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## An Introduction and a Tribute

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### THE CONFERENCE TO HONOUR TIM EDGAR

On February 8 and 9, 2019, friends and colleagues gathered at a conference in Tim Edgar's name to honour his memory and reflect on his scholarship, and to be inspired and encouraged to imagine—and “re-imagine”—a forward-looking tax system that would align with Tim's interests and ideals. In what follows, I offer both an introduction to the collection of papers produced by this conference and my own tribute to Tim.

At the conference, a variety of presentations were made by well-known and distinguished thinkers in the tax area from Canada, Australia, and the United States. The range of subjects discussed at the conference by the presenters whose papers are being published in this issue of the *Canadian Tax Journal* and the next three issues, and the ensuing debate among all conference participants, reflect topics of deep interest to Tim. In a sense, the conference and these papers are Tim's continuing voice.

The presenters all shared Tim's friendship and were inspired by his scholarship, which has no doubt influenced them as students and practitioners of taxation. Their contributions to the conference, and now to this journal, reflect a common interest—an interest that they shared with Tim and that lies, indeed, at the heart of his academic life—in understanding and improving taxation and attendant tax systems. These systems, as all of the contributors recognize, are the engines for implementing and funding fiscal choices with respect to economic and social welfare, which reflect a country's social and institutional civility.

### TIM EDGAR'S SCHOLARSHIP: FAIRNESS, COHERENCE, AND “CALLING IT AS IT IS”

Tim's scholarship was marked by a passionate concern that a tax system be fair and coherent and that it support, accordingly, predictable, rational outcomes that are consistent with the system's private-law underpinnings but not overpowered by them in the face of supervening fiscal and policy objectives, or by unreasonable

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deference to opaque or excessively formal legal distinctions among economically and financially equivalent outcomes, to the detriment of what Tim would perceive as the unvarnished fiscal threads of the tax system. This passionate concern is nowhere more evident than in Tim's formidable monograph, published by the Canadian Tax Foundation, on the treatment of financial instruments: *The Income Tax Treatment of Financial Instruments: Theory and Practice*.<sup>1</sup>

The disarming and somewhat agnostic title of this monograph does not do justice to the work's real force and scope. It drew attention to the importance of perceiving the tax system as an essential part of the legal system, one that orchestrates significant social and economic objectives according to recurring and enduring fiscal themes. The importance of this work by Tim cannot be overstated. Although readers who lack Tim's facility with financial economics may find some of the analysis in this monograph difficult, Tim's work attempts to grapple with major financial undercurrents in the tax system, which, typically, are examined only within the context of typical, predictable, and predominant private-law notions. Tim's interests extended far beyond doctrinaire tax and related private-law notions; they led him to investigate cases where the general legal system did not help its tax system "cousin" by neatly classifying transactions to which the tax system could then easily apply.

In his preface to this monograph, Tim explains his goal for the work—namely, to examine all manner of financial transactions and their combinations in "hybrids" and "synthetics." It is worth noting that he announced this goal well before the Organisation for Economic Co-operation and Development (OECD) and the Group of Twenty (G20) initiated the base erosion and profit shifting (BEPS) project, a project aimed at, among other things, addressing the "re-sourcing" of income through the use of (1) new financial instruments and (2) disunity in the treatment of these instruments among legal and tax systems globally. In the preface, Tim said the following:

I have tried to emphasize the historical context within which the income tax treatment of these instruments should be seen. I am convinced that this perspective reveals clearly that in matters of taxation "everything that is old is new again." In short, many of the issues associated with the income tax treatment of the new financial instruments are longstanding issues that tax-policy makers have struggled with for decades in designing legislative responses to more conventional instruments. . . . More important, the common themes from the past mean that many of the features of past responses are still relevant. There is, I believe, no need to reinvent the wheel with radical legislative solutions. All that is required is a little massaging and extension of past responses.<sup>2</sup>

Embryonic in this introductory observation are many of the themes that were explored in the conference honouring Tim. Tax history is important, not merely as an interesting subject of research but as a source of understanding and inspiration.

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1 Tim Edgar, *The Income Tax Treatment of Financial Instruments: Theory and Practice*, Canadian Tax Paper no. 105 (Toronto: Canadian Tax Foundation, 2000).

2 *Ibid.*, at viii.

Tax policy is about the adaptation and dynamic development of a few seminal fiscal themes, with history providing guidance in this process, in order to meet challenges to coherent taxation arising from private-law constructions that, in Tim's view, are less different in kind and financial outcome than as an expression of normative legal formulations.

Tim venerated intellectual honesty, and he abjured jargon. Such an approach, when applied to the area of financial transactions and instruments, requires careful attention and discipline. The analyst must both want and be able to understand the fundamentals of business and commerce while maintaining a steady focus on the law, undistracted by the glitter of transactional engineering and financial alchemy. An inquiry into the tax system's seemingly glaring inadequacies may reveal, to a discerning and well-informed critical mind like Tim's, that the tax system and the general legal system to which it is accessory are in fact more resistant to the strain of transactional complexity than they might initially seem. Further, attention to the essence (rather than the appearance) of how the law applies lends itself to the development of law, including tax law, whose objectives and underlying influences are well formulated and expressed. Such was the outcome of Tim's scholarship.

As his monograph reflects, Tim was reluctant to embrace—and was not satisfied in any respect with—the “cubbyhole” approach to tax policy and legislation. He recognized (and, in penetrating analysis, identified the limits of) the extent to which different forms that achieve fundamentally the same financial or economic outcomes should go unchecked by tax policy, which should concentrate, instead, on manifestations of enrichment and the transmission of value. Tim's focus was on questions concerning (1) the intrinsic features of income, (2) when income should be realized, and (3) the material distinctions between expected and unexpected returns. Of course, these questions are the core questions for financial innovation. In this context, Tim was particularly concerned with single and composite transactions that seem to defy typical legal designations and therefore, possibly, to escape the reach of prescriptive tax provisions—subject, possibly, to the overarching influence of general anti-avoidance rules (GAARs) and underlying doctrine. Tim had much to say about GAAR and related doctrine, informed as he was by his constant focus on the fundamentals of the tax system, not merely its occasional decorations. Perhaps this is why Tim was so engaged by the analysis of financial instruments and transactions: such analysis encompassed the cosmic questions of income taxation. For these questions, Tim's scholarship in the financial context provides significant inspiration for continuing inquiry and perspective.

### **TIM EDGAR'S PEDIGREE AS A SCHOLAR: INSPIRING FRIENDS AND INFLUENCES**

Two leaders in Canadian tax policy, Brian Arnold and Neil Brooks (to whom Tim was close both personally and professionally), influenced Tim's way of thinking, the tax issues that were of fundamental interest to him, and even his manner of expression. He did not imitate them, but his words and his candour sometimes brought to

mind both their courageous challenging of the orthodoxies of Canadian taxation and their willingness to expose the system's shortcomings—a no-holds-barred willingness to point out when the tax emperor is wearing no clothes. Informed candour in tax policy matters is a distinguishing feature of Tim's intellectual legacy, and it is possible, if one listens closely, to hear the voices of Brian and Neil in Tim's confident tones.

Recently, for example, in the Arnold Report, Brian commented on two recent reports by the OECD and the International Monetary Fund. He touched on two enduring themes—themes that we also find in Tim's work and, indeed, in the preface to Tim's monograph on financial instruments. Brian said:

[T]he reports do not confront the primary difficulty which . . . is the balance between certainty and fairness in any tax system. In addition, in my view there is danger in treating the issue of tax certainty as the subject of a project, suggesting that the problems can be identified and studied, and solutions developed and implemented—and then the international tax community can move on to the next project. But tax certainty isn't a set of "problems" to be "solved"—it's an objective that should be infused into every aspect of the tax system of every country, in the same way that fairness should be.<sup>3</sup>

Apparent here (both as a practical observation and an attitude to the study of taxation) is Brian's impatience with distracting "cubbyholes" and with an approach to tax issues that lacks both a suitable context and an awareness of why taxation exists in the first place. This attitude is a consistent feature of Tim's work, and it is not surprising that Brian's clarity and deliberateness in cutting to the essence of tax issues not only are a feature of Tim's writing but also were evident in his (always engaging) spoken words on tax issues.

Less recently, but with no less force, Neil Brooks argued that tax legislation is meaningful only in the context in which the legislative words are used. Neil's approach, sometimes mistaken for an excessively political orientation to tax policy, is in fact driven by the law. It is a conception of the law, however, that seeks to discover, through informed statutory construction, why the targeted tax provisions exist in the first place—that is, to approach them not as mechanical devices but as part of a policy and legislative weave that is fundamentally coherent and has, as its objective, the enabling of fiscal policy choices born of the political system that defines who we are as a community. Two decades ago, Neil commented on the approach that, in his view, judges should take to deciding tax cases, and he expressed principled incredulity that any other approach could be sensible:

[Judging tax cases] should involve the operation of the creative process inherent in tax policy analysis. It should involve three steps: (1) the postulation of a range of plausible, alternative policy options for each interpretive issue; (2) a consideration of the consequences of each in terms of tax fairness, the neutrality of the tax system, administrative

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3 Brian Arnold, "Tax Certainty," *The Arnold Report*, posting 154, May 3, 2019.

practicality, and other relevant evaluative criteria; and then (3) a choice among the alternatives based upon what makes the most sense in terms of tax principles (given the general structure of the tax legislation being interpreted). This process necessarily entails an explication of the basic principles, theories and tools of analysis that are needed for a sensible, serious discussion of income tax policy. Basically, there should be no sharp distinction between tax policy and tax interpretation: between what treasury department tax analysts do in formulating tax statutes and what judges do in interpreting and applying them. . . . [I]f a judge decides that the application of tax principles would lead to a particular conclusion in a case, the judge should reach that conclusion even though the words used in the disputed provision have not born the usage that must be imputed to them in another context. And, this is the case not only when the words used are ambiguous or are used in a way that is over- or under-inclusive of a sensible interpretation of the section, but also when the words are specific. Indeed, the only circumstance in which judges should reach a result that they feel is not consistent with the tax policy principles underlying the structure of the legislation is in a case in which it is clear that the statute was designed to resolve the specific case in a way other than the judge thinks sensible in terms of tax policies and principles.<sup>4</sup>

In other words, tax analysis involves intense, fundamental legal analysis, despite the all too common (and unfortunately casual) reduction of difficult issues of legal interpretation into questions of “substance”—questions to which the law all too frequently seems an unwelcome bystander (if, indeed, it is present at all). Neil seeks, and has long sought, the essence of tax law; it is a search in which the presumption of knowing what the tax law is should not substitute for the hard thinking required to discover what it is, given that we must reconcile tax law and private law in the service of coherent and fair outcomes. In both Neil’s work and Tim’s work (as, again, the preface to Tim’s monograph reveals), we are constantly reminded of Judge Learned Hand’s admonition in the Second Circuit decision in *Gregory v. Helvering*, later affirmed by the US Supreme Court. To paraphrase (with the impatient and enduring sense of Neil’s thinking as our bedrock): Words have no meaning except in the context in which they are used, and the process of discovering the meaning of those words and their context involves a legal and not some other kind of analysis.<sup>5</sup> In the context of financial instruments and financial transactions, Tim’s quest,

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4 Neil Brooks, “The Role of Judges,” in Graeme S. Cooper, ed., *Tax Avoidance and the Rule of Law* (Amsterdam: IBFD, 1997), 93-129, at 99-100.

5 No doubt others have offered the same (or a similar) sentiment, particularly poignant in this tribute. See *Helvering v. Gregory*, 69 F. 2d 809, at 810-11 (2d Cir. 1934); aff’d sub nom. *Gregory v. Helvering*, 293 US 465 (1935). In the Second Circuit decision, Judge Learned Hand decided what “reorganization” meant in the context of the objectives served by the tax statute—not as the exposition of some sort of loose experiential or anti-avoidance notion but rather as a suitably penetrating examination of what the law was: “Nevertheless, it does not follow that Congress meant to cover such a transaction, not even though the facts answer the dictionary definitions of each term used in the statutory definition. It is quite true, as the Board has very well said, that as the articulation of a statute increases, the room for interpretation must contract; but the meaning of a sentence may be more than that of the separate words, as a

notably, was to discover meaning within the law without being distracted by words or, more generally, by private-law constructions that are meaningless outside the legal context of which they are a meaningful, deliberate part.

The sense and spirit of the foregoing quotations from Brian Arnold and Neil Brooks resonate in Tim Edgar's scholarship. In some respects, Tim's work serves to make the interests, concerns, and approaches that he shared with these two scholars accessible to the professional audience in whose context Tim mostly worked—that is, an audience that might not otherwise have engaged with these ideas as they were expressed by Brian and Neil. Tim recognized and strove to reinforce that a tax system is fair only if it offers coherent and consistent outcomes that capture the economic and financial significance—and equivalence—of similar circumstances, regardless of how the private law might classify, or be contorted to classify (or, worse, ignore), transactional events necessitating a tax response. Any tribute to Tim would be incomplete without noticing the spirit of his scholarship, which was infused with his mentors' passion, curiosity, intellectual honesty, good humour, and frank, penetrating articulation.

### **THE CONFERENCE: A CELEBRATION, MANIFESTATION, AND EXTENSION OF TIM'S SCHOLARSHIP**

Let me turn now to the papers presented at the conference held in Tim's honour. All of them are in keeping with the themes that distinguished Tim's life as a teacher and scholar. I will begin by reviewing, more particularly, how these papers tie in with Tim's own scholarship—with its central concerns, its range, and its preoccupation with coherence, consistency, and, above all, fairness (fairness in general, and distributive fairness in particular).

The conference opened with two sessions under the general heading "The Future of Income Tax." This broad topic encompassed papers on the objectives of taxation and these objectives' roots in tax policy; a few of the papers were devoted to promoting, on an evolving basis, social welfare goals and systemic, proportionate fairness in the tax system. Such goals formed an undercurrent in Tim's work, and his approach to their pursuit, notably, was to look beyond appearances in order to discover the essence of tax principles and their purposeful manifestation in meaningful tax legislation.

Another group of presenters—under the general rubric "Tax Transplants in a Border-Less World?"—addressed aspects of tax reform, pivoting off interesting ideas from other jurisdictions. As Tim's work reminds us, and as numerous tax commentators have observed, taxation is practical: it "works" only when the legislative

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melody is more than the notes, and no degree of particularity can ever obviate recourse to the setting in which all appear, and which all collectively create." In noting this case, I offer thanks to Robert Raizenne, who recently reminded me of the poetic but penetrating exposition of legal analysis in Hand's words, which also, and aptly, describe Tim Edgar's approach to legal analysis and the approaches of his friends and mentors Brian Arnold and Neil Brooks.

outgrowths of tax theory can be administered and the tax collected, and when good ideas are able to migrate and grow together. Another theme addressed in this part of the conference was the fundamental responsibility of tax practitioners to contribute to the health of the tax system by responsible, enlightened practice.

A recurrent theme in Tim's work is the inevitable connection between private law and tax law; tax law is, of course, accessory to private law. This means that possibly the most important aspect of practising tax law—whether as a private practitioner, a scholar, or a tax administrator—is being knowledgeable about and attentive to the features of private-law constructions. In the part of the conference devoted to this question (“Must Tax Law Be a Hostage to Private Law Constructions?”), various points of reference were used to explore the intersection of taxation and private law, again with a view to achieving coherence in tax legislation and, accordingly, outcomes that withstand the test of institutional fairness.

Tax not paid is tax avoided; the manipulation of legal constructions to avoid tax may entail tax avoidance—in the sense that the outcomes of such manipulation are not justified by the tax law as it is understood in the context of relevant private law and the underlying objectives of the tax system manifested legislatively. Tim was intensely interested in “legal ambiguity” and in GAAR, not for their own sake but as necessary counterparts to the more doctrinaire legal and tax analysis that is undertaken to illuminate the point and purpose of tax legislation. In the segment of the conference titled “General Anti-Avoidance Rule and Legal Ambiguity in the Age of Artificial Intelligence,” these themes and, particularly, Tim's contributions to learning in this area were explored. The resulting papers, in addition to exploring GAAR and, more generally, tax avoidance, consider how clarity in the law lies at the essence of how it is interpreted—a process now challenged by the displacement of human beings by algorithms manifesting “artificial intelligence.” This consideration uniquely extends traditional questions about clarity and ambiguity in tax law (which were themes of Tim's work) and what to do in this regard.

Tim was an active contributor to the international tax conversation. The part of the conference titled “BEPS and International Tax” provided a convenient opportunity to reflect on how Canada's tax system relates to the tax systems of other countries. Attention was paid to the tax treatment of interest, which is a recurring subject of Tim's writing and speaking. Tim's analysis of financial instruments was particularly important in discerning the various, sometimes subtle ways in which the time value of money can be manifested in complex or composite transactions without being expressed as “interest” in the form to which the tax system is accustomed.

The conference concluded with what might be described as “next stage issues,” addressed in sessions under the rubric “Tax, Technology, and Digital Economy.” As the preface to Tim's monograph on financial instruments reflects, Tim focused on the enduring themes that underlie tax policy and tax law; he noted that

in matters of taxation “everything that is old is new again.” In short, many of the issues associated with the income tax treatment of the new financial instruments are long-standing issues that tax-policy makers have struggled with for decades in designing

legislative responses to more conventional instruments. . . . More important, the common themes from the past mean that many of the features of past responses are still relevant.<sup>6</sup>

The papers based on this portion of the conference explore what is and is not “new” and how we can learn from what has come before, focusing directly, in one case, on the environment in which financial transactions take place.

## **A FITTING TRIBUTE**

The papers presented at this conference, various as they are, reflect the deep undercurrents of Tim’s life in the law: his devotion to the fundamentals of law, and his interest in adapting the law to new circumstances without concluding that the law as it is currently understood is no longer fit for its original purpose. As these papers show, coherence and fairness—the two concerns that animate Tim’s work—offer the path by which his friends and admirers may remember him and, in fact, extend his work in those areas of tax policy and legislation that mattered to him. These papers constitute a fitting tribute.

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6 *Supra* note 2.