
Canadian Tax Journal: Fifty Years of Influence

Neil Brooks*

THE MANY JOYS OF READING THE JOURNAL

In preparing my reviews of each decade of the journal's 50 years of publication, I cannot say that I read all of the articles published in the journal, but I skimmed them all and read a good number right through. In this sixth and final instalment, I will linger a while on the many pleasures of reading the journal, and then, since one of the purposes of the journal is to influence the public policy process, I will examine its influence, particularly with regard to judicial decision making. Finally, I will offer a few thoughts about future directions for the journal.

Reading through 50 years of the journal, one is reminded why so many of us find tax law and policy to be such an endlessly fascinating subject.¹ Taxes impinge on society in every conceivable way. Most people are aware of the impact of the tax system on the methods of financing small businesses, on the design of executive compensation packages, on the amount of research and development undertaken by corporations, on the structure of industry, and on the financial affairs of households, from the purchase of life insurance to the decision to accumulate savings for retirement. The journal has published numerous articles on each of these subjects. However, the influence of the tax system does not stop there. Over the past decade, the journal also carried articles that dealt with the impact of the tax system on child and spousal support, home ownership, health care, film and cultural policy, access to higher education, and the cost of child care. Almost every major social and economic policy issue has a tax angle that has been explored in journal articles.

As a further illustration of the pervasiveness of taxes, most of the major political debates in Canada in the past decade have centred on issues relating to taxes. The

* Editor, *Canadian Tax Journal*, and of Osgoode Hall Law School, York University, Toronto. The aggregate data relating to the citation of journal articles and comments referred to in this article were compiled by Thaddeus Hwong, a graduate student at Osgoode Hall Law School. His complete study, which breaks the data down into much greater detail than provided here, and a description of the methods he used in compiling the data, is on file at the Foundation library: Thaddeus Hwong, "The Canadian Tax Journal: The First Five Decades in Citations" (December 2002). I am grateful to Thaddeus for the enormous amount of work he did in compiling these data and for many helpful discussions about it.

enactment of the goods and services tax (GST) in 1990, the apparently uncontrollable growth of the deficit in the early 1990s, the size and importance of federal government transfers to the provinces, the alleged brain drain to the United States, the innovative capacity and productivity of the Canadian economy, and even questions such as whether Canadian cities will be able to continue to support professional hockey teams have sparked debates that have essentially been about taxes. Indeed, the annual public debate over the federal budget and related tax changes is about the closest Canadians get to a national conversation about our collective goals and values. Once again, the journal has carried articles that have advanced our understanding of all of these issues.

Most of the major currents in Canadian political history over the past 50 years were reflected in the articles published in the journal. The expansion of state welfare in the post-war “golden age” was heralded in the journal in the 1950s; in the early 1960s, the confident assumption that the Canadian government was becoming a master of its own house and that government social engineering could lead to both greater equality and prosperity was reflected in the report of the Carter commission and in articles published in the journal. As the decades progressed, national concerns over the importance of Canadian ownership, stagflation, the national energy program, free trade, the deficit, and Canada’s lagging rate of productivity growth were all mirrored in articles in the journal. One of the reasons tax law and policy is so riveting is that the whole field crackles with politics. No other public policy issue has been so consistently at the centre of ideological conflict over the proper role, size, and functions of the modern welfare state. Modern political parties really define themselves by their stance on tax issues.

Tax law not only raises profound questions of economics and politics but also serves as a public laboratory for the testing of moral judgments, including the central question that every society must face—namely, what is a morally acceptable distribution of the income and wealth collectively produced by members of a society? Tax laws are a particularly important barometer of shifts in prevailing ideologies. Tax systems have been called “a mirror of democracy.”² Joseph Schumpeter, a widely admired economic historian, observed that “nothing shows so clearly the character of a society and of a civilization as does the fiscal policy that its political sector adopts.”³ In attempting to account for the attraction of tax law, Louis Eisenstein, an American tax lawyer of uncommon brilliance and originality, observed, after a lifetime of practising, studying, and writing about tax law, “Any intelligent thinking on taxes eventually reaches the ultimate purpose of life on this planet as each of us conceives it.”⁴

On a less grand but equally interesting scale, the study of tax law and policy provides a superb vantage point from which to study many related legal, accounting, and business subjects, if not the whole fabric of the law and business relations. In the past decade alone, articles in the journal have dealt with such diverse topics as sale and leaseback transactions, weak-currency loans, commodity straddles, financial derivatives, and the sophisticated strategies of corporate mergers and acquisitions. In addition to the tax implications of such transactions, the articles surveyed the

details of their legal, accounting, business, and economic aspects. Every new fashion in the capitalization of corporations, corporate reorganizations, and most other areas of transactional law must pass before tax lawyers and accountants and will inevitably be reviewed in the journal.

Aside from its importance as an instrument of social and economic policy, or its reflection of the moral character of the country, the study of tax is intellectually fascinating. At its most elemental level, an income tax takes one simple idea—that everyone should pay tax on their income—and then applies it to the full panoramic variety of economic and property relations and transactions that characterize our modern, complex society. To determine each individual's income, the infinite variety of human activities must be classified under this single rubric. While that exercise would be challenging enough in its pure form, the task is made infinitely more complicated because, along the way to defining income for tax purposes, numerous concessions have been made to perceived administrative practicality, such as the fact that generally people's income will be taxed only when it is realized. Attempting to determine the rules that should govern the definition of income in such a second-best world is not an intellectual task for the faint of heart. Journal articles dealing with such subjects as the taxation of debt and discharge of indebtedness, imputed income, personal injury damage awards, advance payments, future costs, and new financial instruments have admirably taken up the challenge.

Tax law is also intellectually exciting because it constitutes the rules of a fast game played for high stakes by dedicated people. Bright tax lawyers, accountants, and economists in the Department of Finance attempt to implement government policy by drafting provisions of the income tax law. As soon as the provisions are announced, a small army of imaginative tax lawyers and accountants begin to apply their minds to how they might advise their clients to find ways around the laws. The courts are called in to resolve disputes. Finance officials respond with proposed amendments to the legislation, in an often vain attempt to preserve the integrity of the government's initial policy intentions. Affected taxpayers lobby for relief. The financial press takes sides. Politicians fulminate. Academics pontificate. And the journal records the fray. Throughout the 1980s and early 1990s, the journal carried a dynamic series of articles on the tax rules governing taxable preferred shares and tax shelters. More recently, articles in the journal have tracked this never-ending dialectic of policy development and response as it relates to the taxation of new financial instruments.

Finally, tax law and policy is engrossing because it can be so funny. Taxpayers and their advisers will do and say strange things to avoid paying taxes. Government officials and politicians will likewise engage in the most contorted rhetoric and enact the most deformed legislation to justify and collect needed revenues or to respond to the pressures of politically favoured interest groups. I don't suppose that judges intend their tax judgments to be read for comic relief, but there is little doubt that casual observers can read them for that purpose. In the first couple of decades of the journal, Gwyneth McGregor regularly made light of tax cases and the tax scene more generally. Anyone who doesn't think that tax is a genuinely funny subject

should read her articles and comments, some of which I mentioned and quoted in my reviews of the journal's first two decades.

Tax law and policy has been so pervasive in the social and political life of Canada that when I began perusing the early issues of the journal, it occurred to me that, when read with a sensitivity to context, the scholarship they contained could be read as a cultural narrative of Canada. I thought it might be possible to write a social history of tax scholarship and the story it told about our nation. I even went so far as to check what else was going on in Canada in the year the journal began publication. By all accounts, 1953 was a good year. Canada's National Library was established in Ottawa. The Stratford Shakespearean Festival opened in a huge tent with a production of *Richard III*, starring Alec Guinness. The Winnipeg Ballet became the first company in the Commonwealth granted a royal charter, becoming the Royal Winnipeg Ballet. Two books shared the Governor General's literary award for non-fiction: J.M.S. Careless, *Canada: A Story of Challenge* and N.J. Berril, *Sex and the Nature of Things*. CBC broadcast the coronation of Queen Elizabeth. The Montreal Canadiens beat the Boston Bruins four games to one to win the Stanley Cup. The annual inflation rate, as measured by the percentage change in the consumer price index, was negative. The Korean War ended. And the *Canadian Tax Journal* commenced publication. I am sure there is some connection among all these events, as well as between Canadian popular culture and articles published in the journal over the past 50 years. However, the connection was sufficiently obscure to me that I decided to leave the task of spelling it out to one of our readers with a more profound understanding of social history.

FIFTY YEARS OF JOURNAL CONTRIBUTORS

As a gesture of tribute to the journal's most consistent contributors over the years, we tabulated the number of articles written by the most frequent contributors and the span of time over which they wrote or have written, from 1953 to the end of 2001. To keep the exercise straightforward, we counted articles both authored and co-authored by individuals, and we counted all of the items in the journal that were indexed as articles. To an extent, not all of the items are comparable. In the early years of the journal, almost every comment was indexed as an article, and most of these early articles averaged only 5 or 6 pages in length. In recent years, only lead articles have been indexed as articles, and some of them have been close to 100 pages in length. Nevertheless, our approach seemed the fairest of the alternatives. The results are shown in table 1.

A.R. Ilersic, who for almost 30 years contributed a feature to the journal on UK tax developments, was by far the most frequent contributor with 103 articles. Even though all of these were relatively short pieces, this is still a remarkable achievement. His articles covered the full range of UK tax and budgetary developments. They were always insightful and gracefully written. He began writing for the journal in the year it was founded. His last article appeared in 1982. Over this 30-year span, he contributed an article to the journal on average three times a year.

TABLE 1 Most Frequent Contributors to the Canadian Tax Journal, 1953-2001

Author	Articles	Span (years)	First published year	Last published year	Average interval (years)
Illersic, A.R.	103	29	1953	1982	0.3
McGregor, G.	42	21	1953	1974	0.5
Due, J.F.	28	43	1954	1997	1.5
Arnold, B.J.	26	28	1973	2001	1.1
Perry, D.B.	24	32	1969	2001	1.3
Perry, J.H.	21	8	1953	1961	0.4
McGurran, H.D.	19	4	1956	1960	0.2
Finnis, F.H.	16	21	1959	1980	1.3
Goodman, W.D.	15	41	1954	1995	2.7
Bird, R.M.	14	34	1963	1997	2.4
Wilson, T.A.	14	28	1972	2000	2.0
Carswell, R.E.	14	5	1953	1958	0.4
Ruggeri, G.C.	12	11	1990	2001	0.9
Robertson, R.	11	8	1960	1968	0.7
Moore, A.M.	11	7	1953	1960	0.6
Short, R.A.	11	4	1963	1967	0.4
Kesselman, J.R.	9	24	1977	2001	2.7
Gillespie, W.I.	9	23	1971	1994	2.6
Thom, S.D.	9	12	1954	1966	1.3
Ward, D.A.	8	26	1974	2000	3.3
Durnford, J.W.	8	18	1979	1997	2.3
Mintz, J.M.	8	18	1982	2000	2.3
Macnaughton, A.	8	17	1983	2000	2.1
Timbrell, D.Y.	8	14	1965	1979	1.8
Edgar, T.	8	11	1990	2001	1.4
Smith, R.S.	7	24	1971	1995	3.4
Dean, J.M.	7	19	1980	1999	2.7
Dungan, D.P.	7	19	1981	2000	2.7
Vaillancourt, F.	7	19	1980	1999	2.7
Bossons, J.	7	12	1971	1983	1.7
Beach, D.I.	7	11	1964	1975	1.6
Jump, G.V.	7	9	1972	1981	1.3
Heller, W.W.	7	4	1954	1958	0.6
Brown, R.D.	6	29	1970	1999	4.8
Poddar, S.N.	6	26	1974	2000	4.3
Kellough, H.J.	6	22	1973	1995	3.7
Carter, G.E.	6	21	1973	1994	3.5
Daly, M.J.	6	20	1980	2000	3.3
Scace, A.R.A.	6	19	1965	1984	3.2
Robinson, A.J.	6	18	1964	1982	3.0
Burns, R.M.	6	13	1959	1972	2.2
Wise, R.M.	6	8	1976	1984	1.3
Bryden, M.H.	6	5	1961	1966	0.8
Li, J.	6	4	1995	1999	0.7
Treff, K.	6	3	1993	1996	0.5

Source: Thaddeus Hwong, "Canadian Tax Journal: The First Five Decades in Citations" (December 2000), 4 (on file at the Canadian Tax Foundation library).

Gwyneth McGregor was the runner-up with 42 articles. Again, most of these articles were relatively short. Nevertheless, they ranged over the entire field of taxation, always argued for a particular position, and constituted a mere fraction of her output—we did not tabulate the hundreds of case comments and countless editorial notes that she authored. She contributed to the journal over a span of 21 years.

John Due, a leading sales tax economist at the University of Illinois, was the next most frequent contributor with 28 articles. Again, many of these were relatively short entries and most were about sales tax issues. He wrote for the journal over 43 years, the longest span of time of all contributors. His first article appeared in 1954, his last in 1997.

Brian Arnold has written 26 articles for the journal over a 28-year span—almost one a year. His articles range over most aspects of tax law, but are concentrated in international tax, tax and accounting, and tax avoidance and statutory interpretation. All of his articles reflect not only a technical mastery of income tax law and practice but also a sophisticated understanding of the principles and tools of tax policy analysis. By any measure, he has been the most substantial contributor to the journal. Over the past three decades, he has been either the top or the second most frequent contributor.

David Perry has contributed 24 articles to the journal over a span of 32 years. Many of these articles have been provincial budget roundups, which are classified as articles in the journal's index. Of course, in addition to these articles, from 1969 on, David has written the Fiscal Figures feature, which has made such an important contribution to the Canadian public finance literature. If we had counted journal features in our survey, he and Gwyneth McGregor would have been the two most frequent contributors.

J. Harvey Perry, H.D. McGurran, and F.H. Finnis, staff members of the Foundation who wrote short comments for the journal throughout their tenure, mainly in the 1950s and 1960s, were the next most frequent contributors.

Wolfe Goodman has been the most prolific tax practitioner of journal contributors. He has written 15 articles for the journal over a span of 41 years—from 1954 to 1995—only two years short of John Due's record. Of course, since he has recently submitted correspondence to the journal, he has in fact been writing for the journal for almost the full 50 years. His is a remarkable record of dedication to tax writing and the dissemination of tax knowledge.

The two academic economists who made the most frequent contributions to the journal are Richard Bird and Tom Wilson. Both contributed 14 articles—Richard over a 34-year span and Tom over a 28-year span.

As an indication of the multidisciplinary nature of the journal, among the top 25 most frequent contributors to the journal, 8 have been academic economists (Ilersic, Due, Bird, Wilson, Ruggeri, Kesselman, Gillespie, and Mintz); 5 have been practising tax lawyers (Goodman, Robertson, Thom, Ward, and Timbrell); 3 have been legal academics (Arnold, Durnford, and Edgar); and 1 has been an academic accountant (Macnaughton).

In the past decade, Brian Arnold's record pace of successive submissions—almost one article a year over 28 years—has been challenged by others. From 1990 to 2001, Joe Ruggeri published 12 articles; in the same 11-year period, Tim Edgar published 8; and in the 4-year period from 1995 to 1999, Jinyan Li published 6 articles in the journal.

THE JOURNAL'S INFLUENCE IN CANADIAN TAX SCHOLARSHIP AND JURISPRUDENCE

Over the journal's 50 years of publication, its influence has been felt in many forums. Most obviously, tax lawyers and accountants rely on it in their day-to-day work for the explication, interpretation, and application of current tax laws to complex personal and commercial transactions, and for a synthesis and analytical critique of tax jurisprudence and current tax developments. It is an invaluable source of information for all students of taxation. Journal articles are read by politicians and have been cited in the House of Commons. The journal is referred to by the architects and administrators of the tax system in finance departments across the country, though undoubtedly they do not use it as often as they might, or at least they do not heed the advice offered in its articles as often as they should. And the journal is relied on by scholars attempting to further our knowledge of tax law and policy, and by judges deciding cases that are concerned in whole or in part with tax.

The journal is also frequently a source of information for journalists and others interested in tax developments. To obtain a rough sense of the influence of the journal in the popular press, we searched three individual databases of Westlaw's collections of newspapers for references to the journal. We also searched for references to David Perry, one of the research staff of the Foundation and one of the most frequently quoted commentators on tax issues in Canada, as well as for references to the Foundation generally.⁵ Since January 1, 2000, the *National Post* has referred to the *Canadian Tax Journal* in five stories, quoted David Perry in 23 stories, and mentioned the Canadian Tax Foundation in 41 stories. In the same period, the *Globe and Mail* has referred to the journal in 2 stories, quoted David in 12 stories, and mentioned the Foundation in 30 stories. Since the start of 2000, the *Toronto Star* has referred to the journal in 2 stories, quoted David in 15 stories, and mentioned the Foundation in 20 stories. Recently, an article in the journal formed the basis of stories on income trusts in the *Globe*,⁶ the *Post*,⁷ and the *Star*.⁸

Although it is difficult to judge the precise influence of the journal in tax practice, administration, scholarship, and jurisprudence, we thought it would be of some interest to see how often journal articles have been cited in the academic literature and in the courts. Analyzing which, and how often, academic articles are cited in other academic articles and in legal opinions has become a minor branch of the sociology of legal and social science scholarship. Such citation analysis has provided the basis for generalizations about the intellectual history of ideas, the nature of innovation in scholarship, the structure of the disciplines, the changing nature of

legal reasoning, and, always intriguing, the significance and influence of individual scholars and their ideas.⁹ Our objective here is much more modest.

Journal Citations in the Academic Literature

Most articles in academic journals never get cited, anywhere. A survey of American law review articles published between 1981 and 1993 found that over 40,000, or more than half, had never been cited.¹⁰ Another survey found that approximately 70 percent of law review articles were not cited in subsequent law review articles.¹¹ It must be somewhat disconcerting to legal scholars—who often spend a year or so diligently researching, writing, and rewriting an article—to discover that so much of their work goes uncited, particularly since most scholars have a footnote fetish: they seem keen to cite any article that bears only remotely on their subject matter, and often string together long lists of such citations. Even more discouragingly, it's probably a safe bet that many of the articles that are cited have not been read by the citator, and that many of those that have been read have not been understood. True, it is likely that some of the thousands of articles that go uncited are read by someone other than the author and his or her friends, but if an article is not being cited, it is unlikely to be influencing the creation of new knowledge or the development of the law.

In other disciplines, in which the quality of an article is not necessarily judged on the basis of the number of footnotes, subsequent citations are even less likely than they are in the field of law. It has been estimated that most scientific papers are not cited even once within five years of publication, and that over 98 percent of articles in arts and humanities and 75 percent in the social sciences are never cited.¹² Richard Posner has suggested that “[s]cholarship, like salmon breeding in the wild, is a high-risk, low-return activity,” and vast amounts of “trivial, ephemeral” output is the “unavoidable price of . . . creative scholarship.”¹³ Some articles, however, are cited repeatedly. A study of the most-cited law review articles found that Ronald Coase’s “The Problem of Social Cost”¹⁴ had been cited 1,741 times in legal journals between 1960, its year of publication, and 1995.¹⁵

Of course, the number of times an article is cited might have little to do with its quality or even its influence or significance. An article might be cited in a judicial opinion simply because it contains a succinct statement of boilerplate propositions of law or because the author is known to the judge. Nevertheless, if only to satisfy our curiosity, we attempted to determine which journal articles, published over the past 50 years, were cited most frequently by academic writers and by the courts.¹⁶

Our attempt to determine how often journal articles had been cited and relied upon in other scholarly journals was, by and large, unsuccessful. The source used by almost all citation analysts (those who study the citations of scholarly articles) is the *Social Sciences Citation Index (SSCI)*, compiled by the Institute for Scientific Information, which indexes over 1,300 periodicals from a wide range of social sciences, including law. Unfortunately, the *Canadian Tax Journal* is not indexed in this source. Therefore, we were left with the option of searching databases of legal periodicals.

A search of the law review databases of Quicklaw, Lexis, and Westlaw enabled us to get some citation data starting in 1981; most law reviews in those databases do not go back earlier than that. From 1981 to 2002, journal articles were cited 214 times in 108 different law journal articles. The great majority of the articles that cited journal articles were published after 1990. Slightly over 60 percent of the citations were in US journals; almost all of the rest were in Canadian journals.

The most frequently cited articles published in the journal were Carl S. Shoup's "The White Paper: Accrual Accounting for Capital Gains and Losses"¹⁷ and John W. Durnford and Stephen J. Toope's "Spousal Support in Family Law and Alimony in the Law of Taxation."¹⁸ Both were cited seven times by seven different law journal authors. The next most frequently cited article was David Ward's "Principles To Be Applied in Interpreting Tax Treaties,"¹⁹ followed by Adil Sayeed's "Choosing Between Tax Credits and Exemptions for Dependent Children."²⁰

The most frequently cited *Canadian Tax Journal* author was Brian J. Arnold (his articles were cited 11 times in the law reviews searched), followed by Carl Shoup, David Ward, J.R. Wilson, John Durnford, Stephen J. Toope, Douglas S. Ewens, Richard M. Bird, Sidney Roberts, Howard Kellough, and Stephen W. Bowman.

We also searched the Foundation's TaxFind database, which contains all of the periodicals and conference reports published by the Canadian Tax Foundation since 1991, to see how often the articles that were cited most frequently in other scholarly journals and in the courts had been cited in Foundation publications. Interestingly, Carl Shoup's article, which was one of the most frequently cited articles in other journals, was never cited in Foundation articles or conference report papers. Of the articles cited most frequently by the courts (discussed below), Brian J. Arnold's "Is Interest a Capital Expense?"²¹ was cited most often in Foundation materials, in 21 articles or papers. John Durnford's "The Distinction Between Income from Business and Income from Property, and the Concept of Carrying On Business"²² was cited in 16 articles or papers, and David Ward's "Principles To Be Applied in Interpreting Tax Treaties"²³ was cited in 7.

We note these citations in Foundation articles and conference report papers simply as a matter of interest; a more serious analysis of citation practices in Foundation materials remains to be done.

Academic Citations in Canadian Jurisprudence

Canadian judges, following an old English tradition, did not cite legal periodicals in their opinions until about the mid-20th century. It is hard to imagine a justification for this judicial unwillingness to consider academic commentary. It has been speculated that English common law judges felt they were divining the law from some omnipresence in the sky and, therefore, were not in need of instruction from academics. Alternatively, since there appeared to be an exception to the no-citation rule if the author had died, perhaps the judges were concerned that if the authors referred to were still alive they might, to the court's embarrassment, subsequently change their mind on the point for which they were being cited. By the 1950s this rule was no longer being followed by English judges. Nevertheless, in a notorious

incident as late as 1950, the Supreme Court of Canada refused to allow counsel arguing a case before it to cite and read excerpts from an article published in the *Canadian Bar Review*.²⁴ Later that year, George Nicholls, the editor of the review, scolded the court for its practice of not referring to secondary literature, particularly the *Canadian Bar Review*. Whether or not as a result, in part, of George Nicholls's stern lecture, the reluctance of judges to cite law review articles slowly gave way throughout the 1950s and '60s and then simply disappeared without a trace.

In the United States, the study of the use that courts make of secondary material—in particular, law review articles—has become a specialized area of legal study,²⁵ whereas in Canada there is only a small body of literature on the judicial use of secondary literature.²⁶ It has been estimated that in 1957 only 15 percent, and in 1967 only 13 percent, of Supreme Court of Canada decisions contained a reference to secondary literature. By 1977, however, 22 percent, and by the late 1980s over 50 percent, of the Supreme Court's decisions contained a reference to secondary literature.²⁷ Between 1985 and 1992, the Supreme Court referred to, on average, 124 periodical articles each year.²⁸ This greater inclination to cite secondary literature is due to a wide range of factors, including changing views about the nature of judicial reasoning, an increase in the number of academic legal journals, an increase in the number of judges who have been academics, and greater use of law clerks to assist judges with their work. As an indication of the acceptance by the court of the use of secondary literature, beginning in 1985 the official Supreme Court Reports began indexing the secondary literature referred to by the court.

Mr. Justice Dickson, who was appointed to the Supreme Court in 1973 and made chief justice in 1984, was undoubtedly responsible in part for the increase in the Supreme Court's use of secondary literature during the 1980s. Although he was never a full-time legal academic, he frequently wrote and spoke about legal education and scholarship. In a speech he gave in 1980, he offered some insight on the Supreme Court's use of academic commentary:

The British tradition of resistance to juristic writing (a consequence of the fact that there were no teachers of English law at the universities until fairly recently) has been swept aside. Judges do read and use legal periodicals, both Canadian and non-Canadian. The weight to be given a citation depends upon the cogency of the argument, the intellectual honesty of scholarship, the thoroughness of the research and, yes, the reputation of the author.²⁹

More recently, Mr. Justice Bastarache described the types of articles the court finds most useful:

Academic commentary that is useful to judges is that which assembles and rationalizes judicial decisions in a given field of law, draws out the general principles that these decisions imply, criticizes judicial decisions and suggests different approaches to particular areas of law.³⁰

He went on to say:

the contribution of academics is invaluable to the development of legal principles and coherent judicial decisions. The nature of the law itself is being transformed. The work of academics serves to provide a contextual social background for legal disputes, helps to make judges aware of the underlying reasons for the decisions that they make and offers useful suggestions for reform. No principled approach to decision-making can ignore the contribution of academics.³¹

By the late 1990s, scholarly analysis was perceived by academics to have become so influential with the court that some writers were sending to judges and their clerks published and even unpublished articles on issues that would be raised before the court in pending cases. In the spring of 2000, Beverley McLachlin, the newly appointed chief justice, sent the following letter to all law school faculties:

It has recently come to my attention that some law professors have been sending unsolicited (and in some cases, unpublished) manuscripts to our law clerks relating to cases pending before this court. In some instances, the sender has specifically expressed the hope that the contents of the manuscript will influence the thinking of the court. Procedural fairness, of course, precludes us from receiving any materials that have not been circulated to the parties. . . .

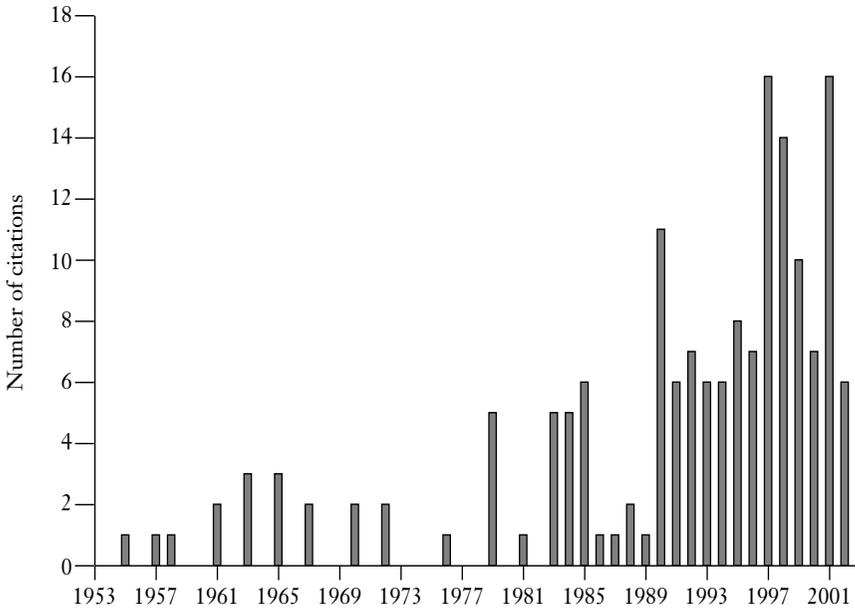
No one should be in a position to make secret representation to the court or become, in effect, an unseen intervener in the case. Accordingly, our policy is to return such materials unread.³²

Journal Citation in Canadian Jurisprudence

In contrast to our search for citations of the journal in the academic literature, our search for journal citations in the courts yielded considerable data. Our primary source was Quicklaw, which contains the entire collection of Dominion Tax Cases. We searched this database for every conceivable variation and abbreviation of “Canadian Tax Journal.” Over the five decades of the journal’s publication, 107 journal articles, case comments, and features have been cited by Canadian courts. These articles have been cited 164 times in 134 different cases by 63 different judges. In the first three decades of the journal’s existence, as a reflection of judges’ general reluctance to cite secondary literature, few journal articles were cited by the courts. In the last two decades, however, the trend toward greater reliance on (or at least reference to) journal articles is unmistakable. From 1953 to 1982, judges cited the journal only 24 times; from 1983 to 1992, they cited the journal 45 times; but from 1993 to 2002, they cited it 95 times. As shown in figure 1, the last decade accounted for 58 percent of all journal citations by the courts, and the last two decades accounted for about 85 percent of all such references.

The 95 citations of the *Canadian Tax Journal* in the last decade were made in 72 cases by 46 different judges and referred to 62 different articles and comments. The great majority of the articles cited by the courts were published between the mid-1970s and the mid-1990s.

The lowest tax courts have referred to the journal most frequently. From 1955 to 1971, the Tax Appeal Board (before 1958 called the Income Tax Appeals Board)

FIGURE 1 Judicial Citations to Canadian Tax Journal Articles, 1953-2002

Source: Thaddeus Hwong, "Canadian Tax Journal: The First Five Decades in Citations" (December 2000), 116 (on file at the Canadian Tax Foundation library).

cited the journal 15 times (9 percent of all citations); from 1971 to 1983, the Tax Review Board cited the journal 12 times (7 percent of all citations); and from 1983 to 2002, the Tax Court of Canada cited the journal 71 times (43 percent of all citations). From 1979 to 1995, the Federal Court Trial Division cited the journal 14 times (about 9 percent of all citations). Somewhat surprisingly, the judges on the Exchequer Court never referred to the journal. However, from 1971 to 2002, the Federal Court of Appeal cited the journal 32 times (20 percent of all citations). Since 1955, the Supreme Court of Canada has cited the journal 20 times (12 percent of all citations).

Of the 63 judges who have cited the journal, Judge Tremblay (who sat first on the Tax Review Board and then, after 1983, on the Tax Court of Canada) accounted for more than 10 percent of all citations. He cited 19 journal articles a total of 20 times in 17 different cases from 1976 to 1996. Other judges who have frequently cited journal articles include Dussault (11 times), Fordham (11 times), and Bowman (7 times). Among Supreme Court justices, Mr. Justice Iacobucci has referred to the *Canadian Tax Journal* most often. In total, he cited the journal 5 times in 4 of his majority opinions (twice in *Candere!*³³ as well as once each in *The Queen v. Crown Forest Industries Limited et al.*,³⁴ *Antosko et al. v. The Queen*,³⁵ and *65302 British Columbia Ltd. v. The Queen*³⁶).

Among other Supreme Court Justices, Mr. Justice Estey cited the journal three times in his majority opinion in *Stubart Investments Limited v. The Queen*.³⁷ Madam Justice McLachlin cited the journal twice in her majority opinion in *Hickman Motors*.³⁸ Mr. Justice Gonthier cited the journal once in his majority opinion in *Corporation Notre-Dame de Bon-Secours v. Communauté Urbaine de Québec et al.*³⁹ Justices Arbour and LeBel cited the journal once in their jointly authored majority opinion in *Brian J. Stewart v. The Queen*.⁴⁰

In terms of dissenting opinions, Mr. Justice Binnie cited the journal three times in his dissent in *Will-Kare Paving & Contracting Limited v. The Queen*,⁴¹ while Madam Justice L'Heureux-Dubé cited the journal three times in two different dissents (twice in *Symes v. The Queen et al.*⁴² and once in *The Queen et al. v. Thibaudeau*⁴³). Mr. Justice La Forest cited the journal once in his dissent in *The Queen v. McClurg*,⁴⁴ while Mr. Justice LeBel cited the journal once in his dissent in *The Queen v. Singleton*.⁴⁵

Most cases that refer to journal articles cite only one article; however, in the following cases the judges referred to three or more journal articles: *Mathew*,⁴⁶ *Lakehouse Enterprises*,⁴⁷ *Stubart Investments*,⁴⁸ *Shell Canada*,⁴⁹ *Will-Kare Paving*,⁵⁰ and *Cardella*.⁵¹

The article cited most frequently by all courts was David Ward's "Principles To Be Applied in Interpreting Tax Treaties."⁵² It was cited six times in six different cases by six different judges. The article was published in 1977 and was cited by the courts for the first time seven years later. Other frequently cited articles include the following: Vivien Morgan, "Stubart: What the Courts Did Next"⁵³ (5 times); Eva M. Krasa, "The Deductibility of Fines, Penalties, Damages, and Contract Termination Payments"⁵⁴ (5 times); John W. Durnford, "The Distinction Between Income from Business and Income from Property, and the Concept of Carrying On Business"⁵⁵ (5 times); Ronald Knechtel, "Taxation of the Life Insurance Industry: The 1978 Tax Reform"⁵⁶ (4 times); Richard Wise, "Valuation and the Income Tax Act"⁵⁷ (4 times); John W. Durnford, "Goodwill in the Law of Income Tax"⁵⁸ (4 times); and Brian J. Arnold, "Is Interest a Capital Expense?"⁵⁹ (3 times).

John Durnford's articles in the journal (including those he co-authored) have been cited more often than those of any other author. Seven of his articles were cited a total of 16 times in 16 different cases by 13 different judges. The second most frequently cited author was Brian Arnold. Ten of his articles were cited a total of 14 times in 10 different cases by 10 different judges. Other frequently cited authors include David Ward (10 times), Thomas E. McDonnell (7 times), Richard B. Thomas (7 times), Richard M. Wise (7 times), Eva K. Krasa (5 times), James R. Wilson (5 times), and Vivien Morgan (5 times).

The first reference to an article in the journal appears to be an incidental citation by Mr. R.S.W. Fordham, a member of the Income Tax Appeal Board. In *No. 243*,⁶⁰ which was decided in 1955, he referred to Gwyneth McGregor's "What Is an Assessment?"⁶¹ He said, "the outcome of this appeal depends on what is an 'assessment.' The point is of interest to many taxpayers and, I notice, forms the subject of a comprehensive article in the 'Canadian Tax Journal.'"⁶² Slightly more

substantively, two years later, in 1957, in distinguishing two cases from the one that he had to resolve, Mr. Fordham said, "It is interesting to note that both these cases drew puzzled comment in the 'Canadian Tax Journal.'"⁶³ Characterizing Gwyneth McGregor's comment on the two cases as "puzzled" was a bit of an understatement. She was commenting on two cases in which the Exchequer Court held that the taxpayers, who by all accounts appeared to be speculative land developers, had earned tax-free capital gains on the sale of subdivided land. The title of Gwyneth's comment on the cases was "What Must One Do To Be Taxed?"⁶⁴

Over the next 15 years, Mr. Fordham was one of the few judges to refer to articles in the journal. He cited the journal almost a dozen times between 1955 and 1970. He was always laudatory. He referred to the articles as "comprehensive," "thought-provoking," and "usefully-written" and as having "interestingly discussed" and "discussed knowledgeably" relevant tax concepts. Once he noted that a case had "provoked some not unreasonable comment in the Canadian Tax Journal." In almost every instance he was referring to articles or case comments written by Gwyneth McGregor, but oddly enough he never mentioned her by name.⁶⁵ During these early years of the journal, Mr. W.O. Davis and Mr. W.S. Fisher also referred to articles in the journal on a couple of occasions and acknowledged that they were helpful and useful. Throughout the 1970s, Mr. Guy Tremblay, a member of the Tax Review Board, was the most frequent citator of articles in the journal.

Then, in 1984, in the well-known *Stuart* case,⁶⁶ Mr. Justice Estey, in holding that there was no business purpose test in Canada, relied upon, or at least drew considerable comfort from, three articles that had been published in the journal: M.J. O'Keefe's "The Business Purpose Test—Who Needs It?,"⁶⁷ David Ward and Maurice Cullity's "Abuse of Rights and the Business Purpose Test as Applied to Taxing Statutes,"⁶⁸ and a comment by Tom McDonnell that was critical of an earlier Federal Court of Appeal case that had struck down a tax-avoidance transaction.⁶⁹ In particular, Mr. Justice Estey referred to the Ward and Cullity article for the proposition that a recent British case did "not represent a repudiation of *Duke of Westminster, et al.*"⁷⁰ He also noted that

[p]erhaps the high water mark in the opposition to the introduction of a business purpose test is found in the reasoning of the learned authors, Ward and Cullity . . . who stated . . . in answer to the question: can it be a legitimate business purpose of a transaction to minimize or postpone taxes?:

If taxes are minimized or postponed, more capital will be available to run the business and more profit will result. Surely, in the penultimate decade of the twentieth century it would be naive to suggest that businessmen can, or should, conduct and manage their business affairs without regard to the incidence of taxation or that they are not, or should not, be attracted to transactions or investments or forms of doing business that provide reduced burdens of taxation.⁷¹

One can only speculate as to how much weight Mr. Justice Estey gave to these articles, since he referred to a considerable amount of other secondary literature in his judgment; however, in the sentence immediately following the above quotation,

he concluded that “I would therefore reject the proposition that a transaction may be disregarded for tax purposes solely on the basis that it was entered into by a taxpayer without an independent or *bona fide* business purpose.”⁷²

Following *Stubart*, the courts appeared to be much more willing to refer to and rely upon secondary literature in tax cases. *Stubart* was, of course, also the case in which Mr. Justice Estey referred approvingly to Elmer Driedger’s so-called modern approach to statutory interpretation⁷³ and thus opened the door to a broader range of extrinsic evidence about legislative intentions and purposes.

Judges might cite academic commentary for a number of reasons: because they wish to adopt a general proposition of law as expressed by the author; because the article contains a convenient summary or a textbook statement of the law; because the article surveys the history of, or reviews the legislative intent in enacting, a particular provision; because the article discusses the real-world consequences of a particular decision or in other ways provides the economic and factual context for a decision; because the article critiques a line of decisions and, therefore, provides a reason for limiting or extending a trend in the jurisprudence; or because the article discusses the tax policy principles underlying the relevant tax rules.

In the paragraphs that follow, we categorize the cases in which judges have cited journal articles according to the uses to which the articles were put. Of course, the uses made of secondary literature could be stated at varying levels of abstraction and categorized in any number of ways. Our purpose here, though, is simply to provide a sense of the influence of the journal in tax jurisprudence in Canada, so we have not attempted to be overly rigorous. Furthermore, no generalization about the use that courts make of secondary literature could be drawn from this review since only articles from the journal are examined. The judges in these cases cited many secondary sources, including other Foundation publications, and presumably read a good many journal articles that they did not cite in their opinions. However, secondary literature, even when it is uncited, may influence judicial decision making by suggesting how the instant case fits within the broad principles of taxation, by tracing currents in legal thought, or by offering a more profound perspective on a law and its social context than that presented in any individual case. Taxpaying parties and their counsel sometimes lack knowledge and interest in such broader matters.

In many cases, the courts cited a journal article in order to adopt a general legal proposition developed in the article as a premise in their decision. For example, in “The Principles To Be Applied in Interpreting Tax Treaties,”⁷⁴ David Ward argued that the courts should give tax treaties a liberal interpretation with a view to implementing the true intention of the parties. His article has been cited by courts, including the Supreme Court of Canada,⁷⁵ six times in reaffirming this general proposition. In one of the first cases to cite the article, *Gladden Estate*, Mr. Justice Addy said, “I fully agree with and adopt the statement of David A. Ward in his paper.”⁷⁶

The courts have also referred to Catherine Brown and Cindy Rajan’s “Constructive and Resulting Trusts: Challenging Tax Boundaries”⁷⁷ for the proposition that constructive trusts may not be taxpayers for the purposes of the Income Tax Act;⁷⁸ Robert Beam and Stanley Laiken’s “Adventure or Concern in the Nature of Trade”⁷⁹ for the proposition that a taxpayer’s secondary intention in acquiring an asset is

only relevant in determining whether it is a capital property in cases in which the taxpayer's primary intention is frustrated;⁸⁰ and Douglas Ewens and Sharon Hugo's "The Effect of Bill C-139 on Certain Corporate Reorganizations"⁸¹ for the proposition that "*de facto* control of a corporation may shift from one shareholder to another based on external factors."⁸²

In a wonderful piece published in 1987, "Stubart: What the Courts Did Next,"⁸³ Vivien Morgan succinctly summarized the state of play with respect to various aspects of statutory interpretation. Eight years later, in *Corporation Notre-Dame de Bon-Secours*,⁸⁴ in a widely cited passage setting out the approach that the courts should take to statutory interpretation, Mr. Justice Gonthier incorporated a passage from Vivien Morgan's article about one of the changes in the courts' approach to statutory interpretation after *Stubart*. His statement, and hence Vivien's conclusion about a distinct change in the law, has been quoted in at least six other cases, making her one of the journal's most cited authors. Here is part of the passage, which will be familiar to many readers:

In light of this passage [a quotation from Mr. Justice Dickson] there is no longer any doubt that the interpretation of tax legislation should be subject to the ordinary rules of construction. . . . The first consideration should therefore be to determine the purpose of the legislation, whether as a whole or as expressed in a particular provision. The following passage from Vivien Morgan's article "Stubart: What the Courts Did Next" . . . adequately summarizes my conclusion:

There has been one distinct change [after *Stubart*], however, in the resolution of ambiguities. In the past, resort was often made to the maxims that an ambiguity in a taxing provision is resolved in the taxpayer's favour and that an ambiguity in an exempting provision is resolved in the Crown's favour. *Now an ambiguity is usually resolved openly by reference to legislative intent* [emphasis added by the court].

The teleological approach makes it clear that in tax matters it is no longer possible to reduce the rules of interpretation to presumptions in favour of or against the taxpayer or to well-defined categories known to require a liberal, strict or literal interpretation.⁸⁵

The courts have often made reference to journal articles authored by John Durnford for a convenient summary of the relevant cases and a statement of the general principles that might be extracted from them. For example, in *Imperial Stables*, Mr. Justice Martin said:

Counsel referred me to . . . a lengthy article by John W. Durnford [in] the Canadian Tax Journal . . . entitled "Profits on the Sale of Shares: Capital Gains or Business Income"^[86] all of which I have read and from which I have concluded that the most significant principles to be applied in cases such as these are the following.⁸⁷

Mr. Justice Martin also noted that the cases were well summarized in the Durnford article. Indeed, judges have been particularly generous in their praise of

Durnford's articles in the journal. Judge Bowman, in drawing the distinction between income from property and income from carrying on a business, referred to Durnford's "The Distinction Between Income from a Business and Income from Property and the Concept of Carrying On Business"⁸⁸ as "[p]ossibly the most extensive, learned and illuminating consideration of the [distinction]."⁸⁹

In other cases, the courts have referred to a section of an article as being an accurate and succinct statement of the law. In *Canderel*,⁹⁰ Mr. Justice Stone set out what he described as the basic rules to be derived from the cases for the computation of profit, and then acknowledged that the propositions were taken from T.E. McDonnell's "More on GAAP and Profit."⁹¹ In the Supreme Court, in *Canderel*,⁹² Mr. Justice Iacobucci cited two comments from the journal in reaching his decision that the tenant inducement payments incurred in that case could be deducted as current expenses. He cited Richard B. Thomas's "The Matching Principle: Legal Principle or a Concept?"⁹³ in support of the proposition that instead of attempting to rigidly categorize expenses as running expenses, matchable expenses, and so on, the taxpayer should focus on "attempting to portray his or her income in the manner which best reflects his or her true financial position for the year."⁹⁴ He cited Tom McDonnell's "Running Headlong into the GAAP (Again)"⁹⁵ in support of the proposition that there was no meaningful distinction between lease pickup payments, which had been treated as current expenses in a previous case, and the tenant inducement payments in *Canderel*.⁹⁶

The courts have sometimes referred to articles in the journal to assist them in resolving a legal issue that has not been the subject of judicial consideration. For example, one of the issues in *McNeill*⁹⁷ was the determination of the year in which damage awards were deductible. Mr. Justice Rothstein stated:

The Court was not referred to any decided cases on the timing issue. However, appellant's counsel did provide the Court with an extensive article by Eva M. Krasa, "The Deductibility of Fines, Penalties, Damages and Contract Termination Payments" . . . which provides a helpful analysis of this timing issue, explaining why the right to deduct damages as an expense arises in the year the damage award is made and not in the year in which the event giving rise to the damages took place.⁹⁸

He quoted from the article at length and concluded, "We agree with this logic and rationale."⁹⁹

Of course, judges do not always agree with the analysis in the articles to which they refer. In *Lyonde*,¹⁰⁰ Judge Taylor reproduced a couple of pages from Eva Krasa's "The Income Tax Treatment of Legal Expenses,"¹⁰¹ to which the taxpayer had made reference in his argument, and then stated:

In my view, the article adds little to the discussion regarding *Maruscak* . . . other than to indicate a continued desire and deep longing on the part of the author, that any distinction the Courts can see between incurring legal expenses for the purposes of "collecting" an amount, as contrasted with "establishing the right to collect" an amount, should be blurred in favour of permitting all such expenditure to be deductible

on some rather vague ground that “general taxation principles apply in determining deductibility.”¹⁰²

Judges have also frequently referred to journal articles in order to gain an understanding of the history and purpose of a provision or concept used in the Act. In *Pete*,¹⁰³ Judge Couture referred to an article by Alan Short¹⁰⁴ in explaining the purpose of the concept of permanent establishment. In *Lake Superior Investments Limited*, in interpreting the definition of a “specified investment business,” Judge Sobier noted: “The text writers give us some insight as to why there was a change in dealing with active business income and investment income, and how this came about.”¹⁰⁵ He then quoted at length from David Phillip Jones’s “Further Reflections on Integration: The Modified Small Business Deduction, Nonqualifying Businesses, Specified Investment Income, Corporate Partnerships, and Personal Service Corporations.”¹⁰⁶ Once again, John Durnford’s articles, in particular, have often been cited for this reason. In *Laflamme*,¹⁰⁷ Judge Watson quoted at length from Durnford’s “Loans to Shareholders” on the purposes of subsection 15(2).¹⁰⁸ In *Kwong et al.*, Judge Bonner also noted that “a useful review of the evolution of subsection 15(2) may be found in John W. Durnford’s article.”¹⁰⁹

An article from the journal has even been cited as direct evidence of the intention of Parliament in enacting a particular provision. David A. Dodge, while he was senior assistant deputy minister of the Department of Finance, wrote an article for the journal in 1988 on the newly enacted general anti-avoidance rule (GAAR).¹¹⁰ In explaining the definition of a series of transactions in subsection 248(10), he said:

The step transaction doctrine, however, when completed by the business purpose test as suggested in *Burmah* and *Furniss v. Dawson* [two well-known British tax-avoidance cases], represents a coherent and orthodox approach. For that reason, this doctrine has been included in proposed section 245 in the forms suggested by these cases.¹¹¹

In *OSFC Holdings*, Mr. Justice Rothstein quoted this passage from the article and concluded:

In view of Mr. Dodge’s express reference to *Furniss v. Dawson*, I think it may reasonably be inferred that Parliament, in enacting paragraph 245(3)(b), adopted the approach to a “series of transactions” developed by the House of Lords. For that reason, I do not think the “mutual interdependence” or “end results” tests are applicable and I would, subject to subsection 248(10), adopt the House of Lords approach. Thus, for there to be a series of transactions, each transaction in the series must be pre-ordained to produce a final result.¹¹²

The David Dodge article, as well as Brian Arnold and Jim Wilson’s “The General Anti-Avoidance Rule—Part 2,”¹¹³ were also quoted, for a similar reason, in the recent *Mathew* case,¹¹⁴ which dealt with the constitutionality of the GAAR. In arguing that the GAAR does not provide sufficient guidance to taxpayers in ordering their affairs to satisfy the constitutional requirements of section 7 of the Charter

(“everyone has the right to life, liberty and security of the person”) and the rule of law, the taxpayers in *Mathew* suggested that the authors of these articles, one the senior deputy minister of the Department of Finance and the others Department of Finance consultants on the GAAR, had conceded as much. The taxpayers noted that Dodge said in his article, “Admittedly, however, the true object and spirit of some provisions of the Act may sometimes appear difficult or even impossible to assess.”¹¹⁵ They also pointed out that Arnold and Wilson stated in their article, “The major difficulty with the exception [the misuse or abuse provision] in subsection 245(4) is that its meaning is opaque.”¹¹⁶ Dodge and Arnold and Wilson would most likely argue that these quotations had been taken out of context by the taxpayers in *Mathew*, since the authors supported the enactment of the GAAR. In any event, in spite of these concessions by some of the architects of the GAAR, Judge Dussault refused to hold that the GAAR was unconstitutional.

An important use that judges sometimes make of secondary literature is to provide support for their findings of social or economic facts that form part of their reasoning process, or to gain an understanding of the tax-planning or other contexts of the case. In his dissent in *McClurg*,¹¹⁷ Mr. Justice La Forest referred to a journal comment by S.H. Goodman on a lower court opinion in the case¹¹⁸ in support of the proposition that the only purpose of employing a discretionary dividend clause in the articles of incorporation is to facilitate tax avoidance through income splitting. In *Antosko*, Mr. Justice Stone in the Federal Court of Appeal cited, along with other articles, a case comment in the journal by M.D. Templeton¹¹⁹ on the lower court judgment in the case in support of the proposition that if purchasers of bonds from tax-exempt entities could not deduct the interest that accrued prior to purchase, it “would create difficulties for buyers of bonds in the open bond and debenture markets in Canada and for the operation of those markets.”¹²⁰ *Antosko* was appealed to the Supreme Court, where Mr. Justice Iacobucci also acknowledged that in interpreting subsection 20(14) he found “helpful the comment of M.D. Templeton in ‘Subsection 20(14) and the Allocation of Interest—Buyers Beware.’”¹²¹ He quoted at length from the comment.

Judges have also referred to articles in the journal in order to gauge the reception of decisions and, therefore, whether their holdings should be limited or extended. In *Coppley Noyes & Randall Limited*,¹²² in the Federal Court Trial Division, the taxpayer tried to make an argument by analogy to the well-known case of *Anaconda*.¹²³ In refusing to accept the analogy, Mr. Justice Reed noted that “it is well known that the reasoning of the Privy Council in overruling both the Exchequer Court and the Supreme Court of Canada [in *Anaconda*] has been widely criticized.”¹²⁴ In support of this assertion, he cited, along with another article, S.D. Thom’s “Anaconda Comment” from the 1956 volume of the journal.¹²⁵ The courts have also cited Brian Arnold and David Ward’s “Dispositions—A Critique of Revenue Canada’s Interpretation”¹²⁶ in limiting the wide scope that some early judgments suggested should be given to the term “disposition” as used in the Act. In *Charron*, Judge Hamlyn noted, “The authors find the position of the courts has been to give broad interpretation to the term disposition.”¹²⁷ He then quoted Arnold and Ward’s

suggestion for a more limited definition of disposition. In *Shepp*,¹²⁸ Judge Lamarre quoted extensively from the Arnold and Ward article and from Douglas Ewens and Michael Flatters's "Toward a More Coherent Theory of Dispositions"¹²⁹ in holding that a special resolution passed by a corporation that might have resulted in the shifting of value between classes of shares did not amount to a disposition of those shares.

Judges have sometimes referred to articles that have questioned whether a line of authority has gone too far. In *Phillips*, in considering whether an allowance for the purchase a new home should be covered by the *Ransom* case,¹³⁰ which had held that certain moving expense reimbursements were not taxable, Mr. Justice Robertson referred to case comments by Richard Thomas¹³¹ in which he had questioned whether or not a line of cases descending from *Ransom* "may have overextended *Ransom* by inviting taxpayers to treat personal living subsidies as tax-free benefits."¹³²

One of the most significant recent illustrations of the influence of secondary literature, including articles from the journal, on judicial law making is in the application of the so-called reasonable expectation of profit (REOP) test. Traditionally, in distinguishing between business and personal activities, the courts have asked whether the taxpayer had a reasonable expectation of making a profit from the activity. If the expectation was not reasonable, the activity was classified as personal and any related expenses were non-deductible. In more recent years, the Canada Customs and Revenue Agency (CCRA) began using this doctrine to attack tax shelters. It argued that if a taxpayer did not have a reasonable expectation of making a net profit from an investment activity, then the taxpayer could not have a source of income from the activity and all the expenses related to the activity should be non-deductible. Several decisions of the Tax Court and the Federal Court of Appeal supported this argument. The tax commentators, by and large, were adamant that this was a misuse of the REOP test. Finally, in 1995, in *Tonn*,¹³³ Mr. Justice Linden held that in determining whether losses were business losses, the REOP test should be limited to circumstances in which there was some suspicion that the loss was made for personal, not business, reasons. In reaching this conclusion, he relied on a passage from Richard B. Thomas's "Reasonable Expectation of Profit: Are Revenue Canada's and the Court's Expectations Unreasonable?"¹³⁴ in which the author suggested that the REOP test was initially restricted to the determination of whether expenses were personal and living expenses and then subsequently, for reasons unknown, appeared to acquire a life of its own.¹³⁵ Two years later, in *Hickman*,¹³⁶ the Supreme Court had to decide whether the REOP test should apply in determining whether a taxpayer had purchased depreciable property "for the purpose of producing income." In holding that the test did not apply in these circumstances, and in further limiting the reach of the REOP test, Madam Justice L'Heureux-Dubé referred¹³⁷ to John Owen's "The Reasonable Expectation of Profit Test: Is There a Better Approach?"¹³⁸ In *Petrovic*, a 2001 Tax Court decision, Judge Lamarre stated, "This question [whether the REOP test is applicable only where there is a personal element to the activity] stems from a growing body of literature challenging a mostly uncritical acceptance of the REOP test by the courts. According to some authors, this test ought to be of very limited application."¹³⁹ He then quoted at

length¹⁴⁰ from Thomas E. McDonnell's "Rental Losses Denied—Confusion Compounded."¹⁴¹ In *Cardella*, Mr. Justice Stone in the Federal Court of Appeal noted that "[t]he application of the [REOP] test in particular cases by both the Tax Court of Canada and this Court has been much criticized by members of the tax bar in Canada."¹⁴² Among other articles, he cited both John Owen's and Tom McDonnell's journal articles.

Finally, in *Stewart*,¹⁴³ in which the Supreme Court settled the issue by holding that the REOP test should not be used in determining whether a taxpayer's activities constitute a source of income, the court cited, along with a number of other secondary sources, two articles from the journal. It quoted from Cy Fien's "To Profit or Not To Profit: A Historical Review and Critical Analysis of the 'Reasonable Expectation of Profit' Test"¹⁴⁴ in establishing that the courts in the 1960s and '70s were extending the test beyond its fairly restricted statutory mandated use of determining whether expenses were personal.¹⁴⁵ The court also referred to John Owen's "The Reasonable Expectation of Profit Test: Is There a Better Approach?"¹⁴⁶ as supporting the view that in *Moldowan*,¹⁴⁷ in which there was a suggestion that the test might be used to determine whether the taxpayer had a source of income, Mr. Justice Dickson "did not intend to set out a broadly applicable source test . . . but instead . . . was simply distinguishing between mere hobbies and *bona fide* businesses."¹⁴⁸

Articles in the journal have proven to be an important source of information for judges who wish to determine the policies underlying particular provisions or concepts used in the Act. In *West Kootenay Power and Light Company Limited*, Mr. Justice MacGuigan, in holding that there was no requirement in income tax matters that there always be conformity between the accounting treatments used in a taxpayer's financial statements and its tax return, said, "Apart from the judicial authorities, I find myself in agreement with the following analysis by Professor Brian J. Arnold . . . as to the policy considerations involved."¹⁴⁹ He then quoted at length from Arnold's "Conformity Between Financial Statements and Tax Accounting."¹⁵⁰

In a frequently cited article, Eva Krasa's "The Deductibility of Fines, Penalties, Damages, and Contract Termination Payments,"¹⁵¹ the author argues that, in the absence of an express statutory provision, public policy considerations should not override the statutory mandate that income tax should be paid on a taxpayer's net income. This article was first cited with respect to this argument by the Federal Court of Appeal in *Amway of Canada*.¹⁵² In his reasons for judgment, Mr. Justice Strayer noted, "it has been argued with some force by learned commentators [Krasa and others] that undefined notions of public policy should not preclude the application of the simple principle that income tax is owing only on the net income of a taxpayer."¹⁵³ However, he refused to follow that policy prescription and held that the deductibility of the fines at issue in the case would be contrary to public policy. Three years later, the Supreme Court in *65302 British Columbia Ltd.*¹⁵⁴ expressly disagreed with the holding in *Amway*. The Supreme Court cited Krasa's article approvingly in limiting the holding of a House of Lords decision that might have been interpreted as supporting the non-deductibility of fines on the grounds of public policy.¹⁵⁵

John Durnford and Stephen Toope's "Spousal Support in Family Law and Alimony in the Law of Taxation"¹⁵⁶ was cited in *Thibaudeau* by both the Federal Court of Appeal¹⁵⁷ and the Supreme Court of Canada.¹⁵⁸ In the Federal Court of Appeal, Mr. Justice Letourneau noted that the authors had proposed reforms to make the deduction/inclusion provisions for child-support payments more effective and fair, but stated that the fact the provisions could be improved in such a way did not make them discriminatory.¹⁵⁹ In the Supreme Court of Canada, Madam Justice L'Heureux-Dubé, in her dissent, also referred to the article in declaring the provision unconstitutional and in suggesting that there were several reasonable alternatives available to the government for amending the provision.¹⁶⁰

A recent series of articles in the journal that discussed approaches to statutory interpretation have already been referred to by the courts. Mr. Justice Binnie, who dissented in *Will-Kare Paving*,¹⁶¹ made extensive reference to David Duff's "Interpreting the Income Tax Act."¹⁶² The majority of the Supreme Court judges in that case held that the phrase "goods for sale" as used in the manufacturing and processing tax credit provision should be given its legal meaning. In contrast, Mr. Justice Binnie reasoned that it should be given its plain meaning. In support of his reasons, he acknowledged that the plain meaning approach to statutory interpretation had been criticized in recent years by commentators. In particular, he noted that David Duff had criticized the approach in an article in the journal and had argued that the approach "produces decisions contrary to legislative intentions and statutory purposes, permits substantial judicial discretion, and places an unreasonable burden on legislative drafters."¹⁶³ Mr. Justice Binnie then dealt at some length with each of these three criticisms of the plain meaning approach and suggested that they did not apply to the interpretive issue in *Will-Kare Paving*.¹⁶⁴ This is an excellent example of a judge dealing seriously with the arguments put forth in a scholarly article. Mr. Justice LeBel also quoted Duff's article in his dissenting opinion in *Singleton*,¹⁶⁵ in which he set out his own approach to statutory interpretation in tax cases. He stated:

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*. As Professor D. Duff points out in his article "Interpreting the *Income Tax Act*" [Part 2] . . . , "[i]n rejecting the extremes of purposive interpretation on the one hand and the plain meaning rule on the other, the words-in-total-context approach affirms a more 'open textured' approach to statutory interpretation."¹⁶⁶

In their fashioning of the law, the courts have recently drawn considerable support from journal articles on the deductibility of interest. In *Gifford*,¹⁶⁷ Judge Bowman stated that his view that whether interest is a capital or a current expense depends on the use to which the money is put was "fortified" by the analysis in Brian Arnold's "Is Interest a Capital Expense?"¹⁶⁸ He noted that the article contains a "thorough analysis of Canadian jurisprudence up to 1992."¹⁶⁹ Judge Bowman quoted two passages from the article and stated that he was "in full and respectful agreement"

with the conclusions contained in them.¹⁷⁰ He also acknowledged that in considering the issues in the case he “obtained great assistance from a case comment on *Shell* in the *Canadian Tax Journal*, ‘Is Interest a Current Expense?’ by Mr. Joel Nitikman.”¹⁷¹ Judge Bowman’s decision in *Gifford* was overturned by the Federal Court of Appeal.¹⁷² Mr. Justice Rothstein, writing for the court, held that he was bound by decisions of the Supreme Court of Canada that indicated that interest is generally a capital expense. However, after referring to three articles from the journal—the Arnold and Nitikman articles and a recent article by Joseph Frankovic¹⁷³—Mr. Justice Rothstein stated that in the event that the decision was appealed further to the Supreme Court of Canada, it was his view that interest, by its nature, is generally a current expense. He explicitly approved of the reasoning in Frankovic’s “Why Interest Should Be Considered a Current Expense.”¹⁷⁴

This review of the citation by the courts of articles published in the *Canadian Tax Journal* reveals that judges have relied on journal articles for a wide range of purposes. In several instances, it appears that the articles had some influence in changing the direction of the law. Most significantly, though, the courts in recent cases appear willing to engage in a dialogue with journal contributors (and authors of other scholarly articles) about the appropriate evolution of the law. A dialogue may not seem to be the best metaphor to describe the relationship between a judge and a scholarly commentator, since at the end of the conversation the law is what the judges say it is. Nevertheless, it seems reasonably clear that the judiciary is taking seriously the reasoning and opinions of journal authors, and that journal authors in turn are contributing to the development of Canadian tax jurisprudence by providing original, imaginative, and carefully crafted commentary on the work of the courts.

MOVING FORWARD

The purpose of the Foundation “is to provide both the taxpaying public and the governments of Canada with the benefit of expert, impartial research into current problems of taxation and government finance.”¹⁷⁵ This has been the aim of the Foundation since its establishment. In the Foundation’s first annual report, for the year ending December 31, 1946, Molyneux Gordon, the first chair of the board of governors, explained that

[t]he Canadian Tax Foundation has been brought into existence as an independent institution in order to undertake and encourage study and research in the field of taxation and related economic problems and to make disinterested and constructive recommendations regarding policy, legislation or administration upon any matter in which its findings may serve the public interest.¹⁷⁶

The importance of this aspect of the Foundation’s work has been reasserted over the years, both by the chairs of the board of governors and by the directors of the Foundation. Some of these restatements were quoted in the reviews of the journal’s five decades. In his report to the 39th annual meeting of the Foundation, Douglas Sherbaniuk, the Foundation’s director, elaborated on the Foundation’s mission:

Research in taxation and public expenditures, like research in other areas, is an effort to break new ground, to advance the frontiers of knowledge, and to gain new understanding of the ways in which our tax laws and spending programs work or do not work.¹⁷⁷

In addition to its primary mission—to encourage, foster, and publish research and scholarship relating to government taxes and expenditures—the Foundation has always had a second objective: to assist in educating its members (for the most part tax practitioners) and, more generally, the taxpaying public about the intricacies of tax law and government finances. The journal is the Foundation's principal research publication; nevertheless, in furtherance of this second objective, it has always published articles whose sole purpose was simply to describe difficult areas of tax law. The journal now carries six features, appearing in almost every issue, that are intended almost solely for the edification of tax practitioners: Current Cases, International Tax Planning, Personal Tax Planning, Corporate Tax Planning, Selected US Tax Developments, and Current Tax Reading. Some articles that might fairly be called descriptive, in that they neither add to the store of knowledge nor recommend policy changes, also appear in the lead article section of the journal. The goal of these articles is to present knowledge about the tax system in a form that is accessible to a wide audience of lawyers, accountants, economists, business people, and members of the public. These articles might describe a conceptually difficult area of tax law, they might survey and synthesize the results of research and compare and evaluate different contributions, or they might describe recent tax changes and advances in tax practice. However, the main function of the lead articles section of the journal is still to further the Foundation's primary mission by publishing scholarship relating to tax and government finance.

One of the many unique features of the journal is that while most of the scholarship published in the journal is written by academics, a good deal of it is written by practising accountants, lawyers, and civil servants. Indeed, the leaders of the tax bar have been some of the most consistent contributors to the scholarship published in the journal over the years, and over the 50 years of the journal's existence some of the best articles were written by practitioners. Almost half of the articles we chose to reproduce from the first three decades were authored or co-authored by practitioners. One suspects that this amount of scholarship being contributed by practitioners is unique to tax law. The practice of tax law, more so than most areas of law, is an intellectual endeavour. The qualities that distinguish a good tax practitioner are very likely the same as those that distinguish a good academic: an intimate knowledge of the development and interstices of the law, intellectual curiosity, the ability to conceptualize in ways that cut across established categories, familiarity with the economic and other underlying principles that illuminate the law, and the ability to write clearly and logically. In addition, many tax practitioners seem to feel keenly about their professional responsibility for the quality of the tax legislation, and thus often take lead roles in tax reform exercises in which the principles, theories, and tools of tax policy analysis must be regularly employed.

As an aside to the contribution that practitioners have made to the journal, I would like to hazard a generalization, based on my reading of the articles in the journal over the past 50 years. There are so many obvious exceptions to this generalization that I hesitate to make it, but I think it is compelling all the same. Those tax practitioners who practised when the tax law had fewer detailed rules, who went through the exercise of considering the tax reforms enacted as a result of the Carter commission, and who practised when tax practitioners were often generalists, had a better sense of and respect for the underlying theories, principles, and values that animate the tax system and, therefore, wrote more fundamental and wide-ranging scholarship about the tax system than those practitioners whose careers began later. Practitioners who have not gone through the exercise of rethinking the system in terms of its fundamental principles, and who specialize only in particular areas of tax law, are more likely to see the tax system as just a ragbag of disparate rules.

As the journal moves ahead into its next 50 years, its overriding goal appears to be straightforward: to continue to improve the quality of the scholarship it publishes. What does this entail? At the most basic level, the purpose of all scholarship is to understand the world as it is—to uncover the truth—and to reason about how it should be. Nothing else. In an earlier review,¹⁷⁸ I noted that scholarship is often divided into three categories: scholarship of discovery, which makes a direct contribution to human knowledge; scholarship of integration, which draws apparently isolated facts or ideas together in a context that reveals new relationships or provides new interpretations of their significance; and scholarship of application, which applies knowledge in new ways. The knowledge that forms the subject matter of these various forms of scholarship can usually be classified as either empirical, normative, or analytical.

Most articles published in the journal do not undertake what might be described as pure scholarship. Instead, they are characterized primarily by instrumental reasoning or policy analysis. That is to say, they use knowledge developed by others instrumentally in the pursuit of certain goals. They are articles that advocate that the courts, administrators, or legislators adopt a particular tax or expenditure policy. They tend to be normative in purpose and pragmatic in nature. They are normative in purpose in that, almost invariably, they are attempting to justify a result in terms of its consequences. They are pragmatic in nature in that they employ a wide variety of forms of argumentation in advancing their preferred policy outcome.

The general criteria that are used in judging the value of scholarship are well established and accepted across all disciplines: originality, significance, and competence. Like all criteria, they do not displace personal opinion or control bias, but they provide a framework for exercising and discussing judgments about the value of particular pieces of scholarship. The journal's reviewers routinely apply these criteria in their reports on submitted manuscripts—indeed, this brief elaboration of these criteria is based, in part, on comments made in those reviews over the past year and a half.

Originality is the most basic standard of scholarship and often the hardest to meet. In some disciplines, this standard can only be satisfied by the presentation of

newly discovered empirical knowledge or by a new interpretation of or solution to a theoretical problem. Such a strict standard as originality is difficult to apply to disciplines like law. Therefore, in legal writing and in most social science writing, the conceptualization or application of existing knowledge in an original way is taken to satisfy the originality standard. While the dissemination of such knowledge might not be of theoretical significance, it can promote understanding and be of considerable value to policy makers, including, in the case of tax law, finance officials, tax administrators, and judges.

It is a familiar criticism that much legal writing falls short of even this broader originality standard. Legal scholars often repeat in large sections of their articles what is already well known to their audience. Indeed, if one sits down with a number of articles on a particular tax law and policy subject, it is often impossible to tell just by reading the articles in what order they were written. In most disciplines, journals explicitly require authors to undertake a careful review of the leading literature on the subject they are dealing with and to state clearly what their work adds to the literature. Authors must demonstrate that their articles contain new ideas, new connections, new perspectives, or new ways of thinking about existing knowledge. Discovering new knowledge is necessarily a social enterprise, and each author is required to indicate the incremental contribution the author thinks that he or she is making to the literature.

Scholarship is also evaluated on the basis of its significance. The dissemination of new knowledge that required little genuine intellectual effort to acquire or that had no serious potential impact would not be deemed to be serious scholarship. Scholarship can be significant socially, practically, or theoretically, but it must be significant. There are, of course, different levels of significance. At a minimum, the article might further the development of the field in some fashion or observe a trend in the field and suggest that it continue. But the article might have more serious aspirations—to promote a change in the tax system, or to make a long-lasting contribution to thinking about taxes or government finance. A very small number of articles are so significant that they change fundamentally how others think about difficult issues, or open up new areas of investigation, or even change a discipline. Of course, articles can only have an impact if they are widely disseminated and their results communicated to a wide audience. In several ways, the *Canadian Tax Journal* attempts to ensure that the results of the scholarship that it publishes are more widely disseminated.

Finally, scholarship is evaluated on the basis of its competence. At a minimum, this means that the work has been thoroughly researched and adequately documented, clearly written, and logically structured. But it also means that the research is valid: it conceptualizes ideas in ways that are coherent and promote clarity of thought; the arguments are sound; the empirical assertions are supported by the best evidence; normative judgments are backed by good reasons; and, in the final analysis, the research is persuasive.

Another characteristic of scholarship, somewhat different from the three qualities of originality, significance, and competence, is that it is written by authors who

are disinterested in the outcome of their research. That is, scholarship must be undertaken by authors who have no conflicts of interest and who undertake the required research and writing with the sole view in mind of determining the truth. Most obviously, they should not have undertaken the work on behalf of a present or future client or for any form of consideration that was conditional on the conclusion reached or that might have influenced the conclusion reached. This characteristic of scholarship is one of the important differences between writing a factum for a court or a brief for government and writing a scholarly article. Readers of scholarly journals have the right to expect that the conclusion reached in an article represents the best and disinterested judgment of the author, reached after a careful and impartial consideration of the evidence. Even funding received for undertaking scholarly writing that comes with no strings attached should be disclosed, as should any affiliation or undertaking that might have indirectly influenced the outcome of the article. Over the years, the *Canadian Tax Journal* has always attempted to preserve the integrity and independence of the scholarship that it publishes. For example, it will not publish a comment on a case or other tax doctrine that is written or instigated by a lawyer who has been involved in the matter unless that fact is disclosed. The rules of professional ethics lead to the same result: it would be unethical for a lawyer to pretend to be a neutral author of an article in circumstances where he or she has a pecuniary interest in the matter.

Like all scholarly journals, the journal attempts to ensure that the articles published in it are original, significant, and competent primarily through anonymous peer reviewing. All manuscripts submitted to the journal for publication in the lead article section are sent to three or four scholars, often drawn from the members of the board of editors, who are familiar with the subject matter covered and the methodology used in the manuscript. It is a double-blind process: the reviewers are not made aware of the identity of the author, and the author is not made aware of the identities of the reviewers. Among other things, this ensures that the decision to publish is not based on the author's credentials. The reviewers' comments are assessed by the editor of the journal, who then decides whether or not to publish the article. Manuscripts that are accepted for publication often go through three or four iterations until the reviewers are satisfied that the manuscripts are publishable. We are very grateful to reviewers for undertaking this extremely important but time-consuming work. Even within our short deadline of usually three weeks, many reviewers submit extensive comments on an article suggesting ways in which it might be revised. Invariably, the articles are substantially improved in the process. Since Canada has a fairly small academic community, and a relatively small number of tax and accounting practitioners who are interested in scholarship, the number of potential reviewers who are experts in a particular subject matter is small. For this reason, and to ensure the international acceptability of the scholarship published in the journal, we are increasingly sending manuscripts to overseas reviewers.

This brief review of the characteristics of good scholarship is meant simply to underline the point that the most important aspiration of the journal, like that of all scholarly journals, should be to publish more original, more significant, and

more competent scholarship. The journal should also aspire to publish more diverse scholarship. Advancing knowledge toward the eventual generalizations that are needed in practice in tax law and policy requires that all related issues be examined, that they be viewed from every possible angle, and that the full range of methodologies be used in examining them. In briefly illustrating this point, I will refer to a few of the various categories of research that I used in classifying scholarship in the journal in the review of the third decade.¹⁷⁹

The empirical studies published in the journal have generally conducted and illustrated their research through the use of statistical techniques, most commonly regression analysis. This is obviously a useful technique to test the explanatory power of theoretical models. Other methodologies and approaches—surveys, laboratory experiments, case studies, and a variety of qualitative research strategies—can make an important contribution to learning about how the tax world works, but they have been used less frequently in journal articles. Beyond purely empirical studies, which identify the general causes of an event, the journal should seek to publish articles that increase our understanding of the tax world by interpreting the meaning of tax-related events or practices in particular social contexts.

In the past decade, there has been a noticeable change in the nature of much doctrinal scholarship—the careful reading and comparison of judicial opinions—published in the journal. The traditional task of legal scholars engaged in doctrinal research was to extract a doctrine from a line of cases, restate it, perhaps criticize it by identifying ambiguities or inconsistencies, and seek to extend it by exercising the characteristic tools of legal analysis—logic, reasoning by analogy, commonsense judgment, and a handful of principles such as *stare decisis*. Analysts were primarily concerned with the internal logic of the law and the criteria of coherency, consistency and clarity. To the extent that policy analysis was done, it was of the seat-of-the-pants variety. More recently, scholars writing in the journal have more openly acknowledged the sophisticated policy analysis inherent in judicial decision making and have been more willing to subject alternative legal outcomes of a case to rigorous analytical scrutiny. They identify their underlying factual and moral assumptions; situate them in historical context; apply the full range of modern accounting and finance theory in assessing outcomes; draw on interdisciplinary approaches such as economic and feminist analyses; and explicitly judge outcomes against widely accepted norms such as fairness, economic efficiency, administrative practicality, and institutional integrity. Analysts continue to play the central role of lawyers in identifying and weighing the tradeoffs that are everywhere implicit in legal rules and offering creative and practical solutions to real-world problems, but they do so with the full assistance of the theories, concepts, and methods of other disciplines.

Although there was some surprisingly sophisticated tax-planning analysis published in the journal in its early years, many of the articles took the form of “the five tax consequences you should consider when issuing debt.” It is hard to dress up these how-to articles as anything other than the conveyance of information. In recent years, however, academic tax accountants, drawing in part on the vast accounting and finance literature that was written after the publication in 1992 of

Scholes and Wolfson's *Taxes and Business Strategy: A Planning Approach*,¹⁸⁰ have developed a sophisticated and empirically based microeconomic theory of tax policy and tax planning. It focuses on the effect of tax rules on asset prices, changes in contractual arrangements brought about by tax rules, and the interaction of tax and non-tax factors in managerial and financial decision making. Recently, the journal has published a number of imaginative articles written using the insights of the Scholes and Wolfson paradigm. This research agenda is far from exhausted.

Technical tax policy scholarship consists of normative statements about the way the government should make decisions regarding the technical elements of the tax system: the base, rates, unit of taxation, accounting rules, and rules of administration. Traditionally, tax scholars evaluated tax policy from the perspectives of horizontal equity, economic efficiency, and administrative practicality. Over the course of the journal's 50 years of publication, the journal has published exemplary tax policy analysis. But, like doctrinal analysis, this type of scholarship has become much more sophisticated. In the earlier issues of the journal, technical tax policy analysis was relatively formalistic. The scholar started with the comprehensive definition of income developed by Henry Simons and elaborated upon by the Carter commission and deduced the appropriate design of the tax system. Now, technical tax policy analysis routinely draws upon insights from competing normative theories of tax policy, such as optimal tax and public choice theory, and uses concepts and tools of analysis drawn from economic and finance theory.

The journal initiated the discussion of the tax expenditure concept in Canada back in the mid-1970s. Over the past decade, the journal published a series of tax expenditure studies that explored the normative justifications for the expenditures, analyzed the design of the tax expenditures and evaluated how well they were serving their objectives and at what cost, and examined whether the objectives could be better served by the use of some other policy instrument. Much work remains to be done in exploring the full implications of the tax expenditure concept.

Tax law is intimately connected with many of the most pressing issues of the day. Furthermore, because of the political character of taxation, it is impossible to separate one's opinions on tax matters from one's views on the full range of other fundamental policy issues and, ultimately, from one's conviction of what constitutes a good society. Therefore, the only defensible stance for a journal committed to gaining an understanding of the tax world is to promote methodological pluralism: to encourage the publication of articles with diverse goals and methods.

One of the biggest challenges facing the Foundation and the journal over the next few years will be to raise our already high scholarly standards in an environment characterized by increasing competition for outstanding scholarship from other research institutes and journals. During the 1970s and 1980s, the journal was able to publish tax working papers produced for the Economic Council of Canada and other research institutes. Several policy institutes in Canada now have ambitious tax programs and publish and widely disseminate all of their own studies. There is also an increasing number of international academic tax journals that provide a publishing option for tax scholars. More public policy journals in Canada

are publishing more tax and public finance materials. And several of the leading economic and accounting research journals also publish a considerable amount of tax scholarship.

Two of the great strengths of the *Canadian Tax Journal* are the Foundation's record of publishing outstanding independent and objective research and the central role that the journal has played in the Canadian tax debate over the past 50 years. For 50 years the journal has published some of the most original, significant, and competent tax research undertaken in Canada. Not only has the journal successfully attracted this body of research, it has also reviewed the work thoroughly and independently, reference-checked it painstakingly, edited it line by line, and disseminated it widely. So long as it maintains and builds on this record, the journal will continue to serve Canadian taxpayers by increasing our knowledge of the effects of the tax system and government expenditures on the quality of their lives.

NOTES

- 1 The next few paragraphs are drawn from my description of the attraction of tax law and policy, which was published as part of an introduction to tax law for law students. See Neil Brooks, "The Logic, Policy and Politics of Tax Law," in Tim Edgar, Jinyan Li, and Daniel Sandler, eds., *Materials on Canadian Income Tax*, 12th ed. (Toronto: Carswell, 2000), chapter 1.
- 2 Carolyn Webber and Aaron Wildavsky, *A History of Taxation and Expenditure in the Western World* (New York: Simon and Schuster, 1986), 326.
- 3 Joseph Alois Schumpeter, *History of Economic Analysis* (New York: Oxford University Press, 1954), 769.
- 4 Louis Eisenstein, Edmond Cahn, Thurman Arnold, and Robert J. McDonald, "A Discussion of 'The Ideologies of Taxation'" (1962) vol. 18, no. 1 *Tax Law Review* 1-22, at 22.
- 5 A search was performed on three individual databases of Westlaw's collection of newspapers: "natpost" for the *National Post* (formerly the *Financial Post* in this database), "globemail" for the *Globe and Mail*, and "trnstst" for the *Toronto Star*.
- 6 Guy Dixon, "Rein In Income Trusts: Critics," *Globe and Mail*, January 21, 2003.
- 7 Peter Fitzpatrick, "Trust Crackdown Likely, Study Says: Costs Government \$1B: Legislative Response Called 'Inevitable,'" *National Post*, January 21, 2003.
- 8 James Daw, "New Trusts Aren't Big Drain on Government Coffers," *Toronto Star*, January 25, 2003.
- 9 Over the past decade there was a spate of articles using citation analysis in legal journals, leading to a 1999 conference at Northwestern Law School on the interpretation of legal citations. Many of the papers presented at that conference are published in (2000) vol. 29, no. 1, part 2 *The Journal of Legal Studies* 317-584. In economics there is a long history of studies using citation analysis to rank economic journals, scholarly productivity, and economic departments. Many of the studies are cited most recently in Rik Pieters and Hans Baumgartner, "Who Talks to Whom? Intra- and Interdisciplinary Communication of Economics Journals" (2002) vol. 40, no. 2 *Journal of Economic Literature* 483-509.
- 10 Deborah L. Rhode, "Legal Scholarship" (2002) vol. 115, no. 5 *Harvard Law Review* 1327-61, at 1331.
- 11 Michael J. Saks, Howard Larsen, and Carol J. Hodne, "Is There a Growing Gap Among Law, Law Practice, and Legal Scholarship?: A Systematic Comparison of Law Review Articles One Generation Apart" (1996) vol. 30, no. 1 *Suffolk University Law Review* 353-77, at 369.

- 12 See David P. Hamilton, "Research Papers: Who's Uncited Now?" (1991) vol. 251 *Science* 25 and Lynne V. Cheney, "Melange: Foolish and Insignificant Research in Humanities," *Chronicle of Higher Education*, July 17, 1991, B2. Both of these articles are referred to in Rhode, *supra* note 10, at 1332, notes 20 and 21.
- 13 Richard A. Posner, "The Deprofessionalization of Legal Training and Scholarship" (1993) vol. 91, no. 8 *Michigan Law Review* 1921-28, at 1928.
- 14 R.H. Coase, "The Problem of Social Cost" (1960) vol. 3 *The Journal of Law & Economics* 1-44.
- 15 Fred R. Shapiro, "The Most-Cited Law Review Articles Revisited" (1996) vol. 71, no. 3 *Chicago-Kent Law Review* 751-79, table 1, at 767.
- 16 In counting the number of times that journal articles and comments have been cited in Canadian courts by judges, I include not only cases heard by the Supreme Court of Canada, the Exchequer Court (before 1971), the Federal Court of Appeal, the Federal Court Trial Division, and the Tax Court of Canada (after 1983), but also cases heard by the Income Tax Appeals Board (1949-1958), the Tax Appeal Board (1958-1971), and the Tax Review Board (1971-1983).
- 17 Carl S. Shoup, "The White Paper: Accrual Accounting for Capital Gains and Losses" (1970) vol. 18, no. 2 *Canadian Tax Journal* 96-102.
- 18 John W. Durnford and Stephen J. Toope, "Spousal Support in Family Law and Alimony in the Law of Taxation" (1994) vol. 42, no. 1 *Canadian Tax Journal* 1-107.
- 19 David A. Ward, "Principles To Be Applied in Interpreting Tax Treaties" (1977) vol. 25, no. 3 *Canadian Tax Journal* 263-70.
- 20 Adil Sayeed, "Choosing Between Tax Credits and Exemptions for Dependent Children" (1985) vol. 33, no. 5 *Canadian Tax Journal* 975-82.
- 21 Brian J. Arnold, "Is Interest a Capital Expense?" (1992) vol. 40, no. 3 *Canadian Tax Journal* 533-53.
- 22 John Durnford, "The Distinction Between Income from Business and Income from Property and the Concept of Carrying On Business" (1991) vol. 39, no. 5 *Canadian Tax Journal* 1131-1205.
- 23 Ward, *supra* note 19.
- 24 This incident is recounted in Gordon Bale, "W.R. Lederman and the Citation of Legal Periodicals by the Supreme Court of Canada" (1994) vol. 19, no. 1 *Queen's Law Journal* 36-64, at 49-50; and J.E. Côté, "Far-Cited" (2001) vol. 39, no. 3 *Alberta Law Review* 640-56, at 640-41.
- 25 See, for example, Louis J. Sirico Jr. and Jeffrey B. Margulies, "The Citing of Law Reviews by the Supreme Court: An Empirical Study" (1986) vol. 34, no. 1 *UCLA Law Review* 131-47.
- 26 See Vaughan Black and Nicholas Richter, "Did She Mention My Name?: Citation of Academic Authority by the Supreme Court of Canada, 1985-1990" (1993) vol. 16, no. 2 *Dalhousie Law Journal* 377-94; Bale, *supra* note 24; and Côté, *ibid.*
- 27 Black and Richter, *supra* note 26, at 383.
- 28 Bale, *supra* note 24, at 55.
- 29 Brian Dickson, "The Role and Function of Judges" (1980) vol. 14 *Law Society of Upper Canada Gazette* 138-91, at 164-65, quoted in Bale, *supra* note 24, at 59.
- 30 M. Bastarache, "The Role of Academics and Legal Theory in Judicial Decision-Making" (1999) vol. 37, no. 3 *Alberta Law Review* 739-47, at 740.
- 31 *Ibid.*, at 746.
- 32 Letter from B. McLachlin to the University of Alberta, Faculty of Law, March 28, 2000, cited in Bruce Ziff, "The Canadian Law Review Experience: Introduction to the Symposium" (2001) vol. 39, no. 3 *Alberta Law Review* 611-15, at 612.
- 33 *Canderel Limited v. The Queen*, 98 DTC 6100 (SCC).

- 34 95 DTC 5389 (SCC).
- 35 94 DTC 6314 (SCC).
- 36 99 DTC 5799 (SCC).
- 37 84 DTC 6305 (SCC).
- 38 *Hickman Motors Limited v. The Queen*, 97 DTC 5363 (SCC).
- 39 95 DTC 5017 (SCC).
- 40 2002 DTC 6969 (SCC).
- 41 2000 DTC 6467 (SCC).
- 42 94 DTC 6001 (SCC).
- 43 95 DTC 5273 (SCC).
- 44 91 DTC 5001 (SCC).
- 45 2001 DTC 5533 (SCC).
- 46 *Mathew et al. v. The Queen*, 2002 DTC 1637 (TCC).
- 47 *Lakeview Enterprises Ltd. et al. v. MNR*, 83 DTC 388 (TRB).
- 48 Supra note 37.
- 49 *The Queen v. Shell Canada Limited*, 98 DTC 6177 (FCA).
- 50 Supra note 41.
- 51 *Cardella v. The Queen*, 2001 DTC 5251 (FCA).
- 52 Ward, supra note 19.
- 53 Vivien Morgan, "Stubart: What the Courts Did Next," International Tax Planning feature (1987) vol. 35, no. 1 *Canadian Tax Journal* 155-81.
- 54 Eva M. Krasa, "The Deductibility of Fines, Penalties, Damages, and Contract Termination Payments" (1990) vol. 38, no. 6 *Canadian Tax Journal* 1399-1451.
- 55 Durnford, supra note 22.
- 56 Ronald C. Knechtel, "Taxation of the Life Insurance Industry: The 1978 Tax Reform" (1980) vol. 28, no. 1 *Canadian Tax Journal* 9-31.
- 57 Richard M. Wise, "Valuation and the Income Tax Act" (1981) vol. 29, no. 5 *Canadian Tax Journal* 626-44.
- 58 John W. Durnford, "Goodwill in the Law of Income Tax" (1981) vol. 29, no. 6 *Canadian Tax Journal* 759-808.
- 59 Arnold, supra note 21.
- 60 *No. 243 v. MNR*, 55 DTC 176 (ITAB).
- 61 Gwyneth McGregor, "What Is an Assessment?" (1955) vol. 3, no. 1 *Canadian Tax Journal* 40-47.
- 62 Supra note 60, at 177.
- 63 *No. 430 v. MNR*, 57 DTC 334, at 337 (ITAB).
- 64 Gwyneth McGregor, "What Must One Do To Be Taxed?" Around the Courts feature (1957) vol. 5, no. 3 *Canadian Tax Journal* 189-90.
- 65 Gwyneth McGregor's Around the Courts articles were cited on a nameless basis 9 different times. In total, she was cited by the courts 11 times.
- 66 Supra note 37.
- 67 M.J. O'Keefe, "The Business Purpose Test—Who Needs It?" (1977) vol. 25, no. 2 *Canadian Tax Journal* 139-50.

- 68 David A. Ward and Maurice C. Cullity, "Abuse of Rights and the Business Purpose Test as Applied to Taxing Statutes" (1981) vol. 29, no. 4 *Canadian Tax Journal* 451-75.
- 69 T.E. McDonnell, "Legal Effect of Limited Partnership and Trust Arrangements Entered into for Tax Avoidance Purposes," Current Cases feature (1976) vol. 24, no. 5 *Canadian Tax Journal* 466-68.
- 70 Supra note 37, at 6316.
- 71 Ibid., at 6322.
- 72 Ibid.
- 73 Ibid., at 6323.
- 74 Ward, supra note 19.
- 75 *Crown Forest Industries*, supra note 34, at 5396.
- 76 *Gladden Estate v. The Queen*, 85 DTC 5188, at 5191 (FCTD).
- 77 Catherine Brown and Cindy L. Rajan, "Constructive and Resulting Trusts: Challenging Tax Boundaries" (1997) vol. 45, no. 4 *Canadian Tax Journal* 659-89.
- 78 *Drapeau v. The Queen*, 2000 DTC 1721, at 1724 (TCC).
- 79 Robert E. Beam and Stanley N. Laiken, "'Adventure or Concern in the Nature of Trade': 'Badges of Trade' as the Key Indicator of Taxpayer Intention," Personal Tax Planning feature (1996) vol. 44, no. 3 *Canadian Tax Journal* 888-913.
- 80 *The Queen v. Zelinski et al.*, 2000 DTC 6001, at 6008 (FCA).
- 81 Douglas S. Ewens and Sharon J. Hugo, "The Effect of Bill C-139 on Certain Corporate Reorganizations," The Taxation of Corporate Reorganizations feature (1988) vol. 36, no. 4 *Canadian Tax Journal* 1021-34
- 82 *Mimetix Pharmaceuticals Inc. v. The Queen*, 2001 DTC 1026, at 1037 (TCC).
- 83 Morgan, supra note 53.
- 84 Supra note 39.
- 85 Ibid., at 5022.
- 86 John W. Durnford, "Profits on the Sale of Shares: Capital Gains or Business Income? A Fresh Look at Irrigation Industries" (1987) vol. 35, no. 4 *Canadian Tax Journal* 837-92.
- 87 *Imperial Stables (1981) Ltd. v. The Queen*, 90 DTC 6135, at 6139 (FCTD).
- 88 Durnford, supra note 22.
- 89 *Arbutus Gardens Apartments Corp. v. The Queen*, 98 DTC 1795, at 1798 (TCC).
- 90 *The Queen v. Canderel Limited*, 95 DTC 5101, at 5106 (FCA).
- 91 T.E. McDonnell, "More on GAAP and Profit," Current Cases feature (1994) vol. 42, no. 2 *Canadian Tax Journal* 452-56, at 454.
- 92 Supra note 33.
- 93 Richard B. Thomas, "The Matching Principle: Legal Principle or a Concept?" Current Cases feature (1996) vol. 44, no. 6 *Canadian Tax Journal* 1693-99.
- 94 Supra note 33, at 6108.
- 95 T.E. McDonnell, "Running Headlong into the GAAP (Again)," Current Cases feature (1995) vol. 43, no. 3 *Canadian Tax Journal* 738-45.
- 96 Supra note 33, at 6110.
- 97 *McNeill v. The Queen*, 2000 DTC 6211 (FCA).
- 98 Ibid., at 6215.

- 99 Ibid.
- 100 *Lyonde v. MNR*, 88 DTC 1397 (TCC).
- 101 Eva M. Krasa, “The Income Tax Treatment of Legal Expenses” (1986) vol. 34, no. 4 *Canadian Tax Journal* 757-800.
- 102 Supra note 100, at 1401.
- 103 *Pete v. MNR*, 91 DTC 204 (TCC).
- 104 R. Alan Short, “Permanent Establishment and Agencies” (1963) vol. 11, no. 5 *Canadian Tax Journal* 387-93.
- 105 *Lake Superior Investments Limited v. MNR*, 93 DTC 898, at 900 (TCC).
- 106 David Phillip Jones, “Further Reflections on Integration: The Modified Small Business Deduction, Nonqualifying Businesses, Specified Investment Income, Corporate Partnerships, and Personal Service Corporations” (1982) vol. 30, no. 1 *Canadian Tax Journal* 1-21. This same quotation was referred to by Judge Brule in *Gill et al. v. MNR*, 98 DTC 2048, at 2052 (TCC).
- 107 *Laflamme v. MNR*, 93 DTC 50 (TCC).
- 108 John W. Durnford, “Loans to Shareholders” (1988) vol. 36, no. 6 *Canadian Tax Journal* 1414-48.
- 109 *Kwong et al. v. The Queen*, 93 DTC 588, at 590 (TCC).
- 110 David A. Dodge, “A New and More Coherent Approach to Tax Avoidance” (1988) vol. 36, no. 1 *Canadian Tax Journal* 1-22.
- 111 Ibid., at 15.
- 112 *OSFC Holdings Ltd. v. The Queen*, 2001 DTC 5471, at 5479 (FCA).
- 113 Brian J. Arnold and James R. Wilson, “The General Anti-Avoidance Rule—Part 2” (1988) vol. 36, no. 5 *Canadian Tax Journal* 1123-85.
- 114 Supra note 46.
- 115 Ibid., at 1697.
- 116 Ibid.
- 117 Supra note 44.
- 118 S.H. Goodman, “The Last Bastion for Income-Splitting?” Current Cases feature (1986) vol. 34, no. 2 *Canadian Tax Journal* 404-6.
- 119 M.D. Templeton, “Subsection 20(14) and the Allocation of Interest—Buyers Beware,” Current Cases feature (1990) vol. 38, no. 1 *Canadian Tax Journal* 85-90.
- 120 *Antosko et al. v. The Queen*, 92 DTC 6388, at 6391 (FCA).
- 121 Supra note 35, at 6322.
- 122 *Copley Noyes & Randall Limited v. The Queen*, 91 DTC 5291 (FCTD).
- 123 *MNR v. Anaconda American Brass Ltd.*, 55 DTC 1220 (PC).
- 124 Supra note 122, at 5298.
- 125 Stuart D. Thom, “Anaconda Comment” (1956) vol. 4, no. 1 *Canadian Tax Journal* 8-11.
- 126 Brian J. Arnold and David A. Ward, “Dispositions—A Critique of Revenue Canada’s Interpretation” (1980) vol. 28, no. 5 *Canadian Tax Journal* 559-84.
- 127 *Charron v. MNR*, 91 DTC 81, at 82 (TCC).
- 128 *Shepp v. The Queen*, 99 DTC 510 (TCC).
- 129 Douglas S. Ewens and Michael J. Flatters, “Toward a More Coherent Theory of Dispositions” (1995) vol. 43, no. 5 *Canadian Tax Journal* 1377-1411.
- 130 *Ransom v. MNR*, 67 DTC 5235 (Ex. Ct.).

- 131 R.B. Thomas, "Some Benefit!" Current Cases feature (1988) vol. 36, no. 2 *Canadian Tax Journal* 398-401 and "A Hole That You Could Drive a Moving Van Through," Current Cases feature (1990) vol. 38, no. 4 *Canadian Tax Journal* 937-42.
- 132 *The Queen v. Phillips*, 94 DTC 6177, at 6182 (FCA).
- 133 *Tonn et al. v. The Queen*, 96 DTC 6001 (FCA).
- 134 Richard B. Thomas, "Reasonable Expectation of Profit: Are Revenue Canada's and the Court's Expectations Unreasonable?" Current Cases feature (1993) vol. 41, no. 6 *Canadian Tax Journal* 1128-34.
- 135 Supra note 133, at 6007.
- 136 Supra note 38.
- 137 Ibid., at 5373.
- 138 John R. Owen, "The Reasonable Expectation of Profit Test: Is There a Better Approach?" (1996) vol. 44, no. 4 *Canadian Tax Journal* 979-1015.
- 139 *Petrovic v. The Queen*, 2001 DTC 306, at 313 (TCC).
- 140 Ibid., at 313.
- 141 Thomas E. McDonnell, "Rental Losses Denied—Confusion Compounded," Current Cases feature (2000) vol. 48, no. 2 *Canadian Tax Journal* 444-51.
- 142 Supra note 51, at 5259.
- 143 Supra note 40.
- 144 Cy Fien, "To Profit or Not To Profit: A Historical Review and Critical Analysis of the 'Reasonable Expectation of Profit' Test" (1995) vol. 43, no. 5 *Canadian Tax Journal* 1287-1315.
- 145 Supra note 40, at 6974.
- 146 Owen, supra note 138.
- 147 *Moldowan v. The Queen*, [1978] 1 SCR 480.
- 148 Supra note 40, at 6977.
- 149 *West Kootenay Power and Light Company Limited v. The Queen*, 92 DTC 6023, at 6027 (FCA).
- 150 Brian J. Arnold, "Conformity Between Financial Statements and Tax Accounting" (1981) vol. 29, no. 4 *Canadian Tax Journal* 476-88.
- 151 Krasa, supra note 54.
- 152 *Amway of Canada, Ltd. v. The Queen*, 96 DTC 6135 (FCA).
- 153 Ibid., at 6141.
- 154 Supra note 36.
- 155 Ibid., at 5812.
- 156 Durnford and Toope, supra note 18.
- 157 *Thibaudeau v. The Queen*, 94 DTC 6230 (FCA).
- 158 Supra note 43.
- 159 Supra note 157, at 6248.
- 160 Supra note 43, at 5310.
- 161 Supra note 41.
- 162 David G. Duff, "Interpreting the Income Tax Act—Part 1: Interpretive Doctrines" (1999) vol. 47, no. 3 *Canadian Tax Journal* 464-533 and "... Part 2: Toward a Pragmatic Approach" (1999) vol. 47, no. 4 *Canadian Tax Journal* 741-98.
- 163 Ibid., at 770.

- 164 Supra note 41, at 6477.
- 165 Supra note 45.
- 166 Ibid., at 5541-42.
- 167 *Gifford v. The Queen*, 2001 DTC 168 (TCC).
- 168 Arnold, supra note 21.
- 169 Supra note 167, at 174.
- 170 Ibid., at 175.
- 171 Ibid., at 177-78.
- 172 *The Queen v. Gifford*, 2002 DTC 7197 (FCA).
- 173 Joseph Frankovic, "Why Interest Should Be Considered a Current Expense" (2002) vol. 49, no. 4 *Canadian Tax Journal* 859-78.
- 174 Supra note 172, at 7208-9.
- 175 See the preliminary matter of any recent issue of the *Canadian Tax Journal*.
- 176 M.L. Gordon, "Report of the Chairman of the Board of Governors," in Canadian Tax Foundation, *First Annual Report*, for the year ending December 31, 1946 (Toronto: Canadian Tax Foundation, 1947), 1-2, at 1, quoted in Neil Brooks, "Canadian Tax Journal: The First Decade—1953-1962" (2002) vol. 50, no. 1 *Canadian Tax Journal* 261-81, at 262.
- 177 D.J. Sherbaniuk, "Report of the Director," in Canadian Tax Foundation, *Thirty-Ninth Annual Report*, for the year ending December 31, 1984 (Toronto: Canadian Tax Foundation, 1985), 15-23, at 15, quoted in Neil Brooks, "Canadian Tax Journal: The Fourth Decade—1983-1992" (2002) vol. 50, no. 4 *Canadian Tax Journal* 1378-412, at 1378.
- 178 Neil Brooks, "Canadian Tax Journal: The Third Decade—1973-1982" (2002) vol. 50, no. 3 *Canadian Tax Journal* 1056-83, at 1059ff. The following two paragraphs are drawn from that review.
- 179 Ibid.
- 180 Myron S. Scholes and Mark A. Wolfson, *Taxes and Business Strategy: A Planning Approach* (Englewood Cliffs, NJ: Prentice Hall, 1992).