

Welcome to the fourth UBC Tax newsletter. This issue of UBC Tax highlights interviews with Justice Karen Sharlow of the Federal Court of Appeal, and UBC's Senior Associate Dean Claire Young.

An interview with Justice Karen Sharlow

by Allison Brown



Can you tell me how you became interested in tax law?

I initially became interested in tax law in the early 1970s, when there was considerable press coverage of the Carter Commission report and tax reform. At that time, I had just finished my first term at university with a plan to return after a work

break. I was fascinated by what seemed like endless discussions in the press.

How did you get to the Federal Court of Appeal? What was your career path?

My work break lasted from 1970 to about 1975. For the last bit I worked as a clerk at the local income tax office in Vancouver, and also worked part time toward my BA. degree at SFU, while my husband was attending university full time. That was my first exposure to some of the technical intricacies of tax law (albeit at a pretty junior level), and I found that I enjoyed trying to resolve the complexities.

At SFU, I was studying commerce and economics with the objective of qualifying eventually as an accountant, but the further along that path I went, the more I realized I did not like where I was headed. When my husband finished his degree it was my turn to work on my degree full time. I wrote the LSAT and, after I finished my last year at SFU, went to law school at UBC.

I took as many tax courses as I could, and found I enjoyed them. I also enjoyed a lot of other legal subjects, and so I applied for a clerkship after law school. I clerked for one year with the BC Supreme Court. I was assigned to New Westminster, where I lived. I worked with a number of judges, including those who worked permanently in New Westminster and those who travelled there from Vancouver on what was called the "circuit".

Later, when I looked for articles in 1982, I was very for-

tunate to hook up with Rosemarie Wertschek, a brilliant tax lawyer with the firm that was then called Shrum, Liddle and Heberton, which is now part of McCarthy Tétrault. Most of what I know about tax law I learned from her. In 1990 I joined Thorsteinssons, a highly regarded tax boutique, where again I was fortunate to gain tax litigation experience by working with some of the best tax litigators in the country, including Warren Mitchell and Craig Sturrock, on some very interesting files.

Eventually I applied for a judicial position. The application form requires you to tick a box to indicate which court you wish to apply for. For me, the choices were the British Columbia courts, the Tax Court of Canada, or the Federal Court of Canada (at that time, the federal trial and appellate courts were two divisions of a single court). I pondered for a long time (well, say about 20 minutes) before ticking only the Federal Court of Canada box. I knew I would enjoy the Tax Court of Canada as well, but I was worried that tax work would eventually be quite limiting, and I thought it would be interesting to tackle the broader job.

After what seemed like forever, I got a telephone call asking me if I would be willing to accept an appointment to the Federal Court, Trial Division. I knew there was no tax work to be had there, but I said yes anyway, a decision I did not regret for a moment – I learned a great deal as a trial judge. I was appointed to that court in January of 1999. In November of that same year, I was asked if I would accept an appointment to the Appeal Division, and again I said yes.

Has your experience as a tax litigator been useful to you as a judge?

Any litigation experience is valuable for a judge, because it makes it easier to understand how a case evolves (or should evolve) from a mass of facts and documents into an organized presentation that forms the foundation for the legal issues to be decided.

What would you say was the most significant change in tax law and policy during your career?

I think I would have to say that it is the enactment of the general anti-avoidance rule. The jurisprudence is still being developed of course, but at the moment it seems that GAAR has been relatively successful, at least from the point of view of the government, in deterring what the government has long thought were abusive transactions. It will be most interesting to see if that trend continues.

In your private practice, what was your most significant case?

To help me remember what I have worked on, I generated a list from QL. Looking at that list, it is very hard to pick out one favourite, because I had the good luck to be able to work on a number of significant pre-GAAR tax avoidance files that were

part of the jurisprudence that culminated in the retrenchment the Duke of Westminster principle.

What about your favourite tax judgment as a judge?

I really cannot really answer that question. My favourite judgment at any point in time (tax or not) is the one I just finished. Writing a judgment can be fairly intense and consuming, which is part of what makes the job so interesting, but it also means that once the case is done, I become equally immersed in the next case. It can be hard sometimes to even recall past cases, without some kind of a reminder. Usually that comes as a pointed comment in a legal argument (you, Justice Sharlow, said such-and-such in the case of Somebody v. Canada, just a few months ago ... and, sotto voce to the other counsel, can she really have forgotten that already?).

An interview with Claire Young: Senior Associate Dean & Tax Professor

by Allison Brown



What made you interested in tax law?

I got interested in tax law in the middle of my career. I never took tax law in university as part of my law degree, something I enjoy telling my students. After I graduated from the London School of Economics in England, I came to Canada and eventually ended up articling and practicing law with a firm. That led me to working for

the Alberta government as Associate Chief Legislative Counsel. In that capacity, I was responsible for drafting all the legislation that went through the Alberta legislature. One day the provincial treasurer of Alberta wandered into the office and said - we're going to introduce an Alberta corporate income tax system and we need someone to work on it for a couple of years. It was a great opportunity, and I ended up being the legislative drafter working on the project. I worked with tax practitioners and provincial tax policy people and I loved it! I was able to bring my drafting experience to the exercise, but also learnt so much about tax in the process.

What areas of law did you primarily practice before becoming interested in tax?

When I practiced with a firm I did everything, a bit of family, a bit of criminal and so on. When I worked with the provincial government, my work was largely in the area of administrative law. As a legislative drafter, I was exposed to the drafting of different pieces of legislation which gave me knowledge of a wide area of law, but the actual technical skill was the legislative drafting. After I worked on the corporate Income Tax Act, I decided I would like to pursue post-graduate work in tax. So I packed my bags and came out to the best post-graduate tax program in the country - UBC! I worked with the wonderful Mike O'Keefe, who is a founding partner with Thor-

steinssons LL.P. At that time Mike was an adjunct professor at the faculty. He supervised my work and I had a terrific year.

Why did you decide to become a professor?

After finishing my LL.M., I went back and resumed my job in Alberta. By then I had been seconded to the provincial treasurer's department where I worked in the tax policy unit. I worked there for several years as legal counsel. I thoroughly enjoyed it, but I just had a hankering after my experience at UBC to see if academia would be something that I'd enjoy. I was lucky enough to be offered a position at the University of Western Ontario, where the National Tax Centre is based. I worked at Western with a team of three others teaching, researching, and writing in the area of tax law and that's how I got into academia. So, an unusual trajectory because normally people start out really wanting to be professors and I certainly didn't do that.

However, while I loved my work in the profession and my practice with the government, I do have to say that the thing that gives me the greatest pleasure without a doubt is working in legal academia.

What has been your most memorable teaching experience?

My most memorable teaching experience was when I was at Western standing at the front of the room talking about the Johns-Manville case, capital cost allowance, open pit mining, people digging up the edges of the mine, and whether or not the costs were eligible for capital cost allowance when the ground under my feet began to ripple and shake and the windows rattled. I was thinking - this is very odd - but I kept plowing on until one student said "Professor Young, I think that was an earthquake", which it was. As for my time at UBC, all I'll say is that I've been very honored to receive the University Killam teaching award twice. Right now I'm working more on the administrative side of things as the Associate Dean and I miss teaching terribly. I thoroughly enjoy it; every moment in the classroom is a pleasure.

Has there been a significant tax case in recent years that you think was wrongly decided and how would you have decided it differently?

I think Canada Trust Co., where the SCC declined to apply the General Anti Avoidance Rule to an avoidance transaction, was wrongly decided. I felt the transaction was an abuse of the Act in contravention of section 245. My problem with the decision is that I think it has really limited the future opportunity to apply GAAR to many abusive tax avoidance transactions. In the judgment, the SCC took the view that the economic substance of a transaction was not relevant in determining whether or not an avoidance transaction is an abuse of the Act or a misuse of the provisions of the Act. Rather, they looked at the legal costs and not the economic costs when computing eligibility for capital cost allowance. They ignored what was really a series of offsetting circular transactions in evaluating whether GAAR applied. In my view that approach effectively set up a situation where it is highly unlikely that GAAR can ever apply to tax avoidance transactions that involve capital cost. That result seems very odd to me.

What do you think was the most important tax case ever decided?

I think the most important case, and probably the one that is certainly cited more than any other, is actually the British case of the Duke of Westminster. This is an old case that basically says that every man is entitled to organize his affairs in such a way as to minimize the tax payable regardless of what the tax authorities think. It's an adage that keeps being brought up again and again by taxpayers, to basically say that if the taxing authority wants to tax them, they have to be explicit in levying that tax. Indeed since the Johns-Manville case it has been extended to say that ambiguity should be decided in favor of the taxpayer. So, I think the Duke of Westminster is the most important case because it has laid down this principle that has been the taxpayer's mantra all these many years.

What do you think is the most significant recent development in tax law?

I think it has to be the General Anti-avoidance Rule. GAAR came in when I was starting to teach tax. I watched the de-

bate around the Stupart decision, which I always thought was a weak case to take to the Supreme Court of Canada if the Department of Justice expected the Court to develop some kind of business purpose test for avoidance transactions. Stupart simply involved a rather inconsequential avoidance transaction involving consolidation of the accounts of members of one corporate group, hardly the most egregious form of tax avoidance. The result was, somewhat inevitably, that the government, not being able to get a SCC decision to support the principle that a transaction had to have a business purpose to be valid introduced the GAAR. And of course the GAAR has had a significant impact on the practice of tax law and the advice that tax lawyers give their clients. It's taken a while for cases dealing with the rule to wend their way through the courts so for a long time there has been a lot of uncertainty about the application of the rule. Now, however, we are seeing more jurisprudence clarifying the situation somewhat and from an academic perspective the recent cases have been fascinating to read.

Do you think GAAR has been a positive development?

I think GAAR is a positive development. I think there are some transactions that just should not be permitted and I think GAAR was a very genuine attempt by the government to come up with a rule to try to define what those transactions are. Inevitably, it's got some ambiguity, it's got grey areas and so on, but it sits there as a warning to people considering transactions that are pretty offensive in terms of being totally at odds with the spirit and object of the Income Tax Act. It is quite possible in those circumstances that the advantageous tax consequences of those transactions will be negated. It's a kind of "do it if you dare rule", but you have to be a bit braver now to do it than you did before GAAR came in.

If you could give one piece of advice to a UBC student who wanted to practice tax law, what would it be?

My advice to anybody who wants to practice tax law is don't limit yourself to the tax rules; look at the policy behind them. I think a really good understanding of tax policy will make you a much better tax lawyer. A good grasp of tax policy principles is essential to understanding how the rules operate and it is critical in terms of applying the rules and being able to use them in creative and constructive ways.



GRADUATE PROFILE



Anne Mette Nyborg recently completed an LL.M. with a focus in tax law at UBC's faculty of law. In most years, UBC law has two or three students who undertake graduate work with a tax focus.

"After completing my law degree in Denmark in the summer of 2006, I began my LL.M. studies at UBC, where I am currently working on my thesis in tax law. My thesis focuses on international taxation and I am researching the income characterization of e-commerce transactions under Canada's bilateral tax treaties. E-commerce is a rapidly growing, relatively new form of trade that presents a major challenge to the international tax system in part because traditional income categories are blurred and the traditional tax base of states is eroded. I explore this challenge to the tax system in my thesis work."

FIRST TAX FORUM A SUCCESS!

On the evening of February 28th, 2007, the Faculty of Law presented its inaugural Tax Forum at UBC Robson Square. This event, which featured a panel presentation, a question and answer period, and an opportunity to network, allowed UBC Law students to hear about the realities of tax practice from leading tax practitioners including Ian Worland (Legacy Tax & Trust Lawyers), David Graham (Koffman Kalef LLP), William Cooper (Boughton Law Corporation), Joel Nitikman (Fraser Milner Casgrain LLP), Lisa Heddema (Kellough & Partners LLP), Michael Welters (Bull, Housser & Tupper LLP), Bill Basran (Department of Justice), and John Gregory (Thorsteinssons LLP).

We would like to thank the following firms who were in attendance tonight for their generous support of UBC Law's tax program: Blake, Cassels, & Graydon, Boughton Law Corporation, Bull, Housser, & Tupper LLP, Department of Justice, Fraser, Milner, Casgrain LLP, Kellough & Partners LLP, Koffman Kalef LLP, Legacy Tax & Trust Lawyers, McCarthy Tétrault LLP, and Thorsteinssons LLP.

THANK YOU!

Thank you to Thorsteinssons LLP for providing copies of the Income Tax Act to all students enrolled in tax classes at UBC!



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