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**Jean Beetz and Gagnon v. The Queen ,,
His Only Foray Into the Troubled Waters
of the Law of Taxation**

John W. Durnford^[1]

It is well known that the Supreme Court of Canada does not enjoy hearing appeals in the law of taxation. One reason for this was given by Pigeon J. in a speech to the Association des Professeurs de Droit du Québec on the occasion of one of its annual meetings. He pointed out that when a judgment is being rendered that involves the interpretation of a statute, the court should take the scheme of the whole of that statute into consideration. This poses a real challenge when a judge is faced with that monster known as the *Income Tax Act*^[2].

Another reason for the reluctance of the Court to hear tax cases is that after the Court has taken the trouble to render a judgment in this difficult field where the principles are often obscured by highly technical language, the Minister of Finance may rise to his^[3] feet in the House of Commons, snap his fingers (hopefully only figuratively speaking) on the occasion of the presentation of the next budget, and announce that the Act is to be amended so as to annul the effects of the judgment. The judges of our Supreme Court of Canada can be forgiven if they sometimes wonder whether it is worth the effort to deal with the complexities involved in interpreting the Act when Parliament is in any event annually making an extraordinarily large number of amendments to it.

Gagnon^[4] is itself a striking example of the foregoing phenomenon. It relates to the deductibility for the purposes of income tax of certain alimony payments that the taxpayer was ordered to make to his former spouse but which were directed to be transmitted to certain third parties. A significant byproduct of a finding of deductibility is the increasingly controversial principle that the former spouse, almost invariably the ex-wife, has to include these amounts in her income for tax purposes. Since in this instance she lacked discretion as to how the money was to be spent, *Gagnon* involves the fundamental question as to what constitutes income under the Act. In other words, when money has been received by a person who has no control over its use, or the person has not even received the money but has simply benefited from its application, does it constitute income for that person? In this connection, instead of defining the concept of income for tax purposes and levying tax on the amount so determined, the Act deals with income for tax purposes on the basis of the *source* from which the money received has arisen. The consequence is that funds received from one of the sources actually listed in the Act constitute income for tax purposes; the problem presents itself when the money arises from a source not so listed.

The trial judgment of Walsh J. of the Federal Court Trial Division^[5] is a carefully reasoned decision,

holding the alimony payments to be deductible for the husband. The Federal Court of Appeal judgment[6] is a brief one for the simple reason that it was the view of Pratte J. that the principles involved had already been established in *Pascoe*[7], a well known leading decision rendered by him on behalf of that Court some years previously and which had since dominated the thinking of that Court. The judgment of the Supreme Court of Canada, rendered by Beetz J., overruled the Federal Court of Appeal decision in *Gagnon*, and in the process overturned *Pascoe*. This carefully reasoned and well-drafted judgment laid down fresh and distinctly different guidelines for the interpretation of the Act in this area. It was not long, however, before the Minister of Finance rose to his feet and "snapped his fingers" in the House of Commons and Parliament amended the Act so as to nullify the effect of *Gagnon*[8].

It is accordingly not surprising that there appears to be a certain reluctance on the part of the Supreme Court of Canada to grant leaves to appeal in judgments involving the law of taxation[9].

The foregoing may also help to explain the figurative "waving of the arm" with which the Supreme Court maintained, in one short paragraph, the taxpayer's appeal in *Fries*[10] to the effect that strike pay was not income, thereby refusing to enter into the delicate but important issue of what constitutes income "from a source" under section 3 (that is, from a source other than one of those specifically listed in the Act). It may be that the judges of the Court felt it was not worth their while to invest a large amount of time and energy in a matter which they felt Parliament would likely deal with anyway[11]. In any event, the effect of their brief judgment in *Fries* was to reverse in summary fashion well-reasoned judgments rendered by both the Federal Court of Appeal and the Federal Court Trial Division[12].

Despite the foregoing, the Supreme Court does feel impelled to hear a number of tax appeals. It would be interesting to know what motivates the judges of the Court to hear the tax cases they do hear. They agreed, for example, to hear the *Symes* appeal concerning the deductibility of nanny expenses[13]. On the other hand, they refused leave to appeal in *Prior* concerning the fundamental notion of the rights of conscientious objectors in the domain of taxation instead of the usual one of the battlefield (the taxpayer sought to divert to a peace fund the percentage of her income tax owing to the government represented by spending on armaments)[14].

By no stretch of the imagination can Beetz J. be described as having played an active role in the area of taxation in his time on the Supreme Court of Canada (January 1, 1974 to November 10, 1988). In only one of the tax cases heard by the Court during that period did he do more than simply concur with either the majority or the minority. That one case was *Gagnon*[15], and in it he alone rendered the unanimous judgment of the Court.

Why did the Supreme Court agree to hear this particular case? It was probably due to a controversy that had developed over a period of some years between the Federal Court of Appeal, on the one hand, and the Federal Court Trial Division (and the Tax Review Board)[16], on the other. Indeed, the split had reached the point where the Federal Court of Appeal was being publicly criticized by the judges of that Court's Trial Division. The most notable example occurred in *The Queen v. Kendall*[17], in which Collier J. made the following remarks:

the law as currently laid down by the Federal Court of Appeal rules that these expenses..., no matter how the Income Tax Act appears to read, cannot be deducted. I tried to do something about it in the Bryce case, but... the Court of Appeal overruled me. So, I just have no choice but to dismiss your appeal [...]

I have every sympathy for you. Some of my colleagues in the Trial Division have railed about the harshness of the [Federal Court of Appeal judgment in the] Pascoe case. But again it is the Federal Court of Appeal by which I am bound. We have sad cases, such as yours [...]

I can only add that the whole theory [...] is coming before the Supreme Court of Canada [...] At some stage, the Supreme Court of Canada will be able to consider the Federal Court of Appeal judgments in the Bryce case, the Gagnon case and in the Pascoe case. [18]

What was the controversy all about? It had arisen in the painful realm of divorce, and as already mentioned related to the contentious question of whether payments made to third parties rather than to the other spouse should be deductible for the paying spouse and consequently (as a result of the interplay between paragraphs 56(1)(b) and 60(b)), at the same time subject to inclusion in the income of the other spouse. The real issue is, of course, whether the recipient spouse should be obliged to include in income for tax purposes amounts over which that person has no discretion as to its disposition due to the payments being made directly to third parties or to there being conditions over how the money is to be applied.

Our *Income Tax Act* provides for the deductibility of alimony payments, but only where the strict requirements of paragraph 60(b) of the Act have been met. One of these is that the amounts paid must constitute "alimony or other allowance" [19]. The Act contains no real definition of either of those two crucial terms [20]. So it was up to the courts to supply that definition, and this was done, as we have seen, by Pratte J. in the well known *Pascoe* judgment of the Federal Court of Appeal; the relevant part of the definition for the purposes of this discussion is expressed in the following words:

once paid, [the amount...must be] at the complete disposition of the recipient who is not required to account for it. [21]

What could be a more reasonable requirement? Since, under paragraph 56(1)(b) of the Act, the recipient of alimony must include the same in income and accordingly be taxed on it, why should any such person be obliged to pay tax on money paid directly to a third party and consequently over which he or she lacks discretion as to its use?

The answer is more simple than might appear at first sight. In many instances of marital breakdown, the desirable solution is for the wife to remain in the family home with the children; much of the alimony is therefore applied to the expenses of the home, such as the real estate taxes, mortgage interest and insurance premiums. No problem arises with respect to the deductibility where the alimony (including the amounts for the home) is all paid to the recipient spouse and the right to receive the alimony is not subject to its being applied to any specified purposes, and the recipient pays the bills in question.

But the atmosphere of love and trust that was present between the spouses at the time of the marriage has evaporated and has generally been replaced by hate and distrust; moreover, in some instances the recipient spouse may be the victim of a mental sickness or a disability resulting from drug or alcohol abuse. There is also the fact that the paying spouse wishes to avoid risking the loss of the house (an important investment) through the non-payment of crucial bills such as the type in question. The judgment or agreement providing for the payment of alimony would accordingly direct that certain

specified parts of the alimony had to be paid directly to listed third parties.

The predominant opinion seems to have been, at least until recently, that even though the recipient spouse under the above circumstances would have to pay tax on the entire amount paid by the other spouse despite lacking discretion as to the application of at least part of it, deductibility is such a desirable incentive to assist and encourage the paying spouse to support the family that it should be permitted anyway. Thus a number of judgments were rendered at trial level maintaining full deductibility[22], but once the matter was taken to the Federal Court of Appeal, the latter, feeling bound by its above definition of allowance in *Pascoe*, denied deductibility[23].

The foregoing explains the frustration expressed by Collier J. in his above remarks in *Kendall*, and in which he mentioned the possibility of *Gagnon* being appealed to the Supreme Court of Canada.

The facts in *Gagnon* were not entirely identical to those in the typical situation outlined above in that the payments to third parties related to a property that belonged to the recipient spouse (the wife) rather than to the paying spouse; the principle at stake was nonetheless considered to be the same, since the terms of the alimony order required the wife to apply the payments against two mortgages and the property taxes, thus depriving her of discretion as to the application of the funds.

The judgment at trial was rendered by Walsh J.[24] His approach was to distinguish the facts from those in *Pascoe*. He reasoned that since the house was her property, the payments for the mortgages and property taxes were "wholly to her benefit"[25], and the fact that the payments were to be applied to the expenses specified did not prevent the funds from being "at her complete disposition" since if "she did not choose to [apply them as specified] she would suffer the consequence of possibly losing her property [...]"[26].

It took only a brief decision for the Federal Court of Appeal to overrule the trial judgment[27]. Pratte J., after reproducing his definition of an "allowance" in *Pascoe*, held that the fact that the former wife was only entitled to the payments on the condition of their being applied to the mortgages meant that they did not qualify (since she did not have full discretion as to their use).

At last! The long awaited occasion for the settlement of the dispute between the Federal Court of Appeal and the Trial Division of that Court presented itself when the *Gagnon* case came before the Supreme Court of Canada for adjudication in 1986. In a brief, brilliant and lucid judgment[28], Beetz J. laid down the solution which so many had awaited for so long. But, sadly (in the minds of some), that solution, as already mentioned, only endured until the Minister of Finance rose in the House of Commons and "snapped his fingers". Parliament's alternative solution to the problem of third party payments[29] turned out to be well intentioned but, to this writer at least, of doubtful practicality, and is besides phrased in terms that are too complex for the non-tax specialists that are generally called upon to apply it: family law judges and lawyers. But we are getting ahead of ourselves.

In the course of reviewing the judgments of the lower courts in *Gagnon*, which inevitably brought to light the predominant and controversial role played by the *Pascoe* decision of the Federal Court of Appeal, Beetz J. made the following remark, expressing himself in his usual tactful manner:

Pascoe has been applied and followed, but not without misgivings.[30]

At the end of his review of a number of past precedents, Beetz J. added the following comment:

Appellant submitted that the definition of "allowance" in Pascoe is unduly limiting and should be revised. I think he is right. [31]

Beetz J. then faced the daunting task of, in effect, justifying the inclusion of payments in the income of a recipient where the latter lacks discretion as to its use (this being, as we have seen, the counterpart of the right to deduct on the part of the paying spouse) [32].

He commenced by reviewing the *Pascoe* definition of "allowance" which required that three conditions be met:

(1) the amount must be limited and predetermined [33]; *(2) the amount must be paid to enable the recipient to discharge a certain type of expense; (3) the amount must be at the complete disposition of the recipient, who is not required to account for it to anyone.* [34]

Having agreed with the first two conditions, Beetz J. questioned the third:

But what is the reason for the Pascoe judgment imposing the third condition, which clearly cannot be inferred from paragraph 60(b)? [35]

The question could not have been more clearly put. The issue, moreover, is a basic one in the law of income tax. For even though paragraph 56(1)(b) contains no provision to the effect that the recipient of alimony must have control over its disposition, the question remains as to whether the Act ever imposes taxation on amounts received by a taxpayer where there is no freedom to decide on how they are to be spent.

One could indulge in a theoretical discussion as to whether alimony should constitute income at all [36]. The reality is, however, that Parliament has decreed alimony to be income, and that was the background against which Beetz J. had to render judgment in *Gagnon* and one with which we are faced until such time that the Act is changed [37].

Since paragraph 56(1)(b) declares that alimony is income but contains no stipulation that this rule applies even where the recipient has no discretion as to the application of the funds, we are forced to fall back on the general principles that determine what constitutes income under the Act. This is what Beetz J. proceeded to do.

Beetz J. expressed the issue as follows:

It is important to specify what is meant in requiring that, to be an allowance, an amount must be "at the complete disposition of the recipient" [as laid down by the Federal Court of Appeal in Pascoe].

According to Pascoe, this condition means that the recipient must be able to apply this amount to certain types of expense, but at her discretion and without being required to account for it.

However, the condition could also mean that the recipient must be able to dispose of the amount completely, and that, provided she benefits from it, it is not relevant that she has to account for it and that she cannot apply it to certain types of expense at her complete discretion.

It seems to me, with respect, that the second interpretation is the correct one, in light of the earlier decisions which Pascoe appears to have misinterpreted.[\[38\]](#)

Not surprisingly, Beetz J. referred to the well-known judgment of Thorson J. (as he then was) in *K.B.S. Robertson, Limited v. M.N.R.* [\[39\]](#). The issue in that case was whether certain sums of money received during a taxation year could be considered as income where the right to retain them was not settled until the results of certain year end adjustments had been ascertained. The test applied by Thorson J. (and relied on by Beetz J.) was whether the person's right to the amount received was "absolute and under no restriction, contractual or otherwise, as to its disposition, use or enjoyment" [\[40\]](#).

Beetz J. expressed the view that the Federal Court of Appeal had misinterpreted this requirement:

What Thorson, J. meant by "restriction" in the rule which he adopted was not a restriction as to the way in which an amount is disposed of, but a restriction as to the very right to dispose of it, a restriction which has the result that a taxpayer derives no benefit from it at all. This is indicated by what he wrote at 183 (C.T.C. 91):

To put it in another way, can an amount in a taxpayer's hands be regarded as an item of profit or gain from his business, as long as he holds it subject to specific and unfulfilled conditions and his right to retain it and apply it to his own use has not yet accrued, and may never accrue? [\[41\]](#)

The result of the foregoing review was the statement by Beetz J. that

the rule for determining what constitutes taxable income emphasizes the benefit the taxpayer derives from income, whatever the way in which it is derived. [\[42\]](#)

Beetz J. also cited another well known Canadian tax case, namely *The Queen v. Poynton* [\[43\]](#), in which a scheme of kickbacks carried out by a senior employee resulted in, according to the Supreme Court of Ontario, taxable income in the taxation years in which it was received. The Court in that case suggested some guidelines:

the manner of receipt, the control over it, the liabilities and restrictions attaching to it, the use made of it by the holder, the person to whom the benefits accrue. These are but some of the circumstances to be weighed. [\[44\]](#)

So an assessment of the judgment of Beetz J. in *Gagnon* involves the question as to whether, in the

absence of a specific provision in the Act, the general concept of "income" in the Act is sufficiently broad to encompass funds from which the recipient benefits without having had any discretion as to their application. (It must be kept in mind, of course, that we are not dealing with incapables whose income is handled by another person due to the incapacity of the beneficiary, or income beneficiaries of trusts, because in those situations special arrangements have been made for a third party to be responsible for the administration of the funds from which the taxpayer benefits.)

It seems, at least at first glance, both abnormal and distasteful to oblige a person to pay tax on money over which the recipient or beneficiary has no control as to how it is to be spent. But the world of taxation is a strange place; it is an artificial creation with its own peculiar rules. A striking example of this phenomenon is the abovementioned judgment of the Supreme Court of Ontario in *Poynton*. Even though the judgment may be considered desirable on the ground that one does not wish to see a criminal escape punishment, the remarkable thing is that he was ordered to pay tax on money which he had since reimbursed to his employer. The Court simply invoked the rule that taxation "is an annual affair" (it is reassuring to see at least a *hint* of romance in the *Income Tax Act*)[\[45\]](#), and accordingly it was held that the fact of reimbursement in a subsequent taxation year was irrelevant[\[46\]](#).

So what is income? This most basic element of the *Income Tax Act* is not therein defined. The concept of income has been the object of much learned study by academics and others[\[47\]](#), concerning whose writings it would probably be fair to say that the main objective of the authors has been to broaden the base of income on which tax is levied (one result of which was the inclusion of capital gains in income for the first time with the advent of the tax reform of 1972).

The approach of Parliament, in an effort to avoid the pitfalls inherent in any attempt to define what is income, has been to apply the concept of *source*. In other words, the Act obliges a taxpayer to compute income on the basis of the source from which it arises. The Act lists five principal sources in section 3: they are office and employment, business and property, and taxable capital gains. Additional sources (including alimony) are to be found in sections 56 to 59.1. Creating a tax base consisting of two lists of specific sources, the income from which is to be taxed, has necessarily a limiting effect: the net cannot help but be incomplete. That it was not Parliament's intention to limit income for tax purposes to those listed sources can be seen from the following extract from section 3:

3. The income of a taxpayer...is his income...determined by the following rules:
(a) determine the aggregate of amounts each of which is the taxpayer's income for the year [...] from a source inside or outside Canada, including, without restricting the generality of the foregoing, *his income for the year from each office...* (my emphasis).

It is evident from the foregoing excerpt from section 3 that Parliament intended to extend the net of income subject to taxation beyond the sources specifically listed. The courts have, however, tended to shy away from the challenge of declaring the existence of other sources. It is true that in *The Queen v. Fries*[\[48\]](#), the Federal Court of Appeal did declare that strike pay was income from a source under section 3, the source in that instance being the "strike fund set up by the union from the dues paid to it by its members"[\[49\]](#). We have seen, however, that its judgment was struck down by the Supreme Court of Canada in a one paragraph judgment rendered from the bench[\[50\]](#), in which Sopinka J. for the Court stated:

We are not satisfied that the payments by way of strike pay in this case come within the definition

of "income...from a source" within the meaning of section 3 of the Income Tax Act. In these circumstances the benefit of the doubt must go to the taxpayers.

But the Federal Court of Appeal has itself also demonstrated a reluctance on at least one occasion about naming an additional source: in *Cranswick*[\[51\]](#) it held that a payment received by a minority shareholder from a majority shareholder by way of voluntary compensation for damage caused to the company in order to avoid possible litigation was not income for tax purposes because

[it] was not income earned by or arising from the [...] shares, which are the only possible source of income in this case [...] income from a source will be that which is typically earned by it or which typically flows from it as the expected return. The income which is typically earned by shares of capital stock consists of dividends paid by the company in which the shares are held. The payment in the present case was of an unusual and unexpected kind that one could not set out to earn as income from shares, and it was from a source to which the [taxpayer] had no reason to look for income from his shares. I agree with the learned trial judge that it was in the nature of a "windfall".[\[52\]](#)

Let it not be thought, though, that much income escapes taxation. This is because the provisions of the Act have become so detailed. Two of the few remaining sources of income that escape taxation are lotteries and hobbies. Not many persons are successful in making money out of either; indeed, lotteries are treated by hard-up governments as a form of taxation in themselves (and have, tragically but all too accurately, been described as a tax on fools)[\[53\]](#).

Since alimony received is expressly listed as a source of income under paragraph 56(1)(b) of the Act, the reader may wonder what the problem is. The answer lies in the question as to whether money received in the form of alimony really constitutes alimony, and consequently amounts to income, where the recipient either has no discretion as to how it is to be spent, or does not actually receive the money because it is paid to third parties. Thus we are faced with the fundamental question as to whether we can ever be said to have received income for tax purposes where the money has not passed through our hands or where we have not had control over its use. A related question is whether it is necessary to receive the money itself, or whether it suffices to be the beneficiary of money's worth.

Parliament has shown no hesitation about inserting provisions into the Act which have the effect of taking money from us through the tax system without our having had it in our possession, or where we have received money's worth instead of cash. Herewith are some examples:

1. *The obligatory withholding at source by employers of part of the taxpayer's employment income, representing the estimated amount of income tax and other levies that affect the income (section 153).* When a taxpayer argued that he should not be taxed by the federal government with respect to the amount of provincial tax deducted from his salary, it was held that:

the word "receive" obviously means to get or to derive benefit from something, to enjoy its advantages without necessarily having it in one's hands. In other words, the [taxpayer] can, and must, say, "what is left of my salary or income, after taxes, is \$14,639.85"; it is not correct to say "my income is only \$14,639.85".[\[54\]](#)

(Does it not seem rather ironical that the law deems us to have "enjoyed" money that has been snatched from us by the tax collector even before we have had a chance to lay our hands on it?)

An indication of the fine distinctions that are made in this field is seen from comparing the foregoing with the situation in *Rousseau*^[55], where salary had been earned by an employee, but the amount involved was not included in his income by the Exchequer Court because it had simply been credited to him on the books of the company instead of his having been paid it^[56]. (In this connection it is important to note that *Rousseau* related to *employment* income, which is normally subject to taxation only in the year in which it is received (subsection 5(1)), as opposed to income from business or property, which is usually treated on an accrual basis (subsection 9(1)).

2. *The levying of taxes under section 6 on "benefits of any kind" arising out of the contract of employment.* A striking example is seen in the *Waffle* case^[57], in which the employee of an automobile dealership went on a cruise with his wife paid for by the Ford Motor Company, he did not even want to go, and did so only for business reasons, and even that part of the cost of the cruise that was for his spouse was included in his income.

The *Waffle* judgment is a good example of just how some of the reasoning used in the House of Lords' decision rendered in 1892 in *Tennant v. Smith*^[58] is far removed from the realities of Canada's current income tax system. Tennant, a bank employee, was obliged, as part of his contract of employment, to live in bank premises for the purposes of security and after-hours service. The issue was whether the value of the housing represented income in his hands. It was held that it did not. The decision could have been based on the simple premise that he was living in the premises for the benefit of his employer. Indeed, Lord Watson expressed himself as follows:

The appellant does, no doubt, reside in the building, but he does so as the servant of the bank and for the purpose of performing the duty which he owes to his employers.^[59]

But their Lordships went further and declared that only money or what is convertible into money constitutes income.

Statutory provisions in our Act such as section 6 govern the situation insofar as Canadian income taxation is concerned:

6(1) There shall be included in computing the income of a taxpayer [...] as income from an office or employment [...]

(a) the value of board, lodging and other benefits of any kind whatever received or enjoyed by him in the year in respect of, in the course of, or by virtue of an office or employment [...]

3. *The inclusion in the income of a life tenant or beneficiary, who has the use of property, of the cost to the trust of maintaining it (subsection 105(2)).*

4. *Subsection 56(2), under which a payment made to a third person at the direction of or with the concurrence of the taxpayer will be included in the taxpayer's income.* A striking example of this rule is seen in *M.N.R. v. Bronfman*[\[60\]](#). The directors of a company were obliged to include in their incomes the amount of gifts made by the corporation to relatives of the directors. It was held to be irrelevant that the money had not belonged personally to the directors. In the words of Revenue Canada:

A taxpayer to whom subsection 56(2) applies need not be legally entitled to the property paid or transferred but must have some degree of control over its payment or transfer.[\[61\]](#)

There was a different set of circumstances in *High Level Hotel Ltd. v. M.N.R.*[\[62\]](#). The owner of a hotel of which the top floor was unfinished engaged a contractor to finish it, the contractor being paid on the basis of 85% of the gross receipts arising from the top floor for a period of about four years. The hotel's owner argued that the amounts paid over to the building contractor did not constitute income in its hands because it did not have the beneficial enjoyment of it. The Board disagreed and held the amounts to form part of its income.

5. *The attribution rules.* Where a person transfers property to a spouse or to minor children, the income from the property belongs to its recipient, but the transferor is the one who must include it in income for tax purposes[\[63\]](#).

6. *Under paragraph 69(1)(b), a taxpayer making a gift will be deemed to have made a disposition at fair market value.* The donor will accordingly be obliged to pay tax on the resulting capital gain even though no money has been received.

7. *The receipt of money's worth (as opposed to money) constitutes income.* This is apparent from the definition of the word "amount" in subsection 248(1):

"amount" means money, rights or things expressed in terms of the amount of money or the value in terms of money of the right or thing [...][\[64\]](#)

The word "amount" appears in connection with the computation of income in, *inter alia*, sections 3, 6, 12 and 15.

The conclusion to be drawn from the foregoing examples from the Act is that Parliament imposes taxation in many instances by treating money as income in our hands even when it is either never actually received by us or we are not in a position to enjoy it in any real sense of that word. So the finding of Beetz J. in *Gagnon* that it sufficed for the former wife to benefit from the payments and that there was no requirement that she have discretion over the application of the funds is certainly consistent with Parliament's approach to the matter as evidenced in the examples.

Let us now examine whether the courts have rendered decisions on the question of when money is to be treated as income for tax purposes that are incompatible with *Gagnon*. It can be said right from the start that the courts have not hesitated to reach a finding of income in many such instances, even in the absence of a directly applicable provision of the Act.

Almost invariably one of the first judgments that comes to mind is one that was referred to by Beetz J. in *Gagnon*, namely that of *K.B.S. Robertson, Limited v. M.N.R.* [65]. The theme of this and related judgments [66] is that where the right to retain and apply to one's use, disposition or enjoyment money that has come into one's hands is contingent on the happening of an event that may not take place, the receipt of that money does not constitute income. We saw that Beetz J. was of the opinion that *Robertson* did not have the effect of taking away the quality of income with respect to money from which the former wife benefited, because *Robertson* concerned

a restriction as to the very right to dispose of it, a restriction which has the result that a taxpayer derives no benefit from it at all. [67]

Even where money has been earned, there must also be entitlement to payment of it before it will constitute income for tax purposes. One instance of this relates to holdbacks in the field of construction. In the *Colford* case [68], it was held that where under a contract holdbacks were not payable until the supervising architect or engineer had certified that the work had been satisfactorily completed, the holdbacks lacked the quality of income until such certification had taken place. But the distinctions that are drawn can sometimes be very fine; thus the mere fact that the taxpayer might be obliged subsequently to make a refund of money received does not alone take away the quality of income in the taxation year in which it is received [69]. A good example is seen in the 1990 judgment in *Rodgers*: in 1982, on his dismissal, Mr. Rodgers' severance package included an amount of \$120,000. In 1983, the former employer sued to obtain reimbursement of that sum. The claim was settled in 1987 and the taxpayer was allowed to retain \$108,000. It was held that that amount had to be included in the taxpayer's income for 1982 [70]. On the other hand, though, it can sometimes happen that money owed does not constitute income until the taxation year in which the amount is fixed. Thus in *M.N.R. v. Benaby Realities Ltd.* [71], property belonging to the taxpayer was expropriated in its 1954 taxation year but the amount of the compensation was not determined until the 1955 taxation year. The Supreme Court of Canada held that the indemnities only became income of the taxpayer in the latter year.

The principles concerning entitlement and timing laid down in cases such as *Colford*, *Rodgers* and *Benaby Realities*, do not detract from the judgment of Beetz J. in *Gagnon*.

A major area in which the courts have had to declare in whose hands income should be taxed is that relating to the matrimonial regime of community of property between spouses in the law of Quebec. The leading case is that of *Sura v. M.N.R.* [72]. The Supreme Court of Canada held that even though the property of the community, including the income arising therefrom, belonged to both the spouses (they were married under the then regime of community of property existing in the law of Quebec), nonetheless such income was the husband's for tax purposes because it was he who had the enjoyment of it, the ownership of the property was irrelevant [73].

The basis of the *Sura* judgment being that it is the *enjoyment* of income that matters for income tax purposes, it could be said to be compatible with *Gagnon*. It may depend, however, on how you define "enjoyment". If you regard the essence of enjoyment as *benefit*, then *Gagnon* is compatible with *Sura*. But the words of Taschereau J. in *Sura* indicate that enjoyment also entails *control*:

le mari seul administre les biens de la communauté. [74]

[le mari] *seul en a la jouissance sans restrictions [...]* [75]

la femme ne touche aucun revenu des biens communs, qu'elle n'a "aucun traitement, salaire ou rémunération", que rien ne lui "provient d'entreprises, de biens, de charges ou d'emplois". [76]

Gagnon accordingly reflects a narrower concept of what is necessary for money to be treated as income for tax purposes. While this may be a reasonable ground on which to distinguish *Gagnon* from *Sura*, there does not necessarily result an incompatibility between the two judgments, since the Supreme Court of Canada was faced with a different set of facts in the two cases and there is no certainty that if Taschereau J. who rendered the judgment in *Sura* had also had to decide *Gagnon* the result would have been different to that reached by Beetz J.

The advent of the taxation of capital gains in 1972 (that is, post-*Sura*), has given rise to interesting questions. In the 1984 judgment in *Laporte*^[77] Judge Tremblay of the Tax Court of Canada held that since the Act taxes capital gains on the basis of ownership, and since under their matrimonial regime of community of property the wife was a co-owner, the husband could only be held liable for taxes to the extent of one-half of the taxable capital gains arising from the sale of shares belonging to the community. *Laporte* was not followed in *Dumais* (rendered in 1989)^[78]. Dubé J. declared that:

[despite amendments to the Civil Code] it is still the husband who administers the community property, and it is therefore still the husband who has the unlimited enjoyment of the income produced by the community, including the capital gain. It follows that for a woman married in community of property, a capital gain cannot be taxed against her simply because she is co-owner of property, if she has no right to freely dispose of the income made at the time of sale.^[79]

It is to be noted that *Dumais* was under appeal at the time of writing.

A different rule would seem to apply where there has been a partition of the community. In *Garant*^[80] the taxpayer and his wife, having been married under the regime of community of property, later changed to that of separation of property. The question was whether a transfer of the ownership of property had resulted from the partition of the community assets, and accordingly whether the income from the property received by the wife was subject to taxation in the hands of the husband on the ground of attribution. It was held that no transfer of ownership had taken place, since the partition had been of property held in co-ownership. Rouleau J. distinguished the effects of partition from those of transfer: the former is simply declaratory of ownership, whereas the latter has the effect of conferring ownership. Consequently, on the partition of the community assets, property which falls into the wife's share does not originate from the husband's patrimony. The husband, moreover, no longer has the enjoyment or the administration of these assets.^[81] Attribution accordingly did not apply.

In connection with the foregoing, it is interesting to note the *Faure Estate* case^[82]. In their Belgian marriage contract, the parties stipulated that they would be in community of property, and that the whole of any property acquired during the marriage should belong to the surviving spouse. De Grandpré J. (for the Supreme Court of Canada), stated:

Whatever the nature of the community may be, on its dissolution by the death of the husband, giving rise to application of the above-mentioned stipulation in the marriage covenants, the widow became owner of all the property, retroactively to the date of the marriage.^[83]

De Grandpré J. based himself on the statement made by Taschereau J. in *Sura* to the effect that where there is partition, there is no *passing* to the wife; there is, instead, partition, "in which she took the share coming to her, which had belonged to her since the marriage"[\[84\]](#). As a consequence, the entire estate of the deceased spouse was the property of the surviving wife.

It would appear that the foregoing cases relating to capital gains realized upon the disposition of community assets and to the partition of the community are compatible with the judgment of Beetz J. in *Gagnon*. It should also be noted that the enactment of subsections 248(23) and (24) in 1991 may well have nullified the effect of at least some of the foregoing decisions[\[85\]](#) by declaring that for fiscal purposes the dissolution of the matrimonial regime of community of property results in a transfer of property. This lends force to the proposition that the law, both legislative and judicial, obliges taxpayers to include in their income amounts that under the private law do not belong to them.

Another area in which the courts have had to decide what amounts have to be included in the income of a particular taxpayer is that of estates and trusts. It is basic, of course, that for income to be "received" for tax purposes, it must be *beneficially* received. A person who receives money in trust for another (as does a trustee under a will) and does not have the right to spend it on his or her own needs and desires, will not be obliged to include such money in income[\[86\]](#). The concept of the necessity for there to be beneficial receipt is not, of course, limited to the field of estates and trusts. Thus in *Bégin v. M.N.R.*[\[87\]](#), the taxpayer obtained a license for the sale of beer on the basis that he would forego operating the business for his personal profit and would use it exclusively to create funds which would be distributed for purposes of welfare, education and social purposes in the town in which he lived; the Board held that the revenues were not the property of the taxpayer. Once we stray a bit from clear situations such as trustees under wills and the facts set forth in *Bégin*, however, we run into borderline situations which have given the courts food for thought.

The leading case is *Bouck v. M.N.R.*[\[88\]](#), a judgment of the Supreme Court of Canada rendered in 1952. In his will, Mr. Bouck directed that all the income of a trust created under his will "shall be under the sole control of my wife to be used by her to maintain a home for herself and my children [...]"[\[89\]](#). The Minister assessed the entire income to the widow. In a three-to-two decision, Kellock J. for the majority held:

I think [...] that the wife, being obligated to apply the income needed for the benefit not only of herself but also for the children, although her discretion is absolute [...], has an interest limited to that which she appropriates for herself, and the children become entitled to the remainder in the proportions she from time to time determines.[\[90\]](#)

The Supreme Court of Canada was faced with a somewhat similar situation in 1955 in *Wilson v. M.N.R.*[\[91\]](#). It again rendered a three-to-two decision. The late Mr. Wilson bequeathed his business to his son, but subject to the condition that he enter into an agreement with the testator's widow to pay her the monthly amount of \$500, plus pay the cost of maintenance of the city and country houses occupied by her, these arrangements to last her lifetime. The son complied with the condition and became the owner of the business. It was held that the amounts which the son had to pay over to the widow did not constitute income in his hands.

How does *Gagnon* fit in with *Bouck* and *Wilson*? In *Bouck* while the taxpayer had the control of the funds in question, she nonetheless did not benefit personally from them. In *Wilson*, it would seem to be

fair to say that the taxpayer had neither the control nor the benefit. It would accordingly appear that *Gagnon* does not deviate from either of those two judgments.

The foregoing review of the judgments rendered in various fields of the law of taxation would appear to indicate that *Gagnon* is compatible with them, with the possible exception of the Supreme Court of Canada judgment in *Sura*.

Let us now, in the light of the foregoing review, consider whether the decision by Beetz J. in *Gagnon* in which the recipient spouse was obliged to include in her income amounts over which she did not have discretion as to their disposition, was sound both from the legal and policy points of view. It could be said by those who on a policy level disagree with the proposition that the recipient should have to pay tax on amounts over which there is no control, that Beetz J. was acting in fulfilment of the desires of what still appeared, on the surface at least, to be the dominant opinion, namely that the maintenance of the other spouse and of the children justified stretching somewhat the concept of income for the purposes of the *Income Tax Act*. Indeed, his judgment received a favourable comment in the *Canadian Tax Journal*: R. B. Thomas suggested that the *Gagnon* judgment more easily facilitated Parliament's intention in connection with alimony^[92].

Critics of the judgment could also refer to its second to last paragraph, in which Beetz J. referred to certain amendments to the Act that had been made after the hearing of the appeal^[93]. Those amendments would appear to consist of the enactment of subsections 56.1(2) and 60.1(2) in 1984^[94]. These provide for, *inter alia*, the deductibility as alimony of the kind of expenses in question, namely third party payments such as mortgage payments, property taxes and insurance premiums. More will be said about these provisions in a moment. Suffice it to say, however, that one cannot help reaching the conclusion that Beetz J. and his colleagues might have been influenced in favour of maintaining the appeal in *Gagnon* by the belief that Parliament had settled the problem for the future by the changes made to the Act.

It is most unlikely that the judges of the Supreme Court of Canada would have been made aware of the fact that those who formulate fiscal policy in the Department of Finance were no longer under the influence only of those who held the traditional view that deductibility should be an essential element in the alimony provisions of the *Income Tax Act*; for in the meantime, womens' advocacy groups had become influential in political circles. They pointed to the astounding delinquency rate amongst former husbands, one estimate being as high as 85%^[95]. They also reminded the policy makers that as the Act now stands every dollar that is deductible for the paying spouse has to be included in the income of the recipient, whether the alimony is being paid for the recipient spouse alone, that spouse plus the children, or even the children alone^[96]. The evidence would also appear to indicate that alimony awards are generally of too small an amount to furnish a satisfactory level of support even before the imposition of taxes on the amounts received.

It is accordingly not entirely surprising that the reaction by the Department of Finance to *Gagnon* was negative and resulted in another "snapping of the fingers" in the House of Commons by the Minister of Finance, as a result of which Parliament in 1988 enacted subsection 56(12) for the express purpose of reversing *Gagnon* and restoring the previous definition of allowance (the one laid down in *Pascoe*)^[97]. Thus subsection 56(12) declares that alimony

does not include any amount that is received by a person [...] unless that person has discretion as to the use of the amount.

The effect of subsection 56(12) is to force spouses to have recourse to subsections 56.1(2) and 60.1(2) when deductibility is sought of alimony payments made to third parties (such as mortgage payments, property taxes and insurance premiums). A requirement of these subsections is that there be an agreement of the spouses or a judgment of the (family) court that these two subsections apply (specific mention of them by section number is required in the agreement or judgment).

The spouse who has to pay alimony is, accordingly, only allowed to deduct an alimony payment where the recipient has discretion as to its use (subsection 56(12)), unless an agreement between the spouses has been reached or a judgment of the family court has been rendered invoking subsections 56.1(2) and 60.1(2).

Is Parliament's solution a good one? Insufficient time has elapsed to judge on the basis of experience. One may, however, speculate on the matter.

To begin with, while the Act's basic provisions on alimony (paragraphs 56(1)(b) and 60(b)) at least *appear* simple^[98], subsections 56.1(2) and 60.1(2) are anything but. They constitute a challenge to the tax specialist, to say nothing of the judges and lawyers in the domain of family law who have to apply them. Moreover, these provisions not only have to be understood, but also expressly invoked. It is an imposition of a heavy burden, I would suggest, to require the judges who sit in family court to incorporate references to specific sections of the *Income Tax Act* in their divorce judgments when the sections in question are long, complex, unclear, and, moreover, form part of an Act with which few feel comfortable.

But there remains a more basic problem. To require either an agreement to which the recipient spouse will be a party or an expressly worded judgment of the divorce court is in theory highly beneficial. The reasoning behind subsections 56.1(2) and 60.1(2) is that the recipient should not have to pay tax on alimony that is not directly paid to him/her without having either agreed thereto or had the protection of a judgment of the divorce court. The intention is no doubt to bring about an increase in the amount of the alimony to be paid in the light of the fact that the recipient spouse will have to pay income tax thereon in spite of the payments being made to third parties. In other words, the paying spouse will not have the advantage of being able to deduct third party payments without either the consent of the recipient spouse or the protection that comes with the judge having to consider the matter and then insert the necessary wording into the judgment.

There are two serious difficulties in connection with the foregoing solution. The first is that a marital breakdown has usually occurred because of the absence of agreement of the spouses about the most basic things in life. But that is not all. We are also frequently in the presence of bitterness and resentment, often to a totally irrational extent. The number of warring spouses that will be able to work out a satisfactory agreement that will provide reasonable protection to the recipient and the children where the agreement requires that the recipient include amounts in the latter's income without any discretion as to its use will, I suspect, be small.

The other difficulty presents itself when it is the judge of the family court who is called upon to draft a judgment incorporating these provisions. While the situation has greatly improved in recent years, counsel to parties seeking a divorce do not always take income tax implications into account when making representations as to the amount of the alimony^[99]. This being so with respect to a relatively simple aspect of taxation, how many of them will go to the trouble of invoking the complex provisions of subsections 56.1(2) and 60.1(2)? I am frankly skeptical as to how often these latter provisions will be applied.

We are accordingly left with the dilemma: assuming that it is desirable to retain the incentive of deductibility of alimony payments with the accompanying inclusion of the payments in the income of recipients (a large question in itself which is being more and more debated), are we better off (in connection with third party payments for the maintenance of the family home) with Parliament's foregoing provisions under which either the consent of the recipient has to be obtained, or failing that, the judgment of the family court has to take the matter into express consideration? Or would it have been preferable if Parliament had left undisturbed the solution of the Supreme Court of Canada in *Gagnon* as so ably rendered by Beetz J.?

On reflection, I tend to favour the *Gagnon* solution. It is true that the spouse living in the family home with the children ends up paying tax on the sums received which are paid directly to third parties despite having no discretion over their disposition and without regard to the reduction of already inadequate support because of the tax burden. Nonetheless, this solution has the advantage of being both simple and workable. That alone would not, of course, be either sufficient or fair. But fortunately the situation of the recipient spouse is being alleviated by the fact that family courts are making a real effort to take the tax implications into consideration when fixing the amount of alimony.

In conclusion: on the assumption, as already mentioned, that alimony will continue to be deductible for the paying spouse and will be included in the income of the recipient spouse (concerning which only Parliament can provide a different solution)^[100], my view is that the closely reasoned but succinctly stated judgment by Beetz J. in the only tax case in which he rendered the judgment of the Supreme Court of Canada furnished a solution sounder in both legal and policy terms than that laid down by Parliament in those poorly drafted and impractical provisions known as subsections 56.1(2) and 60.1(2) of the *Income Tax Act*.

^[1]Professor of Law, McGill University. Grateful thanks are due to Me Claudette Allard for her wise and helpful comments, and to Dana DiBartolo for her research assistance.

^[2]R.S.C. 1952, c. 148, as amended by S.C. 1970-71-72, c. 63, and as subsequently amended (herein referred to as "the Act"). Unless otherwise stated, statutory references in this article are to the Act. His awareness of the difficulties posed by the Act did not prevent Pigeon J. from rendering a remarkable judgment in *M.N.R. v. Freud*, [1968] C.T.C. 438 (S.C.C.).

^[3]The Federal Government has so far had only male Ministers of Finance.

^[4]*Gagnon v. The Queen*, [1986] 1 C.T.C. 410.

^[5]*Gagnon v. The Queen*, [1980] C.T.C. 324.

[6] *The Queen v. Gagnon*, [1981] C.T.C. 463.

[7] *The Queen v. Pascoe*, [1975] C.T.C. 656.

[8] Another striking example is the case of *Savage v. The Queen*, [1981] C.T.C. 332 (S.C.C.). The taxpayer was in the employ of a life insurance company which offered its employees the sum of \$100 for every course successfully taken in its field of operations at a certain educational institution. Having met the requirements with respect to three such courses, she received \$300 from her employer. The ensuing litigation with the Minister of National Revenue relating to whether the receipt of this money constituted a prize or income from employment was fought before the Tax Review Board and then through three levels of courts: *Savage v. M.N.R.*, [1979] C.T.C. 2301 (T.R.B.) (Mr. Taylor); *The Queen v. Savage*, [1980] C.T.C. 103 (F.C.T.D.) (Grant D.J.); *Savage v. The Queen*, [1981] C.T.C. 332 (F.C.A.); *The Queen v. Savage*, [1983] C.T.C. 393 (S.C.C.). Parliament cancelled the effect of the final judgment by an amendment to the Act.

[9] Richard W. Pound has commented that "[i]t has been practically impossible to get leave to appeal on tax cases in recent years" in *Tax Case Notes (Supplement to Canada Tax Cases)*, Scarborough, Ontario, Carswell, Release no 10, May 21, 1992, at p. 1. Leave to appeal has been required since 1974.

[10] *Fries v. The Queen*, [1990] 2 C.T.C. 439.

[11] It is interesting to note that at the time of writing Parliament had not amended the Act so as to nullify the effects of *Fries*. This might be explained on the basis that Members of Parliament do not desire to be seen as anti-labour. On the other hand, neither has Parliament reversed the controversial three-to-two judgment of the Supreme Court of Canada in *The Queen v. McClurg*, [1991] 1 C.T.C. 169 in a case involving tax avoidance techniques which was lost by the government. Could this be an indication of a new feeling of restraint on the part of the government with respect to judgments of the courts; or is it just a question of political timing? Or is the government waiting to see whether the courts will apply a broad or narrow interpretation to *McClurg* before introducing an amendment to nullify its effect? Possibly the government is hoping that the general anti-avoidance rule will take care of such situations in the future.

[12] *The Queen v. Fries*, [1986] 1 C.T.C. 4 (F.C.T.D.) (Collier J.); *The Queen v. Fries*, [1989] 1 C.T.C. 471 (F.C.A.).

[13] *Symes v. The Queen*, [1989] 1 C.T.C. 476 (F.C.T.D.) (Cullen J.); *The Queen v. Symes*, [1991] 2 C.T.C. 1 (F.C.A.). *Symes v. The Queen*, [1994] 1 C.T.C. 40 (S.C.C.).

[14] *Prior v. M.N.R.*, [1987] 1 C.T.C. 2076 (T.C.C.) (Tremblay T.C.J.); *Prior v. The Queen*, [1988] 1 C.T.C. 241 (F.C.T.D.) (Addy J.), [1989] 2 C.T.C. 280 (F.C.A.).

[15] *Supra*, note 3.

[16] The latter has since been replaced by the Tax Court of Canada.

[17] [1983] C.T.C. 119 (F.C.T.D.) (Collier, J.).

[18] *Id.*, at 119-120.

[19] For the sake of simplicity, the term "alimony" will alone be used in this paper to cover both "alimony" and "allowance".

[20] The Act contains no definition at all of the word "alimony"; subsection 56(12) is entitled "Definition of 'allowance'" but its contents do not bear out the title.

[21] *Supra*, note 6, at 658.

[22] Examples: *The Queen v. Bryce*, [1980] C.T.C. 401 (F.C.T.D.) (Collier J.), reversed [1982] C.T.C. 133 (F.C.A.); *Smallman v. M.N.R.*, [1980] C.T.C. 2326 (T.R.B.) (Mr. Dubrule); *Babcock v. M.N.R.*, [1980] C.T.C. 2535 (T.R.B.) (Mr. Bonner); *Lindgren v. M.N.R.*, [1980] C.T.C. 2482 (T.R.B.) (Mr. Cardin); *Biles v. M.N.R.*, [1979] C.T.C. 2411 (T.R.B.) (Mr. Taylor); *Walley v. M.N.R.*, [1979] C.T.C. 2997 (T.R.B.) (Mr. Tremblay); *Fortin v. M.N.R.*, [1979] C.T.C. 2907 (T.R.B.) (Mr. Tremblay).

[23] This continued even after the enactment by Parliament of sections 56.1 and 60.1 (1974-75-76), which seemed intended to provide for the deductibility of amounts paid to third parties for the benefit of the other spouse, but the lack of clarity in the provisions caused the Federal Court of Appeal to declare that the requirement that the recipient have entire discretion over the application of the funds continued to apply: *The Queen v. Bryce*, *supra*, note 21.

[24] *Supra*, note 4.

[25] *Id.*, at 327.

[26] *Id.*, at 329.

[27] *Supra*, note 5.

[28] *Supra*, note 3.

[29] Some of the solution actually antedated the *Gagnon* (*supra*, note 3) judgment (the enactment of subsections 56.1(2) and 60.1(2) in 1984 (subsequently amended in 1988 and in 1993)); on the other hand, the enactment in 1988 of subsection 56(12) was in direct reaction to *Gagnon*.

[30] *Supra*, note 3, at 414.

[31] *Id.*, at 415.

[32] The right to deduct is provided for in paragraph 60(b); the obligation to include in income any amount that is eligible for deduction is set forth in paragraph 56(1)(b).

[33] But it should be noted that Beetz J. supported the statement of Walsh J. in the trial judgment that the fact that the payments "were subject to some slight variations foreseen by the judgment [...] does not in my view prevent them from being considered as predetermined sums of money within the meaning of the *Pascoe* case." (*Gagnon*, *supra*, note 3, at 413).

[34] *Id.*, at 415.

[35] *Id.*

[36] For an in-depth analysis of the nature of alimony and whether it constitutes income, see Richard KREVER, "Support Payments and the Personal Income Tax", (1983) 21 *Osgoode Hall L.J.* 636-700.

[37] Paragraph 56(1)(b) is in subdivision d of division B of the *Income Tax Act*, the heading of which is "Other Sources of Income". Section 56 starts, moreover, with the words: "Without restricting the generality of section 3, there shall be included in computing the income of a taxpayer for a taxation year [...]"

[38] *Gagnon*, *supra*, note 3, at 415-416.

[39] *K.B.S. Robertson, Limited v. M.N.R.*, [1944] C.T.C. 75 (Ex. Ct.).

[40] *Id.*, at 91; reproduced by Beetz J. in *Gagnon*, *supra*, note 3, at p. 416. It is to be noted that the realm

of application of this principle has been narrowed by statutory provisions such as paragraphs 12(1)(a) and (b): *Canada Tax Service*, Scarborough, Ontario, Carswell (looseleaf), at p. 12-12.

[41] *Gagnon*, *supra*, note 3, at 416 (the emphasis is that of Beetz J.).

[42] *Id.*, at 417.

[43] [1972] C.T.C. 411.

[44] *Id.*, at 419; reproduced by Beetz J. in *Gagnon*, *supra*, note 3, at 417.

[45] The Act has been described as "that most dehumanized of all possible legislative monstrosities [...]" (by Margaret BAIRD, in "Canada's Human Scrapheap", (1957) 5 *Canadian Tax Journal* (no. 2) 106-112, at p. 106)).

[46] The relative harshness of this judicial holding is also reflected in the attitude of the Department of National Revenue in its Interpretation Bulletin IT-256R (August 27, 1979): "4. It is the Department's practice that when [stolen] amounts that were added to a taxpayer's income [...] are repaid, there will normally be a deduction allowed in respect of such repaid amounts for the taxation year in which the repayments are made unless the taxpayer was a major shareholder or senior official of the injured party at the time of the theft or other act to which the comments herein apply". (Tax specialists may wonder whether the restriction above with respect to senior employees should continue to apply following the judgment on a related question in *Parkland Operations Ltd. v. The Queen*, [1991] 1 C.T.C. 23 (F.C.T.D.) (Jerome A.C.J.) which resulted in revisions being made by the Department to its Interpretation Bulletin IT-185R (September 11, 1991)).

[47] The authors include: Henry C. SIMONS, *Personal Income Taxation, The Definition of Income as a Problem of Fiscal Policy*, Chicago, The University of Chicago Press, 1938; *Report of the Royal Commission on Taxation*, Ottawa, the Queen's Printer, 1966 (herein referred to as the "Carter Report"); James A. RENDALL, "Defining the Tax Base", in Brian G. HANSEN, Vern KRISHNA and James A. RENDALL (eds.), *Canadian Taxation*, Toronto, Richard DeBoo, 1981, pp. 59-115.

[48] [1989] 1 C.T.C. 471.

[49] *Id.*, at 475.

[50] *Supra*, note 9.

[51] *The Queen v. Cranswick*, [1982] C.T.C. 69.

[52] *Id.*, at 73. Rendall discusses other cases, *loc. cit.*, note 46, at 64-66.

[53] An exceptional hobbyist who actually made money out of his hobby was a retired businessman who raced horses: *Hammond v. M.N.R.*, [1971] C.T.C. 663 (F.C.T.D.) (Pratte J.).

[54] *Morin v. The Queen*, [1975] C.T.C. 106, at 110 (F.C.T.D.) (Lacroix D.J.); see also *Belisle v. M.N.R.*, [1980] C.T.C. 2002, at 2004 (T.R.B.) (Mr. Cardin).

[55] *M.N.R. v. Rousseau*, [1960] C.T.C. 336 (Ex. Ct.) (Fournier J.).

[56] See the discussion in *Ward's Tax Law and Planning*, Toronto, Carswell (looseleaf), paragraph 13.2[a], at pp. 1-96.

[57] *Waffle v. M.N.R.*, [1968] C.T.C. 572 (Ex. Ct.) (Cattanach J.).

[58] *Tennant v. Smith*, [1892] A.C. 150 (H.L.). See the comments in *Ward's Tax Law and Planning*, *op. cit.*, note 55, paragraph 13.2[a], at pp. 1-97 ("The 'money or money's worth' doctrine of United Kingdom tax law, as exemplified in the case of *Tennant v. Smith* [...], has been substantially displaced by statutory provisions in Canadian tax law"); R. W. POUND, "Fringe Benefits: Management 'Perks'", in *Income Tax Aspects of Executive and Employee Compensation*, 1979 Corporate Management Tax Conference, Toronto, Canadian Tax Foundation, 1980, pp. 63-95, at p. 65: "Since 1917 [...] there have been a series of statutory provisions designed to counter the effects of [*Tennant v. Smith*]." See also Brian J. ARNOLD and Timothy W. EDGAR (eds.), *Materials on Canadian Income Tax*, 9th edition, Don Mills, Ontario, Richard DeBoo, 1990, at pp. 244-245; F.E. LaBRIE, *The Meaning of Income in the Law of Income Tax*, Toronto, University of Toronto Press, 1953, at pp. 44-46.

[59] *Tennant v. Smith*, *supra*, note 57, at 158.

[60] [1965] C.T.C. 378 (Ex. Ct.) (Dumoulin J.).

[61] Interpretation Bulletin IT-335R (September 11, 1989), paragraph 3. See *Ward's Tax Law and Planning*, *op. cit.*, note 55, paragraph 13.2[b], at pp. 1-97.

[62] [1970] Tax ABC 1166 (Mr. St-Onge).

[63]Section 74.1.

[64]*Canadian Tax Reporter*, Scarborough, Ontario, Carswell (looseleaf), paragraph 2035, at p. 3045.

[65]*Supra*, note 38.

[66]See the judgments mentioned in the interesting discussion in *Ward's Tax Law and Planning*, *op. cit.*, note 55, paragraph 43.1[a](i), at p. 4-102.23 *et seq.*, and paragraph 43.1[a](ii), at p. 4-102.30 *et seq.*

[67]*Supra*, note 3, at 416.

[68]*M.N.R. v. John Colford Contracting Co.*, [1960] C.T.C. 178 (Ex. Ct.) (Kearney J.); *aff.* [1962] C.T.C. 546 (S.C.C.).

[69]*Ward's Tax Law and Planning*, *op. cit.*, note 55, paragraph 43.1[a](i) at pp. 4-102.24 to 4-102.25 (see *Brown v. Helvering*, (1933) 291 U.S. Reports 193, referred to by Thorson P. in *Canadian Fruit Distributors Ltd. v. M.N.R.*, [1954] C.T.C. 284, at 292).

[70]*Rodgers v. M.N.R.*, [1990] 2 C.T.C. 2634 (T.C.C.) (Christie A.C.J.T.C.) (the judgment was under appeal at the time of writing).

[71][1967] C.T.C. 418 (S.C.C.).

[72]*Sura v. M.N.R.*, [1962] C.T.C. 1 (S.C.C.).

[73]Care must be taken in applying *Sura* to ensure that subsequent amendments to the Civil Code plus additions to the *Income Tax Act* such as the introduction in 1972 of the taxation of capital gains have not changed the situation as to the tax effects in individual cases: see the remarks by Pratte J. in *Beique v. The Queen*, [1981] C.T.C. 75, at pp. 75-76 (F.C.A.). There has also been some discussion concerning the effect of the community of property between the spouses having originated in a foreign jurisdiction. In *Wertman v. M.N.R.*, [1964] C.T.C. 252 (Ex. Ct.), Thurlow J. held that the community of property being of Polish origin, the income from it belonged to each of the spouses in equal shares; he expressly distinguished *Sura*. On the other hand, in *Bedford v. M.N.R.*, (1964) 35 Tax ABC 397, Mr. Boisvert of the Tax Appeal Board held that the fact that the taxpayer's marital status was community of property under the laws of California did not allow him to divide his income with his wife for the purposes of liability to Canadian income tax.

[74]Taschereau J. in *Sura*, *supra*, note 71, at 5.

[75]*Id.*, at 6.

[76]*Id.*, at 8.

[77]*Laporte v. M.N.R.*, [1984] C.T.C. 2260 (T.C.C.) (Tremblay T.C.J.).

[78]*The Queen v. Dumais*, [1990] 1 C.T.C. 342 (F.C.T.D.) (Dubé J.).

[79]*Id.*, at 349.

[80]*Garant v. The Queen*, [1985] 1 C.T.C. 153 (F.C.T.D.) (Rouleau J.).

[81]*Id.*, at 159. See, however, art. 1037 third para. C.C.Q. which now suggests that the act of partition is attributive of the right of ownership.

[82]*M.N.R. v. Faure Estate*, [1977] C.T.C. 340 (S.C.C.).

[83]*Id.*, at 341.

[84]*Supra*, note 71, at 8 (in the French original), and reproduced (in the English translation) in *Faure Estate* at 341. See also *Leduc v. M.N.R.*, [1967] Tax ABC 771 (Mr. Boisvert); *R. Pinkus Estate v. M.N.R.*, [1969] Tax ABC 1146 (Mr. Davis).

[85]Jean-Marie FORTIN and André LAREAU, *Fiscalité matrimoniale*, Farnham, Québec, Publications CCH/FM Ltée (looseleaf), paragraph 1030, at p. 505. It is to be noted that there is at the time of writing a pending amendment by which subsection 248(23) will be changed and a new subsection 248(23.1) will be added.

[86]F. E. LaBRIE, *The Principles of Canadian Income Taxation*, Don Mills, Ontario, CCH Canadian Limited, 1965, at p. 25. See also *Canadian Tax Reporter*, Don Mills, Ontario, CCH Canadian Limited (looseleaf), paragraph 2028, at p. 3032.

[87](1960) 24 Tax ABC 161 (Mr. Panneton).

[88][1952] C.T.C. 90 (S.C.C.).

[89]*Id.*, at 92.

[90]*Id.*, at 103.

[91][1955] C.T.C. 87 (S.C.C.). This judgment appears to represent an exceptional situation: normally the testator should provide for the payments to such an income beneficiary to be the responsibility of the estate or trust rather than of the principal beneficiary: *Ward's Tax Law and Planning, op. cit.*, note 55, paragraph 233.2[i], at pp. 23-104.

[92]R.B. THOMAS, "Current Cases feature", (1986) 34 *Canadian Tax Journal* (No. 4), 853-871, at 853-856.

[93]*Supra*, note 3, at 417.

[94]These subsections were amended in 1988 and 1993.

[95]Maureen MALONEY, *Women and Income Tax Reform* (a background paper), Ottawa, Canadian Advisory Council on the Status of Women, October 1987.

[96]Paragraph 56(1)(b). It should be noted that in a majority judgment rendered in May, 1994, the Federal Court of Appeal held in *Thibaudeau v. The Queen*, A-1248-92, that the obligatory inclusion in the income of the recipient spouse of amounts paid solely for the support of children is invalid on the ground of constituting an infringement of section 15 of the *Canadian Charter of Rights and Freedoms*. The decision is under appeal to the Supreme Court of Canada. Examples of cases in which it was held that the recipient spouse must include in income all amounts received, even those for the maintenance of the children; *Day v. M.N.R.*, (1954) 11 Tax ABC 367 (Mr. Fordham); *Marks v. M.N.R.*, (1954) 10 Tax ABC 125 (Mr. Fisher); *Hedges v. M.N.R.*, [1974] C.T.C. 2025 (T.R.B.) (Mr. Cardin); *Iles v. M.N.R.*, [1967] Tax ABC 523 (Mr. Snyder); *Taylor v. M.N.R.*, [1968] Tax ABC 1011 (Mr. Fordham); *Thetford v. M.N.R.*, [1971] Tax ABC 174 (Mr. Fordham); *Archambault v. Sous-Ministre du Revenu du Québec*, [1985] R.D.F.Q. 78 (C.P.) (Prévost J.). (But where the alimony is paid directly to the children, the spouse who has their custody is not obliged to include the money in income: *D'Anjou v. M.N.R.*, [1991] 2 C.T.C. 2563 (T.C.C.) (Couture C.J.T.C.)).

[97] Department of Finance Technical Notes (1988), as reproduced in David M. SHERMAN (ed.), *Income Tax Act and Regulations, Department of Finance, Technical Notes*, 4th ed., Scarborough, Ontario, Carswell, 1992, at p. 256.

[98] That this simplicity may be may more apparent than real appears from the large number of judgments rendered, not all of them consistent.

[99] Judge R. James WILLIAMS, "Child Support, An Update and Revision of Quantification of Child Support", (1989) 18 *Reports of Family Law* 234, at 240. Recent judgments of the Québec Court of Appeal have expressly taken the tax burden into consideration when fixing the amount of alimony, such as *Droit de la Famille* ,, 1755, [1993] R.J.Q. 671. Moreover, Jean-Marie Fortin and André Lareau, in a just published and most useful looseleaf service, *op. cit.*, note 84, cite other judgments taking the tax factors into consideration, make an eloquent plea in favour of this being done, and set forth the information necessary to do so.

[100] This is subject to the possibility that the Supreme Court of Canada will maintain the decision of the Federal Court of Appeal in *Thibaudeau v. The Queen*, *op. cit.*, note 95, to the effect that it is an infringement of section 15 of the Charter to include in income amounts paid for the support of children.