Tax Law Practice, from Yesterday to Tomorrow

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ABSTRACT
The author presents his thoughts on the evolution of tax law practice over the last 30 years, as well as on the challenges that practitioners are now facing. Given the particular character of tax laws and their economic and policy objectives, he reviews important changes that have occurred with respect to both the courts and the Income Tax Act. He also discusses contributing factors, explaining important legislative amendments and the constant intervention of the courts to review interpretation rules applicable in the context of tax laws. Finally, the author presents his views on how tax law practice should continue to evolve in future years.

KEYWORDS: AMENDMENTS ■ INTERPRETATION ■ TAX COURT OF CANADA ■ TAX CASES ■ TAX LAW PRACTICE ■ TAX LEGISLATION

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INTRODUCTION
Taking time to look back upon the evolution of the practice of tax law leads us to acknowledge the significant road travelled since the creation of the Tax Court of Canada in 1983. As will be discussed, the complexity and the volume of cases have considerably increased, as has the formalism of the procedure before the courts. Also, the Income Tax Act¹ has undergone many amendments over the years, both as

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¹ Income Tax Act, 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.
a reaction to judicial decisions and in an effort to keep up with economic realities. Finally, the interpretation of fiscal law, a domain in constant evolution, is a continuing challenge for the courts.

Some readers will remember the practice of tax law at the time of the Tax Review Board, prior to the creation of the Tax Court of Canada. The board would summon the numerous parties scheduled for hearings in a given week to appear on Monday morning, at which time they would be advised of the order in which their cases would be heard: what a difference from the current practice! The duration of a hearing was usually a half-day or, at the very most, a full day. At the time of the creation of the Tax Court of Canada, the Act provided that the decision rendered could be appealed to the Federal Court Trial Division, where a new trial would take place.² It has only been since January 1, 1991 that the Tax Court of Canada has had exclusive jurisdiction to hear appeals on matters involving income tax, and that appeals from its decisions have been brought directly before the Federal Court of Appeal.

The practice of tax law has certainly evolved over the years, but so too has substantive law. For example, Canada’s first income tax statute,³ adopted in 1917 and intended to be temporary, comprised only 24 sections, the first of which merely stated that the statute could be cited as the “Income War Tax Act, 1917.” Compared to that original act, which, including its annexes amounted to 8 pages, the annotated 2012 Act published by CCH totals, by itself, 2,050 pages in double-columns format, to which are added approximately 520 pages for the Income Tax Application Rules and the Income Tax Regulations.

There are many indications that tax practice in Canada will continue to evolve. Contributing factors include

- an increase in the number of court cases;
- numerous legislative amendments; and
- the important role of the courts, and in particular the Supreme Court of Canada, in the development of Canadian tax law and the determination of statutory interpretation.

Before I embark on a brief analysis of these points, it is important to underline that the catalyst for many of the major changes that have occurred over the last 30 years was the decision rendered in 1984 by the Supreme Court of Canada in Stubart Investments Ltd.⁴ The discussion that follows will focus on the significance of the Stubart decision with respect to both the legislative amendments that ultimately led to the adoption of the general anti-avoidance rule (GAAR) in 1988, and the changes that the decision provoked in the statutory interpretation of tax laws.

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² Former section 172; repealed by SC 1988, c. 61, section 18(1).
³ Income Tax War Act, 1917, SC 1917, c. 28; adopted on September 20, 1917.
⁴ Stubart Investments Ltd. v. The Queen, [1984] 1 SCR 536.
INCREASE IN THE VOLUME OF COURT CASES

The fiscal domain evolves rapidly as a consequence of the complexity and the volume of files. The Canada Revenue Agency (CRA) and the courts are currently faced with a proliferation of major files. While projects involving multiple files were rare 10 years ago, the Tax Court of Canada is now faced with coordinating many groups of files—cases in which significant numbers of taxpayers have participated in various investment tax shelters, gift schemes, and registered retirement savings strips, among others. As well as managing these projects, the Tax Court must ensure the progress of other major files involving complex issues with significant monetary impact. One example would be transfer-pricing cases, which typically require many weeks of trial.

In such circumstances, the CRA, and consequently the courts, have seen their inventories increase considerably. For example, during the 2002 to 2007 taxation years, the CRA received and processed an average of 50,000 to 65,000 objections per year. This workload doubled over the next three years, ranging between 110,000 and 120,000 objections annually, and since then seems to have settled at about 85,000 objections per year. The recent increase in the number of objections handled by the CRA will have a direct impact on the number of appeals brought before the Tax Court, which is already dealing with an increase in its inventory. While the court generally received 1,500 appeals per year at the beginning of the last decade, that number has increased to almost 2,800 annually in recent years.

The scale and importance of the files handled by the Tax Court of Canada has also had an impact at the level of the Supreme Court. Although the court heard several tax cases in the 1980s and 1990s, in the last 10 years we have seen a considerable increase in the number of times that the court’s intervention has been solicited in tax appeals. The court receives approximately 20 applications for leave to appeal in tax cases annually, and of that number, agrees to hear several appeals. In the first months of 2013 alone, the court has already heard the appeals in Daishowa-Marubeni, in February, and Envision Credit Union, in March. In addition, the court has already rendered or will render judgment in nine applications for leave to appeal filed by taxpayers including, notably, those filed by 1207192 Ontario Limited and Global Equity Fund Ltd., both of which involve the application of GAAR.

For evidence of the growing importance of tax matters for the Supreme Court, we can look to the fall of 2011, when six tax cases were pending before the court:

In several instances, as will be seen below, the court has heard cases involving the interpretation of tax laws; it has determined that tax laws are complex and sometimes difficult to interpret, and that their objectives have changed over the years. As Estey J mentioned in *Stubart* in 1984,

[the arrival of these [anti-avoidance] provisions in the statute may also have heralded the extension of the *Income Tax Act* from a mere tool for the carving of the cost of government out of the community, to an instrument of economic and fiscal policy for the regulation of commerce and industry of the country through fiscal intervention by government. . . .

Income taxation is also employed by government to attain selected economic policy objectives. Thus, the statute is a mix of fiscal and economic policy.15

**LEGISLATIVE CHANGES**

The Act, which was originally meant to be a tax collection measure, now aims to achieve various economic and fiscal policy objectives. The need to protect the tax base and the desire to implement economic policies are largely responsible for the legislator’s frequent amendments to the Act. In addition, the courts, who consider that the Act is precise and explicit, resist giving it a wide interpretation. Estey J, in *Stubart*, expressed a preoccupation with these factors in interpreting the anti-avoidance provisions that preceded GAAR:

The most obvious [characteristic] is the fact that in some jurisdictions, such as Canada and Australia, the legislature has responded to the need for overall regulation to forestall blatant practices designed to defeat the Revenue. These anti-tax avoidance provisions may reflect the rising importance and cost of government in the community, the concomitant higher rates of taxation in modern times, and hence the greater stake in the avoidance contests between the taxpayer and the state. . . .

All this may reflect the tradition of annual amendments to the *Income Tax Act* when the government budget for the ensuing year is presented to Parliament for approval. Perhaps the facility of amendment to the *Income Tax Act* is one of the sources of the problem since the practice does not invite the courts to intervene when the legislature can readily do so.16

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9 *Calgary (City) v. Canada*, 2012 SCC 20.
12 *Copthorne Holdings Ltd. v. Canada*, 2011 SCC 63.
14 *Canada v. Craig*, 2012 SCC 43.
15 *Stubart*, supra note 4, at 573-74 and 575.
16 Ibid., at 573 and 579.
Consequently, the legislator regularly amends the Act, be it in response to decisions of the courts, in response to flagrant abusive tax avoidance, or simply in response to current economic realities. As a general rule, such amendments are made so as to ensure that the relevant provisions will be interpreted and applied in accordance with the purpose for which they were adopted. The legislator plays a crucial role in putting fiscal measures in place. As the Supreme Court held in *Stubart*, a general anti-avoidance provision cannot be developed by the judiciary; it is up to the legislator to define the broad lines of such a rule.

In *Stubart*, the court referred to the inclusion in the Act of “measures . . . that are instructions from Parliament to the community on the individual member’s liability for taxes, expressed in general terms.”17 Parliament responded by adopting GAAR, which was enacted in 1988 as section 245 of the Act. Section 245 traces the dividing line between two goals—reducing the tax burden and preventing abusive tax avoidance. A tax advantage resulting from an abusive avoidance transaction will be disallowed where the transaction has not been structured principally for bona fide purposes other than to obtain a tax benefit, and would result in a misuse or an abuse of the provisions of the Act. Since its adoption, GAAR has been the subject of many challenges, and 25 years later is still the source of much litigation. The Supreme Court has been called upon in several instances to pronounce on the application of section 245, notably in *Canada Trustco*,18 *Lipson*,19 and *Copthorne Holdings*.20 More recently, it has dismissed applications for leave to appeal in *1207192 Ontario Limited*,21 and in *Global Equity Fund Ltd.*22 Thus, the court has just refused to revisit GAAR.

It is obvious, as it was for the Supreme Court in *Stubart*, that “the legislature has responded to the need for overall regulation to forestall blatant practices designed to defeat the Revenue.”23 The legislator has reacted in an even more important manner in adopting, throughout the years, numerous specific anti-avoidance provisions in an attempt to curb tax avoidance. For example, the legislator has adopted and amended subsection 15(1.2), to govern situations where advantages are conferred on a shareholder through forgiveness of debt; section 51, dealing with convertible property; and section 51.1, dealing with conversion of a debt obligation. In addition, several other provisions have been adopted or amended: for example, sections 84.1, 94.1, and 256; subsections 55(2), 69(11), 83(2.1) to (2.4), 85(1) and (2), 85.1(5), 86(2) and (3), 88(4), and 212(4); and, of course, the rules dealing with foreign affiliates.

These few provisions are indicative of the abundance of situations or transactions that are structured to take advantage of loopholes in the Act. In order to counter

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17 Ibid., at 574.
18 *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54.
20 *Copthorne Holdings Ltd.*, supra note 12.
21 *1207192 Ontario Limited*, supra note 7.
22 *Global Equity Fund Ltd.*, supra note 8.
23 *Stubart*, supra note 4, at 573.
such forms of tax planning, the legislator has adopted many other important provisions aimed at defining the rules applicable to these types of transactions, and even to penalize those who are responsible for planning them. In 1988, subsections 246(1) and (2) were added to the Act in order to deal with benefits conferred on persons entering into non-arm’s-length transactions, as well as section 237.1, which defines the rules applicable to tax shelters.

Also in 1988, the legislator introduced section 247 (the transfer-pricing rules) to address the issues surrounding transfers made by a taxpayer to a non-resident related person in circumstances that would not have existed had the parties been dealing at arm’s length. In 2000, the legislator again attacked the problems created by abusive tax-planning schemes in enacting, in section 163.2, a penalty imposed on third parties who cause others to misrepresent taxes owing.

Quite apart from the objective of countering abusive tax planning, the legislator has put in place a fiscal regime and wishes to ensure that the provisions of the Act are applied and interpreted in accordance with the objectives that they aim to achieve. In addition, certain provisions have been either adopted or amended in response to decisions rendered by the courts. Some examples are paragraph 12(1)(x), subsection 152(9), section 222, subsections 224(1.2) and (1.3), and subsections 227(4), (4.1), and (5).

At the beginning of the 1980s, many decisions dealt with issues such as the inclusion in revenue of inducement payments, reimbursements, and refunds. Paragraph 12(1)(x) was adopted to clarify this situation and especially to counteract a certain jurisprudential trend, as was underlined by the Federal Court Trial Division in Westcoast Energy Inc.:

The facts in the case at bar, are different from Woodward Stores Limited. However, the reasoning with respect to the legislative intent of paragraph 12(1)(x) is applicable. Paragraph 12(1)(x) represents a statutory departure from existing law to include in the taxpayer’s income money as a reimbursement. The same choice is available to the taxpayer, and the same transitional provision applies. The inclusion of the word reimbursement was designed to remedy the situation as found in Consumers’ Gas. I conclude that the word reimbursement is a change in the law.24

Similarly, in Tioxide Canada Inc., the Tax Court of Canada noted:

[Paragraph 12(1)(x)] is designed to reverse a trend in the courts not to include certain types of payment in calculating a taxpayer’s income on the ground that the amounts received were payments on capital account and also should not be taken into account in calculating the capital cost of property.25

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24 Westcoast Energy Inc. v. The Queen, 91 DTC 5334, at 5340-41 (FCTD); aff’d. 92 DTC 6253 (FCA).
25 Tioxide Canada Inc. v. The Queen, 93 DTC 1499, at 1502 (TCC); aff’d. 96 DTC 6296 (FCA).
The legislator also adopted subsection 152(9), in response to the Supreme Court’s decision in *Continental Bank of Canada*,\(^26\) to permit the Crown to rely, before the courts, on an alternative argument to support an assessment, whether or not that argument was relied on at the time the assessment was issued. As the Federal Court of Appeal acknowledged in *Hollinger*, “the recent legislative amendment . . . brought to section 152 . . . overrule[s] the decision of the Supreme Court in *Continental Bank* on this point.”\(^27\)

In collection matters, the legislator responded to the Supreme Court’s decision in *Markevich*\(^28\) by amending section 222 to provide that the applicable limitation period for collection of tax was 10 years. In addition, the legislator ensured that the minister of national revenue would have priority over certain claims by allowing the minister to garnish assigned debts owing to a tax debtor in the hands of a third-party assignee. In response to judicial decisions, Parliament not only adopted subsections 224(1.2) and (1.3) in 1987, but again amended the Act in 1990 to ensure that the courts give the desired effect to the provisions at issue. Such was the analysis made by the Supreme Court in *Alberta (Treasury Branches)*:

As Major J. pointed out, prior to 1987 the provisions of the garnishment remedy in the *ITA* (s. 224(1)) were almost unanimously interpreted by the courts in such a way that a demand made under the section was ineffective to attach any of the assigned debts . . . .

In an attempt to address these decisions, Parliament amended the *ITA* in 1987 by adding two new subsections.\(^29\)

Again in the context of collections, the legislator has created a “super-priority” over source deductions by creating a deemed trust. The Supreme Court recognized, in *Sparrow Electric*,\(^30\) that the deemed trust had the effect of allowing the minister to claim rights to an asset given in guaranty on the condition that it was not subject to a fixed and specific privilege. In response to *Sparrow Electric*, the legislator amended subsections 227(4) and (4.1), adding the words “notwithstanding any security interest . . . in the amount so deducted or withheld” to subsection 227(4). The Supreme Court later recognized, in *First Vancouver Finance*, the extent of the amendments brought by the legislator:

In response to *Sparrow Electric*, the deemed trust provisions were amended in 1998 (retroactively to 1994) to their current form. . . .

It is apparent from these changes that the intent of Parliament when drafting ss. 227(4) and 227(4.1) was to grant priority to the deemed trust in respect of property that is also subject to a security interest.\(^31\)


\(29\) *Alberta (Treasury Branches) v. MNR*, [1996] 1 SCR 963, at paragraphs 11-12.


Several amendments have been made to the Act in order to adapt to current economic conditions. In the context of the requirement to maintain adequate books and records found in section 230, in 1988 the legislator adopted subsections 230(4.1) and (4.2) in order to adapt to electronic record keeping. The legislator also adopted subsections 152(4.1) and 220(3.1), which allow taxpayers to claim, under certain conditions, deductions that they have omitted to claim in a prior year, and also to claim, again in certain circumstances, relief from penalties and interest. In fact, subsection 220(3.1) was amended in response to the case of Bozzer, in order to limit the period during which relief may be claimed to 10 years after the taxation year at issue.

A good example of an amendment made in order to adapt to economic realities is the introduction, in 1989, of the tax on large corporations (part I.3 of the Act). The legislator’s intention in introducing this tax was to ensure that large corporations would pay a minimum amount of income tax and thereby contribute to paying down Canada’s deficit. Subsequently, when Canada’s finances improved, the government effectively abolished the tax by reducing the applicable tax rate to zero.

Some amendments enacted by the legislator in tax matters have gone beyond the scope of the Act, as illustrated by the addition, in 1989, of section 172.1 to the Bankruptcy and Insolvency Act. That provision limits the situations allowing for the liberation of a bankrupt in cases of tax-motivated bankruptcies.

Finally, apart from legislative amendments, the CRA has adopted the voluntary disclosure program, which aims to encourage delinquent taxpayers to declare income that they have previously failed to report.

**Interpretation of Tax Laws**

The decision of the Supreme Court in *Stubart* was decisive as regards the development of rules of statutory interpretation applicable to tax laws. *Stubart* was the first of a series of judgments of the Supreme Court on that subject. From 1984 to 2011, the court rendered decisions on matters of statutory interpretation and analyzed the applicable principles in more than 15 cases. That the issue has come up so often is perhaps attributable, in part, to the very particular character of tax laws and the specificity of the provisions involved.

*Stubart* marked a turning point in the evolution and application of the rules of interpretation applicable to tax laws, as reflected in the following comments of the court:

Gradually, the role of the tax statute in the community changed, as we have seen, and the application of strict construction to it receded. Courts today apply to this statute the plain meaning rule, but in a substantive sense so that if a taxpayer is within the spirit of the charge, he may be held liable.34

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33 RSC 1985, c. B-3, as amended.
34 Stubart, supra note 4, at 578.
These observations, made in 1984, are even more relevant today. Two year later, in *Golden*, the court again acknowledged the crucial role of the tax statute, and the need to take that role into account in interpreting the provisions of the Act:

Strict construction in the historic sense no longer finds a place in the canons of interpretation applicable to taxation statutes in an era such as the present, where taxation serves many purposes in addition to the old and traditional object of raising the cost of government from a somewhat unenthusiastic public.\(^\text{35}\)

Then, in 1994, the court adopted the teleological approach, in the case of *Corp. Notre-Dame de Bon-Secours*:

The first consideration should therefore be to determine the purpose of the legislation, whether as a whole or as expressed in a particular provision. . . . In other words, it is the teleological interpretation that will be the means of identifying the purpose underlying a specific legislative provision and the Act as a whole; and it is the purpose in question which will dictate in each case whether a strict or a liberal interpretation is appropriate or whether it is the tax department or the taxpayer which will be favoured.\(^\text{36}\)

Nevertheless, in its 1995 decision in *Friesen*, the court felt that it was necessary to return to the ordinary meaning rule:

In interpreting sections of the *Income Tax Act*, the correct approach, as set out by Estey J. in *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536, is to apply the plain meaning rule. . . . I accept the following comments . . . in P.W. Hogg and J.E. Magee, *Principles of Canadian Income Tax Law*. . . .

. . . “[O]bject and purpose” can play only a limited role in the interpretation of a statute that is as precise and detailed as the Income Tax Act.\(^\text{37}\)

After the court had again ruled on the applicable principles in *Shell Canada Ltd.*,\(^\text{38}\) *65302 British Columbia Ltd.*,\(^\text{39}\) and *Will-Kare Paving*,\(^\text{40}\) in 2001 LeBel J in *Singleton*, although dissenting with the majority on the issue, reviewed the statutory interpretation methods discussed above and determined that the applicable method


\(^{38}\) *Shell Canada Ltd. v. Canada*, [1999] 3 SCR 622.

\(^{39}\) *65302 British Columbia Ltd. v. Canada*, [1999] 3 SCR 804.

\(^{40}\) *Will-Kare Paving & Contracting Ltd. v. Canada*, 2000 SCC 36.
was the approach recommended in *Stubart* (the so-called words-in-total-context approach):

In *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536, this Court articulated a new method of statutory interpretation appropriate to the *Income Tax Act*, dubbed the “words-in-total-context approach” by MacGuigan J.A....

Since *Stubart*, this Court has taken such an approach in a number of other decisions. . . . Even cases such as *Québec (Communauté urbaine) v. Corp. Notre-Dame de Bon-Secours*, [1994] 3 S.C.R. 3, at p. 15 (advocating the teleological approach), and *Friesen v. Canada*, [1995] 3 S.C.R. 103, at para. 10, *per* Major J. (advocating the “plain meaning” approach), still refer to *Stubart* as the foundational modern Canadian case for statutory interpretation.

The words-in-total-context approach steers a middle course between the pure teleological method of Gonthier J. in *Corp. Notre-Dame de Bon-Secours* and Major J.’s focus on the “plain meaning” of the statute in *Friesen*. . . .

The words-in-total-context approach ensures that clear statutory language is not overlooked in order to carry out a broad statutory purpose more effectively. It is the approach that should be applied here.41

In *Placer Dome* in 2006, the court noted that “because of the degree of precision and detail characteristic of many tax provisions, a greater emphasis has often been placed on textual interpretation.”42 Nevertheless, as the court emphasized in *Canada Trustco* in 2005, “[t]he provisions . . . must be interpreted in order to achieve consistency, predictability and fairness.”43 In particular, “[i]n order to reveal and resolve any latent ambiguities in the meaning of provisions of the *Income Tax Act*, the courts must undertake a unified textual, contextual and purposive approach to statutory interpretation.”44

The Act has evolved into a statute that serves as a vehicle for achieving the government’s fiscal objectives through the enactment of detailed and precise provisions, which have an important impact on the way taxpayers organize their affairs. As a result, the Supreme Court has found it necessary to develop interpretation tools specific to the Act. Determining the object of a particular provision has been for more than 30 years, and remains today, an important challenge for the court. It is in that context that the methods developed to assist courts in interpreting tax laws should be understood. The assessment of the object and spirit of a provision remains a current issue, as the Supreme Court noted in 2011 in *Copthorne Holdings*:

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42 Placer Dome Canada Ltd. v. Ontario (Minister of Finance), 2006 SCC 20, at paragraph 21.
43 Canada Trustco Mortgage Co., supra note 18, at paragraph 12.
44 Ibid., at paragraph 47; see also Placer Dome Canada Ltd., supra note 42, at paragraph 22.
It is necessary to remember that “Parliament must . . . be taken to seek consistency, predictability and fairness in tax law.”  

The object, spirit or purpose can be identified by applying the same interpretive approach employed by this Court in all questions of statutory interpretation—a “unified textual, contextual and purposive approach.”

WHAT CAN WE EXPECT FROM THE PRACTICE OF TAX LAW?

It is interesting to reflect upon the evolution of the practice of tax law since the development of the Tax Court of Canada. The changes that have occurred have been extremely significant, both for the courts and for the Act itself. An analysis of the decisions rendered by the Supreme Court reveals the particular character of tax laws, their economic policy objectives, and their impact on decisions taken by taxpayers, all of which speak to the necessity of developing interpretation methods that eliminate ambiguity and uncertainty. In such a context, the legislator is forced to react rapidly and enact regular amendments to the Act, in order to ensure that the objectives for which particular provisions have been adopted are attained. As Estey J underlined in 1984 in *Stubart*, the fact that the legislator can amend the Act may explain the reluctance of the courts to intervene in interpreting tax laws that are insufficiently detailed or precise.

In such circumstances, the practice of tax law will continue to evolve and the courts’ role will not diminish for the following reasons, among others:

- The complexity and volume of litigation files has grown considerably over the past few years.
- Various “products” to reduce taxes are regularly proposed to groups of taxpayers.
- In the 2012 budget, the federal government clearly identified the objective of improving the functioning of the fiscal regime; following the budget, amendments to the Act were proposed to address (among other concerns) tax shelters, the use of partnerships, and the use of foreign affiliates and foreign trusts.
- In the 2013 budget, the federal government reiterated its goal to counter tax evasion.

45 Copthorne Holdings Ltd., supra note 12, at paragraph 67, quoting Canada Trustco Mortgage Co., supra note 18, at paragraph 42.

46 Copthorne Holdings Ltd., supra note 12, at paragraph 70, quoting Canada Trustco Mortgage Co., supra note 18, at paragraph 47, and Lipson, supra note 19, at paragraph 26.


48 Canada, Department of Finance, 2013 Budget, Budget Plan, March 21, 2013, at 268.
The CRA remains committed to attacking aggressive tax planning and certain offensive international transactions, while at the same time maintaining a balance between protecting the tax base and the economic development of Canadian companies in the international marketplace.

In an effort to halt abusive use of tax havens, states will increasingly collaborate in and promote the exchange of information.

At first glance, there seems to be good reason to expect that the courts will be solicited by taxpayers with increasing frequency in the future. There are other factors, however, that tend to indicate that this will not necessarily be the case. In the present climate of technological challenges, where information exchange is rapid and often instantaneous, parties are more and more conscious of the risks and costs of litigation. Taxpayers are challenging these costs, forcing tax advisers to adapt and better define their clients’ needs, and to revise their methods of litigation. Much effort is made by all parties to ensure that both the work involved and the resulting invoice are justified.

Although this preoccupation with litigation costs applies to all parties, both private and public, over the last few years taxpayers have demonstrated increased awareness and involvement—for example, by instituting legal proceedings against advisers who have recommended investments in projects that have resulted in disallowed tax deductions. Certain civil proceedings have been brought not only against the promoters of such projects, but also against the legal counsel who have endorsed the investments.

In my view, the Tax Court of Canada has been very proactive in countering the proliferation of hearings and their duration. The court has amended, among others, the practice rules in order to encourage parties to settle their cases or to circumscribe the issues where groups of taxpayers are involved. The court has also issued a notice to the public and to the profession in order to explain the amendments to the rules, as well as the adoption of new rules relating to settlement offers, lead cases, and litigation process conferences. These amendments and additions have a clear objective of streamlining the process of hearings. The measures are principally aimed at

- ensuring that the parties are rapidly and continually aware of the issues;
- ensuring that the hearing will proceed in a rapid and orderly manner;
- reducing the costs borne by the parties;
- eliminating, when possible, the need for a hearing in appropriate cases by encouraging settlement discussions early in the litigation process and avoiding last-minute settlements; and
- facilitating the litigation process by choosing a lead case where appeals involving many taxpayers have common or related issues of fact or law.

In this context, the parties are invited to attempt to avoid, as far as possible, recourse to a hearing. The approach that the Tax Court wishes to install and the attitude that
the parties are invited to adopt would allow for a reduction in the number and dura-
tion of appeals. Ultimately, any decision to have recourse to the courts should be made judiciously.

Nevertheless, in today’s society, where everything evolves rapidly and where technology allows for an opening to the world, the legislator will always be in a position to adapt to change by modifying the Act. The analysis of tax law will continue to raise stimulating challenges as policy makers and the courts endeavour to ensure not only that the objectives and policies underlying the legislation are attained, but also that their decisions meet taxpayers’ expectations for predictability, consistency, and a just result.

The past has shown us that the Act is a very particular law, both complex and precise, requiring that it be examined in minute detail. Such is the situation today, and so will it be in the years to come.