
Making a Case for Increased “Judicial Globalization” in Consumption Tax Law

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PRÉCIS

Le présent article plaide en faveur d'une plus grande mondialisation juridictionnelle dans le droit des taxes à la consommation. L'auteur fait valoir que la mondialisation juridictionnelle est appelée à devenir de plus en plus importante lorsque l'Organisation de coopération et de développement économiques (OCDE) rendra publique la version finale de ses *Principes directeurs internationaux pour l'application de la TVA/TPS*. On s'attend à ce que les principes directeurs soient adoptés dans le monde entier, ce qui aura pour effet d'uniformiser encore plus les principes relatifs aux taxes à la consommation dans le monde de sorte qu'un dialogue juridictionnel mondial dans ce secteur d'activités sera de plus en plus pertinent, bénéfique et nécessaire.

L'article vise à démontrer, d'une part, les avantages qui découlent de ce que les tribunaux du monde entier participent à un dialogue juridictionnel mondial dans le domaine du droit des taxes à la consommation et, d'autre part, les désavantages liés au fait de ne pas participer à ce type de dialogue. Pour y parvenir, l'auteur analyse la présence d'un dialogue juridictionnel, ou son absence, dans les tribunaux du Canada et de l'Europe. On s'intéresse principalement au dialogue juridictionnel qui porte sur une question juridique chaudement discutée, à savoir, lorsqu'une transaction porte sur plus d'une fourniture, comment les tribunaux peuvent-ils déterminer que toutes les fournitures doivent être considérées comme une seule fourniture taxable, ou que chacune d'elles doit être imposée séparément? Cette question peut revêtir une grande importance pour les contribuables, les consommateurs et les autorités fiscales nationales, et elle est notamment abordée par l'OCDE dans ses *Principes directeurs internationaux pour l'application de la TVA/TPS*.

Grâce à l'analyse comparative de la jurisprudence qui porte sur la fourniture unique, l'auteur montre l'importance de la participation à un dialogue juridictionnel mondial dans le secteur des taxes à la consommation, et il conclut que les tribunaux doivent amorcer le plus vite possible un changement d'attitude à l'égard de leur participation à un tel dialogue. À ce sujet, il importe de reconnaître le leadership dont ont fait preuve les tribunaux canadiens dans cette nouvelle tendance mondiale.

* Graduate (LLB, LLM—Taxation) of the London School of Economics and Political Science (LSE). This article is dedicated to Ian Roxan of the LSE; he made the study of taxation intriguing, and has been a source of great inspiration and support. I also wish to take this opportunity to thank my parents, Jacob and Zina Pichhadze, for their love, support, and encouragement. Any errors or omissions in the article are my responsibility.

ABSTRACT

This article makes a case for increased “judicial globalization” in consumption tax law. The author argues that judicial globalization will assume increased importance once the Organisation for Economic Co-operation and Development (OECD) has released its final *International VAT/GST Guidelines*. It is expected that the guidelines will be adopted worldwide, and will thus have the effect of further homogenizing consumption tax principles around the world. As a result, global judicial dialogue in this field will be increasingly relevant, beneficial, and necessary.

The article sets out to demonstrate, on the one hand, the advantages of having courts around the world engage in a global judicial dialogue in the field of consumption tax law, and, on the other hand, the disadvantages of not engaging in this type of dialogue. To achieve this, the author analyzes the judicial dialogue, or lack thereof, between courts in Canada and Europe. The focus is on judicial dialogue over a heavily litigated legal question: When a transaction consists of more than one supply, how should the courts determine whether all the supplies should be treated as parts of a single taxable supply, or whether each supply should be taxed separately? This question can be of significance to taxpayers, consumers, and domestic tax authorities, and it is specifically addressed by the OECD in the *International VAT/GST Guidelines*.

Through a comparative analysis of cases that have dealt with the single supply question, the author shows the value of engaging in a global judicial dialogue in the field of consumption tax, and concludes that a shift in the attitude of the courts toward engaging in such dialogue should begin sooner rather than later. In this regard, credit must be given to the Canadian courts for their leadership in this emerging global trend.

KEYWORDS: CONSUMPTION TAXES ■ GST ■ VAT ■ COMPARATIVE ANALYSIS ■ TAX COURT OF CANADA ■ EU

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INTRODUCTION

In the preface to the draft *International VAT/GST Guidelines*, the Organisation for Economic Co-operation and Development (OECD) describes the proliferation of value-added tax (VAT) (also called goods and services tax [GST]) as “the most important development in taxation over the last half-century. Limited to less than ten countries in the late 1960s it has now been implemented by about 136 countries.”¹

The guidelines are intended to address the problems that arise from the inconsistent application of consumption tax principles to cross-border trade. In a press release dated March 9, 2006, the OECD summarized these problems and the objective of the guidelines as follows:

While some commonly held principles are adhered to when it comes to taxing international transactions, there are still many differences in the way value added taxes are implemented around the world and across OECD countries. Variations by governments in the application of VAT to the international trade in services have led to obstacles to business activity and distortions of competition significant enough to justify the design of common principles. The aim in developing guidelines would be to ensure that transactions are taxed only once and in a single, clearly defined jurisdiction in order to avoid uncertainties, double taxation or involuntary non-taxation.²

At the time this article was written (April 2008), only the preface and table of contents of the guidelines document had been released; therefore, it is not possible to consider and comment on details of the proposed guidelines. Nonetheless, on the basis of the preface, it can be assumed that the guidelines, once adopted worldwide, will have the effect of further homogenizing consumption tax principles around the world.

The global judicial community could have an important role in the realization of the OECD’s objectives, as it has with respect to other globally shared objectives and issues, such as those relating to human rights laws. Through the interpretation and application of consumption tax principles, judges could cooperate within the global judicial community to achieve some degree of cross-border consistency in how shared principles are applied. This would require judges to become more engaged in the emerging trend of international judicial cooperation, or “judicial globalization.” Judicial globalization refers to the practice of “global judicial dialogue,” by which judges refer to the judgments of courts in other jurisdictions to learn how

1 Organisation for Economic Co-operation and Development, *International VAT/GST Guidelines* (Paris: OECD, 2006) (partially available online: <http://www.oecd.org/dataoecd/16/36/36177871.pdf>), paragraph 1.

2 Organisation for Economic Co-operation and Development, “OECD To Develop International VAT Tax Guidelines,” press release March 9, 2006 (online: <http://www.uscib.org/index.asp?documentID=3442>).

they have dealt with similar legal issues. Other terms used to describe this judicial practice include “legal cross-fertilization”³ and “transjudicialism.”⁴

In support of increased judicial globalization in relation to consumption tax law, this article sets out to demonstrate, on the one hand, the advantages of engaging in a global judicial dialogue in this field, and, on the other hand, the disadvantages of not engaging in this type of dialogue. The discussion will be based on an analysis of the judicial dialogue, or lack thereof, between the Tax Court of Canada and European courts—specifically, the European Court of Justice and the UK Court of Appeal. I focus my discussion on judicial dialogue over a heavily litigated legal question: When a transaction consists of more than one element of supply, how should the courts determine whether all the elements should be treated as parts of a single taxable supply, or whether each element of supply should be taxed separately? This “question of single supply”⁵ is one of the issues to be addressed by the OECD in its *International VAT/GST Guidelines*.⁶ The key points of my analysis can be summarized as follows.

First, I will discuss a Canadian case, *O.A. Brown Ltd. v. The Queen*,⁷ in which the Tax Court of Canada referred to UK case law in order to derive relevant principles for distinguishing between single and multiple supplies. In that case, the Tax Court found it necessary to refer to principles established by the UK courts because, at the time, Canadian law did not have its own established principles for dealing with that issue. The court’s reference to UK case law enabled it to reach a sound, precedent-setting judgment, thereby exemplifying the benefit of legal cross-fertilization.

Second, I will discuss two UK cases, *Dr. Beynon and Partners v. C & E Comrs*⁸ and *College of Estate Management v. C & E Comrs*,⁹ in which the Court of Appeal could have benefited from referring to the judgment of the Tax Court of Canada in *Sterling Business Academy v. Canada*.¹⁰ I will suggest that had the UK court referred to and followed the approach taken by the Tax Court in *Sterling Business Academy*, it could have properly resolved the legal question under consideration, and could have avoided the reversal of its decisions by the House of Lords.

3 Anne-Marie Slaughter, “Judicial Globalization” (1999-2000) vol. 40, no. 4 *Virginia Journal of International Law* 1103-24.

4 J. Clifford Wallace, “Comparative Perspectives on the Office of Chief Justice” (2005) vol. 38, no. 1 *Cornell International Law Journal* 219-36, at 222.

5 The phrase “question of single supply,” as used in this article, is borrowed from Bowman ACJ in *Canada Trustco Mortgage Company v. The Queen*, 2004 TCC 792, at paragraph 16.

6 According to the released table of contents, the topic of mixed supplies will be dealt with in chapter II of the guidelines (supra note 1).

7 [1995] GSTC 40.

8 [2005] STC 55 (HL).

9 [2005] STC 1597 (HL).

10 [1998] GSTC 130.

Finally, I will illustrate the importance of engaging in a global judicial dialogue by examining the relevance for other courts of the recent European Court of Justice decision in *Talacre Beach Caravan Sales v. C & E Comrs.*¹¹ I will demonstrate that the precedent established in the *Talacre* case may well be relevant for situations such as that considered by the Tax Court of Canada in *Canada Trustco Mortgage Company v. The Queen.*¹²

THE NEED FOR INCREASED JUDICIAL GLOBALIZATION IN THE FIELD OF CONSUMPTION TAXATION

What Is Judicial Globalization?

In a 2005 lecture on the topic of judicial globalization, Panganiban J (subsequently chief justice) of the Philippines Supreme Court explained that “traditionally, laws and judicial decisions are territorial in scope and are binding only within the country of the issuing authority. This concept flows from the centuries-old view that sovereignty is absolute within a state’s boundary.”¹³ Nevertheless, as the American comparatists John Henry Merryman and David S. Clark have noted, “[f]rom ancient times . . . those wishing to establish a just legal system have sought inspiration and example from other lands.”¹⁴ By referring to the views of judges in foreign jurisdictions, judges have been able to either enhance the rationality of their decisions or provide confirmation for their decisions.

In 1999, Anne-Marie Slaughter, a pioneer in the study of judicial globalization, introduced a study¹⁵ that highlighted an emerging trend: judiciaries worldwide have become increasingly engaged in a global judicial dialogue. Claire L’Heureux-Dubé, a former judge of the Supreme Court of Canada, has opined that it is “no longer appropriate to speak of the impact or influence of certain courts on other countries but rather of the place of all courts in a global dialogue on human rights and other common legal questions.”¹⁶ This includes “vertical dialogue” between national courts and supranational courts (for example, between the courts of EU member states and the European Court of Justice, and between national courts and the

11 [2006] STC 1671 (ECJ).

12 Supra note 5.

13 Artemio V. Panganiban, “Judicial Globalization,” lecture before the First Australasia Judicial Educators Forum (AJEF), New World Renaissance Hotel, Makati, February 14, 2005 (online: http://www.cdi.anu.edu.au/CDIwebsite_1998-2004/philippines/philippines_downloads/PhilJudgoba.rtf), 3.

14 Quoted in Carl Baudenbacher, “Judicial Globalization: New Development or Old Wine in New Bottles?” (2003) vol. 38, part 3 *Texas International Law Journal* 505-26, at 525.

15 Slaughter, supra note 3.

16 Quoted in Panganiban, supra note 13, at 4.

European Court of Human Rights),¹⁷ as well as “horizontal dialogue” between national courts of different countries.¹⁸ This phenomenon of global judicial dialogue is described as judicial globalization. Unusual features of this new wave of legal cross-fertilization, as compared with the past, are the growing frequency of references by national courts to foreign judicial views¹⁹ and the broadening range of countries to which they are willing to refer.²⁰

What explains this growing embrace of judicial globalization? Baudenbacher²¹ describes judicial globalization as a reaction to forces such as the globalization of trade, the globalization of social and legal norms,²² the international convergence and homogenization of certain areas of the law, and technological advancements that enable easier communication of judgments, as well as increased personal interaction

17 Slaughter, *supra* note 3, at 1104-12.

18 *Ibid.*, at 1112-19.

19 Slaughter (*ibid.*, at 1117-18) refers to Choudhry’s observation that “extensive and detailed treatments of foreign materials have become familiar features of constitutional adjudication in many courts outside the United States”: quoting Sujit Choudhry, “Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation” (1999) vol. 74, no. 3 *Indiana Law Journal Supplement* 819-92, at 819. For example, “according to one British scholar [Loveland], [s]everal senior members of the British judiciary’ have recently suggested that they are ‘increasingly prepared to accord persuasive authority to the constitutional values of other democratic nations when dealing with ambiguous statutory or common law provisions which impact upon civil liberties issues’”: quoting Ian Loveland, “The Criminalization of Racist Violence,” in *A Special Relationship? American Influences on Public Law in the UK* (Oxford: Clarendon Press, 1995), 253-78, at 257. Slaughter adds that “[e]ven the United States Supreme Court, regarded by many foreign judges and lawyers as resolutely parochial in its refusal to look either to international or foreign law, has begun to stir.” See also Wallace, *supra* note 4, at 222.

20 As Baudenbacher explains (*supra* note 14, at 523), “[j]udicial globalization means being prepared to take into account judgments from every jurisdiction around the globe, not just the laws of the most powerful powers such as the United States, Britain, France, or Germany.”

21 *Supra* note 14.

22 For example, Slaughter notes (*supra* note 3, at 1119) the observation of Calabresi J in *United States v. Then* (56 F. 3d 464, at 466 (2d Cir. 1995)) that “U.S. courts should follow the lead of the German and the Italian constitutional courts in finding ways to signal the legislature that a particular statute is ‘heading towards unconstitutionality,’ rather than striking it down immediately or declaring it constitutional. He [Calabresi J] also observed that the United States no longer holds a ‘monopoly on constitutional judicial review,’ having helped spawn a new generation of constitutional courts around the world.”

Another example is the rise of an “international” human rights law. As Panganiban J has observed (*supra* note 13, at 5), the Universal Declaration of Human Rights is considered to be a compendium of generally accepted legal principles that are incorporated into national laws by express constitutional provision. Similarly, Slaughter notes (*supra* note 3, at 1111) that the judgments of the European Court of Human Rights are increasingly quoted and accepted by national courts within and outside Europe, even though they have no formal binding authority. “Commentators have adduced various explanations for this phenomenon, including the dictates of domestic or international law, the increased publication and hence availability of human rights decisions, and a growing sense that other countries are taking these treaties seriously, a sense enhanced by the explicitly universal rhetoric surrounding human rights law.”

between judges. The significance of this array of forces is that they identify globally shared social and legal issues, and facilitate communication, creating the incentive, need, and capability for judicial cooperation through increased global judicial dialogue.

As Baudenbacher has observed, global judicial dialogue may serve different functions. In some cases, it will provide judges with confirmation of their views and decisions; in other cases, it will enable judges to fill in gaps or rethink existing principles and rules (that is, to consider whether established legal principles and rules are appropriate and effective, how to interpret them, and how to apply them).²³ To the extent that it is necessary and possible, judicial dialogue can also facilitate consistency in how established legal principles are applied by courts across the globe. Moreover, Kersch suggests that global judicial dialogue is making it possible to rethink

[the] very future of the nation-state itself, and, with renewed hopefulness, the prospects for either world government or global governance. To pretend that the Court's current transnational turn has nothing to do with this major intellectual project is to misunderstand fundamentally what is happening in American law and in the jurisprudence of the U.S. Supreme Court.²⁴

How Is Judicial Globalization Relevant for Consumption Tax?

As noted earlier, one of the forces driving judicial globalization is the growth of international trade. After the Second World War, international trade began to flourish; for many countries, it represented a significant part of their economy.²⁵ To facilitate trade, the General Agreement on Tariffs and Trade (GATT) was founded in 1948 as an agency of the United Nations; by 1994, it had 125 members. GATT was replaced in 1995 by the World Trade Organization (WTO), which had grown to 150 members by 2007.

The preamble of the WTO charter established common goals for its members, which include “raising standards of living” and “allowing for the optimal use of the world's resources in accordance with the objective of sustainable development.”²⁶ To achieve the WTO's objectives, the twin agreements at the heart of the organization—the Agreement on Tariff Barriers to Trade and the Agreement on Sanitary and Phytosanitary Measures—preclude national legislatures from introducing unnecessary

23 Baudenbacher, *supra* note 14, at 523.

24 Ken I. Kersch, “The New Legal Transnationalism, the Globalized Judiciary, and the Rule of Law” (2005) vol. 20, no. 4 *Washington University Global Studies Law Review* 345-87, at 379.

25 Alan Schenk and Oliver Oldman, *Value Added Tax: A Comparative Approach* (New York: Cambridge University Press, 2007), 18.

26 Quoted in Dario Ciccarelli, “Better Regulation in the Global Market: Institutional and Economic Implications for Italy: The Role of the World Trade Organization,” paper presented at the Ricerca Giannini-Formez II Fase promotion seminars on Administrative Innovation, International Context and Growth, SPISA Via Belmeloro, Bologna, January 15, 2008 (online: <http://unpan1.un.org/intradoc/groups/public/documents/CAIMED/UNPAN028997.pdf>), 10.

barriers to trade, while at the same time allowing for the legitimate exercise of state power in order to achieve national goals.²⁷

Indirect taxation has had an important role in international trade because of its treatment under GATT, and now under the WTO. As Schenk and Oldman explain,

[w]hen GATT was being negotiated, most of the European countries relied heavily on indirect taxes for their revenue . . . it was easier to identify the indirect tax component in the price of exports, and difficult if not almost impossible to identify any direct tax buried in product prices. It thus is not surprising that GATT permitted signatory countries (contracting parties) to rebate indirect, but not direct, taxes on exports. . . . Thus, countries that relied on turnover or value added tax had border-adjustable taxes; that is, they were able to rebate these taxes on exports and impose them on imports.²⁸

As noted above, the OECD has concluded that differences in the application of VAT/GST principles to international trade result in obstacles to business activities. The OECD is therefore seeking to establish a set of recognized VAT/GST principles to be adopted by OECD and non-OECD countries. The effect of the widespread adoption of such principles would be to further homogenize the law of consumption taxation around the world. In accordance with Baudenbacher's description of the forces that drive judicial globalization, this homogenization and convergence of legal principles, coupled with the widely shared WTO and OECD objectives, could be expected to focus attention on common social and legal problems, which would necessitate increased judicial cooperation.

JUDICIAL DIALOGUE BETWEEN CANADIAN AND EUROPEAN COURTS ON THE QUESTION OF SINGLE SUPPLY

Having identified factors that lead to, and indeed necessitate, increased judicial globalization in the field of consumption tax law, I will now turn to the case law to illustrate the benefits of engaging in a global judicial dialogue and the disadvantages of failing to do so. My analysis focuses on the judicial dialogue, or lack thereof, between the Tax Court of Canada and European courts vis-à-vis the common problem of taxing transactions that consist of more than one element of supply.

Legal Cross-Fertilization at Work: Guidance from the Case Law of a Foreign Jurisdiction

The Single Supply Question: The Problem with Taxing Transactions That Consist of Multiple Supplies

Under both the VAT system adopted by the European Union and the Canadian GST system, consumption tax is levied on transactions in which a taxable person supplies

27 Ibid., at 7.

28 Supra note 25, at 18.

goods or services in exchange for consideration. It should be noted that not every supply of goods or services is taxable, and that the law treats supplies differently on the basis of their type; thus, supplies may be standard-rated, zero-rated, taxable at a reduced rate, or exempt from consumption tax. In order to levy VAT/GST, it is therefore necessary to be able to identify whether the supply is taxable and to determine its characterization for tax purposes (that is, determine what type of supply it is, and how that type is treated for consumption tax purposes).

Under the EC council directive establishing the VAT, tax is imposed on “*the supply* of goods for consideration within the territory of a Member state by a taxable person acting as such.”²⁹ Similarly, in Canada, section 165 of the Excise Tax Act (“the ETA”) provides:

Subject to this Part, every recipient of a *taxable supply* made in Canada shall pay to Her Majesty in right of Canada tax in respect of *the supply* calculated at the rate of 5% on the value of the consideration for the supply.³⁰

Section 123 of the ETA defines “taxable supply” as “*a supply* that is made in the course of a commercial activity.”³¹ Note that under both the council directive and the ETA, taxable supply is referred to in the singular—“the supply” or “a supply.” The courts have deduced from such phrasing that a taxable supply must be distinct and independent.³²

Where a transaction consists of a single (distinct and independent) supply that corresponds to a recognized category (standard-rated, zero-rated, exempt, etc.), it is straightforward to identify and classify the supply in order to determine its tax consequences. However, a transaction may consist of more than one supply, of either goods or services. Where the supplies are of different types, each attracting a different tax treatment, it could be very important, both for taxpayers and for the revenue agency, to determine how the supplies are to be characterized: whether the transaction is seen as providing “multiple supplies,” such that every supply in the transaction is taxed separately on the basis of its own characterization; or whether the transaction is seen as providing a “single supply,” such that all the elements are treated as parts of a single supply and taxed according to the character of that supply. This type of situation may manifest itself in different variations. Below are two typical scenarios exemplified by decided cases.

29 Council Directive 2006/112/EC of November 28, 2006; OJ L 347 (herein referred to as “the council directive”), article 2(1)(a) (emphasis added).

30 RSC 1985, c. E-15, subsection 165(1) (emphasis added).

31 ETA subsection 123(1) (emphasis added).

32 For example, in *Card Protection Plan v. C & E Comrs*, [1999] STC 270, at 293; [1999] All ER (EC) 339, the European Court of Justice explained that “it follows from art 2(1) of the Sixth Directive that every supply of a service must normally be regarded as distinct and independent.”

The first scenario involves a transaction that consists of both zero-rated supplies and standard-rated or exempt supplies. This scenario is exemplified by *Talacre*³³ and *College of Estate Management*.³⁴ In *Talacre*, the taxpayer sold caravans. The transaction consisted of the supply of the caravan, which was taxed at a zero rate, and the contents inside the caravan, which, if treated as a separate supply, would be taxed at the standard rate. In *College of Estate Management*, the taxpayer supplied education services to students, a supply that was exempt from consumption tax. The transaction also included the supply of books, which was zero-rated. In both cases, the taxpayer had an interest in taking advantage of the zero-rate tax treatment of supplies.

Why would taxpayers, such as *Talacre* or the *College of Estate Management*, have an interest in being subject to tax at a zero rate, rather than being taxed at a standard rate or being exempt from consumption tax? The answer is that zero-rating gives rise to tax treatment that is more favourable to sellers and customers, compared with the treatment under standard-rating or exemption. When a taxable person makes a supply other than an exempt supply, the taxpayer is granted the right to deduct input taxes incurred from purchases related to the making of that taxable supply, regardless of the applicable rate. For customers, however, it is obviously more appealing to purchase taxable supplies that are taxed at a zero rate, rather than at a standard (full) or reduced rate. For customers, an exempt supply is also attractive because it is not subject to any output tax. However, an exemption could be disadvantageous for suppliers because the right of deduction does not apply to the making of exempt supplies (unless otherwise provided by statute). Hence, the advantages of a zero-rated supply are that the seller is able to deduct input taxes, while the customer is not burdened because the rate of tax is zero.

It can therefore be understood why it would have been in *Talacre*'s interest to have the standard-rated contents of the caravan treated as though they were part of the supply of the zero-rated caravans, and thus also treated as a zero-rated supply. Similarly, the *College of Estate Management* had an interest in having the books taxed as zero-rated supplies, rather than an exempt supply of education services, and so it would want to have each supply taxed independently (according to its own tax characterization). Conversely, the revenue agency would want to limit access to the benefits of zero-rating in order to either maximize the amount of revenue it could collect by taxing consumption, or limit the right to an input tax deduction. In the *Talacre* case, for example, the revenue agency argued that each supply should be taxed separately on the basis of its own tax characterization, with the effect that the zero rate would apply only to the supply of caravans. In the *College of Estate Management* case, the revenue agency argued that the zero-rated supply of books was part of the exempt supply of education services, and therefore should also be exempt.

The second scenario involves taxpayers that make exempt supplies and either wish to have other supplies in the same transaction fall within the exemption, or wish

33 *Supra* note 11.

34 *Supra* note 9.

to avoid having other supplies fall within the exemption. These different objectives will depend on whether it is advantageous for the taxpayer to be affected by the exemption.

In *Canada Trustco Mortgage Company v. The Queen*,³⁵ for example, Canada Trustco, a mortgage lender, entered into an asset-backed securitization arrangement with securitization trusts. The assets that Canada Trustco supplied to back the securitization were portfolios of residential mortgages. This supply constituted an exempt commercial activity. The transaction also included the supply of “servicing the mortgages” on behalf of the securitization trusts, which, if treated independently, would be a taxable supply. The basis for this treatment is that the supply was provided to a trust whose principal activity was the investment of its funds, which, according to subsection 123(1) of the ETA, is excluded from the financial services exemption. In this case, it was in the interest of Canada Trustco to have the servicing of the mortgages treated as part of the exempt supply of residential mortgages. The revenue agency, on the other hand, sought to deny the exemption for the servicing of the mortgages by arguing that the two supplies were distinct and independent, and each should be taxed according to its characterization.

*Customs & Excise v. BT*³⁶ exemplifies cases where the taxpayer tries to avoid having non-exempt supplies treated as part of an exempt supply in the same transaction, in order to be able to deduct input taxes related to the non-exempt supplies. In this case, British Telecommunications Plc. (“BT”) purchased new cars from different manufacturers. The supply of motor cars is exempt from VAT. The transaction also included the service of transporting and delivering the purchased vehicles. BT wanted to have the transportation and delivery service treated as a distinct taxable supply in order to be able to deduct the related input taxes. The revenue agency argued, however, that the transportation and delivery service was part of the exempt supply of motor cars, and therefore BT should not be entitled to the input tax deduction.

The Tax Court of Canada’s Solution to the Single Supply Question: Adopting the Single Supply Doctrine from UK Case Law

In the European Union, because the VAT directive does not directly address the single supply question, the courts have had to develop guidelines. In the United Kingdom, for example, this question has troubled the VAT tribunal and courts since the inception of a European VAT. In fact, as Avery Jones has noted, the first single/multiple supply case was heard by the UK’s VAT tribunal in 1973—the first year it started to hear cases.³⁷ The current authoritative guidelines are those set out by the European

35 Supra note 5.

36 [1999] 3 All ER 961 (HL).

37 According to Avery Jones, the first reported case was *Comrs of Customs v. Glassborow*, [1974] STC 142 (QB); see John Avery Jones, “The Early Days of the VAT Tribunal” (March 2007) 875 *Tax Journal* 6.

Court of Justice in *Card Protection Plan v. C & E Comrs*³⁸ (referred to here as “the CPP case”). The authoritative status of these guidelines was recently emphasized by the House of Lords in *Beynon*.³⁹

In Canada, the GST came into effect in 1991. Before long, in the *O.A. Brown* case,⁴⁰ the Tax Court of Canada also faced the dilemma of how to treat transactions that consist of multiple elements of supply. Recall Baudenbacher’s explanation that global judicial dialogue may serve different functions, such as confirming a judge’s views or filling in gaps in the law. In *O.A. Brown*, Rip J recognized that

[t]he GST legislation is of recent vintage in Canada and Canadian courts have not judicially considered what may constitute a single or multiple supply for purpose of GST. The *Value Added Tax* statute in the United Kingdom contains many provisions similar to our GST.⁴¹

He then went on to fill in the gaps in the Canadian jurisprudence by engaging in legal cross-fertilization—specifically, by examining how the UK’s VAT tribunal and courts had dealt with the issue he faced in *O.A. Brown*.

Rip J did great service to the Tax Court of Canada by properly distilling from UK case law a sound principle used to guide the single supply question.⁴² The principle has been referred to as the “single supply” doctrine⁴³ or the “economic/customer” analysis.⁴⁴ According to this principle, once it has been found that a transaction consists of more than one supply, it is necessary to determine the reality of the supply/supplies to the customer from an economic point of view: in the arrangement between the parties, what is/are the supply/supplies given in exchange for consideration? In order to conclude that a “single supply” is given, all of its multiple elements must be combined and found to be inextricably interdependent, in the sense that the supply cannot be fulfilled if the transaction excludes any one of the elements. In this case, the transaction should not be artificially split; that is, the different elements of the supply should all be treated on the basis of the tax characterization of the single

38 Supra note 32, at paragraphs 29-31.

39 With regard to decisions prior to the judgment in *CPP*, which were presented to the court for consideration, Lord Hoffmann stated that “there is no advantage in referring to such earlier cases and their citation in future should be discouraged. The *Card Protection* case was a restatement of principle and it should not be necessary to go back any further”: *Beynon*, supra note 8, at paragraph 19.

40 Supra note 7.

41 *Ibid.*, at 40-45.

42 As noted below, this principle was also adopted by the European Court of Justice in the guidelines it set out in the *CPP* case.

43 *Sterling Business Academy*, supra note 10.

44 See, for example, Geoffrey Morse, “Separate or Composite Supplies for VAT—Assessing the Level of Generality: *Dr. Beynon and Partners v. Customs & Excise Commissioners*” [2005] no. 2 *British Tax Review* 190-96, at 192.

supply of the transaction. If, however, it is concluded that the transaction consists of multiple supplies, each supply should be taxed separately according to its own characterization.

Rip J’s willingness to engage in legal cross-fertilization needs to be highlighted because it demonstrates the benefit of participating in a global judicial dialogue. While the decisions of foreign courts are not binding, they can be helpful in providing guidance on how to properly resolve common legal problems, as was the case in *O.A. Brown*; conversely, they may also illustrate inappropriate approaches that should be avoided. *O.A. Brown* is just one of many cases where Canadian judges have engaged in a global judicial dialogue. The Supreme Court of Canada, for example, has been described as “actively participating in the global conversation, particularly in constitutional and human rights law.”⁴⁵ The next section illustrates the disadvantages of not taking the opportunity to participate in a global judicial dialogue.

Experience with a Similar Legal Issue in Consumption Tax Law

Defining the Relationship Between the Economic/Customer Analysis and the Principal/Ancillary Analysis

Again recall Baudenbacher’s explanation that one of the forces driving judicial globalization is the increasing convergence of legal principles and issues, which makes judicial dialogue relevant and beneficial. For example, in the context of constitutional law, Breyer J of the US Supreme Court stated in *Printz v. United States*:

Of course, we are interpreting our own Constitution, not those of other nations, and there may be relevant political and structural differences between their systems and our own. . . . But their experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem.⁴⁶

Likewise, the application of the economic/customer analysis has given rise to similar legal questions and difficulties in Europe and in Canada. The problem was foreshadowed by Lord Widgery’s remark in *Customs and Excise Comrs v. Scott*:

[W]hat I said . . . is to hope that when answering Lord Denning MR’s question [that is, what is the supply for which consideration was given?] in the future in this type of case people do approach the problem in substance and reality. . . . I think it would be a great pity if we allowed this subject to become over-legalistic and over-dressed with legal authorities when, to my mind, once one has got the question posed, the answer should be supplied by a little common sense and concern for what is done in real life.⁴⁷

45 Baudenbacher, *supra* note 14, at 522.

46 521 US 898, 117 S.Ct. 2365, at 2405 (1997). See also Baudenbacher, *supra* note 14, at 515.

47 [1978] STC 191, at 195 (QB). The question posed by Lord Denning was, he said, the real question to be addressed: *BRB v. Customs and Excise Comrs*, [1977] STC 221; [1977] 2 All ER 873, at 876 (CA).

Particularly troubling has been the confusion relating to the relationship between the economic/customer analysis on the one hand and the “principal/ancillary” analysis on the other. As Bowman CJ explained in *Canada Trustco*,

the line between these categories is not always easy to draw. . . . [They] can merge rather easily into each other with subtle shifts of emphasis.⁴⁸

Under Canada’s GST law, the principal/ancillary analysis is established by statute. Section 138 of the ETA provides that where a transaction consists of more than one supply, and the supplies are given together for a single consideration, if there is a principal supply for which the other supply/supplies is/are ancillary, then the ancillary supply/supplies will be treated as part of the principal supply, and thus, the transaction as a whole will be characterized according to the nature of the principal supply.

Under the European Union’s VAT law, the principal/ancillary analysis is established by the judicial guidelines of the European Court of Justice in the *CPP* case.⁴⁹ The court’s guidelines begin by setting out the economic/customer analysis.⁵⁰ The court then goes on to add:

There is a single supply *in particular* in cases where one or more elements are to be regarded as constituting the principal service, whilst one or more elements are to be regarded, by contrast, as ancillary services which share the tax treatment of the principal service. A service must be regarded as ancillary to a principal service if it does not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied. . . . In those circumstances, the fact that a single price is charged is not decisive.⁵¹

Either in the European Union’s VAT system or in the Canadian GST system, what is the relationship between the economic/customer analysis and the principal/ancillary analysis? Is it necessary for there to be a principal/ancillary relationship between the different supplies in order to establish a single supply, or is the principal/ancillary relationship merely one of a range of possible situations in which a transaction with more than one supply should nonetheless be treated as a single supply? This question has resulted in much confusion and a significant amount of litigation in both Canada and Europe.

48 *Supra* note 5, at paragraph 23.

49 *Supra* note 32.

50 *Ibid.*, at paragraphs 29-31.

51 *Ibid.*, at paragraphs 30-31 (emphasis added).

The Approach of the Tax Court of Canada: A Lesson Overlooked by the European Courts

Wise parents do not hesitate to learn from their children.

—Calabresi J in *United States v. Then*,
56 F. 3d 464, at 469 (2d Cir. 1995)

It appears that the Tax Court of Canada addressed the principal/ancillary issue earlier than the UK courts. Three years after his decision in *O.A. Brown*, Rip J was confronted with this question in *Sterling Business Academy*.⁵² In that case, a school charged its students GST on purchases of “books and supplies” (a taxable supply) but not on tuition fees for instruction (an exempt supply).⁵³ The school claimed input tax credits for all of the GST it paid on its own purchases; however, after a few years, the revenue agency sought to reclaim the deducted amounts on the basis that the school was making an exempt supply. More specifically, it was argued that in accordance with section 138 of the ETA, the supply of “books and supplies” was ancillary to the principal supply of instruction, and therefore the school should not be entitled to an input tax credit. Rip J found that the transaction consisted of more than one supply, but there was no principal/ancillary relationship between the supplies. Therefore, the question was whether the absence of a principal/ancillary relationship necessarily meant that the different elements were to be treated as independent supplies, each taxed separately on the basis of its own characterization.

Applying the single supply doctrine (the economic/customer analysis), Rip J examined the economic reality of the transaction to determine what was being supplied for the consideration received. He found that, from the student’s (customer’s) perspective, the economic reality of the transaction was that the student was paying for the supply of academic instruction, which consisted of different elements, such as “teaching, laboratory, supply of books and equipment.”⁵⁴ In other words, a direct link existed between the supply and the consideration on the condition that all of the elements were provided together, such that they were “interdependent and intertwined and each is an integral part of the whole course of instruction.”⁵⁵ Rip J therefore held that despite the lack of a principal/ancillary relationship, the economic reality was that the transaction involved a single exempt supply consisting of several elements, and should be taxed as such. Hence, the fundamental factor in the analysis is the reality of the supply or supplies to the customer from an economic point of view. A principal/ancillary relationship between the supplies is merely one possible indicator that may shed light on that reality.

52 *Supra* note 10.

53 As provided in schedule V, part III, section 1 of the ETA.

54 *Sterling Business Academy*, *supra* note 10, at paragraph 28.

55 *Ibid.*, at paragraph 29.

The judgment in the *Sterling Business Academy* case was delivered in December 1998; the European Court of Justice gave its judgment in the *CPP* case in February 1999. It can therefore be assumed that the European Court of Justice had the opportunity to learn from the confusion that arose in the *Sterling Business Academy* case. Regrettably, as Baudenbacher explains,

[d]ecisions of the European Court of Justice “offer no direct clue as to whether they have been influenced by decisions of the U.S. Supreme Court” or by any other foreign court. In important cases, however, the opinions of the Advocates General contain citations of such courts.⁵⁶

There is no express reference by the advocates general to the *Sterling Business Academy* case, and it seems fair to suggest that the European Court of Justice did not take the opportunity to benefit from the lessons that could be learned from the Canadian experience. Had it done so, it would have clarified more effectively that the absence of a principal/ancillary relationship does not necessarily mean that a transaction consists of multiple supplies.

Perhaps, had the European Court of Justice taken the opportunity to distill the necessary lessons from Rip J’s judgment, the UK Court of Appeal, in applying the European Court’s guidelines in *Beynon*⁵⁷ and in *College of Estate Management*⁵⁸ (both of which addressed legal issues that were fundamentally similar to those in the *Sterling Business Academy* case),⁵⁹ would not have placed its focus primarily on dissecting the transaction to find a principal/ancillary relationship between the different elements of supply. Moreover, it would not have made the mistake of concluding, despite the economic reality of the transaction, that in the absence of a principal/ancillary relationship, the transaction consisted of multiple supplies. On the other hand, perhaps blame should not be placed solely on the European Court of Justice. Perhaps the court’s guidelines, which used the words “in particular”⁶⁰ to link the economic/customer analysis to the scenario where the elements of supply have a principal/ancillary relationship, were not wholly confusing; however, as suggested above, in light of the Canadian experience, the court could have taken greater care to clarify the relationship between the economic/customer analysis and the principal/ancillary analysis. Moreover, perhaps the UK Court of Appeal may itself be at fault for failing to take the opportunity to refer to, and learn from, the *Sterling Business Academy* case.

Either way, it is suggested that had the European Court of Justice and the UK Court of Appeal engaged in a global judicial dialogue, they could have gained from

56 Supra note 14, at 516.

57 Supra note 8.

58 Supra note 9.

59 The *College of Estate Management* case, in particular, had practically identical facts.

60 See *CPP*, supra note 32, at paragraph 30, reproduced in the text above at note 51.

referring to the judgment of Rip J. As the chief justice of the Supreme Judicial Court of Massachusetts, Margaret H. Marshall, has noted,

[p]articipating in the global conversation about human liberty will keep our courts a vital part of the local community we serve and of the world community into which we and our constituents are now so tightly woven. Our constitutional offspring have much to tell us. We would be wise to listen.⁶¹

Similarly, while consumption tax may have emerged out of Europe, European courts nonetheless have something to gain from joining and contributing to the global judicial dialogue. As Marshall CJ reminds us, “wise parents do not hesitate to learn from their children.”⁶²

Following the House of Lord’s judgment in the *Beynon* case, some commentators suggested that the court had failed to adequately clarify the issue.⁶³ In *College of Estate Management*, however, in addition to reversing the Court of Appeal’s mistaken analytical approach, the House of Lords did address the confusion about the European Court of Justice’s guidelines in the *CPP* case.⁶⁴ The House of Lords explained that the fundamental objective is to determine the reality of the supply or supplies to the customer from an economic point of view. In some cases, multiple supplies in a transaction may have a principal/ancillary relationship, which would be indicative of a single supply. Alternatively, the reality may be that the supplies, while not having a principal/ancillary relationship, are all necessary parts that together make possible a single supply, such that, should any of these elements be excluded, the supply could not be fulfilled. In such a case, the transaction should not be artificially split for tax purposes.

Interestingly, in an earlier case, *C & E Comrs v. FDR*,⁶⁵ the UK Court of Appeal did recognize that while there may be cases, such as *CPP*, where a transaction has one principal supply that is supported by ancillary supplies (what it referred to as an “apex” supply), there may also be cases where the transaction consists of several supplies that are integral to each other, but none of which dominates the others (what it referred to as a “table top” supply). In a table top supply, therefore, the analysis is based on determining the core supply that the transaction is providing for consideration. In the *FDR* case, for example, banks outsourced money-transfer services to the taxpayer (“FDR”). The court found that there was no single apex principal service,

61 Margaret H. Marshall, “Wise Parents Do Not Hesitate To Learn from Their Children’: Interpreting State Constitutions in an Age of Global Jurisprudence” (2004) vol. 79, no. 5 *New York University Law Review* 1633-56, at 1656.

62 *Ibid.*, quoting Calabresi J in *United States v. Then*, supra note 22, at 469.

63 See, for example, Morse, supra note 44.

64 Morse also recognized that “the House of Lords in the *Estate Management* case has provided, if not the last word on the subject, a further and substantial clarification of the criteria to be applied”: Geoffrey Morse, “Identifying Supplies. Further Reflections on Third Party and Multiple Supplies: *Debenhams Retail plc v CEC* and *College of Estate Management v. CEC*” [2006] no. 1 *British Tax Review* 54-63, at 60.

65 [2000] STC 672 (CA).

but rather several money-transfer services that were integral to each other. The true and substantial nature of these supplies—the core supply—was the transfer of money, which was exempt. This table top character of transactions was subsequently recognized, as well, by the European Court of Justice in *Levob v. Staatssecretaris van Financiën*.⁶⁶

Further Evidence of the Importance of Global Judicial Dialogue in Consumption Taxation

The relevance of, and need for, engagement in a global judicial dialogue is ongoing. Consider, for example, the recent decision of the European Court of Justice in the *Talacre* case. As outlined above, this case involved the sale of caravans. The transaction consisted of the supply of the caravan, which was taxable at a zero rate, and the contents inside, which would be taxed at the standard rate. By applying the guidelines in the *CPP* case, the court found that the transaction consisted of a single supply: the principal supply was the sale of the caravan, while the contents of the caravan were ancillary to the principal supply. However, by enacting section 30 of the UK's value-added statute⁶⁷ (which was authorized by a directive of the European Council),⁶⁸ the UK Parliament expressly excluded certain items from the scope of zero-rating. The question for the court was whether the revenue agency could apply the statutory exclusion and tax the relevant excluded items at the standard rate, even though, according to the principal/ancillary analysis, the items were part of a single supply that was zero-rated. The European Court of Justice held:

While it follows, admittedly, from that case law that a single supply is, as a rule, subject to a single rate of VAT, the case law does not preclude some elements of that supply from being taxed separately where only such taxation complies with the conditions imposed by art 28(2)(a) of the Sixth Directive on the application of exemptions with refund of the tax paid.⁶⁹

[T]here is nothing to support the conclusion that the application of a separate rate of tax to some elements of the supply of fitted caravans would lead to insurmountable difficulties capable of affecting the proper working of the VAT system.⁷⁰

The court's decision appears to be sensible. In accordance with the principle of parliamentary sovereignty over taxation, Parliament's expressed intentions should be given priority over inconsistent conclusions drawn from judicial principles, such

66 [2006] STC 766 (ECJ). The European Court of Justice stated that two or more elements may be so closely linked that they form a single indivisible economic supply, which should not be artificially split.

67 Value Added Tax Act 1994, c. 23.

68 Article 28(2)(a) of the Sixth VAT Directive (77/388/EC), amended by Council Directive 2006/18/EC of February 14, 2006 (OJ L 51/12).

69 *Talacre*, supra note 11, at paragraph 24.

70 *Ibid.*, at paragraph 26.

as the economic/consumer analysis and the principal/ancillary analysis. The *Talacre* decision clearly establishes limitations on the applicability of these judicial principles. As Cordara points out,

[w]hat *Talacre* shows us is that the ECJ will not sacrifice the aims of the VAT system on the altar of the supposed single supply rule. . . . *Talacre* is a revival of the view of the London VAT Tribunal quoted above (*Rayner & Keeler*) that the important thing is to tax in a way closest to Parliament’s intentions. Parliament did not want removable contents of caravans to be taxed, so they were not—even though they formed part of a single supply.⁷¹

Other consumption tax systems may possibly also experience this type of inconsistency between, on the one hand, conclusions derived from the application of judicial principles and, on the other hand, Parliament’s expressed intentions. It is therefore of great importance that this development be noticed within the global judicial dialogue.

Consider, for example, the judgment of the Tax Court of Canada in *Canada Trustco*.⁷² In that case, as noted above, Canada Trustco, a mortgage lender, entered into an asset-backed securitization arrangement with securitization trusts in order to raise money at an appealing interest rate. The assets that Canada Trustco supplied to back the securitization were portfolios of residential mortgages. The arrangement also included, without additional cost to the trusts, the supply of “servicing the mortgages” on behalf of the trusts. While the trusts did not have to pay an additional fee for the servicing, Canada Trustco did record the fee in its statements.

The Canadian revenue agency sought to claim uncharged GST on the servicing of the mortgages. It argued that the servicing of the mortgages amounted to a supply separate from the sale of the mortgages. (Note that the sale of the mortgage was a “commercial activity,” but it was also an exempt financial activity under part VII of schedule V of the ETA.) Further, the servicing was a taxable supply because it was provided to a trust whose principal activity was the investment of its funds (which, according to subsection 123(1) of the ETA, is excluded from the financial services exemption). Therefore, the question before Bowman ACJ (as he then was) was whether the transaction amounted to a single supply or multiple supplies, and accordingly what was the appropriate tax treatment of the servicing of the mortgages.

Bowman ACJ applied Rip J’s single supply doctrine from the *O.A. Brown* case. Looking at the economic reality of the transaction, he found that the transaction provided a single supply of mortgages to the trusts. He also found that the sale was inextricably dependent on the servicing of the mortgages, since it was unfeasible to have someone other than Canada Trustco service the mortgages, and the supply of mortgages without servicing would defeat the purpose of the transaction. Therefore,

71 Roderick Cordara and Jern-Fei Ng, “Single/Multiple Supplies” (June 2007) 891 *Tax Journal* 12.

72 *Supra* note 5.

the servicing of the mortgages had to be categorized in the same way as the overall “true” supply of the transaction—the exempt supply of mortgages.

Bowman ACJ’s conclusion, based on the application of the single supply doctrine, would have appeared at the time to be sound. As van der Stok and Sinyor suggest, the same conclusion could have been expected under the EU’s VAT, if such a situation had faced the courts in Europe.⁷³ However, the recent judgment of the European Court of Justice in *Talacre* casts, in retrospect, a shadow over the application of the single supply doctrine in *Canada Trustco*.

A case comment in the *International VAT Monitor* has raised the following question(s) about the *Canada Trustco* decision:

The sales of the mortgages were completed on day one, yet the subsidiary supplies continued for years or decades, as Canada Trustco would service the mortgages throughout their life. Yet the Court concluded that the servicing of the mortgages was sufficiently subsidiary to their sale that it is part of the sale even though it continues for many more years. . . . [I]f the Court wishes to extend the “single supply” concept in this way, it would be appropriate to explore the implications of this decision. It means, in effect, that provided the conditions for exemption are met upon the sale of a given mortgage, *Canada Trustco can continue not to charge GST on servicing fees which Parliament has said are taxable, for 25 or 30 years after that sale!* This is, as noted, a significant extension of the “single supply” concept.⁷⁴

In referring to “servicing fees which Parliament has said are taxable,” the author, I assume, was alluding to paragraph 123(1)(q) of the definition of “financial service” in the ETA, which provides (in part) that the exemption granted to financial services shall not apply to

the provision . . . to any corporation, partnership or trust whose principal activity is the investing of funds, of

- (i) a management or administrative service, or
- (ii) any other service (other than a prescribed service), if the supplier is a person who provides management or administrative services to the . . . corporation, partnership or trust.

As Bowman ACJ concluded in *Canada Trustco*,⁷⁵ the servicing of the mortgages in this case is affected by paragraph 123(1)(q), with the result that the service is excluded from the exemption granted to financial services. Despite this express parliamentary exclusion from the scope of the financial services exemption, Bowman ACJ concluded, on the basis of the application of the single supply doctrine, that the servicing of the

73 Eelco van der Stok and Alan Sinyor, “Securitizations: VAT Aspects in the European Union” [January/February 2003] no. 1 *Derivatives and Financial Instruments* 2-5.

74 “Servicing Mortgages Was Part of a Single Supply of Selling Mortgages,” Case Notes—Canada (2005) vol. 16, no. 3 *International VAT Monitor* 216.

75 *Supra* note 5, at paragraphs 6-14.

mortgages was an integral part of the overall supply of the mortgage; that the supply should therefore not be artificially split; and thus, that the servicing of the mortgages should be subject to the exemption granted to financial services.

The question raised in the case comment referred to above assumes greater significance in light of the recent judgment of the European Court of Justice in *Talacre*. At hand is the choice between two alternative approaches. Recall, from *Talacre*, that the UK Parliament expressly excluded certain items from the scope of zero-rating, and that the relevant items in the case were affected by this exclusion. This is analogous to the facts in *Canada Trustco*, where Canada’s Parliament expressly excluded a supply such as the servicing of mortgages from the scope of the exemption granted to financial services. The two cases differ, however, in how the interplay between Parliament’s intentions and the judicial principles (that is, the single supply analysis and/or the principal/ancillary analysis) was resolved. Bowman ACJ gave force to the single supply analysis, which resulted in an exemption of the servicing of mortgages even though this was contrary to the treatment stipulated by Parliament (exclusion from the exemption). In contrast, the European Court of Justice in *Talacre* gave force to the UK Parliament’s exclusion of the items from the scope of zero-rating, even though the principal/ancillary analysis suggested that the items were ancillary to the principal zero-rated supply. It is submitted that if a case with such circumstances and issues is considered by the Tax Court of Canada in the future, as could well happen, the court should be encouraged to refer to and follow the approach of the European Court of Justice in the *Talacre* case.

There remains the question of whether this analysis undermines Bowman ACJ’s judgment in *Canada Trustco*. As Bowman ACJ acknowledged, the conclusion he reached (based on the single supply doctrine) could also have been reached by applying Parliament’s own rules in sections 138 and 139.⁷⁶ Although, as he noted, his conclusion was sufficient to dispose of the case, he chose, “out of respect for the arguments of counsel,” to address the alternative positions advanced—that is, the application of sections 138 and 139.⁷⁷ Bowman ACJ found that even if the different elements—sale and servicing—were separate supplies, there was no evidence to suggest that the principal/ancillary rule in section 138 was not satisfied. There was no evidence that anything other than single consideration was paid for the transaction, and it was clear that the servicing was ancillary to the principal supply (the sale of the mortgage).

Note that while the principal/ancillary analysis is a judicial principle in the application of the European VAT (as established in the *CPP* case), in Canada it is a statutory rule (codified in section 138 of the ETA). Therefore, while the principal/ancillary analysis could not be applied in the *Talacre* case, because it was inconsistent with Parliament’s intentions as expressed by statute, it is arguable that the principal/ancillary analysis could have been applied in *Canada Trustco*, because it is itself a

76 *Ibid.*, at paragraphs 22-35.

77 *Ibid.*, at paragraph 22.

statutory rule (that is, an explicit expression of Parliament's will). Therefore, Bowman ACJ's decision is sustainable on the basis that it recognized, as an alternative, the application of the rule in section 138 of the ETA. Ironically, while Bowman ACJ stated that he would proceed to consider the effect of sections 138 and 139 even though it was not necessary to do so (because the conclusion drawn from the application of the single supply doctrine was "sufficient to dispose of the case"), in hindsight the application of these statutory rules was necessary after all.

As a postscript to the foregoing analysis, there is yet another meaningful potential issue that ought to be mentioned, at least briefly. In both the *Talacre* and the *Canada Trustco* cases, Parliament's intentions on the tax treatment of a particular type of supply were explicitly set out by statute. A question that apparently has yet to be addressed in the global judicial dialogue is how to deal with the interplay between judicial principles and Parliament's intentions when those intentions are not expressed explicitly but only implied.

CONCLUSION

In discussing the emergence of judicial globalization, this article has focused on the global judicial dialogue with respect to a specific issue in consumption tax law, namely, the single supply question. I assume that, with some investigation, many other examples could be identified to support the claim that judiciaries around the world could benefit from participating in a global judicial dialogue. As stated above, the relevance of such a dialogue in consumption tax law will likely increase once the OECD's forthcoming principles of consumption tax have become adopted around the world. It is therefore recommended that a shift in the attitude of judiciaries toward engaging in global judicial dialogue should begin sooner rather than later. As Baudenbacher has recognized, credit must be given to the Canadian courts for their leadership in this emerging global trend.⁷⁸ Another noteworthy leader is the Swiss Supreme Court, which "has been praised as a role model of openness when it comes to judicial conversation. Approximately ten percent, if not more, of all judgments contain comparative remarks."⁷⁹ It is to be hoped, if not expected, that other courts around the world will follow suit.

78 Baudenbacher, *supra* note 14, at 522.

79 *Ibid.*, at 520.