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• THE FISCAL LANDSCAPE: PART I •

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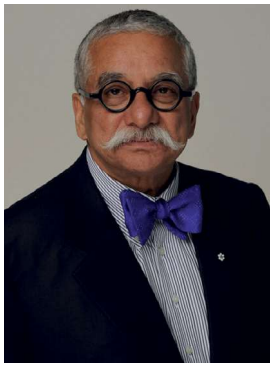

Vern Krishna CM

GENERAL COMMENT

September 20, 2017 was the 100th anniversary of the Canadian income tax. We start 2018 by looking at the fiscal landscape to see how much "progress" we have made in a hundred years, and the nature of problems that lie ahead on the domestic and international fronts. As with a jigsaw puzzle, we need to look at the picture on the front of the box before we start putting the pieces together. Hence, we examine the nature and meaning of taxes, the constitutional authority to levy them, and the analytical framework of fiscal legislation, its administration and judicial dispute resolution.

• In This Issue •

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Nature of Income Tax Law

We tend to think of income tax a recent invention of governments. That is because both Canada and the United States introduced taxes at about the same time to fight World War I, and then continued with it to fight World War II, and many subsequent wars. But taxes have a much longer history.

Historically, taxes had considerable religious meaning and were a fundamental part of ancient Greece, and the Roman Empire. We can see the religious aspect of taxation in the Brancacci Chapel in Florence, where the fresco *Rendering of the Tribute Money* depicts the gods approving the Florentine income tax.

Modern income tax systems are less religious, and most were introduced to finance revolutions and wars. The Boston Tea Party, for example, was essentially a revolution against Great Britain's Stamp Tax on everything from tea to legal documents, and gave birth

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to the phrase "No taxation without representation", which is incorporated in Canadian constitutional law.

However, income tax law has evolved from being a revenue generator, and is now also concerned with social, economic, and income redistribution. Tax law is now behavioral finance. Tax rules are used to invoke behavioural responses from taxpayers to respond to incentives and sanctions. For example, there are special tax rules to encourage Canadian culture and films [See: section 125.5], and discourage investments in foreign magazines [subsection 19(1)].

Ultimately, taxpayers and tax administrators must be capable of understanding the law if they are expected to comply with it. This is not an easy task, and has substantial financial costs in the form of compliance, and administrative and legal dispute resolution. The multiple purposes served by, and responses to, income tax law contribute to its complexity. As we pass through the 100th anniversary of the Canadian income tax system, we should remember that the size of the original statute was 11 pages and that the current version of the *Income Tax Act* of approximately 3000 pages.

Since income tax is a form of appropriation of private property for public purposes, it inevitably creates friction between taxpayers who engage in tax minimization and tax collectors who seek new way to curb tax leakage. The tension results in prolonged and costly litigation. There is no alternative dispute resolution process in tax law, and access to justice is limited for middle income taxpayers.

Income tax law has a reputation of being a difficult and dry subject. To be sure, tax law is difficult, but it is neither dry nor unpleasant. Yes, tax law is replete with difficult and obtuse language. The most recent amendments to the Income Tax Act, announced on December 13, 2017, dealing with the tax on shifting income (TOSI) are a testimony to the style of Canadian drafting of fiscal legislation.

Nevertheless, taxpayers must live with the statute as it is, and not with the one that they wish had been written. We must comply with the law or face severe sanctions. Advisors must advise, litigators

litigate, and judges adjudicate, on uncertain, changing, complex and poorly drafted provisions. Tax litigation is long and expensive process that is well beyond the reach of middle-income taxpayers, and there is no reasonable expectation of any reversal.

THE MEANING OF TAX

The term "tax" derives from the Latin verb "taxare" meaning "to touch repeatedly", which, ironically, is exactly what taxes do — they touch us repeatedly in every facet of our lives.

The *Income Tax Act* (Canada) ("*Act*") does not formally define either "income" or "tax". We have developed the legal meaning of these terms through various interpretations in the case law. Although there are several sources that define "tax" in various contexts, their common theme is that taxes are an enforced contribution that a state levies by virtue of its sovereignty to support its operations and public needs. Legislatures sometimes describe taxes as "charges", "exactions" or "duties". However, the common element of all taxes is that they are mandatory and coercive. They operate *in invitum* — against an unwilling person.

The meaning of "tax" is important because of constitutional restraints on the power to tax. The Canadian Constitution divides the authority to impose taxes between the federal and provincial governments. The federal parliament has the power to raise money by *any* mode or system of taxation. In contrast, the provinces can impose income taxes only through direct taxation within the province, and then only for raising revenue for provincial purposes. Thus, it is important for constitutional reasons to identify whether a levy is a user fee, license, penalty or tax and on whom the burden falls.

It is important to look beyond the label attached to levies to determine their meaning. Since all taxes are painful, politicians like to soften the blow of taxing statutes by calling them by gentler names to lessen their pain. For example, in 1996 Premier Dalton McGuinty of Ontario introduced the Fair Share Health Care Levy (FSHCL), and in 2004, a health care "premium". Both the levy and the premium were in substance "taxes".

Similarly, the United States enacted the *Patient Protection and Affordable Care Act* (2012) (which is known as "Obama Care") as "health insurance". The individual mandate required most Americans to maintain "minimum essential" health insurance coverage. Individuals had to pay a "penalty" to the Internal Revenue Service if they did not obtain coverage. The Act described the "shared responsibility payment" as a "penalty". The essential constitutional question was whether the Federal Government could order people to buy insurance, and subject them to a penalty if they did not do so.

The United States Supreme Court held that the Federal Government did not have the power to order people to buy health insurance, and the relevant provision of the Internal Revenue Code was unconstitutional *if* read as a command. However, the Federal Government did have the power to impose a *tax* on those without health insurance. Hence, the relevant provision was constitutional, because in substance it was a tax. In fact, Obama Care was saved because it was a tax.

The statutory label of a levy can be important for political purposes. However, it is irrelevant in determining the legal character of the levy. Exactions may not be taxes even when labeled as such, and be taxes when not so labeled. One must look past the label of the exaction to its pith and substance to determine its character.

A tax raises revenue for public expenditures by attaching to an event — for example, earning income, buying goods and services, or engaging in an activity. In contrast, a penalty is a punitive sanction for doing something that is considered harmful and, in most cases, requires the actor to have knowledge of the wrongful act.

To be sure, both taxes and penalties affect conduct, but they do so in different ways. Tax provisions are often used for purposes other than to raise revenue. For example, taxes on cigarettes not only raise substantial revenues for governments, but are also

intended to encourage people to give up smoking for health reasons. In contrast, governments use liquor taxes primarily to raise revenues, but without excessive concern for health.

Thus, every tax is in some measure regulatory in that it poses an economic impediment to the activity taxed, as compared with others that are not taxed. In contrast, penalties imply punishment for an unlawful act or omission — such as, for example, failure to secure a motor vehicle permit or a dog license.

Taxpayers do not generally receive specific measurable benefits from their taxes. A tax is simply an enforced contribution pursuant to constitutional legislative authority to raise revenue for public purposes and not as a payment for some special benefit or service. Taxpayers do, however, indirectly derive benefits from government services — such as, national defense, health care, public schools, judicial services and public roads, etc.

Behavioral Finance

All laws are behavioral. Tax laws invite behavioral responses from taxpayers. We need to focus on the real-world consequences of legal rules. For example, at the top end of the rate scale, where governments take more than one-half of one's earned income, it is understandable that individuals expend considerable energy and resources trying to minimize the tax bite. Corporations, which are more mobile than individuals, seek to improve their return on equity (ROE) by minimizing their tax exposure to Canadian tax, and move their income to low tax jurisdictions.

Frustrated by the creativity of taxpayers in legally avoiding tax, legislators respond by drafting provisions that are ever longer, and more complex in order to reduce tax leakage and revenue loss, sometimes referred to in economic circles as the "tax gap".

The raising of revenue is the imperative justification of tax law. However, now, governments also use tax law to implement social policies and redistribute income. Hence, the Canadian individual tax return form is labeled "Income Tax and Benefit Return". However, nearly one-third of the approximately 27 million Canadians who file personal tax returns do not pay any income tax at all. They filed their returns primarily to receive income-tested benefits from, and not pay taxes to, the government. Thus, we use our tax law to balance different objectives: funding of public expenditures, economic policies, regional disparities and redistribution of income. No other statute serves so many diverse — and often, conflicting — purposes.

Badly Drafted

The *Income Tax Act* is badly drafted. The statute violates almost every principle of good grammatical construction. For example, our drafting tradition requires that each subsection of the *Act* — no matter its length — should be a single self-contained sentence. Single sentence drafting of complex provisions that can contain several hundred words causes interpretational difficulties.

The comments of a member of the British Parliament speaking about the Irish Home Rule bill in 1889 would also fairly describe the Canadian *Income Tax Act* today:

> "... it sweats difficulties at every paragraph; every provision breeds a dilemma; every clause ends in a cul-de-sac; dangers lurk in every line; mischiefs abound in every sentence and an air of evil hangs over it all."

The notion that only Parliament enacts tax legislation is the bedrock of our constitutional history. It does not mean, however, that parliamentarians read and understand the legislation that they enact. That is left to the bureaucrats, who advise the Minister of Finance, to explain what the legislation is intended to achieve. They do so in obscure language. As Mogan J. of the Tax Court of Canada described a definition in the *Act*:[1]

> "The definition is prolix in the extreme. The persons who drafted that definition did not practise any economy of words or language. One may well ask how many members of parliament understood the definition when it was made law by amendment to the Act."

Shorn of its technical language, however, the statute is a policy document that reflects the social,

political, economic and moral values of society at any particular time. There is a reason or purpose underlying every provision. Although the policy of provisions may not be obvious on first reading, the rationale is there for those who search for it. As Frankfurter J. said:[2]

> "Legislation has an aim: it seeks to obviate some mischief, to supply an inadequacy, to effect a change in policy, to formulate a plan of Government. That aim, that policy is not drawn, like nitrogen, out of the air; it is evinced in the language of the statute as read in the light of other external manifestations of purpose."

THE BASIC QUESTIONS

We must ask five basic questions in tax law:

1. What is the law?
2. Why is the law?
3. How does it function?
4. How do the courts interpret the law? and
5. How do taxpayers respond to the law?

The first step is to read the statute slowly and carefully. The next two steps are closely related. We apply the plain meaning of words where the language is "clear and unambiguous". The meaning of words in tax law, however, is rarely as plain as its authors anticipate when they draft the legislation. Where the language is not clear, we should look to the purpose or policy (its object and spirit) of the provision to determine its rationale.

The words of the tax statute are primordial. Judges are deferential, at least on the surface, to the words that Parliament enacts. However, every judicial interpretation has policy implications. Judges may look at legislative history, and engage in purposive analysis, when the words of the statute are capable of different meanings. In *Hewlett-Packard (Canada) Co. v. Canada*,[3] for example, the Tax Court had to wrestle with whether the word "lodge" included "luxury hotels". If it did, the taxpayer could not deduct expenses to entertain its employees in the particular hotels. The purpose of the rule prohibiting deduction of lodge expenses is to prevent expense account living on the public purse. Although dictionaries sometimes use the word "hotel" to describe "lodge", the Tax Court did not think that most Canadians would describe large resort hotels with a range of modern amenities as "lodges". Thus, the Court allowed the taxpayer to deduct its substantial expenses and, in doing so, sideswiped the underlying policy of the provision against the deduction of such expenses.

Purposive analysis requires an understanding of the principles and policies underlying tax law. Judges, consciously or unconsciously, may inject their own policy perspective in interpreting the statute and apply their own normative beliefs of the appropriate policy. As Justice Benjamin N. Cardozo said in his classic work, *The Nature of the Judicial Process* (1949):

> "Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge."

Ultimately, judges are lawmakers. Hence, in tax litigation, it is important to "know" your judge and his or her judicial history before arguing a case.

HISTORICAL BACKGROUND

The most significant study of Canadian tax law followed the *Carter Commission* (1966), culminating in the current version of the *Income Tax Act*, which came into effect on January 1, 1972. Since then, there have been various attempts at "reform" and "simplification" of the statute, all with minimal success. The statute is now incomprehensible to the average person, who must, nevertheless, comply with it under threat of severe sanctions for non-compliance. As the Joint Committee on Taxation of the Canadian Bar Association and the Canadian Institute of Chartered Accountants, in addressing the House of Commons Committee on Finance and Economic Affairs, said:

> "For any taxpayer to pick up some of this legislation we are looking at today and understand how these

> rules are going to impact on him when he sits down to fill out his tax return is almost impossible.
>
> There is no quick fix to the complexity issue. It is a very long-term problem, but I fear that the Government's priority for tax simplification has fallen down to the bottom of the various objectives set out for tax reform."

Tax professionals have abandoned any hope of tax simplification. In 1997, for example, the Report of the Technical Committee on Business Taxation reported:[4]

> "[I]n a complex society that is part of a world economy, where the form and processes of business activities are increasingly sophisticated, and where the tax system is also used for purposes other than raising revenue, it is unrealistic to expect our tax system to be simple."

Bureaucrats write complex laws. Taxpayers must live with the complexity of the statute, and pay for professional advice to comply with the law. Resolving tax disputes is a slow, arduous, and expensive process. It is not unusual for dispute resolution of moderate complexity to extend to ten years. Complex files can be litigated for fifteen to twenty years. Hence, we speak of the "unpleasant subject of taxes".

SOURCES OF TAX LAW

There are four principal sources of tax law in Canada:

- The *Income Tax Act*,
- Regulations pursuant to the Act;
- Tax treaties; and
- Judicial decisions interpreting the law.

The courts do not formally enact tax law. The constitutional doctrine is that only Parliament and the legislatures can enact tax law. However, the courts interpret the law as written by Parliament, and, in doing so, "make" tax law through their interpretations.

Canada also has a large, and ever increasing, number of bilateral tax treaties with other countries. These treaties are enacted into Canadian law by Parliament and, therefore, become part of our domestic law.

The Canada Revenue Agency also issues various interpretations of tax law. These interpretations and rulings are helpful in discerning the CRA's administrative views. They serve as the basis for uniform application of tax administration across the country in various regional tax offices. They also signal taxpayers and their professional advisors as to the CRA's assessing policies in respect of particular provisions and, through rulings and comfort letters, provide some certainty in tax planning.

Although helpful to taxpayers, CRA interpretations, circulars, rulings, and comfort letters are not law. However, they may be of some persuasive value in interpreting ambiguous provisions of the ITA. As the Supreme Court of Canada said in *R. v. Nowegijick*, [1983] S.C.J. No. 5, [1983] 1 S.C.R. 29:

> "Administrative policy and interpretation are not determinative but are entitled to weight and can be an "important factor" in the case of doubt about the meaning of legislation" (para. 37).

Similarly, in *Mattabi Mines v. Ontario (Minister of Revenue)*, [1988] S.C.J. No. 72, [1988] 2 S.C.R. 175, the Supreme Court of Canada, per Wilson J.:

> "Crucial to a resolution of this issue is an understanding of the legal effect of administrative practice as publicized in Interpretation Bulletins [now referred to Folios]. As already mentioned, the latter are not authoritative sources for the interpretation of taxing statutes."

However, the resolution of statutory ambiguity by reference to the CRA's administrative views in its pronouncements does not imply that the Minister's interpretation should prevail. Any such presumption would confer *de facto* rule making authority on the Minister, which would be contrary to the fundamental doctrine of Parliamentary supremacy in tax law.

The law is clear: The Deputy Minister does not have the power to legislate. Nevertheless, for its own internal purposes, auditors and appeals branch officers usually consider their own bulletins and folios to be the definitive interpretation of the law. Hence, in disputes involving legal interpretation, taxpayers

must evaluate the costs and time value of proceeding by administrative appeal to the CRA against the merits of proceeding directly to trial.

TAXPAYERS

A significant element of tax complexity is the multitude of types of entities and relationships to which different rules apply. A tax system must identify each type that it shall tax, and specify the rules that apply to each group. For example, the Canadian income tax system identifies:

- Individuals (natural persons);[5]
- Corporations (artificial entities);[6]
- Trusts (relationships);[7] and
- Partnerships (flow through relationships).[8]

In addition, there are many special purpose entities, such as, mutual funds, charitable organizations, and various registered plans.

Each individual is a taxpayer in his or her own right, and must file a tax return in respect of tax payable for the year. Corporations, trusts and estates are also taxpayers in their own right, and must file separate returns. A partnership is not a taxpayer in its own right, but we determine its income at the partnership level *as if* it were an entity, and partners then declare their share of income in their tax returns. The rules that govern the flow of income between various types of taxpayers require complex provisions in order to prevent double taxation, tax leakage and tax avoidance.

THE INCIDENCE OF TAXES

Tax law is a combination of constitutional, statutory, and case law. The Canadian Constitution allocates the power to tax based on the *legal* incidence of the tax.

The legal incidence of a tax is on the taxpayer who is required to pay the tax. The Act identifies who is liable to pay tax[9], the income[10] on which the tax is payable and the time for payment[11].

The economic incidence of a tax falls on the person who ultimately bears the economic cost of the tax — that is, the person who endures the financial burden. The economic incidence of a tax may be quite different from its legal incidence because the cost may be passed on. For example, the Harmonized Sales Tax (HST) is legally levied on the person who collects and remits the tax, but its economic impact is on the ultimate consumer who buys the goods or services. Similarly, since corporations are artificial entities, they do not bear the ultimate financial burden of taxes. The ultimate economic incidence of corporate taxes is passed on to shareholders (reduced dividends), employees (reduced wages) and customers (higher prices).

It is difficult to measure the economic incidence of taxes because of the complexities of the underlying supply and demand conditions (including elasticity), contractual arrangements (labour contracts) and other factors. Nevertheless, it is important for policy makers and legislators to evaluate both the legal and economic incidence of the taxes that they enact to ensure that they are efficiently targeted.

THE AUTHORITY TO TAX

Division of Powers

Democratic societies cherish the rule of law and accountability for the collection of taxes for public purposes. Under Canadian law, the federal Parliament and provincial legislatures have the constitutional authority to impose taxes. We can trace the roots of the rule — no taxation without representation — as far back as *Magna Carta* (1215).

Under the doctrine of parliamentary supremacy, the Constitution and legislative traditions determine the power to tax and the passage of money bills. Section 53 of the *Constitution Act,* (1867) is a constitutional imperative:[12]

> "Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall *originate* in the House of Commons."

The Constitution[13] divides the authority to impose taxes between the federal and provincial governments. The federal Parliament has the power under subsection 91(3) to raise money by *any* mode or system of taxation. Subsection 92(2) allows the

provinces to impose income taxes, but only through *direct* taxation within the province and only for raising revenue for provincial purposes. This division of the taxing power gives the federal government considerable power over the national economy and the distribution of income.

The legislative body must clearly express its will to levy a tax in the first instance. Although the legislative body can delegate the details of taxation to another body, it must do so in unambiguous language that clearly expresses its intention.[14] However, neither the Dominion nor a province may delegate to the other its power to legislate on taxation.[15]

This dual authority to levy income taxes results in differential income tax burdens in various regions in the country. The income tax burden for Ontario residents, for example, is substantially higher (53.53 per cent in 2018) than the equivalent tax in Alberta (48 perc ent).

The *Income Tax Act,* the primary source of income tax law, authorizes the enactment of *Income Tax Regulations* ("Regulations"). Parliament can amend the Act but only through a Bill introduced in the House of Commons. In contrast, Regulations are enacted by Orders–in-Council, which are essentially determined by the Cabinet.

The rationale for limiting provincial legislatures to direct taxation is to contain their powers within their boundaries. Thus, the provincial taxing power is limited in law to direct taxes, imposed within the province, and for provincial purposes. This prevents a province from using its taxing power for colorable purposes by concealing its real objectives. In economic terms, however, we cannot contain provincial taxes within a province. Taxpayers can pass on direct taxes to persons (for example, consumers) outside the province.

The distinction between direct and indirect taxes is more rigid and formalistic in legal terms than it is in economic analysis. For example, in 1848, John Stuart Mill stated the distinction between direct and indirect taxes as follows:

> "A direct tax is one which is demanded from the very persons who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another, such as the excise or customs."

In the final analysis, the constitutional validity of a tax depends upon its "pith and substance", which is another way of saying that the substance of the levy will prevail over its form. Thus, the crucial inquiry is the object and primary purpose of the scheme and not simply its formal or superficial characteristics.[16] The pith and substance approach contrasts with blanket categorizations whereby certain categories of taxes — such as property and income taxes — are considered as direct taxes.[17]

For example, in *Atlantic Smoke Shops Ltd. v. Conlon*:[18]

> "Their Lordships are of opinion that Lord Cave's reference in his judgment in the Fairbanks' case to "two separate and distinct categories" of taxes, "namely those that are direct and those which cannot be so described", should not be understood as relieving the courts from the obligation of examining the real nature and effect of the particular tax in the present instance, or as justifying the classification of the tax as indirect merely because it is in some sense associated with the purchase of an article."

Hence, we look at the *legal* incidence of a tax, not its label, to determine its constitutional validity.[19]

The categories approach does not always provide an unequivocal answer to the nature of a tax. For example, a land tax would usually be a direct tax; it may, however, also be an indirect tax under the legal incidence test. As Iacobucci J. said in *Ontario Home Builders' Association*:[20]

> "The hallmarks of a land tax are that the tax is, of course, imposed on land against the owner of the land, and that the tax is assessed as a percentage of the value of the land, or a fixed charge per acre. The tax may be an annual, recurring assessment, or a one-time charge... Although landowners, like everyone, may wish to pass on their tax burden to someone else or otherwise avoid taxation, this desire or ability does not transform the direct nature of the tax into an indirect one... the case law reveals that land taxes are generally direct taxes; but I do not believe the case law prevents

> a tax on land by itself from being treated as an indirect tax."

Most economists consider Mills' definition of direct and indirect taxes as narrow and rigid. Indeed, the question as to who actually bears the burden of any tax ("incidence of taxation") is an unsettled economic issue. Nevertheless, in constitutional law, Mills' distinction between the two forms of taxes provides a finite answer[21] and is now considered the accepted test.[22]

Restraint on Powers

Section 125 of the *Constitution Act,* (1867) provides that no lands or property belonging to Canada or any province shall be liable to taxation. This provision provides inter-governmental immunity from taxation in respect of "lands or property" owned by the federal or provincial Crown. The restriction also extends to Crown agents such as Crown corporations.[23]

What is the extent of this protection? The first question we must determine is whether a particular statutory measure is a "taxation" measure or the exercise of regulatory power under some other legislative head, for example, the commerce clause. On its surface, it appears as though section 125 exempts only provincial "lands or property" from federal taxation. The restraint on the federal government is, however, broader: section 125 applies not only to provincial lands or property but also to taxes levied on persons and transactions in respect of Crown property. Thus, section 125 overrides the express powers of taxation contained in subsections 91(3) (the federal power) and 92(2) (the provincial power) of the *Constitution Act,* 1867, and provides a constitutional guarantee of immunity from federal taxation of provincial property.[24] The Supreme Court of Canada has stated:[25]

> "This immunity would be illusory if it applied to taxes "on property" but not to a tax on the Crown in respect of a transaction affecting its property or on the transaction itself. The immunity would be illusory since, by the simple device of framing a tax as "*in personam*" rather than "*in rem*" one level of government could with impunity tax away the fruits of property owned by the other. The fundamental constitutional protection framed by section 125 cannot depend on subtle nuances of form."

Hence, once we determine that the "pith and substance" of a measure are "taxation", section 125 restrains the federal government from imposing the tax on provincial lands, property, Crown agents, and transactions directly involving provincial property. This appears to be the case whether or not the province is involved in commercial activity. In Professor Hogg's words:[26]

> "Section 125 probably covers taxation of all property belonging to Canada or a province, regardless of whether the property is acquired for or employed in a commercial activity or a governmental activity. The section is not limited to non-commercial property."

The determination of whether the substance of legislation constitutes taxation or the exercise of a regulatory power can be a difficult question and, in some cases, produces dubious results.

In Part II, we will look at other aspects of the fiscal landscape, such as the responsibility for taxation, and the legislative, executive, and judicial processes of administration.

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1 *Citibank Canada v. Canada*, [2001] T.C.J. No. 14, [2001] 2 C.T.C. 2260 (T.C.C. [General Procedure]), aff'd [2002] F.C.J. No. 496, [2002] 2 C.T.C. 171 (C.A).

[2] Frankfurter, Felix, "Some Reflections on the Reading of Statutes" (1947) 47 Colum. L. Rev. No. 4, 527 at 538-39.

[3] [2005] T.C.J. No. 280, 2005 TCC 398, 2005 D.T.C. 976, [2005] 4 C.T.C. 2274 (T.C.C. [General Procedure]).

[4] Report of the Technical Committee on Business Taxation (December 1997), A Report to the Minister of Finance, at 1.2.

[5] §248(1) "individual"

[6] §248(1) "person"

[7] §248(1) "trust" and §104(1).

[8] §96(1)(a).

[9] Ss. 2(1).

[10] Ss. 2(2).

[11] See generally: Division I, Section 153 and following.

[12] See, for example, *SNEAA c. Canada (Procureur general)*, [2008] S.C.J. No. 69 (sub nom. *Confédération des syndicats nationaux v. Canada (Procureur général)*), 2008 SCC 68, Date: 20081211; Docket: 31809, 31810, for modern application of the principle.

[13] *Constitution Act*, 1867 (U.K.), 30 & 31 Vict., c. 3.

[14] *O.E.C.T.A. v. Ontario (Attorney General)*, [2001] S.C.J. No. 14, (sub nom. *Ontario English Catholic Teachers' Assn. v. Ontario (Attorney General)*), [2001] 1 S.C.R. 470 (provincial legislation authorizing the Minister of Finance to prescribe tax rates for school purposes was constitutional. The legislation set out the structure of the tax, the tax base and the principles for imposing the tax).

[15] *Constitutional Validity of Bill No. 136 (Nova Scotia), Re* (1950), (sub nom. *Nova Scotia (Attorney General) v. Canada (Attorney General)*) [1950] S.C.J. No. 32, [1951] S.C.R. 31, 50 D.T.C. 838.

[16] *Ontario Home Builders' Assn. v. York (Region) Board of Education*, [1996] S.C.J. No. 80, 137 D.L.R. (4th) 449 (S.C.C.).

[17] See *Halifax (City) v. Fairbanks Estate*, [1927] J.C.J. No. 1, 4 D.L.R. 945 (Nova Scotia P.C.).

[18] [1943] J.C.J. No. 1, A.C. 550, C.T.C. 294 (New Brunswick P.C.) at 565, quoted with approval by Iacobucci J. at 492 of Ontario Home Builders' Assn.

[19] *Ontario Home Builders' Assn*. at 476:

> Of course, it is the general tendency of the tax that is of concern, rather than the ultimate incidence of the tax in the circumstances of a particular case … the test of incidence is based on a legal, rather than an economic distinction … . When determining the incidence of a tax, it is important to bear in mind the context within which the tax operates as well as the purpose of the tax. See John Stuart Mill "Principles of Political Economy, Book V", (London: John W. Parker & Son, 1852)

[20] At 478-479.

[21] See *Lambe v. North British & Mercantile Fire & Life Insurance Co.* (1887), (sub nom. *Bank of Toronto v. Lambe*) L.R. 12 App. Cas. 575, [1917-1927] C.T.C. 82 (Quebec P.C.) at 582 per Lord Hobhouse:

> Taxes are either direct or indirect. A direct tax is one which is demanded from the very persons who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another; such as the excise or customs.
>
> The producer or importer of a commodity is called upon to pay a tax on it, not with the intention to levy a peculiar contribution upon him, but to tax through him the consumers of the commodity, from whom it is supposed that he will recover the amount by means of an advance in price.

[22] *Eurig Estate, (Re)*, [1998] S.C.J. No. 72, [1998] 2 S.C.R. 565 (taxpayer challenged Ontario's estate probate fees as being an indirect tax beyond the power of the provincial government. Applying Mills' definition, the tax would be indirect if the executor was personally liable for payment of probate fees, as the intention would clearly be that the executor would recover payment from the beneficiaries of the estate. However, the legislation did not make the executor personally liable for the fees. The executor would pay only in his or her representative capacity. The majority of the Supreme Court held that amounts collected in respect of grants of letters probate constituted a tax rather than a regulatory fee. The probate fee was a direct tax and, therefore, intra vires the Province of Ontario.). See also, *Hudson's Bay*

Co. v. Ontario (Attorney General), [2000] O.J. No. 2203, 49 O.R. (3d) 455 (S.C.J.), aff'd [2001] O.J. No. 710, 52 O.R. (3d) 737 (C.A.).

[23] See, *e.g.*, *Nova Scotia Power Inc. v. Canada*, [2004] S.C.J. No. 36, 2004 SCC 51 (NSPC acting within its purposes as a Crown agent and thus entitled to immunity from legislation, including the *Income Tax Act*, as provided by s. 17 of the *Interpretation Act*).

[24] *Exported Natural Gas Tax*, *(Re)*, [1982] S.C.J. No. 52, [1982] 1 S.C.R. 1004.

[25] *Ibid.*, at 1078.

[26] Hogg, *Constitutional Law of Canada*, loose-leaf (Toronto: Carswell, 1997) at 30–32.