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Jinyan Li and J. Scott Wilkie

Homage to the Income War Tax Act, 1917

Canada's federal income tax regime was introduced in 1917, with the enactment of the Income War Tax Act, 1917 (IWTA).¹ Though initially portrayed as a temporary measure to help fund Canada's contribution to the First World War and manage the conscription crisis, income taxation has persisted in Canada. Compared with the current Income Tax Act ("the Act") and Income Tax Regulations, which are voluminous, the IWTA is "breathtakingly brief,"² containing 24 sections and, with the schedule, occupying 11 pages. Despite its brevity, the IWTA was comprehensive, dealing, more or less, with the same kinds of tax and fiscal issues as Canada is addressing today, sometimes in surprisingly familiar terms. The IWTA has all of the fiscal DNA, skeletal framework, muscle, and indeed sensory capacity of the mature Act.

The IWTA is a statute, and it may seem odd to celebrate the birthday of a statute. To us, however, it is more than a statute, and its significance transcends the subject of income taxation. The IWTA expresses Canada's genetic makeup as a society, at once influenced by and an influence on a range of economic and social welfare choices that any nation faces as it contemplates its national objectives and the development and deployment of its resources—in short, its national personality. As a means of funding collective consumption (public goods) and achieving distributive justice, the IWTA offers a window onto the challenges and values that shaped Canada in the past. It is a portal through which we may seek to understand who we are as a nation, what kind of system of collective civility we want to live by, and why certain enduring threads of our tax system continue to entangle and challenge us even as they did in 1917. As a living, breathing manifestation of our collective lives—a kind of national family budget—income tax law is organic and dynamic, anticipating, affecting, and responding to the forces that shape our national experience. Income tax law reflects the social, economic, and distributive justice priorities that our civil society chooses to live by; it manifests those choices, pays for them and gives them effect via fiscal policy, and funds the fiscal expenditures by exacting the price of collective consumption through taxation.

It is often said that tax practitioners are, and have to be, historians. Tax law responds to the challenges facing the country—the challenges are the threads that the tax law must work with. Appreciating how a government has grappled

with these challenges and tried to weave them into the legislative fabric is critical to understanding the tax law of a country at any given time. The threads of the original IWTA persist in the more complex weave of our present income tax system. The threadcount in the current weave—its density—may be much higher, but the pattern and the garment are the same.

The objective of the IWTA Centennial Project (comprising a symposium in May 2016 and the publication of this book) was to investigate (1) the human and historical context from which the modern income tax system, in the form of the IWTA, emerged in Canada; (2) how subsequent legislative imperatives emerged from policy responses to political, social, and economic challenges; and (3) how the past 100 years may prefigure the future. This book is a collection of papers written for the centennial project and of panel discussions among individuals who have helped shape the system.

The book has three parts. Part 1 considers the “what” and “why” questions about the revenue-raising and the spending (or tax expenditure) sides of our income tax law. In the first paper, Campbell and Raizenne unpack the circumstances of the IWTA’s birth and the technical features of the statute. Other papers in part 1 examine key aspects of personal income tax, corporate income tax, and international tax; the dynamic relationship between income tax law and general law; and tax expenditures. Part 2 considers the “how” and “who” questions: How did the relevant ideas and policies come about? How did the policies get translated into legislation? How was the law made to work? Who were (and are) the people behind all of these processes? It is trite to say that none of the tax law and policy elements of the system mean much unless they actually work in a reliable and predictable fashion. Part 2 is primarily made up of panel discussions, including a special session from January 2017 with a former finance minister, Michael Wilson. The participants are former politicians, officials, judges, and practitioners who have helped make the system work. It also includes two papers that discuss the role of the accounting and legal professions and the Canadian Tax Foundation in the development of the tax system. Part 3 is about looking back in order to look forward. It reports the views of some of Canada’s leading thinkers on critical themes, milestones, and future directions.

Why Celebrate the Birthday of a Statute?

A History and Living Memoir of Nationhood

It bears repeating that the IWTA is much more than a statute. The year 1917 was a time of great upheaval in the world, and the subject of taxation may seem trivial in the context of the First World War. But taxation is not an end in itself; it is a means to an end, and as such, not surprisingly, it foreshadows and mirrors the ends that it serves. The IWTA was also an auspicious point of departure for comprehensive income taxation, as Canada responded to notable influences on revenue raising, especially those in the United States, that had studied thoroughly the “modern” legislative experience. The IWTA marks Canada’s progress as a nation

in step with others, such as the United States, that were adopting income taxation as a primary means of meeting fiscal needs. Income tax paid for the early stages of Canada’s nationhood in ways that (as tax and fiscal policy commonly do) inevitably shaped the country’s national personality and economic development.

Raising revenue, in itself, is not particularly meaningful. What is meaningful, and what offers insight into our national consciousness and conscience, is why a revenue-raising device is required and why it takes the form it does, and how it reflects the guidance by which economic and financial concerns are translated into a coherent regime to achieve certain fiscal and revenue objectives without propagating or creating unwarranted distortions. The IWTA offers an understanding of Canada’s nascent place in the world of 1917. Today, we tend to imagine that we are the first generation to be faced with the challenges to national and personal self-interest posed by globalization and the international contact and even competition that globalization engenders. But, as the contributors to this volume remember, the young Canada of 1917 was already venturing into the international realm, not merely as a combatant in support of a global democratic cause but as a commercial actor, too. One hundred years ago, as now, Canada punched above its weight in the tax policy area.

The IWTA and its early refinements show the fiscal maturity of Canada during this period. All of this happened before Canada had independent national personality or the notion of Canadian citizenship. It seems that Canada matured more slowly politically than it did fiscally. The IWTA is also significant in that it reflects the earliest stages of federal-provincial relations as well as a North American alliance of sorts, the features of which persist to this day. Canada’s first foray into income taxation at the federal level was preceded by several provinces’ enactment of income tax legislation to replace forms of property taxation, and by the introduction of income tax in the United States. Edwin Seligman and Thomas Adams are the architects of income taxation in North America. Their influence on US income taxation and indeed income taxation generally is considerable; that influence on the IWTA is palpable. Income taxation was considered as “[superior] to most forms of taxation . . . [in terms of being] [e]lastic and productive . . . [e]quitable . . . [e]specially equitable as a balance to indirect taxes on consumption . . . [but] [n]ot discouraging to initiative in . . . [a number of] ways.”³

In the light of the above, it is much clearer why we are celebrating the birth of the IWTA. Our celebration is, in the end, about the foundation of Canada as a country. The papers in this book chronicle not merely embryonic tax policy but also Canada’s teenage years and their influence on the country’s adulthood, as the framework established by the IWTA was tested and modified through several reforms, including the Carter commission’s.⁴ Accordingly, our celebration is more than a memorial of a historical legal fact. It is, most importantly, a reflection on how we got to where we are as a country and how, through income taxation, we fund social and economic priorities and share our wealth. To adapt Al Kapp, the noted cartoonist: We have seen the IWTA, and it is us.

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Enduring Values

Canadians hold dear basic values of fairness, inclusiveness, and pragmatism. The IWTA and the Act reflect these values. Fairness—in the sense of sharing the cost of government goods and services in accordance with one's ability to pay—is a hallmark of the Canadian income tax system. As Campbell and Raizenne explain in detail in this volume's first paper, the IWTA was enacted as a reaction to the political crisis over conscription; the financial sacrifice imposed on the wealthy was meant to be commensurate with the personal sacrifice of the soldier. Technically, section 3 of the IWTA defined "income" broadly to measure an individual's ability to pay, and it regarded undistributed corporate profits as dividends for the purposes of applying the progressive tax rates. It also contained a transfer-pricing rule and other anti-avoidance measures to prevent income splitting or income shifting. Fairness and equity are objectives of subsequent tax reforms. In spite of the changing political landscape in Canada over the past 100 years, the ability-to-pay principle (both in the sense of vertical equity, by taxing higher income at higher progressive rates; and in the sense of horizontal equity, by taxing equally two people with the same income) has endured. As Neil Brooks observes in this book's final panel discussion, "The income tax is widely regarded as the fairest tax."⁵

The IWTA was a visceral response to inclusiveness. It opted for residence as a basis for tax jurisdiction, emphasizing social and economic ties with Canada as opposed to political status (citizenship) or parental intention (domicile). Any person can be a taxpayer in Canada. In terms of policy objectives, the IWTA and the Act were sensitive to concerns about fairness, neutrality, and non-discrimination. As an indirect spending instrument, the Act has, effectively, delivered social assistance to lower-income Canadians.

Pragmatism is another hallmark of the IWTA. The United Kingdom and the United States had an income tax in 1917, but the IWTA was, in many respects, an adaptation of the Ontario municipal income tax that was most familiar to the fathers of the IWTA. How to make the new tax system work was debated almost as much as how progressive the tax should be. The IWTA was a work-in-progress from the very beginning: as Campbell and Raizenne's comments indicate, it was drafted and enacted in haste, with provisions that were skeletally minimal and yet comprehensive. In the early stages, pragmatism was also notable in the incremental and measured reaction to gaps and problems in the statute. This pragmatism reflects what Canadians are—practical, understated performers and workers in the trenches, not self-ordained eagles preening in self-adoration.

Critical Roles

Since its inception, income tax has played a foundational role in the development of modern Canadian society by generating the necessary revenue to finance Canada's public goods and services and by functioning as a main tool for achieving distributive fairness, sustainable economic development, and democratic politics.

As shown in table 1, income tax as a source of revenue for the federal government has become increasingly important in the last century. Income taxes as a share of total Canadian government revenues rose from 2.8 percent in 1918 to 55.4 percent in 1957, and then to 66.1 percent in 2017. As a share of total revenues, personal income tax steadily increased over the years, while corporate income tax stayed within a certain range and has been below 13 percent since 1987. Income taxes paid by non-residents have accounted for less than 2 percent of total revenue most of the time.

In addition to producing revenue to finance shared public consumption in what might be loosely described as our Canadian welfare state—a state, in other words, that reflects the notions of distributive justice and social welfare that infuse Canadian society—the income tax has been a major source of funds for direct and indirect government spending on social and economic programs, thus reflecting the priorities that Canadians have made through the democratic process. In other words, the tax system provides over 100 personal tax expenditures, which are intended to benefit lower-income families, provide relief to Canadians in specific circumstances, and give incentive to taxpayers to engage in activities that are deemed beneficial to society. Canada also uses tax law to maximize the welfare of Canadians in the increasingly globalized economy.

Income tax has been the main policy instrument for redistributing social income in a manner that Canadians consider fair. In 1917, the IWTA was designed to ensure that "it imposed sufficient tax on the wealthy," and only a very small number of individuals paid the tax.⁶ The progressive nature of the tax has remained, although the level of progressivity has been revisited over the past 100 years. Personal income tax is the only progressive tax in Canada's tax system, and it helps reduce high-end income inequality.

More profoundly, the income tax is an indispensable part of the Canadian democratic process and the rule-of-law system. The IWTA was created to serve a political purpose, and subsequent legislative amendments have often reflected the outcomes of the political process. The independent judiciary has been a partner in the development of the income tax system through its interpretation of the words of the legislation and its triggering of legislative amendments when its interpretations were deemed unacceptable.

Structural Sophistication and Foresight

The IWTA showed incredible structural sophistication and foresight. It laid down the foundation of what we now know as the outbound and inbound regimes, effectively integrated corporate tax and personal tax, created ways of treating economic units as tax units notwithstanding the legal separation of income-earning activities and the "persons" conducting them (on the one hand) and (on the other hand) the economic owners of the income, sketched out the meaning of "Canadian income," and addressed the effective territorial taxation of business income. For example, the concept of territoriality infused the income tax system

Table 1 Income Taxes and Federal Government's Revenues (1908-2017)

Year	Total revenues	Personal income tax		Corporate income tax		Non-resident income tax		Total income taxes as percentage of total revenues
		millions (\$)	total revenues (%)	millions (\$)	total revenues (%)	millions (\$)	total revenues (%)	
1918	313	8	2.5	1	0.3			2.8
1927	431	23	5.3	33	7.7			13.0
1937	517	40	7.7	70	13.5	10	1.9	23.1
1947	2,872	670	23.3	364	12.7	36	1.3	37.3
1957	5,420	1,635	30.2	1,296	24.0	64	1.2	55.4
1967	10,925	3,650	33.4	1,821	16.7	221	2.0	52.1
1977	35,633	13,988	39.2	5,280	14.8	569	1.6	55.6
1987	97,215	42,422	43.6	10,710	11.0	1,162	1.2	55.8
1997	160,864	74,949	46.6	21,179	13.1	1,999	1.2	60.9
2007	245,525	113,528	46.2	42,212	17.2	5,693	2.3	65.7
2017	302,000	153,700	50.9	39,900	13.2	6,300	2.0	66.1

Source: Livio Di Matteo, *A Federal Fiscal History: Canada, 1867-2017* (Vancouver: Fraser Institute, February 2017), at table A2.1.

almost from the outset, as reflected in concerns about (1) how income with more than one jurisdictional connection would be associated with one jurisdiction or the other, (2) credit for foreign tax, (3) how Canadian tax on foreign incorporated income would be deferred indefinitely, and (4) even how transfer pricing within commonly controlled corporate groups would be countered to avoid unwarranted base erosion.

Subsequent tax reforms refined these structural elements. The original debates over policy choices among the fathers of the IWTA remain fresh today. A notable example of such freshness is an exchange between Sir Thomas White (who, as finance minister of the day, championed the IWTA) and Sir Wilfrid Laurier (then the leader of the opposition) about the perils to the national fisc posed by transfer pricing.⁷ That parliamentary exchange, like so many others concerning the IWTA and its series of amendments, sets out considerations of tax policy and related fiscal needs (FAPI [foreign accrual property income] and tax administration) that remain relevant today, with the same issues and reactions arising now as arose 100 years ago.

Solid Building Blocks

The IWTA contained the basic requirements of an income tax: taxable subjects, tax base, progressive rates for individual income, tax administration, and anti-avoidance rules. Taxpayers were "persons"; what kinds of persons would be tax subjects was a foundational consideration, particularly because the IWTA responded

to the obvious ways of separating the owners of income from the generation of income. Resident persons were made taxable on their income irrespective of its territorial source, and non-residents were taxable on Canadian income (that is, income from carrying on business in Canada [or COBIC income]).⁸ Individuals were tax units, as they continue to be, even though married couples—in an early manifestation of dependency that is still found in the Act—received special treatment in some cases (for example, doubling the amount of basic exemption in 1917). Similarly, in 1917 as now, corporations were taxpayers separate from their shareholders, although the fiscal unity of corporations and their shareholders was recognized through the precursor of the integration rules.

The tax base was defined comprehensively in section 3 of the IWTA, aggregating income from all sources into a lump sum; this reflected the influence of the US Revenue Act of 1913. The 1972 Act added taxable capital gains as a type of income under section 3. Details on the characterization, realization, and computation of income as well as on loss recognition are either provided in the statute or elaborated in case law.

Tax rates for personal income are progressive. Corporate tax rate is flat: it correlated with the basic personal income tax in 1917 (that is, 4 percent), but subsequently deviated from the lowest personal tax rate when the latter was increased. Lower rates for active business income of Canadian-controlled private corporations (CCPCs) and manufacturing and processing profits were subsequently introduced as tax incentives. Non-residents were taxed at the same tax rates as residents on active income (originally COBIC income, and then income from employment), but at a flat rate on income from investment under the withholding tax regime introduced in 1924.

The self-assessment system was adopted in 1917 and has remained largely unchanged since. To ensure the effective operation of this system, the IWTA and the Act contain rules on (1) the provision of information to the minister, (2) the minister's powers to audit, (3) requests for further information, (4) the imposition of penalties, and (5) dispute resolution. The country's changing legal and business circumstances (through, for example, globalization, digitization, and the rise of multinational enterprises) have called for changes to be made to the specific features of the system without undermining its core design.

In order to achieve the goals of fairness, distributive justice, and fiscal efficiency, the IWTA contained anti-avoidance measures. These measures balanced, on one hand, the respect for private law and taxpayers' use of legal constructs to arrange their affairs, and, on the other hand, the need to protect the integrity of the system. The political context of the IWTA's enactment made it very clear that the incidence of income tax is supposed to be borne by people (primarily high-income people, in 1917, and subsequently middle- and high-income people). When people use corporations to earn income, the corporate tax has an effect similar to that of a withholding tax, although whether that is its only or principal role is open to a debate that some papers in this volume acknowledge. When a corporation is used to defer or avoid personal (or shareholder-level) income tax,

the separateness in law between the corporation and shareholder is effectively ignored for the purposes of measuring the shareholder's ability to pay. This is essentially true of the present imputation rules in a domestic context and of FAPI rules in the outbound context. As noted above, the IWTA and the Act endorse the territorial taxation of business income. Business income earned in Canada should be taxable in Canada, regardless of the legal vehicles chosen for carrying on the business or of the residence status of the taxpayer. Transfer-pricing, thin capitalization, and surplus-stripping rules (including the recent foreign affiliate dumping rules) are meant to protect this Canadian tax base.

“To Stay There for Many Generations”

One hundred years ago, it was predicted that the income tax would “stay . . . for many generations” or even become “permanent.”⁹ The prediction has certainly proven correct thus far. Will the income tax stay permanently? Maybe. As long as Canada is governed by a democracy and no better instrument or regime is created to finance the collective aspirations of Canadians, the income tax is here to stay.

The IWTA was created as an instrument to serve a young democracy. “This tax,” Sir James Loughheed observed, “is unquestionably the outcome of public opinion as represented by the most numerous class of citizens—a class which, in all probability will have to contribute very little to the taxation provided for in the Bill.”¹⁰ It was an uneasy compromise between the concerns of the working class and those of the wealthy class. The evolution of the income tax has reflected subsequent compromises between economic concerns and political realities. Democracy is not perfect, but it is the best form of government that we have.¹¹ The income tax is imperfect, but it has served the needs of an imperfect democracy for 100 years.

The income tax has undergone several major reforms, most notably the following: in 1948, when what may be described as the “class tax” under the IWTA became a mass tax, as more voters became taxpayers; in 1972, when (among other important changes) capital gains became taxable and a partial integration of corporate and personal tax was introduced; in 1987, when, notably, personal tax rates (among others) were reduced with a broader tax base, and the general anti-avoidance rule (GAAR) was introduced; and over the last two decades, when income from capital has become, in significant measure, tax-free as the result of tax-sheltered savings vehicles. The income tax has proven able to evolve and adapt. There is always room for rebalancing, redistributing, restructuring, and rethinking,¹² but the fundamental need to share the cost of our collective spending in a fair and efficient manner has remained unchanged. No clear alternatives have yet been found viable: consumption taxation, in the form of value-added tax (VAT) or goods and services tax (GST), has produced less than 15 percent of total revenues and has been criticized as being regressive in some respects; a cash flow tax to replace the corporate income tax has been proposed, but Canada

is unlikely to be the first country to adopt it. No mechanism other than the mandatory sharing of wealth through progressive income taxation has been designed to address the problem of extreme income inequality.

The First 100 Years: Evolution of the Law, Policy, and Principles

The Birth of the IWTA

The first step in examining the IWTA's heritage is to consider the events that shaped both its existence and its development.¹³ Colin Campbell and Robert Raizenne, in this volume's first paper, remind us why the IWTA was conceived: ostensibly, it was to fund Canada's war effort, but this may in fact be more fiscal mythology than truth. Campbell and Raizenne chronicle the early stages of income taxation in Canada, illustrating the story of emerging tax policy with the human story of those who were affected by this policy and those (notably Finance Minister Sir Thomas White) who orchestrated the IWTA's emergence and refinement. The authors note that, under strong US influence and with the benefit of some Canadian provinces' experience, the IWTA began a trend toward substituting the taxation of income for the taxation of property and consumption. They explain the principal design features of the IWTA that laid the foundation for its evolution.

The Tax Base: People, “Persons,” and the Community of Nations

The three key features of a sophisticated modern tax system are personal taxation, corporate taxation, and international taxation. It is striking that all three of these were present in Canada's system more or less from the outset and remain so today. The papers in this volume that consider these features reveal the maturity of Canada's thinking about tax policy even at an early stage of the country's development.

Jonathan Rhys Kesselman and Kathleen Lahey explore the formative underpinnings of personal income tax across the entire life spectrum: tax base and tax units. James Davies and Tammy Schirle comment on the papers by Kesselman and Lahey. Their analyses show how, as we continue to grapple with the tenets of personal income taxation, we necessarily revisit the same considerations and tensions that no doubt shaped the IWTA's response to the taxation of family income and to gender equity. Kesselman highlights major changes to the tax base that have occurred over time, and he assesses them in economic and practical terms. One of the key themes that he discusses is the differential treatment of labour income and capital income and the differential scope for individuals to defer or shift income for tax purposes. Kesselman also analyzes the extent to which capital income actually originates from labour-type inputs, and he explains why this has implications for how we think about horizontal and

vertical equity. He advocates base broadening along the lines of the Carter report's 1966 recommendations. Lahey traces the debate over the use of the individual as the tax unit. She applauds the IWTA for standing up for women's right to the individual taxation of their incomes and property. She notes, however, that this right has been slowly diluted by the continual addition of spousal and partnership tax unit provisions, and she calls for a truly gender-neutral tax statute for the future.

The corporate income tax papers by James Wilson, J. Scott Wilkie, and Robin Boadway address three interconnected questions. The first relates to tax incidence: Do corporations, as such, really "pay" tax or does the tax come to rest on consumers, employees, and shareholders? The second question relates to the nature of the corporate tax: Is this tax more in the nature of a backup withholding tax on account of shareholder-level taxation, recognizing the fragmentation of the ownership of income and the means by which it is earned? Is corporate "income" really income (that is, in the economist's terminology, a "rent"), and should the corporate income tax system as we know it give way to a cash flow tax system that does not tax "normal" capital returns but only "true rents"?

Wilson's careful historical reconstruction of how the IWTA came about, its birth partly inspired by and partly cloned from the development of income tax in the United States and Canadian provinces, lays the ground for a test of the significance and robustness of a corporate income tax. Wilkie focuses on key elements of the corporate tax system that effectively deal with, and from the outset have dealt with, arresting or controlling the effects of the separation of income-earning activities from the owners of income, through forms of corporate income tax integration that were sophisticated not just by the standards of 1917 but even by present standards. A pervasive related concern was surplus stripping. These key features of corporate income taxation—key in 1917, and key even now—have been thematically consistent and coherent from the earliest stages of corporate taxation in Canada. Wilkie draws parallels between the corporate income tax system as we know it and cash flow taxation as Boadway explains it, suggesting that the differences may not be as profound as they often seem and can be seen as deliberate, anticipatory reactions to the sorts of considerations that might impel a wholesale alternative. Wilkie's and Wilson's analyses are complemented by the historical perspective of Campbell and Raizenne. That perspective serves to bookend the other end of the corporate tax discussion by Boadway, a persuasive advocate of abandoning the corporate income tax system as we know it in favour of a cash flow system that would, essentially, tax only true economic profits—that is, rents. Boadway's assumptions about the features of a cash flow tax are addressed by Wilkie, too; he takes the view that the main elements of a cash flow approach can already be found in our corporate tax system and that refinements that carry us away from such a "pure" system are deliberately directed to particular tax policy needs or objectives. That said, this part of the anniversary celebration has, interestingly, turned out to be somewhat

prescient in light of serious discussions developing in Europe and the United States about adopting a cash-flow-based system of corporate income taxation.

It has been said that everything about Canadian income tax is "international." From the outset, Canada has taxed income according to its qualitative and geographic source. The notion of "source" is fundamental to the tax base, yet it is not a natural or normative notion. Jinyan Li and J. Scott Wilkie explore the legal underpinnings of this notion, tracing it as a consistent theme in the IWTA from 1917 to 1924, and extending it to present concerns that underlie the base erosion and profit shifting project (BEPS) orchestrated by the Organisation for Economic Co-operation and Development (OECD) and the G20. Li and Wilkie note that the BEPS project, like the IWTA, is concerned with identifying the source of income and dealing with the effects of non-transformative intermediation by what amounts to negative source rules—identifying where income does not originate. Li and Wilkie coin the term "COBIC"—"carrying on business in Canada"—to illustrate the jurisdictional parameters used by the IWTA to frame determinations about source.

Brian Arnold and Jacques Sasseville provide a chronological survey of Canada's double tax treaties, discussing the development of the treaty network along with major themes and trends. They offer insights into Canada's current position on treaty negotiation, into how and why that position has developed over time, into ways in which Canadian treaties deviate from the OECD model treaty, and into the future direction of the Canadian position. In tracing the treaty network's development, Arnold and Sasseville do not pass judgment on the quality of Canadian jurisprudence on treaty interpretation. In their view, it might be worthwhile to have a major review of Canadian tax treaty policy.

A key issue addressed by the corporate taxation system and the international taxation system is the separation of owners from income as that income is being earned by intermediaries, such as corporations. Angelo Nikolakakis explores the evolving and ambivalent relationship between the income tax law and the separate-entity principle in private law. His inquiry touches on both inbound and outbound issues. His analysis demonstrates the pragmatic approach that the IWTA and the Act take toward this principle. This theme is picked up in this volume's papers on the accessory nature of tax law.

Tax Law Is Law

It is easy to forget that tax law is, in the end, law. However, the general law infuses the most fundamental elements of what we assume to be the tax law. The general law provides the necessary framework for human interaction (for civil discourse), and the relationships and objects to which the general law give life form the platform for taxation. Thus, in a sense, tax law is "accessory" to the general law; it essentially accepts the legal constructions, formulations, and personalities enlivened by the general law, and then it gives effect to fiscal and

tax policy by drawing tax effects from value transfers among “tax subjects” who deal with “tax objects” in ways that are recognizable “tax realization events.”

Matias Milet, Christopher Sheridan, Martha O’Brien, and Adam Parachin examine the accessory nature of tax law, highlight the role of common law in the development of tax law, and identify some notable trends. Milet and Sheridan observe the correlation between the importance of the accessory principle and the strict approach to statutory interpretation (as exemplified by the *Duke of Westminster* case),¹⁵ and they trace how this principle has been eroded by the increasing use of statutory deeming rules, the shift to a purposive statutory interpretation, and the introduction of GAAR. However, they note that the income tax law, like any organism, “needs to feed on something external to itself,” even though “it sometimes creates its own nourishment.”¹⁶

O’Brien considers which general law can tax law in Canada be traced to: Is it Quebec civil law or the common law of English Canada? She uses the case law on rectification to make the point. Her paper is current, covering the December 2016 Supreme Court of Canada decision in *Fairmont Hotels*.¹⁷

Parachin discusses how tax law from its inception relies on the common-law meanings of “charity” and “gift” in providing tax subsidy to charitable donations. As a policy choice, such provision has stood the test of time, in spite of the significant changes in how charities operate, the philosophical shifts regarding charity, and the blurring of traditional categories. Parachin anticipates, however, that the tax program will reduce its reliance on the general law in the next 100 years.

Spending the Tax: Manifesting Collective Consumption by the National Family

The papers by Neil Brooks, Thaddeus Hwong, John Lester, Alan Macnaughton, and Lindsay Tedds explore the utility of the tax system as a means of affecting behavioural choices, influencing economic activity, and delivering social benefits. Fundamentally, as with a private consumption decision, there are always two basic questions about a tax measure. First, what are we buying and how are we paying for it? Second, is what we are buying worth what we paid for it—that is, has the consumption objective been achieved and, if so, is the tax system an efficient and fair means of achieving it?

Brooks and Hwong provide a review of personal tax expenditures in the past 100 years, identifying when, why, and which political party introduced a specific tax expenditure, noting some interesting trends, and offering some insightful reflections and conclusions. They point out a paradox: the publication of the list of tax expenditures, with their estimated value—as a measure meant to discourage them—has actually led to the opposite result. Special interest groups lobby for special treatment for themselves rather than lobbying for the elimination of special treatment for others. Brooks and Hwong conclude that the rise in tax

expenditures is not likely to end until they are subject to all of the same budgetary controls and processes as direct spending programs.

Lester provides a framework for evaluating tax expenditures and offers an assessment of selected ones on the basis of a cost-benefit analysis. Macnaughton provides empirical evidence on the takeup rate of social benefits delivered through the personal income tax system. The evidence indicates a low takeup rate, possibly because the availability of information (or other resources) that would allow taxpayers to claim their benefits is inadequate. This reflects a practical criticism of some tax expenditures as a feature of an efficient, fair, and compassionate tax system: even if they could work in theory, they often do not because, as a practical matter, they go unclaimed. Tedds examines tax subsidies for expenditures incurred by taxpayers engaged in the mineral, petroleum, and natural gas industries, subsidies that function through favourable deduction of the expenditures and the use of flowthrough shares. She traces the deductibility of non-renewable resource expenses to the Second World War era and is critical of the flowthrough share regime. Regarding the future of these regimes, she is not impressed with the proposal of the current Trudeau government.

The First 100 Years: Politics, Professionals, and Processes

Needs and Aspirations—and the Reality of Governing

Tax policy is, as a philosopher might say, one hand clapping unless it is coherent—that is, unless it is designed by a capable tax architect, built by capable fiscal engineers and contractors, and managed by enlightened and effective administrators. The historical underpinnings of the Act are a rich montage of political and social (and fiscal) challenges and turmoil. The question, always, is how to implement the government’s fiscal remit in a politically palatable and effective manner. How governments actually make decisions is an important consideration now, as it was in 1917 and during the early stages of the IWTA.

“How Tax Policy Decisions Are Made: Perspectives on the Decision-Making Process” is an edited transcript of a panel discussion chaired by Stephen Richardson. The panellists are four experienced tax policy leaders: Elly Alboim, a former member of a finance minister’s political staff; Michael Horgan, a former deputy minister of finance; and Len Farber, a former general director of the Department of Tax Policy and Legislation at the Department of Finance. Richardson himself is a longstanding tax practitioner as well as a veteran of three senior levels of responsibility at the Department of Finance. Richardson provides a brief background on the parliamentary system of government in Canada and the decision-making structure. Alboim, Horgan, and Farber combine their experience in illuminating the backstage process by which fiscal and tax policy develops to meet the social welfare and economic needs of Canada and Canadians.

The panellists' candid exchange provides an unusual vantage from which to appreciate the humanity of law making, and it serves as a warning about interstices in the law that distort the achievement of core policy objectives and that need to be identified, monitored, and remediated.

Taking Responsibility: The Parenting of the Tax Law

"Perspectives of a Former Finance Minister" is an edited transcript of a conversation between the Honourable Michael Wilson and Robert Couzin. Wilson was Canada's finance minister during possibly the most profound recent tax reform. With penetrating candour, and with the grace and honesty of a committed steward of the tax system, Wilson reflects on how political aspirations in the tax area take shape and are implemented. His insights are particularly revealing in the light of his past responsibility for trade matters ultimately covered by the North American Free Trade Agreement. There is an inescapable and deep link between tax and trade—pillars of Canada's economic policy.

Couzin's questions prompt Wilson to remember and reminisce about his experience with the tax system. Couzin is arguably the dean (and the muse) of Canadian tax practitioners. He has served the tax system in a variety of public roles and certainly with a public spirit; thus, his own contributions to the conversation are insightful and valuable. The exchange between these two pre-eminent commentators adds to our appreciation of the history of the income tax in Canada and of the tax law as a living organism, and to our understanding of the kinds of concerns and anxiety that most policy makers feel for their legislative progeny.

It Doesn't Work if It Doesn't Work

A consistent theme in this volume's celebration of the IWTA is the humanity of the statute—its objective humanity (as an institutional response to our needs) and its subjective humanity (as a device among several government tools designed to look after Canadians directly, as people, and indirectly, with respect to businesses and enterprises that greatly influence the Canadian people's prospects and well-being). A collection of rules, by itself, is not human (whatever the rules' latent humanity). What makes those rules come to life is how they are applied—that is, how they are administered by those in the private and public spheres who are responsible for making the bones of the tax skeleton (to revert to this osseous metaphor) move smoothly by supplying the necessary cartilage and muscle.

"Tax Administration: Making It All Work" is an edited transcript of a panel discussion conducted by Wayne Adams, an exemplar of Canadian public service in the tax field. The discussion covers all of the practical perspectives that inform our tax system and make it workable. David Penney offers insights from his experience as the senior tax officer of the Canadian subsidiary of a major multinational industrial company. Balancing Penney's observations are the remarks

of William Baker, formerly a commissioner of the Canada Revenue Agency. Both evince a passionate commitment to openness and trust, and a shared sense of responsibility for making the tax system work—and, in fact, for making the Canadian system one of the pre-eminent systems in the world.

Our celebration of the IWTA's significance and of the persistence of its themes has to acknowledge those points in its development where conflicting points of view, commonly associated with tax avoidance, have had to be addressed. Effective redress is a key to the fairness of the system. Tax litigation and court decisions help shape the evolution of the statute. In the discussion conducted by Adams, Warren Mitchell offers a retrospective on key moments in the history of the tax law in Canada, noting the significant changes brought about by the 1972 Act and GAAR, and the growing complexity and difficulty of litigating a tax case. Mitchell's remarks serve as a suitable platform from which two eminent jurists, the Honourable Marshall Rothstein and the Honourable Karen Sharlow (retired justices, both of them), reflect on the formalities and current direction of the tax system. Their particular perspective—that of interested public observers of taxpayers' private interactions with the system in which they were once (as justices) disinterested observers—is unique.

The papers discussed so far demonstrate clearly and very directly the humanity and behavioural significance of the tax system, which, over the course of its 100 years, has been shaped and guided by large personalities who have assumed longstanding responsibility for trying to make the system work. In this respect, the tax system is to be understood not simply as a regime of rules but as a framework for civil fiscal interaction that can be effective only through enlightened tax administration. Tax professionals and organizations, such as the Canadian Tax Foundation, the Canadian Bar Association, and the Chartered Professional Accountants bodies, play an indispensable role in the Canadian income tax system.

Looking Back To Look Ahead: The Next 100 Years?

It is not unusual for an anniversary celebration to end with a reflection by the honoree. Statutes, of course, do not talk, at least not in the usual way. But, as this volume shows, the IWTA actually speaks volumes about our society broadly and, more specifically, about the future course of our fiscal and tax policy endeavours. All of the discussions at the symposium and all of the related commentaries that fill this volume demonstrate that the IWTA, as it identified, grappled with, and came to conclusions on key tax issues (as outgrowths of key social and economic issues), was part of a system. It is equally clear that that original system endures in many notable ways, exemplified in how we tax people and corporations, how we deal with international circumstances, and even how we administer the tax system.

Part 3 of this volume is the edited proceedings of a panel discussion among eminent commentators—all with perspectives informed by a lifetime of

commitment to the tax system—as they consider the future prospects of the income tax regime to which the IWTA gave birth. The consensus seems to be that income tax is likely to continue as the mainstay of Canada's public finance for years to come, although the future of corporate taxation—more sensitive to what happens outside Canada, especially in the United States—is less predictable.

In this panel discussion, Kevin Dancey and Robert Couzin address the practical side of the system. Dancey highlights the good, the bad, and the ugly elements of the system and how they may inform its future development. He also emphasizes the importance of transparency. Couzin offers predictions about administration and compliance; he notes the blurring of the line between illegal and legal tax minimization, and he questions the traditional wisdom supporting corporate income tax. Neither Dancey nor Couzin is so bold, however, as to imagine the system as cast in bronze—impermeable to change or improvement.

Richard Bird, ever practical and insightful, conducts a “looking back” and “looking around” before “looking ahead,” and he identifies factors that may affect the future of the income tax. He and Couzin speculate that the corporate income tax as we know it is likely to stay, but they also say that if our major trading partners change their approach, we will have to react. Their remarks remind us that we venerate the IWTA in this volume because it is a living manifestation of us and our surroundings.

Neil Brooks and Jack Mintz provide equally insightful comments—part reminiscence and part aspiration—about a tax system to which both are intensely dedicated. As an inveterate fan of the income tax, Brooks emphasizes the social justice features of the tax system and how that underpinning could and should be made better. Mintz has the public economist's eye for the all-important return on investment that tax, as a cost, must provide. Mintz's commitment to the notion of social justice might be said to flow indirectly from his notion of a properly functioning economy, in which the right measure of a tax is whether it is a competitive cost that generates a suitable and proportionate return for the national wealth. He identifies the globalization of business activities as the most important shift in the past 100 years because it makes international income taxation the most challenging area for corporate tax policy. He anticipates that governments will find it a challenge to maintain their share of the global taxable income of multinational business in a world where source-based taxation principles are being tested. And yet, he suspects, the corporate income tax will continue to exist, at least in the foreseeable future.

A Postscript: Seen by the Light of One Hundred Candles

The purpose of the centennial project was to recognize the seminal significance of the IWTA in setting a tone for civil discourse and economic development in Canada. We think that Canada leads the way in tax policy and tax administration. We think that Canada's fiscal policy is inclusive and compassionate. Neither the

tax system nor fiscal policy is perfect. Both could be better, and the world is challenging us in many ways to react, just as Sir Thomas White and Sir Wilfrid Laurier and their colleagues reacted, to the challenges of the time, which included, in their case, strife and uncertainty in several spheres—political, military, and economic. We as a country, and the IWTA as a nascent tax regime, have persisted and adapted. Our tax system rests on an amazingly resilient and internally consistent framework of norms that have withstood the scrutiny of a number of tax reviews and can be found, even today, in the most critical elements of our tax system.

The centennial anniversary of the statute has given us an opportunity to examine ourselves, as Canadians and as guardians of the tax system. That is why we are celebrating—venerating—a statute. Happy birthday, IWTA!

Notes

- 1 SC 1917, c. 28 (herein referred to as “IWTA”).
- 2 See Jonathan Rhys Kesselman, “Toward a Broader Base for Personal Taxation: Reconciling Equity and Efficiency,” 3:1-40, elsewhere in this volume.
- 3 Charles Percy Plaxton and Frederick Percy Varcoe, *A Treatise on the Dominion Income Tax Law* (Toronto: Carswell, 1921), at 2. Further, the IWTA reflects the tenets of residence-focused international taxation as these principles were being debated and worked out under the guidance and direction of the League of Nations, even though Canada's direct participation in that effort was not evident for some time.
- 4 Canada, *Report of the Royal Commission on Taxation* (Ottawa: Queen's Printer, 1966).
- 5 See Richard Bird, Neil Brooks, Larry F. Chapman, Robert Couzin, Kevin Dancey, and Jack Mintz, “Looking Back To Look Ahead: Critical Themes, Milestones, and Future Directions,” 25:1-36, elsewhere in this volume, per Neil Brooks.
- 6 See Colin Campbell and Robert Raizenne, “The 1917 Income War Tax Act: Origins and Enactment,” 2:1-96, elsewhere in this volume.
- 7 See Campbell and Raizenne, *ibid.*; and Jinyan Li and J. Scott Wilkie, “Source of Income and Canadian International Taxation,” 8:1-32, elsewhere in this volume.
- 8 See Li and Wilkie, *supra* note 7.
- 9 See Campbell and Raizenne, *supra* note 6, quoting Rodolphe Lemieux and Thomas White.
- 10 Campbell and Raizenne, *ibid.*, quoting Sir James Lougheed introducing the income tax bill in the upper chamber.
- 11 See Winston Churchill, in United Kingdom, House of Commons, *Hansard*, November 11, 1947: “Many forms of Government have been tried, and will be tried in this world of sin and woe. No one pretends that democracy is perfect or all-wise. Indeed it has been said that democracy is the worst form of Government except for all those other forms that have been tried from time to time.”
- 12 Bird et al., *supra* note 5, per Richard Bird.
- 13 At the symposium in May 2016, Shirley Tillotson provided a vivid account of the earlier years of Canadian income taxation in terms of tax morale, tax culture, and fostering confidence in the young tax system. Owing to a prior commitment, her paper cannot be included in this project, but it can be found in Tillotson, *Give and Take: The Citizen-Taxpayer and the Rise of Canadian Democracy* (Vancouver: UBC Press, forthcoming).

- 14 We will attribute this observation to Robert Couzin, who has regularly observed in his professional life that because Canada is a relatively small country with an open economy (as well as being the neighbour of an economic behemoth), most economic interactions affecting Canadians inevitably have an international aspect and are influenced by trade and tax developments elsewhere.
- 15 *Inland Revenue Commissioners v. Westminster (Duke)*, [1936] AC 1 (HL).
- 16 Matias Milet and Chris Sheridan, "The Income Tax Act as 'Accessory': A Modern Re-Examination," 13:1-31, elsewhere in this volume.
- 17 *Canada (Attorney General) v. Fairmont Hotels Inc.*, 2016 SCC 56.