
Fairness, Common Sense, and Justice in Deciding Tax Cases: The Legacy of Justice Bowman

Guy Du Pont and Wilfrid Lefebvre*

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INTRODUCTION

It is a daunting task to sit at a computer and attempt to extract, only from memory and from the reported cases, things that may contribute to the glory of a judge with whom we are honourably bound in a long, common, and continuing labour in the field of tax. If we have not succeeded today in painting a picture of a tax lawyer and tax judge worthy of his merits and of the feeling we have for him, then we should be damned as poor writers, if not poor barristers indeed, who, though having between them more than 70 years at the bar, have been unable to put across this most obvious case.

* Guy Du Pont is of Davies Ward Phillips & Vineberg LLP, Montreal (e-mail: gdupont@dwpv.com). Wilfrid Lefebvre is of Ogilvy Renault, Montreal (e-mail: wlefebvre@ogilvyrenault.com). The authors would like to extend their heartfelt thanks to Slava Sinigerska of Davies Ward Phillips & Vineberg LLP, whose hard work and research made the completion of this article possible.

Former Chief Justice Bowman was, as he himself put it, “a journeyman trial judge slogging it out in the trenches”¹ for 17 years, beginning with his appointment to the Tax Court of Canada in 1991. After serving as associate chief judge, associate chief justice, and ultimately chief justice, he retired in 2008 owing to the mandatory retirement age limit. He will be greatly missed, both for the quality of his decisions and for the style in which they were delivered.

During his tenure on the Tax Court, Bowman J was called upon to opine on many complex aspects of tax law as well as some of the more trivial and routine. He treated both with the same thoroughness and, generally, respect for the positions of the litigants before him, and always for the rule of law. As can be distilled from his rich judicial legacy, he made it his mission to give taxpayers and the Canada Revenue Agency (CRA) a fair and full hearing and render just and sensible decisions.

Bowman J’s judgments are written with wit, intelligence, and the commonsense perspective that has made him an outstanding judge. He has displayed a talent for circumventing obstacles and obtaining excellent results. His quiet force of persuasion has won him both trust and respect for his thoughts and opinions from his colleagues on the bench and from the legal profession, and there is no doubt about the impact of his ideas on the relationship between taxpayers and the CRA.

This article does not purport to be exhaustive of the subject matter, for no work of scholarship can be the final authority on this remarkable individual. Indeed, our journey through his many judgments has revealed him a fugitive from our inquiries, a “most-wanted” judge who has slipped over the border just when we thought we had seized him. Here, for what it is worth, is the result of our efforts. At best, this article will attempt to mark some of the boundaries of his character, opinion, and experience, as can be distilled from the collection of reported cases based on a number of topics that we have selected. At a minimum, we hope to make Donald G.H. Bowman, the judge, better known to our readers.

FAIR AND DUE PROCESS

It was of utmost importance for Bowman J to give taxpayers the opportunity to have a fair hearing before an impartial court uninfluenced by the tax authorities. He said, during an interview after his appointment as chief justice was announced in February 2005:

I have never liked the name [Tax Court] because people do confuse us with the tax department. I want the public to know we are totally independent from the tax department and we are here to give you an impartial, fair, full hearing, and I hope a courteous one.²

1 David G. Duff and Harry Erlichman, eds., *Tax Avoidance in Canada After Canada Trustco and Mathew* (Toronto: Irwin Law, 2007), foreword.

2 Cristin Schmitz, “Donald Bowman Named Tax Court Chief Justice for Tax Court” (March 11, 2005) *The Lawyers Weekly* (online: <http://www.lawyersweekly.ca/index.php?section=article&articleid=47>).

One of the ways in which he levelled the playing field between the CRA and the taxpayer was through the use he made of the CRA's published positions—he gave them persuasive value only if they assisted the taxpayer. His approach is encapsulated in comments he made at a symposium on tax avoidance held in Ontario in 2005:

Bowman CJ said that he was very reluctant to look to the government to determine what the rules mean; therefore, interpretation bulletins are not very helpful. However, if the interpretation bulletin assists the taxpayer, Bowman CJ will refer to it. If the interpretation bulletin upholds the government's position, he will not use it, because that is “dirty pool.”³

In *Canadian Occidental U.S. Petroleum Corporation v. The Queen*,⁴ for example, he declined to consider a technical interpretation issued by the former Department of National Revenue, which it had cited in support of its argument. He concluded:

The court is not bound by departmental practice although it is not uncommon to look at it if it can be of any assistance in resolving a doubt: *Nowegijick v. The Queen et al.*, 83 DTC 5041 at 5044. I might add as a corollary to this that departmental practice may be of assistance in resolving a doubt in favour of a taxpayer. There can be no justification for using it as a means of resolving a doubt in favour of the very department that formulated the practice.⁵

But even though Bowman J would go to some lengths to achieve a result that was fair to the taxpayer, he was not ready to uphold an erroneous administrative interpretation merely because the taxpayer had relied on it. In *Moulton v. The Queen*,⁶ the taxpayer had relied and acted upon advice given to him by the CRA. He had sustained an injury and needed to buy back pension time in order to maintain his pension status. He was told, wrongly, by CRA officials that if he made payments in 1998, they would be deductible in 1999. With great regret, Bowman J held against the taxpayer in that case and gave precedence to the need for consistency and predictability over fairness to a particular taxpayer:

The appellant argues with great conviction that he should be entitled to rely on advice given by the CCRA and relied upon by him in good faith. I agree that the result may seem a little shocking to taxpayers who seek guidance from government officials whom they expect to be able to give correct advice. Unfortunately such officials are not infallible

3 Benjamin Alarie, Sanjana Bhatia, and David G. Duff, “Symposium on Tax Avoidance After Canada Trustco and Mathew: Summary of Proceedings” (2005) vol. 53, no. 4 *Canadian Tax Journal* 1010-37, at 1036.

4 2001 CanLII 461 (TCC).

5 *Ibid.*, at paragraph 30.

6 2002 CanLII 798 (TCC).

and the court cannot be bound by erroneous departmental interpretations. Any other conclusion would lead to inconsistency and confusion.⁷

He had reached the same conclusion in the earlier case of *Goldstein v. The Queen*.⁸ In *Goldstein*, the taxpayer had filed tax returns on the premise that losses in respect of a multiple unit residential building were not deductible from his “earned income” for the purposes of calculating his registered retirement savings plan limit, consistent with the position of the CRA at the time. The CRA later changed its position, and the taxpayer argued that the new position could not be held against him. Bowman J held that no estoppel could arise against the CRA where the representations of CRA officials were not in accordance with the law, even if this result was unfair to the taxpayer:

The result of the application of the rule in *Maritime Electric* and the many other cases to the same effect can have, in particular cases, unfortunate consequences for a taxpayer who, in good faith, relies upon a departmental interpretation that is subsequently changed. Nonetheless it is not in the interests of justice that the courts should be fettered by erroneous interpretations of the law by departmental officials.⁹

In his quest to provide the parties before him with a fair trial, Bowman J was respectful, courteous, and firm. He did not, however, tolerate uncooperative behaviour, unfair tactics, or procedural skirmishes. He overtly disparaged those litigants who engaged in these practices in his courtroom. In *Merchant v. The Queen*,¹⁰ for example, he heard the appeal of a taxpayer, a lawyer, who had refused to cooperate with the CRA’s auditors and did not provide any information or supporting documentation to the tax authorities until the time his appeal reached the Tax Court. As a result, the trial was reduced to petty evidence of receipts and modest expenditures, and unnecessarily lasted seven whole days. Bowman J was unsparing in his criticism of the taxpayer’s behaviour:

The system of assessment, objection and appeals from income tax assessments in Canada is one that works very well. . . . The success of the system requires however good faith and openness on both sides. It does not work if the appeal process is treated, as it was here, as an exercise in gamesmanship and obfuscation.¹¹

If Mr. Merchant expects this court to act as an income tax auditor he should not be surprised if the court draws an adverse inference from his failure to establish every constituent element necessary to the deductibility of a claimed expense.¹²

7 Ibid., at paragraph 11.

8 96 DTC 1029 (TCC).

9 Ibid., at 1034.

10 1998 CanLII 322 (TCC).

11 Ibid., at paragraph 5.

12 Ibid., at paragraph 31.

Still, Bowman J chose not to take into account the taxpayer's unacceptable behaviour and focused on the legal and factual issues in deciding the substantive merits of his case. He did, however, condemn Mr. Merchant's unacceptable behaviour in his award of costs. Because the taxpayer had "deliberately frustrated the audit process and the objection process with a view to having matters dealt with by the court that should never have had to come before it,"¹³ the CRA was awarded costs on a solicitor and client basis.

Bowman J was no less critical of the CRA and its counsel where their behaviour proved to be unfair and abusive. In *Scavuzzo v. R.*,¹⁴ he criticized CRA officials for going after different companies for the same unremitted source deductions, by way of issuing "joint assessments"—something that Bowman J sarcastically characterized as "an interesting and novel concept" and "an innovative approach" with which "the law has thus far not caught up."¹⁵ He observed that

the officials of the CRA have displayed a remarkably confusing and inconsistent shotgun approach to the problem. . . .

Their conduct is reminiscent of Sir Ronald in Stephen Leacock's story, *Gertrude the Governess*, who "flung himself upon his horse and rode madly off in all directions."¹⁶

In *Loewen v. The Queen*, Bowman J criticized the CRA's use of the words "so-called," "called a," and "purportedly," which rendered its pleadings "unacceptably equivocal and ambiguous."¹⁷ The use of such "weasel words," especially in pleading assumptions, offended Bowman J's sense of fairness:

I find the use of "So-Called" in paragraph 15 in describing the promissory note completely unacceptable. Since the assumptions pleaded are important in defining the appellant's onus the appellant is entitled to know just what assumptions he has to demolish. How can one demolish something that is as amorphous and equivocal as an assertion that something is a "So-Called promissory note"? If the Crown wishes to allege that the promissory note is a sham, or unenforceable or illegal it should put the appellant on notice that it is raising this as an issue and allege facts that support the assertion. I used the expression "weasel word" above. The use of weasel words is offensive and unacceptable in any pleading. It is doubly so in pleading assumptions.¹⁸

Another strongly worded judgment condemning the behaviour of CRA officials was *Jackman v. The Queen*.¹⁹ This case was an application by CRA counsel to be released

13 Ibid., at paragraph 59.

14 2005 TCC 722.

15 Ibid., at paragraph 41.

16 Ibid., at paragraphs 41-42.

17 2003 TCC 101, at paragraph 94; rev'd. [2004] 4 FCR 3.

18 Ibid. (TCC), at paragraph 93.

19 2000 CanLII 108 (TCC).

from an undertaking that she had given to the court because the CRA refused to honour it. The taxpayer in this case, who was not represented by counsel, had signed a settlement letter that included a waiver of his right to object or appeal. The CRA assessed according to the settlement letter, and the taxpayer, not understanding that he had waived his right to appeal, filed notices of objection to the new reassessments. The Appeals Division returned the notices of objection, taking the position that they were not valid as a result of the waiver. The taxpayer then brought an application to the Tax Court of Canada for an extension of time to file the notices of objection. On hearing the application, Bowman J held that the objections had been filed on a timely basis, since the CRA could not undo the filing by returning the notices of objection. CRA counsel undertook to issue a notice of confirmation so that the taxpayer might thereafter file an appeal to the Tax Court and the question as to whether he was entitled to object could be put before the court properly.

The CRA, however, refused to issue the notice of confirmation and honour the binding undertaking given by CRA counsel as a representative of the attorney general of Canada. Bowman J was not happy with the CRA's decision:

The conduct of the officials of the CCRA has . . . been arrogant and improper. It is moreover based upon the erroneous premise that by returning a document that has been filed the filing is somehow magically undone. For the CCRA to return a notice of objection filed by a taxpayer is an act that is without legal authority and is tantamount to an attempt to reverse history.²⁰

This constitutes an endeavour to deprive Mr. Jackman of any right to have this court determine the validity of the waiver that he signed.

When the CCRA refused to honour Ms. Coombs' undertaking given to the court it again attempted to usurp the role of this court. The undertaking that Ms. Coombs gave was one that she, as the representative of the Attorney General of Canada, had the right and the authority to give. . . .

The behaviour of the officials of the CCRA in seeking to usurp the role of this court and in refusing to honour a binding undertaking given by a representative of the Attorney General of Canada is reprehensible.²¹

Bowman J was also strongly critical of the CRA in situations where it did not set out in full the actual assumptions on which it acted in making the assessment being appealed. The practice of the CRA to include boilerplate paragraphs (characterized by Bowman J as "stereotypical verbal formulae")²² offended his sense of procedural fairness and honesty:

The pleading of assumptions involves a serious obligation on the part of the Crown to set out *honestly* and *fully* the actual assumptions upon which the Minister acted in

20 Ibid., at paragraph 24.

21 Ibid., at paragraphs 26-28.

22 *Shaughnessy v. The Queen*, 2002 CanLII 742, at paragraph 13 (TCC).

making the assessment, whether they support the assessment or not. Pleading that the Minister assumed facts that he could not have assumed is not a fulfilment of that obligation. The court and the appellant should be entitled to rely upon the accuracy and completeness of the assumptions pleaded. Sadly, this is becoming increasingly difficult. The entire system developed in our courts relating to assumptions and onus of proof is in jeopardy if the respondent does not set out the actual assumptions on which the assessment is based with complete candour, fairness and honesty.²³

He was prepared to impose sanctions when faced with these or other obfuscating practices, whether on the part of the CRA or of the taxpayer:

In an appropriate case I would have no hesitation in allowing an appeal, striking out a reply or awarding costs on a solicitor and client basis either against the respondent or, in a flagrant case, against a counsel who drafted a misleading reply.²⁴

STATUTORY INTERPRETATION—LOGIC, HUMANISM, AND COMMON SENSE

Bowman J was often called upon to interpret various provisions of the Income Tax Act²⁵ and other statutes. His approach to statutory interpretation was characterized by logic, common sense, and his quest to achieve a just result.

In *McAnulty v. The Queen*,²⁶ Bowman J gave a broad and purposive interpretation of the words “agree” and “agreement” in paragraph 110(1)(d) of the Act. The taxpayer in this case claimed the deduction under paragraph 110(1)(d) on the basis of the assumption that the stock option price under certain options that she exercised was not less than the fair market value of the shares “at the time the stock option agreement was made.”²⁷ The CRA took the position that paragraph 110(1)(d) did not apply because at the time the stock option agreement was signed by the taxpayer, the fair market value of the shares was greater than the option price. Bowman J allowed the taxpayer’s appeal, holding that the stock option agreement was made at the time that the taxpayer’s employer informed her of the stock option, rather than at the later time when a written agreement was signed. In reaching this result, Bowman J took a practical approach, taking into account the realities of such arrangements in the business world:

My view is simply this: a broader approach to the interpretation of “agree” and “agreement” in paragraph 110(1)(d) is required if the object of that paragraph is to be achieved. A technical one that excludes an oral commitment made by a senior officer of

23 Ibid.

24 *Holm v. The Queen*, 2002 CanLII 47030, at paragraph 18 (TCC).

25 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.

26 2001 CanLII 909 (TCC).

27 Ibid., at paragraph 21.

the company with apparent authority would in my view destroy the purpose for which the provision is in the act, that of according to the taxation of employee stock options what essentially amounts to capital gains treatment where the option price at the time of the agreement is no less than the price at which the shares are trading at that time. It would create chaos in the public companies in the country if when senior management tells the employees that they are to be given options at a particular price, they had to look at the by-laws and ensure that management followed the rules, and then, if there is an upward fluctuation in the price of the shares between the date of notification and the date something was put in writing and a final resolution of the directors is passed an adjustment had to be made to the option price.²⁸

In the right circumstances, Bowman J was willing to endorse a liberal, humane, and compassionate interpretation of the provisions before him. In *Radage v. The Queen*,²⁹ he allowed the disability tax credit claim of a taxpayer for his son who had borderline intelligence and impaired hand-eye coordination. Bowman J adopted a teleological approach to statutory interpretation, in line with the purpose of the disability tax credit provisions, which required “a sensible, practical and compassionate interpretation [of] the words that will give effect to the intention of Parliament, which is to give a measure of tax relief to persons with serious disabilities.”³⁰ He did not hesitate to apply a liberal interpretation of the provisions in question, even though he had earlier expressed a view that a narrower approach should be adopted:

The court must, while recognizing the narrowness of the tests enumerated in sections 118.3 and 118.4, construe the provisions liberally, humanely and compassionately and not narrowly and technically. In *Craven v. The Queen*, 94-2619(IT)I, I stated:

The application of the inflexible tests in section 118.4 leaves the court no room to apply either common sense or compassion in the interpretation of the disability tax credit provisions of the *Income Tax Act*—provisions that require a compassionate and commonsense application.

In my view I stated the test unduly narrowly in that case. I have heard many disability tax credit cases since that time and my thinking has evolved. . . . If the object of Parliament, which is to give to disabled persons a measure of relief that will to some degree alleviate the increased difficulties under which their impairment forces them to live, is to be achieved the provision must be given a humane and compassionate construction.³¹

While Bowman J was ready to apply a creative interpretation of the statutory rules where he considered it appropriate to do so, he also recognized that judges should show restraint when the words of the statute are clear. The following extract

28 Ibid., at paragraph 36.

29 96 DTC 1615 (TCC).

30 Ibid., at 1618.

31 Ibid., at 1625.

from his reasons in *Datacalc Research Corporation v. The Queen* provides some insight into how he perceived his role as a judge:

I do not think that the fact that a statutory provision can in some circumstances lead to an unjust or inconvenient or even absurd result can justify ignoring it or not applying it to a different set of circumstances. The principle that if a statute is susceptible of two interpretations, one leading to an absurd result and one not, the interpretation that avoids absurdity is to be preferred is well known. However where the words of the statute are clear the court must give effect to them even if they lead to an absurd, unjust or inconvenient result. To modify the plain legislative language so that it conforms to the judge's notion of what is more reasonable or more fair or less absurd would be to usurp the role of Parliament.³²

Similarly, in *Canadian Occidental*, a case dealing with the interpretation of subsection 17(3) of the Act, prior to the 1998 amendments, Bowman J stated:

French and English are linguistic instruments capable of great precision of expression. Parliamentary drafters are presumed to have mastered one or both of those languages and to be able to say what they mean and to mean what they say.

None of the conditions such, for example, as ambiguity, inconsistency or absurdity that might warrant applying the rules of interpretation that have been developed in other cases exist here. . . . The judicial filling of perceived legislative lacunae to achieve some unspecified policy objective is an unacceptable usurpation by the court of the legislative function.³³

He was of the opinion that the same approach should apply even in the case of incentive legislation, such as the provisions with respect to scientific research and experimental development (SR & ED). In *LGL Ltd. v. The Queen*,³⁴ he rejected the claim for income tax credits of a taxpayer who carried on SR & ED projects relating to the environmental effect of certain activities on whales, birds, and fish, the data for which were being collected off the north coast of Alaska, because the SR & ED was not “carried on in Canada” within the meaning of paragraph 37(1)(a). He made the following remarks as to the possibility of a more generous, purposive interpretation of the rules:

Here the inescapable fact is that a substantial part of the project was performed outside of Canada. What principle of interpretation would permit or compel me to conclude that the work forming part of the SR & ED project outside of Canada was carried on in Canada? Many aids to interpretation are available and may be invoked where the words of a statute are ambiguous or difficult to understand, or where a particular interpretation may lead to an absurdity or is clearly at odds with the apparent legislative intent. For that reason, principles of statutory construction have been developed by

32 2002 CanLII 46703, at paragraph 54 (TCC).

33 Supra note 4, at paragraphs 18-19.

34 1999 CanLII 133 (TCC); aff'd. 2000 CanLII 14931 (FCA).

the courts which permit them to interpret legislation in a manner that “best ensures the attainment of its objects.” . . .

It is obvious that the SR & ED legislation is incentive legislation. . . . That does not however permit a court to strain the plain meaning of the words to achieve a result that appears to be desirable.³⁵

In other situations, Bowman J used logic and contextual interpretation to discern the meaning of the provisions before him. In *Glaxo Wellcome Inc. v. The Queen*,³⁶ he held that land acquired with the intention that it be used in an anticipated future expansion, which land however remained vacant until it was sold, did not constitute a “former business property” as defined in section 248—that is, “capital property . . . that was used by the taxpayer primarily for the purpose of gaining or producing income from a business.” Bowman J took a textual and contextual interpretive approach. He observed that all of the expressions “use,” “acquired for use,” “intended to be used,” and “was held” are used in the Act, so that it could be assumed that they are not used interchangeably. He logically concluded that the property in this case was “intended to be used,” but was not “used,” since it was never put to use in the business.

The different approaches to statutory interpretation taken by Bowman J in different contexts are easily explained in light of his own admission, at the symposium for the 20th anniversary of the Tax Court, that he often favoured a commonsense, results-oriented approach to statutory interpretation, rather than a technical, legalistic one:

I don't regard statutory interpretation as a very arcane sort of thing. You decide what is the commonsense answer and you interpret the legislation accordingly, or you find authority to support your conclusion. But essentially, in deciding tax cases—whether we're talking about the *Shell Canada* case or the *Radage* case, the poor little fellow who gets caught up in the toils of section 60 and whether he can deduct alimony or not—you look at it as a practical matter and then say, “What is my job here? My job here is to decide if he is in accordance with the law and in accordance with common sense and with compassion.” And if you do that, you have a 50-50 chance of being upheld in Appeal.³⁷

“COMMON SENSE, INSTINCT AND A CONSULTATION WITH THE MAN ON THE CLAPHAM OMNIBUS”

Bowman J has proved himself to be a well-rounded jurist, with exceptional knowledge not only of tax law but of the law in general (as a result, no doubt, of his considerable experience both as a judge and at the bar). Nonetheless, he never relied

35 Ibid., at paragraphs 55-56.

36 96 DTC 1159 (TCC); aff'd. 98 DTC 6638 (FCA).

37 “Tax Court of Canada 20th Anniversary Symposium” (2005) vol. 53, no. 1 *Canadian Tax Journal* 135-75, at 151.

completely on strict legal tests and technical arguments, and he always tested the results of a case against his inner instincts and against what he would consider to be the commonsense solution.

One example is his judgment in *Dean Lang and Sharon Lang v. MNR*,³⁸ a case in which he was called upon to determine whether the workers retained by the taxpayers were employees or independent contractors, in order to decide whether the taxpayers had to pay pension and employment insurance contributions. After an in-depth examination of the relevant case law extending over several pages, Bowman J applied the relevant legal tests, reached a conclusion, and then went on to say that the result would have been the same if he had applied the test of “common sense, instinct and a consultation with the man on the Clapham omnibus.”³⁹ He concluded:

If I were to rely solely on my own instincts and common sense I would say that quite apart from the *Wiebe Door* test, quite apart from intention, workers who are called on to clean the ducts of a couple of houses, paid a portion of the fee and then sent on their way do not by any stretch of the imagination look like employees.⁴⁰

Similarly, in *Saskatchewan Wheat Pool v. The Queen*,⁴¹ Bowman J held that the corporate taxpayer who sold a piece of land as repayment for a loan owed to it by a fund in which it participated had generated a loss on revenue account. In reaching this conclusion, he examined two alternative ways of approaching the issue—(1) by looking only at the taxpayer’s use and intention with respect to the land, or (2) by also examining whether the land was capital property of the fund—and concluded that the result in both cases would be the same. He then concluded his analysis by turning to the “commonsense” test:

The determination of this type of question in these cases is not an easy one. It is an exercise in judgement, common sense and an assignment of weight to a variety of factors. Although as I mentioned in footnote 1 to paragraph 21 of *Imperial Tobacco Canada Limited v. The Queen*, [2007] T.C.J. No. 482 (QL) I have learned to be somewhat wary of placing too much reliance upon my own common sense in this type of question, nonetheless I propose once again, to rely on my own common sense and to conclude that, taking all of the factors into account, the sale of the section 26 property here was on revenue account.⁴²

In *Gartry v. The Queen*,⁴³ the taxpayer had not yet taken title to a boat when it sank. One of the issues was whether the taxpayer could claim a terminal loss for the

38 2007 TCC 547.

39 *Ibid.*, at paragraph 36.

40 *Ibid.*, at paragraph 40.

41 2008 TCC 8.

42 *Ibid.*, at paragraph 30.

43 94 DTC 1947 (TCC).

boat and related expenses. The CRA argued that the taxpayer had not “acquired” depreciable property within the meaning of paragraph 13(21)(b) of the Act. The position taken by the CRA struck Bowman J as unfair and in conflict with common sense:

The Crown’s position would relegate the appellant to the worst of both possible worlds. It says, in effect, to Mr. Gartry “You were spending money on a capital asset, a boat, and if those expenses had matured into full ownership before the boat sank you would have been able to claim a terminal loss. As it happens, the boat sank before title was transferred to you and you obtained nothing. But they are still capital expenditures and so you can deduct nothing.”

This position is inconsistent with ordinary fairness, common sense and commercial reality.⁴⁴

Accordingly, he rejected the CRA’s position and held that although title to the boat had remained with the vendor, the taxpayer had sufficient incidents of ownership to enable him to treat the boat as his depreciable property. Therefore, the taxpayer was entitled to succeed.

On a preliminary motion in *Continental Bank Leasing Corporation et al. v. The Queen*,⁴⁵ the CRA applied for an order permitting a withdrawal of an admission and certain amendments to its reply. After examining the relevant authorities and legal tests, Bowman J stated:

Although I find that these tests have been met I prefer to put the matter on a broader basis: whether it is more consonant with the interests of justice that the withdrawal or amendment be permitted or that it be denied. The tests mentioned in cases in other courts are of course helpful but other factors should also be emphasized, including the timeliness of the motion to amend or withdraw, the extent to which the proposed amendments would delay the expeditious trial of the matter, the extent to which a position taken originally by one party has led another party to follow a course of action in the litigation which it would be difficult or impossible to alter and whether the amendments sought will facilitate the court’s consideration of the true substance of the dispute on its merits. No single factor predominates nor is its presence or absence necessarily determinative. All must be assigned their proper weight in the context of the particular case. *Ultimately it boils down to a consideration of simple fairness, common sense and the interest that the courts have that justice be done.*⁴⁶

Again, while he acknowledged and even applied the relevant authorities, the ultimate legal test for him was what was sensible, fair, and just.

44 Ibid., at 1952.

45 93 DTC 298 (TCC). The appeal in this case was the first occasion on which the Federal Court of Appeal referred to one of Bowman J’s decisions.

46 *Continental Bank Leasing*, supra note 45, at 302 (emphasis added).

IMPORTANCE OF COMMERCIAL CONSIDERATIONS AND DEFERENCE TO BUSINESS JUDGMENT

In deciding the outcome of the cases before him, Bowman J was always mindful of the commercial reality that led taxpayers to choose a certain tax treatment and was reluctant to second-guess legitimate business decisions. In this respect, he described the role of a judge as follows:

The court's function is to decide the case on the basis of the facts as disclosed in the evidence *bearing in mind the business exigencies that necessitated the payment and the commercial objectives that it was designed to achieve.*⁴⁷

Consequently, he did not spare criticism of the tax authorities in situations where their position was, in his view, out of touch with commercial reality.

One of Bowman J's last cases, *Jolly Farmer Products Inc. v. The Queen*,⁴⁸ involved an extensive and profitable horticultural operation carried on by a corporation whose shareholders and employees were observant Christians living in a religious community on the farm property. The CRA took the position that the corporation was not entitled to claim capital cost allowance on the residential buildings on the farm because they were serving personal rather than business purposes. In holding in favour of the taxpayer, Bowman J was highly critical of the restrictive approach of the CRA in recognizing what constitutes a valid business practice:

Mr. Leblanc struck me as a conscientious and honest public servant but I think his views reflect a ministerial mindset that is out of touch with commercial reality. . . .

[E]ven after the employer, Jolly Farmer Products Inc., overwhelmingly demonstrates (unnecessarily in my view) that its business organization results in a resounding commercial success, the Minister still hangs on with the tenacity of grim death to his original error and argues that the appellant should have adopted a way of doing business that the Minister finds more palatable, even though it is less economic. *Mit der Dummheit kämpfen Götter selbst vergebens.* ["Against stupidity the gods themselves contend in vain."] ⁴⁹

Having thus castigated the CRA for its stubborn disregard of legitimate business considerations, Bowman J went on to demonstrate that having the workers live on site was essential to the success of the appellant's horticultural operation and concluded with the following remarks as to the need to respect business decisions:

47 *International Colin Energy Corporation v. The Queen*, 2002 CanLII 47015, at paragraph 49 (TCC) (emphasis added).

48 2008 TCC 409.

49 *Ibid.*, at paragraphs 13-14. The quotation is from Friedrich Schiller.

Even if there were no economic benefit—and clearly there is—I would still have held that the business decision of the appellant on the manner in which it conducts its business must be respected. . . .

This case is an excellent example of the CRA seeking to substitute its business judgment for that of the taxpayer. The alternatives suggested by the respondent would have made the operation far less profitable. The way in which the appellant chooses to carry on its highly successful commercial operation is a business decision and the Minister of National Revenue has no right to substitute his business judgment and advance other alternatives that are more palatable to him.⁵⁰

Bowman J was often called upon to decide whether losses were deductible in certain situations where the CRA was arguing that the expenses in question were not paid or incurred for the purpose of earning income, or that the taxpayer had no reasonable expectation of earning a profit. In deciding those cases, Bowman J stressed on numerous occasions that the CRA could not second-guess the business judgment of taxpayers. His decision in *Frappier v. The Queen*⁵¹ is a good example. The CRA disallowed the deductibility of certain payments made by the taxpayer, who was employed as a financial adviser, to clients that lost money on securities purchased by the taxpayer on their behalf. Bowman J examined the nature of the payments and held that the “principal stock in trade” of the taxpayer was her reputation, her expertise, and her relationship with her clientele, whose referrals were essential to the success of her business.⁵² Thus, he held that payments made for the purpose of preserving the taxpayer’s reputation and a good adviser-client relationship were “made for sound business reasons to secure a commercial advantage and they were not on capital account.”⁵³

Bowman J’s deference to the business objectives and judgment of taxpayers led him to reject the reasonable expectation of profit (REOP) test. He took the following view of this test:

I do not find the ritual repetition of the phrase [“reasonable expectation of profit”] particularly helpful . . . and I prefer to put the matter on the basis “Is there or is there not truly a business?” This is a broader but, I believe, a more meaningful question and one that, for me at least, leads to a more fruitful line of enquiry. No doubt it subsumes the question of the objective reasonableness of the taxpayer’s expectation of profit, but there is more to it than that. How can it be said that a driller of wildcat oil wells has a reasonable expectation of profit and is therefore conducting a business given the extremely low success rate? Yet no one questions that such companies are carrying on a business. It is the inherent commerciality of the enterprise, revealed in its organization, that makes it a business. Subjective intention to make money, while a factor, is not

50 Ibid., at paragraphs 23-24.

51 98 DTC 1521 (TCC).

52 Ibid., at 1523.

53 Ibid., at 1524.

determinative, although its absence may militate against the assertion that an activity is a business.⁵⁴

In *Sbaughnessy v. The Queen*,⁵⁵ Bowman J allowed the losses claimed by the taxpayer in respect of a condominium in Whistler, British Columbia, in a situation where the CRA was arguing that the taxpayer had no REOP, since he had no plan showing anticipated profitability and had not reported any income since acquiring the property. Bowman J's response to the CRA's position was predictably dismissive:

The losses here were disallowed on the basis of the Minister's ceremonial chanting of the rubric identified by the acronym REOP, a gloss on the statute that, as applied by the CCRA as a free-standing test, cannot withstand rational scrutiny. Any realistic analysis of what the CCRA was doing in this case makes it crystal-clear that it was in essence disallowing the interest because it did not result in the production of net income. This is precisely the approach rejected by the Supreme Court of Canada in *Ludco*.⁵⁶

Similarly, in *Allen et al. v. The Queen*,⁵⁷ the CRA had taken the position that because the financing arrangement for an investment in a limited partnership involved the payment of interest that exceeded the income from the limited partnership, the losses should be rejected under the REOP doctrine. Bowman J held that the investment in question was a perfectly viable business; that there was no personal element involved; that the investment was sensible, long-term, and bona fide; and that "where there is no personal element and a genuine business exists the NREOP [no REOP] doctrine has no application."⁵⁸ He was highly critical of the CRA's attempt to invoke the REOP doctrine in such a context:

Whatever else may be said about 99% financing of an investment, it certainly cannot be said that its result is that the vehicle in which the taxpayer has invested did not carry on a business. This is wrong as a matter of logic, law and common sense. The Minister is seeking to limit the deduction of the amount of interest which is permitted by paragraph 20(1)(c) by intoning the ritual incantation NREOP, where it is obvious and admitted that the partnership is carrying on a profitable business.⁵⁹

The decision in *Safety Boss Limited v. R*⁶⁰ is another example of a case where Bowman J allowed the taxpayer's appeal on the basis of the reasonableness of the

54 *Kaye v. The Queen*, 1998 CanLII 182, at paragraph 4 (TCC).

55 *Supra* note 22.

56 *Ibid.*, at paragraph 22.

57 1999 CanLII 170 (TCC); *aff'd. Canada v. Milewski*, 2000 CanLII 16145 (FCA); application for leave to appeal to the Supreme Court of Canada dismissed, [2000] SCCA no. 618.

58 *Ibid.*, at paragraph 25.

59 *Ibid.*, at paragraph 22.

60 2000 CanLII 216 (TCC).

arrangement in issue in light of the commercial considerations behind it. An individual resident in Alberta (Mr. Miller) owned 99 percent of the shares of Safety Boss Limited, a company in the business of oilfield firefighting and capping of blow-out oil and gas wells. Safety Boss earned large fees on account of services performed in Kuwait. Miller moved to Bermuda and formed a Bermuda company (“Bermudaco”), which entered into an agreement with Safety Boss to provide Miller’s services to it. Safety Boss paid Bermudaco approximately \$2 million for such services. The CRA disallowed the intercorporate fee as being unreasonable. Bowman J allowed the deduction of the fee paid for Miller’s services. He held that the CRA had failed to take into account the fact that Miller was the driving force behind Safety Boss and that the existence of the contract with Kuwait and its fulfillment were attributable primarily, if not solely, to Miller. The fee paid to Bermudaco was thus entirely reasonable and in line with commercial reality.

THE UNBEATEN PARTY

Bowman J did not hesitate to break new ground and render bold and decisive judgments when presented with difficult and novel issues. In *O’Neill Motors Limited v. The Queen*,⁶¹ he was called upon to determine the appropriate remedy under section 24 of the Canadian Charter of Rights and Freedoms⁶² (“the Charter”), in a case where the reassessments were based upon information and documents obtained in an illegal search and seizure that had infringed the rights of the taxpayer under section 8 of the Charter. Bowman J did not hesitate to reach the conclusion that, on the facts before him, the assessments based on the illegally obtained evidence were to be vacated. He chose to quash the assessments on the basis that the alternative remedy of excluding the evidence and imposing the burden of sustaining the assessments on the tax authority would have led to the same result (the CRA had admitted that the assessments could not be sustained without the constitutionally tainted evidence), while unjustly imposing on the taxpayer the burden of having to go to court. Bowman J did, however, impose a caveat in respect of the application of his finding to other cases involving unconstitutionally obtained information:

I would not want my conclusion in this case to be taken as a wholesale sanctioning of the vacating of all assessments where some component of the Minister’s basis of assessment was unconstitutionally obtained information. Other cases may arise in which a simple exclusion of evidence is sufficient, others in which the evidence is of little or no significance in the making of the assessments or where its introduction would not bring the administration of justice into disrepute, or still others in which [the] *Suarez* solution will commend itself. In the exercise of the discretion vested in the court under section 24 of the Charter one must be vigilant in balancing, on the one hand, the rights of the subject that are protected under the Charter, and on the other, the importance

61 96 DTC 1486 (TCC); aff’d. 98 DTC 6424 (FCA).

62 Part I of the Constitution Act, 1982, being schedule B of the Canada Act 1982 (UK), 1982, c. 11.

of maintaining the integrity of the self-assessing system. As each case arises these and, no doubt, other factors will play a role and all factors must be assigned their relative weight. In the circumstances of this case I have concluded that the most appropriate exercise of my discretion is to vacate the assessments.⁶³

Bowman J's decision was confirmed by the Federal Court of Appeal.⁶⁴ *O'Neill Motors* has been widely discussed and commented on, and it has been relied upon—although unsuccessfully—in a series of decisions that have followed.⁶⁵

DISDAIN FOR TECHNICALITIES

Bowman J was not fond of lawyers who tried to bring up technical procedural points, since he perceived this as an unnecessary hindrance to achieving the ultimate goal of the trial before the court, namely, a just and timely decision. He did not like to be bound by legalistic technicalities and felt that, as a judge, he was free to use all the legal tools that would allow him to reach a fair and equitable judgment.

One example is his opinion on the precedential value of cases decided under the informal procedure. In *Mourtzis v. The Queen*, he made it clear that he did not feel that his ability to follow such cases was in any way restricted by section 18.28 of the Tax Court of Canada Act,⁶⁶ which provides that informal procedure cases “shall not be treated as a precedent for any other case”:

I regard that section as being of very limited application. I am prepared to accept it insofar as it means nothing more than this: If I do not choose to follow the decision of one of my brethren in an informal procedure, I am not bound by the strict rules of *stare decisis*. If that section is interpreted to mean that counsel is not entitled to refer to informal procedure cases or that I am not prepared to cite them or follow them if I choose to do so, then I regard that as a most unreasonable interpretation of the Act and, indeed, I would regard it as an unwarranted attempt by Parliament to interfere with my judicial independence and with the independence of the bar in this country to refer to such authorities if they see fit to refer to them. After all, the decisions of the House of Lords are not binding on me. Does that mean they should not be referred to? . . . I find that interpretation patently unacceptable. . . .

That view of section 18.28 may not be shared by all my brethren, but, certainly, it is mine.⁶⁷

63 *O'Neill Motors*, supra note 61 (TCC), at 1496.

64 *Ibid.* (FCA).

65 See, for example, *Donovan v. Canada*, 1998 CanLII 541 (TCC); 2000 CanLII 15592 (FCA); *Jurchison v. The Queen*, 1999 CanLII 313 (TCC); 2001 FCA 126; *Norwood v. The Queen*, 2000 CanLII 269 (TCC); *Wawara v. The Queen*, 2001 CanLII 489 (TCC); and *Wawara v. The Queen*, 2003 TCC 756; aff'd. 2005 FCA 34.

66 RSC 1985, c. T-2, as amended.

67 94 DTC 1362, at 1364 (TCC).

INTEREST DEDUCTIBILITY

Given the economic importance of interest deductibility, it should come as no surprise that the tax law in this area is frequently debated before the courts. Two of the cardinal principles developed over the last 50 years in Canadian jurisprudence are the following:

1. Interest is a capital expenditure, and given the scheme of the Act, particularly the restriction of deductions for capital outlays in paragraph 18(1)(b), specific provisions (such as paragraph 20(1)(c)) must provide for its deductibility.
2. In determining the deductibility of interest expense, the principle of “direct tracing” between the money borrowed and the income-earning purpose for which it is used must, subject to rare exceptions, be adhered to.

As a former counsel in both the private sector and government, Bowman J was obviously familiar with the issue of interest deductibility. He was well aware that the above principles, though providing useful guidelines, did not produce satisfactory and logical results in all cases, and he unhesitatingly challenged their authority. After all, why shouldn't section 9 apply to such a recurring and ordinary business expense?

The application of the first principle arose in *Gifford v. The Queen*.⁶⁸ The issue appeared simple. Mr. Gifford, a financial adviser, borrowed \$100,000 to pay one of his colleagues (who was leaving the business) for his endorsement of Gifford to the colleague's clients, along with an undertaking to cease providing investment advice to them. Since Gifford was an employee, the deductions sought of both the principal amount and the related interest on the borrowed funds had to come within the ambit of paragraph 8(1)(f).

What, then, were the business realities of this situation? By borrowing and then accessing his former colleague's client base, Gifford could, and did, realize and earn taxable income. There was nothing of a personal nature in the amounts spent. All were related to business. The CRA's decision to deny the deductions sought in their entirety, while fully taxing the resulting income, did not sit well with Bowman J.

Addressing the interest deductibility issue, he readily recognized that paragraph 20(1)(c) had no application, since he was dealing with the computation of employment income. Although the CRA asserted that this was the end of the matter, Bowman J disagreed. Whether interest was on capital or revenue account was not a settled issue for all purposes, notwithstanding the Supreme Court of Canada's pronouncement in the case of *Shell Canada Limited v. The Queen*.⁶⁹ The answer, said Bowman J, depended on “what the borrowed money is used for.”⁷⁰ For example, money borrowed

68 2001 CanLII 559 (TCC).

69 1999 CanLII 647 (SCC).

70 *Gifford*, supra note 68, at paragraph 22.

to pay salaries should be viewed and treated as a current expense. His review of the case law and articles of commentators led him to the following conclusion:

Although the statement that interest is a non-deductible expenditure on account of capital is frequently made, it is seldom accompanied by any analysis. Commentators usually cite the cases as authority for this proposition; the cases cite other cases or consider the proposition to be self-evident.⁷¹

This realistic, albeit judicially controversial, approach led him to conclude that neither paragraph 8(1)(j) nor paragraph 20(1)(c) provided for an extensive or complete code for the deduction of interest. He thus allowed the appeal on the basis that the interest expense at issue was on current account.

Although Bowman J's decision was ultimately overturned by the Supreme Court of Canada,⁷² his reasoning was well taken. The court said that the Act was not a complete code on interest deductibility. The problem rather was the nature of the borrowing. In *Gifford*, it was an amount "on account of capital"; therefore, so were the related interest payments.

The tracing principle is also, for many commentators and judges, well entrenched in our tax legislation⁷³ and, by and large, brings about satisfactory results. Not in every instance, however.

In *Mark Resources Inc. v. The Queen*,⁷⁴ a Canadian corporate taxpayer was faced with the situation that its US subsidiary (a "foreign affiliate" for the purposes of the Act) had substantial losses that were about to expire under the loss carryforward rules of the US Internal Revenue Code. Something had to be done. A plan was devised and the following steps taken:

- Amounts were borrowed from the bank by the taxpayer.
- The funds so borrowed were used to inject further capital into the US subsidiary.
- The subsidiary then used the funds to acquire a term deposit that allowed it to earn income against which the losses could be applied.

For the plan to be "tax-efficient," the interest on the amount borrowed had to be deductible for Canadian purposes and the dividend received from the subsidiary as a result of its earning income on the term deposit had to be deductible under section 90 of the Act.

71 Ibid., at paragraph 30.

72 2004 CanLII 15 (SCC).

73 *Bronfman Trust v. The Queen*, 1987 CanLII 76 (SCC).

74 1993 DTC 1004 (TCC). An appeal to the Federal Court of Appeal was filed and subsequently discontinued.

This case squarely raised the issue of what the “direct” use of the borrowed funds was. Obvious, said the taxpayer: they were used to inject capital (an eligible use for interest deduction) into the subsidiary so that it could earn interest income, which could then be distributed, via deductible dividends, to the taxpayer.

Applying the direct tracing approach in these circumstances produced what Bowman J considered unwarranted results. Looking at the matter in a broader fashion and not limiting the analysis to “one event” (the injection of capital into the subsidiary), but rather examining the series of transactions in their entirety, he readily concluded that

[t]he true purpose for which the borrowed money was used was to implement a plan to absorb into the Canadian parent’s income the losses of a foreign subsidiary. That result is not contemplated by the Canadian income tax system and it is not consistent with the scheme of the Act which contemplates the separation for fiscal purposes of the profits and losses of separate corporate entities. . . .

Accumulated business losses of domestic subsidiaries may be absorbed by Canadian parent companies by winding the subsidiary up into the parent or amalgamating it with a related company with a profitable business. Section[s] 87, 88 and 111 contain detailed rules regulating the extent to which this can be done. No such procedures are available in the case of foreign affiliates.⁷⁵

Thus, the plan failed.

GAAR

It appears that Bowman J was (and perhaps remains) not particularly enamoured of section 245 (the general anti-avoidance rule, or GAAR). It could be argued, with some justification, that the introduction of this type of legislative measure constituted a recognition that legislators simply cannot meet the challenge of drafting tax provisions to deal with all situations, so that recourse to a general anti-avoidance rule is necessary. To some degree, the very existence of GAAR may demonstrate a lack of imagination in attacking perceived or real abusive tax plans.⁷⁶

Bowman J’s initial approach to GAAR was unpredictable. That this should be so is largely attributable to the substantial difficulties not only of interpreting the provisions themselves but also of reconciling the views of both the Federal Court of Appeal and the Supreme Court of Canada.

In his first GAAR encounter, Bowman J preferred to rest his decision on his interpretation of the specific provisions that the CRA asserted were abused. The case was

75 Ibid., at 1016.

76 GAAR may, of course, be contrasted with Revenu Québec’s much more robust and much more far-reaching legislation, which was only recently introduced. See Bill 96, An Act To Amend the Taxation Act, the Act Respecting the Québec Sales Tax and Other Legislative Provisions, 1st Sess., 39th Leg., Quebec, 2010. (Adoption in principle, May 26, 2010.)

RMM Canadian Enterprises Inc. et al. v. The Queen,⁷⁷ and it involved a classic dividend strip in the context of cross-border transactions. Central to the dispute was whether or not two parties, RMM Canadian Enterprises Inc. (“RMM”) and Equilease Corporation (“EC”), were dealing at arm’s length. If they were not, then the specific provisions found in sections 84 and 212.1 would catch the plan, making the application of GAAR unnecessary.⁷⁸ Bowman J approached the matter thus:

What, then, is the situation here? We have a corporation that uses another corporation to participate in what is essentially a plan to achieve a particular fiscal result. Does the very act of participation make the relationship non-arm’s length? Admittedly there was clearly arm’s length bargaining about the return that RMM would realize on the transaction. During those negotiations there was no element of control between EC and RMM, and RMM was separately advised. At that stage, EC and RMM were at arm’s length. However, once the deal was settled, and as it evolved through the sale, the payment of the funds, the premature payment of the guaranteed amount, the endorsement of the refund cheques by RMM to EC and the virtual disappearance of RMM from the scene once it had served its purpose, it became clear RMM had no independent role. If one adopts the “common mind” theory of non-arm’s-length relationships it is perfectly clear that only one mind was involved, that which was the controlling mind of EC. The same result is achieved if one applies the “acting in concert” theory. RMM and EC were in my view not at arm’s length in carrying out the transaction including the sale. Accordingly, section 212.1 applies in any event. It must be borne in mind that in Canada the focus is on the relationship between persons. The concept seems to be somewhat different in the United States, where the focus is on whether the transaction is at arm’s length, that is to say whether the transaction is one that arm’s length persons would enter into.⁷⁹

Then came *Geransky v. The Queen*,⁸⁰ a case in which real commercial transactions were carried out in the most tax-efficient manner. Two brothers held shares in a holding company (“GH”), which owned all the shares of an operating company (“GBC”) that carried on a concrete construction business. The brothers had agreed to sell that business to Lafarge, an unrelated cement manufacturer.

Understandably, the brothers preferred a sale of shares, which would allow them to access the capital gains exemption. The following steps were taken:

77 1997 DTC 302 (TCC).

78 Bowman J did indicate (*ibid.*, at 313) that, if he was wrong in his primary conclusions, then GAAR would apply: “[T]he *Income Tax Act*, read as a whole, envisages that a distribution of corporate surplus to shareholders is to be taxed as a payment of dividends. A form of a transaction that is otherwise devoid of any commercial objective, and that has as its real purpose the extraction of corporate surplus and the avoidance of the ordinary consequences of such a distribution, is an abuse of the Act as a whole.”

79 *Ibid.*, at 311.

80 2001 CanLII 480 (TCC).

- Each brother sold 40 class A shares to a numbered company (“Newco”).
- GBC paid a dividend in kind (the cement plant and related property) to GH.
- GH redeemed the 80 class A shares held by Newco, paid in kind (the cement plant and related property).
- The brothers sold the shares of Newco to Lafarge.

Bowman J considered the transactions in their entirety and reviewed the tax consequences resulting therefrom (in particular, recapture at GBC’s level, capital gain at GH’s level by the application of section 55, and taxable capital gain for the brothers, which could be offset by the capital gains exemption).

In answer to the CRA’s position that section 245 applied to recharacterize the gain realized by the brothers as dividends, Bowman J’s response was swift and direct: “That is not what GAAR is all about.”⁸¹ He was obviously offended by the suggestion that commercial transactions carried out in conformity with a series of specific provisions of the Act, many of which contain anti-avoidance measures, could attract the application of GAAR.

Much closer to a potential application of section 245 was the situation in *Evans v. The Queen*,⁸² a dividend stripping case. *Evans* was heard soon after the Supreme Court of Canada’s decision in *Canada Trustco Mortgage Company v. The Queen*⁸³ and *Kaulius*,⁸⁴ in which the court emphasized that the interpretation of the Act had to achieve consistency, predictability, and fairness. Bowman J followed the court’s direction:

The only basis upon which I could uphold the Minister’s application of section 245 would be to find that there is some overarching principle of Canadian tax law that requires that corporate distributions to shareholders must be taxed as dividends, and where they are not the Minister is permitted to ignore half a dozen specific sections of the Act. This is precisely what the Supreme Court of Canada has said we cannot do.⁸⁵

Lipson v. The Queen, however, proved to be the limit. Given the facts before him, Bowman J concluded that

if section 245 is to serve any purpose it must be applied to the very sort of contrived transaction such as this one at which it is obviously aimed.⁸⁶

In *Lipson*, the taxpayer’s wife had borrowed from a bank ostensibly to acquire shares of a family corporation from her husband. An equal amount was then borrowed by them both on the security of a mortgage on a new house. These funds were used to pay off the original bank loan. The upshot was that by not making a subsection 73(1)

81 *Ibid.*, at paragraph 43.

82 2005 TCC 684.

83 2005 SCC 54.

84 *Mathew v. Canada* (sub nom. *Kaulius v. The Queen*), 2005 SCC 55.

85 *Evans*, supra note 82, at paragraph 30.

86 2006 TCC 148, at paragraph 33.

election on the sale of the shares, the parties hoped that the attribution rules would apply so as to allocate to the taxpayer the losses resulting from the difference between the dividends received by his wife on the shares and the interest payments made to the bank.

Bowman J's approach in *Lipson* was entirely consistent with the view he expressed in *Mark Resources*. When the overall purpose of the original borrowing was examined, the inescapable conclusion was that the money borrowed had been used to buy a residence for personal use, an ineligible purpose for interest deductibility.

ONUS OF PROOF

As previously mentioned, Bowman J did not particularly favour procedural arguments. That certainly was true when it came to debates on onus of proof. As far as he was concerned, "a great deal of time is wasted in income tax appeals on questions of onus and assumptions."⁸⁷

Subsection 152(8) deems an assessment to be valid and binding, subject to objection and appeal rights. This has justified the interpretation that initially the taxpayer has the onus of reversing the assumptions made by the CRA in assessing or of establishing that the assumptions made do not justify the assessments issued.

In practical terms, and subject to some exceptions, this means that the taxpayer bears the responsibility to initially present, through oral and/or documentary evidence, facts that rebut the assumption(s). Technical arguments can of course arise in terms of what, when, and how assumptions were made. Bowman J strongly favoured a direct approach to the presentation—putting the cards on the table—rather than entertaining arguments as to who should prove what.

Not only did he advocate a fair result; he also ensured that procedural fairness always prevailed. In that context, he did not hesitate, from time to time, to admonish the CRA:

The premise is that the respondent has, in the Reply to the Notice of Appeal fully and with complete honesty pleaded the facts on which he relies in making the assessment. Another sub-rule that I have seen emerging is that the "reverse onus" relating to the taxpayer's burden to demolish the assumptions does not, as a matter of ordinary fairness, extend to requiring the taxpayer to disprove the assumptions of facts that are peculiarly or exclusively within the Minister's knowledge.⁸⁸

There are numerous cases in which Bowman J did not hesitate to intervene so as to ensure that the appropriate procedural result was achieved. Two examples will serve to illustrate.

In *Honeywell Limited v. The Queen*,⁸⁹ the CRA had obtained a restricted waiver from the taxpayer that allowed for an assessment based on GAAR outside the normal

87 *RMM Canadian*, supra note 77, at 306.

88 *Anchor Pointe Energy Ltd. v. The Queen*, 2006 TCC 424, at paragraph 21.

89 2006 TCC 325.

reassessment period. At issue was a so-called second-tier financing transaction where the CRA was seeking to tax in Canada interest income received by the taxpayer's foreign affiliate. In filing its reply to notice of appeal, the CRA attempted to justify the assessment on a different ground. The interest income of the foreign affiliate constituted, it was alleged, foreign accrual property income, taxable in the taxpayer's hands. Bowman J would have none of it:

To [allow the CRA's basis for assessment] would violate rules of simple fairness. The taxpayer was induced to sign a waiver on the basis that the Minister would apply only GAAR and paragraph 12(1)(c). The Minister, having gotten in under the wire on one basis now says that the field is wide open. Perhaps if there were no waiver the Minister has the sort of *carte blanche* that *Loewen* suggests but once there is a waiver some effect must be given to the restrictions imposed by subsection 152(4.01). One cannot do an end run around them and in effect come in the back door when the front door is locked.⁹⁰

In *Mensah v. The Queen*,⁹¹ Ms. Mensah carried on a delicatessen business. The CRA thought that she had understated her income. Disregarding all accounting records and applying the net worth method, the CRA assessed with gross negligence penalties. Central to Bowman J's approach to the case was his assessment of the taxpayer's credibility. He proceeded to review at length all the evidence, oral and documentary, that was submitted and rejected the method used by the CRA, even in light of some contradictions:

I cite the above as examples of possible minor discrepancies that have no appreciable effect on the business income. They simply illustrate that Ms. Mensah was running a typical small business. If these are the only inaccuracies the Minister can come up with he certainly should not be hitting her with a net worth [assessment].⁹²

CONCLUSION

Bowman J's ideas, like those of other great tax judges before him—the late Chief Justice Jaccett of the Federal Court of Canada, Lord Clyde of the Scottish Court of Sessions, and Justice Rowlatt of the UK High Court of Justice, to name just a few—transcend the period in which he wrote and will continue to evoke our admiration in the future.

More importantly, he is a remarkable human being. Even a quick journey through his judicial legacy reveals a judge of great competence, superb intellect, and substantial imagination. We are honoured and privileged to have been asked to write this article. When all is said and done, we salute Donald G.H. Bowman, QC, a truly independent and fair judge.

90 Ibid., at paragraph 21(b).

91 2008 TCC 378.

92 Ibid., at paragraph 36.