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The Supreme Court of Canada Crumbles Mr. Christie's Cookie

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THE SUPREME COURT OF CANADA CRUMBLES MR. CHRISTIE'S COOKIE

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In *British Columbia (Attorney General) v. Christie*[1] the unanimous full bench of the Supreme Court of Canada upheld a provincial sales tax ("PST") on legal services, rejecting a *Charter* challenge and overturning the lower courts' decisions that partially invalidated the tax. On behalf of the taxpayer, the late Dugald E. Christie, it was argued that the PST on legal services denied his impoverished clientele access to justice, thereby infringing the rule of law. The Court agreed with the taxpayer's argument only to the limited extent that a narrowly defined rule of law was indeed a foundational principle. Despite this common starting point, the Court rejected the taxpayer's attack on the PST, reasoning that the taxpayer had assumed excessively broad concepts of the rule of law and access to justice. The Court concluded in effect that the taxpayer sought nothing less than a guaranteed right to counsel for each and every litigant. The Court held that if it were to accede to the taxpayer's argument, as the Court had reformulated it, drastic consequences would have followed: virtually any litigant, individual or corporate, in civil or criminal proceedings, would be entitled to counsel funded at taxpayers' expense by legal aid, at ruinous cost. The taxpayer's counsel tried to counter the Court's view by contending that the Court was exaggerating and overstating his argument, but to no avail. Having dismissed the taxpayer's argument through *reductio ad absurdum*, the Court allowed the government's appeal,

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[1] 2007 SCC 21, 2007 D.T.C. 5229, 361 N.R. 322, rev'g 2005 BCSC 122, (*sub nom. Attorney General of British Columbia v. Dugald E. Christie*), 250 D.L.R. (4th) 728, 39 B.C.L.R. (4th) 17; varying 2005 BCCA 631, 262 D.L.R. (4th) 51, 48 B.C.L.R. (4th) 267, supplementary reasons, 2006 BCCA 59, 263 D.L.R. (4th) 582, 48 B.C.L.R. (4th) 322.

rejected the taxpayer's cross-appeal, and reinstated the PST on legal services in full.

The argument on behalf of the taxpayer contended that the courts should strike down the entire PST on legal services, and the government argued the opposite: that the tax was valid in its entirety. The judgment at first instance and the majority judgment of the appellate court took positions somewhere between the two extremes. This unfortunately caused uncertainty, until the unanimous decision of the Supreme Court, which sided with the government's position, restored greater certainty.

The taxpayer, a lawyer practising poverty law in British Columbia, challenged the validity of a provincial sales tax charging 7 percent on fees billed for legal services and payable on billing.[2] The PST on legal services required lawyers and notaries public in private practice to add the tax onto their billings. The taxpayer proved that his clientele needed legal assistance in litigious matters, but could not afford to pay the PST on top of his modest fees, with the result that he had to pay the PST personally on their behalf. All the judges hearing the case accepted as a fact that the PST impeded access to legal assistance by the taxpayer's clientele, and imposed a hardship on him personally. The motions judge in the British Columbia Supreme Court and a majority of the British Columbia Court of Appeal declared the tax invalid to the extent that it violated civil rights of access to justice. Access to justice is implicitly guaranteed by the concept of the rule of law as expressed in the Preamble to the *Canadian Charter of Rights and Freedoms*.[3] The dissenting appellate judges held that the PST was nevertheless valid, even if it violated the rule of law, or denied access to justice. The Supreme Court of Canada upheld the PST on legal services in full, concluding that the taxpayer had failed to establish any violation of the rule of law or denial of access to justice.

The amount of revenue generated by the taxation of legal services is considerable. For example, the PST on legal services generates approximately $150 million annually for the Province

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[2] *Social Service Tax Amendment Act (No. 2), 1993*, S.B.C. 1993, c. 24.

[3] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

of British Columbia (out of total PST revenue in excess of $4 billion) and the goods and services tax ("GST") on legal services raises approximately $840 million annually for the Government of Canada.[4] If Mr. Christie had succeeded in striking down the PST on legal services, constitutional principles, including the rule of law, would have required the Province to refund taxes to all affected taxpayers, not only for the years in dispute but also for prior years within the limitation period of six years.[5]

The reasons for judgment of the Supreme Court of Canada emphasize three points: (1) certainty is a virtue in matters of taxation; (2) taxation by arbitrary administrative discretion is contrary to the rule of law; and (3) the Preamble to the *Charter* is no help to taxpayers.

I. CERTAINTY IS A VIRTUE IN MATTERS OF TAXATION

The outcome of the various decisions rendered by the lower courts over the period of the two years, from 2005 to 2007, caused uncertainty for the legal profession and its clients.[6] Although the Supreme Court of Canada's reasons for its decision might seem hastily written and evasive of the issues, the decision itself restored a degree of certainty, which is essential in matters of taxation. In contrast, the lower courts' rulings had created a chaotic situation.

In the Supreme Court of British Columbia, Koenigsberg J. declared the PST on legal services partially *ultra vires* the province to the extent that it applied to legal services for low-income clients, but upheld its validity as a charge on billings for other legal services. The learned judge adopted the means test for family law duty counsel funded by legal aid, as the demarcation for invalidity of the PST. The taxpayer had fallen in arrears in remitting the PST due on his billings to his poorer clients, and the government had used its statutory collection remedies, but

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[4] "Province wins Supreme Court of Canada ruling" (May 25, 2007), online: CKNW News Talk 980, <http://www.cknw.com>.

[5] *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1 at paras. 13-15, 56, [2007] 1 S.C.R. 3, 276 D.L.R. (4th) 342.

[6] See e.g. *Derek K. Miura Corp. v. British Columbia (Attorney General)*, 2005 BCSC 1569, 49 B.C.L.R. (4th) 307.

collections based on the invalid aspect of the PST were also invalid, and had to be refunded.

The Attorney General appealed and the taxpayer cross-appealed to the British Columbia Court of Appeal. By a 3 to 2 majority, the appellate judges dismissed the appeal, varied the motions judge's decision, and allowed the cross-appeal. For the majority of appellate judges, Newbury J.A. (Prowse and Donald JJ.A. concurring) partially invalidated the PST to the extent that it applied to legal services relating to litigation that determined rights and obligations, in courts of law or in independent administrative tribunals.[7] The majority upheld the tax as a valid charge to the extent that it was applied to non-litigious legal services, however. The majority defined access to justice as an implicit constitutional entitlement:

> [R]easonable and effective access to courts of law and the opportunity to obtain legal services from qualified professionals, that are related to the determination and interpretation of legal rights and obligations by courts of law and other independent tribunals.[8]

The majority judgment varied that of the lower court by striking down the tax in relation to barristers' services, regardless of clients' wealth, and restoring the validity of the PST on solicitors' fees regardless of clients' lack of means, in non-litigious matters. The judgment at first instance had aimed at protecting impoverished clients, but the majority decision of the appellate court sought to protect litigious legal services from tax. The dissenting appellate judges (Southin J.A., Thackery J.A. concurring) would have allowed the appeal and upheld the validity of the PST, declining to comment on whether or not the tax was impolitic.

Uncertainty ensued about the effect of the majority's decision, and about the proper form of the order. On a further hearing, two judges (Donald and Newbury JJ.A.) of the majority affirmed their previous decision. The judges declined both the taxpayer's application to declare invalid the entire PST on legal services, and

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[7] According to administrative law jurisprudence, the independence of a tribunal depends upon the security of tenure of its members.

[8] 2005 BCCA 631 at para. 30, 262 D.L.R. (4th) 51, [2006] 2 W.W.R. 610.

the government's application to order suspension of the effective date of implementing the order. The judges said their decision "read down" the legislation to preserve the tax revenue generated by the remainder of the PST. The other majority judge (Prowse J.A.), concurring with the ruling to preserve their majority, would have preferred to suspend implementation of their judgment for six months to allow time for legislative amendments to the PST in order to conform to the majority judgment. The dissenting judges declined to participate in the rehearing.

Further uncertainty ensued when the government applied to the Supreme Court of Canada for leave to appeal the majority decision of the British Columbia Court of Appeal. After initiating its application for leave, the government applied to a judge of the Court of Appeal in chambers for an interlocutory stay of the majority decision pending the outcome of the appeal, to reinstate collection of the PST. On the hearing of the stay application, the government argued that if its appeal ultimately succeeded at the Supreme Court of Canada, it could not collect the arrears of PST that it would be owed over the appeal period. The Chambers judge, Smith J.A., agreeing with the government that the public interest required interlocutory preservation of disputed tax revenue, stayed the majority decision while the appeal was underway.[9] The effect of the stay was to require B.C. lawyers to collect the PST on legal services relating to litigation and to accumulate the funds in trust until the final outcome of the appeal, instead of remitting them currently as the tax legislation required.

The taxpayer successfully appealed the interlocutory stay to three members of the Court of Appeal.[10] Finch C.J.B.C., for the unanimous bench, agreed with the taxpayer that the stay undid the benefit of his successful litigation. The three appellate judges restricted the scope of the stay. They restored the immediate effect of the majority decision to exempt the taxpayer, his clientele, and other lawyers and their low income litigants from paying the PST. The variation of the stay meant reinstating the legal profession's

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[9] *British Columbia (Attorney General) v. Christie*, 2006 BCCA 120, 264 D.L.R. (4th) 468, 223 B.C.A.C 253.

[10] *Christie v. British Columbia (Attorney General)*, 2006 BCCA 241, 270 D.L.R. (4th) 697, 225 B.C.A.C. 150.

obligation to collect and retain the PST on the fees charged to clients above the low income level.

For the guidance of the public and the legal profession, the provincial government issued updates purporting to offer its interpretation of the courts' decisions.[11] The Law Society of British Columbia issued its own updates interpreting the courts' decisions and the government's updates, noting lingering uncertainties.[12] Lawyers were advised to collect and hold in trust or remit the PST on legal services to clients who did not qualify for low-income status. Following the decision of the Supreme Court of Canada, the PST on legal services has been restored, and the PST held in trust pending the outcome of the appeal has been remitted to the provincial government.

II. TAXATION BY ARBITRARY ADMINISTRATIVE DISCRETION IS CONTRARY TO THE RULE OF LAW

In the course of its reasons for judgment, the Supreme Court of Canada reaffirmed the status of the rule of law as a "foundational principle."[13] The Court went on to narrowly define the rule of law as comprising:

> [A]t least three principles. The first principle is that the "law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power." The second principle "requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order." The third principle requires that "the relationship between the state and the individual ... be regulated by law."[14]

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[11] British Columbia Ministry of Small Business and Revenue, *Legal Services Provided to British Columbia; Information Update* (17 August 2006), online: <http://www.rev.gov.bc.ca/ctb/Legal_Services_Provided_to_ British_ Columbians.htm>.

[12] Law Society of British Columbia, "Provincial government issues new PST remittance guidelines" (18 June 2007), online: Law Society of British Columbia <http://www.lawsociety.bc.ca/utilities/whatsnew.html#pst>.

[13] *Supra* note 1 at para. 19.

[14] *Ibid.* at para. 20 [citations omitted]; see also *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9 at paras. 134-35, 276 D.L.R. (4th) 594, 358 N.R. 1.

In the context of taxation, these dicta will be very helpful to the interpretation of statutory provisions authorizing public servants to exercise discretion over such matters as the allocation or apportionment of amounts for tax purposes. Previous Canadian tax cases had respected Parliament's delegation of discretion to taxation administrators as long as the discretion was exercised within the letter and the purpose of the provisions.[15]

In its stricter application of the rule of law to the interpretation and exercise of administrative discretion, the *Christie* case is consistent with more recent taxation cases.[16] Thanks to the *Christie* case, taxpayers have an authoritative basis for attacking arbitrary or excessively zealous exercises of administrative discretion, such as so-called "arbitrary" or net worth assessments, even though legislation authorizes the method of assessment.

III. THE PREAMBLE TO THE *CHARTER* IS NO HELP TO TAXPAYERS

The *Canadian Charter of Rights and Freedoms* consists of a preamble and the text itself. Since the enactment of the *Charter* a quarter of a century ago, taxpayers have achieved only minimal success in challenging tax assessments as violating their *Charter* rights as stated in the text.[17] While the ordinary taxpayer has not had much success in asserting *Charter* rights or values against tax

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[15] *D.R. Fraser & Co. Ltd. v. M.N.R.*, [1949] A.C. 24, [1948] 2 W.W.R. 1119 (J.C.P.C.); *Pioneer Laundry & Dry Cleaners Ltd. v. M.N.R.*, [1939] S.C.R. 1, [1939] 1 D.L.R. 246 (Davis J. dissenting; Duff C.J.C. concurring), aff'd [1940] A.C. 127 (J.C.P.C.).

[16] *The Queen v. Golden*, [1986] 1 S.C.R. 209, 25 D.L.R. (4th) 490; *Vestey v. I.R.C. (Nos. 1 and 2)*, [1979] 3 All E.R. 976, [1980] A.C. 1148 at 1171-74, per Lord Wilberforce: "A proposition that whether a subject is to be taxed or not, or that if he [sic] is, the amount of his liability is to be decided (even though within a limit) by an administrative body represents a radical departure from constitutional principle ... ."

[17] See e.g. *Symes v. Canada*, [1993] 4 S.C.R. 695, 110 D.L.R. (4th) 470, [1994] 1 C.T.C. 40; *Nadeau v. M.N.R.*, 2003 FCA 400, [2004] 1 F.C.R. 587, [2004] 1 C.T.C. 293 (C.A.) [*Nadeau*]; *Mathew v. The Queen*, 2002 D.T.C. 1637, [2003] 1 C.T.C. 2045 (T.C.C.) [*Mathew*], aff'd on other grounds 2003 FCA 371, [2004] 1 C.T.C. 115, aff'd 2005 SCC 55, [2005] 2 S.C.R. 643, 259 D.L.R. (4th) 255; see also Natalie Lee, "The Effect of the Human Rights Act 1998 on Taxation Policy and Administration" (2004) 2 eJournal of Tax Research 155.

assessments, taxpayers who are suspected of tax evasion, as criminal suspects facing the possibility of prosecution, have the full benefit of *Charter* protection.[18]

Mr. Christie's argument relied heavily on the Preamble to the *Charter* for its endorsement of the rule of law, and though the lower courts referred to the Preamble, the Supreme Court of Canada did not do so, preferring to ground the rule of law in the Preamble to the *Constitution Act, 1982*,[19] and in section 1 of the *Charter*.[20] "The rule of law," is a basic constitutional principle underlying Canadian federalism, which is stated in the Preamble to the *Charter of Rights and Freedoms*, as follows:

> Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law: ...

Subection 52(1) of the *Constitution Act, 1982*, provides as follows:

> s. 52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

The Preamble to the *Charter* states two principles, but taxpayers have had negligible success in challenging taxes under either (a) the supremacy of God, or (b) the rule of law.

A. THE SUPREMACY OF GOD AND TAXATION

Taxpayers' attempts to invoke "the supremacy of God" as a basis for their conscientious and religious scruples against taxation have failed abysmally. Tax courts have rejected refusal on conscientious grounds to pay taxes as putting taxpayers' subjective beliefs in conflict with the other principle of the Preamble, namely obedience to the rule of law. Furthermore, the

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[18] *R. v. Jarvis*, 2002 SCC 72, [2002] 3 S.C.R. 757, 219 D.L.R. (4th) 233.

[19] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[20] *Supra* note 1 at para. 19.

courts have noted that these conscientious objectors could cause chaos in the tax system.[21]

B. THE RULE OF LAW AND TAXATION

Taxpayers who willfully refuse to pay a tax, protesting that it violates the rule of law, have not fared much better in the tax courts than conscientious objectors against taxation. A taxpayer refusing to pay a tax, claiming that it is a violation of the rule of law, usually faces the conundrum that the very same argument could be made against the willful refusal to pay a lawful obligation. In Mr. Christie's straitened financial circumstances, however, the apparent self-contradiction did not apply, because he could not afford to pay the PST.

The rule of law is an amorphous concept that can be defined broadly or narrowly. In the *Christie* case the Supreme Court of Canada reiterated its narrow definition of the rule of law.[22] An admirable formulation of the broader concept of the rule of law

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[21] *O'Sullivan v. R.*, [1992] 1 F.C. 522, 84 D.L.R. (4th) 124 (T.D.); *Norejko v. Canada*, 2004 TCC 829, [2005] T.C.J. No. 5; *Pappas v. Canada*, 2006 TCC 692, [2006] T.C.J. No. 551, per Miller T.C.J.: "An introductory statement in the *Charter* recognizing Canada is founded upon principles that recognize the supremacy of God is not an invitation to superimpose passages from the Bible onto the country's legislation. This would create, at best, confusion, and at worst chaos. Mr. Pappas is attempting to elevate the *Charter* preamble to the status of an overriding statement of law akin to a specific section of the legislation."

[22] See also *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473, 257 D.L.R. (4th) 193 [*Imperial Tobacco*]. For the unanimous Court, Major J. stated in an *obiter dictum*, as follows at paras. 59, 66 and 67:

> [I]t is difficult to conceive of how the rule of law could be used as a basis for invalidating legislation ... based on its content.
>
> [I]n a constitutional democracy such as ours, protection from legislation that some might regard as unjust or unfair properly lies not in the amorphous underlying principles of our Constitution, but in its text and the ballot box.
>
> The rule of law is not an invitation to trivialize or supplant the Constitution's written terms. Nor is it a tool by which to avoid legislative initiatives of which one is not in favour. On the contrary, it requires that courts give effect to the Constitution's text, by whatever its terms, legislation that conforms to that text.

was recently made by Britain's senior Law Lord, Lord Bingham of Cornhill, who stated:

> The core of the existing principle is, I suggest, that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts. I doubt if anyone would suggest that this statement, even if accurate as one of general principle, could be applied without exception or qualification ... . But it seems to me that any derogation calls for close consideration and clear justification.[23]

Lord Bingham advanced eight sub-rules as essential components of the rule of law, which are paraphrased as follows:

(1) Law must be accessible and as intelligible, clear and predictable as possible.
(2) Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion.
(3) Laws should apply equally to all, save to the extent that objective differences justify differentiation.
(4) Law must afford adequate protection of fundamental rights.
(5) Means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve.
(6) As fundamental to and at the core of the rule of law, ministers and public officers at all levels must exercise the powers conferred on them reasonably and in good faith, for the purpose for which the powers were conferred, without exceeding the limits of such powers.
(7) Adjudicative procedures provided by the state should be fair.
(8) The state must comply with its obligations under international law.[24]

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[23] Lord Bingham of Cornhill, "The Rule of Law" (Sixth Sir David Williams Lecture, delivered at the Centre for Public Law, Faculty of Law, University of Cambridge, 16 November 2006), online: Centre for Public Law <http://cpl.law.cam.ac.uk/past_activities/the_rt_hon_lord_bingham_the_rule_of_law.php>.

[24] *Ibid.*

To locate the taxpayer's argument among Lord Bingham's framework of sub-rules comprising the rule of law, Mr. Christie invoked sub-rule (5) by arguing that the PST infringes the rule of law by adding to the "prohibitive cost" of access to the courts. Although Lord Bingham regarded sub-rule (6) as at the heart of the rule of law, Canadian courts have sometimes regarded sub-rule (5) as fundamental to all the other sub-rules, reasoning that without access to justice, enforcement of the other sub-rules is impossible. The Supreme Court, however, refused to accept Mr. Christie's argument around sub-rule (5), in the absence of expert economic evidence proving the factors affecting the cost of legal services.

To rephrase the narrow definition of the rule of law applied by the Supreme Court of Canada in Mr. Christie's case in Lord Bingham's terminology, the Court only accepted sub-rule (6) as relevant to Canada, and by implication rejected any sub-rules as a potential ground for attacking the validity of taxation legislation.

Courts' reluctance to strike down taxation legislation for violation of the rule of law was an issue in the Tax Court of Canada's decision in *Mathew v. The Queen*.[25] In *Mathew*, taxpayers challenged the validity of the General Anti-avoidance Rule ("GAAR," section 245) of the *Income Tax Act* on grounds of vagueness, as contrary to Lord Bingham's sub-rule (1) of the rule of law. Dussault T.C.C.J. summarized the effect of leading cases as follows:

> [T]he rule of law is not an independent basis for striking down legislation. The rule of law may be used to fill in gaps in the express terms of constitutional texts or as an interpretive tool. However, it would seem that it is only where a law is inconsistent with substantive rights guaranteed by the *Charter* or is incapable of being assigned to the legislative authority of either the provinces or Parliament that the judiciary has the authority to strike down or read down legislation pursuant to subsection 52(1) of the *Constitution Act, 1982*.[26]

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[25] *Supra* note 17.

[26] *Ibid.* at para. 491.

Since Mr. Christie challenged the PST only for violating the rule of law, without making a further allegation that it violated an express substantive right or freedom provided by the text of the *Charter*, or that it exceeded provincial powers of taxation, the challenge fell short of satisfying the test suggested in this dictum. Dussault T.C.C.J. also referred to lines of authorities that denied the protection of section 7 of the *Charter* to the economic interests of individuals or to corporations. The Supreme Court of Canada also referred to these points in its reasons for rejecting Mr. Christie's argument.

In a decision long before the *Charter,* the Federal Court of Appeal took a broader view of the courts' scope to strike down taxation legislation as void for uncertainty, but that decision is inconsistent with the recent rulings on limits of the rule of law culminating in the *Christie* decision.[27] Nowadays, however, the prevailing view is that uncertainty cannot sustain a successful attack on the validity of legislation. In the aftermath of the *Charter* and its subsequent interpretation, the rule of law seems to have lost its clout as a means of controlling the exercise of legislative power. Unfortunately, these decisions permit governments, untrammeled by a narrower reading of the rule of law, to create uncertain and complex laws, and to benefit from tax revenues generated by the resulting need for legal services to cope with these laws. Compliance with red tape causes the public additional legal expense, and if governments charge PST and other taxes on the legal make-work, their increasing tax revenue is a reward for their own inefficiency.

The history of the PST on legal services shows extensive flouting of the rule of law and Lord Bingham's sub-rules by the provincial government. The Supreme Court of British Columbia struck down the initial enactment of the PST on legal services because of uncertainty, contrary to sub-rule (1), and for exceeding provincial legislative powers.[28] The provincial Legislature fixed

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[27] *British Columbia Railway Co. v. Canada*, [1979] 2 F.C. 122, [1979] C.T.C. 56 (T.D.), aff'd [1981] 2 F.C. 783, [1981] C.T.C. 120 (C.A.). Uncertainty violates Lord Bingham's sub-rule (1).

[28] *Canadian Bar Assn. (British Columbia Branch) v. British Columbia (Attorney General)* (1993), 101 D.L.R. (4th) 410, 14 C.R.R. (2d) 115 (B.C.S.C.).

the problem by violating sub-rule (1) again. To avoid having to refund the PST already collected under the invalid tax, the Legislature resorted to a further violation of sub-rule (1), by retroactively enacting clearer legislation, removing the uncertainty and retaining the taxes collected. Unfortunately, the Supreme Court of Canada's view that sub-rule (1) lacks sufficient constitutional clout to invalidate legislation affirms the validity of retroactive tax legislation, which is the bane of tax planning. According to the Supreme Court of Canada, a province has the power to enact retroactive ameliorating tax legislation correcting the invalidity of previous acts as a preferable alternative to "fiscal chaos."[29]

At the B.C. Supreme Court hearing in Mr. Christie's case, the provincial government tendered an affidavit to the effect that the taxpayer had options by which he could have mitigated the hardship imposed on him by the PST on legal services. The motions judge did not discuss the details of the options suggested, but a possible option might have been an application by the taxpayer for a remission order, remitting the PST on his legal services on grounds of "great public inconvenience, great injustice or great hardship."[30] Remission may be made before or after collection of the tax and may be total or partial, conditional or unconditional. In other words, remission of taxes is discretionary and preferential treatment—and while it is possibly contrary to Lord Bingham's sub-rules (2) and (3), remission has been part of tax systems for many years, and much appreciated by recipients of the largesse.

Following the British Columbia Court of Appeal's decision in the taxpayer's favour, the government showed further disregard for the rule of law. The provincial government issued an information update setting forth its interpretation of the appellate court's decision for the guidance of taxpayers and their advisers in determining liability to pay PST. A document such as an information update has no legal status and does not bind anyone, including the government that issues it; as a determination of

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[29] *Supra* note 5 at paras. 12, 25; *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161, 59 D.L.R. (4th) 161.

[30] *Financial Administration Act*, R.S.B.C 1996, c. 138, s. 19.

liability to tax by administrative discretion, rather than by law, its issuance violates sub-rule (2). Since the PST legislation does not explicitly authorize the ministry to issue updates, their issuance is a breach of sub-rule (6), which Lord Bingham regarded as at the core of the rule of law. The failings of the PST on legal services contradict the government's assertion that it respects the rule of law in its dealings with taxpayers.[31]

IV. TAXATION AND ACCESS TO JUSTICE

Mr. Christie's failed appeal invites examination of the Canadian tax system's detrimental effects on access to justice and the rule of law in light of the *Charter*. The taxpayer's activities as a poverty lawyer and a proponent of the rule of law entailed protecting access to justice. The taxpayer protested against cutbacks to legal aid and rising court costs, and he founded a *pro bono* legal aid program that operated clinics throughout western Canada. The taxpayer regarded the PST on legal services as a further erosion of the rule of law and access to justice. The tax added to the cost of legal services, which he regarded as already beyond the financial reach of his clientele. The taxpayer, who was far from wealthy and lived very modestly, had virtually nothing to gain financially from litigating the tax. To the taxpayer, the issue was one of vital principle: defending the rights of Canadians to affordable legal services against a governmental assault on those rights through taxation. Official reports concur with the taxpayer that access to justice is declining because of rising costs and delay.[32]

Tax policy analysts favour broadening the "tax base" to increase tax revenues and to improve tax neutrality by reducing market distortion. In the context of a retail PST, broadening the

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[31] Province of British Columbia, Ministry of Small Business and Revenue, *Taxpayer Fairness and Service Code: A Partnership of Working Together*, 3d ed. (February 2007), online: <http://www.sbr.gov.bc.ca/fairness/Choose_Booklet.htm>.

[32] B.C. Justice Review Task Force, *Effective and Affordable Civil Justice: Report of the Civil Justice Reform Working Group to the Justice Review Task Force* (November 2006), Appendix G, online B.C. Justice Review <http://www.bcjusticereview.org/working_groups/civil_justice/cjrwg_report_11_06.pdf>.

base entails expanding its scope to include transactions other than sales of tangible goods, such as rentals and purchases of services. A tax on services could enable the government to share in the growing service sector of the provincial economy. The legal profession is a high-profile supplier in the services sector. Though many other professions provide services, the Provincial Legislative Assembly focused on lawyers and notaries public. As its only foray into broadening the tax base of the retail PST to include professional services, the B.C. Legislative Assembly extended the PST exclusively to legal services.

Taxes add to the cost of legal services in many jurisdictions. Some countries currently tax suppliers of legal services as part of a national sales taxes on goods and services. Some regional governments impose tax on legal services through sales taxes on consumption of goods and services. Though the British Columbia PST charges consumers on their purchases of goods and some services, it is exceptional in only taxing legal services, as distinct from other professional services.

The history of taxation supports the government's side of the dispute over the validity of taxes which add to the cost of access to justice. Taxes on access to justice are pervasive and venerable in the common law tradition. Among the most venerable taxes is stamp duty. Despite its age and inefficiency, stamp duty is currently in effect in Commonwealth countries other than Canada. Stamp duties require taxpayers to purchase and attach government stamps to goods and documents. Though some stamp duties might be categorized as fees for government or court services rather than taxes, most are outright taxes.[33]

Stamp duties are a direct intrusion on access to justice, at least in civil proceedings. To deter non-compliance, stamp duty legislation provides that unstamped documents are inadmissible as evidence in civil proceedings.[34] The Province of British Columbia imposed a law stamp duty from 1879 to 1986, requiring law stamps to be affixed on civil proceedings and legal instruments, and prescribed the consequences for non-compliance: unstamped

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[33] For a discussion of the distinction between fees and taxes, see *Eurig Estate (Re)*, [1998] 2 S.C.R. 565, 40 O.R. (3d) 160.

[34] See e.g. *Stamp Act, 1891 (U.K.)*, 54 & 55 Vict., c. 39, s. 14.

civil proceedings were void, and unstamped instruments were inadmissible in the courts.[35] Another example of an early tax impeding access to justice was that formerly imposed by the British colony of Lower Canada on litigation for the purpose of financing the construction and upkeep of court houses and jails.[36] From the very beginnings of modern taxation, governments imposed taxes impeding access to justice. Nowadays, as taxes become more pervasive, they impose further limits on access.

The *Charter* guarantees rights and freedoms, but as interpreted so far at least, it does not immunize the exercise of those guarantees from tax consequences. The *Charter* offers constitutional rights to trial by jury (section 7), to counsel for the accused (section 10), or to a translator for a party or witness (section 14), but current federal and provincial income taxes ("ITs") apply to the remuneration of jurors, counsel and translators.

In Canada, the federal goods and services tax (GST), provincial harmonized sales taxes (HST), and PST on legal services impede access to justice. The impediment can be particularly severe for individuals involuntarily embroiled in proceedings concerning personal matters. These individuals usually receive no IT deduction for legal costs that they are forced to incur in connection with such disputes as consumer purchases or debt, spousal dissolution, estate matters, personal injuries, or the defence of criminal charges.[37] There is usually no IT relief on lawyers' bills for assistance with such commonplace, non-litigious transactions as the purchase or sale of a dwelling or making of a will, and PST and GST must also be paid on the fees in British Columbia.

Clients in straitened financial circumstances must find the wherewithal to pay their legal bills out of after-tax income, savings, or borrowings, unless they qualify for legal aid. To make

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[35] *Law Stamps Act*, S.B.C. 1879 (42 Vict.), c. 31; *Law Stamp Act*, R.S.B.C. 1979, c. 226, repealed in 1986 (1985 c. 65, s. 10).

[36] *An Act respecting Houses of Correction, Court Houses and Gaols*, Consolidated Statutes for Lower Canada, 1860 (23 Vict.), c. 109.

[37] *Nadeau*, *supra* note 17; *Leduc v. Canada*, 2005 TCC 96, [2005] 1 C.T.C. 2858, 2005 D.T.C. 250 (T.C.C.); Canada Revenue Agency, IT-99R5 (Consolidated), "Legal and Accounting Fees".

matters worse, many legal costs occur when the dispute and ensuing litigation have already drained the litigant's financial resources. If the litigant must borrow to pay personal legal bills, the interest is not deductible for IT purposes. In this financial plight, litigants increasingly face the choice of forgoing legal assistance and representing themselves in litigation, or passing up litigation entirely.

The PST, GST, and HST exempt legal services funded by legal aid, which lifts the financial barrier to access to justice for those few who qualify. Legal aid funding depends on the type of litigation and on qualifying under a restrictive means test. The exemption calls into question the fairness of taxing the fees paid for legal services that do not qualify for subsidy from legal aid. Similarly, the waiver of legal fees by a lawyer retained on a *pro bono* basis also eliminates the taxes, and improves access to justice for some.

Taxation also affects the risks and the rewards of litigation by its treatment of monetary recoveries, reimbursement of legal costs, and interest awards. If the sums recovered are tax-free, as in personal injuries or wrongful death claims, access to justice is improved. Conversely, if the recoveries are taxable, as in wrongful dismissal cases, IT further impedes access.

The tax system creates an imbalance in access to justice by conferring fiscal advantage on larger businesses and corporations because their legal costs are usually tax-deductible. Corporations can usually deduct their legal bills as legitimate business expenses in computing IT, including the PST on legal services. The consumer or personal litigant obtains no such IT relief, however.

Corporations, which are usually GST and HST registrants, can claim input credits for these taxes on their legal bills to offset their own tax liabilities, but the consumer client bears the full brunt of both taxes. Corporations that employ in-house counsel not only deduct their remuneration as a business expense for IT purposes, but also do not pay GST, HST, or PST on internally provided legal services.

To fulfill the ideal of access to justice, tax legislation should offer the same relief to all purchasers of legal services. The current disparity in tax treatment can turn the adversary system

into a war of attrition waged by the tax-favoured corporate litigant against a fiscally disadvantaged individual opponent.[38]

A PST on the purchase of consumer goods requires the retailer to add the tax to the sale price of goods sold, and to collect it from the purchaser at the time of sale. The retailer then remits the total taxes collected on a periodic basis to the provincial government. From a legal perspective, a retail PST is a direct tax because of its form: the consumer purchaser bears the incidence or burden of the tax, and the retailer merely acts as collector of the tax from the purchaser, on behalf of the government. Since the retailer collects the tax from the purchaser at the moment of sale (before remitting it to the government), the retailer does not suffer any reduction in cash flow as a result of the tax.

To determine the burden or incidence of a tax from an economic rather than a legal perspective, economists take into account the market forces of supply and demand, and inquire into a retailer's behaviour in setting the price for the goods. If demand were inelastic, the retailer could set the price for the goods regardless of the tax, and the consumer must bear it. On the other hand, given very elastic demand for the goods, the consumer will refuse to purchase the goods if the price and tax are too high, thereby requiring the retailer to reduce the price of the goods to offset the tax. Economic analysis would inquire further into the retailer's behaviour and the ultimate incidence of the PST, to determine if the retailer had to accept the lower price and reduced profits or could shift the incidence to employees through the imposition of lower wages, or to suppliers and wholesalers by reducing the costs of purchasing inventory.

On the facts of *Christie* as found by the trial judge, the taxpayer had to absorb the PST because his marginal solo practice and low-income clientele did not permit shifting its incidence.

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[38] Cameron Murphy, "Tax Deductibility and Litigation: Reducing the Impact of Legal Fees and Improving Access to the System" (2004) 27 U.N.S.W.L.J. 240; New South Wales Legal Fees Review Panel, Report: Legal Costs in New South Wales (December 2005) at 18, online: Lawlink NSW <http://www.lawlink.nsw.gov.au/lawlink/legislation_policy/ll_lpd.nsf/vwFiles/Final_Costs_Paper_and_Recommendations_Summary.pdf/$file/Final_Costs_Paper_and_Recommendations_Summary.pdf>.

In the initial legislation that extended the retail PST to legal services, the Legislature failed to confine the tax within the constitutional limits on the provincial power to tax. A province can only impose a direct tax within the province for provincial purposes. The initial legislation was struck down as uncertain and as exceeding the provincial power of taxation.[39] The legislation that was amended to correct this deficiency was upheld as within provincial powers of taxation,[40] but as amended, the legislation remained open to challenge by the taxpayer.

Though the PST on legal services was within provincial legislative powers, it was not a fair or a good tax in policy terms. The PST charged lawyers with collection from the client when the bill was paid or payable, whichever happened first. In the usual course, the tax became collectible from a lawyer on billing the client, before the client had received the bill, and even though the client might never pay the bill. Thus, lawyers had to remit the tax out of their cash flow, before it was put in funds by the client, in the hope that the client would eventually pay the bill in full. If the client never paid the bill, the lawyer could not recoup the PST from the client. The legislation did not provide for a refund or credit of the PST remitted on billings that became bad debts and uncollectible.

Mr. Christie was caught in this dilemma: The PST on legal services ceased to be a tax imposed on the client and collected by the lawyer. Instead, the tax on uncollectible billings became a tax on the gross revenues of the lawyer. As a tax on lawyers' gross billings, the tax contravened basic norms of good policy: it added another tax to the income taxes imposed on lawyers' professional earnings, resulting in double-taxation of lawyers' incomes. Furthermore, it was inequitable in terms of ability to pay analysis, because the tax was imposed on gross billings without any deduction for expenses incurred by the lawyer to earn the income or for bad debts on uncollectible billings.

A PST on legal services is a bad tax, according to the benefit theory of taxation. The benefit theory holds that a fair tax

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[39] *Supra* note 27.

[40] *Canadian Bar Assn. v. British Columbia (Attorney General)* (1994), 91 B.C.L.R. (2d) 207, 47 A.C.W.S. (3d) 951 (S.C.).

allocates its burden on those who benefit from the public service funded by the tax. Governments impose taxes to fund various public goods and services, including the provision of an accessible justice system for the peaceful resolution of disputes among citizens. A tax that impedes individuals' access to the justice system defeats the overall purpose of taxation.

In a leading IT case, Rand J., on behalf of the Supreme Court of Canada, stated that "taxes are, in theory, justified by the protection to life and property which the laws of the country imposing them may give."[41]

Rand J. went on to say that conformity with the benefit theory was a guideline for the reasonable interpretation of tax legislation, not that it was essential to validity. Rephrasing Mr. Christie's argument in terms of the benefit theory of taxation, the PST on legal services contradicts the theory by denying to some members of the public the very access to justice that their taxes fund. The taxpayer's argument, that the PST on legal services was an insurmountable financial barrier that prevented some taxpayers from gaining access to the justice system, highlighted a fundamental contradiction. The PST on legal services thwarts an over-arching purpose of taxation, namely to fund an accessible justice system. Compare the tax treatment of two types of professional services: medical services are completely tax exempt, yet legal services are generally taxable. The tax system supports the cost of public health care so that those who need it can have tax-free access to health services. Though the same reasoning should apply to legal services, these services are taxable. The different tax treatment of these similar types of services does not accord with the benefit theory of taxation. Legislatures should avoid imposing taxes that violate the benefit theory, but an unwise and unpopular tax may nonetheless be legally valid.[42]

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[41] *Thomson v. Minister of National Revenue*, [1946] S.C.R. 209 at para. 55, [1946] C.T.C. 51.

[42] See David G. Duff, "Benefit Taxes and User Fees in Theory and Practice" (2004) 54 U.T.L.J. 391.

V. CONCLUSION

Even though Mr. Christie's appeal ultimately failed at the Supreme Court of Canada, the litigation increased public awareness of the broader harm caused by the impact of taxation on the rule of law and its negative effect on access to justice. It is to be hoped that the publicity given to Mr. Christie's plight might prompt the B.C. Legislature to amend the PST so as to offer relief for lawyers and notaries who have remitted PST on uncollectible billings. Even better, repeal of the PST on legal services would improve access to justice for residents of British Columbia, and serve as a fitting tribute to Mr. Christie.