Current Tax Reading

Co-Editors: David Duff, Tim Edgar, and Alan Macnaughton*


This book originated in a series of lunchtime presentations at the Tax Law Section of the Department of Justice, Ontario Regional Office. The first part of the book is devoted to advocacy and contains papers on appellate advocacy, trial advocacy, expert witnesses, and business valuation, written by prominent judges and practitioners. The second part contains papers by academics and practitioners on substantive tax issues: the Supreme Court of Canada’s judgments on interest deductibility and the reasonable expectation of profit test; the prospects for the general anti-avoidance rule at the Supreme Court of Canada; the competent authority mechanism as a dispute resolution tool; tax problems posed by the digital economy; aboriginal income and commodity taxation; the basic structure of the goods and services tax; challenges for indirect taxation created by electronic commerce and information technology; and income taxation of derivatives. The book should be of interest to practitioners, judges, policy makers, and students.

D.D.


This is one of the most interesting articles using Canadian tax data to appear in recent years. The authors use personal income tax return data from 1920 to 2000 to examine the behaviour of top income shares—the proportion of total personal taxable income earned by the top 5 percent, 1 percent, 0.1 percent, etc., of the income distribution. As in the United States, top income shares display a U-shaped pattern over the century, with declines from the onset of the Second World War up to about 1970 and sharp increases since the late 1970s.

The composition of top incomes has also changed over time, with the share of total personal taxable income from employment rising sharply since 1946. Thus,

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within the top income group, self-employed business proprietors and capital-income earners have in large part been replaced by highly compensated employees. Much of this shift is due to a huge increase in employment income arising from stock options. Such income amounted to less than 0.1 percent of total employment income before 1990 but has risen steadily to about 1.5 percent in 2000.

The authors’ preferred explanation for the decline in importance of capital incomes within the top income group up to 1970 is that the development of a progressive income and estate tax system after the beginning of the Second World War substantially reduced the after-tax returns earned by wealthy individuals. However, the authors speculate that the recent surge in top incomes, combined with the repeal of estate taxes in the 1970s, may restore the importance of capital income in the coming years.

A principal factor in the growth in employment income among top income earners is that the share of total employment income received by the top 1 percent of the income distribution has risen from about 1 percent to 4.3 percent, with most of this surge occurring after 1995. A similar surge is observed in US data. With no sharp change in marginal tax rates in this period, taxation factors would not likely be the cause. A skill-biased pattern of technological change as the cause is also unpersuasive. The most likely explanation, according to the authors, is that competition for highly skilled executives and other professionals in the US market has forced Canadian firms to raise salaries to avoid a “brain drain.” One piece of evidence supporting this interpretation is that the rise in the income share of the top 1 percent of the income distribution has been much less for francophones in Quebec than for the rest of the provinces.

A.M.

Joanne E. Magee, Understanding Income Tax 2004-2005

René Huot, Guide fiscal Huot (Toronto: CCH Canadian, 2004)
(CD-ROM), ISBN 2693664369

René Huot’s well-known Understanding Income Tax is now being prepared by Joanne Magee of York University. The text continues to be aimed mainly at accounting students and accordingly includes many numerical examples but relatively little description of case law. It is expected to be revised annually. The chapter on Quebec taxation from the former Huot text has been discontinued for this edition. The publication referred to above is the practitioners’ edition; the student edition is identical except that it includes problems at the back of the book.

René Huot is continuing as the author of the French text (which still includes the chapter on Quebec taxation), but it is now published only as an electronic

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Magee is also a co-author of a widely used text aimed at law students: Peter W. Hogg, Joanne E. Magee, and Jinyan Li, Principles of Canadian Income Tax, 4th ed. (Toronto: Carswell, 2004).
product available as a CD and on the Web. Guide fiscal Huot is available in three formats: as a standalone product; as a product with links to the legislation contained in the CCH service Collection fiscale—Impôts; and as part of the French version of the Taxprep tax return preparation software. The ISBN cited above is for the standalone product.

A.M.


Over two perfect English summer days in 2002, a group of some 40 interested people gathered for the first Tax Law History Conference organised by the Centre for Tax Law which is part of the Law Faculty of the University of Cambridge. Our days were passed in the beautiful surroundings of Lucy Cavendish College and the air was heavy with the scents of a Cambridge Edwardian garden in late summer. No less perfect and no less intoxicating were the technical discussions as we sat and listened to the speakers and talked among ourselves.2

So writes Cambridge tax law professor John Tiley in the preface to this interesting and eclectic collection of papers written by tax academics, academic historians, and tax practitioners.

The book contains 16 papers divided into four parts: “Victorian and Modern,” “Twentieth Century Problems,” “Deep History,” and “Comparisons.” The first three parts focus mainly on the United Kingdom, while the fourth includes papers on taxation in Australia, Israel, and Hong Kong. In addition to its obvious scholarly value, the book should be enjoyed by any tax practitioner who is also a history buff.

Part I contains four papers concerning the substance and administration of the UK income tax. In “What Is Income?” Martin Daunton, an economic historian (and author of an impressive history of the politics of taxation in the United Kingdom since the introduction of the first income tax by Pitt the Younger in 1799),3 considers the absence of a systematic definition of income in UK tax law. Examining this issue in light of “the political culture of Britain and the electoral calculations of politicians,” Daunton concludes that the schedular approach adopted in the United Kingdom was not the product of “systematic legal thinking so much as a confused mixture of political and cultural assumptions about the virtue of charity, the standing of corporations, the need for savings or the undesirability of socially created income.”4

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2 At vii.
In the second paper, John Avery Jones examines the taxation of foreign income from the introduction of Pitt’s income tax until modern times. After reviewing the evolution of the charging provisions for foreign income, Avery Jones discusses the origins and decline of the remittance basis for taxing foreign income, questioning proposals to eliminate the remittance basis for non-domiciled persons on the basis that it might be “better to accept defeat and tax what one can see, rather than say one is taxing worldwide income knowing that one is not.”

The third paper, by Chantal Stebbings, a professor of law and legal history at Exeter, turns to the administration of the income tax, examining the origins and development of income tax tribunals in the Victorian legal system. These bodies originated as either lay tribunals (“General Commissioners”) or salaried civil servants (“Special Commissioners”); however, popular and official pressure for a relationship with the formal legal system led to review of the decisions and procedures and the increasing judicialization of income tax tribunals over time.

The fourth paper, by Tiley, considers the origins and evolution of schedule A of the UK income tax, which taxes profits from the ownership of land, but originally taxed the “annual value of land.” Arguing persuasively that the original schedule A was less a tax on income than a form of property taxation, Tiley makes the provocative suggestion that this method of taxation might be restored in the current UK context.

Part II turns to aspects of 20th-century UK tax law, with papers on the excess profits duty enacted during the First World War, official deliberations, up to 1955, on the introduction of capital gains taxation; the development of legislation to facilitate and promote the use of employee share ownership plans (ESOPs); and the odd contradiction in descriptions of Ireland and the United Kingdom in the respective versions of the 1976 tax convention between these countries. The second of these papers, by David Stopforth, a professor of revenue law at the University of Stirling, provides a fascinating account of the influence wielded by the revenue department in opposition to the introduction of a capital gains tax. The third, by Peter Casson of the School of Management in Southampton, is an excellent account of the transmission of the ESOP concept from the United States to the United Kingdom.

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5 John Avery Jones, “Taxing Foreign Income from Pitt to the Tax Law Rewrite—The Decline of the Remittance Basis,” ibid., at 15-56.
6 Ibid., at 56.
7 Chantal Stebbings, “Income Tax Tribunals: Their Influence and Place in the Victorian Legal System,” ibid., at 57-79.
12 J.D.B. Oliver, “What’s in a Name?” ibid., at 177-97.
Part III reaches further back in time, with papers on taxation under King John, estate planning in 16th-century England, stamp duty on newspapers during the French revolutionary and Napoleonic wars, and taxes on slaves and slave commerce in the United States from colonial times to the Civil War. In “John Lackland: A Fiscal Re-Evaluation,” Jane Frecknall Hughes and Lynne Oats, professors at the business schools at Leeds and Warwick, respectively, present a more sympathetic account than one generally encounters of the king whose reign led to Magna Carta. Explaining the need to raise revenues as a response to the fiscal crisis created by the costs of the Third Crusade, the ransom that was paid to liberate John’s older brother, Richard I, from Duke Leopold V of Austria, and inflation caused by an increased supply of silver from new mines in eastern Germany, the authors conclude that circumstances forced John to change the nature of taxation from feudal dues to national taxes, causing those subject to taxation to insist that taxes should not be imposed by the will of the king but only with the people’s consent. In “Slave Taxes,” Kevin Outterson of the College of Law at West Virginia University responds to the argument that reparations for African-Americans should not be paid by persons who were not alive when slavery existed, by demonstrating that governments (which did exist at the time) also benefited from slavery through taxation.

Part IV looks at tax history in countries other than the United Kingdom, with papers on the relationship between tax administration and tax law in Australia, the allocation of taxing powers between the federal and state governments in Australia, the evolution of tax avoidance doctrines in Israel in the 1950s and 1960s, and tax reform in Hong Kong in the 1970s. The first of these papers surveys major developments in the history of the Australian income tax, concluding that tax policy does not develop in a coherent and structured manner but is “the result of a random or politically driven process.” The second documents the centralization of taxing power in the hands of the Australian federal government over the

16 Kevin Outterson, “Slave Taxes,” ibid., at 263-82.
21 Coleman and McKerchar, supra note 17, at 311.
course of the 20th century. The third contends that Israel’s courts adopted a more aggressive approach to tax avoidance as the capabilities of the country’s tax authorities improved during the 1950s and 1960s. The final paper provides a fascinating account of the history of Hong Kong’s tax system, with particular emphasis on its origins in 1940 and the unsuccessful effort of the colonial government to reform the system in the mid-1970s.

Interested readers should note that the papers from the second tax history conference, held in the summer of 2004, also will be published (and again will be edited by John Tiley). A third tax history conference will be held at the School of Law, University of California at Los Angeles in July 2005, confirming that this is a growing area of scholarly interest.

D.D.


Klassen, Pittman, and Reed use financial statement data on research and development to estimate the responsiveness of R & D expenditure of public corporations to tax incentives in Canada and the United States over the period 1991-1997. Holding other factors affecting R & D constant, they estimate that the Canadian system induces, on average, $1.30 of R & D expenditure per dollar of taxes forgone. This suggests that the Canadian R & D incentives are more effective than direct spending on R & D by governments, which would cost $1 of revenue per dollar of R & D performed. However, another finding of the study is that US incentives induce, on average, $2.96 of additional R & D spending per dollar of forgone revenue; therefore, the US incentives are more efficient. This suggests that incentives that apply to incremental spending (the US system) are more effective than incentives that apply to total R & D spending (the Canadian system). Of course, the research design is unable to determine whether the US incentives truly apply only to incremental spending.

A.M.


This new book describes the administration of income tax in Canada federally and in the provinces that employ tax collection agreements. Topics addressed include books and records, filing of tax and information returns, payment of tax, interest, refunds, audits, collection, assessments and reassessments, objections, penalties, and appeals. There are numerous references to the case law, but few to the secondary literature. In contrast to many books of this type, full value is provided in the sense that the text is not bulked up by the extensive reproduction of interpretation bulletins and the like.

A.M.

In recent years, economists and environmentalists have increasingly favoured market-based instruments such as environmental taxes as a more efficient and dynamic approach to environmental protection than traditional regulation. This book is a valuable resource on the theory and practice of environmental taxation. It comprises 27 papers by authors from 15 countries, which were originally presented at the Third Annual Global Conference on Environmental Taxation in April 2002 at Woodstock, Vermont.

The volume is divided into seven parts, organized by topic. The papers in part I are largely theoretical, examining the justifications for environmental taxation, their implications for the design of environmental taxes, and the advantages and disadvantages of environmental taxes compared with other forms of environmental regulation. The papers in part II examine legal limits on the ability of various countries to introduce environmental taxes—limits that are often embodied in constitutional provisions regarding the division of powers in federal states or the kinds of taxes that national governments may impose. Part III considers taxes and tax incentives directed at the problem of global warming, with papers on energy and carbon taxes in various European countries, and a critical assessment of biomass tax credits in the United States. Part IV surveys national experiences with pollution taxation in the former Soviet Union, Central and Eastern Europe, and Japan. Parts V, VI, and VII deal, respectively, with the relationship between environmental taxation and the regulation of international trade, transportation and environmental taxation, and environmental aspects of property taxation.

D.D.


This book analyzes the discussion of Canadian fiscal policy that appeared in the *National Post* from its inception in October 1998 until early December 1999. The author notes, correctly, that the *Post*’s coverage of taxes was virtually a campaign for tax cuts, and much of the book is devoted to a critique of the newspaper’s articles in this area. The inspiration for the critique lies in the author’s belief that it is in the best interests of most people to live in a country with the highest possible taxes, since only a small elite benefit from lower taxes.

The most intriguing part of the book is its thesis that the articles in the *Post* had much to do with the tax cuts announced in February and October 2000. Noting that the period in which these articles were published coincided roughly with the transformation of federal fiscal policy from the modest tax cuts of the February 1999 budget to the major cuts of the 2000 announcements, the author argues that
the *Post* was a “major spur” to this transformation, although he concedes that there is no “direct causal link.”22 Unfortunately, he does not consider to what extent this policy shift was due to the influence of the Reform Party, which held the position of official Opposition at this time, and the fact that there was simply much more money available for government spending in February 2000 than in February 1999.


In the first half of this article, Duff reviews different rationales for the special tax status of charities and the tax recognition of charitable contributions. In the second half, he examines certain features of the Canadian system. His key policy recommendations are that

- the statutory definition of charity should go beyond the current common-law categories, to include organizations that meet a general “public benefit” test;
- the deduction for corporate donations should be eliminated;
- the pattern of rates for the individual tax credit should be reversed, so that the rate declines with income; and
- the reduction of the capital gains inclusion rate for gifts of publicly traded securities should be repealed.


In this article, Duff first discusses the situations in which benefit taxes and user fees should be applied and how the rates should be determined. He then briefly examines the potential for applying user fees and benefit taxes in various policy areas: health care and education, transportation, water and sewage, and collection and disposal of solid waste.


This study raises the question of whether the value per dollar of investment in a tax-deferred retirement savings account is greater or less than the per-dollar value of investment in a taxable account, in terms of the amount of retirement consumption it can provide. Surprisingly, this study concludes that the value is greater for a

\[\text{22 At 2.}\]
taxable account. Since the study is based on US data, the results cannot be imported to Canada without allowing for differences in marginal tax rates and deferral horizons. However, Poterba’s detailed methodology paves the way for a similar Canadian analysis. This would be of interest not only to tax policy analysts, but also to tax and family law practitioners seeking to divide family assets on divorce.

A.M.


The United States has no counterpart to the Canadian disability tax credit, other than a higher standard deduction for the blind. Instead, there are two tax provisions that provide incentives for employers to accommodate people with disabilities: the disabled access credit and the work opportunity credit. The focus of these two credits is on making it easier for employers to afford the cost of the accommodations required to bring disabled people into the workforce. Although this suggests an intriguing direction for Canadian tax policy, Lipman provides data showing that these incentives are underutilized and may not be having much effect. A number of suggestions for improvement are made.

A.M.


This book by two Canadian economists reviews tax policy aspects of land and property taxation in 25 countries, with an emphasis on developing countries. Bird and Slack contribute three interesting overview papers, comparing land and property taxation systems around the world and describing why they are so difficult to reform. Slack also contributes a brief chapter on property taxation in Canada. One interesting suggestion, which is in the spirit of tax expenditure analysis, is that where property tax exemptions are granted for churches, golf courses, and the like, all exempt property should be assessed in the same way as other properties so that the value of the exemption is known.23

A.M.


Payments under the Canada child tax benefit program are made to the person “who primarily fills the responsibility for the child’s care and upbringing,” and that person is presumed by the legislation to be the mother. In a timely examination of

23 At 26.
this presumption, given the current focus on equality issues and Charter rights, Woolley begins by reviewing payment patterns of similar programs around the world, and finds great variety. The US earned income tax credit, for example, is paid in proportion to income, with greater payments to the spouse who earns more. Turning to Canada, Woolley reports results of a 1995 survey of financial decision making by 300 anglophone couples in the Ottawa-Hull region. The findings can be interpreted as supporting various payment patterns, depending on the goals of the program. Women were more likely to spend a windfall on children’s basic needs such as food and clothing; men were more likely to save the windfall and perhaps use it for other purposes such as the child’s postsecondary education. Woolley concludes that consideration should be given to a policy of formal equality, to recognize the role of both parents in raising children.


In 1997, Statistics Canada carried out a special survey of individuals’ charitable activities, “The National Survey of Giving, Volunteering and Participating.” Using the survey data, the authors study how donations are affected by tax incentives, income, education, and other variables. Perhaps the most interesting finding is that donations to places of worship are unaffected by tax incentives, implying that abolishing the charitable tax credit would have no impact on these donations. Donations to places of worship also seem to be unaffected by the level of government expenditure. In contrast, donations to secular charities are quite sensitive to tax incentives and also suffer from a crowding-out effect from government expenditures. Finally, the analysis suggests that donations and contributions via charitable gaming (for example, buying tickets on lotteries sponsored by charities) are complements rather than substitutes. Thus, once an individual is sold on buying a ticket on a charitable lottery, it may be easier to sell him or her on the idea of making a charitable donation as well.


With the metamorphosis of the Department of National Revenue into the Canada Customs and Revenue Agency, now the Canada Revenue Agency (CRA), Canada’s tax authorities acquired a broad mandate to collect more of the country’s taxes. A question that arises is where the limit should be set: for example, should the CRA collect amounts other than taxes owing, such as child support and repayments under a proposed income-contingent student loan system? The concern is that such expansion of the CRA’s collection powers could change the relationship between citizens
and the state, and erode the moral principle that one should pay taxes as a matter of civic duty.

This article reports on a survey in Australia, where both child support and repayments of income-contingent student loans are collected through the tax system. Australia is a particularly relevant model for Canada as it is more reliant on a self-assessment system than other countries, such as the United Kingdom. The authors found that, after controlling for other determinants of tax evasion, the collection of non-tax payments under either of these arrangements was associated with increased levels of evasion. This was particularly true for lower-income individuals.

A.M.


For those who like to reflect on some of the philosophical issues that shape tax policy debates, the Canadian Journal of Law and Jurisprudence is publishing a special issue on taxation, guest edited by the US tax scholar Ed McCaffery of the University of Southern California Law School. In addition to McCaffery, contributors include Richard Epstein of the University of Chicago Law School; David Duff of the University of Toronto Faculty of Law; Kirk Stark of the School of Law at the University of California at Los Angeles; Andrei Marmor, co-director of the Center for Law and Philosophy at the University of Southern California; James Penner of the Law Department at the London School of Economics; Marjorie Kornhauser of Tulane Law School; Michael Livingston of Rutgers Law School; and Daniel Shaviro of the New York University Law School.

Epstein’s paper, entitled “Taxation with Representation: Or, the Libertarian Dilemma,” presents a libertarian argument for a limited form of government with limited taxation. Duff’s article criticizes libertarian theories of private property and their implications for tax policy and tax scholarship. Stark considers the theoretical case for taxing each individual’s capacity to earn income, defending this form of “endowment taxation” on liberal-egalitarian grounds. Marmor and Penner reflect on the relationship between private property and taxation, addressing various aspects of Liam Murphy and Thomas Nagel’s recent book The Myth of Ownership: Taxes and Justice.24 Kornhauser discusses ways in which increased publicity of tax information might increase tax compliance. Livingston reflects on the prospects for comparative tax analysis. Shaviro argues that the Bush administration’s tax cuts are likely to increase the size of the US government over the long term by increasing an already huge deficit. Finally, McCaffery contends that the ideal personal tax is a progressive postpaid or qualified account consumption tax.

D.D.

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John Rawls is widely regarded as the most important political philosopher of the 20th century. This article is one of many in a symposium issue of the Fordham Law Review devoted to the implications of Rawls’s scholarship for legal theory. While Rawls himself lent qualified support to the idea of a flat-rate consumption tax, Sugin suggests that a Rawlsian approach to distributive justice is more likely to suggest broad constraints on allowable tax policies than to specify a particular tax structure.


This review article, by a professor in the Politics Department at the University of Waterloo, discusses three books that address deeper questions about the fairness of taxation than those inherent in traditional tax policy concepts such as the benefit principle, ability to pay, and vertical and horizontal equity. In addition to challenging libertarian arguments that taxation is unfair, the author considers three themes that raise important questions about taxation and distributive justice: the relationship between taxation and private property, the justification for welfare payments, and the legitimacy of inheritance taxation. It’s refreshing to see political science scholars taking an interest in a field in which accountants, economists, and lawyers tend to dominate.

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25 John Rawls, A Theory of Justice (Cambridge, MA: Harvard University Press, 1971), 278-79 (advocating a proportional tax on total consumption “assuming that income is fairly earned”). In addition to this consumption tax, Rawls also favoured a progressive inheritance tax. Ibid., at 277.