CANADIAN TAX JOURNAL

REVUE FISCALE CANADIENNE

PEER-REVIEWED ARTICLES

Statute-Barred Date: Why Isn't There Always One?

Grace Chow and Henry Shew

Income Tax Complexity Faced by Multinational Corporations:
A Comparative Study of Canada, the United States, and
Other Selected OECD Countries

Susann Sturm

POLICY FORUM

Editors' Introduction—First Nation Property Taxation

*Frances Woolley, River Doxtator,
Alan Macnaughton, and Daniel Sandler*

A Critical Analysis of Property Taxation Under the First Nations
Fiscal Management Act as a Self-Government Tool

Audrey Boissonneault

Analyse critique de l'impôt foncier sous le régime de la Loi
sur la gestion financière des premières nations comme outil
d'autonomie gouvernementale

Audrey Boissonneault

In Defence of the First Nations Fiscal Management Act

André Le Dressay

Property Taxation: Establishing an Urban Reserve—Property Tax
Challenges and Opportunities

Mike Icton and Devan Mescall

Implementing the Chippewas of Georgina Island First Nation
Property Tax System—Opportunities, Challenges, and Lessons Learned

Kate McCue and Bill McCue

First Nation Property Taxation and Governance in British Columbia

Ross Hickey

(Continued on inside front cover)

(Continued from outside front cover)

FEATURES

Finances of the Nation: The Evolution of Health Expenditures in Canada, 1926-2019

Livio Di Matteo

Current Cases: (FCA) Canada v. Lux Operating Limited Partnership; (FCA) Eyeball Networks Inc. v. Canada; (TCC) Damis Properties Inc. v. The Queen

*Josiah Davis, Dorian Fenton,
Michael Hassar, and Darian Khan*

International Tax Planning: China's New Regime for Taxing Expatriate Income: Tightening the Screws or Vintage Wine in a New Bottle?

Yan Xu and Zizheng Zhao

Corporate Tax Planning: Impact of COVID-19 and Transfer Pricing: Approaches for Comparability Adjustments

*Andrew Barton, Vinu Subramaniam,
and Paola Marino*

Current Tax Reading

Jinyan Li and Alan Macnaughton

■ CANADIAN TAX JOURNAL EDITORIAL BOARD / COMITÉ DE RÉDACTION DE LA REVUE FISCALE CANADIENNE

■ Editors/Rédacteurs en chef

Alan Macnaughton
University of Waterloo

Daniel Sandler
EY Law LLP

Kevin Milligan
University of British Columbia

Frances Woolley
Carleton University

■ Practitioners and Academics/Fiscalistes et Universitaires

Allison Christians
McGill University

Rick Krever
The University of Western Australia

David G. Duff
University of British Columbia

Angelo Nikolakakis
EY Law LLP, Montreal

Luc Godbout
Université de Sherbrooke

Shawn D. Porter
Department of Finance, Canada

Kenneth J. Klassen
University of Waterloo

Diane Ring
Boston College

Wojciech Kopczuk
Columbia University

Lindsay Tedds
University of Calgary

■ FEATURE EDITORS/RÉDACTEURS DE CHRONIQUES

Corporate Tax Planning

Mark Brender, Osler LLP, Montreal

Brian Carr, Thorsteinssons LLP, Toronto

Michael Smith, Deloitte LLP, Calgary

Christopher Steeves, Fasken Martineau LLP, Toronto

Current Cases

Ryan Morris, WeirFoulds LLP, Toronto

Andrew Stirling, McMillan LLP, Toronto

Current Tax Reading

Kim Brooks, Dalhousie University, Halifax

Jinyan Li, York University, Toronto

Alan Macnaughton, University of Waterloo

Mike Veall, McMaster University, Hamilton

Finances of the Nation

Ken McKenzie, University of Calgary

Michael Smart, University of Toronto

Trevor Tombe, University of Calgary

International Tax Planning

Ian Bradley, PwC LLP, Toronto

Ken Buttenham, PwC LLP, Toronto

Personal Tax Planning

Sonia Gandhi, KPMG LLP, Toronto

Dino Infanti, KPMG LLP, Vancouver

Bessy Triantafyllos, Deloitte LLP, Toronto

Chris Watt Bickley, Deloitte LLP, Ottawa

Selected US Tax Developments

Peter Glicklich, Davies Ward Phillips & Vineberg LLP, New York

Michael Miller, Roberts & Holland LLP, New York and Washington, DC

Reach BEYOND

MASTER OF TAXATION

Join tomorrow's tax leaders

EXPERT FACULTY >
UNPARALLELED
LEARNING
EXPERIENCE

In addition to strong technical competencies, the MTax program prepares graduates for roles as high performing members of the tax community.

Next class starts in
September – apply now!

All classes held in downtown Toronto

learn ... develop ... experience

TO GO BEYOND. LEARN MORE.

The MTax advantage.
mtax.ca

UNIVERSITY OF
WATERLOO

www.ctf.ca/www.fcf-ctf.ca

CALL FOR BOOK PROPOSALS

The Canadian Tax Foundation, an independent, not-for-profit research and educational organization, is seeking proposals for books in the areas of taxation and public finance.

Since its inception in 1945, the Foundation has published many books and articles on a wide range of subjects within its areas of interest. The Foundation seeks proposals for research projects that will

- result in a book on a single topic of interest in the area of taxation or public finance;
- be undertaken by an experienced researcher who has expertise in an area of taxation or public finance; and
- be carried out within a time frame that is reasonable, given the nature of the project.

Projects selected by the Foundation may qualify for its full or partial financial support of the research and for its underwriting of the publication costs. The Foundation retains the absolute right at its sole discretion to choose whether to support a given proposal or to publish a project.

Interested parties should send a brief written outline of a proposal, for initial consideration by the Foundation, to:

Heather Evans
Executive Director and Chief Executive Officer
Canadian Tax Foundation / Fondation canadienne de fiscalité
145 Wellington Street West, Suite 1400
Toronto, Ontario M5J 1H8
hevans@ctf.ca

For further information, please contact the director, as indicated above, or the co-chairs of the Canadian Tax Foundation Research Committee:

Hugh Woolley
c/o Canadian Tax Foundation / Fondation canadienne de fiscalité

Kim Brooks
c/o Canadian Tax Foundation / Fondation canadienne de fiscalité

APPEL DE PROPOSITIONS DE LIVRES

La Fondation canadienne de fiscalité (FCF) / Canadian Tax Foundation, un organisme sans but lucratif indépendant de recherche et à caractère éducatif, souhaite recevoir des propositions de livres dans les domaines de la fiscalité et des finances publiques.

Depuis sa fondation en 1945, la FCF a publié de nombreux livres et articles sur divers sujets dans ses champs d'intérêt. La FCF souhaite obtenir des propositions de projets de recherche qui :

- mèneront à la rédaction d'un livre sur un sujet unique d'intérêt en fiscalité ou en finances publiques;
- seront dirigés par un chercheur chevronné ayant une expertise dans un domaine de la fiscalité ou des finances publiques;
- seront effectués dans un délai raisonnable, compte tenu de la nature du projet.

Les projets qui seront sélectionnés par la FCF pourront être partiellement ou totalement admissibles à une aide financière pour la recherche et les frais de publication. La FCF se réserve le droit absolu, et à sa seule discrétion, d'appuyer une proposition particulière ou de publier un projet.

Toute personne intéressée doit faire parvenir un bref sommaire de la proposition pour examen initial par la FCF à :

Heather Evans
Directrice exécutive et chef de la direction
Canadian Tax Foundation / Fondation canadienne de fiscalité
145 Wellington Street West, Suite 1400
Toronto, Ontario M5J 1H8
hevans@ctf.ca

Pour plus d'information, veuillez communiquer avec le directeur, tel qu'il est mentionné plus haut, ou avec les co-présidentes du comité de recherche de la Fondation canadienne de fiscalité :

Hugh Woolley
a/s Canadian Tax Foundation / Fondation canadienne de fiscalité

Kim Brooks
a/s Canadian Tax Foundation / Fondation canadienne de fiscalité

■ RECENT AND UPCOMING EVENTS*

■ ACTIVITÉS RÉCENTES ET À VENIR*

YOUNG PRACTITIONER FOCUS / FOCUS SUR LES JEUNES PRACTI CIENS (ENGLISH AND FRENCH)

Webcast ■ September 9, 2021

WESTERN CANADA TAX CONFERENCE

Webcast ■ September 28-29, 2021

ONTARIO TAX CONFERENCE

Webcast ■ October 26-27, 2021

ATLANTIC PROVINCES TAX CONFERENCE

Webcast ■ November 4-5, 2021

73RD ANNUAL TAX CONFERENCE

Webcast ■ November 24-25, 2021

* For further details on upcoming events, please visit the Canadian Tax Foundation website at www.ctf.ca. / Pour plus de renseignements, veuillez consulter le site Web de la Fondation à www.fcf-ctf.ca.

Disclaimer. The material contained in this publication is not intended to be advice on any particular matter. No subscriber or other reader should act on the basis of any matter contained in this publication without considering appropriate professional advice. The publisher, and the authors and editors, expressly disclaim all and any liability to any person, whether a purchaser of this publication or not, in respect of anything and of the consequences of anything done or omitted to be done by any such person in reliance upon the contents of this publication. Opinions expressed by individual writers are not necessarily endorsed by the Canadian Tax Foundation and its members.

Photocopying and reprinting. Permission to photocopy or reprint any part of this publication for distribution must be applied for in writing; e-mail: permissions@ctf.ca.

Advertising. Inquiries relating to advertisements should be directed to Christine Escalante, e-mail: cescalante@ctf.ca.

Exonération de responsabilité. Le contenu de cette publication ne doit être interprété d'aucune façon comme un avis ou une opinion. L'abonné ou le lecteur ne devrait pas fonder ses décisions sur le contenu de cette publication sans envisager une consultation professionnelle appropriée. L'éditeur et les auteurs réfutent toute responsabilité envers toute personne, qu'elle soit abonnée ou non, relativement à toute conséquence résultant d'actes ou omissions faits en fonction du contenu de la présente publication. Les opinions exprimées par les auteurs particuliers ne sont pas nécessairement appuyées par la Fondation canadienne de fiscalité et ses membres.

Photocopie et réimpression. L'autorisation de photocopier ou de réimprimer toute portion de cette publication à des fins de distribution devra être obtenue en adressant une demande écrite à permissions@ctf.ca.

Annonces publicitaires. Toutes demandes concernant les annonces publicitaires devront être adressées à Christine Escalante, courriel : cescalante@ctf.ca.

Canadian Tax Journal
Published four times per year
Price: \$75 per copy (plus applicable taxes)
Subscription rate: \$343.75 per year (plus applicable taxes)
(HST registration no. R-106867260)

Canadian Tax Foundation
145 Wellington Street West
Suite 1400
Toronto, Canada M5J 1H8
Telephone: 416-599-0283
Toll Free: 1-877-733-0283
Facsimile: 416-599-9283
Internet: www.ctf.ca

2021, vol. 69, no. 3
(Issued November 2021)

ISSN 0008-5111

Printed in Canada
600 11-21

Revue fiscale canadienne
Publiée quatre fois l'an
Prix : 75 \$ l'exemplaire (taxes en sus)
Abonnement : 343,75 \$ par an (taxes en sus)
(Numéro d'enregistrement de TVH :
R-106867260)

La Fondation canadienne de fiscalité
1250, boul. René-Lévesque ouest
Bureau 2935
Montréal (Québec) H3B 4W8
Téléphone : 514-939-6323
Télécopieur : 514-939-7353
Internet : www.fcf-ctf.ca

2021, vol. 69, n^o 3
(publication : novembre 2021)

ISSN 0008-5111

Imprimée au Canada
600 11-21

Canadian Tax Journal

Revue fiscale canadienne

PEER-REVIEWED ARTICLES

- 687 **Statute-Barred Date: Why Isn't There Always One?** GRACE CHOW AND HENRY SHEW
- 745 **Income Tax Complexity Faced by Multinational Corporations: A Comparative Study of Canada, the United States, and Other Selected OECD Countries** SUSANN STURM

POLICY FORUM

- 791 **Editors' Introduction—First Nation Property Taxation** FRANCES WOOLLEY, RIVER DOXTATOR, ALAN MACNAUGHTON, AND DANIEL SANDLER
- 799 **A Critical Analysis of Property Taxation Under the First Nations Fiscal Management Act as a Self-Government Tool** AUDREY BOISSONNEAULT
- 813 **Analyse critique de l'impôt foncier sous le régime de la Loi sur la gestion financière des premières nations comme outil d'autonomie gouvernementale** AUDREY BOISSONNEAULT
- 829 **In Defence of the First Nations Fiscal Management Act** ANDRÉ LE DRESSAY
- 835 **Property Taxation: Establishing an Urban Reserve—Property Tax Challenges and Opportunities** MIKE ICTON AND DEVAN MESCALL
- 857 **Implementing the Chippewas of Georgina Island First Nation Property Tax System—Opportunities, Challenges, and Lessons Learned** KATE MCCUE AND BILL MCCUE
- 873 **First Nation Property Taxation and Governance in British Columbia** ROSS HICKEY

FEATURES

- 889 Finances of the Nation:** The Evolution of Health Expenditures
in Canada, 1926-2019 LIVIO DI MATTEO
- 921 Current Cases:** (FCA) Canada v. Lux Operating Limited
Partnership; (FCA) Eyeball Networks Inc. v. Canada;
(TCC) Damis Properties Inc. v. The Queen JOSIAH DAVIS, DORIAN FENTON,
MICHAEL HASSAR, AND DARIAN KHAN
- 953 International Tax Planning:** China's New Regime
for Taxing Expatriate Income: Tightening the Screws
or Vintage Wine in a New Bottle? YAN XU AND ZIZHENG ZHAO
- 981 Corporate Tax Planning:** Impact of COVID-19
and Transfer Pricing: Approaches for
Comparability Adjustments ANDREW BARTON, VINU SUBRAMANIAM,
AND PAOLA MARINO
- 1003 Current Tax Reading** JINYAN LI AND ALAN MACNAUGHTON

■ CANADIAN TAX JOURNAL

The *Canadian Tax Journal* publishes research in, and informed comment on, taxation and public finance, with particular relevance to Canada. To this end, the journal invites interested parties to submit manuscripts for possible publication as peer-reviewed articles, and it especially welcomes work that contributes to the analysis, design, and implementation of tax policies.

Articles may be written in English or French and should present an original analysis of the topic. Submitted work, or any substantial part or version thereof, must not have been previously published, either in print or online, and it must not be submitted or scheduled for publication elsewhere. The journal welcomes shorter submissions (from 4,000 to 8,000 words) focused on specific topics as well as longer submissions (to a maximum of 20,000 words) that analyze issues in depth.

Submitted articles are subject to a double-blind peer review; authors' identities are not known to reviewers, and reviewers' identities are not known to authors. (Non-peer-reviewed contributions may appear elsewhere in the journal.) Final decisions on publication of articles are made by the editors, Alan Macnaughton, Daniel Sandler, and Kevin Milligan, on the advice of reviewers. Many reviewers are drawn from the editorial board (listed on the inside front cover of this journal), although ad hoc reviewers are also consulted. Submissions may be (1) accepted outright; (2) accepted if recommended revisions are made; (3) revised by the authors, as requested by the editors on the advice of reviewers, and resubmitted for further review; or (4) rejected with reasons. The time from submission to the first editorial decision is usually two months or less.

Prospective contributors should submit a copy of the manuscript to the journal's editorial department. The preferred method of submission is by e-mail with an attached Word document. E-mail inquiries are welcome: write to CTFeditorial@ctf.ca. Contributors are responsible for providing complete and accurate citations to sources, a detailed abstract (200 to 400 words), and up to six keywords for indexing purposes.

The full text of many articles that have appeared in the *Canadian Tax Journal* since 1991 can be found on the Canadian Tax Foundation's website: www.ctf.ca. Additionally, the journal in its entirety appears in the Canadian Tax Foundation's *TaxFind*, which is updated regularly.

The *Canadian Tax Journal* is indexed in EconLit, ABI Inform, LegalTrac, Index to Canadian Legal Literature, CCH Canadian's Canadian Income Tax Research Index, Carswell's Income Tax References, Accounting and Law Index, Current Law Index, Canadian Index, Canadian Periodicals Index, Index to Canadian Legal Periodical Literature, Index to Legal Periodicals and Books, and PAIS International in Print.

■ REVUE FISCALE CANADIENNE

La *Revue fiscale canadienne* publie des recherches et des commentaires éclairés sur la fiscalité et les finances publiques, particulièrement pertinents pour le Canada. À cette fin, la revue invite les personnes intéressées à soumettre des articles en vue d'une éventuelle publication en tant qu'articles revus par des pairs, et elle accueille tout particulièrement les travaux qui contribuent à l'analyse, à la conception et à la mise en oeuvre des politiques fiscales.

Les articles peuvent être rédigés en anglais ou en français et doivent présenter une analyse originale du sujet. Les articles soumis, ou toute partie substantielle ou version des articles, ne doivent pas avoir été publiés antérieurement en format papier ou électronique, et ne doivent pas être soumis ou prévus pour publication ailleurs. Vous pouvez soumettre pour publication, dans la revue fiscale, des articles plus courts (4 000 à 8 000 mots) sur des sujets particuliers ainsi que des articles plus longs (maximum de 20 000 mots) analysant des sujets en profondeur.

Les articles soumis sont sujets à une double revue à l'aveugle par des pairs; l'identité des auteurs n'est pas connue des réviseurs et celle des réviseurs n'est pas connue des auteurs (certains articles non soumis à cette révision par des pairs peuvent paraître ailleurs dans la revue.) La décision finale de publier ou non un article est celle des rédacteurs en chef Alan Macnaughton, Daniel Sandler et Kevin Milligan, à la recommandation des réviseurs. Bien que certains réviseurs *ad hoc* soient aussi consultés, la majorité des réviseurs sont choisis parmi les membres du Comité de rédaction (énumérés à l'endos de la page couverture de la revue). Les articles soumis peuvent être 1) acceptés d'emblée; 2) acceptés après modifications; 3) modifiés par les auteurs tel que demandé par les rédacteurs en chef sur l'avis des réviseurs, et resoumis à une nouvelle révision; ou 4) rejetés avec raisons. Le temps écoulé entre la soumission d'un article et la première décision éditoriale est habituellement de deux mois ou moins.

Les aspirants contributeurs doivent soumettre un exemplaire de l'article proposé au service éditorial. Il est préférable que la soumission se fasse par courriel, avec une pièce jointe en Word. Les demandes de renseignements par courriel sont les bienvenues. Elles doivent être adressées à CTFeditorial@ctf.ca. Les contributeurs doivent soumettre l'ensemble de leurs sources, un précis détaillé de leurs articles (entre 200 et 400 mots), et jusqu'à six mots clés aux fins d'indexation.

On peut trouver le texte intégral de nombreux articles publiés dans la *Revue fiscale canadienne* depuis 1991 sur le site Internet de la Fondation : www.fcf-ctf.ca. De plus, la revue dans son entier se trouve dans *TaxFind*, qui est mis à jour régulièrement.

La *Revue fiscale canadienne* est indexée sous EconLit, ABI Inform, LegalTrac, Index to Canadian Legal Literature, Canadian Income Tax Research Index de CCH Canadian, Income Tax References de Carswell, Accounting and Law Index, Current Law Index, Canadian Index, Canadian Periodicals Index, Index to Canadian Legal Periodical Literature, Index to Legal Periodicals and Books, et PAIS International in Print.

■ CANADIAN TAX FOUNDATION

The Canadian Tax Foundation is Canada's leading source of insight on tax issues. The Foundation promotes understanding of the Canadian tax system through analysis, research, and debate, and provides perspective and impartial recommendations concerning its equity, efficiency, and application.

The Canadian Tax Foundation is an independent tax research organization and a registered charity with over 12,000 individual and corporate members in Canada and abroad. For more than 70 years, it has fostered a better understanding of the Canadian tax system and assisted in the development of that system through its research projects, conferences, publications, and representations to government.

Members find the Foundation to be a valuable resource both for the scope and depth of the tax information it provides and for its services, which support their everyday work in the taxation field.

Government policy makers and administrators have long respected the Foundation for its objectivity, its focus on current tax issues, its concern for improvement of the Canadian tax system, and its significant contribution to tax and fiscal policy.

MEMBERSHIP

Membership in the Foundation is open to all who are interested in its work. Membership fees are \$399.00 a year, except that special member rates apply as follows: (a) \$199.00 for members of the accounting and legal professions in the first three years following date of qualification to practise; (b) \$199.00 for persons on full-time teaching staff of colleges, universities, or other educational institutions; (c) \$40.00 for students in full-time attendance at a recognized educational institution; and (d) \$171.00 for persons who have reached the age of 65 and are no longer actively working in tax. Memberships are for a period of 12 months dating from the receipt of application with the appropriate payment.

Applications for membership are available from the membership administrator for the Canadian Tax Foundation: facsimile: 416-599-9283; Internet: www.ctf.ca; e-mail: ctfmembership@ctf.ca.

■ FONDATION CANADIENNE DE FISCALITÉ

La Fondation canadienne de fiscalité est un organisme indépendant de recherche sur la fiscalité inscrit sous le régime des œuvres de charité. Elle compte environ 12 000 membres au Canada et à l'étranger. Depuis plus de 70 ans, la FCF favorise une meilleure compréhension du système fiscal canadien et aide au développement de ce système par le biais de ses projets de recherche, conférences, publications et représentations auprès des gouvernements.

Les membres considèrent l'étendue et le détail de l'information offerte par la FCF comme une importante ressource. Ils apprécient également les autres services de la FCF qui facilitent leur travail quotidien dans le domaine de la fiscalité.

Les décideurs et administrateurs gouvernementaux respectent depuis longtemps l'objectivité de la FCF, son attention aux questions fiscales de l'heure, sa préoccupation envers l'amélioration du système fiscal canadien et son importante contribution au développement des politiques fiscales.

ADHÉSION

Toute personne intéressée aux travaux de la FCF peut en devenir membre. Les droits d'adhésion sont de 399,00 \$ par année, à l'exception des tarifs spéciaux suivants : a) 199,00 \$ pour les personnes faisant carrière en comptabilité ou en droit pendant les trois premières années suivant leur admission à la profession; b) 199,00 \$ pour le personnel enseignant à temps plein dans un collège, une université ou une autre maison d'enseignement; c) 40,00 \$ pour les étudiants fréquentant à temps plein une maison d'enseignement reconnue; et d) 171,00 \$ pour les personnes qui ont 65 ans et plus et qui ne travaillent plus activement en fiscalité. La période d'adhésion est de 12 mois, à compter de la réception de la demande accompagnée du paiement approprié.

Il est possible de se procurer les demandes d'adhésion auprès de l'administratrice responsable de l'adhésion à la FCF : télécopieur : 514-939-7353; Internet : www.fcf-ctf.ca; courriel : adminmtl@ctf.ca.

■ BOARD OF GOVERNORS/CONSEIL DES GOUVERNEURS

Elected November 27, 2020/Élu le 27 novembre 2020

Albert Anelli, QC ^{1*}	Ted Gallivan, ON ³	John Oakey, NS ¹
Cheryl Bailey, ON ¹	Rachel Gervais, ON ^{1*}	Shamim Panchbhaya, ON ³
Jeffery Blucher, NS ²	Siobhan Goguen, AB ²	Ryan Rabinovitch, QC ²
Cathie Brayley, BC ^{2*}	Paul Grower, MB ²	Mitchell Sherman, ON ²
Alycia Calvert, ON ^{1*}	Eric Hamelin, QC ³	Michael Smith, AB ¹
Marlene Cepparo, ON ^{1*}	Lucy Iacovelli, ON ¹	Martin Sorensen, ON ^{2*}
Grace Chow, ON ¹	Soraya Jamal, BC ²	Sean Sprackett, QC ¹
Michael Coburn, BC ²	Dean Landry, ON ^{1*}	Linda Tang, ON ¹
Giancarlo Di Maio, ON ¹	Rick McLean, ON ¹	John Tobin, ON ²
Nancy Diep, AB ²	Stefanie Morand, ON ²	Hugh Woolley, BC ¹
Marie-Claire Dy, BC ²	Michael Munoz, AB ³	Barb Worndl, ON ^{2*}
Olivier Fournier, QC ²		

* Executive Committee of the Board of Governors

Comité de direction du conseil des gouverneurs

¹ Nominee of the Chartered Professional Accountants of Canada

² Nominee of the Canadian Bar Association

³ Non-sponsor

■ OFFICERS/MEMBRES DE LA DIRECTION

Chair/ <i>Présidente du conseil</i>	Barb Worndl
Vice-Chair and Chair of the Executive Committee/ <i>Vice-présidente du conseil et présidente du comité de direction</i>	Marlene Cepparo
Second Vice-Chair/ <i>Deuxième vice-présidente</i>	Cathie Brayley
Past Chair/ <i>Présidente sortant du conseil</i>	Alycia Calvert
Executive Director and Chief Executive Officer/ <i>Directrice exécutive et chef de la direction</i>	Heather Evans
Director, Membership Development and Community Relations/ <i>Directeur, Développement du programme de l'adhésion et relations avec la communauté</i>	Wayne Adams
Regional Director, Quebec/ <i>Directrice régionale du Bureau du Québec</i>	Lucie Bélanger
Director of Finance and Treasurer/ <i>Directrice financière et trésorière</i>	Shelly Ali

■ STAFF/PERSONNEL

Director of Communications and Special Projects/ <i>Directrice des communications et projets spéciaux</i>	Roda Ibrahim
Librarian/ <i>Bibliothécaire</i>	Judy Singh
Managing Editor/ <i>Directeur de la rédaction</i>	Michael Gaughan

■ CANADIAN TAX FOUNDATION PUBLICATIONS

The Foundation's publications comprise a range of forms and delivery formats. A number of the regularly issued publications are distributed without charge to Foundation members: the *Canadian Tax Journal* (4 issues), *Perspectives on Tax Law & Policy* (4 issues, delivered electronically), *Tax for the Owner-Manager* (4 issues, delivered electronically), *Canadian Tax Focus* (4 issues, delivered electronically), and the annual conference report. Monographs and books may be purchased on the Foundation's website at www.ctf.ca.

CANADIAN TAX JOURNAL — issued quarterly to members via www.ctf.ca (Non-Members \$75 per copy, \$343.75 per year).

NEWSLETTERS

Perspectives on Tax Law & Policy — issued quarterly to members via www.ctf.ca.

Tax for the Owner-Manager — issued quarterly to members via www.ctf.ca.

Canadian Tax Focus — issued quarterly; available to members and non-members via www.ctf.ca.

Canadian Tax Highlights — archives (2000-2019) available to members via www.ctf.ca.

CONFERENCE REPORTS — Reports of the proceedings of annual tax conferences (Members \$40; Non-Members \$95). Latest issue: 2019 (Members \$40; Non-Members \$350).

— *Tax Dispute Resolution, Compliance, and Administration in Canada: Proceedings of the June 2012 Conference* (Members \$30; Non-Members \$195)

— Collections of papers delivered at regional and special tax conferences (British Columbia, Prairie Provinces, Ontario, and Atlantic Provinces) are available in USB format (Members \$445; Non-Members \$495).

FINANCES OF THE NATION — Review of expenditures and revenues and some budgets of the federal, provincial, and local governments of Canada. PDFs for the years 2002-2012 are available on the CTF website at no cost. In 2014, "Finances of the Nation" began to appear as a feature in issues of the *Canadian Tax Journal*.

MONOGRAPHS

2021. *The General Anti-Avoidance Rule: Past, Present, and Future*, Brian J. Arnold, ed. (\$90 each)

2020. *Taxation of Private Corporations and Their Shareholders*, 5th edition, Rachel Gervais, John Sorensen, David Stevens, and Dave Walsh, eds. (Members and Non-Members \$170; Students \$70)

2019. *Funding the Canadian City*, Enid Slack, Lisa Philipps, Lindsay M. Tedds, and Heather L. Evans, eds. (\$40 each)

2018. *Tax Treaties After the BEPS Project: A Tribute to Jacques Sasseville*, Brian J. Arnold, ed. (Members \$60; Non-Members \$90)

2018. *Reforming the Corporate Tax in a Changing World*, School of Public Policy of the University of Calgary (Members \$30; Non-Members \$50)

2017. *Income Tax at 100 Years: Essays and Reflections on the Income War Tax Act*, Jinyan Li, J. Scott Wilkie, and Larry F. Chapman, eds. (Members \$60; Non-Members \$90)

2016. *Reform of the Personal Income Tax in Canada*, School of Public Policy of the University of Calgary (Members \$35; Non-Members \$50)

2016. *Canadian Taxation of Trusts*, Elie S. Roth, Tim Youdan, Chris Anderson, and Kim Brown (Members \$150; Non-Members \$200; Students \$50)

2016. *User Fees in Canada: A Municipal Design and Implementation Guide*, Catherine Althaus and Lindsay M. Tedds (\$40 each)

2015. *Timing and Income Taxation*, 2d edition, Brian J. Arnold, Colin Campbell, Michael Hiltz, Richard Marcovitz, Shawn D. Porter, and James R. Wilson (Members \$25; Non-Members \$125; Students \$25)

2015. *Effective Writing for Tax Professionals*, Kate Hawkins and Thomas E. McDonnell, qc (Members \$35; Non-Members \$40)

2014. *After Twenty Years: The Future of the Goods and Services Tax*, School of Public Policy of the University of Calgary (Members \$25; Non-Members \$35)
2013. *Essays on Tax Treaties: A Tribute to David A. Ward*, Guglielmo Maisto, Angelo Nikolakakis, and John M. Ulmer, eds. (\$100 each)
2012. *Tax Policy in Canada*, Heather Kerr, Ken McKenzie, and Jack Mintz, eds. (Members \$75; Non-Members \$100; Students \$50)
2011. *Canadian Tax Foundation Style Guide*, 5th edition (Members \$35; Non-Members \$40)
2011. *International Financial Reporting Standards: Their Adoption in Canada*, Jason Doucet, Andrée Lavigne, Caroline Nadeau, Jocelyn Patenaude, and Dave Santerre (Members \$30; Non-Members \$40)
2011. *Tax Expenditures: State of the Art — Selected Proceedings of the Osgoode 2009 Conference*, Lisa Philipps, Neil Brooks, and Jinyan Li, eds. (Members \$45; Non-Members \$55; Students \$30)
2010. *Taxation of Private Corporations and Their Shareholders*, 4th edition (Members \$75; Non-Members \$100; Students \$25)
- TAX PROFESSIONAL SERIES (Please specify title and author when ordering.)
2003. *The Taxation of Business Profits Under Tax Treaties*, Brian J. Arnold, Jacques Sasseville, and Eric M. Zolt, eds. (softcover edition, \$75)
2003. *International Taxation in the Age of Electronic Commerce: A Comparative Study*, Jinyan Li. Co-published with International Fiscal Association (Canadian Branch) (Members \$95; Non-Members \$145; Students \$45)
1999. *Countering Tax Treaty Abuses: A Canadian Perspective on an International Issue*, Nathalie Goyette (\$75 each)
- CANADIAN TAX PAPER SERIES (Please specify publication number when ordering.)
- No. 112: 2009. *Effective Responses to Aggressive Tax Planning: What Canada Can Learn from Other Jurisdictions*, Gilles N. Larin and Robert Duong, with a contribution from Marie Jacques
- No. 111: 2009. *Reforming Canada's International Tax System: Toward Coherence and Simplicity*, Brian J. Arnold (Members \$100; Non-Members \$125)
- No. 110: 2006. *Financing Education and Training in Canada*, 2d edition, Douglas Auld and Harry Kitchen
- No. 109: 2004. *The Canadian Federal-Provincial Equalization Regime: An Assessment*, Alex S. MacNevin
- No. 108: 2004. *Venture Capital and Tax Incentives: A Comparative Study of Canada and the United States*, Daniel Sandler
- No. 107: 2002. *Municipal Revenue and Expenditure Issues in Canada*, Harry M. Kitchen (Members \$20; Non-Members \$40)
- No. 106: 2002. *Taxes and the Canadian Underground Economy*, David E.A. Giles and Lindsay M. Tedds
- No. 105: 2000. *The Income Tax Treatment of Financial Instruments: Theory and Practice*, Tim Edgar
- No. 104: 1999. *Rationality in Public Policy: Retrospect and Prospect, A Tribute to Douglas G. Hartle*, Richard M. Bird, Michael J. Trebilcock, and Thomas A. Wilson, eds.
- No. 103: 1999. *Canadian Tax Policy*, 3d edition, Robin W. Boadway and Harry M. Kitchen
- No. 102: 1997. *Financing the Canadian Federation, 1867 to 1995: Setting the Stage*, David B. Perry
- No. 101: 1997. *General Payroll Taxes: Economics, Politics, and Design*, Jonathan R. Kesselman
- No. 100: 1995. *Growth of Government Spending in Alberta*, Paul Boothe
- No. 99: 1995. *Financing Education and Training in Canada*, Harry Kitchen and Douglas Auld
- SPECIAL STUDIES IN TAXATION AND PUBLIC FINANCE (Please specify publication number when ordering.)
- No. 2: 2000. *Gambling and Governments in Canada, 1969-1998: How Much? Who Plays? What Payoff?* François Vaillancourt and Alexandre Roy
- No. 1: 1998. *Federal-Provincial Tax Sharing and Centralized Tax Collection in Canada*, Ernest H. Smith

■ LES PUBLICATIONS DE LA FONDATION CANADIENNE DE FISCALITÉ

Les publications de la Fondation existent sous différentes formes et elles sont disponibles de diverses façons. Certaines de ces publications régulières sont distribuées gratuitement aux membres de la Fondation : la *Revue fiscale canadienne* (4 numéros), *Perspectives en fiscalité et en politique fiscale* (4 numéros, offerts électroniquement), *Actualités fiscales pour les propriétaires exploitants* (4 numéros, offerts électroniquement), *Canadian Tax Focus* (4 numéros, offerts électroniquement) et le Rapport de la conférence annuelle. Les livres et monographies peuvent être achetés sur le site Web de la Fondation www.fcf-ctf.ca.

REVUE FISCALE CANADIENNE — parution trimestrielle aux membres sur www.fcf-ctf.ca
(Non-membres 75 \$ par numéro, 343,75 \$ par année).

BULLETINS

Perspectives en fiscalité et en politique fiscale — parution trimestrielle disponible aux membres sur www.fcf-ctf.ca.

Actualités fiscales pour les propriétaires exploitants — parution trimestrielle disponible aux membres sur www.fcf-ctf.ca.

Canadian Tax Focus — parution trimestrielle disponible aux membres et non-membres sur www.fcf-ctf.ca.

Faits saillants en fiscalité canadienne — archives (2000-2019) accessibles aux membres sur www.fcf-ctf.ca.

RAPPORTS DES CONFÉRENCES — comptes rendus des conférences annuelles sur la fiscalité (Membres 40 \$; Non-membres 95 \$). Dernière édition : 2019 (Membres 40 \$; Non-membres 350 \$).

— *Tax Dispute Resolution, Compliance, and Administration in Canada: Proceedings of the June 2012 Conference* (Membres 30 \$; Non-membres 195 \$)

— Collections contenant les travaux présentés aux conférences régionales sur la fiscalité, soit British Columbia, Prairie Provinces, Ontario et Atlantic Provinces, sont disponibles en format USB (Membres 445 \$; Non-membres 495 \$).

FINANCES OF THE NATION — Analyse des recettes et dépenses, et quelques budgets, des gouvernements fédéral, provinciaux et locaux au Canada. Les copies PDF pour les années 2002-2012 sont disponibles sur le site Web de la FCF pour téléchargement gratuit. Dans le numéro 62:3 (2014), « *Finances of the Nation* » est apparu dans les éditions de la *Revue fiscale canadienne* à titre de nouvelle rubrique.

MONOGRAPHIES

2021. *The General Anti-Avoidance Rule: Past, Present, and Future*, Brian J. Arnold, éd.
(\$90 chacun)

2020. *Taxation of Private Corporations and Their Shareholders*, 5^{ième} édition, Rachel Gervais, John Sorensen, David Stevens et Dave Walsh, éd. (Membres et Non-membres 170 \$; Étudiants 70 \$)

2019. *Funding the Canadian City*, Enid Slack, Lisa Philipps, Lindsay M. Tedds et Heather L. Evans, éd. (\$40 chacun)

2018. *Tax Treaties After the BEPS Project: A Tribute to Jacques Sasseville*, Brian J. Arnold, éd.
(Membres 60 \$; Non-membres 90 \$)

2018. *Reforming the Corporate Tax in a Changing World*, l'École de politique publique de l'Université de Calgary (Membres 30 \$; Non-membres 50 \$)

2017. *Income Tax at 100 Years: Essays and Reflections on the Income War Tax Act*, Jinyan Li, J. Scott Wilkie et Larry F. Chapman, éd. (Membres 60 \$; Non-membres 90 \$)

2016. *Reform of the Personal Income Tax in Canada*, l'École de politique publique de l'Université de Calgary (Membres 35 \$; Non-membres 50 \$)

2016. *Canadian Taxation of Trusts*, Elie S. Roth, Tim Youdan, Chris Anderson et Kim Brown (Membres 150 \$; Non-membres 200 \$; Étudiants 50 \$)

2016. *User Fees in Canada: A Municipal Design and Implementation Guide*, Catherine Althaus et Lindsay M. Tedds (40 \$ chacun)

2015. *Timing and Income Taxation*, 2^{ième} édition, Brian J. Arnold, Colin Campbell, Michael Hiltz, Richard Marcovitz, Shawn D. Porter et James R. Wilson (Membres 25 \$; Non-membres 125 \$; Étudiants 25 \$)
2015. *Effective Writing for Tax Professionals*, Kate Hawkins et Thomas E. McDonnell, QC (Membres 35 \$; Non-membres 40 \$)
2014. *After Twenty Years: The Future of the Goods and Services Tax*, l'École de politique publique de l'Université de Calgary (Membres 25 \$; Non-membres 35 \$)
2013. *Essays on Tax Treaties: A Tribute to David A. Ward*, Guglielmo Maisto, Angelo Nikolakakis et John M. Ulmer, eds. (100 \$ chacun)
2012. *Tax Policy in Canada*, Heather Kerr, Ken McKenzie et Jack Mintz, eds. (Membres 75 \$; Non-membres 100 \$; Étudiants 50 \$)
2011. *Canadian Tax Foundation Style Guide*, 5^{ième} édition (Membres 35 \$; Non-membres 40 \$)
2011. *International Financial Reporting Standards: Their Adoption in Canada*, Jason Doucet, Andrée Lavigne, Caroline Nadeau, Jocelyn Patenaude et Dave Santerre (Membres 30 \$; Non-membres 40 \$)
2011. *Tax Expenditures: State of the Art — Selected Proceedings of the Osgoode 2009 Conference*, Lisa Philipps, Neil Brooks et Jinyan Li, eds. (Membres 45 \$; Non-membres 55 \$; Étudiants 30 \$)
2010. *Taxation of Private Corporations and Their Shareholders*, 4^{ième} édition (Membres 75 \$; Non-membres 100 \$; Étudiants 25 \$)
- COLLECTION TAX PROFESSIONAL (Prière d'indiquer le titre et le nom de l'auteur sur votre commande.)
2003. *The Taxation of Business Profits Under Tax Treaties*, Brian J. Arnold, Jacques Sasseville et Eric M. Zolt, eds. (édition brochée, 75 \$)
2003. *International Taxation in the Age of Electronic Commerce: A Comparative Study*, Jinyan Li. Publié en collaboration avec l'Association fiscale internationale (chapitre canadien). (Membres 95 \$; Non-membres 145 \$; Étudiants 45 \$)
1999. *Contrer l'abus des conventions fiscales : Point de vue canadien sur une question internationale*, Nathalie Goyette (75 \$ chacun)
- CANADIAN TAX PAPER SERIES (Prière d'indiquer le numéro de la publication.)
- N° 112 : 2009. *Des réponses efficaces aux planifications fiscales agressives : leçons à retenir des autres juridictions*, Gilles N. Larin et Robert Duong, avec la contribution de Marie Jacques
- N° 111 : 2009. *Reforming Canada's International Tax System: Toward Coherence and Simplicity*, Brian J. Arnold (Membres 100 \$; Non-membres 125 \$)
- N° 110 : 2006. *Financing Education and Training in Canada*, 2^{ième} édition, Douglas Auld et Harry Kitchen
- N° 109 : 2004. *The Canadian Federal-Provincial Equalization Regime: An Assessment*, Alex S. MacNevin
- N° 108 : 2004. *Venture Capital and Tax Incentives: A Comparative Study of Canada and the United States*, Daniel Sandler
- N° 107 : 2002. *Municipal Revenue and Expenditure Issues in Canada*, Harry M. Kitchen (Membres 20 \$; Non-membres 40 \$)
- N° 106 : 2002. *Taxes and the Canadian Underground Economy*, David E.A. Giles et Lindsay M. Tedds
- N° 105 : 2000. *The Income Tax Treatment of Financial Instruments: Theory and Practice*, Tim Edgar
- N° 104 : 1999. *Rationality in Public Policy: Retrospect and Prospect, A Tribute to Douglas G. Hartle*, Richard M. Bird, Michael J. Trebilcock et Thomas A. Wilson, eds.
- N° 103 : 1999. *Canadian Tax Policy*, 3^{ième} édition, Robin W. Boadway et Harry M. Kitchen
- N° 101 : 1997. *General Payroll Taxes: Economics, Politics, and Design*, Jonathan R. Kesselman
- N° 102 : 1997. *Financing the Canadian Federation, 1867 to 1995: Setting the Stage*, David B. Perry
- N° 100 : 1995. *Growth of Government Spending in Alberta*, Paul Boothe
- N° 99 : 1995. *Financing Education and Training in Canada*, Harry Kitchen et Douglas Auld
- SPECIAL STUDIES IN TAXATION AND PUBLIC FINANCE SERIES (Prière d'indiquer le numéro de la publication.)
- N° 2 : 2000. *Gambling and Governments in Canada, 1969-1998: How Much? Who Plays? What Payoff?* François Vaillancourt et Alexandre Roy
- N° 1 : 1998. *Federal-Provincial Tax Sharing and Centralized Tax Collection in Canada*, Ernest H. Smith

Statute-Barred Date: Why Isn't There Always One?

Grace Chow and Henry Shew*

PRÉCIS

La Loi de l'impôt sur le revenu du Canada impose des limites à la période pendant laquelle le ministre est autorisé à établir une cotisation ou une nouvelle cotisation pour un contribuable. En général, le délai de prescription pour l'établissement d'une cotisation ou d'une nouvelle cotisation est de trois ou quatre ans à compter de la date de la cotisation initiale. Cet article traite des nombreuses dispositions de la Loi qui donnent au ministre le pouvoir d'établir une cotisation ou une nouvelle cotisation sans préciser de délai de prescription. Les auteurs regroupent ces dispositions en catégories selon les circonstances qu'elles visent. Dans ce cadre, ils examinent la raison d'être de l'omission d'un délai de prescription et se demandent si cette politique est justifiée. Les auteurs abordent ensuite brièvement les positions de l'Agence du revenu du Canada et des tribunaux en ce qui concerne l'établissement de cotisations au-delà du délai de prescription habituel, ainsi que les options offertes aux contribuables qui cherchent à apporter des modifications à une déclaration frappée de prescription. Enfin, les auteurs présentent leurs recommandations pour la modification de certaines dispositions où un délai de prescription serait justifié.

ABSTRACT

The Canadian Income Tax Act imposes limitations on the time period during which the minister is allowed to assess or reassess a taxpayer. Generally, the limitation period for assessment or reassessment is three or four years from the date of the original assessment. This article addresses the many provisions in the Act that give the minister the authority to assess or reassess without specifying a limitation period. The authors group these provisions into categories according to the circumstances that they address. Within this framework, they review the rationale behind the omission of a limitation period and consider whether that policy is justified. The authors then provide a summary discussion of the positions of the Canada Revenue Agency and the courts with respect to assessment beyond the normal limitation period, and the options available to taxpayers who seek to make changes to a statute-barred return. Finally, the authors present their

* Of Cadesky Tax, Toronto (e-mail: GChow@Cadesky.com and HShew@Cadesky.com). We wish to thank Daniel Sandler, Alan Macnaughton, Brian Carr, and two anonymous reviewers for their valuable input and helpful comments.

recommendations for the amendment of specific provisions where a limitation period would be justified.

KEYWORDS: ASSESSMENTS ■ REASSESSMENTS ■ STATUTE-BARRED ■ LIMITATION PERIOD ■ TAX ADMINISTRATION ■ ELECTIONS

CONTENTS

Introduction	689
Overview of Provisions Without a Limitation Period	690
“At Any Time”	691
“Notwithstanding”	692
Specific Provisions Without a Limitation Period	693
Lack of Information or Returns Not Filed	694
Provincial Limitation Periods	695
Different Types of Returns	697
No Requirement To File a Return	697
Aggressive Tax Planning	699
Tax Shelters	700
Contingent Amounts	702
“Zapper Penalties”	703
Collection of Taxes	704
Payroll Obligation	705
Part XIII Tax	705
Sale of Taxable Canadian Property	707
Distribution by a Legal Representative	708
Director’s Liability	708
Joint and Several Liability	709
Excess Refunds and Interest	711
Information Reporting in Respect of the Collection of Taxes	712
Subsequent Events	715
Inadequate Consideration in Respect of a Transfer	715
Election for Deemed Outlay or Expense	716
Involuntary Disposition of Resource Property	717
Spousal Attribution Election on Emigration	718
Unwinding of Deemed Disposition upon Return to Canada	719
Section 119 Credit: Former Resident Credit for Tax Paid	720
Other Post-Emigration Dispositions	721
Other Election-Based Provisions	721
Excessive Capital Dividend and Eligible Dividend	722
Part VI.1 Election	723
Late-Filed Election Under Subsection 220(3.2): Fairness	725
Agreement to a Transfer of a Forgiven Amount: Section 80.04	726
Foreign Spinoff: Section 86.1	727
Other Matters	729
Tax Attribute Balances	729
Non-Deductibility of Illegal Payments	731
Donation of Cultural Property or Ecological Property	732
Disposition of Appeal on Consent	734

The Positions of the CRA and the Courts on Reassessment Beyond the Normal Reassessment Period	734
Can a Taxpayer Make Changes to a Statute-Barred Return?	736
Changes Not Affecting Tax, Interest, or Penalties	736
Statute-Barred Refunds	737
Limitations on Objections	738
Consequential Assessments of Statute-Barred Years	739
Record Keeping	740
Conclusion and Recommendations	741

INTRODUCTION

The concept of a limitation period is not unique to taxation. Statutes of limitations originated in ancient Roman law,¹ which provided a title to property by use after the passage of time.² Limitation periods later emerged in several different areas of law, including criminal law, family law, employment law—and, of course, taxation. There are several reasons underlying the application of limitation periods.³ The main reason for the existence of a limitation period is to bring fairness to the defendant, who should be entitled to mount a defence when witnesses and evidence are still fresh.

The Income Tax Act (Canada)⁴ imposes limitations on the time period during which the minister is allowed to assess or reassess⁵ a taxpayer for amounts payable under the Act. The principal limitation period, often referred to as “the normal reassessment period,” is generally three or four years (depending on the type of taxpayer) from the date of the original assessment for a taxation year.⁶

The importance of such a limitation period in taxation is supported by Canadian jurisprudence. As stated by the Supreme Court of Canada in the *Markevich* case, “[l]imitation periods . . . are meant to promote certainty, avoid stale evidence, encourage diligence, and bring repose.”⁷

1 Paul D. Swanson, “Limitless Limitations: How War Overwhelms Criminal Statutes of Limitations” (2012) 97:6 *Cornell Law Review* 1557-85, at 1562. See also Valrie Chambers, Cynthia Bolt-Lee, and Brian Elzweig, “The Effect of a Taxpayer Advocate Order on Tolling the Taxpayer Statute of Limitations” (2016) 41:2 *Oklahoma City University Law Review* 119-53.

2 The first known instance in which fixed time limitation periods were established has been traced to the 1540s; see “Developments in the Law—Statutes of Limitations” (1950) 63:7 *Harvard Law Review* 1177-1270, at 1185.

3 There are, however, difficulties in ascertaining all of the purposes of creating these limitation periods. This can be seen in Suzette M. Malveaux, “Statutes of Limitations: A Policy Analysis in the Context of Reparations Litigation” (2005) 74:1 *George Washington Law Review* 68-122.

4 RSC 1985, c. 1 (5th Supp.), as amended (herein referred to as “the Act”). Unless otherwise stated, statutory references in this article are to the Act.

5 Except where specifically provided herein, the reference to “assessment” includes a reassessment, in accordance with the definition of “assessment” in subsection 248(1).

6 Subsection 152(3.1), the definition of “normal reassessment period.”

7 *Markevich v. Canada*, 2003 SCC 9, at paragraph 17.

Without a general limitation on the minister's right to assess, taxation years would always be open to potential reassessment, and there would be no certainty as to the final tax liability.⁸ As a result, taxpayers may be unable to allocate their financial resources and organize their affairs efficiently.

Given the importance of having a limitation period, why does Parliament grant the minister, in certain circumstances, the right to assess or reassess a taxpayer beyond the normal reassessment period? One such exception is contained in subparagraph 152(4)(a)(i), which applies where a taxpayer has made "any misrepresentation that is attributable to neglect, carelessness or wilful default or has committed any fraud." The subject of misrepresentation has been covered extensively by other authors⁹ and is not the focus of this article. Instead, in this article we explore the many other provisions that allow the minister to assess or reassess without providing any limitation period. These provisions give rise to a taxation year that would never become statute-barred and would thus result in no tax certainty.

We begin this article with an overview of how the legislation has come to include provisions with no limitation on the right to assess, followed by a review of the reasoning behind the specific provisions, and consideration of whether the omission of a limitation period is justified in the circumstances. We then provide a summary discussion of the positions of the Canada Revenue Agency (CRA) and the courts on assessment beyond the normal reassessment period, the options available to a taxpayer who wants to make changes to a statute-barred return, and certain other implications following from the absence of a limitation period. Finally, we provide our recommendations for the amendment of the Act in circumstances where, in our view, a limitation period would be justified. We also identify one scenario in which we think there should be no limitation period. We hope that this article will stimulate additional discussion of the policy rationale behind a limitation period.

OVERVIEW OF PROVISIONS WITHOUT A LIMITATION PERIOD

The absence of a limitation period for tax purposes in certain circumstances dates back to the 1927 Income War Tax Act.¹⁰ However, until around 1994, the circumstances in which there was no limitation period were restricted to situations where there was a false or missing statement¹¹ (as in a "misrepresentation") or, in some cases, the imposition of joint and several liability. There are two phrases that are often used in the Act to indicate that there is no limitation period: "at any time" and "notwithstanding." These are discussed in more detail below.

8 Although a reassessment itself does not create the tax liability, the liability cannot be crystallized if a return may be reassessed many years after a transaction has occurred.

9 For example, see Robert Kopstein and Rebecca Levi, "When Should the Courts Allow Reassessments Beyond the Limitation Period" (2010) 58:3 *Canadian Tax Journal* 475-527.

10 RSC 1927, c. 97.

11 Ibid., section 55.

“At Any Time”

The phrase “at any time” in the context of assessments appears in a number of provisions. In plain English, “at any time” means at a time that is not or does not need to be decided or agreed.¹² In other words, this phrase allows the minister a right to assess a taxpayer at any particular time even if the time to raise an assessment for the taxation year is beyond the normal reassessment period.

The phrase “at any time” was originally used in this context in section 55 of the Income War Tax Act in 1927¹³ and has become more widely used since 1994.¹⁴ In *Debou*, the Tax Court of Canada discussed in depth the use of the phrase and stated,

Clearly, the words “at any time” form a substantive part of each assessing provision in the *Act* in which they are found. They have the effect of making the normal reassessment period inapplicable and, thereby, greatly expand the Minister’s power of assessment.¹⁵

This view is supported by *Davis*, in which McArthur J summarized the meaning of the phrase and stated, “I am satisfied that the words ‘at any time’ provide a freedom to assess without the restrictions of ‘with all due dispatch’ regardless of the lapse of time since the assessment at issue is an original assessment.”¹⁶

The phrase “at any time” is also used in other tax contexts. In the Excise Tax Act¹⁷ (ETA), for example, the phrase “recoverable . . . at any time” appears numerous times. The Federal Court Trial Division in *EH Price* held that

[t]he frequency with which the provision for recovery of money at any time has occurred suggests . . . that it is the policy of parliament that in circumstances of these types the Crown’s long time prerogative right of not being subject to rules of limitation should be and is intended to be preserved.¹⁸

Smith J went on to state that he was

12 *Cambridge Essential English Dictionary*, 2d ed., definition of “anytime.”

13 In section 55, the minister was already given the power to assess a person for tax liability at any time if that person made an incorrect or false return or did not pay the tax in whole or in part. This provision was later transcribed to subsection 42(4) of the Income Tax Act, 1948, SC 1948, c. 52.

14 Prior to 1994, and apart from what was contained in the Income War Tax Act as noted above, the power allowing the minister to assess at any time was used only in subsections 160(2), 160.2(3), 160.3(2), and 191.3(5) in respect of joint and several liabilities, and in subsections 160.1(3), 164(3.1), and 164(4) in respect of excess interest payments. These provisions are discussed in more detail later in the article.

15 *Debou v. MNR*, [1999] 4 CTC 2382, at paragraph 17 (TCC).

16 *Davis et al. v. The Queen*, [1994] 2 CTC 2033, at paragraph 11 (TCC).

17 RSC 1985, c. E-15, as amended.

18 *EH Price Ltd. v. MNR*, [1982] 2 FC 518, at paragraph 25 (FCTD).

unable to find anything in the words “at any time,” as used in all these statutes from which [he] could conclude that they are not intended to have their grammatical meaning.¹⁹

On the basis of the comments set out above, it is clear that the use of the words “at any time” allows the minister the right to assess or reassess a taxpayer without being subject to any limitation period.

“Notwithstanding”

The phrase “at any time” is not the only expression in the Act that provides the minister with the power to assess a taxpayer without a limitation period. In several provisions of the Act, a variation of the following phrase (referred to herein as “the notwithstanding phrase”) produces a similar result: “Notwithstanding subsections . . . , such assessments, determinations and redeterminations may be made as are necessary to give effect to.”

Rather than directly stating that the minister could assess “at any time,” the notwithstanding phrase provides an exception to the application of the statutory limitation period set out in the specified provisions. The notwithstanding phrase has been used most frequently since 1994²⁰ and seems to apply to assessments, determinations, and redeterminations in order to give effect to certain sections or subsections, or to take into account certain elections or agreements.

Our observation is that all of the provisions that use the words “at any time” seem to deal with an amount payable in respect of, for example, joint and several liability, withholding taxes, or excess refund, and they all involve initial assessments.

The notwithstanding phrase includes the words “as are necessary.” Whether this language restricts the minister to assessment or reassessment beyond the normal reassessment period was discussed in great detail in *Tolboek*.²¹ This case involved tax shelter arrangements and the application of subsection 143.2(15), which provides that “notwithstanding subsections 152(4) to (5), such assessments, determinations and redeterminations may be made as are necessary to give effect to [section 143.2].”

The Tax Court summarized the arguments of the taxpayer (“the Appellant”) as follows:

The Appellant maintained that subsection 143.2(15) should not apply . . . because it was not “necessary” for the Minister to have reassessed beyond the normal limitation period, and characterized the phrase “as are necessary” contained in this provision as substantially limiting the Minister’s ability to reassess outside the limitation period.

. . . The Appellant argued that the purpose of this provision is to grant the Minister additional time to reassess when facts occur subsequent to the expiration of the normal

19 Ibid.

20 Some provisions that we are aware of that used this “notwithstanding” phrase before 1994 are subsection 12(2.2) and certain elections in relation to part VI.1 tax.

21 *Tolboek v. The Queen*, 2006 TCC 681, at paragraph 64; aff’d 2008 FCA 128.

period and that this subsection was not intended to compensate the Minister for missing the deadline due to a shortage of auditors.²²

The Crown, on the other hand, argued that

the meaning of the provision may be discerned from a plain reading of the text of subsection 143.2(15), and the phrase “as are necessary” merely restricts the extent or nature of the reassessment and not the ability to reassess.²³

The court undertook a textual, contextual, and purposive analysis of subsection 143.2(15) and concluded that the words “as are necessary”²⁴ cannot be the dominant interpretive factor. The court further found that “these words represent a slender restriction”²⁵ on the minister’s otherwise broad judgment and discretion to reassess under subsection 143.2(15). It stated that given that Parliament understands the complexity of tax shelters and that the minister requires more time to perform an appropriate audit, the words “as are necessary” cannot possibly restrict the ability of the minister to reassess beyond the normal limitation period. The court dismissed the argument that the qualification of the provision depends on the timing and availability of particular facts and information to the minister.

The Federal Court of Appeal confirmed this decision, although it commented, without elaboration, that the lower court decision did not permit the minister to reassess under subsection 143.2(15) without any limitation.²⁶

SPECIFIC PROVISIONS WITHOUT A LIMITATION PERIOD

We now turn to the specific provisions²⁷ that grant the minister the right to assess or reassess beyond the normal reassessment period without any limitation. For the purposes of this review, we have grouped the various provisions into broad categories according to the circumstances that they address. We discuss the policy intent behind the provisions and provide our views on whether the absence of a limitation period is justified.

22 Ibid. (TCC), at paragraphs 66-67.

23 Ibid., at paragraph 72.

24 Or in French “voulue(s),” meaning “as required by the circumstances.”

25 *Tolboek*, supra note 21 (TCC), at paragraph 87.

26 Ibid. (FCA), at paragraph 69.

27 In this article, we discuss all the provisions that include the “at any time” or “notwithstanding” phrase with the exception of subsections 146(8.01) (regarding a withdrawal from a home buyers’ plan [HBP] or a lifetime learning plan [LLP]) and 227(10.01) (regarding part XII.5 tax). A detailed review of the operation of each of the provisions considered is beyond the scope of this article.

Lack of Information or Returns Not Filed

The inclusion of a limitation period establishes a fixed period of time during which the CRA may examine the activities of a taxpayer and make assessments or reassessments if necessary. As discussed above, generally the normal reassessment period is three or four years from the day of sending of a notice of an original assessment under part I of the Act for a taxpayer liable to tax or the day of sending of an original notification that no tax is payable by the taxpayer for the year.²⁸ If a tax return for a particular taxation year is not filed, no assessment will be issued; therefore, the taxation year will not become statute-barred until such time as a return is filed and assessed—at which time the clock will start ticking.²⁹

A similar result arises in the case of a partnership. Under the Act, a partnership is not itself liable for tax; instead, the income or loss of the partnership is allocated to its members and then included in the computation of the members' taxable income.³⁰ In assessing the tax liability of the partnership's members, the minister may make a determination of the income or loss of the partnership, or any deduction or other amount or any other matter in respect of the partnership, for the fiscal period that is relevant in determining the income or taxable income of its members. The determination must be made within three years after the later of the day on which the partnership is required to file a return and the day on which the return is filed.³¹ The CRA has confirmed that

[i]n situations where the partnership return [of income] has been filed and the Minister has not made a determination within the timeframe provided by subsection 152(1.4), a determination can only be made if one of the exceptions in 152(4) is applicable.³²

However, the time period allowed for making a determination will not start until *the later of* the due date for filing a partnership return and the actual filing date of such a return. Therefore, if a partnership return is not filed, the assessment period for the partners will not expire until one year and 90 days after a determination has been issued to the partnership under subsection 152(1.4).³³

There are also comparable rules that apply to information returns required to be filed for tax shelters under subsection 237.1(7)³⁴ and for reportable transactions

28 Subsection 152(3.1), the definition of “normal reassessment period,” and subsection 152(4).

29 Recently enacted paragraph 152(4)(b.3) imposes no limitation on the reassessment period if there is an omission of reporting of a disposition of real or immovable property (whether situated in Canada or not). The three-year limitation period starts only after the taxpayer has filed a prescribed form amending the prior return and reporting the disposition.

30 Paragraphs 96(1)(f) and (g).

31 Subsection 152(1.4).

32 CRA document nos. 2018-0739141I7, April 17, 2018, and 2017-0734751I7, April 17, 2018.

33 Paragraph 152(1.7)(b).

34 Subsection 237.1(7.5) assesses a penalty against every person who fails to comply with the requirement under subsection 237.1(7), equal to 25 percent of the greater of the consideration

under subsection 237.3(2).³⁵ If these returns are not filed as required, an assessment, reassessment, or additional assessment can be made in respect of the relevant taxation year before the day that is three years after the day on which the information return is filed.³⁶ This extended period of reassessment will not start until the relevant information return has been filed.

The policy intent behind these provisions is quite clear. Canada has a self-assessment system, and there should be checks and balances to allow the minister to examine the activities of a taxpayer. Hence, there needs to be sufficient information provided to the minister so that this examination can take place. If an income tax return, a partnership return, or an information return (as the case may be) is not filed, the information is not available, and the minister should not be precluded from reassessing a taxpayer because of the lack of information.

When viewed in this light, it appears entirely reasonable that a taxation year is not statute-barred until the necessary information is made available to the minister. However, things are not quite so straightforward, as can be seen below.

Provincial Limitation Periods

Quebec is the only province where a taxpayer is required to file a separate personal income tax return, and only Quebec and Alberta require separate corporate tax returns. In all other provinces, the filing of income tax returns and tax collection are administered federally. The question of whether an assessment of federal tax would imply that the limitation period will also apply to the provincial tax was addressed on two occasions.

A 2013 technical interpretation considered a situation in which it was determined after the federal normal reassessment period that a taxpayer was a resident of Ontario and should have been subject to Ontario tax.³⁷ In that situation, the CRA concluded that because there was neither an Ontario tax assessment nor a notice that no Ontario tax was payable, an assessment for Ontario taxes could still be issued and was not restricted by subsection 152(4) of the Act. The situation, however, seems

received by the promoter of the tax shelter and, if it is a gifting arrangement, the value of the property subject to the donation. This penalty may be assessed at any time, pursuant to paragraph 227(10)(b).

35 Subsection 237.3(8) assesses a penalty against every person who fails to file or late-files an information return under subsection 237.3(2), equal to the success fee or the fee for contractual protection. This penalty may be assessed at any time, pursuant to paragraph 227(10)(b).

36 Paragraph 152(4)(b.1) provides that an income tax return for a year in which a deduction or claim is made in relation to a tax shelter is not statute-barred until three years from the day on which the required information return under subsection 237.1(7) is filed. Paragraph 152(4)(b.1) also provides that a taxpayer's income tax return in which a deduction or claim is made in respect of a tax benefit (as defined in subsection 245(1)) is not statute-barred until three years after the day on which the information return required under subsection 237.3(2) is filed.

37 CRA document no. 2013-0476501I7, March 15, 2013.

to apply to a taxation year prior to 2009, when a separate return was required for Ontario purposes.

A recent Quebec court decision also confirmed that the limitation period for Quebec will not start if no Quebec tax return has been filed. In *Rousseau*,³⁸ a taxpayer had filed his tax return as a resident of Alberta. However, the taxpayer was later reassessed, and it was confirmed that he remained a resident of Quebec. The taxpayer argued that (1) the auditors from Revenu Québec (RQ) could not reassess him beyond the limitation period provided under Quebec's Regulation Act because his spouse remained a resident of Quebec, and (2) his spouse's tax return should have provided sufficient notification for RQ's auditors to undertake an audit within the regular limitation period. The Quebec Court of Appeal dismissed the appeal on the grounds that the absence of the taxpayer's return could not allow him to benefit from the limitation period provided by the provincial statute, and the spouse's return would not provide the prescribed information for the auditors to conduct an audit on the taxpayer's return.

For provinces that do not require a separate tax return, the provincial income tax acts generally adopt the federal tax administration provisions.³⁹ Therefore, since the federal government has the responsibility for the administration of all provincial tax returns other than Quebec's (both personal and corporate tax returns) and Alberta's (corporate tax returns only), the normal reassessment period for federal purposes should also apply provincially where no separate returns are required to be filed.

Where there has been a reallocation of income provincially for corporations, the minister may issue an assessment, reassessment, or additional assessment on or before the day that is one year from the later of the day on which the minister is advised of the provincial reassessment and 90 days after the date of the notice of provincial reassessment.⁴⁰ This will allow an adjustment to be made to the assessment of tax in the province to or from which the income is reallocated. For example, if Quebec or Alberta issues a reassessment to a corporate taxpayer beyond the normal reassessment period for federal purposes such that more income is reallocated to Ontario, the minister will be able to reassess the corporate taxpayer for additional income in Ontario under this provision. This provision does not apply to individuals.

38 *Rousseau c. Agence du revenu du Québec*, 2020 QCCA 1308.

39 For example, section 1(8) of the British Columbia Income Tax Act (RSBC 1996, c. 215, as amended) makes reference to the definition of "return of income" in subsection 122.5(1) of the federal Act. The definition of "return of income" then becomes a relevant term in section 29 of the British Columbia Income Tax Act, which is a provision that adopts the federal administrative provisions. Similarly, in Ontario, section 10(1) of the provincial Income Tax Act (RSO 1990, c. I.2) references the federal administrative provisions.

40 Paragraph 152(4)(d).

Different Types of Returns

A statute-barred assessment under part I in respect of a return filed under subsection 216(1) does not result in the taxation year being statute-barred for tax under part I relating to other sources of income. In a 2002 technical interpretation, the CRA considered whether the assessment of a return filed by a taxpayer as a non-resident under subsection 216(1) commenced the normal reassessment period for part I tax that may otherwise have been payable by the taxpayer.⁴¹ The taxpayer was subsequently determined to be a resident of Canada and subject to tax on his or her worldwide income, including employment income earned outside Canada. The CRA concluded that the minister was not precluded from reassessing the taxpayer on the employment income. Key to this result was the fact that subsection 216(1) specifically provides that the election does not affect the liability of the non-resident person for tax otherwise payable under part I. It was therefore concluded that “a return filed under subsection 216(1) of the Act [is] separate and distinct from any other return under Part I of the Act” and

an assessment in respect of a return . . . under subsection 216(1) of the Act should be regarded as an assessment separate and distinct from any other assessment under Part I of the Act in respect of income from sources other than those referred to in paragraph 216(1)(b) of the Act.⁴²

No Requirement To File a Return

The Act allows an exception to the requirement to file an income tax return where certain conditions are met. This gives rise to the question of whether the taxation years in these situations should never become statute-barred. The conditions for the exception from the requirement to file a return are as follows:

- For corporations, only a corporation that was a registered charity throughout the year is excepted from filing an income tax return.⁴³
- For individuals (other than trusts) who are Canadian residents, the individual must have no tax payable, must not have a taxable capital gain, and must not have disposed of capital property, and the balance (if any) in the individual's home buyer's plan (HBP) or lifetime learning plan (LLP) (as those terms are defined in subsections 146.01(1) and 146.02(1)) at the end of the taxation year must not be positive.⁴⁴

41 CRA document no. 2002-0146627, September 20, 2002.

42 Ibid.

43 Paragraph 150(1.1)(a).

44 Paragraph 150(1.1)(b).

- For individuals (other than trusts) who are non-residents, the individual must have no tax payable, must not have a taxable capital gain (other than from a disposition of an excluded property), and must not have disposed of “taxable Canadian property”⁴⁵ (other than an excluded property), and the individual’s HBP balance or LLP balance at the end of the taxation year must not be positive.⁴⁶
- For trusts, the same rules described above for individuals apply; however, proposed amendments have been introduced that would apply to taxation years ending after December 30, 2021, and would require all express trusts that are Canadian residents (other than certain limited categories of trusts such as mutual fund trusts and graduated rate estates) to file a T3 form⁴⁷ and to fulfill additional reporting requirements, regardless of whether they otherwise meet one of the exceptions in subsection 150(1.1).⁴⁸ The reasons provided for the introduction of the new reporting requirement are that “[a]uthorities require sufficient information in order to determine taxpayers’ tax liabilities and to effectively counter aggressive tax avoidance as well as tax evasion, money laundering and other criminal activities.”⁴⁹ The information required, however, goes well beyond the reporting of income and taxes payable.⁵⁰

For partnerships, the Income Tax Regulations provide that

all partnerships that carry on business in Canada or are Canadian partnerships or specified investment flow-through (SIFT) partnerships, must file a partnership information return. However, under CRA administrative policy, certain partnerships that carry on business in Canada or are Canadian partnerships are not required to file a partnership information return.⁵¹

The administrative exception to filing applies to a partnership (other than a tiered partnership) with a combined total value of revenue and expenses of \$2 million or less and assets of \$5 million or less.⁵² The rationale behind this policy is to reduce the burden of the reporting requirement for “small” partnerships.

45 As defined in subsection 248(1).

46 Paragraph 150(1.1)(b).

47 CRA form T3, “Trust Income Tax and Information Returns.”

48 Proposed subsection 150(1.2) and proposed regulation 204.2.

49 Canada, Department of Finance, 2018 Budget, Tax Measures: Supplementary Information, February 27, 2018, at 15.

50 Additional reporting is required under proposed regulation 204.2.

51 Canada Revenue Agency, *T4068 Guide for the Partnership Information Return (T5013 Forms)* (Ottawa: CRA, 2020), at 6, in respect of the requirement in regulation 229(1).

52 Ibid.

Regardless of whether the exception is met under subsection 150(1.1) or, instead, under the CRA's administrative policy, the particular taxpayer's taxation year will not be statute-barred. In our view, if (for example) a partnership fits within the conditions to be excluded from filing a partnership information return under the CRA's current policy and chooses not to file the return, there should be a specified limitation period in which the minister can reassess the taxpayer partners provided that all the conditions for the exception to filing have been met. We recommend that explicit amendments be made to the Act excluding the members of such partnerships from the requirement to file partnership information returns. This can be accomplished by amending subsection 152(1.4)—with necessary consequential amendments to subsection 152(1.5)—to exclude from the application of that provision a determination in respect of “small” partnerships.

Aggressive Tax Planning

It is a longstanding view of the government that “[a]ggressive tax planning arrangements entered into by some taxpayers can undermine the tax base and the fairness and integrity of the tax system.”⁵³ Not surprisingly, the normal reassessment period in this context may be extended in many situations,⁵⁴ and in some instances indefinitely, to ensure that the minister has sufficient time to review the information in connection with an identified aggressive tax-planning arrangement and determine the necessary assessment or reassessment. In this category, we have included the specific provisions that target aggressive tax-planning arrangements, which do not have a limitation period.

In general, we understand the policy intent behind these provisions and agree with not having a limitation period in order to combat aggressive tax planning. However, in one particular circumstance discussed below, we believe that it would be more reasonable to have a limitation period and therefore recommend that changes be considered.

53 Canada, Department of Finance, 2010 Budget, Tax Measures: Supplementary Information, March 4, 2010, at 27.

54 Note, however, that a reassessment applying the general anti-avoidance rule (GAAR) is subject to the limitation period applicable to the part of the Act under which the assessment is raised. So, for example, if the application of GAAR adjusts income or taxable income under part I, the normal reassessment period, perhaps as extended under paragraph 152(4)(b), would apply; on the other hand, if the application of GAAR results in an assessment under part XIII, no limitation period will apply to such assessment. The CRA stated at the Canadian Tax Foundation's 2012 Atlantic conference that “[t]he GAAR Committee requires that all submissions to the Committee identify the years to be assessed and will not authorize an assessment of an otherwise statute-barred year unless there are compelling reasons provided which meet the negligence threshold”: CRA document no. 2012-0465921C6, November 9, 2012.

Tax Shelters

One area in which the minister is granted unlimited time to assess and reassess is the application of the rules relating to tax shelters. The rules were first introduced in 1988 and have since been tightened. In introducing amendments in 2003, the federal budget stated:

Generally, a tax shelter is any property in respect of which it is represented that a potential purchaser will be able to claim within four years, deductions from income or taxable income which equal or exceed the net cost of the property to the purchaser (that is, net of certain prescribed benefits such as limited-recourse debt).⁵⁵

The budget expanded the definition of a tax shelter to include any arrangement that involves a transfer of property in respect of which it is represented that a donation or contribution of the property would generate tax credits or deductions, if it may reasonably be considered that a person will incur limited-recourse debt in connection with the arrangement.⁵⁶ These arrangements, which gave investors the ability to claim deductions or tax credits within a short time frame and thereby recover the cost of their investments, were perceived to be aggressive tax-planning arrangements that needed to be closely monitored and constrained by specifically targeted rules.

Under the tax shelter rules, a promoter is required to apply for an identification number for a tax shelter.⁵⁷ Until an identification number has been issued, the promoter may not sell, issue, or accept a contribution in respect of the tax shelter.⁵⁸ A penalty is imposed on any person who has filed false or misleading information in the application for a tax shelter identification number, or has sold, issued, or accepted consideration in respect of a tax shelter before the minister has issued an identification number.⁵⁹ To the extent that such a penalty has been imposed against and not paid by the promoter, or has been refunded or applied against other debts of the promoter under the objection process, no deduction or claim in respect of the tax shelter may be made by any person for any taxation year.⁶⁰ In this respect, subsection 237.1(6.2) allows the minister, notwithstanding subsections 152(4) through (5), to make such assessments, determinations, and redeterminations as are necessary to give effect to subsection 237.1(6.1). As a result, no deduction or claim may

55 Canada, Department of Finance, 2003 Budget, Tax Measures: Supplementary Information and Notices of Ways and Means Motions, February 18, 2003, at 14.

56 See subsection 237.1(1), the definitions of “tax shelter” and “gifting arrangement.”

57 Subsection 237.1(2). The application is made by filing form T5001, “Application for Tax Shelter Identification Number and Undertaking To Keep Books and Records.”

58 Subsection 237.1(4).

59 Subsection 237.1(7.4) and former subsection 162(9) applicable to transactions prior to December 1, 1994. The penalty may be assessed at any time, pursuant to paragraph 227(10)(b).

60 Subsection 237.1(6.1).

be made in respect of a tax shelter even if the taxation years involved are otherwise statute-barred.

These rules are extremely punitive in that, where a penalty is imposed against a promoter, an investor in a tax shelter arrangement is not allowed to deduct or claim any amount in respect of the arrangement until such time as the penalty is paid. Because there is no limitation period, a penalty can be levied many years after the investment is made, and the investor's previous deductions or claims will then be added back to taxation years outside the normal reassessment period. The reassessment could result in a significant liability for unpaid tax as well as interest charges to the investor, even though the investor did not commit any offence. In addition, there appears to be no provision for reinstatement of the denied deductions or claims even if the penalty is subsequently paid by the promoter.

These rules may therefore be a deterrent to investment in tax shelter arrangements. In contrast to the circumstances described above, where the limitation period is held open because information is not available to the minister, in the context of the penalty under subsection 237.1(7.4), the promoter of the tax shelter has provided information in the application for a tax shelter number. One may ask, then, why the minister should not be given a reasonable amount of time to review the information in the application and determine whether any of it is false or misleading, rather than having a seemingly unlimited period in which to complete that task. In our view, an extended period of three additional years, which is consistent with other provisions in the Act,⁶¹ should provide sufficient time for the minister to make a determination. Indeed, this would give the minister six years from the date of filing of the application form to assess or reassess any taxpayer under subsection 237.1(6.2). If there is a concern that this change may reduce the deterrent effect of the penalty provisions, Parliament could consider increasing the amount of the penalty levied against the promoter.

The tax shelter rules also provide the minister with the power to make such assessments, determinations, or redeterminations as are necessary to give effect to section 143.2. That provision reduces the cost of a tax shelter (subsection 143.2(6)) or the amount of a donation for the purposes of calculating the donation credit or deduction (subsection 143.2(6.1)) by the amount of limited-recourse debt and certain benefits that circumvent the application of the at-risk rules, notwithstanding subsections 152(4) through (5). This provision was tested in the *Tolboek* case discussed above, where the Federal Court of Appeal affirmed the Tax Court's decision that subsection 143.2(15) permitted the minister to reassess beyond the normal reassessment period.⁶² In *Tolboek*, the original notice of assessment was issued on May 18, 1998 and the notice of reassessment was issued on November 24, 2003,

61 For example, under paragraph 152(4)(b.2), a three-year extension of the normal reassessment period applies where an information return for foreign property under subsection 233.3(3) is not filed on time and there is unreported income for the year.

62 *Tolboek*, supra note 21.

about two and a half years after the expiration of the normal reassessment period. The Tax Court concluded that

the Minister is granted broad powers to reassess beyond the normal reassessment period pursuant to subsection 143.2(15).⁶³

As previously discussed, the use of the words “as are necessary” was reviewed extensively in the case, and the Tax Court decided that

[t]he words “as are necessary” do not imply that the Minister must comply with the limitations set out in subsections 152(4) and (5), rather the provision is broadly worded to combat potential abuse by tax shelters, in concert with, and in the context of, the deeming provisions contained in section 143.2.⁶⁴

In upholding the Tax Court’s decision, the Federal Court of Appeal noted that

[t]he Tax Court did not go so far as to conclude that subsection 143.2(15) operates to empower the Minister to levy assessments or reassessment without any limitation.⁶⁵

Subsection 143.2(15), which has no limitation period, applies only to assessments or reassessments related to tax shelter arrangements and, in our view, is justified because of the involvement of what is considered to be aggressive tax planning.

Contingent Amounts

Another area where the minister has been granted unlimited time to make assessments or reassessments involves the deduction of contingent amounts. The rules on the deductibility of such amounts were tightened by draft legislation released on March 16, 2011,⁶⁶ to reverse the effect of the decision of the Federal Court of Appeal in *Collins*.⁶⁷ In that case, the court found that

the appellants had a non-contingent obligation to pay interest accrued on the approximately \$1.5 million principal amount of the debt at the rate of 10% as stipulated in subparagraph 6(ii) of the Amending Agreement.⁶⁸

63 Ibid. (TCC), at paragraph 99.

64 Ibid.

65 *Tolboek*, supra note 21 (FCA), at paragraph 69.

66 The proposed changes under section 143.4 were enacted by Bill C-48, An Act To Amend the Income Tax Act, the Excise Tax Act, the Federal-Provincial Fiscal Arrangements Act, the First Nations Goods and Services Tax Act and Related Legislation, SC 2013, c. 34, royal assent June 26, 2013.

67 *Collins v. Canada*, 2010 FCA 12.

68 Ibid., at paragraph 19.

The court held that, as accrual-basis taxpayers,

[the appellants] are entitled to deduct interest as it accrues, regardless of the date on which payment is due. . . . They are entitled to [the] deduction [that they claimed] even though they were not obliged to pay the full amount of the interest in the year of accrual, and even though the lender would be obliged, if the appellants exercised the settlement option, to forgive most of the obligation to pay principal and interest.⁶⁹

Section 143.4 was introduced in response to that decision, to reduce the amount of a taxpayer's expenditure that is otherwise deductible for income tax purposes or that forms part of the cost of a capital property, if the taxpayer has the right to reduce or eliminate the payable amount. Subsection 143.4(7) allows the minister to make such assessments, determinations, or redeterminations as are necessary to give effect to section 143.4, notwithstanding subsections 152(4) through (5).

“Zapper Penalties”

The so-called zapper penalties were introduced in the 2013 federal budget as a result of CRA audits of restaurant businesses, which identified in a number of cases the use of computer software that falsified the records of electronic cash registers, or electronic cash registers with a hidden programming option that allowed the creation of a second bill or could be used to manipulate or eliminate transaction records. A series of penalties were introduced under section 163.3 in respect of the use, possession, and manufacturing or making available of such zapper software or a similar device.⁷⁰ Subsection 163.3(5) permits the minister to assess such penalties at any time. There is a limitation under subsection 163.3(6) providing that the minister may not assess multiple penalties under these provisions against the same taxpayer. However, if a penalty is vacated as provided under subsection 163.3(9), it is deemed to have never been assessed. Subsection 163.3(6) would then not apply. The same taxpayer can, after a penalty under subsections 163.3(2) through (4) has been vacated, be assessed another penalty within the provisions.

Because of the seriousness of the use of zapper software or a similar device to falsify records and evade tax, we agree that it would be reasonable that the penalties for the use, possession, and manufacturing of such software or device not be subject to a limitation period. In essence, the taxation years for which income tax was evaded because of the use of zapper software or a similar device would not have a limitation period in any event, since the falsification of income through the use of such technology would constitute a misrepresentation attributable to wilful default or fraud.⁷¹

69 Ibid., at paragraph 24.

70 The penalties are provided under subsections 163.3(2) through (4).

71 These are the two more serious grounds for the absence of a limitation period in subparagraph 152(4)(a)(i).

Collection of Taxes

Income taxes represent a major source of government revenue,⁷² and many provisions have been included in the Act to protect this revenue base. There are mechanisms built into the Act to preserve the Crown's prerogative right to collect taxes⁷³ by imposing on certain persons the responsibility to withhold taxes in respect of certain payments, holding a person other than the taxpayer liable for the remittance of taxes, and requiring the refund of an excess amount paid to a taxpayer. Several provisions in the Act that fall into this category ensure that the minister's right to assess is never statute-barred. There are also certain related reporting requirements that are covered by this category.

In requiring certain persons to withhold and remit taxes, the Canadian income tax system effectively imposes on those persons the responsibility to act as a custodian for the Crown. Other tax statutes impose similar obligations. For example, the ETA requires suppliers to remit goods and services tax (GST) (net of input tax credits) on sales made during a defined period.⁷⁴ Another example is provincial legislation such as the Ontario Land Transfer Tax Act,⁷⁵ which applies to the purchase of real estate in that province. Section 5(7) of the statute imposes on the designated collector (usually the seller) an obligation to collect land transfer tax on the conveyance of real estate and to remit such tax to the provincial government. In this article, we consider only the collection and remittance provisions contained in the federal Income Tax Act, including, in particular, those related to withholding taxes and source deductions.

Withholding taxes and source deductions are funds collected and held by a person in trust for the Crown.⁷⁶ This means that the collected funds do not belong to the person, and these funds represent a liability owed to the government. Because of this important distinction from taxes otherwise due under the Act, Parliament drafted the provisions that govern the collection and remittance of such amounts to ensure that the minister has the power to assess such persons "at any time" to collect such funds.

For example, subsections 227(10) and (10.1) grant the minister the power to assess certain persons at any time in respect of a variety of withholding obligations, including those related to payroll and part XIII tax withholdings, as well as liabilities that may extend to directors, representatives, and others. In addition, a penalty is

72 Income tax revenues for the 2019-20 fiscal year were \$227.1 billion, representing 68 percent of total revenues of approximately \$334.1 billion. See Canada, Department of Finance, "Annual Financial Report of the Government of Canada Fiscal Year 2019-2020" (www.canada.ca/en/departement-finance/services/publications/annual-financial-report/2020/report.html).

73 *EH Price*, *supra* note 18, at paragraph 25.

74 ETA subsection 222(1).

75 RSO 1990, c. L.6, as amended.

76 Subsection 227(4).

imposed on an employer for the failure to deduct or withhold tax,⁷⁷ and the failure to remit the tax on amounts withheld.⁷⁸ Interest will apply on amounts not deducted or withheld, and on amounts deducted or withheld but not remitted.⁷⁹ These provisions are discussed in more detail below.

Payroll Obligation

Section 153 requires employers to withhold taxes on payments to employees. If an employer fails to deduct or withhold the tax, or fails to remit the tax as and when required by the Act, the employer is liable to pay the tax that should have been so deducted or withheld (in the case of non-resident employees or employees resident in Canada solely because of the sojourn rules in paragraph 250(1)(a)),⁸⁰ or the amount so deducted or withheld but not remitted (for all employees regardless of residence status).⁸¹ Subsections 227(10) and (10.1) ensure that the minister may, at any time, assess the employer and collect such taxes, as well as any applicable penalties and interest.⁸²

Part XIII Tax

In order to facilitate the collection of taxes from non-residents of Canada, an obligation is imposed on a Canadian-resident payer to withhold and remit taxes under part XIII of the Act. Part XIII tax applies to Canadian-source income that is not otherwise captured under section 115 as taxable income earned in Canada, for which the non-resident recipient has no obligation to file an income tax return in Canada.⁸³ The tax is charged in the form of a withholding tax and usually represents the final tax paid in Canada. Unlike tax under part I of the Act, which is levied on income reported in the taxpayer's annual return, part XIII tax is essentially a tax on particular

77 Under subsection 227(8), the penalty is 10 percent of the amount that should have been deducted or withheld, or 20 percent if the failure was made knowingly or in circumstances amounting to gross negligence.

78 Subsection 227(9). Subsection 227(9.1) specifies that unless the person who underremits does so in circumstances amounting to gross negligence, the penalty applies only to the amount by which the underremitted amounts exceed \$500.

79 Subsections 227(8.3) and (9.2), respectively. In contrast, a penalty applies only where there is a failure to deduct or withhold tax, and not where there is a failure to remit tax as and when required.

80 Subsection 227(8.4).

81 Subsection 227(9.4).

82 Subsection 227(10) originated from the Income Tax War Act, and subsection 227(10.1) was added in 1985. However, the addition of the words "at any time" applied only from December 1, 1994 for the purposes of subsection 227(10) and to amounts that became payable after 1990 for the purposes of subsection 227(10.1).

83 The charging provisions of part XIII are contained in section 212, which provides a mechanism to tax non-residents on certain income that is sourced in Canada.

transactions, and must be collected and remitted for each transaction to which the provisions of part XIII apply. While the notice of assessment issued in respect of part XIII tax typically refers to the year in which the tax liability arose, multiple assessments of part XIII tax can arise in a given year where multiple transactions subject to withholding occur. For example, if a Canadian corporation with non-resident shareholders pays quarterly dividends to those shareholders, the obligation to withhold and remit part XIII tax in respect of the dividend payments arises four times in the particular calendar year.

Paragraph 227(10)(d) states that the minister may assess the taxpayer at any time on amounts payable under part XIII by a person resident in Canada.⁸⁴ However, the CRA's established administrative policy has been to limit the years of assessment under part XIII.⁸⁵ This administrative policy was tested in *JP Morgan*.⁸⁶ The taxpayer paid a service fee for intercompany investment advice to a non-resident sister company located in Hong Kong. The minister assessed the taxpayer for failure to withhold and remit part XIII tax in respect of the fees paid by the taxpayer to the sister company for the fiscal periods 2002-2008. The notices for all taxation years were sent in 2011. The taxpayer alleged that the issuance of assessments for all years was an "improper exercise of the Minister's discretion"⁸⁷ because it deviated from the CRA's established administrative policy. The taxpayer argued that the CRA acted "arbitrarily, unfairly, . . . in a manner inconsistent with CRA's treatment of other tax payers."⁸⁸

The taxpayer submitted an application to the Federal Court for judicial review to challenge the exercise of the minister's discretion. The Federal Court initially provided a favourable result to the taxpayer by dismissing the minister's motion to strike the application. However, the Federal Court of Appeal overturned the decision and struck out the taxpayer's application for judicial review of the CRA's assessments.⁸⁹ The court concluded that the taxpayer was unable to demonstrate that the minister's failure to follow the CRA's administrative policies was an abuse of discretion. Specifically, Stratas J stated:

84 The taxation of non-residents on income earned in Canada existed as far back as 1955. However, the ability of the minister to assess withholding tax did not exist until the early 1960s. Former subsection 123(10), enacted by SC 1960-61, c. 49, stated that "[t]he Minister may assess any person for any amount payable by that person under Part III, this section or section 129 and, upon his sending a notice of assessment to that person, Division F of Part I is applicable mutatis mutandis." Part III (the predecessor of part XIII) and section 129 were added to the Act in 1961.

85 See *JP Morgan Asset Management (Canada) Inc. v. Canada (National Revenue)*, 2012 FC 651, at paragraph 2, stating that the CRA's practice is to issue assessments for only the current taxation year and the two immediately preceding years.

86 Ibid.

87 Ibid., at paragraph 2.

88 Ibid., at paragraph 22.

89 *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250.

The word “may” in subsection 227(10), the authority for the assessment here, does not vest the Minister with a general, sweeping discretion not to assess tax. Rather, it allows the Minister to forego [sic] making a formal assessment of Part XIII tax in situations where the tax was properly withheld and remitted.⁹⁰

The court concluded that the provisions in the Act were clear: the CRA had the right and power to make such assessments “at any time,” and the charging provision did not give the minister the discretion not to issue an assessment. What this decision makes clear is that while the minister may exercise discretion to decide which taxation years to assess, and may even establish administrative policies in that respect, the fact remains that the minister’s power to assess is not limited by the passage of time.

The CRA confirmed its practice with respect to assessments for part XIII tax consistent with this decision in a subsequent technical interpretation.⁹¹ A taxpayer asked the CRA whether the minister can assess a corporation at any time for underremittance of part XIII tax. The CRA responded by confirming that subsection 215(6) governs the liability of the corporation that underremits part XIII tax and that the CRA can assess the underremitter, pursuant to paragraph 227(10)(d), at any time. The CRA also confirmed that a subsequent reassessment, following an initial assessment under this provision, must be made within the timelines set out in section 152.

This position is consistent with the language of subsection 227(10). Once an assessment has been issued under part XIII, the Act treats this assessment in accordance with section 152, and the normal reassessment period contained in subsection 152(3.1), or such extension to that period as may be applicable under subsection 152(4), will apply. Therefore, there is no limitation period only if the CRA has never issued an assessment of part XIII tax with respect to the particular transaction in issue, because in that case the clock for the normal reassessment period will not have started.

Sale of Taxable Canadian Property

If a non-resident person disposes of taxable Canadian property,⁹² the non-resident seller is liable to pay withholding tax under section 116 equal to 25 percent of the gross sale proceeds. The non-resident seller can apply for a certificate of compliance under subsection 116(1) or (3) for a reduction of the withholding tax to 25 percent of the gain from the sale of the taxable Canadian property. Such a certificate will be issued under subsection 116(2) or (4) upon payment of the required withholding tax.

In order to ensure that the withholding tax is collected, subsection 116(5) imposes a liability on the purchaser (whether a resident or a non-resident of Canada) equal to 25 percent of the gross sale proceeds unless a certificate has been issued

90 Ibid., at paragraph 109.

91 CRA document no. 2013-0481581I7, April 29, 2014.

92 As defined in subsection 248(1).

under section 116. Furthermore, penalties and interest will apply to the tax liability imposed on the purchaser under section 116.⁹³ Paragraph 227(10.1)(a) allows the minister to assess the liability of the purchaser under subsection 116(5), as well as the penalties and interest related to such liability, at any time.

Distribution by a Legal Representative

Legal representatives may be fiduciaries, owing a legal duty to others. Examples are trustees, administrators, and executors. Often a legal representative faces the decision to distribute property in his or her possession or control to a beneficiary or a specific class of beneficiaries. Subsection 159(2) requires the legal representative to obtain a clearance certificate from the minister, confirming that all outstanding taxes of the taxpayer have been paid or that security therefor has been accepted, before such a distribution is made. If a legal representative distributes the assets without obtaining a clearance certificate, subsection 159(3) allows the minister to assess the legal representative at any time in respect of the tax owing by the taxpayer. This is similar to an imposition of tax under the joint and several liability provision discussed below.

Obtaining a clearance certificate is therefore of paramount importance for legal representatives. In practice, however, legal representatives may require beneficiaries to sign an indemnification agreement before distributing the assets, in an attempt to achieve protection in the event of such an assessment. However, indemnities rely on the beneficiaries retaining sufficient means to satisfy such obligations, and, because of the minister's ability to assess at any time, an assessment could occur long after a distribution has been made. An added benefit of obtaining a clearance certificate by a legal representative of a deceased taxpayer or a trust is that the books and records related to the deceased taxpayer or the trust may be destroyed after the clearance certificate has been received.⁹⁴

Director's Liability

Because directors are responsible for the management of a corporation, subsection 227.1(1) imposes a liability on a director of a corporation if that corporation fails to deduct or remit payroll taxes and other obligations under section 153, section 215, subsection 135(3), or subsection 135.1(3).⁹⁵ The director is liable for amounts that ought to have been withheld on payments subject to the above provisions, most notably payroll and amounts subject to withholding under part XIII. Subsection 227(10) provides the minister with the ability to assess a director in respect of such liability at any time.

93 Subsection 227(9) in respect of penalties and subsection 227(9.3) in respect of interest.

94 Regulation 5800(1)(g).

95 Section 153 relates to payroll taxes, section 215 to part XIII tax, subsection 135(3) to patronage dividends of cooperative organizations, and subsection 135.1(3) to patronage dividends of agricultural cooperatives.

Although the minister may assess a director of a corporation for liabilities imposed under subsection 227.1(1) “at any time,” no action or proceedings may be commenced by the minister if more than two years have passed since the person ceased to be a director of the corporation.⁹⁶ The CRA uses similar language in *Information Circular* IC89-2R3, where it states that “no actions or proceedings to recover . . . shall be commenced more than two years after the director last ceased to be a director of that corporation.”⁹⁷

Not surprisingly, many court cases turn on whether a person has ceased to be a director within the two-year time frame. It is important to note that a person can cease to be a director not only through resignation but also by operation of law.⁹⁸ Other remedies and defences are also available to directors against a subsection 227.1(1) assessment;⁹⁹ however, the two-year limit after a director has resigned is the most important defence, given the otherwise unlimited time period in which the minister may issue an assessment under this provision.

Joint and Several Liability

The Act contains several provisions under which a person is jointly and severally liable for the tax liability of another person. An assessment under these provisions is never statute-barred.

The rationale for the joint and several liability provisions is to “follow the money” that can satisfy the tax liability. For example, if property has been transferred from one person to another in a manner that frustrates the CRA’s ability to collect from the primary tax debtor, the CRA should be allowed to collect tax from the recipient or transferee. The following is a summary list of these provisions:

96 Subsection 227.1(4). The ETA provides a parallel statutory time limit for assessing a director under section 323. Under ETA subsection 323(5), the minister must issue the assessment within two years after the person last ceased to be a director of the corporation.

97 *Information Circular* IC89-2R3, “Directors’ Liability,” April 10, 2014, appendix A. Interestingly, subsection 227.1(4) does not refer to an assessment or a reassessment, but rather to “actions or proceedings.” In *Larocque et al. v. MNR*, [1991] 2 CTC 2151, the Tax Court held that an assessment is considered to be an action or proceeding within the meaning of subsection 227.1(4). Because of the language used in the provision, it is insufficient for the minister to simply write to the director within the two-year limitation period, regarding a potential liability. Rather, the minister must issue a notice of assessment within that period.

98 Sections 108 and 105 of the Canada Business Corporations Act, RSC 1985, c. C-44, state that a director is disqualified from being a director if he or she is a minor, mentally incapable, or bankrupt. A person may also cease to be a director as a result of the dissolution of the corporation.

99 A director may argue that the minister is not compliant with the technical requirements listed in subsection 227.1(2). The director may also defend against the director’s liability under the due diligence exception in subsection 227.1(3) or contest the assessment on the basis that he or she is not a legally appointed director or a de facto director. Several court cases have been litigated on this matter.

1. Section 160 imposes joint and several liability in many situations including liability
 - a. on a transferee for taxes owing by the transferor at the time of transfer where there has been a transfer of property either directly or indirectly, by means of a trust or by any other means whatever, by a person to any non-arm's-length person for less than fair market value (FMV) consideration;¹⁰⁰
 - b. on a person deemed to have received a benefit in respect of a non-arm's-length transfer under subsection 69(11);¹⁰¹
 - c. on a parent or a source individual¹⁰² where the tax on split income under subsection 120.4(2) applies to an individual under the age of 25;¹⁰³
 - d. on both a transferor and a transferee in respect of a split pension income election under section 60.03;¹⁰⁴ and
 - e. on a spousal or common-law partner trust where the income is deemed to have become payable under subsection 104(13.4) by way of a joint election made between the trust and the legal representative of the deceased spouse beneficiary.¹⁰⁵

Subsection 160(2) allows the minister to assess tax on a person subject to any of the joint and several liability provisions under section 160 at any time.
2. Certain joint and several liability provisions are also included in the non-resident trust provisions in section 94, allowing the minister to collect taxes payable by a non-resident trust from the settlor or beneficiaries of the trust. Subsection 160(2.1) allows the minister to assess the person subject to the joint and several liability provisions for such taxes at any time.
3. Subsection 160.4(1) imposes joint and several liability on a transferee who does not deal at arm's length with a corporation where there has been a transfer of property at less than FMV to the person and the corporation is not entitled to a deduction under subsection 61.3(3) (applicable to insolvent corporations). Subsection 160.4(3) provides that such assessments may be issued at any time.
4. Subsection 185(4) imposes joint and several liability on the recipients of a dividend from a corporation where the corporation elected to treat the dividend as a capital dividend¹⁰⁶ or a capital gains dividend¹⁰⁷ and the corporation

100 Subsection 160(1).

101 Subsection 160(1.1).

102 Defined in subsection 120.4(1).

103 Subsection 160(1.2).

104 Subsection 160(1.3).

105 Subsection 160(1.4).

106 Subsection 83(2).

107 Subsection 130.1(4) for mortgage investment corporations or subsection 131(1) for mutual fund corporations.

is liable to tax because of such election. Subsection 185(5) provides that such assessments may be issued at any time.¹⁰⁸

5. Similarly, subsection 185.2(3) imposes joint and several liability on the recipients of dividends from a Canadian-controlled private corporation¹⁰⁹ (CCPC) or a deposit insurance corporation,¹¹⁰ along with the corporation, for taxes related to excessive designations of eligible dividends.¹¹¹ Subsection 185.2(4) provides that such assessments may be issued at any time.
6. Where an agreement has been filed in respect of a liability under part VI.1, the minister may assess the transferor corporation at any time for the part VI.1 tax payable, under subsection 191.3(5).¹¹²
7. Where taxes, interest, and penalties are payable by a person and those taxes are payable by a debtor under subsection 80.04(10) in relation to a transfer of a forgiven amount, the debtor and the person are jointly and severally liable to pay those amounts.¹¹³
8. A number of provisions impose joint and several liability on recipients of amounts from certain registered plans and trusts,¹¹⁴ and any assessments under these joint and several liability provisions are never statute-barred.

Excess Refunds and Interest

There are many provisions in the Act that govern excess refunds and interest. In general, any amount that has been refunded to a taxpayer in excess of the amount to which the taxpayer is entitled will have to be repaid by the taxpayer with interest at the prescribed rate applicable from the day on which the amount was refunded.¹¹⁵ In these cases, the minister may assess a taxpayer at any time for such overpaid amounts.¹¹⁶ Similar provisions apply to deem an excess payment of the GST credit or the Canada child benefit to be a liability of the taxpayer (and of the taxpayer's spouse or common-law partner in respect of the Canada child benefit) such that

108 See the discussion below under the heading "Other Election-Based Provisions—Excessive Capital Dividend and Eligible Dividend."

109 Defined in subsection 125(7).

110 Defined in subsection 137.1(5).

111 Subsection 89(1).

112 See the discussion below under the heading "Other Election-Based Provisions—Part VI.1 Election."

113 Subsection 80.04(12). See the discussion below under the heading "Other Election-Based Provisions—Agreement to a Transfer of a Forgiven Amount: Section 80.04."

114 Sections 160.2 (registered retirement savings plans, registered retirement income funds, and qualifying trust annuities), 160.21 (registered disability savings plans), and 160.3 (retirement compensation arrangements).

115 Subsection 160.1(1).

116 Subsection 160.1(3).

these amounts will need to be repaid.¹¹⁷ There is, however, no interest levied on a refund of the GST credit or the Canada child benefit, suggesting leniency in the treatment of such overpayments.

A similar provision exists for private corporations that are entitled to dividend refunds. If a corporation is entitled to a dividend refund, interest begins to accrue starting on the later of the day that is 120 days after the end of the taxation year and 30 days after the corporate return is filed.¹¹⁸ If it is subsequently determined that excess interest has been paid to the corporation on a dividend refund, the corporation becomes liable to repay the excess amount. The minister may assess the corporation at any time for the excess interest.¹¹⁹

Likewise, excess interest can arise on refunds to mutual fund corporations and mutual fund trusts in respect of capital gains dividends and capital gains redemptions for the year.¹²⁰ If excess interest is refunded, the minister can assess such taxpayers at any time for repayment of the excess interest.¹²¹

Information Reporting in Respect of the Collection of Taxes

To allow the minister to determine whether taxes have been properly deducted or withheld, taxpayers are required to file information returns reporting such deductions or withholding.

For source deductions and withholdings, form T4¹²² is required to be submitted by the end of February of the following calendar year,¹²³ and form NR4¹²⁴ on or before the end of March of the following calendar year.¹²⁵ Failure to file these information

117 Subsections 160.1(1.1) in respect of the GST credit and 160.1(2.1) in respect of the Canada child benefit.

118 Subsection 129(2.1).

119 Subsection 129(2.2).

120 Subsections 131(2) for mutual fund corporations and 132(1) for mutual fund trusts. For mutual fund corporations, subsection 131(3.1) provides that interest is calculated for the period beginning on the day that is the later of the day that is 120 days after the end of the year and the day that is 30 days after the corporate return is filed. For mutual fund trusts, subsection 132(2.1) provides that interest is calculated for the period beginning on the day that is 30 days after the later of the day that is 90 days after the end of the year and the day on which the trust return is filed.

121 Subsections 131(3.2) for mutual fund corporations and 132(2.2) for mutual fund trusts.

122 CRA form T4, "Statement of Remuneration Paid (Slip)."

123 Regulation 205(1).

124 CRA form NR4, "Statement of Amounts Paid or Credited to Non-Residents of Canada." The requirement to file the NR4 form originated in the 1950s. The form was previously referred to as form UST456.

125 Regulation 202(7) provides that the due date for filing an NR4 return for a taxpayer other an estate or trust is March 31 of the following calendar year; the due date for an estate or trust is 90 days after the taxation year-end of the estate or trust.

returns will give rise to a penalty for late or missed filing. The imposition of these penalties is never statute-barred.¹²⁶

Given that the CRA has a system in place to receive the relevant source deductions and withholding tax information (forms T4 and NR4) on an annual basis, allowing it to complete its review of the information on a timely basis, we question whether it is necessary for the CRA to have an unlimited period in which to issue assessments for source deductions and withholding tax¹²⁷ when such information returns have been duly filed. The CRA has stated in the past that notices sent to taxpayers on the submission of prescribed forms for non-resident withholding are simply acknowledgments of receipt and not assessments of part XIII tax.¹²⁸ Indeed, it is understood that amounts withheld by Canadian-resident taxpayers in respect of part XIII tax are not regularly assessed.

The Tax Executives Institute (TEI) raised this issue in 2017 in a liaison meeting with the Department of Finance. The TEI commented that because amounts paid or credited under part XIII are not regularly assessed, the normal reassessment period as defined in subsection 152(3.1) never begins.¹²⁹ The TEI asked whether the Department of Finance could amend the legislation to require the minister to issue an initial assessment for a part XIII tax liability when the required forms have been filed and taxes have been remitted. The TEI further commented that a part XIII tax liability should be no different from a part I tax liability such that the minister should be required to assess “with all due dispatch” or “within a reasonable time.”¹³⁰ The TEI also suggested that schedule 29 (“Payments to Non-Residents”) in the corporation income tax return (form T2) can assist the minister in handling the assessment process.

In response, the Department of Finance stated that the unlimited assessment period for part XIII tax has existed for many decades and that making any change to this established law may warrant extra caution. The department advised that if a

126 In addition, a penalty is imposed under part XIX with respect to the common reporting standard. If a reportable person fails to provide its taxpayer identification number to a financial institution, a penalty will be levied. Subsection 281(4) ensures that assessment of such penalty is not statute-barred.

127 Pursuant to subsections 227(10) and (10.1). See the discussion above under the headings “Payroll Obligation” and “Part XIII Tax.”

128 CRA document no. 2013-0481581I7, April 29, 2014.

129 Subsection 227(10) states that if a notice of assessment in respect of part XIII tax is issued, divisions I and J of part I apply. As a result, section 152 will cause the normal reassessment period under subsection 152(3.1) to apply. Income tax questions submitted to the Department of Finance, Department of Finance and Tax Executives Institute, Inc. Liaison Meeting, December 6, 2017, “Section C, New Matters—Question 1, Part XIII Tax” ([www.tei.org/sites/default/files/advocacy_pdfs/TEI%202017%20DoF%20Liaison%20Meeting%20Questions%20%26%20Responses%20\(FINAL\).pdf](http://www.tei.org/sites/default/files/advocacy_pdfs/TEI%202017%20DoF%20Liaison%20Meeting%20Questions%20%26%20Responses%20(FINAL).pdf)).

130 Income tax questions, *supra* note 129.

similar question were to be resubmitted in future liaison meetings, specific examples should be provided of situations where the CRA assessed part XIII tax at a time that would be considered beyond reasonable according to the TEI. The department also asked the TEI to provide recommendations on how to distinguish between a Canadian-resident payer's obligation to withhold and remit, and the non-resident's liability for the tax.¹³¹

We are of the view that if a Canadian-resident payer has been duly diligent in its efforts to withhold and remit taxes, and has submitted the prescribed forms to report such withholding, the payer should not be subject to liability for an unlimited period in respect of such withholding. While the CRA may arguably require an extended period to undertake its review of such forms, consistent with the extended periods associated with transactions involving a Canadian resident and a non-arm's-length non-resident,¹³² we believe that an additional three years for making an assessment or a reassessment, as opposed to an unlimited period, would be more reasonable. The Department of Finance has yet to comment on whether it is considering an amendment to paragraph 227(10)(d).

The policy on the assessment of part XIII tax can be contrasted with the treatment of sales of taxable Canadian property discussed above. If the non-resident seller follows the rigorous procedures under section 116 to apply for a certificate of compliance and remits the required amount of tax withheld, the minister must "forthwith" issue the certificate to the non-resident person and the purchaser.¹³³ Further, once such a certificate has been issued, the purchaser is no longer liable in respect of the transaction, under subsection 116(5). While section 116 does not provide a limitation period per se, the certificate of compliance gives assurance and comfort to both the purchaser and the non-resident seller that the transaction is compliant under the Act. The issuance of a certificate also means that penalties and interest under subsections 227(9) and (9.3) are not applicable because there is no tax liability to the purchaser. A procedure similar to the application for a section 116 certificate may be an option to be adopted so that Canadian-resident payers can initiate a review of part XIII withholding. However, such a procedure would be onerous to Canadian corporations that make frequent payments to non-residents, such as dividend payments to non-resident shareholders or interest payments to non-resident creditors who deal at non-arm's-length with the payer. In these circumstances, an application process will not be practical, especially if there are a significant number of non-resident recipients of such payments in multiple jurisdictions (that is, where different reduced withholding tax rates may apply pursuant to an applicable bilateral tax treaty).

131 Ibid.

132 See, for example, clause 152(4)(b)(iii)(A).

133 Subsection 116(2).

Subsequent Events

There are situations where a taxpayer's liability may change as a result of a subsequent event, which may occur years after the original assessment, long past the expiration of the normal reassessment period. Hence, there are several sections of the Act that include an unlimited assessment or reassessment provision, in order to accommodate the minister's reconsideration of a prior taxation year that has been affected by a subsequent event.

A number of these provisions relate to transactions that may occur many years after a taxpayer has emigrated from Canada and may have an impact on the income or tax payable for the emigration year. In these circumstances, in our view, an unlimited assessment or reassessment period is justified since the emigration year may otherwise be statute-barred. In reviewing these provisions, we note that there is a limitation period for losses and foreign tax credits to be carried back to the emigration year and question whether there should not be a limitation period for these assessments or reassessments, as requested by the taxpayer for adjustments in the circumstances.

Inadequate Consideration in Respect of a Transfer

Subsection 69(11) denies a tax-deferred rollover if the benefits of tax deductions or other entitlements are available to a non-affiliated transferee and the transferred property is subsequently disposed of, or if arrangements are made for such disposition, within three years from the date of the original transfer. The Act will deem the original transfer to have been made at FMV at the original disposition time. Subsection 69(12) ensures that an assessment or reassessment to give effect to subsection 69(11) is never statute-barred such that, notwithstanding subsections 152(4) through (5), the minister can reassess the tax return of the original transferor for the year of the original disposition to adjust the proceeds to FMV.

In the past, subsection 69(11) applied only if the subsequent disposition occurred within the three-year period following the original disposition. As a result, the application of the normal reassessment period under subsection 152(4) would likely allow sufficient time to capture a disposition under subsection 69(11). However, in 1995, subsection 69(11) was expanded to apply if arrangements for the subsequent disposition were made within three years of the original disposition. Hence, the subsequent disposition may occur after the expiration of the normal reassessment period. Subsection 69(12) ensures that subsection 69(11) could still apply for adjustments to be made to the year of the original disposition, which would otherwise be statute-barred. Furthermore, if subsection 69(11) is applicable, subsection 160(1.1) will deem both the transferor and the transferee in the original disposition to be jointly and severally liable for the payment of each other's liabilities. Subsection 160(2) ensures that the joint and several liability provision is never statute-barred.

The application of subsection 69(11) can be illustrated with an example. Suppose that a taxpayer (Mr. A) transfers land to a non-affiliated corporation on a rollover basis in 2021 in exchange for shares of the corporation. Suppose further that the corporation has net capital losses available to it, or possibly owns capital property

with accrued but unrealized capital losses. In the same year, the non-affiliated corporation makes arrangements to sell the land to an arm's-length purchaser, with the sale taking place five years later, in 2026, at FMV. In 2026, the non-affiliated corporation sells the land, and the disposition is reported in the corporate tax return for 2026. The non-affiliated corporation claims capital losses to shelter the capital gain from the disposition. In this scenario, the CRA will be made aware of the disposition of the land for the first time when the non-affiliated corporation files its corporate tax return for 2026. Because arrangements were made to sell the land within three years from the original disposition, subsection 69(11) could apply. Therefore, the CRA requires an extended period to reassess Mr. A for 2021.

Subsection 69(11) will not apply if no arrangement is made for a subsequent disposition within three years from the date of the original disposition. However, if a series of transactions is involved such that the three-year period is frustrated, the general anti-avoidance rule could apply.¹³⁴

Election for Deemed Outlay or Expense

Subsection 12(2.2) allows a taxpayer to elect an amount received in respect of an outlay or expense, which would otherwise be taxable under paragraph 12(1)(x), to be netted against such outlay or expense. As a result, the amount received will be treated as a reduction of the outlay or expense rather than an inclusion in the income of the taxpayer.

This is a favourable provision for taxpayers because the election can apply to reduce non-deductible outlays and expenses, as confirmed by the CRA in a technical interpretation.¹³⁵

The election under subsection 12(2.2) may be made in respect of an outlay or expense made or incurred before the end of the taxation year following the year of receipt (which, for this purpose, would include any outlay or expense made or incurred in any preceding taxation year). For amounts received in January 1990 or prior, an election under subsection 12(2.2) was available only to reduce an outlay or expense incurred within three taxation years immediately preceding the year of receipt or the taxation year following the year of receipt. With the removal of this three-year limitation for amounts received after January 1990, a taxpayer can elect to reduce the amount of an outlay or expense for a preceding taxation year that may otherwise be statute-barred. Consequently, the minister requires the ability to reassess a prior taxation year that may otherwise have become statute-barred to give effect to the election.¹³⁶

134 These were the circumstances in *Canada v. Oxford Properties Group Inc.*, 2018 FCA 30.

135 CRA document no. 9721505, October 15, 1997.

136 Similar elections are available under subsections 13(7.4) and 53(2.1), allowing a reduction of the capital cost of depreciable property and non-depreciable capital property, respectively, instead of an income inclusion under paragraph 12(1)(x). Both of these elections have a three-year limitation in respect of a prior-year expenditure; hence, there is no extension of the statutory limitation on reassessment for making adjustments in relation to these elections.

Involuntary Disposition of Resource Property

A taxpayer in the resource industry often faces economic, environmental, and regulatory challenges. It is not uncommon in this industry for a taxpayer to be required to involuntarily dispose of resource property owing to government expropriation. The proceeds received in respect of such expropriations represent compensation for property taken under statutory authority. Section 59.1 provides relief to the taxpayer by allowing an election to be made to reduce the income from the involuntary disposition. If the taxpayer incurs Canadian exploration expenses (CEE), Canadian development expenses (CDE), or Canadian oil and gas property expenses (COGPE)¹³⁷ within 10 taxation years following the expropriation, the amount of proceeds can be offset against such expenses. The taxpayer must make the election when the return for the year of disposition is filed.

If the amount of such expenses is insufficient to fully offset the amount of the taxpayer's income in respect of the involuntary disposition, the proceeds of disposition will be retroactively adjusted to reflect the amount of deficiency to be included as income in the year of disposition. In order to allow the minister to reassess the taxation year in which the involuntary disposition occurred in such circumstances, an assessment in respect of the election under section 59.1 is never statute-barred.

Section 59.1 and subsection 12(2.2) are similar because they both provide elections that can be made by a taxpayer based on an event or events that happen in the future. Section 59.1 is an election to allow income of a year to be reduced by expenses incurred in the future, whereas subsection 12(2.2) is an election to allow income of a year to be reduced by expenses incurred in the past as well as in the immediately following taxation year. However, there are notable differences in their application. As previously mentioned, there is no limitation period for a reassessment by the minister to give effect to an election under subsection 12(2.2), because adjustments to the outlay or expense subject to the reduction may need to be made to a prior, otherwise statute-barred, year. In contrast, section 59.1 provides for a finite period (10 years) during which the taxpayer may apply its CEE, CDE, or COGPE against the proceeds of an involuntary disposition. Presumably, it should be known by the end of the 10-year period whether the conditions for the election under section 59.1 have been met and whether additional income will need to be recognized by the taxpayer in the year of receipt of the proceeds from the involuntary disposition. Hence, we question whether the adjustment for the income inclusion under section 59.1 should be so open-ended, such that the taxation year will never be statute-barred in respect of the disposition. We propose that the reassessment period for the income inclusion adjustment under section 59.1 should end at the expiration of the normal reassessment period for the 10th subsequent year, that year being the end of the period allowed for expenses to be applied against the proceeds from the involuntary disposition. In our view, this limitation is appropriate because the adjustment, if any, to income for

137 As described in sections 66.1, 66.2, and 66.4, respectively.

the year of disposition is known at the time that the tax return for the 10th year is filed, and the minister should reasonably require only the normal reassessment period thereafter to perform any review.

Spousal Attribution Election on Emigration

When an individual taxpayer emigrates from Canada, that taxpayer is deemed to have disposed of most of his or her assets at FMV.¹³⁸ Assets that are not subject to the deemed disposition on emigration include, but are not limited to, real or immovable property situated in Canada, excluded rights or interests, and capital property used in a business carried on in Canada.¹³⁹ Where a taxpayer realizes a capital gain on such deemed disposition, an election can be filed with the minister to defer payment of the departure tax if adequate security for the unpaid balance is provided.¹⁴⁰ No interest or penalty will apply on the unpaid balance where adequate security has been provided. The application of these rules can be complicated, however, where the spousal attribution rules under subsection 74.2(1) may have applied to such assets.

Under subsection 74.2(1), if an individual previously acquired a property from the individual's spouse or common-law partner at less than FMV consideration, any capital gain realized on a subsequent disposition by the transferee spouse will be attributed to the transferor spouse. However, such attribution could create anomalies in posting security for deferring the departure tax on the capital gain from the deemed disposition of an emigrating individual. For instance, if the capital gain is attributed to the transferor spouse, the transferor spouse does not have the asset to furnish security to the minister because the asset continues to be owned by the emigrant transferee spouse. In addition, attribution of the capital gain creates an unintended result if there is a capital loss arising on a subsequent disposition of taxable Canadian property.¹⁴¹ Canada retains the right to tax the disposition of taxable Canadian property, whether owned by residents or non-residents of Canada.¹⁴² Where an emigrant individual subsequently disposes of a taxable Canadian property and realizes a loss, subsection 128.1(8) provides relief by allowing the individual to elect to reduce the proceeds of the deemed disposition by the loss amount. If the original gain was attributed to the transferor spouse because of the application of subsection 74.2(1), the post-emigration loss relief under subsection 128.1(8) will not provide relief since it is available only to the transferee spouse. This would clearly produce an unfair result. In order to counter this unfairness and allow the post-emigration loss rule and the furnishing of security to apply correctly, subsection 74.2(3) deems the

138 Subsection 128.1(4).

139 Paragraph 128.1(4)(b).

140 Subsection 220(4.5).

141 As defined in subsection 248(1).

142 For dispositions by non-residents, a section 116 obligation arises.

spousal attribution not to apply unless the spouses jointly elect in the return reporting a post-emigration disposition of a property¹⁴³ to have the attribution rules apply to the deemed disposition on emigration. Such an option allows the family a choice to retroactively allow attribution to apply in the year of emigration when the deemed disposition occurred. For example, if the transferor spouse has losses in the future that may be carried back to be applied against the gain on the emigration disposition, an election can be made to attribute the gain on the emigration disposition to the transferor spouse to allow these losses to be utilized.

An election under subsection 74.2(3) does not have a time restriction. Hence, subsection 74.2(4) allows the minister to assess such tax as is necessary to take into account the joint election, notwithstanding subsections 152(4) through (5). Subsection 74.2(4) also provides that any such assessment shall not affect the computation of interest and penalties for any period that is before the filing-due date for the first taxation year in which the property is disposed of. As a result, no interest or penalty will apply to the taxes payable for the emigration year because of the election. This is a welcome feature of subsection 74.2(4).

Unwinding of Deemed Disposition upon Return to Canada

When a former resident taxpayer returns to Canada, a capital gain realized on the deemed disposition on emigration can be reversed. This is especially relevant for taxable Canadian property because Canada continues to have the right to tax gains from the eventual sale of taxable Canadian property, and there is no revaluation of the cost of the property upon the taxpayer's return to Canada. If a taxpayer returns to Canada while owning the same taxable Canadian property that was owned at the time of emigration, the taxpayer may elect in writing under subsection 128.1(6) to reverse the initial deemed disposition of each property upon emigration. Where the election is made, the minister may reassess a taxpayer to take the effect of the election into account, and any security furnished to defer the payment of departure tax will be returned to the taxpayer.

Since it is not known, at the time of emigration, whether an emigrating individual will return to Canada, subsection 128.1(6) does not affect the general deemed disposition obligations imposed under subsection 128.1(4). Instead, it allows a taxpayer to retroactively reverse the gain from the deemed disposition upon a subsequent return to Canada. Paragraph 128.1(6)(d) allows the minister to retroactively adjust the proceeds of the original deemed disposition with no time limit because the year in which the taxpayer returns to Canada may be well beyond the normal reassessment period for the year of emigration. In addition, paragraph 128.1(6)(d) provides that the recomputation of taxes does not affect the calculation of interest and penalties for any year prior to the year of return. A similar provision exists for returning trust beneficiaries where a distribution of property by a trust was taxable in Canada when

143 As set out in subsection 74.2(3), the election must be made in the first return filed after emigration reporting the disposition of the property by the transferee spouse.

the beneficiary was a non-resident.¹⁴⁴ Subsection 128.1(7) provides that subsection 107(2.1) will not apply to the distribution; instead, the property is deemed to have been distributed at cost by the trust. Similarly, paragraph 128.1(7)(i) allows the minister to reassess the trust in the year of distribution beyond the normal reassessment period, notwithstanding subsections 152(4) through (5).

Section 119 Credit: Former Resident Credit for Tax Paid

Section 119 is designed to provide relief from double taxation in respect of taxable Canadian property when an individual taxpayer emigrates from Canada. Without this provision, an individual taxpayer could be subject to tax under both part I and part XIII in relation to shares that are taxable Canadian property. As previously stated, when an individual emigrates from Canada, a deemed disposition occurs at FMV for most assets of the individual, including corporate shares and (relevant here) shares of Canadian corporations that are taxable Canadian property. The individual is also deemed to have reacquired that property at FMV.¹⁴⁵ Dividends subsequently paid to a non-resident by such Canadian corporations are subject to withholding tax under part XIII. Double taxation arises when the individual pays withholding tax on the dividend, on the theory that the value of that dividend was taxed as part of the accrued gain when the individual emigrated from Canada.

The dividend could cause a decline in the value of the shares, which could result in a loss on a subsequent disposition of the shares. If the loss can be carried back to the year of emigration, part I tax could be refunded to the individual taxpayer. However, subsection 40(3.7) would deny the loss because taxable dividends are received. Section 119 provides relief to a former resident taxpayer by providing a tax credit in the year of emigration in respect of the deemed disposition of taxable Canadian property. The credit is calculated as the lesser of the withholding tax on the dividend and the amount of tax on the gain from the deemed disposition that arose on emigration. If a taxpayer wishes to claim a section 119 credit, an amended return for the year of emigration must be filed to reduce the tax payable. Although section 119 has some limitations, it provides relief to taxpayers in certain situations.¹⁴⁶

Subsection 152(6.3) provides that the minister “shall reassess the taxpayer’s tax for any relevant taxation year” (other than a year before the year of emigration) in order to take into account the deduction of taxes under section 119. While subsection 152(6.3) does not include the phrase “at any time” or “notwithstanding subsection 152(4) to (5),” the language of the provision indicates that there is no time restriction on the minister’s right to assess or reassess; accordingly, it provides the authority to reassess beyond the normal reassessment period.

144 Subsection 128.1(7).

145 Paragraph 128.1(4)(c).

146 For a more detailed discussion, see Henry Shew, “Section 119: Flawed Relief” (2016) 6:2 *Canadian Tax Focus* 9-10.

Other Post-Emigration Dispositions

As mentioned in our discussion of the spousal attribution rules above, subsection 128.1(8) provides relief in situations where a taxpayer realizes a post-emigration loss on a disposition of a taxable Canadian property, by allowing the post-emigration loss to be applied against the emigration gain. Unlike the relief provided under the spousal attribution rules, which is not limited by subsections 152(4) through (5), the relief granted by subsection 128.1(8) is available only within three years after the end of the normal reassessment period in respect of the disposition year. This subtle yet important limitation is found in subparagraph 152(4)(b)(i) and paragraph 152(6)(f.2), and has been confirmed by the CRA in a technical interpretation.¹⁴⁷ In that technical interpretation, as a consolation, the CRA suggested that if the disposition was beyond the permitted reassessment period, the taxpayer could apply to the minister for consideration of a late-filed election under the taxpayer relief provisions, provided that such request to late-file the election was made within 10 years of the taxation year of emigration.¹⁴⁸ While this would extend the period in which relief could be provided, there is still a time limit on the availability of this option. Moreover, the granting of relief is subject to the minister's discretion and therefore is by no means certain.

A similar problem exists with a claim for a foreign tax credit in respect of a post-emigration disposition under subsection 126(2.21). Here too the period for assessment or reassessment is limited to three years after the normal reassessment period, pursuant to subparagraph 152(4)(b)(i) and paragraph 152(6)(f.1). In contrast with the CRA's view on post-emigration losses, the CRA has stated that the taxpayer relief provisions (in particular, in this instance, subsection 152(4.2)) do not provide any opportunity to extend the statutory assessment period.¹⁴⁹ The CRA has also suggested that it will not consider a blanket waiver under subparagraph 152(4)(a)(ii) or paragraph 152(4)(c) without the provision of sufficient details of the transaction to keep the disposition year open.¹⁵⁰

It is counterintuitive that these provisions, which are meant to provide relief to taxpayers from the impact of subsequent events, are limited to a time period, because the CRA cannot assess a statute-barred year. Perhaps these provisions should have no limitation period in order to allow taxpayers to claim relief based on a subsequent event.

Other Election-Based Provisions

There are a number of other provisions that are never statute-barred to allow the minister to assess or reassess a taxpayer to take an election into account. These election-based provisions are discussed below.

147 CRA document no. 2010-0353711E5, November 8, 2010.

148 Subsection 220(3.2) and regulation 600(c).

149 CRA document no. 2016-0673171E5, October 11, 2017.

150 Ibid.; and CRA document no. 2016-0660421E5, October 11, 2017.

Excessive Capital Dividend and Eligible Dividend

Capital dividends and eligible dividends are tax-preferential items. Capital dividends may be received tax-free by a Canadian-resident shareholder, and eligible dividends are taxed at a reduced rate.¹⁵¹

To obtain this preferential treatment, private corporations can pay capital dividends and eligible dividends to shareholders only to the extent of the balance in the corporation's capital dividend account (CDA)¹⁵² or general-rate income pool (GRIP),¹⁵³ respectively. Any "excessive capital dividend election"¹⁵⁴ or "excessive eligible dividend designation"¹⁵⁵ will attract additional tax as a penalty for the excessive amounts paid.¹⁵⁶

An election may be made by the corporation to treat the excess capital or eligible dividends as ordinary dividends.¹⁵⁷ With the election, there will not be any excessive amount, and the corporation will not be subject to the additional tax. The election must be made in a prescribed manner within 90 days from the day of the notice of assessment for the additional tax.¹⁵⁸

151 The eligible dividend regime was enacted by Parliament in 2007. According to the Department of Finance, the objective was that "by eliminating the double taxation of large corporation dividends, these measures will make investment in shares of corporations more attractive and help to level the playing field with other investments, such as investments in units of income trusts." The eligible dividend regime provided "[an] enhanced gross-up and [dividend tax credit] for dividends paid from corporate earnings that do not benefit from preferential rates" to eliminate the double taxation of those dividends at the federal level. Canada, Department of Finance, *News Release* 2006-026, "Draft Changes To Eliminate the Double Taxation of Large Corporation Dividends," June 29, 2006.

152 Defined in subsection 89(1). In general terms, the CDA balance includes the non-taxable portion of capital gains net of capital losses, capital dividends received from another corporation, and the death benefit of a life insurance policy.

153 Defined in subsection 89(1). In general terms, GRIP refers to income of the corporation taxed at general corporate tax rates (that is, not taxed at a preferential rate, such as the reduced tax rate for small businesses) and eligible dividends received.

154 An election may be made under subsection 83(2) for a capital dividend not to be taxable.

155 In order to pay an eligible dividend from GRIP, the corporation must designate its dividend as an eligible dividend under subsection 89(14) by a notification to this effect sent to the shareholder.

156 Part III tax equal to three-fifths of the excess capital dividend applies under subsection 184(2). Subsection 185.1(1) provides that part III.1 tax is calculated as 20 percent of the excessive eligible dividend designation, or 30 percent of such an amount if GRIP was artificially increased.

157 Subsection 184(3) provides for the election in respect of capital dividends, and subsection 185.1(2) provides for the election in respect of eligible dividends. An election is not available if the excessive dividends arose because of an arbitrary inflation of GRIP as described in paragraph 185.1(1)(b).

158 There is currently no prescribed form. The CRA has noted in its policy that a certified copy of the director's resolution authorizing the election will satisfy the conditions. The CRA has also confirmed that late-filing of such an election is not accepted because subsections 184(3) and 185.1(2) are not prescribed provisions under subsection 220(3.2) and regulation 600: CRA document no. 2010-0383801E5, December 23, 2010.

An election is valid only if it is made with the concurrence of the corporation and all of the shareholders who received the affected dividend and whose addresses were known to the corporation.¹⁵⁹ Shareholders who received the dividend will be reassessed for tax on the dividend, which will no longer be tax-free or benefit from a reduced rate.

If the election is made within 30 months after the payment of the original dividend, any assessment of tax, interest, and penalties owed by the shareholders will be made within the normal reassessment period, in accordance with subsection 152(4). However, if the election is made more than 30 months after payment, and with the concurrence of the corporation's shareholders, any reassessment may be made beyond the normal reassessment period without any limitation, to take into account the effect of the election.¹⁶⁰

We can understand that the CRA may need extra time to assess a shareholder if an election is made close to the end of the normal reassessment period, but it is unknown why a period of 30 months from the original dividend payment date was chosen as the time frame to make this determination, or why the reassessment period needs to be unlimited rather than just extended. Having an election filed outside the 30-month period does not automatically mean that the CRA cannot assess a shareholder to take into account the election under subsection 184(3) or 185.1(2). If it is the intention of the Department of Finance that the CRA should always be allowed to reassess a shareholder on dividends subject to an election under subsection 184(3) or 185.1(2), perhaps the more logical approach would be to allow the CRA a three-year extended period from the election date to make a proper assessment or reassessment of the shareholders taking the election into account.

Part VI.1 Election

Parts IV.1 and VI.1 were introduced to deal with preferred share financing. Historically, debt financing was the preferred method of raising capital in Canada because of the interest deduction that can be claimed by Canadian corporations. However, such an advantage is diminished if the corporation is tax-exempt or has no taxable income. In such a scenario, the corporation is indifferent as to whether to raise capital through debt or through functionally equivalent equity. A creditor corporation may be more inclined to finance through equity because the return generated, in the form of a dividend, is tax-free for corporations.¹⁶¹

Generally, in a preferred share financing arrangement, the debtor corporation is liable for part VI.1 tax at a rate of 25 percent on dividends (other than excluded dividends) paid on taxable preferred shares in excess of the dividend allowance. On

159 Subsection 184(4) in respect of an excessive capital dividend and subsection 185.1(3) in respect of an excessive eligible dividend.

160 Subparagraphs 184(4)(b)(ii) and 185.1(3)(b)(ii).

161 Ignoring the possibility of a subsection 55(2) recharacterization from a dividend to a capital gain.

the recipient side, the creditor corporation must pay part IV.1 tax of 10 percent on receiving such dividends. However, the Act allows the debtor corporation to make an election under subsection 191.2(1) to pay part VI.1 tax on the dividends at the increased rate of 40 percent. Where this election is made, the creditor corporation will not be subject to the 10 percent part IV.1 tax. Many corporations make the election when issuing preferred shares as a sweetener to encourage the contribution of capital by investors.

The subsection 191.2(1) election must be filed in a prescribed form (T769)¹⁶² with the minister before the filing-due date of the tax return for the taxation year in which the preferred shares are issued, or when they first become taxable preferred shares, or within six months of any of the following days:

1. the date of the notice of assessment of part VI.1 or part I tax;
2. where a notice of objection has been filed in respect of such assessment, the date on which the minister sends a notice that the assessment is either confirmed or varied;
3. where an appeal has been instituted to the Tax Court of Canada, the date on which a copy of the decision of the court is mailed to the taxpayer; and
4. where an appeal has been instituted to the Federal Court of Appeal or the Supreme Court of Canada, the date on which judgment is pronounced or delivered, or the date on which the corporation discontinues its appeal.

Subsection 191.2(3) provides that an assessment to take into account an election made under subsection 191.2(1) is not subject to a limitation period.

In our view, it is reasonable to allow for a reassessment beyond the normal reassessment period to take into account an election under subsection 191.2(1) because of the time period that is allowed to make the election. For instance, subparagraphs 191.2(1)(b)(iii) and (iv) allow a corporate taxpayer to file the election within six months after a decision on an appeal has been rendered by the Tax Court of Canada, the Federal Court of Appeal, or the Supreme Court of Canada. In tax cases, it sometimes takes many years for a final judicial decision to be made or for the litigation to be ultimately discontinued. If a corporation files an appeal to the Supreme Court of Canada, the resolution of the disputed taxation year may be reached many years after the expiration of the normal reassessment period. However, we do not believe that the period allowed for such reassessment needs to be unlimited. Instead, we recommend the provision of an extended period of reassessment, such as allowing an additional three years from the election date for the completion of an assessment or reassessment taking the election into account.

162 CRA form T769, "Election Under Section 191.2 by an Issuer of Taxable Preferred Shares To Pay Part VI.1 Tax at a Rate of 40%."

Late-Filed Election Under Subsection 220(3.2): Fairness

The Act allows taxpayers the opportunity to make many elections to arrive at an alternative tax position, depending on the facts and circumstances. Most, if not all, of the elections have specified time periods in which the elections can be made. However, taxpayers may not be able to meet the tax election deadlines owing to personal misfortune or circumstances beyond their control. Therefore, the taxpayer relief legislation is designed to give the CRA the discretion to administer the income tax system with a commonsense approach, in certain circumstances.

In particular, the Act provides relief to taxpayers on the basis of fairness by allowing the minister to extend the time for making certain elections. Under subsection 220(3.2), taxpayers may be permitted to late-file, amend, or revoke certain elections,¹⁶³ and in the case of a late-filed election, the result is as though the election was filed on time.¹⁶⁴ The CRA does not always extend the deadline for late-filed elections under subsection 220(3.2). According to *Information Circular* IC07-1R1, the CRA will deny a request if the election was made as retroactive tax planning, if adequate records do not exist, or if the taxpayer was negligent or careless in complying with the law.¹⁶⁵ On the other hand, the CRA will consider accepting a request for a number of reasons, including if the election was not made on time owing to extraordinary circumstances, if the taxpayer was unaware of the election provision despite taking reasonable care to comply, or if the taxpayer can demonstrate that later accounting in respect of the transactions suggested that all parties believed that the election had been made.¹⁶⁶ However, even if a late-filed election meets the CRA's administrative policy, the request to extend the time for making the election must be made within 10 calendar years after the end of the relevant taxation year.¹⁶⁷

Subsection 220(3.4) provides that where late-filing of an election is permitted under subsection 220(3.2), the minister may make an assessment of tax, interest, and penalties payable by each taxpayer for any taxation year beginning prior to the fairness application to take the election into account, without any limitation period.¹⁶⁸ Since a fairness review is a lengthy process and the completion date may

163 The election must have been made under a prescribed provision—that is, a provision listed in regulation 600 or a designation listed in subsection 220(3.21) (which is deemed to be an election under a prescribed provision). Where the minister provides an extension, a penalty may apply under subsection 220(3.5).

164 Subsection 220(3.3).

165 *Information Circular* IC07-1R1, "Taxpayer Relief Provisions," August 18, 2017, at paragraph 57.

166 *Ibid.*, at paragraph 56.

167 Paragraph 220(3.2)(b).

168 As explained in the 1991 technical bill, the addition of subsection 220(3.4) allows the minister to reassess the taxpayer for each taxation year to take into account a late, amended, or revoked election, even if the normal reassessment period for that year has expired: SC 1994, c. 7, schedule II (SC 1991, c. 49), section 181(1), applicable to elections in respect of 1985 and subsequent years.

not be predictable, we agree that an unlimited period is justified in order to ensure that any adjustments approved under the fairness provisions can be processed. Although a taxation year is never statute-barred because of the late-filed election, the assessment may be made only to take into account the election, amended election, or revocation, as the case may be.

Agreement to a Transfer of a Forgiven Amount: Section 80.04

Section 80 governs the tax treatment of debt forgiveness. Where a commercial debt of a taxpayer is forgiven, the taxpayer's tax attributes such as non-capital losses, capital losses, or cost bases are reduced in a particular order pursuant to subsections 80(3) through (12). Normally, one-half of any remaining "forgiven amounts"¹⁶⁹ not applied will be taxable under subsection 80(13).

However, section 80.04 allows the taxpayer to enter into an agreement with an "eligible transferee"¹⁷⁰ to transfer any remaining forgiven amounts to the eligible transferee, in order to reduce or eliminate the income inclusion under subsection 80(13). Subsection 80.04(9) states that the minister may assess or reassess the tax, interest, or penalties to take such an agreement into account, without any limitation period. The agreement must be filed on or before the later of the debtor's and the transferee's filing-due date, or on or before the later of the 90-day period after the date of mailing of a notice of assessment and one year after the filing-due date (for individuals and graduated rate estates).¹⁷¹ Since the filing-due date for the transfer agreement under section 80.04 is well within the normal reassessment period, not subjecting the transfer of debt forgiveness to a limitation period is most likely due to the potential for abuse in obtaining the benefit stipulated in subsection 80.04(8). That provision states that where it can reasonably be considered that the main purpose of an eligible transferee corporation becoming related to the debtor corporation is to enable the transfer under section 80.04, the transferred amount specified in the agreement is deemed to be nil. For example, assume a situation where a corporation purchases an unrelated corporation that has substantial non-capital losses. Provided that there is no restriction on the carryforward of losses because of a loss restriction event,¹⁷² the debtor can transfer the forgiven amount to the newly acquired loss company to absorb the debt-forgiveness income. Subsection 80.04(8) will deny such a transfer if the main purpose of the acquisition (which causes the corporations to be related) is to enable the transfer of the forgiven amount.

Additionally, subsection 80.04(10) provides that a debtor is liable to pay all of the eligible transferee corporation's taxes for taxation years ending in the period from

169 Defined in subsection 80(1).

170 Generally defined as a related taxable Canadian corporation or a Canadian partnership; see subsection 80.04(2).

171 Paragraph 80.04(6)(a).

172 Defined in subsection 251.2(2).

the date of the transfer agreement to the end of four calendar years after the date of the agreement,¹⁷³ to a maximum of 30 percent of the amount specified in the agreement (that is, the transferred amount), although the transferee remains jointly and severally liable with the debtor for such amounts.¹⁷⁴ Subsection 80.04(12) provides that the minister may assess at any subsequent time (that is, without a limitation period) the tax, interest, and penalties in respect of the debtor's liability under subsection 80.04(10). Under paragraph 80.04(12)(b), where the debtor is a partnership, an assessment of the liability can be issued only to taxpayers who are members of the partnership at the time of the agreement, or former members of the partnership who re-enter the partnership. If a former member was not a member at the time of the settlement (or agreement time), subsection 80.04(12) does not apply to such person, and the minister has no authority to levy tax on that former member unless that member re-enters the partnership. This provision seems to address avoidance transactions where members of a partnership temporarily cease to be partners in order to prevent the application of subsection 80.04(10). A new member who joined after the settlement time and was never previously a member of the partnership would not become liable for the tax liability of the debtor partnership under subsection 80.04(10).

There does not seem to be a good reason for the absence of a limitation period for the assessment of tax, interest, and penalties under subsection 80.04(10). Subsection 80.04(10) provides that the debtor is liable for taxes of the eligible transferee only for a finite period (taxation years ending within four calendar years after the date of the transfer agreement). Hence, it appears that it would be more appropriate to have a limitation period of three years from the date of the notice of assessment for the last taxation year of the eligible transferee for which the debtor bears liability for taxes (that is, the taxation year ending four calendar years after the date of the transfer agreement). This amendment would provide more finality to taxpayers who are liable for the transferee's taxes.

Foreign Spinoff: Section 86.1

A spinoff by a US corporation will generally not result in a taxable event in the United States. In the 1990s, the frequency of US spinoff activities was significant enough that the Department of Finance decided to introduce an amendment to the Act that would provide Canadian-resident shareholders with a tax result comparable to the US tax treatment enjoyed by US-resident shareholders.

173 Prior to technical amendments enacted in 1997, the specified period was 10 calendar years: paragraph 80.04(10)(a) as amended by SC 1988, c. 19, section 113(3), applicable to taxation years that end after February 21, 1994.

174 Subsection 80.04(11).

Prior to the introduction of section 86.1,¹⁷⁵ subsidiary shares distributed by a foreign corporation on a foreign spinoff or demerger and received by a Canadian-resident shareholder would be included as dividend income and taxable under subsection 90(1). Section 86.1 allows taxpayers to elect to defer the recognition of the foreign dividend and instead allocate the cost base between the parent shares and the subsidiary shares. This provision mirrored the tax treatment of shareholders resident in the foreign country. However, the rules in section 86.1 are not intended to grant unconditional rollover treatment of foreign spinoff transactions.

The election for a rollover under section 86.1 is allowed only in respect of an “eligible distribution.”¹⁷⁶ A number of conditions need to be fulfilled for a distribution paid by a foreign corporation to be considered an eligible distribution, with the main condition being that the Canadian taxpayer must not be taxable on receiving such a distribution in the foreign jurisdiction. For instance, for proof that the spinoff distribution is not taxable to Canadian-resident shareholders in the United States, the CRA has administratively requested that a copy of a ruling letter be issued by the Internal Revenue Service to confirm that such a distribution is not taxable to US residents.¹⁷⁷ If a ruling letter is not available, the US corporation should state in its filings to the Securities and Exchange Commission that the spinoff transaction is intended to be structured as tax-free for US shareholders. For non-US corporations, the requirements are similar, but there are additional conditions prescribed by the Department of Finance. If these conditions are met, the CRA will ask the Department of Finance to consider the non-US spinoff for exception.¹⁷⁸ If the foreign spinoff transaction subsequently becomes taxable in the foreign jurisdiction, it will no longer be an eligible distribution and the rollover treatment will not be available.

175 Section 86.1 was introduced in the October 18, 2000 economic statement in response to the need to broaden the rules related to a foreign reorganization; the provision was enacted in 2001, applicable to distributions received after 1997.

176 An eligible distribution is defined in subsection 86.1(2), which provides that the foreign corporation must be publicly listed and must meet a detailed list of conditions. Satisfying these conditions can be onerous. For US corporations, the corporation must confirm that its shares are publicly traded or registered with the Securities and Exchange Commission, and provide the following information: the date of the distribution, the FMV of each property distributed to Canadian-resident shareholders, the name and address of each Canadian-resident shareholder recipient, proof that the US corporation and the spinoff corporation were never resident in Canada, and proof that the Canadian-resident shareholder is not taxable in the United States.

177 Canada Revenue Agency, “Information for Foreign Corporations” (www.canada.ca/en/revenue-agency/services/tax/businesses/topics/information-foreign-corporations.html).

178 Once the spinoff has been approved, the CRA will, with the consent of the foreign corporation, make the transaction public on the CRA website, to reduce the foreign corporation’s workload in informing the Canadian-resident shareholders. See Canada Revenue Agency, “Eligible Spin-Offs” (www.canada.ca/en/revenue-agency/services/tax/businesses/topics/eligible-spin-offs.html). Regulation 5600 also lists all historical, prescribed spinoffs.

Subsection 86.1(5) allows the minister to make such assessments, reassessments, determinations, or redeterminations as are necessary in these circumstances to deny the rollover treatment, without any time limitation. This provision ensures that any changes in taxation in the foreign jurisdiction may be taken into account for the foreign spinoff election, so that the taxability or non-taxability of Canadian-resident shareholders will continue to mirror the treatment in the foreign jurisdiction.

Other Matters

In this section, we consider provisions that do not fit neatly within the categories discussed above.

Tax Attribute Balances

A corporate taxpayer has many tax attribute balances that are important for tax computation purposes. These include non-capital losses, net capital losses, GRIP, low-rate income pool (LRIP), eligible refundable dividend tax on hand (ERDTOH), non-eligible refundable dividend tax on hand (NERDTOH), undepreciated capital cost (UCC), investment tax credits (ITCs), and the CDA. These balances are calculated cumulatively. Although the Act does not explicitly state that these balances are never statute-barred, they represent a carryforward amount from previous statute-barred years but may still be adjusted when such balances are utilized in a subsequent taxation year.

In a 2011 technical interpretation,¹⁷⁹ the CRA took the position that even though tax attribute balances may be based on events that occurred in statute-barred periods, the balances themselves are not statute-barred and could be adjusted by the CRA at a future time. This position was based on jurisprudence. In *Coastal Construction*, the Tax Court stated:

The Minister is obliged to assess in accordance with the law. If he assesses a prior year incorrectly and that year becomes statute-barred this will prevent his reassessing tax for that year, but it does not prevent his correcting the error in a year that is not statute-barred, even though it involves adjusting carry-forward balances from previous years, whether they be loss carry-forwards or balances of investment tax credits.¹⁸⁰

In a more recent case,¹⁸¹ the Tax Court reminded the taxpayer that if an error is made in the assessment of a statute-barred year and that error affects another year, the minister must correct the error. The correction will be for the year that reflects adjustments from an error in law in a previous year, including a statute-barred year.

179 CRA document no. 2011-0425501E5, December 1, 2011.

180 *Coastal Construction and Excavating Ltd. v. The Queen*, [1996] 3 CTC 2845, at paragraph 24 (TCC).

181 *Leola Purdy Sons Ltd. v. The Queen*, 2009 TCC 21.

In a 2015 technical interpretation,¹⁸² the CRA offered its view that an incorrect calculation of UCC will not be adjusted in a statute-barred year even if the adjustment results in recapture income in that year. Although UCC is a cumulative account reflecting all additions and dispositions, the CRA explained that adjustment to the UCC in a statute-barred year is not appropriate, but the UCC would be recalculated and corrected at the beginning of the first non-statute-barred year. On this basis, if the UCC is determined to be negative, recapture income will be included as income in the first non-statute-barred year. However, this position may not be valid. The CRA may have relied on the decision in *Coastal Construction*, but this jurisprudence may not extend to the UCC balance.¹⁸³

Similarly, in a 2007 technical interpretation,¹⁸⁴ the CRA stated that it may adjust the amount of the CDA balance at any point in time, even if the events that gave rise to the amount were outside the relevant normal reassessment period. The CRA also stated that components in the calculation of the CDA balance will not be subject to a normal reassessment period until a capital dividend has been paid and an election under subsection 83(2) has been made. Once a capital dividend has been paid, the normal reassessment period will apply to the taxation year in which the payment is made.

Rather than waiting for the expiration of the normal reassessment period following the payment of a capital dividend, corporate taxpayers may want certainty as to the amount of CDA that the companies have. At this time, the CRA may, as a service, verify a corporation's CDA balance if the T2 schedule 89 is filed. This balance verification service is available to corporate taxpayers once every three years unless the request is filed with form T2054 (that is, the election for payment of a capital dividend).¹⁸⁵ Unfortunately, the CRA's verification of the CDA balance is not binding, and the CRA could still subsequently assess part III tax if it determines that the "verified" CDA balance is incorrect.

In contrast, a notice of determination (where available) is binding on both the minister and the taxpayer under subsection 152(1.3). A notice of determination from the CRA confirms loss balances, such as non-capital loss, net capital loss, restricted

182 CRA document no. 2015-0575921I7, July 29, 2015. This view is also published in paragraph 1.115 of *Income Tax Folio S3-F4-C1*, "General Discussion of Capital Cost Allowance."

183 There appears to be a limitation when there has been no acquisition or disposition in the particular UCC class in the first non-statute-barred year. Without any acquisition or disposition in the class, the minister may not have the authority to reassess the taxpayer to correct an error and impose recapture income for that year. Subsection 13(1) makes reference to the inclusion of recapture income to a taxpayer at the end of a taxation year. "[A] taxation year" could mean the statute-barred year, and may not extend to a subsequent year that is not statute-barred.

184 CRA document no. 2006-0185291E5, June 11, 2007.

185 CRA form T2054, "Election for a Capital Dividend Under Subsection 83(2)."

farm loss, farm loss, or limited partnership loss balances.¹⁸⁶ The minister is required to provide a notice of determination only if the amount of loss reported by the taxpayer is different from the amount determined by the minister.¹⁸⁷ In addition, once the CRA has determined the loss balance (and has issued form T67AM),¹⁸⁸ the normal reassessment period begins, providing the taxpayer with access to the usual objection and appeal process.¹⁸⁹

We recommend that a provision similar to subsections 152(1.1) and (1.3) be added for confirming a taxpayer's CDA balance. This is a logical step because the CRA will have obtained all the information when such CDA balances are being verified. We recommend that similar determination processes also be available for other balances such as ITCs, ERDTH, NERDTH, LRIP, GRIP, and UCC.

Non-Deductibility of Illegal Payments

Subsection 67.5(1) provides that no deduction is allowed for outlays or expenses that are considered illegal payments. The Act refers to payments described in the Criminal Code¹⁹⁰ and the Corruption of Foreign Public Officials Act,¹⁹¹ which generally include bribery of judges, members of Parliament, officers, government officials, etc. Subsection 67.5(2) provides that assessment or reassessment to deny a deduction claimed on an illegal payment is never statute-barred.

At first glance, it seems reasonable that the assessment or reassessment in respect of such payments is never statute-barred because the payments relate to illegal activities. Indeed, there are two possible reasons for this provision:

1. The first reason relates to the timing of the judicial process. It is unclear whether subsection 67.5(1) requires that the taxpayer be convicted of or merely charged with the offence. Under Canada's judicial system, a conviction against a defendant may not take place until many years after charges are first

186 Subsection 152(1.1).

187 In CRA document no. 2014-0550351C6, November 18, 2014, the CRA disagrees with the Department of Finance's interpretation of subsection 152(1.1) that a taxpayer can request that the amount of a loss be determined when the taxpayer files its return. The CRA will make a determination only if the amount of the loss appears to be different from that reported by the taxpayer.

188 CRA form T67AM, "Notice of Determination/Redetermination of a Loss."

189 A notice of assessment issued in respect of a loss year is not an assessment for the purposes of determining the normal reassessment period or applying the objection and appeal provisions in the Act. However, when a taxpayer requests a notice of determination, the latter provisions are engaged, such that a taxpayer can obtain certainty in respect of its loss balances, or can challenge the minister's determination of such balances, in a manner that would not otherwise be available.

190 RSC 1985, c. C-46, as amended.

191 SC 1998, c. 34.

laid, well beyond the normal reassessment period. Accordingly, the minister may need an unlimited period in which to assess a taxpayer, if such assessment cannot occur until after a judge has convicted the taxpayer. When the language in subsection 67.5(1) is compared with that in section 242 (which states that if a corporation commits an offence, any director, officer, or agent who participated in the offence is also liable to the punishment, whether or not the corporation has been prosecuted or convicted), it seems clear that subsection 67.5(1) will not apply unless the taxpayer has been convicted of a relevant offence.

2. The second reason is that there may be difficulty in gathering evidence because of the activities involved, perhaps because the taxpayer has intentionally hidden the nature of the expense, possibly through commingling with other, legitimate expenses. Arguably, the potential for concealed evidence increases the minister's difficulty in properly assessing the taxpayer within the normal reassessment period.

We note that if subsection 67.5(1) is invoked, the provision permits only a one-sided reassessment; that is, adjustments may be made to the tax liability of the payer but not that of the recipient. For the recipient of an illegal payment, the normal reassessment period is subject to the provisions in subsections 152(4) through (5) and is not otherwise extended by subsection 67.5(1).

Subsection 67.5(1) can be contrasted with section 67.6, which addresses deductions of fines and penalties, and does not provide an exception to the limitation period. The distinction is logical, in our view, because a determination in respect of payments of fines and penalties does not require a rigorous judicial process. Such a determination is a relatively easy exercise, and the decision will typically be rendered well within the normal reassessment period, allowing sufficient time for the minister to ascertain whether or not the payments are deductible.

Donation of Cultural Property or Ecological Property

When a taxpayer donates cultural property, the FMV of that property is deemed to be the FMV determined by the Canadian Cultural Property Export Review Board (CCPERB).¹⁹² A donation of cultural property has many tax benefits, such as exemption from capital gains tax on the disposition of the donated property,¹⁹³ deduction of the FMV of the donated property from taxable income of a corporation,¹⁹⁴ availability of a donation credit for an individual,¹⁹⁵ and exclusion from the limitation on charitable gifts to 75 percent of net income.¹⁹⁶ In order for the property to qualify as

192 Subsection 118.1(10).

193 Subparagraph 39(1)(a)(i.1).

194 Paragraph 110.1(1)(c).

195 See subsection 118.1(1), the definition of "total cultural gifts."

196 See paragraph 118.1(1)(c) and paragraph 110.1(1)(c), the definition of "total gifts."

an eligible cultural property, it must fulfill specific requirements set by the Cultural Property Export and Import Act¹⁹⁷ (CPEIA). Upon request, the CCPERB must issue a certificate if the taxpayer meets the criteria listed in the CPEIA.¹⁹⁸ Once the CCPERB has determined the FMV, it will be relevant for all purposes of the Act for two years from the date of the determination.¹⁹⁹

A donation of ecological property offers benefits similar to those for a donation of cultural property. In order for the property to qualify as an eligible ecological gift, the FMV of the property must be certified by the minister of the environment.²⁰⁰ The taxpayer will request the determination of FMV by the minister of the environment, and that minister must determine the FMV and issue a certificate to the taxpayer if the request is made within three years after the end of the taxation year in which the disposition occurred.²⁰¹

The CCPERB may redetermine the FMV of a cultural property at any time under section 32(5)(b) of the CPEIA. Similarly, the minister of the environment may redetermine the FMV of an ecological property at any time under paragraph 118.1(10.4)(b) of the Act. Since the CCPERB and the minister of the environment can redetermine the FMV of the subject property at any time, the Act allows the minister of national revenue to reassess the taxpayer, without limitation, to reflect the redetermination of FMV.²⁰² The minister may also reassess the taxpayer as a result of a court decision on an appeal to the CCPERB or the minister of the environment, notwithstanding subsections 152(4) through (5).²⁰³ In our view, the assessment or reassessment in respect of a donation of cultural or ecological property for income tax purposes without a limitation period is reasonable, to align with the power to redetermine FMV at any time that is granted to the CCPERB and the minister of the environment. However, the harsher treatment is that, under subsection 165(1.2), a taxpayer is not allowed to object to an assessment made by the minister of national revenue if the taxpayer was assessed under subsection 118.1(11). The reason for the limitation imposed on the objection to such an assessment may be that the necessity for the reassessment is initiated by a non-tax authority. Hence, a judicial review of the decision on the redetermined FMV could be raised only with the CCPERB or the minister of the environment, unless a statutory appeal is permitted under the relevant statutes.

197 See subsection 118.1(1), the definition of “total cultural gifts.”

198 In 2019, the federal government relaxed the criteria, removing the requirement that the cultural property be of “national importance”: Canada, Department of Finance, 2019 Budget, Budget Plan, March 19, 2019, at 173 and 175.

199 Subsection 118.1(10.1).

200 Subsection 118.1(1), the definition of “total ecological gifts.”

201 Subsections 118.1(10.3) and (10.5).

202 Subsection 118.1(11).

203 Ibid.

Disposition of Appeal on Consent

Under subsection 169(3), with the consent of the taxpayer in writing and for the purpose of disposing of a Tax Court appeal, the CRA is permitted to reassess any taxation year without any limitation under section 152. In contrast to most general contracts, the consent in writing does not have to be signed by both parties. The Tax Court has confirmed that the procedure under subsection 169(3) requires only the taxpayer's written consent.²⁰⁴ As expected, since this is a settlement reached by the taxpayer and the CRA, the reassessment is binding, and no objection procedure is available, as provided under subsection 165(1.2).

THE POSITIONS OF THE CRA AND THE COURTS ON REASSESSMENT BEYOND THE NORMAL REASSESSMENT PERIOD

Our review of the positions taken by the CRA and the courts, respectively, on reassessments beyond the normal reassessment period reveals some areas of disagreement. Moreover, at times, the CRA has seemingly expressed contradictory views on the subject.

In a 2012 technical interpretation,²⁰⁵ the CRA acknowledged that the minister could not reopen statute-barred years after the taxpayer submitted amended returns for those years. The CRA had issued arbitrary assessments to a CCPC, pursuant to subsection 152(7), because no corporate tax returns had been filed. The CCPC subsequently filed amended returns after the normal reassessment period, reporting lower amounts of taxable income than had been arbitrarily assessed. The CRA would not reassess the statute-barred years because none of the exceptions under subsection 152(4) applied. The CRA stated, “[a]ssuming the changes requested by the taxpayer are otherwise permitted under the Act, there would be no misrepresentation in the ‘amended return’ to remedy. As such, the Minister would not be able to re-open the statute barred years.”²⁰⁶

Two years later, the CRA issued a strikingly similar technical interpretation²⁰⁷ on the same question, except that the conclusion was completely opposite. The CRA reiterated similar facts but noted that in this case the proposed changes in the amended returns would result in higher taxable income. The CRA stated that it would not issue an arbitrary assessment without first requesting that the taxpayer file a return, and hence the taxpayer would have been aware of its filing obligation. Accordingly, there would have been neglect, such that the “Minister may exercise her discretion under subparagraph 152(4)(a)(i) to make a reassessment beyond the

204 *Granofsky v. The Queen*, 2016 TCC 181.

205 CRA document no. 2012-0447401I7, September 21, 2012.

206 *Ibid.*

207 CRA document no. 2014-0525371I7, July 9, 2014.

normal reassessment period.”²⁰⁸ The CRA then clarified that the difference between the 2014 and the 2012 interpretations was what it considered to be a misrepresentation made by the taxpayer. The CRA believed that it was inappropriate to reassess an otherwise statute-barred year if the reassessment resulted in a decrease in tax payable, since this would allow a taxpayer who failed to comply with the filing requirement a longer period of time to file a tax return, compared to a taxpayer who attempted to comply with the Act. In contrast, the CRA believed that it should reassess an otherwise statute-barred year if the reassessment would increase the tax payable because it “would be inappropriate for the taxpayer to rely on the normal reassessment period to profit (i.e., underpay its taxes) from its failure to comply with the obligation to file a return.”²⁰⁹

The CRA’s contradictory positions on the reassessment of an otherwise statute-barred year raise many red flags. For instance, determining whether an action is attributable to neglect, carelessness, or wilful default should not depend on whether the assessment results in an increase or decrease in tax payable. The determination of misrepresentation is a question of fact, but the CRA was not applying the test consistently in the two technical interpretations discussed above. Furthermore, the failure to file a return may not be considered “misrepresentation.” In a previous interpretation, the CRA stated that “any misrepresentation must be made at the time that the return was filed.”²¹⁰ In other words, if no return is filed, there cannot be a “misrepresentation.” According to the case law, the minister may not even have the statutory discretion to decide whether it can assess a taxpayer, regardless of the result of such assessment.²¹¹ We suggest that the CRA further clarify its assessing position in these circumstances.

Courts have long recognized the importance of statutory limitation periods, but they also understand the need to strike a proper balance to ensure that the public has trust in a tax system that is based primarily on self-assessment. For instance, in *Tolboek*, the Tax Court noted that the special provisions that grant the minister the discretion to reassess beyond the limitation period are intended to “fulfill the purpose of the section and combat abusive tax shelters.”²¹²

On the basis of the decision in *JP Morgan*,²¹³ the court cannot impede the rights provided to the minister under a statutory provision explicitly granting the minister the power to reassess an otherwise statute-barred taxation year, even if the minister has an administrative policy not to reassess.

208 Ibid.

209 Ibid.

210 CRA document no. 2005-0113241I7, February 2, 2005.

211 For further discussion, see John Sorensen, “CRA’s Position on Late Reassessments” (2014) 22:11 *Canadian Tax Highlights* 5-6.

212 *Tolboek*, supra note 21 (TCC), at paragraph 95.

213 *JP Morgan*, supra note 86.

The decision in *JP Morgan* is consistent with the decision of the Supreme Court of Canada in *Addison & Leyen*.²¹⁴ In that case, the taxpayer was assessed under section 160 for joint and several liability because a transfer of property between non-arm's-length parties was involved. The taxpayer alleged that the reassessment was abusive because of the long delay in pursuing the matter, which prevented the taxpayer from forming a proper defence. The Supreme Court struck the application for judicial review. Specifically, the court determined that the allegation of abuse was related to the limitation period argument, but section 160 does not contain such a limitation period. The court quoted from the decision of the Federal Court of Appeal, which held that "Parliament intended that there be no applicable limitation period and no other condition on when the Minister might assess."²¹⁵

Accordingly, the courts generally will not interfere with the provisions that allow for no limitation period for an assessment or reassessment.

CAN A TAXPAYER MAKE CHANGES TO A STATUTE-BARRED RETURN?

In general, a taxpayer may not make adjustments to a statute-barred return other than in certain limited circumstances. These are discussed below.

Changes Not Affecting Tax, Interest, or Penalties

Subsection 152(4) states that the minister may at any time make assessments, reassessments, or additional assessments of tax, interest, and penalties payable by a taxpayer for a taxation year, but may do so after the normal reassessment period only if certain exceptions apply. A request for an adjustment to a statute-barred taxation year that does not affect the amount of tax, interest, or penalties is not expressly precluded by the wording in subsection 152(4), whether or not the exceptions apply.

Consequently, a taxpayer should be allowed to adjust a discretionary deduction for a particular year as long as the adjustment does not result in a change in taxes payable, whether or not that year is statute-barred. The CRA has administratively allowed the revision of capital cost allowance (CCA) and other permissive deductions (such as special mortgage reserves, scientific research expenditures, or taxable capital gains reserves) as long as the reassessment does not result in a change in taxes payable. The CRA published this view in *Information Circular* IC84-1.²¹⁶ In response to the decision in *Clibetre Exploration*,²¹⁷ the CRA has also specifically allowed the recharacterization of expenses, changing from non-capital losses to CEE for taxation

214 *Canada v. Addison & Leyen Ltd.*, 2007 SCC 33; rev'g 2006 FCA 107.

215 *Addison & Leyen*, supra note 214 (FCA), at paragraph 92.

216 *Information Circular* IC84-1, "Revision of Capital Cost Allowance Claims and Other Permissive Deductions," July 9, 1984.

217 *Clibetre Exploration Ltd. v. Canada (Minister of National Revenue)*, 2003 FCA 16.

years that are statute-barred, again as long as there is no change in taxes payable for each year.²¹⁸

However, the CRA will deny any requests to amend a CCA claim if such adjustments are made to permit retroactive tax planning.²¹⁹ In a 2013 technical interpretation,²²⁰ a taxpayer made a request to adjust the CCA claim for a statute-barred year where the adjustment would result in the conversion of a non-capital loss carry-forward balance to a higher UCC balance. In this particular case, the non-capital loss carryforward balance was about to expire, and the adjustment would preserve taxable basis in the form of a higher UCC balance. The CRA denied the request on the ground that CCA was a discretionary claim and the taxpayer did not make an error when making the claim. In addition, the adjustment of the CCA claim “would render the restrictions on the application of losses in [section] 111 ineffective,” and would be considered retroactive tax planning.²²¹ Although taxpayers have expressed concern that the CRA’s position is not fully consistent with IC84-1, or indeed with the legislation, the CRA reconfirmed its position at the Canadian Tax Foundation’s 2013 round table and the 2014 TEI liaison meeting.²²² In its response at the 2014 TEI liaison meeting, the CRA stated that it would take a closer look at IC84-1 requests on a case-by-case basis.²²³

Statute-Barred Refunds

Two recent court cases are relevant in determining whether refunds can be statute-barred. These cases were decided after the release of the 2012 and the 2014 technical interpretations discussed above.²²⁴ In *Pomeroy’s Masonry Limited*,²²⁵ the taxpayer was assessed a harmonized sales tax (HST) liability of approximately \$113,000. At the same time, the taxpayer late-filed its corporate tax returns and was owed refunds of approximately \$43,000. However, since the taxpayer had not filed its returns within three years, no refund was available under part I, as provided by subsection 164(1). The taxpayer instead applied under subsection 221.2(2) to ask the minister to apply the statute-barred refunds to the HST liability. The minister is given discretion under subsection 221.2(2) to allow the transfer of payments from one account for a year to another account for a different year. The CRA denied the request on

218 CRA document no. 2012-0459341I7, December 11, 2012.

219 CRA document no. 2013-0474111I7, March 25, 2013.

220 Ibid.

221 Ibid.

222 CRA document no. 2014-0550381C6, November 18, 2014.

223 For a more detailed discussion, see Daniel Sandler and Allison Blackler, “(Can’t Get No) Satisfaction? Look Beyond the Fairness Provisions,” in *Report of Proceedings of the Seventieth Tax Conference*, 2018 Conference Report (Toronto: Canadian Tax Foundation, 2019), 33:1-30.

224 See supra notes 204 and 207 and the accompanying text.

225 *Pomeroy’s Masonry Limited v. Canada (Attorney General)*, 2017 FC 952.

the basis that the tax returns giving rise to the refunds were not filed on a timely basis and the filing was not hindered by any extraordinary circumstances, such as a natural or human-made disaster, as set out in its published policy at the time. The Federal Court granted judicial review of the CRA's decision and referred the matter back to the minister for reconsideration on the ground that the taxpayer was facing bankruptcy, which was a persuasive "other" factor that should have been considered.

A similar decision was reached in *Referred Realty Inc.*²²⁶ The Federal Court granted judicial review of the CRA's refusal to apply statute-barred refunds against tax liabilities in a subsequent year. The court found that the taxpayer demonstrated an active effort to meet its corporate tax responsibility and relied on professional advice to the effect that, once all the financial affairs were properly arranged, taxes and penalties would be paid without objection or request for relief. The court directed the minister to carefully consider all the taxpayer's circumstances in order to re-evaluate whether it was reasonable to grant the reappropriation of the statute-barred credit under subsection 221.2(2).

Because of recent cases such as those discussed above, the CRA stated at the Canadian Tax Foundation's 2017 annual conference that section 221.2 will be revisited to review the criteria in form RC431.²²⁷

Interestingly, in *Bonnybrook Park Industrial Development Co. Ltd.*,²²⁸ the Federal Court of Appeal offered another form of remedy to corporate taxpayers. The court stated that subsection 220(3) provides the CRA with the authority to waive the three-year filing deadline, including the claim for a dividend refund under subsection 129(1). The CRA had originally argued that subsection 220(3) is relevant only to the provision of relief with regard to the filing of tax returns under subsection 150(1), and it has no effect on relieving the condition to provide a dividend refund in subsection 129(1). The court disagreed with this position and stated that the provision in subsection 220(3) provides exactly that kind of relief to taxpayers. Accordingly, if taxpayers can otherwise satisfy the CRA's guidelines for relief,²²⁹ they may request an extension from the minister under subsection 220(3) to allow a refund that arises from a statute-barred year.

Limitations on Objections

If the minister reassesses a taxation year that is otherwise statute-barred under any of the specific provisions discussed earlier in this article, a taxpayer is not allowed

226 *Referred Realty Inc. v. Canada (Attorney General)*, 2018 FC 59.

227 See Ted Gallivan, Alexandra MacLean, John Sorensen, and Adrienne Woodyard, "A Potpourri of Issues in the Administration and Enforcement of the Income Tax Act," in *Report of Proceedings of the Sixty-Ninth Tax Conference*, 2017 Conference Report (Toronto: Canadian Tax Foundation, 2018), 32:1-16, at 32:11 (Gallivan); and CRA form RC431, "Request for Reappropriation of T2 Statute-Barred Credits."

228 *Bonnybrook Park Industrial Development Co. Ltd. v. Canada (National Revenue)*, 2018 FCA 136.

229 IC07-1R1, supra note 165.

to utilize the reopened taxation year as an opportunity to claim additional credits or deductions beyond those that are subject to the specific reassessments. Subsection 165(1.1), introduced in 1991, limits the ability of a taxpayer to object only in respect of matters that the minister has assessed under the provisions that allow reassessments beyond the normal reassessment periods.²³⁰ Subsection 169(2) provides a similar limitation on objections at the appeal stage to the Tax Court of Canada.

CONSEQUENTIAL ASSESSMENTS OF STATUTE-BARRED YEARS

Where there have been changes to a “balance”²³¹ in respect of a taxation year because of an assessment or reassessment of a subsequent taxation year that would otherwise be statute-barred, subsection 152(4.3) allows—or, if the taxpayer so requests in writing, requires—the minister to make a consequential assessment of the subsequent year. Balances that may have a consequential effect include carryforward balances (such as a non-capital loss, a net capital loss, and a foreign accrual property loss) and alternative minimum tax. Such assessments made by the minister in respect of an earlier taxation year consequentially extend the assessment period to the affected subsequent taxation years.²³² Nonetheless, the minister must reassess the subsequent taxation years (which would otherwise be statute-barred) for changes related to the change in the particular balance of the earlier year within one year after the expiration of the rights of objection and appeal for the earlier year.²³³

The consequential assessment is not a provision that favours the minister only. There are situations where the taxpayer may also benefit from revising a carryforward balance for a taxation year that would otherwise be statute-barred. For example, if a non-capital loss amount is determined to be higher after an appeal, the taxpayer may request that such a balance be applied to subsequent statute-barred years.²³⁴

230 Specifically, subsection 165(1.1) refers to assessments made pursuant to subsections 67.5(2), 152(1.8), 152(4.3), 152(6), 161.1(7), 164(4.1), 220(3.4), and 245(8), and subparagraph 152(4)(b)(i).

231 The term “balance” is defined in subsection 152(4.4) to mean “the income, taxable income, taxable income earned in Canada or any loss of the taxpayer for the year, or the tax or other amount payable by, any amount refundable to, or any amount deemed to have been paid or to have been an overpayment by, the taxpayer for the year.”

232 Under subsection 152(4.3).

233 The one-year clock for subsection 152(4.3) is important, as can be seen in *Blackburn Radio Inc. v. The Queen*, 2012 TCC 255. In *Blackburn Radio*, the Tax Court vacated consequential reassessments issued by the CRA because they were issued more than one year after the taxpayer’s appeal rights had expired.

234 However, in practice, if the appeal process is extensively prolonged, the taxpayer may file a waiver to protect carryforward balances from being statute-barred.

The issue of whether the CRA is allowed to make an adjustment to the amount of non-capital loss claimed in respect of a statute-barred year under subsection 152(4.3) was addressed in the recent Tax Court decision in *Bakorp Management Ltd.*²³⁵ The taxpayer (“Bakorp”) requested a reassessment under subsection 152(4.3) to reduce the amount of non-capital loss claimed in a statute-barred year after the settlement of non-capital loss carried forward from an earlier year (referred to as “the first loss claim”). The adjustment, if made, would have resulted in no change in income to Bakorp for that statute-barred year because of additional ITCs being claimed. Bakorp also requested that the losses freed up by the reassessment be carried forward and deducted in a subsequent taxation year (referred to as “the second loss claim”). The minister denied both requests. Bakorp appealed to the Tax Court in respect of the second loss claim. The court considered the application of subsection 152(4.3) in respect of the first loss claim and concluded that Bakorp did not meet the conditions because the first loss claim was not affected by the loss in dispute in relation to the earlier year. The court found that Bakorp “has not overclaimed or underclaimed non-capital losses attributable to the earlier year [i.e., the losses that were in dispute and ultimately settled].”²³⁶ Of particular interest, Hogan J (who rendered the decision) said, “In my opinion, this constitutes after-the-fact tax planning that is not permitted under the limited scope of application of subsection 152(4.3).”²³⁷ The Federal Court of Appeal²³⁸ dismissed this case on the ground that the minister’s denial under subsection 152(4.3) could be challenged only by way of judicial review in the Federal Court.

Essentially, the decision in *Bakorp Management Ltd.* clarified that a taxpayer that wishes to recharacterize losses in statute-barred years cannot modify previous positions if they were factually and legally correct.²³⁹

RECORD KEEPING

The provisions that have no limitation period appear to be at odds with the Act’s record-keeping requirements. Subsection 230(4) specifies how long a taxpayer is required to keep records and books of account—generally, for six years from the

235 *Bakorp Management Ltd. v. The Queen*, 2018 CarswellNat 5991 (available on *Taxnet Pro*).

236 *Ibid.*, at paragraph 39.

237 *Ibid.*, at paragraph 43.

238 *Bakorp Management Ltd. v. Canada*, 2019 FCA 195.

239 Lubetsky has explained that loss years or years with no tax payable can never become statute-barred under the *New St James* principle. However, under *Bakorp*, a taxpayer with the ability to recharacterize losses in a statute-barred year as provided by the *New St James* principle may still not modify previously taken positions that were factually and legally well founded. Michael Lubetsky, “Income Tax Disputes Involving Loss Years: Pitfalls, Foibles, and Possible Reforms” (2019) 67:3 *Canadian Tax Journal* 499-531.

end of the last taxation year to which the books and records relate. These records and books of account are the ones that allow the minister to determine the amount of tax owing. Exemptions may be granted to eliminate the record-keeping requirement for specific persons or classes of persons in certain circumstances (as provided in subsection 230(4.2)), and there are exceptions that extend the period if returns have not been filed (under subsection 230(5)) or while objections or appeals are ongoing (under subsection 230(6)). However, none of these exemptions or exceptions take into account the fact that the minister can assess a taxpayer at any time under provisions that have no limitation period. If the books and records are destroyed by the taxpayer as permitted by the Act, the taxpayer may not have the proper supporting documents to successfully challenge such reassessments.

In addition, there is other legislation that requires the destruction of information. For example, section 4.5.3 of schedule 1 of the Personal Information Protection and Electronic Documents Act²⁴⁰ (PIPEDA) states that organizations should destroy personal information that is no longer required to fulfill the identified purpose. Personal information could include financial information of an individual. A director who destroys salary information of an employee in accordance with PIPEDA may not have the necessary information to object to the minister's reassessment, especially when the director's liability to withhold source deductions is not subject to a limitation period. Although one can argue that such personal information is still required to fulfill the identified purpose, the contradiction between permitting documents to be destroyed and holding years open indefinitely poses a practical challenge to taxpayers.

There is limited jurisprudence in which the courts have discussed the type and scope of documents covered by the record-keeping requirements, especially when such records are subsequently destroyed. In *Husky Oil*, for example, the Tax Court implicitly indicated that a judge should not draw an adverse conclusion against a taxpayer that has destroyed documents in accordance with a sound record retention policy and with the requirements of the Act.²⁴¹ However, these statements by the court are helpful only to the extent that no adverse inference can be drawn against a taxpayer. They do not necessarily mean that a taxpayer may be allowed a lesser evidentiary burden because documents have been destroyed as allowed under subsection 230(4).

CONCLUSION AND RECOMMENDATIONS

As we have shown, there are many assessing provisions in the Act that have no limitation period, some of which are justified because Canada has a self-assessment system and information is required for the minister to properly assess a return. In

240 SC 2000, c. 5, as amended.

241 *Husky Oil Limited v. MNR*, 95 DTC 316 (TCC), at paragraphs 45, 50, and 84.

particular, the minister is given broad power to reassess beyond the normal reassessment period in certain cases to combat aggressive tax avoidance.²⁴²

After reviewing all of these provisions, we have identified certain areas where, in our view, amendments should be considered. Our recommendations are as follows:

1. A return that is exempt from filing should become statute-barred after a certain reasonable period, provided that there is not a subsequent discovery that the conditions for the exemption from filing are not met. Individual returns and trust returns that meet the exceptions under subsections 150(1.1) and (1.2) are examples in this category.
2. Explicit provisions should be added to the Act allowing an exception for small partnerships in respect of the requirement to file partnership information returns, and the limitation period in subsection 152(1.4) should be extended to include such circumstances.
3. The Act should be amended to provide for an additional three years rather than an indefinite period for assessment or reassessment as follows:
 - a. amend subsection 237.1(6.2) to provide a time limit of six years from the filing of form T5001 (application for a tax shelter number) for an assessment, determination, or redetermination to give effect to subsection 237.1(6.1) for denying any deduction or claim made in respect of a tax shelter;
 - b. amend subsection 184(4) to provide a time limit of three years from the date of a subsection 184(3) election for assessment or reassessment of the shareholders to take into account the effect of the election (to treat an excessive capital dividend as a regular taxable dividend);
 - c. amend subsection 185.1(3) to provide a time limit of three years from the date of a subsection 185.1(2) election for assessment or reassessment of the shareholders to take into account the effect of the election (to treat an excessive eligible dividend as a regular taxable dividend);
 - d. amend subsection 191.2(3) to provide a time limit of three years from the date of a subsection 191.2(1) election for assessment or reassessment of tax, interest, and penalties to take into account the effect of the election (to pay part VI.1 tax as provided under subparagraph 191.1(1)(a)(ii)); and
 - e. amend subsection 80.04(12) to provide a time limit of three years from the date of the notice of assessment of the last taxation year for a which a debtor is liable for the taxes of the transferee (that is, the taxation year ending within four calendar years from the date of the transfer agreement).

242 See, for example, subsection 143.2(15), which gives the minister broad power to reassess beyond the normal reassessment period to combat potential abuse by tax shelters, and the decision in *Tolboek*, supra note 21.

4. Consider a statute-barred period from the date of filing of form T4 for source deductions and form NR4 for part XIII taxes. This can be an additional three-year period similar to the provision under paragraph 152(4)(b) for transfer-pricing adjustments.
5. Provide a statute-barred date for adjustments to an election under section 59.1 to coincide with the normal reassessment period for the 10th subsequent year to the year of election, since sufficient expenditures must have been incurred within 10 years to fully offset the income from the property subject to expropriation. The normal reassessment period for the 10th year would allow the minister sufficient time to reassess the taxpayer to include income that has not been reduced by the expenditures in the original year of expropriation.
6. Allow for a binding determination of tax attributes such as the CDA, ITCs, ERDTH, NERDTH, LRIP, GRIP, and UCC, similar to a notice of loss determination under subsection 152(1.3) in respect of losses.
7. Allow reassessment with no limitation period to take into account the utilization of post-emigration losses under subsection 128.1(8) and claims of foreign tax credits under subsection 126(2.21) in respect of a post-emigration disposition.

Income Tax Complexity Faced by Multinational Corporations: A Comparative Study of Canada, the United States, and Other Selected OECD Countries

Susann Sturm*

PRÉCIS

Cette étude examine la complexité du régime fiscal des sociétés au Canada du point de vue des sociétés multinationales et le compare avec la complexité du régime américain, en tenant aussi compte des mesures de complexité de 19 autres pays membres de l'Organisation de coopération et de développement économiques (OCDE). L'auteur constate qu'en ce qui concerne le code canadien des impôts, les lois les plus complexes sont celles relatives à la réorganisation des sociétés, aux prix de transfert et aux sociétés étrangères contrôlées, et qu'en ce qui concerne le cadre fiscal canadien, les aspects les plus complexes sont les vérifications fiscales, la promulgation des lois fiscales et les orientations fiscales. Par rapport aux autres pays de l'OCDE, le Canada est extrêmement semblable aux États-Unis. Les deux pays ont un degré moyen de complexité globale, et tous deux ont un code des impôts plus complexe, mais un cadre fiscal moins complexe que ceux des autres pays. Toutefois, un examen plus approfondi des codes et cadres fiscaux canadiens et américains révèle des différences importantes dans les degrés de complexité, notamment en ce qui a trait à certaines lois fiscales.

* Of Rödl & Partner, Munich (e-mail: susann.sturm@roedl.com). This article was written during my time as a research assistant at the Munich School of Management, Ludwig Maximilian University of Munich. I thank Georg Bauer, Alexander Edwards, Thomas Hoppe, Maximilian Mayer, Alan Macnaughton (one of the editors of this journal), Wolfgang Sturm, François Vaillancourt, and two anonymous reviewers for helpful comments and suggestions. I also thank all survey respondents of Baker Tilly Roelfs, BDO, Crowe Kleeberg, Deloitte, DFK, Ecovis, HLB Stückmann, KPMG, Kreston, Moore Stephens, Nexia, PKF, PwC, RSM, Rödl & Partner, Taxand, UHY, Warth & Klein Grant Thornton, and WTS, without whom the tax complexity index and also this study, which uses tax complexity index data, would not have been possible. I gratefully acknowledge funding by the Deutsche Forschungsgemeinschaft (DFG, German Research Foundation), Project ID 403041268, TRR 266 Accounting for Transparency, and the LMU Mentoring Program. Data interpretations are my own. They do not reflect the views of Rödl & Partner or the Munich School of Management.

ABSTRACT

This study examines the complexity of Canada's corporate income tax system from the perspective of multinational corporations and compares it with the complexity of the US system, also taking into account measures of complexity for 19 other member countries of the Organisation for Economic Co-operation and Development (OECD). The author finds that with regard to the Canadian tax code, the most complex laws are those on corporate reorganization, transfer pricing, and controlled foreign corporations, and with regard to the Canadian tax framework, the most complex areas are tax audits, tax-law enactment, and tax guidance. In comparison with other OECD countries, Canada is remarkably similar to the United States. Both countries have a medium level of overall complexity, and both have a more complex tax code but a less complex tax framework than other countries. However, a closer examination of the Canadian and US tax codes and tax frameworks reveals some significant differences in complexity levels, particularly in respect of certain tax laws.

KEYWORDS: TAX ■ SURVEYS ■ CANADA ■ COMPARATIVE STUDIES ■ UNITED STATES ■ OECD

CONTENTS

Introduction	746
Methodology	753
Survey and Index	753
Respondents and Analysis	757
Results	759
Role of Tax Complexity	759
Overview of Tax Complexity	760
Tax Code Complexity	761
Tax Framework Complexity	768
Tax Audits	769
Tax-Law Enactment	773
Tax Guidance	776
Tax Appeals	778
Tax Filing and Payments	782
Conclusion	784
Appendix	787

INTRODUCTION

Tax complexity is not a new phenomenon in Canada.¹ However, in recent years, it has received increased attention. Many concerns have emerged about the (rising) complexity of the Canadian tax system.² A general problem with tax complexity is

1 Already in the 1990s, the complexity of the tax legislation was perceived as the main source of the high federal compliance costs of large Canadian businesses. Brian Erard, *The Income Tax Compliance Burden on Canadian Big Business*, Working Paper no. 97-2 (Ottawa: Department of Finance, Technical Committee on Business Taxation, April 1997).

2 See François Vaillancourt, Marylène Roy, and Charles Lammam, "Measuring Tax Complexity in Canada" (April 2015) *Fraser Research Bulletin* 1-10; François Vaillancourt, Charles Lammam,

that it can impose significant costs on taxpayers and governments.³ As a result, a complex tax system is often viewed as a threat to a country's global competitiveness, which is generally important for economic growth and investments. Global competitiveness also plays a large role for Canada. Guided by the concern that the country is struggling to remain competitive, in 2012, the Canadian Chamber of Commerce launched the "top 10 barriers to competitiveness" initiative, producing a list of 10 barriers that needed to be overcome to improve Canada's competitiveness. In all the subsequent reporting about this initiative, the complexity of the Canadian tax system is highlighted as one of these barriers.⁴ Surprisingly, despite the substantial attention given to tax complexity in Canada, there is not much research available on the subject—especially in contrast to other countries where it is considered a serious issue (for example, Australia and the United States).⁵ Most prior

Feixue Ren, and Marylène Roy, *Measuring Personal Income Tax Complexity in Canada* (Vancouver: Fraser Institute, April 2016); François Vaillancourt and Richard Bird, "Tax Simplification in Canada: A Journey Not Yet Mapped," in Simon James, Adrian Sawyer, and Tamer Budak, eds., *The Complexity of Tax Simplification: Experiences from Around the World* (New York: Palgrave Macmillan, 2016), 70-94; and Finn Poschmann, François Vaillancourt, and Jake Fuss, *Tax Complexity in 2019: Can It Be Tamed?* (Vancouver: Fraser Institute, 2019). Tax complexity mainly occurs as a by-product of designing and reforming a tax system that aims to maximize social welfare while considering the tradeoffs between efficiency, equity, and fairness. See Gregory A. Carnes and Andrew D. Cuccia, "An Analysis of the Effect of Tax Complexity and Its Perceived Justification on Equity Judgments" (1996) 18:2 *Journal of the American Taxation Association* 40-56; Louis Kaplow, "Accuracy, Complexity, and the Income Tax" (1998) 14:1 *Journal of Law, Economics, & Organization* 61-83; and Andrew D. Cuccia and Gregory A. Carnes, "A Closer Look at the Relation Between Tax Complexity and Tax Equity Perceptions" (2001) 22:2 *Journal of Economic Psychology* 113-40.

- 3 Costs of tax complexity include, for example, distortions, non-compliance, compliance costs, and legal uncertainty. See David Ulph, "Measuring Tax Complexity," in Chris Evans, Richard Krever, and Peter Mellor, eds., *Tax Simplification* (Alphen aan den Rijn, the Netherlands: Kluwer Law International, 2015), 41-53.
- 4 See Canadian Chamber of Commerce, *Top 10 Barriers to Competitiveness*, for the years 2013 through 2016 (available upon request).
- 5 There are many studies that cover various aspects of tax complexity in Australia and the United States. For Australia, see, for example, David Smith and Grant Richardson, "The Readability of Australia's Taxation Laws and Supplementary Materials: An Empirical Investigation" (1999) 20:3 *Fiscal Studies* 321-49; Chris Evans, Phil Lignier, and Binh Tran-Nam, *Tax Compliance Costs for the Small and Medium Enterprise Business Sector: Recent Evidence from Australia*, Tax Administration Research Centre Seminar Discussion Paper no. 003-13 (Exeter, UK: Tax Administration Research Centre, 2013); and Binh Tran-Nam and Chris Evans, "Towards the Development of a Tax System Complexity Index" (2014) 35:3 *Fiscal Studies* 341-70. For the United States, see, for example, J. Scott Moody, Wendy P. Warcholik, and Scott A. Hodge, *The Rising Cost of Complying with the Federal Income Tax*, Tax Foundation Special Report no. 138 (Washington, DC: Tax Foundation, 2005), 1-16; Joel Slemrod, "The Etiology of Tax Complexity: Evidence from U.S. State Income Tax Systems" (2005) 33:3 *Public Finance Review* 279-99; and Hughlene A. Burton and Stewart Karlinsky, "Tax Professionals' Perception of Large and Mid-Size Business US Tax Law Complexity" (2016) 14:1 *eJournal of Tax Research* 61-95.

studies on Canada focus on certain aspects of tax complexity, often at a highly aggregated level. Furthermore, the few cross-jurisdictional studies that include Canada provide different results on how the country performs relative to others in terms of tax complexity. Hence, on the basis of the literature, the question remains whether Canada's tax system is as overly complex as indicated by the initiative of the Canadian Chamber of Commerce.

In this study, I respond to this question by examining the complexity of the Canadian corporate income tax system faced by resident multinational corporations (MNCs) in 2016, contrasting it to the average complexity of other important and comparable countries.⁶ On the one hand, I focus on the United States. While comparisons between Canada and the United States are prominent in the tax literature,⁷ no previous studies have examined particular facets of tax complexity in the two countries. Since Canada and the United States have interdependent economies with various similarities (as well as a common border), they provide a useful basis for comparison. On the other hand, I follow prior tax-related comparative studies⁸ by focusing on member countries of the Organisation for Economic Co-operation and Development (OECD) (to which Canada and the United States belong) and selecting 19 of the those other member countries as a peer group. The selected countries are a suitable peer group insofar as they share many characteristics with Canada. Most of them have advanced economies with a similar degree of development.⁹ Moreover, they are affected in the same way by recent tax initiatives of the OECD, such as the base erosion and profit-shifting (BEPS) project to tackle international tax avoidance by MNCs. To conduct the analyses, I use the data of the tax complexity index,¹⁰

6 I focus on corporate income taxes because they are an important source of tax revenue and an influential factor for real corporate decisions. See Michelle Hanlon and Shane Heitzman, "A Review of Tax Research" (2010) 50: 2-3 *Journal of Accounting and Economics* 127-78.

7 See, for example, Erard, *supra* note 1; Howard Chernick and Jennifer Tennant, "Federal-State Tax Interactions in the United States and Canada" (2010) 40:3 *Publius: The Journal of Federalism* 508-33; and Odette M. Pinto, "Tax Factors Affecting International Competitiveness: Canada vs. United States Perspective" (2016) 7:12 *International Journal of Business and Social Science* 1-10.

8 Adam Wagstaff and Eddy van Doorslaer, "What Makes the Personal Income Tax Progressive? A Comparative Analysis for Fifteen OECD Countries" (2001) 8:3 *International Tax and Public Finance* 299-316; Chang Woon Nam, "Corporate Tax Incentives for R&D Investment in OECD Countries" (2012) 26:1 *International Economic Journal* 69-84; and Marcus Drometer, Marco Frank, Maria Hofbauer Pérez, Carla Rhode, Sebastian Schworm, and Tanja Stittenede, "Wealth and Inheritance Taxation: An Overview and Country Comparison" (2018) 16:2 *ifo DICE Report* 45-54.

9 David F.J. Campbell, Elias G. Carayannis, and Scheherazade S. Rehman, "Quadruple Helix Structures of Quality of Democracy in Innovation Systems: The USA, OECD Countries, and EU Member Countries in Global Comparison" (2015) 6:3 *Journal of the Knowledge Economy* 467-93.

10 Aggregate data compiled by the tax complexity index are publicly available and can be downloaded at www.taxcomplexity.org. In this study, I use not only the publicly available data but also the disaggregated data, which are not publicly available.

a composite measure of total tax complexity developed by Hoppe, Schanz, Sturm, and Sureth-Sloane.¹¹ It covers 100 countries and is based on data collected in 2016 through a global online survey of tax consultants from 19 international tax services firms and networks. The index makes available a large quantity of information about tax complexity and thus provides a unique opportunity to study the complexity of the Canadian tax system in detail. Following Hoppe et al., I define “tax complexity” as a characteristic of the tax system that arises from the difficulty of reading, understanding, and complying with the tax code (tax code complexity), as well as from issues of various kinds related to features and processes within the tax system (tax framework complexity).

I find that Canada has a medium level of total tax complexity, as compared with the United States and the other 19 OECD countries; however, Canada has a higher level of tax code complexity and a lower level of tax framework complexity. A closer look at the dimensions of tax code and tax framework complexity reveals that in the Canadian tax code the most complex laws¹² are those on corporate reorganization, transfer pricing, and controlled foreign corporations, while in the tax framework the most complex areas are tax audits, tax-law enactment, and tax guidance.

Relative to the other OECD countries, Canada and the United States are remarkably similar in terms of their complexity levels; however, there are also some differences. For tax code complexity, I find significant differences between Canada and the United States for 5 out of 15 tax laws. While laws on corporate reorganization and capital gains are considered to be more complex in Canada, in the United States laws on local and industry-specific taxes, depreciation, and (alternative) minimum taxes are viewed as more complex. Drivers contributing to the more complex laws in Canada are excessive detail and ambiguity. Regarding the complexity levels of the tax framework areas (audits, appeals, enactments, filing and payments, and guidance), the main complexity drivers are generally similar in Canada and the United States; however, I find significant differences among a few complexity drivers within certain areas of the tax framework. For example, both the time period between the announcement and the enactment of a tax law in the tax-law enactment process, and the time period between the filing of an appeal and a final decision at the judicial level in the tax appeals process, are regarded as more serious problems in Canada than in the United States. On the basis of the overall results for Canada, and the comparison with the United States and the average of the other OECD countries, I conclude that

11 Thomas Hoppe, Deborah Schanz, Susann Sturm, and Caren Sureth-Sloane, “The Tax Complexity Index—A Survey-Based Country Measure of Tax Code and Framework Complexity” (2021) *European Accounting Review* 1-35 (<https://doi.org/10.1080/09638180.2021.1951316>). Unless otherwise noted, references in this article to Hoppe et al. are to this 2021 study.

12 Hoppe et al., *ibid.*, use the term “regulations” to describe provisions, rules, and standards in the tax code. However, because this term has a specific meaning in Canada (laws that have not been explicitly passed by Parliament but instead have been given legal status by Cabinet), I refer to the term “laws.”

Canada's corporate income tax system cannot be considered to be overly complex as indicated by the initiative of the Canadian Chamber of Commerce.

The contribution of this study is twofold. First, I extend prior literature that has focused exclusively on tax complexity in Canada, most of which is the result of the pioneering work of François Vaillancourt. The majority of studies have focused on tax compliance costs for individuals,¹³ businesses,¹⁴ or both individuals and businesses. These costs were often estimated through surveys (telephone or mail) or simulations. While the findings provide some evidence about the magnitude of the tax compliance burden, they are subject to several limitations, including the difficulty of disentangling the drivers of the compliance costs in the tax system itself, which are strongly affected by taxpayer-specific characteristics such as firm size.¹⁵ There are also some studies that have estimated the costs to government relating to enforcement and tax collection (administrative costs).¹⁶

In addition to the purely cost-based studies, a few recent Canadian studies¹⁷ combine three measures that have been proposed in prior literature to quantify tax

-
- 13 Brian Erard and François Vaillancourt, "The Compliance Costs of a Separate Personal Income Tax System for Ontario: Simulations for 1991," in A.M. Maslove, ed., *Taxation in a Sub-National Jurisdiction* (Toronto: University of Toronto Press, 1993), 137-70; François Vaillancourt, "The Compliance Costs of Individuals in Canada: Personal Income Tax and Payroll Taxes," in Cedric Sandford, ed., *Tax Compliance Costs: Measurement and Policy* (Bath, UK: Fiscal Publications, 1995), 196-209; François Vaillancourt and E. Blais, "The Evolution of Compliance Time of Personal Income Tax-Filers in Canada 1971-93," in *Tax Compliance Costs*, supra, 263-272; François Vaillancourt, *The Cost to Canadians of Complying with Personal Income Taxes* (Vancouver: Fraser Institute, April 2010); Sean Speer, Milagros Palacios, Marco Lugo, and François Vaillancourt, *The Cost to Canadians of Complying with Personal Income Taxes* (Vancouver: Fraser Institute, April 2014); and Marco Lugo and François Vaillancourt, "Measuring Tax Complexity: Analytical Framework and Evidence for Individual Income Tax Preferences for Canada," in *Tax Simplification*, supra note 3, 141-65.
 - 14 Sally Gunz, Alan Macnaughton, and Karen Wensley, "Measuring the Compliance Cost of Tax Expenditures: The Case of Research and Development Incentives" (1995) 43:6 *Canadian Tax Journal* 208-34; Robert E. Plamondon and David Zussman, "The Compliance Costs of Canada's Major Tax Systems and the Impact of Single Administration" (1998) 46:4 *Canadian Tax Journal* 761-85; François Vaillancourt and Jason Clemens, "Compliance and Administrative Costs of Taxation in Canada," in Jason Clemens, ed., *The Impact and Cost of Taxation in Canada: The Case for Flat Tax Reform* (Vancouver: Fraser Institute, February 2008), 55-102; and François Vaillancourt and Maria Silvia Barros, "The Tax Compliance Costs of Small and Medium Businesses, Canada, 2007," in *Proceedings of the One Hundred Fourth Annual Conference on Taxation and Minutes of the Annual Meeting of the National Tax Association* (Washington, DC: National Tax Association, 2011), 212-18.
 - 15 For a discussion of further limitations, see Sebastian Eichfelder and Frank Hechtner, "Tax Compliance Costs: Cost Burden and Cost Reliability" (2018) 46:5 *Public Finance Review* 764-92.
 - 16 See, for example, Vaillancourt and Clemens, supra note 14; and François Vaillancourt, Édison Roy-César, and Maria Silvia Barros, *The Compliance and Administrative Costs of Taxation in Canada* (Vancouver: Fraser Institute, April 2013).
 - 17 For example, Vaillancourt et al., supra note 2; Vaillancourt and Bird, supra note 2; and Poschmann et al., supra note 2.

complexity in the United States. These three measures are the number and value of tax expenditures,¹⁸ the size of the federal income tax code,¹⁹ and the length of the instruction.²⁰ These variables were analyzed with respect to personal income tax, corporate income tax, and goods and services tax (GST); all three indicators yield similar increases in tax complexity over time. However, owing to the strong focus on only a few aspects, often at a highly aggregated level, the studies provide an overview of the complexity of the Canadian tax system and do not offer an in-depth analysis. This is where the present study steps in. Using the data in the tax complexity index, I can quantify and comprehensively review complexity within the Canadian tax system.

Furthermore, I extend the literature by comparing the tax complexity in Canada with that in other countries or country groups. Since (given the prior lack of data) cross-jurisdictional studies on tax complexity are generally rare, there are only few country comparisons that have considered Canada. One of these is the 1997 study by Erard,²¹ which estimated the income tax compliance burden of big businesses in Canada and compared it with the cost estimates of Slemrod and Blumenthal for the United States.²² Erard's study indicated that compliance costs in Canada were high but lower than those in the United States. Another study comparing tax compliance costs among countries is a 2014 study by Evans et al.²³ that was conducted for small businesses in Australia, Canada, South Africa, and the United Kingdom. In that study, Canada was highlighted for its very high level of internal compliance costs for income taxes, compared to the other three countries. Although both studies provide some indication about Canada's compliance burden relative to that of other countries, they are subject to some limitations. Owing to differences in the methodologies across the countries, the estimates are not fully comparable.²⁴ Moreover, the approaches used do not offer the capability to obtain deep insights into the key determinants of compliance costs across the countries studied.

Another study examining tax complexity across countries is the annual study of the World Economic Forum, which aims to measure the global competitiveness of nations. In earlier versions, the study also measured tax complexity. Business

18 Paul Weinstein, *The State Tax Complexity Index: A New Tool for Tax Reform and Simplification* (Washington, DC: Progressive Policy Institute, 2014).

19 Moody et al., *supra* note 5.

20 Slemrod, *supra* note 5.

21 *Supra* note 1.

22 Joel B. Slemrod and Marsha Blumenthal, "The Income Tax Compliance Cost of Big Business" (1996) 24:4 *Public Finance Quarterly* 411-38.

23 Chris Evans et al., "Small Business and Tax Compliance Costs: A Cross-Country Study of Managerial Benefits and Tax Concessions" (2014) 12:2 *eJournal of Tax Research* 453-82.

24 The problem of limited comparability is also noted by several review studies, which call for more internationally comparable analyses in the future. See, for example, Sebastian Eichfelder and François Vaillancourt, "Tax Compliance Costs: A Review of Cost Burdens and Cost Structures" (2014) 210:3 *Review of Public Economics* 111-48.

executives in each country were asked to rate the complexity of the tax system on a scale from one (highly complex) to seven (simple and transparent). In the 2005 report, which was the last one to include this question, Canada ranked in the middle of the OECD countries (at 17th out of 35), with an average score of 2.9.²⁵ Similar to the compliance cost studies by Erard and Evans et al., the scores reported by the World Economic Forum give an impression of Canada's tax complexity relative to that of other countries, but the data are somewhat subjective, and they do not provide any information on the underlying drivers of the scores. A different approach is followed by Ehrlich, who has measured tax complexity on the basis of the standardized number of words in a country's tax laws.²⁶ With about 1.26 million words, Canada ranked 4th among the 19 OECD countries in Ehrlich's sample and thus was one of the most complex countries. In contrast to the previous studies, the count-based approach by Ehrlich would allow for a closer look at single laws. However, the approach is very narrow in its focus since it captures only the amount of detail in a tax law.²⁷

A more comprehensive approach is taken in the "paying taxes" study by Price-waterhouseCoopers (PwC) and the World Bank Group.²⁸ This study combines several measures, including the number of tax payments, and the time to file and pay taxes, in order to quantify the total tax burden. To ensure comparability, the measures are calculated by reference to a medium-sized case-study company without any foreign operations. PwC and the World Bank Group found that, in 2016, Canada had a total paying taxes score of 88.05, which translated into a country ranking of 29th out of 35 OECD countries, indicating a very low level of tax complexity.²⁹ Under the composite approach of the paying taxes study, it is possible to look at the values of single components and thus, to some extent, to obtain information about the reasons for the low level of tax complexity. However, the paying taxes study is often heavily criticized—for example, for its focus on a purely domestic medium-sized company and its inability to capture the whole tax burden.³⁰

25 Augusto Lopez-Claros, Michael E. Porter, and Klaus Schwab, *The Global Competitiveness Report: 2005-2006: Policies Underpinning Rising Prosperity* (New York: World Economic Forum and Palgrave Macmillan, 2005).

26 Sean D. Ehrlich, *Access Points: An Institutional Theory of Policy Bias and Policy Complexity* (Oxford: Oxford University Press, 2011).

27 Detailed tax laws do not have to be negative per se, since they could also offer more comprehensive explanations, more examples, and so on. However, in prior research, detail usually has a negative connotation in the sense that it may be excessive.

28 PwC and World Bank Group, *Paying Taxes 2020: The Changing Landscape of Tax Policy and Administration Across 190 Economies* (PwC and World Bank Group, 2019) (www.pwc.com/gx/en/paying-taxes/pdf/pwc-paying-taxes-2020.pdf).

29 PwC and World Bank Group, *Paying Taxes 2018* (PwC and World Bank Group, 2017), at 87 (www.pwc.com/gx/en/paying-taxes/pdf/pwc_paying_taxes_2018_full_report.pdf). In the most recent paying taxes study, *Paying Taxes 2020*, supra note 28, Canada has a total paying taxes score of 88.1, suggesting that the tax system has not substantially changed over the last five years.

30 Tran-Nam and Evans, supra note 5, at 356-57.

Given the limitations of the different approaches and the varied results, as described above, it is still unclear how Canada performs relative to other countries. The present study uses a comprehensive approach and provides more clarity. It carries out a detailed comparison between Canada, the United States, and other OECD countries. It compares not only the overall levels of tax complexity, but also the underlying drivers.

This study will be of interest to different groups. The results can help policy makers to improve existing tax policies and processes and provide them with evaluation criteria to assess new policies and processes in the future. In addition, MNCs may find the information about tax complexity to be relevant and useful in making certain business decisions. Last but not least, the study provides researchers with comprehensive information on tax complexity that could be used as a starting point for future research.

The remainder of this article is organized as follows. The next section provides an overview of the tax complexity index and its underlying survey. In addition, it describes the sample and the methodology of the analysis. The section that follows presents the results, focusing on the levels of tax complexity in general and providing details on the drivers of tax code and tax framework complexity. The last section summarizes the findings and offers conclusions.

METHODOLOGY

Survey and Index

I use the data of the tax complexity index for 2016 to examine the complexity of the Canadian tax system and to present comparisons with the United States and other OECD countries.³¹ The tax complexity index developed by Hoppe et al. is a composite measure that captures the total complexity of corporate income tax systems faced

31 The data of the tax complexity index have already been used in several other studies. See, for example, Thomas Hoppe, Deborah Schanz, Susann Sturm, and Caren Sureth-Sloane, "Sarum ist Unser Steuersystem so Komplex? Eine Befragungsbasierte Analyse" (2017) 70:17 *Wirtschaftsprüfung* 1026-33; Thomas Hoppe, Martina Rechbauer, and Susann Sturm, "Steuerkomplexität im Vergleich Zwischen Deutschland und Österreich—Eine Analyse des Status Quo" (2019) 96:4 *Steuer und Wirtschaft* 397-412; Thomas Hoppe, Reyhaneh Safaei, Amanda Singleton, and Caren Sureth-Sloane, "Tax Complexity for Multinational Corporations in South Africa—Evidence from a Global Survey," in Chris Evans, Riel Franzsen, and Elizabeth Stack, eds., *Tax Simplification—An African Perspective* (Pretoria: Pretoria University Law Press, 2019), 267-93; Thomas Hoppe, "Tax Complexity in Australia—A Survey-Based Comparison to the OECD Average" (2020) 35:4 *Australian Tax Forum* 451-75; Thomas Hoppe, Deborah Schanz, Susann Sturm, Caren Sureth-Sloane, and Johannes Voget, *The Relation Between Tax Complexity and Foreign Direct Investment: Evidence Across Countries*, WU International Taxation Research Paper series no. 2020-03; and TRR 266 Accounting for Transparency Working Paper series no. 13 (Berlin: Arbeitskreis Quantitative Steuerlehre, January 27, 2020).

by MNCs.³² It is based on Hoppe et al.'s two-pillar concept of tax complexity,³³ which is illustrated in figure 1. According to this concept, pillar 1 represents the complexity of the tax code, and pillar 2 represents the complexity of the tax framework, which includes legislative and administrative features, and procedures within the tax system. To collect country-specific information on tax complexity, Hoppe et al. conducted a survey among tax consultants of leading international tax services firms and networks.³⁴ The standardized questionnaire included questions on the different dimensions of tax code and tax framework complexity.³⁵

The complexity of the tax code was assessed on the basis of the following 15 dimensions (also referred to as “laws”):³⁶

1. additional local and industry-specific taxes,
2. (alternative) minimum tax,
3. capital gains and losses,
4. controlled foreign corporations,
5. corporate reorganization,
6. depreciation and amortization,
7. dividends (including withholding taxes on dividend payments),
8. general anti-avoidance,
9. group treatment,
10. interest (including withholding taxes on interest payments) and thin capitalization,
11. investment incentives,
12. loss offset,
13. royalties (including withholding taxes on royalty payments),
14. statutory corporate income tax rate, and
15. transfer pricing.

To measure the level of complexity of each law, survey respondents were asked to assess the extent to which each of five complexity drivers contributed to the complexity of a law (using a five-point scale that ranged from “no extent” to “very great extent”). The five complexity drivers were

32 This primary focus of the index is on the federal level. However, as a measure of the complexity of the tax code, it also covers additional income taxes, such as provincial corporate income taxes.

33 See Thomas Hoppe, Deborah Schanz, Susann Sturm, and Caren Sureth-Sloane, “What Are the Drivers of Tax Complexity for MNCs? Global Evidence” (2018) 46:8/9 *Intertax* 654–75.

34 These firms and networks include Baker Tilly Roelfs, BDO, Crowe Kleeberg, Deloitte, DFK, Ecovis, HLB Stückmann, KPMG, Kreston, Moore Stephens, Nexia, PKF, PwC, RSM, Rödl & Partner, Taxand, UHY, Warth & Klein Grant Thornton, and WTS. Hoppe et al., *supra* note 11.

35 The survey instrument is reproduced in Hoppe et al., *ibid*.

36 The 15 laws listed here have been identified on the basis of the survey described in Hoppe et al., *ibid*.

FIGURE 1 Two-Pillar Concept of Tax Complexity

Source: Based on figure 1 in Thomas Hoppe, Deborah Schanz, Susann Sturm, and Caren Sureth-Sloane, "What Are the Drivers of Tax Complexity for MNCs? Global Evidence" (2018) 46:8/9 *Intertax* 654-75, at 668.

1. ambiguity and interpretation (the law is phrased in an unclear, imprecise, and/or ambiguous manner so that different interpretations are possible);
2. change (the law is changed frequently, and the changes are extreme in terms of quantity and/or scope);
3. computation (the law requires numerous and/or sophisticated calculations to prove its applicability);
4. detail (the law contains excessive detail, such as numerous rules, exceptions to rules, and/or cross-references to other rules); and
5. record keeping (the law requires many records and documents to substantiate all claims under that law).

The total complexity level of a law was calculated as a weighted sum of the single assessments, yielding a potential range of values between 0.00 (not complex) and 1.00 (extremely complex).³⁷ A tax code complexity subindex was then determined, reflecting the complexity levels of the 15 laws.

37 For further details on the methodology, such as the weightings, see Hoppe et al., *ibid.* This article provides only a brief overview of the methodology applied.

The complexity of the tax framework was established on the basis of the following five dimensions (also referred to as “areas”):

1. tax audits,
2. tax appeals,
3. tax enactment,
4. tax filing and payments, and
5. tax guidance.

In contrast to the dimensions of the tax code, the complexity of the dimensions of the tax framework was ascertained by complexity drivers specific to each area. The number of complexity drivers varied across the areas and ranged between 6 (for tax enactment and tax guidance) and 14 (for tax filing and payments).³⁸ The total complexity level of an area was calculated as the average of the assessments for the respective complexity drivers, yielding a potential value between 0.00 (not complex) and 1.00 (extremely complex). A tax framework complexity subindex was then determined, reflecting the complexity levels of the five areas. Using the average of the tax code subindex and the tax framework subindex, the tax complexity index was created.

In addition to questions on the drivers of tax code and tax framework complexity, the questionnaire included introductory questions on tax complexity (at the beginning) and demographic questions (at the end). Respondents were asked to answer a total of 52 questions. In general, they were asked to evaluate their own country; however, they were not asked to compare the complexity of their country with other countries, or other countries with each other. Since respondents may have different subjective standards, Hoppe et al. added definitions, hints, and anchor examples beside the questions, when required, to provide a reference point for the assessment and a uniform understanding of all terms, independent of any country or personal characteristics.

The link to the questionnaire was sent to 19 international tax services firms, which shared it with local tax consultants within their networks. The survey was open from October to December 2016. The final sample consisted of 933 responses from 100 countries, including Canada, the United States, and 31 other OECD countries.

In this article, I include only those OECD countries for which there were at least 10 responses per country. That is, the “other OECD countries” peer group, with which Canada and the United States are compared, consists of the following 19 countries: Australia, Austria, Belgium, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Japan, Luxembourg, Mexico, the Netherlands, Poland, Spain, Sweden, Switzerland, and the United Kingdom.

38 For a description of the complexity drivers for each area, see the section headed “Tax Framework Complexity” below.

Respondents and Analysis

Table 1 presents selected demographic information on the respondents from Canada (17 respondents),³⁹ the United States (31 respondents), and the other OECD countries (341 respondents).⁴⁰ As indicated by the distribution of the demographic variables, the three samples are characterized by highly experienced and well-educated respondents.⁴¹ In all three, the majority of the respondents were partners, directors, or principals (Canada, 82 percent; the United States, 71 percent; the other OECD countries, 72 percent). In Canada, 70 percent of the respondents had worked in the tax area for more than 15 years. Compared to the respondents from the other OECD countries (for which the average share with the same level of tax experience was 64 percent), the respondents from Canada—as well as the United States (with 71 percent)—were slightly more experienced. About half of the respondents from Canada and the other OECD countries were familiar with at least one other tax system (Canada, 53 percent; the other OECD countries, 50 percent), compared to only 32 percent for the US respondents. In terms of education, 71 percent of the Canadian respondents and an equal share of the US respondents had at least a master's degree—slightly lower than the share of respondents from the other OECD countries (79 percent).

A larger difference exists with regard to the age distribution. While in Canada almost half of the respondents (47 percent) were between 40 and 49 years old, only about a quarter (26 percent) from the United States and a third (30 percent) from the other OECD countries were in that age bracket. Slightly more US respondents were over 50 years old. However, as indicated by Hoppe et al.,⁴² this does not seem to be a problem: demographic differences do not have a crucial impact on the responses given within this sample. With respect to gender, nearly all respondents (94 percent) from Canada were male. In contrast, the share of males was smaller—though still large—for both the United States (71 percent) and the other OECD countries (76 percent).

In the next section, I present and compare the responses of the survey participants. First, I review the responses to the introductory questions of the survey. Next, I provide an overview of total tax complexity and its two components, tax code and tax framework complexity. I then look at the dimensions of tax code and tax framework complexity and examine the complexity drivers. Given the extensive information provided by the data reported by Hoppe et al., I often focus on selected

39 This number is not very high, and thus may suggest a limitation of the study. However, the data in Hoppe et al., *supra* note 11, provide a unique opportunity to perform an in-depth analysis of Canada's corporate income tax complexity.

40 The distribution of survey respondents among the 19 other OECD countries is shown in figure A1 in the appendix to this article.

41 It would be interesting to examine whether the samples are also representative of the target populations. However, this is nearly impossible since there are no comparable, publicly available data on tax consultants.

42 Hoppe et al., *supra* note 11.

TABLE 1 Demographic Characteristics of Survey Respondents

	Canada (n = 17)		United States (n = 31)		Other OECD countries (n = 341)	
	No.	Percent	No.	Percent	No.	Percent
Job position						
Partner/director/principal	14	82	22	71	247	72
Manager	3	18	9	29	66	19
Senior assistant	0	0	0	0	20	6
Junior assistant	0	0	0	0	5	2
Other	0	0	0	0	3	1
Tax experience						
>15 years	12	70	22	71	217	64
>10 but ≤15 years	1	6	5	16	66	19
>5 but ≤10 years	3	18	3	10	37	11
≤5 years	1	6	1	3	21	6
Familiar with other tax systems						
>Three	2	12	3	10	38	11
Three	0	0	2	6	19	6
Two	3	18	1	3	48	14
One	4	23	4	13	63	19
No	8	47	21	68	172	50
Missing	0	0	0	0	1	0
Education						
Doctoral degree or equivalent	1	6	5	16	44	13
Master's degree or equivalent	11	65	17	55	224	66
Bachelor's degree or equivalent	5	29	9	29	64	19
Secondary education	0	0	0	0	4	1
Other	0	0	0	0	5	1
Age						
Over 59 years	1	6	6	19	30	9
50-59 years	5	29	11	36	92	27
40-49 years	8	47	8	26	103	30
30-39 years	3	18	5	16	101	30
Under 30 years	0	0	1	3	15	4
Gender						
Male	16	94	22	71	261	76
Female	1	6	8	26	78	23
Not available	0	0	1	3	2	1

dimensions and complexity drivers. All results refer to 2016. While the numbers for Canada and the United States are based on the average of the individual responses, the numbers for the other 19 OECD countries, which are treated as a peer group (“other OECD countries”), refer to the GDP-weighted averages for those countries.⁴³ I test for differences in the results between Canada and the United States using Mann-Whitney U tests.⁴⁴ In the figures, asterisks indicate statistically significant differences.

RESULTS

Role of Tax Complexity

At the beginning of the questionnaire, respondents were asked about the role of tax complexity in their country based on three statements that addressed the impact of tax complexity in the past, present, and future. Respondents were asked to indicate the extent to which they agreed or disagreed with each statement, ranging from 0.00 (strongly disagree) to 1.00 (strongly agree).⁴⁵ Figure 2 includes the three statements and shows the respective mean values of the responses of the survey participants from Canada, the United States, and the other OECD countries.

As can be seen from figure 2, the average opinion of the respondents from Canada varies among the statements. On average, the respondents tend to agree with the first statement, that “tax complexity has substantially increased for MNCs in the last five years” (with a value of 0.66). However, when considering the implications of tax complexity, that result does not seem bad, per se.⁴⁶ Regarding the second statement, that “tax complexity currently has only negative implications for MNCs,” there is generally little agreement. The average value for Canada is even close to

43 Because the 341 respondents in the 19 other OECD countries are not equally distributed among those countries, countries with more (fewer) respondents would have higher (lower) weights if the simple average of the individual responses were calculated. To determine a meaningful average value for the other OECD countries, I first calculated the average of the individual responses at the country level and then combined these country values by using the GDP of each country as a weight. The weights are displayed in table A1 in the appendix to this article. This weighting approach is useful to account for countries’ different roles within the OECD. To examine the influence of the weighting, in a robustness test, I calculated the average values for the other OECD countries based on the countries’ average responses, and found that the descriptive results were quite similar to those based on the GDP-weighted approach. I therefore conclude that the weighting does not have a crucial impact on the results of this study.

44 I do not test for differences in the results between Canada and the other OECD countries.

45 The questions were intended only to familiarize respondents with the topic and are not included in the tax complexity index.

46 A potential benefit of tax complexity is that it can provide opportunities for tax planning—for example, where it results in ambiguity in the tax laws. See Stacie K. Laplante, Hollis A. Skaife, Laura A. Swenson, and Daniel D. Wangerin, “Limits of Tax Regulation: Evidence from Strategic R & D Classification and the R & D Tax Credit” (2019) 38:2 *Journal of Accounting and Public Policy* 89-105.

FIGURE 2 Tax Complexity in the Past, Present, and Future

MNCs = multinational corporations.

having no clear opinion (0.56). In line with this result, for the third statement, that “tax complexity will be one factor forcing MNCs to shift their business activities to other countries,” the respondents from Canada express only slight disagreement (0.41). Turning to the United States, the respondents tend to agree more, on average, with all three statements (statement 1, 0.79; statement 2, 0.66; statement 3, 0.59). When I test for differences between Canada and the United States, I find statistically significant differences regarding the first and the third statements. These results suggest that tax complexity increased more substantially in the United States in the preceding five years than in Canada, while tax complexity is viewed as more of a threat for MNCs in the United States in the future. In contrast, the average opinion of the respondents from the other OECD countries is often not very different from the Canadian average (statement 1, 0.72; statement 2, 0.54; statement 3, 0.49).

Overview of Tax Complexity

This section presents the main results of the analysis. The underlying data are also available for download.⁴⁷

Figure 3 shows the level of total tax complexity for Canada, the United States, and each of the 19 other OECD countries, ranked from highest to lowest. Across all 21 countries, Italy has the most complex tax system and Luxembourg the least. Canada is near the middle of the range, in 8th place, followed by Germany (9th) and the United States (10th).

Splitting total tax complexity into two components, I observe a slightly different pattern. For tax code complexity, shown in figure 4, Canada ranks 7th and thus

47 www.ctf.ca/CTFWEB/Documents/CTJ%202021/Issue%203/CTJ%2069-3%20-%20Sturm%20Tax%20Complexity%20Paper%20-%20Data%20Spreadsheet.xlsx.

FIGURE 3 Total Tax Complexity

moves one place closer to the high end of the scale; however, the shift for the United States is greater as it moves to 6th place. For tax framework complexity, shown in figure 5, Canada shifts toward the middle, at 9th place, while the United States drops to 13th.

In light of the findings for Canada, the question arises, what might account for these levels of complexity in the tax system? To answer that question, I next examine the dimensions and the drivers of the two complexity components in Canada and compare them with those in the United States, also taking into account the results for the other OECD countries.

Tax Code Complexity

The legal basis for imposing federal income tax in Canada is the Income Tax Act (ITA).⁴⁸ In addition to the ITA, there is provincial and territorial tax legislation, which, however, builds on the ITA.⁴⁹

48 See Jinyan Li, Joanne E. Magee, and J. Scott Wilkie, *Principles of Canadian Income Tax Law*, 9th ed. (Toronto: Thomson Reuters, 2017); and Income Tax Act, RSC 1985, c. 1 (5th Supp.), as amended. In 2016, the ITA contained 18 parts and 269 sections.

49 Canada has 10 provinces (Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland and Labrador, Nova Scotia, Ontario, Quebec, Prince Edward Island, and Saskatchewan) and three territories (the Northwest Territories, Nunavut, and Yukon), all of which levy provincial/territorial income taxes on corporations. See Brian J. Arnold, "Canada," in Hugh J. Ault, Brian J. Arnold, and Graeme S. Cooper, eds., *Comparative Income Taxation: A Structural Analysis*, 4th ed. (Alphen aan den Rijn, the Netherlands: Kluwer Law International,

FIGURE 4 Tax Code Complexity

FIGURE 5 Tax Framework Complexity

In the United States, corporations are subject to federal income tax under the provisions of the Internal Revenue Code.⁵⁰ Corporate income tax may also be imposed under the tax laws of most states and some local jurisdictions.

Figure 6 illustrates the complexity of the 15 tax code dimensions (laws). The three tax laws identified as the most complex by the respondents from Canada are laws on corporate reorganization (0.73), transfer pricing (0.65), and controlled foreign corporations (0.63). For the US respondents, the two most complex tax laws are those on transfer pricing (0.69) and controlled foreign corporations (0.67), followed by laws on additional local and industry-specific taxes (0.66). In the other OECD countries, transfer-pricing laws are often regarded as a crucial aspect of the tax code, involving many complex issues;⁵¹ in those countries, similar to the United States, they are considered to be the most complex tax laws (0.69). The least complex laws in Canada are those on (alternative) minimum tax (0.26, compared to 0.15 in the other OECD countries), preceded by laws on group treatment (0.37) and depreciation and amortization (0.39). In contrast, in the United States, the three laws that are considered the least complex are laws on the statutory corporate income tax rate (0.34), royalties (0.38), and dividends (0.41).

When considering the complexity levels of all 15 tax laws, I generally observe similar values for Canada and the United States for many laws. Nevertheless, I do find several differences. The largest differences exist for the laws on corporate reorganization (+0.10), capital gains/losses (+0.10), additional local and industry-specific taxes (−0.20), depreciation and amortization (−0.14), and (alternative) minimum tax (−0.16). The differences are also statistically significant, indicating that laws on corporate reorganization and capital gains/losses are considerably more complex in Canada than in the United States, while laws on additional local and industry-specific taxes, depreciation and amortization, and (alternative) minimum tax are more complex in the United States. Regarding the other OECD countries, there are a few differences in the complexity levels compared to Canada. There are notable differences for the laws on corporate reorganization, (alternative) minimum tax, and additional local and industry-specific taxes. To learn more about the diverse complexity levels, I now concentrate on the underlying complexity drivers of the five laws mentioned above.⁵²

2019). Provincial legislation is available at the website of the Canadian Legal Information Institute (www.canlii.org), and both provincial and territorial legislation is available at the respective government websites.

50 Internal Revenue Code of 1986, as amended.

51 An overview of transfer-pricing issues in different countries is provided by Duff & Phelps, eds., *Guide to International Transfer Pricing: Law, Tax Planning and Compliance Strategies*, 6th ed. (Alphen aan den Rijn, the Netherlands: Kluwer Law International, 2016).

52 In an additional analysis, I examine the underlying complexity drivers of the remaining 10 laws. I also examine the complexity drivers of all laws on the aggregate level. The results are displayed in appendix table A2 and figure A2.

FIGURE 6 Complexity of Tax Code Dimensions

Notes: The 15 dimensions are listed in descending order based on the values for Canada.

*** indicates statistical significance at the 0.01 level; ** at the 0.5 level; * at the 0.1 level.

Table 2 shows the extent to which each of the five complexity drivers (columns) contributes to the complexity level of each law (rows). The first set of data in the table provides an overview of the complexity drivers of the laws on corporate reorganization. In Canada, there is a broad range of rules on corporate reorganization, and the tax consequences depend on the type of reorganization.⁵³ The overarching principle is that transactions must be recognized at fair market value. However, some reorganizations may be eligible to be conducted on a tax-deferred basis. To be eligible for the benefits, detailed statutory requirements in the ITA must be fulfilled. As indicated in table 2, the complexity of laws on corporate reorganization in Canada is largely driven by detail (0.84), followed by ambiguity (0.74) and change (0.72). Detail also has the largest impact in the United States (0.73) and the other OECD countries (0.66). The difference between Canada and the United States is also statistically significant. The different impact of detail in the two countries may be explained by different adjustments and amendments in recent years, including new rules in the ITA for eligible capital property (ECP)⁵⁴ announced in 2016.⁵⁵ These rules repealed the existing ECP regime and replaced it with a capital cost allowance class for depreciable capital property, which, for example, eliminated a tax-deferral opportunity.⁵⁶ In addition to detail, I observe a statistically significant difference between Canada and the United States for the ambiguity driver of complexity.

The second set of data in table 2 illustrates the complexity drivers of the laws on capital gains/losses. As in the case of the laws on corporate reorganization, the Canadian respondents attribute a very high impact to detail (0.59). Record keeping (0.54) and ambiguity (0.53) also contribute to a large extent to the complexity of

53 The general rules are contained in sections 55 (divisive reorganizations), 85 (transfer of property and share-for-share exchanges), 86 (reorganization of capital), 87 (amalgamations), and 88 (liquidation/winding up) of the ITA. Comprehensive reviews of these rules are provided by David T. Tetreault and Robert F. Lindsay, "The Taxation of Corporate Reorganizations: How Are We Doing So Far?" (1995) 43:5 *Canadian Tax Journal* 1441-64; Vern Krishna, *Halsbury's Laws of Canada: Income Tax (Corporate)* (Markham, ON: LexisNexis, 2008); K.A. Siobhan Monaghan, Raj Juneja, Paul Lamarre, and Colin Campbell, *Taxation of Corporate Reorganizations*, 2d ed. (Toronto: Carswell, 2012); and Robert Kopstein et al., "Canada," in Peter H. Blessing, ed., *Tax Planning for International Mergers, Acquisitions, Joint Ventures and Restructurings*, 4th ed. (Alphen aan den Rijn, the Netherlands: Kluwer Law International, 2017), 1-132.

54 Common examples of ECP include goodwill, trademarks, consumer lists, and franchise rights. Ryan Morris, "Hello CCA Class 14.1, Goodbye Eligible Capital Property," *Thomson Reuters Practical Law*, January 25, 2017 ([https://ca.practicallaw.thomsonreuters.com/w-005-3636?transitionType=Default&contextData=\(sc.Default\)](https://ca.practicallaw.thomsonreuters.com/w-005-3636?transitionType=Default&contextData=(sc.Default))).

55 For other developments that might explain the larger impact of changes in Canada, see KPMG, *Taxation of Cross-Border Mergers and Acquisitions*, 2016 ed. (<https://assets.kpmg/content/dam/kpmg/pdf/2016/07/mergers-and-acquisitions-full-report.2016.pdf>).

56 Under the new regime, the gain from selling the ECP must be taxed in the year of disposition. In contrast, under the old regime, vendors had the opportunity to defer some of the taxes. See Asif Abdulla, "Goodwill Sale: Everything Must Go!" May 31, 2016 (www.thor.ca/blog/2016/05/goodwill-sale-everything-must-go/).

TABLE 2 Complexity Drivers of Selected Tax Code Dimensions

	Ambiguity and interpretation	Change	Computation	Detail	Record keeping
Corporate reorganization					
Canada	0.74*	0.72	0.68	0.84*	0.68
US	0.60*	0.62	0.59	0.73*	0.62
OECD	0.59	0.55	0.55	0.66	0.62
Capital gains/losses					
Canada	0.53*	0.47	0.46	0.59**	0.54*
US	0.39*	0.43	0.40	0.45**	0.42*
OECD	0.41	0.43	0.41	0.48	0.48
Additional local and industry-specific taxes					
Canada	0.47***	0.47***	0.46	0.47***	0.43**
US	0.69***	0.70***	0.56	0.72***	0.60**
OECD	0.30	0.33	0.30	0.35	0.30
Depreciation and amortization					
Canada	0.34**	0.37***	0.40**	0.44*	0.41
US	0.45**	0.60***	0.52**	0.56*	0.52
OECD	0.38	0.41	0.45	0.48	0.51
(Alternative) minimum tax					
Canada	0.22**	0.22**	0.32*	0.32**	0.22*
US	0.39**	0.42**	0.47*	0.50**	0.35*
OECD	0.11	0.12	0.11	0.11	0.11

OECD = average of 19 other OECD countries.

Note: *** indicates statistical significance at the 0.01 level; ** at the 0.5 level; * at the 0.1 level.

the laws on capital gains and losses. In both the United States and the other OECD countries, the impact of the complexity drivers for these laws is generally lower. Except for change and computation, I find statistically significant differences between Canada and the United States. When considering the laws on capital gains and losses in more detail, this finding appears to be plausible. In contrast to the United States, capital gains generally have a tax advantage in Canada over other types of income, given that only 50 percent of the gains are taxable.⁵⁷ While being favourable, this general rule also comes with several special provisions.

Next, I turn to the complexity drivers for laws on additional local and industry-specific taxes (the third set of data). In Canada, the impact is similar for all five complexity drivers. For example, ambiguity, change, and detail contribute to the same extent (0.47) to the complexity of the laws, closely followed by computation (0.46) and record keeping (0.43). In the United States, all complexity drivers have, on average, a much higher impact compared to the values for Canada (detail, 0.72; change, 0.70; ambiguity, 0.69; record keeping, 0.60; computation, 0.56). The differences between Canada and the United States are statistically significant for almost all drivers. The opposite result arises for the other OECD countries, in which the impact of each complexity driver is much lower (detail, 0.35; change, 0.33; ambiguity, 0.30; computation, 0.30; record keeping, 0.30). Similar to the United States, in Canada a subnational tax is imposed on corporate income earned in a particular province or territory. This tax is added to the federal income tax and cannot be deducted.⁵⁸ Among the complexity drivers, a very large difference between Canada and the other OECD countries exists for computation. A potential reason for this result may be the different computation rules. For example, different tax rates apply not only across the different provinces and territories but also across different income types.⁵⁹ However, when I consider the findings for the United States, where state and local income taxes may apply to corporations across the country, the level of complexity in Canada seems to be limited.

57 In the United States, corporations receive no favourable tax treatment for long-term capital gains. These gains are taxed at the normal corporate income tax rate. William A. Raabe, James C. Young, Annette Nellen, William H. Hoffman, and David M. Maloney, *Corporations, Partnerships, Estates and Trusts*, 44th ed. (Boston: Cengage Learning, 2021).

58 However, the federal tax rate is set in a way that takes provincial tax rates into account. See Arnold, *supra* note 49, at 42.

59 In 2016, the provincial (standard) tax rates varied from 10 percent in Ontario and Saskatchewan to 16 percent in Nova Scotia and Prince Edward Island. Moreover, all provinces and territories applied a reduced tax rate to a specified threshold amount (generally, the first \$500,000, but \$450,000 in Manitoba and \$350,000 in Nova Scotia) of the active business income of a Canadian-controlled private corporation. See PwC, "Worldwide Tax Summaries: Corporate Taxes 2016/17," 2016 (www.pwc.com/gx/en/tax/corporate-tax/worldwide-tax-summaries/assets/worldwide-tax-summaries-corporate-taxes-2016-17.pdf) for an overview of the different tax rates.

The fourth set of data illustrates the complexity drivers of the laws on depreciation and amortization. Like additional local and industry-specific taxes, the significant difference in the level of complexity of laws on depreciation and amortization between Canada and the United States is obvious for almost all complexity drivers. While I find relatively low values for Canada (detail, 0.44; record keeping, 0.41; computation, 0.40; change, 0.37; ambiguity, 0.34), the values for the United States are quite high (change, 0.60; detail, 0.56; computation, 0.52; record keeping, 0.52; ambiguity, 0.45). Statistically significant differences between the two countries are observed for change, computation, ambiguity, and detail. This result can be explained by the fact that depreciation deductions are permanently used and extended in the United States to create incentives for businesses. For example, a special incentive is the 50 percent bonus depreciation that was extended for five years as part of the general business incentives prior to the survey.⁶⁰ However, when the values for Canada are compared with those for the other OECD countries, the results are similar.

The last set of data in table 2 illustrates the complexity drivers of the laws on (alternative) minimum tax. Canada has lower values than the United States but higher values than the average of the other OECD countries. This can be explained by the fact that, in 2016, alternative minimum tax was rarely imposed in the other OECD countries, whereas it was a relatively well-known feature of the US tax law.⁶¹ In Canada in 2016, Ontario was the only province that levied a corporate minimum tax.⁶² (It was introduced in 1986 in order to establish a fairer tax system.) As shown in table 2, overall, the impact of the complexity drivers in Canada for this tax is very moderate (computation, 0.32; detail, 0.32; ambiguity, 0.22; change, 0.22; record keeping, 0.22). One reason for the higher values for computation and detail may be the many adjustments that need to be considered when calculating Ontario's tax.⁶³

Overall, the analysis reveals that Canada has laws that are more complex and laws that are less complex than the corresponding laws in the United States. Concerning the more complex laws, notable drivers are detail and ambiguity. In addition, the analysis shows that complexity can result from the provision of specific tax benefits, and therefore, from a firm's perspective, the negative impact may be mitigated to some extent.

Tax Framework Complexity

Next, I look at the complexity of the tax framework dimensions (areas). Figure 7 illustrates the level of complexity of each of the five areas for Canada, the United States, and the average of the other 19 OECD countries.

60 See PwC, *ibid.*, for an overview of depreciation in the United States and the numerous amendments that were made around 2016.

61 In the United States, the federal alternative minimum tax for corporations was eliminated by the Tax Cuts and Jobs Act of 2017, Pub. L. no. 115-97, enacted December 22, 2017.

62 For the current version of the legislation, see Taxation Act, SO 2007, c. 11, schedule A, sections 54 through 62 (available at <https://www.ontario.ca/laws/statute/07t11>).

63 See, for example, section 58 of the Taxation Act, *supra* note 62.

FIGURE 7 Complexity of Tax Framework Dimensions

Note: The five dimensions are listed in descending order based on the values for Canada.

For Canada, the most complex areas are audits (0.34), enactment (0.33), and guidance (0.29), while the least complex areas are appeals (0.16) and filing and payments (0.12). Similar values are observed for the United States and the other OECD countries: for the United States, audits, 0.34; enactment, 0.31; guidance, 0.26; appeals, 0.20; filing and payments, 0.17; for the other OECD countries, audits, 0.34; enactment, 0.31; guidance, 0.26; appeals, 0.20; filing and payments, 0.17. When comparing the complexity levels of the tax framework areas between Canada and the United States, in contrast to the dimensions of the tax code, I find no statistically significant differences at the aggregate level. However, it is still possible that there are differences for single complexity drivers within the areas. Therefore, in the discussion that follows, I analyze each area in more detail, in descending order of Canadian complexity.

Tax Audits

The tax audits area covers the examination of MNCs' tax returns, books, and records by the tax authorities. Around the world, tax audits are known to be very challenging for MNCs. Hence, they are also a very interesting topic for international research.⁶⁴

⁶⁴ See, for example, Paul J. Beck and Petro Lisowsky, "Tax Uncertainty and Voluntary Real-Time Audits" (2014) 89:3 *Accounting Review* 867-901; James Brushwood, Derek M. Johnston, and Stephen J. Lusch, "The Effect of Tax Audit Outcomes on the Reporting and Valuation of Unrecognized Tax Benefits" (2018) 42 *Advances in Accounting* 1-11; and Benjamin Ayers, Jeri K. Seidman, and Erin M. Towery, "Tax Reporting Behavior Under Audit Certainty" (2019) 36:1 *Contemporary Accounting Research* 326-58.

In Canada, tax audits play a large role since Canada employs a self-assessment system, which requires taxpayers to calculate, report, and pay their own tax payable.⁶⁵ Hence, continuous audits by the Canada Revenue Agency (CRA) are considered to be an important tool to maintain this system.⁶⁶ The CRA's powers in respect of the conduct of audits are set out in section 231 of the ITA; they include, for example, the power to audit books and records, and the power to require the provision of information.⁶⁷ With regard to the tax audit process itself, the CRA is generally transparent, publishing several tax audit manuals that contain information on how the CRA selects, plans, conducts, and finalizes its audits.⁶⁸ In Canada, the selection of audit targets and the audit approach depend primarily on the size of the firm and the CRA's estimation of the risk of non-compliance or tax avoidance.⁶⁹ For example, large corporations are assessed every year in terms of tax risk.⁷⁰ If they are classified as corporations at high risk of non-compliance or avoidance, they are audited annually.

Complexity can arise through problems in anticipating tax audits and in the audit process itself. Figure 8 illustrates the impact of each of four complexity drivers associated with the anticipation of tax audits. The vertical axis of this figure shows the percentage of respondents who consider these drivers to be a serious problem.

The most serious problem in Canada is "bad disclosure of selection criteria" (that is, little or no disclosure) for tax audit targets, chosen by almost half of the respondents (47 percent). At first glance, this result seems surprising, given the range of information provided by the CRA. However, a closer look reveals that there is not much detailed and precise information that could help companies to predict the likelihood of being audited. For example, the risk assessment process is described in a superficial way, and there is almost no information on the extent to which new technologies are used to select audits.⁷¹ Compared to the poor disclosure of selection criteria, the

65 Li et al., *supra* note 48, at 27.

66 Colin Campbell, *Administration of Income Tax* (Toronto: Thomson Reuters, 2018), at 274.

67 For more details on these powers, see Susan Van der Hout, Robert Goldstein, and Angelina Fisher, "Taxpayer Information: Administration and Enforcement Procedures Under the Income Tax Act (Canada)" (2000) 23:1-2 *Advocates' Quarterly* 84-142.

68 The manuals are available online at www.canada.ca/en/revenue-agency/corporate/about-canada-revenue-agency-cra/access-information-privacy-canada-revenue-agency/virtual-reading-room.html.

69 Dan Misutka and Lauchlin MacEachern, "The CRA's Tax Transparency Initiatives: Implications for a Corporate Governance Response" (2013) 63:3 *Canadian Tax Journal* 829-55.

70 In 2016, large corporations were defined to be corporations with gross annual revenues in excess of \$250,000. *Ibid.*, at 837.

71 According to the CRA, the risk assessment considers, for example, the likelihood and frequency of errors made by the taxpayer in the past. However, since taxpayers do not know the reference points used by the CRA, it appears to be impossible to infer from this very general information whether they will be audited or not. See Canada Revenue Agency, "Business Audits" (www.canada.ca/en/revenue-agency/services/tax/businesses/topics/changes-your-business/business-audits.html#toc0).

FIGURE 8 Complexity Drivers Regarding the Anticipation of Tax Audits

Note: The four drivers are listed in descending order based on the values for Canada.

remaining problems are less serious. “Bad communication of audit topics” (that is, poor or no communication) and “late or no notification of an upcoming audit” are chosen by only 29 percent and 24 percent of the Canadian respondents, respectively. This result might be explained by the fact that, in the case of a regular audit, the process usually starts with the receipt of a letter informing the audit target about the audit, its scope, and potential documents required.⁷² Moreover, even if the topics are not clear, on the basis of experience with past audits it seems to be rather easy to anticipate some of them.⁷³

The least serious problem in Canada, identified by only 12 percent of the respondents, is “absence of a regular audit cycle.” This result might be associated with the fact that MNCs expose themselves to more risks, compared to other corporations, and thus are more frequently audited according to the risk-based approach of the CRA. When taking the responses from the United States into account, I again observe bad disclosure of selection criteria to be the most serious complexity driver (at 45 percent). Hence, regarding this problem, the United States does not seem to

72 There is no evidence in the literature that the time limits proposed by the CRA might be too short.

73 In an additional question, the respondents were asked about the top current audit topics. For Canada, the responses indicated two key topics: transfer pricing and corporate reorganization (both mentioned by 65 percent of respondents). Also mentioned were controlled foreign corporations and investment incentives (by 29 percent of respondents in both cases).

differ from Canada. This also seems to be true for the second most serious problem in the United States, which is bad communication of audit topics (29 percent). Regarding the remaining complexity drivers, the US results deviate slightly from those for Canada. The third most serious problem in the United States is absence of a regular audit cycle (19 percent)—the least serious problem in Canada—followed by late or no notification of an audit (10 percent). Overall, I do not find any statistically significant differences between Canada and the United States for any of the four complexity drivers. Hence, Canada does not appear to be substantially different from the United States regarding the complexity in anticipating tax audits. Even if I include the averages of the other OECD countries, I cannot find any notable differences between those responses and the responses for either Canada or the United States.

Figure 9 shows the complexity drivers associated with the tax audit process. In Canada, the most serious problem is “lack of experience and technical skill of tax officers” (88 percent). This result might be explained by the initiatives to strengthen the CRA’s capacity to stop tax evasion and combat aggressive tax avoidance, introduced by the 2013 budget plan and amended in subsequent years.⁷⁴ These initiatives included a plan to hire additional tax officers to audit high-risk MNCs and thereby increase the number of compliance activities. Hence, it might be possible that, as a result of this plan, many MNCs were confronted with new and relatively inexperienced tax officers in 2016, leading to problems such as uncertainty regarding the tax treatment of specific transactions or arrangements. Moreover, I also find that “inconsistent decisions by tax officers” is a main but less serious problem in Canada, as indicated by about half of the respondents (53 percent).⁷⁵ In contrast, neither “offensive or unethical behaviour by tax officers” (6 percent) nor “ineffectiveness of sanctions” (0 percent) is considered to be a serious problem in Canada. For the United States, I find a similar picture. To a large extent, both the lack of experience and technical skill of tax officers and their inconsistent decisions are considered to be serious problems, while offensive or unethical tax officer behaviour and the ineffectiveness of sanctions are not. Again, across all potential problems of the tax audit process, I do not find any significant differences between Canada and the United States. However, when considering the averages of the other OECD countries, inconsistent decisions (54 percent) are more problematic than lack of experience and technical skill (42 percent)—results that are in contrast to those obtained for Canada, where the latter is perceived as a very serious problem. Hence, this problem appears to be

74 See Canada, Department of Finance, 2013 Budget, Budget Plan, March 21, 2013. A budget plan provides an estimate of the government’s revenues and expenses for the next year. Ted Cook, *Canadian Tax Research: A Practical Guide* (Toronto: Carswell, 2010), at 46.

75 Such inconsistencies are also identified in Auditor General of Canada, *2018 Fall Reports of the Auditor General of Canada to the Parliament of Canada*, “Report 7—Compliance Activities—Canada Revenue Agency” (www.oag-bvg.gc.ca/internet/English/parl_oag_201811_07_e_43205.html). The report mentions several reasons for this result, including the appraisal of the tax officers: *ibid.*, at 7.18.

FIGURE 9 Complexity Drivers Regarding the Tax Audit Process

Note: The four drivers are listed in descending order based on the values for Canada.

a specific issue in Canada, probably because of the special initiatives to strengthen the CRA's capacity, as explained above.

Tax-Law Enactment

Tax-law enactment refers to the process that begins with the introduction of a draft tax law and ends with the passage of the law by Parliament (or the equivalent legislative body). In Canada, the power to impose federal taxes is given by the constitution to Parliament, which consists of the queen (represented by the governor general), the Senate, and the House of Commons.⁷⁶ In general, the process starts with the amendments to the ITA normally prepared by the Department of Finance and ends with royal assent (that is, formal approval by the governor general), at which time the bill becomes law.⁷⁷ Various complexity drivers for the tax-law enactment process are illustrated in figure 10.

76 See section 91 of the Constitution Act, 1967 (UK), 30 & 31 Vict., c. 3. The powers of the provincial legislatures are described in section 92 of the Constitution Act.

77 Briefly, the legislative process is as follows. The Department of Finance releases the proposals to the public—for example, by presenting them as part of the budget. In the next step, the public is often invited to provide comments on the draft legislation, which can be used by the Department of Finance to refine the draft. However, at this stage, changes usually consist of small technical amendments rather than major content-related changes. Afterward, the proposed tax-law changes are introduced as a bill in the House of Commons. After two rounds

FIGURE 10 Complexity Drivers Regarding the Tax-Law Enactment Process

Notes: The five drivers are listed in descending order based on the values for Canada.

* indicates statistical significance at the 0.1 level.

The most serious problem is “quality of drafting,” chosen by 71 percent of the respondents from Canada as regularly causing problems. This result might be attributed to several different factors.⁷⁸ It might be the result of unclear or vague legislative proposals that were enacted. Another factor could be that legislative proposals did not take existing laws sufficiently into account, leading to different interpretations of the law at the federal level or even at the federal and provincial levels. Moreover, since the tax legislation is bilingual, conflicts in the meaning of words could cause problems.⁷⁹ Evidence for these arguments is given, for example, by a news release issued by the Department of Finance on September 16, 2016. According to this release, which made new proposals public, amendments were included “to improve

of reading, the bill is examined by the House of Commons Standing Committee on Finance and then presented in the House for the third reading. The bill then passes to the Senate for two rounds of reading before being reviewed by the Senate Standing Committee on Banking, Trade and Commerce, after which it receives a third reading. The bill, with any agreed Senate amendments, is then returned to the House of Commons for a final review and vote. For a detailed description of all processes, see Cook, *supra* note 74, at 44-50.

78 Li et al., *supra* note 48, at 17-18; and Arnold, *supra* note 49, at 45-47.

79 In Canada, legislation is provided in the two official languages, English and French. Normally, it is developed in English and then translated into French before being made public. Both versions have equal value in law. Arnold, *supra* note 49, at 47.

the accuracy and consistency of the income tax legislation and regulations.”⁸⁰ Another serious problem is “time between announcement and enactment” of a tax law, noted by 59 percent of the Canadian respondents. This problem can result from the very short or very long time taken, or both. In Canada, there is some evidence of the latter.⁸¹ For example, in the 2009 fall report of the auditor general of Canada, Parliament was criticized for having enacted only very few technical amendments, although several were outstanding.⁸² The report also indicated that important issues identified in comfort letters⁸³ as being under consideration for proposed changes had not been resolved for a very long time, thus increasing uncertainty among taxpayers.⁸⁴ However, there are problems not only with the length of time until a law is enacted, but also with the “time at which legislation becomes effective,” considered by 53 percent of the Canadian respondents to regularly cause problems. In Canada, changes often become effective from the date on which they are publicly announced for the first time.⁸⁵ Hence, when there is a delay between the announcement and the enactment, uncertainty arises for both the CRA and the taxpayer regarding the application of the pending legislation.

As also indicated in figure 10, the two remaining drivers, “influence of third parties” and “access to legislation,” are not very problematic in Canada (at about 18 percent and 0 percent, respectively). The latter finding may be explained by the fact that in Canada tax laws are publicly available on the Internet.⁸⁶ For the United States, the results are slightly different. The three most frequent complexity drivers are quality of drafting (48 percent), time at which legislation becomes effective (48 percent), and influence of third parties (35 percent), which is not very problematic in Canada. However, in contrast to Canada, the share of US respondents selecting time between announcement and enactment as causing problems (32 percent) is much smaller

80 Department of Finance, “Archived—Department of Finance Canada Consults on Updates to the Tax System” (www.canada.ca/en/departement-finance/news/2016/09/departement-finance-canada-consults-updates-system.html).

81 Kim Brooks, “Canada,” in Michael Lang, Jeffrey Owens, Pasquale Pistone, Alexander Rust, Josef Schuch, Claus Staringer, and Alfred Storck, eds., *Trends and Players in Tax Policy* (Amsterdam: International Bureau of Fiscal Documentation, 2016).

82 Auditor General of Canada, *Fall 2009 Report of the Auditor General of Canada*, chapter 3, “Income Tax Legislation,” 3.31-3.34 (https://publications.gc.ca/collections/collection_2009/bvg-oag/FA1-2009-3-3E.pdf).

83 Comfort letters are issued by the Department of Finance and indicate amendments to the ITA that will be proposed, thus providing taxpayers with some “comfort” regarding the potential application of a law. Carl MacArthur, “Canada,” in Karen B. Brown, ed., *A Comparative Look at Regulation of Corporate Tax Avoidance* (Dordrecht: Springer, 2012), 65-104, at 67.

84 To strengthen this argument, the auditor general’s report mentioned amendments to the taxation of dividends that were identified in a comfort letter as due to be enacted, but that did not pass into law for seven years. See Auditor General, *supra* note 82.

85 See Li et al., *supra* note 48, at 9; and Arnold, *supra* note 49, at 46.

86 All federal tax laws are available online at www.laws-lois.justice.gc.ca.

compared to the share for Canada. The difference for this problem between Canada and the United States is also statistically significant. Nonetheless, we should not jump to the conclusion that this driver is a major issue only in Canada. When considering the other OECD countries, the share of respondents choosing this driver (46 percent) is only slightly smaller than the share for Canada. In general, the results for the other OECD countries are very similar to the results for Canada. Hence, overall, Canada does not encounter substantially different complexity drivers in the tax-law enactment process than the United States or, on average, the other OECD countries.

Tax Guidance

Tax guidance covers the information provided by the tax authority or by other sources to clarify uncertain tax treatments or procedures, and to explain tax policy and administrative practices. In Canada, there is a broad range of guidance issued by the CRA.⁸⁷ For example, the CRA provides general information to the public in the form of income tax interpretation bulletins or income tax folios⁸⁸ (the CRA's interpretations of tax laws), information circulars (information on the CRA's procedures and practices), income tax technical news (a newsletter containing recent CRA announcements), various application policies, forms, and tax guides.⁸⁹ All information is available online at the CRA's website.⁹⁰ In addition, the CRA offers guidance to specific taxpayers on request, mainly through technical interpretations and advance income tax rulings. While technical interpretation letters are not binding for the CRA with respect to the assessment position it will take on the specified transactions, advance income tax rulings are binding.⁹¹ These types of guidance are also made available to the public but in severed (protected) form. However, in contrast to the documents above, they are released through various publishers and not through the website of the CRA itself.⁹²

87 For a detailed description, see Cook, *supra* note 74, at 123-43. In the survey, the responses to the questions on binding rulings and non-binding advice indicate that the respondents from Canada are aware of the various ways to obtain guidance from the CRA.

88 Income tax folios are a new set of publications replacing and updating the longstanding interpretation bulletins. For more information, see Canada Revenue Agency, "Income Tax Interpretation Bulletins (ITs)" (www.canada.ca/en/revenue-agency/services/tax/technical-information/income-tax/current-income-tax-interpretation-bulletins.html).

89 Cook, *supra* note 74, at 125.

90 The CRA's website (www.canada.ca/en/revenue-agency.html) provides lists of all forms and publications.

91 See *Information Circular* IC70-6R11, "Advance Income Tax Rulings and Technical Interpretations," April 1, 2021, at paragraph 14 (www.canada.ca/en/revenue-agency/services/forms-publications/publications/ic70-6/ic70-6-advance-income-tax-rulings-and-technical-interpretations.html).

92 For example, they are made available at www.taxinterpretations.com/cra/severed-letters.

In addition to guidance issued by the tax authority, there are other sources that provide help in applying the law.⁹³ Two main sources are recognized accounting principles and rules, especially generally accepted accounting principles (GAAP) and so-called soft law.⁹⁴ However, these principles and rules can also serve as an additional driver of tax complexity; for example, when they are in conflict with the tax law in place, they can lead to uncertainty. In the case of GAAP, conformity with the rules may result in a number of adjustments in reconciling book and taxable income.

In the survey, respondents were asked to choose the extent to which national GAAP differ from the national tax laws, based on a range between 0.00 (no extent) and 1.00 (very great extent). The results indicate that, in Canada, GAAP and tax laws differ to some extent (0.59). However, the difference is smaller than the difference noted by the US respondents (0.69). With regard to soft law, respondents were asked to choose the extent to which the existence of international soft law offers support by providing additional information in dealing with the tax law, based on a range between 0.00 (very great extent) and 1.00 (no extent). I find that international soft law provides moderate support in Canada (0.62). For the United States, I obtain the same result (0.62). In comparison with the average of the other OECD countries (0.45), international soft law appears to be less helpful in Canada and the United States. In Canada, this may be explained by controversies that arose from the implementation and application of BEPS recommendations, such as the disputes and uncertainties that resulted from the new OECD guidance on transfer pricing. For example, in the 2016 budget plan,⁹⁵ it was argued that the revisions arising from this new guidance were in line with current practice and thus applicable by the CRA without notification; however, experts were critical, noting that the guidelines contained new content and called for a transfer-pricing memorandum.⁹⁶ Moreover, there were many unresolved issues, as well as concerns about the retroactive adoption of the new guidance by the CRA.⁹⁷

Another driver affecting the complexity of tax guidance is the lack of tax laws on important business matters. A majority of the Canadian respondents (59 percent) believe that there are various substantial business issues whose tax treatment is not codified in the ITA. In the United States, the share of respondents with this opinion is

93 An overview of various sources is provided by Cook, *supra* note 74, at 145-73.

94 "Soft law" is defined to mean rules that are neither strictly binding in nature nor completely lacking legal significance. The term is used to refer to guidelines, policy declarations, or codes of conduct that are not legally enforceable. OECD guidelines are an example of soft law.

95 Canada, Department of Finance, 2016 Budget, Budget Plan, March 22, 2016.

96 See, for example, Deloitte, "Budget 2018—Tax Policy Issues for Consideration," 2018 (www2.deloitte.com/content/dam/Deloitte/ca/Documents/tax/en_Deloitte_2018_pre-budget_policy_recommendations_AODA.PDF).

97 See, for example, Norton Rose Fulbright, "Canada Proposes To Adopt BEPS Recommendations," 2016 (www.nortonrosefulbright.com/en/knowledge/publications/915d05f8/canada-proposes-to-adopt-beps-recommendations).

smaller (42 percent) and similar to the share of respondents in the other OECD countries (44 percent). However, the difference between Canada and the United States is not statistically significant. Surprisingly, nearly all respondents with this opinion state in the survey that there is guidance that helps to clarify tax treatment that is not codified in the law.

Tax Appeals

The tax appeals area covers the resolution of tax disputes. In Canada, the dispute resolution process is very clear. As a first formal step, if a taxpayer disagrees with the CRA's assessment, the taxpayer can file a notice of objection with the CRA (appeal at the administrative level).⁹⁸ The notice is reviewed by the Appeals Branch of the CRA, and the result is communicated to the taxpayer. If the taxpayer is not satisfied with the result, the taxpayer can appeal to the Tax Court of Canada (appeal at the judicial level).⁹⁹ At the level of the Tax Court, there are two procedures: an informal procedure and a formal procedure.¹⁰⁰ The informal procedure can be chosen when the amount of federal tax and penalties or losses is small.¹⁰¹ However, this procedure is akin to an arbitration process and thus does not allow the taxpayer (or the Crown) to file an appeal against the Tax Court's decision. In contrast, where the more formal general procedure is chosen, the taxpayer may appeal the Tax Court's decision to the Federal Court of Appeal. Finally, the taxpayer can seek leave to appeal the decision of the Federal Court of Appeal to the Supreme Court of Canada (the highest court in Canada for all legal matters). If leave to appeal is granted, a Supreme Court judgment is obtained. In practice, relatively few tax cases are decided at this level.¹⁰²

Despite clearly communicated processes, it is still possible that there are certain issues that lead to complexity. Figure 11 illustrates the complexity drivers at the administrative level. In Canada, the most serious problem is "unpredictable time

98 Corporations must file the notice of objection within 90 days after the day of mailing of the notice of assessment (which notifies the taxpayer about changes to taxable income or tax payable) or the notice of determination (which notifies the taxpayer about changes to a loss claimed). See Canada Revenue Agency, "File an Objection—Income Tax" (www.canada.ca/en/revenue-agency/services/about-canada-revenue-agency-cra/complaints-disputes/file-objection-cppei-appeal-minister/income-tax.html).

99 Similar to a notice of objection, the appeal must be filed within 90 days after receipt of notice from the CRA. See Canada Revenue Agency, "File an Appeal to the Court—Income Tax or GST/HST" (www.canada.ca/en/revenue-agency/services/about-canada-revenue-agency-cra/complaints-disputes/file-appeal-in-court/income-tax-gst-hst.html).

100 Campbell, *supra* note 66, at 446; Li et al., *supra* note 48, at 27; and Arnold, *supra* note 49, at 49.

101 The amount in issue is considered to be small if it involves less than \$12,000 in federal income tax. See Cook, *supra* note 74, at 88.

102 For an overview of the number of tax cases heard, respectively, by the Tax Court, the Federal Court of Appeal, and the Supreme Court of Canada between 2015 and 2017, see Arnold, *supra* note 49, at 49. Over this three-year period, the Supreme Court of Canada decided only two tax cases.

FIGURE 11 Complexity Drivers Regarding the Tax Appeal Process—Administrative Level

Note: The four drivers are listed in descending order based on the values for Canada.

until resolution” after an objection has been filed, with almost half of the Canadian respondents (47 percent) choosing this driver. The (in)ability to issue decisions in a timely manner was also mentioned in the tax appeals evaluation report of the Corporate Audit and Evaluation Branch of the CRA published in 2012.¹⁰³ According to the report, it took on average 299 calendar days for the Appeals Branch in 2009 to 2010 to resolve a notice of objection.¹⁰⁴ In contrast to the processing time for objections, the remaining problems are not considered to be very serious in Canada. “Lack of (specialized) agents/staff” to resolve objections is selected by only 24 percent of respondents.¹⁰⁵ There are also few concerns about “inconsistent decisions” by tax

103 Canada Revenue Agency, “Tax Appeals Evaluation” (www.canada.ca/en/revenue-agency/programs/about-canada-revenue-agency-cra/internal-audit-program-evaluation/internal-audit-program-evaluation-reports-2012/tax-appeals-evaluation.html). Moreover, timeliness was mentioned in the auditor general’s 2016 fall report, thus indicating that the problem remained. See Auditor General of Canada, *2016 Fall Reports of the Auditor General of Canada*, “Report 2—Income Tax Objections—Canada Revenue Agency” (www.oag-bvg.gc.ca/internet/English/parl_oag_201611_02_e_41831.html#ex3,tjis).

104 Recent figures distinguish between tax objections on the basis of their complexity. The processing time ranges from 51 days (low-complexity income tax objections) to 690 days (high-complexity income tax objections). See Canada Revenue Agency, “Processing Times and Complexity Levels—Income Tax and GST/HST Objections” (www.canada.ca/en/revenue-agency/services/about-canada-revenue-agency-cra/complaints-disputes/complexity-level-processing-time.html).

105 The term “tax agents” refers to the tax authority’s revenue agents.

agents (6 percent) and no concerns about the “influence of third parties” (0 percent). The result for inconsistent decisions by tax officers is particularly interesting since it is in sharp contrast to the result for the tax audit process, where 53 percent of the respondents select this driver as a serious problem.

In the United States as well, the above-mentioned complexity drivers are, on average, not regarded as very problematic. Compared to Canada, the share of respondents who consider unpredictable time until resolution to be a serious problem is slightly smaller in the United States (39 percent). The difference is not, however, statistically significant. A similar result can be seen for lack of (specialized) agents, which is considered to be a serious problem by only 26 percent of the US respondents (compared to 24 percent for Canada). In contrast, I observe slightly different results for inconsistent decisions by tax agents. The share of US respondents selecting this driver (19 percent) is larger than the share of Canadian respondents, but, again, the difference between Canada and the United States is not statistically significant. Moreover, similar to Canada, influence of third parties is not viewed as a problem at all in the United States (0 percent). In the other OECD countries, the first two drivers are considered slightly less serious, on average, compared to Canada (unpredictable time until resolution, 32 percent; lack of specialized tax agents/staff, 11 percent). In contrast, a much larger share of the respondents in the other OECD countries chooses, on average, inconsistent decisions (29 percent). Although this share is still relatively small in general, the difference compared to Canada suggests that there are fewer inconsistent decisions at the administrative level in Canada. The fact that decisions are perceived as consistent is also highlighted in the 2012 tax appeals evaluation report. A possible explanation for this result may be the CRA’s efforts to support a consistent response to objections.¹⁰⁶ This may also explain why inconsistency is not a serious problem for the appeals process compared to the audit process.

Figure 12 shows the drivers of complexity at the judicial level. Overall, they seem to be of similar size compared to those at the administrative level. The most serious complexity driver in Canada is “unpredictable time until resolution” of an appeal. With 65 percent of the respondents selecting it as a serious problem, this share exceeds the share of respondents who identify this driver as a problem at the administrative level by 18 percentage points. According to the 2012 tax appeals evaluation report, in 2009 and 2010 it took the Tax Court 688 calendar days, on average, to progress a case from its registration with the court to its resolution.¹⁰⁷ Again, in contrast to the processing time of appeals, all remaining complexity drivers (“inconsistent decisions,” “lack of (specialized) judges,” and “influence of third parties”) were not regarded as problematic in Canada. The share of respondents selecting one of the drivers to be a serious problem is very low for each driver (inconsistent

106 In addition to internal evaluations, in 2006, intake centres were established to support the Appeals Branch in “the timely and consistent validation of notices of objections”: Canada Revenue Agency, *supra* note 103.

107 *Ibid.*

FIGURE 12 Complexity Drivers Regarding the Tax Appeal Process—Judicial Level

Notes: The four drivers are listed in descending order based on the values for Canada.

** indicates statistical significance at the 0.5 level.

decisions, 12 percent; lack of (specialized) judges, 6 percent; influence of third parties, 0 percent).

For the US respondents, the most serious complexity driver is the processing time of appeals. With only 29 percent of respondents identifying processing time as a serious problem, this driver is much less relevant in the United States than in Canada. The difference between Canada and the United States is also statistically significant. Potential reasons for the long time periods in Canada at both the administrative and the judicial levels include the heavy caseload owing to increased aggressiveness in tax planning and the lack of a legal provision that makes a decision binding on all taxpayers appealing the same issue.¹⁰⁸ Less serious problems in the United States at the judicial level include lack of (specialized) judges (19 percent), inconsistent decisions (16 percent), and influence of third parties (0 percent). Regarding the other OECD countries, similar to Canada, a relatively large share of respondents (50 percent) considers unpredictable time period until resolution to be a serious problem. Moreover, the respondents in the other OECD countries perceive this complexity driver to be more serious at the judicial level than at the administrative level, as indicated by the positive difference of approximately 18 percentage points.

108 Ibid.

Tax Filing and Payments

The area of tax filing and payments comprises two main processes: the filing of a tax return and the payment of tax. As indicated earlier, Canada's tax system is based on self-assessment. Hence, taxpayers have to determine their own tax liability and file the required returns. Figure 13 shows various complexity drivers for the tax return filing process. In Canada, the general filing process does not seem to be a major issue in terms of tax complexity. The only complexity driver that is selected by the Canadian respondents is "preparing returns." However, it is chosen by only 24 percent of the respondents as regularly causing problems. In the United States, four of the five drivers (all except "determining due dates") are present. The most serious problems concern "number of returns" (42 percent), "preparing returns" (39 percent), and "(electronic) transmission" (19 percent).¹⁰⁹ When comparing these complexity drivers for Canada and the United States, I find statistically significant differences regarding the number of returns and the (electronic) transmission of returns. In Canada, corporations have to file a corporate income tax return (T2) every year. For most provinces,¹¹⁰ the return serves as both a federal and a provincial tax return. Therefore, there are no separate returns such as those required in the United States where state and/or local income taxes are imposed.¹¹¹ This may explain why the number of returns is seen as more problematic in the United States than in Canada. Furthermore, the difference with regard to the (electronic) transmission of returns may be explained by the quality of the Canadian electronic-filing system and the continuous efforts to improve it.¹¹² In general, taxpayers appear to be satisfied with the online tax filing system in Canada.¹¹³ In the other OECD countries, on average, I find all complexity drivers to be present; however, none of them has a large impact.

Figure 14 illustrates the complexity drivers of the tax payment process. Similar to the tax return filing process, the overall tax payment process is not very complex.

109 One possible explanation of the perception that tax return preparation is not very problematic may be the existence of instructions. Respondents were asked whether the written instructions issued by the tax authority are helpful. Surprisingly, 82 percent of the Canadian respondents and 90 percent of the US respondents classify tax authority instructions as helpful.

110 Exceptions are Alberta and Quebec, where a separate provincial tax return must be filed. See Canada Revenue Agency, "T2 Corporate Income Tax Return" (www.canada.ca/content/dam/cra-arc/formspubs/pbg/t2/t2-16e.pdf).

111 For example, in the United States, corporations generally file separate federal and state tax returns. An overview of the state filing requirements and links to their income tax forms are provided at www.taxadmin.org/state-tax-forms.

112 Patrice Dutil, Cosmo Howard, John Langford, and Jeffrey Roy, *The Service State: Rhetoric, Reality and Promise* (Ottawa: University of Ottawa Press, 2010).

113 See, for example, Frédéric Bastien, Harold Jansen, Royce Koop, Thierry Giasson, and Tamara Small, "Online Tax Filing Is an E-Government Success Story," *Policy Options Politiques*, April 12, 2017 (policyoptions.irpp.org/magazines/april-2017/online-tax-filing-is-an-e-government-success-story).

FIGURE 13 Complexity Drivers Regarding the Filing of Tax Returns

Notes: The five drivers are listed in descending order based on the values for Canada.

*** indicates statistical significance at the 0.01 level; * at the 0.1 level.

The share of respondents selecting a driver as regularly causing problems is low, irrespective of which driver is considered. “Refunding overpaid taxes,” “computing payments,” and “number of payments” are chosen by 12 percent of the Canadian respondents as regularly causing problems. Even fewer problems seem to be caused by “(electronic) remittance” (that is, e-transfer), which is selected by only 6 percent of Canadian respondents. Moreover, similar to the filing process, none of the Canadian respondents select “determining due dates” and “identifying recipient(s)” as a serious problem. Overall, the low values may be explained by the characteristics of the tax return filing process in Canada. For example, the CRA provides clear instructions on how much and when to pay by instalments, or how to request a refund.¹¹⁴ For the US respondents, the most problematic complexity driver is computing payments; however, only 29 percent perceive this driver as regularly causing problems, followed by number of tax payments (26 percent), (electronic) remittance of payments (26 percent), refunding overpaid taxes (10 percent), determining due dates (3 percent), and identifying recipient(s) of the payments (0 percent). When I compare these results with those for Canada, I find a statistically significant difference only for (electronic) remittance—again underlining the satisfaction of corporate taxpayers with Canada’s electronic (payment) services. Finally, when the other OECD

114 Canada Revenue Agency, “Corporation Payments” (www.canada.ca/en/revenue-agency/services/tax/businesses/topics/corporations/corporation-payments.html).

FIGURE 14 Complexity Drivers Regarding the Payment of Taxes

Notes: The six drivers are listed in descending order based on the values for Canada.

* indicates statistical significance at the 0.1 level.

countries are considered, the results are, on average, very similar to those for Canada. Hence, regarding the complexity of the tax payment process, Canada does not seem to be substantially different from the average experienced in other OECD countries.

CONCLUSION

In this study, I analyze the complexity of the Canadian income tax system faced by MNCs in 2016, using the tax complexity index developed by Hoppe et al. and the underlying survey data. I compare the findings with results from the United States and the average results from 19 other OECD countries. I find that Canada ranks 8th among all 21 sample OECD countries for total tax complexity. When I split total tax complexity into its two components, Canada ranks 7th for tax code complexity and 9th for tax framework complexity. In the tax code, the most complex laws are those on corporate reorganization. These are followed by laws on transfer pricing and controlled foreign corporations, indicating that specific anti-avoidance measures play a large role in inducing tax complexity. In the tax framework, the most complex areas in Canada are tax audits, tax enactment, and tax guidance. Compared to the United States, Canada has a similar level of tax code complexity. Nonetheless, I observe significant differences between the two countries with respect to the level of complexity for 5 out of 15 tax laws. While laws on corporate reorganization and capital gains are considered more complex in Canada, laws on local and industry-specific taxes, depreciation and amortization, and (alternative) minimum tax are perceived as more complex in the United States. Drivers contributing to the more

complex laws in Canada are excessive detail and ambiguity. Similar to tax code complexity, the level of tax framework complexity in Canada is comparable to that in the United States. Among all areas, I do not observe any significant differences in the level of complexity between Canada and the United States. Even within the tax framework areas, I find that many complexity drivers are present to a similar extent in both countries. Nonetheless, there are a few differences. On the one hand, for some complexity drivers, Canada performs worse than the United States. For example, the time period between announcement and enactment in the tax-law enactment process, as well as the time period between filing an appeal and a final decision at the judicial level in the tax appeals process, are considered to be more serious problems in Canada. On the other hand, for some complexity drivers, Canada performs better. Examples include the number of tax returns and (electronic) remittance of returns in the tax filing and payments process.

Taking prior comparative studies on tax complexity into account, the results of this study help to shed light on the different findings. For example, they support the result of the 2005 report by the World Economic Forum,¹¹⁵ in which Canada ranks in the middle of the OECD countries in terms of (total) tax complexity—even in 2016. Moreover, they show that excessive detail is a crucial driver of tax complexity in Canada, as is also indicated by the word count reported by Ehrlich.¹¹⁶ The low values in the areas of filing and payments may also explain, to a large extent, why Canada performs relatively well in terms of the paying taxes ranking by PwC and the World Bank Group.¹¹⁷ Nevertheless, the results of the present study also indicate that tax complexity is not equally present across the different dimensions of tax complexity in Canada. Some aspects are more complex than others. Hence, caution should be exercised with regard to the measure chosen when examining and comparing tax complexity.

In addition to enhancing the understanding of tax complexity in Canada, the findings have important policy implications. They show that the corporate income tax system in Canada performs not as badly as indicated by the “top 10 barriers to competitiveness” of the Canadian Chamber of Commerce.¹¹⁸ On the basis of the overall results for Canada and the comparison with the average of other OECD countries, the corporate income tax system cannot be regarded as an overly complex system that might impair Canada’s global competitiveness. Even so, as indicated above, there are certain aspects that are indeed very complex and thus may require attention. However, as with other studies, there are some limitations that must be considered when interpreting the results. Since the data that this study is based on refer to 2016, concerns could be raised as to whether the results are still fully valid

115 Lopez-Claros et al., *supra* note 25.

116 *Supra* note 26, at 171-72.

117 PwC and World Bank Group, *supra* note 29.

118 Canadian Chamber of Commerce, *supra* note 4.

today. In light of changes introduced by the US Tax Cuts and Jobs Act of 2017,¹¹⁹ comparisons with the United States employing more recent data on tax complexity than those used in this study would be interesting.¹²⁰ Moreover, in order to better interpret the results, the underlying causes and the consequences of the individual complexity drivers need to be analyzed in further research. For example, certain complexity drivers may also be positive for corporations (such as ambiguity in tax laws) or governments (such as opaqueness in tax audit selection criteria). Finally, this study is about the level of tax complexity faced by MNCs. The results presented may therefore not be applicable to other groups of taxpayers in the same way. Hence, more analysis is necessary for other groups that are supposed to be strongly affected by tax complexity in Canada, such as small businesses.¹²¹ Irrespective of all limitations, this study provides a valuable contribution to the prior literature, as well as many new insights into tax complexity that can be used as a starting point for future research.

119 See *supra* note 61.

120 Given the 2018 US reform, I expect major changes in the complexity level of the US laws applicable to controlled foreign corporations (subpart F rules) and the laws on interest and thin capitalization.

121 Bernard Shinder, “The Taxation of Small Business: An Historical and Technical Overview” (1984) 32:1 *Canadian Tax Journal* 1-53.

APPENDIX

TABLE A1 Weighting Factors for 19 OECD Countries

Country	Weighting factor ^a
Japan	0.2142
Germany	0.1505
United Kingdom	0.1147
France	0.1067
Italy	0.0805
Spain	0.0536
Australia	0.0521
Mexico	0.0453
Netherlands	0.0336
Switzerland	0.0290
Sweden	0.0223
Poland	0.0204
Belgium	0.0203
Austria	0.0169
Ireland	0.0132
Finland	0.0103
Greece	0.0083
Hungary	0.0054
Luxembourg	0.0025

a Based on each country's gross domestic product in 2016.

FIGURE A1 Distribution of Survey Respondents Among 19 OECD Countries

Note: The countries shown are the “other OECD countries” included in the survey—that is, excluding Canada and the United States.

TABLE A2 Complexity Drivers of Remaining Tax Code Dimensions

	Ambiguity and interpretation	Change	Computation	Detail	Record keeping
Transfer pricing					
Canada	0.75	0.50**	0.66	0.68	0.68
US	0.69	0.69**	0.63	0.71	0.73
OECD	0.73	0.72	0.73	0.70	0.77
Controlled foreign corporations					
Canada	0.59	0.63	0.62	0.75	0.59
US	0.65	0.66	0.65	0.75	0.65
OECD	0.57	0.54	0.55	0.63	0.56
General anti-avoidance					
Canada	0.78**	0.60	0.46	0.53	0.54
US	0.60**	0.53	0.40	0.60	0.52
OECD	0.67	0.58	0.46	0.59	0.60
Investment incentives					
Canada	0.49	0.53	0.47	0.51	0.54
US	0.47	0.53	0.43	0.59	0.52
OECD	0.46	0.50	0.46	0.52	0.52
Interest (including withholding taxes) and thin capitalization					
Canada	0.46	0.40	0.52	0.54	0.49
US	0.39	0.50	0.40	0.45	0.44
OECD	0.48	0.50	0.52	0.58	0.49
Loss offset					
Canada	0.51	0.41	0.44	0.51	0.38*
US	0.44	0.49	0.48	0.56	0.49*
OECD	0.45	0.50	0.47	0.52	0.48

(Table A2 is concluded on the next page.)

TABLE A2 Concluded

	Ambiguity and interpretation	Change	Computation	Detail	Record keeping
Dividends (including withholding taxes)					
Canada	0.44	0.37	0.47	0.46	0.51
US	0.39	0.44	0.38	0.47	0.38
OECD	0.42	0.47	0.41	0.51	0.47
Statutory corporate income tax rate					
Canada	0.41	0.44	0.47*	0.41	0.37
US	0.33	0.40	0.30*	0.35	0.29
OECD	0.30	0.41	0.37	0.39	0.35
Royalties (including withholding taxes)					
Canada	0.41	0.40	0.35	0.41	0.43
US	0.35	0.40	0.32	0.40	0.43
OECD	0.45	0.41	0.44	0.50	0.49
Group treatment					
Canada	0.41	0.34*	0.32*	0.41**	0.37
US	0.51	0.51*	0.48*	0.60**	0.48
OECD	0.49	0.51	0.53	0.59	0.49

OECD = average of 19 other OECD countries.

Note: ** indicates statistical significance at the 0.5 level; * at the 0.1 level.

FIGURE A2 Complexity Drivers of Remaining Tax Code Dimensions

Note: The five drivers are listed in descending order based on the values for Canada.

Policy Forum: Editors' Introduction— First Nation Property Taxation

In an article published in this journal in 2000, Chief C.T. (Manny) Jules wrote:

Property tax systems have been an effective means of developing First Nation economies. They have produced benefits far beyond property tax revenues. They have given First Nation communities the means to improve their infrastructure and thereby attract more private investment and promote economic development. This investment has created jobs and lease revenues. Property tax systems have improved the administrative capacity and business culture of many First Nations. These improvements have created the confidence and capacity that First Nation governments need to successfully assert their jurisdiction in other areas, including other types of taxation.¹

In the 20 years since Chief Jules made this observation, the First Nation property tax landscape has changed dramatically. The number of First Nations with property taxes has almost quadrupled, increasing from 74 in 1998² to 275 in 2019-20.³ The First Nations Fiscal Management Act (FMA) enacted in 2005⁴ changed the legal environment under which First Nation property tax systems operate and created the First Nations Tax Commission. The Canadian government has accepted the report of the Truth and Reconciliation Commission and made a commitment to implement the United Nations Declaration on the Rights of Indigenous Peoples, which includes the right to self-determination.⁵

These changes have coincided with growth in Canadian research in Indigenous law, economics, and other scholarship,⁶ but only a handful of papers have been written

1 Chief C.T. (Manny) Jules, "Responding to Challenges: The Future of the Indian Taxation Advisory Board" (2000) 48:5 *Canadian Tax Journal* 1470-95, at 1472-73.

2 *Ibid.*, at 1472.

3 First Nations Tax Commission, *2019-2020 First Nations Tax Commission Annual Report* (Kamloops, BC: First Nations Tax Commission, 2020).

4 SC 2005, c. 9, as amended.

5 Canada, Department of Crown-Indigenous Relations and Northern Affairs, "Truth and Reconciliation Commission of Canada" (www.cirnac-rcaanc.gc.ca/eng/1450124405592/1529106060525#chp2); United Nations, Department of Economic and Social Affairs, Indigenous Peoples, United Nations Declaration on the Rights of Indigenous Peoples, adopted by the General Assembly on September 13, 2007 (www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf).

6 Recent contributions include Fernando M. Aragón and Anke S. Kessler, "Property Rights on First Nations Reserve Land" (2020) 53:2 *Canadian Journal of Economics* 460-95; and Anya

on First Nation taxation in the Canadian context.⁷ Since 2000, the *Canadian Tax Journal* has published only two articles focusing on the topic.⁸ Until very recently, none of the leading Canadian income taxation textbooks in accounting contained any discussion of the unique tax situation of people with status under the Indian Act,⁹ and First Nations have difficulty finding lawyers and real estate agents with experience in First Nation property taxation.

This Policy Forum is a first step toward addressing this knowledge deficit. The first two articles, by Audrey Boissonneault and André Le Dressay respectively, discuss the legal context for First Nation property taxation and debate the question of what kind of legislative framework best advances the goals of self-government and First Nation self-determination. The next two articles, by Mike Icton and Devan Mescall, and Kate McCue and Bill McCue, respectively, serve as case studies. They bring home forcefully the challenges that First Nations face when setting up property tax systems, but demonstrate that these challenges can be overcome, and that a strong First Nation property taxation system can have wide-ranging and sometimes

Hageman and Pauline Galoustian, *Economic Aspects of the Indigenous Experience in Canada* (Kingston, ON: Queen's University, 2020) (<https://ecampusontario.pressbooks.pub/indigenouseconomics244>).

- 7 Notable contributions (other than publications of the Canadian Tax Foundation) include John Graham and Jodi Bruhn, "In Praise of Taxes: The Link Between Taxation and Good Governance in a First Nations Context," in Jerry P. White, Julie Peters, Dan Beavon, and Peter Dinsdale, eds., *Voting, Governance, and Research Methodology* (Thompson Educational Publishing, 2013), 45-87; and Bradley Bryan, "Indigenous Peoples, Legal Bodies, and Personhood: Navigating the 'Public Body' Exemption with Private Law Hybrid Entities" (2020) 1:6 *Canadian Journal of Comparative and Contemporary Law* 58-77.
- 8 See Devrin Q. Froese, "Exploring the Constitutional Sources of a First Nation's Right To Tax" (2007) 55:4 *Canadian Tax Journal* 777-802; and Martha O'Brien, "Income Tax, Investment Income, and the Indian Act: Getting Back on Track" (2002) 50:5 *Canadian Tax Journal* 1570-92. However, several conference papers on this topic are available in TaxFind.
- 9 See Robert E. Beam et al., *Introduction to Federal Income Taxation in Canada*, 40th ed. (Wolters Kluwer, 2019); Clarence Byrd and Ida Chen, *Byrd & Chen's Canadian Tax Principles, 2020-2021 Edition*, 1st ed. (Pearson, 2020); and William Buckwold, Joan Kitunen, and Mathew Roman, *Canadian Income Taxation, Planning and Decision Making*, 23d ed. (McGraw-Hill Ryerson, 2020). The 2020 edition of Beam et al. addressed this omission; see Robert E. Beam et al., *Introduction to Federal Income Taxation in Canada*, 41st ed. (Wolters Kluwer, 2020). The neglect of this topic can be partly explained by its absence from the Chartered Professional Accountants (CPA) competency map, which is used to set professional exams: Chartered Professional Accountants Canada, "The CPA Competency Map: Qualifications for the Canadian CPA Designation" (www.cpacanada.ca/en/become-a-cpa/why-become-a-cpa/the-cpa-certification-program/the-cpa-competency-map). Recent editions of textbooks on income tax law have included some discussion of First Nation taxation issues; see Arthur Cockfield, Martha O'Brien, and Catherine Brown, *Materials on Canadian Income Tax*, 16th ed. (Toronto: Thomson Reuters, 2020), at 168-96; Scott Wilkie, Jinyan Li, and Joanne Magee, *Principles of Canadian Income Tax Law*, 9th ed. (Toronto: Thomson Reuters, 2020), at 122-24; and David G. Duff, Benjamin Alarie, Geoffrey Loomer, and Lisa Philipps, *Canadian Income Tax Law*, 6th ed. (Toronto: LexisNexis Canada, 2018), at 67-68. References to the Indian Act are to RSC 1985, c. I-5, as amended.

unexpected benefits. The final article, by Ross Hickey, explores the connection between First Nation governance structures and property taxation, arguing that good taxation requires—and can also promote—good governance. To understand the significance of and key takeaways from these articles, however, it is useful to have some basic knowledge of First Nation property taxation.

A BRIEF INTRODUCTION TO FIRST NATION PROPERTY TAXATION

Property taxation on reserve differs fundamentally from property taxation off reserve, partly because of the nature of on-reserve land tenure arrangements and partly because of the unique role of First Nations in the Canadian federation.

By law, reserve land is inalienable and cannot be sold or repossessed.¹⁰ However, a First Nation may give permission to non-members to occupy reserve land. For example, as McCue and McCue describe in their contribution to this Policy Forum, the Chippewas of Georgina Island First Nation (GIFN) leases waterfront property to cottagers on Snake Island and Fox Island in Lake Simcoe.¹¹ First Nations may also issue certificates of possession to members, who can in turn lease out the land they hold.

This land tenure system has important implications for the nature of on-reserve property taxes, as explained by the First Nations Tax Commission:

Property tax systems off-reserve generally levy taxes on the fee simple interest of a property, and it is the owner of the fee simple interest who is liable for the taxes. There are no fee simple interests in reserve lands, which means a different approach is necessary. First Nation property tax systems levy taxes on occupiers of reserve lands, regardless of the nature of the occupation. This means that occupiers of reserve lands, whether they hold a lease, license, permit or simply occupy the land, can be liable for taxes. In this sense, the taxation is on the occupation of the land, and not related to the specific way that the person occupies the reserve lands. Occupations can be for a range of uses, including residential, commercial, industrial, agricultural, or utility. The full range of occupations can be taxable, just as they are off reserve.¹²

In theory, First Nations could levy taxes on any occupiers of reserve lands, including their own members.¹³ However, in practice, in most cases property taxes are

10 For an excellent introduction to First Nation land tenure arrangements, see Hageman and Galoustian, *supra* note 6, at chapter 24.

11 See Kate McCue and Bill McCue, “Policy Forum: Implementing the Chippewas of Georgina Island First Nation Property Tax System—Opportunities, Challenges, and Lessons Learned,” in this feature.

12 First Nations Tax Commission, “Taxpayers: Property Taxation on Reserve” (<https://fntc.ca/property-taxation-on-reserve>).

13 For a history of First Nation taxation powers, see André Le Dressay, “Policy Forum: In Defence of the First Nations Fiscal Management Act,” in this feature; Graham and Bruhn,

levied primarily on leaseholders, who are usually not members of the First Nation, and on commercial occupiers of reserve land. As noted by McCue and McCue, GIFN's tax code is typical in that it "provides exemptions for member properties (as long as the property is actually occupied by the member), for the First Nation itself, and for First Nation-owned businesses."¹⁴ McCue and McCue, and their fellow contributors Icton and Mescall,¹⁵ explain the rationale behind this practice, while Hickey¹⁶ provides a more critical perspective. The issues of governance and taxpayer representation that arise when the majority of First Nation property taxpayers are not eligible to vote in First Nation elections are themes that recur in the contributions to this Policy Forum.

Property taxes and related payments are the most significant form of First Nation own-source tax revenue; in 2018-19, they raised \$96 million.¹⁷ Yet the bulk of this revenue is raised by a handful of First Nations who control highly desirable land. Two First Nations—Westbank, with reserves in the Okanagan, and Squamish, with reserves in the BC lower mainland—accounted for over one-quarter of the \$96 million in revenue; over one-half was raised by just 10 nations. Among First Nations reporting their tax revenue in the *First Nations Gazette*, the median amount of revenue raised in 2019 was approximately \$130,000,¹⁸ and the majority of First Nations in Canada do not collect any property taxes at all.

Moreover, First Nation property taxes are typically designed to cover the cost of providing services to on-reserve properties. Thus, as described by Icton and Mescall in this Policy Forum, in many cases property tax revenue flows into a First Nation and then immediately flows out again to pay for services such as fire protection, garbage collection, and road maintenance, contracted from a local or provincial government. Given the need for such arrangements, and given the insignificance of \$96 million in property tax revenue (compared with, say, the \$15.28 billion budgeted

supra note 7, at 47; and Jonathan R. Kesselman, "Aboriginal Taxation of Non-Aboriginal Residents: Representation, Discrimination, and Accountability in the Context of First Nations Autonomy" (2000) 48:5 *Canadian Tax Journal* 1525-1644.

14 McCue and McCue, supra note 11, at 864.

15 Mike Icton and Devan Mescall, "Policy Forum: Establishing an Urban Reserve—Property Tax Challenges and Opportunities," in this feature.

16 Ross Hickey, "Policy Forum: First Nation Property Taxation and Governance in British Columbia," in this feature.

17 First Nations Tax Commission, *First Nations Tax Commission Annual Report 2018-19* (Kamloops, BC: First Nations Tax Commission, 2019), at 5-6.

18 These numbers are based on data compiled by River Doxtator from the *First Nations Gazette*. We would like to thank Eric McGregor and Eric Guimond at the Department of Indigenous Services for making information on First Nations names and membership numbers available to us. The data, with revenue estimates and mill rates for 2001, 2006, 2011, 2016, and 2019, are available at [www.ctf.ca/CTFWEB/Documents/CTJ_2021/Issue_3/CTJ_69-3 - First Nations Population Counts and Mill Rates.xlsx](http://www.ctf.ca/CTFWEB/Documents/CTJ_2021/Issue_3/CTJ_69-3_-_First_Nations_Population_Counts_and_Mill_Rates.xlsx).

for grants and contributions through the Department of Indigenous Services in 2021-22),¹⁹ one may ask: Why should we care about First Nation property taxation?

WHY FIRST NATION PROPERTY TAXATION MATTERS

First Nation property taxation matters because the capacity of First Nations for self-government is inextricably linked to their ability to tax. In the first article in this Policy Forum, Boissonneault quotes Jim Prentice's remarks during the House of Commons debate preceding the passage of the FMA:

[S]elf-government . . . is predicated upon the hard work associated with citizenship: the installation, for example, of community infrastructure, the responsibilities of debt service, the administration of a property tax system and the building of fiscal, managerial and financial capacity.²⁰

In her article, Boissonneault provides a careful analysis of the legal framework underlying the FMA and argues that the regulatory framework that it imposes is too restrictive; specifically, it does not meet the government's stated objective of creating meaningful self-government for the participating First Nations. Reform, she argues, is needed.

In a companion article, Le Dressay defends the FMA. He notes that "[t]he FMA was created by Indigenous leaders pursuing a strategy of growing Indigenous economies and public revenues to provide the fiscal foundation for self-determination."²¹ Le Dressay argues that the standards and processes described by the FMA serve functions akin to similar provisions in trade and investment agreements: by reducing uncertainty, and transaction and implementation costs, they promote investment and economic growth.

Indeed, a study of First Nation taxation reveals how much social and administrative infrastructure the implementation of even the most basic of taxation systems requires—infrastructure that is easily taken for granted off reserve. Icton and Mescall's case study, for example, describes the challenge of communicating the idea of taxation to Muskeg Lake Cree Nation (MLCN) elders, whose language contains no word for taxation. This challenge was overcome by making the cultural connection between taxation and the traditional practices of hunters of the First Nation, who would distribute resources across the membership for the good of all. McCue

19 Treasury Board of Canada Secretariat, "Infographic for Government of Canada" (www.tbs-sct.gc.ca/ems-sgd/edb-bdd/index-eng.html#orgs/gov/infograph/financial).

20 Audrey Boissonneault, "Policy Forum: A Critical Analysis of Property Taxation Under the First Nations Fiscal Management Act as a Self-Government Tool," in this feature, at 802, quoting Canada, House of Commons, *Debates*, November 19, 2004, at 1610 (Mr. Jim Prentice).

21 Le Dressay, *supra* note 13, at 831.

and McCue describe in detail the substantial upfront costs, including the costs of carrying out property assessments and creating appropriate financial and administrative systems, faced by any First Nation implementing a property taxation system. The case studies by Icton and Mescall and by McCue and McCue are recommended reading for anyone looking to understand how to set up a First Nation property tax system, or considering the types of practical policy reforms that could support First Nations' fiscal capacity.

A key lesson learned from the two case studies is the importance of good governance—strong leadership, well-informed band councils, and structures that facilitate taxpayer input representation. The theme of governance is developed more fully in Hickey's contribution to this Policy Forum. Hickey examines First Nation governance through a political economy lens and argues that the default election codes under the Indian Act do not always provide an incentive for band councillors to act in their constituents' best interests. His conclusions, however, are optimistic: First Nations who adopt property taxes often reform their electoral codes in ways that promote better governance.

CONCLUDING THOUGHTS

First Nations have legitimate aspirations to self-government. Yet the activities of government, from road maintenance to property assessment and tax collection, typically involve considerable economies of scale. In 2019, of the 620 First Nations in Canada, only 10 had more than 10,000 members. The typical First Nation has fewer than 1,000 members.²² Lacking capital equipment, infrastructure, and the availability of economies of scale, many First Nations (like GIFN and MLCN described in this Policy Forum) find themselves negotiating with local municipalities for the provision of basic services. While, on paper, the relationship between First Nations and other governments may be equal, lack of resources and lack of other options put First Nations in a weak bargaining position. These observations raise a fundamental question: How can First Nations be self-governing when they are too small to be able to carry out the activities of government in a cost-effective manner? The FMA is one answer to this question, but as the articles in this Policy Forum suggest, more answers are needed.

More answers are also needed to the question of why, to date, only a third of First Nations have implemented property taxes. The articles that follow provide insights, but perhaps it is useful to summarize some of the ideas here. Are First Nations deterred by the upfront costs of creating a property tax regime? Is the FMA too restrictive? Do some First Nations have too few leaseholders or commercial occupiers of reserve land to justify the expense of creating a tax regime? Are First Nations reluctant to implement taxes because of uncertainty about how the increase in own-source revenue would affect federal payments? Does the default

22 Data from the tables referred to in note 18, *supra*.

two-year election cycle under the Indian Act reduce the incentive for band councils to take on projects with big long-term payoffs? Within First Nations, are there political barriers to the introduction of new taxes, possibly stemming from a desire to protect the tax exemption under section 87 of the Indian Act, or from a distrust of government? Or is wider adoption of property taxes just a matter of time, given that the FMA is a relatively recent innovation in historical terms, and that the requisite social/political/administrative infrastructure has to be created first? In fact, every year a few more First Nations create new taxes under the FMA.²³ Research to identify impediments to First Nations' development of their fiscal capacity and to support potential policy change needs to continue.

As the editorial team that put together this Policy Forum, we have welcomed the opportunity to engage with these intellectually challenging questions. The experience has been both enlightening and rewarding.²⁴ The Truth and Reconciliation Commission identified "the fact that many lawyers did not have adequate cultural, historical, or psychological knowledge" as a contributor to residential school survivors "not receiving appropriate legal service."²⁵ The commission called upon Canadian law schools "to require all law students to take a course in Aboriginal people and the law."²⁶ Becoming better informed about First Nation taxation law and practice might seem to be a very small act of reconciliation. However, it is one step that tax practitioners, policy analysts, and scholars can take as individuals to be part of a long-term, collective effort.

Frances Woolley
River Doxtator*
Alan Macnaughton
Daniel Sandler
Editors

23 Data on new property taxes are provided in the 2019-20 annual report of the First Nations Tax Commission, *supra* note 3.

24 For informing our understanding of the topic, we are indebted to the contributors to this Policy Forum. We also thank Brad Bryan, Donna Feir, André Le Dressay, and Brad Regehr for helpful conversations.

25 Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Winnipeg: Truth and Reconciliation Commission of Canada, 2015), at 168.

26 *Ibid.*

* Guest editor.

Policy Forum: A Critical Analysis of Property Taxation Under the First Nations Fiscal Management Act as a Self-Government Tool

Audrey Boissonneault*

PRÉCIS

La Loi sur la gestion financière des premières nations (LGFPN) délègue aux conseils de bande le pouvoir de prélever l'impôt foncier. Le présent article décrit et analyse l'efficacité de la délégation de pouvoir comme outil d'autonomie gouvernementale.

L'article 5(1) de la LGFPN permet aux conseils de bande de prélever l'impôt foncier afin d'améliorer leur situation économique — en leur fournissant une source de revenus — et d'améliorer leur autonomie gouvernementale. Toutefois, il comporte de nombreuses restrictions. Celles-ci incluent l'obligation de se conformer aux normes de gestions financières prévues par la Loi, ainsi que l'homologation des lois concernant l'impôt foncier par la Commission sur la fiscalité des premières nations (CFPN) (dont la majorité des membres sont nommés par le gouvernement fédéral). L'impôt foncier doit également respecter les règlements pris par le gouverneur en conseil en vertu de la Loi, qui concernent présentement l'évaluation des propriétés (incluant les appels concernant celle-ci), les intérêts et pénalités ainsi que l'inspection des propriétés.

Les contribuables ont déposé à deux reprises des demandes en contrôle judiciaire visant à faire invalider les décisions de la CFPN. Considérant que ces deux tentatives se sont soldées par un échec, il importe de mitiger les critiques liées aux restrictions à l'autonomie gouvernementale qui semblent être imposées par le texte de la LGFPN.

Il n'en demeure pas moins que le gouvernement fédéral conserve un contrôle important sur le processus législatif des Premières Nations en ce qui concerne l'impôt foncier. Lorsqu'il prend la forme de règlement, ce contrôle est direct, mais le gouvernement conserve également un contrôle indirect de par la présence de la CFPN. Une réforme s'impose : les pouvoirs doivent être véritablement délégués afin d'atteindre l'objectif d'améliorer de façon significative l'autonomie gouvernementale des Premières Nations participantes. Le pouvoir de prélever l'impôt foncier est délégué aux conseils de bande depuis la Loi sur les indiens de 1951. Il est temps que

* Of Mallette LLP, Chicoutimi, Quebec (e-mail: audrey.boissonneault@mallette.ca).

les Premières Nations puissent exercer ce droit sans ingérence fédérale. Une protection constitutionnelle de l'autonomie gouvernementale doit être l'objectif ultime.

ABSTRACT

The First Nations Fiscal Management Act (FMA) delegates the power to levy property taxes to band councils. The purpose of this article is to describe and analyze the effectiveness of the legislation as a self-government tool.

Section 5(1) of the FMA allows band councils to levy property taxes both to increase their economic capacity—providing them with a source of income—and to improve self-government. However, this grant of power is subject to numerous conditions. These include compliance with the financial management requirements set out in the act, as well as approval of property tax laws by the First Nations Tax Commission (FNTC) (the majority of the members of which are appointed by the federal government). Also, the taxes imposed must comply with regulations set by the governor in council, which currently cover the property assessment process (including an appeal process), interest and penalties, and inspection of property.

There have been two attempts by property taxpayers to overturn the decisions of the FNTC by way of judicial review. The fact that both were unsuccessful has somewhat mitigated criticism of the constraints on First Nation self-government imposed by the FMA.

Overall, the federal government maintains significant control over the law-making process by which First Nations levy property taxes, both directly through regulations and indirectly through its dominant presence on the FNTC. Reform is needed: real powers need to be delegated to meet the stated objective of creating meaningful self-government for participating First Nations. The power to impose property taxes was first delegated to band councils by the Indian Act in 1951. Therefore, it is high time that First Nations be granted the right to exercise that power without federal intervention. Constitutional protection of the right to self-government must be the ultimate goal.

KEYWORDS: FIRST NATIONS ■ PROPERTY TAXES ■ SELF-GOVERNMENT ■ FISCAL POLICY ■ GOVERNANCE ■ FINANCIAL MANAGEMENT

CONTENTS

Introduction	801
The Concept of Self-Government	802
Property Taxation Under the FMA	803
The Power To Pass Laws	804
Conditions Imposed by the FMA	804
Conditions of Regulations	806
Conditions Imposed by the FNTC's Standards for Property Tax Laws	807
Analysis: Does the Power To Pass Property Taxation Laws Improve Self-Government?	808
Criticism of the Text of the FMA	808
Practical Application Through Case Law	809
Justification for the Inclusion of Conditions on the Exercise of Law-Making Powers	810
Conclusion	811

INTRODUCTION

The power for band councils¹ to levy property taxes is defined, in its simplest legal terms, as a delegation of power from the federal government, whether under the Indian Act² or under the First Nations Fiscal Management Act (FMA).³ Since the delegation of power is effected by way of statute, the usual Canadian legislative process applies. As a result, there is a wealth of information in the proceedings of the House of Commons and its committees, and the proceedings of the Senate, that allows us to trace Parliament's intent in granting this power to First Nations.

In allowing band councils to levy property taxes, whether under the Indian Act or under the FMA, the federal government had two objectives: to increase the economic capacity of First Nations⁴ and to improve their self-government.⁵ Given that no major legislative changes have occurred in this area since the passage of the FMA in 2005, it is possible in 2021 to assess the effectiveness of the legislation in achieving the government's objectives. Approximately 30 percent of First Nations in Canada now levy property taxes under one of the two acts,⁶ and there are considerable data on the impact of these statutes.

Because the government's objectives are broad and their implications are diverse, this article will focus solely on the objective of self-government and whether the FMA achieves it. The Indian Act is not discussed here since the FMA closes certain loopholes in the older statute, in particular with respect to self-government.⁷

The article begins with a brief section on the concept of self-government. It then outlines the power to levy property tax set out in the FMA, including not only what band councils are allowed to do, but also the limitations that are placed on them in exercising that power. Finally, the article provides a critical analysis of whether self-government is really improved by the FMA, in light of its constraints on the exercise

1 In this article, the term "band council" includes both the "council of the band" as defined in section 2(1) of the Indian Act, *infra* note 2, and the "council" as defined in section 2(1) of the First Nations Fiscal Management Act (FMA), *infra* note 3. These terms are interchangeable, since the definition of "council" in the FMA refers to the meaning of "council of the band" under the Indian Act.

2 RSC 1985, c. I-5, as amended.

3 SC 2005, c. 9, as amended.

4 See, for example, Canada, House of Commons, *Debates*, December 10, 2004, at 2598-99 (Hon. Sue Barnes); and *Debates*, November 19, 2004, at 1608-9 (Hon. Sue Barnes).

5 See, for example, *Debates*, December 10, 2004, *supra* note 4, at 2598 (Hon. Sue Barnes); *Debates*, November 19, 2004, *supra* note 4, at 1609 (Mr. Jim Prentice); and Canada, House of Commons, *Evidence*, Standing Committee on Aboriginal Affairs and Northern Development, 38th Parl., 1st sess., meeting no. 13, December 7, 2004, at 3 (Mr. André Bellavance) and 7 (Hon. Andy Scott).

6 First Nations Tax Commission, "Taxpayers: Property Taxation on Reserve" (<https://fntc.ca/property-taxation-on-reserve>).

7 Examples are the limitation in section 83 of the Indian Act, which only allows for the making of bylaws, and the various supervisory powers granted to the minister of Indigenous services.

of the power to tax, and case law on the subject. The analysis concludes with a brief review of the arguments advanced in support of those constraints using data from certain First Nations participating in the FMA.

THE CONCEPT OF SELF-GOVERNMENT

During the debates leading up to the passage of the FMA, self-government was regularly mentioned as a key objective of the proposed legislation:

I return then to the legislation before the House. It must be noted at the outset that this legislation originates not with the government, but rather with a group of visionary Aboriginal Canadians who have *fought for their vision of self-government* and who have persisted in the face of considerable difficulty.

...

The self-government which they fight for is predicated upon the hard work associated with citizenship: the installation, for example, of community infrastructure, the responsibilities of debt service, the administration of a property tax system and the building of fiscal, managerial and financial capacity.⁸

In order to understand what the government was trying to achieve, it is important to define the meaning of “self-government” in this context. In the legal sense, self-government typically refers to an inherent right protected by section 35 of the Constitution Act, 1982.⁹ What this legal self-government entails is not well defined, and there is still much debate concerning the specific rights that it includes. However, in connection with property taxation under the FMA, it is clear that the government was not seeking to provide constitutionally protected self-government. The preamble to the act states:

Whereas this Act is not intended to define the nature and scope of any right of self-government or to prejudge the outcome of any self-government negotiation.¹⁰

However, this preamble does not prevent the legislator from wishing to confer a certain degree of self-government through the act. The FMA grants self-government as the term is commonly used, meaning the right of First Nations to make certain decisions for their communities and govern themselves by moving away from the colonial logic. The FMA sets out the right to make decisions on taxation and certain fiscal matters, but not the authority to establish the form of government that will make those decisions. Furthermore, case law recognizes self-government as one of

8 *Debates*, November 19, 2004, supra note 4, at 1610 (emphasis added) (Mr. Jim Prentice).

9 Constitution Act, 1982, being schedule B to the Canada Act 1982 (UK), 1982, c. 11; and Canada, Department of Crown-Indigenous Relations and Northern Affairs, “The Government of Canada’s Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government” (www.cirnac-rcaanc.gc.ca/eng/1100100031843/1539869205136).

10 FMA preamble.

the objectives of the FMA, and this was used as the ground for denying an application for judicial review in a recent decision.¹¹ The term seems to me to be appropriate for defining the federal government's objective, although the act does not afford the constitutional protection generally provided for self-government.

The scope of the term "self-government" as used in this article also implies existence within the Canadian legal order;¹² therefore, self-government is a component of internal self-determination¹³ as defined by the Supreme Court of Canada in *Reference re Secession of Quebec*.¹⁴ Under the concept of self-government, the government of Canada agrees to recognize Indigenous peoples, and Indigenous peoples agree to operate within Canada, rather than seeking territorial control as occurs with external self-determination.¹⁵ Accordingly, this article seeks to determine whether, in the current environment, the FMA contributes to First Nations' "political, economic, social and cultural development within the framework of an existing state."¹⁶ The discussion that follows ignores the limitations inherent in the Canadian legal system and focuses instead on the limitations imposed by the FMA.

It should be noted that the preamble to the FMA does not necessarily mean that rights outside the act's framework could not be included in self-government. The question remains. Despite the above clarification of terminology, this article does not attempt to determine whether such rights could be protected by section 35 of the Constitution Act.

PROPERTY TAXATION UNDER THE FMA

In order to determine whether the power to levy property tax enhances First Nation self-government, it is important to understand the powers that the FMA delegates and the process for exercising them. The act, which was passed in 2005 and came into force on April 1, 2006, has a much broader purpose than providing for property taxation; specifically, it sets out powers in the areas of taxation (including but not limited to property tax), financial management, financing for infrastructure, and economic development. This article addresses only property taxation, except where reference to the other components of the act is essential to an understanding of how the legislation works.

11 *Ontario Lottery and Gaming Corporation v. Mississaugas of Scugog Island First Nation*, 2019 FC 813, at paragraphs 46-51.

12 Stephanie Irlbacher-Fox, *Finding Dabsbaa: Self-Government, Social Suffering, and Aboriginal Policy in Canada* (Vancouver: UBC Press, 2009), at 7.

13 Rhona K.M. Smith, *Textbook on International Human Rights*, 5th ed. (New York: Oxford University Press, 2012), at 295-96.

14 [1998] 2 SCR 217, at 282.

15 Sébastien Grammond, *Aménager la coexistence : Les peuples autochtones et le droit canadien* (Brussels and Montreal: Bruylant and Yvon Blais, 2003), at 130 and 280-82.

16 *Reference re Secession of Quebec*, supra note 14, at 282.

The Power To Pass Laws

Section 5(1)(a) of the FMA contains the delegation of property tax authority. It states:

5(1) *Subject to subsections (2) to (5), sections 4 and 6 and any regulations made under paragraph 36(1)(d), the council of a First Nation may make laws*

(a) *respecting taxation for local purposes of reserve lands and interests or rights in reserve lands, including*

(i) the assessment of the value of those lands and interests or rights, the requisition of any information necessary to conduct the assessment and the inspection, in accordance with procedures prescribed by regulation, for assessment purposes of any reserve lands that are subject to taxation for local purposes,

(ii) a mechanism to establish tax rates and apply them to the assessed value of those lands and interests or rights,

(iii) taxation for the provision of services in respect of reserve lands,

(iv) the taxation of business activities on reserve lands, and

(v) the imposition of development cost charges [emphasis added].

At first blush, this delegation is simple. The taxation power is exercised over reserve lands (defined in the Indian Act to mean land “the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band”)¹⁷ and over designated lands. The power to tax relates to “rights” and “interests,” which are defined in the FMA as follows:

“[R]ight,” in relation to reserve lands in Quebec, means any right of any nature in or to the lands, including any right to occupy, possess or use the lands and any right of a lessee, but does not include title to the lands that is held by her Majesty.¹⁸

“[I]nterest,” in relation to reserve lands in Canada elsewhere than in Quebec, means any estate, right or interest of any nature in or to the lands, including any right to occupy, possess or use the lands, but does not include title to the lands that is held by her Majesty.¹⁹

It should be noted that the taxation powers granted under the FMA are not limited to those found in sections 5(1)(a)(i) through (v) since section 5(1)(a) stipulates “including.”

Conditions Imposed by the FMA

Despite the apparent simplicity of the delegation of authority contained in section 5(1)(a) of the FMA, a number of requirements have to be met for a band council to pass a property taxation law. This power is granted “[s]ubject to subsections (2) to (5), sections 4 and 6 and any regulations made under paragraph 36(1)(d).”²⁰

17 Indian Act section 2(1), the definition of “reserve.”

18 FMA section 2(1), the definition of “right.”

19 Ibid., the definition of “interest.”

20 Ibid., section 5(1).

Section 5 contains several conditions that a band council has to meet in the process of passing its law. First, sections 5(2) and (3) require laws to be approved by the First Nations Tax Commission (FNTC), a body established by the FMA.²¹ This condition implicitly contains a second condition. The FMA allows the FNTC to establish the standards to be met by property taxation laws. Although there is no indication in section 5(1)(a) that exercising the band council's law-making power is contingent on compliance with the standards established by the FNTC, the FNTC may refuse to approve a law that does not meet those standards.²² Thus, sections 5(2) and (3) effectively require that laws meet the standards set by the FNTC, in addition to being approved by it.

The standards that the FNTC can set are not merely procedural. They include "the form *and content* of local revenue laws" and "enforcement procedures to be included in those laws."²³ The FMA defines "local revenue law" to mean "a law made under subsection 5(1),"²⁴ and therefore includes any law relating to property taxation. In a subsequent section of this article, I will return to the discussion of the standards set by the FNTC and consider the extent to which they restrict the property taxation law-making power of band councils.

The governor in council (the federal Cabinet) appoints the majority of the commissioners serving on the FNTC, on the recommendation of the minister of Crown-Indigenous Relations and Northern Affairs.²⁵

Second, section 5(4) contains a content requirement. It states that legislation must contain an appeal procedure in respect of assessments of lands, rights, or interests for property taxation purposes.²⁶

Other sections of the FMA provide a framework for property taxation law making. Section 4 states:

The council of a First Nation may not make a law under paragraph 5(1)(d) *until the council has made a law respecting the financial administration of the First Nation under paragraph 9(1)(a) and that law has been approved by the First Nations Financial Management Board* [emphasis added].

Accordingly, there is a preliminary legislative step of adopting a financial administration law and having it approved by the First Nations Financial Management Board (FNFMB).²⁷ Like the FNTC, the FNFMB is established by the FMA,²⁸ and similarly the

21 Ibid., section 17.

22 *Buffalo Point Cottagers Association Inc. v. Buffalo Point First Nation*, 2014 FC 1173, at paragraph 20.

23 Ibid., appendix B (emphasis added).

24 FMA section 2(1), definition of "local revenue law."

25 Ibid., sections 19 and 20.

26 Ibid., section 5(4)(a).

27 Ibid., section 9(2).

28 Ibid., section 38(1).

governor in council appoints the chair and directors.²⁹ The FNFMB can approve a law only if it complies with the FMA, the regulations thereunder, and any standards established by the FNFMB.³⁰ The FNFMB's standards can affect the form and content of laws, as well as procedural aspects.³¹

Section 6 of the FMA requires a band council to publish a notice at least 30 days before making a law.³² The notice must be published in the *First Nations Gazette*, posted in a public place on the reserve lands, and sent to the FNTC.³³

Conditions of Regulations

In addition to the conditions imposed by the FMA, local revenue laws passed by band councils are subject to regulations made under section 36(1)(d).³⁴ That section provides that the governor in council may make regulations “respecting the exercise of the law-making powers of First Nations under subsection 5(1).” Therefore, this regulatory power is very broad. The governor in council may also introduce more targeted measures, including regulations relating to sections 5(1)(a)(i), 5(1)(e), and 5(7);³⁵ each of those sections explicitly makes the exercise of the power that it delegates subject to compliance with the conditions set forth in the regulations. As noted above, section 5(1)(a)(i) allows band councils to make laws in relation to “the assessment of the value of [reserve] lands and interests or rights, the requisition of any information necessary to conduct the assessment and the inspection . . . of any reserve lands that are subject to taxation for local purposes.” Section 5(1)(e) creates the right to make laws respecting “the enforcement of laws made under paragraphs (a) and (a.1) in respect of outstanding taxes, charges or fees.” Section 5(7) provides for the assignment of a right or interest if taxes owing are more than two years overdue. As a result, the federal government retains significant power to limit the content of laws passed by First Nations.

The regulations that have been passed are diverse and cover all aspects of the FMA.³⁶ For the purposes of this article, only those regulations that relate to property taxation will be considered. The First Nations Assessment Appeal Regulations contain mandatory elements to be included in all assessment laws.³⁷ As the title indicates, these elements concern the appeal process for assessments.³⁸ The First Nations

29 Ibid., sections 40 and 41(1).

30 Ibid., sections 9(2.1) and 55.

31 Ibid., section 55.

32 Ibid., section 6(1).

33 Ibid.

34 Ibid., section 5(1).

35 Ibid., section 36(1)(a).

36 As provided in FMA sections 36, 56, 89, and 140.

37 SOR/2007-241, regulation 2.

38 Ibid., regulations 3 through 13.

Taxation Enforcement Regulations stipulate the mandatory enforcement measures to be set out in property taxation laws.³⁹ In particular, they set forth restrictions on interest rates and penalties,⁴⁰ and the conditions to be met upon an assignment of taxable property,⁴¹ seizure and sale of personal property,⁴² and discontinuance of services.⁴³ The First Nations Assessment Inspection Regulations provide a mandatory procedure for inspections of assessable property for assessment purposes.⁴⁴ In particular, they set out requirements for the issuance of a notice of assessment inspection and its content,⁴⁵ notice of the proposed time when the inspection will take place,⁴⁶ and the conditions under which an assessment without inspection is permissible.⁴⁷

All of the elements specified in the regulations described above are to be fully included in the laws adopted by band councils, which have no discretion in this regard.

Conditions Imposed by the FNTC's Standards for Property Tax Laws

Finally, as discussed earlier in this article, the FNTC has established standards that must be met in order for laws to be approved.⁴⁸ The law must apply to all interests or rights in reserve lands that are subject to taxation unless they are exempted in accordance with the law.⁴⁹ Under the standards, a First Nation may create different tax districts only where doing so is necessary to create a fair taxation regime and where the distinction is warranted by differing levels of servicing requirements or different reference jurisdictions.⁵⁰ The standards also require that laws include all the basic information in a property taxation law (including payment dates, exemptions, tax refunds, and the creation of a tax roll)⁵¹ and that the band council appoint a tax administrator.⁵²

39 SOR/2007-243, regulation 2.

40 Ibid., regulation 4.

41 Ibid., regulations 9 through 16.

42 Ibid., regulations 17 through 20.

43 Ibid., regulation 21.

44 SOR/2007-242, regulation 2.

45 Ibid., regulation 3.

46 Ibid., regulation 5.

47 Ibid., regulation 6.

48 Standards for First Nation Property Taxation Laws, 2016, in effect as of April 1, 2016 (<https://partii-partiii.fng.ca/fng-gpn-II-III/sfm/en/17705/1/document.do>).

49 Ibid., part VII, section 2.1.

50 Ibid., part VII, section 3.2.

51 Ibid., part VII, sections 5, 9, and 10.

52 Ibid., part VII, sections 1 and 2.

ANALYSIS: DOES THE POWER TO PASS PROPERTY TAXATION LAWS IMPROVE SELF-GOVERNMENT?

The economic situation of participating First Nations is unquestionably improved by the delegation of taxing powers under the FMA, and in this respect, the statute supports self-government. However, the political and legal components of self-government are not significantly improved. The constraints set out in the legislation deny First Nations the flexibility they need to develop a property taxation regime that works for them. However, the case law has lessened the restrictive potential of some provisions of the act.

Criticism of the Text of the FMA

The review of the legislation presented above clearly leads to two conclusions:

- 1) First Nations have little latitude in deciding on the content and form of their laws, and
- 2) the federal government retains pervasive control over the exercise of First Nation taxing powers.

To elaborate, first, virtually all the basic elements that a law must contain are predetermined by the FNTC's standards, by the regulations, and by the act itself. Participating First Nations have no creative freedom as to what form their laws should take. The laws must contain the elements set out in the standards and regulations; otherwise, they will not be approved, and they will never enter into force. Accordingly, a First Nation seeking to establish a property taxation regime cannot design its own legislative procedures for achieving its objectives. This is a significant limitation on the exercise of self-government. The only forms of self-government actually provided to a First Nation are the ability to decide whether to adopt a law and the ability to set the applicable tax rates.

Second, the federal government remains present at all stages of the process. It sets the requirements contained in the regulations, and it may add new requirements. It also appoints the majority of the members of the administrative bodies responsible for adopting standards and approving laws, and those appointments are made on the recommendation of the minister. A federal government that wished to tighten its control would only have to appoint individuals who were sympathetic to its views. I am not suggesting that either the FNTC or the FNFMB has been biased in its decision making in the past, or that either body has interfered with First Nation self-government. However, it is important to note the legal loophole of federal government control over the appointment of commissioners and directors. Prior to the enactment of the FMA, it was thought that the FNTC would be truly independent, since the federal government would appoint 6 commissioners and the Assembly of First Nations would appoint 12;⁵³ however, ultimately, the federal government retained

53 See Chief C.T. (Manny) Jules, "Responding to Challenges: The Future of the Indian Taxation Advisory Board" (2000) 48:5 *Canadian Tax Journal* 1470-95, at 1490.

majority control. Thus, the independence of the FNTC (and similarly the FNFMB) could be compromised if the government's advantage were misused.

Practical Application Through Case Law

The above criticisms are based solely on the text of the FMA and the potential loopholes that it contains, but they do not take into account the practical application of the statute. Of course, some of the limits imposed by the FMA are not subject to change in practice—an obvious example being the minister's power to appoint commissioners. However, the role of the FNTC is circumscribed by case law, which appears to be generally protective of First Nation laws (as long as they meet all the specified standards).

Property taxpayers have twice sought to have decisions of the FNTC overturned through judicial review. In both cases, the taxpayers were attempting to bring in external elements to prevent the approval of a First Nation property taxation law. In *Mississaugas of Scugog Island First Nation*,⁵⁴ Grammond J noted that only the First Nation's enabling or "home" statute has to be considered and that external elements—in this case, contracts between the parties—are relevant only if the legislator has so provided.⁵⁵ He also pointed out that First Nation self-government must be taken into account when considering such appeals.⁵⁶

Similarly, in *Buffalo Point Cottagers Association*,⁵⁷ the court refused to consider an agreement between the parties,⁵⁸ limiting the issue to the usual grounds for judicial review—namely, compliance with the First Nation's home statute⁵⁹ and procedural fairness.⁶⁰ The court found that the FNTC's duty of fairness to the property owners existed at the lower end of the spectrum, given the mandatory nature of the scheme of the FMA.⁶¹ The FNTC's representations, the fairness of the tax measure, and the form of the FNTC's decision were all rejected as grounds for challenging that decision.⁶²

Accordingly, provided that the particular property tax law is compliant in every respect, the scheme of the FMA will appropriately protect First Nations from disgruntled taxpayers. However, it is also clear from the judgments in the two cases that such protection will be granted only where the FNTC's decision to approve

54 Supra note 11.

55 Ibid., at paragraph 26.

56 Ibid., at paragraph 46.

57 Supra note 22.

58 Ibid., at paragraph 20.

59 Ibid., at paragraphs 13 and 16.

60 Ibid., at paragraphs 16-17.

61 Ibid., at paragraph 50.

62 Ibid., at paragraphs 27-28, 38, and 46-47.

the law is reasonable.⁶³ The reasonableness of the decision depends on compliance with the standards set out by the FNTC, among other considerations.⁶⁴ While the outcome in these two cases mitigates, to some extent, criticism of the limitations imposed by the FMA, the courts' judgments also serve as a reminder that the constraints that remain are considerable.

Justification for the Inclusion of Conditions on the Exercise of Law-Making Powers

To conclude this discussion, one may question why so many restrictions were included in the legislation if the objective of the FMA was to improve First Nation self-government. A number of arguments can be made in support of the decision to impose constraints on the delegated powers.

First of all, it is clear from the comments of the various stakeholders prior to the passage of the act that the government was faced with a problem that can be summed up by the maxim "No taxation without representation." There was little doubt that First Nations would favour property taxes for non-Indigenous members of the community, and those people are not entitled to vote in elections for the band council. With this in mind, stakeholders were concerned about whether taxpayers' interests were being appropriately protected, and the federal government imposed the restrictions to provide such protection.⁶⁵ Some of the bill's most ardent supporters believed that a collective scheme was required to improve taxpayer confidence and create a better business environment for investment.⁶⁶ The idea was that the collectivization of law-making powers through the FNTC would provide broad-based reassurance to investors and serve as a lever for the economic development of all First Nations participating in the FMA.⁶⁷ In 2000, Chief C.T. (Manny) Jules (currently the chair of the FNTC) stated that "[s]tandards and guidelines protect the investment climate of all First Nations from *damage to reputation caused by the actions of any single First Nation tax authority*."⁶⁸ He also said that "[t]he role of the FNTC is to do what individual First Nation governments require but cannot accomplish individually."⁶⁹ These comments seem to demonstrate a lack of confidence in First Nations individually, since they imply that First Nations are incapable of ensuring the implementation of a fair

63 *Mississaugas of Scugog Island First Nation*, supra note 11, at paragraphs 26-28; and *Buffalo Point Cottagers Association*, supra note 22, at paragraphs 16-17.

64 *Buffalo Point Cottagers Association*, supra note 22, at paragraph 20.

65 See *Debates*, November 19, 2004, at 1608 (Hon. Sue Barnes); *Evidence*, supra note 5, at 2 (Hon. Andy Scott); and Canada, Department of Indigenous Services, "First Nations Fiscal Management" (www.isc-sac.gc.ca/eng/1393512745390/1591985622069).

66 Jules, supra note 53, at 1475.

67 *Ibid.*

68 *Ibid.*, at 1481 (emphasis added).

69 *Ibid.*, at 1475.

and equitable system for all. It is surely obvious that the idea that Canada's Indigenous peoples need a federally appointed institution to protect them from themselves is inconsistent with the concept of self-government.

The FNTC was also intended to serve as a safeguard against potential public misapprehension.⁷⁰ Unfortunately, *Buffalo Point Cottagers Association* seems to show that the commission may not perform the overall conciliatory role that is deemed appropriate for the collective good. In this case, the FNTC encouraged taxpayers' dissatisfaction by suggesting that their agreement would be taken into account in the approval of the law.⁷¹ The commissioners also made false representations to taxpayers.⁷² This case therefore undermines the argument for the enforcement mechanisms currently set out in the FMA.

Finally, it may be argued that the FNTC is a form of shared jurisdiction, a kind of collectivized self-government. The problem with this argument is that while some First Nations were in full agreement with the system introduced by the FMA, others were vehemently opposed to it, including the Assembly of First Nations.⁷³ It was clear, when the legislation was passed, that many First Nations did not wish to participate in the regime set out in the act,⁷⁴ and it is for this reason that the regime in section 83 of the Indian Act was maintained.⁷⁵ The differences among First Nations were split on a regional basis,⁷⁶ as reflected in the use of the FMA: First Nations in British Columbia tend to exercise the powers delegated by the act much more systematically than First Nations elsewhere in Canada.⁷⁷ Accordingly, it does not appear that a system imposed by another level of government can really claim to represent a shared jurisdiction. Such a system simply does not delegate enough real power to promote the self-government of participating First Nations, whether it be individual or collective.

CONCLUSION

While it is undeniable that a First Nation with a source of revenue from its own laws has a greater degree of self-government than a First Nation with no law-making powers, the regime in the FMA does not promote real self-government from political and law-making standpoints. The powers that it grants are diluted by archaic controls that preclude any experiment in self-government on terms chosen by a First Nation, and that deny First Nations free choice in determining key elements of their laws.

70 Ibid., at 1473.

71 *Buffalo Point Cottagers Association*, supra note 22, at paragraph 31.

72 Ibid., at paragraph 30.

73 See, for example, *Evidence*, supra note 5, at 3-5 (Mr. Jeremy Harrison and Mr. Pat Martin).

74 Ibid.

75 Ibid., at 7 (Ms. Brenda Kustra and Hon. Andy Scott).

76 Ibid., at 4 (Mr. Pat Martin).

77 Department of Indigenous Services, supra note 65.

The flaws in the FMA could be easily remedied through reform. Allowing for the selection of commissioners of the FNTC by the participating First Nations, for instance, would be a worthwhile measure to further distance the commission from the federal government. In fact, as discussed above, it appears from early proposals on this issue that the majority of appointments were to be made by First Nations.⁷⁸ The federal authority to restrict taxation mechanisms through regulations could also be repealed to allow for greater self-government. Finally, if self-government is truly the federal government's goal, there is no reason why First Nation laws should require the approval of an external administrative body. The FNTC could exist as an adviser to First Nations in need of its expertise, without retaining control over laws. If control by the FNTC is absolutely necessary, it might be beneficial to require the commissioners to agree to any law that is reasonable and fair, rather than allowing them to impose a set of standards. This would afford First Nations greater freedom to design their own systems.

At present, the only way for a First Nation to design a property taxation regime outside the federal government's parameters is to negotiate a self-government agreement. Some First Nations have been engaged in such negotiations for a number of years without success, while others are not yet ready for this step. It is unthinkable that, in the meantime, they should have no other means to achieve self-government from a property taxation perspective. This method of taxation has been delegated to First Nations since 1951.⁷⁹ It is high time that they be granted the right to manage it without federal government intervention.

78 Jules, *supra* note 53, at 1490.

79 It was introduced in Bill 79, An Act Respecting Indians, 21st Parl., 4th sess., 1951.

Policy Forum : Analyse critique de l'impôt foncier sous le régime de la Loi sur la gestion financière des premières nations comme outil d'autonomie gouvernementale

Audrey Boissonneault*

ABSTRACT

The First Nations Fiscal Management Act (FMA) delegates the power to levy property taxes to band councils. The purpose of this article is to describe and analyze the effectiveness of the legislation as a self-government tool.

Section 5(1) of the FMA allows band councils to levy property taxes both to increase their economic capacity—providing them with a source of income—and to improve self-government. However, this grant of power is subject to numerous conditions. These include compliance with the financial management requirements set out in the act, as well as approval of property tax laws by the First Nations Tax Commission (FNTC) (the majority of the members of which are appointed by the federal government). Also, the taxes imposed must comply with regulations set by the governor in council, which currently cover the property assessment process (including an appeal process), interest and penalties, and inspection of property.

There have been two attempts by property taxpayers to overturn the decisions of the FNTC by way of judicial review. The fact that both were unsuccessful has somewhat mitigated criticism of the constraints on First Nation self-government imposed by the FMA.

Overall, the federal government maintains significant control over the law-making process by which First Nations levy property taxes, both directly through regulations and indirectly through its dominant presence on the FNTC. Reform is needed: real powers need to be delegated to meet the stated objective of creating meaningful self-government for participating First Nations. The power to impose property taxes was first delegated to band councils by the Indian Act in 1951. Therefore, it is high time that First Nations be granted the right to exercise that power without federal intervention. Constitutional protection of the right to self-government must be the ultimate goal.

* De Mallette s.e.n.c.r.l., Chicoutimi, Québec (courriel : audrey.boissonneault@mallette.ca).

PRÉCIS

La Loi sur la gestion financière des premières nations (LGFPN) délègue aux conseils de bande le pouvoir de prélever l'impôt foncier. Le présent article décrit et analyse l'efficacité de la délégation de pouvoir comme outil d'autonomie gouvernementale.

L'article 5(1) de la LGFPN permet aux conseils de bande de prélever l'impôt foncier afin d'améliorer leur situation économique — en leur fournissant une source de revenus — et d'améliorer leur autonomie gouvernementale. Toutefois, il comporte de nombreuses restrictions. Celles-ci incluent l'obligation de se conformer aux normes de gestions financières prévues par la Loi, ainsi que l'homologation des lois concernant l'impôt foncier par la Commission sur la fiscalité des premières nations (CFPN) (dont la majorité des membres sont nommés par le gouvernement fédéral). L'impôt foncier doit également respecter les règlements pris par le gouverneur en conseil en vertu de la Loi, qui concernent présentement l'évaluation des propriétés (incluant les appels concernant celle-ci), les intérêts et pénalités ainsi que l'inspection des propriétés.

Les contribuables ont déposé à deux reprises des demandes en contrôle judiciaire visant à faire invalider les décisions de la CFPN. Considérant que ces deux tentatives se sont soldées par un échec, il importe de mitiger les critiques liées aux restrictions à l'autonomie gouvernementale qui semblent être imposées par le texte de la LGFPN.

Il n'en demeure pas moins que le gouvernement fédéral conserve un contrôle important sur le processus législatif des Premières Nations en ce qui concerne l'impôt foncier. Lorsqu'il prend la forme de règlement, ce contrôle est direct, mais le gouvernement conserve également un contrôle indirect de par la présence de la CFPN. Une réforme s'impose : les pouvoirs doivent être véritablement délégués afin d'atteindre l'objectif d'améliorer de façon significative l'autonomie gouvernementale des Premières Nations participantes. Le pouvoir de prélever l'impôt foncier est délégué aux conseils de bande depuis la Loi sur les indiens de 1951. Il est temps que les Premières Nations puissent exercer ce droit sans ingérence fédérale. Une protection constitutionnelle de l'autonomie gouvernementale doit être l'objectif ultime.

MOTS CLÉS : PREMIÈRES NATIONS ■ IMPÔT FONCIER ■ AUTONOMIE GOUVERNEMENTALE ■ POLITIQUE FISCALE ■ GOUVERNANCE ■ GESTION FINANCIÈRE

CONTENTS

Introduction	815
Le concept d'autonomie gouvernementale	816
L'impôt foncier sous la LGFPN	818
Le pouvoir d'adopter des textes législatifs	818
Les conditions imposées par la LGFPN	819
Conditions imposées par règlement	821
Conditions imposées par les Normes relatives aux lois sur l'imposition foncière des premières nations	822
Analyse : Le pouvoir d'adopter un texte législatif sur l'impôt foncier améliore-t-il l'autonomie gouvernementale?	823
Critiques liées au texte de la LGFPN	823
Application pratique par la jurisprudence	824
Justification pour l'inclusion des conditions à l'exercice du pouvoir législatif	825
Conclusion	827

INTRODUCTION

Le pouvoir pour les Conseils de bande¹ de prélever l'impôt foncier se définit, dans sa plus simple expression juridique, comme une délégation de pouvoir du gouvernement fédéral, que ce soit en vertu de la Loi sur les indiens² ou la Loi sur la gestion financière des premières nations (LGFPN)³. Puisque la délégation de pouvoir se fait au moyen d'une loi, elle doit suivre le processus législatif canadien habituel. Se faisant, il existe une multitude d'informations dans les travaux de la Chambre des communes et ses comités et des délibérations du Sénat qui permettent de retracer l'intention du législateur lorsqu'il a accordé ce pouvoir aux Premières Nations.

Que ce soit par la Loi sur les indiens ou par la LGFPN, le gouvernement fédéral visait deux objectifs en permettant aux Conseils de bande de prélever l'impôt foncier : augmenter la capacité économique des Premières Nations⁴ et améliorer leur autonomie gouvernementale⁵. Étant donné qu'aucun changement législatif majeur n'est survenu depuis 2005, il est possible en 2021 d'analyser les effets des deux lois à atteindre leurs objectifs près de 15 ans après les dernières modifications d'importance. En effet, environ 30 pour cent des Premières Nations au Canada prélèvent désormais de l'impôt foncier en vertu d'une des deux lois⁶ et il existe de nombreuses données sur les retombées de celles-ci.

Les objectifs étant larges, et leurs retombées diverses, le présent texte se concentrera uniquement sur l'objectif d'autonomie gouvernementale et cherchera à déterminer si la LGFPN l'atteint. En effet, nous ne traiterons pas ici de la Loi sur les indiens, puisque la LGFPN colmate certaines brèches contenues dans la Loi sur les indiens, entre autres, en matière d'autonomie⁷. Le texte comportera

1 L'expression « Conseil de bande » que nous utilisons ici englobe tant le « conseil de bande » défini à l'article 2(1) de la Loi sur les indiens que le « conseil de la première nation » défini à l'article 2(1) de la Loi sur la gestion financière des premières nations. En effet, ces termes sont synonymes puisque la définition de « conseil de la première nation » renvoie au sens de « conseil de bande » selon la Loi sur les indiens.

2 LRC 1985, c. I-5.

3 LC 2005, c. 9.

4 Voir, entre autres, Canada, Chambre des communes, *Débats*, 10 décembre 2004, aux pp. 2598 à 2599 (l'hon. Sue Barnes) et *Débats*, 19 novembre 2004, aux pp. 1608 à 1609 (l'hon. Sue Barnes).

5 Voir, entre autres, *Débats*, 10 décembre 2004, supra, note 4, à la p. 2598 (l'hon. Sue Barnes); *Débats*, 19 novembre 2004, supra, note 4, à la p. 1609 (M. Jim Prentice) et Canada, Chambre des communes, *Témoignages*, Comité permanent des affaires autochtones et du développement du Grand Nord Canadien, 1^{re} sess., 38^e légis., 7 décembre 2004, à la p. 3 (M. André Bellavance) et p. 7 (l'hon. Andy Scott).

6 Commission de la fiscalité des premières nations, *Taxpayers: Property Taxation on Reserve* (<https://fntc.ca/property-taxation-on-reserve>).

7 Par exemple, le fait que l'article 83 de la Loi sur les indiens permet uniquement d'adopter des règlements, ainsi que les divers pouvoirs de supervision du ministre des Services autochtones.

d'abord une brève section sur le concept de l'autonomie gouvernementale. Il présentera ensuite le pouvoir de prélever l'impôt foncier contenu dans la LGFPN, en incluant non seulement ce qu'elle permet aux Conseils de bandes de faire, mais également les limites qu'elle impose dans l'exercice de ce pouvoir. Finalement, le texte fera une analyse critique afin de constater si l'autonomie gouvernementale est réellement améliorée par la LGFPN, en raison des contraintes qu'elle comporte, ainsi que de la jurisprudence à son sujet. Cette analyse se conclura avec une brève examen de nos propos à l'aide des données de certaines Premières Nations participant à la LGFPN.

LE CONCEPT D'AUTONOMIE GOUVERNEMENTALE

Au cours des débats ayant mené à l'adoption de la LGFPN, l'autonomie gouvernementale est régulièrement mentionnée comme objectif du projet de loi :

Je reviens donc à la mesure législative qui est devant la Chambre. Il convient de signaler au départ que son idée émane non pas du gouvernement mais plutôt d'un groupe de Canadiens autochtones d'avant-garde qui ont défendu leur vision de l'autonomie gouvernementale et qui ont persévéré en dépit de difficultés considérables.

[...]

Ils luttent pour une autonomie gouvernementale fondée sur le travail ardu qu'implique la notion de citoyenneté : le fait, par exemple, d'établir des infrastructures communautaires, d'assumer les responsabilités du service de la dette, d'administrer d'un régime d'impôt foncier et de se doter de la capacité voulue en matière de fiscalité, de gestion et de finances⁸.

Afin de bien cerner l'objectif que le gouvernement cherchait à atteindre, il importe de définir la signification d'« autonomie gouvernementale » dans ce contexte. En effet, au sens juridique, l'autonomie gouvernementale désigne généralement un droit inhérent protégé par l'article 35 de la Loi constitutionnelle de 1982⁹. Ce qui est inclus dans cette autonomie gouvernementale juridique est mal défini et il existe encore de nombreux débats au sujet de quels droits elle comprend. Or, dans le cadre de l'impôt foncier de la LGFPN, il est clair que le gouvernement ne cherchait pas à conférer une autonomie gouvernementale bénéficiant d'une protection constitutionnelle. En effet, le préambule de la Loi énonce :

8 Canada, *Débats*, 19 novembre 2004, supra, note 4, à la p. 1610 (M. Jim Prentice).

9 Loi constitutionnelle de 1982, Annexe B de la Loi de 1982 sur le Canada (R.-U.), 1982, c. 11 et Gouvernement du Canada, « Approche fédérale sur le droit inhérent des peuples autochtones à l'autonomie gouvernementale » (<https://www.rcaanc-cirnac.gc.ca/fra/1100100031843/1539869205136>).

Attendu :

[...]

que la présente loi n'a pas pour but de définir la nature et l'étendue de tout droit à l'autonomie gouvernementale ou d'anticiper l'issue des négociations portant sur celle-ci¹⁰.

Ce préambule n'empêche toutefois pas que le législateur ait voulu conférer une certaine autonomie gouvernementale par la Loi. En effet, la LGFPN accorde une autonomie gouvernementale dans son sens commun, soit le droit des Premières Nations de prendre elles-mêmes certaines décisions pour leurs collectivités et de se gouverner en sortant de la logique coloniale. La LGFPN prévoit un droit de prendre des décisions de nature fiscale et financière, mais sans pouvoir établir la forme du gouvernement qui prendra ces décisions. D'ailleurs, la jurisprudence reconnaît l'autonomie gouvernementale comme l'un des objectifs de la LGFPN, et cela a servi de motifs pour refuser une demande en contrôle judiciaire dans une décision récente¹¹. Le terme nous semble donc approprié pour définir l'objectif du gouvernement fédéral, bien que la Loi n'accorde pas la protection constitutionnelle généralement prévue à l'autonomie gouvernementale.

La portée du terme « autonomie gouvernementale », tel qu'utilisé dans le présent article, implique également une existence au sein de l'ordre juridique canadien;¹² autonomie gouvernementale est donc la composante d'une autodétermination interne¹³, telle que définie par la Cour suprême du Canada dans le *Renvoi relatif à la sécession du Québec*¹⁴. En effet, dans le cadre de l'autonomie gouvernementale, le gouvernement du Canada accepte de reconnaître les peuples autochtones et ceux-ci acceptent de fonctionner à l'intérieur du Canada, plutôt que de tenter d'obtenir un contrôle territorial comme dans une autodétermination externe¹⁵. L'article visera donc à déterminer si, dans le contexte actuel, la LGFPN contribue, pour les Premières Nations, à leur « développement politique, économique, social et culturel dans le cadre d'un état existant »¹⁶. L'analyse qui suit ne tiendra donc pas compte des limites inhérentes au système juridique canadien et se concentrera sur les limites imposées par la LGFPN.

10 Supra, note 3.

11 *Société des loteries et des jeux de l'Ontario c. Première Nation des Mississaugas de Scugog Island*, 2019 CF 813, aux paragraphes 46 à 51.

12 Stephanie Irlbacher-Fox, *Finding Dabsbaa: Self-Government, Social Suffering, and Aboriginal Policy in Canada* (Vancouver : UBC Press, 2009), à la p. 7.

13 Rhonda K.M. Smith, *Textbook on International Human Rights* (Oxford : Oxford University Press, 2012), aux pp. 295 à 296.

14 [1998] 2 RCS 217, à la p. 282.

15 Sébastien Grammond, *Aménager la coexistence : Les peuples autochtones et le droit canadien* (Bruxelles et Montréal : Bruylant et Yvon Blais, 2003), aux pp. 130 et 280 à 282.

16 *Renvoi relatif à la sécession du Québec*, supra, note 14, à la p. 282.

Notons que le préambule de la LGFPN ne signifie pas nécessairement que ces droits hors du cadre de la Loi ne pourraient pas être compris dans l'autonomie gouvernementale. La question reste entière. Malgré les précisions terminologiques qui précèdent, le présent article ne vise pas à déterminer si ces droits pourraient être protégés par l'article 35 de la Loi constitutionnelle ou non.

L'IMPÔT FONCIER SOUS LA LGFPN

Afin de déterminer si le pouvoir de prélever l'impôt foncier améliore l'autonomie gouvernementale des Premières Nations, il importe de comprendre les pouvoirs que la LGFPN délègue et le processus pour exercer ceux-ci. Adoptée en 2005 et entrée en vigueur le 1^{er} avril 2006, la Loi a un objet beaucoup plus vaste que l'impôt foncier; en particulier, elle prévoit des pouvoirs en termes d'imposition (y compris l'impôt foncier), de gestion financière, de financement des infrastructures et de développement économique. L'article abordera uniquement l'impôt foncier, sauf lorsque la compréhension des autres éléments de la loi est essentielle pour comprendre le fonctionnement de la LGFPN.

Le pouvoir d'adopter des textes législatifs

L'article 5(1)a) de la LGFPN est celui qui contient la délégation de pouvoir en matière d'impôt foncier. Il énonce :

5(1) Le conseil de la première nation peut, sous réserve des paragraphes (2) à (5), des articles 4 et 6 et des règlements pris en vertu de l'alinéa 36(1)d), prendre des textes législatifs :

a) concernant l'imposition de taxes à des fins locales sur les terres de réserve et sur les droits ou intérêts sur celles-ci, y compris :

(i) l'évaluation de ces terres et de ces droits ou intérêts, la demande des renseignements nécessaires à l'évaluation et l'inspection aux fins d'évaluation, conformément à la procédure fixée par règlement, des terres imposables à des fins locales,

(ii) le mode de fixation des taux d'imposition applicables à leur valeur imposable,

(iii) l'imposition de taxes pour les services fournis relativement aux terres de réserve,

(iv) l'imposition de taxes à l'égard des activités commerciales sur les terres de réserve,

(v) l'imposition de taxes d'aménagement;

[Soulignements de l'auteur.]

À première vue, cette délégation est simple. Le pouvoir d'imposition s'exerce sur les terres de réserve (selon la Loi sur les indiens, un terrain dont « Sa Majesté est propriétaire et qu'elle a mise de côté à l'usage et au profit d'une bande », et sur les terres désignées¹⁷. Le pouvoir d'imposition vise les « droits » et les « intérêts »,

17 Loi sur les indiens, article 2(1), définition de « réserve ».

deux concepts qui sont clairement définis dans la LGFPN. Le mot « droit » est défini comme suit :

S'agissant de terres de réserve situées au Québec, tout droit de quelque nature que ce soit portant sur celles-ci, notamment tout droit d'occupation, de possession ou d'usage sur elles et, par assimilation, tout droit du locataire; est cependant exclu le titre de propriété détenu par Sa Majesté¹⁸.

Le mot « intérêt » est défini de la manière suivante :

S'agissant de terres de réserve situées au Canada, mais ailleurs qu'au Québec, tout domaine, droit ou autre intérêt portant sur celles-ci, notamment tout droit d'occupation, de possession ou d'usage sur elles; est cependant exclu le titre de propriété détenu par Sa Majesté¹⁹.

Il convient de noter que ces pouvoirs ne sont pas limités à ceux que l'on retrouve expressément aux articles 5(1)a)(i) à (v), puisque l'article 5 mentionne « y compris ».

Les conditions imposées par la LGFPN

Malgré l'apparente simplicité de la délégation de pouvoir contenue à l'article 5(1)a) de la LGFPN, le Conseil de bande doit respecter plusieurs exigences afin d'adopter un texte législatif en matière d'impôt foncier. En effet, ce pouvoir est conféré « sous réserve des paragraphes (2) à (5), des articles 4 et 6 et des règlements pris en vertu de l'alinéa 36(1)d) »²⁰.

D'abord, l'article 5 contient plusieurs conditions qu'un Conseil de bande donné doit respecter dans le cadre du processus d'adoption de son texte législatif. Premièrement, les articles 5(2) et (3) obligent les textes législatifs à être agréés par la Commission de la fiscalité des premières nations (CFPN), qui a été établie par la LGFPN²¹. Cette condition en contient implicitement une seconde. En effet, la LGFPN permet à la CFPN d'établir les normes que les textes législatifs en matière d'impôt foncier doivent respecter. Bien que rien n'indique à l'article 5(1)a) que l'exercice du pouvoir législatif du Conseil de bande soit conditionnel au respect des normes établies par la CFPN, la CFPN peut refuser d'agréer un texte qui ne respecte pas ces normes²². Les articles 5(2) et (3) font donc en sorte que les textes doivent respecter les normes que la CFPN a établies en plus d'être agréés par elle.

18 Loi sur la gestion financière des premières nations, article 2(1), définition de « droit ».

19 Ibid., article 2(1) « intérêt ».

20 Ibid., article 5(1).

21 Ibid., article 17.

22 *Buffalo Point Cottagers Association inc. c. Première nation de Buffalo Point*, 2014 CF 1173, au paragraphe 20.

Les normes que la CFPN peut fixer ne sont pas uniquement procédurales. En effet, elles incluent « la forme et le contenu des textes législatifs sur les recettes locales » et les « mesures de contrôle d'application à inclure dans ces textes législatifs »²³. L'expression « texte législatif sur les recettes locales » est définie par la LGFPN comme tous les textes législatifs pris en vertu de l'article 5(1), dont ceux concernant l'impôt foncier²⁴. Je reviendrai sur le contenu des normes effectivement fixées par la CFPN ci-dessous, afin de voir dans quelle mesure elles restreignent le pouvoir législatif des Conseils de bande en matière d'impôt foncier.

C'est le Gouverneur en conseil (le Cabinet fédéral) qui nomme la majorité des membres de la CFPN, sur recommandation du ministre des Relations couronne-autochtone et affaires du nord Canada²⁵.

L'article 5(4), quant à lui, contient une exigence de contenu. Il énonce que les textes législatifs doivent contenir une procédure d'appel pour l'évaluation des terres, droits ou intérêts aux fins de l'impôt foncier²⁶.

Des autres articles de la LGFPN encadrent le pouvoir de légiférer en matière d'impôt foncier. L'article 4 indique :

Le conseil de la première nation ne peut prendre un texte législatif en vertu de l'alinéa 5(1)d) que s'il a déjà pris un texte législatif sur la gestion financière en vertu de l'alinéa 9(1)a) et que celui-ci a été approuvé par le Conseil de gestion financière des premières nations [soulignement de l'auteur].

Ainsi, il y a une étape législative préliminaire, soit d'adopter un texte en matière de gestion financière et que celui-ci soit agréé par le Conseil de gestion financière des Premières Nations (CGFPN)²⁷. Comme la CFPN, le CGFPN est créé par la LGFPN²⁸, et c'est le Gouverneur en conseil qui nomme la majorité de ses membres²⁹. Le CGFPN ne peut approuver un texte législatif que si celui-ci respecte la LGFPN, les règlements et les normes que le CGFPN établit³⁰. Ces normes peuvent toucher la forme et le contenu des textes législatifs, ainsi que des aspects procéduraux³¹.

23 Ibid., annexe B (soulignement de l'auteur).

24 Loi sur la gestion financière des premières nations, article 2(1) « texte législatif sur les recettes locales ».

25 Ibid., articles 19 et 20.

26 Ibid., article 5(4)a).

27 Ibid., article 9(2).

28 Ibid., article 38(1).

29 Ibid., articles 40 et 41(1).

30 Ibid., articles 9(2.1) et 55.

31 Ibid., article 55.

L'article 6 de la LGFPN oblige le Conseil de bande à publier un préavis au moins 30 jours avant la prise d'un texte législatif³². Cette publication doit se faire dans la *Gazette des Premières Nations*, dans un lieu public sur les terres de réserve et il doit être transmis à la CFPN³³.

Conditions imposées par règlement

En plus des conditions imposées par la LGFPN, l'adoption des textes législatifs est assujettie aux règlements prévus à l'article 36(1)d)³⁴. Cet article prévoit d'abord que le Gouverneur en conseil peut prendre des règlements afin de « régir l'exercice du pouvoir des Premières Nations de prendre des textes législatifs en vertu du paragraphe 5(1) ». Il s'agit donc d'un pouvoir réglementaire très large. Le Gouverneur en conseil peut également prendre des mesures plus ciblées y compris des règlements relatives aux articles 5(1)a)i), 5(1)e) et 5(7)³⁵; chacun de ces articles assujettit explicitement l'exercice du pouvoir qu'il délègue au respect des conditions fixées par règlement. L'article 5(1)a)i) permet aux Conseils de bande de légiférer concernant « l'évaluation des terres, droits et intérêts, la demande de renseignement nécessaires à l'évaluation et l'inspection aux fins d'évaluation [...] des terres imposables à des fins locales ». L'article 5(1)e) crée le droit de prendre des textes législatifs concernant « le contrôle d'application des textes législatifs pris en vertu des alinéas a) et a.1) en matière de taxes ou de droits en souffrance ». L'article 5(7) prévoit la cession d'un droit ou intérêt si des taxes exigibles sont en souffrance depuis plus de deux ans. Le gouvernement fédéral conserve donc un important pouvoir de limiter le contenu des textes législatifs adoptés par les Premières Nations.

Les règlements effectivement adoptés sont divers et concernent tous les aspects de la LGFPN³⁶. Aux fins du présent article, on étudiera uniquement les règlements qui concernent l'impôt foncier. Le Règlement sur les appels d'évaluations foncières des premières nations prévoit des éléments que doivent obligatoirement contenir tous les textes législatifs relatifs à l'évaluation foncière³⁷. Ces éléments concernent la procédure d'appel pour ces évaluations³⁸. Le Règlement sur le contrôle d'application de la fiscalité foncière des premières nations prévoit des éléments obligatoires pour les textes relatifs au contrôle d'application de l'impôt foncier³⁹. Il fixe, entre autres, des restrictions quant aux taux d'intérêts

32 Ibid., article 6(1).

33 Ibid.

34 Ibid., article 5(1).

35 Ibid., article 36(1)a).

36 Voir Loi sur la gestion financière des premières nations, articles 36, 56, 89 et 140.

37 DORS/2007-241, article 2.

38 Ibid., articles 3 à 13.

39 DORS/2007-243, article 2.

et pénalités⁴⁰, ainsi que les conditions à respecter lors de la cession de biens imposables⁴¹, la saisie et vente de biens meubles⁴² et la cessation de services⁴³. Le Règlement sur l'inspection aux fins d'évaluation foncière des premières nations prévoit une procédure obligatoire pour l'inspection des biens sujets à une évaluation aux fins de l'impôt foncier⁴⁴. Entre autres, il prévoit un avis obligatoire et le contenu de celui-ci⁴⁵, les heures pendant lesquelles l'inspection peut se dérouler⁴⁶ et les conditions dans lesquelles l'évaluation peut se faire sans inspection⁴⁷.

Tous ces éléments des règlements doivent être contenus de façon intégrale dans les textes législatifs adoptés par les Conseils de bande, qui n'ont aucune latitude à cet égard.

Conditions imposées par les Normes relatives aux lois sur l'imposition foncière des premières nations

Finalement, tel que mentionné ci-dessus, la CFPN a mis en place des normes que doivent respecter les textes législatifs afin d'être agréés⁴⁸. Le texte législatif doit s'appliquer à tous les droits et intérêts sur les terres de réserves et ils doivent tous être assujettis à l'impôt foncier sauf en conformité avec le texte législatif⁴⁹. Les normes prévoient qu'une Première Nation ne peut créer différents districts fiscaux que si cela est nécessaire pour créer un régime d'imposition équitable et que cette distinction est justifiée par des besoins en matière de service ou des territoires de référence différents⁵⁰. Les normes exigent également que les textes législatifs comprennent toutes les informations de base d'un texte d'imposition (dont les dates de paiement, les exemptions, les remboursements d'impôt et la création d'un rôle)⁵¹. Il rend obligatoire la nomination d'un administrateur fiscal⁵².

40 Ibid., article 4.

41 Ibid., articles 9 à 16.

42 Ibid., articles 17 à 20.

43 Ibid., article 21.

44 DORS/2007-242, article 2.

45 Ibid., article 3.

46 Ibid., article 5.

47 Ibid., article 6.

48 Normes relatives aux lois sur l'imposition foncière des premières nations, 2016 (<https://partii-partiii.fng.ca/fng-gpn-II-III/sfm/fr/17705/1/document.do>).

49 Ibid., partie VII, article 2.1.

50 Ibid., partie VII, article 3.2.

51 Ibid., partie VII, articles 5, 9 et 10.

52 Ibid., partie VII, articles 1 et 2.

ANALYSE : LE POUVOIR D'ADOPTER UN TEXTE LÉGISLATIF SUR L'IMPÔT FONCIER AMÉLIORE-T-IL L'AUTONOMIE GOUVERNEMENTALE?

La situation économique des Premières Nations participantes est incontestablement améliorée par les pouvoirs fiscaux de la LGFPN et la Loi soutient l'autonomie gouvernementale. Toutefois, les composantes politique et juridique de l'autonomie gouvernementale n'est aucunement améliorée de façon significative. En effet, la Loi contient des limites importantes qui empêchent les Premières Nations d'avoir une réelle latitude afin de mettre sur pied un régime d'impôt foncier qui leur correspond. La jurisprudence a toutefois amoindri le potentiel limitatif de certaines dispositions de la Loi.

Critiques liées au texte de la LGFPN

L'examen de la législation présenté ci-dessus conduit clairement à deux conclusions :

1. les Premières Nations ont peu de latitude quant au contenu et à la forme de leurs textes législatifs et
2. le gouvernement fédéral conserve un contrôle omniprésent sur les pouvoirs d'imposition des Premières Nations.

D'abord, pratiquement tous les éléments de base que le texte doit contenir sont déterminés d'avance par les normes de la CFPN, par règlement et par la Loi. Les Premières Nations participantes n'ont aucune liberté créative en ce qui concerne la forme que leurs textes devraient adopter. Ils doivent contenir les éléments prévus dans les normes et les règlements, sans quoi le texte ne peut être agréé et n'entrera jamais en vigueur. Ainsi, la Première Nation qui cherche à établir un régime d'impôt foncier ne peut concevoir ses propres formalités législatives. C'est une composante importante de l'autonomie qui s'en trouve limitée. La seule autonomie qui est réellement accordée à la Première Nation est de décider d'adopter une loi ou non et de fixer son taux d'imposition.

Ensuite, le gouvernement fédéral demeure présent à toutes les étapes du processus. Il peut ajouter des exigences par règlement. Il nomme aussi la majorité des membres des organismes administratifs qui sont chargés d'adopter les normes et d'agréer les textes législatifs et c'est le ministre qui recommande ces membres. Un gouvernement fédéral voulant resserrer son contrôle n'aurait donc qu'à nommer des commissaires qui sont favorables à ses positions. Je ne soumette en aucun cas que la CFPN ou la CGFPN ait, par le passé, été impartiale ou ait nui à l'autonomie gouvernementale. Toutefois, il faut souligner la brèche juridique qu'est le contrôle du gouvernement fédéral sur la nomination des membres et directeurs. Avant la promulgation de la LGFPN, on a pensé que la CFPN aurait une indépendance réelle puisque le gouvernement n'aurait nommé que 6 commissaires

et l'Assemblée des Premières Nations en aurait nommé 12⁵³. Or, au final, le gouvernement fédéral a plutôt gardé le contrôle sur la nomination de la majorité des membres. L'indépendance de la CFPN (et de même de la CGFPN) pourrait être compromise si l'avantage du gouvernement est utilisé à mauvais escient.

Application pratique par la jurisprudence

Les critiques énoncées ci-haut découlent uniquement du texte de la LGFPN et des brèches potentielles qu'elle contient, mais ne tiennent pas compte de son application pratique. Évidemment, certaines des limites imposés par la LGFPN ne sont pas modifiées par la pratique — par exemple le pouvoir du ministre sur la nomination des commissaires. Toutefois, le rôle de la CFPN est circonscrit par la jurisprudence et elle semble, en général, protéger les textes des Premières Nations (dans la mesure où ils respectent toutes les normes).

Les contribuables visés par l'impôt foncier ont tenté à deux reprises d'obtenir des révocations des décisions de la CFPN par un pourvoi en contrôle judiciaire. Dans les deux cas, les contribuables tentaient d'amener des éléments externes afin d'empêcher l'homologation du texte législatif sur l'impôt foncier d'une Première Nation. Dans la cause *Première nation des Mississaugas de Scugog Island*⁵⁴ le juge Grammond rappelle qu'il faut uniquement tenir compte de la loi habilitante de la Première Nation et que les éléments externes — soit, dans cette cause, les contrats entre les parties — ne sont pertinents que si le législateur l'a prévu⁵⁵. Il rappelle également qu'il faut tenir compte de l'autonomie gouvernementale des Premières Nations lors de l'étude de ces pourvois⁵⁶.

La cour dans *Buffalo Point Cottagers Association*⁵⁷ a également refusé de considérer une entente entre les parties⁵⁸ et a limité la question en litige aux motifs habituels de demande en contrôle judiciaire — soit le respect de la loi habilitante de la Première Nation⁵⁹ et l'équité procédurale⁶⁰. La cour note que la CFPN n'a pas une très grande obligation d'équité envers les propriétaires d'immeubles considérant le caractère obligatoire du régime de la LGFPN⁶¹. Les représentations de la CFPN, l'équité de la mesure fiscale et la forme de la décision de la CFPN ont tous été rejetés comme motifs de contestation de sa décision⁶².

53 Chef C.T. (Manny) Jules, « Responding to Challenges: The Future of the Indian Taxation Advisory Board » (2000) 48:5 *Revue fiscale canadienne* 1470-1495, à la p. 1490.

54 *Supra*, note 11.

55 *Ibid.*, au paragraphe 26.

56 *Ibid.*, au paragraphe 46.

57 *Supra*, note 22.

58 *Ibid.*, au paragraphe 20.

59 *Ibid.*, aux paragraphes 13 et 16.

60 *Ibid.*, aux paragraphes 16 et 17.

61 *Ibid.*, au paragraphe 50.

62 *Ibid.*, aux paragraphes 27, 28, 38, 46 et 47.

Ainsi, le régime de la LGFPN, s'il est respecté en tout point dans le texte législatif particulier, protégera adéquatement les Premières Nations contre les contribuables mécontents. Toutefois, il ressort également clairement des deux décisions que ces textes sont protégés uniquement lorsque la CFPN rend une décision raisonnable lorsqu'elle homologue un texte législatif⁶³. La raisonnabilité d'une telle décision dépend, entre autres, du respect des normes édictées par la CFPN⁶⁴. Ces décisions atténuent quelque peu les critiques potentielles à l'égard des limites imposées aux gouvernements autochtones, mais rappellent également que celles qui subsistent sont considérables.

Justification pour l'inclusion des conditions à l'exercice du pouvoir législatif

Afin de conclure nos propos, on peut s'interroger sur les raisons motivant l'inclusion d'autant de restrictions si l'objectif de la LGFPN était d'améliorer l'autonomie gouvernementale des Premières Nations. Plusieurs arguments peuvent être retracés à cet effet.

D'abord, il ressort des propos des différents intervenants avant la promulgation de la LGFPN que le gouvernement s'est retrouvé face à un problème qui se résume par la maxime « *no taxation without representation* ». Il était clair que les Premières Nations favoriseraient l'impôt foncier pour les membres allochtones du communauté et ceux-ci n'ont pas le droit de voter pour le Conseil de bande. Se faisant, les intervenants s'inquiétaient de la protection adéquate des intérêts des contribuables et le gouvernement fédéral a imposé les restrictions dans le but de protéger les contribuables⁶⁵. Certains des défenseurs les plus ardents du projet de loi croyaient qu'un régime collectif était nécessaire, pour améliorer la confiance du public et les perspectives économiques⁶⁶. L'idée véhiculée était que la collectivisation du pouvoir législatif, via la CFPN, encouragerait la confiance des investisseurs et augmenterait les moyens financiers de toutes les Premières Nations qui participent à la LGFPN⁶⁷. En 2000, le chef C.T. (Manny) Jules (le président actuel de la CFPN) avait énoncé que « *Standards and guidelines protect the investment climate of all First Nations from damage to reputation caused by the actions of any single First Nation tax authority* »⁶⁸. Il a dit aussi que « *the role of the*

63 *Première Nation des Mississaugas de Scugog Island*, supra, note 11, au paragraphes 26 à 28 et *Buffalo Point Cottagers Association*, supra, note 22, au paragraphes 16 et 17.

64 *Buffalo Point Cottagers Association*, supra, note 22, au paragraphe 20.

65 Voir *Débats*, 19 novembre 2004, supra, note 4, à la p. 1608 (l'hon. Sue Barnes); *Témoignages*, supra, note 5, à la p. 2 (l'hon. Andy Scott); et Services aux Autochtones Canada, « Gestion financière des Premières Nations » (<https://www.sac-isc.gc.ca/fra/1393512745390/1591985622069>).

66 Jules, supra, note 53, à la p. 1475.

67 Ibid.

68 Ibid., à la p. 1481.

FNTC is to do what individual First Nation governments require but cannot accomplish individually »⁶⁹. Ces commentaires nous semblent démontrer un manque de confiance envers les Premières Nations de façon individuelle, puisqu'elle sous-entend que les Premières Nations sont incapables d'assurer elles-mêmes la mise en place d'un système juste et équitable pour tous. Il est bien sûr évident que l'idée que les peuples autochtones aient besoin d'une institution dont les membres sont nommés par le gouvernement fédéral pour les protéger d'elles-mêmes est incompatible avec leur autonomie.

La CFPN devait également servir de protecteur contre les dérives potentielles de l'opinion publique⁷⁰. Malheureusement, la cause *Buffalo Point Cottagers Association* semble démontrer que la commission n'a pas le rôle global de conciliateur qu'elle jugeait bon pour le bien collectif. Dans cette affaire, la CFPN a encouragé le mécontentement des contribuables en laissant croire que leur entente serait prise en compte dans l'homologation du texte législatif⁷¹. Ses commissaires ont également fait de fausses représentations aux contribuables⁷². Cette affaire sape l'argument qui justifie les mécanismes de contrôle présentement prévus dans la LGFPN.

Finalement, on pourrait dire que la CFPN est une forme de partage de compétence, soit une espèce d'autonomie collectivisée. Le problème avec cet argument est que, s'il est vrai que certaines Premières Nations étaient tout à fait d'accord avec le système mis en place par la LGFPN, d'autres y étaient farouchement opposées, incluant l'Assemblée des Premières Nations⁷³. Il a été clair, lors de l'adoption de la Loi, que plusieurs Premières Nations ne désiraient pas participer au régime de la LGFPN⁷⁴ et c'est pour cette raison que le régime de l'article 83 de la Loi sur les indiens a été maintenu⁷⁵. Les différences entre Premières Nations étaient régionales⁷⁶ et se reflètent d'ailleurs dans l'utilisation de la LGFPN; les Premières Nations de la Colombie-Britannique utilisant cette loi de façon beaucoup plus systématique que celles ailleurs au Canada⁷⁷. Ainsi, il ne semble pas qu'un système imposé par un autre ordre de gouvernement puisse réellement prétendre constituer un partage de compétence. Un tel système ne

69 Ibid., à la p. 1475.

70 Ibid., à la p. 1473.

71 *Buffalo Point Cottagers Association*, supra, note 22, au paragraphe 31.

72 Ibid., au paragraphe 30.

73 Voir, par exemple, *Témoignages*, supra, note 5, aux pp. 3 à 5 (M. Jeremy Harrison et M. Pat Martin).

74 Ibid.

75 Ibid., à la p. 7 (Mme Brenda Kustra et l'hon. Andy Scott).

76 Ibid., à la p. 4 (M. Pat Martin).

77 Services aux Autochtones Canada, supra, note 65.

délègue tout simplement pas assez de pouvoirs réels pour promouvoir l'autonomie des Premières Nations y participant, que celle-ci soit individuelle ou collective.

CONCLUSION

S'il est indéniable qu'une Première Nation qui bénéficie d'une source de revenus qui provient de ses propres textes est plus autonome qu'une Première Nation qui n'a aucun pouvoir législatif, le régime dans la LGFPN ne promeut pas une réelle autonomie politique et législative. Les pouvoirs qu'elle accorde sont diluée par des mesures de contrôle archaïques qui empêche toute expérience de gouvernement autochtone dans les termes choisis par la Première Nation. Celle-ci n'est pas libre de choisir la majeure partie de son texte législatif.

Les défauts dont souffre la LGFPN pourraient facilement être corrigés lors d'une réforme. Par exemple, une sélection des membres de la CFPN par les Premières Nations participantes constituerait une mesure intéressante afin de renforcer la distanciation de la CFPN avec le gouvernement fédéral. Il semble d'ailleurs que dans les premières propositions sur la question, la majorité des nominations devaient être faites par les Premières Nations⁷⁸. Le pouvoir fédéral de restreindre les mécanismes d'imposition au moyen de règlements pourrait également être abrogée afin d'accorder plus de place à l'autonomie. Finalement, si l'autonomie gouvernementale est réellement l'objectif du gouvernement fédéral, il n'y a aucune raison pour qu'un organisme administratif doive agréer les textes des Premières Nations. La CFPN pourrait exister dans un rôle consultatif pour les Premières Nations ayant besoin de son expertise, sans garder un contrôle sur les textes législatifs. Si le contrôle de la CFPN est absolument nécessaire, il pourrait être bénéfique que les commissionnaires doivent obligatoirement agréer tout texte qui est raisonnable et équitable, plutôt que leurs permettre d'imposer une série de normes. Les Premières Nations auraient alors plus de liberté pour concevoir leurs propres systèmes.

Actuellement, la seule façon pour une Première Nation de concevoir un régime d'impôt foncier hors des balises du gouvernement fédéral est de négocier une entente d'autonomie gouvernementale. Certaines Premières Nations négocient depuis plusieurs années sans succès et d'autres ne sont pas encore prêts pour cette étape. Il est impensable qu'en l'attente, ils n'aient accès à aucune autre option afin de garantir leur autonomie en ce qui concerne l'impôt foncier. Ce mode d'imposition est délégué aux Premières Nations depuis 1951⁷⁹. Il serait grand temps qu'on les donne le droit de le gérer sans intervention du gouvernement fédéral.

78 Jules, supra, note 53, à la p. 1490.

79 Il a été introduit dans le Projet de loi 79, An Act Respecting Indians, 4^e sess., 21^e légis., 1951.

Policy Forum: In Defence of the First Nations Fiscal Management Act

André Le Dressay*

PRÉCIS

Le débat sur la reconnaissance des droits, des titres et des compétences des autochtones a été largement gagné. Il s'agit maintenant de déterminer la meilleure façon de mettre en œuvre ces droits, ces titres et ces compétences inhérentes. En ce qui concerne la compétence fiscale autochtone, la mise en œuvre doit relever les défis liés à la représentation des contribuables, à la compétence concurrente, aux ententes de services avec d'autres gouvernements, à la capacité administrative, à la gestion financière et à l'accès aux capitaux d'emprunt publics à des taux concurrentiels. Dans ce article, l'auteur soutient que la Loi sur la gestion financière des premières nations (LGFPN) a réussi à surmonter ces défis. La LGFPN a protégé et élargi la compétence fiscale autochtone grâce à des normes et à un soutien institutionnel. Par conséquent, elle représente un moyen efficace pour les gouvernements autochtones intéressés « d'exercer sur leurs réserves le pouvoir proprement gouvernemental de taxation », comme l'a affirmé la Cour suprême du Canada dans l'arrêt *Bande indienne de Matsqui*, et d'étendre l'utilisation de ce pouvoir.

ABSTRACT

The debate with respect to the recognition of Indigenous rights, title, and jurisdiction has largely been won. It has now moved to how best to implement those rights, title, and inherent jurisdictions. For Indigenous taxation jurisdiction, implementation must address challenges related to taxpayer representation, concurrent jurisdiction, service agreements with other governments, administrative capacity, financial management, and access to public debt capital at competitive rates. In this article, the author argues that the First Nations Fiscal Management Act (FMA) has been successful in overcoming these challenges. The FMA has protected and expanded Indigenous tax jurisdiction through standards and institutional support. As a result, it represents an effective path for interested Indigenous governments "to exercise [their] inherently governmental power of taxation" affirmed by the Supreme Court of Canada in *Matsqui Indian Band*, and to expand their use of that power.

KEYWORDS: FIRST NATIONS ■ FISCAL ■ ECONOMIC DEVELOPMENT ■ JURISDICTION ■ GOVERNMENTS ■ INSTITUTIONS

* Director of the Tulo Centre of Indigenous Economics and director of Fiscal Realities Economists, Kamloops, British Columbia (e-mail: andre@fiscalrealities.com).

CONTENTS

Introduction	830
Historical Legal Context of First Nation Fiscal Powers	830
Self-Government, Economic Development, and the Fiscal Foundations for Self-Determination	831
Taxpayer Representation and Jurisdictional Issues	832
Concluding Comments	833

INTRODUCTION

First Nation tax jurisdiction comprises two elements. First, there is the inherent right of government to tax, which has been granted to First Nations (as affirmed by the Supreme Court of Canada in 1995 in *Matsqui Indian Band*).¹ Second, there is the interaction of First Nation tax jurisdiction with concurrent federal, provincial, and provincially delegated local government tax jurisdictions. The First Nations Fiscal Management Act (FMA)² represents a standards-based jurisdictional innovation supported by first-of-the-kind First Nation institutions to help interested First Nation governments to exercise their inherent tax power while occupying as much concurrent tax room as possible. It has been 15 years since the FMA was passed into law. The preceding article by Audrey Boissonneault, together with the other contributions to this Policy Forum, offers an important review of the FMA innovation for possible improvements.

HISTORICAL LEGAL CONTEXT OF FIRST NATION FISCAL POWERS

The colonial foundation of Canada was established with the passage of the British North America Act, 1867,³ which ignored the fiscal and other jurisdictions of Indigenous governments. Specific efforts by First Nations to collect property taxes from leaseholders and railroads between 1867 and 1910 were prohibited. Efforts to maintain self-determination and collect taxes were eroded by incremental amendments to the Indian Act until 1927, when the raising of any revenues to pay for a lawyer or pursue land claims was completely abolished.⁴ Indeed, the 1927 legislative abolition of First Nation fiscal power so that First Nations would not pursue land claims was one of Canada's gravest acts of colonialism. This colonial action, as much as any other, created the dependence and economic disparities that exist for First Nations today.⁵

1 *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 SCR 3, at paragraph 18.

2 SC 2005, c. 9, as amended.

3 30 & 31 Vict., c. 3 (UK), as amended.

4 Indian Act, RSC 1927, c. 98, section 141.

5 As was recently stated in a paper by the Yellowhead Institute, 1927 marked the beginning of First Nations' complete fiscal dependence on Canada. "Cash Back: A Yellowhead Institute Red Paper," *Yellowhead Institute*, May 2021.

The path to establish First Nation property tax powers was renewed in the 1960s by First Nations in Ontario and British Columbia. Provincial governments collected property taxes on reserves “in persona” until the 1970s and continue to do so in British Columbia and Quebec today. Property taxes in the latter two provinces could not be collected by First Nations until the passage of an amendment to the Indian Act in 1988 (“the Kamloops amendment”),⁶ BC legislation in 1990,⁷ and Quebec legislation in 1996.⁸

This historical context is important because it shows how the FMA is connected to interpretations of self-government. As the Supreme Court stated in its decision in *Matsqui Indian Band*, in reference to the 1988 iteration of First Nation property tax jurisdiction,

[I]t is important that we not lose sight of Parliament’s objective in creating the new Indian taxation powers. The regime which came into force in 1988 is intended to facilitate the development of Aboriginal self-government by allowing bands to exercise the inherently governmental power of taxation on their reserves.⁹

Indeed, the incremental efforts by First Nations across Canada to renew their fiscal powers have been at the heart of the self-government process for more than 150 years.

SELF-GOVERNMENT, ECONOMIC DEVELOPMENT, AND THE FISCAL FOUNDATIONS FOR SELF-DETERMINATION

In the preceding article, Boissonneault provides an analysis of the FMA that separates issues of self-government from those of economic development. Yet I would argue that economic development and self-determination are intrinsically linked. The FMA was created by Indigenous leaders pursuing a strategy of growing Indigenous economies and public revenues to provide the fiscal foundation for self-determination. Their intention was to establish an enabling framework for First Nations to exercise their fiscal and financial administration powers in a manner that lowers transaction costs, improves the investment climate, and supports a higher credit rating for financing infrastructure to support economic development.

Stated differently, the fundamental question being addressed by the FMA was not “What is self-government?” but rather “How might a First Nation implement self-government?” Self-determination requires a fiscal foundation. In other contexts, sovereign nations opt into trade and investment agreements containing regulations,

6 Bill C-115, An Act To Amend the Indian Act, 1988 (known as “the Kamloops amendment”).

7 Indian Self Government Enabling Act, SBC 1990, c. 52.

8 Bill 67, An Act To Establish an Administrative Review Procedure for Real Estate Assessment and To Amend Other Legislative Provisions, SQ 1996, c. 67, sections 61 and 62.

9 *Matsqui*, supra note 1, at paragraph 18.

standards, and institutional support with the aim of promoting economic growth. Likewise, First Nations participating in the FMA are opting into the framework because of their own evaluation of the economic benefits compared to the requirements of participation.

A key benefit to First Nations of participating in the FMA is reduction of the costs of administration and transition costs. Implementing First Nation fiscal powers (like any jurisdictional powers) is costly and time consuming. The provision of standards, institutional support, capacity development, and samples under the FMA significantly reduces these transition costs. This has meant that more First Nations can implement more FMA fiscal powers sooner and cheaper than would otherwise be possible. To the extent that participating First Nations can use these revenues to support more self-determination, the FMA provides an effective way to realize self-government aspirations.

It is also important to realize just how much scope for flexibility and innovation the FMA gives First Nations. The FMA creates a broad range of fiscal powers other than property taxation, such as the power to levy service taxes, business activity taxes, fees, and development cost charges. First Nations have used these fiscal powers to advance innovations such as the property transfer tax, hotel accommodation tax, business occupancy tax, mine drilling tax, local improvement taxes, and most recently water and sewer utility types of taxes. The FMA also allows for significant variation in First Nations' policies within their property tax and FMA local revenue laws. These policies relate, for example, to exemptions, grant programs, expenditures, and enforcement, as well as many other elements of the more than 4,500 FMA laws published in the *First Nations Gazette*. Amendments to the FMA during the last 15 years have further enhanced First Nations' scope for fiscal self-determination, with new provisions related to debenture financing, new fiscal powers, and financial administration.¹⁰

TAXPAYER REPRESENTATION AND JURISDICTIONAL ISSUES

First Nation taxation creates unique taxpayer representation and jurisdictional issues. The property tax power is exercised almost exclusively over lessees on First Nation lands. It is an interesting legal question whether this is exclusive First Nation tax jurisdiction or concurrent tax jurisdiction with other governments. If it is concurrent, as some legal opinions suggest,¹¹ the creation of an institutional and

10 In addition to the FMA laws in the *First Nations Gazette*, another source of information about FMA innovations and flexibility is the First Nations Fiscal Institutions & Lands Advisory Board's virtual national meeting, First Nations Economic Resilience: First Nations Leading the Way 3, held on February 17-18, 2021 (<https://fnleadingtheway.com>).

11 See, for example, *Ontario Lottery and Gaming Corporation v. Mississaugas of Scugog Island First Nation*, 2019 FC 813.

regulatory framework through the FMA is a tool that First Nations can use to exercise this jurisdiction and to gain as much fiscal room as possible. By contrast, the BC treaty process, for example, imposes more significant limitations on the exercise of First Nation tax jurisdiction in respect of non-members. An extensive reading of the testimony for the implementation of the FMA reveals that the legislation, regulations, and standards were considered important protections for taxpayers and First Nation members, and that such protections were necessary to support the exercise of property tax jurisdiction.

As discussed by Boissonneault, the FMA has survived two judicial review challenges from taxpayers. The decision in *Mississaugas of Scugog Island First Nation*¹² is particularly noteworthy because it makes the connection between the FMA standards and First Nation concurrent tax jurisdiction. Two elements of that decision are of interest here. First, the Federal Court ruled in favour of the First Nation's jurisdiction and determined that the First Nations Tax Commission closely adhered to its standards for the "reasonableness" of the approval decision. The judge also observed that the FMA and the regulations, standards, and institutions created thereunder provide an efficient and effective method for implementing First Nation tax jurisdiction and representing the interests of stakeholders.

CONCLUDING COMMENTS

Boissonneault's article and this brief essay have addressed the same questions—What is Indigenous self-government, and to what extent does the FMA support self-government?—but have arrived at different conclusions. I have emphasized the fiscal foundations for self-government: self-determination requires material resources and administrative capacity. The standards created by the FMA lower the transition costs faced by First Nations who want to enhance their fiscal base, while still providing First Nations with substantial flexibility. Moreover, the administrative and other resources provided by the First Nations Tax Commission are key supports for First Nations who want to implement new taxes, as is illustrated by Kate McCue and Bill McCue in their article in this Policy Forum. Moreover, First Nations are not (at least not primarily) taxing themselves; most First Nations taxes are levied on people who are not band members. This raises unique taxpayer representation issues—issues that the FMA has, in my opinion, managed to successfully address.

12 Ibid.

Policy Forum: Establishing an Urban Reserve—Property Tax Challenges and Opportunities

Mike Icton and Devan Mescall*

PRÉCIS

Les réserves urbaines offrent un outil de développement économique unique aux gouvernements des Premières Nations en leur donnant accès à des marchés et à des infrastructures qui sont généralement absents des terres des réserves au Canada. Asimakiniseekan Askiy est la première réserve urbaine du Canada établie sur des terres appartenant auparavant à une ville. La réserve urbaine a été établie à Saskatoon par la nation crie Muskeg Lake en 1988. Asimakiniseekan Askiy fournit un exemple du potentiel économique des réserves urbaines pour les Premières Nations et leurs membres, ainsi que pour les gouvernements municipaux et leurs citoyens. La réserve urbaine compte actuellement 60 entreprises autochtones et non autochtones et leurs 700 employés. En 2020, la réserve urbaine a versé 465 662 \$ en frais de service à la ville de Saskatoon. Cependant, avant de pouvoir réaliser ce potentiel économique et de faire passer Asimakiniseekan Askiy d'une idée novatrice à une réussite concrète, il a fallu surmonter un obstacle de taille : l'impôt foncier.

Établir une réserve urbaine a des répercussions importantes sur l'impôt foncier, puisque le processus exige le transfert de propriété de l'autorité fiscale d'une compétence municipale à la compétence fiscale d'un gouvernement de Première Nation. Les ententes prévoyant le transfert de l'autorité fiscale impliquent également de négocier la prestation continue de services à la réserve urbaine par la municipalité. Cet article présente tout d'abord un résumé du contexte législatif entourant la formation et l'imposition d'une réserve urbaine. Il présente ensuite une étude de cas sur la création et les 33 années d'exploitation d'Asimakiniseekan Askiy afin d'illustrer les répercussions de l'impôt foncier et le processus d'entente de services municipaux nécessaire pour que les collectivités canadiennes puissent tirer profit des avantages économiques des réserves urbaines. Les auteurs indiquent les défis liés à l'impôt foncier qui sont inhérents à l'établissement d'une réserve urbaine et émettent des recommandations

* Mike Icton is the chief executive officer of Muskeg Lake Cree Nation Investment Corporation (e-mail: mike@mlcninvestment.ca); Devan Mescall is of the University of Saskatchewan (e-mail: mescall@edwards.usask.ca). We would like to thank the following for their contributions to our study: Angie Desnomie, Barrett Greyeyes, Harry Lafond, and Trenton Paul.

pour améliorer l'accès aux réserves urbaines en tant qu'outil de développement économique innovant.

ABSTRACT

Urban reserves offer a unique economic development tool for First Nation governments by providing access to markets and infrastructure unavailable on most reserve lands in Canada. Asimakiniseekan Askiy is Canada's first urban reserve established on land previously owned by a city. The urban reserve was established in Saskatoon by the Muskeg Lake Cree Nation in 1988. Asimakiniseekan Askiy provides an example of the economic potential of urban reserves for First Nations and their members, as well as municipal governments and their citizens. The urban reserve is currently home to 60 First Nation and non-First Nation businesses and their 700 employees. In 2020, the urban reserve contributed \$465,662 to the city of Saskatoon in service fee payments. However, before this economic potential could be realized, property taxation presented a sizable barrier in the path of taking Asimakiniseekan Askiy from an innovative idea to a successful reality.

Establishing an urban reserve has significant property tax implications, since the process requires the transfer of property from the taxing authority of a municipal jurisdiction to the tax jurisdiction of a First Nation government. Agreements providing for the transfer of tax authority also include negotiations relating to the continued provision of services to the urban reserve by the municipality. This article first provides a summary of the statutory environment surrounding the formation and taxation of an urban reserve. A case study of the establishment and 33 years of operation of Asimakiniseekan Askiy is then provided, to illustrate the property tax implications and municipal service agreement process necessary for Canadian communities to achieve the economic benefits of urban reserves. The authors identify property tax challenges inherent in the establishment of an urban reserve and offer recommendations to improve access to urban reserves as an innovative economic development tool.

KEYWORDS: FIRST NATIONS ■ PROPERTY TAXES ■ TAXATION ■ MUNICIPAL GOVERNMENT ■ MUNICIPAL TAXATION ■ URBAN RESERVE

CONTENTS

Introduction	837
Property Tax Legislation and First Nations	838
Establishment of Reserve Lands	840
Urban Reserves	842
Asimakiniseekan Askiy	843
Municipal Service Agreements	846
Urban Reserves: Property Tax Challenges and Solutions	850
Issue 1: The Lack of a Legal Framework	850
Issue 2: Monopoly in Service Provision	852
Issue 3: Property Value Assessment	852
Issue 4: Tax Rate Determination	853
Issue 5: Taxpayer Representation	854
Issue 6: Lack of Retained Property Tax Revenues	855
Conclusion	855

INTRODUCTION

Indigenous economic development is an integral component of reconciliation, holding huge potential to fuel Canadian economic growth.

National Indigenous Economic Development Board, *The Indigenous Economic Progress Report 2019* (Gatineau, QC: NIEDB, 2019), at 8

Notable studies such as those undertaken by the Royal Commission on Aboriginal Peoples and the Harvard Project on American Indian Economic Development conclude that the right to tax and the resulting tax revenues are an essential tool for the economic success of First Nation governments.¹ In the 1995 decision of the Supreme Court of Canada in *Matsqui Indian Band*, Lamer CJ affirmed First Nation taxation powers as an “inherently governmental power.”² In Canada, the most common tax levied by First Nation governments is property tax.³

According to the First Nations Tax Commission (FNTC), there is a growing trend in the adoption of property taxes by First Nation governments. Despite this growth, only 30 percent of First Nations had property taxes on reserve land as of 2020.⁴ One of the challenges in developing a steady source of property tax revenue for First Nation governments is the development of a tax base on which tax revenues can be generated. For municipal governments, property tax bases predominantly comprise residential and commercial properties. First Nations face a challenge in creating a residential tax base because they have a responsibility to provide and manage housing on their reserves. Accordingly, the majority of residential properties on most Canadian reserves are owned and provided to community members by the First Nation, resulting in little economic gain for a First Nation levying tax on this property. For a similar reason, most municipal governments exempt their own property from taxation. Therefore, the residential tax base for most First Nation property taxes primarily consists of the residential properties leased by non-members, such as vacation properties. As a result, a sustainable property tax base for First Nations is largely dependent on the development of commercial interests. The predominantly rural location of most reserve lands makes commercial development a challenge.

Urban reserves are a promising tool for economic development. Urban reserves have the potential to generate (1) financial returns through the land development

1 John Graham and Jodi Bruhn, “In Praise of Taxes: The Link Between Taxation and Good Governance in a First Nations Context,” in Jerry P. White, Julie Peters, Dan Beavon, and Peter Dinsdale, eds., *Voting, Governance, and Research Methodology* (Thompson Educational Publishing, 2013), 45-87.

2 *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 SCR 3, at paragraph 18.

3 Canada, Department of Crown-Indigenous Relations and Northern Affairs, “Fact Sheet—Taxation by Aboriginal Governments” (www.cirnac-rcaanc.gc.ca/eng/1100100016434/1539971764619).

4 First Nations Tax Commission, “Taxpayers: Property Taxation on Reserve” (<https://fntc.ca/property-taxation-on-reserve>).

process for the First Nation, (2) employment for First Nation members, and (3) consistent tax revenues for First Nation governments. Land in urban centres has many advantages supporting the development of a tax base, including improved access to markets, human resources, services, and financing. Unfortunately, property taxation creates significant barriers to the development of urban reserves. This is because the establishment of an urban reserve involves the negotiation of an agreement concerning the transition of the taxing authority from a municipal government to the First Nation government. Importantly, the property tax challenges are not limited to a one-time transition but are integral to the ongoing operation of an urban reserve, since it is often economically prudent for ongoing services to be purchased from the municipality.

Despite these challenges, several First Nations and municipal governments have completed agreements and adapted property tax policies that have resulted in successful urban reserves. The urban reserves established by the Muskeg Lake Cree Nation (MLCN) in Saskatoon are an example of this success. In the following study, we will review the property tax legislation that pertains to First Nation governments in Canada and draw on MLCN's experience in operating Canada's first reserve established on land within city boundaries, to identify the property tax challenges, solutions, and opportunities inherent in the establishment and operation of urban reserves as an innovative and effective tool for economic development.

PROPERTY TAX LEGISLATION AND FIRST NATIONS

The ability to levy property tax on land designated as an urban reserve is affected by Canadian legislation that exempts First Nation property on reserve land from taxation by non-First Nation governments and legislation that affirms First Nation jurisdiction to levy tax on reserve lands.

The First Nation tax exemption predates the advent of most modern taxes, including goods and services tax (GST) and income tax, and was meant to avoid the forfeiture of reserve lands to non-First Nation governments for non-payment of municipal property taxes in the late 19th century.⁵ Section 87 of the Indian Act⁶ exempts all real and personal property situated on reserve lands from taxation where the property is owned either by individual Indians or collectively by the First Nation. Section 2 of the Indian Act defines "Indian" as "a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian." Additionally, section 90 deems any personal property acquired with "Indian moneys" or given under a "treaty or agreement between a band and her Majesty" to be considered on

5 Fiona Martin, Brad Morse, and Barbara Hocking, "The Taxation Exemption of Canadian Indians as Governments and Individuals: How Does This Compare with Australia and New Zealand?" (2011) 40:2 *Common Law World Review* 119-43; and Graham and Bruhn, *supra* note 1.

6 RSC 1985, c. I-5, as amended.

reserve and exempt under section 87. Blanket exemption from all taxes has been asserted by some First Nations as a treaty right; however, this broad interpretation has been rejected by the courts.⁷ Therefore, the First Nation tax exemption under section 87, broadly speaking, applies to taxation by non-First Nation governments of First Nation people, property, and income sourced to reserve lands. Notably, the First Nation tax exemption does not apply to taxation by First Nation governments on reserve land.

Under current Canadian law, First Nation governments have three avenues by which they can pursue the creation of a property tax: section 83 of the Indian Act, the First Nations Fiscal Management Act (FMA),⁸ and self-government agreements. First, the Indian Act provides that the exemption under section 87 is subject to section 83, which allows First Nation governments to make bylaws for the taxation of land or interest in land on the reserve. The Kamloops amendment to section 83 expanded the breadth of a First Nation's ability to generate taxation bylaws that now apply to all persons utilizing First Nation reserve lands, empowering the First Nation to tax on-reserve interests of First Nation members and non-members alike. Enacting property tax bylaws under section 83 has two important drawbacks. The first is the bureaucratic process and the requirement for ministerial approval, which may impede expeditious enactment. The second is that property tax revenues collected under section 83 cannot be pledged to access financing.⁹ The inability to use reserve lands or property tax revenues raised under section 83 as loan security, as a result of the restrictions in sections 89 and 90 of the Indian Act, respectively, creates a sizable challenge for First Nations seeking to obtain financing for infrastructure investments, and often results in the need to use shorter-term and higher-rate financing.

Second, the FMA provides a broad framework for the financial management of a participating First Nation, including the ability to levy property taxes. The legislation was originally passed in 2005 and subsequently updated in 2013 and again by Bill C-86 in 2018.¹⁰ A goal of the legislation is to improve First Nations' access to financing for infrastructure and place First Nations on a similar footing to other governments. This includes a strengthening of the First Nations real property tax system. Property taxes levied under the FMA may be pledged for financing infrastructure projects if the First Nation obtains borrowing status. This is an important advantage over property tax bylaws enacted under section 83 of the Indian Act, since it creates the potential to access additional financing for infrastructure that was previously unavailable. The process of enacting property taxes under the FMA

7 *Benoit v. Canada*, [2002] FCJ No. 257.

8 SC 2005, c. 9, as amended.

9 John W. Gailus and Caitlin E. Mason, "Property Taxation as an Effective Tool of Self Government," presented at Federated Press Aboriginal Taxation Conference, Calgary, Alberta, March 19-20, 2013.

10 Bill C-86, A Second Act To Implement Certain Provisions of the Budget Tabled in Parliament on February 27, 2018 and Other Measures, SC 2018, c. 27, royal assent December 13, 2018.

requires approval by the FNTC, consistent with the enactment of tax bylaws under section 83, but bylaws under the FMA do not require ministerial approval, and thus streamline the process. As a result of these benefits, recent data suggest, the use of property tax bylaws under section 83 has decreased from 56 First Nations in 2014 to 41 First Nations in 2018, while the use of FMA laws has increased from 68 to 113 in the same period.¹¹

Third, self-government agreements generally include the power to impose direct taxes on members of the First Nation, including property taxes. The Constitution Act, 1982, recognizes the inherent right of First Nation peoples to self-government.¹² Negotiated self-government agreements provide the practical effect of this right.

The legislative ability of First Nations to levy property taxes has been reinforced by case law. Both *Osoyoos Indian Band*¹³ (2001) and *Seabird Island Indian Band*¹⁴ (2002) supported the right of First Nations to tax interests on reserve lands, including rights-of-way. However, this right does not extend to the interests of federal or provincial governments, including Crown corporations, owing to the intergovernmental immunity found in section 125 of the British North America Act, 1867.¹⁵

This is a significant exemption, given that the interests of Crown corporations (such as power, gas, and telecommunications infrastructure) make up a substantial portion of the non-First Nation interests on reserve lands. In practice, although federal and provincial governments are not required to pay property taxes to municipalities or First Nations, most federal and provincial governments provide grant payments to municipalities matching the property tax that would be owing but for the immunity provision; in 2016, these payments by governments and government organizations across the country totalled \$1.7 billion.¹⁶ Unfortunately, First Nations have not been afforded the same treatment. Although federal Crown corporations have extended the practice of making payments in lieu of property taxes to First Nations, many provincial Crown corporations have not, thus limiting the tax revenues that might otherwise be collected by First Nations.

ESTABLISHMENT OF RESERVE LANDS

A consistency across statutes legislating both the exclusion from property tax levied by non-First Nation governments and the right of First Nation governments to levy property taxes is that the application of these statutes is confined to reserve

11 National Indigenous Economic Development Board, *The Indigenous Economic Progress Report 2019* (Gatineau, QC: NIEDB, 2019).

12 Constitution Act, 1982, being schedule B to the Canada Act 1982 (UK), 1982, c. 11, section 35.

13 *Osoyoos Indian Band v. Oliver (Town)*, 2001 SCC 85.

14 *Seabird Island Indian Band v. BC Tel*, 2002 FCA 288.

15 30 & 31 Vict., c. 3 (UK), as amended.

16 First Nations Tax Commission, "Payments in Lieu of Taxation (PILTs): An Important Step to Expanding FMA Taxation Revenues," July 5, 2016 (<https://fntc.ca/payments-in-lieu-of-taxation-pilts-an-important-step-to-expanding-fma-taxation-revenues/>).

lands. Reserve lands are the result of both modern and historical treaties and subsequent land claim processes. Modern treaties and land claims have facilitated the creation of new reserve lands, including urban reserves, as described in this section.

The government of Canada signed historical treaties with First Nation communities between 1701 and 1923.¹⁷ Since 1973, the Canadian government has negotiated modern treaty agreements under the comprehensive land claims policy. Where the government has not fulfilled its obligation under the treaties, First Nations can make claims for compensation through the specific claims or treaty land entitlement (TLE) process.

Specific claims involve failures related to historical treaties. Specific claims are settled through voluntary negotiations outside the judicial system. The process was established in 1982 and most recently updated in 2007. For example, the creation of Riding Mountain National Park resulted in reserve land being taken away from the Keeseekoowenin First Nation in 1935. In 2005, 2 specific claims were settled, resulting in the return of all 435 hectares of former reserve land and the payment of \$12 million in compensation to the First Nation. As of March 2018, 464 specific claims had been negotiated by the Canadian government.¹⁸

Alternatively, if land promised under a historical treaty was never received, a First Nation may file a TLE claim. Negotiations to settle the claim generally involve the First Nation and both the federal and provincial governments. The majority of TLE settlements have occurred in Saskatchewan and Manitoba as a result of TLE framework agreements between First Nations and the respective provinces in the 1990s. Twenty-nine First Nations in Manitoba and 25 First Nations in Saskatchewan signed onto these agreements.¹⁹ As of 2016, agreements had been reached in 90 percent of the cases, resulting in federal and provincial governments fulfilling their treaty obligations with the return of 1.2 million acres of unoccupied Crown land and payments totalling \$630 million for the purchase of land.²⁰

To complete any resulting settlement, the First Nation may acquire land through an open-market purchase or a selection of unoccupied Crown land. The First Nation generally has a 10- or 20-year period to complete any land purchase. Once new land is acquired, the First Nation must apply under the additions to reserve (ATR) policy if it wishes to have the freehold land converted to reserve status. Between 2015 and 2019, approximately four million acres were added to reserves through the ATR process.²¹ First Nations have criticized the length and opaqueness of the process. The

17 Organisation for Economic Co-operation and Development, *Linking Indigenous Communities with Regional Development in Canada* (OECD: Paris, 2020), at 150.

18 Ibid.

19 Shaun Soonias, Heather Exner-Pirot, Mohamed Salat, and Asad Shah, *City of Bridges: First Nations and Metis Economic Development in Saskatoon & Region* (Saskatoon: Saskatoon Aboriginal Employment Partnership, 2016).

20 OECD, *supra* note 17.

21 NIEDB, *supra* note 11.

average length of time to complete an urban ATR is 4.2 years.²² When combined with the TLE process outlined above, the average length of time in Manitoba for the entire process was 8 years.²³ In efforts to streamline the process, Bill C-86 was passed enacting the Addition of Lands to Reserves and Reserve Creation Act.²⁴

URBAN RESERVES

Lands acquired through TLE and ATR can be urban or rural, and need not be contiguous. This flexibility provides First Nations with an opportunity to acquire land that supports economic development. In 2020, the Organisation for Economic Co-operation and Development (OECD) issued a study to provide recommendations to the Canadian government on how to improve the economic outcomes of Indigenous peoples. The report recognized that one of the fundamental challenges for the economic improvement of Indigenous peoples was their rural location; 60 percent of Indigenous people in Canada were located rurally, compared to 33 percent of non-Indigenous people.²⁵ The report states, “Rural areas face structural disadvantages associated with higher transport costs, thin markets and lower levels of human capital.”²⁶ In contrast, the acquisition of land by First Nations in urban centres provides potential access to markets, infrastructure, and employment.²⁷ In 2016, the National Aboriginal Economic Development Board (NAEDB) observed that the establishment of an urban reserve has the potential to produce direct revenue for the First Nation through leases, taxes, and fees.²⁸ The greater opportunity for attracting businesses and development on acquired land in an urban setting increases the potential for a stable tax base on which to generate property tax revenue for First Nation investment in infrastructure.

As described above, lands acquired under TLE settlements are not automatically accorded reserve status. First Nations must choose whether to undertake the ATR process to have the land recognized as reserve land or hold the acquired land in fee simple.

22 National Aboriginal Economic Development Board, *Improving the Economic Success of Urban Additions to Reserves* (Gatineau, QC: NAEDB, 2015).

23 Canada, House of Commons, *Indigenous Land Rights: Towards Respect and Implementation*, Report of the Standing Committee on Indigenous and Northern Affairs, 42d Parl., 1st sess., February 2018.

24 Bill C-86, *supra* note 10; and Addition of Lands to Reserves and Reserve Creation Act, SC 2018, c. 27, section 675.

25 OECD, *supra* note 17, at 20.

26 *Ibid.*

27 Martin et al., *supra* note 5.

28 Prairie Research Associates, *Additions to Reserves: Lessons Learned from First Nations—Final Report*, prepared for the National Aboriginal Economic Development Board (Winnipeg: PRA, January 2016).

Table 1 summarizes the implications of the decision to hold acquired land in fee simple or to pursue reserve status, and highlights two important outcomes. First, pursuing reserve status is costly since it requires the First Nation to both go through the complex ATR process and negotiate a service agreement with affected stakeholders, which may include municipal governments, regional governments, and school boards. The evidence from Manitoba described above and the experience of MLCN described below show that these processes can extend over a number of years and can generate significant legal and consulting expenses. Second, the benefits of achieving reserve status for the urban land acquired, as opposed to the fee-simple option, are largely driven by tax. The urban reserve provides the opportunity for tax exemption under section 87 of the Indian Act for employees and businesses that qualify, and allows the First Nation to levy property tax. Both of these tax attributes have the potential to create an economic benefit for the First Nation by establishing the acquired land as reserve land. Urban reserve status provides on-reserve businesses with an advantage in attracting customers and employees who are recognized as status Indians under section 2 of the Indian Act and can therefore receive exemption from GST, income tax, and sales taxes under section 87. This can result in benefits to the First Nation in the form of increased returns from lease revenue and increased employment for members. Additionally, as discussed above, the opportunity for the First Nation to levy taxes, including property taxes, has the potential to provide the First Nation with direct revenue. Asimakiniseekan Askiy, an urban reserve established in Saskatoon by MLCN, illustrates the effects of these costs and benefits in practice.

ASIMAKINISEEKAN ASKIY

Prior to settlement through the TLE process, MLCN's sole reserve land was approximately 100 kilometres north of Saskatoon. MLCN has 2,157 members, approximately 80 percent of whom reside off reserve.²⁹ The stated business goal of MLCN is "to become economically self-sufficient and to provide resources for community programs and services that will enhance the lives and well-being of . . . members."³⁰ Establishing the urban reserve was a significant step toward accomplishing this goal. Importantly, the proximity of MLCN to Saskatoon made the city a viable location to meet the First Nation's economic goals.

Asimakiniseekan Askiy 102a, the first urban reserve established by MLCN, encompasses 35 acres of land in the Sutherland area of Saskatoon. MLCN gave the urban reserve a Cree name that roughly translates to "the veterans' land" to honour Indigenous soldiers who served Canada in the two world wars and the Korean war and who serve in peacekeeping roles today. The land was acquired by MLCN as a result

29 City of Saskatoon and Saskatoon Regional Economic Development Authority, *First Nation Community Profile: Muskeg Lake Cree Nation* (Saskatoon: City of Saskatoon and SREDA, January 2020), at 1.

30 Muskeg Lake Cree Nation, "About Muskeg Lake Cree Nation" (<https://muskeglake.com/about-muskeg-lake>).

TABLE 1 Establishing Urban Lands as Reserve Status Versus Fee Simple

	Implications of reserve status	Implications of fee simple
Additions to reserve (ATR) process	The ATR process is required.	The ATR process is not required.
Municipal service agreement	Municipal service agreement negotiation is likely required.	No service agreement is required.
Potential for section 87 tax exemption	First Nation property and income sourced from the land will be exempt from taxation by non-First Nation governments.	No tax exemption is available.
Opportunity to levy tax . . .	The First Nation government will have the authority to levy tax.	The First Nation does not have authority to levy tax.
Financing	Businesses on reserve will have access to various First Nation capital funds.	It may be easier for the First Nation to attract third-party investment.
Disposal	The land cannot be sold but can be leased/designated.	The land can be sold on the open market.

Source: Shaun Soonias, Heather Exner-Pirot, Mohamed Salat, and Asad Shah, *City of Bridges: First Nations and Metis Economic Development in Saskatoon & Region* (Saskatoon: Saskatoon Aboriginal Employment Partnership, 2016).

of its TLE framework agreement with a claim placed on the land by MLCN in 1984. The decision to pursue the novel idea of an urban reserve involved challenges both internal and external to the First Nation, but was brought to fruition by a dedicated group of individuals from MLCN, the city of Saskatoon, and the federal government, who all saw Asimakiniseekan Askiy as a unique opportunity and became committed to opening a new avenue of economic development for First Nations.

The opportunity to select the urban land itself was the result of a rare situation. The TLE agreement provided that MLCN could select a parcel of federal land; however, it was unusual for a sizable parcel of federal land to be available within the limits of a city such as Saskatoon. In this case, the land had been owned and put aside by the federal government as a possible federal prison site several years before, and had since sat undeveloped. This unique situation provided MLCN with the chance to select land within the city limits, but approval by the membership and ultimately an agreement with the city of Saskatoon were required before the reserve could be established.

Gaining the support of the MLCN membership to invest in a barren parcel of urban land and establish it with reserve status was not a given, since many members were understandably skeptical. The practicality of investing in land at some distance

from current reserve land, when much closer rural land was available, was one hurdle to overcome. The idea also involved MLCN in establishing its first property tax, which would be levied on the urban reserve land. Getting members' consent to this idea met a language barrier since there is no Cree word for taxation. Communicating the concept of taxation to MLCN elders required the champions of the urban reserve idea to make the cultural connection of the concept of taxation to the traditional hunters of the First Nation and the resulting distribution of resources across the membership for the good of all. Ultimately, the First Nation membership provided its support for the endeavour.

Before the land could be granted reserve status, an agreement had to be reached with non-Indigenous stakeholders, including the city of Saskatoon and the Saskatoon Board of Education. This idea was new for both the city of Saskatoon and the federal government. Harry Lafond, a former Chief of MLCN and the key architect of Asimakiniseekan Askiy, noted that “[r]isks were taken by all three governments—the First Nation, City and Federal Government.”³¹ Lafond attributes the success of the endeavour to having the right leadership and individuals in place at all three levels of government, who assembled a committed team that stayed in place and saw the project through to fruition, despite the pressure and uncertainty faced by each government. MLCN took the initiative to create something new. The federal government supported the idea of a new alternative for economic development, allowing the selection of the urban parcel of land and providing a grant to reduce some of the financial risks faced by the First Nation and the city. The municipal government of Saskatoon opened the city to a new form of development and the opportunity to build a unique relationship with MLCN. After four years of negotiations, the land was granted reserve status when an agreement between MLCN, the federal government, and the city of Saskatoon was reached in 1988. Asimakiniseekan Askiy was the first Canadian reserve to be built on land previously set aside for city development.³² In 1991, the land was leased to a development company wholly owned by MLCN and the first buildings were completed. MLCN established a second urban reserve in Saskatoon in 2011.

In the early 1990s, the Saskatoon school board and MLCN negotiated a compensation payment for the loss of future educational tax revenue as a result of the land being transferred to reserve status during the ATR process. This payment benefited the Saskatoon school board since the land was undeveloped federal land at that time and the future success of the development was uncertain. The payment was funded by the TLE settlement and a federal grant provided to MLCN.

The NAEDB commissioned a study to review multiple urban reserves across Canada with the goal of identifying key success factors. The study recognized MLCN's urban reserves as being among the most successful.³³ MLCN has undertaken substantial

31 Comment provided during an interview with one of the authors on May 14, 2021.

32 Soonias et al., *supra* note 19.

33 NAEDB, *supra* note 22, at 9 and 40.

development of the land, which now encompasses approximately 233,000 square feet of commercial office space that is 100 percent leased, in addition to two gas stations. Although some contemporary urban reserves do include residential development, Asimakiniseekan Askiy is a purely commercial development. The development of the land was funded by the TLE settlement and a grant from the federal government. The approximate fair market value of the development is \$61 million. The reserve contains about 60 First Nation and non-First Nation businesses and will continue to grow, since 6.4 acres of land remain for future development. Collectively, the lease and business interests have generated \$15 million of income for the members of MLCN over the past decade. The businesses on the urban reserve employ more than 700 people. Approximately 30 percent of jobs employ MLCN members. According to census data, median household incomes for MLCN members increased by 12.5 percent between 2001 and 2015 after controlling for inflation.³⁴ The unemployment rate for MLCN members decreased by 25 percent during this period, dropping from 23.5 percent to 17.6 percent.³⁵ The MLCN investment company is responsible for the day-to-day operations of the commercial facilities on the urban reserve, ensuring the separation of MLCN government operations and operations of the commercial property.

MUNICIPAL SERVICE AGREEMENTS

The development has had a positive impact not only for MLCN and its members but also for the city of Saskatoon. Laura Hartney, regional planning manager for the city of Saskatoon, explained:

The MLCN reserve was raw land at the edge of the city in an area that was ripe for redevelopment. It brought new investment into the area and lifted the area up. All of the urban reserves and TLE selections in and around the City of Saskatoon are for economic development purposes so are commercial or industrial sites. The surrounding communities see what a difference these sites make and how they fit into the urban fabric.

Land use and development on urban reserve land is consistent with that of non-reserve land. In terms of municipal services, we provide the same services to reserve land that are provided to other lands. In return we receive a fee for service that is equivalent to what the municipal taxes would have been. It's absolutely a level playing field.³⁶

34 Statistics Canada, "Census Profile, 2001 Census: Muskeg Lake Cree Nation 102, Indian Reserve" and "Census Profile, 2016 Census: Muskeg Lake Cree Nation 102, Indian Reserve." Median household incomes for MLCN were \$18,184 in 2001, which is the equivalent of \$29,469 in 2015. Median household incomes for MLCN were \$33,152 in 2015. Inflation statistics were calculated using the Bank of Canada's "Inflation Calculator" (www.bankofcanada.ca/rates/related/inflation-calculator).

35 Statistics Canada, *supra* note 34.

36 Indigenous Corporate Training Inc., "Notable Impact of Urban Reserves and Saskatoon," *Working Effectively with Indigenous Peoples® blog*, April 25, 2016 (www.ictinc.ca/blog/positive-impact-of-urban-reserves-saskatoon-example).

The ATR process involves consideration of how the granting of reserve status to land will affect other stakeholders. This decision can have a meaningful impact on both municipalities and school boards that currently levy taxes on the non-reserve property. As discussed above, reserve status provides exemption from taxation of the property by non-First Nation governments and therefore removes the property from municipal and school board tax bases. As a result, the ATR process generally requires an agreement between the First Nation and affected municipalities and school boards before reserve status is approved for the land addition. This requirement applies equally to the addition of rural or urban lands to a reserve. However, the acquisition of urban land introduces further complexities since it often involves the provision of additional services such as water, sewage, and garbage pickup. Also, the valuation of urban property and development for tax assessment purposes is generally more complicated than the valuation of rural land. This creates uncertainty and increases the likelihood of dispute.

MLCN and the city of Saskatoon reached a municipal service agreement in 1993. The resulting agreement has served as a model for many subsequent agreements throughout Canada. In fact, the “First Nations-Municipal Community Infrastructure Partnership Program Service Agreement Toolkit” produced by the Federation of Canadian Municipalities highlights the MLCN and city of Saskatoon agreement as a case study.³⁷ The details of the agreement are described in table 2.

One of the key factors for success identified by the NAEDB’s study of urban reserves is own-source revenues. Importantly, the report documents that few urban reserves earn significant revenues from property taxes.³⁸ Although the lack of retained property taxes from the urban reserves is not explained further in the report, the reason may be inferred from the details of the municipal service agreement summarized in table 2: the costs of acquiring services from the local municipality can largely offset the property taxes raised on an urban reserve. Put differently, although urban reserves can provide a more lucrative commercial tax base for First Nation property tax, operating an urban development requires the acquisition of equally costly services. The NAEDB study reports that MLCN’s urban reserves are among the few for which property taxes are an important source of revenue.

MLCN collected \$777,313 in 2020 property taxes—an indication of the substantial value of property development on the urban reserve. Importantly, as described in table 2, the MLCN property tax rate is aligned with the rate set by the city of Saskatoon in accordance with the municipal service agreement. The city of Saskatoon property tax assessment is the aggregate of a tax for city, library, and education services. The opportunity to retain a significant portion of property taxes for the members of MLCN is largely a result of negotiations leading to the establishment of the urban reserve. The Saskatoon school board received a payment from MLCN to

37 Federation of Canadian Municipalities, *First Nations-Municipal Community Infrastructure Partnership Program Service Agreement Toolkit*, 2d ed. (Ottawa: FCM, 2011).

38 NAEDB, *supra* note 22, at 17 and 20.

TABLE 2 Details of the Muskeg Lake Cree Nation (MLCN) and City of Saskatoon Municipal Service Agreement

Issue	Impact on MLCN	Impact on the city of Saskatoon
Services	MLCN receives services from the city, making the urban reserve a competitive and attractive location for business activity. MLCN avoids the costs of having to offer these services itself.	The city agrees to provide all services, including garbage pickup, snow removal, fire, and police. The city also provides direct services such as water and electricity, and individual customers are billed for these.
Property tax collection	MLCN agrees to collect taxes and pay an annual lump-sum equivalent to what the city would have received if the property had remained within the city's tax jurisdiction. MLCN levies a tax, paid by the lessees, that produces an amount of tax equivalent to that which would have been due if the properties had been under the jurisdiction of the city of Saskatoon. In this way, the tax incidence falls primarily on the lessees who are resident on the urban reserve and flows through MLCN to the city of Saskatoon in return for services.	The city receives a service payment equivalent to what it would have received had the land been considered commercial land in Saskatoon and taxed applying the city's assessment formula and tax rate.
Property tax assessment	MLCN has the ability to challenge the assessment and seek arbitration.	Assessment is based on the values and rates determined by the city's assessors.
Property tax rate	MLCN will adopt the going commercial municipal rate in Saskatoon. The rate is applied equally to both First Nation and non-First Nation businesses. These conditions limit MLCN's autonomy and property tax options to some degree. However, they avoid the tax competition that would result if the urban reserve charged a lower rate of tax, and avoid the economic impact of possible tax shopping by businesses.	Because MLCN agrees to charge the same rate as the city, Saskatoon does not face tax competition.

(Table 2 is concluded on the next page.)

TABLE 2 Concluded

Issue	Impact on MLCN	Impact on the city of Saskatoon
Other bylaws	MLCN will abide by all city bylaws. Although this condition may limit autonomy to some degree, it also creates a consistent business environment for customers and businesses operating on and off the reserve in the Saskatoon area.	Because MLCN agrees to abide by all the city's bylaws, the city does not need to be concerned about inconsistencies in the application of bylaws, and continuity is assured across the urban reserve and surrounding land under the city's jurisdiction.
Development	MLCN agrees that land use and development on the reserve will be the same as if the land were held by the city.	This reduces the city's concerns about the land being used for purposes not allowed on adjacent municipal land.

Source: Agreement contract between MLCN and the City of Saskatoon (proprietary document).

compensate for the loss of future tax revenue as a result of the land being transferred to reserve status. However, the municipal service agreement requires that MLCN charge the same tax rate as the city of Saskatoon, which includes the education tax portion. As a result, MLCN is able to retain, for its members, the education portion of the tax rate. In 2020, \$311,651 of property taxes collected (as a result of the education tax) was retained for use directly for the benefit of MLCN members, while \$465,662 was passed on to the city of Saskatoon for services in accordance with the municipal service agreement. Ultimately, the property tax revenue retained by MLCN benefits its members in many ways, including education. Currently, the First Nation receives federal funding for the education of students on reserve. Historically, this funding has fallen far short of funding for off-reserve students in Saskatchewan. A 2014 study by the Fraser Institute documented that in Saskatchewan, \$11,734 was spent per student off reserve compared to \$6,827 per student on reserve.³⁹ The federal government initiated funding changes in 2016 that would begin to decrease this gap.⁴⁰ The significant investment income generated by the MLCN urban reserve, supplemented by the retained property tax, provides the First Nation with opportunities to support its members in many ways, including through additional resources for education.

39 Ravina Bains, *Myths and Realities of First Nations Education* (Vancouver: Fraser Institute, August 2014), at 15, table 5.

40 Canada, Department of Indigenous Services, "New Funding and Policy Approach for First Nations Kindergarten to Grade 12 Education" (www.isc-sac.gc.ca/eng/1553859736924/1552859762978).

In practice, as a result of the municipal service agreement between MLCN and the city of Saskatoon, the city enjoys a larger tax base owing to the application of the commercial tax rate to land previously subject to the lower federal rate, and the significant development of the property by MLCN that has resulted in a much larger assessment. The establishment of the urban reserve has also generated indirect economic benefits for the city, in terms of additional development in the area and jobs created by businesses now situated on the reserve. For MLCN, although the majority of property tax revenues flow through to the city, the municipal service agreement has provided both the services and the geographical opportunity required to develop a viable commercial property, resulting in valuable investment returns for the First Nation and employment for its members and the broader Saskatoon community.

URBAN RESERVES: PROPERTY TAX CHALLENGES AND SOLUTIONS

The Asimakiniseekan Askiy urban reserves exemplify the opportunity to generate employment, financial returns, and taxes for MLCN and economic benefits for the city. However, MLCN's experience in establishing one of Canada's first urban reserves identifies many challenges that can deter the establishment and threaten the effectiveness of urban reserves as an economic development tool for First Nations across Canada.

Issue 1: The Lack of a Legal Framework

Although both First Nations and the Federation of Canadian Municipalities agree on the potential economic benefits of urban reserves, issues related to property taxation may present the largest barrier to the establishment of an urban reserve and become a source of conflict in the operation of the reserve.⁴¹ Property taxes are the principal source of funding for municipalities. Although prior studies, such as a 2015 report prepared for the FNTC,⁴² have shown that urban reserves benefit municipalities both economically and socially, the magnitude of these benefits is largely uncertain at the time the urban reserve is established. For the municipality, what is certain is that the establishment of an urban reserve will decrease its tax base as a result of the removal of the land from its jurisdiction. Owing to concerns about potential losses of property tax resources, municipalities may hesitate to undertake the work required to create a successful urban reserve.

41 Wesley Stevenson, *Governing Municipalities in a Dual Context: An Examination of Urban Indian Reserve Creation Under Article 9 of the Saskatchewan Treaty Land Entitlement Framework Agreement*, MPA Major Research Papers no. 34 (London, ON: University of Western Ontario, 2001).

42 Fiscal Realities Economists, *Addition to Reserve Municipal Tax Loss Concerns: Potential Municipal Property Tax Losses from First Nation ATRs*, prepared for First Nations Tax Commission (Kamloops, BC: Fiscal Realities Economists, April 2015).

Unfortunately, a formal legal framework to guide First Nations and municipalities through negotiations does not exist. This is because, although municipalities and First Nations share the right to levy property taxes, they are afforded this right from two different sources. First Nations are provided the right to levy property taxes under federal legislation, while municipal property tax authorities are governed at the provincial level. The lack of legislation to formalize the relationship between First Nations and municipal governments creates a challenge for the establishment of urban reserves.⁴³ As a result, each facet of property taxation must be discussed, and agreement must be reached, by the negotiating municipality and the First Nation. Importantly, both parties have political interests in any deal, and negotiations can be influenced by public opinion.

In the absence of a formal legal framework for negotiations, the process of establishing an urban reserve has been shaped by the relationship between the parties in each situation. In some cases, this method of proceeding has led to success. For example, both MLCN and the city of Saskatoon have recognized that communication and relationship building between the parties have been essential to the establishment and ongoing success of MLCN's urban reserves. However, interest and effort by both parties are required to make the relationship work. The effort must also be sustained and consistent, since the individuals directly involved (including councillors, chiefs, city administrators, and advisers) will change over time. The successful conclusion of discussions—whether they concern the renegotiation of the service agreement or the establishment of a new urban reserve—can be delayed if the individuals involved are not familiar with the process or are not committed to a model of unity.

Recommendation. An alternative approach exists in British Columbia under the Indian Self Government Enabling Act,⁴⁴ which formalizes aspects of the transition process for changes in property tax jurisdiction. This provincial statute, first passed in 1990 and last modified in 2013, addresses Indigenous assessment and property taxation in British Columbia. The BC process could be adopted in other jurisdictions to provide a more structured framework for collaboration between First Nations and municipalities. The concept of urban reserves as an economic development tool for First Nations and cities is only 30 years old. The proving of the concept through agreements that now have a record of being mutually beneficial, such as the one between MLCN and the city of Saskatoon, was necessary to attract politicians and constituents on both sides of the table to an exploration of these economic development endeavours in good faith. The practicalities and lessons learned from examples such as Asimakiniseekan Askiy provide a starting point for the establishment of future urban reserves, and for refinement and improvement of the process. The addition of more formalized transition procedures to open conversations could complement the progress that has been made.

43 Stevenson, *supra* note 41.

44 RSBC 1996, c. 19, as amended.

Issue 2: Monopoly in Service Provision

The experience of MLCN highlights one path to the creation of an urban reserve within city limits. The benefits of this path include the opportunity to attract businesses and tenants as a seamlessly integrated constituency within the broader urban community. This has proved to be a successful development strategy for MLCN. However, this path does have its drawbacks.

First, this strategy requires significant effort to build and maintain a strong relationship between the First Nation and the municipality. Second, the requirement for a municipal service agreement may limit the options available for the acquisition of services and provide less flexibility to the First Nation in terms of property tax administration, since rates and assessments may be aligned in the agreement. To attract the commercial interests necessary to achieve employment and economic development goals, the urban reserve must be able to provide resident businesses with appropriate municipal services. The close proximity of the urban reserve to adjacent municipal property in the city makes any disparity in service provided obvious and a potential detraction for businesses considering location on the reserve. However, the significant resources required to establish core services such as garbage collection, fire, and police may not be feasible for the First Nation, given the land base of the prospective urban reserve. This creates a monopoly situation in negotiations between the urban municipality and the First Nation, since there is only one source of services.

Recommendation. First Nations may strengthen their negotiating position with the city in terms of services by identifying potential development sites both within the city and in close proximity but outside the city limits. An example of the latter approach—establishing the reserve in close proximity but outside the city limits—is the Grasswood development by English River First Nation immediately south of the city limits of Saskatoon. Other First Nations with sufficient resources and access to appropriate real estate opportunities have pursued the acquisition of land outside but adjacent to the urban municipality, and the development of their own utility system to support the reserve. Although this is not always an option, exploration of these alternatives can provide balance to negotiations between the municipality and the First Nation. Additionally, the ability of the First Nation to provide at least some services reduces service fees paid to the municipality and creates an opportunity for retaining property tax for members. Establishing an urban reserve outside the city limits may result in a different set of development opportunities than a location within the city, but may also create additional flexibility in terms of service provision and property tax administration.

Issue 3: Property Value Assessment

The basis for service fees is generally the assessment of property value. Property developed on an urban reserve often involves a more complex assessment than is required for reserve property that is primarily rural. Prior studies have shown that the development of an independent property assessment system involves significant

fixed costs regardless of the size of the government or region.⁴⁵ These include the cost of skilled labour and the cost of access to software, systems, and data. Economies of scale play a role in effective value assessment for property tax, creating a barrier for First Nations.

From the city's perspective, the establishment of an urban reserve has the potential to reduce the tax base of the municipality. Negotiation of ways to limit this loss and the related uncertainty for the municipality is essential to the successful conclusion of an agreement. Additionally, the financial agreement reached must be tenable and fair to the First Nation, to allow it to manage a property that provides the economic and employment benefits that it is seeking.

Recommendation. To balance the interests of both parties, the agreement should indicate the use of neutral, third-party assessors that are trusted by the municipality and the First Nation and are already available (for example, BC Assessment, the Saskatchewan Assessment Management Agency, the Municipal Property Assessment Corporation, and Service New Brunswick). Additionally, the parties should use the same assessments for service agreement purposes as for tax purposes. The benefits of this approach must be balanced against the additional costs created by the use of a third-party assessor, which can be significant. These issues and the qualitative nature of property assessment highlight the importance of ensuring that any agreement provides for a fair and easily accessible appeal or mediation system.

Issue 4: Tax Rate Determination

Once the urban reserve has been established, the property tax rate is determined by the First Nation, not the municipality. The tax rate set by the First Nation can have a significant impact on all stakeholders with an interest in the urban reserve. The tax rate determines the amount of taxes raised by the First Nation and the revenue available to provide services, develop the land further, and support the First Nation's members. If the property tax is established under the FMA, it may also generate a source of revenue that can be used as collateral to attract financing for development. For commercial interests that are already located on the urban reserve, or are considering location on the reserve, the tax rate has the potential to be either an attraction (if the reserve tax rate is lower than the adjacent municipal property tax rate) or a deterrent (if the reserve rate is higher than the adjacent municipal rate). The autonomy of the First Nation in setting its own tax rate also has the potential to create tax competition for the municipality. Prior studies have shown that local governments located closely to each other engage in strategic rate setting, creating tax competition. For example, Brueckner and Saavedra's investigation of property tax rate setting by local governments concluded that "[s]ince self-interested government officials

45 See, for example, David L. Sjoquist and Mary Beth Walker, "Economies of Scale in Property Tax Assessment" (1999) 52:2 *National Tax Journal* 207-20.

choose tax rates knowing that consumers make such comparisons, strategic interaction among communities arises, as in a tax competition model.”⁴⁶

Recommendation. If prices for services are based on municipal tax rates and assessments, the tax rates set by the First Nation should be at least equal to the municipal rates, so that the revenues raised are sufficient to pay for the services. An agreed-upon common rate is also beneficial to both the municipality and the First Nation in avoiding tax competition, which can have negative economic and relationship impacts.

Issue 5: Taxpayer Representation

A principle of taxation in democratic countries is that taxation must be determined by representation. Put differently, taxpayers should have some voice in decisions on the taxes that they must pay. The Kamloops amendment provided First Nations with the power to tax non-First Nation interests on reserve. Therefore, non-First Nation businesses located on an urban reserve are subject to property tax levied by the First Nation government despite having no say in that government. This facet of property taxation by First Nations has been controversial in the past. For example, non-First Nation residents of Musqueam reserve lands in Vancouver wanted to be sure that they would be treated like other Vancouver citizens.⁴⁷ On the other hand, only First Nation members living off reserve in the municipality would have a vote in municipal elections, providing a very limited voter voice in regard to tax concerns for the urban reserve.

Recommendation. The process for approval of First Nation tax bylaws takes into consideration aspects of a lack of representation for non-members by requiring that rate changes be approved by the FNTC. When reviewing the tax rate, the FNTC ensures that any rate increases are in line with inflation or that the changes match the rate in the local jurisdiction. Exceptions are allowed only in extraordinary circumstances, taking into account considerations such as taxpayer support, an unusual increase in expenses, or a transition to a different reference jurisdiction.

In regard to the issue of taxpayers on the urban reserve having a voice in the city's tax and service decisions, open communication and dialogue between the parties is important. The experience of Asimakiniseekan Askiy suggests that, over time, confidence in the relationship between the parties can strengthen. Although MLCN does not have a direct advocate at city hall, the city consults the First Nation Chief and Council on relevant matters, and values the perspective of the First Nation. For example, representatives of the urban reserve currently serve on Saskatoon's rapid transit committee.

46 Jan K. Brueckner and Luz A. Saavedra, “Do Local Governments Engage in Strategic Property Tax Competition?” (2001) 52:4 *National Tax Journal* 203-29, at 226.

47 Robert L. Bish, “First-Nation Government and Non-Native Taxpayers: Harmonizing Relationships,” prepared for the Indian Taxation Advisory Board, February 1998 (www.uvic.ca/hsd/publicadmin/assets/docs/BBish/non_native_taxpayers.pdf).

Issue 6: Lack of Retained Property Tax Revenues

As discussed above, aligning the interests of the First Nation and the municipality while minimizing economic friction is generally achieved by setting the First Nation tax rate as equivalent to the service rate charged by the municipality, and by using a common and agreed-upon tax assessment formula. This approach results in the majority of the First Nation's property tax revenues being used to acquire services from the municipality, and provides little opportunity for the retention of tax revenue for members.

Recommendation. Negotiating an upfront lump-sum payment for a fixed service period can be beneficial to the First Nation if it is able to develop the property beyond the tax base used to estimate the lump sum. This strategy entails some risk since the payment is concrete, and at the time of negotiation the potential of the development has not yet been realized; however, as illustrated by MLCN's negotiation with the Saskatoon school board, this approach can provide long-term benefits if the First Nation is successful in achieving or even exceeding its development goals.

CONCLUSION

Property tax and service agreements between First Nations and municipalities continue to be one of the most significant barriers to the establishment and ultimate success of urban reserves. However, contemporary initiatives to establish urban reserves benefit from the framework created by the significant efforts of MLCN and the city of Saskatoon to work together.

Urban reserves make substantial financial contributions to municipalities through their service fee payments and the commerce that they generate. Importantly, property tax is not the determinant of a business's decision to locate on or off the urban reserve; rather, it serves as a common thread, since business lessees will be facing the same tax rate and receiving seamless services wherever they are located within the urban area. For most urban reserves, property tax is not the economic driver of success, but the required mechanism to fund the necessary municipal services for the urban reserve development. Municipal service agreements take substantial time and effort to negotiate, but they are the gateway to accessing infrastructure and markets to support an investment in which economic success is driven by the strength of the First Nation's business plan for its urban reserve.

Policy Forum: Implementing the Chippewas of Georgina Island First Nation Property Tax System—Opportunities, Challenges, and Lessons Learned

Kate McCue and Bill McCue*

PRÉCIS

En 2018, la Première Nation des Chippewas de Georgina Island (PNCGI) a mis en place un système d'impôt foncier des Premières Nations en vertu de la Loi sur la gestion financière des premières nations (LGFPN) — l'une des premières Premières Nations de l'Ontario à le faire. La mise en place d'un régime d'impôt foncier a donné à la PNCGI l'occasion d'améliorer le financement et l'expansion des services locaux, et d'assurer un partage plus équitable des coûts des services locaux entre les propriétaires de chalets louant des terres de la Première Nation et la Première Nation. Les principaux défis qui se sont posés lors de la mise en place du régime d'impôt foncier ont été l'obtention d'un consensus sur la nécessité d'un régime d'imposition, la mise en place d'une infrastructure administrative appropriée, l'exécution des évaluations foncières et le manque de connaissances des professionnels en matière d'impôt foncier des Premières Nations. Ces difficultés ont toutefois permis de créer une base de connaissances sur l'impôt foncier au sein de la PNCGI, chez les locataires de chalets et dans la collectivité en général. Les principales leçons apprises sont les suivantes : 1) commencer le plus tôt possible; 2) il est important d'obtenir le soutien de la Commission de la fiscalité des premières nations et de connaître ses normes; 3) la formation du personnel est importante; 4) il faut communiquer tôt et souvent; 5) organiser des journées portes ouvertes; 6) les services locaux ne se limitent pas à l'enlèvement des ordures; 7) les impôts fonciers ne nuisent pas aux taux de location ou aux ventes de chalets; 8) il faut éduquer les avocats, les agents immobiliers et les autres professionnels; 9) les coûts de démarrage sont élevés; 10) il faut coordonner les lois et les normes avec celles des provinces; 11) il faut moderniser les systèmes; et 12) il faut utiliser d'autres parties de la LGFPN.

* Kate McCue is of Fiscal Realities Economists Ltd. (e-mail: katemccue@bell.net); Bill McCue is a councillor of the Chippewas of Georgina Island First Nation, a commissioner on the First Nations Tax Commission, and a director on the First Nations Lands Advisory Board (e-mail: william.mccue@georginaisland.com).

ABSTRACT

In 2018, the Chippewas of Georgina Island First Nation (GIFN) implemented a First Nation property tax system under the First Nations Fiscal Management Act (FMA) — one of the earliest First Nations in Ontario to do so. Implementation of a property tax system gave GIFN an opportunity to improve funding for and expand local services, and provide a more equitable sharing of local service costs between cottagers leasing First Nation land and the First Nation. Key challenges encountered when implementing the property tax system were building consensus around the need for a tax system, building an appropriate administrative infrastructure, carrying out property assessments, and professionals lacking knowledge of First Nation property tax. These challenges, however, presented opportunities to create a knowledge base around property taxation within GIFN, among cottage leaseholders, and in the wider community. Key lessons learned were (1) start as soon as possible; (2) First Nations Tax Commission support and standards are important; (3) staff training is important; (4) communicate early and often; (5) hold open houses; (6) local services are more than garbage collection; (7) property taxes do not harm lease rates or cottage sales; (8) educate lawyers, real estate agents, and other professionals; (9) startup costs were significant; (10) coordinate laws and standards with provincial variations; (11) modernize systems; and (12) utilize other parts of the FMA.

KEYWORDS: FIRST NATIONS ■ RESERVES ■ PROPERTY TAXES

CONTENTS

Introduction	858
The Chippewas of Georgina Island First Nation	859
History and Challenges	861
The Decision To Implement Property Tax Under the FMA	861
The GIFN Property Tax and Assessment Laws	863
Establishing the GIFN Property Tax System	865
Lessons Learned	869

INTRODUCTION

In 2018, the Chippewas of Georgina Island First Nation (GIFN) implemented a First Nation property tax system. There are more than 150 First Nation property tax systems across Canada; in Ontario, GIFN and Wasauksing First Nation were the second and third First Nations, respectively, to implement a First Nation property tax under the First Nations Fiscal Management Act (FMA).¹ We led and participated in this process.² We are writing this article for the *Canadian Tax Journal's* Policy Forum to share GIFN's experience with First Nation property tax and to provide some insight into our lessons learned.

1 SC 2005, c. 9, as amended.

2 Bill McCue has property taxation as one of his GIFN councillor portfolios and is also a commissioner on the First Nations Tax Commission. Kate McCue provided support to GIFN, acting as a project manager for the GIFN property tax system.

THE CHIPPEWAS OF GEORGINA ISLAND FIRST NATION

GIFN is located on lands in and adjacent to Lake Simcoe about 100 kilometres north of Toronto. We are part of the Anishinaabe Nation and signatory to the Williams Treaty of 1923.³ GIFN is made up of three islands—Georgina Island, Snake Island, and Fox Island—as well as some additional property on the mainland near Virginia Beach and Island Grove, adjacent to the town of Georgina.

Our community is located on Georgina Island, the largest of the three islands, where there are approximately 100 member households and 186 cottage leases, as well as our school, health centre, fire station, police station, administration building, community centre, and recreational amenities. Access to Georgina Island is by car ferry except in the winter, when we access the island by ice road or airboat. We are currently under a boil-water advisory that has been in place since 2016. The main industries on Georgina Island are public administration, construction, and tourism. In winter, much of the tourism is focused on ice fishing in Lake Simcoe. Georgina Island is a net importer of labour. Rush hour traffic flows toward the island in the morning and away from the island in the afternoon.

There are 268 cottage leases on Snake Island and Fox Island, as well as a couple of member homes. There is no infrastructure on these islands, and access to the cottages is by water taxi only. The interior of each island is forested, with a trail to facilitate garbage collection by staff.

GIFN reserve lands on the mainland at Virginia Beach include the Island View Business Centre and Marina, which is owned and operated by GIFN. It is a full-service marina with approximately 75 boat slips, a gas station, and commercial space that is leased to a restaurant, two retail shops, and several office tenants. There is also a small natural gas pipeline on the property.

As development around Lake Simcoe increased in the 1960s, local municipalities and cottagers wanted the federal government to turn Georgina Island and/or Snake Island into a public park. GIFN used the opportunity to lease waterfront properties to cottagers in order to generate much-needed income. Some families of cottagers have been coming to GIFN for generations, while other cottage properties are more recent developments.

GIFN lands are managed under the Chippewas of Georgina Island Land Management Code.⁴ GIFN hosted the signing of the Framework Agreement on First Nations

3 GIFN is also part of several other treaties, including the Collins Treaty (1785), the Gun Shot Treaty (1787), Treaty 16 Simcoe (1815), Treaty 18 Nottawasaga (1818), and Treaty 5 Penetanguishene (1876).

4 Chippewas of Georgina Island First Nation Land Management Code, ratified March 11, 1997 (<http://labrc.com/wp-content/uploads/2014/03/Chippewas-of-Georgina-Island-Land-Code.pdf>).

Land Management (“the framework agreement”)⁵ in 1996 and was the initial First Nation in Canada to ratify its land code in 1997. Band members can hold individual interests in reserve land through certificates of possession (CPs). Non-band members can hold leasehold interests on the reserve. Most of the cottage properties on Georgina Island are leased from CP holders (with the lease payments going to those band members), while on Snake Island and Fox Island leases are leased directly from GIFN. The leases generally follow a standard form, although there have been modifications over the years.

The lease provides for rates to be determined at the beginning of each 5-year period during the term of the lease, based on fair market rents at that time. In the 5th year, a professional appraisal firm is contracted to complete a mass appraisal of the land portion of the leasehold properties and estimate the revised fair market rents using a market-based land rent ratio (LRR) to the market value of vacant land. The maximum term for a GIFN lease is 49 years. Leaseholders may negotiate lease renewals, but renewals are not guaranteed. The leases state that the property is to be used for a single recreational dwelling and not for permanent residences. Cottage rentals are not allowed. There is also a provision in every lease stating that the leaseholder is responsible for following the laws of the First Nation and paying any taxes assessed by the First Nation. There is a healthy market for GIFN leases, with numerous realtors listing leasehold properties on the reserve. Cottagers may assign the lease on their lots and sell their buildings and chattels to a purchaser with the consent of the GIFN Council and payment of a \$750 fee to the Lands Department. The practice is to allow the new tenant to take over the existing lease for its remaining duration.

In addition to participation in the framework agreement and the FMA, GIFN has its own membership code and participates in the First Nations Elections Act.⁶ It also operates its own school under its education law pursuant to the Anishinabek Nation Education Agreement Act.⁷ By participating in optional sectoral self-government initiatives, GIFN has opted out of approximately 50 percent of the provisions of the Indian Act.⁸

5 The framework agreement was signed on February 12, 1996 between the 13 First Nations who created and originally advocated for it and the minister of Indian affairs and northern development. Canada ratified and implemented the framework agreement by the First Nations Land Management Act, SC 1999, c. 24, which received royal assent on June 17, 1999. First Nations Land Management is an initiative developed to allow First Nations to opt out of the 44 lands-related sections of the Indian Act (*infra* note 8). Each signatory community to the framework agreement assumes administration and full law-making authority in respect of its reserve lands, environment, and natural resources when it ratifies its land code. At the time of writing, 101 First Nations across Canada have ratified their land codes. More information on the framework agreement is available from the First Nations Land Management Resource Centre (www.labrc.com).

6 SC 2014, c. 5, as amended.

7 SC 2017, c. 32, as amended.

8 RSC 1985, c. I-5, as amended.

HISTORY AND CHALLENGES

In the 1960s, Ontario First Nations were having issues with municipalities collecting taxes on reserve but not providing services on reserve. Municipalities were also having problems with tax collection since their enforcement powers were not as effective on reserve lands. At that time, the Ontario Assessment Act exempted “property held in trust for a tribe or body of Indians, but not if occupied by a person who is not a member of a tribe or body of Indians.”⁹

A group of First Nations (including Curve Lake, Hiawatha, Saugeen, Chippewas of Nawash, Chippewas of Georgina Island, Chippewas of Kettle and Stony Point, Walpole Island First Nation, and Beausoleil First Nation) joined together to form the Indian Tax Grievance Committee. The committee wrote a brief to the province dated November 13, 1968, which included the following:

It is submitted that the Province of Ontario should permit the Band to collect taxes from their own lands which are leased to non-Indians. This would be a progressive step towards creating self-sufficient Bands and at the same time assisting the Bands to provide needed services to lease-hold lands. All of which is respectfully submitted.¹⁰

In 1972, Ontario amended the provincial Assessment Act¹¹ so that reserve properties would no longer be assessed and municipalities could not charge the residents property tax. GIFN started charging cottagers service fees but had difficulty collecting because the Indian agents,¹² who were supposed to be acting in the First Nation’s interest, would not enforce the fees under the lease.

Difficulties with the leasing regime under the Indian Act were part of the motivation for GIFN to enter the framework agreement and adopt its own land code. Under the land code, the GIFN Council could impose service fees, but the main collection mechanism was to start the lease cancellation process—action that was disproportionate to the debt owed. The amount of the service fees was not linked to the services provided and could be increased at any time by the Council.

THE DECISION TO IMPLEMENT PROPERTY TAX UNDER THE FMA

GIFN implemented property tax jurisdiction to fund local services and infrastructure such as emergency services, road maintenance, waste management, and environmental protection services. Services to leaseholders have been subsidized by the First

9 RSO 1960, c. 23, as amended, section 4(2).

10 Indian Tax Grievance Committee, brief submitted to the Ontario government, November 13, 1968.

11 Bill 107, An Act To Amend the Assessment Act, SO 1973, c. 26; royal assent May 18, 1973.

12 The term “Indian agents” refers to the local administrators who implemented the Indian Act at the local level on behalf of Indian and Northern Affairs Canada. They controlled almost every aspect of daily life on reserve (including the pass system).

Nation, since leaseholders previously paid a \$750 annual service fee and the remaining costs were funded by the First Nation from transfer funding meant to benefit GIFN members or from GIFN own-source revenues. As mentioned previously, most of the leases on Georgina Island are granted by individual band members, so the lease payments go to the relatively few band members who have cottage leases on their lands.

Property tax is the major revenue source for local governments across Canada to pay for their service responsibilities. Other common local government revenues to fund local services include utility fees, user fees, service taxes, some business taxes, and development levies. Because First Nations with leaseholds have similar service responsibilities, they should have at least as much fiscal jurisdiction and as many options as are available to local governments for the provision of similar services. First Nations are not the same as local governments. A First Nation government is responsible for a blend of local, provincial, and some federal service responsibilities, based on the First Nation's mixture of inherent, statutory, and contracted jurisdictions. Local governments implement their bylaws, collect their revenues, and provide their services through authorities delegated to them by statute from their provincial government.

GIFN is currently paying property tax to the town of Georgina on fee-simple properties that the First Nation purchased as part of its treaty settlement. GIFN property tax jurisdiction will facilitate the additions to reserve (ATR) process and may support a service agreement between GIFN and the town.

First Nation property tax, while still uncommon in Ontario, is not new. While there are also historical examples, modern First Nation property tax began in 1988. The FMA was enacted in 2005 and as of March 2021, had 309 participating First Nations.¹³ There are FMA-participating First Nations in every province and the Northwest Territories. More than 150 First Nations across Canada already collect property tax under the FMA and under the Indian Act, and annual revenues from property tax were expected to be over \$97 million in 2020.¹⁴

In 2017, GIFN's Chief and Council decided to implement a property tax under the FMA. GIFN had a telephone companies taxation bylaw in place for many years but did not decide to implement full property taxation until 2017. The Chief and Council generally operate on a consensus basis, and there were concerns that a property tax implemented by the First Nation would lead to members having to pay other forms of tax. The 2017 election was the first GIFN election under the First Nations Elections Act. This meant that the term of office for Chief and Council was increased from two years to four years. This provided time to implement a property

13 First Nations Tax Commission, *Corporate Plan 2021/2022* (Kamloops, BC: First Nations Tax Commission, 2020) (forthcoming), at 7.

14 *Ibid.*, at 4.

tax system before the next election.¹⁵ The Chief and Council also attended a workshop in Toronto from the Tulo Centre of Indigenous Economics¹⁶ that explained how First Nation property tax worked, explained some of the benefits of property tax, and dispelled some common myths. The Chief and Council could see how First Nation property tax could benefit GIFN, with its substantial potential tax base of leasehold cottagers, and had the confidence needed to move forward with a First Nation property tax system.

THE GIFN PROPERTY TAX AND ASSESSMENT LAWS

The GIFN property tax system is one of the more complex First Nation property tax systems in Canada. It is a budget-based tax system with two tax districts, two taxpayer advisory boards, two tax payments each year, taxable properties in three assessment classifications, a four-year transition period, and the GIFN Assessment Review Board (“the GIFN ARB”).

A budget-based tax system means that staff prepare a budget for each tax district for the amount of expenditures on local services that will be funded through property tax each year. The budget is apportioned among the taxpayers according to the assessed value of their property. Many other First Nations use reference jurisdiction rates, meaning that they simply apply the rates in the adjacent local government jurisdiction to their First Nation tax base. However, for Georgina Island, budget-based property tax rates were a better option for the following reasons:

1. The property tax and assessment laws had to be adopted before the assessments were completed by the Municipal Property Assessment Corporation of Ontario (MPAC),¹⁷ and there was uncertainty as to what the total property assessment would be, given that there had been no property assessments in almost 50 years.
2. The use of a budget-based system meant that GIFN would have jurisdiction over its tax rates, rather than simply applying the rates of the neighbouring local government jurisdiction.
3. There were substantial differences in the local services funded through property tax between GIFN and the town of Georgina, respectively, and concern was expressed by potential GIFN taxpayers regarding, in particular, the education component of municipal property tax.

15 In the recent 2021 GIFN election, Chief Donna Big Canoe was re-elected by a substantial margin, and three of the four incumbent councillors were re-elected. Bill McCue received the most votes of any candidate for councillor. None of the candidates campaigned against the GIFN property tax.

16 For information, see Tulo Centre of Indigenous Economics (www.tulo.ca).

17 See *infra* note 20 and the accompanying text.

4. There were substantial differences in the respective tax bases between GIFN and the town of Georgina. The town of Georgina has a relatively large and diversified tax base, including commercial, industrial, and institutional properties, whereas the Georgina Island tax base consists almost entirely of cottages.
5. While many other First Nations have negotiated a comprehensive service agreement with their adjacent local government, there would be no similar agreement between GIFN and the town of Georgina, owing in part to the island geography, although GIFN does have a fire protection agreement with the town.

Georgina Island and GIFN's mainland properties are in one tax district while Snake Island and Fox Island are in a separate tax district. This reflects the different services provided in these districts.

A four-year transition period was provided to allow taxpayers time to plan and adjust to the change from service fees to property taxes, and to soften the impact for taxpayers with higher valuations. We believe that we were the initial First Nation in Canada to provide a transition period. The transition period is important because there was no previous taxing jurisdiction in place. As explained above, GIFN cottagers had not been liable for property taxes since 1972 and had only been paying service fees. There was a significant tax base already established, and leaseholders with larger waterfront properties were going to be paying more under the property tax. The transition plan has a profile of 50 percent, 50 percent, 75 percent, and 100 percent over the four-year period to phase in the anticipated tax rates. The second year at 50 percent was added at the request of one of the cottage associations to reflect the five-year leasehold rent review that was occurring that year. There was also a minimum tax equal to the previous service fee of \$750 that applied during the transition period.

This year (2021) is year three of the transition period. Local services that will be funded through property tax in 2021 include fire protection, first response, 911, animal control, road and trail maintenance, garbage collection, landfill and recycling, environmental protection, and a new septic inspection program, as well as general government, tax administration, and MPAC assessments.

There are also other services, including services that benefit leaseholders, which GIFN provides and which are funded in other ways. Policing services are funded through a separate policing agreement. Ferry services are funded through Indigenous Services Canada (ISC) and through user fees. In addition, GIFN provides services that are for members only, such as education, health, housing, and social services. Property tax means that leaseholders contribute an increased proportion of the cost of the services from which they benefit, so GIFN revenues can be directed to other needs. The principle that "the beneficiary pays" is often applied in public finance.

The GIFN property tax system, like other First Nation tax systems, provides exemptions for member properties (as long as the property is actually occupied by the member), for the First Nation itself, and for First Nation-owned businesses. One of the reasons why members are exempted from our property tax law is that First Nation public services are already funded on behalf of members in other ways such as ISC funding agreements and GIFN own-source revenues.

The GIFN ARB is composed of three members,¹⁸ and hears and determines assessment appeals under our assessment law. There were multiple appeals in the first year of taxation. Some involved valuation and data issues, which were corrected by agreement with the assessor. However, there was a group of similar appeals regarding the application of the equity provision in the GIFN assessment law,¹⁹ which would eventually be resolved through a hearing and determination by the GIFN ARB. We believe that these appeals were encouraged by professionals who did not fully understand the First Nation property tax system, assessments on First Nation lands, and the proper application of the equity provision in the First Nation system. This had led to significant costs to the appellants, to MPAC, and to GIFN, since there was a hearing for a test case before the GIFN ARB as well as an application for judicial review to the Federal Court of Canada that was eventually withdrawn. The other 2019 appeals were stayed pending the resolution of the test case. The GIFN ARB is now working to resolve those appeals and identify any that require virtual hearings on issues other than equity.

ESTABLISHING THE GIFN PROPERTY TAX SYSTEM

It took almost two years from the time when the GIFN Council decided to move forward with property taxation in the summer of 2017 until the initial property tax notices were issued in the spring of 2019. Some aspects of this process could be worked on simultaneously, while other aspects needed to be completed in sequence.

GIFN hired a full-time tax administrator in 2018. We were able to access a wage subsidy program for training positions through the Ogemawahj Tribal Council for our tax administrator to help with the costs of the tax administrator position prior to the first year of the property tax. Our tax administrator, along with the GIFN First Nation manager, attended the Tulo Centre of Indigenous Economics in Kamloops, British Columbia to complete the Certificate in First Nation Tax Administration program. This program provides a foundation of knowledge regarding First Nation property taxation.

We started by reviewing the First Nations Tax Commission's (FNTC's) sample property tax laws and sample property assessment laws for Ontario. There are many choices that First Nations must make as they adapt the sample laws for their First Nation. Only the Chippewas of Kettle and Stony Point had used the Ontario

18 The GIFN Assessment Law requires that the three-member board include one individual who is a member of the provincial law society, one individual who has assessment and assessment appeal experience in the province, and one additional member.

19 Section 37(11) of the GIFN Assessment Law states, "In determining the value at which any interest in land must be assessed, the Assessment Review Board must have reference to the value at which similar interests in land in the vicinity are assessed and adjust the assessment of the land to make it equitable with that of similar interests in the vicinity if such an adjustment would result in a reduction of the assessment of the interest in land."

samples previously, so changes were also required to ensure that Ontario property tax and assessment practices were reflected. We prepared some estimates of GIFN's property tax potential and a scenario analysis to help GIFN Chief and Council with some of the design choices for the GIFN property tax legal framework.

We also contacted MPAC, which conducts all off-reserve property assessments in Ontario,²⁰ to negotiate a contract whereby MPAC would act as our assessor and determine assessed values in accordance with our assessment law and the provincial valuation methods and rules. Since it had been almost 50 years since assessments had been done on our lands, MPAC needed to physically measure and inspect each GIFN leasehold property, cottage, deck, and shed to produce the assessments. The contract was structured as a flat fee per property for the initial assessment year, and then lower fees per property in subsequent years. MPAC produces the assessments and sends out the assessment notices each year, as well as responding to taxpayer inquiries, addressing requests for reconsideration, and participating in the appeals process. MPAC also helped with reviewing our draft property tax and assessment laws, and adapting the FNTC samples so that the laws would work with Ontario assessment practices.

We also began developing a communication plan. Implementing a new taxation system is a significant change, and cottagers and band members needed to receive information about First Nation property tax and the GIFN property tax system. The FNTC has standards for providing notice²¹ to interested parties relating to local revenue laws, in addition to the requirements in section 6 of the FMA. Notice of proposed initial property tax and assessment laws is required to be given at least 45 days prior to enacting the law by (1) publishing a notice of the proposed law in the *First Nations Gazette*, (2) posting the notice in a public place on the reserve lands of the First Nation, and (3) sending the notice, by mail or electronic means, to the FNTC.²² Written representations can be sent to GIFN Council for review prior to the enactment of the proposed law, and those who make written representations to Council are also invited to make written representations to the FNTC during its review of the First Nation law.

We decided that in addition to the FNTC notice requirements, we would distribute an information package to CP holders and have an open house at the band office to answer any members' questions. In this regard, band members had been told of the decision to implement a property tax at a previous band meeting. We also decided to hold open houses for leaseholders, with representatives from MPAC present, both before and after the MPAC assessments were sent out. The initial open house was an opportunity for leaseholders to receive an introduction to the GIFN property tax system and ask questions. The subsequent open houses to be held after the initial

20 For additional information, see Ontario, Municipal Property Assessment Corporation (www.mpac.ca).

21 First Nations Tax Commission, "Standards Respecting Notices Relating to Local Revenue Laws, 2018" (<https://partii-partiii.fng.ca/fng-gpn-II-III/sfm/en/17643/1/document.do>).

22 FMA section 6(1).

assessments had been sent out would include general presentations on how the assessments were arrived at and provide opportunities for leaseholders to meet one-on-one with the assessors, to review the data and assessment for their property and possibly correct any data errors. We had to plan our schedule to allow for the representation periods described above, the enactment of laws by Council, and the FNTC review process. Property assessments had to take place during the summer months to allow for boat access, and assessment open houses needed be held in September while the leaseholders were still around to participate. Hence, scheduling was challenging.

Council approved the proposed laws and communication plan. We held the member open house at the band office, and only a few people came out. We arranged with the town of Georgina to rent a meeting room in one of its facilities for the leaseholder open house. We prepared a presentation and printed out the slides as giant posters to hang on the walls. We had a large turnout. Our meeting room was overflowing. We had anticipated individual discussions, with people coming and going, but the whole group wanted to listen to the whole discussion. Chief and Council were there to show their support for the process and explain why the property tax system was being implemented. A regional director from MPAC was present to respond to assessment questions. Kate McCue was there to respond to First Nation property tax questions. The leaseholders were interested, and the questions went on for several hours. Some leaseholders would try to make the same point repeatedly, and then other leaseholders would respond with a different view, or to emphasize a previous answer.

As a result of our communications activities, we received approximately 35 written representations, which were reviewed by Council prior to enacting the laws, and written replies were sent from our property tax administration department.

The enacted laws were then forwarded to the FNTC, with supporting documentation, for review. Those who had made initial representations to the First Nation were invited to make further representations to the FNTC during a further 30-day representation period, in accordance with section 7 of the FMA. The FNTC reviewed the further representations received before ultimately approving the GIFN laws on July 12, 2018.

Once the property tax and assessment laws were in force, the MPAC assessors could start carrying out their assessment inspections. MPAC arranged for approximately 15 assessors to come to GIFN and work in teams to accelerate the inspection process. For Georgina Island, they came on the ferry. For Snake Island and Fox Island, they had to be brought to the islands by water taxi and could do their work only in good weather.

The assessments were completed and distributed in August, and we hosted the open houses in September. Senior MPAC managers were there as presenters, an FNTC tax adviser presented on behalf of the FNTC, and Kate McCue presented on behalf of GIFN. The MPAC assessors also attended and set up at small tables around the perimeter of the hall to review property data and assessments with each individual leaseholder. This was important to correct data issues and promote communication between assessors and property owners.

One of the things that we were trying to explain to leaseholders was that in all First Nation assessment laws,

- “assessed value” means “in relation to an interest in land, the amount of money the fee simple of that interest, if unencumbered and held off the reserve, would realize if sold at arm’s length by a willing seller to a willing buyer,”²³ and
- “interest in land” includes both land and improvements on the property.

This method of determining assessed value is a challenging concept to communicate because there are no fee-simple interests in reserve lands, and leaseholders have an occupational interest rather than a fee-simple interest in the property. First Nation property tax systems levy taxes on occupiers of reserve lands, regardless of the nature of the occupation. This approach is similar to an off-reserve circumstance where a person occupies Crown land (whether by lease, licence, or otherwise). In such a case, the person’s occupation is taxable, and the provincial assessment legislation directs the assessor to assess the occupation on the basis of the full market value of the property, as though it were held in fee simple by the occupier. For example, where public land is leased to a person in a national park, the lessee’s occupation of Crown land is taxed at the full market value of the property, as if the lessee held the land in fee simple.²⁴ First Nation property assessment is completed as if the property were off reserve because there is no fee-simple interest in reserve land and there is a lack of comparable data on reserve lands. The assessment of reserve properties as if they were held in fee simple avoids the issue of reserve land valuation and results in a tax burden similar to that for off-reserve property taxpayers. The reasons for this approach are explained as follows on the FNTC website:

- Assessors use the same rules for assessment that are used provincially. This means the assessment process does not require new and different rules, has comparable properties, and is cost effective to implement.
- Tax revenues do not depend on whether the occupation is under a lease, license, or other arrangement or on the time remaining on the occupation. The assessed value and proportional share of taxes for a class of property will be the same as off reserve lands, whether a property is held under a lease or a license or whether that tenure is short or long term. This ensures a similar distribution of tax liability as is achieved on non-reserve lands.
- The approach is used provincially for occupational interests and is familiar to taxpayers. Using an approach that is like the system used off reserve enables First Nations and their taxpayers to compare their annual tax rates to adjacent non-reserve jurisdictions.²⁵

23 Ontario, Municipal Property Assessment Corporation, “Georgina Island First Nation Property Assessments” (www.mpac.ca/en/News/FactSheet/GeorginaIslandFirstNationPropertyAssessments).

24 First Nations Tax Commission, “First Nations Property Assessment” (<https://fntc.ca/property-taxation-on-reserve>).

25 Ibid.

After our assessment open houses, we arranged for the FNTC to facilitate a workshop for leaseholders to have input into our draft communication policy. Approximately 35 leaseholders attended, and worked in groups to review and revise a section of the draft communication policy. The communication policy established the Georgina Island Taxpayer Advisory Body and the Snake and Fox Islands Taxpayer Advisory Body, and explained how those groups would work with the tax administrator during the annual process to review and adopt the property tax budget for each tax district, and the annual rates and annual local revenue expenditure laws. It was important to create a process for taxpayer input into the annual expenditure laws and a mechanism for the representation and communication of taxpayer interests, as a way of addressing concerns about taxation and representation, since non-member property taxpayers on First Nation lands do not vote in First Nation elections for Chief and Council.

A key part of implementing property taxes was creating the necessary administrative systems. GIFN used TAS (tax administration system) cloud-based software, which is designed specifically for tax administration systems established under the FMA. TAS tracks payments and other information for each property tax folio and generates property tax notices as well as other property tax documents. We also set up online banking to enable electronic payments and pre-authorized payments in accordance with our property tax law. Separate paperwork had to be filed with each major bank, and the process took approximately six months to complete, which was longer than anticipated.

For the initial year of taxation, the 2019 budgets and annual laws were prepared in November 2018 for review with the taxpayer advisory boards. Normally, the interim taxes are based on 50 percent of the previous year's property tax bill, and the budgets and annual laws are not enacted until May; however, we wanted the budget notification period to be completed and copies of the proposed annual laws to be available prior to the distribution of the initial interim tax notices. We issued our first interim property tax notices representing 50 percent of the anticipated property taxes for the year on March 1, 2019, with a due date of April 1, 2019, and final property tax notices on June 30, 2019, with a due date of August 1, 2019. Property taxes that were not paid by the due date were subject to a penalty of 10 percent plus interest at 15 percent per year until taxes were paid. For 2019, we had a tax payment rate of just over 95 percent within the calendar year, with the outstanding taxes being paid in the following year. For 2020, after delaying the interim tax payment because of the COVID-19 emergency, we ended up with a tax payment rate of 97.6 percent by the end of the calendar year.

LESSONS LEARNED

Overall, property taxation has been positive for GIFN. Our lessons learned have included the following:

- *Start as soon as possible.* First Nations should start the implementation process for First Nation property taxation as soon as possible since every element in the process will likely take longer than expected.

- *FNTC support and standards are important.* The FNTC provides institutional support for the First Nation property tax system, including standards and sample laws. FNTC tax advisers are also available to guide First Nations who are new to property tax through the process. The FNTC helps to transfer knowledge and experience from the more than 150 First Nation property tax administrations that are currently in operation. This support is especially beneficial to First Nations who are new to property tax or have fewer resources available. The FNTC's role as regulator and the requirements to meet FNTC standards are also helpful for building taxpayer confidence in the First Nation property tax system and taxpayer communication.
- *Staff training is important.* Having staff attend the Certificate in First Nation Tax Administration program at Tulo gave them the confidence, experience, and knowledge to implement our First Nation property tax system and to respond to taxpayer inquiries. There was a bursary for the tuition amounts, but the First Nation paid for travel costs from Ontario to British Columbia on eight occasions. It was also beneficial to have the First Nation manager complete the training since First Nation property tax involves many departments within the First Nation, including the departments that are delivering community services, lands, finance, and audits.
- *Communicate early and often.* Early and frequent communication is important, and staff can expect to have to answer the same questions multiple times. Staff should also prepare for a lot of interest and emotion from leaseholders regarding their property taxes.
- *Hold open houses.* Open houses are an important part of a communication plan. It can be daunting for First Nations who are new to property tax to talk with taxpayers about something that they are just learning about themselves. However, open houses allowed us to have experts communicating with everyone present in real time, and also allowed for questions and interactions not only between the leaseholders and the presenters, but also among the leaseholders themselves. When there were passionate, emotional, or repetitive comments, it was often the other participants who had the best response. We also suggest using the services of an independent and experienced facilitator to manage the meeting and maintain focus.
- *Local services are more than garbage collection.* Leaseholders have learned more about the GFN public services that they are receiving. When we started implementation, leaseholders would argue that the only service they received was garbage collection, so why should they pay more? However, most local services benefit the community without occurring directly at the taxpayer's property.
- *Property taxes do not harm lease rates or cottage sales.* Leaseholders have also learned that property taxes have had little impact on lease rates to CP holders or sales of cottages. When we were starting to implement property tax, a few leaseholders had predicted that property tax would cause drastic reductions in lease revenues or crush the market for resales of cottages. Neither of these predictions was realized. The five-year rent review that was just completed

generally resulted in a small increase in annual lease payments. Like most of southern Ontario, GIFN has seen a strong market for cottage resales during the pandemic. There have been no complaints from recent cottage purchasers about the GIFN property tax system, since purchasers generally have experience with property taxes elsewhere in Ontario.

- *Educate lawyers, real estate agents, and other professionals.* There are few professionals in Ontario with experience in First Nation property tax. Our lawyer was learning along with us as we went through the process. Other Ontario First Nations have had to use lawyers from British Columbia to assist them through the law development process. Having more lawyers and real estate agents with training regarding the First Nation property tax system would be helpful, and might reduce the amount of misleading or incorrect information.
- *The startup costs were significant.* The costs for the initial assessments had to be covered by GIFN from other own-source revenues prior to the initial year of taxation. This meant that GIFN could not use the property tax revenues toward that cost. The cost was approximately 50 percent of the property taxes for one year for most residential properties. While this amount is not huge, it could be significant if a First Nation did not have uncommitted own-source revenues to cover it. However, MPAC was helpful with dividing the costs into several payments and regarding the timing of the payments. In our experience, only MPAC has the data, experience, and reputation to complete the property assessments in Ontario. Perhaps a program could be developed to provide bridge funding or grants to First Nations who are introducing a property tax, to assist with the costs of initial property assessments in locations where there are no previous assessments. There are also staff training costs and legal costs associated with adapting the FNTC's sample laws for the First Nation's own circumstances and with enacting the property tax, assessment, and annual rates and expenditure laws. The FNTC provides grants to help with the initial legal costs and Tulo tuition. As noted earlier, we were also able to access a wage subsidy program for training positions through the Ogemawahj Tribal Council for our tax administrator.
- *Coordinate laws and standards with provincial variations.* There are still some parts of the Ontario property tax and assessment system that could be more fully or better incorporated into the FMA laws and the FNTC's sample laws for Ontario. For example, since many of the initial taxing First Nations were in British Columbia, the FNTC's sample laws tend to reflect the annual assessment cycle rather than the four-year assessment cycle that has been used in Ontario. Since Ontario has now delayed its general reassessment by at least two years, we have had to repeatedly amend our GIFN assessment law to follow the Ontario reassessment changes. Having interim and final property tax bills is also an Ontario variation, with some Ontario municipalities issuing four or six tax notices annually.
- *Modernize systems.* The implementation of property tax has led to improvements or modernizations in GIFN's systems and processes in other areas. For

example, the implementation of electronic payments by property tax administration is leading to implementation of electronic payments in the lands department, at the request of leaseholders.

- *Utilize other parts of the FMA.* Implementing property tax has led to GIFN accessing other services from the FMA institutions. We are currently in the process of implementing a financial administration law through the First Nations Financial Management Board, which could lead to GIFN being able to access 10-year grant funding through ISC instead of funding through shorter-term contribution agreements, or could facilitate the financing of a bridge to Georgina Island as a replacement for our aging ferry, which is one of the community's long-term goals.

In conclusion, as with all sectoral initiatives, implementing First Nation property tax on Georgina Island has not been easy. It has required several years of work by a team of professionals and the unwavering support of Chief and Council. Property tax will continue to benefit our community in the longer term by ensuring that those who benefit from our local services and infrastructure also contribute to the costs. This will enable us to continue to improve our local services and infrastructure, and meet the needs of our community. While property taxation might not be the choice of all First Nations, implementing property tax was the right decision for GIFN.

Policy Forum: First Nation Property Taxation and Governance in British Columbia

Ross Hickey*

PRÉCIS

Dans cet article, je pose la question suivante : « Quelle est la relation entre les règles régissant les élections des conseils de bande et les impôts fonciers dans les Premières Nations de la Colombie-Britannique? » Je présente les trois principales catégories de règles électorales des Premières Nations : les élections par défaut en vertu de la Loi sur les Indiens, les règles de la Loi sur les élections au sein de premières nations et les codes électoraux coutumiers. Je soutiens que les Premières Nations qui utilisent des codes électoraux coutumiers sont plus susceptibles de présenter une gouvernance stable que celles qui ne le font pas. Ce mécanisme peut être utile pour introduire l'impôt foncier. Il peut également réduire l'incertitude liée à l'impôt foncier, une caractéristique connue pour faire baisser la valeur des propriétés dans les réserves. Je fais également des suggestions à l'intention des Premières Nations qui souhaitent améliorer le recouvrement des impôts dans leurs communautés.

ABSTRACT

In this article, I ask, “What is the relationship between rules governing band council elections and property taxation across First Nations in British Columbia?” I outline the three major categories of First Nation electoral rules: default Indian Act elections, First Nations Elections Act rules, and custom election codes. I contend that First Nations who use custom election codes are more likely to exhibit stable governance than those who do not. This mechanism can be helpful in introducing property taxation. It can also reduce property tax uncertainty—a feature known to depress on-reserve property values. I also present some suggestions for First Nations wishing to improve perceptions of taxation in their communities.

* Of the Faculty of Management and Department of Economics, University of British Columbia, Okanagan (Kelowna) (e-mail: ross.hickey@ubc.ca). I thank Maisha Badhon, Dallas Chelick, and Julia Polianskikh for excellent research assistance, and River Doxtator, Daniel Sandler, Frances Woolley, and Alan Macnaughton for helpful comments, suggestions, and critiques. All errors are my own. I am not a member of a First Nation in British Columbia. My family owns property on and off reserve in British Columbia. My research has been supported by the Social Sciences and Humanities Research Council and the University of British Columbia. To view my conflict-of-interest disclosure statement, see Ross Hickey, “Conflict of Interest Disclosure Statement,” July 14, 2021 (<https://sites.google.com/site/rosshickey/conflict-disclosure>).

KEYWORDS: FIRST NATIONS ■ CANADA ■ BRITISH COLUMBIA ■ GOVERNANCE ■ ELECTIONS ■
PROPERTY TAXES

CONTENTS

Introduction	874
First Nation Institutions	876
Concepts for Discussing Governance and Taxation	879
Data and Analysis	881
Policy Proposals	884
Conclusion	887

INTRODUCTION

“Uncertainty” is a word that frequently appears in court transcripts of cases regarding property law and taxation on reserve. For example, in *Hodgson v. Musqueam Indian Band*, the Federal Court noted that uncertainty over the provision of municipal service agreements between First Nations and neighbouring municipalities is a cause for concern for on-reserve residents.¹ In *Musqueam Indian Band v. Glass*, Rothstein J provided the following summary of the discount for land on reserve relative to land off reserve:

One consideration is the Indians’ jurisdiction over the land and uncertainty relating to such matters as property taxation and, in particular, assessment for property taxation purposes by the Indian authority. Another is the publicized unrest on Indian reserves in British Columbia including road blockades in Penticton and Douglas Lake. A further reason is that non-natives cannot stand for election to the body governing the reserve, the Indian Band Council. Non-Indian residents have no vote on issues such as planning, zoning or taxation. Ministerial approval is needed for certain sales or mortgages or construction. Finally, services provided by the City of Vancouver are contracted but permanent arrangements have not been finalized.²

Thus, property tax uncertainty is a key factor influencing the discount of reserve land—but what is the cause of this uncertainty?

There are three key elements of electoral rules that have the potential to affect property tax rates. First, electoral rules determine who is eligible to vote in an election. For example, Kesselman³ argues that the absence of resident non-member representation in elections, the exclusion of resident non-members from voting in band council elections, and the absence of resident non-member input in the electoral

1 [2017] FC 509, at paragraphs 212 to 214.

2 1997 CanLII 5557, at paragraph 43 (FC).

3 Jonathan R. Kesselman, “Aboriginal Taxation of Non-Aboriginal Residents: Representation, Discrimination and Accountability in the Context of First Nations Autonomy” (2000) 48:5 *Canadian Tax Journal* 1525-1644.

system are all cause for concern for those who lease property on reserve but are not band members, because the result is that non-member interests will not be reflected in the choice of tax rates. Electoral rules also determine the timing of elections. The ballot box is where voters discipline politicians, and the timing of elections affects politicians' incentives and has been shown to induce political budget cycles in taxation.⁴ Electoral rules also prescribe how votes are aggregated to select politicians. This influences both who seeks office and how politicians behave while in office.⁵

The focus of my analysis is residential property taxes, partly because of their importance in First Nations' own-source revenue. First Nations have the legal authority to establish a variety of taxes on reserves. These taxes include consumption tax, through the First Nations sales tax (FNST) or the First Nations goods and services tax (FNGST); income tax, through the First Nations personal income tax (FNPIT); and property tax.⁶ But no tax is more frequently used by First Nation communities than the property tax. Nationwide, in 2019, 187 First Nations had a property tax,⁷ while only 8 used the FNST,⁸ 31 used the FNGST,⁹ and 15 used the FNPIT.¹⁰ It is not surprising that First Nations have most frequently implemented property taxation, given its relative ease of administration and relative absence of evasion opportunities. For First Nations governed by the Indian Act,¹¹ it is also a tax with a statutory incidence borne by non-members, with band councils exempting members from the tax.¹² This exemption makes it easier for leaders to introduce this tax without negatively affecting their electoral prospects. Given the importance of property taxation, reducing uncertainty about the property tax environment could make individuals more willing to invest in land on reserve, thus reducing the discount applied

4 Alberto Alesina and Matteo Paradisi, "Political Budget Cycles: Evidence from Italian Cities" (2017) 29:2 *Economics & Politics* 157-77.

5 Timothy Besley, "Political Selection" (2005) 19:3 *Journal of Economic Perspectives* 43-60.

6 See Canada, Department of Crown-Indigenous Relations and Northern Affairs, "Fact Sheet—Taxation by Aboriginal Governments" (www.cirnac-rcaanc.gc.ca/eng/1100100016434/1539971764619).

7 First Nations Tax Commission, "Taxpayers: Property Taxation on Reserve" (<https://fntc.ca/property-taxation-on-reserve>).

8 Canada, Department of Finance, "First Nations Sales Tax Administration Agreements" (www.canada.ca/en/departement-finance/programmes/tax-policy/aboriginal/tax-administration-agreements/first-nations-sales-tax.html).

9 Canada, Department of Finance, "First Nations Goods and Services Tax Administration Agreements" (www.canada.ca/en/departement-finance/programmes/tax-policy/aboriginal/tax-administration-agreements/first-nations-gst.html).

10 Canada, Department of Finance, "First Nations Personal Income Tax Administration Agreements" (www.canada.ca/en/departement-finance/programmes/tax-policy/aboriginal/tax-administration-agreements/first-nations-personal-income-tax.html); and Department of Crown-Indigenous Relations and Northern Affairs, *supra* note 6.

11 RSC 1985, c. I-5, as amended.

12 Kesselman, *supra* note 3, at 1525.

to on-reserve properties. Since property taxes are the outcome of a political process, one possible way to create a more certain tax environment and thus strengthen the tax base available to First Nation governments is to increase the transparency of electoral institutions.

In the next section, I present a description of the institutional setting for taxation on reserves. Following this, I introduce some concepts from the literature on political economy, and present an analysis of First Nation electoral rules and property taxation, followed by a discussion of policy recommendations. These recommendations speak directly to the uncertainty discussed above.

FIRST NATION INSTITUTIONS

Land on reserve is owned by the First Nation band.¹³ Band members may obtain certificates of possession (CPs) from their chief and council, providing them with the legal right to make use of the land in accordance with band land-use policies. CPs are the most common form of exclusive land tenure used by bands in British Columbia. They can only be transferred or sold to other band members, and importantly they cannot be sold to non-members. In order for a non-member of a band to obtain a land tenure agreement for reserve land, that person must lease the property. Leasehold land is well known to trade at a discount relative to freehold land, and this is one important attribute of reserve land that influences the magnitude of the discount applied to it relative to land off reserve.¹⁴

There are two mechanisms available to bands to tax property on reserve: they can apply for permission to levy taxes through section 83 of the Indian Act; or they can apply for permission to levy taxes through the First Nations Fiscal Management Act (FMA).¹⁵ For each mechanism, tax administration is similar, with tax rates being set through band council resolutions. However, there are important differences. The FMA adds a layer of governance oversight through the First Nations Tax Commission (FNTC) and also explicitly requires that the interests of taxpayers be represented to taxing councils.¹⁶ The FNTC approves all tax rates scheduled under the FMA. Section 83 of the Indian Act provides no requirement for the representation of taxpayer interests, and all tax rates are approved by the minister responsible under the Indian Act.

First Nations who do not have self-government agreements are governed by the Indian Act.¹⁷ Under the Indian Act, elections for chief and council are to take place

13 Fernando M. Aragón and Anke S. Kessler, "Property Rights on First Nations Reserve Land" (2020) 53:2 *Canadian Journal of Economics* 460-95.

14 *Musqueam Indian Band v. Glass*, 2000 SCC 52; *Hodgson*, supra note 1.

15 SC 2005, c. 9, as amended.

16 FMA section 5(1)(c).

17 Canada, Department of Crown-Indigenous Relations and Northern Affairs, "Self-Government" (www.cirnac-rcaanc.gc.ca/eng/1100100032275/1529354547314).

every two years.¹⁸ The default Indian Act elections code establishes rules that the comparative politics literature would describe as a multi-member single district plurality rule.¹⁹ All candidates are elected by all voters in a single district with the top “N” candidates obtaining the “N” elected positions.²⁰ With Indian Act elections, much like a presidential system, once the First Nation’s chief and councillors have been elected, they hold office with executive and legislative authority for two years until the next scheduled election date. This is in contrast to Canada’s parliamentary system, where the government formed by the prime minister holds the executive authority and governs at the discretion of the legislature.

The Indian Act provides transparency through election monitoring by the minister responsible, and electoral rules are described by the act. However, some First Nation people express frustration with this section of the act. As an example, consider the following passage from the 1996 report of the Royal Commission on Aboriginal Peoples:

In many First Nations communities, the family-based consensus process has been displaced by majority-based electoral systems, which have altered the roles of women, elders and other members of the community. According to some interveners, these electoral systems have had the effect of splintering viewpoints, alienating the community from decision making, and breeding distrust of leaders and officials. Electoral systems have also been susceptible to domination by numerically powerful families in the community.

“When you look at elections in communities with the DIA [Department of Indian Affairs] elected system it’s common knowledge that the ones with the bigger families are the ones that get elected in these positions today.”—Jeanette Castello, Terrace, BC, 25 May 1993.²¹

Within Indian Act election rules, there is some unobservable variation in the actual procedures used. For example, the act offers the governor in council the ability to decide whether a First Nation’s chief is elected directly by the members or is elected indirectly by the elected councillors.²² Which of these alternatives applies to a particular First Nation is not clear, since there is no repository of this information. Indirect election of chiefs would provide less accountability than direct election. It is also the case under section 74 of the Indian Act that First Nations can hold a referendum to switch from having a single electoral district to having “not more

18 Indian Act section 78.

19 Torsten Persson and Guido Tabellini, *The Economic Effects of Constitutions* (Cambridge, UK: MIT Press, 2005).

20 Indian Act section 74.

21 Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, vol. 2 (Ottawa: Canada Communication Group, October 1996), chapter 3, at 130.

22 Indian Act section 74(3).

than six electoral sections containing as nearly as may be an equal number of Indians eligible to vote.”²³ Multi-member districts are possible in that case, thus introducing a problem that is well known in the economics literature—“the team production problem”—according to which when people share gains and blame, they reduce their effort.²⁴

The first available alternative to the Indian Act elections is a custom election code.²⁵ Under the Indian Act, First Nations can apply for ministerial approval for custom elections.²⁶ With a custom election, bands select their own term length along with other features of their electoral rules. Other important features of custom election codes are that they can specify criteria for who is eligible to run for office, and for the removal of elected officials from office. The Indian Act has no mechanism to prevent members whom the First Nation deems unfit for office from running for office following an offence. With the Indian Act elections, the minister is limited in that the minister can remove an elected official from office but cannot prevent candidates from running who meet the open criteria—that is, the candidate is a member of the First Nation who is 18 years of age or older on the date of the nomination meeting. Further concerns with Indian Act elections are found in the 2010 report of the Senate Standing Committee on Aboriginal Peoples:

While several individuals talked about their particular grievances, underlying many of these complaints appears to be a need to address, in a meaningful way, the accountability of Chief and Council, the fostering [of] greater transparency in the way funds are managed, the establishment of mechanisms for greater community participation in the decision-making process, and the creation of a neutral civil service on reserve. With regard to elections specifically, concerns were commonly raised regarding the impartiality of elections and electoral officers, the use and/or misuse of mail-in ballots, the need for a transparent appeals process, and clear procedures for the removal and suspension of elected officials for wrongdoing and unethical practices.²⁷

23 Ibid., section 74(4).

24 Bengt Holmstrom, “Moral Hazard in Teams” (1982) 13:2 *Bell Journal of Economics* 324–40.

25 Some examples are Stz’uminus First Nation, “Election Code” (www.stzuminus.com/members/election-code/); Namgis First Nation Election Regulations, September 2013 (www.namgis.bc.ca/wp-content/uploads/2015/05/Namgis-First-Nation-Election-Regulations1.pdf); and The Heiltsuk Custom Election Rules Governing the Election of Chief and Council, amended February 2014 (www.heiltsuknation.ca/wp-content/uploads/2016/03/H CER-Final-Feb-2104.pdf).

26 Indian Act section 74; and Canada, Department of Indigenous Services, “Conversion to Community Election System Policy” (www.isc-sac.gc.ca/eng/1433166668652/1565371688997).

27 Canada, Senate, *First Nations Elections: The Choice Is Inherently Theirs, Report of the Standing Senate Committee on Aboriginal Peoples*, chaired by Gerry St. Germain (Ottawa: Senate Committees Directorate, May 2010), at 36.

The recent First Nations Elections Act (FNEA)²⁸ provides a third alternative election code for First Nations who are still under the Indian Act. Elections under this 2016 act, like the Indian Act elections, have greater transparency than custom elections because FNEA rules are documented in federal legislation. The FNEA addresses some of the concerns raised above, namely, describing a more detailed appeals process and providing procedures for the removal of elected officials. The primary innovation, though, is the extension of the term of office for chief and council to four years. While the FNEA offers a four-year term of office, it is more restrictive with respect to the forms of governance that can be used by First Nations, compared to those available under a custom code.

CONCEPTS FOR DISCUSSING GOVERNANCE AND TAXATION

To understand why these electoral rules matter, we turn to public choice theory. This theory sees politicians as rational economic agents who make decisions to advance their own (possibly selfish, possibly altruistic) interests. Electoral rules matter because they change politicians' incentives, and thus the decisions that politicians make.

The scope of public choice theory is vast, so here I highlight key results that are particularly relevant to understanding First Nation governance. The first is Black's median voter theory.²⁹ Median voter theory suggests that, under certain conditions, candidates for election take positions that align with the median voter's preferred policy. In the present context, if all residents on reserve were ranked by their preferred tax rates, the median, and all voters, would be untaxed owing to the exemptions granted by First Nations. Voters elect a council that will apply taxation to the non-voting residents. We should expect the tax rates selected by the median voter to exceed what would have been selected were the median (or any voter) to bear the tax. Uncertainty about property taxes arises in this context because for a non-member to form an expectation over future tax rates in this context, that person would have to form an expectation about member preferences—preferences for taxing other people—which are hard to predict or observe. In addition, because non-members cannot participate in elections on reserve, they have little reason to inform themselves of the electoral rules used on reserve, and thus face even more uncertainty.

Yet even if, in accordance with Black's median voter theory, the band council acts to promote band members' interests, surely band members and non-members alike have an interest in the council's setting property tax rates that promote long-term economic growth on reserve or, more generally, the well-being of band members in the medium to long term. However, setting the "right" (that is, long-term,

28 SC 2014, c. 5, as amended.

29 Duncan Black, "On the Rationale of Group Decision-Making" (1948) 56:1 *Journal of Political Economy* 23-34.

growth-promoting) tax rates requires effort on the part of councillors. For example, councillors need to inform themselves of the relevant issues and learn how property taxation operates. Because the tax rates chosen depend on how much effort is expended by the council, in considering two identical investments, one on reserve and one off reserve, the expected tax for each depends in part on our expectations of government performance. The performance of government is influenced by the electoral rules, and our expectation of that performance then depends on our knowledge of those rules. Without transparency, one cannot form accurate expectations. Some examples of the effects of electoral rules on government performance are described by Persson, Tabellini, and Trebbi,³⁰ who study variation in electoral rules across countries and find that large voting districts provide more individual accountability of politicians. Persson, Roland, and Tabellini³¹ find that, compared to parliamentary regimes, presidential regimes are often associated with redistribution toward powerful minorities. Shedding light on the electoral rules illuminates the electoral incentives facing First Nation politicians. For example, where there is a single electoral district for First Nation elections, if a majority of voters live off reserve, it is possible that there is no elected official representing concerns of the minority of voters living on reserve. In such a scenario, the incentives to spend political capital on property taxation would be muted.

The frequency of elections is another important determinant of the quality of governance, because accountability is enhanced by the discipline of the ballot box. In one piece of research on rather extreme behaviours, Ferraz and Finan³² studied Brazilian mayors and found that those mayors who could seek re-election misallocated 27 percent less resources than those mayors who could not seek re-election owing to term limits. This finding is strong evidence of the disciplinary role of elections. Schultz³³ theoretically demonstrates that shorter term lengths can increase the accountability of elected officials, but that they distort policy toward populism. The increased accountability of shorter terms in office can also reduce effort by politicians. Dal Bó and Rossi³⁴ demonstrate that more frequent elections can discourage politicians from investing in meaningful reforms, not because of the costs of frequent campaigns, but because the returns to reforms are likely to be spread over a longer horizon that exceeds a single term in office.

30 Torsten Persson, Guido Tabellini, and Francesco Trebbi, "Electoral Rules and Corruption" (2003) 1:4 *Journal of the European Economic Association* 958-89.

31 Torsten Persson, Gerard Roland, and Guido Tabellini, "Comparative Politics and Public Finance" (2000) 108:6 *Journal of Political Economy* 1121-61.

32 Claudio Ferraz and Frederico Finan, "Electoral Accountability and Corruption: Evidence from the Audits of Local Governments" (2011) 101:4 *American Economic Review* 1274-1311.

33 Christian Schultz, "Information, Polarization and Term Length in Democracy" (2008) 92:5-6 *Journal of Public Economics* 1078-91.

34 Ernesto Dal Bó and Martín A. Rossi, "Term Length and the Effort of Politicians" (2011) 78:4 *Review of Economic Studies* 1237-63.

DATA AND ANALYSIS³⁵

The analysis in the previous section suggests that First Nations can improve the quality of band governance by putting in place appropriate rules and institutions. In this section, I explore the provisions contained in First Nation election codes and argue that these codes contain precisely the types of features that one would predict to be adopted by communities that were attempting to enhance the quality of their governance. I then examine the relationship between electoral codes and property taxation. Are governance structures and property taxation related, as public choice theory would predict?

It is difficult to study First Nation election codes in Canada because there is no central repository of custom election codes. There is a central repository that lists First Nations using Indian Act elections under section 74. The analysis presented in this article makes use of the removal of First Nation communities from schedules 1, 2, and 3 to the Indian Band Council Elections Order.³⁶ By examining this repository, one can see who is using the Indian Act elections. This repository itself is quite cumbersome because it refers to First Nation communities by their names, which are not stable unique identifiers, as opposed to their band numbers, which are stable and unique identifiers.³⁷ Similarly, by examining schedules 2 to 5 and 42 to the FNEA, one can identify which First Nations are using the FNEA code.³⁸ To learn about the custom election codes used in British Columbia, information was collected from First Nations' websites, and by requests for governing documents through e-mail and telephone contacts with First Nation government employees. What this research generates is a partial picture of custom election codes, shown in table 1.

What are the novel features of custom elections? I obtained information on at least one of the electoral rules from 68 of the 114 First Nations that use custom elections. Chief and council stability is enhanced through most custom codes, with 55 First Nations selecting term lengths greater than the two years prescribed by the Indian Act.³⁹ Continuity is also enhanced by staggered terms in office, as used by 15 First Nations. Some rules address the unique features of these small First Nation communities: 8 use a restriction on the number of councillors who can be elected from each family; 19 have rules for band employees who run for office; and 6 have a hereditary chief. Other rules affect the selection of candidates through eligibility

35 Code and data used for this manuscript are available at www.ctf.ca/CTFWEB/Documents/CTJ2021/Issue3/CTJ69-3-FirstNationsPopulationCountsandMillRates.xlsx.

36 SOR/97-138 (<https://laws-lois.justice.gc.ca/eng/regulations/SOR-97-138/20060322/P1TT3xt3.html>).

37 Name changes are chronicled in the *Canada Gazette* (<https://canadagazette.gc.ca/accueil-home-eng.html>).

38 FNEA schedules 2 to 5 and 42 (<https://laws.justice.gc.ca/eng/acts/F-11.65/section-sched224669-20200917.html>).

39 The mean and mode of the custom election code term length is four years.

TABLE 1 Features of First Nation Custom Election Codes

	No. of First Nations with rule	FNEA has rule	Indian Act has rule
No. of family candidates restricted . . .	8	No	No
Length of term more than			
two years	55	Yes	No
Staggered terms	15	No	No
Rules on employees running	19	No	No
Hereditary chief	6	No	No
Chief is highest vote getter	52	No	No
Election preceded by forum			
or debate	18	No	No
Criminal record check for			
candidates	29	No	No
Deposit required by candidates	13	Yes	No
Financial status requirement	17	No	No
Process for removal of officials	42	Yes—minister has no power	Yes—minister has power

Source: Author’s calculations from survey of British Columbia First Nations Constitutions conducted in 2016. At the time of writing, 68 First Nations responded or had information on their website describing their custom election code. First Nations Elections Act and Indian Act Elections from Department of Indigenous Services, “Leadership Selection in First Nations” (www.isc-sac.gc.ca/eng/1323195944486/1565366893158).

requirements for prospective candidates: 29 require a criminal record check for prospective candidates, and 17 require a financial record check. First Nations’ ability to discipline politicians is enhanced for 42 communities by specifying rules for the removal of elected officials from office. While custom elections can add opacity to the rule of law on reserve from the perspective of non-members, many of the reforms listed above are consistent with commonsense notions of good governance.

Figure 1 displays trends in the use of property taxation and First Nation electoral rules during the period 1997-2020. The use of property tax is based on observations from the annual *First Nations Gazette* (online version). A First Nation is recorded as having a property tax if there is a record of its annual property tax law or bylaw. There is considerable variation in the use of property taxation over time. While the variation may be due in part to First Nations not taxing property in all years, it may also reflect a failure by some First Nations to report their annual rate laws or bylaws. A noticeable break from the trend occurs in 2011, when only 38 First Nations were recorded as taxing property. Overall, however, there is a strong upward trend in property tax use. In 1997, only 35 First Nations were using a property tax. By 2020, that number had more than doubled to 85.

As the use of property taxes increased, the use of the Indian Act electoral rules decreased. In 1997, 103 of the 198 First Nation bands in British Columbia used the Indian Act electoral rules, while 95 bands had a custom election. By 2020, only 60

FIGURE 1 First Nation Taxation and Governance, 1997-2020

Source: Author's calculations based on information in the *First Nations Gazette*, 1997-2020 (<https://fng.ca>), and the *Canada Gazette*, 1997-2020 (<https://canadagazette.gc.ca/accueil-home-eng.html>).

First Nations were using Indian Act electoral rules, while 114 used a custom election, 9 had self-government agreements, and 15 had adopted the rules set out in the FNEA.

There is a clear pattern in the data showing that First Nations who adopt property taxation also have an election code that allows for more stable governance. This is unsurprising, given the earlier argument that having more stable governance is an important part of demonstrating political stability to the market.⁴⁰

Figure 2 displays the year of adoption of custom elections along with the year of adoption of property taxation for the 17 First Nations who implemented both reforms between 1990 and 2010. The majority of these First Nations first introduced property taxation and then a custom election code. Why? The 2010 Senate Standing Committee on Aboriginal Peoples shed light on this through testimony indicating that custom election codes are expensive.⁴¹ The new code must be approved by a

40 Yong Tu and Helen X.H. Bao, "Property Rights and Housing Value: The Impacts of Political Instability" (2009) 37:2 *Real Estate Economics* 235-57 (<https://doi.org/10.1111/j.1540-6229.2009.00241.x>).

41 Senate report, *supra* note 27, at 33. Custom election codes are independently administered. The Department of Indigenous Services is not involved in the election process. According to the government's website, "the department's role is limited to recording the election results provided by the First Nation": Department of Indigenous Services, "Leadership Selection in First Nations" (www.isc-sac.gc.ca/eng/1323195944486/1565366893158). As a result, there are additional costs associated with adopting a custom election code—the cost of reform and the cost of administering the elections.

FIGURE 2 First Year of Custom Elections and Property Taxes, 1990-2015

Source: Author's calculations based on information in the *First Nations Gazette*, 1997-2015 (<https://fng.ca>), and the *Canada Gazette*, 2000-2016 (<https://canadagazette.gc.ca/accueil-home-eng.html>).

majority of members in a referendum and must meet the minister's standard of appropriateness. In the 2010 Senate report, Chief Tim Manuel of the Upper Nicola First Nation provided the following remarks on adopting a custom election code:

It does cost money, I mean the time, effort and money and expertise, to go from the section 74 to custom elections. It is very time-consuming. Again the band incorporated its own revenue from forestry to offset that cost, but I think looking at other bands or smaller bands that want to do this certainly do not have that capacity to do it.⁴²

While the costs are explicit, tangible, and immediate, many of the benefits of adopting a custom code arrive in the long run. There is an immediate benefit from the matching of electoral institutions more closely with a First Nation's values. Over time, extended term lengths improve the ability of councils to adopt and execute long-term projects, reassuring taxpayers of the quality of governance.

POLICY PROPOSALS

Many non-Indigenous Canadians have no idea of the rich cultural and linguistic diversity of First Nation peoples in British Columbia—let alone the diversity of tax and electoral rules and procedures used on reserves.⁴³ To enable investors to easily

42 Senate report, *supra* note 27, at 33.

43 Imagine trying to explain to someone who has never been at a powwow why one grass dancer won first prize over the others! It would be so much easier for that person to understand if he

understand the attributes of one opportunity relative to another, non-member investors need to possess the same comfort with First Nation institutions that they have with non-First Nation institutions. Making the rules and procedures transparent, and increasing the availability of information on elections and rate setting, offer a simple and low-cost way of reducing transaction cost differentials between, for example, on-reserve and off-reserve housing. A reduction in transaction costs would reduce the discount facing leasehold reserve land in the marketplace.

The FMA reduces tax-rate uncertainty in two important ways. First, it provides for the establishment of the FNTC as the approver of tax laws.⁴⁴ Having a specific single-issue entity responsible for the approval of tax rates reduces the scope for bureaucratic error and delay. Second, publishing the tax-rate laws and bylaws for all First Nations who implement property taxation in the *First Nations Gazette* increases transparency.⁴⁵ Making information more accessible through the FNTC would also help to increase the salience of important policies on reserve. One example of an important policy that is used on reserve but is not well known is band-offered home-ownership grants. In British Columbia, off-reserve homeowners who meet certain criteria are eligible for a provincial homeowner grant.⁴⁶ To compete with off-reserve housing, some First Nations administer their own similar homeowner grants available to non-members living on reserve.⁴⁷ But there is no easy way for potential investors to compare these offerings.

The outcomes of elections could be better communicated to prospective rate payers. For off-reserve property, British Columbia publishes municipal election results through a centralized platform.⁴⁸ Such a platform should exist for participating First Nations—again letting the world know that they are open for business. Data on First Nation election outcomes, stored in a format that can be processed by a computer, would enable other parties to help spread the word and is strongly encouraged. The Department of Crown-Indigenous Relations and Northern Affairs currently administers First Nation profiles, an online resource that contains information on First Nation communities from a variety of sources, including the Canadian census.⁴⁹ Adding more information on governance and taxation would improve the value of

had experienced the powwow and seen the dancers, their dress, their movements, their rhythm, and their spirit, all at once.

44 First Nations Tax Commission, "Welcome to the First Nations Tax Commission" (<https://fntc.ca>).

45 *First Nations Gazette*, "Publishing First Nation Laws and Public Notices" (<https://fng.ca>).

46 British Columbia, "Home Owner Grant" (www2.gov.bc.ca/gov/content/taxes/property-taxes/annual-property-tax/home-owner-grant).

47 See, for example, West Bank First Nation, "Property Tax" (www.wfn.ca/your-government/budget-taxes/property-tax.htm).

48 CivicInfo BC, "Election Results" (www.civicinfo.bc.ca/election).

49 This resource can be accessed at <https://fnp-ppn.aadnc-aandc.gc.ca/fnp/Main/Search/SearchFN.aspx?lang=eng>.

this resource and help the government of Canada in meeting its fiduciary responsibility to First Nation peoples.⁵⁰

There is also a role to be played by an intermediary. The assessed values of on-reserve property are not publicly available, while the assessed value of every off-reserve residential property in British Columbia is available through a searchable online portal.⁵¹ Providing information on the assessed values of the leasehold properties on reserve can improve the thickness of the market by encouraging marginal participants to consider leasehold dwellings. This can reduce the transaction costs associated with the search for information required for an informed purchase of on-reserve leasehold property.

The elimination of property tax exemptions for band members would greatly improve the perception of procedural fairness and change the median voter calculus. Levying taxes on members who are living in band-owned housing units, or are holding CPs and paying mortgages that are co-signed by the band, may seem silly from the perspective of someone inside the band. Off-reserve investors need confidence that band governance is stable and that the members are holding the chief and council accountable. But why would the members hold the chief and council accountable in their setting of rates on property if they themselves were not subject to those rates? We have a stronger incentive to participate more fully in politics and civic life when we have more at stake. All of the revenue raised by taxing members' properties can be returned to members through transfers. Moreover, placing the trust in band governance to administer a tax-and-return scheme inspires confidence among non-members and is a great gesture of cooperation within communities.

Finally, while procedural fairness is paramount, another important step that First Nations can take to make their property tax less painful for taxpayers is to encourage the use of tax escrow.⁵² Tax escrow accounts are managed by the financial institutions that provide mortgages to homeowners; they are used to collect property taxes as mortgage payments are made, and to then transfer the collected taxes to the appropriate entity. Research has shown that tax escrow can reduce the salience of the tax in a manner that does not damage the perception of procedural fairness.⁵³ Rate payers are still aware of how the tax is determined and administered, but they are more likely to make mistakes when asked to recall the tax that they paid. If leaseholders had one less cheque to write to the band, the difference between living on and off reserve would again be smaller.

50 *Guerin v. The Queen*, [1984] 2 SCR 335, at 349-50.

51 BC Assessment (www.bcassessment.ca).

52 Marika Cabral and Caroline Hoxby, *The Hated Property Tax: Salience, Tax Rates, and Tax Revolts*, National Bureau of Economic Research Working Paper no. 18514 (Cambridge, MA: NBER, November 2012).

53 *Ibid.*

CONCLUSION

A lot can be gained through a change in perspective. Much of the uncertainty in property taxation on reserve comes from a combination of instability-inducing electoral institutions and the comparative opacity of First Nation institutions from a non-member perspective. Increasing transparency will enhance the perception of fairness on reserve. Good governance, fairness, and stability—these are worthwhile goals for all Canadians.

FINANCES OF THE NATION

THE EVOLUTION OF HEALTH EXPENDITURES IN CANADA, 1926-2019

Livio Di Matteo*

For almost 60 years, the Canadian Tax Foundation published an annual monograph, Finances of the Nation, and its predecessor, The National Finances. In a change of format, the 2014 Canadian Tax Journal introduced a new “Finances of the Nation” feature, which presents annual surveys of provincial and territorial budgets and topical articles on taxation and public expenditures in Canada.

The underlying data for the Finances of the Nation monographs and for the articles in this journal will be published online in the near future.

In this article, Livio Di Matteo provides an overview of expenditures on health care in Canada over the long term. He examines changes in the size, relative importance, growth, and composition of health expenditures, with an additional focus on provincial-territorial government spending since the 1970s. Di Matteo links the evolution of health-care spending to factors affecting the demand for and supply of health services, including income, demographic changes, technological development, cost, policy, and public finances.

KEYWORDS: HEALTH-CARE EXPENDITURES ■ TRENDS ■ SUPPLY AND DEMAND

CONTENTS

Introduction	890
The Canadian Health-Care System	891
Overview of Total Health Expenditures: Public and Private	894
Provincial and Territorial Government Health Expenditure, 1975-2019	905
Concluding Discussion: The Six Ages of Health Spending in Canada and What Lies Ahead	915
Appendix	920

* Of the Department of Economics, Lakehead University, Thunder Bay, Ontario (e-mail: Livio.DiMatteo@lakeheadu.ca). I wish to thank the editors of this journal for their comments and their encouragement during the preparation of this article. As well, this article benefited from comments provided by Paul Grootendorst and participants in the 2021 meetings of the Canadian Health Economics Study Group.

INTRODUCTION

The health-care system is one of the key institutions of a modern society; many individuals will interact with it throughout their lives, from birth to old age and ultimately death. While the long-term determinants of health status over time are multidimensional, and include socioeconomic and environmental factors, the health-care system and its services remain essential to the health and welfare of the population. Perceptions of the centrality of the system are not merely academic but are also reflected in public attitudes.

In attempting to grasp the size and importance of the health-care system as a social institution, one inevitably resorts to basic economic concepts. The health sector can be viewed as part of both the in-kind and the expenditure sides in macro-economic national accounting data series: it is a source of income as well as a source of spending. In terms of basic principles of public finance, health care has characteristics of both a public and a private good when it comes to provision. The allocative function marks its designation as a public good, but with spillover into distributive and stabilization roles. At the same time, health care can be provided privately, with the degree of private provision ultimately being a political decision. Public provision is not the same as public finance. In the case of Canada's health-care system, it is well understood that while the lion's share is funded by public spending, the majority of health services are provided through contracts with private individuals or suppliers, non-profit organizations, and other business entities.

The health-care system also mirrors Canada's governmental structure as a federation, with funding arrangements that cross all fiscal tiers. In some respects, the Canadian health-care system constitutes a unique fiscal tier, with its own social order, administrative procedures, and revenues and expenditures that are simultaneously centralized and decentralized in administration and operations. The system brings together federal and provincial governments, First Nations, and municipalities in never-ending and ever-evolving negotiations over funding and responsibilities.

This article examines Canadian health spending with a view to providing a long-term picture of its size, importance, growth, and composition, with an additional focus on spending by provincial and territorial governments since the 1970s. The studies, analyses, and evaluations of health economists and policy analysts are usually focused on problems driven by current issues relating to efficiency and effectiveness in the provision of health-care services. Current issues in any health-care system are shaped by long-term economic and health trends, as well as institutionalized patterns of spending; but, owing to the absence of accessible long-term data, seldom is there an opportunity to step back and look at the health spending picture from an aggregate long-term perspective.¹ The purpose of this article is to provide such an overview of health expenditure in Canada and its evolution over time.

1 For an example of an attempt to take a longer-term view in the case of US health spending, see Maryaline Catillon, David M. Cutler, and Thomas E. Getzen, "Two Hundred Years of Health and Medical Care," *VOXeu/CEPR*, February 9, 2019 (<https://voxeu.org/article/two-hundred-years-health-and-medical-care>).

The story is one of growth and change, in which health spending can be viewed as evolving through six “ages” (or eras), based on trends in growth rates. Those changes in growth rates, in turn, ultimately reflect factors affecting the demand for and supply of health services, including income, demographic changes, technological innovation and development, cost, government policy, and government finances. The six ages identified in this study are

1. beginnings (pre-1957),
2. boom (1957-1975),
3. stabilization (1976-1989),
4. decline (1990-1996),
5. recovery (1997-2009), and
6. renewed restraint (2010-2019).

The defining feature of these temporal divisions is differences in the rates of growth in health expenditures as evidenced by data on real per capita spending (total, public, private, and provincial and territorial government spending).

THE CANADIAN HEALTH-CARE SYSTEM

Canada’s health-care system has private origins but even in the 19th century, there was some public-sector involvement. Under the 1867 British North America Act/Constitution Act,² the provinces were given responsibility for “[t]he Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals” (section 92.7) and “[g]enerally all Matters of a merely local or private Nature in the Province” (section 91.16), which ultimately grew into provincial jurisdiction over health. However, the federal government also had a direct role, since it was responsible for “[q]uarantine and the Establishment and Maintenance of Marine Hospitals” (section 91.11), as well as all matters relating to First Nations (section 91.24).

Public health measures to deal with disease outbreaks, such as cholera or typhoid, hygiene, and sanitary reform not only generated federal or provincial action, but also led to the establishment of local health boards.³ As medical interventions and technology began to develop prior to the First World War, the provision of health services and payment for them remained largely a private activity, with private insurance rather than government assisting with the cost (for those who could afford the premiums).

In the 20th century, some provinces and municipalities begin to venture into the health-care field, most notably in western Canada, and these jurisdictions played a leadership role in the eventual creation of a publicly funded health-care system. In

2 1867 (UK), 30 & 31 Vict., c. 3.

3 See Christopher Rutt and Sue C. Sullivan, *This Is Public Health: A Canadian History* (Ottawa: Canadian Public Health Association, 1986), chapter 1.

1916, Saskatchewan legislators passed the Rural Municipality Act, which allowed the province's towns, villages, and rural municipalities to join together and form districts that would build and run hospitals to meet local needs. Thus, even before the emergence of the modern Canadian health-care system, there was some public involvement in hospital care, though the provision of physicians' services remained private.

Canada's modern health-care system evolved in several stages, starting with individual provincial initiatives shortly after the end of the Second World War. Saskatchewan became the first province to implement a universal hospital services plan, in 1947, and was soon followed by British Columbia and Alberta. In 1957, the federal government became more involved, enacting the Hospital Insurance and Diagnostics Act, which established federal-provincial transfers for cost sharing in respect of provincial hospital insurance plans; and in 1966, the federal Medical Care Insurance Act extended cost sharing to physicians' services. Public funding grew rapidly in the next five years; by 1971, all provinces provided universal coverage for hospital and physicians' services. In 1984, in the wake of funding restraints and provincial sallies into private care, the federal government passed the Canada Health Act,⁴ establishing national standards for hospital, diagnostic, and medical-care services that must be met for provinces and territories to receive federal funding for their public health-care systems.

Health financing in Canada consists of three layers: (1) public insurance for hospital, diagnostic, and physicians' services considered by the government to be *medically necessary*, (2) a mix of public-private insurance for covered items such as drugs and home care, and (3) entirely private financing (insured or user-paid) for services such as dental care and physiotherapy.⁵ The Canadian health-care system is financed by both the federal and the provincial/territorial governments, but (as noted above) health is a provincial responsibility under the constitution, and the provincial/territorial governments deliver publicly funded health care. This makes for a decentralized health-care system, with diversity in expenditure levels and service provision across the provinces and territories, combined with varying degrees of reliance on market mechanisms for services.⁶ The Organisation for Economic Co-operation and Development (OECD) has classified Canada as a group 2 country (along with Belgium, Australia, and France) as having a health-care system with public insurance for basic coverage and private insurance beyond the basic coverage.⁷

4 RSC 1985, c. C-6.

5 Danielle Martin, Ashley P. Miller, Amélie Quesnel-Vallée, Nadine R. Caron, Bilkis Vissandjée, and Gregory P. Marchildon, "Canada's Universal Health-Care System: Achieving Its Potential" (2018) 391:10131 *Lancet* 1718-35.

6 Gregory Marchildon, "Health System in Canada," in Adrian Levy, Sarah Goring, Constantine Gatsonis, Boris Sobolev, Ewout van Ginneken, and Reinhard Busse, eds., *Health Services Evaluation* (New York: Springer, 2019), 769-77.

7 Organisation for Economic Co-operation and Development, *Health Care Systems: Getting More Value for Money*, OECD Economics Department Policy Notes no. 2 (Paris: OECD, 2010).

Ultimately, Canadian federalism means that the health sector is funded through 14 public sources: each of the 10 provinces and 3 territories has its own funding system, and the federal government provides direct health spending for indigenous peoples, the military, and the Royal Canadian Mounted Police. At the provincial/territorial level, health expenditures cover insured health services and extended health care, and are financed by own-source revenues as well as federal government transfers. Private-sector health-care expenditures include those from health insurance firms, out-of-pocket expenditures of individuals, and patient service revenue paid by private insurers for items such as preferences for private or semi-private hospital rooms and charges for services that are not deemed medically necessary.

The respective contributions of private and public sources to the financing of Canadian health care have stabilized over time, at approximately 30 percent private and 70 percent public, but the proportion varies across provinces and territories, and even within expenditure categories.⁸ It should again be emphasized that public finance differs from public provision. For example, Canadian physicians' services are nearly 100 percent publicly financed, but physicians are usually private contractors rather than salaried government employees.⁹ As a result, physicians in Canada have substantial private autonomy and flexibility in their daily practice. Difficulties in accessing physicians' services (particularly those of family doctors) are a major issue in many regions of the country. Discussions generally focus on the need to boost the supply of physicians, rather than increase their working hours.¹⁰

Federal transfers for provincial/territorial government health spending are made pursuant to the Canada Health Act, which specifies the criteria that provinces and territories must meet in order to receive these transfers. Provincial/territorial health systems must

- be publicly administered,
- be comprehensive in their coverage of insured services,
- be universal in their coverage,
- have portable benefits, and
- provide for reasonable access to insured services.

Despite these formal requirements, there has never been an interruption of federal health transfers to any province or territory for non-compliance with the Canada Health Act, and the transfers are generally treated as unconditional funds. There is

8 See Canadian Institute for Health Information, "National Health Expenditure Trends," table B.4.1, "Provincial/Territorial Government-Sector Health Expenditure by Province/Territory and Canada, in Millions of Current Dollars, 1975 to 2019" (www.cihi.ca/en/national-health-expenditure-trends-1975-to-2019).

9 For a discussion, see Livio Di Matteo, "Physician Numbers as a Driver of Provincial Government Health Spending in Canadian Health Policy" (2014) 115:1 *Health Policy* 18-35.

10 See Di Matteo, *ibid.*, and Janine Clarke, *Health at a Glance: Difficulty Accessing Health Care Services in Canada* (Ottawa: Statistics Canada, 2016).

variation among provincial/territorial systems in terms of the medical services and drugs that are covered by their respective plans, but health outcomes are remarkably uniform across jurisdictions.¹¹

According to the federal Department of Finance, in the 2018-19 fiscal year, the total value of the Canada health transfer (CHT) to the provincial and territorial governments was estimated to be \$38.584 billion, and was expected to increase to \$40.373 billion in 2019-20 and \$41.870 billion in 2020-21.¹² The CHT funds about 20-25 percent of combined provincial and territorial government health spending, though the growth rate of these transfers declined after 2017, as a result of the implementation of a new allocation formula. The new formula is based on the annual rate of growth in real gross domestic product (GDP), subject to a 3 percent floor, as opposed to the previous health accord escalator (which provided for an annual increase of 6 percent).¹³ With the onset and continuation of the COVID-19 pandemic, public finances at all levels of government are in flux, and we may see permanent changes to the amount of federal transfers for health, as well as provincial and territorial spending responses.¹⁴

OVERVIEW OF TOTAL HEALTH EXPENDITURES: PUBLIC AND PRIVATE

Assembling the data for a long-term overview of Canadian health spending is a challenging exercise. Three main sources are used here. The pre-1975 data for total health spending as well as provincial government health spending are from two sources: Statistics Canada's Historical Statistics of Canada, series B504 to B513, spanning the period 1926-1975;¹⁵ and Statistics Canada's series of provincial government expenditure

11 See Marchildon, *supra* note 6, for further discussion.

12 See Canada, Department of Finance, "Major Federal Transfers" (www.canada.ca/en/departement-finance/programmes/federal-transfers.html).

13 Sonya Norris, *Federal Funding for Health Care, Background Paper* (Ottawa: Library of Parliament, 2021).

14 By September 2020, the federal government had already committed to providing the provinces and territories with special one-time funding of more than \$19 billion (in total) to support the capacity of the health-care system and assist with their economic recovery from COVID-19. See Canada, Governor General, *A Stronger and More Resilient Canada: Speech from the Throne To Open the Second Session of the Forty-Third Parliament of Canada*, September 23, 2020, at 7 (www.canada.ca/en/privy-council/campaigns/speech-throne/2020/stronger-resilient-canada.html). At least two premiers have argued that this support must be supplemented with sustainable long-term funding increases. See "PM Agrees to Virtual Meeting on Federal Health Transfers to Provinces," *CBC News*, September 11, 2020; and Aidan Geary, "Premiers' Calls for Increased Health Transfers 'Ignored' in Throne Speech: Pallister," *CBC News*, September 24, 2020. To date, the federal government has not seemed inclined to increase transfers beyond what is planned under the current formula.

15 Statistics Canada and Social Science Federation of Canada, "Historical Statistics of Canada," section B, table B504-513, "Health Expenditures, Canada, 1926 to 1975" (<https://www150.statcan.gc.ca/n1/pub/11-516-x/sectionb/4147437-eng.htm>).

data¹⁶ covering the period 1965/66–1990/91, which is used here to provide estimates of provincial government health spending from 1966 to 1974. The third source, for aggregate health expenditure data spanning the period 1975–2019, is the national health expenditure database maintained by the Canadian Institute for Health Information (CIHI).¹⁷ Although it is possible to construct an overview of total annual health spending for the period 1926–2019, consistent private and public health spending data are available only from 1975, while health expenditure data for the provinces only are available for the period 1965–1974, and for all provinces and territories from 1975 to 2019.

For the pre-1975 period, health spending is defined according to the definitions set out in the two Statistics Canada sources cited above, which generally coincide with modern definitions. For the post-1975 period, the CIHI definition applies—namely, health expenditure is any type of spending whose aim is to improve, or prevent deterioration of, health status.¹⁸ The CIHI organizes its data by finance source. Health spending is categorized as total expenditure, public expenditure (health-care spending by governments and government agencies), and private expenditure (spending financed from private sources but provided either publicly or privately). Public spending is categorized according to source: provincial/territorial government, federal government direct, municipal, other public health, and social security funds. In addition, within each of the broad expenditure categories, spending is often further subdivided according to the use of funds: hospitals, other institutions, physicians, other professionals (dentists, optometrists, etc.), prescription and non-prescription drugs, capital expenditure, public health (food and drug safety, health promotion and inspection, communicable disease prevention, etc.), administration, and other uses (including research, home and community care, and medical transport).

Figure 1 presents Canadian total real health spending in 2019 dollars¹⁹ for the period 1926–2019, with separate plot-lines for public (1975–2019), private (1975–2019), and provincial and territorial government spending (1965–2019). Figure 2 presents these series in real per capita terms.²⁰ Health spending in Canada rose from

16 Statistics Canada, *Public Finance Historical Data* (1992), 1965/66 to 1991/92, catalogue no. 68-512 (https://publications.gc.ca/collections/collection_2016/statcan/CS68-512-1992.pdf).

17 Canadian Institute for Health Information, “National Health Expenditures Database (NHEX)”; Canadian Institute for Health Information, “National Health Expenditure Trends,” under the headings “Full Data Tables” and “Individual Data Tables, Appendices A to D,” for the period 1975–2019 (www.cihi.ca/en/national-health-expenditure-trends-1975-to-2019); Canadian Institute for Health Information, “Access and Data Reports” (www.cihi.ca/en/access-data-and-reports).

18 Canadian Institute for Health Information, “National Health Expenditure Trends,” under the heading “Methodology Notes,” for the period 1975–2019.

19 Spending was deflated using the Statistics Canada all items consumer price index (2002 dollars = 100) (series v41693271) and then recalibrated at 2019 = 100. Statistics Canada, table 18-10-0005-01, Consumer Price Index, annual average, not seasonally adjusted.

20 Real per capita spending is calculated using the series in figure 1 divided by total Canadian population. Population data are from Statistics Canada, series v52154496 and v742019 (<https://datacentre.chass.utoronto.ca/chasscansim/>).

a total of \$1.5 billion in 1926, with real per capita spending of \$159, to a total of \$264.4 billion in 2019, with real per capita spending of \$7,035. The implied annual growth rate for real per capita total spending over this period is thus 4 percent, compared to a population growth rate of 1.5 percent and a real per capita GDP growth rate of 2.1 percent.²¹ Figure 3 shows that total health spending as a share of GDP rose from 1.8 percent in 1926 to 11.5 percent in 2019.

This dramatic growth in Canadian health spending parallels the trend in other OECD countries, where health-care spending as a share of GDP accelerated after the Second World War. The period 1970-2019 saw the average grow from 4.6 percent to 8.8 percent; in 2019, the ratio of health spending to GDP across 37 OECD countries ranged from a high of 17 percent in the United States to a low of 4.4 percent in Turkey, with Canada ranked seventh at 10.8 percent.²² Factors driving this growth include rising income (since health spending is an income-elastic good); growing and aging populations, with the associated increased demand for services; technological change, including the development of new procedures and diagnostic techniques; supplier-induced demand and a greater focus on preventive medicine; labour productivity factors and health-sector-specific price inflation relating to cost disease,²³ reduced mortality from chronic disease, and longer life spans; changes in government policies on the rationing of health procedures and quality of care over time; and public finance resources and priorities.²⁴

With respect to the financing sources for health expenditure in Canada, for the time periods for which data are available, the trends parallel those for total health spending. As shown in figures 1 and 2, public, provincial and territorial government, and private spending all rise in tandem, although the first two categories, in contrast to private spending, show a decline during the federal fiscal crisis of the early 1990s, which led to federal transfer restraint. In particular, real per capita provincial and

21 Author's calculations using the implied growth rate formula $y = Ae^{rt}$.

22 Author's calculations based on data from Organisation for Economic Co-operation and Development, "OECD Health Statistics 2020—Frequently Requested Data," June 2020 (www.oecd.org/health/health-statistics.htm).

23 Cost disease is the rise in labour costs associated with labour-intensive activities. See W.J. Baumol and W.E. Bowen, *Performing Arts: The Economic Dilemma* (New York: Twentieth Century Fund, 1966).

24 For an overview of these factors and references to econometric studies on the drivers and determinants of health spending, see Bianca K. Frogner, Peter S. Hussey, and Gerard F. Anderson, "Health Systems in Industrialized Countries," in Sherry Glied and Peter C. Smith, eds., *The Oxford Handbook of Health Economics* (New York: Oxford University Press, 2011), chapter 2. For some Canadian overviews and studies, see Livio Di Matteo and Rosanna Di Matteo, "Evidence on the Determinants of Canadian Provincial Government Health Expenditures: 1965-1991" (1998) 17:2 *Journal of Health Economics* 211-28; Gregory Marchildon and Livio Di Matteo, *Health Care Cost Drivers: The Facts* (Ottawa: Canadian Institute for Health Information, 2011); and Livio Di Matteo and Colin Busby, *Hold the Applause: Why Provincial Restraint on Healthcare Spending Might Not Last*, C.D. Howe Institute Commentary no. 455 (Toronto: C.D. Howe Institute, August 2016).

FIGURE 1 Real Health Spending in Canada (Billions of 2019 Dollars), 1926-2019

Sources: 1926 to 1974: Statistics Canada and Social Science Federation of Canada, "Historical Statistics of Canada," series B504-513; 1975 to 2019 (forecasted): Canadian Institute for Health Information, "National Health Expenditure Trends," table B.1.1, "Total Health Expenditure by Province/Territory and Canada, in Millions of Current Dollars, 1975 to 2019"; Canadian Institute for Health Information, "National Health Expenditure Trends," table B.3.1, "Public-Sector Health Expenditure by Province/Territory and Canada, in Millions of Current Dollars, 1975 to 2019"; Canadian Institute for Health Information, "National Health Expenditure Trends," table B.4.1, "Provincial/Territorial Government-Sector Health Expenditure by Province/Territory and Canada, in Millions of Current Dollars, 1975 to 2019"; Canadian Institute for Health Information, "National Health Expenditure Trends," table B.2.1, "Private-Sector Health Expenditure by Province/Territory and Canada, in Millions of Current Dollars, 1975 to 2019"; Statistics Canada, Consumer Price Index, series V41693271; 1965 to 1974: Statistics Canada, Public Finance Historical Data, 1965/66 to 1991/92, catalogue no. 68-512.

territorial health spending (in 2019 dollars) rose from \$544 in 1965 to \$2,764 by 1992, declined to \$2,555 by 1996, and then climbed back to \$4,582 by 2019.

As a share of GDP, health spending appears to demonstrate some volatility and variation. However, this is driven more by fluctuations in GDP than by fluctuations in health spending—with the reductions in transfers during the federal fiscal crisis of 1990-1996 being an obvious exception. It has been noted that the process of change in health spending in general is comparable to the inertia of an oil tanker.²⁵ The evolution of the Canadian health-care system has often been shaped by an incremental approach to fiscal and regulatory initiatives on the part of the government; the 1990s, in particular, were marked by the expansion of community services and the

25 See Thomas E. Getzen, "Forecasting Health Expenditures: Short, Medium and Long (Long) Term" (2000) 26:3 *Journal of Health Care Finance* 56-72.

FIGURE 2 Real Per Capita Health Spending in Canada (2019 Dollars), 1926-2019

Sources: 1926 to 1974: Statistics Canada and Social Science Federation of Canada, “Historical Statistics of Canada,” series B504-513; 1975 to 2019 (forecasted): Canadian Institute for Health Information, “National Health Expenditure Trends,” table B.1.1, “Total Health Expenditure by Province/Territory and Canada, in Millions of Current Dollars, 1975 to 2019”; Canadian Institute for Health Information, “National Health Expenditure Trends,” table B.3.1, “Public-Sector Health Expenditure by Province/Territory and Canada, in Millions of Current Dollars, 1975 to 2019”; Canadian Institute for Health Information, “National Health Expenditure Trends,” table B.4.1, “Provincial/Territorial Government-Sector Health Expenditure by Province/Territory and Canada, in Millions of Current Dollars, 1975 to 2019”; Canadian Institute for Health Information, “National Health Expenditure Trends,” table B.2.1, “Private-Sector Health Expenditure by Province/Territory and Canada, in Millions of Current Dollars, 1975 to 2019”; Statistics Canada, Consumer Price Index, series V41693271; 1965 to 1974: Statistics Canada, Public Finance Historical Data, 1965/66 to 1991/92, catalogue no. 68-512.

creation of regional authorities in order to consolidate services.²⁶ Interestingly, in comparison, private health spending as a share of GDP appears to be more stable, but that may be because private spending more closely tracks fluctuations in economic activity or GDP.

Figure 4 presents average annual growth rates for eight distinct periods corresponding to the trends in growth rates discussed above. The story is one of change, in which spending can be viewed in terms of several “ages,” based on differences in growth rates. These ages are

1. beginnings (pre-1957),
2. boom (1957-1975),

26 C. David Naylor, “Health Care In Canada: Incrementalism Under Fiscal Duress” (1999) 18:3 *Health Affairs* 9-26.

FIGURE 3 Health Spending in Canada as a Share of GDP, 1926-2019

GDP = gross domestic product.

Sources: 1926 to 1974: Statistics Canada and Social Science Federation of Canada, “Historical Statistics of Canada,” series B504-513; 1975 to 2019 (forecasted): Canadian Institute for Health Information, “National Health Expenditure Trends,” table B.1.1, “Total Health Expenditure by Province/Territory and Canada, in Millions of Current Dollars, 1975 to 2019”; Canadian Institute for Health Information, “National Health Expenditure Trends,” table B.3.1, “Public-Sector Health Expenditure by Province/Territory and Canada, in Millions of Current Dollars, 1975 to 2019”; Canadian Institute for Health Information, “National Health Expenditure Trends,” table B.4.1, “Provincial/Territorial Government-Sector Health Expenditure by Province/Territory and Canada, in Millions of Current Dollars, 1975 to 2019”; Canadian Institute for Health Information, “National Health Expenditure Trends,” table B.2.1, “Private-Sector Health Expenditure by Province/Territory and Canada, in Millions of Current Dollars, 1975 to 2019”; Statistics Canada, Consumer Price Index, series V41693271; 1965 to 1974: Statistics Canada, Public Finance Historical Data, 1965/66 to 1991/92, catalogue no. 68-512; GDP, 1926 to 1959: M.C. Urquhart, *Canadian Economic Growth, 1870 to 1980*, Working Paper No. 734 (Kingston, ON: Queen’s University Economics Department, 1988); GDP, 1960 to 2019: Federal Reserve Economic Data (FRED), series FRED-CANGDPNADSMEI (<https://fred.stlouisfed.org/series/CANGDPNADSMEI>).

3. stabilization (1976-1989),
4. decline (1990-1996),
5. recovery (1997-2009), and
6. renewed restraint (2010-2019).

The defining feature of these divisions is differences in the rates of growth of real per capita total, and provincial and territorial government, health expenditures. Ultimately, however, each age reflects shifts in the supply of and demand for services in response to the various determining factors identified above.

FIGURE 4 Average Annual Rates of Growth in Real Per Capita Health Expenditure, Canada, 1926-2019

Source: Author's calculations based on data from figure 2.

With respect to real per capita total health spending, the entire pre-1957 period saw an average annual growth rate of 4.6 percent, with growth from 1946 to 1956 being somewhat higher, at 5.3 percent, reflecting the demand for increased investment in health care at the start of the post-war economic boom. During the boom age, from 1957 to 1975, the modern, publicly financed, Canadian health-care system was created with the passage of the Hospital Insurance and Diagnostics Act (1957), which provided 50 percent federal cost sharing for hospital services, and the Medical Care Insurance Act (1966), which extended this funding formula to physicians' services. By 1971, all provinces were on board. With post-war economic growth and 50/50 cost sharing for health, the annual average growth rate of real per capita total health spending rose to 8.6 percent, while the rate for provincial and territorial government spending averaged 12.7 percent. The early 1970s also saw the introduction of provincial government drug plans that subsidized purchases of prescribed medications for seniors and recipients of social assistance, and funded home-care programs.²⁷

This golden age of health expenditure growth came to an end in the 1970s, as governments were forced to deal with the twin economic shocks of the oil crisis and stagflation. The hallmark funding event was the replacement, in 1977, of 50/50 federal cost sharing with established programs financing (EPF). EPF was a block cash

27 Livio Di Matteo and Paul Grootendorst, "Federal Patent Extension, Provincial Policies and Drug Expenditures" (2002) 50:6 *Canadian Tax Journal* 1913-48; and Livio Di Matteo and Rosanna Di Matteo, "Public Home Care Expenditures in Canada" (2001) 27:3 *Canadian Public Policy* 313-33.

grant whose future growth was to be determined by an economic growth formula. The end of 50/50 cost sharing was particularly unwelcome for provincial governments, and the federal government attempted to lessen the blow by also surrendering a number of federal income tax points to provincial revenues. Nevertheless, ever since, provincial premiers have advocated for a return to a greater federal share of provincial government health spending.

Following the changes in federal funding arrangements, the growth rate of health spending declined dramatically. Between 1976 and 1989, real per capita total spending increased by 3 percent, provincial and territorial government spending by 2.9 percent, and private spending by 3.5 percent. Provinces responded to the reduction in transfers by imposing spending restraints, which led to a public health-care crisis featuring hospital bed closures, limits on physicians' billings, and special charges for some services payable by patients. The introduction of the Canada Health Act in 1984 was promoted by the federal government as assurance that medically necessary services would be available to all Canadians regardless of their financial circumstances.²⁸ Provinces that did not comply with the standards set out in the act were threatened with the suspension of the federal transfer (although, as noted earlier, this penalty has never been applied).

Federal finances continued to deteriorate during the 1980s as deficits grew and rising interest rates increased debt-service payments. This situation, coupled with the severity of the 1991-92 recession, triggered the federal fiscal crisis of the 1990s.²⁹ Among other expenditure restraints adopted by the federal government, the EPF grant and the Canada assistance plan (CAP)³⁰ were replaced with the Canada health and social transfer (CHST), which provided federal funding for post-secondary education and social assistance, as well as health. Under the CHST, the cash portion of the grant was reduced by approximately one-third, leading to another public-sector health-funding crisis. The average annual growth rate of real per capita total spending fell to 0.5 percent over the 1990-1996 period, while the rate for provincial and territorial government spending declined to -0.3 percent and private spending fell to 2.6 percent. The reduced contributions of funds from government sources fuelled concern about growing privatization in the Canadian health-care system.

With the balancing of the federal budget in the late 1990s, economic recovery, and low interest rates generating a fiscal dividend, provincial and federal finances improved, and ultimately spending for health increased. A catalyst for the increased

28 See Odette Madore, "The Canada Health Act: Overview and Options," 2003, Economics Division (<https://publications.gc.ca/Collection-R/LoPBdP/CIR/944-e.htm>).

29 For an account of the fiscal history of the Canadian federal government over the entire period 1945-2017, including discussion of the federal fiscal crisis, transfer arrangements, and impact on the provinces, see Livio Di Matteo, *A Federal Fiscal History: Canada, 1867-2017* (Vancouver: Fraser Institute, 2017), at 45-75.

30 The CAP was a federal cost-sharing transfer arrangement with the provinces and territories for social assistance programs. See www.canada.ca/en/departement-finance/programmes/federal-transfers/history-health-social-transfers.html.

spending in the wake of the restraint of the 1990s was the report of the Commission on the Future of Health Care in Canada,³¹ delivered in 2002. The report argued for increased federal health transfers in the form of a cash-only grant, to encourage “transformative changes,”³² in the Canadian health-care system. The report recommended that this change be targeted to health care in rural and remote communities, diagnostic services, primary care, home care, and drugs. The result was the 2004 health accord, which provided for an annual increase of 6 percent for the cash portion of the revised CHT.³³ This funding escalator was extended in 2011 to 2017, but on expiry, the basis for future increases became the annual rate of growth in real GDP, subject to a 3 percent minimum.

As a result, the period from 1997 to 2009 saw a return to robust health expenditure growth, but this was followed by a significant slowdown in the wake of the 2009 recession. From 1997 to 2009, all categories in figure 4 recorded growth rates in real per capita spending of approximately 4 percent; however, during the period 2010-2019, real per capita spending growth across all categories fell to approximately 1 percent. This slowdown in public-sector spending was puzzling, given that CHT growth remained at 6 percent until 2017.

Whereas much of the public discussion on the fiscal dimensions of health care in Canada prior to 2000 focused on restraint, access, and increasing privatization of health care, the period from 1997 to the 2009 recession was about sustainability, given aging populations and the rebound in expenditure growth. Since 2010, the focus has been on what seems to date to have been a new era of restraint, with the outcome being a successful bending of the cost curve.³⁴ However, there is no guarantee that such restraint will last, in light of the recent slowdown. Weakening capital spending and a slowdown in pharmaceutical innovation and expenditure coincided with the lead-up to the reduction in the growth rate of federal transfers that took effect after 2017, perhaps reflecting provincial adjustment to the post-2017 transfer regime.³⁵

As a final dimension of the long-term evolution of health spending, figure 5 provides insight into the changing nature of Canadian health spending by presenting some compositional trends. In 1960, 39 percent of total health funding in Canada

31 Commission on the Future of Health Care in Canada, *Building on Values: The Future of Health Care in Canada, Final Report*, Roy J. Romanow, commissioner (Ottawa: Commission on the Future of Health Care in Canada, November 2002).

32 Ibid., at xvii.

33 Effective from 2004, the CHST was restructured as the separate Canada social transfer (CST) and Canada health transfer (CHT).

34 For further background on these issues, see Marchildon and Di Matteo, *supra* note 24; Livio Di Matteo, “The Sustainability of Public Health Expenditures: Evidence from the Canadian Federation” (2010) 11:6 *European Journal of Health Economics* 569-84; and Livio Di Matteo, “Policy Choice or Economic Fundamentals: What Drives the Public-Private Health Expenditure Balance in Canada” (2009) 4:1 *Health Economics, Policy and Law* 29-53.

35 See Di Matteo and Busby, *supra* note 24.

FIGURE 5 Composition of Health Spending in Canada, 1960-2019^a

a Data for 2019 are forecasted.

Sources: Statistics Canada and Social Science Federation of Canada, “Historical Statistics of Canada,” section B, table B504-513, “Health Expenditures, Canada, 1926 to 1975”; 1975 to 2019 (forecast): Canadian Institute for Health Information, “National Health Expenditure Trends,” table C.1.1, “Total Health Expenditure by Use of Funds in Millions of Current Dollars, Canada, 1975 to 2019”; Canadian Institute for Health Information, “National Health Expenditure Trends,” table G.14.1, “Expenditure on Drugs by Type and Source of Finance in Millions of Current Dollars, Canada, 1985 to 2019.”

was spent on hospital-based care, 17 percent on physicians, 6 percent on prescription drugs, and the remaining 38 percent on all other health services. The advent of Canadian medicare in the 1960s primarily covered public funding for physicians’ services and hospital-based care. The share of hospital spending rose, peaking at 46 percent in 1970, while spending on physicians peaked at 18 percent in 1972. Since then, there has been a decline in the hospital share of total spending, to a low of 29 percent in 2019. The share for physicians’ services bottomed out at just over 13 percent in the early 2000s but has since recovered to 15 percent in 2019. Meanwhile, spending on prescription drugs increased from 6 percent in 1960 to peak at just over 14 percent in 2010; in 2019, the share was 13 percent.

Growth in spending on physicians’ services has been partly the result of increases in the number of physicians since 2000. This is also a factor in health-care spending, given the gatekeeper role of physicians in providing access to health services. According to data from Scott’s medical database (SMDB),³⁶ the total number of physicians

36 Canadian Institute for Health Information, Scott’s Medical Database (www.cihi.ca/en/scotts-medical-database-metadata).

per 100,000 of the population was relatively flat from the early 1990s to the early 2000s, slightly increasing from 186 in 1990 to 188 in 2000 and 190 by 2005 (see the appendix to this article). Indeed, the slowdown in the growth of physician numbers during this period can be attributed to the influence of the 1991 Barer-Stoddart report,³⁷ which recommended (among other things) a curtailment of enrolment at Canadian medical schools. The expansion of medical training after 2000, in response to concerns about access and perceived doctor shortages, increased the supply to 241 physicians per 100,000 of the population in 2018.³⁸ This has implications for spending. It has been noted, for example, that between 1998 and 2008, physicians' decisions propelled roughly 50 percent of the growth in health-care costs.³⁹

Combining the data, we see that the hospital-physician share of total health spending fell from nearly two-thirds in the early 1970s to less than one-half (about 44 percent) in 2019, while spending on prescription drugs and all other health spending (including public health, community-based care, capital expenditure, other professionals, administration, and research) together grew from about one-third to over one-half of spending. This shift reflects the growth of provincial government plans for prescription drugs and community-based care introduced in the 1970s, as well as the policy shift to consideration of broader determinants of public health, emphasizing biology, lifestyle, environmental factors, and traditional medical-care factors, as first articulated in the 1974 Lalonde report.⁴⁰

To summarize, health spending in Canada has grown over time, but the growth rates have varied. This pattern of ebb and flow in spending has been accompanied by a compositional shift away from hospital- and physician-based care toward a broader approach, including pharmaceuticals, community-based care, capital-intensive diagnostics, and public health. As well, the public share of health-care spending has remained relatively stable, at about 70 percent, since the late 1990s, after declining from a peak of 77 percent in the mid-1970s.

37 See Morris L. Barer and Greg L. Stoddart, *Toward Integrated Medical Resource Policies for Canada*, report prepared for the Federal/Provincial/Territorial Conference of Deputy Ministers of Health (Vancouver: University of British Columbia, Centre for Health Services and Policy Research, June 1991).

38 There has also been a shift toward more specialization among physicians and away from general practice. For more on physician numbers and the role of physicians in driving health spending, see Di Matteo, *supra* note 9, and Canadian Institute for Health Information, *Physicians in Canada, 2019, Summary Report* (Ottawa: CIHI, 2020).

39 See Gregory P. Marchildon and Michael Sherar, "Doctors and Canadian Medicare: Improving Accountability and Performance" (2018) 17:4 *Healthcare Papers* 14-26; and Terrence Sullivan, "Physician Compensation, Accountability and Performance in Canada: Changing the Pas de Deux," in *Healthcare Papers*, *ibid.*, 4-12.

40 Marc Lalonde, *A New Perspective on the Health of Canadians, A Working Document* (Ottawa: Ministry of National Health and Welfare, 1974).

PROVINCIAL AND TERRITORIAL GOVERNMENT HEALTH EXPENDITURE, 1975-2019

Health is primarily a provincial responsibility under the Canadian constitution. Provincial and territorial government health spending currently accounts for about two-thirds of total health spending. As a share of total health expenditure, spending by the provinces and territories grew from approximately 40 percent in 1965 to peak at 72 percent in 1983 before declining to 65 percent by 2019.

Figures 6A and 6B show real per capita government health spending (in 2019 dollars) for the provinces and territories, respectively, from 1975 to 2019. The trend has been upward for all jurisdictions, with the exception of a noticeable decline during the 1990s federal fiscal crisis. That decline was quite pronounced, averaging -0.3 percent across the provinces and territories, but varying among particular jurisdictions. Some governments managed to mitigate the impact of the transfer reductions and economic slowdown better than others. The average annual growth rate of real per capita health spending between 1990 and 1996 was negative for 6 out of the 10 provinces—Nova Scotia, Ontario, Manitoba, Saskatchewan, Alberta, and British Columbia—ranging from -3.4 percent annually for Alberta to -0.1 percent for British Columbia. For the other 4 provinces, the rate ranged from just above 0 for Quebec to 1.6 percent for Newfoundland and Labrador.

Several features of these data are worth noting. First, the territories, owing to their low populations, are in a league of their own. In 2019, per capita spending ranged from a high of \$15,508 for Nunavut to a low of \$8,051 for Yukon—well above the provincial and territorial average of \$4,605. Second, there has been a shift in provincial rankings over time. Provincial government real per capita spending in 1975 ranged from a high of \$2,303 for Alberta to a low of \$1,588 for Nova Scotia, with Saskatchewan ranking second at \$2,240, British Columbia third at \$2,146, and Quebec fourth at \$2,124. Ontario (Canada's largest province) ranked seventh at \$2,012. By 2019, the range was from a high of \$6,009 for Newfoundland and Labrador to a low of \$4,258 for British Columbia, with Alberta second at \$5,188, Prince Edward Island third at \$5,162, and Nova Scotia fourth at \$4,845. Quebec was eighth at \$4,582, Ontario ninth at \$4,386, and British Columbia was the lowest at \$4,258. The third point worth noting is that real per capita spending across the provinces has become more dispersed over time, with the differential increasing from \$715 in 1975 to \$1,752 in 2019.⁴¹

Figures 7A and 7B depict the share of GDP accounted for by provincial and territorial government health spending. The data show an upward trend, but again with a relatively wide range across jurisdictions. In 1975, the combined provincial and territorial government share of GDP in Canada was 5 percent; however, among the provinces, it ranged from a high of 9.0 percent in Prince Edward Island to a low of 3.7 percent in Alberta. By 2019, the Canadian figure was 7.6 percent, and the provincial share ranged from 10.9 percent in Prince Edward Island to 6.6 percent in

41 The accompanying standard deviation ranged from 254.9 to 496.6.

FIGURE 6A Real Per Capita Provincial Government Health Spending (2019 Dollars), 1975-2019

FIGURE 6B Real Per Capita Provincial and Territorial Government Health Spending (2019 Dollars), 1975-2019

Sources: Canadian Institute for Health Information, “National Health Expenditure Trends,” table B.4.1, “Provincial/Territorial Government-Sector Health Expenditure by Province/Territory and Canada, in Millions of Current Dollars, 1975 to 2019”; Canadian Institute for Health Information, “National Health Expenditure Trends,” appendix D.1, “Population by Province/Territory and Canada, in Thousands, by Year, 1975 to 2019”; Canadian Institute for Health Information, “National Health Expenditure Trends,” appendix B.1, “Government Current Expenditure Implicit Price Index (Base Year 1997), by Province/Territory and Canada, 1975 to 2019.”

FIGURE 7A Provincial Government Health Spending as a Percentage of GDP, 1975-2019^a **FIGURE 7B Provincial and Territorial Government Health Spending as a Percentage of GDP, 1975-2019^a**

GDP = gross domestic product.

a Data for 2019 are forecasted.

Sources: Canadian Institute for Health Information, “National Health Expenditure Trends,” table B.4.1, “Provincial/Territorial Government-Sector Health Expenditure by Province/Territory and Canada, in Millions of Current Dollars, 1975 to 2019”; GDP 1981 to 2019: Canadian Institute for Health Information, “National Health Expenditure Trends,” appendix A.1, “Gross Domestic Product at Market Prices by Province/Territory and Canada, in Millions of Current Dollars, by Year”; GDP 1975 to 1980: Statistics Canada table 36-10-0325-01 (formerly CANSIM 384-0015), “Archived-Provincial Gross Domestic Product (GDP), Expenditure-Based, Provincial Economic Accounts, Annual, 1961-1980 (x 1,000,000).”

Alberta. In 2019, all three territories had high ratios of health spending to GDP, with the numbers for Yukon and the Northwest Territories being similar to those for the Atlantic provinces, at 10.5 percent and 10.7 percent respectively, while the ratio for Nunavut was much higher, at 19.7 percent.

Health spending has become the largest single expenditure item in provincial and territorial government budgets. Figure 8 plots the health share of program spending in all jurisdictions from 1975 to 2017. For Canada as a whole, the health share of provincial and territorial program spending rose from 28.4 percent in 1975 to 37.3 percent by 2017. In 1975, the provinces with the highest share were Ontario, Manitoba, and Quebec, at 30.8 percent, 30.0 percent, and 29.5 percent respectively. The three provinces with the lowest share were Newfoundland and Labrador, Prince Edward Island, and New Brunswick, at 23.7 percent, 22.7 percent, and 22.2 percent respectively. By 2017, the top three were Ontario, Manitoba, and British Columbia, at 39.9 percent, 38.2 percent, and 37.9 percent respectively, while the bottom three were Saskatchewan, Quebec, and New Brunswick, at 35.1 percent, 34.5 percent, and 33.1 percent respectively. Notable among the long-term trend is Quebec, which went from being in the top third to the bottom third in terms of its health expenditure share of program spending. The territories spend relatively less on health as a share of program spending, but the federal government has a larger health spending role in the territories because of their large indigenous population.

The increase in real per capita health spending by provincial and territorial governments and in the health share of program spending has been accompanied by compositional shifts, as illustrated in figures 9A and 9B. At the time that Canadian governments began to fund health care, the health-care system was oriented toward hospital-based care and physicians' services. In 1975, 56 percent of provincial and territorial health spending was on hospitals, while physicians accounted for 20 percent (see figure 9A). Between 1975 and 2019, other health expenditure categories expanded at rates much faster than hospitals. As a result, the hospital share of provincial and territorial spending dropped to 37 percent (see figure 9B). Physicians saw their share increase slightly, to 22 percent, while the combined share for other categories (including other institutional care, community care, prescription drugs, and public health) grew from 24 percent in 1975 to 41 percent by 2019.

The diversity of the Canadian federation is also reflected in differences in spending composition across the provinces, as shown in figures 10A to 10F. The Atlantic provinces collectively continue to spend the most on hospital-based care, at 42 percent, while Ontario spends the least, at 34 percent. For spending on physicians, Ontario has the largest share, at 24 percent, compared to a low of 18 percent in Atlantic Canada. Ontario also currently spends more than any other province on funding prescription drugs, at 9.0 percent of its total health spending, while British Columbia, Saskatchewan, and Manitoba all have the lowest share, at 5.0 percent.

Figures 11A, 11B, and 12 present real per capita provincial and territorial government expenditures by category over time, accompanied by average growth rates—helpful data in assessing the sustainability of provincial health spending. Figure 12 also shows the average growth rates for real per capita GDP, in an effort to provide a

FIGURE 8 Provincial and Territorial Government Health Spending as a Share of All Program Expenditures, 1975-2017

Sources: Canadian Institute for Health Information, “National Health Expenditure Trends,” appendix C.1, “Total Provincial/Territorial Government Programs, by Province/Territory and Canada, in Millions of Dollars, by Year, 1975 to 2018”; Canadian Institute for Health Information, “National Health Expenditure Trends,” table B.4.1, “Provincial/Territorial Government-Sector Health Expenditure by Province/Territory and Canada, in Millions of Current Dollars, 1975 to 2019.”

sustainability gauge. The fiscal sustainability of government health expenditures can be defined as the gap between growth in spending rates and growth in measures of the resource base. Real per capita GDP is one measure of the resource base available to support public health-care spending.⁴²

Figure 11A shows that real per capita spending in the physician and other institution categories has trended upward, but hospitals have experienced two periods of more pronounced spending decline, from 1989 to 1997 and from 2010 to 2016. The most severe period of decline coincides with the 1990-91 recession and the federal fiscal crisis, at which time hospital spending dropped by 17 percent. The decline in the second period was less drastic, at 6 percent. For other categories, prescription drugs and capital spending have experienced pronounced periods of decline, while public health and all other health spending have benefited from substantial increases. After robust increases, real per capita spending on prescription drugs peaked in

42 See Di Matteo, “The Sustainability of Public Health Expenditures,” *supra* note 34.

FIGURE 9A Composition of Provincial and Territorial Government Health Spending, 1975

FIGURE 9B Composition of Provincial and Territorial Government Health Spending, 2019 (Forecasted)

Source: Canadian Institute for Health Information, “National Health Expenditure Trends,” table C.4.1, “Provincial/Territorial Government Health Expenditure by Use of Funds in Millions of Current Dollars, Canada, 1975 to 2019.”

2009 and has since declined. Capital spending declined in the 1990s, but the more pronounced slide has been since 2012. Indeed, there are differences between the restraint of the 1990s and that which has occurred since 2012. The post-2012 declines relative to the 1990s are characterized by a slowdown in spending on capital investments and prescription drugs, while hospitals and physicians have not been so greatly affected.

Finally, figure 12 presents growth rates by health expenditure category. With the exception of the 1990–1996 period, in most categories, real per capita health spending by provincial and territorial governments has generally grown faster than real per

FIGURE 10A Composition of Provincial Government Health Expenditure, Atlantic Provinces, 2019 (Forecasted)

FIGURE 10B Composition of Provincial Government Health Expenditure, Quebec, 2019 (Forecasted)

FIGURE 10C Composition of Provincial Government Health Expenditure, Ontario, 2019 (Forecasted)

**FIGURE 10D Composition of Provincial Government Health Expenditure,
Manitoba and Saskatchewan, 2019 (Forecasted)**

**FIGURE 10E Composition of Provincial Government Health Expenditure,
Alberta, 2019 (Forecasted)**

**FIGURE 10F Composition of Provincial Government Health Expenditure,
British Columbia, 2019 (Forecasted)**

Source: Canadian Institute for Health Information, “National Health Expenditure Trends,” series D4, “Provincial/Territorial Government Health Expenditure by Use of Funds in Millions of Current Dollars, by Province and Territory, 1975 to 2019.”

FIGURE 11A Real Per Capita Provincial and Territorial Government Health Spending by Category (2019 Dollars), 1975-2019^a **FIGURE 11B Real Per Capita Provincial and Territorial Government Health Spending by Category (2019 Dollars), 1975-2019^a**

^a Data for 2019 are forecasted.

Sources: Canadian Institute for Health Information, “National Health Expenditure Trends,” table C.4.3, “Provincial/Territorial Government Health Expenditure by Use of Funds in Millions of Current Dollars, Canada, 1975 to 2019”; Canadian Institute for Health Information, “National Health Expenditure Trends,” appendix B.1, “Government Current Expenditure Implicit Price Index (Base Year 1997), by Province and Territory and Canada, 1975 to 2019.”

FIGURE 12 Average Annual Rates of Growth in Provincial and Territorial Government Health Spending by Category, 1975-2019^a

GDP = gross domestic product.

a Data for 2019 are forecasted.

Source: Author's calculations based on data in figures 11A and 11B.

capita GDP. In the 1976-1989 and 1997-2009 periods, total real per capita provincial/territorial health spending expanded faster than real per capita GDP. From 1976 to 1989, real per capita total spending grew at an average of 3 percent annually while real per capita GDP expanded at 1.6 percent. From 1997 to 2009, health spending again expanded at 3 percent annually, while real per capita GDP grew at only 1.8 percent. Thus, during times of economic growth, health spending expands faster than income, while during times of slower economic growth, there is inevitably restraint.⁴³

⁴³ Spending growth across categories can be further decomposed. Indeed, cost drivers for each of these categories can be divided into population aging, price inflation, technological change, and utilization of services. In the case of total health spending growth, over the period 1998-2008, population growth added, on average, 1.0 percent per year to public-sector health spending, accounting for 13.5 percent of total spending growth from 1998 to 2008. Population aging, at 0.8 percent per year, added even less to the total growth (10.8 percent). General inflation, as measured by the GDP deflator, averaged 2.8 percent per year from 1998 to 2008, accounting for close to 38 percent of the overall increase in health spending. Changes in technology, increases in utilization of services, and health-sector inflation above the rate of general inflation accounted for the remainder. See Marchildon and Di Matteo, *supra* note 24.

CONCLUDING DISCUSSION: THE SIX AGES OF HEALTH SPENDING IN CANADA AND WHAT LIES AHEAD

Health spending in Canada has grown over time in a story best described as one of growth, evolution, and change. As described earlier in this article, several distinct periods, or ages, in the evolution of the health-care system can be identified, each of which ultimately reflects factors that affect the demand for and supply of health services. The main factors are income, population growth and aging, technological change and innovation, cost, government policy, and government finances. The six ages and related dates are

1. beginnings (pre-1957),
2. boom (1957-1975),
3. stabilization (1976-1989),
4. decline (1990-1996),
5. recovery (1997-2009), and
6. renewed restraint (2010-2019).

The defining feature of this temporal division is differences in the growth rates of real per capita health expenditures. Those rates were highest during the boom and recovery periods.

While issues of health-care access and service provision flare up almost daily in Canada, the perennial underlying public policy debates have been about the degree of privatization and the sustainability of the health-care system in terms of funding. In the context of public spending, it is important to recognize that, ultimately, the health-care system is as sustainable as we want it to be; more specifically, sustainability is determined by the spending preferences of the public, public willingness to pay for health care out of private or public resources, tax rates, and the willingness of government to make taxation and expenditure decisions. Indeed, governments have embarked on spending restraint in the past. The expenditure debate may begin by focusing on sustainability, but it often becomes sidetracked into discussions of who pays, and how—by increasing or reducing public funding, by providing larger federal transfers to recapture the bygone era of 50/50 funding, or by increasing the private share of spending? However, none of these questions addresses the most important issue.

The real issue is value for money. In the end, what matters is not only how much or how little we spend, but what we spend the available funds on and what we get in return. A recent study examined value for money in Canadian health care as measured by long-term trends in spending per quality-adjusted life year (QALY). The study found that the costs per QALY gained averaged \$16,977 and \$14,968 for the general population and for seniors, respectively, suggesting better value for money from spending on health care for seniors.⁴⁴ The fact that cost per QALY gained was

44 Ruolz Ariste and Livio Di Matteo, “Value for Money: An Evaluation of Health Spending in Canada” (2017) 17 *International Journal of Health Economics and Management* 289-310.

lower for seniors than for the general population suggests that, despite an aging population, much of the recent rise in health spending was driven by the health-care needs of younger individuals. Moreover, a comparison found that while the costs per QALY gained in Canada were generally lower than those found for the United States, they were higher than the costs for the United Kingdom, suggesting some room for improvement.

In Canada, the policy debate is complicated by the relative restraint of the last decade, leading to questions of whether more efficiencies can be found. The debate is further complicated by the aging of the population and the capacity of the health-care system to provide the required services, such as long-term care. Indeed, the deficiencies of the current system became strikingly evident with the onset of the COVID-19 pandemic. Canada's low rate of hospital beds per capita, compared to the capacity of other advanced economies, has also contributed to the death rate during the pandemic,⁴⁵ making the solution of a simple resource transfer from hospital-based care to long-term care not exactly obvious.

Other complicating factors are the rise in physician numbers, the decline in physicians' workload,⁴⁶ lagging reform of primary care in terms of technology and patient registrations, and greater dissemination of alternate physician payment systems in lieu of fees for service.⁴⁷ As well, while slowing technological extension, particularly in the

45 See Livio Di Matteo, *Global Storm: The Effects of the COVID-19 Pandemic and Responses Around the World* (Vancouver: Fraser Institute, 2021) (www.fraserinstitute.org/sites/default/files/global-storm-effects-of-COVID-19-pandemic-and-response-around-world.pdf).

46 Female physicians on average work fewer hours than male, and there has been an increase in the proportion of female physicians. There has also been a decline in male physician workloads. See Thomas F. Crossley, Jeremiah Hurley, and Sung-Hee Jeon, "Physician Labour Supply in Canada: A Cohort Analysis" (2009) 18:4 *Health Economics* 437-56.

47 Fees for services remain the dominant method of physician compensation in Canada, although alternative payment plans (APPs) such as salaries, capitation models, and contract-based payments have grown over time. Many physicians receive payments by combining models. Between 1999-2000 and 2018-19, alternative payments as a share of total compensation rose from 11 percent to 27 percent. Nevertheless, more than 96 percent of all physicians in 2018-19 received a portion of their total payments through fees for services, and only 69 percent were paid a portion through APPs. Moreover, the last few years have seen a slight decline in physicians using APPs. See Canadian Institute for Health Information, *supra* note 38. For a more in-depth discussion of some of these policy issues and the range of viewpoints, see Hugh M. Grant and Jeremiah Hurley, "Unhealthy Pressure: How Physician Pay Demands Put the Squeeze on Provincial Health-Care Budgets" (2013) 6:22 *SPP Research Papers* [University of Calgary, School of Public Policy] 1-38; Di Matteo, *supra* note 9; P. Leonard and A. Sweetman, "Paying the Health Workforce," in Gregory P. Marchildon and Livio Di Matteo, eds., *Bending the Cost Curve in Health Care: Canada's Provinces in International Perspective* (Toronto: University of Toronto Press, 2015), 139-68; Jeremiah Hurley and Jinhu Li, "Financial Incentives and Pay-for-Performance," in *Bending the Cost Curve in Health Care*, *ibid.*, 35-64; Richard H. Glazier and Tara Kiran, "Doctors and Canadian Medicare: Improving System Performance Requires System Change" (2018) 17:4 *Healthcare Papers* 41-47; Audrey Laporte, "Physician Service Costs: Is There Blame To Share Around?" in *Healthcare Papers*, *ibid.*, 28-31; and Jack Mintz, "Canada's Ailing Healthcare System: It's the Doctors' Fault?" in *Healthcare Papers*, *ibid.*, 63-69.

area of pharmaceuticals, appears to have slowed the rate of expenditure growth, especially when combined with cost containment policies, it remains that a new wave of innovation can change this.⁴⁸ In addition, there is always the potential for the extension of public drug plans or pharmacare as a factor in future expenditure growth.⁴⁹

Despite these complications, the focus of the next age of health spending needs to be directed to improvements in performance and outcomes within the current framework of forecasted spending increases. While it is obvious that there is room for improvement, there is as yet no consensus on what needs to be done. International rankings often place Canada relatively low when it comes to health-care performance but much higher in terms of per capita spending or share of GDP devoted to health. For example, the 2017 Commonwealth Fund report ranked the performance of Canada's health-care system 9th out of 11 high-income countries.⁵⁰ The World Health Organization's 2010 health rankings placed Canada 30th out of 191 countries in terms of health-care system performance,⁵¹ while a more recent study in the *Lancet* placed Canada 14th out of 195 countries.⁵² Additionally, while Canada is often mid-ranked for performance among developed countries, there is also a range across categories when it comes to health outcomes. Canada performs well with respect to the attainment of health-care system goals, years of life lived with disability, and stroke mortality, but poorly in areas related to disability-adjusted life expectancy, potential years of life lost, obesity in adults and children, diabetes, female lung cancer, and infant mortality.⁵³

Meanwhile, spending results are more consistent; usually Canada is ranked as one of the higher spenders in terms of both per capita expenditure and health spending as a share of GDP. The latest OECD health spending indicators showed

48 See "Pharmaceutical Spending Trends and Future Challenges," in Organisation for Economic Co-operation and Development, *Health at a Glance 2015: OECD Indicators* (Paris: OECD, 2015), 29-43; and Paul V. Grootendorst, Lisa R. Dolovich, Bernie J. O'Brien, Ann M. Holbrook, and Adrian R. Levy, "Impact of Reference-Based Pricing of Nitrates on the Use and Costs of Anti-Anginal Drugs" (2001) 165:8 *Canadian Medical Association Journal* 1011-19.

49 For a discussion of universal pharmacare, see Colleen M. Flood, Bryan Thomas, Asad Ali Moten, and Patrick Fafard, *Universal Pharmacare and Federalism: Policy Options for Canada*, IRPP Study no. 68 (Montreal: Institute for Research on Public Policy, September 2018).

50 Eric C. Schneider, Dana O. Sarnak, David Squires, Arnav Shah, and Michelle M. Doty, *Mirror, Mirror 2017: International Comparison Reflects Flaws and Opportunities for Better U.S. Health Care* (New York: The Commonwealth Fund, July 2017) (https://interactives.commonwealthfund.org/2017/july/mirror-mirror/assets/Schneider_mirror_mirror_2017.pdf).

51 World Health Organization, *The World Health Report, Health Systems Financing: The Path to Universal Coverage* (Switzerland: WHO, 2010).

52 Rafael Lozano et al., "Measuring Performance on the Healthcare Access and Quality Index for 195 Countries and Territories and Selected Subnational Locations: A Systematic Analysis from the Global Burden of Disease Study 2016" (2018) 391:10136 *Lancet* 2236-71.

53 Said Ahmad Maisam Najafizada, Thushara Sivandan, Kelly Hogan, Deborah Cohen, and Jean Harvey, "Ranked Performance of Canada's Health System on the International Stage: A Scoping Review" (2017) 13:1 *Healthcare Policy* 59-73.

Canadian per capita total health spending in 2019 of US\$5,414 and ranked Canada 11th out of 46 developed countries (but 15th for per capita government spending, at US\$3,815).⁵⁴ As a share of GDP, total health spending is 10.8 percent, putting Canada at 7th-highest out of the same set of countries (and 13th out of those countries with 7.6 percent of GDP going to government health spending). A key question is why Canada spends as much as it does, relative to other countries, for a more variable and mid-ranked set of outcomes. It is not that Canadian health care is not good, but it could be better, given the amount of money being spent.

These issues are relevant to the future in light of the current impact of COVID-19 on health spending in Canada, as well as changes that are already under way. Added to the perennial provincial demands for more funding, there is a perceived federal readiness to embark on more social spending in the wake of COVID-19, which may ultimately include health given the shock of the pandemic, especially to the long-term-care system. There may need to be increases in spending to compensate for the long-term effects of delayed and cancelled hospital procedures, and the steep decline in patient visits and surgeries in 2020.⁵⁵ At the same time, some evidence suggests this decline may actually serve to have reduced overall health spending in 2020, making the call for increased federal transfers for health somewhat awkward, to say the least.⁵⁶

Nevertheless, the relative restraint of the last decade may give way to new increases in areas such as pharmaceuticals (especially if new product innovation resumes), long-term care as the population ages, and public health in the wake of COVID-19. As well, the increase in the stock of physicians, noted earlier, has implications for future spending, given the role of physicians as gatekeepers to the system. Broad-based technological change in new health procedures may also introduce new expenditure pressures.

Counterbalancing these considerations will be the ability and willingness of governments to pay. Forecasts for Canada's economic growth suggest, at best, only moderate increases in real GDP over the next decade,⁵⁷ notwithstanding the anticipated

54 Organisation for Economic Co-operation and Development, "Health Spending, Indicators" (<https://data.oecd.org/healthres/health-spending.htm>).

55 It has been reported that from March to June 2020, overall surgeries relative to the same period in 2019 fell by 47 percent. Canadian Institute for Health Information, "COVID-19's Effect on Hospital Care Services," July 8, 2021 (www.cihi.ca/en/covid-19-resources/impact-of-covid-19-on-canadas-health-care-systems/covid-19s-effect-on-hospital).

56 In the United States, it appears that health spending in 2020 actually dropped slightly. See Cynthia Cox, Krutika Amin, and Rabah Kamal, "How Have Health Spending and Utilization Changed During the Coronavirus Pandemic?" *Peterson-KFF Health System Tracker*, March 22, 2021 (www.healthsystemtracker.org/chart-collection/how-have-healthcare-utilization-and-spending-changed-so-far-during-the-coronavirus-pandemic/#item-start).

57 The 2021 federal budget forecasts real GDP growth, averaged across private-sector forecasts, of 6 percent in 2021 and 4 percent in 2022 before reverting to 2 percent in 2023 and following years. See Canada, Department of Finance, 2021 Budget, Budget Plan, April 19, 2021, annex 1, table A1.1.

immediate post-pandemic rebound. In the absence of increased reliance on private-sector health care, the question remains whether, and to what extent, the federal and provincial/territorial governments will have the fiscal capacity to meet increased resource demands, given the large debt loads acquired during the pandemic and the future path of interest rates.

**APPENDIX FIGURE A Physicians per 100,000 of Canada's Population,
Census Years from 1871 to 1943 and Annually from 1947 to 2018**

Notes: Scott's Medical Database (SMDB) data exclude (1) resident physicians, physicians in the military, and semi-retired and retired physicians; and (2) physicians who requested that their information not be published as of December 31 of the reference year. Historical Statistics of Canada define physicians as active civilian physicians. SMDB backcast data are for the period 1968-1975. SMDB estimates average 80 percent of the number from the Historical Statistics of Canada. This figure is used to estimate pre-1968 numbers.

Sources: Canadian Institute for Health Information, Scott's Medical Database (www.cihi.ca/en/scotts-medical-database-metadata); Statistics Canada and Social Science Federation of Canada, "Historical Statistics of Canada," series B82-92.

INTERNATIONAL TAX PLANNING

Co-Editors: Ken Bottenham and Ian Bradley*

CHINA'S NEW REGIME FOR TAXING EXPATRIATE INCOME: TIGHTENING THE SCREWS OR VINTAGE WINE IN A NEW BOTTLE?

*Yan Xu and Zizheng Zhao***

Expatriates have been fundamental to China's economic growth, contributing to the country's socioeconomic development and modernization. The second-largest group of expatriates in China are North Americans. Personal income taxation concessions for expatriate workers have been an important instrument to attract and retain skilled foreign labour since China opened its doors to foreign investment and an income tax was adopted four decades ago. A recent overhaul of the law on individual income tax introduced a number of changes to expatriate income taxation, including the winding back of some preferential concessions previously offered only to expatriates. A literal reading of these changes suggests that the new regime has led to harsher tax treatment of expatriates and increased their tax liability. This article considers whether this view holds up, by closely analyzing the new system's major features relating to individual income tax as they affect expatriates. The authors challenge the literal reading of the law and argue that the recent changes have not fundamentally altered the underlying policy on expatriate income taxation. Further, an economically stronger China has not observed any diminishment of the role of personal income taxation as an instrument of government policy, despite the recent changes. A generous interpretation of the legal terms and rules, and of the application of concessions under the amended system, may encourage more lenient treatment of Canadians and other expatriates working and living in China.

KEYWORDS: INDIVIDUAL INCOME TAXES ■ EXPATRIATES ■ TAX INCENTIVES ■ CHINA ■ TAX LAW ■ TAX PLANNING

* Of PricewaterhouseCoopers LLP, Toronto (e-mail: ken.bottenham@pwc.com; ian.k.bradley@pwc.com).

** Yan Xu is of the School of Accounting, Auditing and Taxation, University of New South Wales, Sydney, and adjunct associate professor, Faculty of Law, University of Hong Kong. Zizheng Zhao is a research associate at the University of Western Australia Law School, Perth.

CORPORATE TAX PLANNING

Co-Editors: Mark Brender,* Brian R. Carr,** Michael R. Smith,*** and Christopher J. Steeves****

IMPACT OF COVID-19 AND TRANSFER PRICING: APPROACHES FOR COMPARABILITY ADJUSTMENTS

*Andrew Barton, Vinu Subramaniam, and Paola Marino******

The impact of the COVID-19 pandemic has varied significantly across market sectors and companies, and the disruptions generated by the pandemic have had major implications for the transfer-pricing practices of many multinationals. The COVID-19 crisis has challenged the efficiency of traditional benchmarking of profit margins and markups on the basis of the profitability of comparable companies. In this article, we provide a framework for addressing two key questions: (1) how to ensure that the data used for setting or testing transfer-pricing results are appropriate in terms of comparability and that they adequately reflect economic reality for the tested party; and (2) what adjustments need to be made if the tested party's results fall below the arm's-length range. Given the extraordinary circumstances, we cannot rely on a simple analysis of historical data to adjust for the impact faced by businesses as a result of COVID-19. For example, in situations where the taxpayer's results have been affected by the COVID-19 pandemic to a greater extent than the results of comparable companies, the approaches outlined in this article will provide the taxpayer with an estimated arm's-length range of profitability for the comparable companies that is calibrated to the impact of the pandemic on the tested party's results. These approaches are aligned with the transfer-pricing guidance for COVID-19 adjustments issued by the Organisation for Economic Co-operation and Development in December 2020.

KEYWORDS: TRANSFER PRICING ■ COMPARABILITY ■ ADJUSTMENTS ■ COVID-19 ■ ECONOMIC IMPACT ■ INTERNATIONAL TAXATION

* Of Osler Hoskin & Harcourt LLP, Montreal (e-mail: mbrender@osler.com).

** Of Thorsteinssons LLP, Toronto (e-mail: bcarr@thor.ca).

*** Of Deloitte LLP, Calgary (e-mail: michaessmith@deloitte.ca).

**** Of Fasken Martineau DuMoulin LLP, Toronto (e-mail: csteeves@fasken.com).

***** Of Deloitte LLP: Andrew Barton, Toronto (e-mail: anbarton@deloitte.ca); Vinu Subramaniam, Ottawa (e-mail: visubramaniam@deloitte.ca); Paola Marina, Montreal (e-mail: pmoreno@deloitte.ca). We express gratitude and appreciation for all the feedback and guidance from Muris Dujic at Deloitte LLP.

CURRENT TAX READING

Co-Editors: Kim Brooks, Jinyan Li, Alan Macnaughton,
and Mike Veall*

Oliver Nnamdi Okafor and Jonathan Farrar, “Punishing in the Public Interest: Exploratory Canadian Evidence Pertaining to Conviction and Incarceration for Tax Offences,” *Journal of Accounting and Public Policy* (forthcoming) (www.sciencedirect.com/science/article/pii/S0278425421000314)

The authors of this article obtained, through access-to-information legislation, the complete set of tax-crime conviction notices published by the Canada Revenue Agency (CRA) on its website over a period of 10 calendar years (2006-2015). Only the notices were examined; the actual court decisions were not studied (and would be hard to find, since the notices do not include case references). The CRA publishes all convictions as court processes conclude, according to the authors, so this study covers the entire population of tax-crime convictions for this period.

The notices report on 2,570 convicted taxpayers. About 96 percent of convicted taxpayers were fined, but only 346 (13 percent) were incarcerated. The average time of incarceration was 17 months. The average number of tax crimes committed by a convicted taxpayer was four—mainly, it seems, because many of the convictions covered multiple tax years.

The authors express concern about the small number of convictions, suggesting that it may indicate a lack of CRA resources. During the time period studied, the CRA processed 271 million tax returns (250 personal tax returns, 19 million corporate tax returns, and 2 million trust tax returns), and so it follows that, on average, about one taxpayer is convicted per 100,000 tax returns filed. Furthermore, the number of taxpayers convicted generally declined over the period, from 321 in 2006 to 137 in 2015. The number of taxpayers incarcerated also appeared to decline, but less obviously.

For individuals convicted of tax offences, gender was highly predictive: 86 percent of the people convicted were male, and 14 percent were female. The predominant offence was failure to file returns (53 percent), followed by unreported income (19 percent), overstated deductions (also 19 percent), and unreported goods and

* Kim Brooks is of the Schulich School of Law, Dalhousie University, Halifax (e-mail: kim.brooks@dal.ca); Jinyan Li is of Osgoode Hall Law School, York University, Toronto (e-mail: jinyanli@osgoode.yorku.ca); Alan Macnaughton is of the School of Accounting and Finance, University of Waterloo (e-mail: amacnaughton@uwaterloo.ca); and Mike Veall is of the Department of Economics, McMaster University, Hamilton, Ontario (e-mail: veall@mcmaster.ca).

services tax (GST)—9 percent. There were no convictions for international tax fraud or abusive offshore tax schemes for any type of taxpayer.

There were also significant patterns of incarceration. Overstating deductions was the offence most likely to lead to incarceration; the article suggests that judges may view the overstating of deductions as a particularly calculating crime that involves greater incentive to deceive than other tax crimes do. Also, professionals who commit tax crimes are most likely to be incarcerated, and for longer terms.

The results above generally hold true both as simple cross-tabulations and as the results of applying a multivariate statistical model in which predictions are made by changing one variable while holding all of the others constant.

A related question, not examined in the study, is the litigation strategy for tax crimes. It would appear that the government prosecutes only cases that it fully expects to win: the Public Prosecution Service of Canada's conviction rate under the Criminal Investigations Program is reported to be 96 percent.¹ This would suggest that a high degree of caution exists, owing, perhaps, either to a concern about setting legal precedents or to a concern that the CRA might harm its reputation by bringing charges that the press will portray as not fully justified. Alternatively, as noted above, the strategy could simply be the result of a resource constraint. Unfortunately, there is no data on cases settled out of court—which, of course, must involve only fines, interest, and penalties without incarceration.

AM

Annet Wanyana Oguttu, *Base Erosion and Profit Shifting: A Blueprint for Africa's Response* (Amsterdam: IBFD, 2021)

In 2015, the Organisation for Economic Co-operation and Development/Group of Twenty (OECD/G20) base erosion and profit shifting (BEPS) project generated a number of minimum standards, common approaches, and best practices (“BEPS measures”) for countries to incorporate into their domestic laws or bilateral tax treaties in order to protect their tax bases.² The implementation of the BEPS measures appears to have varied from country to country, depending on such factors as the perceived need for beefing up the anti-avoidance rules and the availability of legislative and administrative resources.

There is scant literature on how African countries have implemented the BEPS measures. *Base Erosion and Profit Shifting: A Blueprint for Africa's Response* fills that void. The author, a leading tax scholar in Africa, provides an excellent examination of the BEPS measures, of their relevance to African countries, and of possible actions to be taken. In addition, she offers insights into issues that were not covered by the BEPS project but were important in Africa, such as illicit financial flows and tax

1 Canada Revenue Agency, *Annual Report to Parliament 2014-2015* (Ottawa: CRA, 2015), at 58.

2 For an overview of the final reports, see Organisation for Economic Co-operation and Development, “BEPS Actions” (www.oecd.org/tax/beps/beps-actions).

incentives. The author's analyses and recommendations are tailored to the specific circumstances of African countries, including the challenges these countries face with respect to administrative capacity. She enjoins African countries to take advantage of the international development and develop their international tax rules. She also urges African countries to transform themselves from "instrument-takers" into "worthy decision makers" in the area of international tax law.³

The book's five parts cover the following: (1) general background; (2) the implementation of the four minimum standards (that is, countering harmful tax practices in action 5; preventing treaty abuse in action 6; country-by-country reporting [CbCR] in action 13; and improving dispute resolution in action 14); (3) best practices—such as limiting base erosion through interest expense deduction—whose implementation could be a priority for African countries; (4) the adoption of international standards, such as preventing the artificial avoidance of permanent establishment status (addressed in action 7) and ensuring that transfer-pricing outcomes are in line with value creation; and (5) the taxation of the digital economy (addressed in action 1).

There are 15 chapters in the book. Some chapters provide excellent examples of specific aspects of African countries. In discussing harmful tax competition, for example, chapter 3 explores the preferential tax regimes in Botswana, Liberia, Mauritius, Seychelles, and South Africa. With respect to the prevention of treaty abuse and to dispute resolution through the mutual agreement procedure (MAP), chapter 4 notes that African countries have not signed many double tax agreements and that quite a few countries (for example, Angola, Benin, Botswana, Congo (Rep.), Djibouti, Kenya, Liberia, and Sierra Leone) have not signed the multilateral instrument (MLI),⁴ and chapter 6 explains that the MAP is difficult to use owing to African countries' lack of capacity and capability and that only Mauritius opted for mandatory binding arbitration.⁵ In discussing country-by-country reporting, chapter 5 emphasizes the importance of information about transfer-pricing transactions, but it notes that only a few African countries currently have domestic legislation requiring some form of documentation for transfer-pricing transactions. In chapter 10, the author notes that, even though transparency is critical, only one country in Africa (namely, South Africa) has comprehensive mandatory disclosure rules.

The author identifies tax avoidance by multinational enterprises (MNEs) and illicit financial flows as two major stumbling blocks to the mobilization of corporate tax revenue in Africa. She notes that corporate taxes have become a major contributor to total tax revenue in African countries: the capacity to raise revenue from individual income taxes is low owing to the small formal sector of the economy. In general, corporate taxes account for an average of 29 percent of total revenue in Africa, but

3 At 36.

4 At 155-62. Organisation for Economic Co-operation and Development, "Multilateral Convention To Implement Tax Treaty Related Measures To Prevent BEPS" (herein referred to as "the MLI").

5 At 282.

for only 9 percent in OECD countries.⁶ In some countries, taxes paid by MNEs account for the lion's share of the total corporate tax revenue. For example, MNEs paid about 70 percent of Rwanda's corporate tax and 88 percent of Nigeria's corporate tax.⁷

The author recommends that African countries better protect their tax base by embracing some international initiatives, including the BEPS measures and international help in funding their capacity development through programs such as Tax Inspectors Without Borders. She suggests that these countries tailor the BEPS measures to their needs. Since most African countries are capital-importing countries, relying heavily on foreign investments and access to technology, their main concern is how to protect the erosion of their right to tax income that is derived from within their geographic boundaries. Accordingly, the BEPS measures most relevant are those related to (1) the taxation of the digital economy, (2) the deduction of interest expense and other financial payments, (3) treaty abuse, and (4) transfer pricing.

This book is an excellent resource for anyone interested in international tax issues in Africa, especially those related to the implementation of BEPS measures.

JL

Mary C. Bennett, "Contemplating a Multilateral Convention To Implement OECD Pillars 1 and 2," *Tax Notes*, June 11, 2021 (www.taxnotes.com/special-reports/base-erosion-and-profit-shifting-beps/contemplating-multilateral-convention-implement-oecd-pillars-1-and-2/2021/06/11/76k35)

On July 1, 2021, the OECD/G20 Inclusive Framework on base erosion and profit shifting released a statement.⁸ Key components of the solution were endorsed by the G20 finance ministers on July 10, 2021, and a final agreement and detailed implementation plan are expected by October 2021. It appears that there is now a chance for the proposed solution to become reality. Pillar 1 is essentially about creating a new taxing right for market jurisdictions and allocating this right on the basis of a formulaic apportionment of group residual profit by using sales as the sole allocation key (the so-called amount A). Pillar 2 concerns a global minimum tax on corporate profits, imposed by residence countries in a manner that is very similar to the existing controlled foreign corporation (CFC) rules and that mimics the US global intangible low-taxed income (GILTI) rules. In order to give effect to the pillar 1 and pillar 2 proposals, however, a new multilateral convention is needed because existing laws do not support multilateral tax measures.

In this article, the author, who is the former head of the Tax Treaty, Transfer Pricing, and Financial Transactions Division of the OECD's Centre for Tax Policy &

6 At 8.

7 Ibid.

8 Organisation for Economic Co-operation and Development, "Statement on a Two-Pillar Solution To Address the Tax Challenges Arising from the Digitalisation of the Economy," July 1, 2021.

Administration, offers her thoughts on the need for a multilateral tax convention and the key design features of such an initiative. Even though the article refers to the pillar 1 blueprint⁹ and pillar 2 blueprint,¹⁰ which were published by the OECD in October 2020 and predate the July 1 statement, Bennett's analysis is valid because the two-pillar solution described in the statement was based on the technical details in the blueprints.

With respect to the need for a multilateral convention, the author considers each pillar separately. Because amount A in pillar 1 has features that “transcend mere bilateral relationships,” the need for a multilateral convention is clear: a multilateral treaty would be the best way to “ensure coordination, consistency and certainty, and operate in a speedy manner.”¹¹ The need for a multilateral convention to implement pillar 2 is less clear because the common approach, once agreed upon, can be incorporated into domestic laws. The author suggests, however, that a multilateral convention is necessary because, among other reasons, a need exists to clarify the compatibility of bilateral tax treaties with CFC rules and other elements of pillar 2 (such as the undertaxed-payment rule that allows the source country to deny deduction for base-erosion payments to low-taxed recipients). Furthermore, the United States' desire to ensure that its GILTI regime is recognized as compliant with pillar 2 could also lead to interest in having other countries commit to that recognition through a multilateral convention. Finally, if the two pillars were to be implemented as a package deal, a single multilateral convention might be needed.

Following a brief overview of existing multilateral tax agreements, including the MLI, the author discusses issues in the new multilateral convention that are to be addressed by building on existing concepts from bilateral treaties. These issues include persons covered; taxes covered; definitions; residence; permanent establishment; international shipping and air transport; non-discrimination; mutual agreement procedure and dispute resolution; exchange of information; assistance in collection; limitation on benefits; entry into force; and termination and amendment.

The elephant in the room is whether a new multilateral convention will be ratified by the US Congress: a two-thirds majority of the US Senate is required for ratification, and such a majority is difficult to muster in today's political climate. An alternative process has been suggested for guiding the pillar 1 and pillar 2 negotiations in the United States—namely, the trade promotion authority (TPA), under which the executive branch's trade negotiations must follow guidelines and objectives set by Congress. In the author's view, however, such a suggestion is merely “intriguing”—unlikely

9 Organisation for Economic Co-operation and Development, *Tax Challenges Arising from Digitalisation—Report on Pillar One Blueprint, Inclusive Framework on BEPS* (Paris: OECD, 2020).

10 Organisation for Economic Co-operation and Development, *Tax Challenges Arising from Digitalisation—Report on Pillar Two Blueprint, Inclusive Framework on BEPS* (Paris: OECD, 2020).

11 Mary C. Bennett, “Contemplating a Multilateral Convention To Implement OECD Pillars 1 and 2,” *Tax Notes*, June 11, 2021 (www.taxnotes.com/special-reports/base-erosion-and-profit-shifting-beps/contemplating-multilateral-convention-implement-oecd-pillars-1-and-2/2021/06/11/76k35).

to be taken up in the near term, because the TPA must first survive the Senate advice-and-consent process.

In the author's view, the drafters of the new multilateral convention have a herculean task in front of them. The time needed to draft and reach an agreement that will revolutionize the international tax system could be a multiple of the time (more than one year) needed to generate the MLI, which simply incorporated previously agreed-upon BEPS-related treaty changes.

This thoughtful article is a reminder that in the area of international taxation, the devil is in the details. The broad consensus reached by politicians can be translated into law only if the details can work in practice and if countries ratify the multilateral agreement. If the implementation of the MLI is any example, many countries that signed the agreement may not end up ratifying it.

JL

Steven A. Dean and Attiya Waris, "Ten Truths About Tax Havens: Inclusion and the 'Liberia' Problem," *Emory Law Journal* (forthcoming)

(<https://ssrn.com/abstract=3822421>)

Appearing in the *Emory Law Journal's* special issue on systemic racism, this article offers 10 provocative "truths" about tax havens, in order to "highlight perceptions of bias that fuel global inequality, distorting international tax policies and priorities."¹² The authors claim that international tax law "may seem an unlikely place for the dog-whistle politics of race and discriminatory exclusion, yet its preoccupation with preserving the market from perceived threats lends itself to fears of lower class or racially charged lawlessness."¹³ Countries such as Liberia, and Trinidad and Tobago, have been blacklisted as jurisdictions that engage in harmful tax competition, while whiter and wealthier states, such as Switzerland and Luxembourg, have not been. The elite within the OECD and European Union continue to shape the global policy-making process in an effort to address the flaws in the existing system, but they refuse to look inward when it comes to identifying the source of the problem, and they put the blame on states such as Liberia for being tax havens.

The first three truths (tax havens will always exist; tropical tax havens do not matter much; and the United States has become a super-haven) address the complexities of the term "tax haven." The authors observe that while tropical tax havens can only provide secrecy and be a conduit for money in transit, the United States is a major destination of the portfolio investments that bear little tax in the country of residence. By refusing to participate in the common reporting standard (CRS), which is designed to increase transparency, the United States is the only major country that has secured its place as the tax haven of tomorrow.

Truths number 4 to 6 seek to show why the anti-tax-haven initiatives can be seen by many as a racialized system of control, and evidence of white privilege in the

12 At 3.

13 Ibid.

United States and European countries. These truths explain the “global southern strategy,” which tells the culture story of anti-tax-haven campaigns: privilege matters in international tax, and the culture story of tax havens caused a lost decade in international tax policy and represents the effort of large developing countries to form a coalition to counter white privilege.

Truths number 7 to 9 (ring-fencing taxpayers has proved to be easy; minimum taxes punish difference; and a preoccupation with punishing tax havens distorts the policy-making agenda of international taxation) explain why inclusiveness matters in international tax policy making today. Using the GILTI regime as an example, the authors suggest that recent minimum tax proposals, while not openly targeting “Black or Brown states” as the previous blacklists do, continue to embrace the established culture’s narrative of tax havens. This culture justifies treating any state that does not have a comprehensive income tax “as having forfeited its claim to the revenues a more civilized state would have collected.”¹⁴ In comparison with minimum taxes, the CbCR regime implicitly acknowledges that the failures of the corporate tax system constitute a collective failure that cannot be solved by punishing wayward states. The CbCR regime shows the power of inclusion in international tax policy. That “[i]nclusion is a powerful tool and international tax must learn to wield it” is the 10th truth set out in this article,¹⁵ which makes the following argument:

Whether racial, gender, religious, or ethnic, the truth of the matter is that failure to make a consistent effort to be inclusive and to level all elements of the playing field will continue to hamper the ability of states to achieve an inclusive, fair, and just outcome and a future that delivers an international system that is fiscally legitimate.¹⁶

If the authors intended to be provocative and to generate uncomfortable conversations, they succeed in that respect. After reading the article, one will find it difficult to ignore the perception of racial bias in international taxation.

JL

Mitchell Kane and Adam Kern, “Progressive Formulary Apportionment: The Case for ‘Amount D,’” *Tax Notes*, June 15, 2021 (www.taxnotes.com/featured-analysis/progressive-formulary-apportionment-case-amount-d/2021/06/11/76k47)

Adopting a formulary apportionment method for allocating a portion of certain multinational enterprises’ (MNE) residual profit to market jurisdictions is a key feature—and arguably the most innovative and transformative feature—of the proposed pillar 1, which is part of the two-pillar approach to addressing tax challenges arising from digitalization. This method is used to establish a market jurisdiction’s

¹⁴ At 16.

¹⁵ At 17.

¹⁶ At 18.

share of the global profit and thus the extent of the jurisdiction's new taxing right. It has the effect of transforming the taxation of MNEs from an entity-based to a consolidated group-based (or unitary-based) regime and of transforming the basis for allocating taxing rights from a physical-presence or corporate-residence test to a sales-based test. The formulary apportionment method is designed to benefit market jurisdictions that include developing countries.

In this article, the authors argue that pillar 1 has opened the door to thinking in creative ways about the international allocation of taxing rights in order to make the international tax system more “progressive.”¹⁷ The progressive formulary apportionment method represented by amount D—unlike the formulary apportionment method set out in pillar 1, which allocates taxing rights on the basis of taxpayers' behaviour with respect to transactions, such as sales—allocates some taxing rights on the basis of a country's economic well-being, with worse-off countries receiving more taxing rights than well-off countries. Such countries receive the new taxing rights (under a new amount D)¹⁸ even if they do not have any right under amount A.

The authors argue that the most straightforward rationale for amount D is ethical: “Many people in developing nations could be better off if their states had greater fiscal capacity, and the international tax regime should account for their interests.”¹⁹ Another reason for amount D is the need to make concessions to developing countries that must abandon unilateral digital services tax (DST) in order to support pillar 1. The authors also explain that amount D offers advantages to alternative mechanisms that allocate fiscal capacity to developing countries on the grounds of distribution, efficiency, and administrability. The authors provide a detailed explanation of the computation of amount D and of certain implementation issues, such as the use of a collection agent to collect taxes on behalf of developing countries.

The authors state that “the pillar 1 blueprint is misguided in its attempt to cling to historic demands for nexus . . . by tying some delimited business sectors to the amorphous concept of value creation,”²⁰ and that “this effort is bound to fail because it is at odds with the very indeterminacy of the question about linking profit to jurisdictions that drives the need for reform in the first place.”²¹ They also state that “it

17 For an article that was inspired by this development in pillar 1 and advocated turning pillar 1 into a global corporate tax, see Sophie Chatel and Jinyan Li, “Repurposing Pillar One into an Incremental Global Tax for Sustainability: A Collective Response to a Global Crisis” (2021) 75:5 *Bulletin for International Taxation* (IBFD online).

18 Amount D will be added to the existing amount A and amount B in pillar 1. Amount C was originally included in pillar 1 but was not in the blueprint. To avoid confusion, the authors name their proposal element in favour of developing countries “amount D.”

19 Mitchell Kane and Adam Kern, “Progressive Formulary Apportionment: The Case for ‘Amount D,’” *Tax Notes*, June 15, 2021 (www.taxnotes.com/featured-analysis/progressive-formulary-apportionment-case-amount-d/2021/06/11/76k47).

20 Ibid.

21 Ibid.

is hard to see why market jurisdictions should have the exclusive rights to tax non-residents on their residual profit.”²²

The progressive formulary apportionment idea is surely thought-provoking. The authors’ criticism of amount A is forceful, and easy to appreciate. However, their view that the current pillar 1 allocates to market jurisdictions the exclusive rights to tax MNEs’ residual profit is incorrect: only 20-30 percent of such profit is subject to amount A. It is also difficult to see how far the proposed amount D can “cure” the defects in pillar 1 while being “simply a natural extension of the trajectory that we are observing in pillar 1.”²³

JL

Wei Cui, “What Does China Want from International Tax Reform?”

Tax Notes, July 9, 2021 (www.taxnotes.com/special-reports/base-erosion-and-profit-shifting-beps/what-does-china-want-international-tax-reform/2021/07/09/76rh1)

As a member of the G20, China played an active role in the OECD/G20 base erosion and profit shifting project. Mr. Jianfan Wang of China serves as co-deputy chair of the steering group of the Inclusive Framework that oversees the development of pillar 1 and pillar 2. Thus, even though China has rarely publicly discussed its views on pillar 1 or pillar 2, its support for the multilateral approach to solving international tax problems has seemed to be clear. But when the Group of Seven (G7) leaders openly confronted China at the June 2021 summit communiqué about issues related to, among other things, human rights and an investigation into the origin of COVID-19, China denounced the G7 statement and warned that the days when a small group of countries could decide the fate of the world were long gone.²⁴ That generated some concerns about China’s willingness to go along with the two pillars agreed to by the G7. On July 10, 2021, those concerns were put to rest, as China’s finance minister endorsed the key components of pillar 1 and pillar 2.²⁵

Wei Cui’s article was published before the G20 finance ministers’ communiqué. The author examines China’s possible response to the global efforts to reach consensus on the two pillars, especially the minimum corporate tax rate under pillar 2. He suggests that China would probably not be an initial adopter if the Inclusive Framework did not require most participating countries to be so. Regarding whether China will support a multilateral agreement to implement the pillars, the author

22 Ibid.

23 Ibid.

24 “G7 Summit: China Says Small Groups Do Not Rule the World,” *BBC*, June 13, 2021 (www.bbc.com/news/world-asia-china-57458822) and “China Denounces G7 Statement, Urges Group To Stop Slandering Country,” *Reuters*, June 14, 2021.

25 Italian G20 Presidency, Third Finance Ministers and Central Bank Governors Meeting, Communiqué 9-10 July 2021 (www.g20.org/wp-content/uploads/2021/07/Communique-Third-G20-FMBCBG-meeting-9-10-July-2021.pdf).

says that the answer will depend mainly on what stake China has in the pillar 1 blueprint, but there appears to be no decisive considerations for China under pillar 1 because China neither has any DST to withdraw nor relies on the taxation of China-based MNEs for additional revenue. Accordingly, as the author says, “it seems the G-7’s global minimum tax proposal offers China plenty of opportunities to act as a good multilateralist (President Xi’s favorite role).”²⁶

The author’s conclusion is based on some thoughtful reflection about China’s recent policy changes in respect of international taxation. Among the changes China has made are (1) departing from a paradigm of taxing the foreign income of Chinese-resident corporations; (2) relaxing the enforcement of anti-abuse rules, including the “controlled foreign corporation” rules; (3) increasing its efforts to attract foreign investment through the creation of the Hainan free trade port; and (4) maintaining the importance of Hong Kong for China’s global economic strategy.

The author argues that China and the United States have made some similar tax policy choices, such as not to increase personal income tax or consumption tax for revenue, and to engage in tax competition in order to attract foreign investment and promote domestic financial centres. But the two countries’ common interest in multilateralism may come from different sources. While the United States wants to use multilateral action to stop the race to the bottom with respect to corporate income tax, China may see multilateralism as a way to weaken the obligations created under any new international tax agreement “so as to minimize harms to China’s competitive position as a rising center for global finance.”²⁷

This article is timely, given that the Inclusive Framework is expected to prepare a detailed implementation plan for the G20 finance ministers in October 2021. Pillar 2 takes a “common approach” route to implementation, while the implementation of pillar 1 requires a new multilateral agreement, and thus it will be interesting to see how China weighs the pros and cons of each pillar. In the United States, on the other hand, it has been made clear that the Biden administration will implement pillar 2 (the US-modified GILTI regime) first and put pillar 1 on a slower track, because the passing of legislation on pillar 1 poses a greater challenge.

JL

Robert Goulder, “The Cost of Change: Pillar 1 Reduced to the Back of a Napkin,” *Tax Notes*, July 1, 2021 (www.taxnotes.com/featured-analysis/cost-change-pillar-1-reduced-back-napkin/2021/07/01/76qdb)

The general revenue impact of pillar 1 was estimated by the OECD to be insignificant.²⁸ With respect to individual countries, investment hubs or low-tax jurisdictions

26 Wei Cui, “What Does China Want from International Tax Reform?” *Tax Notes*, July 9, 2021.

27 Ibid.

28 Organisation for Economic Co-operation and Development, *Tax Challenges Arising from Digitalisation—Economic Impact Assessment, Inclusive Framework on BEPS* (Paris: OECD, 2020).

are expected to be fiscal losers, while market countries, such as Canada, are expected to be winners.²⁹ The US Treasury Secretary Janet Yellen recently claimed that pillar 1 will be largely revenue-neutral for the United States.³⁰ Whether a country gains or loses under pillar 1 may affect its decision to implement the pillar 1 regime.

In this article, the author describes a specific computational method used by a tax lawyer (Dan Neidle) to estimate the cost of adopting pillar 1, and he reports the results of applying the method to a data set—the Forbes Global 2000 index, which ranks the world’s largest publicly traded companies according to a mixture of assets, profits, sales, and market value. The method is intuitively logical and includes the following steps:

1. Identifying the relevant companies by excluding companies in the data set that are in banking, financial services, and extractive industries that are carved out in pillar 1.
2. Filtering out companies with profit margins under 10 percent. The profit-margin cut-off generates a figure of \$835 billion as an approximation of aggregate profits that are within the scope.
3. Assuming that 20 percent of the in-scope profits (similar to taxable profits) would be subject to being allocated to market jurisdictions through amount A, the aggregate amount A is \$167 billion ($\$835 \text{ billion} \times 20 \text{ percent}$).
4. Apportioning amount A to each market jurisdiction on the basis of a jurisdiction’s proportional share of a company’s sales, relative to worldwide sales. Instead of calculating the ratio for each company, one uses a proxy to approximate country-level outcomes by making an assumption about each country’s share of global consumption—an assumption that is based on the World Bank’s global index of private consumption expenditures. For example, since the United Kingdom accounts for 3.76 percent of global private consumption, 3.76 percent of amount A (that is, $\$6.3 \text{ billion}$ or $\$167 \text{ billion} \times 3.76 \text{ percent}$) is allocated to the United Kingdom.
5. Translating a country’s share of amount A into corporate tax revenue by multiplying it by the corporate tax rate. For example, assuming the corporate income rate is 25 percent in the United Kingdom, the United Kingdom’s tax revenue would be $\$1.5 \text{ billion}$ or $\pounds 1.1 \text{ billion}$ ($\$6.3 \text{ billion} \times 25 \text{ percent}$).
6. The amount determined above is then reduced by two amounts:
 - a. double tax relief through either a foreign tax credit method or exemption method; and
 - b. revenue from DST that must be forgone as a condition of adopting pillar 1.

29 For example, Martin A. Sullivan, “OECD Pillar 1 ‘Amount A’ Shakes Up Worldwide Profit,” *Tax Notes*, February 24, 2020; Lorraine Eden, “Canada and the United States: Winners or Losers from Pillar One Amount A?” (2021) 50:3 *Tax Management International Journal* 143-47.

30 Stephanie Soong Johnston, “U.S. Pillar 1 Tax Pitch Is Largely Revenue Neutral, Yellen Says,” *Tax Notes*, June 14, 2021.

Consider the example of the United Kingdom. If it is assumed that a full tax credit method were to be adopted and if the Forbes dataset is used, \$3.5 billion is attributed to UK-headquartered MNEs. Accordingly, the amount of tax credit is \$874 million (or £620 million), which is 25 percent of \$3.5 billion, and deducted under (a). The estimated loss of £750 million in DST is deducted under (b). The net revenue effect would be a negative £254 million.

The method described above can easily apply to the dataset in respect of other countries. For example, the United States would receive a revenue increase of \$12.6 billion but would have a cost of crediting of \$22.9 billion, so that the net revenue change would be negative \$10.3 billion, making the United States the largest loser. On the other hand, China would have a revenue increase of \$4.7 billion and a cost of crediting of \$4.2 billion, resulting more or less in a wash. The biggest winners are India, Japan, and France, while Switzerland and Canada are the second- and third-largest losers.

According to the author of this article, number-crunching exercises of this kind are bound to be relevant to the political viability of pillar 1.

JL

Hugh J. Ault, Brian J. Arnold, and Graeme S. Cooper, *Comparative Income Taxation: A Structural Analysis*, 4th ed. (Alphen aan den Rijn, the Netherlands: Kluwer Law International, 2020)

Finding comparative information about the taxation laws of different countries is quite difficult, and it is a tribute to the three principal authors and the 18 contributing editors of this book that they have succeeded so well in providing an accessible source of much-needed and accurate information. The target audience is policy makers, as well as university faculty and students, but practitioners may also find the book useful as an overview and a starting point for research. The authors are, for the most part, distinguished academics or former academics from the countries involved. Jinyan Li of York University wrote the chapter on China.

The book describes the income tax systems of 11 countries: nine developed countries (including Canada) and two developing countries, China and India.³¹ Only the actual laws are discussed, not proposals for reform. Thus, the book does not discuss, for example, the many proposals for formulary apportionment of income across different countries as a replacement (or supplement) for the current system of transfer pricing.

Approximately the first third of the book consists of chapters on individual countries. All of these chapters include the same 10 headings, covering the following topics: history; constitutional issues; tax rates; composition of the fiscal system (that is, statistical data at the federal-government level on income tax versus other revenue

31 The other eight countries covered are Australia, France, Germany, Japan, the Netherlands, Sweden, United Kingdom, and the United States.

sources); basic structure of the income tax; tax legislation (process of change, drafting style, and statutory interpretation); courts dealing with tax matters; tax administration; general principles (anti-avoidance rules and the relation of income tax rules to financial accounting and private law); tax treaty network; and sources of tax law (that is, notable government and non-government publications).

The first part of the book can be thought of as setting the stage for the comparative work that follows, which is where the book really shines. This comparative portion is divided into three sections: basic income taxation; taxation of business organizations; and international taxation. Each of these three sections is further subdivided. Basic income taxation, for example, is divided into sections on global versus schedule design, inclusions in the tax base, and deductions. The subsection on deductions is further divided into topics such as commuting, business entertainment, capital cost recovery systems (such as capital cost allowance in Canada), and medical expenses; and illegal payments, fines, and penalties. The discussion of each topic starts with a paragraph or two stating the policy issue, followed by separate paragraphs on each of the 11 countries (or a subset of them). Most readers will use this comparative study as a reference work, to be read a few pages at a time—and it is designed with that kind of use in mind, with nice touches such as putting country names in italics.

The major drawback of this work is that sources are not provided for most of the facts about each country's laws. For the section on basic income taxation, for example, there are about four footnotes per page—about 50 percent more than in the third edition, but still far fewer than readers would like. Also, more coverage of the subnational governments in some countries would be helpful, especially in the case of Canada. But producing the book apparently required support from institutional research funds, so there may have been limits on what was possible in the way of scholarly references.³²

As is inevitable in a book with multiple editions, a few errors of updating have occurred. For example, the chapter on Canada in the first part of the book does not recognize (1) that Alberta moved away from a flat-rate personal income tax in 2015, (2) that the loss amount limit under the Tax Court of Canada's informal procedure was raised to \$50,000 in 2013, or (3) that, since 2007, regulations are often passed through Parliament instead of being approved by the Cabinet.³³

Readers of the previous edition will be pleased to find that the book has been significantly expanded: the page count is up by almost one-third, and the analysis now covers two more countries, China and India. Graeme Cooper is a new co-author.

AM

32 At xxvii.

33 Compare to pages 42, 49, and 58 respectively. For the updated information, see Vivien Morgan, "Survey of Provincial and Territorial Budgets, 2015-16," *Finances of the Nation* feature (2016) 64:1 *Canadian Tax Journal* 147-206, at 170; Peter H. Baek, "A Preview of the Tax Court Informal Procedure Appeal," in *2014 Ontario Tax Conference* (Toronto: Canadian Tax Foundation, 2014), 9:1-17, at 9:2; and Xiao Jin Chen, "Regulations: An Outmoded Idea?" (2013) 3:3 *Canadian Tax Focus* 3. On the regulations issue, see also Jim Samuel, "Interaction of the Foreign Affiliate Surplus and Safe-Income Regimes: Selected Anomalies, Issues, and Planning Considerations" (2018) 66:2 *Canadian Tax Journal*, 269-307, at 276.

Victor Thuronyi, Kim Brooks, and Borbala Kolozs, *Comparative Tax Law*, 2d ed.
(Alphen aan den Rijn, the Netherlands: Kluwer Law International, 2016)

Although this book is five years old, it is appropriate to review it now because it is a useful companion to the work by Ault et al., reviewed above. Ault et al. is a wonderful source for descriptions of different countries' tax laws (both in the stand-alone chapters on different countries and in the comparative chapters on specific areas of the law), but it devotes less attention to the perilous task of analyzing and synthesizing these laws. Readers in search of such analysis and synthesis may want to look instead at this work by Thuronyi et al. The book's goal is to provide "a framework for understanding tax law in other countries," focusing "on what tax systems have in common and key structural differences."³⁴ It is a work that few people could write—the index shows no fewer than 86 countries' laws being discussed, as opposed to the 11 countries covered in Ault et al. by a much larger group of authors. The focus is on legal issues rather than economic analysis. Although most of the book is about income tax law, 20 pages are devoted to value-added tax and 10 pages to other taxes. The chapter titles are as follows: "The Comparative Approach," "Overview," "Tax and Taxes," "The Legal Context," "Interpretation of Tax Law and Anti-Avoidance Rules," "Tax Administration and Procedure," "Income Tax," "Value-Added Tax," and "Other Taxes."

This book will likely be of most help to academics (particularly those interested in comparative law) rather than to practitioners or policy makers. The book includes footnotes galore, extensively updated for the second edition, so it is an excellent starting point for research in any particular area of tax law. But one should not expect to learn much about the tax laws of any particular country from this broadly focused and relatively short book (about half the length of Ault et al.); its aim is to find commonalities and differences, and therefore many countries' laws are discussed. Perhaps the best approach for readers interested in a particular area of tax law may be to read Ault et al. first and then turn to this book for commentary on features common to countries and for sources of further reference.

This book is in some ways the ideal counterpart to Ault et al.: the major deficiency of Ault et al. is its lack of citations to sources, while a major strength of this book is its plethora of footnotes to sources.

Readers familiar with the first edition, which was published in 2003 (and reviewed in this feature),³⁵ will find that the text has not changed nearly as much as the footnotes have. This is essentially an update rather than a rewrite. The first edition was by the first author (Thuronyi) alone, while Kim Brooks of Dalhousie University is one of two co-authors who are new to this edition.

AM

³⁴ At xiii.

³⁵ Victor Thuronyi, *Comparative Tax Law* (The Hague: Kluwer Law International, 2003), reviewed in this feature (2003) 51:6 *Canadian Tax Journal* 2357-70, at 2357-60.

Kim Brooks, “An Intellectual History of Comparative Tax Law”(2020) 57:3 *Alberta Tax Review* 649-82

There is a long tradition of works that describe the tax laws and practices of different jurisdictions, and they range from the series of “doing business in X” pamphlets produced by accounting firms and law firms, to the substantial monographs prepared by academic scholars. Such works often stand on their own, however, and are not surveyed as a body of research. Therefore, the appearance of this intellectual history of such studies is welcome.³⁶

Studies in comparative tax law appear to have three different goals: to understand tax systems better, either the systems in general or the tax system of one’s own country; to support tax planning by identifying deficiencies in law (for example, identifying the one country that, unlike other countries, has not developed an anti-avoidance rule for a particular tax strategy); and to support the development of government policy. This article is concerned principally with works that have the first of these goals—that is, understanding tax systems.

The objective of this article is to advance this area of scholarship by surveying its history, revealing its conceptual foundations, and creating a taxonomy of it. To bound the scope of the inquiry, the article considers only the work of people who find their disciplinary home in law rather than in accounting or the social sciences.

Research studies that compare tax laws across countries often do not identify the ways that they build on other such studies; indeed, as this article observes, they often do not reference each other at all.³⁷ All such works, however, face common issues, such as deciding on the set of jurisdictions that is to be studied. Thus, those of us who frequently read such studies can benefit from a discussion of their history and of how their authors have approached these common issues.

The content of this article differs from a standard review of the literature in that it addresses not only the ideas of the scholars discussed but also key aspects of the scholars’ personal identities (such as their countries of origin) and the reception of their work in the academic community. This is appropriate, because many of these authors were not generally well known outside their own countries in their time, let alone now. Also, the fact that these authors have generally not built explicitly on one another’s work means that readers generally do not become aware of previous research by reading these authors.

Brooks’s review is divided into six partially overlapping periods. Research in the first of these periods (1927-1985) was generally limited in terms of the countries it considered, but it was broad in terms of the tax institutions considered. Works done in the second of these periods (1985-1998) were broader in scope with respect to countries considered but narrower in that they focused primarily on the legislative

36 See also a related paper by the same author that takes a thematic, rather than a historical, approach to surveying scholarship in this area: Kim Brooks, “A Hitchhiker’s Guide to Comparative Tax Scholarship” (2020) 24:1 *Florida Tax Review* 1-50.

37 At 650.

framework in each country. Work from this second period (notably, Ault et al., and Thuronyi et al., which are reviewed above) continues to be familiar to readers because it continues to appear in new editions. Work in this period focused primarily on the legislative framework in each country. Works in the third period (1996-2007) provided more discussion of judicial guidance, administrative practices, and the general culture in the country. The fourth period (2007-2009) was marked by the convening of regular international meetings on the topic of comparative law. The fifth period (2009-2016) was marked by the work of two scholars (Carlo Garbarino and Omri Marian) who sought to offer critical reflections on the body of comparative tax law scholarship to date. Finally, in the current period (2017 to the present), two comprehensive works on specific issues—tax treaties and the socially enforced commitment to paying taxes in the Middle East—are said to reflect a new maturity in the discipline.

The author's declared limitations on the article's scope leave the reader to wonder how these advances in the study of comparative tax law by legal scholars relate to similar comparative work by social scientists. In particular, the recent comparative work considered in the article is said to go beyond the comparing of tax legislation to the assessing of how tax law works in practice, and this trend would seem to relate to social science work not covered in this article, in that a single study involves surveys of tax practitioners in multiple countries. For example, one study measured tax complexity as experienced by multinational corporations, first conceptually and then empirically, and it found that Canada ranks eighth for total tax complexity among all of the 21 OECD member countries included in the work.³⁸ Another study used a survey of global transfer-pricing partners and managers from two of the Big Four accounting firms in 33 countries to develop a metric of transfer-pricing risks for each country for each year.³⁹

Also, the reader might ask the following question: How should the recent advances in comparative tax law influence the way in which policy makers and tax policy researchers use international comparisons? In Canada, for example, policy makers have used such comparisons (1) to identify trends in tax policy in other countries (for example, e-invoicing) that might usefully be adopted in Canada;⁴⁰ (2) to forecast, for a new law, which problematic fact situations (for example, cosmetic medical expenses) will have to be addressed under the law or administrative practice;⁴¹ and (3) to find areas of taxation (for example, employee expense deductions) that are

38 Susanne Sturm, "Corporate Income Tax Complexity Faced by Multinational Corporations: A Comparative Study of Canada and Its Peer Countries," elsewhere in this issue.

39 Devan Mescall and Kenneth J. Klassen, "How Does Transfer Pricing Risk Affect Premiums in Cross-Border Mergers and Acquisitions" (2018) 35:2 *Contemporary Accounting Research* 830-65.

40 Melina de Souza Rocha Lukic, "Canada Should Consider E-Invoicing for GST/HST" (2020) 10:3 *Canadian Tax Focus* 12.

41 Ling Chu, Alan Macnaughton, and Nicole Verlinden, "Curtailing Income Tax Relief for Cosmetic Medical Expenses" (2010) 58:3 *Canadian Tax Journal* 529-75, at 559-63.

problematic in policy terms because they are outside the international norm.⁴² Is this research question simply different from those posed by legal scholars in comparative tax law, or is there potential for cross-pollination?

AM

Canada Revenue Agency, *Payment Tax Gap and Collection Efforts*

(Ottawa: CRA, 2020)

Canada Revenue Agency, *Tax Gap for Federal Excise Duty on Cigarettes*

(Ottawa: CRA, 2020)

The CRA formally defines the tax gap as “the difference between the taxes that would be paid if all obligations were fully met in all instances, and the tax actually paid and collected.”⁴³ This concept comprises three kinds of non-compliance: (1) registration/filing non-compliance, which arises from individuals and corporations failing to register (for GST/HST) or failing to file tax returns; (2) reporting non-compliance, which arises from the provision of incomplete or inaccurate information on those returns; and (3) payment non-compliance, which arises from payments that are insufficient or late. Previous CRA reports have concerned the first kind of non-compliance, while the second and third kinds are the subjects of the reports reviewed here. A report to be published in 2021 will address all three elements of the tax gap, and it will update the figures to the year 2017 (reports to date have been for the year 2014).

The third kind of non-compliance is the subject of the payment gap study. Payment non-compliance is unusual in that it requires no estimation; CRA records provide all of the information that is needed to determine the amount. It can be calculated as the outstanding debt of taxpayers plus the CRA’s writeoff of this debt (since, although uncollectible, it is still a tax debt), less interest and penalties (since these are charges for an unpaid debt, rather than the debt itself). Unpaid provincial debts are also included in the calculation, since the tax collection agreements provide that the federal government is responsible for this debt. Separate payment gaps are estimated for personal income tax, corporate income tax, and GST/HST.

The payment gaps for personal income tax and GST/HST generally decline over time as payment is made; for example, the payment gap for 2014 personal income tax was \$3.1 billion after one year, but this figure had declined to \$0.7 billion by 2020.⁴⁴ On the other hand, the payment gap for corporate income tax generally rises until about the fifth or sixth year as audits proceed, and then the gap declines. For example, the 2011 corporate income tax gap was \$0.7 billion after one year, rose to

42 Bhuvana Rai, “Policy Forum: Write It Off (and Start Again)—Adapting Home Office Deductions for the Digital Era” (2021) 69:2 *Canadian Tax Journal* 487-511.

43 At 8.

44 At 33.

\$0.9 billion five years out, and then declined to \$0.6 billion by 2020.⁴⁵ Results were further disaggregated into small and medium-sized enterprises (SMEs) and large corporations. Non-compliant SMEs were more likely to be recently incorporated (that is, within the last 10 years) and to be in certain industries, such as construction.

The CRA's report focuses on these absolute amounts and does not provide the amount of tax assessed for each year or the percentage of tax not paid on time. This seems to be an important omission. As the auditor general of Canada reported:

The ratio of tax debt to total cash receipts is a trend indicator of how well the Agency is managing the tax debt, and this ratio has grown from 4.27 percent to 5.43 percent since 1997. . . . In 2003 and again in 2004, the Board of Management [of the CRA] expressed concern about the increase in tax debt. It indicated a need for a clear and concise explanation of the reasons for growth and for an action plan to address them.⁴⁶

In lieu of more specific, data-centred analysis, the CRA makes only general comments about its intention to “remain innovative” in its compliance, collections, and verification efforts and to “make smart use of new technologies, business intelligence, and data analytics.”⁴⁷ However, perhaps a research report is not the best place to address issues of administrative policy.

The second tax gap study published by the CRA concerns the second component of the tax gap—that is, reporting non-compliance. The specific issue is federal excise duties on tobacco for the year 2014. Two different methodologies are used to estimate the amount of this tax gap. The first is as follows: estimate total cigarette consumption from Statistics Canada survey data, applying a 35 percent uplift factor to correct for underreporting of cigarette use; estimate legal consumption, mainly from the CRA's own domestic production data and information from the Canadian Border Services Agency on cigarette imports; subtract legal consumption from total consumption to get illegal consumption; and apply the federal excise duty rate to get the tax gap estimate of \$483 million.

The acknowledged weakness in this methodology is the arbitrariness of the figure chosen for the uplift factor and its important impact on the results: a 25 percent uplift would reduce the tax gap to zero, while a 45 percent uplift would more than double it, to \$1.1 billion.⁴⁸ Thus, the CRA also used a second methodology that produced a tax gap estimate of almost exactly the same amount as the 35 percent uplift produced (\$490 million). This second methodology is said to be based on a 2017 econometric study by Anindya Sen of the University of Waterloo.⁴⁹ That

45 At 34.

46 Office of the Auditor General of Canada, *2006 May Status Report* (Ottawa: Office of the Auditor General of Canada, 2006), at paragraphs 8.21 and 8.22.

47 At 28.

48 At 33.

49 Anindya Sen, *Smokes, Smugglers and Lost Tax Revenues: How Governments Should Respond*, C.D. Howe Institute Commentary no. 471 (Toronto: C.D. Howe Institute, February 2017), reviewed in this feature (2018) 66:1 *Canadian Tax Journal* 251–68, at 262–63.

study showed a tax gap from federal and provincial excise duties and sales taxes of between \$816 million and \$900 million in Ontario and between \$85 million and \$93 million in Quebec. Although those figures are significantly higher than the CRA's reported \$490 million, the Sen study included many more taxes. Unfortunately, the CRA's publication makes no attempt to reconcile the two figures.

AM

Canada, Senate, Special Senate Committee on the Charitable Sector, *Catalyst for Change: A Roadmap to a Stronger Charitable Sector, Report of Special Senate Committee on the Charitable Sector* (Ottawa: Special Senate Committee on the Charitable Sector, June 2019)

Minister of National Revenue, *Response to the Report of the Special Senate Committee on the Charitable Sector: Catalyst for Change: A Roadmap for a Stronger Charitable Sector* (Ottawa: MNR, March 2021)

Parliamentary reports are mostly compilations of views expressed in oral testimony and of written submissions by interested parties. Thus, the way to find the most valuable information is to use the report as an index—that is, by taking down the names of the parties who have expressed an opinion on the topic of interest and then looking up the transcript of their testimony and the text of their submissions on parliamentary websites.⁵⁰ This report on the charitable sector is no exception to this pattern. Still, it provides a thorough airing of views on the key policy issues affecting this sector, and the government response from the minister of national revenue also has some intriguing hints.

Consider donor-advised funds, whose situation is well summarized by the minister:

Generally speaking, donor advised funds are accounts within a registered charity whereby donors are entitled to provide ongoing advice as to how their donations should be disbursed. Concerns have been expressed that individual donor advised accounts within a charity may not be meeting the disbursement quota, even though the organization as a whole is compliant.⁵¹

The committee report devotes some five pages to this issue. Its recommendations show a concern similar to the minister's; they suggest that there is a need “to consider means of ensuring that donations do not languish in donor-advised funds, but are instead used to fund charitable activities in a timely fashion.”⁵²

AM

50 For the documents for this committee, see Canada, Senate, Special Senate Committee on the Charitable Sector, “Briefs and Other Documents” (<https://sencanada.ca/en/committees/cssb/Briefs/42-1>).

51 Response, at 17.

52 Report, at 113.

S. Burcu Avci, Cindy A. Schipani, H. Nejat Seyhun, and Andrew Verstein,
“Insider Giving,” *Duke Law Journal* (forthcoming)

This article reports the findings of an empirical study on insider giving. Using a vast dataset of virtually all transactions in US public company stocks since 1986, the authors have found consistent and economically significant evidence that corporate insiders, while in possession of material, non-public information, avoid losses by disposing of their stock through charitable giving that reflects “impeccable timing.” They have also found that such insider giving was more widespread than previously believed and that corporate insiders enlarge their tax break by backdating the gift to gain a higher valuation of the stock. They show why lax reporting and enforcement encourage such insider giving (for example, insider trading must be reported within two weeks, but insider giving can be reported within 400 days under US laws). Their findings have implications for three areas of law and policy—corporate, securities, and tax.

With respect to tax law, the authors argue that a tax deduction for charitable giving is a tax expenditure that was intended “to encourage taxpayers to give much more than the fiscal losses (otherwise, the government could give to the charity directly) and to encourage taxpayers to use their private information to select and monitor good charities.”⁵³ They show that manipulative insider giving allows insiders to take a tax deduction that exceeds the value of the gift, thereby constituting a valuation abuse and undermining the policy goals of the tax expenditure. It is thus bad tax policy for a taxpayer to be able to give \$1,000 to a charity and receive more than \$1,000 in tax benefits for doing so.

The authors argue that “a society that opposes valuation abuse under the tax code or insider trading under the securities laws should be ill at ease that manipulative gifts are rife.”⁵⁴ They advocate for changing the tax code so that donors who give stocks are required to pay capital gains tax, or so that the valuation of the stocks, for the purposes of the tax deduction, must be averaged over a period of time.

This article makes one wonder whether similar abuse exists in Canada and whether pre-emptive anti-abuse rules should be put in place.

JL

Craig Elliffe, “Discerning Commercial and Economic Reality: Applying the GAAR to Frucor,” *New Zealand Journal of Tax Law and Policy* (forthcoming)

The general anti-avoidance rule (GAAR) in New Zealand is over 130 years old. Like Canada’s much younger GAAR, however, the NZ rule relies on judicial interpretation for its effectiveness. The notion of abuse is key to both GAARs. According to the jurisprudence, the finding of abuse is benchmarked against parliamentary intention

53 At 39.

54 At 49.

in New Zealand and against legislative rationale in Canada. In practice, finding parliamentary intention or legislative rationale “can be an elusive quest.”⁵⁵

In this article, the author considers whether commercial and economic reality is intended by parliament and how to discern such reality. He begins by explaining the landmark decision of the NZ Supreme Court in *Ben Nevis*,⁵⁶ which formulated the parliamentary contemplation test and endorsed an economic substance approach to tax avoidance. He then discusses how the approach should be applied in avoidance cases involving the deduction of expenses—for example, the deduction of interest in a cross-border hybrid structuring arrangement in the *Frucor* case. The author summarizes the state of the law as follows: the expectation of any specific provision permitting the deduction is that the taxpayer has actually borne the economic burden of the expenditure, and the GAAR permits an examination (in a commercially and economically realistic way) of the substance of the transaction to see how the taxpayer has used the provision.

In the *Frucor* case, the taxpayer was an NZ company that was acquired by a French company, Group Danone SA, for about \$300 million. The cross-border hybrid financing arrangement involved two interconnected elements:

1. An investment bank lent Frucor \$204 million under an optional convertible note with a yield of 6.5 percent per annum. The principal was repayable in cash after five years, unless the bank opted to take 1,025 non-voting shares in Frucor in satisfaction of the loan.
2. At the same time, Frucor’s parent company (through its Singapore-based subsidiary) entered into a forward purchase agreement with the bank in respect of the 1,025 shares. Under the agreement, the parent was required to make a \$149 million upfront payment to the bank in return for the transfer of the shares on maturity of the note.

As a result, \$149 million of the \$204 million was returned to the bank through the forward purchase price payment by the parent. Only \$55 million of the \$204 million convertible note was actually financed by the bank. Frucor paid interest amounting to \$66 million on the face value of the convertible note and claimed a deduction for \$66 million. The commissioner took the position that only the interest on \$55 million was deductible.

55 Muir J in *Frucor Suntory New Zealand Limited v. Commissioner of Inland Revenue*, [2018] NZHC 2860, at 194; rev’d [2020] NZCA 383; commissioner’s application for leave to appeal to the New Zealand Supreme Court granted December 18, 2020; [2020] NZSC 150. In Canada, achieving clarity of legislative purpose is an elusive goal; see Shawn D. Porter, “The Relationship Between the General Anti-Avoidance Rule and Specific Anti-Avoidance Rules,” in Brian J. Arnold, ed., *The General Anti-Avoidance Rule: Past, Present, and Future* (Toronto: Canadian Tax Foundation, 2021), 407-48, at 419.

56 *Ben Nevis and ors v. Commissioner of Inland Revenue/Accent Management Ltd and ors v. Commissioner of Inland Revenue*, [2008] NZSC 115.

The taxpayer won the case in the High Court but lost in the Court of Appeal. While recognizing that “[t]here is no doubt that, as a matter of legal form, Frucor was able to make use of the relevant specific provisions to claim a full deduction for the interest expenditure on the sum of \$204,421,565,”⁵⁷ the court found that “Frucor used the specific provisions to claim deductions for interest in an artificial and contrived manner that cannot have been within Parliament’s contemplation.”⁵⁸ The court stated:

The primary purpose of the funding arrangement was the provision of tax efficient funding to Frucor. That was its stated goal. The tax advantage was gained in New Zealand through the interest deductions Frucor claimed. [The Parent] (in effect) paid \$149 million to Frucor for the shares on day one but with the payment being structured to enable Frucor to claim interest deductions on it over a five-year term.⁵⁹

The author of this article argues that *Frucor* is an example of a case in which the line between acceptable tax planning and unacceptable tax avoidance was crossed, and he agrees with the Court of Appeal. In the author’s view, the real question was whether the funding arrangement, viewed in a commercially and economically realistic way, suggested that the use of the interest deductions was made in a manner consistent with Parliament’s purpose. The NZ Supreme Court in *Ben Nevis* invited an examination “behind the scenes” to see whether the real economic consequences were being borne by the taxpayer. In the *Frucor* case, even though the taxpayer had a legal obligation to pay interest on the \$204 million debt, the multinational group of which Frucor is a member owed only \$55 million to the bank. Recognizing the inherent uncertainty in applying the economic substance approach, the author argues that “the nature of tax planning and tax avoidance necessitates an approach from Parliament that, in the hands of the judges, is both flexible and responsive.”⁶⁰

Readers may find this article relevant to the discussions of the misuse or abuse test in the forthcoming public consultation on the Canadian GAAR, especially in respect of the relevance of economic substance.

JL

Organisation for Economic Co-operation and Development, *Ending the Shell Game: Cracking Down on the Professionals Who Enable Tax and White Collar Crimes* (Paris: OECD, 2021)

The argument of this report is that countries should consider creating laws specifically aimed at “professional enablers”—that is, intermediaries who facilitate others’ commission of tax offences (and possibly other financial crimes). These are not

⁵⁷ *Frucor*, supra note 55, at paragraph 58 (CA).

⁵⁸ *Ibid.*, at paragraph 59 (CA).

⁵⁹ *Ibid.*, at paragraph 82 (CA).

⁶⁰ At 16.

people who exploit “grey areas of the law”;⁶¹ they are people who know or ought to know that they are helping people commit crimes, usually by making the crimes hard to detect. Nine specific examples of transactions—examples that were contributed by a number of OECD member countries (Canada was not one of them)—leave no doubt that ordinary law-abiding professionals are not the target.⁶²

The report identifies several actions in this area already undertaken by OECD countries. France has introduced a law to punish professional services such as “allowing the taxpayer to conceal his or her situation or activity by a fictitious act or by the intervention of a fictitious entity.”⁶³ Mexico has undertaken reforms “amending federal laws to formally include tax crimes in the catalogue of organised crime offenses.”⁶⁴ Australia has issued taxpayer alerts warning the community of new or emerging high-risk tax schemes. The United Kingdom has made corporations liable for not taking actions to prevent an individual from committing acts that were already criminal; the government need not prove that senior management was aware of or involved in the criminal activity.

One of the most controversial areas in which governments could take action is professional privilege, such as lawyers’ solicitor-client privilege. Here, the report does not go into detail, merely suggesting that “[w]here countries are considering introducing specific criminal law provisions to address professional enablers, key elements to be considered could include . . . [l]ifting professional privilege in regards to privileged evidence of professional enablers when [they are] being directly investigated for the commission of a tax or economic crime.”⁶⁵

AM

61 At 11.

62 At 13-21, boxes 1 to 9.

63 At 28, box 14.

64 At 28, box 15.

65 At 28.