

Welcome to UBC Tax's inaugural newsletter! In an effort to keep the community better informed about developments in the tax area at UBC law, we hope to release this newsletter semi-annually. In each issue, we expect to disseminate information on research developments and teaching news at UBC, in addition to highlighting significant developments in the tax law area.

In this issue of UBC Tax, we review some of the major tax developments of 2004/2005, congratulate the students who won tax prizes in the 2004/2005 academic year, and profile the tax practitioners who support UBC's tax law program by contributing their time to teaching courses at the school.

Interesting Developments in Tax Law

UBC Law turns 60 this year. To celebrate this milestone, UBC hosted a diamond jubilee on Friday, September 30th. This celebration included a number of substantive law sessions, including a substantive law session on the top five developments in business law.

In line with UBC's business group's Jubilee theme, UBC's tax law scholars compiled a list of some of the interesting developments in tax law in the 2004–2005 academic year, in chronological order.

OCTOBER 26, 2004: Federal Court of Appeal applies the *Gaynor* principle in *Imperial Oil*

The Federal Court of Appeal released its decision in *Imperial Oil v. R.* on October 26, 2004. In that case, the court considered a number of issues, including whether a foreign exchange loss was properly deductible under paragraph 20(1)(f) or as a capital loss under subsection 39(2). The court also considered whether the *Gaynor* principle (the principle that when determining the value of amounts denominated in a foreign currency, the amounts "must be value in Canadian currency which is the only monetary standard of value known to Canadian law") was applicable in the context of business income.

The Federal Court of Appeal held that the loss was properly deductible under paragraph 20(1)(f), and concluded that the *Gaynor* principle applied on the facts. On May 19, 2005, the Supreme Court of Canada granted leave to appeal in *Imperial Oil*. The case will be heard with a companion case, *R. v. Inco Limited*.

FEBRUARY 23, 2005: Tax-favoured pension plans can hold an unlimited amount of foreign investments

Since 1971, the Department has maintained a cap on the percentage of foreign content that may be held in a registered pension plan or registered retirement savings plan. Where the plan exceeds the permissible cap, it will fail to qualify for tax-preferred treatment. The original justification for the limit was the protection of Canadian equity markets and the promotion of investment in Canadian companies. Foreign content was originally capped at 10%, and that limit was raised over time to 30%.

In a surprise move in its 2005 federal budget, the Liberal government eliminated the foreign content limit altogether. There are a host of rationales for the change, including Canada's increased role as a capital exporter, and the rise in the availability of derivatives products that effectively allowed investors to increase their foreign content above the 30% threshold.

FEBRUARY 23, 2005: Responding to industry submissions, the Federal government increases the capital cost allowance rate for transmission pipelines, combustion turbines, electricity transmission and distribution equipment, and cable used in communications

The government regularly undertakes to revisit its capital cost allowance rates, both to ensure that those rates accurately reflect the rate at which assets depreciate, but also to encourage and incentivize taxpayers to invest in particular business assets. Several industry groups made representations before the Finance Committee in their pre-budget hearings arguing that the CCA rates for at least some assets were out of line with actual rates of depreciation. This year, the federal government adjusted the CCA rates for hydrocarbon transmission pipelines and related pumping and compression equipment, combustion turbines generating electricity, electricity transmission and distribution equipment, and cables used for telecommunications infrastructure. In each case the rate of capital cost allowance was increased to roughly double the original rate.

FEBRUARY 25, 2005: New Supreme Court of Canada justices enter the tax fray in *Tsiaprailis*

On February 25, 2005, the Supreme Court of Canada handed down its decision on *Tsiaprailis v. R.* In *Tsiaprailis*, the taxpayer received a lump sum payment in settlement of a lawsuit she brought against her disability insurer. The issue was whether the lump sum payment was taxable pursuant to paragraph 6(1)(f) as an amount that was "payable... on a periodic basis...pursuant to a disability insurance plan."

In a 4/3 decision, the Supreme Court held that a portion of the payment was attributable to arrears under the disability insurance plan and was therefore taxable under paragraph 6(1)(f). In its reasoning, the majority applied the *surrogatum* principle, which requires the characterization of a payment for tax purposes to mirror what its characterization would have been had it been received in its original form.

This case is interesting for two reasons. First, the court's two newest members, Justices Charron and Abella, drafted the majority and dissenting reasons, respectively. The departure of the Hon. Mr. Justice Frank Iacobucci, who crafted the vast majority of the Court's tax decisions during his tenure on the bench, has undoubtedly left a void in the tax law area, and the entrée of these two new Justices should make for interesting times in the development of tax law jurisprudence at the Supreme Court.

Second, at least in the context of this decision, in its majority decision the court moved away from a purely legal form approach to the characterization of the payment—which pursuant to the settlement agreement was not for arrears under the insurance plan, but instead was to resolve the dispute about whether any liability under the plan existed.

MARCH 8, 2005: Fate of the general anti-avoidance rule to be determined by the Supreme Court of Canada

On March 8, 2005, the Supreme Court of Canada heard *Canada Trustco Mortgage Company Limited* and *Matthew et al. v. The Queen*. These are the first cases on Canada's general anti-avoidance rule to reach the Supreme Court of Canada. The approach the Supreme Court ought to take in interpreting Canada's GAAR has been hotly contested by tax practitioners and scholars in the pages of every major Canadian tax journal, newsletter, and conference since its introduction in 1987, so the Supreme Court's decision will undoubtedly be a landmark one.

MARCH 11, 2005: Canada expands its international tax reach

Bill S-17 was passed by the House of Commons on March 11, 2005. It implements Canada's new tax treaties with Armenia, Azerbaijan, Gabon, Ireland, and Oman. Canada's tax treaty network now includes 89 tax treaties.

Tax is a dynamic area of law—it is constantly changing, highly technical, and deeply rooted in social and economic policy. Providing students both with the foundation they need to understand tax law, as well as advanced courses exploring some of the more technical aspects of tax law is a heavy charge for any law school. At UBC, we are fortunate to have three full-time faculty members who teach in the tax curriculum, as well as to have a number of committed adjunct faculty.

In this issue of the newsletter, we profile three adjunct faculty members who have devoted significant time to UBC's tax law curriculum over the years. Ed Kroft has taught at UBC for over 15 years, teaching both the introductory taxation course (Taxation I) as well as Tax Policy. Joel Nitikman teaches a specialized seminar in tax law that focuses on tax administration, litigation, and dispute resolution (Topics in Taxation Law). Carrying on the long tradition of support for tax law at UBC by Thorsteinssons LLP, David Christian joins us for the first time this year, teaching the taxation of corporations and shareholders (Taxation II). We are grateful for the continued support of these enthusiastic adjuncts, and applaud their continued commitment to legal education at UBC.

APRIL 26, 2005: The promised corporate tax rate reductions are rescinded

One of the more amusing tax dust-ups this year was the Liberal government pledge in the 2005 budget to reduce corporate tax rates, followed by the revocation of that promise in a last-minute compromise aimed at preventing a non-confidence vote in the House of Commons, followed by a promise to restore the tax cuts at some future time.

In his 2005 budget, the Honourable Ralph Goodale promised a reduction in the federal effective corporate tax rate from 21% to 19% by January 1, 2010. That reduction was controversially revoked on April 26, 2005 after the Liberal government and the New Democratic Party cut a deal on changes to the 2005 budget proposals. NDP support was required for the budget bill to pass in the House of Commons.

MAY 17, 2005: Alberta joins the unlimited liability company game

On May 17, 2005, Alberta's *Business Corporations Act* was amended to provide for the incorporation of unlimited liability corporations in that jurisdiction. Prior to these amendments, Nova Scotia was the sole Canadian jurisdiction that permitted the incorporation of unlimited liability companies.

Unlimited liability companies have a hybrid characterization that makes them popular in cross-border tax planning. These entities may be classified as corporations for Canadian tax purposes, but treated as partnerships or disregarded under U.S. tax law. The hybrid nature of the entity provides for a number of useful tax planning results, including that the activities of the unlimited liability company may be consolidated with the U.S. parent for U.S. tax purposes, which means that any interest expenses incurred by the unlimited liability company may be deductible in the U.S.

Adjunct Profiles

ED KROFT,
partner, McCarthy Tétrault LLP

Ed Kroft is a tax partner of McCarthy Tétrault LLP. He received his LLB in 1978 from Osgoode Hall Law School and his LLM in 1980 from the University of British Columbia. Mr. Kroft was called to the British Columbia bar in 1980.



He has appeared on behalf of clients before the Supreme Court of Canada, the Tax Court of Canada, the Federal Court of Canada, and the Supreme Court of British Columbia, and has represented clients frequently in tax disputes involving the Canada Revenue Agency and other tax authorities. He has been, and continues to be, involved in a number of tax cases for major Canadian corporations and in negotiations with "Competent Authority" in major transfer pricing disputes.

Ed loves to teach tax. He has been an adjunct professor in the Law Faculty at UBC since 1989 and has taught Tax I and Tax Policy. He also teaches tax courses for the Canadian Institute of Chartered Accountants,

the Institute of Chartered Accountants of British Columbia, and the Certified General Accountants Association of British Columbia. He has also written more than 50 articles and papers on taxation and corporate law subjects for the Canadian Tax Foundation and other organizations.

Ed was recognized in the 2005 *Guide to the Leading 500 Lawyers in Canada*, in the areas of corporate tax and tax litigation, in the *International Tax Review* as one of Canada's top 10 tax advisors, and in the 2004 *Guide to the World's Leading Tax Advisors*. Ed was also awarded an honorary CGA designation by the Certified General Accountants Association of British Columbia for outstanding contributions to the Association.

Ed is a member of the Rules Committee of the Tax Court of Canada and the CBA (BC Tax Section)—CCRA Liaison Committee. He is a former Governor of the Canadian Tax Foundation and a former Chairperson for the Tax Subsection of the British Columbia Branch of the Canadian Bar Association. Ed was also a Research Officer for the House of Commons Standing Committee on Finance and Economic Affairs during the hearings on the income tax portion of the White Paper on Tax Reform in 1987.

JOEL A. NITIKMAN,
partner, Fraser Milner Casgrain LLP



When you work as a tax litigator you become an instant expert in whatever tax topic the case is about, and then you forget it until the next time that topic arises. But when you teach a course you don't have that luxury—you have to know the whole area you teach and you have to know it off the top of your head from a conceptual point of view. Often we think much of what we teach may never arise "in the real world", but in tax that's unlikely to be the case—almost everything we teach comes up, and usually sooner rather than later. I was recently reminded of that in a contested motion I argued before Chief Justice Bowman of the Tax Court of Canada. We had brought a motion to strike out much of the Reply filed by the Crown (essentially the Crown's Statement of Defence in a tax appeal). In the middle of the motion the Chief Justice started to ask me questions about a number of cases that were not cited in my written argument, about how they related to the present motion, about such obscure provisions of the Act as subsections 152(5) and 152(9), and about various articles written in the *Canadian Tax Journal*. I was able not only to answer his questions, but also to develop an argument in the middle of the motion that I hope may persuade him (the judgment is currently reserved as of July 4, 2005). The only way I could ever have done this was to teach Tax Litigation at UBC and develop some understanding of how the administrative provisions of the Act work together to govern a tax appeal.

I had a similar experience on another file. The Minister had assessed certain years but refused to reassess other years because they were statute-barred. We appealed the assessed years. Having taught Tax Litigation, I knew that subsection 169(3), an obscure provision that even senior Justice lawyers don't always know about, was designed for exactly that situation. We proposed to Justice and the CRA that they reassess the statute-barred years under subsection 169(3) and achieved a very favourable overall settlement for all the years for the client.

DAVID CHRISTIAN,
partner, Thorsteinssons



I am a partner at Thorsteinssons LLP. This is the first year I will be teaching Tax II, but I follow in a distinguished line of former adjunct professors from my firm who have taught this course.

Michael O'Keefe began teaching tax law at UBC in 1973. In addition to Tax II he also taught Tax I and a seminar in Tax Policy. In the 1980s the growing demands of his practice caused Mike to scale back his teaching load to Tax II alone. I was pleased to be a student in Mike's last year teaching Tax II in 1989.

When Mike ceased teaching, Risa Levine—now Madam Justice Levine of the B.C. Court of Appeal—took over Tax II. She taught the course for several years before ceding her teaching duties to Doug Powrie, who was followed by Ian Gamble. Ian taught Tax II through spring 2005.

My practice deals almost exclusively with privately-held businesses, which dove-tails perfectly with the subject matter of Tax II. Tax II deals with corporate taxation; in particular it addresses the problem of taxing corporate distributions and reorganizations. The law in this area is dynamic as it must seek to avoid double taxation of income while deterring tax avoidance. The tension between these objectives is the heart of the course, as it is the heart of my practice.

I am delighted to be teaching this course, and look forward with great anticipation to doing so.

Supreme Court of Canada Watch

The Supreme Court of Canada has reserved judgment in two cases:

Canada Trustco Mortgage Co. v. Canada, [2004] S.C.C.A. No. 157, appeal heard and reserved March 8, 2005.

Mathew v. Canada, [2003] S.C.C.A. No. 538, appeal heard and reserved March 8, 2005.

The Supreme Court of Canada has granted leave to appeal in the following cases:

Inco Ltd. v. Canada, [2005] S.C.C.A. No. 137, application for leave to appeal granted with costs (without reasons) June 23, 2005.

Imperial Oil Ltd. v. Canada, [2004] S.C.C.A. No. 576, application for leave to appeal granted with costs (without reasons) May 19, 2005.

In addition to contributing their time to work with students in the classroom, a number of firms support UBC Tax by providing prizes and awards to students enrolled in tax law. In particular, UBC offers five tax prizes annually. Thorsteinssons LLP offers a tax prize to the top student in each section of Taxation I, and to the top student in each section of Taxation II. Stikeman Elliott LLP and Carswell offer a prize in tax law to an outstanding student in the tax law program overall at UBC.

Last year's winners of these prizes are profiled below. To summarize, the recipients of the tax awards for the 2004/2005 academic year were as follows:

THORSTEINSSONS PRIZE IN TAXATION I

Olen Aasen
Allison Blackler
Jenna Virk

THORSTEINSSONS PRIZE IN TAXATION II

Douglas Mordy

STIKEMAN ELLIOTT AND CARSWELL NATIONAL TAX PRIZE

Douglas Mordy

Student Profiles:

OLEN AASEN was honored to receive the Thorsteinssons prize in taxation. He started law school after doing three years in the finance program at the Sauder School of Business at UBC. He enjoys tax so much he decided to spend the summer collecting duties and taxes working for Canada Customs. His work at customs may also lead to some good appeal work for the local tax bar. He is entering his final year of law school and after graduation he plans to practice commercial law and maybe even a little tax.



ALLISON BLACKER started law school after more than a decade working in a government tax environment. Although returning to full-time post-secondary education was a difficult decision, she didn't want to look back with any regrets. She decided to risk uncertainty and it has been the best decision she has ever made. She has since found a particular interest and aptitude in tax law. This was recognized when she was named first on the eligibility list to the Tax Court of Canada's 2006/2007 clerkship team. She is now greatly honoured to have received the Thorsteinssons Prize for Taxation, for high standing in Taxation I. She is looking forward to building a career that she hopes will involve tax law and will constantly challenge her to push the boundaries of her experience.



DOUG MORDY developed an interest in pursuing a career in tax while completing his Commerce degree at the University of British Columbia. With a career in tax in mind, he started to pursue his Chartered Accountant designation, but soon found that lawyers were doing most of the work he wished to be involved in. He returned to school to earn his law degree, where he was extremely pleased with the educational experience, especially the quality and breadth of the tax curriculum at UBC. He is greatly honoured to have received the Stikeman Elliot/Carswell National Tax Prize and the Thorsteinssons Prize for Taxation, for high standing in Taxation II. Doug is returning to public accounting to complete his C.A. designation, but is certain that his career will involve tax in one area or another.



JENNA VIRK completed her BBA at Simon Fraser University in Accounting and Finance. She worked as a Junior Financial Accountant and took courses through the CGA program before attending UBC law. She is interning at WorkSafe BC over the summer. Jenna is entering her third year of law school and would like to pursue a career in tax law.



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For more information about UBC's tax law program, to provide feedback or input on this newsletter, or to discuss ways your firm may get involved in UBC Tax, please contact Kim Brooks.