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Tim Edgar: The Accidental Comparatist

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Tim Edgar: The Accidental Comparatist

Kim Brooks*

PRÉCIS

Cet article traite des contributions de Tim Edgar en tant que grand spécialiste du droit comparé. Il passe en revue les principaux débats et orientations théoriques en droit comparé, et propose une étude de cas des contributions de Tim Edgar à la lumière des grands débats dans ce domaine. L'évolution de ce spécialiste en tant que comparatiste est décrite en trois phases distinctes. L'article met en évidence la détermination du problème de politique à résoudre comme un aspect majeur de sa contribution.

ABSTRACT

This paper focuses on the contributions of Tim Edgar as a major comparative law scholar. It reviews the major debates and theoretical directions in comparative law scholarship and offers a case study of Edgar's contributions in the light of the major debates in comparative law. Edgar's development as a comparatist is traced through three defined phases. His identification of the policy problem to be resolved is highlighted as a major feature of his contribution.

KEYWORDS: COMPARATIVE ANALYSIS ■ CORPORATE FINANCE ■ ANTI-AVOIDANCE

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WHY STUDY THE TAX LAWS OF OTHER COUNTRIES?

Practitioners, policy makers, and academics regularly compare tax laws across jurisdictions. The epistemic question is why. What kind of new knowledge does comparison yield? A review of the substantial tax literature that uses comparative law techniques reveals that authors look to the practices of other countries to achieve multiple ends. In some cases, the authors' aspirations are primarily doctrinal. They seek to understand the laws of another country in order to engage in better tax planning, to learn more about their own tax law system (through the study of it in comparison to alternatives), or simply to satisfy their curiosity about how another country's system is designed and functions.¹ In other instances, the authors' aims are explanatory: to assess why some countries adopt different tax law frameworks, administrative practices, or institutional designs.² Sometimes, comparative tax scholarship is instrumental: an author cites tax laws or practices from other jurisdictions in arguing for tax policy changes (and related changes in tax design) in the author's home country or more generally.³ Finally, and less often, the aim of a comparative work is normative: the author uses comparative law to urge countries to elevate some underlying value, such as equality or privacy, or to suggest that countries' tax laws should be harmonized or coordinated.⁴

Recognition of the growing complexity of commercial transactions and forms has inspired renewed interest in comparative law generally and in comparative tax law in particular, and practitioners and scholars have rapidly produced the literature that defines the modern field. Tim Edgar was a remarkable, if perhaps unintentional, participant in the expansion and development of comparative tax scholarship. His career path and his publication record offer a ready case study in tax comparativism, and his use of comparative law has some distinctive features that are worth exploring.

The remainder of this paper proceeds as follows. In the next section, I review the major debates and theoretical directions in comparative law scholarship, focusing on recent work in the field. My goal here is to provide a framework against which the contributions of comparative tax scholars, and of Tim Edgar in particular, can be analyzed. The final section of the paper is a case study of Edgar's contributions in the light of the major debates in comparative law. It traces Edgar's development

1 See, for example, Peter Harris, *Corporate Tax Law: Structure, Policy and Practice* (Cambridge: Cambridge University Press, 2013).

2 See, for example, Cedric Sandford, *Successful Tax Reform: Lessons from an Analysis of Tax Reform in Six Countries* (Fersfield, UK: Fiscal, 1993).

3 See, for example, Brian J. Arnold, "The Process of Tax Policy Formulation in Australia, Canada and New Zealand" (1990) 7:4 *Australian Tax Forum* 379-94, at 381.

4 See, for example, Antony Ting, *The Taxation of Corporate Groups Under Consolidation: An International Comparison* (Cambridge: Cambridge University Press, 2013).

through three defined phases of comparative work, and it identifies his focus on the identification of policy problems as a major feature of his contribution.

THE QUESTIONS OF COMPARATIVE LAW

This paper does not attempt to cover the literature on comparative law in a detailed way.⁵ That literature has a long history; in its modern incarnation, it may be traced to 1900 Paris and the International Congress of Comparative Law.⁶ Rather, my aim in this paper is to highlight the preoccupations of comparative law scholars, with a view to better informing an analysis of Tim Edgar's contributions to the field.

To oversimplify, comparative law scholars are concerned with five major questions:

1. What is comparative law?
2. What unit of comparison is used?
3. What is compared?
4. From what perspective is the comparison undertaken?
5. What process should be adopted to effect the comparison?

An overview of comparative law scholarship divulges no definitive answer to the first, most fundamental question: What is comparative law? Over a century's worth of debates among comparatists has provided few assurances even about the basic question of whether comparative law is a distinct science or simply a method that can be applied in any area of jurisprudence.⁷ Nevertheless, there is some consensus on the taxonomy of approaches to comparative law projects.⁸ Although there is

5 This paper has benefited from a number of relatively recent, outstanding books on comparative law. See, for example, Maurice Adams and Dirk Heirbaut, eds., *The Method and Culture of Comparative Law: Essays in Honour of Mark Van Hoecke* (Oxford: Hart, 2015); Michael Bogdan, *Concise Introduction to Comparative Law* (Groningen: Europa Law, 2013); William E. Butler, O.V. Kresin, and Iu Shemshuchenko, *Foundations of Comparative Law: Methods and Typologies* (London: Wildy, Simmonds & Hill, 2011); Nicholas H.D. Foster, Michael Palmer, and Maria Federica Moscati, *Interdisciplinary Study and Comparative Law* (London: Wildy, Simmonds & Hill, 2016); Jaakko Husa, *A New Introduction to Comparative Law* (Oxford: Hart, 2015); Pier Giuseppe Monateri, ed., *Methods of Comparative Law*, Research Handbooks in Comparative Law (Cheltenham, UK: Edward Elgar, 2012); and Geoffrey Samuel, *An Introduction to Comparative Law Theory and Method* (Oxford: Hart, 2014).

6 H. Patrick Glenn, "Against Method?" in *The Method and Culture of Comparative Law*, supra note 5, 177-88, at 183. (Glenn acknowledges this origin story and further claims that comparison of law has been around for much longer than this story suggests.)

7 For a discussion of these debates, see Geoffrey Samuel, "Comparative Law and Jurisprudence" (1998) 47:4 *International and Comparative Law Quarterly* 817-36.

8 The many excellent taxonomies of comparative law theories include Jaakko Husa, "Research Designs of Comparative Law—Methodology or Heuristics?" in *The Method and Culture of Comparative Law*, supra note 5, 53-68. See also the two standard comparative law encyclopedias: Mathias Reimann and Reinhard Zimmermann, eds., *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006); and Jan M. Smits, ed., *Elgar Encyclopedia of Comparative Law*, 2d ed. (Cheltenham: Edward Elgar, 2012).

disagreement about precisely how these frameworks, along with their scholarly adherents, should be categorized, it seems useful, broadly speaking, to divide comparatists into five camps.

Functionalist approaches continue to dominate comparative law scholarship.⁹ The basic thrust of the functionalist approach (or approaches) is to look at how multiple jurisdictions tackle through legal regulation the same underlying social, political, or economic issue. Despite this common denominator, as one of the main proponents of functionalism observes,

[a]s a theory [functionalism] hardly exists, at least in an elaborated version. The standard reference text for supporters and opponents alike is a brief chapter in an introductory textbook, a text that in its original conception is almost half a century of age and whose author, Zweigert, expressed both disdain for methodological debate and a preference for inspiration over methodological rigour as the comparatist's ultimate guide.¹⁰

Put another way, functionalists adopt a variety of approaches, often determined by the particular outcome the scholar seeks. In the main, adherents of the functionalist approach may be identified by three (or perhaps four) chief tendencies: (1) they focus on the facts as reflected by the effects of rules; (2) they see law in the light of its functional relationship to society and therefore believe that law and society can be separated; and (3) they maintain that institutions can be compared if they fulfill similar functions, even if they exist in different legal systems.¹¹ Finally, most (but not all) functionalists share the view that comparative law can provide guidance in determining which legal resolutions are better than others.

The most striking counter-theory to functionalism might be described as a cultural (or hermeneutics) approach to comparative law scholarship. As with functionalism, the scope and underlying principles of cultural comparativism are debated even by those who adhere to it.¹² What unifies work in the cultural school is the shared view that law is simply a signifier of a culture or mentality. The scholar who adopts this approach must develop an appreciation of his or her role as a culturally situated interpreter. This leads to (1) considerable skepticism about the very possibility of comparativism, (2) heavy questioning of comparativism's potential value, and (3) a significant cynicism about whether one country's laws can ever be appropriate for, or transplanted to, another country.

9 There is a rich literature on each of these functionalist approaches. See, for example, Ralf Michaels, "The Functional Method of Comparative Law," in *The Oxford Handbook of Comparative Law*, supra note 8, 339-82; and Catherine Valcke and Mathew Grellette, "Three Functions of Function in Comparative Legal Studies," in *The Method and Culture of Comparative Law*, supra note 5, 99-112.

10 Michaels, supra note 9, at 340-41 (notes omitted).

11 Ibid., at 342.

12 The quintessential cultural comparatist is Pierre Legrand. See, for example, Pierre Legrand, *Le droit comparé*, 5th ed. (Paris: Presses Universitaires de France, 2015).

Historically, there was greater emphasis than there is now on what is sometimes referred to as a structuralist approach to comparative law study. This line of scholarship seeks to identify structurally similar elements between systems. For example, a structuralist approach to comparative law might compare how branches of law in different jurisdictions are differentiated in similar or different ways. In the main, this line of work appears to have become less prominent or to have been subsumed into the broad category of functionalism, although, occasionally, a work of scholarship emerges that appears to be rooted firmly in the structuralist tradition.

More recently, a strand of work has emerged in comparative law that might be described as critical comparative study, or critical comparativism.¹³ Scholars working in this theoretical vein have proceeded in a variety of ways. Some may be identified on the basis of their commitment to using comparative law to expose the power dynamics involved in the formulation of legal responses. Others have focused on bringing a broader frame into view—for example, by stepping outside the usual comparative concerns with identifying similarities and differences, and focusing, instead, more on the consequences of legal regulation. Still other critical comparatists start by identifying legal “formants” (“a type of personnel, or a community, institutionally involved in the activity of creating Law”)¹⁴ and then seek to look at what those institutions or institutional actors produce as legal text instead of starting, as functionalists do, by identifying a common underlying problem that law seeks to address. At their heart, however, all critical comparatist approaches undertake, as an aspect of their method, an unveiling of how powerful players and institutions influence the design of legal institutions.¹⁵

Finally, there is an orientation to comparative law—an approach often ignored in the standard taxonomy of comparative law theories—that sees its function as providing “the cognitive frames through which social actors, including legal and social scientific observers, apprehend social realities.”¹⁶ Under this model, which contrasts with that of some mid- and late-20th-century scholars¹⁷ but is close, arguably, to that of the 19th century pre-comparatists, comparative law provides an

13 For an illustration, see Pier Giuseppe Monateri, “Methods in Comparative Law: An Intellectual Overview,” in *Methods of Comparative Law*, supra note 5, at 7-24.

14 *Ibid.*, at 7.

15 As stated by Monateri, “[W]hat I claim as a new outline of the task of Comparative Law is an insight into the ‘ceaseless discursive warfare’ which is fought within legal cultures among competing groups” (*ibid.*, at 21 [notes omitted]).

16 Annalise Riles, “Comparative Law and Socio-Legal Studies,” in *The Oxford Handbook of Comparative Law*, supra note 8, at 775-813, at 808.

17 Riles analyzes this evolution as follows: “Unlike other legal fields, for example, over the course of the twentieth century comparative law moves towards a more radical separation from other disciplines, their methods and their work. From the 1930s forward, the ideal reader of twentieth-century comparative legal scholarship is the law professor and, even more importantly, the bureaucrat or the judge, not the social scientist” (Annalise Riles, “Introduction,” in Annalise Riles, ed., *Rethinking the Masters of Comparative Law* [Oxford: Hart, 2001] 1-18, at 10).

avenue for fierce interdisciplinarity. Annelise Riles, who is perhaps the most prominent proponent of this sociolegal comparativism,¹⁸ has identified some of its broad themes and directions. These include the effects of globalization on the practice of law; a resurgence of interest in the role of the rule of law, particularly in lower-income countries; the consequences of globalization for national and local regulatory practices; legal pluralism and its consequences for comparison; the consequences of the social dimensions of legal transnationalism for legal transplants; and the role of legal culture, whether as an explanatory tool or as a barrier to legal importation.¹⁹

Before I conclude this overview of the competing approaches to comparative law, it might be helpful to address the rich literature on legal transplants.²⁰ That literature, which concerns the migration of law (or legal processes, institutions, or ideas about law) from one jurisdiction to another, is often slightly divorced from, although always connected with, the comparative law literature. It is divorced from it in the sense that scholars of legal transplant theory often make only minimal reference to the different “schools of thought,” or approaches to comparative law, that I have identified in this overview. Still, the scholarship on legal transplants might be best understood as a specific strand of the debate between the functionalist and culturalist schools of comparative law. This scholarship seeks to explore and explain why some transplants are effective and others are not. To oversimplify, functionalists tend to proffer a range of explanations for why legal transplants are effective or not, while cultural comparativists tend to hold that most (or all) transplants are ineffective, given the importance and influence of the cultural foundations to which legal rules are inevitably affixed.

In the remainder of this section of the paper, I provide a brief review of the remaining four questions (listed above) that concern comparative law scholars.²¹ First, what unit of comparison is to be used in undertaking comparative law scholarship? Speaking generally, comparative law operates at the level of the nation-state. Most of the work that is identified with the comparative law movement seeks to compare one nation’s legal system with another’s, even though comparative work at the subnational level (for example, comparing one state or province with another) would presumably qualify as comparative law scholarship. A smaller body of work

18 See, for example, *ibid.*, *Rethinking the Masters of Comparative Law*.

19 See Riles, *supra* note 16, at 789-99.

20 For the mandatory starting place, see Alan Watson, *Legal Transplants: An Approach to Comparative Law*, 2d ed. (Athens, GA: University of Georgia Press, 1993) (first published in 1974). See also, for example, Pierre Legrand, “The Impossibility of ‘Legal Transplants’” (1997) 4:2 *Maastricht Journal of European and Comparative Law* 111-24; and Mathias M. Siems, “The Curious Case of Overfitting Legal Transplants,” in *The Method and Culture of Comparative Law*, *supra* note 5, 133-46.

21 For a helpful review of the questions raised in this part of the chapter, see Esin Örüçü, “Developing Comparative Law,” in Esin Örüçü and David Nelken, eds., *Comparative Law: A Handbook* (Portland: Hart, 2007), 43-65.

attempts to compare countries by legal “family” (usually drawing on a common historical evolutionary pattern) or by legal tradition or culture.²²

Comparative law scholars also debate the ontological question of what to compare. The more conventional approaches to comparative law look to formal expressions of law, generally to state-made law, whether expressed in the form of legislation or cases. Recently, however, scholars have become more innovative in their use of comparative approaches and have sought to use comparative law as a lens through which to consider legal institutions, legal structures, administrative practices, regulatory practices, legal cultures, legal actors, and even the problems (social, economic, and political) addressed by law.²³

As with many methodologies, there has been a fierce debate about the position of the researcher relative to the subject of study. Some scholars allege that comparative work can be undertaken only by legal insiders and that a scholar cannot effectively compare two legal regimes without deep knowledge of the social, economic, and political conditions in each. William Ewald espouses that view, claiming that if “one’s aim is to understand the ideas that lie behind the foreign legal system (and . . . this should be the aim of comparative law) the sociological data and rule-books alike are unable to furnish what we want, which is a grasp, from the inside, of the conscious reasons and principles and conceptions that are employed by the foreign lawyers.”²⁴ Others allege that it is only by remaining an outsider that a scholar can truly appreciate the contours of the object of study. Thus, for example, James Whitman argues that an outsider might uncover “differences in unarticulated assumptions” that “will frequently be the most revealing and gratifying work a comparatist can do.”²⁵

The process used for comparison (that is, the method) exposes something about the objectives of the study. Some comparatists have laid out in considerable detail the precise steps to be followed in undertaking comparative study. For example, Jaakko Husa’s summary of the technical decisions to be made in developing a research project in comparative law includes the following alternatives:

22 See H. Patrick Glenn, “Comparative Legal Families and Comparative Legal Traditions,” in *The Oxford Handbook of Comparative Law*, supra note 8, 421-40.

23 As Geoffrey Samuel asks, “[W]hat actually forms the object of comparison[?]. Is it a question of comparing rules, norms, concepts, institutions, categories, systems, factual situations, reasoning techniques or what?” (Geoffrey Samuel, “What Is Legal Epistemology” in *The Method and Culture of Comparative Law*, supra note 5, 23-36, at 26.)

24 See William Ewald, “Legal History and Comparative Law” (1999) *Zeitschrift für Europäisches Privatrecht* 553, at 555-56; cited in Samuel, *An Introduction to Comparative Law*, supra note 5.

25 See James Q. Whitman, “The Neo-Romantic Turn,” in Pierre Legrand and Roderick Munday, eds., *Comparative Legal Studies: Traditions and Transitions* (Cambridge: Cambridge University Press, 2003), 312-44, at 336.

1. micro/macro,
2. longitudinal/traverse,
3. multilateral/bilateral,
4. vertical/horizontal, and
5. monocultural/multicultural.²⁶

In other words, comparative law projects can compare narrow institutions or issues or they can compare fundamental characteristics or functions; they can be based on the current circumstances or they can take a longer-term perspective; they can focus on two jurisdictions or on multiple jurisdictions; they can compare similar systems (as in, for example, country-to-country comparison) or they can compare layered systems (for example, supranational versus national, or national formal laws versus some other kind of normative order); and they can focus on systems in the same general cultural sphere or systems whose cultural contexts are distinct. Identifying where a comparative study lands with respect to these various choices reveals much about the author's otherwise implicit views on comparativism and law.

Other scholars (for example, Esin Örüçü) have explored the differing steps required for a comparative law method, finding some approaches to be more fruitful than others. Örüçü endorses an approach with at least five phases.²⁷ The first phase requires the scholar to conceptualize the project. Scholars should choose meso- or micro-comparison, the sources of law or legal systems, and so on. In brief, the scholar elects what to compare, with an eye to the theoretical framework—whether that framework is functionalism, structuralism, or another interdisciplinary approach. In the second phase, the scholar undertakes to describe the norms, concepts, and institutions of the chosen systems. This is the observation phase. The third phase is the identification phase, in which the scholar takes note of similarities and differences; a phase that Örüçü also refers to as “the classification phase.” In the fourth phase, the scholar works to explain those divergences and similarities.²⁸ The fifth and final, theory-testing phase seeks to test or suggest hypotheses that might transcend the cases being compared. Örüçü notes that some projects may also include

26 Husa, *supra* note 8, at 57. For a similar list of decisions that need to be taken before a comparative project is undertaken, see Bogdan, *supra* note 5, at 45.

27 A. Esin Örüçü, “Methodology of Comparative Law,” in *Elgar Encyclopedia of Comparative Law*, *supra* note 8, at 567-71.

28 The comparative law literature is weakest when it comes to this process of explanation—that is, delineating the kinds of factors that might be relevant for the purpose of explaining differences and similarities. This weakness may stem from the fact that such identification is more likely to be aligned with the questions asked in political science. For a brief list of relevant factors, see Bogdan, *supra* note 5, at 57-62. (Bogdan identifies differences in the economic system, the political system and ideology, religion, history and geography, demographic factors, co-influences [for example, other control mechanisms like collective bargaining agreements], and accidental or unknown factors.) See also Husa, *supra* note 5, at chapter 7 (which adds culture and climate to the list).

an evaluation phase, in which the comparatist seeks to discover whether one approach is better than another.

The foregoing overview of the questions and directions of comparative law scholarship, although it oversimplifies considerably the dense and intense scholarly debates that have been held among comparatists for well over a century, has provided, I hope, sufficient context to enable us to assess one scholar's contributions to the field.

A MODEL INSIDER

Tim Edgar made a remarkable contribution to tax scholarship. Over the course of his career, he authored at least 40 journal articles (many of them well over 60 pages), six book chapters, one major report, one monograph, one co-authored casebook, and several introductions.²⁹ Although he had a few publications that stood substantively alone (for example, on capital gains,³⁰ the concept of taxable consumption,³¹ charitable giving,³² trusts,³³ and source attribution³⁴), most of his work was focused on corporate income tax issues and the taxation of financial instruments in both income and consumption taxes, with a minor strand devoted to general anti-avoidance rules. To frame it another way, the focus of Edgar's work was the exercise of drawing the line between substitutable activities or transactions in a second-best world (where it is unlikely that policy makers could be convinced to abandon the line altogether). Except for his casebook, all of his work had better tax policy as its ultimate aim (and perhaps even his casebook had that aim, albeit indirectly), and much of this work undoubtedly benefited from his comparative study. Twelve of Edgar's scholarly contributions adopt a comparative approach, and these works are the focus of the remainder of this paper.

29 Publications list compiled by Alan Macnaughton, on file with author.

30 Brian Arnold and Tim Edgar, "Selected Aspects of Capital Gains Taxation in Australia, New Zealand, the United Kingdom and the United States" (1995) 21, *supp. Canadian Public Policy* S58-76.

31 Tim Edgar, "The Concept of Taxable Consumption and the Deductibility of Expenses Under an Ideal Personal Income Tax Base," in Richard Krever, ed., *Tax Conversations: A Guide to the Key Issues in the Tax Reform Debate: Essays in Honour of John G. Head* (The Hague: Kluwer Law International, 1997), 293-363.

32 Daniel Sandler and Tim Edgar, "The Tax Expenditure Program for Charitable Giving: Kicking a Gift Horse in the Teeth" (2003) 51:6 *Canadian Tax Journal* 2193-2214.

33 Tim Edgar, "Deemed Realization of the Trust Property: Proposed Amendments to the 21-Year Rule" (1992) 11:3 *Estates & Trusts Journal* 207-43; and Tim Edgar, "The Trouble with Income Trusts" (2004) 52:3 *Canadian Tax Journal* 819-52 (although arguably his interest in this topic was connected to his work on corporate income taxation, and so the article is not an outlier).

34 Tim Edgar and David Holland, "Source Taxation and the OECD Project on Attribution of Profits to Permanent Establishments" (2005) 37:6 *Tax Notes International* 525-539.

The First Decade (1987-2000): Careful and Sustained Study of a Small Number of Jurisdictions

Edgar's career offers a model study in thoughtful comparative tax scholarship. His first article, which he published as an LLM student in 1987, was on the tax rules that apply when a corporation borrows money to finance a foreign subsidiary. His publication of this article in the *Australian Tax Forum* constitutes dramatic foreshadowing: throughout his career, his interest in certain comparator countries and in the taxation of financial instruments remained steadfast.³⁵ In this early article, Edgar reviews the Canadian position on the deductibility of interest incurred to finance a foreign subsidiary in Canada, and he compares this position with the equivalent positions of Australia, the United Kingdom, and the United States. Even in this early work, Edgar is an adept comparatist. Instead of simply reciting the rules of each of the four jurisdictions, he offers an integrated summary of how the practices of Australia, the United Kingdom, and the United States vary from the Canadian approach, and he reviews with specificity alternative policy options, assessing each against clearly articulated tax policy criteria.

Where some scholars dip occasionally into the ocean of comparative tax law, Edgar revealed himself very quickly to be a keen and adept swimmer. His second comparative piece was published in 1990, "The Classification of Corporate Securities."³⁶ His career mantra is captured by a line early in this article: "[T]ax law should not treat economically similar transactions differently."³⁷ In this article, Edgar reviews in detail proposed American regulations on securities classification. He found reason for optimism in the United States' willingness to worry about the classification of debt held by shareholders. However, ever dissatisfied with rules that ignore the economic substance of financial instruments, Edgar identified substantial inadequacies in the American approach proposed at the time—inadequacies in both the legislative framework and the judicial decisions (which, he argued, lacked any organizing principle).³⁸ In the comparative tax literature, it is rare to find a scholar reviewing another country's rules in order to identify their inadequacies. On the basis of his analysis of the failings of both the Canadian and American systems, Edgar recommends an approach that would (1) draw the debt-equity line at one of the far ends of the spectrum between debt and equity and (2) classify everything else as the alternative. He argues that this approach (assuming that we live in a world where debt and equity are unlikely to be treated the same) would best serve to minimize tax planning.

35 Tim Edgar, "The Corporate Interest Deduction and the Financing of Foreign Subsidiaries" (1987) 4:4 *Australian Tax Forum* 491-528.

36 Tim Edgar, "The Classification of Corporate Securities for Income Tax Purposes" (1990) 38:5 *Canadian Tax Journal* 1141-88.

37 *Ibid.*, at 1145. (Persuading the Supreme Court of Canada of this point was not among Edgar's successes.)

38 *Ibid.*, at 1162.

In 1992, Edgar is back in the pages of the *Canadian Tax Journal*, where he published most of his work.³⁹ He has fixed his comparative eye firmly on Australia and the United States, this time with a view to pressing for policy reform of Canada's thin capitalization rules. In this article, Edgar praises Canada's approach to its thin capitalization rules, arguing that they should be expanded, and he offers a nod to some design features of the US and Australian rules. He explicitly justifies the choices of Australia and the United States: they are countries that impose thin capitalization rules by legislation rather than by administrative guidance,⁴⁰ and he assesses their legislative frameworks to be more comprehensive than Canada's. Atypically for his comparative work, Edgar, in this article, presents each country's rules in turn. While this presentation makes for easy reading, it leaves the comparative work to the reader. Edgar proceeds to draw on the Australian and US experiences as he reviews in meticulous detail the various policy choices reflected in the design of each country's thin capitalization rules, and he offers an assessment of the pros and cons of variations on each of those policy choices.⁴¹ To that end, the comparator countries are used as a mechanism to help Edgar identify a wide range of policy alternatives.

Three years later, Edgar returns with an article, co-authored with Brian Arnold, comparing capital gains taxation in Australia, New Zealand, the United Kingdom, and the United States.⁴² At its outset, the article offers a clarifying discussion of both its focus and its choice of comparator countries. The authors are explicit about rejecting a high-level overview of many countries and opting instead for a narrow cluster of countries and a limit on the number of features of capital gains taxation that are subject to review.⁴³ The four countries are chosen because the authors believe that they provide a fairly representative sampling of approaches, because they share a common-law tradition, and because they are major trading partners for Canada. The article advocates, implicitly, for harmonization among Canada and the four countries.⁴⁴ The comparative review is organized under headings that highlight

39 Tim Edgar, "The Thin Capitalization Rules: Role and Reform" (1992) 40:1 *Canadian Tax Journal* 1-54. Macnaughton's publication list suggests that Edgar published at least 18 major articles with the *Canadian Tax Journal*, in addition to minor contributions.

40 *Ibid.*, at 10. (Although it is unclear why this difference matters.)

41 *Ibid.* Specifically, Edgar examines in this article the definition of a specified non-resident (32-33), the appropriate level of share ownership (33-37), the relevant debt-to-equity ratio (37-39), the calculation of debt and equity (39-44), the clawback of short-term equity (44-46), loanbacks (46-47), hybrid securities (47), consolidation (47-48), the calculation and treatment of interest on excess indebtedness (48-50), the issuers and investors subject to the rule (50-53), and the debt creation rules (53-54). On most policy issues, Edgar does not recommend a specific option for Canada; instead, he lays out in detail the various policy options, and assesses which of them seem suitable for Canada.

42 Arnold and Edgar, *supra* note 30.

43 *Ibid.*, at S58-59.

44 "In an increasingly globalized and competitive economy, Canada's tax system cannot differ significantly from the tax systems of its trading partners" (*ibid.*, at S59).

some of the major design features of capital gains taxation (for example, under the heading “Special Exemptions,” the authors discuss the distinction between capital gains and ordinary income, short- versus long-term gains, gains on shares, debt obligations, gains on real property and principal residences, relief for small businesses, gains on personal-use property, realization and rollovers, instalment sales, dividends compared with capital gains, and miscellaneous receipts). Each section of the article addresses in summary form the general approach taken by each country. Ultimately, the authors discover that in contrast to what might be predicted, Canada and the four other countries vary dramatically from one another in their design of capital gains taxation. The authors underscore the particularly anomalous provision by Canada of the \$100,000 lifetime exemption.⁴⁵ Although the authors do not expressly recommend the removal of this provision, they seem to intend for readers to infer such a recommendation.

In 1996, Edgar published a major article on the concept of interest in the Income Tax Act.⁴⁶ Of this article’s 70 pages, only 11 are devoted to a discussion of the legislative approach taken in other countries (primarily New Zealand).⁴⁷ However, Edgar’s capacity to make sense of the tax law in other jurisdictions—and his willingness to stay abreast of the laws of Australia and New Zealand in particular—shines through. He explains the comprehensive accrual regime adopted by New Zealand in 1987, and he offers an accessible summary of that complicated regime. For the first time in one of his comparative works, Edgar uses New Zealand legislation as a model for the rules that Canada should adopt.⁴⁸

By the end of the 1990s, Edgar’s answer to most of the major comparative law debates is clear. He is an untroubled functionalist, never questioning his position as an interpreter of others’ laws and concerned primarily (although at this stage still

45 Ibid., at S70.

46 Tim Edgar, “The Concept of Interest Under the Income Tax Act” (1996) 44:2 *Canadian Tax Journal* 277-347. This appears to be the only article of Edgar’s in which he took case law seriously. See, for example, his description of the Supreme Court’s work in tax cases as “tax follies” (Tim Edgar, “Policy Forum: Interest Deductibility Restrictions—Expecting Too Much from REOP?” (2004) 52:4 *Canadian Tax Journal* 1130-72, at 1132). (See also Andrea Black, “Timothy W. Edgar (1960-2016),” December 27, 2016, online: *Let’s Talk About Tax NZ* (letstalkabouttaxnz.com/2016/12/27/timothy-w-edgar-1960-2016) [perma.cc/64FK-3TX4].)

47 Edgar, “Concept of Interest Under the Income Tax Act,” supra note 46, at 337-47.

48 See *ibid.*, at 346-47: “[A]ll debt-financing charges that economically represent the cost of credit should be recognized for deductibility and inclusion purposes on an annual accrual basis. In the face of an apparently limitless capacity for the development of sophisticated financial instruments in the current marketplace, this goal can be most effectively realized through the enactment of comprehensive accrual rules similar to those in New Zealand.” Similarly, in an article that does not discuss in any detail the approaches taken by New Zealand or Australia, Edgar urges Canada to follow these two countries’ lead in legislating to address the challenges of taxing financial instruments (in response to the Supreme Court’s efforts to cope with weak-currency borrowings in *Shell Canada Ltd. v. Canada*, [1999] 3 SCR 622 and *Canadian Pacific Limited v. Canada*, [1999] SCCA no. 97): Tim Edgar, “Some Lessons from the Saga of Weak-Currency Borrowings” (2000) 48:1 *Canadian Tax Journal* 1-34.

relatively implicitly) with the policy problems that tax law seeks to resolve. He engages at the macro level, choosing to focus on countries with similar legal traditions and languages. Perhaps unsurprisingly, given the importance of the legislative basis of tax law, Edgar focuses almost exclusively on tax legislation, delving only briefly into, and then without much deference for, tax jurisprudence.

The Second Decade (2000-2010): Comparativism That Refocuses the Policy Debate

While Edgar's work in the 1990s was characterized by a preoccupation with taxing similar economic transactions similarly, his work in the 2000s expanded on that insight to focus more directly on the harms that arise from tax avoidance when governments fail in their duty to address such avoidance. Edgar kicked off the decade with a massive monograph on the income tax treatment of financial instruments, a work for which he has become justly renowned.⁴⁹ This book, which he worked on over a five-year period, was originally a doctoral dissertation prepared under the tutelage of Canadian-born, Australian-employed, world-engaged tax expert Rick Krever. In the monograph, Edgar borrows from Australia and New Zealand (primarily highlighting their proposed and enacted legislation, respectively) and the United States (primarily borrowing from the work of US tax scholars). The preface to the work reveals that Edgar did not merely read the law of those countries from the comfort of his office; instead, he met with officers at the Australian Tax Office, the Australian Treasury, and the New Zealand Inland Revenue Department in order to better understand the draft and enacted legislation in those jurisdictions. He made careful study of the laws of other countries. In this book, Edgar does not advocate for the wholesale adoption by Canada of the rules of any other jurisdiction; instead, he uses the approaches from other jurisdictions as a starting place for the discussion of possibilities. Ultimately, he argues for a comprehensive accrual regime as a means of enacting expected-return taxation. Edgar's summary explanation of the aim of the monograph reveals that, by 2000, his initial focus on equivalent economic transactions has become entwined with his aim of preventing tax avoidance:

[T]he principal goal of policy makers should be the consistent taxation of equivalent cash flows identified in terms of expected and unexpected gains and losses. This goal ensures that perfectly substitutable transactions are taxed equivalently. The imperative underlying this goal is the need to block revenue leakage from avoidance transactions and minimize the associated welfare loss.⁵⁰

49 Tim Edgar, *The Income Tax Treatment of Financial Instruments: Theory and Practice* (Toronto: Canadian Tax Foundation, 2000). Amusingly, Edgar claims (at vii) that his "original intention was to keep the monograph to a manageable size so that readers might be able to take it in with a minimal commitment of time." He also asserts that he "tried to maintain true to [his] goal of providing an accessible overview of the tax-policy issues associated with financial instruments and the related approaches to legislative design." These seem like unrealistic (and unrealized) goals.

50 Tim Edgar, "Response: A Defensible and Workable Approach to the Income Tax Treatment of Financial Instruments" (2002) 50:1 *Canadian Tax Journal* 249-58, at 251.

In the year following the publication of his monograph (2001), Edgar published three peer-reviewed articles—two in the *New Zealand Journal of Taxation Law and Policy*⁵¹ and one in the *Canadian Tax Journal*.⁵² Edgar's publication venues make it clear that by 2001, he has become an "insider" to the Australian and New Zealand tax communities, resolving his position on one of the remaining comparative law debates. The biographical entry for Edgar in two of the articles acknowledges his work on secondment as a senior policy adviser with the New Zealand Inland Revenue Department, Policy Advice Division.⁵³ Each of Edgar's articles in the New Zealand journal compares the approaches taken to financial instruments and personal tax shelters in Canada, the United States, New Zealand, and Australia. Each article highlights concerns about the avoidance possibilities offered by the design of current regimes.

This era also sees a shift in how Edgar uses his comparative knowledge in his Canadian tax work. Fewer of his articles offer an explicitly comparative review, with an extended discussion of the approaches that multiple jurisdictions take to a particular issue.⁵⁴ More commonly during this period—particularly in articles where he further develops his policy position on financial instruments or the taxation of interest—Edgar simply alludes to how the works of American scholars and Australian and New Zealand policy makers have inspired his thinking. In a 2004 article, he exhibits his characteristic modesty in offering a nod to those influences:

51 Tim Edgar, "Financial Instruments and the Tax Avoidance Lottery: A View from North America" (2001) 6:2 *New Zealand Journal of Taxation Law & Policy* 63-102; Tim Edgar, "At-Risk Rules as a Legislative Response to 'Abusive' Personal Tax Shelters" (2001) 7:4 *New Zealand Journal of Taxation Law & Policy* 291-321.

52 Tim Edgar, "Exempt Treatment of Financial Intermediation Services Under a Value-Added Tax: An Assessment of Alternatives" (2001) 49:5 *Canadian Tax Journal* 1133-99. This article is not explicitly comparative, although it is clear that Edgar has benefited from his study of the goods and services tax in Australia and New Zealand. It is the first of his articles to be focused on the value added tax, and it is perhaps typical of Edgar's working style in that it is long, clocking in at almost 70 pages. In his biographical note, he thanks an external referee for bringing his attention to the approaches used in Singapore and South Africa. In the article, however, he does not appear to reference or build on those countries' approaches. This seems consistent with his approach to comparativism; typically, he uses only jurisdictions with which he is willing to become highly familiar.

53 Edgar's work with the New Zealand government seems to animate at least some of this 2002 report: New Zealand, Inland Revenue Department, *GST & Financial Services: A Government Discussion Document* (Wellington, NZ: Inland Revenue Department, Policy Development Division, 2002) (<http://taxpolicy.ird.govt.nz/sites/default/files/2002-dd-gst-financial-services.pdf>).

54 On the other hand, a few of Edgar's articles in this era maintain that approach. See, for example, Reuven Avi-Yonah, Tim Edgar, and Fadi Shaheen, "Stapled Securities—'The Next Big Thing' for Income Trusts? Useful Lessons from the US Experience with Stapled Shares" (2007) 55:2 *Canadian Tax Journal* 247-88. (In this article, the authors offer a review of the US response to the taxation of stapled share structures as an illustration of a sensible direction for Canada.)

I confess that there is little in this paper that is original. The policy case for restrictions on the deduction of interest expense is well developed in the literature, which is the almost exclusive preserve of a handful of tax academics at US law schools.⁵⁵

Another feature of his work in this decade—and one that represents, I believe, a distinctively Edgarian contribution to comparative tax scholarship—is a marked increase in the amount of space that he devotes to the articulation of the policy problem to be solved. In a 2003 article on corporation income tax coordination, for example, he devotes 18 pages to articulating and resolving the policy interaction of international tax competition and international tax arbitrage.⁵⁶ Ultimately, he takes a different tack from the previous literature on those two phenomena, arguing in favour of framing the policy problem as the perfect or near-perfect substitutability of higher- for lower-taxed transactions. As a result, he sees international tax competition and tax arbitrage as linked and the required policy response as common. This 2003 article is not explicitly comparative. I would observe, however, that the exercise of thinking comparatively—that is, of considering the different ways in which different jurisdictions identify and resolve tax policy problems—trains researchers to better articulate the policy problem they believe they are addressing. That being the case, Edgar’s previous comparative work stands him in good stead in these articles because his accustomed type of thinking helps him approach old issues in new ways, which is one of the main attributes of comparative law.

Finally, by his second decade, Edgar had clearly become—presumably in part because of his comparative tax expertise—a valued (if not always heeded) government adviser. His scholarship reveals that, in addition to contributing (as noted above) to the New Zealand government,⁵⁷ he was serving as an adviser to the Canadian government.⁵⁸ In 2008, recognizing the depth of Edgar’s Australian expertise, the University of Sydney Law School formalized its academic connection with him, and he began an ongoing arrangement with that university.⁵⁹

55 Tim Edgar, “Policy Forum: Interest Deductibility Restrictions—Expecting Too Much from REOP?” supra note 46, at 1133-72.

56 Tim Edgar, “Corporate Income Tax Coordination as a Response to International Tax Competition and International Tax Arbitrage” (2003) 51:3 *Canadian Tax Journal* 1079-1158, at 1104-21.

57 See Ewen McCann and Tim Edgar, “The International Income Taxation of Portfolio Debt in the Presence of Bi-Directional Capital Flows” (2006) 4:1 *eJournal of Tax Research* 5-24 (in which the authors acknowledge that a first draft of the paper was prepared for the New Zealand “Tax Review 2001”).

58 In “The Trouble with Income Trusts” (2004) 52:3 *Canadian Tax Journal* 819-52, Edgar reports that his article is a revised and condensed version of a background paper prepared for the Department of Finance. In 2008, Edgar wrote a research report for the Advisory Panel on Canada’s System of International Taxation: see Tim Edgar, *Interest Deductibility Restrictions and Inbound Direct Investment* (Ottawa: Department of Finance, Advisory Panel on Canada’s System of International Taxation, October 2008).

59 He held a unit of study appointment there in 2008 and 2009 and was appointed to staff between 2010 and 2014.

The Third Decade (2010-2016): An Established and Model Comparatist

The third decade of Edgar's professional life was shorter than it should have been. As a result, his publications in this decade were fewer than in the first two decades. Yet even in this reduced output, Edgar's comparativism is apparent. A book chapter that he contributed in 2010 reflects his continued push for sensible rules in a second-best (or third- or fourth-best) world.⁶⁰ The focus of the chapter is the appropriate policy response to three behavioural margins: the choice of intragroup debt versus equity; the choice of location of external debt; and the choice of investment location. In his characteristic way, Edgar combines what had previously been separate policy issues, with the result that he advocates for a modification of the Australian or New Zealand thin capitalization regime.

A few years later, returning to work that builds on his early attention to UK tax law and his career-long commitment to Australian tax law, Edgar published an article that lays out the policy implications of the academic literature on taxation and risk taking (and, more specifically, the ability to transfer risk to the government through the income tax system).⁶¹ In a novel application of his attention to comparable transactions, he argues for a loss limitation provision to restrict the transfer to government of risk that flows from post-tax, perfectly hedged positions.

Finally, Edgar's last major foray into policy (in 2015), while clearly not designed as a capstone effort, serves both to bring his scholarship full circle and to substantially advance it.⁶² The topic—risk-based anti-avoidance rules—is not far from his earliest work on the basic building blocks of financial arrangements (interest deductibility and classification of securities). He remains true to one of his primary scholarly aims: the development of better law—law that is based on a clear articulation of the policy problem to be solved and on pragmatic solutions borrowed, where applicable, from the insights gained through his study of the United States and the United Kingdom and through his deep connections to Australia and New Zealand. Indeed, the US and Australian approaches feature prominently in his policy recommendations. In this final article, Edgar's work with comparator jurisdictions is exemplary. He does not treat other jurisdictions as simply the subject of descriptive study. Instead, he uses his insights into the law and policy of the United States—insights generated from several decades of careful study and engagement—to bolster (but not without caveats) his policy recommendations for Canadian tax law.

60 Tim Edgar, "Outbound Direct Investment and the Sourcing of Interest Expense for Deductibility Purposes," in Arthur J. Cockfield, ed., *Globalization and Its Tax Discontents: Tax Policy and International Investments: Essays in Honour of Alex Easson* (Toronto: University of Toronto Press, 2010), 60-83.

61 Tim Edgar and Amir Aghdai, "Using the Tax System as Your Hedge Counterparty" (2013) 28:2 *Australian Tax Forum* 317-75.

62 Tim Edgar, "Risk-Based Overrides of Share Ownership as Specific Anti-Avoidance Rules" (2015) 63:2 *Canadian Tax Journal* 397-465.

CONCLUSION

Having offered a detailed catalogue of Tim Edgar's contributions to comparative tax law scholarship, I will conclude with four general reflections about his work. First, his work seems to have had, at least occasionally, an impact on policy. As my review of his scholarship has shown, he was a consummate policy analyst and a committed functionalist. Every one of his journal articles and book chapters includes recommendations for policy reform. And in some cases, the governments of Canada, Australia, and New Zealand appear to have heeded his advice. While it is impossible to claim that his work directly caused policy change, it is certain that the governments in Canada, Australia, and New Zealand reformed their thin capitalization rules, their capital gains exemptions, and their taxation of financial instruments in the wake of his substantial work on those topics. At least some of that impact was likely the result of Edgar's ability to point to the rules adopted in other jurisdictions, rules that must have provided both technical guidance and political reassurance to Canadian, Australian, and New Zealand policy makers.

Second, Edgar's scholarly path serves as a model for tax comparatists. His sustained focus on a small number of countries, and the considerable amount of time that he spent in Australia and New Zealand, made him, perhaps inadvertently, an "insider" to those countries. His understanding of their social, political, and economic contexts (as well as his detailed knowledge of much of Australia's and New Zealand's income tax law and goods and services tax law) made him a valuable contributor to the Australian and New Zealand landscapes of tax scholarship and policy.⁶³ Put another way, Edgar demonstrated a willingness to immerse himself in the rules and contexts of the countries that he used for comparison purposes.

Third, Edgar was adept in his use of comparativism. At times, he used the tax law framework of another jurisdiction to urge Canada's (or another country's) policy makers to make changes. At other times, he engaged in comparative work in order to ensure that his articulation of policy options was complete. There were occasions when he verged on using comparative work to promote the harmonization of countries' regimes, in the service of preventing tax avoidance and abuse. Perhaps most distinctively, relative to other tax comparatists, Edgar rarely suggests wholesale tax transplants, despite what seems to be his general view that countries should coordinate or harmonize their rules to reduce tax avoidance. Instead, he uses the experiences of Australia, New Zealand, and the United States as springboards, affording opportunities to see the policy choices available and to test them against tax policy criteria.

63 In 2000, Edgar published an article on the Australian project related to the taxation of financial arrangements, urging Australia to enact their proposed reforms. By that point in his career, he was in a position to claim that these reforms were "the most thoroughly developed of any government." Tim Edgar, "The Taxation of Financial Arrangements (TOFA) Proposals: A Modest and Defensible Agenda for Reform" (2000) 23:2 *University of New South Wales Law Journal* 288-98.

Fourth, and perhaps most significantly, Edgar made a distinguished and unique contribution to the design of policy-relevant comparative tax-law research. As his comparative work matured, it would typically include a section explicitly setting out the policy problem to be resolved.⁶⁴ In every case, this section would offer a novel combination of real-world conditions that allowed him to clarify with unusual precision the problem that governments should be trying to solve in drafting tax laws. I have not seen other comparative tax scholars emulate this approach, but they should.

Edgar's scholarly career answers the major questions of comparative law. He was a thoughtful and considerable tax scholar whose countless contributions, which have helped us better understand the tax world, are in some cases connected to understanding, comparing, and evaluating the tax laws of other jurisdictions. His scholarly work, seen in its entirety, suggests that Edgar did not set out to be a tax comparatist. Rather, it suggests that he set out to be an outstanding tax scholar, and comparative law provided him with an effective avenue for achieving that goal.

64 For an excellent example, see his co-authored 2013 article, Edgar and Aghdaei, *supra* note 61, at 331-43.