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A Reasonable Balance: Revenue Authority Discretions and the Rule of Law in Canada

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The Delicate Balance

Tax, Discretion and the Rule of Law

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A Reasonable Balance: Revenue Authority Discretions and the Rule of Law in Canada

Kim Brooks*

1. Canada's porous separation of powers

Like its United Kingdom and American democratic antecedents, the Canadian government is separated into three branches: the legislature, executive, and judiciary. Some commentators suggest that one important aspect of the rule of law is that the legislative body makes laws, the executive administers them, and the judiciary interprets them. These legal functions are assumed to be entirely distinct. However, a more realistic understanding of the legal process recognizes that a continuum exists between these legal functions and it is often difficult to distinguish one from the other. While in theory the functions performed by the three branches of government in Canada are separate, in practice only limited use is made of the notion of the strict separation of powers. For example, the task of the legislative branch is assumed to be drafting legislation as opposed to the task of the executive branch, which is assumed to be formulating regulations pursuant to that legislation. Leading Canadian administrative and constitutional law scholar Roderick Macdonald argues that most of the theoretical distinctions between legislation and delegated legislation fall away on examination:

> [s]tatutes frequently approach regulations in their detail, which regulations at times imitate statutes in their permanence. On occasion, Parliament will endlessly debate the particulars of legislation and canvass public opinion widely, whereas the Governor-in-Council and administrative agencies often fail to consult even directly affected parties; regulatory statutes sometimes will be devoid of contentious political judgments, while regulations will advance an overtly political purpose. In other words, it is impossible today to assert any clear political, technical or functional division between these two legislative modes.[1]

In the design and administration of Canada's tax system, this observation holds for most of the theoretical lines of authority between the legislature,

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1. Macdonald, Roderick, "Understanding Regulation by Regulations", in Ivan Bernier and Andrée Lajoie (eds.), *Regulations, Crown Corporations and Administrative Tribunals* (Toronto: University of Toronto Press, 1985), p. 93.

executive, and judiciary. This chapter reviews the separation of powers and the exercise of law-making discretion in Canada as it relates to tax law, in particular the income tax law. The chapter concludes that Canada's somewhat weak separation of powers has worked reasonably well in achieving the goals of the tax system and the values inherent in the rule of law.

Parenthetically, it might be noted that Canada is a federal state and the Canadian Constitution divides taxing authority between the federal and provincial governments. The federal government has the power to impose any form of taxation, while the provinces are limited to direct taxation within the province for provincial purposes.[2] The Constitution further limits each government in delegating its power to legislate.[3]

2. The three branches in theory

2.1. The legislative branch

The federal income tax, first enacted in 1917, is imposed by the Income Tax Act.[4] The Act covers both the substantive imposition of the tax law and its administration. The Income Tax Act may be amended only by Parliament through a Bill introduced in the House of Commons.[5] Provinces also impose income taxes, but for the most part, those taxes are harmonized with the federal legislation and in most cases the federal government administers and collects the tax on behalf of the provinces. The Income Tax Act is the primary source of tax law in Canada and is exceedingly detailed and complex. The Act is drafted by members of the tax legislation division of the Department of Finance but these drafters are assisted by a relatively large number of tax lawyers, accountants and economists who work in the tax policy division of that Department.

2. Constitution Act, 1867 (U.K.), 30 and 31 Vict., c. 3, ss. 91(3) and 92(2), respectively.
3. *Attorney General of Nova Scotia v. Attorney General of Canada* [1951] S.C.R. 31 (S.C.C.).
4. R.S.C. 1985, c. 1 (5th Supp.), as amended (Income Tax Act).
5. Tax legislation may not be introduced by a Private Member's Bill, nor can it be introduced in the Senate. For a review of the legislative process involved in amending the income tax law, see Cook, Ted, *Canadian Tax Research: A Practical Guide* (Toronto: Carswell, 4th ed., 2005), section 2.4.

2.2. The executive branch

The Income Tax Act expressly provides that "the Governor in Council [i.e. the Governor acting on the advice of the Cabinet] may make regulations... prescribing anything that, by this Act, is to be prescribed or is to be determined or regulated by regulation".[6] In Canada, unlike in the United States, there are no formal procedural requirements for administrative policy setting. There is no equivalent of the Administrative Procedures Act.[7] Generally, wherever the legislature uses the word "prescribed" in the Income Tax Act it signals that it has delegated authority to the executive to provide further detail about that particular provision through regulations. Regulations are used extensively to provide detailed rules needed to complement the legislation. By way of illustration, the rates of depreciation that apply to tangible property and much of the regime for claiming capital cost allowances are found in the regulations. Measured simply by the number of pages they consume, the regulations add approximately 25% to the length of the Act. They have the same force of law as the Act;[8] however, unlike amendments to the legislation it is not necessary that they be passed by the legislative body but instead they must simply be approved by the executive, namely, the Governor in Council, and be published in the *Canada Gazette*. Generally regulations progress through a number of steps that include prepublication, consultation, registration, and final publication. Although they are drafted for the executive and not the legislative body, the regulations are drafted by the same lawyers in the Department of Finance who draft the amendments to the income tax legislation.

In addition to drafting regulations, in exercising its executive function, the Department of Finance regularly issues comfort letters, about 30 per year, which are released to the public as a result of access to information requests. In these letters the executive informs taxpayers of recommended amendments to the Act. These letters presumably offer some assurance that the existing law (or at least interpretations of it that deviate from underlying policy) will not be applied strictly. These letters can be accessed through databases run by private providers on a fee-paying basis.

6. Income Tax Act, s. 221(1)(a).
7. See Hickman, Kristin, "The Promise and the Reality of U.S. Tax Administration" (this volume), text at nn. 29-42.
8. Statutory Instruments Act, R.S.C. 1985, c. S-22, as amended.

Another agency in the executive branch that plays a major role in the tax law-making process is Canada's national tax administrator, the Canada Revenue Agency (CRA). In 1999, the federal tax administration was converted from a government department into a relatively independent agent of government. The Board of Management and Chief Executive Officer are responsible for the daily operations of the CRA; however, the Minister of National Revenue is accountable to Parliament for all aspects of CRA operations. The CRA has separate employer status. To assist in administering the law and collecting taxes, the CRA prepares a wide variety of administrative publications including forms, guides, information circulars, information bulletins, technical updates, advance tax rulings, and letter opinions. Some of the Canada Revenue Agency forms are prescribed by regulation and so have the force of law, but the remaining CRA materials are soft law. Nevertheless, since they state the CRA's current administrative position on particular issues, they are an important source of tax law and practice. The following are the most important documents produced by the Canada Revenue Agency.

Information circulars: These documents focus on the CRA's organization and procedures and are drafted in relatively accessible language, designed presumably for the non-specialist. The Department of National Revenue (the predecessor of the CRA) began publishing circulars in 1970 with the aim of reaching a wide audience with updates about procedural issues and news about changes in administration of the federal taxing legislation.[9] There are over 60 information circulars that remain current and they address topics from the retention or destruction of books and records, to how to obtain a clearance certificate, and descriptions of voluntary disclosure programs.

Interpretation bulletins: Interpretation bulletins, the publication of which also commenced in 1970, are designed for a specialist tax audience. Their objective is to provide guidance about the Department's view of the tax law itself and they have a substantive focus. There are hundreds of interpretation bulletins in which the CRA offers substantive interpretations of Canada's income tax laws, addressing issues from the tax treatment of unpaid amounts to the tax treatment of part dispositions.

Advance rulings: Taxpayers may request that the revenue agency provide a tax opinion on a particular transaction or set of facts. There is no legislative

9. See Department of National Revenue, "Announcement – Information Circulars and Interpretation Bulletins", Information Circular 70-1 (25 August 1970).

authority for the giving of these opinions; however, beginning in 1970, the tax administration announced that it would give its opinion on the tax consequences of proposed transactions for a fee. Initially these rulings were not routinely disclosed to the public but since 1997 all rulings, in severed form, have been released to commercial tax publishers. The CRA issues approximately 250 Advance Income Tax Rulings per year. The Agency has stated that it intends to bind itself by these rulings with respect to the taxpayer to whom each is issued.[10] Despite this statement, however, it is likely that the Agency cannot bind itself by its rulings (although it can clearly simply fail to assess a taxpayer in a way that is inconsistent with a prior ruling). For example, in the era before the Agency released formal advance rulings, it did provide taxpayers with informal positions on proposed transactions. In an early case, the court held that, even though the Agency affirmed a particular tax consequence for a taxpayer in an informal tax ruling, it was acceptable for the Agency to reassess the tax consequences if those consequences were more in line with the law.[11] The revenue agency takes the view that rulings are binding for the taxpayer who seeks the ruling, not for taxpayers in similar circumstances; nevertheless, rulings are published with identifying information redacted, and all taxpayers rely upon them as a statement of the CRA's administrative position. There have been some problems for taxpayers seeking advance rulings such as the amount of time it takes to receive a ruling.[12]

Technical interpretations: Taxpayers may request a technical interpretation to address a particular transaction or set of facts without paying a fee and without providing any taxpayer-identifying information. These revenue agency views are regularly released although the revenue agency takes the position that they are not binding. The Agency releases approximately 2,200 technical interpretations each year.

Taxpayer Bill of Rights: Finally, the Canada Revenue Agency has published a Taxpayer Bill of Rights.[13] This Bill does not have the force of law and it is comprised of five broad statements. Some of the statements reflect practices or policies that do have some force of law because they have been enacted in other pieces of legislation; for example, the Bill of Rights

10. Department of National Revenue, "Advance Income Tax Rulings", Information Circular 70-6R3 (1996), para. 6.
11. See *Woon v. Minister of National Revenue* [1950] C.T.C. 263 (Ex. Ct.).
12. Office of the Auditor General of Canada, *2009 Fall Report of the Auditor General* (2009), para. 3.49. Available at: http://www.oag-bvg.gc.ca/internet/English/parl_oag_200911_03_e_33204.html#hd5j.
13. Available at: http://www.cra-arc.gc.ca/E/pub/tg/rc4417/rc4417-09b.pdf.

promises taxpayers the right to service in both official languages. It also includes commitments such as the right to expect accountability and the right to privacy.

2.3. The judicial branch

Canada has a vast body of income tax case law. If a taxpayer objects to the characterization or calculation of taxable income, he or she begins with an administrative appeal.[14] Most disputes are resolved at this level – on an informal basis in discussions between the taxpayer and an appeals officer of the revenue agency.

Where a dispute is not resolved internally, a taxpayer may appeal to the Tax Court of Canada. Appeals of Tax Court of Canada judgments are made to the Federal Court of Appeal and finally, if leave is granted, to the Canada's highest court, the Supreme Court of Canada. Cases in the Tax Court of Canada may proceed by way of informal or general procedure. The informal procedure process is designed for disputes involving less than $12,000 in federal tax and penalties for each taxation year. Informal procedure cases are not to be treated as precedent for subsequent decisions. Only a small number (as few as one or two) tax decisions are heard by the Supreme Court of Canada each year. Responsibility for litigating tax cases on behalf of the government rests with the Department of Justice.

The courts turn to the Income Tax Act and supporting regulations in their adjudication of tax disputes, since those documents clearly have the force of law. The Canada Revenue Agency's publications, including information circulars, interpretation bulletins, rulings, and letters, do not have the force of law. The courts in Canada have appropriately held that these documents may be used as a persuasive aid, but that they do not govern the court's approach to resolving tax disputes. For example, in the *Nowegijick* case,[15] the issue before the Supreme Court was whether the employment income of the taxpayer was the personal property of an Indian situated on a reserve and therefore tax exempt. In that case, the Crown argued that an interpretation bulletin, which stated that "it is considered that the intention of the Indian Act is not to tax Indians on income earned on a reserve" was wrong. Income was not "personal property" and therefore the tax exemption did not apply to wages. The Supreme Court noted that "administrative policy

14. The process for appeals is set out in the Income Tax Act, s. 165.
15. *Nowegijick v. R.* [1983] 1 S.C.R. 29 (S.C.C.).

and interpretation are not determinative but are entitled to weight and can be an 'important factor' in case of doubt about the meaning of legislation".[16]

The courts have generally been open to reviewing and considering interpretation bulletins[17] and Minister's memoranda (in the goods and services tax context).[18] Some courts seem to have been excessively mindful of the fact that interpretative documents, such as interpretation bulletins, are interpretative guides without the force of law. For example, in some cases courts have suggested that these documents should only be relied upon as relevant where there are two "equally plausible, probable and acceptable" interpretations.[19] In other cases, the courts have suggested that they are only useful where they support the position taken by the taxpayer and not when they support the position taken by the revenue agency.[20]

3. The good sense of blurring the three functions in practice

Many advantages of delegating legislative functions to the executive and judicial branches of government have been identified. Primary among these, and critical in the area of tax law, is to take advantage of the expertise of the executive and judicial branches. While, for example, the legislature and the Department of Finance have specialist expertise in legislative drafting and tax policy, the Canada Revenue Agency and the courts, especially the Tax Court of Canada, are well placed to assess how the rules apply to taxpayers on a case by case basis and the consequences that follow from different applications of the rules.

A second advantage of delegating the task of developing interpretative positions and discretionary administrative practices to the Canada Revenue Agency as overseen by the courts is that it enables a textured and flexible response to emerging issues in tax law that takes account of changing social and economic conditions. The Department of Finance and the legislature would need to expend significant time and resources if they were to address

16. *Nowegijick v. R.* [1983] 1 S.C.R. 29 at para. 28.
17. See for example *Taylor v. Minister of National Revenue* [1988] 2 C.T.C. 2227 (T.C.C.); *Mattabi Mines Ltd. v. Ontario (Minister of Revenue)* [1988] 2 S.C.R. 175 at 196.
18. See for example *London Life Insurance Co. v. R.* [2000] G.S.T.C. 111 (F.C.A.).
19. See for example *Brouillette v. R.* [1998] 1 C.T.C. 2229 at para. 49.
20. *Placer Dome Canada Ltd. v. Ontario (Minister of Finance),* 190 O.A.C. 159 (Ont. C.A.) at paras. 49-52.

the broad range of issues that arise in the application of the Income Tax Act as taxpayers attempt to ascertain the tax consequences of their actions. Providing not only rules but also standards and principles in the legislation, which in effect amounts to a delegation of legislative authority to other branches of government, allows informed decision-making that is responsive to a long list of relevant variables that cannot be known ex ante.

Those who are concerned about the rule of law and the exercise of discretion in public policy-making frequently list a number of disadvantages of delegation. However, the problems they identify are not insurmountable. One concern is that the administrative arm may offer guidance to taxpayers or interpretations of the law that are inconsistent with the objects of the legislation. However, where this is the case, the legislature is free to step in and rectify the interpretation with a legislative amendment. For example, for many years the CRA disallowed the deductibility of business fines and penalties on grounds of public policy, even though the legislation was silent on the tax treatment of fines and penalties. The CRA took the view that it would be against public policy to allow the tax deduction of fines and penalties that were intended to act as a deterrent for the conduct in question and further that the deduction of such expenses would by implication represent a condonation of that conduct. In the late 1990s, a taxpayer challenged this position of the CRA. The case was appealed to the Supreme Court of Canada, which held that since the legislation did not make provision for the non-deductibility of fines and penalties it was improper for the CRA not to allow them to be deducted.[21] In part, the Supreme Court relied upon an argument by leading Australian tax scholar Richard Krever that allowing the tax administration to deny the deductibility of fines and penalties would introduce excessive uncertainty into the administration of the law, given that different jurisdictions may impose fines (or not) for the same activities;[22] the inequity can also be noted of differential treatment of businesses engaging in the same activities in different jurisdictions. After the judiciary reached this decision, the legislature amended the Act to explicitly disallow the deduction of business fines and penalties.[23]

Another concern of those opposed to the delegation of policy-making to the executive and judiciary is that it might lead to interpretations that disadvantage taxpayers. In other words, where there are potentially competing

21. *65302 British Columbia Ltd. v. R.* [1999] 3 S.C.R. 804 (S.C.C.).
22. See Krever, Richard, "The Deductibility of Fines: Considerations from Law and Policy Perspectives", 13 *Australian Tax Review* (1984), p. 168.
23. See Income Tax Act, s. 67.6.

interpretations, the administrative arm may be inclined to endorse an approach that favours taxation over non-taxation. Conversely, it may be perceived by some taxpayers that the administrative arm may be unduly influenced by groups representing the interests of particular taxpayers and therefore provide overly generous interpretations to them. It is the case that administrative bodies, like legislatures, are not divorced from the politics of law-making and interpretation. Where interpretations by administrative bodies are adverse to taxpayers, the taxpayers always have the option of litigating the matter. Where the interpretations of the administration are argued to be inappropriately favourable to particular taxpayers, seeking correction of the errors is more difficult.

Canadian courts have grappled explicitly with the issue of whether a person not directly affected by an administrative ruling can challenge an advance ruling by the CRA on the basis that it is inconsistent with tax law and favours other taxpayers. In *Harris*, a member of the public alleged that the CRA had inappropriately provided a taxpayer with a private advance ruling that was inconsistent with the tax law and further that the CRA was acting in bad faith in granting the ruling.[24] The plaintiff in the suit alleged that there had been political interference in the granting of the advance ruling, which addressed a tax-free change of trust residence. The Minister of Justice sought to strike the claim on the grounds both that the claimant did not have standing to bring the suit and that the proceedings did not reveal a reasonable cause of action. The Federal Court held that the claimant had standing to bring the suit but that to succeed he was required to show not only that the advance ruling was wrong in law but that the CRA had acted in bad faith in granting the ruling. In this particular case, the Court found that there was no evidence of bad faith on the part of the CRA. This case makes it somewhat difficult for individual concerned citizens to seek the correction of positions taken by tax administrators which are perceived to be overly generous. However, the legislature may amend the law so as to reverse the position (and following this particular case the legislation was so amended to remove the possibility of favourable treatment to taxpayers such as those who received the ruling); the laws relating to standing to challenge administrative positions also might be liberalized.

A third concern with delegating substantive policy-making authority to the administrative and judicial branches is that there might be a lack of reasoned public debate about the underlying policies reflected in the guidelines, regulations, or decisions of those branches. If courts or the

24. *Harris v. R.* [2002] 1 C.T.C. 243 (F.D.T.D.).

administrative agency adopt policies that diverge from the objectives of the legislation, and do so without public consultation, deliberative democracy will be eroded. Broadly speaking, some scholars have expressed concern about the importance of ensuring that appropriate processes guide administrative decision-making. Illustratively, Canadian administrative law scholar Alice Woolley cautions that, without proper oversight, ministerial and administrative bodies might undermine deliberative democracy:

> [t]he failure of legislators and the courts to ensure that ministerial and administrative policy making follows from appropriate process renders the legitimacy of the resulting policies questionable, as well as making these policies less likely to be factually and normatively sound. Many administrative agencies and government ministries currently follow procedures when designing policy; however, the sufficiency of these procedures is at best difficult to determine and at worst doubtful. In any event, reliance on the goodwill and good faith of individual decision makers to establish the process of policy making is insufficient to ensure that the resulting policies are both democratically legitimate and well informed. Public policy making should, and should be required to, follow an appropriate process that ensures its legitimacy and soundness.[25]

This concern about the lack of public deliberations in relation to tax policy is of course a concern not only at the administrative level but also at the legislative level. Some tax scholars have argued that the language that tax experts use in describing tax laws and their policies precludes sensible public debate about legislative directions.[26] Nevertheless, although a meaningful public debate about the broad issues underlying tax policy decision-making is important, it is arguably less important, and perhaps impossible, to have a rich public debate about the intricacies of complex tax matters such as controlled foreign affiliate regulations, despite the importance of ensuring robust rules to prevent tax planning opportunities. In Canada, there is no formally required process of public debate for the promulgation of new administrative guidelines. However, in most instances the Canada Revenue Agency raises shifts in its stated position at conferences attended by large numbers of members of the tax profession and publishes its view on changes to positions in income tax technical news releases, documents that they publish periodically. There is thus usually ample opportunity for informed members of the public to make their views known on these administrative issues.

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25. Woolley, Alice, "Legitimating Public Policy", 58 *University of Toronto Law Journal* 2 (2008), p. 155.
26. See for example Philipps, Lisa, "Discursive Deficits: A Feminist Perspective on the Power of Technical Knowledge in Fiscal Law and Policy", 11 *Canadian Journal of Law and Society* (1996), p. 141.

Some analysts have expressed concern generally about the potential for administrative positions to become outdated. In other words, without a formal and fully exposed process, the administrative arm might fail to periodically review and adjust its administrative positions in the light of changing circumstances. In Canada, there is ample evidence that this has occurred in both the legislative and executive branches. Drafting (and ultimately passing) technical changes to the Income Tax Act has been unduly slow. As reported by the Auditor General in her 2009 Fall report, only four income tax technical Bills have been enacted in the last 20 years. There are countless comfort letters, issued by the Department of Finance on technical gaps in the legislation, that remain legislatively unaddressed. In fact, in 2009 the Auditor General estimated that there were at least 250 technical amendments that had been identified but not drafted or released for comment.[27]

Finally, in defending the delegation of broad public policy-making authority to the administrative branch of government, it should be noted that general administrative law principles in Canada apply to and guide the exercise of discretion by decision-makers. Most critically, discretion is not absolute or unfettered. There are a host of constraints on the application of discretionary power, including that decision-makers should act in a way the promotes the policies and objects of the governing legislation, that the factors used to make a decision must be relevant to the statutory objects, that decision-makers must act in good faith, cannot refuse to exercise discretion, and must be independent and impartial, and that decisions cannot be made in advance of the presentation of the merits of the decision to be made (in other words, that decision-makers cannot come to the issue with a closed mind).[28]

In summary, the Canadian approach to governance, as manifest in the tax law area, does not rely upon a clear separation of functions between the various branches of government, but allows detailed delineation- and application-based functions, that clearly imply a good deal of policy-making, to be allocated to the executive and judicial branches. The Canadian system seems to function relatively well. To the extent that there are concerns relating to the need to ensure that the law is changing to accommodate changing social and economic conditions, the risk of political capture, and the potential for undemocratic process that may threaten the rule of law, these concerns are present not only in the executive or judicial branches,

27. See Office of the Auditor General of Canada, supra, n. 12, para. 3.31.
28. See generally, Blake, Sara, *Administrative Law in Canada* (Toronto: LexisNexis, 4th ed., 2006), ch. 3.

but also in the legislative branch. While in practice there are areas of tax law policy setting and administration that could be improved, overall the system functions relatively smoothly, with checks and balances in place to mitigate possible risks.

4. A reasonable balance in action: The taxation of in-kind benefits

Any one of a large number of areas of tax law could be chosen to illustrate how the relationship among tax legislators, administrators and judges in Canada gives rise to rich and largely productive dialogue.[29] In this chapter, the taxation of in-kind, or fringe benefits, is used for such illustrative purposes because the area presents conundrums about the appropriate taxation of an employee's income, yet the area itself is an easy one to comprehend.[30] The simple problem that legislators, administrators, and judges must confront is how to appropriately identify and value non-cash payments received by employees. Every country is required to resolve this problem by balancing responsibility for policy-making and decision-making among the branches of government. In Canada, the vast majority of benefits are brought into the tax net by a simple paragraph in the tax legislation:

> There shall be included in computing the income of a taxpayer for a taxation year as income from an office or employment … the value of board, lodging and other benefits of any kind whatever received or enjoyed by the taxpayer in the year in respect of, in the course of, or by virtue of an office or employment…[31]

This paragraph leaves all manner of policy decisions to the discretion of the tax administration and courts. For example, how should fringe benefits be distinguished from conditions of employment? If a fringe benefit should be taxable, how should its value be determined? Should in-kind benefits be

29. In Canada, the passage of a Charter of Rights in the Constitution gave the courts the ability to review legislation for compliance with the Constitution. A rich debate about the relationship between courts as reviewing bodies of legislative enactments followed. Peter Hogg, one of Canada's leading constitutional law scholars, responded to debates about the relationship between the legislatures and courts with an argument that the different arms of government were engaged in a dialogue. This metaphor was quickly embraced by many. See for example Hogg, Peter and Allison Thornton, "The Charter Dialogue Between Courts and Legislatures", *Policy Options* (April 1999), p. 19.

30. For a fuller discussion of the taxation of in-kind benefits in Canada, see Brooks, Kim, "The Taxation of In-Kind Benefits", 49 *McGill Law Journal* (2004), p. 255.

31. Income Tax Act, s. 6(1)(a).

included at their fair market value, opportunity cost, marginal cost or average cost? If a fringe benefit has both a business and personal element, how should the personal element be distinguished from the business element? When should non-tax social policy rationales for encouraging employers to provide employees with benefits that might further their safety or mental well-being trump taxation policy? Should it matter whether the receipt of the benefit is voluntary or involuntary; whether the employee would be willing to sacrifice cash compensation to receive the benefit; whether the receipt of the benefit assists the employer's business objectives; or whether the provision of the benefit is cost-free to the employer?

The governing legislation does not address any of the critical questions that would assist a taxpayer in determining whether the value of a laptop computer provided by an employer but that can be used at home is taxable; whether the value of an employee uniform must be included in income; or whether a free meal provided to all employees in an employee cafeteria because their work location is remotely located should be valued and included in income.

Given the devolution of decision-making on these and other questions, the Canada Revenue Agency and courts have done exactly as might have been hoped: they have provided reasoned answers to all of these questions that by and large have resulted in myriad detailed rules that sensibly address the relevant issues. The Canada Revenue Agency has released an extensive Interpretation Bulletin that addresses a long list of different non-cash benefits from annual gifts to employer-paid education to discounts on the employer's merchandise.[32] The first interpretation bulletin on this issue was released in 1964 and it has been updated numerous times over the last 50 years to account for changing conditions and practices.[33] In addition to the Interpretation Bulletin, the Revenue Agency has issued hundreds, if not thousands, of rulings, memoranda, and views to individual taxpayers that address all manner of specific issues. The answers to these questions could not be found by resort to the language of the statute. In each case the Agency was required to make a policy judgment after carefully weighing the equity, neutrality and administrative practicality of the particular ruling it was making. No tax policy specialist would agree with every one of these positions, but by and large they represent reasonable compromises.

32. Revenue Canada, "Employees' Fringe Benefits", Interpretation Bulletin IT-470R (consolidated) (12 October 1999).
33. See Department of National Revenue, "Employees' Fringe Benefits", Information Bulletin No. 24 (12 February 1964).

Where the Revenue Agency's guidelines have proved to be insufficient or where a taxpayer disagrees with the Revenue Agency's interpretation, resort has been had to the courts. Again, there are hundreds of decisions that address the appropriate taxation of in-kind benefits. On the one hand, it could be argued that these cases reflect a waste of resources – litigation is expensive and time consuming. On the other hand, it would be a much greater waste of resources to have the legislative branch agonizing over detailed rules to resolve each of these cases. Subsidized parking provides a simple illustration of the need for the devolution of discretion to tax administrations and the courts. Parking is not explicitly addressed in the Income Tax Act. Therefore, the general provision requiring the inclusion of the value of any benefit received by virtue of employment applies. The Canada Revenue Agency provides some guidelines on its view of employer-provided parking in its Employers' Guide to Taxable Benefits.[34] The Guide clarifies that, generally speaking, the provision of parking by an employer to an employee usually gives rise to a taxable benefit. The amount of the benefit is the fair market value of the parking. The exceptions to taxation are: (1) where the employer provides parking and the employee is required to regularly use an automobile to carry out his or her duties; (2) where the value cannot be determined; or (3) where the employee is required to scramble park (i.e. where the employer has insufficient parking spaces for the employees and so some employees are unable to find parking). The Revenue Agency has addressed a range of specific circumstances in its interpretations.[35]

The courts have similarly been required to address some specific parking arrangements. For example, in *Richmond*, the Court held that an employee had received a taxable benefit even if he never used the spot reserved for him.[36] In *Stauffer*, the Court held that in some circumstances the value of the benefit is not fair market value, but instead the value to the employer.[37] The Court has considered whether employer-provided parking was a taxable benefit for employees when some of those employees were required to use their cars for work purposes and concluded that, where an employee was required to travel in the course of his or her duties, the benefit was not taxable.[38] In *Anthony*, the Court adjusted the value included by the Revenue

34. Revenue Canada, "Employer's Guide to Taxable Benefits", Guide T4130 (2010).
35. See for example Canada Revenue Agency, "Employer provided parking", 2008-0286381E5 (5 December 2008); "Employer provided parking", 2008-0288491E5 (17 November 2008).
36. *Richmond v. R.* [1998] 3 C.T.C. 2552 (T.C.C.) (informal procedure).
37. *Stauffer v. R.* [2002] 4 C.T.C. 2608 (T.C.C.) (informal procedure).
38. *Adler et al. v. R.* [2007] 4 C.T.C. 2005 (T.C.C.).

Agency on the basis that a better comparator price was available.[39] None of these cases could have been sensibly decided on the basis of deductive reasoning from the phrases used in the legislation.

For the most part, the Canada Revenue Agency and courts seem to make decisions that are sensitive to the underlying purpose of the taxation of non-cash benefits. Although certainly no observer would agree with all of the rules formulated by the administration and the courts, they have developed an incredibly detailed body of rules that would suggest that the delegation of discretion appears to work well.

5. An appropriate allocation of discretion

The notion that clear lines can be drawn between the legislature, executive, and judiciary, and that clear lines might be drawn between the exercise of rule-making authority and the mere application or modest interpretation of that authority is foolhardy.[40] Scholars have long understood that while distinguishing between branches of government and types of regulatory activities is important and helpful, the myth that administrative bodies and courts do not appropriately engage in rule-setting ignores the reality of modern administrative governments. Indeed, if the Department of Finance, Canada Revenue Agency, and tax courts stepped back from what might be construed as rule-making, Canada's Income Tax Act, despite its detail and length, would remain a woefully inadequate document. The Canadian tax system would be less equitable, neutral and simple as a result.

39. 2010 T.C.C. 533 (T.C.C.) (informal procedure). See also *Toronto Parking Authority v. R.* [2010] 5 C.T.C. 2456 (T.C.C.) (employment insurance).
40. See in particular on this point Macdonald, Roderick, "The Administration of Statutes", 12 *Queen's Law Journal* (1987), p. 488.