect to receive fair, accurate, and courteous service from the revenue authority—an "unwritten" right is to be put into legislation. Enforcement of this rule, nevertheless, argues Swinson, will remain problematic.



IRSRA represents, inter alia, the most recent effort of reforming the state of taxpayers' rights in the United States. Major changes include restructuring the IRS into geographical and taxpayer-type segments and alternating the administrative hierarchy.<sup>108</sup> This approach is not unique from an international perspective, since the Australian, Canadian, and New Zealand revenue authorities have previously undergone similar reorganizations.<sup>109</sup> Protection for IRS employee whistleblowers has been included,<sup>110</sup> which indirectly provides a further protection for taxpayers against revenue official misconduct and taxpayer abuse.<sup>111</sup> Other positive moves for taxpayers' rights include the directive to revise the publication *Your Rights as a Taxpayer* in the context of the audit process.<sup>112</sup> Non-attorneys who are federally authorized tax practitioners are to be on the same level as attorneys with the ability to offer their clients privilege with respect to confidential non-criminal communications.<sup>113</sup> Further protections have been included with respect to collection activities, such as installment arrangements.<sup>114</sup>

Judicial proceedings have been made more favorable to taxpayers by reversing the onus from the taxpayer to the government in civil proceedings in which the taxpayer has produced credible evidence and certain conditions are met.<sup>115</sup> Other changes include equalizing the interest rate on

108. IRSRA, Pub. L. No. 105-206, §§ 1001-02, 1101-05, 1201-05, 112 Stat. 685, 689-723.

109. See Bentley (1996), *supra* note 66, at 115 (Australia); Li (1997), *supra* note 50, at 136 (Canada); N.Z. COMMITTEE OF EXPERTS ON TAX COMPLIANCE, *supra* note 58, paras. 16.1-16.23 (New Zealand).

110. See IRSRA §§ 3001, 3101-06.

111. For an exposition on the IRS' internal culture, staff relations, and "ethics," see generally SHELLEY L. DAVIS, UNBRIDLED POWER: INSIDE THE SECRET CULTURE OF THE IRS (1997). Davis, the first and last IRS official historian recounts the bureaucracy, cowardice, pettiness, and vindictiveness of IRS personnel and procedures.

112. See IRSRA § 3502.

113. See *id.* §§ 3411-17, 3701-12.

114. See *id.* §§ 3421-68.

115. This portion of the IRSRA arose out of complaints of IRS treatment presented during Senate hearings under the leadership of Senator Roth, hearings that have been described as biased and unrepresentative of IRS typical standards of practice by former IRS Commissioner Margaret Milner Richardson. Margaret Milner Richardson, Address at the University of Virginia School of Law (Nov. 2, 1998). For a summary of Richardson's speech, see *Legal Briefs: Margaret Richardson Addresses Groups*, 51 VA. L. WKLY., Nov. 6, 1998, at 6. In fact, this legislation appears to exceed the reasonable balance between taxpayers' rights and the effective administration powers that a revenue authority is entitled to wield.

overpayments and underpayments and on other penalty and refund alterations.<sup>116</sup>

However, notwithstanding the apparent positive attributes of this legislation, particularly how it brings the IRS/taxpayer relationship closer to that which prevails in Australia, Canada, and New Zealand, at least one major drawback exists. Returning to Greenbaum's observations over TBR1 and TBR2, IRSRRA is not the result of a mutual IRS/Government initiative. Rather, it exemplifies yet another instance of members of a Republican-dominated Congress scoring political gain over the Democrat minority as part of their agenda for reducing taxation, in this instance under the guise of weakening the revenue collection agency. Congress worsened the situation by imposing changes without IRS support and cooperation, which is contrary to the approach followed in Australia. Furthermore, IRSRRA contains more instances of what appear to be genuine taxpayer rights—enshrined in legislation without any reference to taxpayer rights in its title—than are in either TBR1 or TBR2.<sup>117</sup> Both TBR1 and

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116. In New Zealand, for example, a large differential between the over-payment and under-payment rates has been maintained for several years; until recently it was 6.43% percent. As from November 8, 1998, the differential has been furthered increased to 7.69% following a reduction in both under-payment and over-payment rates, reflecting to some degree the recent decline in world market interest rates. However, from March 1, 1999, the differential was reduced to 7.21% when a larger decline in the rate for under-payments will be made than to over-payments by taxpayers. The differential is not supposed to be seen as a penalty, according to the New Zealand Government and the Inland Revenue Department, although I would argue—along with many other tax commentators and advisers—that the facts clearly suggest otherwise. This rate differential “forces” many taxpayers into making probable over-payments of tax since the under-payment rate is considerably higher than prevailing market rates. However, not all common law countries employ some form of a Use Of Money Interest (UOMI) regime to encourage (voluntary) compliance. Currently, there is no realistic opportunity for a significant reduction in the differential between UOMI rates. See FEC, *supra* note 60, paras. 181-90. According to the Director of Tax for the Institute of Chartered Accountants of New Zealand, the Inland Revenue Department has been accused recently of overcharging interest by using a compounding basis instead of simple interest on short paid provisional tax, notwithstanding the clear intention of the New Zealand Parliament. See *IRD 'Overcharging' Interest*, CHRISTCHURCH PRESS, Mar. 2, 1999, at 35.

117. For instance, TBR1 contains procedural provisions that were one subdivision of an even larger piece of legislation. TBR2 is also an omnibus bill containing a variety of procedural issues. By way of contrast, IRSRRA provides certain rights, as noted previously, including whistleblower protection and extension of professional privilege. However, arguably it goes too far in placing the burden of proof in court proceedings on the government when the taxpayer produces credible evidence. See IRSRRA, Pub. L. No. 105-206, § 3001, 112 Stat. 685, 726. Greenbaum argues that other parts of the Internal Revenue Code offer more protection for taxpayers than either of TBR1 or TBR2, and indirectly the Constitution of the United States of America. Greenbaum (1998), *supra* note 50, at 376. Greenbaum also argues that TBR3 (ISRRA) effectively undermines the

TBR2 were given the colloquial title of "Taxpayer Bill of Rights," suggesting that they comprise statements on taxpayers' rights, but, as Greenbaum argues, they do not contain any real rights for taxpayers.<sup>118</sup> Nevertheless, the general thrust of the IRSRRA is directed at including some items that could be included in a U.S. taxpayer charter, if the United States was to pursue this opportunity. However, IRSRRA by itself is not sufficient to form the basis for a charter of taxpayers' rights.

#### 4. Statements of Taxpayers' Rights in the Remaining Common Law Countries

The enacted interim Constitution<sup>119</sup> and the recent new and final Constitution of South Africa,<sup>120</sup> contain specific rights protecting taxpayers in an accompanying Bill of Rights. These rights include fundamental provisions, such as the right to equality and privacy, access to information, administrative justice (lawful and fair administrative action), and property rights.<sup>121</sup> Several tax provisions have been identified as being in conflict with the interim Constitution and final Constitution, and the anticipated outcome is a constitutional challenge.<sup>122</sup> Under the previous apartheid regime, such rights were unavailable to the majority of the population in all aspects of their lives quite apart from tax-related matters. In 1997, a charter of taxpayers rights was introduced in South Africa by the South Africa Revenue Service, appropriately titled "Client Charter." It is a single folio of thirteen points stated in general terms.<sup>123</sup>

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IRS via the U.S. Congress attempting to run the IRS. *See id.* TBR1, argues Greenbaum, is the closest to a coherent charter of taxpayers' rights. TBR 2 and TBR 3 cannot be so characterized. *See id.* at 379.

118. *See generally id.*

119. Constitution of the Republic of South Africa, Act 200 of 1993 (interim Constitution in force from Apr. 27, 1994).

120. Constitution of the Republic of South Africa, Act 108 of 1996 (in force from Feb. 4, 1997).

121. These rights were protected under Constitution of the Republic of South Africa, Act 200 of 1993, arts. 8, 13, 23-24, 28. *See Williams (1997), supra* note 50, at 8-10, 14-15. Now they come within Constitution of the Republic of South Africa, Act 108 of 1996, arts. 9, 14, 25, 32-33. All rights are subject to art. 36(1), a general overriding limitation provision. *See Williams (1998), supra* note 50, at 287.

122. Williams (1997), *supra* note 50, at 11; Williams (1998), *supra* note 50, at 295-96.

123. *See Williams (1998), supra* note 50, at 296-97. It appears, according to Williams, to be an innocuous document (arguably much like the New Zealand IRD's 'Customer Charter' discussed in Part IV of this paper), more noteworthy for what it does not say than for what it does say.

In the United Kingdom, a Taxpayer's Charter was introduced in 1986.<sup>124</sup> This brief document summarizes the basic expectations that taxpayers may have of the Inland Revenue in the United Kingdom. It is similar in content and size to Revenue Canada's Declaration, although it makes no reference to any constitutional provisions.<sup>125</sup>

One common theme among taxpayer charters and similar documents in the common law nations is that each represents an approach to prohibiting arbitrary practices by the tax administration against taxpayers. Only the U.S. attempts to have the direct force of law through enactment by statute. Interestingly, the U.S. approach is the only instance in the common law nations surveyed in this article in which the tax administration was not the most active party in preparing the statement on taxpayer rights.<sup>126</sup>

## 5. Dispute Resolution and Tax Courts

An international symposium on the role of tax courts in dispute resolution in several civil law and common law countries was held in 1988 in the United States.<sup>127</sup> From this symposium emerged several observations pertinent to a review of taxpayers rights. First, in each system represented, the courts enjoy a strong tradition of judicial independence, even when they form part of the executive branch.<sup>128</sup> Australian taxpayers experience

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124. INLAND REVENUE, CHARTER FOR INLAND REVENUE TAXPAYERS (1999). A copy is available at the U.K. Inland Revenue's website: (visited Oct. 24, 1999) <<http://www.inlandrevenue.gov.uk/pdfs/ir167.htm>>. David Williams states that this document cannot and does not claim to be a statement of rights. See Williams (1998), *supra* note 50, at 335.

125. The United Kingdom does not have a formal constitution, although there are protections provided through the Bill of Rights (1688), see Bill of Rights, 1 W. & M. sess. 2, ch. 2 (Eng.), reprinted in 10 HALSBURY'S STATUTES OF ENGLAND AND WALES 44 (4th ed. 1985), other legislative protection of rights that are constitutional in nature, and various covenants and conventions, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 6.

126. This is with some justification given the contents of TBR1, TBR2, and particularly IRSRRA are not entirely favorable from the IRS's perspective.

127. The report of the conference was prepared by Professor Paul B. Stephan, where the countries represented included France, Germany, Japan, the Netherlands, and Sweden from the civil law countries featured earlier in this article, and Australia, Canada, New Zealand, and the United States from the common law countries featured in this article. See Paul B. Stephan III, *Courts with Income Tax Jurisdiction: An International Comparison*, 8 VA. TAX REV. 233 (1988).

128. See *id.* at 235.

the least specialized tax court system,<sup>129</sup> while Canadian and New Zealand taxpayers can take advantage of the relative informality of hearings.<sup>130</sup> Only in Canada can taxpayers as of right postpone all of the tax alleged to be due pending the court proceeding.<sup>131</sup>

The position of New Zealand has altered significantly since the symposium, as a new dispute resolution process came in to place on October 1, 1996.<sup>132</sup> New Zealand has also since implemented a new and even more informal small claims division in the Taxation Review Authority,<sup>133</sup> and a substantial number of decisions by the New Zealand Taxation Review Authority judges were appealed and reversed on appeal.<sup>134</sup>

In the United States, with the choice of first instance<sup>135</sup> and with the independent nature of the thirteen Federal Tax Court circuits, disgruntled U.S. taxpayers possess a wide scope of choice, including two appellate levels that conclude with the U.S. Supreme Court.<sup>136</sup>

Professor Paul B. Stephan's observation of the differences in prerequisites for litigating a dispute and in the role of tax advisors in the countries represented at the symposium emphasizes that aspects of taxpayer rights are far from uniform internationally. Since the symposium, significant developments in the dispute resolution process have been enacted in Australia, New Zealand (as noted earlier), and the United States.<sup>137</sup>

129. Since this symposium, the Australian tax court system has been refined and it now more closely resembles the New Zealand system for courts lower in the hierarchy, albeit within a federal system.

130. See Stephan, *supra* note 127, at 237, 242 (dealing with Canada and New Zealand separately).

131. See *id.* at 237.

132. See Tax Administration Act, 1994, pt. IVA, amended by Tax Administration Amendment Act (No. 2), 1996, § 11 (N.Z.).

133. See Taxation Review Authorities Act, 1994, § 13B, amended by Taxation Review Authorities Amendment Act, 1996, § 3 (N.Z.).

134. This position is contrary to that reported by Stephan, *supra* note 131, at 242, since in recent years, approximately 80% of decisions of the Taxation Review Authority that are appealed are reversed on appeal (either by the High Court or Court of Appeal), according to the presenters at the 1998 New Zealand National "Facts on Tax" Seminars, run by the Tax Education Office, held at Christchurch (at which I was present). It appears that New Zealand taxpayers have become more willing to dispute decisions of the TRA, and with some success.

135. The three alternatives are the Tax Court, Claims Court and District Court. See Stephan, *supra* note 127, at 243-44.

136. See, e.g., PATRICIA T. MORGAN, TAX PROCEDURE AND TAX FRAUD IN A NUTSHELL 118-19 (1990).

137. For changes to the Australian system, see *supra* Part III.B.1, and for the United States, see *supra* Part III.B.3. However, perhaps the greatest changes have been in New Zealand, where outlier situations such as the maximum 300% penalty of tax owed have been replaced by a conceptually new penalty structure (in effect from April 1, 1997) with the highest penalty being 150% in the case of

In contrast, the court systems in the civil law nations of Germany, France, the Netherlands, and Sweden are closely tied to the constitutional structure of each nation. In Germany, the specialist tax court, the Federal Fiscal Court, acts as the appellate and final authority over all tax disputes except for those of a constitutional nature.<sup>138</sup> The French and Swedish systems are similar; disputes are taken through an administrative court process, which includes an appellate process.<sup>139</sup> The evidence suggests that a significant number of tax cases are appealed in Sweden.<sup>140</sup> The Dutch system, however, resembles something more akin to the New Zealand system in its use of the regular court system and its minimal scope for consideration of constitutional issues in the tax arena.<sup>141</sup> In Japan, the National Tax Tribunal deals with tax disputes only while aggrieved taxpayers have the opportunity to appeal to the judicial process.<sup>142</sup>

#### IV. TAXPAYERS' RIGHTS IN NEW ZEALAND

The OECD study<sup>143</sup> reports that New Zealand has a formal statement, through a taxpayers' charter or declaration, the Statement of Principles (SOP), issued in 1986.<sup>144</sup> This document, however, is not in the traditional style of a charter, but, as its title suggests, it sets out a number of principles designed to encourage voluntary compliance with the tax system. It does not contain any taxpayers' rights per se, other than the statement that the New Zealand Inland Revenue Department (IRD) aims "to

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civil evasion, see Tax Administration Act, 1994, § 141E (N.Z.), and increased to 175% where obstruction of the Commissioner is established. See Tax Administration Act, 1994, § 141K (N.Z.). Criminal evasion is punishable by up to five years imprisonment, a fine up to NZ \$50,000, or both. See Tax Administration Act, 1994, § 143B (N.Z.).

138. See Stephan, *supra* note 127, at 238. It is arguable that issues involving taxpayers rights, if they come within human rights generally, would be able to be appealed to the Federal Constitutional Court.

139. See *id.* at 238-39; GAMBIER & MERCIER, *supra* note 30, paras. 920-30.

140. See Stephan, *supra* note 127, at 243 (discussing the appellate jurisdiction of Swedish courts).

141. See *id.* at 241.

142. See *id.* at 240. With the lack of taxpayer rights in any formal sense in Japan, this bias in favor of taxpayers is a positive concession on one hand, but equal opportunity for appeals from both sides is jurisprudentially preferable. See Ishimura (1997), *supra* note 27.

143. See OECD SURVEY, *supra* note 1.

144. The OECD report indicates 1986, but the Statement of Principles was published by the Inland Revenue Department (IRD) in January 1984. See INLAND REVENUE DEPARTMENT, STATEMENT OF PRINCIPLES (Publication Information Bulletin No. 123, 1984).

make it as easy as possible for people to comply with the tax laws, by letting them know their rights and obligations."<sup>145</sup> The SOP also suggests that taxpayers can expect the law to be administered in a consistent, courteous, and prompt manner so that everyone knows they are treated fairly.<sup>146</sup> However, there is no reference to any statutorily enforceable rights in the Statement of Principles. Subsequent to the SOP, the general principles as enunciated in the SOP and details of a client service focus were announced in 1988.<sup>147</sup>

The IRD has set out its Customer Charter providing taxpayers with information regarding the standards of service they can expect.<sup>148</sup> This sets out a number of rights and obligations, several of which have the backing of legislation as second-order legal rights (and as first-order administrative rights).<sup>149</sup> The remaining are administrative rights of the second- and third-order.<sup>150</sup> The rights set out are as follows:

- (1) *Your right to good service*—You are entitled to prompt, courteous, and efficient service from Inland Revenue.<sup>151</sup>
- (2) *Your right to confidentiality*—We will respect the information you give us, and use it for lawful purposes only.<sup>152</sup>

145. *Id.* This implies that taxpayers must look elsewhere to find details of their rights, with the IRD undertaking to let taxpayers know where to find a reference to their rights.

146. See Bentley (1996), *supra* note 66, at 109-11. A combination of second order administrative and third order (aspirational) administrative rights.

147. See INLAND REVENUE DEPARTMENT, PRESS RELEASE: TAX OFFICE-NEW APPROACH, (Publication Information Bulletin No. 173, 1988). Other changes in administration have occurred within the IRD since 1988, although they have received more attention in the IRD's Annual Report to the New Zealand Parliament, a publicly available document.

148. INLAND REVENUE DEPARTMENT, ANNUAL REPORT 1995-96 at 6 (1996). This Customer Charter is displayed in all IRD offices, although there are fewer and fewer offices left following downsizing. Interestingly, the Customer Charter was not reprinted in the 1996-97 Annual Report (or in any subsequent Annual Reports), which leaves taxpayers unsure as to whether the IRD still intends to honor the charter. See, e.g., N.Z. COMMITTEE OF EXPERTS ON TAX COMPLIANCE, *supra* note 58, paras. 16.1-16.23 (discussing the IRD's efforts at changing from a paradigm of taxpayer to "customer" in 1995, and the Committee's concerns over this change in focus); *id.* paras. 16.24-16.31 (espousing the public's misconception over use of the IRD's motto "It's our job to be fair").

149. This classification is based on Bentley (1996), *supra* note 66, at 103-09, in his discussion of the Australian Charter.

150. See *id.* at 109-11.

151. A combined second-order administrative and third-order administrative right. See *id.*

152. A combined second-order legal and first-order administrative right. See *id.* at 106. There have been alleged breaches of this right recently by a

- (3) *Your right to be believed*—We will presume that you are honest in your dealings with us unless we believe otherwise. However, sometimes we are required to check information you give us.<sup>153</sup>
- (4) *Your right to individual attention*—You are entitled to know the name of the staff member you are dealing with.<sup>154</sup>
- (5) *Your right to help*—We will give you the information you need to understand your rights, and to meet your obligations.<sup>155</sup>
- (6) *Your right to question our decisions*—If you ask, we will explain how to object to any assessment or decision we make.<sup>156</sup>

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number of IRD personnel, and the matter is under investigation. See *Probe into Standards of IRD Staff*, CHRISTCHURCH PRESS, Nov. 13, 1998, at 9. The Commissioner of Inland Revenue has publicly admitted to breaches of the secrecy obligations by some staff during the Parliamentary investigation of the IRD. See *IRD Admits Secrecy Slip: Mistakes Made, Says Head*, CHRISTCHURCH PRESS, Apr. 22, 1999, at 11; see also Tax Administration Act, 1994, § 6(2)(c), (e), where one function of the Commissioner is to protect the integrity of the tax system, and Tax Administration Act 1996, § 6A(2)(c), (e) (N.Z.), placing the care and management of the tax system, and duty to collect the highest net revenue over time, with the Commissioner.

153. A third-order administrative right. See Bentley (1996), *supra* note 66, at 110.

154. A third-order administrative right. See *id.* at 110. I would argue that it is peculiar that this provision is included as a separate right and not subsumed into the first right to good service; there are much more fundamental rights that could be stated. Inclusion of this right leads to the conclusion that IRD staff members need reminding to give their name to taxpayers! However, with further impending office closures and redundancies of over 800 staff (over 25% of the existing equivalent fulltime staff) with the advent of 1.2 million taxpayers not having to file a tax return, a significant number of taxpayers will be unable to get individual attention in person. Instead, reliance on an automated telephone service and minimal Internet access will be the avenues for "individual" attention. See *IRD Staff Face Job Losses as Offices Close*, CHRISTCHURCH PRESS, Feb. 10, 1999, at 9; David Gee, *SI Tax Jobs, Services Cut*, CHRISTCHURCH PRESS, Mar. 16, 1999, at 3. The IRD has responded to some of these accusations, stating that they are exaggerated. For instance, the number of employees is to be reduced by 600-700, not 1000 as claimed by the New Zealand Public Service Association. See *Inland Revenue Responds to PSA Statements*, SMART TAX WKLY. BULL., Apr. 20, 1999, at 2. One fallout from this downsizing may be taxpayers receiving larger penalties upon an audit that yields a tax shortfall discrepancy, since the time from filing the return to the audit may be several years longer. See *IRD Needs Flexibility on Penalties—Expert*, CHRISTCHURCH PRESS, Feb. 15, 1999, at 30.

155. A combined second-order administrative and third-order administrative right. See Bentley (1996), *supra* note 66, at 109-11. In my view, it is disappointing that the rights about which taxpayers will be given information are not set out in a separate charter or declaration that is displayed in IRD offices and is readily available to taxpayers.



- (7) *Your rights if you are audited*—If you are selected for a tax audit, then we will explain your rights and obligations to you.<sup>157</sup>
- (8) *Your obligation to act honestly*—You are obliged to act honestly in dealing with Inland Revenue (for example, by disclosing all your income in your tax return).<sup>158</sup>

While New Zealand taxpayers cannot refer to an extensive charter or declaration like their Australian counterparts,<sup>159</sup> there are statements referring to a number of rights in disparate locations. This is certainly not a taxpayer-friendly situation. If a charter were to be developed—in my view, the Australian Charter should be a useful reference point—the following components should be included. Taxpayers should, at a minimum, have the right to confidentiality, a notice of revenue authority action, reasonable audits, explanations, counsel, recording meetings, discovery of evidence, a hearing before adjudication of a decision, appeals, and statutory limits on periods for assessments.<sup>160</sup>

Currently, legislation in New Zealand sets out taxpayers' obligations in succinct yet all-embracing terms.<sup>161</sup> Nevertheless, in the face of submissions suggesting the need for balancing obligations with rights for taxpayers (or obligations on the

156. A combined second-order legal and first-order administrative right. *See id.* at 106. However, in my view it is undesirable from a taxpayer's perspective that they must initiate the process of inquiring as to their rights in this respect rather than being pre-empted by the IRD official.

157. A combined second-order legal and first-order administrative right. *See id.* It would be preferable that taxpayers have access to such information before committing to a decision that may have future audit implications (*i.e.*, pre-transaction and filing certainty).

158. This is an obligation that is normally expected of taxpayers in order to be entitled to their rights. It is really a subset of the right to be believed rather than being a separate statement of an obligation (as opposed to a right).

159. This situation also applies, although to a lesser degree, with respect to New Zealand taxpayers' counterparts in Canada and the United Kingdom.

160. *See* Richard K. Gordon, *Law of Tax Administration and Procedure*, in 1 TAX LAW DESIGN AND DRAFTING 111-12 (Victor Thuronyi ed., 1996). These suggested areas are based primarily on rights provided in the United States' Internal Revenue Code rather than any separate document detailing taxpayers' rights.

161. *See* Tax Administration Act, 1994 § 15B (N.Z.). These obligations include correctly determining the amount of tax payable (which necessitates certainty of law), correctly deducting and withholding tax, paying tax on time, keeping all necessary information and accounts, disclosing to the Commissioner in a timely and useful manner as required to by law, cooperating with the Commissioner as required to by law, and complying with all other obligations (a catch-all provision). *See* Adrian J. Sawyer, *Taxpayer Compliance, Penalties and Disputes Resolution Bill: An Update*, 50 BULL. FOR INT'L FISCAL DOCUMENTATION 72, 73 (1996).

Commissioner), the New Zealand government decided not to enact any legislative protection in the form of taxpayers' rights.<sup>162</sup>

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162. This decision was the recommendation of the Finance and Expenditure Select Committee, reporting on the Taxpayer Compliance, Penalties and Disputes Resolution Bill, 1996 (N.Z.), to Parliament following public submissions and consultation on the Bill. I offered a different approach in my submission on the Bill in which I recommended some form of statutory balancing for taxpayers. However, the Select Committee was satisfied that a balance in favor of the Commissioner was justified, but it limited the scope of the original proposed obligations for taxpayers to be those required by the tax laws.

The decision of the Government to accept the Select Committee's recommendation appears to have been ill-conceived; the IRD can no longer waive penalties but must force payment, including bankrupting the taxpayer, an approach mandated by Parliament (or in at least one instance driving a taxpayer to commit suicide for a debt that grew to NZ \$85,000 in six years, and another "almost giving up" after receiving a bill for NZ \$46,000 on an original debt of NZ \$12,000). See *MPs 'Responsible' for IRD Approach*, CHRISTCHURCH PRESS, Feb. 8, 1999, at 11; Rentoul, *supra* note 60, at 2; see also *Bullying by IRD 'Led to Suicides'*, CHRISTCHURCH PRESS, Sept. 30, 1998. The new legislative regime reflects a decision to enforce taxpayer obligations to a point that may force the taxpayer to take their own life while refusing to offer any legislative protection for taxpayers rights. See Victoria Clausen, *Despair for Tax Debtors: Woman Considers Suicide*, CHRISTCHURCH PRESS, Feb. 4, 1999. For an instance of a taxpayer 'needlessly' losing their business at the hands of the IRD, see *Man Lost His Business After IRD 'Vendetta'*, CHRISTCHURCH PRESS, June 10, 1999, at 10. Furthermore, it has been alleged that recent legislation has been introduced to retrospectively validate an extension for the IRD to investigate taxpayers where court hearings were in progress where the underlying issue was that the period in which the IRD could issue an assessment had expired. A prominent New Zealand constitutional lawyer believes this action breaches the New Zealand Bill of Rights Act, 1990 (N.Z.) and constitutional law and signifies that Parliament will rush in to aid the Commissioner but do nothing for taxpayers. See *IRD Bill 'Breaches Rights, Law'*, CHRISTCHURCH PRESS, Feb. 11, 1999, at 3. In response, the Minister of Revenue has referred to some of the claims against the IRD as being outrageous, such as the claim that a NZ \$84 tax debt could spiral to NZ \$85,000 in six years. See *Some Claims About IRD Outrageous-Minister*, MARLBOROUGH EXPRESS (Blenheim), Feb. 1999 (on file with author). Submissions to the FEC inquiry into the operations and powers of the IRD have now finished and the FEC has deliberated over the evidence and submitted its report on October 13, 1999. For a copy of the government's and IRD final report to the FEC, see generally FEC, *supra* note 60. The FEC made 27 recommendations that are summarized in Appendix C of this Article. For details of one of the most comprehensive submissions made to the FEC, see Jeff Owens, *Institute Response to Tax Inquiry*, 78 CHARTERED ACCT. J. 57 (1999). The FEC inquiry heard its evidence in public but deliberated in confidence. The FEC had requested the authority of the New Zealand Parliament to carry over its deliberations to after the November 1999 General Election. See Ian Llewellyn, *IRD Inquiry Likely to Continue After Election*, INDEPENDENT, Sept. 8, 1999, at 10. For a detailed examination of one taxpayer who was recently made bankrupt by the IRD, and who gave evidence to the inquiry, see Matt Philp, *The Grim Reaper*, LISTENER, July 31, 1999, at 28. See also RODNEY HIDE, *THE POWER TO DESTROY* (1999) (discussing some of the "shocking" revelations of IRD harassment and abuse made during the FEC Inquiry into the IRD).

The level of media interest in the FEC inquiry has been immense. The following articles are a sample of the more recent issues raised by way of written or oral evidence presented during the inquiry: Rodney Hide, *IRD Officers Should*

What this failure to legislate fails to recognize is that tax compliance, fundamental to a self-assessment system, is a two-way process necessitating rights and obligations for both the Commissioner and taxpayers to be clearly stated.<sup>163</sup> The rights preferably should be stated in legislative form or at least in an administratively-binding charter of taxpayers' rights.<sup>164</sup> A suggestion has been made that taxpayers' rights could be legislated in New Zealand, modeled on the then-proposed Australian Charter of Taxpayers' Rights.<sup>165</sup>

Confounding the situation is that there is no formal constitution in New Zealand that, inter alia, protects fundamental human rights, including rights applicable to taxpayers.<sup>166</sup> On

*Pay for Their Own Mistakes*, NAT'L BUS. REV. (Auckland), Jun. 11, 1999, at 22; Rob Hosking, *Tax Inquiry: Firm Suggests 'Proxy PAYE System' for Reoffenders*, NAT'L BUS. REV. (Auckland), June 11, 1999, at 6; Jock Anderson, *Tax Victims Confront Inland Revenue over 'Harsh' Treatment*, NAT'L BUS. REV. (Auckland), June 11, 1999, at 6; Jenni McManus, *Top Taxman Blows Whistle on IRD's "Disastrous Errors"*, INDEPENDENT, June 16, 1999, at 22; *IRD officer 'Bragged over Suicides'*, CHRISTCHURCH PRESS, June 17, 1999, at 9; *Allegations Against IRD Eroding Confidence, Commissioner Says*, CHRISTCHURCH PRESS, June 18, 1999, at 7; Rob Hosking, *Tax Victims: At Last, a Little Levity Reaches the Tax Inquiry*, NAT'L BUS. REV. (Auckland), June 18, 1999, at 11; *Punitive IRD 'Counter-Productive'*, CHRISTCHURCH PRESS, June 23, 1999, at 6; Jenni McManus, *IRD Stalling Screws Unsecured Creditors*, INDEPENDENT, June 23, 1999, at 23; Rodney Hide, *IRD Kicks Taxpayer in His Hospital Bed*, NAT'L BUS. REV. (Auckland), June 25, 1999, at 22; Jock Anderson, *'Found' Legal Aid File Crucial to Tax Victim*, NAT'L BUS. REV. (Auckland), June 25, 1999, at 6; Chris Hutching, *Tax Probe MPs Pick over Hendo Evidence*, NAT'L BUS. REV. (Auckland), June 25, 1999, at 15; Rob Hosking, *Tax Lawyer Calls IRD a Lending Institution*, NAT'L BUS. REV. (Auckland), June 25, 1999, at 15; *IRD Accused of Perjury, Forgery*, CHRISTCHURCH PRESS, July 1, 1999, at 25; Collin Espiner, *IRD Targets Chch Sex Trade*, CHRISTCHURCH PRESS, July 20, 1999, at 3; Matthew Brockett, *The Taxman Who Wanted Free Sex*, CHRISTCHURCH PRESS, July 22, 1999, at 3; Jo Doolan & Catherine de Cleene, *Sauce for the Goose Isn't Sauce for the IRD's Vultures*, INDEPENDENT, July 28, 1999, at 15; Rodney Hide, *Like Baking and Travel? Join IRD's Special Audit*, NAT'L BUS. REV. (Auckland), Aug. 13, 1999, at 26; Rodney Hide, *Fight Begins to Reverse Burden of Tax Proof*, NAT'L BUS. REV. (Auckland), Aug. 20, 1999, at 19.

163. See Adrian J. Sawyer, *TAAAC-15B [Taxpayer's Tax Obligations]*, in BROOKER'S SMART TAX COMMENTARY: UPDATE (1999).

164. See *id.*

165. The proposed Australian Charter of Taxpayers' Rights was not adopted entirely as recommended by the Joint Committee of Public Accounts, but the ATO released its Charter in 1997. See generally CHARTER, *supra* note 61; see also Sawyer, *supra* note 163, at 74 (proposing a new § 15C should be added to the Tax Administration Act).

166. This position is unique among the common law nations I surveyed in this article, since for taxpayers in the United Kingdom, in the absence of a written constitution and an entrenched bill of rights, there is protection provided through membership to the European Union and various European covenants and conventions. By way of an analogy, consider the discussion on the implications of entrenching a bill of rights in the United Kingdom and how effective this process may be for providing protection against hasty or casual amendments. See

first reading, this could be interpreted as suggesting that New Zealanders have little in the way of legal protection of their rights. In a strictly purest constitutional interpretation this position is true, although several important pieces of legislation have been enacted since the late 1980s. The first major milestone was the Constitution Act,<sup>167</sup> which was designed, with reference to the long title to the Act, to reform New Zealand's constitutional law and to separate effectively New Zealand from its colonial past by removing it from the overall control of the United Kingdom starting on January 1, 1987.<sup>168</sup> The Act was not afforded the status of constitutional importance, since it only requires a simple majority of the unicameral House of Representatives, dominated by the Executive, to repeal it. The Constitution Act sets out the powers and functions of the three branches of state<sup>169</sup> and the independence of each branch. The Act, however, provides little in the way of real protection since the Executive, through its dominance of Parliament, at least theoretically can take action to repeal the application of the doctrine of the separation of powers in New Zealand.<sup>170</sup>

The second important statutory development, which is more pertinent for taxpayers, was the enactment of the New Zealand Bill of Rights Act,<sup>171</sup> which came into effect on August 28, 1990.

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generally Anupam Chander, Note, *Sovereignty, Referenda, and the Entrenchment of a United Kingdom Bill of Rights*, 101 YALE L.J. 457 (1991). Furthermore, I firmly believe it would be abhorrent to the civil law nations reviewed in this article if they had the choice to consider following New Zealand's example and attempt to maintain their existence without a formal constitution. Furthermore, I would expect common law nations to have a similar reaction if they were forced to downgrade the status of their constitutions.

167. Constitution Act, 1986 (N.Z.).

168. See *id.* at title.

169. That is the Legislature (represented by the House of Representatives and Parliament, see *id.* §§ 10-22), the Executive (see *id.* §§ 6-9) and the Judiciary (see *id.* §§ 23-24).

170. It should be noted that with a Mixed Member Proportional (MMP) parliamentary process in place and coalition governments (or more correctly, currently a National Party led government dependent on the support of independent Members of Parliament and several minor parties, the composition of which is changing almost weekly), the Executive commands less power than under the previous First Past the Post (FPP) system. For background discussion to the MMP referendum proposal, see Mai Chen, *Remedying New Zealand's Constitution in Crisis: Is MMP Part of the Answer?*, [1993] N.Z.L.J. 22. For discussion of the success or otherwise, and the operational aspects of MMP, see generally SIR GEOFFREY W. R. PALMER & MATTHEW PALMER, *BRIDLED POWER: NEW ZEALAND GOVERNMENT UNDER MMP* (1996); Philip Joseph, *The New Parliament*, [1997] N.Z.L.J. 233 (discussing the structure and operations of the first MMP parliament); Philip Joseph, *Mrs. Kopu's Challenge to MMP*, [1997] N.Z.L.J. 413 (discussing how this List MP left her party to become an independent and the resulting constitutional implications).

171. New Zealand Bill of Rights Act, 1990.

The New Zealand Bill of Rights Act is intended to affirm, protect, and promote human rights and fundamental freedoms in New Zealand and to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights.<sup>172</sup> The New Zealand Bill of Rights Act contains provisions typical of a bill of rights, which one would justifiably expect to be granted constitutional status. Instead, this fundamental piece of legislation is only a recent enactment, notwithstanding New Zealand's international human right commitments. Furthermore, the New Zealand Bill of Rights Act may be amended by a simple majority of Parliament, and it has no formal constitutional protection.<sup>173</sup>

Since the enactment of the New Zealand Bill of Rights Act, the Human Rights Act<sup>174</sup> was enacted in 1993 not only to consolidate and amend existing race relations law, but also to provide better protection of human rights in New Zealand in accordance with the United Nations' Covenants and Conventions

172. See International Covenant on Civil and Political Rights, *supra* note 4.

173. A special majority of 75% of Members of Parliament is not required to amend or repeal the New Zealand Bill of Rights Act. Furthermore, New Zealand courts are not permitted to hold that any enactment is impliedly repealed or revoked, or to decline to apply a provision, for the sole reason that it is inconsistent with the New Zealand Bill of Rights Act, which illustrates the lack of constitutional status of this legislation. See New Zealand Bill of Rights Act, 1990, § 4.

Perhaps the most relevant right for taxpayers in the New Zealand Bill of Rights Act is the right to freedom from discrimination, as provided in section 19, and the search, arrest, and detention rights (sections 21-27) that could apply in the case of serious tax fraud. Other more remote rights in the context of protests relating to taxation issues include the right to peaceful assembly (section 16), right to freedom of association (section 17), and the right to freedom of movement (section 18). All rights are subject to justified limitations. See New Zealand Bill of Rights Act, 1990, § 5 (providing for subjection of these rights to "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society").

Furthermore, several scholars have expressed grave concern over the effectiveness of the New Zealand Bill of Rights Act following recent judicial interpretation and application. See, e.g., Scott Optican, *Search and Seizure: An Update on s 21 of the Bill of Rights*, [1996] N.Z. L. REV. 215; Andrew S. Butler, *The End of Precedent and Principle in Bill of Rights Cases? A Note on R v. Grayson*, [1997] N.Z. L. REV. 274; Paul T. Rishworth, *Human Rights and the Bill of Rights*, [1996] N.Z. L. REV. 298; Anna Adams, *Competing Conceptions of the Constitution: The New Zealand Bill of Rights Act 1990 and the Cooke Court of Appeal*, [1996] N.Z. L. REV. 368. Recently, there has been a suggestion that the Bill of Rights Act is effectively dead. See Hart Schwartz, *The Short Happy Life and Tragic Death of the New Zealand Bill of Rights Act*, [1998] N.Z. L. REV. 259. For a recent discussion on the search and seizure provisions of the New Zealand Bill of Rights, see Scott Optican, *Search and Seizure in the Court of Appeal—An Essay on the Uses and Misuses of Section 21 of the Bill of Rights*, 18 N.Z. U. L. REV. 411 (1999).

174. Human Rights Act, 1993 (N.Z.).

on Human Rights.<sup>175</sup> This legislation complements the New Zealand Bill of Rights Act, but offers no greater protection than the New Zealand Bill of Rights Act with respect to human rights, including taxpayers' rights.

In the area of disputes or disagreement over information, New Zealand taxpayers have access (in appropriate circumstances) to confidential information via the Official Information Act<sup>176</sup> and, more recently, enjoy greater protection through the enactment of the Privacy Act.<sup>177</sup> One further area in which taxpayers may exercise their rights is by taking a case to the Ombudsmen, as provided in the Ombudsmen Act.<sup>178</sup> This Act sets up the ombudsmen process in a similar manner to other international jurisdictions and has been used on rare occasions by taxpayers in New Zealand.<sup>179</sup> In the absence of formal

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175. The United Nations' Covenants and Conventions on Human Rights in this context refers to the International Covenant on Economic, Social and Cultural Rights, *supra* note 3, and International Covenant on Civil and Political Rights, *supra* note 4. Once again, the Human Rights Act may be repealed by a simple majority of the New Zealand Parliament. Furthermore, there is no constitutional status afforded to this critical piece of human rights legislation. Interestingly, the Human Rights Act provides that by December 31, 1998, a report must be prepared by the Human Rights Commission to the Minister of Justice setting out the Commission's examination of all relevant rules and regulations, and whether any rules or regulations infringe the spirit or intention of this Act. See Human Rights Act 1993, § 5(i)-(j) (N.Z.). For a brief commentary on the prescribed review (entitled *Consistency 2000*) that was abandoned when half-completed, see generally *NZ Gets a 'B-Plus' on Human Rights*, *supra* note 19. The Chief Commissioner of the Human Rights Commission, Pamela Jefferies is reported as stating that "[i]n New Zealand there's no excuse for not getting an A for human rights." *Id.* Nevertheless, according to Jefferies New Zealanders can feel confident that in most areas our laws are pretty consistent with the Human Rights Act. See *id.*

176. Official Information Act, 1982 (N.Z.) (see especially sections 4-6 on the scope and limitations of the Act).

177. Privacy Act, 1993 (N.Z.) (see especially section 6 setting out the privacy principles). The implications of both the Official Information Act and the Privacy Act and difficulties experienced by New Zealanders coming up against the Privacy Act as reported in the media are beyond the scope of this article. The former provides access to official information, making it more easily available where this is in the public interest to do so.

178. Ombudsmen Act, 1975 (N.Z.) (see especially section 13 for the functions of the ombudsmen.) For a discussion on the office of the Ombudsmen in New Zealand, see Judge Anand Satyanand, *The Office of Ombudsman in New Zealand*, 6 CANTERBURY L. REV. 470 (1997). Judge Anand Satyanand is a New Zealand Ombudsman.

179. See Alston (1997), *supra* note 50, at 223-24. The author discusses a case, in which he was an advisor, concerning three visiting university teachers who succeeded in their complaint not to pay taxes for which they were previously advised by the IRD would not be payable. The recommendations for payments to compensate for the tax due that was paid by each of the three academics were made *ex gratia*, with the amounts modified slightly so as not to exactly mirror the tax payments made. See *id.*

protections and a statement of rights, the IRD provides a variety of useful explanatory booklets on particular taxpayer rights, such as the investigation and audit process and the new dispute resolution process.<sup>180</sup>

## V. DISCUSSION AND CONCLUSIONS

All of the civil law nations reviewed in this article have a formal constitution setting out basic fundamental human rights, including, either by implication or direct reference, taxpayer rights. Furthermore, in each instance, taxpayers have redress to various international and European covenants and conventions detailing human rights. It is not surprising, therefore, that with the preference for statutory law over administrative regulation, few of the civil law nations surveyed in this article have adopted a separate taxpayer charter or declaration of taxpayer rights. Common law nations, in contrast, are more likely to have some form of charter or declaration of taxpayers' rights, normally an administrative document of varying scope and value, instigated at the volition of the revenue authority (the United States being the exception). Out of all of the nations reviewed, Japanese taxpayers have the least form of protection of their rights and demonstrably so; accordingly, there is pressure for reform of this unacceptable situation.<sup>181</sup>

From a formalistic perspective—which has been the approach taken in the preceding discussion—this analysis of the state of taxpayers' rights in New Zealand implies that New Zealand taxpayers fare worse than traditionally comparable developed common law nations such as Australia, Canada, and the United States. Not surprisingly, New Zealand taxpayers generally fare worse than the civil law nations reviewed in this article, with the exception of Hungary and Japan. Since Hungary is just transitioning from a socialist environment to a developing (or emerging) nation with recent OECD membership status, its status is not surprising. Interestingly, however, Japan offers by far the least protection for taxpayers out of all of the industrialized nations reviewed in this article. New Zealand taxpayers, and for that matter, New Zealanders in general, do not

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180. These documents may be viewed at the IRD's website. See Inland Revenue, *Publications* (visited Oct. 24, 1999) <<http://www.ird.govt.nz/resource/publicat/index.htm>>.

181. See Ishimura (1997), *supra* note 27. However, it should be also be recognized that taxpayers' rights in South Africa have not been significantly tested, as of the date of writing, under the interim Constitution or the final Constitution.

have the protection of a formal constitution or any legislation that requires a special majority or referendum in order to alter fundamental rights.<sup>182</sup> Development of a formal constitution for New Zealand has numerous implications, a discussion of which is beyond the scope of this article.<sup>183</sup> Nevertheless, the international experience would suggest that reliance on a benevolent government that dominates Parliament to adhere to fundamental rights is extremely risky, even for a traditionally conservative nation.

The reference in the OECD report<sup>184</sup> to a New Zealand charter or declaration of taxpayers' rights—the Statement of Principles—not only falls well short of the Australian Charter, but it also lacks the content that several scholars advocate as critical for an effective charter.<sup>185</sup> The New Zealand government's focus has been on strengthening taxpayers' obligations while deliberately opting not to provide for taxpayers' rights.<sup>186</sup> Nevertheless, the Tax Administration Act<sup>187</sup> and the Taxation Review Authorities Act<sup>188</sup> set out critical (and largely procedural) rights of taxpayers,<sup>189</sup> including the following provisions: confidentiality of information,<sup>190</sup> restrictions on conducting

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182. There is one exception in the former Electoral Act, 1956 (N.Z.)—where section 189 is entrenched—that requires a special majority of the New Zealand Parliament to repeal certain other provisions of this Act, including the process of altering the electoral system. This provision is now section 268 of the Electoral Act, 1993 (N.Z.). The value of this provision (former section 189, and by implication, new section 268) is questionable since the Act as a whole may be repealed by a simple majority of the unicameral Parliament! For a discussion on such issues, see Phillip A. Joseph, *Constitutional Entrenchment and the MMP Referendum*, 16 N.Z. U. L. REV. 67 (1994).

183. For further discussion on a formal constitution for New Zealand, see Bedgood, *supra* note 19, at 352-53; see generally PALMER & PALMER, *supra* note 170.

184. See OECD SURVEY, *supra* note 1, at 70, tbl. 15.

185. See generally Bentley (1996), *supra* note 66; Gordon, *supra* note 160. The IRD's Customer Charter is not comparable to the Australian Charter, and, furthermore, its continued existence in its current form appears to be in doubt.

186. An alternative label would be providing details of the "Commissioner's obligations" with respect to taxpayers.

187. Tax Administration Act, 1994 (N.Z.).

188. Taxation Review Authorities Act, 1994 (N.Z.).

189. See, e.g., Tax Administration Act, 1994 § 6(2) (N.Z.) concerning the Commissioner's obligation of protecting the integrity of the tax system and § 6A(2) and (3) concerning collecting the highest net revenue over time.

190. See Tax Administration Act, 1994, §§ 81-89 (N.Z.). It should be noted that New Zealand taxpayers do not currently have access to the information the IRD has on them. See Slane, *supra* note 60, at 13. See also Rodney Hide, *Taxpayers Should be Able to Inspect Their Own Files*, NAT'L BUS. REV. (Auckland), June 18, 1999, at 25. However, the Commissioner is proposing to issue a Standard Practice Statement as to how a taxpayer may access their personal



audits, including notification procedures and limitations on the Commissioner's search and seizure powers;<sup>191</sup> a non-judicially focused dispute resolution process, including explanations, limits on assessment periods, and a discovery process;<sup>192</sup> the right to counsel and to confidentiality of information;<sup>193</sup> the right to record meetings and to have adjudications recorded;<sup>194</sup> a process of hearings and appeals;<sup>195</sup> and rights and obligations with respect to interest, penalties, and payment of tax.<sup>196</sup>

Development of a formal document setting out taxpayers' rights would be a positive first step in providing taxpayers with an accessible way to get to know their rights, a situation that should be a guaranteed right in itself. Nevertheless, knowledge gained through a formal document without statutory support for the "legal" rights therein may prove ineffectual if these rights cannot be enforced. Other modifications, including removal of the obligation to pay at least half of the tax in dispute, will bring New Zealand into line with the generally accepted international position outlined in this article.

Formalism, however, is not the sole mechanism for providing guarantees to taxpayers in the form of certain rights. For instance, in the case of New Zealand, the current informality provides sufficient administrative protection if a strong argument can be mounted that there is no need for specific legislative protection (such as a covenant) because there is no real risk that abuses or erosion of rights will eventuate. New Zealand administrators and government officials, either intentionally or through their inaction, support the contention that informality expressed through administrative practices currently provides all

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information and when such information will be withheld. See FEC, *supra* note 60, paras. 144-55.

191. See Tax Administration Act, 1994, §§ 16-19 (N.Z.); see also *id.* pt. VI.

192. See *id.* pts. V, VA, VIIIA.

193. See *id.* § 20 (dealing with legal professional privilege in addition to privilege at common law).

194. This is accepted as an administrative practice, although TRA decision recording is governed by the Taxation Review Authorities Act and the New Zealand High Court Rules and Procedures. One exception is the small claims division of the TRA, see Tax Review Authorities Act 1996, § 13B, where discussions are not published and are frequently oral only.

195. See Tax Administration Act, 1994, pt. VIII (N.Z.); Taxation Review Authorities Act, 1994 (N.Z.); High Court Rules and Procedures. Generally, the onus of proof is on the taxpayer (except for alleged criminal offences), and the taxpayer must prove on the balance of probabilities that the Commissioner is incorrect. There is a proposal to reverse this onus, to reflect the recent U.S. development in TBR3, see, e.g., Greenbaum (1998), *supra* note 50, at 371, but it has been rejected by the Government and FEC. See FEC, *supra* note 60, paras. 104-43.

196. See Tax Administration Act, 1994, pts. VII, IX, XI (N.Z.).

of the necessary protection and that there is no need to formalize the practice through statutory entrenchment.<sup>197</sup>

Nonetheless, there is a strong argument that New Zealand taxpayers are not provided with sufficient protection from

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197. One example of the abuse that can occur in New Zealand is that of the Henderson case. See HENDERSON, *supra* note 58. This case indicates that the New Zealand system appears to lack sufficient redress for taxpayers who are taken advantage of by administrators (or by the system) compared to civil law nations, since there appears to be no avenue open to Henderson other than through the public display of the revenue authority's "dirty laundry." *Id.* In most instances, taxpayers would be unwilling to publicize their tax affairs in this manner when such abuse arises. Therefore, the extent of such abuse is not able to be determined on the publicly available evidence since tax affairs remain confidential as between the taxpayer and the IRD. See *id.*

A further instance of a recent debacle—with implications for New Zealand taxpayers generally and for selected wealthy taxpayers that are alleged to have exploited the tax system and failed to meet their obligations and much greater ramifications than the Henderson episode alone—is the Wine-Box Inquiry. This incident involved millions of dollars routed through the Cook Islands' tax haven in order to gain tax credits for "tax paid" in the Cook Islands against New Zealand tax due and "cloaking" the transactions with secrecy. *Id.* The ensuing debates and allegations over tax fraud verses tax avoidance and allegations of IRD incompetence have been the subject of on-going litigation. *Id.* This incident was at last resolved following continuing court appeals, the most recent being the successful judicial review action taken by Hon. Winston Peters against the Commission of Inquiry, Sir Ronald Davison. See *Peters v. Davison*, 19 NZTC 15,391 (also available at <<http://www.cch.co.nz/tax>>). The High Court bench of two justices found that the Commission of Inquiry concluded with respect to the Magnum transaction by way of several fundamental errors of law. See generally *id.* Consequently, the Commission of Inquiry was not entitled to find that there was no evidence of fraud or incompetence by the IRD or Serious Fraud Office (SFO). Indeed, the Court was of the view that there was strong evidence of fraud and incompetence, but that an action for judicial review prevented the court from concluding as such. This decision followed a unanimous decision of the Court of Appeal to allow a challenge to the Wine-Box Commissioner's findings. *Peters v. Davison*, [1999] 2 NZLR 164. For a discussion of the Commission of Inquiry's report, see Adrian J. Sawyer, *The Wine-Box Inquiry: Never Mind the Findings but What About the Recommendations?*, 52 BULL. INT'L FISCAL DOCUMENTATION 58 (1998).

Calls have been made for a further investigation into the behavior of IRD officials in the context of accusations of inappropriate use of fear tactics and intimidating taxpayers in order to retrieve debts. See *Minister Warns on Taxpayer Privacy*, CHRISTCHURCH PRESS, visited Mar. 3, 1999; Matthew Brockett, *Parliament to Probe IRD*, CHRISTCHURCH PRESS, Mar. 4, 1999; *Parliament Launches Probe into IRD*, CHRISTCHURCH PRESS, Mar. 18, 1999, at 9. Early indications are that there is substance to at least some of the allegations. See *IRD Admits Secrecy Slip: Mistakes Made, Says Head*, *supra* note 152, at 11. A further example of this alleged heavy-handed approach is the announcement that 16 South Island firms would be liquidated or bankrupt—a significant number well outside the average number of pending liquidations at a given time—with many unaware of the proceedings when contacted by members of the press. See Cullen Smith, *IRD May Liquidate 16 Firms*, CHRISTCHURCH PRESS, Mar. 13, 1999, at 1.

potential abuse—and in several instances, actual abuse.<sup>198</sup> Notwithstanding the comfort administrators may attempt to promote through the apparent stability of the current practice of informality, an Executive-dominated unicameral Parliament without the democratic support of the general population may repeal or erode administrative practices and ordinary legislation. A formalized approach is less likely to allow taxpayers' rights to be subrogated than would an informal approach and a benevolent Executive. For instance, although not strictly a tax matter, in October 1998 the New Zealand Government unilaterally decreed that state pensions will fall from a guaranteed sixty-five percent of the average wage to sixty percent over several years.<sup>199</sup>

New Zealand as a nation is typically viewed as being relatively homogenous, although this has dramatically altered following the expansive immigration policies of the late 1980s and early 1990s, creating a more culturally and ethnically diverse nation containing many vulnerable minorities. New Zealand, founded on a partnership between the indigenous Maori and the Crown as represented in the Treaty of Waitangi,<sup>200</sup> boasts the city

198. Revenue authority personnel in New Zealand reflect the lack of protection for taxpayers and the ongoing failure to adequately review the IRD, since many of the IRD's staff are failing to meet their obligations to file a return—300 in 1996 (approximately 10% of total IRD staff), with 70 not having filed a return for several years, although they were required to do so. While at least 300 staff are reported as not paying their tax on time, yet the IRD's enforcement effort cannot be described as being 'lax' for ordinary taxpayers. See *Staff Returns Become a Taxing Problem*, CHRISTCHURCH PRESS, Jan. 18, 1999, at 2. One prominent New Zealand politician is reported as saying this appalling state of affairs is an example of how IRD staff were "thumbing their noses" at the requirement to file tax returns. See *id.* The unpopularity of the IRD generally has been confirmed with the release of a report summarizing taxpayer (IRD customer) attitudes from surveys over 12 years (1986 to 1998). See *Report Confirms Unpopularity of IRD with Public*, CHRISTCHURCH PRESS, Jan. 6, 1999, at 3. Major themes include: a belief that the tax system is unfair, and the IRD and Government are inefficient; taxpayers fear the IRD and are anxious about dealing with it; taxpayers feel powerless in their dealings with the IRD; and many feel that the IRD treats them as guilty until proven innocent. See *id.*

199. More correctly, the major political constituent of the government, the National Party, made the decision. The original proposal from the National Party was for a reduction to 55% of the average wage, and, had it not been for several independent Members of Parliament that currently lend support refusing to support this lower level, the fate facing current recipients of pensions would have been worse. In 1988 the New Zealand state pension was 89.5% of the average wage, with New Zealand governments since 1990 controlled by the National Party. See *Super Move Adds to Elderly Anxiety*, MARLBOROUGH EXPRESS, Oct. 1998 (on file with author). Furthermore, since pensions in New Zealand are paid from general tax revenues and not a separate fund, such as in the United States, pensions are directly related to the level of tax revenues and tax policy.

200. Founding Documents of New Zealand, Treaty of Waitangi, Feb. 6, 1840 (English and Maori text versions). For an excellent discussion of the surrounding

with the largest population of Pacific Island ethnicity in the world, namely Auckland.<sup>201</sup> Large portions of the residents of other New Zealand cities are of Pacific Island, European, and Asian descent and ethnicity as a result of relatively nonrestrictive immigration policies. It should not come as a surprise that immigrants may expect protection similar to that available in their home countries, especially those from the European Union. Furthermore, the rights of the indigenous Maori have received formal legal protection.<sup>202</sup> Is this the first sign that the tide is changing?

Dominance of the pure free market paradigm or philosophy at the expense of consumer rights, pensioner rights, and minority groups is a far cry from pre-1984 New Zealand.<sup>203</sup> Only the humane nature of the Executive branch of the government and the benevolence of administrators prevents serious abuse and erosion of rights. The popular press, however, would suggest that through a process of erosion and by stealth, protection of the less wealthy and vulnerable (extending to taxpayers in these categories) is overdue following the gradual and subtle decay of standards and previously expected rights and entitlements.<sup>204</sup>

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constitutional issues of the Treaty of Waitangi, see PAUL G. MCHUGH, *THE MAORI MAGNA CARTA: NEW ZEALAND LAW AND THE TREATY OF WAITANGI* (1991).

201. See generally Jack H. Nagel, *Constitutional Reform and Social Difference in New Zealand*, 4 CARDOZO J. INT'L & COMP. L. 373 (discussing the important constitutional change in New Zealand from a first past the post (FPP) to a mixed member proportional (MMP) electoral system and the impact of these changes on the indigenous Maori people).

202. Protection is provided through the Treaty of Waitangi Act, 1975 (N.Z.), that was substantially amended in 1985 to extend claims back as far as the signing of the Treaty of Waitangi in 1840, beyond the original date for claims which was limited to legislation and policy current as at the original date of enactment in 1975. See MCHUGH, *supra* note 200, at 309-11.

203. The economic and social restructuring, commenced with the fourth Labour Government and continued by the new National Government in 1990 when it took office, radically altered the fabric of New Zealand society. For two diametrically opposed perspectives on this restructuring, compare ROGER DOUGLAS, *UNFINISHED BUSINESS* (1994) and ROGER DOUGLAS, *COMPLETING THE CIRCLE* (1996), with JANE KELSEY, *THE NEW ZEALAND EXPERIMENT: A WORLD MODEL FOR STRUCTURAL ADJUSTMENT?* (1997). Hon. Roger Douglas was the Minister of Finance in the Labour Government from 1984 to 1988 and instigated most of these changes. He is now the Chair of the right-wing political party, ACT (Association of Consumers and Taxpayers), of which Rodney Hide is a prominent Member of Parliament who has been undertaking a "crusade" against the IRD. Kelsey, a professor of law who holds a chair at the University of Auckland, N.Z., emphasizes the social upheavals of the period of reform and restructuring since 1984.

204. A call for a clean up of the IRD and its "atrocious powers and behavior" has been made by a prominent New Zealand politician (Rodney Hide), following revelations of the consequences of how small debts can mushroom. See Jocelyn Bromby, *MP Targets 'Atrocious' IRD*, CHRISTCHURCH PRESS, Feb. 10, 1999, at 11;

Consequently, the time has come to provide for greater protection for New Zealand taxpayers and, for that matter, New Zealanders in general before the informal administrative practice and weak legislative paradigm becomes so eroded that effective protection is lost through the growing decay and subrogation of basic rights and freedoms, including taxpayers' rights. New Zealand, through its embrace of globalization and pure free market ideology (or liberalism), has exposed itself to the practices of the world (both desirable and undesirable); should this current ideology continue to reign, then, as a nation, New Zealand runs the risk of winning the "race to the bottom." It risks bringing upon itself the associated consequences for both taxpayers' rights and human rights in general.<sup>205</sup>

To respond to the question posed in the title to this article, I believe that I have made the case that New Zealand taxpayers have been short-changed in comparison with the civil and common law nations reviewed in this article from a legal (formalistic) perspective and, more recently, from an informal point of view. The absence of a constitution protecting fundamental human rights, promoting only minimalist legal protection of rights through statutory means (which can be repealed by an ordinary majority of the unicameral Parliament),<sup>206</sup> and the poor attempt at providing a charter (the Statement of Principles<sup>207</sup> and the more recent Customer Charter),<sup>208</sup> all require rectification as soon as possible. If action is not taken, the worse-case scenario may eventuate—the rise of a government that ignores and overrides not only fundamental taxpayers' rights (which are currently provided through

Clausen, *supra* note 162. The politician cites by way of an example how one taxpayer's small debt to the IRD grew 800% within a year (from NZ \$8,000 to NZ \$64,000), with the consequence being the need to mortgage his house. See Bromby, *supra*, at 11. Many others are less fortunate, normally suffering bankruptcy at the hands of the IRD (or committing suicide first), the result of receiving "intimidating and inflammatory letters" from the IRD, failing to seek advice promptly, and topped off by the effects of the new penalties regime. See *id.* at 11.

205. This statement should not be read as though I am not in favor of the free market approach and its general philosophy. Rather, I believe that greater statutory and constitutional protection for the weaker members of New Zealand society is paramount and essential to having an equitable as well as efficient market place and living environment, including the provision of an adequate "safety net" for those that would otherwise fall victim. For a discussion on the possible future directions of taxpayers' rights, see generally Duncan Bentley, *Future Directions*, in *TAXPAYERS' RIGHTS*, *supra* note 27, at 380.

206. Further protection is provided through ratification of international treaties and conventions, although ratification may be withdrawn by the unicameral Parliament. See generally Flaherty & Lally-Green, *supra* note 7.

207. See INLAND REVENUE DEPARTMENT, *supra* note 148.

208. See *id.*

administrative enforcement accompanied by some legislative provisions), but also fundamental human rights. The current legislative environment would facilitate such a government; it is only the political will and the current diversity of political parties under the MMP system that is preventing such tragic circumstances from developing.

Furthermore, the gradual erosion of rights, both administrative and legal, through the dominance and infatuation with the pure free market paradigm, underlies the need for urgent attention. Is it not better to prevent the undesirable from happening rather than resting in what may be a false comfort that a satisfactory level of taxpayers' rights will remain through administrative convention and informality?

**Appendices**

## Appendix A1 - Comparison of Taxpayers' Rights in Selected Civil Law Nations (1990)

Taxpayer Right (or obligation)	Austria	Belgium	Denmark	France <sup>1</sup>	Germany	Hungary <sup>2</sup>
Legality of action	✓	✓	✓	✓	✓	✓
Ex officio investigation of subject	✓	✓	✓	✓	✓	✓
Free evaluation of evidence	✓	?	?	?	?	✓
Right to be heard	✓	✓	✓	✓	✓	✓
(Duty to cooperate)	✓	✓	✓	✓	✓	✓
(Duty to disclose all facts and circumstances)	✓	✓	✓	✓	✓	✓
Administrative review facility	✓	✓	✓	✓	✓	✓
Appeal process to courts	✓	✓	✓	✓ <sup>1</sup>	✓	✓
Independent court to examine legality of administrative decisions <sup>2</sup>	✓	✓ <sup>?</sup>	✓ <sup>?</sup>	✓	✓	?
Secrecy of information (and use of TIN) <sup>3</sup>	✓	✓ <sup>?</sup>	✓	✓	✓	✓
Removal of secrecy only in areas permitted by law	✓	✓	✓	✓	✓	✓
Minimize tax burden by arranging legal affairs (except fraud)	✓	✓	✓	✓ <sup>?</sup>	✓	✓ <sup>4</sup>
European Convention on Human Rights applies (and other protection)	✓	✓	✓	✓	✓	✓
Right to private life	✓	X <sup>5</sup>	✓	✓	✓ <sup>?</sup>	✓ <sup>?</sup>

Key: # Deak, *supra* note 27, on Hungary.

✓ Supplemented by GAMBIER & MERCIER, *supra* note 30, on France.

? Information unavailable/position in doubt.

1. France also provides a "gracious" appeals process where discharge from tax obligations is discretionary. See GAMBIER & MERCIER, *supra* note 30, at para. 435. Disputes over wealth taxes and inheritance taxes, following unsuccessful negotiations with the administration, may be the subject of a judicial review. See *id.* at para. 1493.

2. This includes the right of appeal to the European Court of Justice and European Court of Human Rights for all members of the European Union, and the constitutional courts of each European Union member state.

3. Taxpayer Identification Number-a generic concept where taxpayer data is matched to a unique number identifying a particular taxpayer.

4. Furthermore, there are provisions to deal with tax avoidance in addition to tax fraud.

5. Protection arises under the European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 6.



Appendix A1 - Comparison of Taxpayers' Rights in Selected Civil Law Nations (1990) (Continued)

Taxpayer Right (or obligation)	Austria	Belgium	Denmark	France	Germany	Hungary
Confidentiality for professionals	√?	√ <sup>6</sup>	X <sup>7</sup>	√	√?	?
Limits on ability to search	√?	√	√	?	√	√?
Unable to seize documents	?	√	√?	?	?	X
Right to representation	√?	√	√	√	√	√?
Actions against the administration for mistakes	?	√	?	?	√	?
Postpone tax payments while case is being heard	?	?	√	√	√	?
Expect to be believed	?	?	√	?	?	?
Expect legal certainty	?	?	?	?	?	?
Notify taxpayer of information requests	?	?	?	?	X <sup>8</sup>	X
- third party						
- foreign government	X	X	X	X	X	?
Notify taxpayer of intention to reassess	X	X	X	X	√	?
Notify taxpayer of intention to audit	√	√	√	√	√	?
Advance rulings provided (legally binding)	√	√	√	X <sup>9</sup>	√	?
Key: # Deak, <i>supra</i> note 27, on Hungary.	X	X	√	√ <sup>10</sup>	√	√
- Supplemented by GAMBIE & MERCIER, <i>supra</i> note 30, on France.						
? Information unavailable/position in doubt.						

6. This does not cover tax professionals as an absolute right, but extends to lawyers and accountants.

7. There are no special rules as to professional secrecy.

8. Certainty is questionable given the long period of time before a decision is final. See OECD, *supra* note 1, at paras. 3.66-3.82. See also IBFD, *supra* note 23, at 182 (comments on the Federal Republic of Germany by Karl-Heinz Mittelsteiner and Professor Albert J. Rädler as part of the comparative study).

9. There will be notification in the case of spot auditing.

10. One advantage of securing an advance ruling is that it may be invoked on the basis of administrative estoppel, where the ruling is in the taxpayer's favor and the administration alleges an abuse of law. See GAMBIE & MERCIER, *supra* note 30, at para. 875.

Appendix A2 - Comparison of Taxpayers' Rights in Selected Civil Law Nations (1990)

Taxpayer Right (or obligation)	Japan <sup>a</sup>	Luxembourg	Netherlands *	Spain	Sweden <sup>#</sup>	Switzerland
Legality of action	√ <sup>p11</sup>	√	√ <sup>12</sup>	√	√ <sup>13</sup>	√
Ex officio investigation of subject	√	√	√	√	√	√
Free evaluation of evidence	?	?	?	?	√?	?
Right to be heard	√?	?	√?	√?	√	√?
(Duty to cooperate)	√	√	√	√	√	√
(Duty to disclose all facts and circumstances)	√	√	√	√	√	√?
Administrative review facility	√?	X	√	√	√	√?
Appeal process to courts	√	√	√	√?	√	√
Independent court to examine legality of administrative decisions <sup>14</sup>	X	√?	√	√?	√?	?
Secrecy of information (and use of TIN) <sup>15</sup>	√	√	√	√	√	√?
Removal of secrecy only in areas permitted by law	√?	√	√	√	?	√?
Minimize tax burden by arranging legal affairs (except fraud)	√	√?	√	√	√?	√
European Convention on Human Rights applies (and other protection)	?	√	√	√	√	√
Right to private life	√?	√	√?	√	√	√

Key: & Ishimura (1997), *supra* note 27, on Japan.

# Hultqvist (1997), *supra* note 27, on Sweden.

\* Supplemented by Sommerhaider (1997), *supra* note 27, on the Netherlands.

? Information unavailable/position in doubt.

11. Tax procedures are considered to be opaque with arbitrary decisions by tax authorities, and legislative provisions loosely-worded, leaving widespread discretion for tax authorities. See Ishimura (1997), *supra* note 27, at 167.

12. Case law is not retroactive.

13. There is a constitutional prohibition against the retroactive effects of tax statutes, such that a tax statute must be passed (or Parliament officially notified of details of the change) before the circumstances that constitute a taxable transaction have effect.

14. This includes the right of appeal to the European Court of Justice and European Court of Human Rights for all members of the European Union, and the constitutional courts of each European Union member state.

15. Taxpayer Identification Number-a generic concept where taxpayer data is matched to a unique number identifying a particular taxpayer.

Appendix A2 - Comparison of Taxpayers' Rights in Selected Civil Law Nations (1990) (Continued)

Taxpayer Right (or obligation)	Japan <sup>a</sup>	Luxembourg	Netherlands <sup>*</sup>	Spain	Sweden <sup>*</sup>	Switzerland
Confidentiality for professionals	X?	?	√	X <sup>16</sup>	?	√
Limits on ability to search	X?	?	√	?	√	√
Unable to seize documents	X	?	√	?	√	?
Right to representation	√	√	√	√	√	√
Actions against the administration						
For mistakes	X	?	X <sup>17</sup>	X	√	?
Postpone tax payments						
While case is being heard	√	?	?	?	√ <sup>18</sup>	?
Expect to be believed	√?	?	√	√?	√	X <sup>19</sup>
Expect legal certainty	X	?	X	X	?	?
Notify taxpayer of information requests						
- third party	X	?	X	X	X	X
- foreign government	X	?	√	X	X	√
Notify taxpayer of intention to reassess	X	?	√	X	X	X
Notify taxpayer of intention to audit	X	?	√	X	X	X
Advance rulings provided (legally binding)	X	?	X <sup>20</sup>	X <sup>21</sup>	√	√
Advance rulings provided (legally binding*)	X	?	√	√	√	X

Key: a Ishimura (1997), *supra* note 27, on Japan.

# Hultqvist (1997), *supra* note 27, on Sweden.

\* Supplemented by Sommerhalder (1997), *supra* note 27, on the Netherlands.

? Information unavailable/position in doubt.

16. There is protection for lawyers but not necessarily for other tax professionals.
17. Taxpayers may also invoke the principle of legitimate expectations against the tax authority.
18. There are other circumstances in which an extension of time for payment of tax may be granted by the tax authority.
19. The process of calculating taxes from average income leaves the complete burden of proof to counterclaim the fact to the taxpayer.
20. Notification is done as a matter of policy but is not legally required.
21. Notification is done as a matter of practice but is not legally required.

## Appendix B: Comparison of Taxpayers' Rights in Selected Common Law Nations (1997)

Taxpayer Right (or obligation)	Australia	Canada	New Zealand	South Africa	United Kingdom*	United States
Legality of action	✓ <sup>22</sup>	✓	✓	✓	✓ <sup>23</sup>	✓
Ex officio investigation of subject	✓	✓	✓	✓	✓	✓
Free evaluation of evidence	?	?	X <sup>24</sup>	✓	?	✓
Right to be heard	✓	✓	✓	✓?	✓	✓
(Duty to cooperate)	✓	✓	✓	✓	✓	✓
(Duty to disclose all facts and circumstances)	✓	✓	✓	✓	✓	✓
Administrative review facility	✓	✓	✓ <sup>25</sup>	✓	✓	✓
Appeal process to courts	✓	✓	✓ <sup>26</sup>	✓	✓	✓

Key: # IBFD, *supra* note 23 (as of 1989).

\* U.N. international agreement.

? Information unavailable/position in doubt.

22. There are a number of administrative discretions available to the Commissioner which call into question the legality of action.  
23. There are various forms of non-statutory provisions that apply, including judicial decisions, delegated legislation and various codes of conduct and the like, issued by the revenue authority.

24. However, there are limited rights for discovery and examination of evidence by the taxpayer.

25. There is also limited scope for judicial review of the Commissioner's actions.

26. There are limitations on the production of evidence at court, attributable to the disclosure provisions that operate during the internal review of a taxpayer's case by the Inland Revenue Department.

Appendix B - Comparison of Taxpayers' Rights in Selected Common Law Nations (1997) (continued)

Taxpayer Right (or obligation)	Australia	Canada	New Zealand	South Africa	United Kingdom*	United States
Independent court to examine legality of administrative decisions <sup>27</sup>	X	X <sup>28</sup>	X	√ <sup>29</sup>	√	X <sup>30</sup> ?
Secrecy of Information (and use of TIN) <sup>31</sup>	√	√	√	√	√	√
Removal of secrecy only in areas permitted by law	√	√	√	√	√	√
Minimize tax burden by arranging legal affairs (except fraud & avoidance)	√	√	√	√	√	√
European Convention on Human Rights	√	√*	√	√*	√*	√*
Applies (or other protection*)	√?	√	√?	√	√?	√
Right to private life	√?	√	√?	√	√?	√
Confidentiality for professionals (legal only*)	√	√	√	X	√	√

Key: # IBFD, *supra* note 23 (as of 1989).  
 \* U.N. international agreement.  
 ? Information unavailable/position in doubt.

27. An independent court refers to whether there is a special court dealing with fundamental rights that taxpayers may have access to. For example, this includes the right of appeal to the European Court of Justice and European Court of Human Rights for the United Kingdom since the United Kingdom is a member of the European Union. The role of independent courts in European civil law nations may be as a constitutional court within a nation, or a European Union court with jurisdiction over member states. There is no tradition for independent courts in common law jurisdictions. Common law nations normally provide for jurisdiction over constitutional issues and human rights within the normal court structure, and do not have an independent court, such as a constitutional court, although constitutional issues may be referred to one particular court, such as the Supreme Court in the United States. David Williams notes that in 1999 the Human Rights Bill in the United Kingdom will be enacted to formally introduce the European Convention on Human Rights directly into U.K. law for the first time. See Williams, *supra* note 50, at 331.

28. There is also provision for additional safeguards for taxpayers in difficult financial circumstances with the fairness legislation.

29. In South Africa this refers to the Constitutional Court, which, *inter alia*, has jurisdiction over South Africa's income tax legislation.

30. The U.S. Supreme Court has the functions of the constitutional court but it is also part of the appeal process for important tax disputes.

31. Taxpayer Identification Number-a generic concept where taxpayer data is matched to a unique number identifying a particular taxpayer.

32. This right is not formally protected by a constitution as New Zealand does not have a constitution; rather, it is provided for as a fundamental right in the New Zealand Bill of Rights Act, 1990 (N.Z.).

Appendix B - Comparison of Taxpayers' Rights in Selected Common Law Nations (1997) (Continued)

Taxpayer Right (or obligation)	Australia	Canada	New Zealand	South Africa	United Kingdom <sup>1</sup>	United States
Limits on ability to search	✓ <sup>33</sup>	✓	✓	?	✓	✓
Unable to seize documents	X	X <sup>34</sup>	✓	?	X	X
Right to representation	✓	✓	✓	✓	✓	✓
Actions against the administration for mistakes	X?	X?	X?	✓ <sup>35</sup>	X?	✓
Postpone tax payments while case is being heard	✓	✓	X <sup>36</sup>	?	✓	✓
Expect to be believed	✓	✓	✓	✓ <sup>37</sup>	✓	✓
Expect legal certainty	X?	X?	X <sup>37</sup>	X	X?	X
Notify taxpayer of information requests						
-Third party	X	X	X	X	✓	✓
-Foreign government	X	X	✓	X	X	X
Notify taxpayer of intention to reassess	X	✓	✓	X	X	✓
Notify taxpayer of intention to audit	X <sup>38</sup>	X <sup>39</sup>	X <sup>40</sup>	X <sup>41</sup>	X	✓
Advance rulings provided						
(legally binding -)	✓	✓	✓	✓	✓	✓

Key: # IBFD, *supra* note 23 (as of 1989).

\* U.N. international agreement.

? Information unavailable/position in doubt.

33. Powers of search are very wide although there are limits prescribed by statute and case law.

34. Documents and other items may only be seized in situations which by law provide for such action. See, e.g., CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 8; Income Tax Act § 231.1-2 (RSC 1985, (5th Supp.)) (Can.).

35. The recent provision of this action is noted by Williams (1998), *supra* note 50, at 294-95.

36. Taxpayers are required to pay at least half of the tax in dispute or one-half of a refund in dispute will be held pending the final outcome of the case.

37. However, certainty is improving in New Zealand with the gradual rewriting of the tax legislation. See generally, Maryann Richardson & Adrian Sawyer, *Complexity in the Expression of New Zealand's Tax Laws: An Empirical Analysis*, 14 AUSTR. TAX F. 147 (1998).

38. The taxpayer is normally notified as a matter of practice.

39. There will be notification in the case of spot auditing.

40. Notification is done as a matter of policy but is not legally required.

41. Notification is done as a matter of practice but is not legally required.

## Appendix C

# Inquiry Into the Powers and Operations of the Inland Revenue Department<sup>1</sup>

### Summary of Recommendations

- (1) The Tax Administration Act 1994 (TAA) be amended to provide a clear four-year time bar in relation to all taxes except where the Commissioner of Inland Revenue has reasonable grounds to suspect a return to be fraudulent or willfully misleading.
- (2) The burden of proof remain with the taxpayer, but that consideration be given to establishing a "test" for the Inland Revenue Department to meet to ensure that only properly calculated and substantiated amended assessments are issued to complying taxpayers.
- (3) Section 81 of the TAA be amended to allow for access to personal information, but that this provision be linked to requests for information by the individual concerned under privacy principal 6.
- (4) An electronic footprint be inserted in the Inland Revenue Department's files to record who accesses individual taxpayers' details.
- (5) The Inland Revenue Department review its approach in respect of the care and management provisions in light of recent Court of Appeal decisions, with a view to amending its internal guidelines to make it clear the Commissioner of Inland Revenue can exercise discretion on a case by case basis.
- (6) The procedures for monitoring the delegation of the powers of the Commissioner of Inland Revenue be reviewed.
- (7) With respect to the penalties regime:  
a past record of "good behavior" be taken into account when deciding whether to impose a penalty  
the Inland Revenue exercise a greater degree of flexibility when applying shortfall penalties  
shortfall penalties not apply when it is determined that the taxpayer has made an inadvertent error.
- (8) The Inland Revenue Department develop a systems audit methodology in order to assess whether taxpayers are adopting a reasonable standard of care.

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1. The recommendations of the Finance and Expenditure Select Committee (FEC) are available at <<http://www.gp.co.nz/wooc/i-papers/ird-inquiry.html>>.

- (9) The Inland Revenue Department reinforce both publicly and internally that if a taxpayer or adviser has not interpreted legislation a penalty for unacceptable interpretation cannot apply.
- (10) The Government review the process by which assessments can be challenged, placing particular emphasis on assessing the merits of establishing a time limit on the Commissioner of Inland Revenue when addressing a taxpayer's Notice of Response.
- (11) The method by which use of money interest is calculated be reviewed to determine whether changes to the Interest rates for overpayments and underpayments to reduce the differential between the rates are appropriate.
- (12) The Government review the whole area of write-offs and in doing so consider:  
whether there should be a time limit on the reinstatement of a debt  
whether, if the present policy is to continue, the term "write-off" should be replaced by wording that more accurately describes the policy (for example, "provisional write-off")  
whether it is necessary for the write-off provisions to be contained in the Inland Revenue Acts.
- (13) The Inland Revenue Department issue clear directions to taxpayers as to their options, rights, and obligations with respect to repayment arrangements.
- (14) The ministerial approval thresholds for installment arrangements and remissions be removed, but that the Commissioner of Inland Revenue be required to provide a regular report to the Minister of Revenue outlining applications for remissions and installments in excess of \$100,000.
- (15) The Government review the preferential status of the Inland Revenue Department in liquidations.
- (16) The Inland Revenue Department re-establish a problem resolution service with experienced personnel who are committed to customer satisfaction outcomes.
- (17) The Inland Revenue Department ensure that the problem resolution service, once established, is well publicized.
- (18) The Inland Revenue Department advise all complainants, dissatisfied by the results of an internal inquiry, of their rights to appeal to an external agency.
- (19) The Government establish a specialist tax adviser position within the Officer of the Ombudsman, with appropriate resources, to investigate matters of tax administration by the Inland Revenue Department.
- (20) The Inland Revenue Department investigate ways to preserve over the counter services in areas where it is closing offices, particularly in isolated areas.
- (21) The Inland Revenue Department enhance its monitoring of telephone services to ensure greater timeliness and accuracy of responses and that the department identify and remedy any skills deficiencies as a matter of priority.
- (22) The Inland Revenue Department take steps to enhance the timeliness and quality of its responses to written correspondence, and that the performance standard in the 1999/2000 Purchase Agreement of dealing with all correspondence within eight weeks of receipt be reviewed.
- (23) The Government consider moving the responsibility for drafting tax legislation back to the Parliamentary Counsel Office.



- (24) The Government consider whether establishing a board of directors to provide an oversight of the Inland Revenue Department's operation of its powers is desirable.
- (25) The Inland Revenue Department Implement, as a matter of priority, a nationally consistent training program aimed at improving communication and customer service skills.
- (26) The Inland Revenue Department consider implementing a program along similar lines to the Business and Parliament Trust, which would enable staff to build relationship with, and have greater exposure to, the business community.
- (27) The Inland Department establish a taxpayers' charter to outline to taxpayers their rights and obligations in respect of the tax system.