

In Honour of H. Heward Stikeman for His Outstanding Contribution to Canadian Taxation

INTRODUCTION BY GLENN D. FELTHAM*

H. Heward Stikeman died on June 12 of this year. It is my belief that no individual has had a more profound effect on the development of tax in Canada. It is my privilege to help disseminate one of his last speeches.

On July 24, 1998, at the Second Biennial Canadian Tax Education and Research Conference held at Wilfrid Laurier University, Heward Stikeman became the first recipient of the Outstanding Contribution to Canadian Taxation Award. In the selection process, we looked for an individual who had a fundamental influence on the development of tax law, tax policy, or tax practice—whether that individual made these contributions in government, tax practice, or academia. The decision was obvious. In one individual, Heward Stikeman, we found a recipient who had a profound effect on each of the areas of law, policy, and practice. It is not my purpose here to describe Heward's accomplishments—these would fill the journal. Rather, I want to provide a brief introduction to his acceptance speech.

Heward asked for advice on what the conference attendees, primarily tax academics, would most like to hear addressed in his acceptance speech. In response, I told Heward what I would like to hear. First, I was intrigued with why he had entered tax, and with his influences in government, practice, and academia. Second, I asked him to provide his thoughts on the development of the Canadian tax system and the successes and failures of Canadian tax policy over time. Heward was in a unique position to discuss these matters because all of Canada's significant tax developments occurred during his lifetime (although he was only three years old when the Income War Tax Act was introduced), and he was actively involved in several of these developments. Finally, as the audience would primarily be tax academics, I asked if he would discuss tax education.

Heward's acceptance speech was video-recorded. He also sent me a copy of his speaker's notes. Interestingly, his notes vary greatly from what he actually said. Both his speech and his notes were exceptional. However, it is my belief that the speech itself provides the best insight into the man.

* Of the College of Commerce, University of Saskatchewan; co-chair and organizer of the Second Biennial Canadian Tax Education and Research Conference.

Participants at the conference hung on every word. The speech was delivered with great levity—laughter echoed throughout the room.

Several times in his speech, Heward refers to individuals in the audience. In addition to academic tax accountants and lawyers, representatives from the Department of Finance (at the director and assistant deputy minister levels), Revenue Canada (including the minister), and the Canadian Tax Foundation attended the conference.

Heward wanted the messages in his speech, messages that were important to him, to be disseminated. I can think of no better place to disseminate these messages to academics, practitioners, and government than in Canada's tax journal, the *Canadian Tax Journal*. I am sure that Heward would have agreed.

ACCEPTANCE SPEECH BY H. HEWARD STIKEMAN**

That was a very eloquent introduction [not reproduced here], grossly exaggerated, but very moving. I have never been so honoured before, and I may not be so honoured again. I thank you from the bottom of my heart for an undeserved award and a very warm welcome.

It may surprise you to learn that I was born before there was an income tax law in Canada. We are both doing pretty well, but I think I'm doing better!

Even more amazing, until the last war there was no formal teaching of tax at all in Canadian universities, and there were no textbooks. One day Dick DeBoo came to see me and said, "Does anybody around here want to write a tax service?" Now I had already done that on government time, and at government suggestion. I had taken my manuscript around to various publishers—Carswell, Butterworths, even the Canadian Institute of Chartered Accountants—and they said, "Tax? Nobody is interested in that—go away!" But I had a daughter on the way, and I needed the money. So when DeBoo came in, I put my manuscript on the table and asked, "What's it worth?" He said, "\$250." I wasn't born yesterday, so I went to see my friend Gordon Henderson, who was a copyright lawyer. He said, "It's worth \$2.50 a page." Eventually, the tax service ended up in the Carswell stable (without a contract). However, all that is a digression.

How I Got into Tax

As I look back at my career, it seems extraordinary that I ended up in tax. I started out to be an architect. After two weeks, my professor of architecture looked at me and said, "Stikeman, give up." He said, "You have no mathematical competence. Nothing that you build will stand up." I took refuge in those words.

** Founding partner of Stikeman Elliott, Montreal.

I happened to be in England on my 21st birthday, and I was invited to a dinner meeting at which there was a very celebrated English jurist, Rufus Isaacs, Lord Reading. Being the birthday boy, I sat next to him. He, being chief justice, lord chancellor, and viceroy of India, kept making remarks during the dinner. When he mentioned something that had happened when he was in India, I said, "Oh, when were you in India, sir?" He replied, "I was viceroy at that time," then said, "You don't know who I am, do you?" I admitted I didn't, and he told me to meet him at the tennis court the next morning. I did, and he told me the story of his life, which was quite remarkable. He was the greatest revenue lawyer the English Bar ever produced. In our discussion, he said, "There will be a war, we all know there will be a war in a few years, and after the war Canada will emerge as a great industrial nation. So go back, take law, go to the Revenue department, come out, and be a tax consultant."

I went home and followed his advice. But when I graduated from law school, there were no jobs. I sold life insurance for a year while I pestered my present partner's father, Fraser Elliott, for a job in the Department of National Revenue. At that time, he was the commissioner of income tax. One day, in self-defence, he said, "Would you like to be the conservative meat in a liberal sandwich order in council that I'm preparing? It's easier to get it through the House if we have one conservative." I said, "I will be any meat in anybody's sandwich." So he hired me. He gave me the Income Tax Act and said, "Go away and read it and come back and tell me about it." In a week I was back. I had written a Bar exam not very long before. Anybody who had written a Bar exam in Quebec could memorize a telephone book in about three days, and I had the Act memorized. When I came back, he asked me, "What does it mean?" I said, "I haven't the faintest idea, but I can tell you what it says," and I began to recite it. He said, "I think you'll do. You have a blotting paper memory—do you have a mind to go with it?" I worked with Fraser at Revenue during the war years, we argued the cases together, and he saved me from a lot of mistakes.

Tax Practice

When the war was over, I went back to practice. That's a euphemism. I had never practised. I didn't even know how to send a bill. The first bill I sent out was sent back to me with an extra zero on it. I thought, "Boy, this is pretty easy—I'll make it higher the next time." I didn't know how to form a company, but I knew what Revenue thought and my friends believed that I was honest.

One thing I learned in tax practice is that you can sometimes get into trouble, though otherwise it's rather fun. I'll tell you a story to illustrate what I mean. One day a fellow called me from Vancouver and said, "I want you to come out here because Revenue is on my tail." I asked, "What kind of Revenue?" and he said, "The Special Investigations Department." I asked, "How close are they?" He said, "Too close." I said, "I'll come out and see you," and we went out there and I looked at his

case. From what he told me, he was as clean as a hound's tooth, but it turned out that the hound's tooth hadn't been to the dentist for a while. I told him, "Remember, if I ever find that you lied to me or, in any material particular, the facts are not as you represented, I walk away from this. And if I walk away from this, Revenue Canada knows that there is something wrong." Six months later, after I had made representations to Revenue Canada on his facts, he called me up from Vancouver and said, "Do you remember that conversation we had?" I said, "Absolutely." He said, "Some of it is a little bit vague." I said, "You mean you lied to me?" "Well," he said, "I was told that information." Then I said, "I quit." He said, "You can't quit." I said, "Why not?" He said, "Well, I'm on the ledge of the Georgia Hotel in Vancouver and I'm going to jump if you quit." This was about two in the morning, so I said, "Jump." He didn't, of course. Instead, he went to somebody who was smarter than I was, Revenue Canada got off his trail, and life went on.

Teaching Tax

I have taught tax for a long time. We all teach tax as a science. We try to get students up to speed by getting them interested in funny situations, but we are still teaching the rule of law, which we expect the courts to administer. In real life, it seems to me, we are coming more and more to the point where we should be teaching "the rule of Revenue Canada." The subjective view of our law means the view as disseminated by Revenue Canada—through its rulings, through its notices of what it intends to submit to Parliament for passage as law, or through its general construction of the Act. This view is the one we usually follow as producing the right outcome. The fight against such an avalanche of subjective interpretation is a costly one for a client. The risk of losing is considerable because, as you know, the Act has become a labyrinthine torture chamber which even the judges have trouble finding their way out of, or even into. In this world, in the Federal Court and the Supreme Court of Canada, *stare decisis* is getting harder and harder to apply.

We are also faced with what I call the perpetration of an illegal, non-legal, or extra-legal philosophy. By this, I mean the department's habit of, quite innocently, legislating by prior announcement or by press release. Every now and again when a client is in the middle of a deal, you have to give an opinion that if this and this happens, the tax law will apply in such and such a manner. Then you pick up a paper, or you get in the mail an announcement that Revenue Canada intends to review this area with the possibility of making changes. Everything grinds to a halt. You cannot give an opinion on the law today, because it may be different by the time the deal is done. You cannot give an opinion on the future law, because you have to guess what it might turn out to be. This "legislation by prior notice" is one feature of the present legislative process that really could be rectified.

I don't think the people at Revenue Canada realize the trouble they cause (although I've told them lots of times). They believe they are acting

in the interest of simplicity, of clearness, of transparency. They say, "But we want to tell people what is on our mind. We want to tell them where we are going." I say, "You don't tell them where you are going, but where you might go, and in the end you might not go there." In this situation, professional decision making is very difficult. One must always put a caveat on one's opinion. What good is an opinion? One can always get a prior ruling, but the prior ruling again goes back to the subjective view of a particular group within the government that decides what the philosophy up until that transaction should be.

As you can see, I am not as concerned with policy as I am with process. Any government is entitled to produce any policy it likes, however silly it may appear to me, and however fine it may appear to the government. However, the manner in which that policy is delivered to the public, the poor taxpayer, must be clearer; it must be unequivocal, it must be understandable, and it must be efficient. Sadly, the dichotomy that sometimes exists between Finance and National Revenue does not produce an exact fit. Sometimes I'm sure the ideas that Finance generates as policy, when they are written down, come out differently from what the policy makers intended in the first place. In addition, the policy itself may be sufficiently complicated to require several pages, or several dozen pages, of law to make it work. You fight your way through it, and what do you end up with? "Maybe" or "maybe not," and eventual resolution of the issue by a subjective umpire.

Perhaps I sound very bitter about this. I'm not. I'm just amazed. The source of all this trouble is the increasing tendency of government to legislate in detail so as to try to cover every eventuality. If a hole appears in the Act, which is wriggled through by a taxpayer and confirmed by a judgment in his favour in a court, the government moves quickly to close it. In this way, our written tax law has come to consist of layer upon layer upon layer of closed avenues, explanations, and changes that by themselves make one particular area simpler, but in the end make the whole mess more complicated and more burdensome.

Before 1970, we legislated by principle. We began by trying to lay out a plan of where we were going, as a coherent whole, and then we tried to design the different pieces of that whole so that they fit together. With the introduction of the 1970 Act, which was a good try, the law quite literally got stood on its head. Concepts that we had promoted for 40 years as philosophically defensible positions of fiscal theory became mechanical adjuncts to an inhuman dimension that has its basis in figures, formulas, and doctrine. Instead of legislation by principle, we are getting legislation in detail.

My interest is in seeing tax policy delivered in a better way. Something must be done about how we translate policy into law. We have to teach our students to try to divine, not how a solution to a problem would be applied by Revenue Canada, but how a solution can be sorted out by reference to established judicial principles. It is very difficult.

The Heward Stikeman Fiscal Institute

I have tried to solve the problem in part by starting the Heward Stikeman Fiscal Institute. My intention is to provide money to students, law teachers, and others who would spend their time applying themselves to the simplification of the mechanics of tax, the plumbing. I hope that this bursary may, over time, produce future legislators who have gone through the discipline of trying to arrive at practical answers while they were at college. I hope that they will bring this experience to Parliament.

More recently, I have been excited by the possibility that alternative dispute resolution (ADR) might have a place in tax law. I believe that ADR has a place in the fairness of taxation, in simplifying relationships, in clarifying the issues, previously resolved by an assessor, before an independent third party.

These are the kinds of innovations in taxation that we are interested in at the Institute. They are the kinds of concerns that, after 60 years at the Bar, I have come to conclude are important to this country of ours.

The decline in our dollar is, to some extent, a reflection not only of high tax rates, but also of the impossibility of certainty in the tax system. Foreign investors don't like it. We are trapped in it. It is a stultifying influence, and it is nobody's fault. It is a fault by default. We all stand around, look at it, and say, "How terrible." It is time we got on to it. It is affecting the economic situation and the loss in Canada of brainpower. We have reached the point where we have to do something about it. It is one of our key questions. I hope you agree with me.

Concluding Remarks

Over the years, I have tried to enunciate certain principles that form the foundation of what we teach. We should impress upon our students the fundamentals of a good, sound, effective income tax system. First, I think that no tax structure should prevent business from fulfilling its proper role in the economy, which is to develop and build capital, and to keep Canada on the forefront of the economic stage. Second, every taxpayer should know with some certainty, the more the better, the measure of his or her tax burden—the weight of the tax cost of everything he does in the economic scene. Third, the principle of consistency must be adhered to—it is the prime virtue. Related to this, the law may not change without adequate warning, with regard for the psychological, as well as the economic and legal, effects of such a change upon the Canadian entrepreneur and investor. International research in the tax compliance area has emphasized that for a good tax system to be effective, it must promote an atmosphere that encourages taxpayers to comply with their obligations, engenders perceptions of fairness, reflects consistency, and enhances efficiency in its operations across all tax bases. Without adherence to these rules, compliance will suffer as taxpayers lose faith in the system.

All of us, as tax teachers, as tax administrators, as tax practitioners, can instill the desirability and the importance of these rules. If our conviction

in them can be passed on to our students, we may end up with a better fiscal world and a better Canada. It's up to us; we are the only people who know the problems. It is hard to understand these problems when you are standing outside reading newspapers. It is easy to understand them when a client is asking you a question and you can't answer. All you can tell him is "Well, maybe, maybe." He says, "Hell, you're the lawyer, look it up." I say, "It doesn't do any good to look it up because somebody over there, this god, is going to tell us what the answer is, and we will take it."

In this talk to tax teachers, of which I am one, I am to some extent preaching to the converted. What I have tried to do is to reduce to rules what we might impart to our many students, so that they may appreciate our system. If we teach them well, when they vote, or get voted into office, they may have a feeling for what has gone wrong. It's a practical matter, not a policy matter. What we need to teach, and what they need to understand, is pure plumbing.

If you agree with me to some extent, and carry this message—which is not my message alone—out to the student body, this day will have been worthwhile. Thank you all very much.