Interpretation of Tax Legislation: The Evolution of Purposive Analysis

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PRÉCIS

Durant le XIX^e siècle et la première moitié du XX^e siècle, l'interprétation de la législation fiscale a été dominée par l'application de règles rigoureuses de l'interprétation réglementaire. Les tribunaux, sauf dans des dérogations occasionnelles et des exceptions limitées, ont interprété rigoureusement et littéralement la législation fiscale, d'après les mots utilisés dans la législation, sans formuler aucune hypothèse sur l'objet et l'esprit de la législation autre que la levée d'impôts. Les règles de la preuve empêchaient les tribunaux de se reporter aux débats parlementaires ou à d'autres moyens extrinsèques pour les aider à établir le but ou le sens des dispositions législatives. Si la formulation d'une provision fiscale était jugée ambiguë, l'équivoque était résolue en faveur du contribuable; si une exemption était jugée ambiguë, l'équivoque était résolue en faveur du fisc.

Au moins à compter des années 1930, l'interprétation rigoureuse et littérale a commencé à soulever des critiques sur le plan théorique et judiciaire, critiques qui étaient largement répandues dans le monde de la common law. Durant la première moitié des années 1980, l'approche traditionnelle a été rejetée en faveur de directives plus téléologiques au Canada, au Royaume-Uni et en Australie. Le jugement rendu par la Cour suprême dans l'affaire *Stubart Investments Limited v. The Queen* s'est avéré une décision critique dans ce domaine. Selon les directives adoptées par la Cour suprême dans l'affaire *Stubart*, l'interprétation de la législation fiscale devait être faite selon les mêmes principes généraux applicables à la loi en général, et la législation devait être lue dans son contexte complet et dans son sens grammatical et ordinaire, en harmonie avec le plan de la législation entière, l'objet de la législation et l'intention de la législature.

Les jugements rendus par la Cour suprême du Canada depuis l'affaire *Stubart* ont continué à mettre l'accent sur la primauté du sens simple des provisions réglementaires et sur l'importance de se reporter aux objectifs législatifs pour résoudre les ambiguïtés. Lorsqu'un examen des objectifs ne permet pas de résoudre le problème, il faut avoir recours à une supposition résiduelle en faveur du contribuable.

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La nouvelle approche téléologique n'est pas et ne sera pas une panacée. Selon certain nombre de décisions rendues depuis l'affaire *Stubart*, il est évident que la nouvelle approche ne rendra pas les causes difficiles plus faciles. Elle constitue uniquement une approche plus ouverte et moins arbitraire visant à résoudre des difficultés d'interprétation.

Grâce à l'adoption d'une approche téléologique, les tribunaux ont également fait preuve d'une plus grande volonté d'examiner les moyens extrinsèques afin d'établir le sens et le but de la législature. Il est possible de s'attendre que les tribunaux admettront facilement ce matériel, mais en tenant compte de l'importance à accorder à ce matériel selon sa source et du but dans lequel il est présenté.

ABSTRACT

During the 19th century and the first half of the 20th, the interpretation of tax legislation was dominated by the application of strict rules of statutory interpretation. With occasional departures and limited exceptions, the courts construed tax legislation strictly and literally, on the basis of the words used in the legislation and with no assumptions about any legislative purpose or spirit other than the raising of tax. Rules of evidence barred the courts from looking to parliamentary debates or other extrinsic aids to assist in determining the purpose or meaning of legislative provisions. If the words of a taxing provision were found to be ambiguous, the ambiguity was resolved in favour of the taxpayer; if an exemption was found to be ambiguous, the ambiguity was resolved in favour of the taxing authority.

Academic and judicial criticism of the strict and literal approach was voiced in Canada at least from the 1930s, and was widespread throughout the common law world. The rejection of the traditional approach in favour of more purposive guidelines finally occurred in Canada, the United Kingdom, and Australia in the first half of the 1980s; the decision of the Supreme Court of Canada in *Stubart Investments Limited v. The Queen* proved a watershed in this area. The guidelines adopted by the Supreme Court in *Stubart* called for the interpretation of tax legislation under the same general principles applicable to legislation generally, which require legislation to be read in its entire context and in its grammatical and ordinary sense harmoniously with the scheme of the entire legislation, the object of the legislation, and the intention of the legislature.

Decisions of the Supreme Court of Canada since *Stubart* have continued to emphasize the primacy of the plain meaning of the statutory provisions and the importance of looking to legislative purposes to resolve ambiguities. Where an examination of the purpose does not resolve the issue, recourse may be made to a residual presumption in favour of the taxpayer.

The new purposive approach has not been and will not be a panacea. A number of decisions since *Stubart* have demonstrated that the new

approach will not make hard cases easy. It will simply offer a more open and less arbitrary approach to the resolution of interpretive difficulties.

With the adoption of a purposive interpretive approach, the courts have also shown a greater willingness to examine extrinsic aids to determine the legislation's meaning and purpose. One can expect the courts to admit such material readily, but with due regard for the weight to be accorded to such material depending on its source and the use for which it is introduced.

INTRODUCTION

When the Canadian Tax Foundation was established in 1945, there was nothing novel about taxes and the problems of interpreting tax legislation. Taxes arrived with the first European settlements, although income taxes were relatively new, having only been in place in Canada for some 28 years. In the United Kingdom, income taxation had been in place, with a brief hiatus, since the Napoleonic wars, and other forms of taxation had been known since early history.

While it is difficult in 1995 to reconstruct the view of statutory interpretation that a well-informed taxpayer or adviser would have held in 1945, two high points in the judicial landscape would have stood out. In 1945 the Privy Council decision in *IRC v. Westminster (Duke)*,[1] establishing that taxpayers were free to arrange their affairs so as to minimize tax, had formed part of the reported jurisprudence for 9 years, and Lord Cairns's frequently cited statement of the interpretive principles applicable to tax legislation in *Partington v. The Attorney General*[2] had attained the venerable age of 76 years. Although *Partington* and *Duke of Westminster* were only two decisions in a large and growing body of tax jurisprudence, they exemplified the dominant approach taken by the English and Canadian courts to questions of statutory interpretation and the related area of tax avoidance in 1945 and for much of the period since. The evolution of the law in recent years is the story of how *Partington* and, to a lesser extent, *Duke of Westminster* have fallen from favour.

THE TRADITIONAL APPROACH

The Rule Itself

The traditional approach taken by the UK and Canadian courts to statutory interpretation in the tax context is reflected in the following extract from the opinion of Lord Cairns in the *Partington* case:

> I am not at all sure that, in a case of this kind—a fiscal case—form is not amply sufficient; because, as I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the

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[1] [1936] AC 1 (HL).

[2] (1869), 4 LRHL 100.

> judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute.[3]

Lord Cairns's statement of the strict and literal approach, and the refinements developed by the courts in other cases, coalesced into the following principles:[4]

1) Tax legislation is to be construed strictly on the basis of the words chosen by the legislator in drafting the legislation, and with no assumptions about any legislative purpose or spirit other than the raising of tax.

2) If the plain words of a taxing provision are found to be ambiguous, the ambiguity is resolved in favour of the taxpayer.

3) If the plain words of an exemption are found to be ambiguous, the ambiguity is resolved in favour of the taxing authority.

The courts offered several rationales for the traditional approach to the interpretation of tax legislation. In *Pryce v. Monmouthshire Canal and Railway Companies*, Lord Cairns stated that

> inasmuch as there was not any *a priori* liability in a subject to pay any particular tax, nor any antecedent relationship between the tax-payer and the taxing authority, no reasoning founded upon any supposed relationship of the tax-payer and the taxing authority could be brought to bear upon the construction of the Act, and therefore the tax-payer had a right to stand upon a literal construction of the words used, whatever might be the consequence.[5]

This reflected the traditional view that tax legislation had no purpose other than the raising of taxes, and therefore even if the statutory context and purpose were relevant to statutory interpretation generally (itself a disputed point), there was in fact no broader context or statutory purpose relevant to the interpretation of tax legislation. In other cases, the courts characterized tax legislation as depriving taxpayers of the use and enjoyment of their property, and for this reason applied the same restrictive approach that was traditionally applied to criminal statutes, expropriation

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[3] Ibid., at 122.

[4] The traditional approach is summarized in slightly different ways in a variety of sources. One of the best expositions is provided by Gerald D. Sanagan, "The Construction of Taxing Statutes" (January 1940), 18 *The Canadian Bar Review* 43-51. See also J.T. Thorson, "Canada," in International Fiscal Association, *Cahiers de droit fiscal international*, vol. 50a, *The Interpretation of Tax Laws with Special Reference to Form and Substance* (London: International Fiscal Association, 1965), 75-82; and Douglas J. Sherbaniuk, "Tax Avoidance—Recent Developments," in *Report of Proceedings of the Twenty-First Tax Conference*, 1968 Conference Report (Toronto: Canadian Tax Foundation, 1969), 430-42.

[5] (1879), 4 AC 197 at 202-3 (HL).

acts, and other burdensome legislation infringing individual rights, privileges, and property.[6]

While that position dominated the judicial approach to tax legislation for many decades, the courts from time to time recognized specific exceptions (more often implicitly and without expressly rejecting the strict and literal approach), and on occasion expressly dissented from the traditional view.

The Minority View

In an 1899 House of Lords decision, Lord Russell CJ described the duty of a court in the case of any statute, including a tax statute, as the duty "to give effect to the intention of the Legislature as that intention is to be gathered from the language employed having regard to the context in connection with which it is employed."[7] His Lordship rejected the use of any special canons of construction specific to tax legislation. This principle was cited with approval in the Supreme Court of Canada by Taschereau J in *The King v. Algoma Central Rway. Co.*[8] Similarly, in *Cartwright v. City of Toronto*, Duff J, as he then was, held that tax statutes "must be construed according to the usual rule, that is to say, with reasonable regard to the manifest object of them as disclosed by the enactment as a whole."[9] In 1964, Judson J referred to the traditional approach to tax legislation and the comments made by Duff J in *Cartwright*, and stated with respect to a municipal bylaw that imposed certain charges on property owners:

> The by-law is, of necessity, a detailed document but it does not lack in clarity. I can see no ground for the application of any principle of strict construction whether arising from a private Act or a taxing Act to support any holding that this by-law is bad. To me the scheme and purpose of the legislation are clear. The carrying out of the scheme and purpose by means of the by-law is no more than is authorized by the legislation.[10]

The Exceptions

On occasion, the courts adopted a more purposive approach when confronted with legislative provisions that, on their face, gave rise to "strangely anomalous" or absurd results. This principle, enshrined among

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[6] See, for example, the comments of Brodeur J in *The Canadian Northern Ry. Co. v. The King* (1922), 64 SCR 264, at 275, aff'd. [1923] AC 714 (PC); and *Corporation Notre-Dame de Bon-Secours v. Communaute Urbaine de Quebec et al.*, 95 DTC 5017, at 5021 (SCC). See *The Queen v. Estabrooks Pontiac* (1982), 144 DLR (3d) 21 (NB CA), for a general discussion of the jurisprudence supporting the presumption that statutes are not to be construed as taking property without compensation in the absence of clear language to that effect.

[7] *Attorney-General v. Carlton Bank*, [1899] 2 QB 158, at 164 (CA).

[8] (1902), 32 SCR 277, at 283, aff'd. [1903] AC 478 (PC).

[9] (1914), 50 SCR 215, at 219.

[10] *City of Ottawa v. Royal Trust Co.*, [1964] SCR 526, at 535-36.

the canons of statutory construction as the "golden rule," allows the courts to depart from the literal wording of a statute to avoid anomalous or absurd results. The application of this principle in practice required the courts to recognize the results, and often the purposes, of the legislation, and therefore it is not surprising that it was rarely applied while the traditional strict and literal approach was in its ascendancy, when the courts strongly preferred legislative solutions to legislative problems.

In *Astor v. Perry*,[11] the House of Lords applied this principle in a tax case to avoid what was perceived to be an inappropriate result by reading extra words into the relevant statutory provision. The golden rule was also applied by Lord Reid in another tax case in the following terms: "[I]n order to avoid imputing to Parliament an intention to produce an unreasonable result, we are entitled and indeed bound to discard the ordinary meaning of any provision and adopt some other possible meaning which will avoid that result."[12]

The courts were also inclined to depart from the traditional strict and literal approach in cases where technological change required old statutes to be applied to new circumstances. In *Simpson v. Teignmouth and Shaldon Bridge Company*,[13] the English Court of Appeal considered whether a bicycle ridden over a bridge was subject to tolls applicable to "every coach, chariot, hearse, chaise, berlin, landau and phaeton, gig, whiskey, car, chair, or coburg, and for every other carriage hung on springs." The legislation imposing the toll was passed before bicycles were invented. Although the court held that a bicycle was not subject to tolls, the Earl of Halsbury LC held that

> [t]he broad principle of construction put shortly must be this: What would, in an ordinary sense, be considered to be a carriage (by whatever specific name it might be called) in the contemplation of the Legislature at the time the Act was passed? If the thing so sought to be brought within the Act would substantially correspond to what the Legislature meant by a carriage (called by whatever name you please), I think that the tax would apply; but if not, it is not for the Court to make an effort by ingenious subtleties to bring within the grasp of the tax something which was not intended in substance by the Legislature at that time to be the subject of taxation.[14]

This principle was recently applied in Canada in *British Columbia Telephone Company v. The Queen*,[15] where the Federal Court of Appeal took an "open-textured" approach to the words "telephone . . . equipment . . .

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[11] [1935] AC 398 (HL).

[12] *Commissioners of Inland Revenue v. Luke* (1963), 40 TC 630, at 648 (HL).

[13] [1903] 1 KB 405 (CA).

[14] Ibid., at 413-14. See also *Powell Lane Manufacturing Co., Ld. v. Putnam*, [1931] 2 KB 305 (CA). Of course, sometimes a bicycle *is* a carriage, particularly when the "mischief rule" is applied to legislation prohibiting "any person riding any horse or beast, or driving any sort of carriage" from riding or driving "furiously so as to endanger the life or limb of any passenger": *Taylor v. Goodwin* (1879), 4 QB 288, at 289 (QB).

[15] 92 DTC 6129 (FCA).

that is (i) a wire or cable," and held that fibre optic transmission systems fell within the statutory language even though such systems were not in use or in contemplation when the provision was adopted.

The Place of Tax Avoidance

In the *Duke of Westminster* case,[16] the House of Lords confirmed that taxpayers were entitled to arrange their affairs to minimize their tax obligations. Their Lordships rejected arguments suggesting that somehow tax liabilities could be determined through the application of a "substance over form" doctrine, which would impose results based on a characterization of documents, events, or transactions different from the legal relationships and consequences established by the parties. The *Duke of Westminster* principle, which is focused primarily on characterization of the facts rather than on interpretation of the law, is entirely consistent with the restrictive approach to statutory interpretation traditionally espoused by the courts in tax cases. Indeed, one would not have expected the courts to apply a strict and literal approach to statutory interpretation while characterizing, and recharacterizing, the actual legal relationships of the parties in a manner that resulted in the imposition of tax by reference to economic results or the parties' tax motivations.

The Broader Context

The traditional strict and literal approach taken by the courts did not arise in a legal or social vacuum. The same judges who developed and applied the general principles applicable to such interpretive issues spent the greater part of their careers dealing with legal issues arising outside the field of taxation. Indeed, much of their time, and undoubtedly most if not all of their training, was devoted to the study, advocacy, and judging of matters arising in the traditional non-statutory judge-made law developed by the common law courts and the courts of equity. For such judges, laws created by statute were the exception to the general rule that law emanated from the accumulated decisions of the courts. Legal historians have traced the shifting attitudes of the courts toward Parliament and its statutes,[17] but at certain periods in English history, and certainly in the 18th and 19th centuries, statutes that interfered with personal freedom or the use and enjoyment of private property were generally resisted by the courts as unpalatable incursions into private affairs. Indeed, this view still finds favour with the courts from time to time.[18]

The antipathy of the courts to tax, criminal, expropriation and similar legislation was so strong that the strict and literal approach evolved and

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[16] Supra footnote 1.

[17] See, for example, J.A. Corry, "Administrative Law and the Interpretation of Statutes" (1936), vol. 1, no. 2 *The University of Toronto Law Journal* 286-312; and Eric Tucker, "The Gospel of Statutory Rules Requiring Liberal Interpretation According to St Peter's" (1985), vol. 35, no. 1 *The University of Toronto Law Journal* 113-53.

[18] See *Estabrooks Pontiac*, supra footnote 6.

persisted in these areas notwithstanding that the "mischief rule," which required a purposive approach to statutory interpretation, was formally adopted by the English common law courts in 1584 in the following terms:

> And it was resolved by [the Barons of the Exchequer], that for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law), four things are to be discerned and considered:—
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> 1st. What was the common law before the making of the Act.
>
> 2nd. What was the mischief and defect for which the common law did not provide.
>
> 3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth.
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> And, 4th. The true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*.[19]

The mischief rule was often ignored by the courts, and in some areas, such as tax, it was generally treated as inapplicable. Nevertheless, it was favoured by legislatures, and in Canada the rule was given statutory expression when the Interpretation Act (Canada) was first enacted in 1849.[20] Today, section 12 of the Interpretation Act (Canada) states the rule in the following terms: "Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."

EVOLUTION OF THE PURPOSIVE APPROACH

Writing in 1940, Gerald Sanagan concluded, "[I]t appears at any rate that the canon of strict construction, properly understood, is now embedded in the law of statute interpretation."[21] Two years earlier, however, Professor John Willis had published a much-quoted article in which he declared:

> Once upon a time taxing Acts, like penal Acts, were construed as narrowly as possible. Today it is undoubted law that they are to be construed in just the same way as any other Act. The cases are, no doubt, agreed that the benefit of the doubt still goes to the subject and not the Crown; but the fact that a recent Canadian case found it necessary to collect from previous cases no less than three different reasons why this was so, does seem to indicate that the presumption in favour of the subject is felt to rest on no solid ground and that it will tend to disappear.[22]

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[19] *Heydon's Case* (1584), 76 ER 637, at 638 (KB).

[20] The historical context in which the rule was enacted and its place in the aftermath of the 1837 Rebellion is discussed in Tucker, supra footnote 17.

[21] Sanagan, supra footnote 4, at 51.

[22] John Willis, "Statute Interpretation in a Nutshell" (January 1938), 16 *The Canadian Bar Review* 1-27, at 25-26.

Later in the same article, Willis noted that in the light of the occasional court decisions that took a more purposive approach, "the attitude of the courts towards taxing Acts is at present uncertain."[23]

While Sanagan's view was probably an accurate statement of the prevailing view in 1940, the contrary view expressed by Willis at the very least reflected the fact that the traditional approach was under attack. Commentators writing after Willis and Sanagan differed as to whether a new purposive approach had superseded the traditional strict and literal approach.[24] Whatever the pace of change may actually have been, the fact remains that a purposive approach became more prevalent in the tax jurisprudence, reflecting a broader trend in judicial thinking generally. In 1975, Lord Diplock in the English House of Lords made the following observation with respect to the interpretation of all statutes generally:

> If one looks back to the actual decisions of [the House of Lords] on questions of statutory construction over the past thirty years one cannot fail to be struck by the evidence of a trend away from the purely literal towards the purposive construction of statutory provisions.[25]

In Canada, the trend toward purposive interpretation of tax legislation culminated in the Supreme Court of Canada's decision in *Stubart Investments Limited v. The Queen*.[26] The principles laid down by Mr. Justice Estey in *Stubart* were foreshadowed in His Lordship's minority opinion in *Dauphin Plains v. Xyloid and The Queen*, in which he stated that the rule of strict interpretation "has, in recent years, lost a great deal of its force" and that "[t]he application of the old rules of strict and beneficial construction no longer fit [tax statutes] *in toto*, and sometimes not at all."[27] Similarly, Mr. Justice Dickson, as he then was, stated in a dissenting opinion in *Covert et al. v. Minister of Finance (NS)* that tax legislation should be construed "with reasonable regard to its object and purpose,"[28] and stated in *Nowegijick v. The Queen et al.* that "[w]e must, I think, in these cases, have regard to substance and the plain and ordinary meaning of the language used, rather than to forensic dialectics. I do not think we should give any refined construction to the section."[29]

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[23] Ibid., at 26.

[24] For an early, and perhaps premature, declaration of the demise of the strict and literal approach, see W. Friedmann, "Statute Law and Its Interpretation in the Modern State" (November 1948), 26 *The Canadian Bar Review* 1277-1300. To the contrary, see Thorson, supra footnote 4. For a detailed review of the Canadian tax jurisprudence, and a more gradualist view of the evolution of the courts' approach, see Gwyneth McGregor, "Literal or Liberal? Trends in the Interpretation of Income Tax Law" (March 1954), 32 *The Canadian Bar Review* 281-303, and "Interpretation of Taxing Statutes: Whither Canada?" (1968), vol. 16, no. 2 *Canadian Tax Journal* 122-36; as well as Sherbaniuk, supra footnote 4. For a UK perspective, see Francis Bennion, "Scientific Statutory Interpretation and the Franco Scheme" [1983], no. 2 *British Tax Review* 74-89, at 86-89.

[25] *Carter v. Bradbeer*, [1975] 3 All ER 158, at 161 (HL).

[26] 84 DTC 6305 (SCC).

[27] [1980] 1 SCR 1182, at 1215.

[28] [1980] 2 SCR 774, at 807.

[29] 83 DTC 5041, at 5046 (SCC).

The Decision in Stubart

Stubart was a tax-avoidance case. The taxpayer and its affiliates had entered into transactions for the purpose of applying tax losses of one member of the corporate group to shelter income of a sister corporation. Counsel for the minister argued, among other things, that the transactions were ineffective on the grounds that the transactions lacked a valid business purpose.

The Income Tax Act did not at any time up to the 1988 enactment of the general anti-avoidance rule (now in section 245) contain any rule of general application requiring that transactions be entered into for business purposes or other non-tax purposes. Speaking for the majority, Mr. Justice Estey clearly and unequivocally rejected the existence of a general business purpose test on the basis that in certain circumstances it would conflict with Parliament's objective of encouraging certain activities for reasons of economic or social policy. This view was founded on the recognition that the Income Tax Act had grown "from a mere tool for the carving of the cost of government out of the community, to an instrument of economic and fiscal policy for the regulation of commerce and industry of the country through fiscal intervention by government."[30] The recognition of this fact provided the foundation not only for the rejection of a general business purpose test, but for the formulation of a new set of principles applicable to the interpretation of the Income Tax Act generally.

Those interpretive guidelines adopted by the majority in *Stubart*, which continue to be relevant today, were set out in the following terms:

> 2. In those circumstances where s. 137 [former subsection 245(1), repealed in 1988] does not apply, the older rule of strict construction of a taxation statute, as modified by the courts in recent years (*supra*), prevails but will not assist the taxpayer where:
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> (a) the transaction is legally ineffective or incomplete; or,
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> (b) the transaction is a sham within the classical definition.
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> 3. Moreover, the formal validity of the transaction may also be insufficient where:
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> (a) the setting in the Act of the allowance, deduction or benefit sought to be gained clearly indicates a legislative intent to restrict such benefits to rights accrued prior to the establishment of the arrangement adopted by a taxpayer purely for tax purposes;
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> (b) the provisions of the Act necessarily relate to an identified business function. This idea has been expressed in articles on the subject in the United States:
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> The business purpose doctrine is an appropriate tool for testing the tax effectiveness of a transaction, where the language, nature and purposes of the provision of the tax law under construction

[30] Supra footnote 26, at 6321.

> indicate a function, pattern and design characteristic solely of business transactions.
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> Jerome R. Hellerstein, "Judicial Approaches to Tax Avoidance," 1964 Conference Report, p. 66.
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> (c) "the object and spirit" of the allowance or benefit provision is defeated by the procedures blatantly adopted by the taxpayer to synthesize a loss, delay or other tax saving device, although these actions may not attain the heights of "artificiality" in s. 137. This may be illustrated where the taxpayer, in order to qualify for an "allowance" or a "benefit," takes steps which the terms of the allowance provisions of the Act may, when taken in isolation and read narrowly, be stretched to support. However, when the allowance provision is read in the context of the whole statute, and with the "object and spirit" and purpose of the allowance provision in mind, the accounting result produced by the taxpayer's actions would not, by itself, avail him of the benefit of the allowance.[31]

The court did not so much reject the traditional strict and literal approach as confirm that it had evolved into a more sophisticated set of principles that was better suited to the interpretation of modern tax legislation. Guideline 2 appears to set out the basic principle that "the older rule of strict construction of a taxation statute, as modified by the courts in recent years," continues to apply. Mr. Justice Estey states that "[c]ourts today apply to this statute the plain meaning rule, but in a substantive sense so that if a taxpayer is within the spirit of the charge, he may be held liable."[32] The "plain meaning" of a provision is not determined by the application of predetermined presumptions or by a narrow and restrictive approach to the language used by the legislature. The court approved the following formulation of the modern rule offered by E.A. Driedger:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.[33]

Guideline 3 adds further tests expressly providing for an analysis of legislative intent, the business functions to which a provision relates, or the "object and spirit" of an allowance or benefit as tools for interpreting the Act in a way that is potentially different from the results obtained through application of the plain meaning rule alone. While the traditional approach simply involved a strict and literal application of the legislative language, with ambiguities resolved by applying restrictive presumptions, *Stubart* suggests that the court begins with the plain meaning of a provision determined by reading the provision in the context of the Act as a whole, but then goes beyond the plain meaning to apply the provision to the particular facts in a manner that is consistent with the "legislative

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[31] Ibid., at 6324.

[32] Ibid., at 6323.

[33] Ibid., quoting Elmer A. Driedger, *Construction of Statutes*, 2d ed. (Toronto: Butterworths, 1983), 87.

intent" or the "object and spirit" of the provision or the "business functions" to which it relates.

Experience in Other Countries

The guidelines adopted by the Supreme Court in *Stubart* represented the culmination of a trend found not only in Canada but also in other common law jurisdictions. In the House of Lords decision in *W.T. Ramsay Ltd. v. Commissioners of Inland Revenue*,[34] Lord Wilberforce adopted the following principles similar to those adopted by Estey J in *Stubart*:

> A subject is only to be taxed on clear words, not upon "intendment" or upon the "equity" of an Act. Any taxing Act of Parliament is to be construed in accordance with this principle. What are "clear words" is to be ascertained upon normal principles: these do not confine the courts to literal interpretation. There may, indeed should, be considered the context and scheme of the relevant Act as a whole, and its purpose may, indeed should, be regarded.[35]

In Australia, a similar jurisprudential evolution was reinforced and perhaps overtaken by the following legislative provision enacted in 1981:[36]

> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.[37]

Much the same legislative and jurisprudential history appears to have unfolded in New Zealand.[38]

In the United States, a purposive approach to interpretation was adopted much earlier than in the British Commonwealth. In 1940, the United States Supreme Court set out the following principle:

> There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one "plainly at variance with the policy

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[34] (1981), 54 TC 101 (HL).

[35] Ibid, at 184. Like *Stubart* in Canada, the decision in *Ramsay* was both a culmination and a new beginning, spawning a substantial body of elaboration and commentary in the UK courts.

[36] This observation is made by Patrick Brazil in "Reform of Statutory Interpretation—The Australian Experience of Use of Extrinsic Materials: With a Postscript on Simple Drafting" (July 1988), 62 *The Australian Law Journal* 503-13, at 503.

[37] Australian Acts Interpretation Act 1901, as amended, section 15AA.

[38] See *Commissioner of Inland Revenue v. Alcan New Zealand Ltd.*, [1994] 3 NZLR 439 (CA).

of the legislation as a whole" this Court has followed that purpose, rather than the literal words.[39]

This statement of the US principle is interesting not only for its similarity to the evolving Canadian and UK principles, but also for the manner in which the plain meaning rule is incorporated as an integral part of the search for the legislative purpose; the plain meaning is simply the first place to look.[40]

Life After Stubart

There are now 11 years of post-*Stubart* judicial statements and decisions which collectively provide a gloss on the *Stubart* guidelines. Although one is mindful of J.A. Corry's caution that "[w]e must look much more closely at what the judges do than at what they say,"[41] the purpose of this paper is to explore the stated principles that govern statutory interpretation; a full review of how the courts have fared in the difficult task of applying the principles in practice is a project beyond its scope.

What the Supreme Court Has Said

Stubart has proved to be a watershed in the Canadian judicial discussion of tax interpretation. The guidelines set out by Estey J have been cited with approval and elaborated upon, and have not been expressly rejected or criticized.

In *Johns-Manville Canada Inc. v. The Queen*, Mr. Justice Estey himself cited and applied what he described as "another basic concept in tax law that where the taxing statute is not explicit, reasonable uncertainty or factual ambiguity resulting from lack of explicitness in the statute should be resolved in favour of the taxpayer."[42] This statement of the residual presumption, taken at face value, is more favourable to the taxpayer than the traditional rule, since it appears to do away with the presumption *against* the taxpayer where an *exemption* is ambiguous. At a minimum, the decision would have the effect of establishing a presumption in favour of the taxpayer at least as to the interpretation of provisions granting deductions, since the principle was applied by the court in determining whether an outlay was deductible on income account.

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[39] *US v. Amer. Trucking Ass'ns*., 310 US 534, at 543, quoted in Boris I. Bittker and Lawrence Lokken, *Federal Taxation of Income, Estates and Gifts*, 2d ed., vol. 1 (Boston: Warren, Gorham & Lamont, 1989), 4-21 to 4-22.

[40] While the purposive approach in the United States is well established, recent criticism by Supreme Court Justice Scalia of broad reliance on extrinsic aids to interpretation has the practical effect of placing greater emphasis on the plain meaning of the statutory language without pursuing other potential sources of insight into the statutory purpose. See Bittker and Lokken, supra footnote 39, 1995 cumulative supplement no. 1, at S4-3; and Robert Thornton Smith, "Interpreting the Internal Revenue Code: A Tax Jurisprudence" (September 1994), 72 *Taxes: The Tax Magazine* 527-58, at 528.

[41] Corry, supra footnote 17, at 289.

[42] 85 DTC 5373, at 5384 (SCC).

As the Supreme Court adopted a more liberal stance on statutory interpretation, it also (like the House of Lords in *Ramsay*) suggested that there might be a loosening of the traditional *Duke of Westminster* principle on the issue of form and substance. In *The Queen v. Bronfman Trust*, the chief justice, speaking for the court, approved "[a]ssessment of taxpayers' transactions with an eye to commercial and economic realities, rather than juristic classification of form."[43] His Lordship noted that this reflected, "in this country and elsewhere, a movement away from tests based on the form of transactions and towards tests based on what Lord Pearce has referred to as a 'common sense appreciation of all the guiding features' of the events in question."[44] This language suggested that the court might have been inclined toward a greater reliance on economic results as a determinant of tax consequences. However, in *Antosko et al. v. The Queen*,[45] the court seems to have been intent on subordinating considerations of economic substance to the general principle that tax consequences flow from the application of the plain meaning of a provision (with appropriate regard for guideline 3 in *Stubart*) to the actual transactions and legal relationships of the taxpayer. Speaking for a unanimous court, Mr. Justice Iacobucci stated:

> While it is true that the courts must view discrete sections of the *Income Tax Act* in light of the other provisions of the Act and of the purpose of the legislation, and that they must analyze a given transaction in the context of economic and commercial reality, such techniques cannot alter the result where the words of the statute are clear and plain and where the legal and practical effect of the transaction is undisputed.[46]

This statement of the rule was recently quoted with approval in the Supreme Court in the majority opinion in *Friesen v. The Queen*.[47]

These interpretive and anti-avoidance principles were combined in a restatement of the governing rules in the reasons of Gonthier J in the *Notre-Dame* case in the following terms:

> —The interpretation of tax legislation should follow the ordinary rules of interpretation;
>
> —A legislative provision should be given a strict or liberal interpretation depending on the purpose underlying it, and that purpose must be identified in light of the context of the statute, its objective and the legislative intent: this is the teleological approach;
>
> —The teleological approach will favour the taxpayer or the tax department depending solely on the legislative provision in question, and not on the existence of predetermined presumptions;

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[43] 87 DTC 5059, at 5067 (SCC).

[44] Ibid.

[45] 94 DTC 6314 (SCC).

[46] Ibid., at 6320.

[47] 95 DTC 5551 (SCC).

—Substance should be given precedence over form to the extent that this is consistent with the wording and objective of the statute;

—Only a reasonable doubt, not resolved by the ordinary rules of interpretation, will be settled by recourse to the residual presumption in favour of the taxpayer.[48]

This restatement of the guidelines generally reflects the various interpretive principles set out in *Stubart*, *Johns-Manville*, and *Antosko*, but cast in terms oriented toward the purposive rather than the plain meaning aspect than in *Antosko*, and with the admixture of a substance-over-form principle perhaps inspired by *Bronfman*. The reference to the "teleological approach" seems to be simply a reference to the purposive approach, but described by the term commonly used in European civil law jurisdictions.[49]

What the Supreme Court Has Done

The Supreme Court decisions on legislative interpretation in the tax context can be readily summarized. In *Stubart*[50] and *Johns-Manville*,[51] the taxpayers were successful, and the decisions were reached through straightforward applications of the stated interpretive principles.

In *Antosko*,[52] the court considered the application of subsection 20(14), which deals with the taxation of accrued interest on transfers of debt instruments. The taxpayer was successful in arguing that it was entitled to a deduction under paragraph 20(14)(b) of the Act, notwithstanding that the overall effect would be that certain interest income was not taxable in the hands of any person. The court overturned the decision of the Federal Court of Appeal,[53] which had, with all due respect, strained the statutory language in order to carry out what the Court of Appeal perceived to be its object and spirit. The Supreme Court's message (at least in this case) seems clear: the object and spirit doctrine is not to be applied in a manner that disregards the plain meaning of a provision.

In *The Queen v. Golden et al.*,[54] four members of the Supreme Court found, on an analysis of predecessor sections and the French text of the section, that section 68 applied in the circumstances; the other three members found that, on the "plain meaning" of the section, it did not apply.

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[48] Supra footnote 6, at 5023.

[49] In *AG (Que.) v. Quebec Protestant School Boards*, [1984] 2 SCR 66, at 85, the Supreme Court of Canada described a "teleological interpretation" as "a method of interpretation which looks to the purpose sought by the framers" who drafted the legislation. The use of the term and the differing approaches to statutory interpretation under English law and in continental European systems are described in the reasons of Lord Denning MR in *Bulmer Ltd. v. Bollinger SA*, [1974] 1 Ch. 401 (CA), and somewhat more colourfully in Lord Denning, *The Discipline of Law* (London: Butterworths, 1979), 9-22.

[50] Supra footnote 26.

[51] Supra footnote 42.

[52] Supra footnote 45.

[53] 92 DTC 6388 (FCA).

[54] 86 DTC 6138 (SCC).

Although the members of the court all based their reasoning on sound principles of interpretation, the members of the court were divided on the outcome.

Similarly, in *Symes v. The Queen et al.*,[55] the majority and minority reached very different conclusions based on the provisions of section 63 dealing with child care expense deductions. The majority held that such expenses were not deductible under general principles applicable to business deductions; the minority rejected this view and drew no such implication from the section.

Again, in *Friesen*,[56] the majority and minority differed in their conclusions, even though there was no dispute as to the applicable interpretive principles. Although the majority and minority opinions diverged on a number of issues, the fundamental difference of view was as to whether subsection 10(1) of the Act and regulation 1801 created a deduction in respect of inventory held in connection with a business, or whether it simply provided an inventory valuation rule to be followed in computing profit from a business in connection with section 9 of the Act. The majority emphasized the plain meaning of the words used in the relevant provisions and held that declines in the value of real property held in connection with an adventure in the nature of trade could be claimed as deductions in computing income from a business even in the absence of any other transactions in the year, although as a secondary matter Major J noted a number of policy and purposive arguments in support of this position. In his minority opinion, Mr. Justice Iacobucci favoured a narrower application of subsection 10(1) on the basis of certain unexpressed limitations imputed to the legislative language.

In *Notre-Dame*[57] and its companion cases in the Supreme Court, *Buanderie Centrale de Montréal v. Montreal*[58] and *Partagec Inc. v. CUQ*,[59] the court considered the application of property tax exemptions available to certain public institutions. The court's approach in all three cases strongly favoured the taxpayers, and the exempting provisions were interpreted in the light of the perceived legislative intent. The court went a considerable distance in *Buanderie Centrale*, for example, to hold that

> [i]t may therefore be concluded that, in requiring the creation of a community laundry, the legislature did not intend to affect the exempt status which had always applied to the public establishments before they were merged. No indication is given to the contrary. Such a conclusion would run counter to the legislature's aim of reducing costs.[60]

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[55] 94 DTC 6001 (SCC).

[56] Supra footnote 47.

[57] Supra footnote 6.

[58] [1994] 3 SCR 29.

[59] [1994] 3 SCR 57.

[60] Supra footnote 58, at 52.

What is unclear is just how much the analysis actually rests on the substance doctrine listed by the court among its interpretive principles. This is a question that, having been treated somewhat differently in *Bronfman*, *Antosko*, and now this trilogy, requires further clarification from the court, both as to the scope of the substance doctrine and as to the manner in which it is intended to interact with the principles that are specifically applicable to interpretation of legislation as opposed to characterization of facts.

APPLICATION AND EVALUATION

The purposive approach accepted in *Stubart* and in the years since is consistent with the courts' approach to statutory interpretation generally and now seems to be well established in Canada. It is therefore timely to consider some of its practical ramifications, particularly in the context of the present income tax system, and to evaluate its merits relative to the traditional approach.

General Observations

The traditional approach was characterized by the use of presumptions of general application. Specific circumstances and the objectives of any particular legislative provision were usually ignored unless absurd results forced the courts to apply a more purposive approach under the authority of the "golden rule." By virtue of the courts' focusing solely on the statutory language and applying restrictive general rules, the dice may have been loaded against one side or the other (but usually against the tax authority). Not only did this keep tax liabilities to a minimum, but it was generally felt that a higher degree of certainty and predictability was achieved than would have been the case had a more flexible and purposive approach been taken. Yet consider the income attribution rules, where the courts applied restrictive principles and held that a transfer did not include a loan, the words "property or . . . property substituted therefor" did not include property substituted for substituted property, and income from "the property" did not include income from "the property" if the property was used to generate income from a source that was a business.[61] Such results had the effect of minimizing taxpayer obligations, but were perhaps not entirely predictable by a person attempting to read the sections and determine the manner in which they would apply in practice.

Moreover, the consistently restrictive approach to legislation adopted by the Anglo-Canadian courts historically has contributed to a detailed and complex style of legislative drafting in the common law countries. Detailed legislative provisions invite the courts to conclude that the treatment of the subject is exhaustive, and that the legislation is meant to say exactly what it says and does not mean to say anything that it omits. Gaps are uncovered. The drafters have introduced legislation with increasing

[61] See *Dunkelman v. MNR*, 59 DTC 1242 (Ex. Ct.); *MNR v. MacInnes*, 54 DTC 1031 (Ex. Ct.); and *Robins v. MNR*, 63 DTC 1012 (Ex. Ct.), respectively.

frequency to plug the gaps exposed by restrictive interpretations by the courts. The process becomes self-perpetuating. The result is the creation over time of increasingly wide areas of law where even experienced practitioners must defer to specialists who are able to devote substantial time and energy to mastering the provisions.

Tax laws are only one example of this phenomenon, although perhaps an extreme one. Numerous examples can be cited in the present Income Tax Act, including the provisions dealing with foreign source income of Canadian residents, income from resource properties, the so-called preferred share rules, and taxation of insurance products. If one of the goals of legislation is to be readily comprehensible by the largest percentage of those affected as is practical in view of the nature of the legislation, the traditional strict and literal approach has not achieved that goal.

Will the purposive approach reverse this trend? Certainly it has not done so yet, and perhaps it never will. No one would say the US Internal Revenue Code is a simple statute, although it has been interpreted using purposive principles for many years. Bittker and Lokken observe that interpretive issues under the US Code have not diminished in number or difficulty despite the evolution of increasingly detailed legislation, although they also note that interpretive issues are raised by simple terms like "interest," "debt" and "gift" as well as by complex statutory provisions.[62] The problem lies in the inability of any legislation to anticipate every circumstance to which it may be relevant. If this is accepted as an unavoidable part of the application of legislation, a purposive approach cannot be expected to solve the problem, because the problem has more fundamental causes than the particular way in which courts approach legislative interpretation. Nevertheless, if the purposive approach results in greater conformity of judicial results to legislative purposes, there should at least be a reduction in the volume of legislation designed to remedy judicial action, and perhaps over the long term the adoption of a plainer style of legislative drafting.

Some may be concerned that the purposive approach will undermine predictability by giving judges a licence to "make law" by judicially rewriting legislation in order to carry out some perceived legislative purpose that is not apparent to the taxpayers who are affected by the legislation. This should not be a problem if the application of the purposive approach is confined in the manner adopted by the respective majorities in the Supreme Court of Canada decisions in *Antosko*[63] and *Friesen*.[64] So long as the courts remain firmly anchored by the plain meaning of the statutory language, the application of the purposive approach will be confined to those areas where genuine ambiguity exists. (Obviously, disagreements will arise as to whether or not a plain meaning can be

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[62] Bittker and Lokken, supra footnote 39, at 4-16 to 4-17.

[63] Supra footnote 45.

[64] Supra footnote 47.

found,[65] but this is inevitable and does not by itself mean that the traditional approach is to be preferred.) Judicial creativity has always been exercised in those areas because it is the work of the judiciary to decide cases, and that involves sorting out ambiguities in legislation. All that the purposive approach should do, as compared with the traditional strict and literal approach, is ensure that the resolution of those ambiguities is achieved with proper regard for the purposes of the legislation rather than through the application of arbitrary rules.

Put another way, statutory interpretation cases get to court because the parties cannot agree on what the legislation means. Purposive rules of interpretation will not make hard cases easy, but no matter what approach it adopts, the court must ultimately resolve the ambiguity in favour of one party or the other. The traditional approach simply determined the contest by reference to rigid rules and presumptions rather than by reference to the statutory purpose. It hardly seems objectionable for the court to resolve the issues by reference to what the legislature intended.

Determining Legislative Intent

Sometimes legislative intent, or the object and spirit of a provision, may be obvious. Some statutes have preambles or other provisions that expressly set out the legislative intent. In some cases the intent may be obvious from the nature of the legislation or the specific provision in question. Often, however, the answer may be less obvious. A statutory provision may, for example, be properly characterized by reference to several purposes, or by a hierarchy of general and more specific purposes. These may be cast in very general terms, as in the *Symes* case, where both the majority and the dissenting justices found it relevant in interpreting sections dealing with business deductions and claims for child care expenses that the broad objectives of the tax system included the preservation of vertical and horizontal equity among taxpayers generally.[66]

Where the legislative intent is capable of more than one characterization, the purposive approach may raise more questions than it answers. For example, is the mandatory language in paragraph 20(16)(c) of the Income Tax Act, which states that a terminal loss "shall be deducted" in the taxation year described in paragraphs 20(16)(a) and (b), intended to permit a deduction that would not otherwise be available? Is it intended to confine the deduction to a particular year? Does it have broader economic objectives, such as the creation of an incentive for capital investment? Is it designed to preserve a certain degree of "horizontal equity" between taxpayers who dispose of all depreciable property of a class and realize a terminal loss and those who retain such property and continue to be able to claim capital cost allowance? Is it intended to achieve all of these objectives? If so, is one objective more important than another?

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[65] See, for example, the Supreme Court decisions in *Golden*, supra footnote 54, and *Symes*, supra footnote 55.

[66] Supra footnote 55, at 6015 and 6043.

At the other extreme, in some cases it may be hard to find any identifiable legislative purpose. One can sympathize with Lord Justice Staughton, in the English Court of Appeal decision in *BP Oil Development Ltd. v. Commissioners of Inland Revenue*, who was forced to concede in the face of extremely complex mathematical provisions that "I have not attempted to achieve any purposive construction of the detailed provisions of the Act, since I am not sure what their purpose is."[67] Even the present deputy minister of finance has acknowledged that "the true object and spirit of some provisions of the [Income Tax] Act may sometimes appear difficult or even impossible to assess."[68]

This is not a small matter. The complex and lengthy provisions that govern many areas of taxation contain numerous provisions that may serve specific purposes within the overall scheme, but that are difficult if not impossible to characterize in any way that would suggest the direction a court should take in resolving any ambiguity. However, like the risk of excessive reliance on purposive analysis, the difficulty of determining the relevant legislative intent in any particular case is not a reason to prefer the arbitrary rules applied in the past.

Use of Extrinsic Aids to Interpretation

If the courts are charged with examining the purpose behind a legislative provision, it becomes necessary to consider evidence of that intention. Many sources of information may suggest what the purpose might be, although the most obvious sources—formal statements made in Parliament by the responsible minister, records of parliamentary debates, and other parliamentary material—may be of dubious value given the partisan nature of the parliamentary process.[69] For this reason, and probably because of the courts' antipathy toward Parliament in the past, the traditional rule, stated in 1769, was that "the sense and meaning of an Act of Parliament must be collected from what it says when passed into a law; and not from the history of changes it underwent in the house where it took its rise."[70] Courts have also expressed reservations about interpretive aids that are not "readily or ordinarily accessible to the citizen whose rights and duties are to be affected."[71]

This exclusionary principle has traditionally applied in all areas of law, subject to certain exceptions primarily in constitutional matters. Commentators in Canada, the United Kingdom, and Australia have traced the

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[67] (1991), 64 TC 498, at 532 (HL).

[68] David A. Dodge, "A New and More Coherent Approach to Tax Avoidance" (1988), vol. 36, no. 1 *Canadian Tax Journal* 1-22, at 21.

[69] This point is made forcefully by Muldoon J in *Fibreco Pulp Inc. et al. v. The Queen*, 94 DTC 6325, at 6331 (FCTD), and by Justice Scalia in the US Supreme Court in his opinion in *Begier v. IRS*, 496 US 53, at 67-68.

[70] *Millar v. Taylor* (1769), 98 ER 201, at 217 (KB).

[71] *Pepper v. Hart*, [1993] 1 All ER 42, at 52 (HL), per Lord Oliver of Aylmerton. See also the comment of Lord Diplock in *Fothergill v. Monarch Airlines*, [1980] 2 All ER 696, at 705, quoted by Lord Browne-Wilkinson in *Pepper v. Hart* at 62.

gradual erosion of the rule through judicial and, in Australia, legislative action.[72] The exclusionary rule has long been abolished in the United States.[73]

The importance of the exclusionary rule in the context of Canadian tax legislation has declined substantially. In *Lor-Wes Contracting Ltd. v. The Queen*,[74] *British Columbia Telephone Company v. The Queen*,[75] and *Harvey C. Smith Drugs Limited v. The Queen*,[76] the court admitted evidence with respect to the budget statement of a minister of finance, budget papers tabled by the minister as part of his budget material, and House of Commons debates, respectively, for the purpose of determining statutory purpose. In *Golden*,[77] the Supreme Court looked to predecessors of the legislative provision in question in order to trace its evolution and gain insight into its operation. In addition, the courts from time to time have looked to the French version of the legislation to assist in the interpretation of words that are not entirely clear in the English text.[78]

With respect to non-legislative aids, the courts have also frequently looked to Revenue Canada's published interpretation bulletins to find assistance in determining the meaning of statutory provisions.[79] Resort to such documents has been criticized on the grounds that they are no more than formal statements of the legal position asserted by one of the parties (that is, Her Majesty) to the tax appeal and therefore should not be given any greater weight than arguments made by counsel in court.[80]

In *Friesen*,[81] Major J cited a "regulatory impact analysis statement" and a Department of Finance release to support his policy analysis of the issues before the court in connection with inventory writedowns. At present, there is a growing body of explanatory and technical notes issued by the Department of Finance when new legislation is published for public comment or introduced in Parliament. These notes are of varying

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[72] See Gordon Bale, "Parliamentary Debates and Statutory Interpretation: Switching on the Light or Rummaging in the Ashcans of the Legislative Process" (March 1995), 74 *The Canadian Bar Review* 1-28; Pierre-André Côté, "L'interpretation de la loi fiscale—quelques problèmes" (1991), vol. 39, no. 2 *Canadian Tax Journal* 258-87; Brazil, supra footnote 36; and F.A.R. Bennion, *Statutory Interpretation*, 2d ed., supplement (London: Butterworths, 1993), A35-83.

[73] Bittker and Lokken, supra footnote 39, at 4-20.

[74] 85 DTC 5310 (FCA).

[75] Supra footnote 15.

[76] 95 DTC 5026 (FCA).

[77] Supra footnote 54.

[78] See, for example, *Golden*, supra footnote 54; and *Harvey C. Smith Drugs Limited*, supra footnote 76.

[79] See, for example, *Nowegijick*, supra footnote 29; and *Mattabi Mines Ltd. v. Minister of Revenue (Ontario)*, [1988] 2 SCR 294 (SCC).

[80] See, for example, the strong criticisms levelled by Muldoon J in *Fibreco Pulp Inc.*, supra footnote 69.

[81] Supra footnote 47.

degrees of assistance, but are generally intended to inform the public as to the intended meaning and purpose of the legislation. Conceptually, these materials are rather like the pronouncements of the minister of finance in the House, and indeed they are official statements issued by his department or in his name. There seems to be no reason not to give them as much weight as the formal budget speech and materials introduced in the House by the minister. By and large, they are also non-partisan, and reflect a considered view rather than a polemic.[82]

The widest use of extrinsic material has traditionally been in constitutional cases. In the Supreme Court of Canada decisions in *Symes*[83] and *The Queen et al. v. Thibaudeau*,[84] the Supreme Court of Canada considered extensive statistical information and social policy data and commentary in its analysis of the implications under the Charter of Rights and Freedoms of the deductibility of child care expenses and the income inclusion rule for child support in paragraph 56(1)(b) of the Income Tax Act, respectively. The entire approach of the court to the issues raised reflected the fact these were Charter cases rather than conventional tax cases.

As the courts break down the exclusionary rules, the real issue will presumably become the weight to be accorded to particular extrinsic material rather than its admissibility.

Interaction with the General Anti-Avoidance Rule

No reported court decision has yet dealt with the manner in which the general anti-avoidance rule in section 245 of the Income Tax Act (and similar provisions in other federal and provincial taxing statutes) will be reconciled with the purposive approach to statutory interpretation.

The structure of section 245 requires that a series of tests be applied sequentially. The relevant concepts of "tax benefit" and "avoidance transaction" focus primarily on an analysis of the facts rather than the statute, but the "misuse or abuse" rule in subsection 245(4) requires a determination whether "it may reasonably be considered that the transaction would not result directly or indirectly in a misuse of the provisions of this Act or an abuse having regard to the provisions of this Act, other than this section, read as a whole."

Any determination that a statutory provision has been misused or that a transaction would result in an abuse as those terms are used in

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[82] One concern with such notes is the growing tendency to rely on them unduly as proxies for the statutory provisions themselves. The public has been deluged with large quantities of highly technical amendments in recent years, and the difficulty of keeping up with the volume and understanding the context and objectives of the amendments has created a temptation to read the technical notes before the legislation itself. In the United States, the legislative regime is so complex, and the use of extrinsic aids so well established, that a pseudo-maxim was coined: "Look at the Code only if the [legislative] committee reports are ambiguous": Bittker and Lokken, supra footnote 39, at 4-20.

[83] Supra footnote 55.

[84] 95 DTC 5273 (SCC).

subsection 245(4) seems to require an analysis of the statutory purpose, although section 245 does not simply re-enact section 12 of the Interpretation Act to restate the requirement that the courts take a purposive approach to statutory interpretation. Rather, it sets out a rule that requires a determination of statutory purpose as a necessary step in the overall tax-avoidance analysis.

The Evolving Judicial Approach

Over the long term, judicial approaches to statutory interpretation have evolved as the relationship between the Crown, Parliament, the courts, and the public has changed. Specifically in the field of taxation, the judicial approach has evolved in response to the ever-widening scope of taxation and the growth of non-revenue uses of tax legislation. The recent Supreme Court decisions in *Symes* and *Thibaudeau* illustrate in the income tax context the rapid evolution of judicial thinking in the area of constitutional law. This evolution may well have broader implications in the tax field, not the least of which may be the introduction of principles based on the protection of personal rights and freedoms. Such issues may seem remote from most day-to-day tax issues brought before the tax courts of first instance, particularly the Tax Court of Canada. Nevertheless, as our senior courts become increasingly preoccupied with these issues, it will not be surprising to see, over the longer term, significant further developments in the approaches taken by senior appellate courts to tax matters in areas such as statutory interpretation and the use of extrinsic aids, as judges steeped in constitutional and administrative law issues confront increasingly complex and even arcane tax legislation.