

Welcome to the sixth UBC Tax newsletter. This issue of UBC Tax highlights the controversy surrounding British Columbia's HST, authored by UBC Law Professors Tony Sheppard and Liz Edinger. Also, a tax riddle: What do you call a house with small nails in it? See page 10 for the answer.

British Columbia's Big Tax Attack

by Tony Sheppard and Liz Edinger.

Despite its optimistic title, the Harmonized Sales Tax [HST] has spawned extraordinary and unexpected acrimony rather than "harmony," by the manner of its implementation in British Columbia. A more apt name for the tax in British Columbia might be the "Rancorous Sales Tax" ["RST"].

Provincial HST imposed and collected at the federal level of government may advance tax policy goals of efficiency, and neutrality and may strengthen the Canadian economic union in an era of fierce international economic competition, as the Federal Department of Finance contends.¹ A coherent GST/HST may be a vast improvement over a national GST and diverse individual provincial sales taxes (PST). The public in British Columbia is not in the mood to be persuaded by rational discussion of the merits of the HST over the PST, however. The introduction of any new tax is likely to be unpopular, no matter how meritorious it might be, as shown by the political consequences of the GST for its proponents.

The federal GST took effect on January 1, 1991. For many years thereafter provincial governments spurned the federal open offer to impose and collect an HST on their behalf, out of concern over its likely political unpopularity.² One of the reasons for creating the Canada Revenue Agency (as it is now called) was its mandate to administer provincial sales taxes.³ The Maritime Provinces other than Prince Edward Island were the first to adopt the HST in 1997.⁴ Prince Edward Island imposes a PST on purchases of goods and certain services, on the price inclusive of federal GST.⁵ Since 1991, by agreement between Québec and the Federal Government, Revenu Québec administers the

GST for the federal government and the QST [Québec Sales Tax].⁶ Prior to 2009, the federal government particularly sought to persuade Ontario to adopt the HST, in the reasonable expectation (prior to the fiasco in British Columbia) that other provinces could be expected to follow Ontario's lead. In 2009, Ontario announced that it would adopt the HST, and British Columbia followed Ontario's lead.

Two prairie provinces, Manitoba and Saskatchewan, impose a PST, but Alberta steadfastly refuses to impose any.⁷ All residents of Canada including those in Alberta must pay federal GST. The political debacle in British Columbia over the introduction of HST is likely to fortify the pre-existing reluctance of the provinces that have not yet adopted it from doing so for a long time to come.⁸

In British Columbia, the public reacted with an outrage that has taken everyone by surprise. Public objection to any new tax can be expected, but is usually ineffectual. The surprise was the focused and organized public opposition to the HST, which was energized by the public perception that they had been duped by the underhanded imposition of the HST. Opponents of the HST rallied the public to their cause as victims of a cynical deception: they felt they had been misled by pre-election assurances that the HST was not an option, only to learn within days of re-election that an HST was already in the works. Opponents of the HST have turned public anger into a focused campaign to remove offending politicians from public office and to force repeal of the HST.

Putting the ongoing public outrage aside, we wish to discuss the legal arguments for and against the constitutional validity of the HST, which is currently

the subject of litigation in the Supreme Court of British Columbia. Public outrage has energized what might otherwise have been a doomed constitutional challenge to the legality of the HST in British Columbia.

The initial step towards implementing the HST in British Columbia was the Comprehensive Integrated Tax Coordination Agreement [CITC Agreement], which the governments of Canada and British Columbia signed on November 27, 2009.⁹ Next, the Federal Parliament enacted the Provincial Choice Tax Act,¹⁰ amending the federal GST legislation contained in the Excise Tax Act, to enact from the federal perspective the provincial component of the harmonized value-added tax [HVAT] in respect of the provinces of Ontario and British Columbia. Finally the Legislative Assembly of British Columbia enacted legislation to repeal the PST: Consumption Tax Rebate and Transition Act.¹¹ The new HST came into effect on July 1, 2010 in both provinces.

To defray transitional costs, the federal government is making transfer payments to Ontario and British Columbia of \$4.3 billion and \$1.6 billion, respectively. In British Columbia the HST rate is 12% (7% provincial and 5% federal), while in Ontario the HST rate is 13% (8% provincial and 5% federal).

The steps in implementing the HST coincided in time but differed in substance between Ontario and British Columbia. Ontario enacted legislation that pre-empted the constitutional controversy that has erupted in British Columbia. In Ontario, the Legislature enacted express legislation that "ratified and confirmed" the CITC Agreement between the governments of Ontario and Canada, so as to implement the HST by provincial legislation.¹² By so doing the Ontario Legislature conferred explicit provincial legislative approval of the HST for Ontario. The Legislative Assembly of British Columbia did not take this precaution, however, omitting enactment of a "ratify and confirm" provision explicitly approving of the CITC Agreement at the provincial level. Opponents seized on this legislative lacuna as a fatal misstep, according to principles of Canadian constitutional law, as invalidating the HST in British Columbia.¹³

Two legal disputes over the HST were recently heard by Robert Bauman, Chief Justice of the Supreme Court of British Columbia. In the first case, supporters of the HST, a combination of business interests and the Provincial government, applied to court for an order quelling Initiative Petition 2010-002, entitled, "An

Initiative to End the Harmonized Sales Tax." Pursuant to the Recall and Initiative Act,¹⁴ opponents of the HST had collected over 700,000 voters' signatures in support of its initiative petition and submitted it to the provincial Chief Electoral Officer, for vetting. The petition contained a draft of legislation that the petitioners wanted the Legislature to enact. The Chief Electoral Officer approved of the initiative petition as fulfilling statutory requirements. Instead of sending the initiative petition to the Legislature for its consideration, the Chief Electoral Officer announced an intention to retain it pending the outcome of litigation.

The proponents of the HST applied for a court order quashing the Chief Electoral Officer's approval, to invalidate the petition and block further action on it. The Chief Justice, quoting the Premier's own words to the effect that the citizens' initiative was a "victory for democracy," dismissed the application. The Chief Justice, in short and pointed reasons for judgment, declined to enter into a political fray or to thwart a legitimate exercise in "grassroots democracy" on any fine points of legal technicality.¹⁵ The Chief Justice "respectfully ask[ed] that the Chief Electoral Officer perform his remaining duties under the Recall and Initiative Act forthwith." So far so good for those seeking repeal of the HST and removal from public office of duplicitous elected politicians.

The initiative petition, having survived the court challenge, is currently in the hands of a committee of the Legislature. What happens next is uncertain under the Act because it offers the Provincial Government and opponents of the HST controversial political options: a vote in the Legislature to rescind the HST; a referendum vote of the citizenry at large on the HST; or a recall campaign to remove from office elected Members of the Legislative Assembly, who support the HST against the will of the people.

The second legal proceeding raises interesting legal issues-involving broad constitutional grounds to strike down an unpopular tax.¹⁶ In this proceeding, the parties have entered pleadings and made submissions, but the Chief Justice has reserved to take the time necessary for deliberation prior to reaching his decision.

The basis of the opponents' constitutional argument is that the Legislative Assembly of British Columbia never explicitly enacted a statutory provision that ratified, authorized or approved of the HST. Legislative repeal

of the PST was insufficient to pass constitutional muster, in the opponents' view. According to the argument, the Legislature of British Columbia made a fatal error by omitting the enactment of a provision at the provincial level ratifying the imposition of the HST. These critics contrast British Columbia with Ontario. Whereas the Ontario Legislature explicitly passed a provision ratifying its HST, the British Columbia Legislature did not do so.

Proponents of the B.C. HST argue that the Federal Parliament, by passing the Provincial Choice Tax Framework Act, enacted all the legislation necessary to impose a valid HST at the provincial level in Ontario and British Columbia, and that a further enactment by each provincial legislature ratifying the HST was unnecessary.

Constitutional Provisions

In the Canadian federal system, both Federal Parliament and Provincial Legislatures have powers to impose taxes. The relevant constitutional provisions allow the Federal Parliament to impose any mode or system of taxation,¹⁷ but confine the scope of provincial tax legislation to direct taxes within the province for provincial purposes.¹⁸ In addition to these explicit constitutional provisions enacted by the Imperial Parliament, the courts have developed certain constitutional principles or norms.

Proponents of the HST argue that the Federal Parliament, acting within its power to impose any form or system of taxation, has validly imposed the HST in British Columbia, without any need of further provincial legislation ratifying its legislation. Proponents also correctly point out that a provincial legislature cannot directly repeal federal legislation.

Opponents of the B.C. HST contend that constitutional norms require enactment of provincial legislation to give effect to the HST within a province. They invoke the following constitutional principles: "no taxation without representation;" exclusivity; fundamental constitutional principles; and clear and unambiguous drafting of tax legislation.

"No taxation without representation"

Opponents of the HST invoke the constitutional principle of "no taxation without representation," as their principal argument against its constitutional validity. Their petition¹⁹ to the court states:

1. Section 53 of the Constitution Act, 1867 (U.K.) 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No.

5 provides:

53. Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons.
2. Section 53 is extended and applied to the Legislatures of all Provinces by s. 90 of the Constitution Act, 1867. Sections 53 and 90 of the Constitution Act, 1867 were made applicable in British Columbia by s. 10 of the British Columbia Terms of Union, 1871.
3. Section 53 of the Constitution Act, 1867, codifies the principle expressed in the English Bill of Rights of 1689 and enshrined in the preamble to the Constitution Act, 1867, that there shall be no taxation without representation and consent ("no taxation without representation"). Section 53 and the principle of no taxation without representation require that a decision to tax originate with the Legislative Branch of Government. The Executive Branch cannot impose a tax without the express authorization of the Legislature. [emphasis in original]

Section 53 requires legislation, rather than some lesser form of rule or regulation, to impose a tax, and in a bicameral legislative system, requires further that taxation bills must begin in the elected lower chamber.

Section 53 protects against government attempts to bypass the requirement of political debate and legislation by disguising a tax as a "regulatory charge," which can more easily be imposed by delegated legislation, without political discussion.²⁰ For example, if a government imposes a so-called "regulatory charge" by a regulation for a public service charging an amount for the service that is out of all proportion to the government's cost of providing the service, the courts may characterize it as a "tax" and strike it down as violating s. 53.²¹ This was not a problem for the HST, however, which was an out-and-out tax.

Section 53 also supports the striking down and refunding of an ultra vires tax, because if the legislature enacted a tax exceeding its legislative powers, the tax is an invalid exercise of legislative power. As Bastarache J., for a unanimous Supreme Court of Canada,²² said: 'This principle of "no taxation without representation" is central to our concept of democracy and the rule of law.'

Historically, the founders of Canada and the United States took very different views of this principle. Canada's colonial forebears, unlike their American

counterparts, did not start a revolutionary war with Great Britain in the 1760's over the imposition of tax laws by an Imperial Parliament. The colonists in British North America accepted Imperial taxing Acts as binding and enforceable even though they had no right to vote for members of that Parliament.²³ The constitutional importance in Canada and other Commonwealth countries of "no taxation without representation" can easily be overstated relative to that of the United States. One Australian judge disparagingly referred to the principle as a "slogan," and contrary to the law-making powers over colonials exercised by the Imperial Parliament.²⁴ Even nowadays, Canadian taxpayers must pay taxes imposed by legislators whom they have no right to elect. The principle of "no taxation without representation" does not exempt taxpayers such as minors, foreigners/non-residents, trusts and estates, and corporations that have no vote. Conscientious objectors cannot successfully refuse to pay Canadian taxes on religious or ethical grounds claiming their personal beliefs were not represented in the legislature that imposed the tax.

However, if "no taxation without representation" is viewed as an aspect of the separation of powers, literal interpretation of the phrase is irrelevant. The slogan means that the imposition of taxes is a legislative function, not an executive function.

Section 53 is not an entrenched provision of the Canadian Constitution, 1982 enabling a province to amend or remove it.²⁵ British Columbia has removed s. 53 from its constitution.²⁶ It is an open question whether or not the principle continues to be effective in the Province through the preamble to the Constitution, which states that the Canadian Constitution will be "similar in Principle to that of the United Kingdom," harkening back to the Bill of Rights, 1688.²⁷ Because the separation of powers is a fundamental unwritten principle, it is likely that the repeal of s. 53 in British Columbia will have no effect on the operation of the slogan.

Section 53 also requires that taxation bills must be introduced in an elected House of Commons rather than an appointed Senate, as reflective of democratic values. Elected members in the House must decide whether or not to impose a tax on the voters, before the Senate can consider the taxation bill. Since the Legislative Assembly in the Province of British Columbia is the only provincial legislative body and its members are elected, the latter requirement either has no application or is met.

The principle of "no taxation without representation" requires the imposition of the HST by legislation. Proponents of the B.C. HST argue that it meets the principle because it was imposed by unchallenged federal legislation²⁸ and by the legislative act of repealing the PST in the British Columbia Legislature.²⁹ Opponents argue that taxation laws must be express, rather than implied by repeal of legislation. In both Federal and Provincial chambers, elected representatives cast votes approving of the introduction of the HST in British Columbia. In our view, this manner of implementation upholds democratic values and the rule of law.

Exclusivity

The opponents of the HST also argue that the courts, as they have interpreted the federal and provincial powers of taxation, have conferred on the Provinces exclusive legislative jurisdiction to impose a PST. In their petition,³⁰ the opponents state:

8. In any event, Parliament's authority under s. 91(3) of the Constitution Act, 1867, is subject to the exclusive authority of the British Columbia Legislature under s. 92(2),...

Under s. 92(2)³¹ provinces have exclusive legislative power to enact only "Direct Taxation," "within the Province" and "for Provincial Purposes," but cases imposing any limits on federal taxation powers under s. 91(3) are hard to find. There is some authority establishing a constitutional prohibition on double taxation among provinces, however.³²

Although courts have long held that a PST qualifies as valid provincial legislation, the Supreme Court of Canada has also held that the GST is valid federal legislation, even as it applies to consumers making purchases in a province.³³ The HST is one overall tax comprising both the federal GST and the provincial component into one coherent whole. As the provincial tax is integrated into the HST, it would seem capable of enactment solely by federal legislation, apart entirely from any provincial enactment. There is no doubt that the GST is valid, but the courts have not definitively determined whether it is a direct tax, an indirect tax, or both, because validity does not require that determination.³⁴ The HST is an extension of that same GST.

Like the GST, the HST imposes a value added tax at each stage of production and marketing of a good or a service, and allows the taxpayer at each stage to claim

an input tax credit for taxes paid against taxes owing. Though the federal and provincial governments divide the tax revenue raised by the HST, it is a national tax system that transcends provincial borders and is intended to strengthen the Canadian economic union. As such, the HST exceeds the limits of s. 92(2) because it is not confined "within the Province," and is for national rather than strictly "Provincial Purposes. In our view, the HST does not violate provincial exclusivity.

Fundamental constitutional principles

The opponents of the HST also invoke the fundamental organizational constitutional principles of federalism and democracy in aid of their cause. In their petition,³⁵ they state as follows:

8. In any event, Parliament's authority under s. 91(3) of the Constitution Act, 1867, is subject to...the fundamental and organizing constitutional principles of federalism and democracy.

We believe the opponents of the HST may be referring impliedly to the constitutional principle of "subsidiarity" though they do not specify any principle explicitly. "Federalism" and "democracy" do not yet have judicial definitions, although cases have developed aspects as principles.

L'Heureux-Dubé J., on behalf of a majority in the Supreme Court of Canada,³⁶ described "subsidiarity" as follows

This is the proposition that law-making and implementation are often best achieved at a level of government that is not only effective, but also closest to the citizens affected....

In their petition (quoted above), the opponents refer to "organizing constitutional principles." Organizing constitutional principles, such as subsidiarity, are edifying in aiding our understanding of the constitutional framer's reasons for their allocation of legislative powers between Parliament and the Provincial Legislatures, but judges regard them as only of ancillary importance, and insufficiently weighty grounds on their own for invalidating legislation.³⁷

Taxes must be "clear and unambiguous"

Tax legislation must be "clear and unambiguous," according to the opponents of the HST, an argument that

would surprise anyone who has struggled to understand a taxation statute. Nevertheless, in their petition³⁸ the opponents state as follows:

9. There is also a constitutional requirement for clear and unambiguous authorization of taxation within the enabling statute. Taxation powers cannot arise incidentally in delegated legislation.

This assertion is an iteration of the separation of powers principle that imposition of taxes is a legislative rather an executive function, and of "no taxation without representation."

In enacting a tax, the statute will often contain only the basic rules, leaving the detailed requirements to regulations as expressly permitted under the Act. Such delegation of cumbersome details to regulations is permissible under s. 53 of the Constitution Act, 1867, and essential to the practical administration of many a tax.

The Supreme Court of Canada has expanded upon this limited delegation of legislative power to make rules and regulations in relation to a tax.³⁹ The Court permits much more substantial delegation by legislatures of rule-making powers. The Court has held that a legislature can delegate rule-making of the essential elements of a tax, such as the tax base, the time unit and the tax rate, which can be delegated to the regulations, as long as legislature's intention to impose the tax is "clear and unambiguous."⁴⁰ The critical questions are whether the legislature has approved of the tax and whether the government imposing the tax will be accountable to the electorate in the next general election.⁴¹ In our view, the introduction of the HST in British Columbia was not by way of delegated legislation. The Province did vacate the field of PST and made room for the HST, but Parliament already had plenary jurisdiction to impose such a tax. Even if the HST was delegated, the Supreme Court's requirements were satisfied, as both the Federal Parliament and the Provincial Legislature have clearly and unambiguously indicated their approval and face the political consequences. If the opponents of the HST in British Columbia have their way, members of the Legislature may face accountability by recall even before the next general election.

Conclusion

We predict that Chief Justice Bauman will uphold the validity of the HST in British Columbia, despite the

ingenious and attractive counterarguments made by the opponents. If contrary to our predicted outcome, the Chief Justice or an appellate court, declares the tax invalid, it is predictable that the Provincial Legislature will pass the necessary legislation to validate the HST retroactively. Retroactive legislation to avoid fiscal chaos may offend the rule of law,⁴² but it avoids the painful task of undoing or refunding tax revenue. We also predict that provinces currently imposing an independent PST will steer clear of federal blandishments to join in the HST for many years to come, to avoid the political pitfalls so vividly and recently illustrated by British Columbia's regrettable experience.

(Endnotes)

- 1 Department of Finance Canada, Restoring Fiscal Balance in Canada: Focusing on Priorities: Canada's New Government: Turning a New Leaf, Budget 2006, at p. 51; online: <http://www.fin.gc.ca/budget06/pdf/fp2006e.pdf>; Department of Finance Canada, Reporting Back to Canadians: Consultations on Restoring Fiscal Balance in Canada; online: http://www.fin.gc.ca/activty/consult/fiscbal_2-eng.asp#5.
- 2 Canada Revenue Agency Act, S.C. 1999, c. 17, s. 5(1)(b); Richard Domingue and Jean Soucy, Economics Division, Parliamentary Research Branch, Library of Parliament, Government of Canada, The Goods and Services Tax: 10 Years Later PRB 00-03E (June 15, 2000) at p. 14; online: <http://dsp-psd.pwgsc.gc.ca/Collection-R/LoPBdP/BP/prb0003-e.htm>
- 3 Canada Revenue Agency Act, S.C. 1999, c. 17, s. 5(1)(b).
- 4 Newfoundland and Labrador: Tax Agreement Act, S.N.L. 1996, c. T-0.01; New Brunswick, Harmonized Sales Tax Act, S.N.B. 1997, c. H-1.01 [repealed]; Nova Scotia, Sales Tax Act, S.N.S., 1996, c. 31.
- 5 P.E.I.: Revenue Tax Act, R.S.P.E.I., 1988, c. R-14.
- 6 Québec, An Act respecting the Québec Sales Tax, R.S. Q., c. T-0.1
- 7 Manitoba: The Retail Sales Tax Act, R.S.M. 1987, c. R130, C.C.S.M. c. R130; Saskatchewan, The Provincial Sales Tax Act, R.S.S. 1978, c. P-34.1.
- 8 Manitoba Finance, Sales Tax Harmonization in Manitoba: What it would mean for households, businesses and public finances (December 14, 2009), online: http://www.gov.mb.ca/finance/pdf/hst_december_09.pdf.
- 9 Comprehensive Integrated Tax Coordination Agreement, between the Government of Canada and the Government of British Columbia, online: http://hst.blog.gov.bc.ca/wp-content/uploads/2010/04/bc_citca_nov09.pdf.
- 10 Provincial Choice Tax Act, S.C. 2009, c. 32.
- 11 Consumption Tax Rebate and Transition Act, S.B.C. 2010, c. 5, s. 3 [Royal Assent on April 29, 2010].
- 12 Ontario Tax Plan for More Jobs and Growth Act, 2009, S.O. 2009, c. 34, Sch. R, s. 17. Section 17 added ss. 50 – 51 to Retail Sales Tax Act, R.S.O. 1990, c. R 31.
- 13 Probably the Province of Ontario remembered the constitutional consequences of their failure to legislate probate fees in *Re Eurig Estate*, [1998] 2 S.C.R. 565, 165 D.L.R. (4th) 1, and possibly even the ineffectiveness of an intergovernmental agreement to implement wage and price controls at the provincial level in *Re: Anti-Inflation Act*, [1976] 2 S.C.R. 373, 68 D.L.R. (3d) 452.
- 14 Recall and Initiative Act, R.S.B.C. 1996, c. 398.
- 15 *Allan v. Chief Electoral Officer and Vander Zalm*, 2010 BCSC 1174.
- 16 *Vander Zalm v. The Minister of Finance and the Lieutenant Governor in Council as represented by The Attorney General of British Columbia and Allan*, B.C.S.C. No. S104970 (Vancouver Registry).
- 17 Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5, s. 91(3) confers upon the Federal Parliament, the power of "the raising of money by any mode or system of taxation." In *Re: Anti-Inflation Act*, supra note 13 at p. 390, Laskin, C.J.C. described this power as "apparently limitless."
- 18 Constitution Act, 1867, id., s. 92(2) provides as follows: "s. 92 In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, — ...
2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes."
- 19 *Vander Zalm v. The Minister of Finance and the Lieutenant Governor in Council as represented by The Attorney General of British Columbia and Allan* (Petition at Part 3: Legal Basis, paras. 1-7).
- 20 But s. 92(9) of the Constitution Act, 1867 authorizes Provinces to impose "Shop, Saloon, Tavern Auctioneer and other Licences in order to the raising of a Revenue for Provincial, Local or Municipal Purposes." Such non-taxes may be indirect: *Allard Contractors Ltd. v. Coquitlam*, [1993] 4 S.C.R. 371.
- 21 See *620 Connaught Ltd. v. Canada* (Attorney General), 2008 SCC 7, [2008] 1 S.C.R. 131; *Canadian Assn of Broadcasters v. Canada*, 2008 FCA 157, 292 D.L.R. (4th) 246
- 22 *Kingstreet Investments Ltd. v. New Brunswick* (Finance), [2007] 1 S.C.R. 3, 2007 SCC 1 at para. 14.
- 23 See *Aerial Taxi Cabs Co-operative Society Ltd. v. Lee*, [2000] FCA 1628 at paras. 65-66.
- 24 *Ibid.*
- 25 *Ontario English Catholic Teachers' Assn. v Ontario* (Attorney General), [2001] 1 S.C.R. 470, 2001 SCC 15 at para. 68
- 26 *Ibid.*; Constitution Act, R.S.B.C. 1996, c. 66.

- 27 Ontario English Catholic Teachers' Assn, *ibid.* at para. 72.
- 28 Provincial Choice Tax Act, *supra* note 10.
- 29 Consumption Tax Rebate and Transition Act, *supra* note 11, s.3.
- 30 Vander Zalm v. The Minister of Finance and the Lieutenant Governor in Council as represented by The Attorney General of British Columbia and Allan (Petition at Part 3: Legal Basis, para. 8).
- 31 *Supra* note 18.
- 32 The King v. National Trust Co., [1933] S.C.R. 670; [1933] 4 D.L.R. 465.
- 33 Reference re Goods and Services Tax, [1992] 2 S.C.R. 445, 94 D.L.R. (4th) 51.
- 34 Sobara v. Canada (Attorney General), (2008), 93 O.R. 241, 304 D.L.R. (4th) 470 (On S.C.) at para. 24.
- 35 Vander Zalm v. The Minister of Finance and the Lieutenant Governor in Council as represented by The Attorney General of British Columbia and Allan (Petition at Part 3: Legal Basis, para. 8
- 36 114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town), 2001 SCC 40, [2001] 2 S.C.R. 241; see also Canadian Western Bank v. Alberta, [2007] 2 S.C.R. 3, 2007 SCC 22 at para.45.
- 37 Salt Spring Island Local Trust Committee v. B&B Ganges Marina Ltd., 2007 BCSC 892 at paras. 82-85 affirmed on other grounds 2008 BCCA 544, [2009] 4 W.W.R. 47. Federalism, however, spawned the operating constitutional obligation to give full faith and credit to Canadian judgments within Canada, in Morguard Investments Ltd. v. DeSavoye, [1990] 3 S.C.R. 1077; 76 D.L.R. (4th) 256 (SCC).
- 38 Vander Zalm v. The Minister of Finance and the Lieutenant Governor in Council as represented by The Attorney General of British Columbia and Allan (Petition at Part 3: Legal Basis, at para. 9).
- 39 Ontario English Catholic Teachers' Assn., *supra* note 25, at paras. 67-79.
- 40 *Ibid.* at para. 74.
- 41 *Ibid.*
- 42 Kingstreet, *supra* note 22 at paras. 12 and 25; see also Canada (Attorney General) v. Hislop, [2007] 1 S.C.R. 429, 2007 SCC 10.

Upcoming Event

The National Centre for Business Law, UBC and the Liu Institute for Global Issues invite you to a public talk on:

Responsive Regulation in Theory and Practice with the Fasken Martineau Visiting Senior Scholar Professor John Braithwaite, Australian Research Council Federation Fellow, Regulatory Institutions Network, Australian National University and Arthur Stinchcombe, Professor Emeritus, Northwestern Department of Sociology

When: Friday, October 1, 2010, 2:30 to 4:00 pm (A reception will follow).

Where: Liu Institute for Global Issues, 6476 NW Marine Drive, University of British Columbia.

Please RSVP at www.ncblevents.com. This event qualifies for 1.5 CPD credits.

John Braithwaite is an Australian Research Council Federation Fellow and Founder of RegNet (the Regulatory Institutions Network) at the Australian National University. He is embarking on a 20-year comparative project called Peacebuilding Compared, with Hilary Charlesworth, Valerie Braithwaite, and Kate Macfarlane. In the past he has worked on a variety of areas of business regulation and on the crime problem. His best known work is on the ideas of responsive regulation and restorative justice. John has been active in social movement politics around these and other ideas for 40 years in Australia and internationally. His most recent book is *Regulatory Capitalism: How it works, ideas for making it work better* (2008).

2010 UBC Law Faculty Tax Scholarship

Tony Sheppard, UBC Law Professor

"Capital Gains" chapter in every edition of the Materials on Canadian Income Tax (Carswell) including the 14th edition (2010, Edgar and Sandler editors), published in August 2010 (Chapter 7, pp. 531-97).

David Duff, UBC Law Professor

Most recent publications include "Carbon Taxation in Theory and Practice" (co-authored with U.B.C. Law Associate Professor Shi-Ling Hsu), "Tax Expenditures to Limit the Growth of Carbon Emissions in Canada: Identification and Evaluation" (co-authored with U.B.C. Law J.D. student E. Ian Wiebe), and "Responses to Tax Treaty Shopping: A Comparative Evaluation".

The first of these publications makes the case for carbon taxation as an important element in a mix of public policy instruments to reduce the emission of greenhouse gases (GHGs) and examines actual experience with carbon taxes in selected jurisdictions that have introduced these kinds of taxes (including British Columbia). The paper on which the publication is based was originally prepared for and delivered at the Tenth Global Conference on Environmental Taxation, held in Lisbon and was also delivered at Loyola Law School's Tax Policy Colloquium and at the University of San Diego School of Law's Second Annual Climate and Energy Law Symposium. The article will appear in the eighth volume of *Critical Issues in Environmental Taxation*, one of the leading publications on the growing field of environmental taxation, published by the Oxford University Press.

The second publication examines "tax expenditures" to limit the growth of carbon emissions that contribute to global climate change. The concept of "tax expenditures" refers to tax provisions that are functionally equivalent to spending programs, since they are designed not to levy tax, but to reduce the amount of tax otherwise payable in order to encourage various social and economic activities. Frequently criticized on the grounds that they constitute bad spending policy and bad tax policy, these measures are often tempting for governments to introduce because their true costs are often hidden and difficult to measure and because they can be portrayed as tax cuts rather than spending increases.

The first part of the paper identifies the most prominent tax expenditures that federal and provincial governments in Canada have introduced in order to limit the growth of carbon emissions, including income tax expenditures, sales tax expenditures, and excise tax expenditures. The second part of the paper evaluates these tax expenditures, arguing that tax-delivered subsidies may be justified to limit the growth of carbon emissions, but that the design of these tax expenditures make them vulnerable to many of the traditional criticisms that are directed at tax expenditures generally: that they are poorly targeted spending programs and questionable from a tax policy perspective.

The paper on which the publication is based was originally prepared for and delivered at a conference on "Tax Expenditures and Public Policy in Comparative Perspective" held at Osgoode Hall Law School's

Professional Development Centre. The article will be included in a collection of articles from the Conference that is being published by the Canadian Tax Foundation.

The publication on tax "treaty shopping" discusses the concept of tax treaty shopping and evaluates different responses to this phenomenon among OECD member countries. The concept of "tax treaty shopping" refers to deliberate efforts on the part of individuals and legal entities to affect their tax residence in order to obtain more advantageous tax benefits under the bilateral tax treaties available to the residents of these jurisdictions. As the number of these bilateral tax treaties has expanded over the last 40 years, and globalization has made it easier to change residences for tax purposes (particularly for artificial entities), the phenomenon of tax treaty shopping has become more pronounced. Regarding many of these arrangements as abusive, the OECD and several member jurisdictions have adopted various responses to tax treaty shopping in order to limit its occurrence.

The first part of the article discusses the concept of treaty shopping, defining this term for the purposes of this analysis, providing a few examples for illustrative purposes, and explaining why treaty shopping is problematic on policy grounds. The second part of the article considers interpretive responses to abusive treaty shopping, examining recent cases and commentary on the concepts of "residence" and "beneficial ownership" as well as the existence of an anti-abuse principle inherent in tax treaties and international law. The third part of the article addresses specific

and general anti-avoidance rules, both domestic rules and their relationship to tax treaties as well as anti-avoidance rules contained in tax treaties themselves, such as the Limitation on Benefits (LOB) provision included in the Fifth Protocol to the Canada-U.S. Tax Treaty. Based on this analysis, the final part of the article concludes that each response has a role to play in preventing abusive tax treaty shopping, but that detailed LOB provisions represent the fairest and most effective response to tax treaty shopping.

The paper on which this publication is based was originally prepared for and delivered at a conference

on "Tax Treaties from a Legal and Economic Perspective" held at the Institute for Austrian and International Tax Law in Vienna. It was also presented at the Vancouver office of Thorsteinsson's, the Oxford University Centre for Business Taxation's Annual Symposium held at Oxford University's Said Business School. The article will be included in a collection of articles from the Vienna conference, currently under publication by Kluwer Law International.

In addition to these publications and presentations, Professor Duff delivered a paper on "Rethinking Tax Enforcement and Compliance" at a Symposium Honouring

Professor Michael J. Trebilcock at the University of Toronto Faculty of Law in October, delivered the Farris Lecture on "Aggressive Tax Planning: Causes, Consequences, Responses" in May 18, delivered a paper on the history of wealth transfer taxation in Germany and the United States at a conference on tax history at the University of Cambridge Centre for Tax Law in July, and participated in a symposium on transfer pricing at the London School of Economics also in July. He was also honoured to receive a TSX Research Grant for further research on carbon taxes and emission trading regimes. Professor Duff plans to complete articles on each of these subjects during the next year.

Symposium on Harmonized Sales Tax

On January 21, 2010, the NCBL co-sponsored a symposium on the Harmonized Sale Tax (HST) that subsequently came into effect in British Columbia on July 1, 2010. Held before the referendum and recall campaigns gathered steam, the half-day symposium included a keynote address by British Columbia Finance Minister Colin Hansen, three panels examining the HST, and closing remarks by the Honorable Don Bowman, former Chief Justice of the Tax Court of Canada.

The Finance Minister's opening remarks demonstrated a detailed knowledge of the HST and defended his Government's decision to harmonize British Columbia's provincial sales tax with GST.

The first panel, chaired by NCBL Director David Duff, reviewed the economic background to the HST, with presentations by Jock Finlayson, Executive Vice-President of the Business Council of British Columbia, Professor Jon Kesselman of the Public Policy Program at Simon Fraser University, Professor Michael Smart of the Economics Department at the University of Toronto, and Iglia Ivanova from the Canadian Centre for Policy Alternatives. Among economists, there is considerable consensus that a value-added tax like the HST is more efficient than the provincial sales tax that it has replaced, and likely to improve the competitiveness of British Columbia businesses since the tax applies only once to goods and services consumed in the province

and does not apply to exports.

The second panel, chaired by Lori Mathison of Fraser Milner Casgrain, LLP provided a technical overview of the HST, with presentations by Neil Bass, Gordon Funt and Lori Mathison, all partners at Fraser Milner Casgrain, LLP. The panelists discussed transitional rules and important technical issues that the legislation would have to address.

The third panel, chaired by Walter Pela from KPMG, considered the expected impact of the HST on specific industry sectors, with presentations by Mark Startup, President and CEO of Shelfspace which represents provincial retailers, Mark von Schellwitz, Vice President, Western Canada, Canadian Restaurant and Foodservices Association, Peter Simpson, CEO of the Greater Vancouver Home Builders' Association, and Peter Leitch, Chair of the Motion Picture Production Industry Association of British Columbia. Perhaps not surprisingly, given the non-taxation of restaurant meals under the former provincial sales tax, the representative from the restaurant and foodservices industry was critical of the HST, though significant concerns were also raised by representatives from the retail and home building industries. In contrast, the motion picture industry expects to benefit from the HST, since input tax credits will now be available for HST paid on business inputs.



“Don Thompson’s Tacks Shelter” Don is a folk artist living on Vancouver Island, B.C.

THANK YOU!

Grateful thanks from law students and faculty are due to Thorsteinssons LLP: Tax Lawyers, website: www.thor.ca, for their generosity in providing a copy of the current edition of the CCH, Canadian Income Tax Act with Regulations, Annotated, free of charge to every student taking tax at the UBC Faculty of Law.

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