(In)visible Inequalities: Women, Tax and Poverty

*Claire F.L. Young**

L'impact de la Loi de l'impôt sur le revenu *sur les femmes a été le point central de deux contestations en vertu de l'article 15 de la* Charte *qui ont été entendues récemment par la Cour suprême du Canada. Dans l'arrêt* Symes *c.* Canada, *la majorité des juges a statué que la non-déductibilité des frais de garde d'enfants à titre de dépense d'entreprise ne constituait pas une discrimination fondée sur le sexe. Dans l'arrêt* Thibaudeau *c.* Canada, *la majorité a conclu que l'obligation d'inclure dans le calcul du revenu les sommes reçues à titre de pension alimentaire pour l'entretien des enfants ne constituait pas une discrimination fondée sur la situation de famille. Étant donné qu'on utilise le régime fiscal pour distribuer les subventions accordées par de nombreux programmes sociaux et économiques, l'accès des femmes et des minorités à ces subventions est une question fondamentale dont on doit tenir compte lorsqu'on étudie l'équité du régime.*

Cet article examine l'impact du régime fiscal sur les femmes et démontre que le régime fiscal comporte de multiples exemples de traitement inégal des femmes par rapport aux hommes. Bien que l'auteure reconnaisse que toute forme de catégorisation est problématique, elle se concentre sur les inégalités auxquelles font face quatre groupes de femmes : les femmes pauvres, les femmes âgées, les lesbiennes et les mères. À la lumière des arrêts Symes *et* Thibaudeau, *l'auteure étudie l'efficacité de la* Charte *en tant qu'outil permettant d'éliminer les inégalités. En outre, elle conclut que même si le régime fiscal est modifié, il se peut qu'il ne soit jamais un outil efficace pour appliquer les programmes sociaux de manière équitable. Enfin, il pourrait bien être temps de laisser tomber la stratégie qui se fonde sur les contestations pour éliminer les inégalités, et d'adopter une approche qui se concentre davantage sur le domaine politique.*

The issue of the impact of the Income Tax Act *on women has been the focus of two recent section 15* Charter *challenges heard by the Supreme Court of Canada. In* Symes *v.* Canada *the majority of the Court found that the non-deductibility as a business expense of child care expenses was not discriminatory on the basis of sex and in* Thibaudeau *v.* Canada *the majority held that the requirement that child support payments be included in income did not discriminate on the basis of family status. Given that the tax system is used to deliver financial subsidies for many social and economic programs, access to those subsidies by women and minorities is a key issue in considering the fairness of the system.*

This article examines the impact of the tax system on women and demonstrates that the tax system is replete with examples of unequal treatment of women compared to men. While recognising that any form of categorisation is problematic, the author focuses the inequalities faced by four groups of women; poor women, elderly women, lesbians and mothers. In light of Symes *and* Thibaudeau, *the author considers the effectiveness of the* Charter *as a tool by which to redress these inequalities and discusses why a* Charter *challenge is unlikely to succeed. Further, the author concludes that even if changes are made to the tax system, it may never be an effective tool by which to deliver social programs in a fair manner. It may be time to shift the focus from a litigation based strategy to redress the inequalities discussed in the article to an approach that focuses more on the political sphere.*

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I. INTRODUCTION

The 1995 federal budget proposes massive spending cuts to federal programs in the name of deficit reduction. The spending cuts will be achieved by an initiative termed the Program Review which will reduce federal spending by $9.5 billion in the next three years,[1] and by drastic reductions in the amounts transferred to the provinces.[2] It is clear that many social programs will be affected.[3] As one considers this policy and the impact of these cuts, one must not forget the role that the tax system[4] plays as a funding mechanism for aspects of many social programs. Indeed as I shall demonstrate, the tax system is a powerful social and economic tool that is used to deliver financial subsidies for many activities and programs.[5] It is critical at this time, therefore, to review and consider carefully the impact our tax system has on various groups in Canadian society. In so doing we must evaluate its impact on the particular group and determine if the system treats that group fairly[6] and if not, why not.

In this article I examine the impact of the tax system on women[7] and conclude that such an exercise is truly a study in inequalities. Unfortunately, these inequalities have not yet been found to be discriminatory under section 15 the *Charter of Rights and Freedoms*[8] by the Supreme Court of Canada. In *Symes* v. *Canada*[9] the majority of the

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[1] See Canada, House of Commons, *Budget Plan* (Ottawa: Department of Finance, 27 February 1995) at 7.

[2] The proposal is to introduce the Canada Health, Education and Social Transfer to replace the Established Programs Financing and the Canada Assistance Plan which will result in a move from cost-sharing with the provinces to block funding for programs in the areas of provincial responsibility such as child care.

[3] For example, under Program Review, Human Resources Development Canada, the department which administers, among other items, unemployment insurance, income security programs for children and the elderly, labour market adjustment and social development programs, will see its budget reduced by $885 million over the next three years, a reduction of 34.8 per cent. See *Budget Plan*, *supra* note 1 at 36 and 111.

[4] Although my primary focus is on the income tax system, I use the term "tax system" rather than "income tax system" because the former term is broader and includes taxes such as the Goods and Services Tax. It also incorporates the concept of the exclusion from taxation of some forms of wealth because Canada does not levy a personal wealth tax such as an annual wealth tax, an estate tax or succession duties.

[5] A recent example is the introduction of the child tax benefit in 1993. S. 122.6 of the *Income Tax Act*, R.S.C. 1985, c. I-5 [hereinafter the *Act*] replaces the family allowance for children, an item previously delivered by way of a direct grant. Other examples include the numerous tax subsidies for business, including, for example, the small business deduction (s. 125) and the manufacturing and processing profits deduction (s. 125.1).

[6] Fairness is a concept that is discussed in more detail, see pp. 103-04, below.

[7] Women are, of course, not a monolithic group and it is equally important to consider how the tax system affects different groups of women. While my focus in this article is on the impact of the tax system on women generally, I shall also demonstrate what impact factors such as class, age and sexual orientation have on the way the tax system affects women.

[8] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter the *Charter*]. S. 15 reads in part:

> 15(1) Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and in particular, without discrimination based on race, nationality or ethnic origin, colour, religion, sex, age, or mental or physical disability.

[9] [1993] 4 S.C.R. 695, 110 D.L.R. (4th) 470, [1994] 1 C.T.C. 40 [hereinafter *Symes* cited to C.T.C.].

Supreme Court found that the non-deductibility as a business expense of child care expenses was not discriminatory and in *Thibaudeau* v. *Canada (M.N.R.)*[10] the majority found that the requirement that child support payments be included in custodial parents' income was also not discriminatory. But, as we see in those cases, the non-recognition by the Supreme Court of women's inequality under the tax system as discrimination is itself a highly gendered phenomenon. The discrimination suffered by Elizabeth Symes and Suzanne Thibaudeau is clearly visible to both the women judges on the Court, while being invisible to all the male judges on the Court.[11] My primary focus in this article is the impact of the tax system on women and I demonstrate that the system is replete with examples of unequal treatment. The inequalities are particularly evident when one examines access to tax subsidies. In light of the two recent Supreme Court of Canada cases mentioned above, I also consider the issue of the potential of the *Charter* as a tool to remedy this unequal treatment. My conclusion is that there is little to be optomistic about concerning the potential for success of future *Charter* challenges to the *Act* on the basis of sex discrimination. A more fruitful approach may well be to redirect our attention to the political sphere in an effort to redress the inequalities that I discuss in this article.

Our tax system is not just about revenue raising. It is in fact a massive spending program and should be evaluated as such. Tax expenditure analysis theory tells us that any measures such as income exclusions, deductions, deferrals or tax credits which depart from the "normative tax system" are tax expenditures.[12] That is, rather than delivering a subsidy for a particular activity or endeavor by way of, for example, a direct grant, the government delivers the subsidy through the tax system. While there are ongoing debates about how one defines the normative or benchmark structure of the tax system, which lead to issues about whether a particular item is a tax expenditure or not, these debates do not, in my opinion, detract from the value of tax expenditure analysis as a tool of evaluation.[13] Furthermore, the publication by the federal government of tax expenditure accounts and the acknowledgment that tax expenditure analysis plays a role in the budget process indicate its validity as a method of analysis.[14] Proponents of tax

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[10] [1995] 2 S.C.R. 627, [1995] S.C.J. No.42 (QL) [hereinafter *Thibaudeau*], aff'g (1994), D.L.R. (4th) 261 (F.C.A.), 2 C.T.C. 4 [hereinafter *Thibaudeau* (F.C.A.) cited to C.T.C.], rev'g 92 D.T.C. 2111(T.C.C.) [hereinafter *Thibaudeau* (T.C.C.)].

[11] In *Symes*, the majority of the court, consisting of Justices Lamer, La Forest, Gonthier, Sopinka, Cory, Iacobucci, and Major, found there was no discrimination on the basis of sex and in *Thibaudeau* the majority of the court, consisting of Justices La Forest, Sopinka, Gonthier, Cory, and Iacobucci, held that there was no discrimination against separated or divorced custodial parents. In both cases the only women on the Court, Justices L'Heureux-Dubé and McLachlin, held that the tax provisions contravened s. 15 of the *Charter* and were discriminatory.

[12] Tax Expenditure Analysis was first introduced as a concept by Stanley Surrey in *Pathways to Tax Reform* (Cambridge, Mass: Harvard University Press, 1973). Since that time much has been written on the issue. One excellent Canadian collection of articles is N. Bruce, ed., *Tax Expenditures and Government Policy* (Kingston, Ontario: John Deutsch Institute for the Study of Economic Policy, Queens University, 1988). A "normative tax system" consists of the basic structural features of the current income tax system. According to the Department of Finance it includes "the existing tax rates and brackets, unit of taxation, time-frame of taxation, treatment of inflation for calculating income and those measures designed to reduce or eliminate double taxation". See Canada, Department of Finance, *Personal and Corporate Income Tax Expenditures*, (Ottawa: Department of Finance, 1993) at 4.

[13] Bruce, *ibid.*

[14] Tax expenditure accounts were released in 1979, 1980, 1985, 1992 and 1993. See Canada, Department of Finance, *Tax Expenditures Account: A Conceptual Analysis and Account of Tax*

expenditure analysis argue that its value stems from the fact that it allows one to quantify spending programs that are "hidden" in the tax system. For example, in 1991 the federal government spent $210 million subsidising certain health care expenses through the tax credit for medical expenses.[15] The proponents of tax policy analysis would also argue that when such a program is evaluated it should be done by reference to budgetary criteria such as the target effectiveness of the subsidy and its cost efficiency, as well as by reference to traditional tax policy criteria. I would take tax expenditure analysis one step further and suggest that it allows us to focus on a new, broader range of issues which are fundamentally related to the concept of fairness. Such issues include a consideration of how funds expended through the tax system are allocated. Who benefits from these expenditures? And, perhaps more importantly, who does not benefit from them?[16]

What is considered to be fairness in taxation is, like beauty, very much in the eye of the beholder.[17] Traditional tax policy analysis has judged the effect of tax measures and, to a certain degree, their fairness, by reference to factors such as horizontal and vertical equity, neutrality and economic efficiency and administrative simplicity.[18] Underpinning these criteria have been the normative values of income taxation based on ability to pay and taxation as a tool of income redistribution. But, as feminists have noted, traditional tax policy analysis omits a very important element, that is equality among particular groups in society.[19] Therefore my focus in this article is on the broader concept of (in)equality, rather than the concept of equity as it has traditionally been applied in tax policy debates.

Traditional tax policy analysis defines horizontal equity as the requirement that equals be treated equally and vertical equity as the treatment of persons in differing situations in appropriately differing ways. The limitations of analysis by reference to

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Preferences in the Federal Income Tax and Commodity Tax Systems (Ottawa: Department of Finance, 1979); Canada, Department of Finance, *Tax Expenditure Account: An Account of Tax Preferences in Federal Income and Commodity Tax Systems, 1976-1980* (Ottawa: Department of Finance, 1980); Canada, Department of Finance, *Account of the Cost of Selective Tax Measures*, (Ottawa: Supply & Services Canada, 1985); Canada, Department of Finance, *Personal Income Tax Expenditures*, (Ottawa: Department of Finance, 1992) and Canada, Department of Finance, *Personal and Corporate Income Tax Expenditures*, *supra*, note 12. See also S. Poddar, "Integration of Tax Expenditures into the Expenditure Management System: The Canadian Experience" in Bruce, *supra* note 12; and, E. Lindquist, "Improving the Scrutiny of Tax Expenditures in Ontario: Comparative Perspectives and Recommendations" in A. M. Maslove, ed., *Taxing and Spending: Issues of Process* (Toronto: University of Toronto Press, 1994) 32 where the important role that tax expenditure analysis has played in the federal government's policy making is discussed in detail.

[15] S. 118.2 of the *Act* provides a non refundable tax credit for certain medical expenses.

[16] I am not suggesting that analysis based on the traditional tax policy criteria preclude consideration of issues such as fairness and equity. But it is apparent that this analysis has not focused in the past on an examination of group inequality.

[17] For a discussion of the public perceptions about what constitutes fairness in the tax system, see Ontario Fair Tax Commission, *Fair Taxation in a Changing World* (Toronto: University of Toronto Press, 1993) and in particular the discussion at 44-68.

[18] For an in-depth analysis of the various meanings ascribed to the concept of fairness, see A. Maslove, ed., *Fairness in Taxation: Exploring the Principles* (Toronto: University of Toronto Press, 1993) [hereinafter *Fairness in Taxation*].

[19] The Canadian Advisory Council on the Status of Women first noted this omission. See Canadian Advisory Council on the Status of Women, *Women and Income Tax Reform* (Background Paper) by M. Maloney (Ottawa: Canadian Advisory Council on the Status of Women, 1987) at 2.

these definitions of equity are many and have been discussed elsewhere.[20] Maureen Maloney has pointed out that "[w]hile current interpretations of equity, both vertical and horizontal, may catch class biases, they do not go far enough because the need for equity is generally recognized with respect only to the distribution of income, and even then with very limited effect."[21] Evaluation of the tax system by reference to equality is not as limited in scope. It requires an examination of the impact of the provisions of the *Act* on particular groups in society to determine if they are treated in a prejudicial manner. Therefore factors such as gender, sexual orientation, race, disability and other aspects of social identity must be taken into account in evaluating the fairness of the tax system. There is a second aspect to this issue. This analysis must take into account that equality does not merely mean formal equality, but must also encompass the concept of substantive equality. An approach based on formal equality would treat all individuals in the same manner, regardless of the differences between them. It has been said that it "is inadequate to the task of creating real equality because it does not encompass or even acknowledge inequality of condition".[22] Substantive equality recognises that in order to achieve equality, different groups in society may require different treatment.[23] An example of formal equality in the tax context is the gender neutrality of the *Act*. Each provision applies to both men and women and yet, as I shall discuss, women suffer significant inequalities when compared to men in terms of the application of the tax system.

Feminist work on tax policy issues affecting women has covered a wide range of issues. For example the issue of whether the tax unit should be the individual or whether the tax system should recognise certain relationships and, for instance, tax spouses as one unit has been the focus of much of the literature.[24] Other issues have included the non-taxation of imputed income,[25] the effect of the 1987 tax reform on women, the

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[20] See *e.g.* R.W. Boadway and H.M. Kitchen, *Canadian Tax Policy*, 2d ed. (Toronto: Canadian Tax Foundation, 1984) at 7-15.

[21] M. Maloney, "What is the Appropriate Tax Unit?" in A.M. Maslove ed., *Issues in the Taxation of Individuals* (Toronto: University of Toronto Press, 1994) 116 at 118.

[22] G. Brodsky and S. Day, *Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back?* (Ottawa: Canadian Advisory Council on the Status of Women, 1989) at 150.

[23] McIntyre J. quoted Dickson C.J. from *R.* v. *Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 347 in *Andrews* v. *The Law Society of British Columbia,* [1989] 1 S.C.R. 143 at 165 when discussing the example of religious freedom:

> In fact, the interests of true equality may well require differentiation in treatment. McIntyre J. then continued:
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> In simple terms, then, it may be said that a law which treats all identically and which provides equality of treatment between "A" and "B" might well cause inequality for "C", depending on the differences in personal characteristics and situtations. To approach the ideal of full equality before and under the law — and in human affairs an approach is all that can be expected — *the main consideration must be the impact of the law on the individual or group concerned.* [emphasis added]

[24] See *e.g.* L. Dulude, "Joint Taxation of Spouses — A Feminist View" (1979) 1:4 Can. Tax'n: J. Tax Pol'y 8; K. Lahey, "The Tax Unit in Income Tax Theory" in E.D. Pask, K.E. Mahoney & C.A. Brown, eds., *Women, the Law and the Economy* (Toronto: Butterworths, 1985) 277; L. Dulude, "Taxation of the Spouses: A Comparison of Canadian, American, British, French and Swedish Law" (1985) 23 Osgoode Hall L.J. 67; and Maloney, *supra* note 21.

[25] Imputed income from household production is primarily the value of women's unpaid labour in the home. Such labour is considered to be "earned income in kind" and the theory is that ignoring its value for tax purposes means that those women who work outside the home in the paid labour force

potential application of the *Charter* to the *Act*, the interrelationship of tax and family law and other tax policy issues that affect women.[26] More recently, the *Symes* and *Thibaudeau* litigation have generated considerable feminist work on the issues raised in the cases.[27] I shall focus on the inequalities faced by four groups of women; poor women, elderly women, lesbians and mothers. It is important to realise, however, that any form of categorisation in this manner is problematic. In an attempt to discuss the issues in a clear manner, women's oppression becomes reduced to a series of discrete examples.[28] In reality, life is not about fitting neatly into one particular category and indeed many women may fall into more than one of the categories I use. Consequently the picture is often more complex than the one that is illustrated by my four examples. Nevertheless, such an approach is a starting point for consideration of the inequitable application of the tax system to women. Furthermore, there is one theme in particular that runs through my entire article; that is poverty. Poverty is exacerbated, in many cases, by the lack of access to certain tax subsidies or the inadequacy of their amount. Concurrently, the tax system discriminates in many ways against those who are already poor. I now turn to the inequalities faced by these women.

II. Inequalities Faced by Four Groups of Women

A. *Women as the Poor*

Women tend to earn less than men. In 1992, women with full time paid jobs earned only 71.8 per cent of what men earned.[29] In 1991, the average female-headed family had

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are at a disadvantage as they have to purchase those household services or forego leisure time in order to provide them for themselves and their families.

[26] See *e.g.* M. Maloney, "Women and the Income Tax Act: Marriage, Motherhood and Divorce" (1989) 3 C.J.W.L. 182; L. Dulude, "Tax and Family Laws: A Search for Consistency in Family Law in Canada" in E. Sloss, ed., *Family Law in Canada: New Directions* (Ottawa: Canadian Advisory Council on the Status of Women, 1985) 63; *Women and Income Tax Reform, supra* note 19; National Association of Women and the Law, *Women and Tax Policy* (Ottawa: National Association of Women and the Law, 1991); F. Woodman, "The Charter and the Taxation of Women" (1990) 22 Ottawa L. Rev. 625; B. Kitchen, "The Patriarchal Bias of the Income Tax in Canada" (1986) 11 *Atlantis* 35; L. Philipps, *Taxing Inherited Wealth: Ideologies About Property and the Family in Canada* (LL.M Thesis, York University, 1992).

[27] See *e.g.* C.F.L. Young, "Child Care — A Taxing Issue?" (1994) 39 McGill L.J. 539 [hereinafter "Child Care — A Taxing Issue"]; C.F.L. Young, "Child Care and the *Charter:* Privileging the Privileged" (1994) 2 Rev. Con. Studies 20; F. Woodman, "The Charter and the Taxation of Women" (1990) 22 Ottawa L. Rev. 625; C.F.L. Young, "*Symes* v. *The Queen*" (1991) British Tax Rev. 105; A. Macklin, "*Symes* v. *MNR*: Where Sex Meets Class" (1992) 5 C.J.W.L. 498; D.M. Eansor and C. Wydzynski, "Troubled Waters: Deductibility of Business Expenses under the *Income Tax Act,* Child Care Expenses and *Symes*" (1993) 11 Can. J. Fam. L. 249; E. Zweibel and R. Shillington, *Child Support Policy: Income Tax Treatment and Child Support Guidelines* (Toronto: The Policy Research Centre on Children, Youth and Families, 1993); E. Zweibel, "Child Support Policy and Child Support Guidelines: Broadening the Agenda" (1993) 6 C.J.W.L. 371 [hereinafter "Broadening the Agenda"]; E. Zweibel, "*Thibaudeau* v. *R*: Constitutional Challenge to the Taxation of Child Support Payments" (1993/94) N.J.C.L. 305 [hereinafter "Constitutional Challenge"]; L. Philipps and M. Young, "Sex, Tax and the *Charter*: A Review of *Thibaudeau* v. *Canada*" (1995) 2 Rev. Con. Studies 221.

[28] For a discussion of this issue in the context of the *Charter*, see N. Iyer, "Categorical Denials: Equality Rights and the Shaping of Social Identity" (1993) 19 Queen's L.J. 179.

[29] Women earned on average $28,350 and men $39,468. See Statistics Canada, *The Daily* (17 January 1994) 2.

an income that was less than half that of the average male-headed family.[30] While women form the majority of the poor in Canada, it is single mothers and their children who are the poorest of the poor: 37.6 per cent of unattached women under 65 live below the poverty line, and on average, their income is $6,265 below the poverty line; 58.4 per cent of single mothers with children under the age of 18 live below the poverty line, and on average, they live $8,538 below that line, farther than any other group.[31] The National Council of Welfare has observed that there is "guaranteed poverty for large numbers of Canadian women at some point in their lives."[32] I contend that the tax system exacerbates the problem of women's poverty by making tax expenditures, which are apparently gender neutral in their application, either unavailable or inadequate in amount to many women by reason of their poverty.

To the extent that the tax system provides subsidies by way of deductions in the computation of income rather than as credits for tax payable, it discriminates against low income taxpayers.[33] This is because the value of a deduction is tied to the rate at which the taxpayer is taxed. In other words, a deduction is worth more in terms of tax dollars saved to the taxpayer who pays tax at a high rate than it is to the one who has less income and pays tax at a lower rate. If, for example, a taxpayer is entitled to a deduction of $5000 for child care expenses, that deduction is worth $2500 in tax dollars saved if she pays tax at a combined federal/provincial rate of 50 per cent but it is only worth $1000 to the low income taxpayer who pays tax at a rate of 20 per cent. A tax credit, by contrast, is generally worth the same amount of money to all taxpayers with taxable income. Tax subsidies delivered as deductions include, for example, deductions for child care expenses, moving expenses, union dues, contributions to registered pension plans and registered retirement savings plans, business expenses and, in some instances, capital gains.

Any decrease in the progressivity of the tax system also impacts adversely on the poor. In 1987, Canada experienced its most recent "tax reform". At that time the number of tax rates was reduced from ten to three and the top federal rate reduced from 34 per cent to 29 per cent. The result of this change was a reduction in the progressivity of the tax system. Progressivity is the hallmark of taxation based on ability to pay. It rightly recognises that those with greater incomes should pay a greater proportion of that income as tax than those with lower incomes. Even though we have seen an increase in the top rates because of the introduction of surtaxes, the system is not as progressive as it was prior to the 1987 tax reform.[34] In addition, the introduction of the Goods and Services Tax (GST), a flat rate consumption tax, has meant a further decrease in the

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[30] The figures were $49,812 for male headed families and $23,812 for female headed families. Statistics Canada, *Income Distribution by Size in Canada 1991* (Ottawa: Minister of Industry, Science and Technology, December 1992).

[31] National Council of Welfare, *Poverty Profile 1992* (Ottawa: Supply & Services Canada, 1994) at 45 and 70.

[32] National Council of Welfare, *Women and Poverty Revisited* (Ottawa: Supply & Services Canada, Summer 1990) at 3.

[33] In this article I use the term "discriminate" to refer to the unequal treatment of women by the tax system, regardless of whether that treatment has or has not been held to be discriminatory within the meaning of the *Charter* or Human Rights legislation.

[34] Indeed, the income tax rate structure has been steadily becoming less progressive. The earlier major tax reform, in 1972, saw a reduction in the number of tax rates from fourteen to ten and a lowering of the top federal rate to 47 per cent.

progressivity of the tax system.[35] Flat rate taxes such as the GST, property taxes, sales taxes and payroll taxes do not take into account ability to pay and the consequence is that a person with a lower income often pays a greater proportion of their income in tax than a person with a higher income.

The (non) taxation of wealth also contributes to the lack of progressivity in the tax system. Canada is one of only three OECD countries that does not levy either an annual wealth tax or impose estate taxes, succession duties or gift taxes.[36] As Lisa Philipps points out, the exclusion of wealth from the tax base is not a gender neutral policy. Wealth distribution in Canada is highly gendered with women at a serious disadvantage to men in terms of property ownership.[37] This means that "the ability to inherit and hold wealth free of tax primarily benefits men, and helps to preserve the economic inequalities which are the hallmark of women's subordination."[38] One of the objectives of a tax system is the redistribution of income and resources from the rich to the poor.[39] If wealth, as constituted by property primarily owned by men, is not part of the personal tax base, any redistribution of wealth is adversely affected by that omission. Because women form the majority of the poor in Canada, they bear the burden of the adverse consequences.

My primary focus in this article is, however, the tax system as a spending program. One example of a tax expenditure that operates in an inequitable manner as a result of the gendered nature of wealth ownership in Canada is the preferential tax treatment of capital gains. Capital gains receive preferential tax treatment in several ways. First, only some capital gains are taxed. Any gain on the disposition of property that qualifies as a principal residence is not taxed for the period that the property so qualifies.[40] Secondly, if a gain on disposition of capital property is taxable[41] only three-quarters of the gain is included in income.[42] Thirdly, the capital gains exemption permits a deduction in the

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[35] An income tax credit with respect to the GST was implemented when the tax was introduced in an attempt to reduce some of the regressive effects of the flat rate tax (*Act*, *supra* note 5, s. 122.5). Nevertheless, the credit does not mitigate entirely the regressive effect of the GST. See N. Brooks, *Searching for an Alternative to the GST* (Discussion Paper 90.C.1) (Ottawa: The Institute for Research on Public Policy, 1990).

[36] The other countries are Australia and New Zealand. For a history of wealth taxes in Canada, see M. Cullity and C. Brown, *Taxation and Estate Planning*, 3d ed. (Toronto: Carswell, 1992) at 10-12. The federal government ceased to levy an estate tax after 1971 and the last province to vacate the field of succession duties and estate taxes was Quebec in 1986.

[37] L. Philipps, "Tax Policy and the Gendered Distribution of Wealth" in I. Bakker, ed., *Rethinking Restructuring: Gender and Change in Canada* (Toronto: University of Toronto Press, forthcoming).

[38] *Ibid.* at 16.

[39] For an excellent analysis of the tax system's increasing ineffectiveness as an income distribution tool see N. Brooks, "The Changing Structure of the Canadian Tax System: Accommodating the Rich" (1993) 31 Osgoode Hall L.J. 138. In this article Professor Brooks traces the influence of neoconservatism in current tax policy and discusses how neoconservatives have reinterpreted the traditional objectives of a tax system and the criteria used in evaluating that system.

[40] Ss. 40 and 54(g) of the *Act*. For 1991, the value of this exclusion was $3,190 million if one assumes that if taxed the gain would have been taxed at three-quarters of the taxpayers tax rate. See *Personal and Corporate Income Tax Expenditures*, *supra* note 12 at 18.

[41] It should also be noted that ss. 70 and 73 of the *Act* provide for the "rollover" of capital property to a spouse, either during the transferor's lifetime or on death. The result is that any gain that would normally be taxed as a consequence of the disposition of the capital property is deferred until the transferee disposes of the property. I do not propose to discuss these provisions.

[42] S. 38 of the *Act* states that a taxable capital gain is three-quarters of the capital gain and an allowable capital loss is three-quarters of the capital loss. For the 1988 and 1989 taxation years, the

computation of taxable income of up to $375,000 in respect of a taxable capital gain on the disposition of qualified small business shares and qualified farm property.[43]

It is axiomatic that poor women tend not to own capital property that would be taxable on its disposition, and therefore do not benefit from this allocation of government resources by way of tax expenditures. But neither do women generally.[44] The result is that men benefit more than women from the tax subsidies related to the ownership of capital property. In 1992 the value of the capital gains deductions[45] claimed by men was an average of $5,564 more per person than that claimed by women. In terms of the total amount of capital gains deductions claimed this translated to nearly $4.5 billion claimed by men while women claimed only a total of just over $2 billion. To put it another way, in 1992 women claimed capital gains deductions of a total of only 46 per cent of what men claimed.[46] Unfortunately the statistics do not give a breakdown of the type of property in respect of which the deduction was claimed. This makes it difficult to predict the effect of limiting the deduction to qualified small business shares and qualified farm property. But we know, for example, that in 1992 more than 325,000 men included farming income in their returns while less than 100,000 women did so[47] and 62 per cent of those including net business income in their tax returns were men while only 38 per cent were women.[48] These figures indicate that, despite the recent changes to the capital gains deduction, there is a strong likelihood that men will continue to benefit from it to a greater extent than women. The statistics on the realization of taxable capital gains presents a similar gender breakdown. In 1992 men benefited more from the low effective rate of taxation on capital gains. Specifically, more men than women realised taxable capital gains,[49] and, perhaps most importantly, the value of the taxable capital gains realised by women was only $2.8 billion while men realised more than twice that amount at $6.2 billion. What these figures tell us is that men are benefiting disproportionately from the tax subsidy generated by the exclusion from income of one-quarter of each

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portion was two-thirds and from 1972 to 1987 it was one-half. In 1991, the value of this expenditure was $665 million. See *Personal and Corporate Income Tax Expenditures*, *supra* note 12 at 16.

[43] S. 110.6 of the *Act* provides a lifetime exemption of $375,000 for an individual with respect to any gain on the disposition of qualified small business shares and qualified farm property. Prior to 1992, the exemption applied to a broader range of property. According to *Personal and Corporate Income Tax Expenditures*, *ibid.* at 16 and 18, the value of the tax expenditure for 1991 was $585 million for qualified small business shares and $235 for qualified farm property.

[44] For example, more men than women own their own homes and therefore benefit from the principal residence exemption. In 1986, 42 per cent of women owned the dwelling in which they resided compared with 70 per cent of men. See Statistics Canada, *Women in Canada: A Statistical Report*, 2d ed. (Ottawa: Supply & Services Canada, 1990) at 27 [hereinafter *Women in Canada*]. Furthermore, single mothers are less likely to own their own homes than husband and wife households. In 1986, 72 per cent of female lone parent households rented their home compared with 27 per cent of husband and wife households. See C. McKie and K. Thompson, eds., *Canadian Social Trends* (Toronto: Supply & Services Canada and Thompson Educational Publishing, 1990) at 126.

[45] This included the $100,000 lifetime personal exemption which has since been repealed.

[46] The exact figures, as calculated from Table 4 at 106-107 line 37 in Revenue Canada, *Taxation Statistics: Analyzing the Returns for the 1992 Taxation Year and Miscellaneous Statistics* (Ottawa: Supply & Services Canada, 1994) [hereinafter *Taxation Statistics*], are $4,421,719,000 in capital gains deductions claimed by men and $2,052,703,000 claimed by women.

[47] *Ibid.* line 25.

[48] *Ibid.* line 22.

[49] In 1992, 449,660 men realised taxable capital gains compared with only 324,690 women. *Ibid.* line 20.

capital gain. There is a great deal of rhetoric around the reasons for the preferential tax treatment of capital gains. Certainly one reason for the preferential tax treatment of capital gains is, as the former Finance Minister Michael Wilson put it, to "unlease the full entrepreneurial dynamism of individual Canadians" but perhaps he really meant "male Canadians" and not all individual Canadians, regardless of gender.[50]

The fact that the tax system clearly favours investment in equity over investment in debt is further evidence of its inequitable application to women. As I have illustrated, any gain on an equity investment such as a share is not taxed at the full rate. Another advantage for the investor in equity is the dividend tax credit which reduces the amount of taxes payable on dividend income.[51] This situation can be contrasted to the tax treatment of the interest income generated by debt instruments such as bonds. The statistics show the gender inequality. Women clearly prefer to put their money in investments such as bonds and bank savings accounts which generate interest income.[52] There may be several reasons for this preference, including the fact that because women tend to be poorer than men, they have less to invest and certainly less to risk in ventures such as investment in the stock market. But these figures surely call for a rethinking of how tax subsidies are allocated.

As previously mentioned, the effect of poverty and income inequality is important in my analysis of the tax system. But as I proceed to consider the impact of the tax system on elderly women, lesbians and mothers my discussion of its impact on poor women is relevant because, of course, many of these women also live in poverty. And, as I shall discuss, the tax system is guilty of further contributing to and entrenching their poverty.

B. *Elderly Women*

In its final report, before being disbanded as one of the "cost-saving" measures that were part of the 1995 budget, the Canadian Advisory Council on the Status of Women painted a bleak picture of the financial future for women currently in the 45-54 age range.[53] The conclusion was that the benefits provided by the two main government pension programs, Old Age Security and the Canada Pension Plan, are inadequate and increasingly women will have to rely on private sources of retirement income such as employment pension plans, registered retirement savings plans and their personal savings. Retirement income in Canada takes many forms. The Canadian pension system

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[50] Canada, House of Commons, *Securing Economic Renewal: The Budget Speech* (Ottawa: Department of Finance, 23 May 1985) at 6.

[51] S. 121 of the *Act* provides a tax credit of 16 2/3 per cent in respect of dividend income. When provincial taxes are taken into account, the amount of the credit is approximately 25 per cent. It should be noted that one reason for the low rate of tax on dividends is to take into account the tax assumed to be paid by the corporation on its earnings. Nevertheless, the consequence is that the shareholder receives a subsidy. Indeed if a shareholder has no other income for the 1994 taxation year, she may receive dividend income of up to $23,750 on a tax free basis.

[52] In 1992, women received interest income from bonds of $1,865,367,000 and from bank deposits of $9,974,015,000. The figures for men were $1,404,029,000 for bond income and $8,399,152,000 for interest from bank deposits. See *Taxation Statistics*, *supra* note 46 lines 13 and 14 respectively.

[53] Canadian Advisory Council on the Status of Women, *Women's Financial Futures: Mid-Life Prospects for a Secure Retirement* (Background Paper) by M. Townson (Ottawa: Canadian Advisory Council on the Status of Women, 1995).

can be described as a pyramid,[54] at its base Old Age Security (OAS), supplemented by the Guaranteed Income Supplement (GIS), a flat rate monthly amount paid to those over 65. The next level is the Canada Pension Plan (CPP) which is intended to provide retirement income for those who have participated in the paid labour force. Because of the inadequacies of these government programs,[55] recourse to private pension plans is frequently necessary and indeed being encouraged by the government.[56] At the apex of the pyramid are the two private pension programs, the Registered Pension Plan (RPP), an employment based pension plan, and the Registered Retirement Savings Plan (RRSP), a personal retirement plan. As I shall discuss, both these plans are heavily subsidised by the tax system.

In its report, *Women and Taxation*, the Women and Taxation Working Group of the Ontario Fair Tax Commission said that "[t]he current system of tax-assisted savings for retirement results in systemic discrimination against women, as the benefits are disproportionately enjoyed by men."[57] The result for many women is poverty in retirement. Elderly single women are disproportionately represented among the poor in Canada. In 1992, 45.2 per cent of unattached women over 65 lived below the poverty line and the depth of their poverty was on average $2,480 below that line.[58] Retirement saving is subsidised extensively by the tax system through tax breaks for both contributions to, and income earned by, RPPs and RRSPs. For example, subsections 147.2(1) and (4) of the *Act* permit the deduction by employers and employees of their contributions to a registered pension plan. Section 149(1)(o.1) provides that the income earned by funds in the registered pension plan is not taxable. For 1991, the value of this preferential tax treatment was in excess of $13 billion, making it the single largest tax expenditure that year.[59] Contributions to RRSPs (limited to 18 per cent of earned income up to a

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[54] This metaphor is used in an excellent article which discusses the discriminatory effect of the Canadian pension system for women and analyses many of its privatising effects. See M. Donnelly, "The Disparate Effect of Pension Reform on Women" (1993) 6 C.J.W.L. 419.

[55] The inadequacies of the OAS, GIS and CPP have been well documented. See Townson, *supra* note 53 at 33 and 61; *Women in Canada, supra* note 44 at 109-110; *Women and Poverty Revisited, supra* note 32 at 99-103; N.Z. Ghalam, *Women in the Workplace,* 2d ed. (Ottawa: Statistics Canada, 1993) at 45; T.J. Courchene, *Social Canada in the Millenium: Reform Imperatives and Restructuring Principles*, c. 3 (Toronto: C.D. Howe Institute, 1994) at 66-78; S. Harder, *Women in Canada: Socio-Economic Status and Other Contemporary Issues*, Current Issue Review (Revised 30 Nov 1994) (Ottawa: Library of Parliament, Research Branch, 1994) at 8. The maximum amount available under the OAS and GIS is below the low-income cut off for both single individuals and couples. CPP retirement benefits are equivalent to only 25 per cent of covered lifetime earnings. In 1993, women received only 58.8 per cent of what men received as benefits under CPP/QPP. See Canadian Advisory Council on the Status of Women, *Work in Progress: Tracking Women's Equality in Canada* (Ottawa: Canadian Advisory Council on the Status of Women, 1994) at 44 [hereinafter *Work in Progress*].

[56] Certainly successive governments have demonstrated a commitment to encouraging retirement saving through private plans rather than increasing benefits under OAS or CPP. This policy choice has been made by successive federal governments, both Conservative and Liberal. In endorsing this policy, Marc Lalonde (formerly the Canadian Finance Minister) put it this way: "Private arrangements provide the individual with greater flexibility and personal control over pension saving than are possible under public pension programs, with their fixed schedules of contributions and benefits." Canada, Department of Finance, *Building Better Pensions for Canadians: Improved Tax Assistance for Retirement Saving* (Ottawa: Department of Finance, 1984) at 6-7.

[57] Ontario Fair Tax Commission, *Women and Taxation* (Working Group Report) (Toronto: Ontario Fair Tax Commission, 1992) at 22.

[58] *Poverty Profile 1992, supra* note 31.

[59] *Personal and Corporate Income Tax Expenditures, supra* note 12 at 18.

maximum contribution of $13,500 for the 1994 taxation year) are also deductible and the income earned by the funds accumulates within the plan on a tax free basis. A taxpayer is also permitted to claim a deduction (subject to limitations as to amount) for contributions to a RRSP of which the taxpayer's spouse is an annuitant.

The "privatisation" of retirement savings is problematic in many respects. By encouraging retirement savings through contributions to registered pension plans rather than through a more universal scheme, the State is delivering a publicly funded subsidy in a manner that excludes many from entitlement. Only those who work for relatively large employers who are economically able to provide a pension plan will benefit; those who work part time, in non-unionised jobs, or for small employers unable to finance these plans, or those who are self employed or unemployed, do not benefit. Women are disproportionately represented in the group unable to take advantage of these tax benefits. For example, between 1976 and 1991 women consistently represented at least 70 per cent of part time workers[60] and, while women have been entering the workforce in increasing numbers, 42 per cent of women do not participate in the paid labour force.[61] Of those women who are employed in the paid labour force, only 42.5 per cent are covered by RPPs.[62]

Women who do not have access to work related pension plans may contribute to RRSPs but the ability to take advantage of the preferential tax treatment afforded to contributions to these plans is dependent on having funds with which to make the contribution. Given that women earn considerably less than men, they tend to have less discretionary income to contribute to a RRSP. This is evident when one looks at the statistics on who contributes to a RRSP and how much they contribute. In 1992, more men than women contributed to a RRSP, and, although the disparity in the relative numbers of men to women who contributed was not particularly great,[63] there was a significant difference in the amounts contributed. In total, men contributed almost $10 billion to RRSPs while women contributed just over half that amount, at slightly over $5 billion. Clearly the tax subsidy is not being shared in anything like an equal fashion by men and women.

Neither RPPs nor RRSPs are likely to be of any benefit to women who work inside the home and do not participate in the paid labour force. These women do not have access to employment related plans and, with no income, are unlikely to be able to contribute to a RRSP. The tax system recognises this problem and attempts to redress it partially by including special rules that apply to spouses. For example, RPPs may provide survivor benefits (either pre- or post-retirement) which ensure that pension payments made to an individual can, on the death of the individual, be received by the individual's spouse.[64] Similarly, an individual may, subject to limitations as to amount, contribute to

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[60] *Women in the Workplace*, *supra* note 55 at 21.

[61] Canada, Statistics Canada, Household Surveys Division, *Labour Force Annual Averages 1991* (Ottawa: Ministry of Industry, Science and Technology, 1992).

[62] Townson, *supra* note 53 at 37. The figure for men is somewhat higher at 51.8 per cent.

[63] In 1992, 2,784,180 men and 2,052,230 women contributed to RRSPs. *Taxation Statistics*, *supra* note 46 line 31.

[64] S. 252(4) of the *Act* provides that a spouse of a taxpayer includes the person of the opposite sex who cohabits with the taxpayer in a conjugal relationship and has so cohabited with the taxpayer for 12 months, or is the parent of a child of whom the taxpayer is also a parent. It does not include the partners of lesbians and gay men. The issue of the discriminatory effects of this definition for lesbians is discussed later in this article.

a RRSP in their spouse's name. However, this rule and the provision of survivor benefits are highly problematic. State subsidised benefits are being provided to individuals solely on the basis that they are in a particular defined relationship with another person. Single persons and those whose relationships are not recognised by the tax system, such as lesbians, are discriminated against. There is a second aspect to this problem. Historically the tax system has viewed some forms of dependency as deserving of relief, and the result is a privatisation of economic responsibility for dependent persons. The subsidy is delivered to the economically dominant person in the relationship not the "dependent" person who needs it. This manner of delivery assumes that income will be pooled and wealth redistributed equitably in the relationship. However, studies have shown that this assumption is simply false and that, in reality, such pooling and redistribution of wealth does not occur in the majority of relationships.[65]

Making the only access to tax subsidised pensions such as RPPs and RRSPs for many women dependent on their relationship with a man is unacceptable. As Maureen Donnelly states, "A pension system which assumes a 'world composed of only two categories of people: full-time participants in the labour market (husbands and fathers), and the people they support (women and children)' does not fit the experience of women today; yet the Canadian tax system is still relying on yesterday's reality".[66] The reality is that more women than ever before are living either alone or with their children, and the vast majority of lone parent families are headed by women with recent estimates ranging from 82 per cent[67] to almost 92 per cent.[68] It is high time that the government acknowledged this situation and adjusted their tax policy accordingly.

As with so many tax expenditures, the tax relief provided by contributions to RPPs and RRSPs is in the form of a deduction and not a tax credit. Therefore, as discussed above, those who benefit from the deduction are those with income taxed at the top rate of tax and since men tend to earn more and be wealthier than women, they correspondingly receive greater subsidies. Indeed, the tax provisions relating to private pension plans establish a hierarchy of taxpayers with respect to retirement saving which is in inverse relation to their ability to provide financially for their retirement. At the top are those with the highest incomes (predominantly men) and below them in declining order are taxpayers with lower incomes. At the bottom are those to whom the deduction is worthless, either because they do not have access to a RPP, they do not have funds to contribute to a RRSP, they do not have access through a spouse to a pension plan or simply because they have insufficient taxable income to benefit from the deduction. Converting the deduction to a tax credit would ensure that it is of equal value in terms of tax dollars saved to all taxpayers.[69] Converting the deduction to a refundable tax credit

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[65] *Women and Taxation*, *supra* note 57 at 7 discussed this issue and concluded that the assumption that income is pooled is misleading. See also Philipps and Young, *supra* note 27 at 79.

[66] See Donnelly, *supra* note 54 at 423.

[67] This is a 1991 statistic from C. McKie and K. Thompson, eds., *Canadian Social Trends*, vol. 2 (Toronto: Ministry of Industry, Science and Technology & Thompson Educational Publishing, 1994) at 172.

[68] This is a 1988 statistic from Statistics Canada & Health and Welfare Canada found in *Canadian National Child Care Study: Introductory Report* by D.S. Lero *et al.* (Ottawa: Statistics Canada; Health and Welfare Canada, 1992) at 44.

[69] See Townson, *supra* note 53 at 64 where, among other recommendations, she proposes that "[t]he deduction for contributions to pension plans and RRSPs should be converted to a credit."

would mean that even a person who does not pay tax could benefit from the tax advantage if they had funds to contribute to the RPP or the RRSP.

None of these suggestions address the problems of those excluded from the system. More radical measures, such as greater access to private employment pension plans for part time workers and improvements to the CPP to include those currently excluded, would go some way to redressing the inequities I have discussed. Alternatively, the tax incentives could be abolished in their entirety and the surplus funds used to enrich the CPP and OAS systems. But, as long as the government remains committed to encouraging retirement savings through private pension plans, then the question of whether the tax system is the appropriate method of doing this must be addressed.[70] The answer is surely not, given the inequities that I have discussed.

C. *Lesbians*

The *Act* provides that a spouse of a taxpayer includes the person of the opposite sex who cohabits with the taxpayer in a conjugal relationship and:

> a) has so cohabited with the taxpayer for 12 months, or
> b) is the parent of a child of whom the taxpayer is also a parent. (emphasis added)[71]

Notably, the definition does not include same-sex relationships.[72] I have discussed this omission elsewhere in detail[73] and concluded that the consequences for tax purposes of this omission depend to a great extent on the level of income of both partners in the relationship and the distribution of income between them. It is those couples in which one partner is economically dependent on the other that lose the most from not being considered to be spouses under the *Act*.[74]

I have already discussed the limitations of the tax relief provided for private pension plans and noted that there are special rules that apply to spouses which are intended to alleviate some of the problems for women unable to contribute to these plans. For example, RPPs may provide survivor benefits on the death of a plan member (either pre- or post-retirement) to the surviving spouse of the plan member. But the regulations made under the *Act* state that if a RPP provides survivor benefits to anyone other than a spouse (as defined in the *Act*) the Minister of National Revenue may refuse to register the pension plan or may deregister an already registered plan.[75] Therefore, if the plan provides benefits to its lesbian employees on the same basis as its heterosexual employees, the plan is not eligible for the preferential tax treatment. This makes it financially impossible for employers to include lesbian employees in the same employment

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[70] For an extensive list of recommendations for improvement to the current retirement system as it affects women see, Townson, *ibid.* at 61-66.

[71] S. 252(4) of the *Act*. Because s. 252(1)(d) defines "child" to include an adopted child, parent includes a person who is an adoptive parent.

[72] The focus of this section of the article is the application of the tax system to lesbians. Except where otherwise noted my comments also apply to gay men.

[73] C.F.L. Young, "Taxing Times for Lesbians and Gay Men: Equality at What Cost?" (1994) Dalhousie L.J. 534. As I point out in that article, there are some benefits for lesbians (and gay men) as a result of not being considered spouses but my conclusion is that overall, the lost tax subsidies are considerable and, for most lesbians, will outweigh the limited advantages. See also, P. Lefebour, "Same Sex Spousal Recognition in Ontario" (1993) J.L. & Social Pol'y 272.

[74] Young, *ibid.* at 535.

[75] Reg. 8502(c), 8503(2) and 8506 made pursuant to the *Act*.

pension plan as heterosexual employees[76] and it appears that very few employers have set up separate pension plans for their lesbian employees.[77] It is important to note that contributing to an employment pension plan is not usually optional. It is a condition of employment. This creates a situation where lesbian employees are required to contribute to a plan under which they do not receive the same benefits as their heterosexual co-workers, a plan that is also subsidised by their tax dollars.[78]

Other situations of inequality for lesbians also stem from the limited definition of spouse in the *Act*. For example, the ability to contribute to a spousal RRSP is similarly limited to heterosexual couples. The spousal tax credit[79] is not available to those in lesbian relationships, nor is the ability to transfer unused tax credits to a partner who may use them to offset her taxes payable. The unused portion of the tuition tax credit,[80] the education tax credit,[81] the age credit, the pension credit and the disability credit[82] may all be transferred to a spouse under the *Act*. Further, spouses are entitled to pool their medical expenses for the purposes of the medical expense tax credit.[83] All of these rules are of benefit where one person in the relationship has taxable income and the other has little or no taxable income to which to apply the credits. None are available to lesbians.

D. *Mothers*

Much of the early feminist work on the impact of the tax system on mothers focused on issues such as the lack of tax relief for some of the costs of parenting such as child care expenses or expenses related to child dependency. The challenges to the *Act* by Elizabeth Symes and Suzanne Thibaudeau have resulted in a renewed and greater awareness of the inadequacy of the current deduction for child care expenses and the adverse affect on women of the requirement to include child support payments in income.

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[76] In *Leschner* v. *Ontario (No. 2)* (1992), 16 C.H.R.R. D/184 an Ontario Board of Inquiry held that a gay man was discriminated against on the basis of marital status and sexual orientation under the *Ontario Human Rights Code*, R.S.O. 1990, c. H-19, because his employer, the Government of Ontario, refused to amend his benefit plan from single to family coverage in order to cover his male partner. In their decision the Board prescribed a remedy that included an order that, if the changes to the definition of spouse to include lesbians and gay men for the purposes of registered pension plans were not made to the *Act* within three years of the order, the Government of Ontario must "create a funded or unfunded arrangement outside of the registered pension plan to provide for equivalent survivor benefits and eligibility to persons living in homosexual conjugal relationships with employees as provided to persons living in heterosexual conjugal relationships with employees outside marriage" (at D/224).

[77] See *e.g.*, "Same-Sex Ruling Puts Firms in Catch 22" *The [Toronto] Globe and Mail* (15 February 1993) B4. One employer which has established a separate pension plan for its lesbian and gay employees is the Bank of Montreal. See "Bank of Montreal Extends Same-Sex Spousal Benefits" *XTRA WEST* (29 June 1995) 11.

[78] The discriminatory impact of the definition of "spouse" as it applies to RPPs was challenged as contravening s. 15 of the *Charter* in *CUPE et al.* v. *Minister of National Revenue*, a case heard by the Ontario Court, General Division on July 25, 1995. The decision has not yet been released by the court.

[79] S. 118(1)(a) of the *Act*.

[80] S. 118.5 of the *Act*.

[81] S. 118.6 of the *Act*.

[82] S. 118.8 of the *Act* permits the transfer to a spouse of the unused portion of these three credits.

[83] The definition of "patient" is defined to include a spouse, in s. 118.2(2)(a) of the *Act*.

The lack of affordable, accessible child care in Canada is a significant impediment to entry or re-entry in the paid labour force for women with children.[84] For some women it means not working outside the home, and for others it means part time work, shift work, or work at a location close to home. Indeed 1991 statistics indicate that women form 70 per cent of the part time labour force[85] and, one-quarter of women aged 25 to 44 working part time cited personal or family responsibilities as the reason for working part time.[86] The lack of available child care is clearly linked to women's economic inequality relative to men. As mentioned, women earn less than men and one contributing factor is that the part time work so many women perform is less remunerative than full time work. Women may also work in jobs that require fewer overtime hours or that allow them unpaid leave during school vacation. The child care expense deduction[87] is intended to alleviate some of the expenses incurred by women for child care but it is highly flawed in several respects.[88] First, as discussed above,[89] since it is a deduction in the computation of taxable income, the most benefit in terms of tax dollars saved goes to those women with the highest incomes and the least benefit to those with lower incomes. Because the subsidy is not delivered as a refundable tax credit, it is of no benefit to women with no tax liability. Secondly, only certain women are eligible for the deduction. Because the definition of the "earned income" from which child care expenses may be deducted is so limited, women whose sole income is unemployment insurance, spousal support or child support payments may not deduct child care expenses. This means, for example, that women who are looking for employment or women who are furthering their education in order to return to work, will not receive the subsidy. Thirdly, the amount of the deduction is inadequate. Some 1988 figures put the estimated annual cost of regulated child care at $7,188 a year for infants and $5,361 for

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[84] For example, a report by the National Council of Welfare, *Incentives and Disincentives to Work* (Ottawa: Supply & Services Canada, 1993) at 41 makes the point that the shortage of adequate and affordable child care creates a serious disincentive for women to seek work. Women who would normally receive low wages in the labour force and who face the high costs of suitable child care, which normally cost several thousand dollars a year or more per child, may find it more economical to stay at home. This reality is recognized by the government in its Discussion Paper, *Improving Social Security in Canada* (Ottawa: Supply & Services Canada, 1994) where it states that "In many cases, the lack of affordable, high quality child care is an insurmountable barrier to a job." (at 53).

[85] *Work in Progress*, *supra* note 55 at 49.

[86] D.S. Lero and K.L. Johnson, *110 Canadian Statistics on Work & Family* (Background Paper) (Ottawa: Canadian Advisory Council on the Status of Women, 1994) at 5. Further, along similar lines, during 1988-1990 7.6 per cent or 298,000 women aged 16-64 left their jobs because of "family responsibilities", the most common of which would presumably be caring for children. This is compared with a mere 1.2 per cent or 48,000 men who cited family responsibilities as their reason for leaving their jobs. (*Incentives and Disincentives to Work*, *supra* note 84 at 17-19).

[87] S. 63 of the *Act* provides a deduction of $5000 for a child under 7 (or who has a prolonged mental or physical impairment), and $3000 for a child aged 7 to 13. The expense must be incurred to enable the taxpayer or supporting person who resides with the child to perform the duties of employment, carry on a business, undertake occupational training under the *National Training Act* or carry on grant funded research. The deductible amount is limited to the lesser of the amounts described above or two-thirds of the taxpayer's earned income for the year. In two parent families, the deduction must be claimed by the person earning the lower income, with limited exceptions.

[88] For a detailed analysis of the problems with the deduction see "Child Care — A Taxing Issue", *supra* note 27.

[89] On pp. 105-06, above.

preschoolers.[90] The National Action Committee on the Status of Women recently stated that in B.C., care in a good program can cost as much as $1,000 per month.[91] However, the maximum that may be claimed for a child under the age of 7 is $5000 a year which translates to only $2500 in terms of tax dollars saved for a woman who pays tax at a high rate. It has been estimated that families spent over $2 billion on child care in 1987,[92] and yet the amount of tax dollars spent on the deduction for child care expenses a year later was only $245 million.[93]

The inadequacy of the amount of this subsidy underlies the recent challenge to the non-deductibility of child care expenses as a business expense by Elizabeth Symes. She is a practising lawyer and at the relevant time was a partner in a law firm who argued that she should be able to deduct the full amount of her child care expenses as a business expense under sections 9 and 18(1)(a) of the *Act*, and that to deny the deduction was to discriminate against her on the basis of her sex in contravention of section 15 of the *Charter*. The Supreme Court of Canada denied her claim and the majority found that child care expenses are not deductible in the computation of business income but L'Heureux-Dubé J., in dissent, raised an important issue. She discussed in detail the gender-biased nature of the relevant tax provisions, describing the interpretation of "business expense" as one "wrought with male perspective and subjectivity"[94] and said "....it is clear that this area of the law is premised on the traditional view of business as a male enterprise and that the concept of a business expense has itself been constructed on the basis of the needs of businessmen"[95] (emphasis in the original). The same might be said of many provisions of the *Act*.

At the time the Supreme Court of Canada was considering the *Symes* case, another *Charter* challenge to a provision of the *Act* was underway. This time the focus was the requirement that child support payments be included in the income of the recipient.[96] In particular, section 60(b) and (c) of the *Act* provides a deduction in the computation of income to those who pay child support and section 56(1)(b) and (c) require that child support payments be included in the income of the recipient if they are deductible by the payor. The gender dimensions of these rules are very simple: 98 per cent of those paying child support and thereby entitled to the tax deduction are men and 98 per cent of those

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[90] This is an Ontario Ministry of Community and Social Services estimate from Statistics Canada & Health and Welfare Canada, *Canadian National Child Care Study: Canadian Child Care in Context*, A.R. Pence, ed., (Ottawa: Statistics Canada, 1992) at 396.

[91] National Action Committee on the Status of Women, *Review of the Situation of Women in Canada 1993* by P. Khosla (Toronto: National Action Committee on the Status of Women, 1993) at 19.

[92] Lero and Johnson, *supra* note 86 at 36.

[93] *Personal and Corporate Income Tax Expenditures*, *supra* note 12 at 14. (Figures not available for 1987.) It should be noted that the child care expenses deduction is listed in this document as a "memorandum" item which means that the government does not technically list it as a tax expenditure. The reason given (at 29) is that child care expenses are considered to be an expense of earning taxable income. Nevertheless, I would argue that even if child care expenses are not technically considered to be tax expenditures, the publication of the amount spent on them allows us to evaluate them in a manner similar to that applied to tax expenditures. I would also suggest that because the policy underlying the introduction of the child care expense in 1970 was to enable women to participate in the paid labour force, the expense is part of a social spending program.

[94] *Symes*, *supra* note 9 at 95.

[95] *Ibid.* at 90.

[96] The Tax Court heard *Thibaudeau* (T.C.C.), *supra* note 10, on August 25, 1992.

receiving child support payments which they must include in their income are women.[97] In May 1994, the Federal Court of Appeal held in *Thibaudeau* (F.C.A.) that the requirement to include child support payments in income contravened section 15 of the *Charter* because it discriminated against separated custodial parents.[98] This decision was heralded by many women's groups as a victory for women who receive child support from their ex-spouses.[99] The response of the federal government was twofold; it appealed the decision to the Supreme Court of Canada[100] and it established the Task Force on Child Care headed by Sheila Finestone, Secretary of State (Status of Women) to "seek the views of Canadians.....on the tax treatment of child support".[101] The report of the Task Force has, as of date of writing, not been released to the public.

In order to fully appreciate the inequalities experienced by custodial mothers that flow from the inclusion/deduction system it is important to examine the primary justification for the current rules, as put forward by the Department of Justice in *Thibaudeau*. The argument is that the inclusion/deduction system provides a subsidy which benefits custodial families by making more resources available for the support of children.[102] The subsidy arises where the payor is in a higher tax bracket than the recipient because the monetary value of the deduction to the payor exceeds the amount of tax payable by the recipient. In theory, this permits a higher support award. It has been estimated that the amount of the tax subsidy is approximately $300 million a year.[103] Certainly the objective of providing such a subsidy is laudable and reflects a desire by

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[97] See the evidence of Nathalie Martel, a federal government economist, on cross examination in *Thibaudeau*, Supplementary Case on Appeal, Vol. 2 at 185.

[98] The comparison was with non-separated custodial parents who might receive child support from a spouse, separated non-custodial parents who might receive amounts from a third party for the support of a child and separated custodial non-parents who might receive amounts for the support of a child in their care. In each of these cases there is no requirement to include the amount in income.

[99] See *e.g.* "Mothers Stand to Gain Through Tax Ruling" *The [Toronto] Globe and Mail* (4 May 1994) A2, where Ardyth Cooper, of the Canadian Advisory Council on the Status of Women said that, "[i]t sends out a clear message that the rights of these parents — most of them women and many of them among Canada's poorest — cannot be trampled on by outdated tax law".

[100] The federal government asked the Supreme Court of Canada to stay the order of the Federal Court of Appeal while the case was under appeal and the Supreme Court acceded to this request. On May 25, 1995, the Supreme Court of Canada upheld the appeal and by a majority of 5 to 2 held that the requirement to include child support payments in income did not contravene the *Charter*. See the discussion of the decision, beginning on p. 116, above.

[101] Introduction to Canada, Canadian Advisory Council on the Status of Women, *Task Group on the Tax Treatment of Child Support: Discussion Points* (Ottawa: CACSW, 1994).

[102] The other policy rationales are:

a) the deduction provides equity for non-custodial fathers because it recognises that he has a reduced ability to pay tax as compared to someone with the same income who does not have to pay child support;

b) the requirement to include child support payments in income recognises the basic principle of fairness that taxpayers with income from different sources should pay the same tax; and

c) the principle of reciprocity should be recognised and that a payment deducted by the father must be included in the income of the mother.

For a discussion of the policy rationales, see *e.g.* Zweibel and Shillington, *supra* note 27; "Broadening the Agenda", *supra* note 27; "Constitutional Challenge", *supra* note 27; Philipps and Young, *supra* note 27.

[103] *Federal/Provincial/Territorial Family Law Committee's Report and Recommendations on Child Support* (Canada: Minister of Public Works and Government Services, 1995) at 49.

the State to recognise the extra expenses incurred with respect to the support of children of families that have broken down. The problem is, however, twofold. First, the subsidy only arises in the limited number of cases where the payor is in a higher tax bracket than the recipient. If both pay tax at the same rate or the recipient pays at the higher rate there is no subsidy and, indeed there may be a tax penalty. Secondly, as I shall explain, even when there is a subsidy, the result is not necessarily higher support awards for women but frequently just more after tax dollars for men.

Several studies have focused on the issue of how frequently a subsidy arises by reason of the payor being in a higher tax bracket than the recipient and estimates of the number of cases in which this occurs have ranged from 34 per cent[104] to 67 per cent.[105] Regardless of the exact figures, the Federal Court of Appeal in *Thibaudeau* (F.C.A.) recognised that

> [e]ven on the government's own figures the inclusion/deduction system, whose alleged purpose is to benefit single custodial parents and their children, cannot do so in at least one third of the cases. There is no guarantee that it actually does so in the remaining two thirds of the cases and there is evidence to suggest that it does not.[106]

What is so interesting about this rationale for the inclusion/deduction rules is that whether or not a "couple" receives a subsidy is totally dependent on an arbitrary factor, that is the rate at which the former spouses pay tax. Determining entitlement to the subsidy is beyond their control and, indeed entitlement may be lost or gained as the tax rates of the individuals in the "couple" change.

Regardless of whether or not the respective tax rates of the payor and recipient produce a subsidy, women face a significant problem as a result of the requirement that they include child support in income. In order that the recipient not be at a disadvantage because of the tax liability, she must request an adjustment (the "gross-up") to the amount of the child support award to take her tax liability into account. As L'Heureux-Dubé J. points out in *Thibaudeau,* "the system increases the vulnerability of the custodial parent, who must now bargain for the income tax gross-up in order to protect the effective value of the child support payment."[107] If she is not successful in doing so she suffers the financial penalty of the lost tax dollars. McLachlin J. in *Thibaudeau* described the inequity this way:

> Whether the custodial parent receives such an adjustment or not, the non-custodial parent may reduce his tax burden by deducting the full amount of the child support paid by him in computing his taxable income. On the other hand, not only must the custodial parent request any adjustment from the court, it is not always certain that the court will

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104 Zweibel and Shillington, *supra* note 27 at 13. This study found that in only 34 per cent of the cases was a net tax gain realised due to non-custodial fathers being in a higher tax bracket than the custodial mothers who received the support. Zweibel and Shillington state that in the cases where there is no potential subsidy because the mother's tax liability is greater than the father's tax savings and the Finance Department's primary rationale supporting the current tax regime thus fails, the Finance Department's response has been to ignore them (at 17).

105 Evidence of Nathalie Martel discussed in *Thibaudeau (F.C.A.) supra* note 10 at 18-19.

106 *Ibid.* at 19.

107 *Supra* note 10 at para. 39, quoting Ellen Zweibel in "Constitutional Challenge", *supra* note 27 at 342.

> correctly assess the tax impact or will award a sufficient amount to enable the recipient to discharge her additional tax burden.[108]

Family law is thus relied upon to compensate for the imposition of a tax liability.[109] But such compensation is not always forthcoming. Studies have shown that, in fact, either the amount is not grossed-up to take tax consequences into account, or if an attempt is made to gross-up the award, it is frequently not done accurately.[110] For example, in order to include the full tax liability of the recipient of child support, the amount of the award must be grossed-up more than once so that the gross-up is itself then grossed-up to take account of the tax liability. Without this second adjustment, the tax payable on the gross-up is not taken into account, resulting in a failure to fully compensate the recipient for her tax liability. Also, because entitlement to refundable tax credits such as the Goods and Services Tax credit and the Child Tax Benefit decreases as income increases, the inclusion in income of an award may have the adverse result of reducing the amount of those credits for the recipient of the child support. If the award is grossed-up to reflect the tax liability, the gross-up itself may trigger a reduction in the amount of the refundable credits.[111] It should also be noted that none of these adjustments to the amount of the child support payments mean that the subsidy, if any, is in fact shared by the parties. As McLachlin J. said in *Thibaudeau*:

> The problem is that the overall context in which this scheme is applied does not require, and in some cases prevents, an equitable division of this tax benefit between the separated or divorced parents. In many cases in which a tax benefit results from the application of the deduction/inclusion scheme, the benefit is not passed on to the custodial parent or the children and remains in the possession of the non-custodial parent.[112]

The issue of grossing-up or dividing the subsidy is not just a mechanical matter. In many cases, judges base the amount of the award on their perception of how much the payor can afford and studies of child support awards show that the average child support order is for considerably less than one-half of the expenses actually incurred with respect

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[108] *Ibid.* at para. 180.

[109] McLachlin J. in *Thibaudeau, ibid.* at para. 174, described the problems with the tax legislation in this manner: "It focused solely on improving the financial situation of the non-custodial parent and ignored the tax position of the custodial parent. It contained no provisions to ensure that the custodial parent receiving payments for children would not see her personal tax burden increased, much less share the advantageous tax treatment enjoyed by the non-custodial parent."

[110] See Zweibel and Shillington, *supra* note 27 at 12. See also McLachlin J. in *Thibaudeau* at para. 197 where she cites a survey of judges conducted by Judge Williams of the Nova Scotia Family Court which found that only a minority of counsel present evidence to the court on the tax impact of child support and the majority of judges do not calculate the tax consequences if no evidence is presented to them.

[111] It was suggested by counsel for Revenue Canada in *Thibaudeau* that computer programs are now used by lawyers in making calculations to equitably divide up the tax obligations of the "couple" under the inclusion/deduction system. L'Heureux-Dubé J. expressed considerable skepticism about their usage stating that she has "serious reservations about assuming that such software, and the expertise to use it, will be available in all cases, or even the majority of cases", *supra* note 10 at para. 31.

[112] *Ibid.* at para. 194.

to the child.[113] In these cases women clearly receive less than required and at the same time bear the cost of the inclusion in their income of the amount. The cost of child rearing is therefore borne primarily by them. For those women who do not go to court but negotiate with their ex-spouses for child support, the tax rules also present problems. One of the most significant flaws in the current rules is that they operate on the assumption that the parents of the child have a common interest in setting the amount of these awards in an equitable manner in order to most benefit the child. Clearly this assumption is not always, or indeed often, accurate. The rules apply to individuals who have chosen to separate and given the fact that there is frequently less than equal pooling of income even in ongoing relationships, it is highly unrealistic to expect most ex-spouses to share any tax subsidy. Furthermore, negotiations about the amount of child support to be paid to the custodial parent do not take place in isolation. Frequently they are part of ongoing negotiations or disputes about issues such as custody or property division and this may result in trade offs being made. Perhaps even more disturbing is that one cannot assume that the parties are in an equal position with respect to bargaining power. It has been noted that, "Women are not infrequently pressed to bargain away economic advantages in order to avoid legal battles over their children."[114]

Statistics show that poverty after separation or divorce is a reality for many women.[115] Obviously factors such as non-compliance with support orders contribute to the poverty experienced by custodial mothers but the requirement to include support payments in income also plays a role. The issues I have discussed raise the question of whether the tax system is the best tool by which to achieve the policy objectives of the inclusion/deduction system. It appears, however, that while the government is reviewing changes to the current rules, there are no indications that it is planning to remove them from the *Act* and achieve its policy objectives in another manner, such as by delivering the subsidy directly. The mandate of the Task Force on Child Care, which was established shortly after the Federal Court of Appeal rendered its decision in *Thibaudeau*, was limited to receiving public input about the current tax system and suggestions for change to that system. It did not contemplate repeal of the tax provisions.

III. Application of the *Charter* after *Symes* and *Thibaudeau*

In this article I have illustrated numerous inequalities in the application of the tax system to women. The next issue to be considered is what role the *Charter* might play in redressing these inequalities. This issue is highly topical given that the two most recent sex equality *Charter* challenges heard by the Supreme Court of Canada have been challenges to the *Act*.[116] While the majority of the court did not recognise that the *Act* discriminates on the basis of sex by denying the deduction of child care expenses as a

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[113] See K. Douglas, *Child Support: Quantum, Enforcement and Taxation* (Background Paper) (Ottawa: Library of Parliament, Research Branch, November 1993) at 3.

[114] J.W. Durnford and S.J. Toope, "Spousal Support in Family Law and Alimony in the Law of Taxation" (1994) 42 Can. Tax J. 1 at 28.

[115] See the discussion of this issue in Durnford and Toope, *ibid.* at 10-13.

[116] It should be noted that while Symes argued sex discrimination, Thibaudeau argued that she was discriminated against on the basis of family status, that is, as a single custodial parent. However, a coalition of intervenors in *Thibaudeau*, which included the Charter Committee on Poverty Issues, the Federated Anti-Poverty Groups of British Columbia, the National Action Committee on the Status of Women and the Women's Legal Education and Action Fund, argued that the discrimination against Thibaudeau was also on the basis of her sex.

business expense (*Symes*) or on the basis of family status or sex by requiring the recipient of child support to include those payments in income (*Thibaudeau*), I suggest that the court did not foreclose the possibility of a successful *Charter* challenge to the *Act*, although it clearly has made life difficult for potential litigants who wish to argue that the *Act* discriminates on the basis of sex. In this part, I shall describe briefly these two decisions and then discuss their relevance and application to some of the inequalities discussed above.

In *Symes* the Supreme Court of Canada held that child care expenses were not deductible under section 9 and 18(1)(a) of the *Act* as a business expense because section 63 of the *Act* already permits the deduction of a limited amount of these expenses and that section is a complete code. The court also considered whether the denial of the deduction infringed section 15 of the *Charter* because it discriminated on the basis of sex and the majority (all the men on the court) in a decision written by Iacobucci J. concluded that it did not. He put it this way:

> [T]he appellant taxpayer has failed to demonstrate an adverse effect created or contributed to by s. 63, although she has overwhelmingly demonstrated how the issue of child care negatively affects women in employment terms. Unfortunately, proof that women pay social costs is not sufficient proof that women pay child care expenses.[117]

In dissent, L'Heureux-Dubé J. held (McLachlin J. concurring) that, as a matter of statutory interpretation, child care expenses were deductible as a business expense under the *Act*, and to deny that deduction was an infringement of the *Charter*. She found that Symes "....suffers disproportionately to men and, as such, is discriminated against on the basis of her sex. She has proven that she has incurred an actual and calculable price for child care and that this cost is disproportionately incurred by women."[118] She also found that to deny the deduction was to discriminate against Symes on the basis of her sex.

In *Thibaudeau*, the *Charter* analysis is the entire focus of the decision and is a more complex analysis than that in *Symes*. The court held by a 5-2 majority (again with the men on the court in the majority and the women in dissent) that the requirement to include child support payments in income did not discriminate on the basis of either sex or family status. But, it is important to note that two of the judges in the majority, namely Cory J. and Iacobucci J., disassociated themselves from the decision of Gonthier J. with respect to its section 15 analysis, preferring to adopt the reasoning of McLachlin J. enunciated in *Miron* v. *Trudel*[119] and incorporated into her dissent in *Thibaudeau*. In brief, Gonthier J. applies what he describes as a comparative and contextual approach and determines that the analysis must include a consideration of the principles of family law applicable to child support payments. In applying section 15, he uses a three step test. First, the impugned law must make a distinction between, in this case, separated and divorced parents and other parents. Second, if there is a distinction, then there must also be a prejudicial effect on separated and divorced parents. Third, the distinction must be based on irrelevant personal characteristics. Only if all three tests are met will section 15 be violated. In applying these steps Gonthier J. concludes that there is no prejudice to the group consisting of separated and divorced parents because the inclusion/deduction system generates a benefit for the group, which is the subsidy discussed earlier

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[117] *Symes*, *supra* note 9 at 73.

[118] *Ibid.* at 102.

[119] [1995] 2 S.C.R. 418, [1995] S.C.J. No. 44 (QL).

in this article.[120] As mentioned, Cory and Iacobucci JJ. disagree with the section 15 analysis of Gonthier J. but they agree with his conclusion that there is no discrimination. Their reason is that "[s]imply put, there is no burden."[121] This conclusion echoes that of Gonthier J. because it relies on the fact that separated and divorced couples ostensibly enjoy a tax advantage. Cory and Iacobucci JJ. also state that:

> If there is any disproportionate displacement of the tax liability between the former spouses (as appears to be the situation befalling Ms. Thibaudeau), the responsibility for this lies not in the *Income Tax Act*, but in the family law system and the procedures from which the support orders originally flow.[122]

This statement is quite perplexing. It reminds one of the "chicken and egg" analogy. Surely without the tax rules that require the inclusion of child support payments in income, there would be no need for family law to compensate with respect to the amount of the orders. The problem appears, therefore, to be rooted in the tax rules and not, as the majority suggests, merely a family law problem exacerbated by the tax rules.

A key to understanding the basis for the decision reached by the majority in *Thibaudeau* is that the relevant group for the purposes of their *Charter* analysis was separated or divorced couples or, as Cory and Iacobucci JJ. put it, the "post-divorce 'family unit'".[123] In contrast, McLachlin and L'Heureux-Dubé JJ. in dissent, focus on the inequality between custodial and non-custodial parents. With respect to this difference of opinion about the unit of comparison for the purposes of a section 15 analysis, McLachlin J. states: "Where unequal treatment of one individual as compared with another is established, it is no answer to the inequality to say that a social unit of which the individual is a member has, viewed globally, been fairly treated."[124] Once the women on the court find that the issue is whether *custodial parents* are discriminated against in comparison to non-custodial parents, it is relatively easy for them to conclude that the inclusion/deduction scheme is discriminatory because custodial parents incur a tax burden while non-custodial parents receive a tax subsidy. In reaching this conclusion, McLachlin J. notes that family law does not and cannot rectify this inequality.

The appropriate unit for the purposes of the section 15 analysis is an interesting issue. The majority's view that the divorced or separated couple should be viewed as a single unit is at odds with one of the objectives of family law, which is to promote "clean break" or self-sufficiency of spouses after separation or divorce.[125] While the *Moge* v. *Moge*[126] decision of the Supreme Court of Canada clarified that this objective was only one among others, including compensation for the economic consequence of family

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[120] On pp. 117-18, above. Gonthier J. also states that even though the tax saving from the inclusion/deduction system does not benefit both parents in equal proportion, there is no infringement of s. 15 of the *Charter*, *Thibaudeau*, *supra* note 10 at para. 140.

[121] *Thibaudeau*, *ibid.* note 10 at para. 164.

[122] *Ibid.* at para. 160.

[123] *Ibid.* at para. 158.

[124] *Ibid.* at para. 190.

[125] McLachlin J. discusses this issue in the context of the objectives of the inclusion/deduction system. She says "[o]ne of the premises on which the logic of the deduction/inclusion scheme rests (that custodial parents are generally subject to a lower tax rate than those who pay the child support) is less and less in accord with present reality and undermines the importance our society places on women attaining financial self-sufficiency", *ibid.* at para. 182.

[126] [1992] 3 S.C.R. 813, 43 R.F.L. (3d) 345.

breakdown, self-sufficiency remains a key component of support law. Treating the divorced couple as a single unit flies in the face of this development. Further, if one takes the view of the majority to its logical conclusion, it appears that once a couple has a child, they remain a couple forever. Neither separation, divorce, or even remarriage by one or both of the parties, can dissolve the "family", at least insofar as the inclusion/deduction rules apply to them.

I now turn, in light of *Symes* and *Thibaudeau*, to a consideration of the potential for a successful *Charter* challenge to some of the inequalities I have outlined in this article. At a general level, both *Symes* and *Thibaudeau* have confirmed that the *Act* is subject to *Charter* review. As Iacobucci J. says in *Symes*, "[t]he *Income Tax Act* is certainly not insulated against all forms of *Charter* review".[127] Indeed, he even went as far as suggesting the grounds for a potential *Charter* challenge to the *Act* when he said of Symes' challenge:

> In another case, a different subgroup of women with a different evidentiary focus involving section 63 might well be able to demonstrate the adverse effects required by subsection 15(1). For example, although I wish to express no opinion on this point, I note that no particular effort was made in this case to establish the circumstances of single mothers. If, for example, it could be established that women are more likely than men to head single-parent households, one can imagine that an adverse effects analysis involving single mothers might well take a different course, since child care expenses would thus disproportionately fall upon women. That would be a question of proof, and it might involve other complicated questions associated with the alimony and maintenance provisions of the *Income Tax Act*.[128]

These comments are encouraging because they indicate that a male judge on the Supreme Court can envisage the possibility of a successful challenge to a provision of the *Act* on the basis of sex discrimination. Further, the comments of Iacobucci J. focus on a group of women who, as my previous analysis indicates, suffer considerable discrimination under the *Act*.

Unfortunately, Gonthier J. in *Thibaudeau* muddies the waters somewhat. While agreeing with the tenor of the comments by Iacobucci J. about the relationship of the *Charter* to the *Act*,[129] Gonthier J. then discusses the "special nature"[130] of the *Act*. The question then becomes, is there something so special or different about tax legislation that requires that it be treated differently than other legislation when the subject of a section 15 challenge?[131] It appears that for Gonthier J. the answer is yes. For him, the special nature is connected to the fact that it is the "essence of the ITA to make

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[127] *Supra* note 9 at 67.

[128] *Ibid.* at 74. It should be noted that in *Thibaudeau*, the coalition of intervenors and SCOPE made this argument in support of their contention that the inclusion/deduction rules discriminated on the basis of sex. In its decision, the Supreme Court did not directly address this issue.

[129] Gonthier J. states that "....the [*Act*] is subject to the application of the *Charter* just as any other legislation is," *Thibaudeau*, *supra* note 10 at para. 90.

[130] *Supra* note 10 at para 90.

[131] The Supreme Court has made it clear that the *Act* is subject to *Charter* scrutiny. In *Symes*, Iacobucci J. said "[t]he *Income Tax Act* is certainly not insulated against all forms of *Charter* review" (*supra* note 9 at 67) and in *Thibaudeau*, Cory and Iacobucci JJ. state that: "As must any other legislation, the *Income Tax Act* is subject to *Charter* scrutiny. The scope of the s. 15 right is not dependent upon the nature of the legislation which is being challenged" (*supra* note 10 at para. 159).

distinctions, so as to generate revenue for the government while equitably reconciling a range of necessarily divergent interests".[132] This special nature is a "significant factor that must be taken into account in defining the scope of the right relied on, which here as we know is the right to the 'equal benefit' of the law".[133] Gonthier J.'s analysis is not convincing and contradicts other Supreme Court pronouncements on the issue.[134] Attributing a special nature for section 15 purposes to legislation merely because it makes distinctions is highly problematic. Most legislation makes distinctions and indeed a distinction is the first step to establishing an infringement of section 15. I find Gonthier J.'s concern about revenue raising legislation somewhat of a red herring, as the purpose of the inclusion/deduction system is to generate a tax subsidy not revenue. L'Heureux-Dubé J., in dissent, is clearly not persuaded that such an approach is appropriate in a section 15 analysis. In a veiled criticism of Gonthier J's approach, she states:

> Inequality is inequality and discrimination is discrimination, whatever the legislative source. To water down one's analysis of a legislative distinction or burden merely because it arises in a statute which makes many other distinctions is antithetical to the broad and purposive approach to s. 15 of the *Charter* which this Court has repeatedly endorsed.[135]

At this stage it is helpful to move from the general to the specific. In this article, I have raised many examples of unequal access to tax subsidies. Is it possible, for example, that a *Charter* challenge on the basis of sex discrimination to the current system of tax assisted savings for retirement would be successful? As discussed earlier, there are several reasons why women do not benefit as much as men from the tax preferences for contributions to RPPs and RRSPs.[136] These include factors such as the delivery of the subsidy as a tax deduction which is worth less to those with lower incomes, the tendency for women to earn less than men, and women's lack of access to RPPs which are usually only available to those who work full time. Indeed it is the interaction of these factors that I suggest will make it difficult to argue that the effect of the tax rules is to discriminate on the basis of sex. Three problems arise. First, the source of the inequality becomes blurred and this makes it difficult to fashion an appropriate remedy. In this example, the argument would be that the primary source is the *Act* and the remedy sought would presumably be either a reading down of the provisions that relate to pensions or a reading in of a remedial measure. But, a reading down of the *Act* would simply result in the elimination of the preferential tax treatment for contributions. The issue would then be whether the government would step into the breach and implement a new method of subsidising pensions. Even if the government were to take this step, it is difficult to see how such a measure would redress the problem, given other systemic factors, such as women's poverty and their lack of access to RPPs. It is also unclear how far a court

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[132] *Thibaudeau, supra* note 10 at para. 91. Cory and Iacobucci JJ. support Gonthier J. on this point when they say "[w]e would stress that courts should be sensitive to the fact that intrinsic to taxation policy is the creation of distinctions which operate, as noted by Gonthier J., to generate fiscal revenue while equitably reconciling what are often divergent, if not competing interests"(at para. 159).

[133] *Ibid.* at para. 90.

[134] See discussion on pp. 122-23, above.

[135] *Thibaudeau, supra* note 10 at para. 6.

[136] See the discussion on pp. 110-12, above.

might be prepared to go with respect to reading a remedy into the *Act* given that this would have serious cost implications.

There is a second problem with respect to a *Charter* challenge of this nature to the *Act*. Because the *Act* does not refer explicitly to sex, in order to be successful, a challenge will have to demonstrate that the current tax assisted savings system for retirement has an adverse impact on women. *Thibaudeau* has created some confusion surrounding the instance when a provision can be considered to have an adverse impact on women, and thereby discriminate on the basis of sex. At the Federal Court of Appeal, the intervenor SCOPE argued that the requirement to include child support in income discriminated on the basis of sex because it had an adverse impact on women compared to men. Hugessen J. found that there was no sex discrimination. His reasoning was that a rule does not discriminate on the basis of sex simply because it affects more members of one sex than the other. If a rule which adversely affects women has the same adverse effect on men, then even though the number of women adversely affected (98 per cent in this case) is considerably greater than the number of men adversely affected (2 per cent), there is no sex discrimination. In other words, he invoked a qualitative aspect to the test of adverse impact discrimination. In order to succeed, women in the affected group (separated or divorced custodial parents) had to be affected differently than men.[137] As Professor Ellen Zweibel has said, this interpretation "comes dangerously close to requiring a distinction based on a sex-linked physical characteristic to establish adverse effects discrimination based on sex. It virtually precludes linking gender-based discrimination to social or economic status".[138] At the Supreme Court, the Coalition of Intervenors argued that there was also discrimination on the basis of sex and in so doing challenged this narrow interpretation of adverse effects discrimination. Unfortunately, the majority of the Supreme Court did not address the argument, thereby leaving the issue of adverse impact discrimination unresolved.

A third problem with a sex discrimination challenge to the *Act* is that a court will have to be persuaded that women's oppression in circumstances such as these is the result of a combination of factors and, as in *Thibaudeau*, may be on the basis of overlapping grounds such as sex, family status and poverty.[139] The issue of the interaction of *Charter* grounds was raised by the Coalition of Intervenors in *Thibaudeau*. It argued that "the imposition of an additional tax liability on single mothers who are poor exacerbates their social and economic disadvantage on the basis of their sex, family status and poverty" and that "the prevalence of poverty among women, and in particular single mothers, ought to reinforce sex equality claims".[140] Unfortunately, the Court did not directly address this issue in their decision, although the implication from the result is that the Court remains committed to considering each *Charter* ground as a discrete category. This approach is one of the major stumbling blocks to a successful *Charter* challenge to women's inequality under the *Act*.

My second example of the potential application of the *Charter* to one of the inequalities I have discussed is whether a challenge to the definition of spouse in the *Act*

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137 For an excellent discussion of this issue, see Philipps and Young, *supra* note 27 at 240-47.

138 "Constitutional Challenge", *supra* note 27 at 317.

139 For an excellent discussion of this issue in the context of *Mossop* v. *Treasury Board of Canada*, [1993] 1 S.C.R. 554 and *Symes* (F.C.A.), see Iyer, *supra* note 28. In this article, Nitya Iyer uses the two cases to illustrate how the categorial approach currently applied to *Charter* grounds is problematic.

140 *Thibaudeau*, paras. 38 and 40 of the Factum of the Coalition, on file with the author.

as it applies for the purposes of private pension would be successful. Such a challenge would be based on the ground of sexual orientation. In this case, I am more optimistic. The Canadian Union of Public Employees (CUPE) argued before the Ontario Court, General Division[141] that the definition of spouse in the *Act* discriminates on the basis of sexual orientation because it only applies to opposite sex couples and does not include lesbians and gay men.[142] I suggest that, despite the "losses" in *Symes* and *Thibaudeau*, the chances of success in this case are relatively good. Using the *Charter* analysis of McLachlin J. as approved by Cory and Iacobucci JJ., the argument would go like this. First the plaintiff would show that the *Act*, and specifically the definition of spouse, treats her differently by denying the benefit of a tax deduction for contributions made by her to a pension plan under which her same-sex partner is entitled to survivor benefits. The second part of the argument is that this distinction is discriminatory. As McLachlin J. says in *Thibaudeau*, this would include a distinction made on grounds that are typically based on stereotypical attitudes about the characteristics or situations of the individuals rather than their true situation or true ability. Finally, the prejudicial treatment is based on an analogous ground, namely sexual orientation.[143] In *Egan* v. *Canada*,[144] a case in which a gay man argued that to deny his same sex partner the spousal allowance under the *Old Age Security Act* contravened section 15 of the *Charter* and was discrimination on the basis of sexual orientation, the Supreme Court split on the issue of "spousal benefits". Four of the judges held that there was no discrimination because lesbians and gay men cannot be spouses in the "traditional" sense of that term.[145] Another four judges held that the legislation did discriminate on the basis of sexual orientation.[146] The ninth judge on the Court, Sopinka J., held that there was discrimination, but that it was justified under section 1 of the *Charter*. Thus, I suggest that in the CUPE case, it is quite possible that the court will find that the definition of spouse in the *Act* does discriminate against lesbians (and gay men) on the basis of sexual orientation and the issue will turn on whether that discrimination is justifiable in a free and democratic society. Provided the court does not elevate the *Act* to a status concomitant with the "special nature" ascribed to it by Gonthier J. in *Thibaudeau*, it is difficult to see how the discrimination could be justified.[147]

IV. Conclusion

Analysis of the impact of the tax system on women is truly a study in inequality. As I have demonstrated, women do not benefit from tax subsidies to the same extent that men benefit. Additionally, they are directly penalised by tax rules such as the requirement to include child support payments in income or the limited ability to deduct child care

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141 *CUPE* v. *Minister of National Revenue*, *supra* note 78.

142 See the discussion of this issue, on pp. 113-14, above.

143 Sexual orientation has been recognised by the Supreme Court of Canada as an analagous ground in *Egan* v. *Canada*,[1995] S.C.R. 513, [1995] S.C.J. No. 43 (QL) [hereinafter *Egan*].

144 *Ibid.*

145 Justices Lamer, LaForest, Gonthier and Major.

146 Justices Cory, Iacobucci, McLachlin and L'Heureux-Dubé.

147 This interpretation may be rather optimistic when one considers the comments of Sopinka J. in *Egan* where he said: "Given the fact that equating same-sex couples with heterosexual spouses, either married or common law, is still generally regarded as a novel concept, I am not prepared to say that by its inaction to date the government disentitled itself to rely on s. 1 of the *Charter*." at para. 111.

expenses with its corresponding negative effect on their ability to participate in the paid labour force. Underlying much of this unequal treatment is women's lack of wealth relative to that of men. The result is that as long as this disparity in wealth continues and social programs and subsidies are delivered through the tax system in their current manner, this inequality will continue. This has led the Ontario Fair Tax Commission to recommend that "[c]hanges should be made to the tax system to enhance progress towards the elimination of inequities faced by women and to address provisions that systemically discriminate against women."[148] Those changes could include measures such as converting tax deductions to tax credits, redefining "spouse" to include lesbians, permitting a broader deduction for child care expenses and generally giving women greater access to tax subsidies.

Suggesting changes to the tax system to redress some of the inequalities I have discussed assumes that the tax system is the appropriate tool by which to deliver subsidies for social and economic programs. In fact, I suggest that the tax system may well be an inappropriate instrument by which to provide funds for matters such as child care, old age or the support of children of separated or divorced parents. A review should be undertaken of all tax expenditures to determine whether they might be more fairly delivered by way of a direct grant.

A theme of this article has been the (in)visibility of the inequalities suffered by women as a result of Canadian tax policy. Ironically, while the inequalities suffered by Symes and Thibaudeau were invisible to the Supreme Court, at least insofar as not being found to be discriminatory, that litigation has engendered tremendous public interest and resulted in a heightened visibility of the inequalities suffered by those women and others. Perhaps it is time to shift our focus from a strategy that is directed towards trying to persuade the Supreme Court that the inequalities are discriminatory and infringe our *Charter* rights, and to redirect our attention to the political sphere. In so doing, we can use the tremendous public interest in the recent litigation as a spring board to demands for a redressing of the current inequalities.

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148 *Women and Taxation, supra* note 57 at 47.