MISGUIDED INFERENCES? THE USE OF *EXPRESSIO UNIUS* TO INTERPRET TAX LAW

TAMARA LARRE*

This article explores how the interpretive canon of expressio unius *has been used by the courts when interpreting the* Income Tax Act, *and discusses the canon's place within the landscape of statutory interpretation of income tax law. The article reviews the existing literature to describe the canon, the assumptions on which the canon relies, and the reasons in favour of and against the canon's use. The ultimate conclusion is there is some value in the interpretive tool, but it should be used only to prompt interpreters to ask questions instead of prompting them to draw conclusions. While canons of interpretation are generally considered textualist in nature,* expressio unius *type reasoning is often used as a way of taking into account the context of a particular provision. Another problem apparent in the case law is that the canon, also called implied exclusion, is often confused with the canon of implied exception. The article also examines court decisions that apply or reject the use of* expressio unius *when interpreting the* Income Tax Act. *Finally, the article proposes factors that should be considered when determining whether* expressio unius *should be used in a particular tax case.*

Cet article explore comment les tribunaux ont utilisé le principe fondamental de expressio unius *pour l'interprétation de la* Loi de l'impôt sur le revenu *et examine la place de ce principe dans le paysage de l'interprétation des lois de l'impôt sur le revenu. L'article examine les documents existants pour décrire le principe, les hypothèses sur lequel il repose et les raisons pour et contre son utilisation. En définitive, il semble quelque peu utile comme outil d'interprétation, mais doit cependant être utilisé uniquement pour inciter ceux qui interprètent la loi à poser des questions plutôt que de tirer des conclusions. Alors que les principes d'interprétation sont généralement considérés de nature textuariste, les raisonnements de type* expressio unius *sont souvent utilisés pour tenir compte du contexte d'une disposition particulière. Un autre problème apparent dans la jurisprudence est que le principe, aussi appelé exclusion tacite, est souvent pris pour le principe de l'exclusion tacite. Cet article examine aussi les décisions judiciaires qui appliquent ou refusent l'utilisation de* expressio unius *pour interpréter la* Loi de l'impôt sur le revenu. *Enfin, l'article propose des facteurs dont il faut tenir compte au moment de déterminer si* expressio unius *devrait être utilisé dans une cause fiscale particulière.*

TABLE OF CONTENTS

* Associate Professor, University of Saskatchewan College of Law. Professor Larre writes and teaches in the area of taxation law and policy. I would like to thank the external reviewers and editors for their guidance and careful editing. Thank you also to my research assistant, Alexandra Anderson and to the individuals offering comments at the 2013 Law and Society Association Annual Meeting, at which I presented an earlier version of this article. Any errors or omissions are my own.

I. INTRODUCTION

Courts have grappled with the interpretation of income tax legislation for nearly a century. One tool they have used is the canon of *expressio unius est exclusio alterius*, which tells us that "to express one thing is to exclude another."[1] *Expressio unius* has been used frequently by the Supreme Court of Canada in several well-known tax cases (though the Court correctly refused to apply it in the recent case of *Copthorne Holdings Ltd. v. Canada*[2]). The canon is frequently employed by judges despite stern warnings from a variety of sources. Pierre-André Côté refers to the case *Turgeon v. Dominion Bank*[3] as the source of the "most energetic warning,"[4] in which *expressio unius* is described as a "dangerous master to follow."[5] The decision in *Colquhoun v. Brooks*[6] cautioned that "few so-called rules of interpretation have been more frequently misapplied and stretched beyond their due limits,"[7] and Stéphane Beaulac has commented that "this argument of logic appears to be the most controversial one in statutory interpretation."[8] On the other hand, Ruth Sullivan says that distrust for *expressio unius*, while insightful, has "led to an unwarranted distrust of this maxim as compared to others"[9] and John Mark Keyes reasons that "[t]he fact that *expressio unius* does not render answers with mathematical certainty is no more a reason for dismissing it as an interpretive aid than it is for dismissing grammar or logic."[10]

This article explores how the interpretive cannon of *expressio unius* has been used by the Canadian courts when interpreting the *Income Tax Act*[11] and discusses this canon's place within the current landscape of statutory interpretation of income tax law. One claim advanced in the article is that *expressio unius* reasoning can play a useful, though limited, role in the interpretation of tax statutes. A second claim is that courts have, with a few exceptions, failed to integrate *expressio unius* reasoning into the textual, contextual, and purposive approach set out by the Supreme Court of Canada. A third claim made in this article is that there are a number of cases where courts have applied a different maxim, *generalia specialibus non derogant*, where it was instead more appropriate to consider the application of *expressio unius*.

---

1 Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (Markham, Ont: LexisNexis Canada, 2008) at 243 [*Sullivan*].
2 2011 SCC 63, [2011] 3 SCR 721 [*Copthorne*].
3 [1930] SCR 67 [*Turgeon*].
4 Pierre-André Côté, *The Interpretation of Legislation in Canada*, 3d ed (Scarborough, Ont: Carswell, 2000) at 337.
5 *Turgeon*, *supra* note 3 at 70-71.
6 (1887), 19 QBD 400.
7 *Ibid* at 406, quoted in Randal N Graham, *Statutory Interpretation: Theory and Practice* (Toronto: Edmond Montgomery, 2001) at 104.
8 Stéphane Beaulac, *Handbook on Statutory Interpretation: General Methodology, Canadian Charter and International Law* (Markham, Ont: LexisNexis Canada, 2008) at 211.
9 *Sullivan*, *supra* note 1 at 252.
10 John Mark Keyes, "Expressio Unius: the Expression that Proves the Rule" (1989) 10:1 Stat L Rev 1 at 25.
11 RSC 1985, c 1 (5th Supp) [*ITA*].

The Supreme Court of Canada has stated that tax laws should be interpreted in a way similar to or the same as other legislation.[12] However, there are factors relating to income tax legislation that make the use of *expressio unius* in tax cases somewhat unique and worthy of study. Further, while significant attention has been given to statutory interpretation of the *ITA* in the context of tax avoidance, comparatively little has been written on *how*, exactly, one undertakes a textual, contextual, and purposive approach to interpreting the *ITA*. This article examines a frequently used canon of interpretation and attempts to place it within this broader approach to statutory interpretation. Also, while it will be seen that the usage by the courts of *expressio unius* has been criticized by academics, little work has been done to set out specific guidance as to *how* it should be used in particular contexts, and surprisingly little has been written about *expressio unius* in the tax context in particular. Finally, the mistaken use of *generalia specialibus non derogant* rather than *expressio unius* in tax cases has not been the focus of study. This article begins to fill in some of these gaps.

The article proceeds in Part II by briefly reviewing the existing literature describing the canon of *expressio unius*, the assumptions on which it relies, and the reasons in favour of and against its use. It concludes that there is some value in this interpretive tool, but it should be used only to prompt interpreters to ask questions, instead of prompting them to draw conclusions. Part III describes the Supreme Court's approach to statutory interpretation in income tax cases and comments on how *expressio unius* fits within this approach. Part IV of the article examines court decisions that apply or reject the use of *expressio unius* when interpreting the *ITA*. It is discovered that while canons of interpretation are generally considered textualist in nature, *expressio unius* type reasoning is often used as a way of taking into account the context of a particular provision. This appears to be in line with the Supreme Court of Canada's move to promoting a modern approach to statutory interpretation of the *ITA*, by looking to text, context, and purpose.[13] However, the cases in which the canon has been applied have taken into account too few factors, and thus are, in fact, out of line with current views of how the *ITA* should be interpreted. It is argued that some of the most problematic cases involve situations where both general and specific provisions are under consideration and another maxim of interpretation, *generalia specialibus non derogant*, is used where considering the use of *expressio unius* would have been more appropriate. The over-reliance on and misuse of *expressio unius* and *generalia specialibus non derogant* may suggest that the use of these maxims is merely a convenient tool for reason justification. Part IV of the article also sets out factors that should be considered when determining whether *expressio unius* should be used in a particular tax case. Part V contains a brief conclusion.

II. *EXPRESSIO UNIUS* IN THE LITERATURE

The statutory interpretation literature has explained the canon of *expressio unius*, the assumptions underlying it, and the problems with its use. This literature is briefly reviewed here.

---

12 See e.g. *Canada Trustco Mortgage Co v Canada*, 2005 SCC 54, [2005] 2 SCR 601 [*Canada Trustco*]. See also Part III.B of this article.

13 *Canada Trustco*, *ibid* at para 11.

A. *EXPRESSIO UNIUS* AND ITS USES

Expressio unius is often described as a canon or maxim of interpretation. Beaulac describes canons as extending beyond logic,[14] and Randal Graham refers to maxims as "handy interpretive guidelines."[15] Graham further explains that though maxims help to understand language patterns to determine what drafters "*probably* meant," they are "sources of argument" as opposed to rules that bind courts.[16]

Expressio unius is alternatively referred to as implied exclusion,[17] *a contrario*,[18] or *expressum facit cessare tacitum*[19] (which are used interchangeably in the remainder of this article). As Sullivan explains, "an implied exclusion argument lies whenever there is reason to believe that if the legislature had meant to include a particular thing within its legislation, it would have referred to that thing expressly."[20] When a statutory provision fails to mention a thing, the canon of *expressio unius* gives "grounds for inferring that it was deliberately excluded."[21] However, Sullivan also points out that the reader must have a reason for expecting express reference to that thing, and the better the reason, the stronger the implied exclusion argument.[22]

Expressio unius, or implied *exclusion*, can be distinguished from *generalia specialibus non derogant*, or implied *exception*, which directs that where two provisions or statutes conflict, the specific provision or statute takes priority over the more general.[23] While *expressio unius* is often used in the context of examining both a specific and general provision, it is properly employed where the specific provision does *not* apply, and therefore there is no direct conflict between the specific and general provisions. As is discussed later in the article, these two canons are often confused in the case law.

B. CRITICISMS AND DEFENCES

Expressio unius and canons in general have been subject to numerous criticisms. In terms of canons in general, William N. Eskridge and Philip P. Frickey recount the criticisms by legal realists and critical scholars, for whom "[t]he canons are just part of the mystifying game that is played with legal logic, which is ultimately indeterminate."[24] Along these lines, canons such as *expressio unius* may be used only as reason justification, to prop up a pre-determined result.[25] One partial solution to this problem is to demand a full set of reasons considering text, context, and purpose, and to demote implied exclusion reasoning from its

---

14 *Supra* note 8 at 208.
15 Graham, *supra* note 7 at 86.
16 *Ibid*.
17 *Sullivan*, *supra* note 1 at 244.
18 Côté, *supra* note 4 at 337.
19 John Bell & George Engle, *Cross: Statutory Interpretation*, 3d ed (London: Butterworths, 1995) at 140.
20 *Supra* note 1 at 244.
21 *Ibid*.
22 *Ibid*.
23 *Ibid* at 343.
24 William N Eskridge, Jr & Philip P Frickey, *Cases and Materials on Legislation: Statutes and the Creation of Public Policy* (St. Paul, MN: West Publishing Co, 1988) at 693.
25 See Reed Dickerson, *The Interpretation and Application of Statutes* (Boston: Little, Brown & Co, 1975) at 235; Eskridge & Frickey, *supra* note 24 at 693; James J Brudney & Corey Ditslear, "Canons of Construction and the Elusive Quest for Neutral Reasoning" (2005) 58:1 Vanderbilt Law Review 1 at 1241.

special status of a canon or maxim of interpretation to a mere consideration. To assist with this, it is suggested here that the Latin phrase be substituted with the term "implied exclusion," which may at least be perceived as carrying less importance.

One criticism directed specifically at *expressio unius* is that it has ties to textualism and the now discredited literalism approach to statutory interpretation.[26] This criticism is a reminder that statutory interpretation in tax cases should not stop with textual analysis; context and purpose must also be considered. However, as the analysis of the cases in this article reveals, *expressio unius* does not often reflect textualism in tax cases.

Another set of criticisms challenges the assumptions upon which implied exclusion reasoning rests. For example, like many canons of interpretation, this canon relies on a presumption of coherence and a rational legislature that does not commit errors.[27] This, Richard A. Posner points out, is unrealistic.[28] He adopts Edward Levi's perspective in not blaming poor drafting, but the fact that a "statute necessarily is drafted in advance of, and with imperfect appreciation for the problems that will be encountered in, its application."[29] These criticisms are certainly valid, especially in a statute as vast and frequently amended as the *ITA*. Thus, the assumptions underlying implied exclusion should be challenged in each case before it is applied. Details of how this could be done are provided in Part IV of the article.

The sheer number of criticisms of *expressio unius* and canons in general outweigh the defences. This raises the question of whether *expressio unius* should be used at all. One potential reason for maintaining the use of canons such as *expressio unius* is that, if they are clear, canons can serve as a measure of communication by legislatures and courts. Sullivan states that implied exclusion "is an essential tool of efficient communication."[30] Thus, it could be argued that *expressio unius* has the potential to bring certainty, and, if there is a shared understanding of this rule among legislators and courts, it can help to determine legislative intent. Sullivan suggests that there should be a presumption in favour of *expressio unius*.[31] However, it is argued later in this article that even a rebuttable presumption of *expressio unius* does not make sense in some cases because it is not clear when the presumption is triggered.[32] As a result, the canon cannot bring increased certainty in those cases, thereby defeating the certainty argument in favour of the use of implied exclusion in those instances. Because of this problem and many of the other criticisms of *expressio unius* already identified, and the need for a full textual, contextual, and purposive analysis, a presumption of *expressio unius* is not supported in this article.

There are suggestions in the literature as to how implied exclusion should be used. Eskridge and Frickey observe that "perhaps the best defense of the canons is to posit that

---

26 See Eskridge & Frickey, *ibid* at 641. See also Brudney & Ditslear, *ibid*.
27 Beaulac, *supra* note 8 at 122-23.
28 Richard A Posner, "Statutory Interpretation — in the Classroom and in the Courtroom" (1983) 50 U Chicago L Rev 800 at 811. In *Turgeon*, the Court also pointed out that inadvertence and accidents made *expressio unius* a "dangerous master to follow" (*supra* note 3 at 71).
29 Posner, *ibid* at 811-12, citing Edward H Levi, *An Introduction to Legal Reasoning* (Chicago: University of Chicago Press, 1949) at 30-31.
30 *Supra* note 1 at 252.
31 Ruth Sullivan, *Statutory Interpretation*, 2d ed (Toronto: Irwin Law, 2007) at 193.
32 See Part IV.A.2, below.

they are just a checklist of things to think about when approaching a statute."[33] Others point out that in the case of applying *expressio unius*, there is a need to look to context[34] and purpose to determine if the result would defeat legislative purpose,[35] including other explanations for silence,[36] such as drafting error or inadvertence.[37] Thus, implied exclusion reasoning can play a role as just one of a whole collection of considerations.

The most convincing reason for not completely disregarding the reasoning behind *expressio unius* is that it raises a question worthy of exploration: What is the significance of the exclusion of the item from the provision? It could be that the provision was not intended to apply, but, as noted above, there may be a number of reasons explaining the exclusion. The problem that arises in many of the cases is that there is a lack of exploration of these potential explanations. To prevent the perpetuation of this problem, the canon should be eliminated as such. A canon presumes a conclusion as a starting point. In the case of *expressio unius*, the conclusion is that the exclusion implies an intent that the provision not apply. Using a question as a starting point invites examination of the full text, context, and purpose of the provisions in question, and thus is better in line with a textual, contextual, and purposive approach. It also allows the assumptions underlying implied exclusion to be challenged where appropriate.

III. IMPLIED EXCLUSION AND THE TEXTUAL, CONTEXTUAL, AND PURPOSIVE APPROACH

This part includes a brief description of the structure of the *ITA*, a historical account of statutory interpretation in general and of the *ITA*, and an explanation of how implied exclusion fits within the current approach to statutory interpretation.

A. THE STRUCTURE OF THE *INCOME TAX ACT*

The structure of the *ITA* is important to its interpretation. As a starting point, section 3 requires net income from each source to be included in the taxpayer's income. Four sources of income, the "enumerated sources," are specifically referred to in section 3(a): office, employment, business, and property. However, the section makes it clear that all sources of income are included.[38] Courts have observed that the named sources are not exhaustive,[39] though as Peter Hogg, Joanne Magee, and Jinyan Li point out, courts have also been reluctant to find unenumerated source of income.[40] Section 3(b) states that net taxable capital gains are to be included in income, and further requires that specific items be included in income. Within the *ITA*, certain items are specifically excluded from income or are afforded a deduction to offset an income inclusion.

---

33 *Supra* note 24 at 694.
34 *Sullivan*, *supra* note 1 at 252.
35 Côté, *supra* note 4 at 339.
36 *Sullivan*, *supra* note 1 at 250.
37 Bell & Engle, *supra* note 19 at 140.
38 Peter W Hogg, Joanne E Magee & Jinyan Li, *Principles of Canadian Income Tax Law*, 7th ed (Toronto, Thomson Reuters Canada, 2010) at 80-81.
39 See e.g. *Schwartz v Canada*, [1996] 1 SCR 254 at paras 18, 50-51 [*Schwartz*].
40 Hogg, Magee & Li, *supra* note 38 at 89-91.

For each of the enumerated sources and for capital gains, there is a subdivision in the *ITA* detailing the method of calculation. Within each subdivision, there are usually general rules, and more specific rules, and it is often difficult to determine if the specific rules are intended to modify those general rules, or to reinforce them for greater certainty. For example section 9(1) states that the profit from a business or property is included in income. Section 18(1)(a) precludes a deduction unless the amount is incurred for the purposes of earning income from the business or property, and section 18(1)(h) prohibits the deduction of personal expenses. While it has been pointed out that expenses incurred other than for the purpose of earning income and expenses personal in nature would not be deductible under the legal concept of "profit" in section 9(1), sections 18(1)(a) and (h) are "additional hooks on which a decision can be hung"[41] to deny the deductions. Thus, these sections are viewed as reinforcing section 9(1). In other cases it may be less certain whether the specific provisions modify or reinforce the general rule, though sometimes the text of the provision can provide some clues. For example, the introductory wording in section 56(1), "[w]ithout restricting the generality of section 3, there shall be included in computing the income of a taxpayer for a taxation year,"[42] indicates that items not caught under section 56(1) could still be taxable as income from a source under section 3(a).[43] On the other hand, some of the paragraphs under section 56(1) may expand the tax base as they were enacted in response to court cases that determined that the amount was not taxable.[44] Whether the provision reinforces or modifies the *ITA* can be important information when determining whether implied exclusion reasoning should be used.

B. STATUTORY INTERPRETATION OF TAX LEGISLATION

Before examining the use of the particular canon of *expressio unius* in tax cases, it is useful to briefly describe the courts' approaches to statutory interpretation in general, as well as of tax laws. In her book, *Sullivan on the Construction of Statutes*, Sullivan traces the evolution of statutory interpretation in Canada.[45] She recounts equitable construction, under which Parliament's intention was paramount, to the move to strict construction in the 18th century, accompanied by an emphasis of preservation of life and individual liberty and property, and then the shift to literal construction and the plain meaning rule in the 19th and 20th centuries.[46] The textualist plain meaning rule has for the most part been displaced by the modern principle, attributable to Elmer Driedger, which integrates many of the historical approaches.[47] According to the modern principle, "the words of an Act are to be read in their entire context in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament."[48]

The modern approach to statutory interpretation has been adopted by the Supreme Court of Canada in an overwhelming number of cases.[49] Driedger's modern principle has been

---

41 *Ibid* at 208.
42 *ITA*, *supra* note 11, s 56(1).
43 Hogg, Magee & Li, *supra* note 38 at 93.
44 See *ibid* at 91.
45 *Sullivan*, *supra* note 1 at 4-7.
46 *Ibid*.
47 *Ibid* at 7.
48 Elmer A Driedger, *The Construction of Statutes* (Toronto: Butterworths, 1974) at 67.
49 *Sullivan*, *supra* note 1 at 1.

interpreted as intentionalist in its origins, meaning that the interpretor's role is viewed as discerning the intention of legislators through means other than text alone.[50] However, Beaulac notes that the modern principle has at times been given a textualist construction by emphasizing the text of the legislation as most important in determining the meaning of legislation.[51]

The history of the interpretation of tax law has followed a slightly different path. Based on a respect for personal property rights, the traditional judicial attitude toward tax law was that it should be interpreted literally, with the burden falling on the legislature to draft clear tax rules.[52] Therefore, literalism prevailed, and laws were strictly constructed, giving the taxpayer the benefit of any doubt.[53] Generally, tax minimization was seen as legitimate, and therefore taxpayers were able to take certain liberties with using the statutory provisions.[54] Further, a respect for the rule of law led to an emphasis on predictability and certainty.[55] Later, there was a shift to strict construction, with an emphasis on text, though not necessarily in favour of the taxpayer.[56] The groundbreaking case of *Stubart Investments Ltd. v. The Queen*[57] purported to bring the interpretation of tax law in line with the interpretation of other laws. The Supreme Court of Canada recognized tax legislation as not just a revenue generator, but also an important policy tool, and therefore held that it should be interpreted using the modern principle.[58] Sullivan and Beaulac have both pointed out that the plain meaning rule and literalism have cropped up post-*Stubart*, perhaps like "a bad habit that keeps coming back,"[59] while still paying "lip service"[60] to the modern principle in some cases.

The tension between the Supreme Court's attachment to the modern principle and the persistence of the historical views of tax legislation can been seen in *Canada Trustco*,[61] where the Court supported the textual, contextual, and purposive approach with a goal of determining legislative intent, but also appeared to emphasize the importance of text:

> It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning,

50 *Ibid* at 7.
51 *Supra* note 8 at 34-35.
52 *Sullivan*, *supra* note 1 at 527.
53 *Ibid*.
54 *Ibid* at 529-30.
55 *Ibid* at 528.
56 *Ibid* at 528-29.
57 [1984] 1 SCR 536 [*Stubart*].
58 *Sullivan*, *supra* note 1 at 530.
59 Beaulac, *supra* note 8 at 34.
60 *Sullivan*, *supra* note 1 at 532.
61 *Canada Trustco*, *supra* note 12.

> context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.
>
> …
>
> There is no doubt today that all statutes, including the *Income Tax Act*, must be interpreted in a textual, contextual and purposive way. However, the particularity and detail of many tax provisions have often led to an emphasis on textual interpretation. Where Parliament has specified precisely what conditions must be satisfied to achieve a particular result, it is reasonable to assume that Parliament intended that taxpayers would rely on such provisions to achieve the result they prescribe.
>
> The provisions of the *Income Tax Act* must be interpreted in order to achieve consistency, predictability and fairness so that taxpayers may manage their affairs intelligently.
>
> …
>
> The *Income Tax Act* remains an instrument dominated by explicit provisions dictating specific consequences, inviting a largely textual interpretation.[62]

Brian Arnold suggests that we may infer that the "textual, contextual, and purposive approach" repeatedly mentioned in the case is another label for the modern approach[63] but that the references to an emphasis on textual interpretation raises uncertainty as to whether tax statutes are, in fact, to be interpreted the same as other statutes.[64] Thus, it seems that the Court has dictated that the modern approach should be followed, though perhaps tempered by a greater emphasis on text due to concerns of certainty, predictability, and fairness.

There is some question about whether, where text is unambiguous, it is even necessary to consider context and purpose. Brian Arnold[65] observes such uncertainty after the Supreme Court's decisions in *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*[66] and *Imperial Oil Ltd. v. Canada*,[67] which quote extensively from *Canada Trustco* but also then make inconsistent statements more in line with literalism, such as these statements made in *Placer Dome*: "Where the words of a statute are precise and unequivocal, those words will play a dominant role in the interpretive process"[68] and, later, "Where such a provision admits of no ambiguity in its meaning or in its application to the facts, it must simply be applied."[69] These statements are somewhat at odds: Is the text the sole criterion if the words are unambiguous? Or is text just given greater weight where the words appear clear? The distinction may, in practice be moot, as Arnold points out, because statutory provisions "are never absolutely clear."[70]

---

62 *Ibid* at paras 10-13.
63 Brian J Arnold, "Policy Forum: Confusion Worse Confounded — The Supreme Court's GAAR Decisions" (2006) 54:1 Can Tax J 167 at 175.
64 *Ibid* at 176.
65 Brian J Arnold, "Policy Forum: The Supreme Court and the Interpretation of Tax Statutes — Again" (2006) 54:3 Can Tax J 677 ["The Supreme Court"].
66 2006 SCC 20, [2006] 1 SCR 715 [*Placer Dome*].
67 2006 SCC 46, [2006] 2 SCR 447 [*Imperial Oil*].
68 *Supra* note 66 at para 21.
69 *Ibid* at para 23.
70 "The Supreme Court," *supra* note 65 at 682.

It seems most in line with the Court's comments and practice to assume that context and purpose should always be considered, but greater weight should be given to text.[71] For example, in *Imperial Oil*,[72] the Supreme Court, after acknowledging the "underlying tension between textual interpretation, taxpayers' expectations as to the reliability of their tax and business arrangements, the legislature's objectives and the purposes of specific provisions or of the statute as a whole,"[73] proceeded with a textual, contextual, and purposive analysis of the provision in question without engaging (at least overtly) in an initial question of whether there was any ambiguity.[74]

C. IMPLIED EXCLUSION AND THE TEXTUAL, CONTEXTUAL, AND PURPOSIVE APPROACH

Assuming that the courts should be following the modern approach and consider text, context, and purpose as part of the interpretive process, then how does implied exclusion reasoning fit within this framework? In some cases, it is part of a textual analysis. Quite simply, if one thing is not mentioned in the provision, it can be argued that the provision does not apply to that thing. As mentioned in the review of the cases on statutory interpretation, the text (and in this case, absence of text) of the provision is given a great deal of weight, especially in so-called unambiguous cases. A textual analysis could involve looking to other maxims of interpretation, which could conflict with implied exclusion, such as the limited class rule (*ejusdem generis*),[75] the associated worlds rule (*noscitur a sociis*),[76] and implied exception (*generalia specialibus non derogant*).[77]

In other situations, implied exclusion might form part of the contextual analysis, particularly where implied exclusion is being used to analyze more than one provision. In those cases, the other provision forms part of the internal context.[78] In fact, this is how *expressio unius* is often used in tax cases. One challenge often encountered when interpreting the *ITA* is how to determine how sections of the *Act* interrelate. Implied exclusion reasoning can trigger an inquiry that may assist in determining legislative intent in these cases. However, other contextual or purposive factors (such as legislative history and statements of purpose) may suggest that the application of *expressio unius* is inappropriate in the circumstances.

It is clear from the Supreme Court's direction on statutory interpretation that canons such as implied exclusion should be only one element of a full textual, contextual, and purposive analysis, with the goal of ascertaining legislative intent. Sullivan points out that the weight of an *expressio unius* argument "depends on a range of contextual factors and the weight of

---

71 See *Sullivan*, *supra* note 1 at 532.
72 *Supra* note 67.
73 *Ibid* at paras 29-30.
74 *Ibid* at para 80.
75 *Sullivan*, *supra* note 1 at 231.
76 *Ibid* at 227.
77 *Ibid* at 343.
78 David Duff, "Interpreting the *Income Tax Act* — Part 2: Toward a Pragmatic Approach" (1999) 47:4 Canadian Tax Journal 741 at 781-82. Duff points out that "analysis of the internal context of a statutory text depends on the external context by which the text is understood" (*ibid* at 782).

competing considerations."[79] Similarly, Justice Bowman stated in *Munro v. R.*[80] that "[w]hile the *expressio unius* rule is one of the many tools of statutory interpretation available to the court it is no more than an interpretative aid used to discern the apparent intention of the legislative draftsperson."[81] These authorities suggest that implied exclusion should serve as a starting point, not an ending point. The strength of the implied exclusion argument will depend on the relative importance of the other textual, contextual, and purposive factors, which will, of course, need to be balanced by the court. The same could be said for other canons of interpretation, such as implied exception.

IV. THE USE OF *EXPRESSIO UNIUS* IN INCOME TAX CASES

Sullivan divides *expressio unius* cases into two categories: those where there has been a "failure to mention comparable items" and those where there has been a "failure to follow an express pattern" of reference.[82] In this part, the cases are divided accordingly, and are then described and analyzed. For each category, suggestions for using implied exclusion reasoning follow the case analysis.

One recent case mentioning *expressio unius* is *Copthorne*.[83] This case does not fit within either of the categories of uses of *expressio unius*. In this case, the Supreme Court made it clear that implied exclusion reasoning was not appropriate when applying section 245 of the *ITA*, the general anti-avoidance rule (GAAR). The taxpayer had argued that because the situation at hand did not fall within any of the listed situations to which a specific anti-avoidance rule applied, it could be implied that the circumstances were intended to be excluded from the rule and, therefore, acceptable. The Court made it clear that implied exclusion reasoning is not appropriate under GAAR analysis, where it has already been conceded by the Minister that the transactions are not prohibited on a textual reading of the *Act*.[84] The Court astutely pointed out that if this reasoning were applied in such a situation, the GAAR would be "rendered meaningless."[85]

A. FAILURE TO MENTION COMPARABLE ITEMS

1. REVIEW OF THE CASES

Perhaps the most straightforward application of *expressio unius* is by reasoning that if something is left off a list or otherwise not included within the wording of the provision, it can be implied that the thing was intended to be excluded. An example of this reasoning is found in *Allcolour Paint Ltd. v. The Queen*,[86] in which the section in question listed the provisions that applied to partnerships. The provision granting an enhanced tax credit was not listed. Therefore, it was implied that the enhanced tax credit was not available to partnerships. Generally, this use of *expressio unius* is not controversial, except that the

---

79 *Supra* note 1 at 252.
80 (1997), [1998] 1 CTC 2001 (TCC).
81 *Ibid* at para 13.
82 *Supra* note 1 at 244.
83 *Supra* note 2.
84 *Ibid* at paras 108-109.
85 *Ibid* at para 111.
86 97 DTC 5266 (FCA) [*Allcolour Paint*].

textual, contextual, and purposive approach may demand that context and purpose also be examined, though likely with the textual analysis being given greatest weight if the text is clear that the item is not on the list.

As Beaulac explains, *expressio unius* can move from smaller to larger normative circles,[87] and, thus, may involve one or more provisions of the *ITA*. Many of the tax cases involving two provisions reason that where a specific provision almost applies to an item, it is implied that the item is also excluded from a general provision. This can be viewed as an extension of cases like *Allcolour Chemicals*: if a comparable thing is left off a list or otherwise does not fall within a provision, not only is it implied that the thing was intended to be excluded from that particular provision, but also it was intended to be excluded from a general provision under consideration.

As already mentioned, the rule of implied *exception* states that if a specific rule applies, the general rule does not. That is, the application of a specific rule implies an exception to, or a carve out from, the general rule. However, the cases discussed here are different as they involve situations where the specific rule applies to *similar* things or situations, but not the thing or situation at hand. As there is no direct conflict between the general and specific provision, the use of implied *exception* is inappropriate.

Many of the tax cases where *expressio unius* has been used involve a situation where a specific rule and a general rule are both considered in determining whether an amount is included in income. If a specific rule applies to impose tax on items *similar* to the item in question, courts have usually taken one of two approaches. In the first category, once it is determined that the specific rule does not apply, courts have proceeded to apply the general rule to require the item to be taxed. In this situation, *expressio unius* is not being applied to the general rule. However, a second category of cases contains a surprising number of cases where courts have considered the specific rule's near application as an indication that the general rule also should not apply. That is, it was reasoned that if Parliament intended to tax the item, the specific rule would have been drafted such that it would catch the item. This is implied exclusion-type reasoning because it is being implied that through exclusion from the specific rule, the item is also excluded from the general rule. In the first category, the text of the provisions is often emphasized, while in the second category, one element of internal context (the specific provision) is emphasized in applying the general rule. As the following review of the case law reveals, both approaches often fall short of a full balancing of textual, contextual, and purposive factors.

A number of well-known cases have applied implied exclusion type reasoning in the second category just described. For example, in *The Queen v. Savage*,[88] the taxpayer received a $300 prize from her employer for completing courses relating to her employment. Section 56(1)(n) stated that prizes exceeding $500 were taxable. The issue was whether the prize was taxable under the general sections imposing tax on employment income (sections 5 and 6).The Supreme Court decided that it was not.

---

87 *Supra* note 8 at 210.
88 [1983] 2 SCR 428 [*Savage*].

Section 56(1) stated that it was to be applied "[w]ithout restricting the generality of section 3"[89] (the general provision imposing tax on income from all sources), which the majority acknowledged was inserted to have the effect of defeating an *expressio unius* argument "in order to relate income items contained in subs. 56(1) to the arithmetical calculation set out in s. 3. Income can still be income from a source if it does not fall within s. 56. Moreover, s. 56 does not enlarge what is taxable under s. 3, it simply specifies."[90] These comments appear to reflect the view that section 56(1) was not intended to restrict or enlarge section 3, and therefore a section 3 analysis would be warranted where an item was not taxed under section 56(1). However, the majority then proceeded to preclude a section 3 income inclusion, arguing that it "cannot be right" that prizes over $500 would be taxable under paragraph 56(1)(n) and those under $500 as income from another source under section 3.[91] The $500 exclusion would "never have any effect."[92] Thus, it would seem that pragmatic and consequentialist reasoning prevailed in this case, which, in and of itself, is not necessarily problematic.[93]

In *Savage*, the majority did, in a rather indirect way, consider what should be the overarching question here: Does the near application of section 56(1)(n) indicate that the item should also be excluded from section 3 in these circumstances? The problem is that the reasoning leading to the majority's conclusion was unsound. While certainly the carve-out for prizes under $500 strongly suggested that the legislators had considered whether that amount should be taxable, it is not clear that they intended that it would never be taxed under another provision. The majority's conclusion that the carve-out would have no effect if the Minister's position was accepted does not withstand scrutiny unless all prizes under $500 would be considered income from a source under section 3. If, as is more likely, they would only have been caught if they were income from employment (as the Minister was arguing here) or possibly from business, then only those prizes under $500 originating from employers or tied to a business would potentially be taxed. That is, the overlap between the carve-out and the general provisions were incomplete, which makes it less certain that the legislators intended all small prizes to escape tax. The *Savage* decision would have been much more convincing had the majority directly addressed this issue. In fact, the subsequent amendment to the legislation ensuring that all prizes from employers be taxed is a strong indication that the decision was not in line with the views of legislators.[94]

Fourteen years later, a case similar to *Savage* came before the Tax Court in *Foulds v. R.*[95] There, the issue was whether a prize awarded to a band managed by the taxpayer and not captured by section 56(1)(n) because it was an excluded "prescribed prize" for "meritorious achievement in the arts" and could instead be taxed as business income. The facts in this case shed light on the types of situations section 56(1)(n) may have been intended to address. Had the business not been involved in the arts, the business may have had an argument that it was not in the business of winning prizes, and, therefore, the item was not includable in income under section 9(1). Without section 56(1)(n), the item may have escaped tax. This illustrates

---

89 *ITA*, *supra* note 11, s 56(1).
90 *Supra* note 88 at 445-46.
91 *Ibid* at 446.
92 *Ibid*.
93 *Sullivan*, *supra* note 1 at 283-84.
94 Amended by 1986, c 6, s 28(1).
95 [1997] 2 CTC 2660 (TCC) [*Foulds*].

an instance of incomplete overlap between section 56(1)(n) and the general rules imposing tax.[96]

Following *Savage* (and also citing *Schwartz*,[97] considered below), the Court in *Foulds* held that the amount was not taxable:

> The Courts have consistently held that specific wording within the Act must take precedence over general more inclusive language.… It is clear that Parliament has developed particular rules governing the taxability of "prizes" and where such a "prize" falls within the governing section it should be taxed according to that section.[98]

It could be argued that implied exception reasoning was misapplied in this case. As already mentioned earlier in this article, implied exception reasoning dictates that where a specific and general rule both apply, the specific rule prevails. However, there is not necessarily a direct conflict between specific and general rules here; in fact, the prize did not "fall" within the governing section because it was carved out. Section 56(1)(n), did not clearly say that all prescribed prizes shall be non-taxable under other provisions. Therefore, it is not a clear situation of implied exception. Instead, this is a situation where the Court should have explicitly considered the general rules requiring items to be included in income from a business. Here, it is possible that the item may not have been included if the Court had framed the issue as whether the taxpayer was in the business of earning prizes. Assuming the item would have otherwise been taxed, implied exclusion reasoning should have raised the question of whether the exclusion from section 56(1)(n) implies an exclusion from the general rules imposing tax on business income. The reference to implied exception obscures the issue.

The reasoning in *Foulds* is reminiscent, in some respects, to that in the 1994 Supreme Court of Canada majority decision in *Symes v. Canada*.[99] In *Symes*, the question was whether the taxpayer could deduct child care expenses from her business pursuant to section 9(1), which requires businesses to be taxed on net profits. To be deductible, the expense could not be contrary to section 18(1)(a), which required expenses to be incurred for the purpose of earning business income, and section 18(1)(h), which prohibited deductions that were personal in nature. The majority of the Supreme Court of Canada decided that the expenses were not deductible because of a specific provision, section 63, which permitted the deduction of child care expenses by the lower income parent, up to a certain limited amount. The majority endorsed the Federal Court of Appeal's reasoning that section 63 was a "complete code,"[100] thus suggesting, similar to *Foulds*, that child care deductions could *only* be considered under section 63, and not the more general section 9(1). The majority also considered the purpose of section 63, including the desire to permit deductions under controlled terms and to assist mothers in deciding to return to work. These, in the majority's view, supported the conclusion that section 63 was intended to completely govern child care expenses. Further, the majority considered that to permit the taxpayer a deduction as a

---

96 This observation arises out of the comments of one of the anonymous external reviewers of this article.
97 *Supra* note 39.
98 *Supra* note 95 at para 27.
99 [1993] 4 SCR 695 [*Symes*].
100 *Ibid* at 759.

business expense would result in the limitations on deductibility under section 63 only to apply to employees. While the majority decision has been the subject of criticism for its equality implications,[101] it did, to a much greater extent than many of the other decisions, make a concerted effort to undercover the intention of legislators with respect to whether the general section could apply in light of a specific provision.

The minority decision of the Court in *Symes* pointed out that section 63 did not contain specific wording that overrode the application of section 9, which implied that there was no direct conflict between the provisions. This raises the question of whether the lack of direct conflict on a textual reading of the *ITA* can defeat an implied exclusion argument, where it has been admitted that there is ambiguity in the legislation.[102] At least post-*Canada Trustco*, one would think that the ambiguity would require the text to be given lesser weight, and that increased weight be given to context and purpose. Had the minority decision stopped at this textual analysis, its reasoning could be questioned, but the decision does in fact continue on to consider a number of contextual factors. For example, it was unlikely that it was intended that section 63 restrict the deduction of child care expenses as business expenses because the social reality at the time of enactment was that few women were business owners. Also, horizontal equity among business owners would be better achieved if child care could be deducted by business women. The minority also referred to section 15 of the *Canadian Charter of Rights and Freedoms*[103] in support of permitting the deduction.

Another important decision in this string of cases is *Schwartz*.[104] In *Schwartz*, the taxpayer received an employment contract termination payment from his would-be employer before employment commenced. The Supreme Court of Canada decided that the amount was not taxable under section 56(1)(a)(ii) as a retiring allowance because employment had not yet commenced. This gave rise to the issue of whether the amount could be taxed under section 3(a) as income from an unenumerated source. The Court answered in the negative.

The Court acknowledged that the broad wording of section 3 and the opening words of section 56(1) stating "without restricting the generality of" section 3 were "probably the strongest that could have been used to express the idea that income from *all* sources, enumerated or not, expressly provided for in Subdivision d or not, was taxable under the Act."[105] However, the Court reasoned that it was not proper here to consider taxability under section 3(a), as that "would amount to giving precedence to a general provision over the detailed provisions enacted by Parliament to deal with payments such as that received by Mr. Schwartz pursuant to the settlement."[106] This is, similar to *Foulds*, a convenient though incorrect use of implied exception reasoning, since there is not necessarily a direct conflict between section 56(1)(a)(ii) and section 3. In fact, the opening words of section 56(1) make it quite clear that it was not intended to narrow the application of section 3.

---

101 See e.g. Claire FL Young, "(In)visible Inequalities: Women, Tax and Poverty" (1996) 27:1 Ottawa L Rev 99; Rebecca Johnson, *Taxing Choices: The Intersection of Class, Gender, Parenthood and the Law* (Vancouver: UBC Press, 2002); Andrea York "The Inequality of Emerging Charter Jurisprudence: Supreme Court Interpretations of Section 15(1)" (1996) 54:2 UT Fac L Rev 327.

102 See the discussion in Part III.B for the importance of textual interpretation in tax cases.

103 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 1.

104 *Supra* note 39.

105 *Ibid* at para 50.

106 *Ibid* at para 52.

The Court also noted that section 56 was amended to include termination payments because of previous cases that had determined they were not taxable as employment income.[107] Parliament had chosen to deal with such payments through the definition of retiring allowances, and, therefore, it was that section that should be considered here because "[t]o do otherwise would defeat Parliament's intention by approving an analytical approach inconsistent with basic principles of interpretation."[108] After citing *Savage*, the Court stated:

> The situation here is analogous. To find that the damages received by Mr. Schwartz are taxable under the general provision of paragraph 3(*a*) of the Act would disregard the fact that Parliament has chosen to deal with the taxability of such payments in the provisions of the Act relating to retiring allowances. It is thus to those provisions that I will turn in assessing taxability.[109]

Again, similar to *Savage*, the Court suggested that by introducing the concept of a taxable retiring allowance, this specific provision became an entire "code" dealing with these and similar payments. Of course, the obvious problem here is that it could very well be that Parliament may just not have anticipated a situation where the payment was made before employment began. While in *Savage* one could at least say with some certainty that the legislators had turned their mind to prizes under $500, since they were specifically carved out, the same could not be said here. It was entirely possible that the drafters had failed to consider intended employment.

The majority decision in *Schwartz* suggests that once the legislators decided to fix the problem of termination payments escaping tax by enlarging the definition of "retiring allowance" to include termination payments, rather than instead arguing that such damages were income under section 3(a) or amending the *Act* to include such payments as employment income, the Minister had foreclosed on its option to subsequently argue that any termination payments were taxable as employment income or another source under section 3(a). *Expressio unius* serves a purpose by raising the question of whether the exclusion from the definition of retiring allowance implied an exclusion from section 3(a). However, this is an example of a situation where the assumptions underlying *expressio unius* should have been more directly questioned by the courts in order to explore the likelihood of inadvertence by the drafters.

Two factors likely played a role in the decision in *Schwartz*. First, courts have not been very willing to determine that an amount is income from an unenumerated source,[110] and the courts have few principles to guide them in that analysis. One has to wonder if using *expressio unius* is at times used as a way to sidestep this inquiry. The proper analysis in *Schwartz* and in similar cases would be to fully consider whether the item could be income under a general rule imposing tax, rather than precluding its application on the basis of nearly falling within the specific provision. The presence of a "scheme" to tax similar payments

---

107 *Ibid* at para 53.
108 *Ibid*.
109 *Ibid* at para 54.
110 Indeed, Justice Major's minority decision in *Schwartz* could be viewed an example of the reluctance by the courts of finding income from an unenumerated source. As Hogg, Magee, and Li explain, "[j]udicial interpretation of this concept has been very restrictive. The courts have been reluctant in finding that receipts with the characteristics of income are taxable where the source of the payment is not enumerated" (*supra* note 38 at 89).

could be part of this analysis because it is part of internal context, but should not be the only consideration. Second, as mentioned in Part III, courts have traditionally held a view that tax provisions should be strictly construed against the Crown. *Schwartz* may be an instance where that sentiment played into the decision. Implied exception reasoning may, in fact, have been used as a convenient tool for reason justification, though incorrectly applied. Implied exclusion would have been more appropriate here, though only as a starting point.

An example of the use of *expressio unius* to preclude the application of a general provision can be seen in the Tax Court's decision in *Tsiaprailis v. The Queen*.[111] In this case, the taxpayer received a settlement payment as a result of suing her insurer after her long-term disability benefits were terminated. If the settlement payment did not fall within the specific section (section 6(1)(f)) requiring certain insurance payments to be taxed, was it caught by the general section (section 6(1)(a)) requiring all employment benefits to be taxed? The Federal Court of Appeal decided that the payments relating to past benefits were taxable under the specific provision, section 6(1)(f), and the payment relating to future benefits were apparently not taxable under section 6(1)(a) or (f), though little explanation for this latter conclusion was given.[112] The Supreme Court of Canada majority considered only the past payments and agreed that they fell within section 6(1)(f)[113] and, therefore, the Court did not engage in *expressio unius* reasoning. However, the Tax Court decision concluded that the specific provision did not apply, and Justice Bowman used *expressio unius*-type reasoning in his conclusion that the general provision also did not apply. Justice Bowman stated that just because the specific provision does not apply, it does not mean that that section was "erased from the Act."[114] Justice Bowman quoted his decision from *Landry v. The Queen*,[115] where he had, in a similar case, stated: "paragraph 6(1)(a) is a general provision, and it is not intended to fill in all the gaps left by paragraph 6(1)(f) — *expressio unius est exlusio alterius*."[116] Similar to the Supreme Court of Canada's reasoning in *Savage*, *Symes*, and *Schwartz*, Justice Bowman suggests that a complete mini-code has been enacted with section 6(1)(f) that not only completely covers the things falling within its scope, but some nearly falling within it. Justice Bowman correctly identified the situation as one of implied exclusion, but failed to explain why the general provision was not intended to fill some of the gaps left by section 6(1)(f). In fact, it seems that the nature of a general provision such as section 6(1)(a) may be intended to fill many gaps that are impossible to address through specific provisions.

Later in the decision, Justice Bowman muddled the situation by quoting a passage from *Munich Reinsurance Co. v. Canada*,[117] which applies implied exception.[118] The problem, again, is that neither *Munich Reinsurance* nor *Tsiaprailis* were appropriate situations to apply implied exception reasoning to state that specific rules take priority over general rules

111 2002 DTC 1563 (TCC).
112 *Tsiaprailis v Canada*, 2003 FCA 136, 225 DLR (4th) 2003 at paras 25-26 [*Tsiaprailis*].
113 This issue of the portion of the payment relating to future benefits was apparently not a question on appeal.
114 *Supra* note 111 at para 19.
115 1998 DTC 1416 (TCC).
116 *Ibid* at 1418.
117 2001 FCA 365, 281 NR 377 [*Munich Reinsurance*].
118 *Ibid* at paras 21-24.

because *the specific rule did not apply* and therefore, there was no direct conflict. Justice Bowman's decision in *Tsiaprailis* also referred to *Savage* as authority for his conclusion.[119]

It is interesting that in the similar case of *Suchon v. R.*,[120] an informal procedure case from earlier that same year, the Tax Court's decision was markedly different. Here, Justice Margeson considered whether the inclusion and deduction regime under section 56(1)(v) and section 110(1)(f)(ii) relating to workers' compensation payments precluded the application of section 6(1)(a) although the payment did not fall under the inclusion and deduction regime because it was paid by an employer. Justice Margeson observed that section 6(1)(a) is a general section "but surely it is of equal importance and significance with a so-called 'specific section' except where there is an ambiguity in the Statute."[121] Justice Margeson rejected the argument that the specific section should take priority over general here:

> However, surely this is only so where the so-called specific section acts to exempt from taxable income a payment or receipt such as that received as in the case at bar. If the specific section does not apply to the payment in question then the Court must apply the general section even though it may be very broad in its application and of wide scope. See Savage, *supra*.[122]

It is striking here that the decisions in *Tsiaprailis* and *Suchon* both cite *Savage*, but with different results, on similar facts, and were made by the same level of court in the same year. The highly insightful passage above demonstrates a comprehension of the faulty reasoning in previous cases that had justified their decisions based on the premise that specific rules take priority over general rules, even though the specific rule did not apply. That is, Justice Margeson's comments call into question whether it is appropriate to use the implied exception argument without a direct conflict between the general and specific rules. This more advanced understanding of the implied exception rule can explain the difference in the decisions by the Tax Court in *Tsiaprailis* and in *Suchon*.

In addition to *Suchon*, other cases that have refused to apply *expressio unius* reasoning and instead have held that where a specific rule does not apply, the general rule should be applied. For example, in the 1959 Supreme Court of Canada case of *Curran v. Canada*,[123] the amount fell outside a specific provision imposing tax on signing bonuses because it was not paid by the employer. However, the Court found that the general provision applied. Part of the decision appears to rest on the conclusion that the specific provision dealt only with onus of proof, which suggests that it would have been otherwise taxable under the general provisions taxing employment income.[124]

In *R. v. Stapley*,[125] the Federal Court of Appeal determined that because none of the exceptions to the general rule limiting the deduction of entertainment expenses to 50 percent applied, this indicated that the general rule applied. Along the same lines, in *65302 British*

---

119 *Supra* note 111 at 1569.
120 [2001] 1 CTC 2094 (TCC) [*Suchon*].
121 *Ibid* at para 118.
122 *Ibid* [footnote omitted].
123 [1959] SCR 850.
124 *Ibid* at 862.
125 2006 FCA 36, [2006] 3 CTC 188.

Columbia Ltd. v. Canada,[126] the Supreme Court of Canada considered a situation where an amount, a fine, fell outside specific rules mandating that certain expenses such as bribes and other types of fines were non-deductible. In this situation, the fines were to be considered under the general business deduction provision. Justice Bastarache's reasons quoted from Pierre-Andre Côté,[127] cautioning against the use of *expressio unius*.[128] Similarly, in *Canderel Ltd. v. Canada*,[129] where tenant inducement payments were not listed as an amortizable expenditure under section 18(9), the Supreme Court of Canada viewed this as an indication that Parliament had directed its mind to amortization of some expenses, and perhaps chose not to include tenant inducement payments within that list. However, the Court also commented that the specific provision was not meant to be exhaustive, and the tenant inducement payments were not in the same "category" as the prepaid expenses under section 18(9), and therefore *expressio unius* did not apply.[130]

Although the term was not mentioned, *expressio unius*-type reasoning was rejected by the majority of the Supreme Court of Canada in *Amateur Youth Soccer Association v. Canada*.[131] The taxpayer organization was not a nationwide athletic association and, therefore, fell outside of the Registered Canadian Amateur Athletic Association (RCAAA) regime, which affords those associations many of the same tax advantages as registered charities. The Court stated that it was nonetheless appropriate to consider if the association was a registered charity. While Justice Abella, in dissent, viewed the RCAAA regime as a complete code dealing with athletic associations, the majority stated:

> Neither the text nor scheme of the Act, nor the legislative purpose in establishing the RCAAA regime suggest that the RCAAA provisions preclude charitable status for non-nationwide sports organizations of all sorts or all descriptions. Rather, Parliament created a clear position for RCAAAs, and left the rest to be determined in accordance with the long-standing practice under the common law.[132]

The majority did not think that the RCAAA regime would necessarily be redundant if promotion of sport would be charitable because it was not clear if all RCAAAs would necessarily meet the common law definition of charity.[133] Thus, similar to what this article argues in response to the decision in *Savage*, there was not necessarily complete overlap between the specific provisions dealing with RCAAAs and the more general charities regime. Justice Abella argued that Parliament had turned its mind to drawing a distinction between national athletic associations and local ones and intended to give the tax benefits only to national organizations.[134] In making this decision, Justice Abella drew on contextual information such as the definition of non-profit organizations (which anticipated RCAAAs funnelling donations to local organizations), House of Commons debates concerning whether local organization should get preferential treatment, and commentary by the Federal Court of Appeal on the policy reason for restricting the preferential treatment to national

---

126 [1999] 3 SCR 804.
127 Pierre-Andre Côté, *Interprétation des lois*, 3d ed (Montreal: Editions Thémis, 1999) at 426.
128 *Ibid* at para 11.
129 [1998] 1 SCR 147 [*Canderel*].
130 *Ibid* at para 55.
131 2007 SCC 42, [2007] 3 SCR 217 [*AYSA*].
132 *Ibid* at para 18.
133 *Ibid* at para 20.
134 *Ibid* at paras 52-57.

organizations.[135] While the evidence posed could still be interpreted as leaving room for local athletic associations being charities, Justice Abella's broad consideration of context seems to be in line with the textual, contextual, and purposive approach to statutory interpretation.

2. SUMMARY OF THE CASE LAW ANALYSIS

Where items are left off a list or otherwise excluded and only a single provision is at issue, *expressio unius* reasoning is simply equivalent to a textual reading of the *ITA*. This means that it is also important to consider context and purpose. For example, a purposive analysis might consider whether the purpose of the provision would be better served by applying the provision to the situation. Also, it is important to consider if the list was intended to be exhaustive.[136]

Where the question is whether the general provision should be applied in light of a specific provision nearly applying to a thing, it is crucial that a textual, contextual, and purposive analysis be performed for *both* provisions to determine the legislative intent. Often, the cases have focused only on the specific provision, and have neglected to fully consider whether the general provision should apply. While analysis of general provisions is not easy, and courts often have less than perfect guidance on how to establish, for example, that an item is income from a source, this analysis is equally as important as the focus on the specific provision. Wording in the general provision may also preclude the application of the specific provision. For example, in *Watt v. The Queen*,[137] the Court considered whether farm losses, which were dealt with under section 31, could also be subject to the general rule in section 9(2). The Court said not, in part because section 9(2) stated that it was "subject to subsection 31."[138]

In considering the application of the general provision, the specific provision (including its text, context, and purpose) forms part of the internal context. As was stated by the Tax Court in *Tsiaprailis*, once a specific provision is enacted, it should not be ignored.[139] However, as the Court pointed out in *Suchon*, this does not mean that the general provision is of lesser importance.[140]

There can be no clear rule that will determine when implied exclusion should be considered. Sullivan suggests that *expressio unius* is a rule to be rebutted.[141] However, a rebuttable presumption is particularly problematic in situations where exclusion from a specific rule leads to an implied exclusion from a general rule. This is because there is no way to know when the presumption is triggered. In *Canderel*, the Court determined that the expenses were not in the same "category" as those expenses within the scope of the specific provision, but in cases such as *Savage* and *Schwartz*, the Court, without explanation, apparently believed the items were similar enough to employ implied exclusion-type

---

135 *Ibid*.
136 See *Canderel*, *supra* note 129 and accompanying text.
137 2000 DTC 1566 (TCC).
138 *Ibid* at para 27.
139 See *supra* note 112 and accompanying text.
140 See *supra* note 120 and accompanying text.
141 *Sullivan*, *supra* note 1 at 250.

reasoning. No rule can be developed to dictate when an item is "similar enough" to the specific provisions in question such that the presumption is automatically triggered. This is why the "complete mini-code" reasoning in *Savage*, *Schwartz*, and *Tsiaprailis* is not compelling. Is the specific provision a complete code for all prizes, all prizes not originating from a source, or all prizes exceeding $500? Is it a complete code for termination payments after employment or all employment contract termination payments? Is it a complete code for insurance payments or insurance payments and settlements? There can be no automatic rule to apply here. Thus, a presumption of *expressio unius* cannot be used to promote certainty in applying the *Act*.

There is another reason that a presumption in favour of *expressio unius* is not preferable. In the context of tax cases, this could, and perhaps has, served to weaken the general provisions in the *Act*. In fact, given the crucial role played by the general provisions in establishing the tax base, it may actually be a better presumption that *expressio unius* does not apply, at least in the way it has in tax cases. Instead, it could be presumed that if it was intended that the item be governed by the specific provision, Parliament would have said so, and, thus, to be excluded from the operation of the specific provision reflects an intention to fall back to examine the application of the general provision. This is supported by the decision in *Suchon*.

It is preferable for implied exclusion to serve, as Posner suggests, as an item on the list of considerations. In cases involving specific and general provisions, implied exclusion raises the question for interpreters to consider: Does the omission from the ambit of the specific provision give rise to a conclusion that it was to be excluded from the general provision? A variety of factors that should be considered are explored below in order to challenge the assumptions underlying *expressio unius*. Drawing from the analysis from numerous cases and gathering the factors will hopefully provide a useful collection of considerations for interpreters.

i. Whether There is Language Indicating that the General Provision Should Still Apply

Legislators should have the ability to enact provisions for greater certainty and without precluding the application of general rules. In *Savage*, the Court acknowledged that the words in section 56(1) were intended to defeat an *expressio unius* argument, though it then went on to essentially apply *expressio unius* anyway.[142]

ii. The Likelihood of the Occurrence of the Circumstances in Question

The likelihood of the occurrence of the situation at hand affects the likelihood that the situation was considered. For example, in *Schwartz*, it is relatively unlikely that an employment contract would be terminated before employment began, and this makes it more likely that the omission was through inadvertence. On the other hand, a prize payment of

[142] See *supra* note 91 and accompanying text.

under $500 is almost certain to occur, thus making the *expressio unius* argument in *Savage* more reasonable.

iii. Whether There is a Carve-Out or a Limit in the Specific Provision

A carve out or a limit in the specific provision makes it likely that legislators had considered situations where the amount fell outside of the limit or within the carve-out. However, this should not be conclusive proof that exclusion was intended also to exclude the application of a general rule, especially if the overlap between the carve out and the general provision is incomplete, as was the case in *Savage*. The incomplete overlap was a factor in the decision not to apply implied exclusion reasoning in *AYSA*.

iv. Whether the Specific Rule was Intended to Bring Greater Certainty to the Legislation as Opposed to Altering the Existing Legislation

Whether the specific rule was enacted for greater certainty or to alter existing legislation is a relevant factor. For example, was the specific provision intended to impose tax on an item already believed to be taxable or was it intended to impose tax on an item formerly believed to be non-taxable? The latter would better support the application of *expressio unius*, and was a factor in the *Schwartz* decision. However, this clearly is not conclusive where the item in question falls outside of the specific provision as it is then still possible that the item could properly fall within the ambit of the general provision. Also, it is often difficult to determine whether the provision was enacted for greater certainty. While in the case of other legislation it might be reasonable to conclude that a specific provision would not be unnecessarily enacted (that is, if it would be caught by a general provision, there would be no need for a specific one), there is significant uncertainty about when many of the general provisions in the *ITA* will apply. Indeed, a great deal of the income tax case law surrounds the interpretation of general provisions, such as whether an amount is included as income from employment, whether an endeavour is a business (and thus its profits taxable as income from a business), whether something is deductible under the concept of profit, whether a capital gain exists, and whether the income is from an unenumerated source. It is understandable that legislators would want to create certainty surrounding a thing that it believes would be caught by a general provision.

v. Whether there is a Direct Conflict Between the Two Provisions

Finally, implied exclusion should not be confused with implied exception. There is not, nor should there be, a general rule that if a specific rule almost applies, the general rule does not. As noted in Part III, it could be argued that the courts have made this error in the past in cases such as in the Tax Court's decisions in *Foulds* and *Tsiaprailis*. The apparent conclusiveness of the implied exception rule makes it a convenient tool for reason justification. Even if implied exception is appropriately applied, it should also be part of a textual, contextual, and purposive analysis to determine if the legislative intent is really that the specific provision would take priority over the general provision in the circumstances.

B. FAILURE TO FOLLOW A PATTERN OF EXPRESS REFERENCE

1. REVIEW OF THE CASES

If the provision in question does not contain the same words used in another provision, it may be implied that those words were intentionally excluded. This lack of parallel drafting is one situation in which *expressio unius* has been used in tax cases. This use of the canon is an example of looking to internal context (in this case, another provision in the *Act*) to determine meaning of the text of the provision in question.

Sullivan calls this non-parallel drafting a failure to follow a pattern of express reference. She explains, "[o]nce a pattern has been established, it becomes the basis for expectations about legislative intent."[143] One question that should arise in the application of this reasoning (but rarely does in the tax cases discussed below) is whether a pattern has, in fact, been established. Another question that should be considered is whether other factors indicate that the application of *expressio unius* would be contrary to the intention of Parliament.

One example of a case where a failure to follow a pattern of express reference was used to justify the decision can be found in the reasons of the Supreme Court of Canada majority in *Schwartz*.[144] In this case, the definition of "retiring allowance" in section 248(1), which is taxable under section 56(1)(a)(ii), mentioned only "employment," whereas section 80.4(1) mentioned both "employment" and "intended employment."[145] The majority of the Court reasoned that the exclusion of "intended employment" from the definition of retiring allowance implied that it was not intended to cover situations of intended employment.[146] The Court applied the "presumption" that words have the same meaning throughout the statute, and saw "no reason" to depart from the principle because it supported the ordinary meaning of the terms "employment" and "retiring allowance."[147] The Court also pointed out that the amendment made to section 80.4(1) was made in the same legislation as the amendment of the definition of retiring allowance.[148] Although not overtly stated, the Court here suggested that being contained within the same package made it more likely that the legislators had considered and intentionally omitted the term "intended employment" from the definition of retiring allowance. However, the lack of connection between the two provisions in question does weaken the argument. This is a contextual factor that the Court should have addressed.

Another example of the application of *expressio unius* in a non-parallel drafting situation can be seen in the Federal Court of Appeal's decision in *The Queen v. Vancouver Art Metal Works Ltd.*[149] Here, the Court considered the meaning of section 39(5), which excluded "traders and dealers" from being able to treat profits from sale of securities as capital gains. The question at hand was whether the term "traders or dealers" meant only registered or licensed persons. The Court noted that within that same provision, there was an exclusion for a corporation "licensed or otherwise authorized" to operate as a trustee. Therefore, "[h]ad

---

143 *Sullivan, supra* note 1 at 247.
144 *Supra* note 39.
145 *Ibid* at para 60.
146 *Ibid*.
147 *Ibid* at para 61.
148 *Ibid* at para 62.
149 1993 DTC 5116 (FCA).

Parliament intended such a restriction to apply to a 'trader or dealer' under paragraph 39(5)(a), it would have said so."[150] The Court then went on to quote a criminal law case in which the Supreme Court "referred to the maxim *expressio unius est exclusio alterius* and ruled that the presence of a restriction in one paragraph reinforces the position that Parliament did not intend to restrict the scope of the other paragraphs in which the restriction did not appear."[151]

The case of *Vancouver Art Metal Works*[152] contained a second example of how a failure to follow a pattern of express reference justified the Court's conclusion, though this example is less convincing than the first. The Court pointed out that section 47.1 (dealing with indexed security investment plans) contained the phrase "trader or dealer in securities," which was defined to mean persons registered to trade in securities. The definition applied only to section 47.1 and section 38, which, according to the Court, indicated an intention that the restriction to registered traders was not intended to apply in section 39(5)(a).[153] This reasoning is less persuasive than it would first appear. The whole series of definitions contained in section 47.1(1) applied to sections 47.1 and 38. Section 38, the general section dealing with capital gains and losses, is closely connected with section 47.1, which redefined capital gains and losses for indexed security investment plans. Given this close connection, the specific mention of section 38 in addition to section 47.1 does not strongly indicate that Parliament had considered all other sections in the *Act* that may have included some of the same terms as were defined in section 47.1(1). The Court should have considered this factor.

The case of *Lewin v. R.*[154] concerned whether a family trust was liable for Part XIII tax in spite of a resolution to pay a beneficiary a dividend it had received, and, if so, whether the appellant, a former trustee, should be personally liable for the unremitted tax. After determining the trust was liable for Part XIII tax for the year in question because the dividend was not paid to the beneficiary in the year in question, the Tax Court proceeded to determine the appellant's liability for the unremitted tax under section 227(5). This provision attached liability where the trustee authorized amounts "paid," whereas section 212(1) imposed Part XIII tax for amounts "paid or credited." The Court stated that pursuant to the maxim *expressio unius*, "where the legislator causes a provision to apply to a number of categories but fails to include one that could easily have been included, one may infer that the legislator intended to exclude that category from the application of the provision."[155] Therefore, the Court noted it should not be assumed that section 227(5) should apply to amounts "credited." Here, the amount was "paid" at a time when the appellant was no longer trustee, and therefore he was not liable. Given the close relationship of the two provisions studied, as well as the Court's explanation earlier in the judgment of the difference between the terms "credits" and "pays,"[156] this implied exclusion reasoning is sound, though perhaps not as

150 *Ibid* at 5117.
151 *Ibid* at 5118 (citing *R v Multiform Manufacturing Co*, [1990] 2 SCR 624).
152 *Ibid*.
153 *Ibid*.
154 2011 TCC 476, [2012] 3 CTC 2024.
155 *Ibid* at para 64.
156 *Ibid* at para 55.

fully explained as it might have been.[157] It should be noted that, while the Federal Court of Appeal affirmed the lower court's decision,[158] the Court in its brief judgment stated that its decision was "not to be taken as endorsing the judge's reasons with respect to subsection 227(5) of the *Income Tax Act*."[159]

A convincing justification for the use of *expressio unius* can be found in the reasons of Justice Morgan of the Tax Court of Canada in *London Life Insurance Co. v. The Queen*.[160] The statutory interpretation issue here was similar to those already discussed. The provision in question, clause 190.11(b)(ii)(A), mentioned only "reserves," while another provision, paragraph 190.13(a)(iii), mentioned "deferred taxes" as well as "reserves." Here, the Tax Court cited *expressio unius* as a reason for implying a deliberate exclusion of "deferred taxes" from the provision in question such that it is not included within the term "reserves."[161] The Court went much further than the mere suggestion in *Schwartz* that being within the same amendment package as the other provision made the difference intentional. Here, Justice Morgan posited that the same drafter drafted these two sections, which were very close together in the *ITA* and were connected to one another (in fact, they were inter-related and in the same "tiny taxing statute"[162]), and therefore, the first section was in the mind of the drafter when drafting the second section.[163] This was "intentional and not a slip of the drafting pen."[164] The Court looked to a variety of factors here to determine if the non-parallel drafting was intentional, and as a result this is an example of a compelling use of *expressio unius*.

The use of *expressio unius* has been rejected in at least one non-parallel drafting situation. In *Trans World Oil & Gas Ltd. v. The Queen*,[165] the Tax Court considered whether the taxpayer could offset foreign accrual property income (FAPI) of a controlled foreign affiliate against the affiliate's business losses, which had accrued in a previous year when it was not owned directly by the taxpayer, but by its controlling shareholder. The loss could be taken if it was a "deductible loss" for the year or one of the five years prior. The existence of a deductible loss was determined under section 5903(1) of the *Income Tax Regulations*.[166] Under section 5903(1)(b), deductible losses included exempt losses, and the issue here was whether the affiliate needed to be an affiliate of the taxpayer at the time the exempt loss was incurred.

Justice Bowman noted that where words of the legislation were not clear and unambiguous, it was necessary to look to the object and spirit of the *ITA*.[167] Here, the

---

157 For another non-parallel drafting situation in which *expressio unius* was referred to, refer to Justice L'Heureux-Dubé's decision in *Hickman Motors Ltd v Canada*, [1997] 2 SCR 336. In her decision, she uses *expressio unius* to support her decision that there is no minimum time period for which the property had to produce income in order for capital cost allowance to be available under regulation 1102 (1)(c) of the *Income Tax Regulations*, CRC, c 945. Justice L'Heureux-Dubé cites a number of other capital cost allowance provisions in which time periods were specifically set out (at paras 79-80).

158 *Canada v Lewin*, 2012 FCA 279, 2013 OTC 5006.

159 *Ibid* at para 2.

160 2000 DTC 1774 (TCC) [*London Life*].

161 *Ibid* at para 22.

162 *Ibid* at para 18.

163 *Ibid* at para 21.

164 *Ibid* at para 22.

165 1995 DTC 260 (TCC) [*Trans World*].

166 CRC, c 945.

167 *Trans World*, *supra* note 165 at 266.

Minister's interpretation in support of denial of the loss was "more consonant with the overall scheme of the *Act* and regulations as they relate to FAPI."[168] In coming to his conclusion, Justice Bowman emphasized the objective of the scheme and rejected the taxpayer's *expressio unius* argument relating to a difference between the wording in paragraphs 5903(1)(a) and (b). While (a), which pertained to certain passive losses, applied to losses in a year "during which it was a foreign affiliate of the taxpayer or a person described in any of sections 95(2)(f)(iv) to (vii)," those words were absent in (b), which pertained to business losses and was the provision sought to be applied here. The taxpayer argued that the absence of such words meant that no such restriction was to be applied under paragraph (b), and, therefore, at the time of the loss the affiliate did not need to be a foreign affiliate of the taxpayer or a particular set of persons. The Court rejected this implied exclusion argument advanced by the taxpayer:

> One must be wary of the indiscriminate use of Latin maxims such as *expressio unius est exclusio alterius*. I doubt that it is really an appropriate guide in this case to the interpretation of this provision. It would apply if all that I had to construe were paragraph 5903(1)(a) … I do not believe it is reasonable to conclude from the absence from paragraph 5903(1)(b) of the words "or of a person described in paragraphs 95(2)(f)(iv) to (vii)" that it was intended to broaden the group of potential owners to everyone in the world.[169]

The Court went on to comment that the result of the taxpayer's interpretation would be inconsistent with the purpose of the regime as the use of passive income losses would actually be more restrictive under section 5903(1)(a) because of the more limited class of persons who could have owned the foreign affiliate at the time of the losses. This factor appears to have outweighed the implied exclusion argument.[170] The Federal Court of Appeal dismissed the appeal without explanation.[171]

A second non-parallel case in which an implied exclusion argument was not applied is *The Queen v. Nassau Walnut Investments Inc.*[172] In this case, it had been argued by the Minister that there was no ability to late file under the particular provision because it, unlike several other provisions, did not expressly provide for such relief. The Federal Court of Appeal disagreed, stating that the existence of express reference to late elections in other provisions only raised a rebuttable presumption that the legislators did not intend to permit late election here. In this case, the presumption was rebutted for three reasons: first, to do otherwise would be to embrace literalism; second, the existence of the express exceptions in the other provisions were not determinative; and, third, courts had embraced a contextual or purposive approach. The restrictive approaches with respect to elections were in the context of the possibility of retroactive tax planning, and that was not a concern in the situation facing the Court or a concern in enacting the provision in question.[173] In this case, the Court looked to context and purpose to rebut the presumption that the absence of a reference to late election excluded the possibility of such relief.

---

168 *Ibid*.
169 *Ibid* at 267.
170 Similarly, see also Justice Cartwright's dissent in *Canada v Trans-Canada Investment Corp Ltd*, [1956] SCR 49, where he refused to follow *expressio unius* reasoning in a situation of non-parallel drafting because it would defeat the intention of Parliament (at 64).
171 *Trans World Oil & Gas Ltd v The Queen*, (1997) 1998 DTC 6060 (FCA).
172 (1996), 1997 DTC 5051 (FCA) [*Nassau*].
173 *Ibid* at 5058.

2. SUMMARY OF THE CASE LAW ANALYSIS

Expressio unius has been helpful in uncovering the meaning attached to particular words where certain words are omitted from a provision, but are found elsewhere in the statute. However, a study of the case law demonstrates that caution must be exhibited, in light of the size of the *ITA*, the breadth of its scope, and its many drafters over a long period of time. The absence of particular words may simply be inadvertence or a failure to appreciate, in advance, the situation arising in the case. Further, courts may properly consider whether implied exclusion reasoning is contrary to the purpose of the legislation, as was done in *Nassau* and *Trans World*.

In the case of non-parallel drafting, it is crucial to take note of a number of characteristics of the *ITA* when examining the internal context. The *ITA* is lengthy and complex, and has been subject to amendments on at least an annual basis. This makes it unreasonable to expect that drafters have full knowledge of each and every provision in the *ITA*, and inadvertence is a real possibility for non-parallel drafting. A list of factors that would affect the likelihood that the other provision was considered when drafting the provision under consideration are as follows:

(1) Whether they were drafted by the same drafter. For example, this is likely if the provisions were both in the same "package" of amendments, as was noted in *London Life*. However, provisions that are less closely connected, such as in *Schwartz*, or in a large package of various amendments are less likely to have been drafted by the same drafter.

(2) Whether they are close in subject matter and proximity. This is a factor that the Court failed to take into account in *Schwartz*. The more closely connected the provisions, the more likely the exclusion was intentional.

(3) Whether the other provision (and the details of its language) is well-known. If the other provision and the details of its wording are commonly used or otherwise well-known, this would make it more likely that the words were intentionally omitted from the provision in question.

(4) The number of times the omitted words were used in other provisions. This goes to establishing a pattern of express reference. The greater the number of times the words have been used in other provisions, the easier it is to show that a pattern has been established.

V. CONCLUSION

The use of *expressio unius* or implied exclusion reasoning has been used in several well-known cases to narrow the tax base, often by impeding the application of general provisions that are crucial to maintaining a comprehensive tax base. Now that the Supreme Court of Canada has made it clear that the *ITA* must be interpreted taking into account text, context, and purpose, it is clear that it is unacceptable to use this canon without properly considering the many other factors that could either support or reject a conclusion of implied exclusion.

Many of the cases to date have failed to do so. On the other hand, implied exclusion can raise a question that can assist the courts with determining legislative intent: what can be implied by the exclusion? This should only be the beginning of an inquiry, rather than a conclusion. To help to ensure that courts do not use e*xpressio unius* to jump to conclusions or as a tool for reason justification, the term "implied exclusion" is preferred over its Latin term. By using implied exclusion as a starting point, it can serve as a useful tool of inquiry that can bring in textual and contextual factors into the statutory interpretation process.

The cases applying *expressio unius* to a single provision where items are left off a list are the least common and the least contentious. However, a review of the case law demonstrates that there have been numerous problems with *expressio unius* reasoning in cases considering a general provision where a specific provision nearly applies. First, where *expressio unius* reasoning is applied on the basis that exclusion from the specific rule implies exclusion from the general rule, there is rarely a full consideration of textual, contextual, and purposive factors. Second, implied exclusion is often confused with implied exception. In the case of non-parallel drafting, courts have often used *expressio unius* without a full textual, contextual, and purposive analysis. That is, they have looked only to one element of context, the presence of different words in another section, but fail to dig deeper to examine whether this is truly sufficient to imply intentional exclusion of those words from the provision in question. However, in cases where consideration of the fuller context and the purpose of the provisions have been taken into account, implied exclusion reasoning can be seen as serving a valuable role as an impetus for undercovering legislative intent.