THE *CHARTER* AND THE TAXATION OF WOMEN

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The chapter in the Report of the Royal Commission on the Status of Women in Canada *on "Taxation and Child Care Allowances" was the first effort in Canada to examine the tax system from a women's perspective. Rightly or wrongly, the Commission's recommendations were not accepted by the legislators of the day. The advent of the* Charter of Rights and Freedoms, *which has fundamentally altered the constitutional landscape, may offer women an opportunity, apart from the political process, to influence the shape of the tax system. Thus the case of* Symes *v.* Canada *is of special interest. It was the first case in which a taxpayer successfully used the* Charter *to challenge a substantive provision of the* Income Tax Act.

In Symes, *a lawyer argued that the non-deductibility of certain of her child care expenses violated the equality provisions of the* Charter. *Undoubtedly, there will be further* Charter *challenges to the* Income Tax Act. *The questions for Canadian women are: what provisions, how, and to whose advantage?*

The author concludes that women who seek tax reform are apt to be disappointed. Charter *litigation has the potential to make the income tax fairer, if not equitable. It will not result in radical new departures, but it could be of value to women if it forces courts to take into account the economic and social realities of their lives. The group that may benefit most from litigation is not women* per se *but the low income, among whom women and their children are disproportionately represented.*

Dans le chapitre « La fiscalité et les allocations pour enfants à charge » du Rapport de la Commission royale d'enquête sur la situation de la femme au Canada, *on a tenté pour la première fois au Canada d'examiner le régime fiscal du point de vue des femmes. À tort ou à raison, les recommandations de la Commission n'ont pas été retenues par les législateurs de l'époque. L'avènement de la* Charte canadienne des droits et libertés, *qui a modifié fondamentalement le paysage constitutionnel, peut donner l'occasion aux femmes d'influencer la structure du régime fiscal, autrement que par le processus politique. Par conséquent, l'affaire* Symes *c.* Canada *comporte un intérêt spécial. En effet, c'est la première affaire dans laquelle une contribuable a contesté avec succès, au moyen de la* Charte, *une disposition importante de la* Loi de l'impôt sur le revenu.

Dans cette affaire, une avocate soutenait que la non-déductibilité de certaines dépenses relatives à la garde de ses enfants contrevenait aux dispositions sur l'égalité prévues dans la Charte. *Il ne fait aucun doute que l'on contestera à nouveau la* Loi de l'impôt sur le revenu *en invoquant la* Charte. *Selon le point de vue des Canadiennes, les questions à poser sont: Quelles dispositions devrait-on contester? Comment et pour le bénéfice de qui?*

L'auteure conclut que les femmes qui souhaitent une réforme de la fiscalité risquent d'être désappointées. Les poursuites en vertu de la Charte *peuvent rendre l'impôt sur le revenu plus juste, si ce n'est*

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équitable. Ces contestations ne produiront pas de changements radicaux, mais elles peuvent être utiles aux femmes si elles obligent les tribunaux à tenir compte des réalités économiques et sociales de leur vie. Ce ne sont pas les femmes en tant que telles qui bénéficieront le plus de ces poursuites, mais les personnes ayant de faibles revenus, parmi lesquelles on compte d'ailleurs un nombre disproportionné de femmes et d'enfants.

I. INTRODUCTION

In *Symes* v. *Canada*[1] a taxpayer launched the first successful challenge to a substantive provision of the *Income Tax Act*[2] under the *Canadian Charter of Rights and Freedoms*.[3] The taxpayer was a woman lawyer. She alleged that the non-deductibility of some of her work-related child care expenses infringed the equality rights provisions of the *Charter*.[4] Mr Justice Bud Cullen took the position that he should interpret the meaning of the words "made or incurred. . .for the purpose of gaining or producing income"[5] having regard to the *Charter*. He said:

> I agree with the plaintiff's submission that in light of *Andrews*, an interpretation of the *Income Tax Act* which ignores the realities that women bear a major responsibility for child rearing and that the costs of child care are a major barrier to women's participation, would itself violate section 15 of the Charter.[6]

For women, the *Symes* case is a cause for both celebration and concern. On the one hand, it shows that provisions of the *Income Tax Act* which adversely impact on women may be attacked. On the other hand, the actual outcome in *Symes*, which permits upper-class women to write-off their nannies' full salaries, is of doubtful equity.

Symes also raises a number of questions. The most obvious is whether there are any other income tax provisions that may be challenged under the *Charter* because of their adverse impact on women. Another is whether some or all *Charter* challenges to the income tax system will ultimately accrue to the benefit of all or only certain women. Since *Symes* does not provide much in the way of guidance

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[1] (1989), 25 F.T.R. 306, [1989] 1 C.T.C. 476 [hereinafter *Symes* cited to C.T.C.].

[2] R.S.C. 1952, c. 148 *as am.* S.C. 1970-71-72, c. 63 [hereinafter *Income Tax Act* or *ITA*].

[3] Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982 c. 11 [hereinafter *Charter*].

[4] Section 15 of the *Charter* provides:

> (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[5] *ITA*, s. 18(1)(a).

[6] *Supra*, note 1 at 490.

for courts undertaking a review of tax legislation, there are also questions of approach and technique. These questions include what is "equal benefit of the law" from a tax perspective, how does the disparate impact approach work on an analysis of specific tax provisions, and what other grounds, besides "sex" in section 15, might be used by women in support of women. Finally, *Symes* compels consideration of the legitimate bounds of judicial review of what, after all, is the most complex piece of socio-economic legislation in Canada.

This paper attempts to deal with these questions. The perspective is that of a would-be reformer heavily influenced by the REPORT OF THE ROYAL COMMISSION ON TAXATION.[7] The philosophy underlying the CARTER REPORT is described in its chapter on "Objectives of the Tax System" when, after listing four fundamental objectives of the tax system,[8] it states:

> We assign a higher priority to the objective of equity than to all the others. . . .[O]ur task requires us to make recommendations that would lead to an equitable distribution of the burden of taxation. We are convinced that unless this objective is achieved to a high degree all other achievements are of little account. Thus the need for an equitable tax system has been our major concern and has guided us in all our deliberations.[9]

It is acknowledged, however, that the CARTER REPORT does not necessarily provide guidance in the resolution of *Charter* challenges by women to the *Income Tax Act*. This is not surprising given the date of its publication, the almost exclusively male composition of the Commission and, indeed, Mr Carter's own views.[10] Furthermore, there

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[7] REPORT OF THE ROYAL COMMISSION ON TAXATION, vols 1-6 (Ottawa: Queen's Printer, 1966) (Chair: K. Carter) [hereinafter CARTER REPORT]. In the preface to W.N. Brooks, ed., THE QUEST FOR TAX REFORM (Toronto: Carswell, 1988), the editor describes the CARTER REPORT as follows:

> The Report of the Royal Commission on Taxation is one of the boldest, most imaginative, comprehensive and detailed blueprints of tax reform ever published. It was hailed around the world as a landmark in taxation.

[8] 1. To maximize the current and future output of goods and services desired by Canadians. 2. To ensure that this flow of goods and services is distributed equitably among individuals or groups. 3. To protect the liberties and rights of individuals through the preservation of representative, responsible government and maintenance of the rule of law. 4. To maintain and strengthen the Canadian federation. *See* CARTER REPORT, *ibid.* vol. 2 at 7.

[9] *Ibid.*

[10] *See* L. McQuaig, BEHIND CLOSED DOORS (Markham: Viking, 1987), especially Chapter Five entitled: "How a Nice Bay Street Accountant Ended Up Hated by His Neighbours: The Tale of Kenneth Carter". At page 140, Ms McQuaig notes that Mr Carter opposed having a woman commissioner. There was, however, one woman out of six commissioners. She was Eleanor Milne, a Winnipegger, who had served as treasurer of the National Council of Women.

is no necessary correlation between "equality" under the *Charter* and "equity" in the tax system. Indeed, as shall be seen,[11] there may, in certain circumstances, be a direct conflict. Nevertheless, the CARTER REPORT should, by its assault on privilege and emphasis on fairness, provide guidance and inspiration for women interested in changing the tax system for the better.

II. THE AMERICAN EXPERIENCE

For the most part, the classifications and distinctions drawn in the American *Internal Revenue Code*,[12] including those relevant to women, have not been subject to extensive judicial review under the due process clause of the American constitution.[13] Even in the *Lochner* era,[14] when the Supreme Court of the United States adopted a very interventionist position regarding its right to review economic legislation, the Court held in *Brushaber* v. *Union Pacific Railroad Company* that "the Constitution does not conflict with itself by conferring, upon the one hand, a taxing power, and taking the same power away, on the other, by the limitations of the process clause."[15] The Court did concede, however, that the judiciary could intervene if the taxing provision "was so arbitrary. . .that it was not the exertion of taxation but a confiscation of property".[16] Practically this meant that review by the courts was almost completely inhibited.[17] In effect, the test was the same as the rational connection test developed years later for regulatory and business legislation. Under that test "a legislative classification will not be set aside if any state of facts rationally justifying it is demonstrated to or perceived by the courts".[18]

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[11] *See infra*, Part IX G.

[12] The *Internal Revenue Code* is a compilation of American federal tax legislation.

[13] The *Internal Revenue Code*, being a Federal Statute, is not subject to the equal protection provision of the Fourteenth Amendment. However, in *Bolling* v. *Sharpe*, 347 U.S. 497 (1954), the United States Supreme Court held that the equal protection provision, which applies to state legislation, was read into the Fifth Amendment which applies to federal legislation.

[14] The *Lochner* era in American constitutional history commenced with the United States Supreme Court's decision in *Lochner* v. *New York*, 198 U.S. 45 (1905) which prescribed maximum hours of work for bakers unconstitutional. The end of the era was signalled in *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379 (1937) when the Court expressly reversed an earlier holding invalidating minimum wage laws.

[15] 240 U.S. 1 at 24 (1916).

[16] *Ibid.*

[17] *See* B.I. Bittker, *Constitutional Limits on the Taxing Power of the Federal Government* (1987) 41 THE TAX LAWYER 3.

[18] *U.S.* v. *Maryland Savings-Share Ins. Corp.*, 400 U.S. 4 at 6 (1970).

There are two other higher levels of constitutional review which theoretically might be applied to some of the distinctions of the *Internal Revenue Code*. The "strict scrutiny" test applies to legislation that classifies on the basis of a "suspect" characteristic (for example, race) or in respect of a "fundamental interest" (for example, mobility rights). Under the strict scrutiny test, legislation, including tax legislation, would be declared unconstitutional unless the classification can be shown as *necessary* to further a *compelling* government interest. "Intermediate level scrutiny" applies to "quasi-suspect" characteristics (for example, sex). It requires that the classification be *substantially related* to an *important* governmental interest.[19]

In practice, the United States *Internal Revenue Code* is generally not subject to these higher levels of scrutiny since distinctions drawn in the American income tax legislation, as in its Canadian counterpart, are not based on any of these suspect or quasi-suspect characteristics. The fact that the classifications may have a disparate and adverse impact on women or minorities is immaterial. In the United States, unlike Canada, no theory of general application has been developed to subject legislation to constitutional scrutiny on the basis of its effects as compared to its purposes.[20]

III. The Canadian Experience of Section 15 of the Charter

Unlike the Fourteenth Amendment of the American Constitution, the equality rights provision of the Canadian *Charter* requires a distinctive two-step analysis. First, the complainant must establish that the legislation under scrutiny violates the equality rights provision in section 15. Those rights are guaranteed to every individual "without discrimination". Secondly, if the court finds equality rights have been abrogated, the government has the opportunity to justify the infringement because section 15 is subject to section 1 which guarantees the rights and freedoms under the *Charter* "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

This process has only recently been clarified by the Supreme Court in *Andrews* v. *Law Society of British Columbia*.[21] Even so, there

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[19] *See* R. Elliot, *Judicial Review of Social and Economic Legislation under Section 15 of the Charter*, unpublished paper delivered August 1986 at Stanford University at a conference organized by the Canadian Institute for Advanced Legal Studies.

[20] W.W. Black, *Intent or Effects: Section 15 of the Charter of Rights and Freedoms* in J.M. Weiler & R.M. Elliot, eds, Litigating the Values of a Nation (Toronto: Carswell, 1986) at 120ff.

[21] [1989] 1 S.C.R. 143, 56 D.L.R. (4th) 1 [hereinafter *Andrews* cited to D.L.R.].

remains considerable ambiguity. Section 15 equality rights are guaranteed to every individual "without discrimination". Mr Justice McIntyre defined "discrimination" in *Andrews* as follows:

> [D]iscrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.[22]

Not every distinction drawn in law, however, will be subject to judicial review.[23] Therein lies a problem. Which distinctions will be scrutinized?[24] Mr Justice McIntyre, writing for the majority on section 15 issues, does not seem to attach much importance to the four equalities in the section. The real crux of the matter to him appears to be whether the distinction drawn in law is based on "personal characteristics". As a result, in any analysis using his approach, the emphasis will be on determining whether the distinction is based on an enumerated[25] or analogous ground. In looking at the taxation of women, that might mean, for example, that discussion could centre on whether "income" or "socio-economic status" is an "analogous ground". More women than men are poor and women tend to be poorer.[26]

Compared to Mr Justice McIntyre, Mr Justice La Forest, dissenting in *Andrews*, attaches more significance to the four equalities set out in section 15. It is not entirely clear, however, how he sees the operation of section 15. He is not prepared to accept that the only significance to be attached to the four equalities "is that the protection afforded by the section is restricted to discrimination through the application of law".[27] As he said:

> [I]t can reasonably be argued that the opening words, which take up half the section, seem somewhat excessive to accomplish the modest role attributed to them, particularly having regard to the fact that s. 32 already limits the application of the Charter to legislation and governmental

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[22] *Ibid.* at 18.

[23] *Ibid.* at 13.

[24] For a detailed analysis of the *Andrews* case *see* A. MacKay & D. Pothier, *Developments in Constitutional Law: The 1988-89 Term* (1990) 1 SUP. CT L. REV. (2d) 81 at 83.

[25] Mr Justice McIntyre uses the term "enumerated" in his judgment in *Andrews*. *See, e.g., supra*, note 21 at 18. In fact the grounds in section 15 of the *Charter* are listed, not enumerated.

[26] *See* National Council of Welfare, WOMEN AND POVERTY REVISITED (Ottawa: Supply and Services, 1990); M. Gunderson, L. Muszynski & J. Keck, WOMEN AND LABOUR MARKET POVERTY (Ottawa: Canadian Advisory Council on the Status of Women, June 1990).

[27] *Supra*, note 21 at 37.

> activity. It may also be thought to be out of keeping with the broad and generous approach given to other Charter rights, not the least of which is s. 7, which like s. 15 is of a generalized character. In the case of s. 7, it will be remembered, the Court has been at pains to give real meaning to each word of the section so as to ensure that the rights to life, liberty and security of the person are separate, if closely related rights.[28]

It is also noteworthy that although Mme Justice Wilson concurs with Mr Justice McIntyre on section 15 issues in *Andrews*, she specifically held in *R.* v. *Turpin*[29] that the appellant's "rights to equality under the law and to the equal protection of the law have. . .been violated".[30] In that case the appellants, residents of Ontario charged with first degree murder, were denied the opportunity to be tried by judge alone. In contrast, residents of Alberta charged with the same offense could choose between trial by judge and jury or judge alone. Nevertheless, Mme Justice Wilson concluded that section 15 had not been abrogated because there was no discrimination.[31] In the following section of this paper the concept of "equal benefit of the law" will be explored in relation to the income tax system.

Finally, the various approaches to section 1 adopted by the justices in *Andrews* should be mentioned. Chief Justice Dickson and Justices Wilson and L'Heureux-Dubé apply the approach first fully delineated in *R.* v. *Oakes*.[32] Thus, once it is established that the challenged legislation relates to concerns which are "pressing and substantial",[33] a proportionality test is to be applied. It has three aspects. The limiting measures must be carefully designed or rationally connected to the legislation's objective. They must impair the constitutionally protected right as little as possible. Finally they must not so severely trench on the right, that the legislative objective is nevertheless out-weighed by the abridgement of the right.

Mr Justice McIntyre, Lamer J. concurring, rejects the *Oakes* approach. For Mr Justice McIntyre, "the standard of 'pressing and substantial' may be too stringent for application in all cases".[34] His concern is that "[t]o hold otherwise would frequently deny the community-at-large the benefits associated with sound social and economic legislation".[35] Rather the first question should be "whether the limitation represents a legitimate exercise of the legislative power for the

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[28] *Ibid.* at 37-8.

[29] [1989] 1 S.C.R. 1296, 48 C.C.C. (3d) 8 [hereinafter *Turpin* cited to C.C.C.].

[30] *Ibid.* at 33.

[31] *Ibid.* at 35.

[32] [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200 [hereinafter *Oakes* cited to D.L.R.].

[33] *Ibid.* at 227.

[34] *Supra*, note 21 at 25.

[35] *Ibid.*

attainment of a desirable social objective which would warrant overriding constitutionally protected rights".[36] Although Mr Justice McIntyre adopts as his second step a proportionality test, it is less rigid and more flexible than the one in *Oakes*. He states:

> There is no single test under s. 1; rather, the court must carefully engage in the balancing of many factors in determining whether an infringment is reasonable and demonstrably justified.[37]

Finally, reference should be made to the decision of Mr Justice La Forest who claims to be applying *Oakes* but indicates in other passages considerable sympathy with Mr Justice McIntyre's views.[38]

From this limited analysis of the approach of the justices to section 1 in *Andrews*, it can be seen that there was considerable disagreement about the legitimate bounds of judicial review. Since *Andrews*, Chief Justice Dickson and Mme Justice Wilson have left the Court. It is not clear how future justices will conceive their proper role. A general discussion of the problem can be found in Part VIII of this paper.

IV. The Meaning of "Equal Benefit of the Law"

The purpose of this section of the paper is to consider the possible meanings of "equality" as defined in section 15 with reference to specific issues arising on *Charter* scrutiny[39] of the *Income Tax Act*. The discussion is, of necessity, speculative, since the meaning of the equality rights formulation in section 15 "equal before and under the law", and "the right to equal protection and benefit of the law" has not, as yet, been fully explored by the Canadian courts.

A. *History*

The wording of section 15 of the *Charter* is much broader than the equality provision in the *Canadian Bill of Rights*[40] which provides

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[36] *Ibid.*

[37] *Ibid.* at 26.

[38] *Ibid.* at 38.

[39] The term "*Charter* scrutiny" is used throughout this paper as a shorthand reference to section 15 scrutiny. There have been numerous cases concerning penalties and process under the *ITA*. *See* B.K. Grossman, *Search and Seizure Under the Income Tax Act: A Constitutional Assessment of Bill C-84 Amendments to the Income Tax Act* (1987) 35 Can. Tax J. 1349; E.C. Harris, *Civil Penalties Under the Income Tax Act* in Corporate Management Tax Conference 1988, Income Tax Enforcement, Compliance and Administration (Toronto: Canadian Tax Foundation, 1988) c. 9 at 16 ff. *See also R.* v. *McKinley Transport Ltd* (1990), 106 N.R. 385, [1990] 2 C.T.C. 103 (S.C.C.).

[40] R.S.C. 1985, Appendix III.

only for "the right of the individual to equality before the law and the protection of the law".[41] To a considerable extent, the different wording of section 15 was the result of the lobbying of women's groups during the negotiations leading to the patriation of the Constitution.[42] In particular they wanted the words "equal benefit of the law" added to section 15. This was thought to be necessary because of the decision of the Supreme Court in *Bliss* v. *A.G. Canada*.[43] The plaintiff in that case was denied unemployment insurance benefits because she was pregnant although she was ready and able to work. (She did not qualify for UIC maternity benefits). The judgment of the Court was delivered by Mr Justice Ritchie who held that "[a]ny inequality between the sexes in this area is not created by legislation but by nature".[44] He distinguished the earlier decision of *R.* v. *Drybones*[45] as follows:

> There is a wide difference between legislation which treats one section of the population more harshly than all others by reason of race as in the case of. . .[*Drybones*] and legislation providing additional benefits to one class of women, specifying the conditions which entitle a claimant to such benefits and defining a period during which no benefits are available. The one case involves the imposition of a penalty on a racial group to which other citizens are not subjected; the other involves a definition of the qualifications required for entitlement to benefits, and in my view the enforcement of the limitation provided by s. 46 does not involve denial of equality of treatment in the administration and enforcement of the law before the ordinary Courts of the land as was the case in *Drybones*.[46]

At the very least, therefore, "equal benefit of the law" means that there should be equal entitlement to social welfare programs created by the legislatures without discrimination on enumerated or analogous grounds. This should also be the case for entitlement to "benefits", that is, deductions, exemptions, credits and deferrals, of the income tax system.

B. A Broader Interpretation of the Words "Equal Benefit of the Law"

The term "equal benefit of the law" is also susceptible of a broader meaning. It suggests not only equality of entitlement but equality of results. Equality of results potentially requires the "fair"

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[41] R.S.C. 1985, Appendix III, s. 1(b).

[42] *See, e.g.*, A.F. Bayefsky, *Defining Equality Rights* in A.F. Bayefsky & M. Eberts, eds, EQUALITY RIGHTS AND THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS (Toronto: Carswell, 1985) at 21-24.

[43] [1979] 1 S.C.R. 183, 92 D.L.R. (3d) 417 [hereinafter *Bliss* cited to D.L.R.].

[44] *Ibid.* at 422.

[45] (1969), [1970] S.C.R. 282, 9 D.L.R. (3d) 473 [hereinafter *Drybones* cited to D.L.R.].

[46] *Supra*, note 43 at 423.

or "just" distribution of social goods. In the income tax system this approach would require not only that all taxpayers be equally entitled to benefits, but that at least some of the benefits be distributed equally or fairly among groups. Thus, for example, the provisions for deferred income plans for retirement[47] in the *Income Tax Act* could be challenged because they do not provide "equal benefit of the law". Overall, the value of the tax benefits provided by deferred retirement income plans to women to subsidize their retirement is less than it is to men.[48] Furthermore, the subsidy is an upside-down subsidy. The more income a taxpayer has, the more government subsidy she receives. The less income, the less subsidy she receives. If she has no income, she receives no subsidy.[49]

Whether the Canadian courts will give such a broad interpretation to the phrase "equal benefit of the law" when applying section 15 to provisions of the *Income Tax Act* remains to be seen and is discussed later in this paper.[50] Certainly the American concept of "equality" embodied in the Fourteenth Amendment is more limited. The words of the Fourteenth Amendment "equal protection of the law" are incorporated into section 15 of the *Charter*. However, the other words of section 15, particularly "equal benefit of the law" might suggest that the Canadian constitutional guarantee goes further than the American one. Furthermore, it is possible that philosophically the Canadian and American approaches will be different.

It has been suggested that the goal of equality of results is not one that Americans wish to attain except in certain limited circumstances.[51] While the Warren Court made some brief forays into a result-oriented approach to the Fourteenth Amendment, the Burger Court generally backed away from its implications.[52] Thus, in *San Antonio Independant School Dist* v. *Rodriguez*,[53] the United States Supreme Court dismissed an equal protection challenge to Texas' system of financing its public schools. Under the Texas system, the state guaranteed a minimum grant for each child in the system. School districts were empowered to raise additional revenue through local property taxes. The school district in which the plaintiffs lived was very poor and only by imposing the highest permissible rate in the particular

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[47] *ITA*, ss 146 and 147.1.

[48] *See infra*, Part IX.

[49] The subsidy by the government is equal to the amount of a taxpayer's contribution to a deferred income plan multiplied by the taxpayer's marginal rate of tax. Also, higher income taxpayers have a greater ability to take advantage of the deferred retirement income provisions.

[50] *See infra*, Part IX.

[51] *See* P. Brest, *The Supreme Court 1975 Term —Foreword: In Defense of the Antidiscrimination Principle* (1976) 90 HARV. L. REV. 1 and Black, *supra*, note 20.

[52] *See* L.H. Tribe, AMERICAN CONSTITUTIONAL LAW, 2d ed. (New York: The Foundation Press, 1988) at 1625ff.

[53] 411 U.S. 1 (1973).

metropolitan area was it able to generate revenue of $26 per pupil beyond the state grant. The plaintiffs contrasted their situation with Alamo Heights, a property-rich district, which raised, at a lower rate, $356 per pupil. They contended that the gross disparity in educational spending violated the right of the children in the poor district to equal protection of the law. In dismissing the suit of the plaintiffs, the Supreme Court held the plaintiffs had suffered only a relative deprivation and in any case, the plaintiff class was "large, diverse, and amorphous".[54] "Indeed there is reason to believe that the poorest families are not necessarily clustered in the poorest property districts."[55]

C. *Equal Benefit of the Law: The Concept of "Benefit" in the Tax System*

In *Ontario Public Service Employees Union (OPSEU)* v. *National Citizens Coalition (NCC)*,[56] Mr Justice Galligan, and on appeal the Court of Appeal,[57] began to tentatively explore the concept of benefit in the tax system. In *OPSEU*, the plaintiffs argued that federal and Ontario income taxation violated their equality rights because taxpayers with business income are allowed to deduct donations to political lobby groups (such as the NCC) as business expenses, while employees are not allowed a comparable deduction. In a short judgment, Mr Justice Galligan considered the meaning of "equal benefit of the law" in relation to the tax system. He said:

> The argument advanced with respect to subsection 15(1) is that the circumstances disclosed in paragraphs 10 and 11 of the statement of claim show that certain taxpayers could be disentitled to equal benefit of the tax laws. I have some difficulty in understanding how tax laws can be said to bestow benefits on taxpayers. But, having said that, it is clear that some taxpayers are entitled to certain deductions from their income while others are not. The *Income Tax Act* is full of examples where one taxpayer for certain reasons has certain deductions which another taxpayer does not have. Also, certain taxpayers are called upon to pay more taxes than others. Some taxpayers are called upon to pay taxes at a higher rate than others.[58]

In his statement, Mr Justice Galligan flirts with, but ultimately disavows, the generally discredited notion in the American context that tax "benefits" are somehow different than other benefits bestowed

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[54] *Ibid.* at 28.

[55] *Ibid.* at 23.

[56] (1987), 60 O.R. (2d) 26, [1987] 2 C.T.C. 59 (H.C.) [hereinafter *OPSEU* cited to C.T.C.].

[57] (1990), 74 O.R. (2d) 260, [1990] 2 C.T.C. 163 (C.A.) [hereinafter *OPSEU* (C.A.) cited to C.T.C.].

[58] *Supra*, note 56 at 61.

under other types of legislation.[59] Nevertheless, he dismissed the plaintiff's claim as not showing even the possibility of a *Charter* violation. For Mr Justice Galligan, the *Charter* is "an important piece of legislation which constitutionally protects important rights and freedoms. . . ."[60] It would be "very close to trivializing that very important constitutional law, if it is used to get into the weighing and balancing of the nuts and bolts of taxing statutes".[61]

The Ontario Court of Appeal upheld Mr Justice Galligan's judgment and summarily dismissed the appellant's equality rights arguments on the ground that section 15 only applies to enumerated or analogous groups. The Court found that employees are not a

> discrete and insular minority. It is a large segment of the population. . .which we described in *Mirhadizadeh*. . . "as not linked by any personal characteristics relating to them as individuals or members of a group [62]".[63]

It is noteworthy that in the course of its judgment, the Court of Appeal in *OPSEU* specifically mentioned *Regan* v. *Taxation with Representation of Washington (TWR)*.[64] In that case, the United States Supreme Court accepted that the special tax concessions in question, namely, the non-taxation of certain charitable organizations and the deductibility of contributions made to them, were the equivalent of government cash grants or subsidies. The Ontario Court of Appeal held, however, that *Regan* was of no assistance to the appellants in *OPSEU*. In *Regan* the United States Supreme Court held that there is no requirement under the American Constitution that the government subsidize citizen's free speech, so the failure to grant special treatment to the TWR did not violate its "freedom of speech". Furthermore, TWR's equality rights under the Fifth Amendment were not violated because the *Internal Revenue Code* permitted taxpayers to deduct contributions to veterans' organizations but not to TWR. There was no invidious discrimination in the denial of deductibility for contributions to TWR.

In *OPSEU* the Ontario Court of Appeal resisted using the tax expenditure analysis advanced by the appellants. The failure is unfortunate because the tax expenditure concept may offer Canadian courts some insights for their constitutional reviews of provisions of the income tax system.

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[59] *See* S.S. Surrey & P.M. McDaniels, TAX EXPENDITURES (Cambridge: Harvard University Press, 1989) particularly Chapter Five entitled "The Tax Expenditure Concept in the Courts" at 118.

[60] *Supra*, note 56 at 61.

[61] *Ibid.*

[62] *Mirhadizadeh* v. *Ontario* (1989), 69 O.R. (2d) 422 at 426, 60 D.L.R. (4th) 597 at 601 (C.A.) [hereinafter *Mirhadizadeh* cited to D.L.R.].

[63] *Supra*, note 56 at 61.

[64] 461 U.S. 540 (1983).

D. Tax Expenditures

The late Stanley Surrey, former Assistant Secretary of the United States Treasury, was responsible for coining the term "tax expenditure". He outlined his understanding of the concept in a seminal book in public finance PATHWAYS TO TAX REFORM: THE CONCEPT OF TAX EXPENDITURES.[65] As the title suggests, he believed "that the principal ways to tax reform and improvement of our federal tax system lie in the concept of tax expenditures".[66] The following brief excerpt from a later book on tax expenditures by Surrey and his colleague McDaniel is one of the best explanations of the concept:

> The tax expenditure concept posits that an income tax is composed of two distinct elements. The first element consists of structural provisions necessary to implement a normal income tax, such as the definition of net income, the specifications of accounting rules, the determination of the entities subject to tax, the determination of the rate schedule and exemption levels, and the application of the tax to international transactions. These provisions compose the revenue-raising aspects of the tax. The second element consists of the special preferences found in every income tax. These provisions, often called tax incentives or tax subsidies, are departures from the normal tax structure and are designed to favor a particular industry, activity, or class of persons. They take many forms, such as permanent exclusions from income, deductions, deferrals of tax liabilities, credits against tax, or special rates. Whatever their form, these departures from the normative tax structure represent government spending for favored activities or groups, effected through the tax system rather than through direct grants, loans, or other forms of government assistance.[67]

The Treasury Department compiled the first tax expenditure budget during Surrey's tenure as Assistant Secretary. The United States now publishes a tax expenditure budget annually. In Canada, the government has published three tax expenditure budgets, the first two in 1979 and 1980 and the last one in 1985.[68]

The most significant aspect of the tax expenditure concept is its ability to illuminate, for the scrutiny of political reformers and judicial reviewers alike, the types and costs of subsidies provided by the tax

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[65] (Cambridge: Harvard University Press, 1973) [hereinafter PATHWAYS TO TAX REFORM].

[66] *Ibid.* at vii.

[67] *Supra*, note 59 at 3.

[68] Canada, Department of Finance, GOVERNMENT OF CANADA TAX EXPENDITURE ACCOUNT: A CONCEPTUAL ANALYSIS AND ACCOUNT OF TAX PREFERENCES IN THE FEDERAL INCOME AND COMMODITY TAX SYSTEMS (Ottawa: Supply & Services, 1979) [hereinafter 1979 Tax Expenditure Budget]; Canada, Department of Finance, GOVERNMENT OF CANADA TAX EXPENDITURE ACCOUNT: AN ACCOUNT OF TAX PREFERENCES IN THE FEDERAL INCOME AND TAX COMMODITY SYSTEMS, 1976-1980 (Ottawa: Supply & Services, 1980); Canada, Department of Finance, ACCOUNT OF THE COST OF SELECTIVE TAX MEASURES (Ottawa: Supply & Services, 1985) [hereinafter 1985 Tax Expenditure Budget].

system. If the courts should be oriented, as Mme Justice Wilson has suggested, to using the equality rights provisions of the *Charter* to assist the disadvantaged,[69] then the tax expenditure approach will help them to understand the cost, distribution and economic impact of many tax concessions.

The tax expenditure concept operates on both the taxpayer and national levels. At the taxpayer level, it shows the perverse nature of the upside-down subsidy provided by many tax concessions. Assume, for example, that a taxpayer makes $1,000 in taxable capital gains in a year and is eligible to claim the capital gains exemption.[70] If she is a taxpayer resident in Nova Scotia in the top tax bracket, the exemption will be worth about $462 to her. For a middle bracket taxpayer, the exemption will be worth about $415. A taxpayer in the lowest bracket will receive a benefit of approximately $271. Should an individual who does not pay tax receive a capital gain (which is in any case very unlikely[71]) she will receive no subsidy. At the national level, the list of all tax expenditures made by the government informs its perusers of the gross costs of various tax concessions.[72]

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[69] *Turpin*, *supra*, note 29 at 35.

[70] *ITA*, s. 110.6.

[71] Canada, Department of Finance, ANALYSIS OF FEDERAL TAX EXPENDITURES FOR INDIVIDUALS (Ottawa: Supply & Services, 1981) Table 8 at 19. High-income individuals, defined as individuals with incomes of in excess of $50,000 in 1979, received 62.8 percent of realized capital gains. Over fifty percent of high-income taxpayers reported realized capital gains in the year compared to about 6 percent of all other individuals.

[72] The last tax expenditure budget dealt only up to the 1983 taxation year for individuals. The lifetime capital gains exemption was introduced in the May 22, 1985 budget. The problems of estimating the "cost" of a tax expenditure are described in the 1985 Tax Expenditure Budget, *supra*, note 68 at 4 as follows:

> *The quantitative estimates of federal selective tax measures in the tables should be used with caution.* The reasons for this are summarized in the following points.
>
> First, the estimates are based on the assumption that the removal of a provision would not affect taxpayer behaviour. Often, the removal of a selective tax measure would cause taxpayers to rearrange their affairs to minimize the amount of extra tax they would have to pay. This would result in smaller increases in revenue than are implied by the estimates given in the tables.
>
> Second, the estimates of the value of a provision do not take into account the effect on the overall level of economic activity of removing a selective tax measure. This could be quite significant in the case of a major tax provision. If the removal of a selective tax measure entailed a negative impact on output and incomes in the economy, the federal tax revenue effect would be smaller than otherwise. In this respect, the estimates in the account may be overstated.

The list continues with points four and five which mention significant data constraints and emphasize that the values of individual selective tax measure values cannot be added together to produce a meaningful total value.

A second important aspect of the tax expenditure concept is its emphasis on the comparability of tax subsidies and direct government grants. If, indeed, certain tax expenditures are, in effect, the equivalent of direct government subsidies, then it seems to follow that they should be evaluated on the same basis. This probably implies more judicial activism in the review of tax legislation. Courts should be less inclined to hide behind the twin rubrics of complexity and inter-relatedness if the cost of a particular concession is explicit.

It should be emphasized that the tax expenditure concept cannot, despite its usefulness as a technique of analysis, itself determine whether a provision of the *Income Tax Act* violates the *Charter*. This is true for a number of reasons. First, a subsidy delivered through the tax system to some taxpayers and not to others is not necessarily a denial of equal benefit of the law. The constitutional considerations that obtain for direct government grants apply to tax expenditures. Second, even if a tax provision is not a tax expenditure it is still subject to constitutional review. Third, there is considerable debate over what is a "normative tax system". Only deviations from the normative tax system are tax expenditures. While the first proposition is self-evident, the other two need some explication.

In Part VIII of this paper, the significance for constitutional purposes of whether a particular tax provision is a tax expenditure or part of the normative tax system is discussed. The last proposition, that we do not know what a normative tax system is, will be dealt with briefly below.

Ever since Surrey first introduced the tax expenditure concept, tax theorists have been engaged in debate over its usefulness. The main criticism, although there are others,[73] has been that there is no principled way to distinguish between the normative tax system and tax expenditures. More recently, some of the debate has centred on what the normative tax system should be.

When Surrey orginally published PATHWAYS TO TAX REFORM[74] there was a loose consensus in the tax community that the optimal income tax system should be founded on the comprehensive tax base

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[73] For a good review of the literature on tax expenditures *see* N. Bruce, *Pathways to Tax Expenditures: A Survey of Conceptual Issues and Controversies* in N. Bruce, ed., TAX EXPENDITURES AND GOVERNMENT POLICIES: PROCEEDINGS OF A CONFERENCE HELD AT QUEEN'S UNIVERSITY 17-18 NOVEMBER 1988 (Kingston: John Deutsch Institute for the Study of Economic Policy, 1988) at 21.

[74] *Supra*, note 65.

formulated from the Haig-Simons definition of income.[75] In the last fifteen years, however, the consensus has been eroded. The communnity now seems divided between those favouring the traditional income tax and those supporting a consumption tax.[76] Of course, whether a provision is a tax expenditure will depend on what normative tax system is being used as the benchmark. There are serious difficulties with a combination income and consumption tax system.[77] Therefore, the assumption in this paper will be that tax expenditures are tax expenditures of an income tax system.[78]

Even if the income tax is accepted as the normative tax system, the problems in determining what provision is or is not a tax expenditure are significant. Generally, proponents of the concept use some or all of the criteria of neutrality, practicality, consistency, and functional equivalence to a direct expenditure program.[79] Each criterion, although providing some assistance, is flawed.

The neutrality criterion is used by the Department of Finance in its tax expenditure budgets. To quote from the 1979 Tax Expenditure Budget:

> The main criterion to be used in this analysis is neutrality. Specifically *the benchmark tax structure is one that provides no preferential treatment to taxpayers on the basis of demographic characteristics, sources or uses*

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[75] The Haig-Simons formula is described as follows:

> Personal income may be defined as the algebraic sum of (1) the market value of rights exercised in consumption and (2) the change in the value of the store of property rights between the beginning and end of the period in question. . . . The *sine qua non* of income is *gain*, as our courts have recognized in their more lucid moments - and gain *to* someone during a specified time interval.

See H.C. Simons, PERSONAL INCOME TAXATION: THE DEFINITION OF INCOME AS A PROBLEM OF FISCAL POLICY, rev'd ed. (Chicago: University of Chicago Press, 1970) at 50.

[76] *See* Institute for Fiscal Studies, THE STRUCTURE AND REFORM OF DIRECT TAXATION: REPORT OF A COMMITTEE CHAIRED BY PROFESSOR J.E. MEADE (London: George Allen & Unwin, 1978); Canada, REPORT OF THE ROYAL COMMISSION ON THE ECONOMIC UNION AND DEVELOPMENT PROSPECTS FOR CANADA (Ottawa: Supply & Services, 1985) (Chair: D.S. MacDonald); Economic Council of Canada, ROAD MAP FOR TAX REFORM: THE TAXATION OF SAVINGS AND INVESTMENT (Ottawa: Supply & Services, 1987).

A comprehensive income tax is modelled on the Haig-Simons definition of income. *See ibid.* A lifetime consumption tax, or expenditure tax is, generally speaking, a tax on income less savings or its present value equivalent.

[77] Although some proponents of a consumption tax may view the RRSP and pension income provisions of the *Income Tax Act* as a first step towards a consumption tax.

[78] *See* D. Hartle, *Some Analytical, Political and Normative Lessons from Carter* in Brooks, ed., *supra*, note 7 at 397 (especially section (f) "Equity Considerations" at 398).

[79] *See* Bruce, *supra*, note 73 at 25.

> *of income, geographic location, or any other special circumstances applicable only to a given taxpayer or to a particular group of taxpayers.*[80]

The difficulty with this approach is that it posits an "ideal" tax system that may bear no resemblance to the actual tax system. Therefore additional criteria are needed.

Other criteria include practicality and consistency. Items such as imputed rent and unrealized but accrued capital gains may be omitted from a tax expenditure budget for technical or political reasons. Other provisions may be included because even though they are a part of an ideal tax base, they are not applied across the board. In the Canadian context, a good example is the treatment of indexing. There is no attempt at across-the-board indexing of the Canadian tax system although theoretically indexing should be part of a benchmark tax system. In the last tax expenditure budget,[81] the inventory valuation adjustment,[82] the $1,000 investment income deduction,[83] and the Indexed Securities Investment Plan (ISIP),[84] being *ad hoc* adjustments for inflation were listed as tax expenditures.

The fourth criterion, functional equivalence to a direct expenditure program, is problematic because literally any provision can be viewed as the functional equivalent to a direct spending program. Even if the criterion is defined in a less tautological sense, there may be more than one objective of a tax provision.

V. Disparate Impact

The *Income Tax Act* does not contain any provisions that make distinctions specifically on the basis of sex. When it was first enacted in 1972,[85] the child care expenses deduction was, in most cases, only available to women.[86] Effective, however, for the 1983 taxation year, the provision was amended[87] in response to a ruling by the Canadian

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[80] *Supra*, note 68 at 4 [emphasis in original].

[81] 1985 Tax Expenditure Budget, *supra*, note 68.

[82] *ITA*, s. 20(1)(gg), *as rep.* S.C. 1986, c. 55, s. 5(1).

[83] *ITA*, s. 110.1, *as rep.* S.C. 1988, c. 55, s. 78.

[84] *ITA*, s. 47.1, *as rep.* S.C. 1986, c. 6, ss 20(1)-(3).

[85] *ITA*, s. 63.

[86] A man could claim the child care expenses allowance if his wife was disabled or in prison, or if he was separated from her. He could also claim the deduction if they were not married. *ITA*, s. 63(4), *as rep.* S.C. 1984, c. 1, s. 25(7) provided that it shall be assumed that the child of a man and woman who were living together without being married was ordinarily in the custody of the woman and not in the custody of the man.

[87] S.C. 1984, c. 1, s. 25(1).

Human Rights Tribunal in *Bailey* v. *The Queen*[88] that the measure discriminated in favour of women. The present provision requires the spouse with the lower income to claim the deduction.[89] One of the ironies of the amendment is that it might have been justified as affirmative action for women under subsection 15(2) of the *Charter*.[90]

Because the *Income Tax Act* is facially neutral, challenges under section 15 will have to be on the grounds of the "adverse disparate impact" of tax provisions on women. In other words, the effect rather than the purpose or intent of income tax provisions may determine if section 15 is abrogated. This approach was first sanctioned by the Supreme Court in two human rights cases, *Re Ontario Human Rights Comm. and Simpson-Sears Ltd*[91] and *Re Bhinder and Canadian National Railway Co.*[92] In both cases, the complainants attacked work requirements that they said violated their right to freedom of religion under respectively, the *Ontario Human Rights Code*[93] and the *Canadian Human Rights Act*.[94] In *Simpson-Sears* the complainant was forced to resign when she became a member of the Seventh Day Adventist Church because the company insisted that she be available for work on Saturday in violation of her religious beliefs. In *Bhinder*, the C.N.R. required all employees in its coach yard to wear safety helmets as a condition of employment. The complainant, a Sikh, contended his religion prohibited him from wearing anything on his head except a turban. In both cases the Supreme Court held that discrimination applies to both intentional and adverse impact discrimination.

In one of the early *Charter* cases, *R.* v. *Big M Drug Mart*,[95] the Supreme Court of Canada recognized in *obiter dictum* the relevance of the effects of a law. In *Big M Drug Mart*, Mr Justice Dickson, (Beetz, McIntyre, Chouinard and Lamer JJ. concurring) held that the purpose of the federal *Lord's Day Act*[96] was to compel observance of the Christian sabbath and hence it was an infringement of freedom of religion under the *Charter*.[97] Nevertheless, both Mr Justice Dickson, and Mme Justice Wilson in a separate judgment, said that the effects of legislation may well violate an entrenched right.[98] Subsequently in *R.* v. *Edwards Books and Art*,[99] the Supreme Court considered the

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[88] (1980), 1 C.H.R.R. D/193 [hereinafter *Bailey*].

[89] *ITA*, s. 63(2).

[90] *But see Bailey*, *supra*, note 88 at D/221.

[91] [1985] 2 S.C.R. 536, 23 D.L.R. (4th) 321 [hereinafter *Simpson-Sears*]

[92] [1985] 2 S.C.R. 561, 23 D.L.R. (4th) 481 [hereinafter *Bhinder*].

[93] R.S.O. 1980, c. 340, *as rep. Human Rights Code, 1981*, S.O. 1981, c. 53, s. 48.

[94] S.C. 1976-77, c. 33 [now R.S C. 1985, c. H-6].

[95] [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321 [hereinafter *Big M Drug Mart* cited to D.L.R.].

[96] R.S.C. 1970, c. L-13.

[97] *Supra*, note 95 at 349.

[98] *Ibid.* at 351 and 372.

[99] [1986] 2 S.C.R. 713, 35 D.L.R. (4th) 1 [hereinafter *Edwards Books*].

effect of the Ontario *Retail Business Holidays Act*,[100] which had a secular purpose, on the freedom of religion of owners of businesses closed on a day other than Sunday as a result of their religious beliefs.

The proper approach to the equality rights provisions of the *Charter* was not considered by the Supreme Court of Canada until the recent decision in *Andrews*.[101] In his judgment Mr Justice McIntyre stated that the "differential impact"[102] of a law is relevant in the application of section 15. Mr Justice La Forest said:

> Here there was no allegation that the purpose of the legislation was based on discriminatory considerations; the argument centred rather around the adverse effects of the legislation.[103]

It is noteworthy, however, that in *Andrews* the clear purpose of the legislation was to exclude non-citizens from membership in the Law Society of British Columbia.

Symes[104] is the only case, as yet, in which a taxpayer has successfully attacked a substantive provision of the *Income Tax Act*. In that case, the Court's consideration of the disparate impact of the business deduction provisions of the *Act* was absolutely essential to the taxpayer's success. The taxpayer called as an expert witness Dr Patricia Armstrong, a sociologist teaching at York University. Dr Armstrong provided the evidence upon which the taxpayer founded her disparate impact arguments. They met with a receptive audience in Mr Justice Cullen. He said:

> [S]ince the *Andrews* decision, the Act cannot be interpreted as if parents (mostly female) are the same as other workers, or entrepreneurs (i.e. without child care responsibilities); it must be interpreted in a way which recognizes their specific experience as principally responsible for child care.[105]

The only other *Charter* challenge to a provision of the *Income Tax Act* on the basis of its disparate impact on women, of which this author is aware, is being pursued by The Women's Legal Education and Action Fund (LEAF) on behalf of Joy Stevens.[106] In the 1986, 1987 and 1988 taxation year, Ms Stevens, a mother with three children, was separated from her husband and attending university full time. She claimed her child care expenses pursuant to the child care expenses deduction in section 63 of the *Income Tax Act*. During the years in

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[100] R.S.O. 1980, c. 453.
[101] *Supra*, note 21.
[102] *Ibid.* at 24.
[103] *Ibid.* at 39-40.
[104] *Supra*, note 1.
[105] *Ibid.* at 490.
[106] Statement of Claim filed in the Federal Court Trial Division on January 25, 1990.

question, her main — and in some years, her only — source of income was support payments from her estranged husband. Revenue Canada disallowed her claims for child care expense deductions because she had no "earned income". Section 63 provides that a taxpayer may not claim more than two-thirds of her earned income as child care expenses.[107] "Earned income" is defined as business income, employment income, scholarship and bursary income, research grants and certain allowances paid under the *National Training Act*.[108]

The taxpayer's disparate impact argument is set out in paragraph 20 of her Statement of Claim. However problematic the result is in *Symes*, and that will be dicussed later in this paper, it certainly provides a strong foundation for Ms Steven's position. Paragraph 20 states:

> In our society, it is primarily women who receive support payments on family break-up, which support is included in taxable income under the Act. Similarly, in our society it is primarily women who, on family break-up, require educational or occupational training in order to be able to re-enter the job market, and who incur child care expenses to engage in such activities. [Ms. Stevens had been out of the job market for sixteen years.] The failure to provide for the deduction of child care expenses against support income accordingly has a disproportionate and discriminatory impact on women, and especially upon divorced or separated woman such as the Plaintiff, whose already limited disposable income is thereby reduced. This constitutes discrimination on the basis of sex, marital and family status, in violation of s. 15 of the Charter.

The disparate impact on women of the tax provisions described in the *Symes* and in the Stevens case arises because women still bear primary responsibility for child-rearing. It should be recognized, however, that the disparate and adverse impact of income tax provisions on many women will arise not because of their child care obligations (at least directly), but because of their income. . .or rather their lack of it. The relationship between income and sex is well known.[109] The old adage, that in order to make money you have to have money, can in a slightly altered fashion be applied to many of the provisions of the *Income Tax Act*. In order to save tax, you have to have money. Generally, in order to realize a tax saving, the taxpayer must spend money in an approved way or receive money from particular sources. Lower income taxpayers overwhelmingly receive income from sources that are not treated in a preferential way by the tax system.[110]

The significance of gender and, indirectly, income is obvious on any examination of the take-up rates of the deferred retirement income provisons.[111] For example, in 1987, of taxpayers contributing to RRSPs,

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[107] *ITA*, s. 63(1)(e)(i).
[108] *ITA*, s. 63(3)(b).
[109] *See supra*, note 26.
[110] *Supra*, note 71 at 11.
[111] *ITA*, ss 146 and 147.1.

only 40 percent were women.[112] These women made 33 percent of the value of the deductible contributions.[113] It is also noteworthy that in the same year, 36 percent of taxpayers claiming the capital gains exemption were women.[114] However, the value of their claims was only 31 percent.[115] Generally, higher income taxpayer make more claims.[116]

While the problems associated with judicial review of the income tax system will be thoroughly canvassed in Part VIII of this paper, it should be mentioned that if the courts consider the adverse impact of tax provisons, two problems, in particular, arise. First, there is the problem of defining manageable standards. So far, most of the Canadian cases on disparate impact have revolved around occupational requirements and Sunday closing laws and their impacts on religious freedom. In the area of occupational requirements, the courts have had the relatively easy task of balancing employees' and employers' interests. The employer must make a reasonable effort to accommodate the religious needs of the employee short of undue hardship or undue interference in the employer's business.[117] In the Sunday closing cases, the balancing the courts have had to do has been more difficult. Nevertheless, the focus on the accommodations for religious minorities legislated and litigated in, for example, *Edwards Books*[118] has been relatively narrow. In comparison, the complex and interrelated provisions of the *Income Tax Act*, sometimes with broad and far-reaching social and economic implications, present a formidable obstacle to the courts.

The second problem is that the courts may deem the connection between impact and sex to be too tenuous to justify their intervention. The connections become much stronger if women who are doubly disadvantaged, for example, women who are poor, are considered. In that case, an alternative, and perhaps better approach, may be to argue that income is an analogous ground.

VI. Analogous Grounds: Income, Class or Socio-Economic Status

The listed grounds of discrimination in section 15 of the *Charter* are not exclusive. Although the listed grounds "reflect the most common and probably the most socially destructive and historically prac-

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[112] Revenue Canada, Taxation Statistics (Ottawa: Supply & Services, 1989) Table 4: "All Returns by Age and Sex" at 154-67.

[113] *Ibid.*

[114] *Ibid.*

[115] *Ibid.*

[116] *See supra*, note 71 at 11ff.

[117] *See Simpson-Sears*, *supra*, note 91. *See also Central Alberta Dairy Pool* v. *Alberta (Human Rights Commission)* [1990] 2 S.C.R. 489, 72 D.L.R. (4th) 417.

[118] *Supra*, note 99.

tised bases of discrimination and must, in the words of s. 15(1), receive particular attention",[119] the courts have been left to define other analogous grounds. Those analogous grounds could include income, class or socio-economic status. As yet, however, the issue has not been definitely decided.

In *Andrews*, the Supreme Court, had its first opportunity to comment on the category of analogous grounds. It held that they are distinctions based on "personal characteristics".[120] Mr Justice La Forest referred to the personal characteristics as being immutable, or nearly so.[121] In *Andrews*, the respondent was a British citizen permanently resident in Canada. He was denied admission to the British Columbia bar pursuant to section 42 of the *Barristers and Solicitors Act*[122] because he was not a Canadian citizen. The Court held that "citizenship" was an analogous ground and that section 42 denied the equality rights guaranteed in section 15. In his judgment, Mr Justice La Forest specifically dealt with the question of whether citizenship is "immutable". He said:

> Citizenship is, at least temporarily, a characteristic of personhood not alterable by conscious action and in some cases not alterable except on the basis of unacceptable costs.[123]

The idea that income, class or socio-economic status is a "personal characteristic" that is immutable admittedly is not a comfortable idea for most Canadians. It is contrary to the popular mythology of class mobility.[124] And yet for most people at a particular time, income, class or socio-economic status is "at least temporarily. . .not alterable. . . ."[125] Furthermore, the low-income, the lower-class, or the underprivileged share many of the disadvantages of individuals with enumerated characteristics. They lack political power,[126] and may constitute "discrete and insular minorities".[127]

It is also important to note, as did Mme Justice Wilson in *Andrews*, "that the range of discrete and insular minorities has changed and will continue to change with changing political and social circum-

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[119] *Andrews*, *supra*, note 21 at 18.

[120] *Ibid.* Each of the three judgements in *Andrews* referred to "personal characteristics".

[121] *Ibid.* at 39.

[122] R.S.B.C. 1979, c. 26.

[123] *Andrews*, *supra*, note 21 at 39.

[124] M.P. Marchak, IDEOLOGICAL PERSPECTIVES ON CANADA (Toronto: McGraw-Hill Ryerson, 1988). *See especially* chapter 2 "Individualism and Equality" at 25.

[125] *Andrews*, *supra*, note 21 at 39.

[126] D.H. Clairmont, M. MacDonald & F.C. Wien, *A Segmentation Approach to Poverty and Low-Wage Work in the Maritimes* in J. Harp & J.R. Hofley, eds, STRUCTURED INEQUALITY IN CANADA (Toronto: Prentice-Hall, 1980) 285.

[127] *Andrews*, *supra*, note 21 at 33.

stances".[128] She gives as an example, Mr Justice Stone, who, writing in 1938, was concerned with religious, national and racial minorities. She contrasts his concerns with those of the framers of the *Charter* who, in addition, addressed discrimination based on sex, age and disability. Interestingly, among the twelve Canadian jurisdictions with human rights legislation today, only one (Quebec) includes a prohibition against discrimination based on "social condition".[129]

After *Andrews*, the Supreme Court considered analogous grounds in a number of cases. None of them concerned class or income. Two cases, *Turpin*[130] and *R.* v. *S.(S.)*[131] involved criminal law and discrimination on the basis of province of residence. In both, the Court held that while there might have been unequal treatment stemming from differences in criminal procedures among the provinces (*Turpin*), or differences in the provinces' exercise of a federally delegated power (*R.* v. *S.(S.)*), there was no discrimination. Discrimination consists of imposing obligations or disadvantages on the basis of personal characteristics of an individual or group. In neither case could it be said that the legislation amounted to a distinction based on personal characteristics. To quote Mme Justice Wilson in *Turpin*, "[a] search for *indicia* of discrimination such as stereotyping, historical disadvantage or vulnerability to political and social prejudice would be fruitless in this case. . . . "[132]

In a very short oral judgment, Mr Justice La Forest, for the Court, in *Reference Re Workers' Compensation Act, 1983 (Nfld.)*[133] held that the sections 32 and 34 of the *Workers' Compensation Act, 1983*[134] were not inconsistent with section 15 of the *Charter*. The *Act* provided that the right to compensation under the *Act* is in lieu of all rights and actions to which a worker or dependents might otherwise be entitled. Mr Justice La Forest held that there was no discrimination and that "[t]he situation of the workers and dependents here is in no way analogous to those listed in section 15(1)".[135]

It is noteworthy that in the last three cited cases, the Court would not recognize as discriminatory a distinction drawn by the legislation itself. Indeed, in *Turpin* the Court said that "[a] finding that there is discrimination will. . .in most but perhaps not all cases, necessarily entail a search for disadvantage that exists apart from and independent of the particular legal distinction being challenged".[136]

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[128] *Ibid.*

[129] *Charter of Human Rights and Freedoms*, R.S.Q. 1977, c. C-12, s. 10.

[130] *Supra*, note 29.

[131] [1990] 2 S.C.R. 254, 57 C.R. (3d) 273.

[132] *Supra*, note 29 at 35.

[133] [1989] 1 S.C.R. 922, 56 D.L.R. (4th) 765 [hereinafter *Reference Re Workers' Compensation Act* cited to S.C.R.].

[134] S.N. 1983, c. 48.

[135] *Supra*, note 133 at 924.

[136] *Supra*, note 29 at 34.

One of the issues that the Ontario Court of Appeal in *OPSEU*,[137] (decided after *Reference Re Workers' Compensation Act*) had to determine, was whether the distinction drawn in the *Income Tax Act* between employers and employees is an analogous ground. Not surprisingly, the Court held that the equality rights of taxpayers earning income from employment were not violated. OPSEU had argued that employees were discriminated against because the self-employed and corporations can deduct contributions to political lobby groups as business expenses while employees cannot.[138] Mr Justice Blair said as follows:

> In my opinion, Canadian taxpayers earning income from employment, who constitute the great majority of the working population, do not constitute a group suffering discrimination on grounds analogous to those enumerated in subsection 15(1) of the Charter. This huge group of taxpayers is not a "discrete and insular minority". It is a large segment of the population. . . "not linked by any personal characteristics relating to them as individuals or members of a group". They are. . . "a disparate and heterogeneous group", linked together only by the fact that they are taxed on their employment income. They are incapable of being discriminated against on grounds analogous to those enumerated in subsection 15(1).[139]

Both the judgments in *Reference Re Workers' Compensation Act* and *OPSEU* suffer, to some extent, from the reluctance of the courts to consider the historical and economic context of the groups alleging discrimination.[140] While it is true that employees are a "large" and "heterogeneous group", it is equally true that compared with the self-employed, they are likely to have less income and to have few other sources of income.[141] As a consequence, employees are far less likely — or able — to take advantage of tax concessions.[142] Nonetheless, compared to the groups alleging discrimination in *OPSEU* (C.A.),[143] the poor seem to be more obviously (in Mme Justice Wilson's words) a group suffering "social, political and legal disadvantage".[144]

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[137] *Supra*, note 57.

[138] One of the problems not mentioned by either Court in *OPSEU* is that contributions to political lobby groups may have both personal and business aspects. *See* C.F.L. Young, *Deductibility of Entertainment and Home Office Expenses: New Restrictions to Deal with Old Problems* (1989) 37:2 CAN. TAX JOURNAL 227 for some insights on a somewhat analogous problem. *ITA*, s. 8(2) prohibits employees from any deductions in computing employment income except those specifically permitted.

[139] *Supra*, note 57 at 166-67.

[140] *See* E. Leyton, DYING HARD: THE RAVAGE OF INDUSTRIAL CARNAGE (Toronto: McClelland & Stewart Ltd, 1975).

[141] Statistics Canada, THE DISTRIBUTION OF INCOME AND WEALTH IN CANADA (Ottawa: Supply & Services, 1977) at 40.

[142] *See* ANALYSIS OF FEDERAL TAX EXPENDITURES FOR INDIVIDUALS, *supra*, note 71 at 8 and 11.

[143] *Supra*, note 57.

[144] *Andrews*, *supra*, note 21 at 34.

Lower courts in Canada have rather predictably tended to deny or avoid income-based equality arguments. This was the case even before the decisions in *Turpin*[145] and *Reference Re Workers' Compensation Act*.[146] Thus, in *Barker* v. *Manitoba (Registrar of Motor Vehicles)*[147] the Manitoba Queen's Bench held that the suspension of an applicant's licence due to debts he owed as an uninsured motorist to the Manitoba Public Insurance Corporation did not violate section 15(1) of the *Charter*. It stated that "economic discrimination" did not come within *Charter* purview and that:

> it is well to keep in mind that almost any law dealing with sales or income taxes, licence fees, tariffs or social benefits will have a different and more adverse impact on some groups of persons than others. If one were to accept that the policy decisions underlying these laws were subject to review by the court, then one would be led to the untenable conclusion that Parliament had by section 15(1) intended to create an economically egalitarian society with judges as its supervisors.[148]

In *Bernard* v. *Dartmouth Housing Authority*[149] the Nova Scotia Supreme Court, Appeal Division, refused to recognize the argument of the appellant Bernard that her equality rights had been abrogated. Ms Bernard was a public housing tenant who had been served with a notice to quit which gave her about six weeks notice to vacate the premises. This was permissible under her lease with the public housing authority. Other tenants in Nova Scotia were governed by the provisions of the provincial *Residential Tenancies Act*[150] which provided for three months notice. The Court held that because the tenant freely took advantage of the benefits to subsidized housing, she had to live with its disadvantages.

Blondin v. *Canada (Minister of Employment & Immigration)*[151] contains interesting comments about the distribution of unemployment

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[145] *Supra*, note 29.

[146] *Supra*, note 133.

[147] (1987), 47 D.L.R. (4th) 69, [1988] 2 W.W.R. 28 (Man. Q.B.) [hereinafter *Barker* cited to D.L.R.].

[148] *Ibid.* at 78-79. Tribe, *supra*, note 52 at 1659 had this to say about such arguments:

> Personal qualities and social goods have their own sphere of operation, which are governed by different principles of distribution: welfare to the needy, health care to the infirm, honors to the deserving, political influence to the persuasive, salvation to the pious, luxuries to those inclined and able to pay for them. Injustice may result, however, when the distribution principle of one sphere, such as material wealth, is allowed to invade the spheres of other social goods and determine who gets what. The end result may be not just an inequitable distribution of social goods, but the subjugation of those people who do not possess that particular item by which all other social goods are valued.

[149] (1988), 88 N.S.R. (2d) 190, 53 D.L.R. (4th) 81 (S.C.A.D.).

[150] S.N.S. 1970, c. 13.

[151] (1988), 50 D.L.R. (4th) 764, 93 N.R. 39 (F.C.A.) [hereinafter *Blondin* cited to D.L.R.].

insurance benefits. Under the federal scheme, higher employment income results in higher (to a limit) insurance benefits. In *Blondin*, the appellant experienced an averaging down of his benefits, because his employer topped up his Workers' Compensation payments with insurable income. He challenged the unemployment insurance legislation on the grounds of, among other things, discrimination on the basis of disability. With uncanny echoes of *Bliss*,[152] the Court held that:

> If the application [sic], due to disability, had reduced earnings during those weeks, that fact is not due to any provision, discriminatory or otherwise, of the *Unemployment Insurance Act*. . . . Section 15 does not prohibit paying different unemployment benefits to persons on the basis of their having had different earnings while they were employed.[153]

Finally, mention should be made of *R.* v. *Hebb*.[154] In that case, the Nova Scotia Supreme Court reviewed the *Criminal Code* provision that mandated imprisonment in default for non-payment of a fine.[155] The applicant, Judith Hebb, was completely without financial resources and was receiving public assistance. In Halifax, where the applicant was tried for shoplifting, there was no fine option program, although the program was available in other parts of Nova Scotia and other provinces. A number of constitutional arguments were advanced on her behalf. Among others, it was alleged:

> 7. That the time in default mechanism violates the right to be treated equally regardless of one's economic condition contrary to section 15 of the *Charter*.[156]

The Court chose to avoid the issue, however, and decided the case on the basis of age discrimination. It held that it is discriminatory to afford persons 18 to 21 years of age a right to review before imprisonment for the non-payment of fines, while not affording the same protection to those over 21.[157]

The reluctance of the courts to recognize a category of economically underprivileged individuals is evident from the cases cited above. One of the reasons is, obviously, that in acknowledging a category of poor people, the courts risk being drawn into the highly political process of wealth redistribution (particularly in the tax area). It is a process for which they may feel particularly unsuited.[158] On the other

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[152] *Supra*, note 43.

[153] *Supra*, note 151 at 766.

[154] (1989), 89 N.S.R. (2d) 137, 47 C.C.C. (3d) 193 (S.C.T.D.) [hereinafter *Hebb* cited to N.S.R.].

[155] R.S.C. 1970, c. C-34, ss 722(2) and 646 [now R.S.C. 1985, c. C-46, ss 787(1) and 718].

[156] *Supra*, note 154 at 140.

[157] *Ibid.* at 149.

[158] *See infra*, Part VIII.

hand, if the courts do not recognize the disabilities of low-income individuals, many of the rights and freedoms guaranteed by the *Charter*, including the right to "equal benefit of the law", become, for the poor, chimerical. In Part VIII of this paper, it will be argued that where the *Income Tax Act* delivers, in particular, welfare-type programs to taxpayers, considerable constitutional protection under section 15 is appropriate. Indeed, it will be suggested that aspects of the normative tax system may occasionally be successfully attacked under the *Charter*.

The following Part will deal with section 7 of the *Charter* and the right to "security of the person." In that regard the emphasis shifts from consideration of the allocation of government resources to the protection of minimum individual economic integrity.

VII. SECTION 7 REVIEW

The special release accompanying the WHITE PAPER ON TAX REFORM states that a fair income tax system "should be consistently progressive, imposing little or no burden on those least able to pay".[159] While the 1987 reforms did remove or cut taxes for most lower-income taxpayers,[160] many Canadians living below the "poverty line"[161] must still pay income tax. Furthermore, because the tax system is only partially indexed,[162] assuming at least some inflation and in the absence

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[159] Canada, Department of Finance, THE WHITE PAPER — TAX REFORM 1987 (Ottawa: Supply & Services, 1987) (special release) [hereinafter WHITE PAPER — TAX REFORM].

[160] *Ibid.* at 36. *But see* National Council of Welfare, TESTING TAX REFORM: A BRIEF TO THE STANDING COMMITTEE ON FINANCE AND ECONOMIC AFFAIRS (Ottawa: National Council of Welfare, 1987) [hereinafter TESTING TAX REFORM]; National Council of Welfare, HELP WANTED: TAX RELIEF FOR CANADA'S POOR (Ottawa: National Council of Welfare, 1989).

[161] Several organizations in Canada have established "poverty lines". The poverty line referred to in this paper is Statistics Canada's low income cut-offs (LICOs), sometimes referred to as the "official poverty line". Statistics Canada, however, does not call the LICOs poverty lines. It also does not promote their use for program or administrative purposes. LICOs vary by family size and population size of area of residence and are adjusted annually to reflect the change in the Consumer Price index. Other poverty lines include those of the Canadian Council on Social Development and the Senate Committee on Poverty. *See* R. Love, *A Note on the Measurement of Poverty in Canada* (1984) 59 CAN. STAT. R. vi.

[162] *ITA*, s. 117.1. The system adjusts for inflation that exceeds an increase of three percent a year in the Consumer Price Index.

of further government action, the taxpaying threshold will continually decline in the future.[163]

From a constitutional perspective, the question is whether the taxation of poor people may, in some circumstances, abrogate their right to personal integrity under section 7 of the *Charter*. Section 7 provides that:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

In contrast to the Fifth and Fourteenth Amendments of the American Constitution, section 7 provides for "security of the person" as opposed to "property". Thus to quote from the common judgment of Dickson C.J.C., and Lamer and Wilson JJ. in *Irwin Toy Ltd* v. *Quebec (Attorney General)*:

> The intentional exclusion of property from s. 7, and the substitution therefor of "security of the person" has, in our estimation, a dual effect. First, it leads to a general inference that economic rights as generally encompassed by the term "property" are not within the perimeters of the s. 7 guarantee.[164]

The second effect, the judges continue, is that a corporation's economic rights are not given constitutional protection under section 7. The

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[163] *See* TESTING TAX REFORM, *supra*, note 160 at 8 in which there are some examples of the position of low-income taxpayers in 1988, the first year under the "new" regime:

> According to the Department of Finance, the federal taxpaying threshold in 1988 for a one-earner couple with two children will rise from $16,770 before tax reform to $18,470 after. The latter figure is $4,963 below the projected poverty line ($23,433) for a family of four living in a metropolitan centre. The White Paper says the taxpaying threshold for single persons under 65 will go from $4,940 to $6,220; this is progress, but it represents just 54 percent of the low-income line.
>
> Under the current tax regime, a single parent supporting two children on earnings of $20,000 — roughly the estimated poverty line ($20,336) in 1988 for a family of three in a large city — would owe $1,857 in federal and provincial income taxes. Tax reform will save her $532, but she still pays $1,214 in income taxes.
>
> A working poor one-earner couple and two children with earnings of $17,575 in 1988 — about three-quarters of the poverty line — will pay $557 in income taxes after tax reform. The results are the same for working poor two-earner couples and single people. The happy exception is elderly Canadians, who are free from tax if they are below the poverty line.

[164] [1989] 1 S.C.R. 927 at 1003, 58 D.L.R. (4th) 577 at 632-33 [hereinafter *Irwin Toy* cited to D.L.R.].

judges are not ready however, "to declare. . .that no right with an economic component can fall within 'security of the person'".[165] They recognize that the rubric of "economic rights" may include:

> rights to social security, equal pay for equal work, adequate food, clothing and shelter, to traditional property-contract rights. To exclude all of these at this early moment in the history of *Charter* interpretation seems to us to be precipitous. We do not, at this moment, choose to pronounce upon whether those economic rights fundamental to human life or survival are to be treated as though they are of the same ilk as corporate-commercial economic rights.[166]

Irwin Toy thus leaves open the possibility that there may be an undefined constitutional protection of economic rights "fundamental to human life or survival."

A number of academic commentators have addressed the issues raised by section 7.[167] Generally, however, they have been concerned with entitlements to the "new property",[168] more particularly welfare benefits. The argument in favour of a limitation on government power to tax is in some respects easier to sustain. It is not necessary to support a positive, constitutionally-mandated duty to expend government funds, but simply for the more familiar, and presumably more limited right, to be left alone. Furthermore, the rights/privileges distinction,[169] which in any case Mme Justice Wilson appears to have rejected in *Singh* v. *Minister of Employment and Immigration*,[170] is not in issue. Nevertheless, a limitation on government taxation power requires a broader interpretation of section 7 than the Supreme Court has made so far. Additionally, not collecting taxes is the other side of the expenditure coin. Hence, the problem of judicially imposed burdens on the fisc does arise.

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[165] *Ibid.* at 633.

[166] *Ibid.*

[167] *See* E. Colvin, *Section Seven of the Canadian Charter of Rights and Freedoms* (1989) 68 CAN. BAR REV. 560; I. Johnstone, *Section 7 of the Charter and Constitutionally Protected Welfare* (1988) 46 U.T. FAC. L. REV. 1; M. Jackman, *The Protection of Welfare Rights Under the Charter* (1988) 20 OTTAWA L. REV. 257; J. McBean, *The Implications of Entrenching Property Rights in Section 7 of the Charter of Rights* (1987-88) 26 ALTA L. REV. 548; L. Tremblay, *Section 7 of the Charter: Substantive Due Process?* (1984) 18 U.B.C. L. REV. 201; and J. Whyte, *Fundamental Justice: The Scope and Application of Section 7 of the Charter* (1983) 13 MAN. L.J. 455.

[168] C. Reich, *The New Property* (1964) 73 YALE L.J. 733.

[169] In the absence of a constitutional requirement to provide a benefit, the benefit is a privilege which section 7 does not protect. *See* I. Morrison, *Security of the Person and the Person in Need: Section Seven of the Charter and the Right to Welfare* (1988) 4 J.L. & SOCIAL POL'Y 1 at 15.

[170] [1985] 1 S.C.R. 177, 17 D.L.R. (4th) 422 [hereinafter *Singh* cited to D.L.R.].

In determining the application of section 7 to the taxing power, it is necessary to interpret the meaning of the phrases "personal security" and "fundamental justice".

In the international sphere, personal security has taken on a broader meaning than the mere preservation of physical integrity.[171] Thus, Article 25 of the *Universal Declaration of Human Rights* states:

> 1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services and the right to *security* in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.[172]

The Statistics Canada definition of its low-income cut-off is:

> families who on average spend 58.5% or more of their income on this type of goods and services [food, shelter and clothing] were considered to be in straitened circumstances.[173]

Thus the taxation of families at, or just below, the poverty line may not deprive them of the minimum personal security described in the *Universal Declaration of Human Rights* or contemplated by the judges in *Irwin Toy*. The weight of taxation will at some point, however, prevent these families from obtaining the necessities. In those circumstances, their right to personal security under section 7 is, arguably, abrogated.

It might even be successfully contended that taxation of any family in "straitened circumstances" may violate section 7 of the *Charter*. A higher standard is established by the *American Declaration of the Rights and Duties of Man*.[174] The *Declaration* establishes the standards relied on by the Inter-American Human Rights Commission in monitoring human rights violations. The standard, set out in Article 23, reads as follows:

> Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home.

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[171] *See* Johnstone, *supra*, note 167 at 9ff.

[172] Article 25 of the *Universal Declaration of Human Rights*, GA Res. 217A, 3 UN GAOR Pt 1, UN DOC. A/810 (1948) [emphasis added]. Article 25 was quoted by Mme Justice Wilson in *Singh*, *supra*, note 170 at 460 in interpreting section 7 of the *Charter*. In *Singh*, at 459-60, Wilson J. also quoted the Law Reform Commission of Canada, MEDICAL TREATMENT AND CRIMINAL LAW (Working Paper No. 26) (Ottawa: Supply & Services, 1980) at 6, in which it was suggested that the right to security includes the provision of necessaries for its support.

[173] Statistics Canada, INCOME DISTRIBUTIONS BY SIZE IN CANADA 1989 (Ottawa: Supply & Services, 1989) at 41.

[174] Washington, CONGRESS AND CONFERENCE SERIES, No. 65 at 42-43 (30 March 1948 - 2 May 1948) [hereinafter *Declaration*].

If one of the basic values that informs the interpretation of provisions of the *Charter* is individual dignity, then surely the taxation of income just barely above the minimum needed to survive also breaches section 7.[175]

According to Lamer J. (Dickson C.J.C., Beetz, Chouinard and Le Dain JJ. concurring), in *Reference Re Section 94(2) of the Motor Vehicle Act*, "[t]he principles of fundamental justice. . .are not a protected interest, but rather a qualifier of the right not to be deprived of life, liberty and security of the person".[176] He continues:

> As a qualifier, the phrase serves to establish the parameters of the interests but it cannot be interpreted so narrowly as to frustrate or stultify them. For the narrower the meaning give [sic] to "principles of fundamental justice" the greater will be the possibility that individuals may be deprived of these most basic rights.[177]

In the *Motor Vehicle Reference*, the issue was whether British Columbia legislation which provided for imprisonment for an absolute liability offence, driving with one's licence suspended, violated section 7. The Court held that the legislation was unconstitutional on the grounds that absolute liability in penal law offends the principles of fundamental justice.

Both Lamer J., and Wilson J. in a separate judgment, made several *obiter* comments on the meaning of the phrase "principles of fundamental justice". Both rejected the characterization of the issue as whether the principles of fundamental justice have a procedural or substantive content. To do so would preempt "an open-minded approach".[178] While recognizing the admissibility of the legislative record, which showed that the intent of senior civil servants was that section 7 was to be roughly equivalent to procedural due process, Mr Justice Lamer states that no significant weight is to be given to the evidence.[179] He points out the difficulty of determining the actual intent of the legislative bodies which adopted the *Charter*. He also voices his concern that too much attention to the historical record will cause the *Charter* to be "frozen in time".[180]

The result in the *Motor Vehicle Reference* was that the Supreme Court appeared to recognize a middle road for the courts between

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[175] In *Big M Drug Mart*, *supra*, note 95 at 353 Mr Justice Dickson states: "Freedom must surely be founded in respect for the inherent dignity and the inviolable rights of the human person".

[176] [1985] 2 S.C.R. 486 at 501, 24 D.L.R. (4th) 536 at 548 [hereinafter *Motor Vehicle Reference* cited to D.L.R.].

[177] *Ibid.*

[178] *Ibid.* at 545.

[179] *Ibid.* at 554.

[180] *Ibid.*

substantive and procedural review of legislation. As Mr Justice Lamer said:

> It is, in my view, that precise and somewhat narrow meaning [natural justice] that the legislator avoided, clearly indicating thereby a will to give greater content to the words "principles of fundamental justice", the limits of which were left for the courts to develop but within, of course, the acceptable sphere of judicial activity.[181]

Presumably, therefore, there is a sphere of "political activity" into which the courts should not venture.

In *Morgentaler* v. *R.*[182] the Supreme Court again had the opportunity to consider the meaning of section 7. *Morgentaler* involved a challenge to a section of the *Criminal Code*[183] that provided abortions would be illegal unless they were performed in an "accredited or approved hospital" and a therapeutic abortion committee certified that an abortion was necessary to preserve the life or health of the woman. A majority of the Court held that the legislation contravened section 7 of the *Charter*. All the majority judges, however, except Mme Justice Wilson, decided that the constitutional wrong lay in the procedures prescribed for abortions.[184] Only Mme Justice Wilson decided the case on explicitly substantive grounds.

In the final analysis, the case for the application of section 7 to the taxing power rests on an uncertain foundation. Nevertheless, there is the possibility of a *Charter* challenge. Whether it is successful or not, it is one way that the voices of the poor might be heard among the clamour of special interests that historically have attempted to influence the make-up of the tax system.[185]

VIII. Constitutional Review of the Income Tax System and the Legitimate Bounds of Such Review

The evident immunity of the income tax system from judicial review in the United States has not yet been duplicated, as evidenced by *Symes*,[186] in Canada. The future, however, remains uncertain. There are presently no answers to the questions of whether the courts will subject provisions of the *Income Tax Act* to meaningful *Charter* review, nor how — technically — they will do whatever they mean to do.

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[181] *Ibid.* at 550.

[182] [1988] 1 S.C.R. 30, 44 D.L.R. (4th) 385 [hereinafter *Morgentaler* cited to D.L.R.].

[183] R.S.C. 1985, c. C-46, s. 287.

[184] Dickson C.J.C., Lamer J. concurring, *supra*, note 182 at 392; Beetz J., Estey J. concurring, *supra*, note 182 at 420.

[185] McQuaig, *supra*, note 10.

[186] *Supra*, note 1.

Whatever the choice of any particular court, its expression will be through the two-step approach described earlier in this paper.[187] Therefore, *Charter* review of income tax provisions will potentially be shaped at both the section 15 and the section 1 stages of review. Some of the factors which the courts will have to consider at the section 15 level, such as the problem of defining what is an equal benefit, the link between certain income tax provisions and their disparate impact on women, and the identification of analogous grounds have already been canvassed. Section 1 has also been examined along with the differing standards adopted by various judges.

There are a number of choices open to the courts. At one extreme, the courts can approach income tax legislation with a judicial deference that will, in effect, render any future attempts at substantive review nugatory. The opposite extreme would be to subject provisions of the *Income Tax Act* to intensive judicial scrutiny. This simply has never been a serious proposition. Somewhere in the middle, the courts might review some income tax provisions within fairly well-defined parameters. This could assist women and other disadvantaged groups to achieve certain limited goals.

A. *Arguments Against Judicial Review of Provisions of the Income Tax Act*

It is almost axiomatic that in any discussion of the limits of *Charter* review of social and economic legislation, the *Income Tax Act* is cited as a good example of the kind of legislation that the courts should not attempt to seriously review.[188] To quote Mr Justice La Forest in *Andrews*:

> Much economic and social policy-making is simply beyond the institutional competence of the courts: their role is to protect against incursions on fundamental values, not to second guess policy decisions.[189]

Without doubt, any court contemplating review of the income tax system faces a formidable task. The *Income Tax Act* is the most lengthy and complex piece of legislation in the country. The construction of the basic revenue-raising structure could produce enough policy questions to occupy innumerable economists, accountants and lawyers

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[187] *See supra*, Part III.
[188] *See, e.g., supra*, note 19.
[189] *Supra*, note 21 at 38.

for decades.[190] The imposition on that structure of a myriad of social and economic initiatives has resulted in byzantine complexity.[191] Further, any review is complicated by the inter-relatedness of tax provisions with a host of social and economic programs outside the tax system.[192] Even assuming the courts could master the complexity, the adversarial court system may not be capable of arriving at a proper balance between the competing political, democratic and economic interests, particularly when not all the interests may be represented in court.[193]

Where tax provisions represent government economic policy, there seem to be two issues. Firstly, the courts traditionally have had, and under the *Charter* appear to continue to want to have, a circumscribed role.[194] To quote Chief Justice Dickson (dissenting on other points) in *P.S.A.C.* v. *Canada*:

> In my opinion, courts must exercise considerable caution when confronted with difficult questions of economic policy. It is not our judicial role to assess the effectiveness or wisdom of various government strategies for solving pressing economic problems. The question how best to combat inflation has perplexed economists for several generations. It would be highly undesirable for the courts to attempt to pronounce on the relative importance of various suggested causes of inflation, such as the expansion of the money supply, fiscal deficits, foreign inflation, or the built-in inflationary expectations of individual economic actors. A high degree of deference ought properly to be accorded to the government's choice of strategy in combatting this complex problem.[195]

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[190] Some of the most spirited debates have taken place over the comprehensive tax base. *See, e.g.*, B.I. Bittker, *A 'Comprehensive Tax Base' as a Goal of Income Tax Reform* (1966-67) 80 HARV. L. REV. 925. This generated defences of the CTB from R.A. Musgrave, *In Defense of an Income Concept* (1967-68) 81 HARV. L. REV. 44; J.A. Pechman, *Comprehensive Income Taxation: A Comment* (1967-68) 81 HARV. L. REV. 63; C.O. Galvin, *More on Boris Bittker and the Comprehensive Tax Base: The Practicalities of Tax Reform and the ABA's CSTR* (1967-68) 81 HARV. L. REV. 1016 and a rebuttal by Professor Bittker, *A 'Comprehensive Tax Base' as a Goal of Income Tax Reform*, *supra* at 985.

[191] Everyone wants simplicity in the tax system — at the other taxpayer's expense. *See* A.B.C. Drache, *Introduction to Income Tax Policy Formulation: Canada 1972-76* (1978) 16 OSGOODE HALL L.J. 1. For recent discussions of the problem of simplification *see* D.J. Sherbaniuk, *Tax Simplication — Can Anything Be Done About It?* in 1988 CONFERENCE REPORT (Toronto: Canadian Tax Foundation, 1989) at 3:1 [hereinafter 1988 CONFERENCE REPORT]; W.J. Strain. D.A. Dodge & V. Peters, *Tax Simplification: The Elusive Goal* in 1988 CONFERENCE REPORT, *supra*, at 4:1.

[192] For example, the tax provisions relating to deferred retirement income plans are arguably linked, in policy terms, to both the *Old Age Security Act*, R.S.C. 1985, c. O-9 and the *Canada Pension Plan*, R.S.C. 1985, c. C-8.

[193] Mr Justice McIntyre in *Reference re Public Service Employee Relations Act (Alta)*, [1987] 1 S.C.R. 313 at 416, 38 D.L.R. (4th) 161 at 234.

[194] *See* MacKay & Pothier, *supra*, note 24 in Section III entitled "Economic Rights and the Constitution" at 95.

[195] [1987] 1 S.C.R. 424 at 442, 38 D.L.R. (4th) 249 at 261 [hereinafter *P.S.A.C.* cited to D.L.R.]. Bernard Shaw said it more succinctly: if all economists were laid end to end, they would not reach a conclusion.

Secondly, governments in Canada, at both the federal and provincial levels, set the economic "agenda" in their annual budgets. This "symbolic leadership role" was also commented on by Chief Justice Dickson:

> Due deference must be paid as well to the symbolic leadership role of government. Many government initiatives, especially in the economic sphere, necessarily involve a large inspirational or psychological component which must not be undervalued. The role of the judiciary in such situations lies primarily in ensuring that the selected legislative strategy is fairly implemented with as little interference as is reasonably possible with the rights and freedoms guaranteed by the Charter.[196]

Apart from arguments about the institutional competence of courts, there are reasons why women, in particular, may not want the courts, in these early days, to actively intervene in the tax area. C. Lynn Smith, in an article entitled *Judicial Interpretation of Equality Rights Under the Canadian Charter of Rights and Freedoms: Some Clear and Present Dangers*[197] identifies two major risks for women in *Charter* litigation. The first is that the *Charter* provisions will be interpreted in ways which do not lend themselves to a principled approach.[198] It is possible that very few limits will be imposed on judicial review which would be undertaken on a more or less *ad hoc* basis. The result of subjecting most government legislation to all the claims that "in-

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[196] *Ibid. See also The Queen* v. *Kurisko*, [1988] D.T.C. 6434 at 6443, [1988] 2 C.T.C. 254 at 262 (F.C.T.D.), Walsh D.J., *appeal den'd* [1990] D.T.C. 6376 (F.C.C.A.), *leave to appeal filed* 17 September 1990; *R.* v. *Whyte*, [1988] 2 S.C.R. 3 at 26, [1988] 5 W.W.R. 26 at 44, Dickson C.J.C. (balance in response to pressing social problems); *R.* v. *Schwartz*, [1988] 2 S.C.R. 443, 55 D.L.R. (4th) 1 [hereinafter cited to S.C.R.]. McIntyre J. at 487-89 wrote that courts are not called upon to substitute judicial opinions for legislative ones in regard to fine line drawing; Lamer J. (dissenting) agreed at 493 with McIntyre J.'s approach; *United States of America* v. *Cotroni*, [1989] 1 S.C.R. 1469 (*sub nom. Cotroni* v. *Centre de Prévention de Montréal*) 48 C.C.C. (3d) 193 [hereinafter cited to S.C.R.]. Mr Justice La Forest wrote for the majority at 1495 that legislatures must be allowed adequate scope to achieve their objectives; Wilson J., in dissent, agreed in principle at 1515.

[197] (1988) 23 U.B.C. L. REV. 65.

[198] *Ibid.* at 77.

genious legal mind[s]"[199] can create might be a very low standard of review.[200]

Review of the *Income Tax Act* presents special problems. An integral part of a principled approach to review is the development of manageable standards. There is a fine line between defending fundamental values of the *Charter*, including "equal benefit of the law," and defining tax policy. Furthermore, an approach that emphasizes the adverse disparate approach of income tax provisions on the economically underprivileged has the potential to strike at some of the basic assumptions underlying the tax system.

The second danger seen by Professor Smith is that the provisions of the *Charter* will be interpreted in such a way as to have "no net effect"[201] on the position of women and other disadvantaged groups. . .or worse. Given the generally greater resources available to men in our society, it is not inconceivable that most litigation will be initiated by them in order to advance their interests. Indeed, to some extent this seems to have already happened.[202]

B. Possible Solutions to the Problems of Charter Review of the Provisions of the Income Tax Act

The problem for women is to ensure that the courts apply section 15 so that the distinctions drawn by the legislature in the *Income Tax Act* "should not bring about or reinforce the disadvantage of certain groups and individuals by denying them the rights freely accorded to others".[203] This is not to suggest, however, that *Charter* review of the income tax system will be able to or should be able to precipitate "tax

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[199] *Ibid.* at 86.

[200] *Ibid.* at 85 where, interestingly, she cites at n. 77:

> claims. . .dissonant with the purpose of s. 15; . . . [as including claims] based upon economic regulatory legislation or taxation schemes or other measures where the complaint rests upon the fact of differentiation alone, rather than upon differentiation plus a purpose or effect on members of a disadvantaged group such as those named in s. 15.

Mr Justice Galligan in *OPSEU*, *supra*, note 56 at 61 said it more bluntly:

> The Charter, as it has been said in many, many cases, too numerous to mention, is an important piece of legislation which constitutionally protects important rights and freedoms of people who live in this country. It seems to me that it comes very close to trivializing that very important constitutional law, if it is used to get into the weighing and balancing of the nuts and bolts of taxing statutes.

[201] Smith, *ibid.* at 85.

[202] G. Brodsky & 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).

[203] *Andrews*, *supra*, note 21 at 33.

reform."[204] The courts cannot take on the whole tax system.[205] Perhaps, however, they should intervene in those limited circumstances where there is a reasonably clear link between the distinction drawn and a specific adverse impact on a disadvantaged group and where the distinction has largely to do with the delivery of welfare-type benefits as tax expenditures. Even then, the courts may feel constrained by government justifications under section 1. In addition, the courts might also, in certain limited circumstances, concern themselves with the basic revenue-raising structure of the income tax.

The orientation suggested eliminates, if not completely, some of the problems of *Charter* review of the income tax system. By narrowing the ambit of review, the work to be done seems more clearly to be within the institutional competence of the courts. As well, some of the concerns voiced by Professor Smith are met. Before considering proposals for a focused approach to review of the provisions of the *Income Tax Act*, it should be pointed out that the courts themselves have gone some way in suggesting limits to section 15 review. First, there is the enumerated and analogous grounds approach outlined by Mr Justice McIntyre in *Andrews*.[206] At this point in time, it is not clear whether this is the sole approach to the equality rights provisions

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[204] When and what is a "tax reform" seems to be in some dispute. In his budget on June 18, 1987, the Hon. Michael Wilson announced his two-stage "tax reform." Stage one dealt with the personal and corporate tax systems. Stage two concerned the abolition of the Federal Manufacturer's Sales Tax and the introduction of the General Sales Tax (GST). In its analysis of the 1987 reforms of the income tax system (produced by the Canada Tax Service) the law firm of Stikeman Elliot stated (in referring to the first stage of reform) that "[t]he world of Canadian taxation after June 18 is not particularly brave, nor especially new". The more significant reform is, of course, in the introduction of a non-progressive consumption tax, the GST.

Generally, the term "tax reform" has been used to refer to the legislation arising out of the recommendations of the Carter Commission effective for the 1972 and subsequent taxation years.

[205] *See* R. Hasson, *What's Your Favourite Right? The Charter and Income Maintenance Legislation* (1989) 5 J.L. & SOCIAL POL'Y 1. He is but one in a large number of commentators to argue that the attempt to "judicialize political questions" is doomed to failure.

[206] *Supra*, note 21 at 23.

of the *Charter*, but it is definitely one of the main ones.[207] Second, review seems fairly firmly anchored to "disadvantaged groups".[208] Third, corporations cannot claim the protection of section 15 (or section 7).[209] As a result, a great many difficult comparisons that might arise under the section in a review of income tax provisions are eliminated.

Other limits to section 15 review of provisions of the *Income Tax Act* are suggested by the tax expenditure concept. This concept, which has already been discussed in this paper, distinguishes between the "normative" or "revenue raising" aspects of the *Act* and those tax expenditures which in essence deliver economic, social and welfare-type initiatives. Generally, but not always, the courts would expect to give considerable deference to the legislature's construction of the basic revenue-raising structure. Therefore, they would presumably not allow themselves to be drawn into debates about rates (except in the extreme situations suggested by section 7), accounting periods, the tax base or the unit of taxation. Decisions about the basic nature of the tax system are, in the final analysis, fundamentally political. The presumption could be rebutted, however, in the face of compelling evidence that an aspect of the structure had an adverse disparate effect on a disadvantaged group described in the listed or analogous grounds. One example might be if the federal tax system were to change from

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[207] *See also* the discussion in D. Gibson, THE LAW OF THE CHARTER: EQUALITY RIGHTS (Toronto: Carswell, 1990) at 146. Professor Gibson cites Mr Justice Hugessen of the Federal Court of Appeal in *Smith, Kline & French Laboratories Ltd* v. *Attorney General of Canada* (1986), 34 D.L.R. (4th) 584 at 591 concerning the criteria that might assist in determining whether two categories are similarly situated:

> First, the text of s. 15 itself; secondly, the other rights, liberties and freedoms enshrined in the Charter and thirdly, the underlying values inherent in the free and democratic society which is Canada.

With respect to the "complex of criteria," Mr Justice Hugessen says at 592:

> As far as the text of s. 15 itself is concerned, one may look to whether or not there is "discrimination", in the pejorative sense of that word, and as to whether the categories are based upon the grounds enumerated or grounds analogous to them. The inquiry, in effect, concentrates upon the personal characteristics of those who claim to have been unequally treated. Questions of stereotyping, of historical disadvantagement, in a word, of prejudice, are the focus. . . .

See also supra, Part IV "The Meaning of 'Equal Benefit of the Law'".

[208] *See, e.g., Andrews, supra*, note 21; *Turpin, supra*, note 29; *Reference Re Workmens' Compensation Act, supra*, note 133. *But see* D. Gibson, *ibid.* at 152ff.

[209] *But see* D. Gibson, *Religous and Commercial Discrimination: Gospelco's Equality Gambit* in 1989 CAMBRIDGE LECTURES (Montreal: Les Éditions Yvon Blais, 1990) 111. *See also Irwin Toy, supra*, note 164 at 633.

its present individual unit of taxation to a marital or family unit.[210] Since women are typically "second-earners" in a family, aggregation of family income might increase their taxes (especially at higher income levels) disproportionately. In our society it is not clear that women and men share family income equally.[211] In addition, in many provinces property of the marriage is not shared equally on the dissolution of marriage.[212] On the other hand, it seems absolutely essential that the marital unit of taxation be adopted (at least at some family income levels) if the tax system is to be used to deliver welfare-type benefits, such as the refundable child tax credit or a comprehensive scheme such as a "negative income tax".[213]

Tax expenditures, as contrasted with the normative tax structure, arguably merit more scrutiny. Generally, tax expenditures can be placed on a continuum. At one end, there are those tax expenditures primarily designed to advance economic programs. Examples are the Cape Breton investment tax credit which was developed to encourage investment in Cape Breton[214] or the small business deduction for Cana-

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[210] The present system has the individual as the basic unit of taxation. Nevertheless, there are numerous examples in the *ITA* of the family unit being recognized for tax purposes. For example, there are provisions to permit spouses to transfer unused credits between themselves (s. 118.8) or, in some cases, for children to transfer credits to parents or grandparents (s. 118.9). The concept is also used to limit access to tax benefits. One of the most noteworthy examples is the refundable child tax credit in the *ITA* which limits the availability of the credit on the basis of marital income (s. 122.2).

The CARTER REPORT, *supra*, note 7, vol. 3 at 117 recommended the adoption of the family as the unit of taxation. Its recommendation was rejected in the White Paper on Tax Reform, because it would produce a "tax on marriage": Department of Finance, PROPOSALS FOR TAX REFORM (Ottawa: Queen's Printer, 1969 at 14). In reality, the adoption of a marital or family unit of taxation does not require a tax on marriage, but the result will be a less than ideal hierarchy of taxpaying units. *See* O. Oldman & R. Temple, *Comparative Analysis of the Taxation of Married Persons* (1959-60) 12 STAN. L. REV. 585.

Although the REPORT OF THE ROYAL COMMISSION ON THE STATUS OF WOMEN IN CANADA (Ottawa: Information Canada, 1970) (Chair: F. Bird) at 304 recommended the adoption of the family as the basic unit of taxation in Canada, many women today support the continuation of the present "individual system". *See* J. London, *The Impact of Changing Perceptions of Social Equity on Tax Policy: The Marital Tax Unit* (1988) 26 OSGOODE HALL L.J. 287; L. Dulude, *Taxation of the Spouses: A Comparison of Canadian, American, British, French and Swedish Law* (1985) 23 OSGOODE HALL L.J. 67; F. Woodman, *The Taxation Unit* in V. Krishna, B. Hansen & J. Rendall, eds, ESSAYS IN CANADIAN TAXATION (Toronto: Richard DeBoo Ltd, 1978) 69.

[211] *See* M. Eichler, FAMILIES IN CANADA TODAY, 2d ed. (Toronto: Gage, 1988) at 127.

[212] A. Bissett-Johnson & W.H. Holland, MATRIMONIAL PROPERTY LAW IN CANADA (Toronto: Carswell, 1980).

[213] There are also "diseconomies" on marriage for low-income taxpayers, that is, the need for a dwelling.

[214] *ITA*, s. 127(9).

dian-controlled private corporations.[215] At the other end of the continuum, are welfare-type tax expenditures. Examples of these would be the dependants tax credits,[216] the tax credit for medical expenses,[217] and possibily the deductions for contributions to deferred retirement income plans.[218] Somewhere in the middle are tax expenditures with more social than economic objectives such as accelerated capital cost for pollution control,[219] the special tax concessions extended to artists[220], or the tax credits for charitable donations.[221] Within these categories, there are tax expenditures available only to corporations, those available only to individuals and those available to both.

No strict demarcations can be made along the continuum. The placement of tax expenditures on it is intended merely to provide an initial orientation for the courts. However, it is reasonable that the courts would think themselves most competent to review welfare-type tax expenditures.[222] In that regard, there are already examples of court directed "reform" in the direct expenditure area. Thus, most notably, the Federal Court, Trial Division in *Schachter* v. *Canada*[223] has mandated changes to the *Unemployment Insurance Act*[224] on the grounds of discrimination on the basis of sex and family status.

In *Schachter* the plaintiff argued that he was entitled to unemployment insurance benefits when he took time off work after the birth of his child to care for the infant. Under the then existing provisions,[225] a natural father was not permitted to claim any benefits except in special circumstances. The Court held that natural fathers and mothers should be entitled to the same benefits as adoptive parents. These benefits would be in addition to the maternity benefits already extended to the natural mother.

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[215] *ITA*, s. 125.

[216] *ITA*, s. 118. *But see* the argument *infra*, Part IX, Section F.

[217] *ITA*, s. 118.2.

[218] *ITA*, ss 146 and 147.1.

[219] *ITA*, Reg. 1100(1)(t), Schedule 11, Class 24 and 27.

[220] *ITA*, s. 10(6).

[221] *ITA*, s. 118.1.

[222] The refundable child tax credit (*ITA*, s. 122.2) is arguably the most typical of the welfare-type tax expenditures. The two characteristics that make it most like a direct expenditure for the support of children are not, however, necessarily characteristeric of other types of welfare-type tax expenditures. The child tax credit is refundable. In other words, if the taxpayer has no federal tax payable, he or she is simply paid his or her "unused" tax credit. Secondly, the unused tax credit is paid quarterly to families that qualify. In marked contrast, all other tax expenditures, most of which are not refundable, are recognized by the taxpayer after filing the tax return in which the deduction, credit or whatever has been claimed.

[223] (1988), 18 F.T.R. 199, 52 D.L.R. 525 [hereinafter *Schachter* cited to D.L.R.].

[224] S.C. 1970-71-72, c. 48.

[225] R.S.C. 1985, c. U-1, s. 20, *added*, R.S.C. 1985 (4th Supp.), c. 4, s. 3 (adds ss 20.1 and 20.2).

Schatcher is also noteworthy for the attention that the Federal Court, Trial Division (and on appeal, the Federal Court of Appeal)[226] devoted to the issue of the role of the judiciary where the remedy entails the appropriation of public monies from the Consolidated Revenue Fund for a purpose not authorized by Parliament. In addition, the Courts considered the nature and extent of the court's power to grant a remedy for the infringement of section 15.

The narrower focus suggested in this paper will reduce, but not eliminate, cost problems. Undoubtedly the extension of welfare-type tax expenditures to excluded classes because of *Charter* litigation will force the courts to face problems similar to those confronted by the courts in *Schachter*. Thus, it is reasonably clear that "cost" will play an important role in government justifications under section 1.[227]

As yet, the Supreme Court has not made a definitive pronouncement on the court's right to read provisions into legislation that suffers from underinclusiveness. Section 52 of the *Constitution Act, 1982*[228] provides that "any law inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." Section 24 of the *Charter*, on the other hand, provides that:

> 24(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

In *Schachter* (F.C.A.), Mr Justice Heald (Stone J.A. concurring) upheld Mr Justice Strayer's decision that natural parents be entitled to the same benefits for child care as are adoptive parents. Mr Justice Strayer preferred extending the benefits to natural parents rather than simply declaring section 32 of the *Unemployment Insurance Act*[229] unconstitutional. Mr Justice Mahoney of the Court of Appeal dissented. After quoting from the *Bill of Rights of 1688*,[230] Mr Justice Mahoney said:

> The appropriation of public monies by a court is as offensive to that principle as is its appropriation by prerogative.[231]

Application for leave to appeal to the Supreme Court is pending.

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[226] [1990] 2 F.C. 129 [hereinafter *Schachter* (F.C.A.)].

[227] *Supra*, note 223 at 551. Mr Justice Strayer said: "While cost implications might have been relevant had s. 1 been invoked by the defendants, I do not think they can be relevant to the question of whether a s. 15 right has been infringed". *See also* the comments of Mme Justice McLachlin in "Government and Bench try to 'co-operate', says S.C.C. judge" *The Lawyers Weekly* (30 November 1990) 13.

[228] Being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

[229] S.C. 1970-71-72, c. 48.

[230] *An Act Declaring the Rights and Liberties of the Subject and Setting the Succession of the Crown, 1688* [Bill of Rights], 1 Will & Mary, Sess. 2, c. 2 (U.K.).

[231] *Schachter* (F.C.A.), *supra*, note 226 at 163.

IX. Some Specific Provisions of the Income Tax Act Considered

In this section a number of income tax provisions that are potentially open to *Charter* challenge under section 15 are discussed. Although the primary focus of this paper has been on tax expenditures, it should be mentioned that there are several provisions in the *Income Tax Act* which could be scrutinized from a more traditional perspective. These will be dealt with first. Some tax expenditures, or at least provisions of the *Act* which are arguably tax expenditures, will then be examined. The selection of tax expenditures is based to some extent on the list of individual tax expenditures included in the 1981 publication of the Department of Finance entitled Analysis of Federal Tax Expenditures for Individuals.[232] It will become evident that for various reasons the courts are unlikely to interfere with many of the tax expenditures — at least not in the immediate future. Nevertheless, the kind of tax legislation which might engender judicial activism is explored.

A. *The Concept of "Spouse" in the Income Tax Act*

The term "spouse" in the *Income Tax Act* has been interpreted by the courts to mean "legally married spouse".[233] In *Bailey* v. *The Queen*[234] a Canadian Human Rights Tribunal held the marital exemption[235] to be discrimination on the basis of marital status because it was restricted to married persons. In *Bailey* the taxpayer wanted to claim the marital exemption for her common-law spouse. However, Revenue Canada denied her deduction. Even though the Tribunal found discrimination it held:

> In my view, it is not sufficient that the classification provisions of the offending statute simply are unreasonable, to render those provisions inoperative as being in conflict with the *Canadian Human Rights Act*. The offending provisions are not in conflict to the point of being inoperative in law if the classification of the legislation is based upon considerations perceived by Parliament as relevant to the fundamental purpose of the income tax legislation, being revenue collection. . . .
>
> If the Complaints before this Tribunal had arisen in the context of a constitutionally entrenched *Canadian Bill of Rights* that included the substantive scope of sections 3 and 5 of the present *Canadian Human*

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[232] *Supra*, note 71 at 6 (Table 3).

[233] *See The Queen* v. *Taylor Estate*, [1984] 1 F.C. 948, [1984] C.T.C. 244 (T.D.). There are also a number of provisions which extend the definition of "spouse" in the *ITA*. *See, e.g.*, *ITA*, ss 146(1.1), 252(3), 60(c.1)(iii) and 56(1)(c.1)(iii).

[234] *Supra*, note 88 at D/221.

[235] *ITA*, s. 109(1)(a), *as rep.* S.C. 1988, c.. 55, s. 76.

> *Rights Act*, then in my opinion, a court's decision in respect of the conflict between such *constitutional* provision and both paragraph 109(l)(a) and section 63 of the *Income Tax Act* might have been otherwise, given the findings I have made.[236]

It is noteworthy, however, that an attack on the definition of "spouse" is a two-edged sword for taxpayers. Depending on the distribution of income between the couple,[237] their "mix" of assets,[238] whether they have children or not,[239] and other characteristics (such as whether one of them is disabled or attends university),[240] it may or may not be advantageous for them to be treated as a legally married couple under the present tax system. Indeed, it could be argued that there is a section 15 violation under the *Charter* in those circumstances where a legally married couple is not taxed the same way (and as advantageously) as a common-law couple. For example, the income attribution rules[241] of the *Income Tax Act* apply to prevent the splitting

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[236] *Supra*, note 88 at D/222.

[237] The one-earner couple will pay the most tax on marital income. (This may in fact compensate, although in a crude way, for the untaxed imputed income of the couple.) The least tax will be paid by a two-earner couple each earning the same income. Whether a couple is treated as married will not affect their total tax payable (in a general way). However, it will make a difference if the taxpayers transfer property between themselves.

[238] For example, married spouses may contribute to a spouse's registered retirement savings plan. This may permit income-splitting at retirement or sometimes before retirement. *See ITA*, s. 146(5.1), *but see also ITA*, s. 146(8.3). Common law couples do not have this opportunity. On the other hand, common law spouses are recognized for certain other purposes in the registered retirement savings plan legislation. They may be annuitants under their partner's plans and tax benefits are extended to common law spouses on a partner's death. *See ITA*, s. 146(1.1).

A "family" (*ITA*, s. 54(g)(iii)) may designate only one principal residence.

The big difference, of course, between legally married spouses and other spouses is in the application of the attribution rules in *ITA*, s. 74.1.

[239] A spouse must be legally married to her spouse to claim the marital tax credit. Where the common law couple have a child, however, one spouse may claim the married equivalent tax credit for the child. In fact, a two-earner common law couple with a child is in a more advantageous tax position than a legally married two-earner couple with a child. One of the former couple can claim the marital equivalent tax credit for the child. One of the latter couple can only claim the lesser dependent's tax credit. *See ITA*, ss 118(1)(b) and 118(1)(d). *See also Toutant* v. *M.N.R.*, [1978] C.T.C. 2671 (T.R.B.).

[240] *See ITA*, s. 118.8 regarding transfers of "unused" tax credits to a spouse.

[241] *ITA*, s. 74.1. *See also Goldstein* v. *Canada (Minister of Employment and Immigration)* (1988), 65 O.R. (2d) 72, 51 D.L.R. (4th) 583, (H.C.) [hereinafter *Goldstein* cited to D.L.R.]. In that case, Potts J. ruled that a blanket exclusion of persons employed by their spouses from unemployment insurance benefits was not unconstitutional. He noted at 588 that "[u]nmarried couples cannot be assumed to be as integrally linked financially as are married couples." Note that marital status is not an enumerated ground. *See* A.A. McLellan, *Marital Status and Equality Rights* in Bayefsky & Eberts, eds, *supra*, note 42.

of income between legally married couples but not between common-law spouses. Note, however, that tax-free transfers of property are only permitted between legally married spouses.[242]

B. Alimony and Maintenance

The alimony and maintenance provisions of the *Income Tax Act* may also be subject to judicial scrutiny.[243] The rules provide for the deduction of payments made between separated common-law spouses as well as legally married spouses.[244] There is, however, no provision for payments made pursuant to a written separation agreement between common-law spouses.[245] It is noteworthy that the *Income Tax Act* does not recognize homosexual spouses either as intact or separated couples.[246]

One aspect of the alimony and maintenance provisions that has been questioned by women is the requirement that maintenance paid for children be included in the income of the custodial parent (usually a woman).[247] There may be possible grounds for a section 15 challenge to this requirement on the basis of adverse disparate impact.

C. Capital Gains

Since the 1981 ANALYSIS OF FEDERAL TAX EXPENDITURES FOR INDIVIDUALS,[248] there have been significant changes in the taxation of capital gains in Canada. The inclusion rate has been raised from one-half to three-quarters,[249] the ISIP (Indexed Security Investment Plan)

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[242] *ITA*, s. 73(1). For death *see generally ITA*, ss 70(6) and (6.2).

[243] *ITA*, ss 56(1)(b) (alimony), (c)(maintenance), (c.1) (common law spouses) and *ITA*, ss 60(b), (c) and (c.1). Section 56 is the inclusion of income and section 60 is the deduction from income.

[244] *ITA*, s. 60(c.1).

[245] *ITA*, s. 60(b) makes provision for payments pursuant to a written separation agreement between legally married spouses.

[246] *ITA*, ss 56(1)(c.1)(iii) and 60(c.1)(iii) provide that: "the taxpayer required to pay the amount is an individual of the opposite sex".

[247] *ITA*, ss 56(1)(b), (c) and (c.1).

[248] *Supra*, note 71.

[249] *ITA*, s. 38 *as am.* S.C. 1988, c. 55, s. 19, generally applicable to taxation years and fiscal periods ending after 1990. There was a transition rate of two-thirds for, generally, 1988 and 1989. *See* the legislation for the specific provisions.

has been established and abolished,[250] and the lifetime capital gains exemption introduced and substantially modified.[251]

The taxation of capital gains is significant from tax equity and constitutional equality perspectives because women receive a disproportionately low share of capital gains[252] and taxpayers with high incomes receive a disproportionately large share of capital gains. Thus the Department of Finance's review paper on capital gains issued in 1980 states:

> Because of the strong concentration of capital gains in higher-income brackets, their tax treatment has an important influence on the progressivity of the tax system. In 1978, for example, the top 1/10th of one per cent of tax filers with incomes above $100,000 accounted for 24.2 per cent of reported capital gains, though their share of total income was only 1.9 per cent. To indicate further the concentration of capital gains, it can be noted that in 1978 some 500 individuals with incomes over $100,000 derived virtually all of their income from capital gains.[253]

The Carter Commission recommended the full inclusion of capital gains in income on the grounds of equity and neutrality.[254] The full taxation of capital gains was recommended on equity grounds because capital gains, like other forms of income, increase a taxpayer's ability to command goods and services. The Commission also was concerned that the then current non-taxation of capital gains distorted the workings of market forces and encouraged taxpayers to invest in assets that normally yield more of their return in capital gains.

The suggested full taxation of capital gains caused a public outcry[255] and the eventual compromise was, generally, the half inclusion of capital gains in income. Subsequently the inclusion was raised to three-quarters by Mr Wilson in his 1987 tax reform.

Notwithstanding the recommendations of the CARTER REPORT, there are reasonable arguments against the full taxation of capital gains. They include the effects of taxation on the provision of equity

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[250] *ITA*, s. 47.1 *as am.* S.C. 1984, c. 1, s. 17 (applicable after September 30, 1983). It was repealed by S.C. 1986, c. 6, ss 20(1)-(3). Generally the repeal was effective after January 1, 1986. The Indexed Security Investment Plans ensured that only real (non-inflationary) capital gains were taxed on certain securities held in the plan and the capital gains were taxed on an annual accrual basis. The scheme was not deemed necessary after the introduction of the phased-in lifetime capital gains exemption in *ITA*, s. 110.6.

[251] *ITA*, s. 110.6 *as am.* S.C. 1986, c. 6, s. 58 (applicable to 1985 and subsequent taxation years). Generally it provided for a $500,000 lifetime capital gains exemption to be phased in over a number of years. The present provision was introduced by S.C. 1988, c. 55, s. 81 (applicable to 1988 and subsequent years).

[252] *See supra*, text accompanying note 113.

[253] Canada, Department of Finance, A REVIEW OF THE TAXATION OF CAPITAL GAINS IN CANADA (Ottawa: Supply & Services, November 1980) at 4 [hereinafter REVIEW].

[254] *Supra*, note 7, vol. 3 at 325ff.

[255] McQuaig, *supra*, note 10 at 154ff.

and risk capital, the problems of bunching and the taxation of inflationary gains,[256] and the non-deduction of capital losses against income other than capital gains. In addition, it is argued that tax relief for capital gains prevents investment lock-in.[257]

In the final analysis, the non-inclusion of one-quarter of capital gains can be placed on the economic end of the tax expenditure continuum. It would appear to be appropriate to accord the decision to exempt one-quarter of the gain the considerable deference that Chief Justice Dickson recommended in matters of "difficult matters of economic policy".[258]

The arguments in favour of the non-inclusion of some portion of realized capital gains are not as compelling when applied to the present lifetime exemption of $100,000 of capital gains.[259] The exemption, which was originally for $500,000, was introduced in 1985 by Mr Wilson as a "major initiative to encourage investment by individual Canadians in small and medium-sized businesses".[260] In announcing the $500,000 exemption Mr Wilson was clearly assuming the "symbolic leadership role" that the Chief Justice alluded to in *P. S. A. C.*[261] His government was intent on being more sensitive than the previous one to the needs and concerns of business. As Mr Wilson said:

> This is a measure designed to unleash the full entrepreneurial dynamism of individual Canadians.[262]

The $500,000 exemption, which was to be phased in over five years, was the subject of early criticism.[263] Using a term familiar to constitutional lawyers, the means — that is, the $500,000 exemption — did not seem "rationally related" to the purported end. The $500,000 exemption applied to *all* capital gains and not just those arising from

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[256] Under the comprehensive tax base, capital gains would be taxed as they accrue. This is not practical for a number of reasons including valuation problems and the hardships imposed on taxpayers who have to pay tax on gains they have not realized. Therefore, capital gains are generally taxed in Canada at the earlier date of their realization through sale or gift or their deemed realization on death. This means the gains are "bunched" in one year. The counter-argument, of course, is that the deferral in taxation more than makes up for either bunching or taxation of inflationary gains.

[257] For a general review of these arguments and some of the history *see* T. Sheppard, *Capital Gains: Twenty Years Later a Buck is Still Not a Buck* in Brooks, ed., *supra*, note 7 at 83.

[258] *P.S.A.C.*, *supra*, note 195.

[259] *ITA*, s. 110.6.

[260] Canada, Department of Finance, Release 85-80, "Budget Proposes Lifetime $500,000 Capital Gains Exemption" (23 May 1985).

[261] *Supra*, note 195.

[262] *Supra*, note 260.

[263] Even tax planners and tax advisors had their reservations. *See, e.g.*, S. Goodman & N. Tobias, *The Proposed $500,000 Capital Gains Exemption* (1985) 33 CAN. TAX J. 721 for some muted criticism.

business equity investments. As an earlier Department of Finance study had stated after considering the distribution of capital gains for the 1972-1978 period:

> With the exception of the first two years, the dominant source of capital gains for individuals and corporations has been real estate. In 1978, 53 per cent of net capital gains of individuals were derived from sales of real estate and 34 per cent from sales of shares.[264]

In 1987, Mr Wilson as part of "tax reform" capped the exemption at $100,000.[265] He retained the $500,000 exemption for farmland "to recognize the special circumstances of farmers"[266] and introduced a $500,000 lifetime exemption for shares of small business corporations because "[s]mall business contributes greatly to job creation and innovations".[267] At the same time he tightened up the exemption to reduce tax shelter possibilities and better match deductions with tax-exempt income by requiring the available capital gains exemption in any year to be reduced by the taxpayer's net investment losses.[268] He also increased the inclusion of capital gains in income, as discussed above, from one-half to three-quarters with a two-year phase-in period at two-thirds.[269]

While maintaining that the objectives of the original exemption were unchanged, Mr Wilson justified the modifications described above on the basis that his proposed reduction in tax rates would provide a broad incentive to save and invest.[270] Indeed, overall, Mr Wilson's reforms were somewhat congruent with an approach to taxation that advocates a more comprehensive tax base with fewer tax brackets and a flatter rate structure.[271] It is an approach that, in contrast to the Carter Commission, puts more emphasis on efficiency than equity.

Whatever might be said about the original $500,000 capital gains exemption, the courts are unlikely to interfere on constitutional grounds with the current exemption. As this brief history indicates, the exemption is part of a comprehensive political/economic package that the courts would be loathe to unravel.

D. The Principal Residence Exemption

The Carter Commission, after recommending full inclusion of capital gains in income, suggested a limited exemption for certain

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[264] REVIEW, *supra*, note 253 at 10.

[265] S.C. 1988, c. 55, s. 81.

[266] WHITE PAPER — TAX REFORM, *supra*, note 159 at 21; *ITA*, s. 110.6(2).

[267] *Ibid.*; *ITA*, s. 110.6(2.1).

[268] *See ITA*, s. 110.6(1), "annual gains limit", "cumulative gains limit", "investment expense", and "cummulative net investment loss".

[269] *ITA*, s. 38.

[270] WHITE PAPER — TAX REFORM, *supra*, note 159 at 34.

[271] *See* R.S. Smith, *Rates of Personal Income Tax: The Carter Commission Revisited* (1987) 35 CAN. TAX J. 1226.

residential properties.[272] The recommended exemption could accumulate up to a lifetime total of $25,000 for each family unit or individual. The Commission said:

> Although the reasons for this exclusion are largely administrative, there are also social implications. The complexities in maintaining adequate cost records over the periods involved if gains on residential properties were taxed would be considerably greater than would be involved for other types of property.[273]

In lieu of keeping track of the value of improvements, a taxpayer would also be permitted to elect to add to his tax basis one percent of the cost of the building for each year that the property was held.[274]

The White Paper on Tax Reform rejected the Carter recommendations and recommended a principal residence exemption that would permit most owner/occupiers of dwellings to dispose of them without paying tax on the realized capital gains.[275] The reason given was:

> [T]he government does not feel that it would be appropriate to treat the homeowner's gain as ordinary income. Home ownership is part of the Canadian way of life, and within reasonable limits the profits on the sale of a personal residence would be treated as a recovery of the personal expenses of the homeowner.[276]

When the tax reform legislation was finally unveiled, all of the limitations on the exemption proposed in the White Paper had been removed to provide a complete exemption of capital gains on principal residences.[277]

The last tax expenditure budget estimated the principal residence exemption to cost Canadian taxpayers over $760 million (for 1981) in forgone revenue.[278] The exemption is also delivered in the form of an upside-down subsidy. Hence, the bigger the gain, (often associated

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[272] *Supra*, note 7, vol. 3 at 353.

[273] *Ibid.* at 258.

[274] *Ibid.*

[275] Canada, Department of Finance, PROPOSALS FOR TAX REFORM (Ottawa: Queen's Printer, 1969) at 36 [hereinafter PROPOSALS]. It said at 38:

> Generally, capital gains on the sale of homes would not be taxed. This would be accomplished by providing that when a taxpayer sells his principal residence only the profit in excess of $1,000 per year of occupancy would be taxed, and by granting the "rollover" discussed in the next paragraph.

The rollover would have been granted to taxpayers who sold a home to move to a new job location and bought a new house. Also a home improvement allowance of $150 a year would be granted to taxpayers who failed to keep records of capital expenditures.

[276] PROPOSALS, *ibid.* at 37.

[277] *ITA*, s. 40(2)(b).

[278] 1985 Tax Expenditure Budget, *supra*, note 68, Item E1 at 45.

with a better located and larger house), the bigger the tax subsidy. Any analysis of the distribution of the benefit of the exemption would probably conclude that it accrues disproportionately to high income taxpayers. However, it is likely that the courts would be inclined to conclude that the exemption would be saved by section 1. As one commentator put it, the "Canadian way" could be translated as "the government judges that the taxation of gains on principal residences is simply politically unsaleable".[279]

E. The Dividend Tax Credit

One of the major conceptual issues that arises in the identification of tax expenditures concerns the integration of the personal and corporate income.[280] The basic question is whether corporations and individuals should be viewed as separate tax units or not. The dividend tax credit represents a partial move towards an integrated personal and corporate income tax system.[281] In the 1979 and 1980 tax expenditure budgets, the dividend tax credit was listed as a tax expenditure item because, on the grounds of pragmatism, the complete separation of the personal and corporate systems for purposes of the benchmark tax structure was assumed. However, in the 1985 budget it was assumed that provisions which provide for integration were part of the benchmark tax system.[282] Because of the difficult policy and conceptual issues involved, judicial review of this provision is unlikely.

F. Exemptions, Deductions and Credits

The basic question is whether the debate in public economics and the political economy of tax reform over the selection of exemption/deductions or credits can be constitutionalized.[283] In the personal tax system, exemptions/deductions are used to refine the tax base to

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[279] E.C. Harris, *A Case Study in Tax Reform: The Principal Residence* (1983) 7 DALHOUSIE L.J. 169 at 172 n. 8.

[280] *See* R. Bird & F. Woodman, "Taxation of Corporations" in B. Arnold, *et al.* eds., THE TAXATION OF CORPORATIONS AND SHAREHOLDERS IN CANADA (Toronto: Carswell, 1986) at 191ff.

[281] The Carter Commission recommended the complete integration of corporate and personal taxes. *See supra*, note 7, vol. 4 at 3.

[282] *Supra*, note 68.

[283] The value of an exemption/credit to a taxpayer is the amount of the exemption/deduction multiplied by her marginal rate of tax. The value of a credit is the face amount of the credit assuming she has enough tax payable to "use up" the credit. The amount of a refundable credit that is not set off against the tax liability of a taxpayer is paid to the taxpayer.

For a good discussion of the exemption/deduction or credit debate, *see* A.P. Cloutier & B. Fortin, *Converting Exemptions and Deductions Into Credits: An Economic Assessment* in J. Mintz & J. Whalley, eds, THE ECONOMIC IMPACTS OF TAX REFORM (Toronto: Canadian Tax Foundation, 1989) at 45.

recognize non-discretionary expenditures. Credits generally deliver tax subsidies (that is, tax expenditures) to designated persons. Proponents of exemptions/deductions argue that the ability to pay of a taxpayer is reduced by certain essential outlays. Proponents of credits contend that total income is the appropriate tax base.

The CARTER REPORT recommended that differences in family responsibilities be recognized in two ways. First, it recommended that two rate schedules be adopted, one for families and one for unattached individuals.[284] It said:

> We reject the use of one schedule and the adoption of a fixed exemption or tax credit to differentiate the taxes levied on the two kinds of units. To use one schedule for both kinds of units and a fixed exemption for the couple would be tantamount to the acceptance of the assumption that the extra non-discretionary expenses of a couple not only increase with income but increase at the same rate as the marginal rates of tax increase with income. This we cannot accept. We believe that when the level of income is substantial, the fraction of additional income available for discretionary use is the same for the couple as for the unattached individual. Adoption of an exemption would give an unwarranted tax reduction to upper income couples and would not be sufficiently generous for low income couples.[285]

Secondly, the Commission supported, albeit somewhat reluctantly, the use of credits to distinguish between families with different numbers of dependents. Separate rate schedules would constitute the most refined approach but the small amounts involved would not justify the extra complexity. Therefore, credits should be given because:

> [c]redits against tax are simpler and the inherent bias of fixed credits would be in favour of low income families as we think it should be.[286]

The complexities of the exemption/deduction or credit debate are illustrated by an examination of the present recognition given both within and outside the tax system to the costs of raising children. Generally, excepting child care expenses (which will be discussed later), the costs of raising a child are subsidized in three ways. First, one of the parents may claim the child tax credit for children under eighteen of $69.[287] The credit is non-refundable so if the taxpayer has

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[284] *Supra*, note 7, vol. 3 at 34.

[285] *Ibid.* at 16.

[286] *Ibid.* at 17.

[287] *ITA*, s. 118(1)(d). For the first two dependents the amount is $69 each. For each additional dependent it is $138. This figure relates to federal tax only. The amount of federal tax credit reduces provincial tax because provincial tax is a percentage of federal tax in 9 out of 10 provinces (Quebec excepted). Therefore, indirectly, there is a provincial credit. For example, if provincial tax is half of federal tax, the dependent credit is worth $69 plus half of $69, or $34.50, for a total of $103.50.

no tax liability, the credit is "lost". Second, there is the refundable child tax credit of $585 per child.[288] It is supplemented by a $207 credit for each child who is under seven at the end of the year less 25 per cent of any amount claimed under the child care expenses deduction provisions. The credit is "vanishing", which means that the higher the income of the couple, the less credit that may be claimed. Thus in 1991, the credit is reduced by 5 per cent of every dollar of family income[289] over $25,215. Finally, there is the family allowance program. It is not a tax program at all, but the payments are inextricably intertwined with the tax system. Each month, the mother (generally)[290] receives a cheque for $33 per child. The amount is taxable in the hands of the higher income spouse.[291] In addition, a "claw-back" provision of the *Income Tax Act* provides for an extra tax if the income of the family exceeds $51,765.[292] Eventually, the whole of the family allowance will be taxed back in high income families.[293]

In tax policy parlance, these three programs are "targeted" to lower income Canadians. This result has been promoted by many Canadian social welfare groups, most notably the National Council of Welfare.[294] On the other hand, the cumulative effect on higher income Canadians is that the present tax and social welfare system does not make much of a distinction between higher income couples with children and couples without children at the same income level. In constitutional terms, one might say that there is discrimination at higher income levels on the grounds of family status against people with children. Interestingly, in a preliminary review of the effects of tax changes since 1984, including Mr Wilson's tax reform budget in which many exemptions/deductions were changed into credits, Patrick Grady makes the point that middle income Canadians with children are among the "losers".[295]

Even this short review of government support programs for children shows that it would be very difficult for the courts to interfere with one aspect of the system without reviewing the whole array of programs. This kind of judicial activism is unlikely. The answer to the

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[288] *ITA*, s. 122.2.

[289] Family income is strictly speaking, the aggregate of the incomes of the taxpayer and supporting individual, if any, for the year. The taxpayer is generally the person entitled to receive the family allowance. A supporting person is the child's parent who resides with the taxpayer, whether or not they were legally married or any taxpayer who claimed a section 118 credit for the child.

[290] *Family Allowances Act*, R.S.C. 1985, c. F-1, s. 7(1).

[291] *ITA*, ss 56(5), (6) and (7).

[292] *ITA*, s. 180.2.

[293] The formula is that a taxpayer shall pay a tax equal to the lesser of the amount of family allowance and 15 per cent of the amount, if any, by which the income of the taxpayer exceeds the threshold amount.

[294] *See, e.g.*, TESTING TAX REFORM, *supra*, note 160 at 3ff.

[295] P. Grady, *The Distributional Impact of the Federal Tax and Transfer Changes Introduced Since 1984* (1990) 38 CAN. TAX J. 286 at 297.

question of exemptions/deductions or credits in the area of personal exemptions is not in the final analysis a question for the courts. Nevertheless, in the following discussions of the child care expenses deduction and deferred retirement income provisions, the issue of deductions or credits will again arise. A case can be made, with regard to those provisions, that the issue may be more susceptible to court review.

G. The Child Care Expense Deduction

The child care expense deduction permits a taxpayer to deduct up to $4,000 per child per year for child care expenses.[296] If the parents[297] are living together, the lower income parent must claim the deduction.[298] Before 1983,[299] only women, in most circumstances,[300] were allowed to deduct child care expenses. However, in *Bailey*[301] a Canadian Human Rights Tribunal found that the provision discriminated against men[302] and the legislation was changed. The total child care expenses deducted by a taxpayer cannot exceed 2/3 of earned income.[303] Earned income is salary, business income, scholarships, research grants and certain training allowances.[304] The child care expenses deduction recognizes the extra child care costs of two-earner and single parent working families. By indirectly compensating for the undertaxation of the imputed income of one-earner families, some of the tax disincentives for the second earner to work are removed.[305] In 1987 over 550,000 taxpayers claimed the child care expense deduction for a total of over $923 million in deductions. Women accounted for about 80 percent of the claimants and about 79 percent of the total deductions.[306]

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[296] *ITA*, s. 63.

[297] Section 63(3)(d) defines "supporting person" as a parent of the child, the taxpayer's spouse, or an individual who deducted an amount under section 118 for the year in respect of the child, if the parent, spouse, or individual, as the case may be, resided with the taxpayer during the year and at any time within 60 days from the end of the year.

[298] *ITA*, s. 63(2). The higher income parent may claim the deduction in certain limited circumstances, for example, where the lower income parent is in full-time attendance at a designated educational institution, disabled, or incarcerated.

[299] *ITA*, s. 63(1), *as am.* S.C. 1984, c. 1, s. 25(1), applicable to the 1983 and subsequent taxation years.

[300] The male parent could claim the deduction if he was not married, was separated from his wife, or had a wife who was disabled or incarcerated.

[301] *Supra*, note 88.

[302] *Ibid.* at D/205.

[303] *ITA*, s. 63(1)(e)(i).

[304] *ITA*, s. 63(3)(b).

[305] *See Bailey*, *supra*, note 88 at D/202-D/204 and CARTER REPORT, *supra*, note 7, vol. 3 at 194.

[306] TAXATION STATISTICS, *supra*, note 112, Table 4A at 181.

In the last expenditure budget issued by the federal government, the child care expense deduction was calculated to cost $110 million.[307]

To date, this author knows of only two cases before the courts concerning constitutional rights and the deduction of child care expenses. Both *Symes*[308] and the Stevens case[309] have already been alluded to in this paper.[310] In *Symes* the child care expenses deduction itself[311] was not directly in issue. The taxpayer, a female lawyer, claimed her child care expenses in the computation of her partnership income as business expenses under section 9 of the *Act*. Section 9 provides that "a taxpayer's income for a taxation year from a business or property is his profit therefrom for the year". Paragraph 18(1)(a) of the *Act* prohibits a deduction "except to the extent that it was made or incurred by the taxpayer for the purpose of gaining or producing income from the business or property". Another provision of the *Act*, paragraph 18(1)(h), disallows the deduction of personal or living expenses. The determination of profit is a question of law. The test is whether the expenses are consistent with ordinary principles of commercial trading or well-accepted principles of business practice.[312]

Section 15 of the *Charter* was not directly in issue in *Symes* for most of the taxation years in dispute. The equality rights provisions of the *Charter* were not proclaimed until April 17, 1985 and the years reassessed were from 1982 to 1985. Mr Justice Cullen did not accept the argument of the taxpayer that the *Charter* applied because the years in question were subject to reassessment after the *Charter* was proclaimed.[313] Nevertheless, his interpretation of the meaning of profit was obviously influenced by section 15 of the *Charter*. Faced with a whole series of cases which held that child care expenses are personal living expenses, Mr Justice Cullen said:

> As shown by Armstrong's evidence, there has been a significant social change in the late 1970s and into the 1980s, in terms of the influx of women of child-bearing age into business and into the workplace. This change postdates the earlier cases dismissing nanny expenses as a legitimate business deduction and therefore it does not necessarily follow that the conditions which prevailed in society at the time of those earlier decisions will prevail now. For this reason I do not see why I should be limited in my interpretation of what is a proper business expense as it relates to nanny expenses, by a cluster of cases decided in the 1950s and 1960s based on the reasoning of a decision made in 1891.

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307 1985 Tax Expenditure Budget, *supra*, note 68 at 45 (Table 1). In 1972 the deduction was $1,000 per child with an upper total limit of $4,000. For 1983, the amount was increased to $2,000 per child. For 1988, the amount was increased to $4,000 per child under 7 years of age. The amount of $2,000 remained for children over 6 and under 14. The total limit per family was also removed.

308 *Supra*, note 1.

309 *Supra*, note 106 and accompanying text.

310 *See supra*, Parts I and V.

311 *ITA*, s. 63.

312 *See supra*, note 1 at 480.

313 *Ibid.* at 486.

> I am satisfied on the facts of this case that the plaintiff exercised good business and commercial judgment in deciding to dedicate part of her resources from the law practice to the provision of child care. This decision was acceptable according to business principles which include the development of intellectual capital, the improvement of productivity, the provision of services to clients and making available the resource which she sells, namely her time.[314]

Mr Justice Cullen's commendable willingness to examine the actual circumstances of women's lives today departed significantly from the more traditional analysis of previous cases.[315] It is to be hoped that his approach will not be negated in any subsequent appeals. Mr Justice Cullen also considered separately section 15 of the *Act*. He held that for the 1985 stub period section 15 had been abrogated. Again, an important part of his judgment concerned the necessity of looking at the real position of women in Canadian society. He said:

> [S]ince the *Andrews* decision, the Act cannot be interpreted as if parents (mostly female) are the same as other workers, or entrepreneurs (i.e. without child care responsibilities); it must be interpreted in a way which recognizes their specific experience as principally responsible for child care.[316]

In the Stevens case, the taxpayer alleges the definition of "earned income" for the purposes of the child care expenses deduction in section 63 of the *Income Tax Act* has an adverse disparate effect on women who are single parents. A taxpayer may not deduct child care expenses that exceed two-thirds of her earned income.[317] Earned income does not include alimony or maintenance. Since it is overwhelmingly women who receive alimony or maintenance and also women who must retrain after the break-up of a marriage, the exclusion of alimony and maintenance from the definition of earned income violates section 15 of the *Charter*.

Of the two cases, it is *Symes* which is, in the final analysis, problematic. From a constitutional perspective, the finding that there was a violation of section 15 is welcome. The willingness of Mr Justice Cullen to examine the reality of the lives of present-day Canadian women is an example to be emulated by other courts. On the other hand, the result, that high income taxpayers can deduct *all* of their child care expenses is unacceptable. This may be the consequence of a flawed analysis of section 1.

Two preliminary comments can be made about Mr Justice Cullen's review of the government's section 1 arguments. First, he adopts the

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[314] *Ibid.* at 483.

[315] *See* F. Woodman, *A Child Care Expenses Deduction, Tax Reform and the Charter: Some Modest Proposals* (1990) 8 CAN. J. FAM. L. 371 at 375-77.

[316] *Ibid.* at 490.

[317] *ITA*, s. 63(1)(e).

"pressing and substantial standard" to which present and future courts may not be fully committed.[318] Second, he finds that "[f]urther, on the facts of this particular case, it has not been established that Parliament has made a legislative choice against full deductibility of nanny expenses in this case".[319] This statement is not congruent with the assumptions of almost everyone interested in the child care problem in Canada. From the CARTER REPORT[320] to Katie Cooke's report on child care in Canada,[321] the operating assumptions have always been that child care expenses are not deductible unless specifically provided by the *Income Tax Act* and that there are limited resources available to finance child care in Canada. If this is the true state of affairs (which may never have been proved before Mr Justice Cullen), then the section 1 argument that the court should not substitute its opinion for that of the legislature "as to the place to draw precise lines for allocation of limited public funds and tax expenditures"[322] is more compelling.

A fundamental problem with the section 1 analysis in *Symes* is that it fails to adequately address the balancing of interests required under that section. It is surprising, given the broad ramifications of his holding, that Mr Justice Cullen does not once refer to the array of fiscal, tax policy and constitutional problems that are its inevitable consequence. He fails to note, at the very least, that from the viewpoint of the doubly disadvantaged, parents who are women and poor, the deductibility of *all* child care expenses is not beneficial. As this writer has said:

> Under this new regime, the richer the taxpayer, the more her child care expenses will be subsidized by other Canadian taxpayers. The poorer the taxpayer, the less she will receive. The poorest will receive nothing. This is because the "value" of the deduction to a taxpayer will depend on her marginal rate of tax. Thus $14,000 of child care expenses will be worth $6,212 to a woman lawyer at the highest marginal rate, $6,000 of child care expenses will be worth $2,036 to her secretary at the lowest marginal rate of tax, and $2,000 of child care expenses will be worth nothing to the part-time cleaning lady who is not taxable and who, in any case could not get a receipt.[323]

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[318] *Supra*, Part III.

[319] *Supra*, note 1 at 492.

[320] *Supra*, note 7, vol. 3 at 193.

[321] Canada, Status of Women, REPORT OF THE TASK FORCE ON CHILD CARE (Ottawa: Supply & Services, 1986) (Chair: K. Cooke) [hereinafter COOKE REPORT]. The task force (at 330) recommended the retention of the child care expenses deduction for the medium term. The major thrust of her report (at 181) however, was the development of a system of national child care "as comprehensive, accessible and competent as our systems of health care and education". *See also* Canada, National Council of Welfare, CHILD CARE: A BETTER ALTERNATIVE (Ottawa: Minister of Supply & Services, December 1988) [hereinafter NATIONAL COUNCIL OF WELFARE].

[322] *Supra*, note 1 at 490.

[323] *Supra*, note 314 at 383.

The upside-down subsidy described above is also a characteristic of the child care expense deduction itself. The child care expense deduction does provide, however, an upper limit to the subsidy to higher income taxpayers because no more than $4,000 can be claimed per child per year.

The obvious question is whether the upside-down subsidy for child care expenses, in either the extreme formulation in *Symes* or within the limitations of section 63 of the *Income Tax Act*, violates section 15 of the *Charter*. In other words, does the constitution mandate the choice of credits over deductions in the delivery of child care subsidies? In order to attempt to answer this question it is necessary to consider whether a deduction for child care expenses is part of the normative tax system or a tax expenditure. Earlier in this article,[324] it was suggested that the courts should presume, or incline towards, the constitutionality of a provision if it is part of the normative or benchmark tax system. On the other hand, if the provision is a tax expenditure, it should undergo scrutiny similiar to that of a comparable direct expenditure program. If the child care expense deduction is a tax expenditure, it is situated on the welfare end of the tax expenditure continuum. Hence, the courts should be more likely to intervene than if the deduction was purely an economic incentive.

In this writer's view, any child care expense deduction should be treated as a tax expenditure on the ground of functional equivalence to a direct expenditure program and in view of the treatment of child care expenses in other jurisdictions. The problem with the tautological nature of the functional equivalence ground has already been mentioned in this paper.[325] It is significant, however, that the child care expense deduction has always been treated in Canada as if it were the equivalent of an optional direct expenditure program. Beginning with the CARTER REPORT, who recommended a tax credit,[326] and up to the COOKE REPORT on child care,[327] the assumption has been that resources to recognize the cost of child care are limited. There has never been any sense in the government or among the governed[328] that child care expenses ought to be deductible in the same way as, for example, the costs to an employer of her employees' salaries.

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[324] *Supra*, Part VIII B.

[325] *Supra*, Part IV D.

[326] *Supra*, note 7, vol. 3 at 193.

[327] *Supra*, note 321.

[328] Interestingly, in a study conducted by Professors N. Brooks and A. Doob of York University on public views of various aspects of the Canadian tax system, the majority of people surveyed thought that the right to deduct certain child care expenses should be restricted to low income households. *See Institute for Social Research Newsletter*, January 1991 (York University).

In the first Canadian tax expenditure budget in 1979, the child care expense deduction was put in the "other" category. It stated:

> It is not entirely clear that this provision is a tax expenditure. One view is that childcare expenses are a legitimate expense in earning income. However, if this view is accepted, the maxima on the amounts claimable and the general restrictions to women being able to claim the deduction imply negative tax expenditures. An alternative is to view the entire measure as a tax expenditure. Such treatment is suggested most broadly in terms of the functional equivalence criterion. For example, the Royal Commission on the Status of Women, in commenting on the proposal in 1970 before it was implemented, suggested that a better alternative would be to increase family allowance benefits. More recently, there have been suggestions that the provision would be better structured as a tax credit rather than a deduction. It is apparent from the discussion surrounding the introduction of the measure that it was widely viewed as a matter of social as well as economic policy, and as a measure directed toward the general question of the appropriate tax burden on two-earner couples.[329]

In the 1985 budget, the child care expense deduction was included as a tax expenditure under the Health and Welfare category.[330] It said:

> Given that the medical expense deduction, which can include similar expenditures such as payment for home care for an invalid dependent, is regarded as a selective tax measure, for consistency, the child care expense deduction is viewed in this account as a selective tax measure as well.[331]

It is also noteworthy that credits for child care costs are identified as tax expenditures in a comparative study of international aspects of tax expenditures edited by McDaniel and Surrey.[332] The United States tax expenditure budgets also list the child care credit as a tax expenditure.[333]

Of course, as indicated earlier in this paper, the fact that a provision is a tax expenditure does not in any way imply that it is or is not constitutional. It does, however, orient the court and give the court a sense of what is being disputed. In the case of the child care expense deduction, thinking about the deduction as a tax expenditure makes court intervention seem more rather than less likely. A direct expenditure program to assist parents with child care costs surely would be suspect if it had as its basic premise that higher income parents are to be subsidized more than lower income parents and for

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[329] 1979 Tax Expenditure Budget, *supra*, note 68 at 94.

[330] 1985 Tax Expenditure Budget, *supra*, note 68 at 45.

[331] *Ibid.* at 22.

[332] P.R. McDaniel & S.S. Surrey, eds, INTERNATIONAL ASPECTS OF TAX EXPENDITURES: A COMPARATIVE STUDY (Boston: Kluwer Law and Taxation Publishers, 1985) at 51.

[333] *Ibid.* at 122. *See also* R.S. Smith, TAX EXPENDITURES: AN EXAMINATION OF TAX INCENTIVES AND TAX PREFERENCES IN THE CANADIAN FEDERAL INCOME TAX SYSTEM (Toronto: Canadian Tax Foundation, 1979) at 71-73.

no other reason than that they have a higher income. In addition, the fact that the program was designed so that the take-up rate was very low (the receipt requirement)[334] would seem to demand the attention of the courts.

Whether the program could be justified by the government under section 1 is not clear. Credits might be better than deductions, but refundable credits would be even better, and according to many child care advocates,[335] a comprehensive system of licensed child care the best.

H. Deferred Retirement Income Plans

The federal tax system contains two important mechanisms —the registered retirement savings plan (RRSP)[336] and the registered pension plan(RPP)[337] — which are designed to assist taxpayers to save for their retirements. A contribution to either type of plan is, subject to certain limits, tax deductible. While the contributions remain in a plan, they and the return thereon, are not taxable. When the funds are withdrawn from the plan upon retirement, the retired taxpayer is taxed on them.

In 1987, 3,483,650 taxpayers made over 9 billion dollars of tax deductible contributions to RRSPs and 3,627,590 taxpayers made over 4.5 billion dollars of tax deductible contributions to RPPs. (In addition employers made tax deductible contributions to employee RPPs.) Women constituted about 40 per cent of the contributors to RPPs and RRSPs. The total amount of their contributions was about 33 per cent of total contributions.[338] It is noteworthy that the government has just recently implemented a major overhaul of the rules governing tax assistence for pensions and retirement.[339] The purpose is to provide "equal treatment for tax savers, whether they save through RPPs, DPSPs, or

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[334] This problem has been ameliorated somewhat by the design of the married status tax credit in *ITA*, s. 118(1)(a). Unlike the old married status tax exemption, the first dollars of a "dependent" spouse's income (over a very minimum basic exemption) are not taxed at her husband's marginal rate. Instead, the married status tax credit is reduced by 17 per cent of the dependent spouse's income. Whether the average caregiver will be able to figure this out, and perhaps change her behaviour, is an interesting question.

[335] *See, e.g.*, COOKE REPORT and NATIONAL COUNCIL OF WELFARE, *supra*, note 321.

[336] *ITA*, s. 146.

[337] *ITA*, s. 147.1.

[338] TAXATION STATISTICS, *supra*, note 112. Note that a spouse may make a deductible contribution to his or her spouse's RRSP. *See ITA*, s. 146(5.1). The contributing spouse "uses up" his or her contribution limit to make the contribution for the "dependent" spouse.

[339] S.C. 1990, c. 35.

RRSPs".[340] The new system sets a uniform limit on tax-assisted savings of 18 per cent of earnings, to a dollar maximum which will be equal to two and one-half times the average wage. The result will be that taxpayers will be able to make significantly larger tax deductible contributions to RRSPs and money purchase RPPs to bring them more into line with defined benefit pensions plans.[341]

The Carter Commission endorsed, with some reservations, the continuation of the tax concessions extended to deferred income plans.[342] Although the Commission conceded that the tax advantages extended to the plans violated the objectives of equity and neutrality under the comprehensive tax base, it concluded that:

> in general, tax inducements to encourage retirement income plans should be retained, primarily on the social ground that plans by individuals for income maintenance during periods of adversity or retirement should be encouraged. However, our consideration of the above factors has also led

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[340] Department of Finance, Release 89-132, *Improvement in Tax Assistance for Retirement Saving* (11 December 1989) [hereinafter Department of Finance Release]. A DPSP is a deferred profit sharing plan described in *ITA*, s. 147. A profit sharing plan is an arrangement under which an employer makes payments to a trustee for the benefit of employees of amounts which are computed by reference to profits. A registered deferred profit sharing plan permits an employer to make deductible contributions without an immediate inclusion in employees' incomes. Benefits are taxable in the hands of employees when they are received.

[341] *Ibid.* A defined benefit pension plan is a pension plan in which the employer's and the employee's contributions are allocated into a fund to the employee's credit until her retirement. The contributions are then used to buy a pension. The level of pension at retirement is, however, guaranteed, according to some predetermined formula. Benefits may be based on a percentage of final average earnings over the last three to five years of service. Alternatively, benefits may be a function of average earnings over a career or a flat amount per year. In all of the cases, the amount determined is multiplied by the employee's years of pensionable service. Money purchase pension plans and RRSPs simply use funds accruing to the benefit of the employee at the time of her retirement to purchase whatever pension (annuity, RRIF) the accumulated money will buy.

The new contribution limits are outlined below.

CONTRIBUTION LIMITS

Year	RRSPs	MP-RPPs	DB-RPPs*	DPSPs
1989	7,500	7,000	15,500	3,500
1990	7,500	7,000	15,500	3,500
1991	11,500	12,500	15,500	6,250
1992	12,500	13,500	15,500	6,750
1993	13,500	14,500	15,500	7,250
1994	14,500	15,500	15,500	7,750
1995	15,500	indexed**	indexed	indexed
1996	indexed	indexed	indexed	indexed

*Effective contribution limits calculated by the Federal Department of Finance
**Indexed to growth in the average wage

[342] CARTER REPORT, *supra*, note 7, vol. 3 at 401.

> to the conclusion that deferment of income for tax purposes is a very valuable concession, and has sufficiently important implications to warrant placing greater restrictions on its utilization than now exist. In particular, if the justification for tax concessions is primarily social, the value of such benefits should be designed primarily for the low and middle income groups where encouragement of saving is more socially desirable.[343]

The Commission also considered other arguments in favour of the plan, including administrative implications and economic justifications. It recognized that the prevention of deferment of tax in connection with the plans would be difficult. To prevent deferment both the employer's contributions and the earnings of the plan would have to be attributed to individual members of the plan. Any manageable method of allocation would lead to inequities among employees.[344] The Commission was less convinced by the economic arguments. The Commission stated that it was by no means obvious that domestic saving should be increased or, if it was to be increased, that attempts to increase personal saving would be as effective or equitable as alternative methods.[345] It is noteworthy that the Carter Commission was concerned with the equity of tax deferral plans among taxpayers who could afford to contribute to them. Thus, the Carter Commission anticipated the general, if not specific, thrust of the most recent amendments to the *Act* which would provide "equal treatment for tax savers".[346]

From a section 15 perspective, the concern over equal treatment for tax savers is peculiar, given the patently unequal treatment between those taxpayers who benefit from tax-assisted plans and those (taxpayers and non-taxpayers) who do not. The tax concessions to deferred income plans are welfare-type tax expenditures which ration benefits on the basis of income. Thus, the more one has, the more one receives. Those who have less, receive less.

Defenders of the present scheme could argue, of course, that tax assistance to private deferred income plans is only one tier of a three-tier system designed to provide Canadians with retirement income. The

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[343] *Ibid.* at 420. Generally, the Commission's recommendations in the pension area were not adopted. The Commission's major recommendation was that the benefit limit (at that time a $40,000 pension, with conditions, which in 1986 dollars would be $193,960) be replaced by a single limit equal to the equivalent of a life annuity of $12,000 per year, guaranteed for ten years and payable at age sixty-five. Interestingly, if the annuity amount recommended by the Commission is converted to 1986 dollars, it is almost exactly the current limit. *See* R. Krelove & S. Rae, *Private Pensions and the Tax System: Twenty Years After the Carter Commission* in Brooks, ed., *supra*, note 7, 121.

[344] CARTER REPORT, *ibid.* at 411. Under the then current system and the present one, there is no taxation, generally, unless employees or contributors withdraw amounts from the plans.

[345] *Ibid.* at 413.

[346] Department of Finance Release, *supra*, note 340.

first tier (or the lowest level) is old age security and the guaranteed income supplement. Old age security is a universal program of allowances paid to the elderly. It is taxable and subject to the same claw-back provision as family allowance payments.[347] The guaranteed income supplement is, as the name suggests, an income-tested supplement for the elderly.[348] Most individuals who receive old age security and the guaranteed income supplement are women and most of these people do not have a total income that exceeds the poverty line.[349] The second tier is the Canada Pension Plans and the Quebec Pension Plans which are compulsory government sponsored pension plans for people in the workforce.[350] Fewer women than men contribute to the Canada Pension Plan and the Quebec Pension Plan and they contribute less. Women more often than men drop out of the workforce because of family responsibilities or work part-time.[351] Women also make less money.[352] As a result, men receive significantly more benefits from the Canada Pension Plan and the Quebec Pension Plan.[353] Women do not contribute as much as men to private, tax-assisted pension plans for some of the same reasons they do not contribute to the Canada Pension Plan or the Quebec Pension Plan. In addition they are less likely than men to be covered by (usually) compulsory occupational pension plans.[354] Thus, the third tier of private, tax-assisted pension plans becomes part of a system that institutionalizes women's poverty in old age.[355]

It is curious that constitutionally, the social reasons for private, tax-assisted pensions plans that Carter cites may be no more compelling than the economic reasons the Commission dismisses. Whatever particular economists think,[356] it is obvious that this government's encouragement of deferred income plans reflects its belief that preferential treatment of tax-assisted retirement savings increases domestic savings. Thus in announcing the new pension plan rules in October, 1986, it was stated that the provisions "will help ensure a growing pool of personal savings for investment in job creation, growth, and prosper-

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[347] *Old Age Security Act*, R.S.C. 1985, c. 0-9. The claw-back provision is *ITA*, s. 180.2.

[348] *Old Age Security Act*, R.S.C. 1985, c. O-9, ss 10-18.

[349] Canada, National Council of Welfare, *Giving and Taking: The May 1985 Budget and the Poor* (Ottawa: Minister of Supply & Services, 1985) at 23.

[350] *Canada Pension Plan*, R.S.C. 1985, c. C-8; *Quebec Pension Plan*, R.S.Q. 1977, c. R-9.

[351] Gunderson, Muszynski & Keck, *supra*, note 26 at 101.

[352] WOMEN AND POVERTY REVISITED, *supra*, note 26 at 5.

[353] Statistics Canada, CANADA AND QUEBEC PENSION PLANS, 1984 (Ottawa: Minister of Supply & Services, 1985).

[354] *Ibid.* at 102.

[355] *See* S. Rowley, *Women, Pensions and Equality* (1986-87) 10 DALHOUSIE L.J. 283.

[356] *See, e.g.*, Krelove & Rae, *supra*, note 343.

ity".[357] In the final analysis, the courts may defer, despite the obvious inequities, to government economic policy because, in Chief Justice Dickson's words:

> It is not our judicial role to assess the effectiveness or wisdom of various government strategies for solving pressing economic problems.[358]

X. Conclusion

Carter envisioned an income tax system whose first and guiding principle was the equitable distribution of the tax burden. It is highly improbable, however, that *Charter* review could ever produce that ideal tax system. Simply stated, the task is too large, too political, and too complex for the courts. The question for women, then becomes, if not tax reform, then what? The answer, it is suggested, is that *Charter* review has the potential to make the income tax fairer, if not equitable.

The fulfillment of this potential will depend, of course, on the values the courts eventually associate with the rights described in sections 15 and 7 of the *Charter*, as well as their views on the limits of judicial activism. Especially significant will be the courts' willingness to recognize that equality rights have a significant economic component. Nevertheless, even now, taking into account the short past history of the *Charter*, there are indications that the *Income Tax Act* is vulnerable to review which might result in a fairer income tax. Thus, as we argued in this paper, section 7 of the *Charter*, which protects "security of the person", might be used to protect the minimal economic existence of individuals living below the poverty line from taxation. Women and their children are disproportionately represented among these people. Section 15 could also require the rational and non-discriminatory delivery of welfare-type tax expenditures through the tax system. While this litigation may rest on allegations of discrimination against the poor, again it is women and their dependents who are over-represented in the class. In addition, section 15 could be used to attack provisions of the normative or benchmark tax system that discriminate on the basis of sex or, perhaps, income. Success, however, for reasons described earlier in the paper, is less likely. Because of the courts' reluctance to intervene in socio-economic legislation, *Charter* litigation will probably require adjustments to the income tax rather than radical new departures. Nevertheless, it will be of value to women especially if it forces the courts to take the economic and social realities of women's lives into account.

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[357] Canada, Department of Finance, A Better Pension System: Saving for Retirement (Ottawa: Minister of Supply & Services, 1986) at 27 cited in *ibid.* at 134.

[358] *P.S.A.C.*, *supra*, note 195 at 261.