Delving into the Structure of the *Income Tax Act* : How the Tax Unit and Tax Base Impact on Women and Same-Sex Couples

by

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A thesis submitted in conformity with the requirements for the degree of LL.M.
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Delving into the Structure of the *Income Tax Act*: How the Tax Unit and Tax Base Impact on Women and Same-Sex Couples

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This thesis investigates two structural elements of the *Income Tax Act* which result in the inequitable treatment of women and same-sex couples — the tax unit and the tax base. In a discussion of the tax unit, the author outlines three models and supports the adoption of the individual as the ideal unit of taxation as a means of remedying discrimination against women and same-sex couples. With respect to the tax base, the author focuses on the *Income Tax Act*’s treatment of capital gains, Registered Pension Plans, Registered Retirement Savings Plans and the child care expense deduction to demonstrate how the current manifestation of the tax base impacts negatively upon women.
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INTRODUCTION

Taxation systems serve a variety of functions in society, ranging from resource allocation, and revenue generation to the promotion of economic and social policies for the betterment of society. While achieving these ends, a tax system reproduces societal values and preferences when an individual interacts with the system. This reproduction, caused by the interstices of the organizing text being embedded with societal values, is a powerful form of social ordering; individuals are informed of the appropriate role they are to play in society, dominant viewpoints are solidified, and individuals are notified of their insignificance or importance. These statements hold true for the Income Tax Act\(^1\) in its treatment of varying family forms, same-sex couples, and women.

Society continues to hold sexist views regarding women, restricted notions of what constitutes a family and homophobic beliefs about gay and lesbian people. These views, which have been imported into the Act, impact in a profound manner on individuals in society. For instance, the pre-1994 Act contained only male pronouns in its provisions; reflecting the belief that men were actors in society and women passive subjects to be subsumed under the auspices of “man.” As women began to see the discontinuity between the verbal assurance of equality and legislation which overlooked their existence as independent beings, they realized the power of the Act, and language in general, to shape people’s minds.\(^2\) As societal beliefs changed, people realized that the language one used was an indication of one’s beliefs.\(^3\) In an

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3. Karen Busby states:
   The connection between language, gender and the suppression of women is clear and present in the use of male pronouns. Use of generic male pronouns perpetuates and conceals male domination at all levels of conceptualization and language. I cannot assume that I am included within the ambit of a particular passage; my presence is never a given. The subliminal message that I am not relevant or, even more alienation, that I am the “other” is constantly given and received. Take almost any legal text and count how often a male pronoun is used. You can begin then to realize how often I am told that maybe I am not included.
effort to adopt gender neutral language, the Act of 1994 replaced the words “he” and “his” with “the taxpayer” and the “taxpayer’s.”

Another example of the interplay between the Act and antiquated societal values becomes clear when we look at the Act’s pre-1993 definition of “spouse.” Before 1993 the definition of “spouse” did not include common-law relationships. By excluding this group from the definition of “spouse,” legislators were representing their view and the perspective of the majority of society, that a married couple was distinct from a common-law couple. The distinction lay in the formalities, ceremonies, and procedures that the married couple had undertake, in contrast to the common-law couple which deemed itself a unit without undergoing the same events. The rituals surrounding marriage implied a commitment to the couple’s union, while the common-law couple’s lack of rituals implied a lack of commitment. Thus, individuals unwilling to fully take on the responsibilities that accompany marriage, symbolized by participation in its ceremonies, were not to be accorded any of the benefits that derived from being married by the state. After a time, this restrictive view of who is a spouse and how one achieves this status no longer reflected the reality of a growing number Canadians living in common-law relationships but carrying out the obligations that came with marriage. These couples were devoted to their partners, intertwined their economic lives, and raised


5 The term “spouse” was not specifically defined in the Act. The meaning it tended to have was that which was found in the law generally. However, there was an extended meaning of spouse under the Act for rules relating to RRSPs. Subsection 146(1.1) read:

Definition of “spouse” -- For the purposes of the definitions “annuitant,” “refund of premiums” and “retirement income” in subsection (1), paragraph (3)(b) and subsection (8.8), (8.91) and (16), “spouse” of an individual means a person of the opposite sex
(a) who is married to the individual; or
(b) who is cohabiting with the individual in a conjugal relationship and
   (i) has so cohabited for a period of at least one year, or
   (ii) is a parent of a child of whom the individual is a parent.
children. Yet they were denied the same benefits under the Act. As a consequence of this denial, litigation ensued.⁶

An example of the typical case that arose around this issue is Reid v. Canada.⁷ In Reid, the taxpayer appealed an assessment whereby she was denied her claim for a tax credit under paragraphs 118(1) of the Act for an individual married and supporting her spouse. The taxpayer's male partner had been injured in 1986, and had been unable to work. She claimed, under paragraphs 118(1)B(a) and 118(1)B(b), that he was her spouse or wholly dependent on her. To claim the credit for a spouse under paragraph 118(1)B(a), an individual had to be formally married. However, the taxpayer had lived with her companion for over thirty years without entering into a formal ceremony. The court denied her claim on the ground that she did not undergo a formal marriage as required by paragraph 118(1)(B)(a) and was not related to her common-law partner by marriage, blood, or adoption as required by paragraph 118(1)(B)(b).⁸

Since the definition did not apply to each part of the RRSP, particularly the spousal sections, common-law couples were unable to create spousal RRSPs. See D. M. Sherman, "Till Tax Do Us Part: The New Definition of "Spouse"" (1992) Can. Tax Found. 20:1 at 20:2- 20:3.


⁷ Reid, ibid. at 1444. To claim the wholly dependent persons credit, the taxpayer had to be

109(1)(b)(i)...an unmarried person or a married person who neither supported nor lived with his spouse and was not supported by his spouse, and
(ii) whether by himself or jointly with one or more other persons maintained a self-contained domestic establishment (in which the individual lived) and actually supported therein a person who, during the year, was

(A) except in the case of a child of the individual, resident in Canada,
(B) wholly dependent for support on the taxpayer, or the taxpayer and such person or persons, as the case may be, and
(C) connected, by blood relationship, marriage or adoption, with the taxpayer and such person or persons, as the case may be... R.S.C. 1982, c.148.
Charter challenges were also launched on the ground that the exclusion of common-law couples from the definition of “spouse” was discriminatory. The government conceded in the face of these criticisms, and in 1993 the definition of “spouse” was amended to include common-law spouses.

The latest area where the Act is being challenged on the image it is reflecting to society is in its representation of family and spousal relationships which exclude gay and lesbian

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10 This type of challenge to the legislation was made in Weronski v. Canada (1991), 91 D.T.C. 1105 (Tax Court of Can.). In Weronski, the taxpayer who had lived in a common-law relationship, appealed the Minister’s refusal of his deduction for child support payments made under an agreement entered into between him and his former common-law spouse. The taxpayer claimed to have been discriminated against under section 15 of the Charter on the basis of his marital status, since paragraph 60(b) allowed a deduction for support payments made by a spouse, if made under a court order or separation agreement; however, paragraphs 60 (c, 1) stipulated that common-law spouses could only claim the deduction, if the payments were made under a court order.

In dismissing the taxpayer’s appeal, Christie J. stated that the court order requirement for common-law couples was a “...policy decision relating to an evidentiary requirement to entitlement.” Christie J. further stated that the fundamental differences between marriage and cohabitation -- differences such as the solemnization of marriages for public record, and the obligations that result from this union -- are not found in common-law relationships, and as a result allowed Parliament to make a distinction between common-law couples and married couples. Ibid. at 1112-1113.

The ruling in Weronski was later followed in Hunter v. Canada (1994), T. C. J. no. 1039 (Tax Ct. Can.). In Hunter, the taxpayer appealed the Minister’s disallowance of deductions for maintenance paid to a former common-law spouse for child support, pursuant to a private agreement. Like Weronski, the taxpayer’s appeal was dismissed, since payments between common-law spouses were only deductible if made under an order by a competent tribunal.

Another Charter challenge was raised in Schachtschneider v. The Queen (1993), 93 D.T.C. 5298 (Fed. Ct. A.). In Schachtschneider, the taxpayer was unable to claim the spousal equivalent tax credit for one of her children, because she was married. The taxpayer and her husband were a Christian couple; because of their religious beliefs they would not live together without being married. The credit which can be claimed for a wholly dependent person, is available only to an individual who is unmarried or married but separated from a spouse. This credit is equal to the amount claimed for a dependent spouse and offered more financially than the credit for a dependent child, which was the credit Mrs. Schachtschneider had to claim. As a result of the Minister’s ruling that she could not claim the spousal equivalent tax credit for one of her children, Elaine Schachtschneider paid $1200 more tax than if she had been unmarried and able to claim an equivalent to married credit for her son. Consequently, the taxpayer asserted that she was discriminated against in contravention of section 15 of the Charter on the basis of religion and marital status, since those in married relationships could not utilize this credit.

The court dismissed her freedom of religion argument, finding no connection between section 118(1) and her ability to practice her religion. It also dismissed her marital status argument on the ground that married persons with a child of the marriage, who live together and do not support each other, cannot be described as disadvantaged in social, political or legal institutions. Thus they are not a discrete or insular minority in need of protection under section 15 of the Charter.

The focal point of discussion is the current definition of “spouse,” which excludes gay and lesbian couples. Section 252(4) reads:

In this Act,
(a) words referring to a spouse at any time of a taxpayer include the person of the opposite sex who cohabits at that time with the taxpayer in a conjugal relationship and
   (i) has so cohabited with the taxpayer throughout a 12-month period ending before that time, or
   (ii) would be a parent of a child of whom the taxpayer would be parent, if this Act were read without reference to paragraph (1)(e) and subparagraph (2)(a)(iii)....
(b) references to marriage shall be read as if a conjugal relationship between 2 individuals who are, because of paragraph (a), spouses of each other were a marriage;
(c) provisions that apply to a person who is married apply to a person who, is because of paragraph (a), a spouse of a taxpayer; and
(d) provisions that apply to a person who is unmarried do not apply to a person who is, because of paragraph (a), a spouse of a taxpayer. 13

The exclusion of gay and lesbian couples from this definition is significant: our laws reflect the beliefs we hold about ourselves and others, and are based on the legislator’s view of how an optimal society should function. The image the Act is mirroring to society is that gay and lesbian unions are not the same as heterosexual unions -- married or otherwise. Since they are not the same, they are neither recognised nor treated similarly. This lack of acknowledgment means that same-sex couples do not face the same financial benefits or financial burdens that heterosexual couples experience under the Act. This lack of similar treatment is inequitable as couples that are similarly situated, save for the sex of their partner, should be treated correspondingly, as much as it is possible to do so. Although the Act makes distinctions between individuals, such as imposing differing marginal tax rates, 14 distinctions cannot be made on grounds the Supreme Court of Canada has deemed discriminatory. This

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13 Supra note 1.
treatment of gay and lesbian families by the federal government is a noticeable dereliction of duty, especially in the face of the Charter which represents our desire to give equality to all of our citizens, various human rights legislation, and recent cases bellying the sentiment that gay and lesbian people are entitled to equality.

The effect of exclusion from the definition of "spouse" for gay and lesbian couples is not always a financial burden; depending on a couple's assets and income, they can face a better financial picture by being excluded than from inclusion. This reality has caused a number of gay and lesbian people to speak out against inclusion; nonetheless, there are those members of the gay and lesbian community with lower levels of income who argue in favour of inclusion. However, before members of the gay and lesbian community can move beyond the deadlocked position of inclusion versus exclusion, and arrive at a solution that satisfies as many components of the gay and lesbian community as possible, they must realise that the cause of their differential treatment under the Act is due to overt discrimination, and a structural feature of the Act.

Gay and lesbian couples experience the impact of the Act differently from heterosexual couples, because of the tax unit which is utilized in the Act to impose tax liability and confer benefits. The individual is the unit of taxation for personal income tax in Canada; as a result, it should be inconsequential that a person is in a relationship or that their relationship is unrecognized by the state. However, the concept of the individual tax unit begins to waiver

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14 See Subsection 117 (2), as indexed by section 117.1, which sets out the following: the marginal tax rate is 17% for taxable income not exceeding $29,590, $5,030 plus 26% for any taxable income above $29,590, but not exceeding $59,180, and $12,724 plus 29% for taxable income exceeding $59,180.
15 The Ontario Human Rights Code states:
   Every person has a right to equal treatment with respect to services, goods and facilities without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or handicap. R.S.O. 1990, c. H. 19, s.1.
16 See M. v. H. (1999), 171 D.L.R. (4th) 577 (S.C.C.); Rosenberg v. Canada (1998), 38 O.R. (3d) 577 (Ont. C.A.) and Friend v. Alberta (1998), S.C.R. 493 where the Supreme Court of Canada held that the omission of sexual orientation as a ground of discrimination under the Individual Right's Protection Act was an infringement of section 15(1) of the Charter, to be remedied by reading in the words "sexual orientation" as a prohibited ground of discrimination.
17 K. Lahey, supra note 12.
when it becomes evident that the family and the marital couple are utilized for many transfer programs connected with the Act.18 These spending programs determine their payments based on the income of both spouses, or the sex of each half of the partnership. This method of payment determination restricts benefits, burdens, and privileges to a “family” defined traditionally as a heterosexual couple with or without children.19 This construction of the tax unit for specific provisions is not axiomatic, rather it represents legislator’s view on which tax unit will best serve to determine entitlement to a benefit or result in disqualification. Thus, it is the variant tax unit coupled with the current definition of “spouse,” which has led same-sex couples to experience the Act differently from their heterosexual counterparts. In other words, the mixture of overt discrimination combined with a structural feature (which results in structural discrimination) causes the Act to impact differentially on same-sex couples.

To get a sense of how this structural discrimination20 occurs, Chapter Two will outline three models of the tax unit -- the individual, the family and the married couple -- and discuss the shortcomings and benefits of each. The purpose of this discussion is to inform the reader of the different structures available for a tax unit when devising a tax system, and to reinforce the idea that the tax unit represents a choice made by individuals with a perspective on how society is to operate.

Chapter Three will argue for the adoption of a purely individual system, without the modifications for one’s spouse or assumed family income, which we presently have in the Act.

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20 See Ontario (Human Rights Commission) v. Simpson Sears Ltd (1985) 2 S.C.R. 536 at 551, where McIntyre J. for the court in a human rights case set out the meaning of two different types of discrimination. Direct discrimination is defined as “...a practice or rule which on its face discriminates on a prohibited ground.” Adverse effects discrimination, otherwise known as structural discrimination, in an employment context was defined as “...a rule or standard which is on its face neutral, and which apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force.” Also see Canada (Canadian Human Rights Commission v.
A purely individual tax unit would be a useful method of reform: it would eliminate the inequitable treatment gay and lesbian couples receive in comparison to heterosexual couples, since an individual’s relationships would not impact on tax liability. In addition to this positive outcome for same-sex couples, Chapter Three will discuss how a move to a purely individual tax unit will eliminate some of the Act’s structural inconsistencies and provisions which are problematic for women. These provisions include the attribution provisions which, like many others, are inconsistent with the notion of the individual as the tax unit and minimise women’s accumulation of wealth; the alimony deduction and inclusion scheme, which is detrimental to women’s autonomy and inconsistent with provincial law; the spousal tax credit and transference of credits provisions which are benefit provisions that are inapplicable to gay and lesbian spouses, and serve to reinforce women’s dependency; the refundable tax credits which overlook some who are needy; and inter-spousal transfers which are beneficial only to the wealthy and propagate the notion that gay and lesbian couples do not share assets.

It is not gay and lesbian couples alone who are treated in a discriminatory fashion by the Act; the varying tax unit also treats women negatively. However, this is not the only structure of the Act which results in the discriminatory treatment of women. When we look at the tax base employed in our tax system, we see that women face structural discrimination.

In any taxation system, it is evident that a decision was made about which type of tax base to utilize. Legislators had the choice of taxing individuals on their wealth, income or expenditure. Under the Act, we tax individuals on their income. What exactly suffices as income has been an issue of debate. To situate the reader in this debate, Chapter Four will outline the differing views of income, and the view which was adopted under the Act. The determination of income will inform the tax base employed. The comprehensive tax base was one suggestion for a tax base to utilize under the Act; however, it was never brought to fruition. Although we do not have a comprehensive tax base in the Act, in this section will be a

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discussion of the comprehensive tax base. By keeping the comprehensive tax base in the back
of one’s mind throughout these discussions, it will become evident how this model of a tax
base is replicated for women, but not for men, as more of men’s income sources are given
preferential treatment.

Since income is not a self-evident concept, legislators must choose between various
money producing endeavours to decide what will constitute income. What is determined to be
income will indicate the legislator’s view on what activities are to bear the burden of taxation.
Conversely, those items which are excluded from the definition, indicate the legislators view
on what property or money-generating activity should remain beyond the bounds of taxation
and in the hands of the owner. In the middle are those income generating vehicles which are
given preferential treatment by legislators in the form of a tax deduction, a lower tax rate, and a
deferral on taxation. When we look to the Act, we see that the sources of income which are
given preferential treatment, are sources which tend to benefit men, moreso than women. The
result of this structural effect is that a smaller amount of men’s money is pulled into the tax
base, while women have more of their smaller incomes taxed.21 This is quite striking
considering that women enter the tax system from a position of economic inequality to men;
which is compounded by their responsibility for children and other family members.22 This
construction of the tax base results in structural discrimination against women. This structural
discrimination takes place at the paradigm level of the Act. The tax base, along with other
features of the tax system, such as the tax unit, the tax rate, and the accounting period are
mandatory structural elements. The tax base is one of the foundational pieces of the tax
system; it is one of the legs on the table we call the Act. Remove one of these legs and the
structure ceases to function. Thus, at the level of foundation we see that our tax system has
been crafted in a fashion that has resulted in women’s discriminatory treatment. Therefore, the

(Chair: Carmencita Hernandez) at 1.
aim of Chapter Four is to outline how the current tax base impacts negatively upon women, as it accords preferential treatment to sources of income which are utilized by more men than women. In so doing, the next section will look at specific provisions of the Act, which are more beneficial to men than to women, such as the capital gains provisions. The section on capital gains will outline the genesis of the current treatment of capital gains by tracing its historical evolution, arguments which have been proffered to justify its special treatment, and the counter-arguments. The paper will then discuss the effect of this preferential treatment on women, who have not had the same level of access to these vehicles.

The following section of the paper will discuss the treatment of Registered Pension Plans [hereinafter RPPs] and Registered Retirement Savings Plans [hereinafter RRSPs] under the Act. Their treatment will highlight that they are another mechanism in the income tax system which allows men, in comparison to women, to keep more of their money. Embedded in this discussion will be a stark reminder (in light of Rosenberg$^{23}$) that changing the definition of “spouse” in the Act to include same-sex couples, will leave in place a system which is biased against women.

The final section will deal with the child-care expense deduction, a provision which tries to lessen the burden of child care costs on women, and in a sense minimise the comprehensive tax base that seems to be in effect for women in the operation of other provisions. This section will outline that this provision’s operation is flawed as it provides inadequate aid for women, and is only beneficial to a select group of women. In trying to devise an adequate method of reform, this section will outline that this deduction should be conceptualized as a hybrid expense -- a cross between a business expense and a personal expense -- and advocate for its removal and the implementation of a universally available child care system in its place. Such a discussion of the structure of the Act is warranted so that the language and effects of this crucial legislation treats all members of society fairly.

\[^{23}\textit{Supra note 16.}\]
As gay and lesbian couples move to bring change into their lives,\textsuperscript{24} now is the time to reconsider the structure of the Act. However, if gays and lesbians only look to change the definition of “spouse,” they will be entering a system which is flawed and treats women differently from men. The effects of the Act upon women should be a concern for gay and lesbian couples as sexism and homophobia are intertwined. To highlight the connection between women’s concerns and gay and lesbian people, Chapter Two will set out the links between sexism and heterosexism and the need for all groups interested in social change to aid others. It will become clear that the issue for gay and lesbian people will be whether to embrace a tax system which impacts negatively upon women, or demand changes for lesbians and gay men, as well as women, which make the Act equitable.

Equality is the pervasive sentiment of this paper, since the Act is operating in an unfair manner: it impacts negatively upon women in comparison to men; and it treats same-sex couples differently from heterosexual couples in an overt and structural manner. As a starting point and solution to these inequities, Chapter One argues for the importation of equality into any discussion of taxation and individuals, as a means to ending discrimination and achieving fairness for all.

\textbf{CHAPTER ONE

\textbf{ANALYTICAL FRAMEWORK

\textbf{EQUALITY AS A TAX CRITERION

When economists and tax theorists assess the efficacy of a taxation system, several criteria are routinely trotted out as the standard against which all systems are judged. Some of

\textsuperscript{24} See D. Moulton, “Nova Scotia Blazes Trail by Providing Benefits to Same-Sex Couples” (June 1988) 18 Lawyers Weekly No. 8 at 1 where the author reports that the Nova Scotia Government has decided to pay same-sex couples pension and medical benefits; A (\textit{Re}) (1999), A.J. No. 1349 (Alta. Queen’s Bench) which stated that same-sex couples are allowed to adopt children and the recent Bill of the Ontario government which changes the definition of spouse to include same-sex couples in various pieces of Ontario legislation. \textit{Amendments Because of the Supreme Court of Canada Decision in M. v. H}, 1999 S. O. 1999, c.6.
these norms tend to be equity, neutrality, and administrative simplicity. On the whole, these are sensible criteria. It is common-sensical that an effective tax system must be fair in its treatment of individuals; unfairness encourages tax evasion and avoidance. This concern with fairness in the tax system is covered by the concept of equity, which comes in two forms -- horizontal and vertical. Under the notion of horizontal equity, taxpayers who have similar financial situations should pay similar amounts of tax. This means that an individual with $10,000 from employment should pay the same tax as someone with $10,000 from investments. However, the notion of horizontal equity is tempered by the notion that it is individuals with equal ability-to-pay 28 taxes are to be treated the same. The result is that a

25 See V. Krishna, "Perspectives on Tax Policy" in B. Hansen, V. Krishna & R. Rendall eds., Essays on Canadian Taxation (Toronto: Richard De Boo Limited, 1978) at 16 where the author asserts that neutrality, efficiency and simplicity are merely desirable tax characteristics as opposed to objectives of tax policy. According to Krishna, equity and economic aims such as stabilizing the economy at full employment, the promotion of economic growth and price stability are the objectives of tax policy which take precedence over tax characteristics, in the instance of conflict. Also see Neil Brooks who differs from this view: equity is a tax characteristic while fair revenue generation and "a socially acceptable distribution of income" are the two main objectives of a tax system. N. Brooks, "The Irrelevance of Conjugal Relationships in Assessing Tax Liability" in J. Head & R. Krever eds., Tax Units and the Tax Rate Schedule (Melbourne: Australian Tax Research Foundation, 1996) at 60-63 and 53-60. Two other potential objectives of a tax system are international competitiveness and a balance so that the government is not overly dependent on one type of tax. P. Hogg & J. E. Magee, Principles of Canadian Income Tax Law (Scarborough: Carswell, 1997) at 37.


27 See R. A. Musgrave, "Tax Reform or Tax Deform?" in W. R. Thirsk & J. Whalley ed., Tax Policy Options in the 1980s (Toronto: Canadian Tax Foundation, 1982) at 20 where the author states that adherence to horizontal equity is one of the key requirements of a properly reformed tax system. For an extensive discussion of horizontal equity where the author discusses the problems which exists between traditional definitions of horizontal equity and recent definitions and sets out that horizontal equity does not have a significance apart from vertical equity see L. Kaplow, "Horizontal Equity: Measures in Search of a Principle" (1989) 42 Nat'l Tax J. 139 at 139-140. See R. A. Musgrave, "Horizontal Equity, Once More" (1990) 43 Nat'l Tax J. 113 where the author takes the position that horizontal equity is a stronger principle than vertical equity. For more of the debate on the significance of horizontal equity and vertical equity between Kaplow and Musgrave, see L. Kaplow, "A Note on Horizontal Equity" (1992) 1:3 Florida Tax Rev. 191 and R. Musgrave, "Horizontal Equity: A Further Note" (1993) 1:5 Florida Tax Rev. 354. For a summation of the debate between Kaplow and Musgrave see P. McDaniel & J. R. Repetti, "Horizontal and Vertical Equity: The Musgrave/Kaplow Exchange" (1993) 1:10 Florida Tax Rev. 607.


...the capacity of paying without undue hardship on the part of the person paying or an unacceptable degree of interference with objectives that are considered socially important by other members of the community. If A has more income than B, it
taxpayer’s ability-to-pay is not necessarily the equivalent of his or her income. Thus, if there
are two single taxpayers with the same amount of income, one with no family obligations and
the other with children and an ailing parent, the notion of ability-to-pay which is embedded in
horizontal equity would mandate some recognition of these personal responsibilities. This
recognition would likely result in the taxpayer with more family obligations paying less tax.29

Vertical equity focuses on taxpayers with different amounts of income and demands
that individuals with lower incomes pay less taxes than those with higher incomes. Thus,
individuals who have different amounts of income are to face varying tax burdens. However,
similar to the notion of horizontal equity where the concern is how to define taxpayers in
similar positions, with vertical equity, the quandary is how much more tax is to be paid by
those in differing income positions. Does vertical equity require that the differing amount are
calibrated by progressive30 taxation or on a proportional31 basis?32

The second sensible criterion of an ideal tax system is that it be neutral towards the
choices made by businesses and individuals when they interact with the Act. This requires that

seems reasonable to say that A has greater ability to pay taxes in the sense that the
payment of a given amount will hurt A less and will be less likely to force a cut in
socially desirable consumption.

Goode further contends that the misconception of ability-to-pay being hard to define, exists because “...ability to
pay is being regarded as the name of a numerical formula rather than a term of ethics or politics, as it should be.
Ability to pay is no more imprecise than concepts such as national interest, general welfare, due process of law,
morality, and duty. It is as susceptible of objective evaluation as are intelligence, social adjustment, prudence,
and many other personal characteristics.” However, the author’s examples further demonstrate that ability-to-
pay, along with other characteristics we use to guide our lives are nebulous concepts. The ambiguous nature of
the concept of ability-to-pay is picked up by Peter Hogg and Joanne Magee when the authors point out that it is
difficult for people to agree on what counts as ability-to-pay. They assert, “[t]he problem is not just that people
differ greatly in wealth, but also that many other features of social and economic life arguably affect the amount
of sacrifice that taxpayers must make.” P. Hogg & J. E. Magee, supra note 25. at 38.

29 V. Krishna, Income Tax Law, supra note 26 at 4.
30 Progressive taxation means that an individual’s marginal rate of tax should increase as their income rises. See
subsection 117(2), supra note 1.
31 A Proportional rate structure occurs “...where the fraction of income paid out in taxes remains constant
regardless of the taxpayer’s location on the income scale.” B. Arnold et. al., Materials on Canadian Income Tax
(Toronto: Carswell, 1996) at 87.
32 See V. Krishna Income Tax Law, supra note 26 at 5 who raises this issue and W. J. Blum & Harry Kalven,
The Uneasy Case for Progressive Taxation ( Chicago: University of Chicago Press, 1953) at 3 where the
authors deal with this issue by posing the following question in their seminal work on progressive taxation:
provisions in the Act impinge as minimally as possible on the taxpayer and not distort market
decisions. The tax system should also not distinguish between identical transactions; the tax
consequences of a transaction should be neutral, regardless of who carries it out.\textsuperscript{33} The
underlying assumption of this principle is that private market decisions are generally efficient
and should not be disturbed, to the extent possible.\textsuperscript{34} However, in some instances we have tax
rules which are non-neutral; for one of the functions of the Act is to promote specific social and
economic polices.\textsuperscript{35} Looking at rules dealing with RRSPs, it is evident that they allow
deductions from contributions to RRSPs, suggesting a violation of the principle of neutrality,
as the government encourages individuals to save for their retirement, as opposed to immediate
consumption.\textsuperscript{36}

The third criterion, administrative simplicity, suggests that effective tax systems be easy
to understand and apply, in order to foster compliance. This simplicity breeds a level of
certainty which allows taxpayers the freedom to arrange their business and personal lives,
confident in the knowledge that the consequences of a transaction can be predicted.\textsuperscript{37}
Although simplicity is desirable, for it facilitates ease of compliance and aids in the attainment

\textsuperscript{33} V. Krishna, Income Tax Law, supra note 26 at 7; N. Brooks, "The Changing Structure of the Canadian Tax
System," supra note 26 at 184; M.A. Mahoney, "What is the Appropriate Tax Unit in Allan M. Maslove ed.,
Issues in the Taxation of Individuals (Toronto: University of Toronto Press, 1994) at 117.

\textsuperscript{34} Efficiency is another criteria used to assess the tax system. It is oftentimes closely associated with neutrality
by authors who explain that the most efficient tax is that which affects the market and behaviour the least. See
H. Kiesling, Taxation of Public Goods: A Welfare-Economic Critique of Tax Policy Analysis (Ann Arbor:
supra note 26 at 15-16. For a different view see Vern Krishna who views efficiency as being concerned with the
promotion of economic growth in an effective and efficient manner. He states that a tax measure which is
designed to encourage economic activity is to be evaluated in terms of its actual effect on economic activity —
whether the measure will foster or limit productivity. Does it accomplish its aim in a cost effective fashion? V.
Krishna, Income Tax Law, supra note 26 at 7.

\textsuperscript{35} See E. J. McCaffrey, "Taxation and the Family: A Fresh Look at Behavioural Gender Biases in the Code"
(1993) U.C.L.A. L. Rev. 983 where the author discusses how the American tax system offers incentives which
affect individual’s decision to work full or part time, marry, and become a two or one-earner couple.

\textsuperscript{36} The same can be said of other provisions in the Act such as the small business deduction in section 125,
which is designed to encourage small business growth in Canada, the tax credit for charitable donations, and the
reduced level of tax on capital gains. See below for a further discussion of the latter two provisions.

\textsuperscript{37} V. Krishna, Income Tax Law, supra note 26 at 7; N. Brooks, "The Changing Structure of the Canadian Tax
System," supra note 26 at 191; Mahoney, supra note 33 at 118.
of the other criteria, this principle is not possible to uphold at all times. The Act functions in an intricate economy, and in a heterogeneous social milieu; individuals are taxed in their capacity as income earners, consumers and property holders. This means that a complex system is the order of the day, thus the criteria of simplicity, is really designed to keep the complexity to a minimum, rather than eliminate it.

One criterion which is absent from the evaluation of a tax system is equality. Although equality is not a typical criterion used to assess the effectiveness of a tax system, it can be a useful aid in the elimination of the structural and overt discrimination which women, gay men and lesbians face under the Act. Equality demands different results from a taxation system than equity. Equity attempts to deal with class biases so that individuals in differing economic classes are treated fairly. Those on the lower income scale pay similar income to those in the same tax brackets, those who have more ability-to-pay taxes, pay more than those with less ability-to-pay taxes. In essence, the wealthy are not to receive special treatment because they are rich and the poor are not economically gauged because they are an easy target, due to their lack of political clout.

The notion of equality also focuses on the class element of individual lives, but differs from equity when it considers group affiliations. With a focus on equality, all measures are evaluated in relation to their impact on different people in society, particularly those who have been historically disadvantaged, to see if particular groups are being adversely affected. To gain insight into the impact of tax policies in society, race, sexual orientation, gender, disability and other aspects of identity are to be considered in assessing the justness of a tax system, in addition to one's class background. The type of equality which any assessment will be concerned with is substantive and formal. Formal equality means that "we are to treat similar people similarly." 38 We do not have formal equality in the taxation system for same-sex

couples; although they are similar to heterosexual couples, they are treated differently from common-law couples by their exclusion from the definition of "spouse."

As the Act's impact on women and same-sex couples is anything but neutral, there is an absence of substantive equality. The effect of the Act is negative for gay and lesbian couples as they do not have access to the same benefits and responsibilities as heterosexual couples. It is negative for women as they have more of their income taxed by the tax base which is utilized. With a focus on substantive equality, legislators would look at the affect of a rule, a practice, or procedure on particular groups and move to change the result, if it is negative, so that all individuals are treated equally. This type of equality may at times, require that different groups receive different treatment to ameliorate their condition.

The absence of formal equality for gay and lesbian couples and substantive equality for women is a palpable presence, as it shapes lives in ways which serve to reinforce women's dependence on men, amplifies their poverty, and denies same-sex couples the benefits given to heterosexual couples. The concern about the lack of equality in the Act will not be reversed by the Supreme Court of Canada any time soon, if its record on women's equality rights, as seen in Thibaudeau v. The Queen and Elizabeth Symes v. The Queen is any indication of its future actions. According to Kathleen Lahey:

In both the Thibaudeau and Symes cases, the members of the Supreme Court declined the opportunity, as the beneficiaries of over a century of thinking about fiscal equity and nearly two thousand years of thinking about the meaning of equality, to move beyond the gender-neutral analysis of social policy legislation which has characterized Parliament's efforts to bring legislation like the Act into compliance with the Charter. Instead, the court has carved out an approach to fiscal Charter challenges which ensures that women taxpayers will remain governed by the social expectations and stereotypes relating to women as a class that gained currency during world

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39 M. Donnelly, quoting Catherine MacKinnon, states: "When [the state] is most ruthlessly neutral, it will be the most male; when it is most sex blind, it will be most blind to the sex of the standard being applied." M. Donnelly, "The Disparate Impact of Pension Reform on Women" (1993) 6 C. J. W. L. 419 at 427.
War II and the Post-war period, and that have not been seriously re-examined since then.43

What is to be done if the court is unlikely to entertain equality arguments when the issue is the Act?44 Those vanguards of social equality are to continue in their demands and maintain a dialogue which presents this perspective until a case appears to the court which allows the inequalities in the system to be recognised.45 This thesis will serve as part of this discourse, as it highlights how the Act continues to impact adversely upon women and same-sex relationships.

The absence of equality as a criterion for judging the effectiveness of the taxation system has helped to maintain women’s disadvantageous position and prevented same-sex relationships from being treated similarly to heterosexual relationships. To be a positive tool of social ordering, this feature of the Act must be addressed. To reach this end we must identify the structures in place which prevent members of society from being treated equally. Although

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44 See K. Lahey, “The Impact of the Canadian Charter of Rights and Freedoms on Income Tax Law and Policy” in David Schneideman & Kate Sutherland eds., Charting the Consequences: The Impact of Charter Rights on Canadian Law and Politics (Toronto: University of Toronto Press, 1997) at 110-111, where the author asserts that a Charter challenge will be unlikely to succeed against the Act for the following reasons: fiscal legislation is subjected to a lower level of scrutiny under the Charter, the court uses a very conservative definition of equality and Parliament has tended to favour the side of the privileged when it comes to tax policy issues. For a reiteration of this view see C. F. L. Young, “It’s All In The Family: Child Support, Tax, and Thibaudeau” (1995) 6 Constitutional Forum 107 at 110 and L. Phillips, “Case Comment: Tax Equality Rights: Thibaudeau v. Canada” (1995) 4 Can. Bar. Rev. 668 at 674 - 678 where the author, in a discussion of Thibaudeau, states that courts accord special deference to tax legislation.

45 The recent case of Rosenberg v. Attorney General (1998), 38 O.R. (3d) 577 (Ont. C.A.), which will be discussed below, is one such case; it is the first successful section 15 Charter challenge to the Act. In addition, Kathleen Lahey asserts that Symes left the door open for a successful section 15 case. She stated:

Fortunately for future litigants, the Supreme Court of Canada narrowed its ruling in the Symes appeal on its own initiative. The Court had invited the taxpayer to recast her argument on the basis that, because she was a financially successful woman lawyer, she was really disadvantaged by her family status rather than by her sex. When the taxpayer declined this invitation, the Court suggested that in another case, a different subgroup of women with a different evidentiary focus, involving s.63 might well be able to demonstrate the adverse effects required by s. 15(1).

these structures exist in the Act, they do not exist there alone; they first originated in our larger society, which holds sexists and homophobic views. The next step in this thesis is to step away, for a moment, from the Act and look at the larger society, to make the connection between sexism and homophobia, so it becomes evident that the discriminatory treatment of gay and lesbian people is tied to the discriminatory treatment of women.

THE TIES THAT BIND --- SEXISM AND HETEROSEXISM

It is important to look at each of our institutions to determine whether women and men are being treated fairly. Since we live in a sexist society, it is very likely that a majority of our institutions treat women differently from men in a manner which wreaks havoc in their lives. When we look at the institution of taxation, we might assume that there is no discrimination in the treatment of women, because tax is a technical and scientific discourse, with objective policies that are above reproach. However, this idea of the objective nature of taxation must be tempered with the understanding that it is an area which is inaccessible to a large percentage of the population, due to its technical nature. This means that if the taxation system was impacting on individuals in a sexist fashion, the majority of the population would be unable to determine these effects. This is troubling as important political issues are presented as if they are fiscal concerns to be resolved by the objective solutions of experts.\(^6\) This inability to penetrate this area also means that those who may be the most affected do not have a voice in the process. The disadvantaged need to have a voice in tax policy, as it is not immune from the bias which exists in larger society.\(^7\) According to Lisa Philipps, the tax system helps “...to produce and normalize inequalities by inserting dominant ideologies into fiscal law and policy,


\(^7\) See C. C. Jones, “Split Income and Separate Spheres: Tax Law and Gender Roles in the 1940s” (1988) 6 Law & History Rev. 259 where the author traces the historical evolution of the American joint filing system, with specific emphasis on its income splitting element, and sets out how it has been shaped by notions of gender roles and stereotypes.
[and] presenting such ideologies as part of an objective truth." One of the dominant ideologies which has been inserted into the Act is sexism: women are weak, dependent, and inferior creatures who are less than men. The result of sexism is that women receive less pay than men; are congregated in lower status jobs, shoulder the majority of the unpaid work in society, and bear the primary burden of caring for children.

Taxation provisions deal with the financial dimensions of individual lives; looking at how people receive money and how much they receive. In crafting policy, legislators make assumptions about the individual; however, these assumptions are disadvantageous to women, as legislators do not factor in the concerns which women labour under. Women's poverty is not a concern when the Act has a deduction/inclusion system for alimony, which forces women to include alimony received as income which may then be taxable. Women's lack of wealth ownership is irrelevant when the tax system is devised so that capital gains are given preferential treatment. Such omissions result in the Act reinforcing the inequitable relations which exist between men and women, and further legitimates the existence of social inequality in society. This social inequality is pervasive as the "...benefits and burdens of taxation are distributed unequally not only in terms of class, but along lines of gender, sexual orientation, and other markers of social difference."

Women's social inequality stems from the existence of sexism, which holds patriarchy in place in society. One of the ways this is accomplished is through the maintenance of rigid gender roles. If one is born female, then one is putatively gentle, talkative, warm, yielding and

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52 M. Cassin, supra note 46 at 114.
interested in one’s appearance. If one is born male, then one will assume a masculine gender role, such as being aggressive, forceful, self-reliant and ambitious. After a great deal of societal acceptance of this formulation, a masculine gender always follows a male sex and a feminine gender must always follow a female sex. This concept of a binary gender system fosters cult like behaviour, because individuals in society do not freely choose their gender; the yoke of gender is passed on from one generation to the next, since as infants and children we interact with people who teach us gender appropriate behaviour. This harness is very difficult to remove as one cannot easily relinquish association in one of these gender camps without facing some form of retribution, contempt or condemnation.

Sexism deploys certain tools to aid in the maintenance of these gender roles. One of these tools is homophobia: the “...irrational hatred or fear of homosexuals or homosexuality.” Homophobia is put in place because same-sex relationships threaten gender roles, as they question the need for gender hierarchy by rejecting the automatic subordination of women, and suggest an alternative to the traditional family -- the touchstone for regulating sexual relations and gender roles.

To ensure that individuals do not to cross gender lines, homophobia silences gays and lesbians through stereotypes that enforce appropriate gender roles and sexual relations. The stereotypical view of gay or lesbian persons is that they are trying to adopt the gender role of the opposite sex. Gay men are trying to be women, soft and effeminate; lesbians are

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55 H. Devor, Gender Blending: Confronting the Limits of Duality (Bloomington: Indiana University Press, 1989) at 32.
56 We tend to think of gender as binary – either male or female, but in other cultures, this is not the case. In some aboriginal societies there exists more than two gender groupings. H. Devor, ibid. at 44.
58 This policing of gender lines is seen in young children through the labels we give their actions, when they seem to be acting in a gender inappropriate manner. Young girls who imitate masculine dress and behaviour are referred to as “tomboys.” Young boys who are effeminate are labeled “sissies.”
59 According to Suzanne Pharr, gender roles are maintained “by the weapons of sexism: economics, violence, homophobia.” Pharr, supra note 54 at 8.
attempting to usurp the role of men by being aggressive and domineering. With these stereotypical notions in the back of our mind, people avoid giving off the perception that they are lesbian or gay; thus, they avoid behavior that is a transgression against a gender norm. Young men learn that it is a calamitous insult to be called a "...‘queer’ or ‘fag’ or ‘homo’ or ‘fairy.’" For women it is confusing; the demarcations setting out appropriate behaviour are often hazy. This is especially true since our society teaches women to cherish particular feminine traits, while at the same time rewarding masculine ones with higher pay and status. Women are thus faced with the dilemma of needing to employ some masculine traits while leaving themselves open to the charge of lesbianism. In the end, heterosexism is kept in place as the majority of us act out the scripts that have been written for us by previous generations; we act like women and we act like men in every way possible to stay in bounds and maintain the status quo.

Heterosexual privilege, the flip side of homophobia, rewards those who are not gay or lesbian. Charlotte Bunch attempts to describe the notion of heterosexual privilege when she states, "[w]hat makes heterosexuality work is heterosexual privilege -- and if you don’t have a sense of what privilege is, I suggest that you go home and announce to everybody that you know -- a roommate, your family, the people you work with -- everywhere that you go -- that you are queer. Try being queer for a week." Jeffrey Keller conceptualizes heterosexual privilege when he relates an incident in his life:

Birks. My partner and I pick out “wedding” rings. We have been together for two years, living together for one. We want to do something to show the love that we feel for each other, to show the commitment we have, to show that we intend to be friends and lovers forever. Marriage, a wedding ceremony, is out of the question. Sharing our joy and declaring our commitment within our church before God and our family and friends is impossible. But, no one can stop us from wearing rings. We choose the rings we want. Plain, silver bands with a deep groove around it to symbolize the scars we must bare as a gay couple in a straight world: our

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64 M. Fajer, ibid. at 632.
Heterosexual privilege is societal support for those in heterosexual relationships and condemnation plus erasure for those who are gay and lesbian. This attempt at erasure occurs through societal pressure and institutions which deny recognition of gay and lesbian people and their relationships. One institution which has been used to support heterosexual privilege is the legal system. The legal system has a role in constructing heterosexual privilege; it gives rights, benefits, obligations and powers to those who fall into the definition of “spouse,” but those who are in a gay or lesbian relationship do not receive corresponding rights and obligations. This is evident where the Act excludes gay and lesbian couples from the definition of “spouse,” yet includes married or common-law couples. The result is a system whereby gay and lesbian couples do not have access to certain provisions, regardless of its benefit or burden. This feature of the Act is a display of homophobia and heterosexual privilege, as we have crafted our laws on the assumption that all members of society are heterosexual or should be, and those that are not, will not receive any type of recognition or financial assistance.

To achieve equality for all, this paper attempts to draw the connections between the various forms of oppression — particularly homophobia and sexism. As Bruce Ryder states,

...sexist and heterosexist oppression cannot be adequately theorized in isolation from each other because they are clearly linked by a requirement

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64 Keller, supra note 62 at 196.
that the sexed bodies of men and women adhere to strict gender roles. I believe that gender and sexuality must be treated as interlocking vectors of oppression, each with its own interrelated yet distinct set of mechanisms and effects.\(^6^9\)

The homophobia which gay and lesbian people experience under the Act is tied to the sexism women experience under the Act. Same-sex couples are not considered to be spouses because society has a definitive view of a spousal relationship. A spousal relationship consists of a husband and a wife, who maintain a level of commitment to each other in a bond of love and affection. Same-sex couples violate the first principle: a same-sex relationship never consists of both a husband and a wife, as we have decided that it is only individuals of the opposite sex that can fill these role. Only a man can be a husband and only a woman can be a wife. It is only this configuration that can make up the entity of a spousal relationship. In addition to having strict notions of who can form a spousal unit, there are also definite notions about the role of each member. Men are assumed to be the breadwinners and minimally involved in child rearing. Women are assumed to be the primary care giver for children and responsible for the care of the home and its other inhabitants. This is a role which ensures their dependency on a male, as their interaction in the waged labour force will be circumscribed. This role is rigidified in the Act with such dependency provisions as the spousal tax credit and the refundable child tax benefit. By challenging the notion of the roles that same-sex couples can play, through a deconstruction of the Act, we will also see that it is possible to rethink the possible roles women can play in society.

Women, and gay and lesbian people have an interest in focusing on sections of the Act which discriminate against them, and in arguing for their reform. The first place to begin to bring about a change is in the structure of the Act. The next section will outline the various types of tax unit models which can be utilized in a tax system in an attempt to lay the groundwork for uncovering the assumptions which exists in the Act about what roles individuals can play in arranging their lives.

\(^6^9\) Ryder, "Straight Talk," supra note 65 at 290; Pharr, supra note 54 at 53.
CHAPTER TWO
MODELS OF TAXATION

INDIVIDUAL, COUPLE, FAMILY

The tax unit of any given system represents a model which will best achieve specific ends. Ideally, the chosen model should aid in the aims of a tax system such as revenue generation, resource allocation and the propagation of social and economic polices. Underlying these fiscal concerns is an understanding on the part of the legislator that the chosen unit will reflect the rights and responsibilities which attach to the individual, the tax consequences that flow from varying relationships, (i.e. marriage, common-law spouse, a gay or lesbian couple, siblings, and strangers) and the purpose relationships serve in an individual’s social and economic life. These underlying assumptions operate when either the individual, married couple, or family is utilized as a tax unit.

In traditional tax literature, the individual, the married couple or the family have served as possible choices for a tax unit. Under an unadulterated individual model, it is solely the income that the individual receives which is used to calculate tax payable. Tax is calculated without investigation into an individual’s domestic situation, family obligations, or relationships. There are no deductions, exemptions, or credits based on the added financial costs of familial obligations or living situations. Nor is there a reduction of benefits due to the presumed savings from specific living situations. Such a formulation maintains one’s individuality and privacy, as one’s financial connections with others does not enter into tax calculations. In addition, the individual model keeps all relationships on similar footing as one’s relationships to other individuals would be of no tax consequence; thus, there would be

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70 The tax base and rate are also vital to the achievement of these aims.
71 M.A. Mahoney, “What is the Appropriate Tax Unit,” supra note 33 at 119.
72 See Poulter v. Canada (1995), T. C. J. No. 228 (Tax Ct. Of Canada), where the taxpayer questioned the automatic inclusion of opposite sex common-law couples in the definition of “spouse,” stating that the government’s imposition of the definition of “spouse” was a violation of her civil liberties and privacy, for the government was intruding in the realm of her private life and decisions. Also see V. Krishna, “Spousal Cohabitation” (1994) 5 Can. Current Tax 21 at 22 where the author states that expanded definitions of “spouse” may lead to further state intrusion into the private lives of citizens.
no discrimination based on sexual orientation. This would move any tax system closer
towards equality as gay and lesbian couples are treated the same as heterosexual couples.

The married or common-law couple is another unit of taxation. Under this model, the
income of the couple is combined to determine their ability to pay taxes. The theory behind
the adoption of the marital model is that it accurately reflects the economic lives of married
taxpayers, who are believed to share income and incur a financial savings by living together. Given a economies of scale, couples, in contrast to the single person, can arrange their lives so they have greater ability to pay taxes -- a result of their joint living arrangement. For the common-law and married couple, only one television, refrigerator or CD player needs to be purchased, leaving the couple with more discretionary income.

The third model -- the family unit -- was proposed in 1966 by the Carter Commission for adoption in Canada because "... the family is today, as it has been for many centuries, the basic economic unit in society." Under the family unit model, the income of family members is combined and tax rates are applied to this collective income. One benefit of using the family

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74 M.A. Mahoney, “What is the Appropriate Tax Unit?” supra 33 note at 127.


76 M. McIntyre, “Taxation of the Family,” ibid. at 13.


Oldman and Temple also expressed the sentiment that since family members benefited from each other’s income, the family should be a taxpayer, under a comprehensive tax base because the taxpayer should be the person who benefited from the income see M. McIntyre & O. Oldman, “Treatment of the Family” in Joseph Pechman ed., Comprehensive Income Taxation (Washington: The Brookings Institution, 1977) at 212-213. This notion was rejected by participants in the conference discussions who felt the Haig-Simons definition of the tax base did not give guidance in deciding who is to be taxed. (The comprehensive tax base will be discussed below). See, Emil M. Sunley, “Summary of Conference Discussion” in Joseph Pechman ed., Comprehensive Income Taxation (Washington: The Brookings Institution, 1977) at 271.
as a tax unit is that it recognizes an individual’s economic ties in this social unit.\(^7\) The adoption of the family unit would call for the elimination of current provisions in the \textit{Act} which aim to curb income splitting between couples or parents and children, resulting in a simplification of the \textit{Act}.\(^7\)

**THE IDEAL TAX UNIT**

The family, typically defined in a narrow fashion as a husband, wife and children,\(^8\) was considered a useful tax unit to bestow benefits and obligations upon since its members shared, emotional support, physical care and financial assets. However, as time has past, society has realized that it is not the traditional family alone that can provide these comforts to an individual. This support can also be provided by a panoply of other groupings. This recognition has caused the idea of family to be expanded so that it is based on shared financial reliance, conjugal status, biological relationships and shared accommodations. The notion of the family unit in the \textit{Act} has not expanded to reach these new conceptions, causing inequities to groupings which function in a similar fashion to the traditional family. This has caused

\(^7\) \textit{Carter Commission, ibid. at 122; J. London, “The Family as the Basic Tax Unit” (1979) Winter Can. Tax’n 4 at 7.}

\(^8\) \textit{Carter Commission, supra note 77 at 143; also see J. London, “The Family as the Basic Tax Unit,” \textit{ibid. at 76.}}

\(^9\) \textit{Carter Commission supra note 77 at 122. The Carter Commission tried to expand on this definition to an extent, but still held blood ties to be important. The Carter Commission stated:}

\begin{quote}
We recommend, under the broader concept of the family unit we favour, that the following resident persons be treated as family units:

1. Husband and wife.
2. Husband and wife and dependent children.
3. A surviving spouse.
4. A widower or widow and one or more dependent children.
5. A divorced or separated parent and one or more dependent children.
6. One or more dependent children who previously have been in a family unit but are separated from both their parents because the parents have died or have ceased to be resident or for some other reason.
7. A single individual and one or more dependent children. This would include an unmarried person with one or more adopted children, or unmarried mother and her child or children. \textit{Ibid. at 142.} For a critique of the Carter Commission’s treatment of the family see, V. Salyzyn, \textit{The Family Tax Unit and the Carter Report} (Don Mills: CCH Canadian Limited, 1967).\end{quote}
members of society to ask some timely questions: Why do some households qualify as families, while others do not? Why should a household with three adult friends, two of whom currently pool their finances, share supplies, and care for an ill roommate be treated differently from a household with a man and a woman, who have lived together for one year, have a sexual relationship, and look after an adopted child? Under the notion of family unit which permeates the Act, it would be the second couple which would receive financial assistance from the state. Based on their relationships, the second family would be able to claim the spousal tax credit, receive a child tax benefit and access a transference of various credits. On the other hand, the first grouping could not claim under any of these provisions because they did not fit into the category of spouse, parent or child, although they provided emotional support, companionship and caring.81

It is inequitable to deal with the traditional family differently from other groupings which share resources and abilities. A household of unrelated people may pool their resources and share in purchases and expenses, yet they would not be treated as a tax unit, because they consist of relationships which do not include the married or common-law couple.82 If one of the main reasons for using the family as a tax unit is because it is a grouping of people that look after each other financially and socially, then other groups which perform the same function, should not be excluded. The arbitrary demarcation of what constitutes a family, although different groupings function in the same way, makes this type of tax unit unappealing, as the definition is not sophisticated enough to account for all variations

81 See sections 118(1), 118.5(1), 118.6(1), 118(2), 118(3), 118.3(1) and 122.6, supra note 1 The sick roommate may be able to claim a credit for mental or physical impairment, but if she has no income to claim it against, it will be of little use, whereas, the nuclear family may automatically be given assistance through the Child Tax Benefit for their child.
82 See F. R. Schneider, “Which Tax Unit For the Federal Income Tax?,” supra note 73 at 126 - 130 where the author recommends using the household as a tax unit for personal income tax. According to Schneider, a household consists of:

...all persons who occupy a ‘housing unit,’ that is, a house, an apartment or other group of rooms, or a single room that constitutes ‘separate living quarters.’ A household includes the related family members and all unrelated persons, if any, such as lodgers, foster children, wards, or employees who share the housing unit. A person living alone or a group of unrelated persons sharing the same
Even if the government did expand the definition of family to account for varying family forms it may be difficult to ensure truthfulness on the part of all individuals who insist that they exist in a family type relationship. A group of people could assert that they are a family, although they only share space and nothing else. Trying to ensure compliance with an expansive definition of the family would run the risk of intruding on an individual's privacy. All these factors suggest that the family unit is not a good model to further equality among members of society.

Is the marital unit the ideal unit of taxation for an Act premised on the notion of equality? No. There are several reasons for this negative response. First, if we investigate the underlying reason for the marital couple as a tax unit, we see that it is a belief that couples share their incomes and each party benefits from this sharing. As a result, parties are to pay tax on the income they benefit from. This sharing of income, and other services, is purported to result in an economy of scale, as the parties can find themselves with greater discretionary income due to sharing the cost of household items. One of the problems with the underlying assumption of this model is the non-recognition of the costs involved in sharing. For instance, individuals may have to contend with the limited availability of items they have purchased, if

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83Harvey Brazer has noted that use of the family or the household as the unit of taxation would be intrusive, requiring audits and the inspection of lifestyles. He further notes that it would be administratively burdensome for the tax collection authorities and taxpayers. H. E. Brazer, "Income Tax Treatment of the Family" in H. J. Aaron & M. J. Boskin eds., The Economics of Taxation (Washington : The Brookings Institution, 1980) at 242.

84 See B. Bittker, "Federal Income Taxation and The Family" (1975) 27 Stanford L. Rev. 1389 at 1416-1428 where the author in dealing with the issue of taxing marital income, raised concerns about the tax burdens of married couples when compared to other taxpayers.

85 See N. Brooks, "Comment" (1992) Can. Tax Found. (Canadian Tax Paper No. 93 - Taxation to 2000 and Beyond) 200 at 206, where the author states that the underlying question regarding the tax unit is whether a tax system taxes individuals on the income they benefit from, or on the income they control:

If we should tax individuals on the income they benefit from (and if we assume that spouses share all of their resources), then it is possible to argue that in determining income we should take individual's family ties into account. But if instead we should tax individuals on the income they control -- whether they share that income with someone else or not -- then we should disregard their family relationships.

Also see N. Brooks, "The Irrelevance of Conjugal Relationships," supra note 25 at 47.
they are sharing them with others. An individual will not have one-hundred percent access to a jointly purchased computer, and its usefulness may depreciate more quickly with two people using it, rather than one. This depreciation will be a reason for another computer to be purchased sooner, rather than if it was an individually owned item. Therefore the couple is not financially ahead, in comparison to a single purchaser and user of a computer.86

Another problem with this tax unit is the continual refutation of its underlying premise: all wives and husbands share and pool their income. Louise Dulude argues against this position stating that all couples do not pool their income.87 She asserts:

It therefore appears that the pooling hypothesis on which joint taxation systems are founded is made of quicksand. In a society where most spouses keep control over their own earnings and assets, and where close to 40% of marriages end in divorce, it is impossible to argue with any conviction that husbands and wives have the same ability to pay. Instead, the best measure of any person's ability to pay is that individual.88

Dulude also has found that if sharing does occur, it cannot be assumed to go on in all families. Those couples with low incomes tended to share everything, because they had few other options; when it came to couples who were on the upper level of the income scale, they tended not to share assets. Dulude concluded: "with the single exception of the very poor, the earnings and assets of couples are generally controlled and managed by the spouse who has legal title."89

86 N. Brooks, "Comment," ibid. at 206. See J. Crago, "The Unit of Taxation: Current Canadian Issues" (1993) 52 U. T. Fac. L. Rev. 1 at 19-20, where the author states that using the economies of scale argument as the basis for a tax unit is problematic; it fails to account for other living arrangements with economies of scale, such as roommates. Further, it is over-inclusive; not all couples can take advantage of economies of scale. The example she gives is a commuting couple who have to maintain separate residences.


88 L. Dulude, " Taxation of the Spouses," ibid. at 91.

89 L. Dulude, " Taxation of the Spouses," supra note 87 at 91. For an American view see Marjorie Kornhauser, who states:

Nevertheless, my study and others discussed in this Article clearly establish several facts: (1) not all couples pool assets; (2) pooling is not confined to married couples, and separation of assets is not confined to nonmarried couples; (3) financial
Implementing this tax unit on the assumption that couples share resources is also problematic under a progressive rate structure, where the secondary earner\textsuperscript{90} is the wife.\textsuperscript{91} The problem arises when the wife’s tax rate is determined by a factor other than her individual income.\textsuperscript{92} Under a marital unit model, with the income of the wife stacked on top of her husband’s, the first dollar of her income is affected by her husband’s income, causing her to be taxed at a high marginal rate, in spite of her low earnings.\textsuperscript{93} This heavy tax burden on low earnings is likely to discourage women from taking work outside the home, so as to prevent an increase in taxation.\textsuperscript{94}

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arrangements sometimes change during the course of the relationship; and (4) even among those couples who say they pool, in reality the one earner spouse often does not have equal access to assets; instead the earner controls the money. In short, the empirical evidence on pooling refutes the basic assumption underlying the joint return.
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\textsuperscript{90} A secondary earner is an individual in a marriage, who’s attachment to the labour force is not as strong as the other partner. See H. Rosen, “Is it Time to Abandon Joint Filing?” (1977) 30 Nat’l Tax J. 423 at 428 note 16. Also see L. Zelenak, “Marriage and the Income Tax” (1994) 67 S. Cal. L. Rev. 339 at 365 where Zelenak uses the term “marginal wage earner” to describe a wife in a family which assumes that the husband will have a job, and the choice to be made is whether the wife will join the paid workforce.

\textsuperscript{91} Not all wives are secondary earners, but it tends to be women more than men who are secondary earners. One of the reasons is that women generally have lower incomes than men, thus their income is not heavily relied upon, making it easier for them to leave the labour market. See Statistics Canada, Labour Force Information (Ottawa: Ministry of Industry, 1998) at Table 15 and Statistics Canada, Women in Canada : A Statistical Report 3rd ed. (Ottawa: Ministry of Industry, 1995) at 84.

In addition, women’s rate of part-time employment tends to be higher than men, ensuring that the have less income and a weaker connection to the labour market. See Statistics Canada, Labour Force Information (Ottawa: Ministry of Industry, 1998) at Table 9A and 15.

\textsuperscript{92} L. Dulude, “Taxation of Spouses” supra note 87 at 9.


The disincentive effect of increased marital tax liability is due to married women's decisions to work being based on considerations of after tax income, more so than the employment choices of their husbands, single men or women. This concern for after tax income is a legitimate concern for individuals living in society. Individuals want to keep as much money in their pockets, as opposed to government coffers. However, this desire coupled with the reality of women's existence in society causes women to be the members of society who sacrifice their public lives. Women are burdened by societal expectations of the appropriate role they will serve in families and society. This means that they are primarily responsible for the care of the family and its members. As a result of having to carry such a burden in the family setting, they structure their lives to fulfill such roles. This means that their attachment to the labour force may not be as strong as single women or men since they tend to perform more part time work than men. As a result of this, and sexism in society, they tend to earn less money than men. These factors help to discourage women from working when they are faced with an increase in the amount of tax that must be paid and a corresponding decrease in the household's discretionary income. In other words, when married women decide to work, if the work that they are performing outside of the home is part-time and low-paying, it may be an easy decision to make to stop working, when the possibility of extra taxes arises. This result impedes women's achievement of economic individuality, separate from the marital unit, as their financial contribution is collapsed with their husband's. In recognition of this phenomenon, the Ontario Fair Tax Commission stated:

[The argument that a couple should be the unit of taxation because of its ability to pool income and share expenses is not persuasive. We view as a serious concern the impact of taxation based on family resources on a woman's willingness and ability to work outside the home. We cannot ignore the damage that would result from masking the individual economic contribution made by women and sublimating rather than encouraging their]

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96 L. A. Davis, supra note 87 at 211.
economic individuality within the family unit. Taxation should respect, support and encourage a woman's economic autonomy. 97

Forcing women to be taxed with their husbands would not be a means of maintaining individual rights. It would be a carryover from the days when women were not considered to be persons 98 in their own right. It would overlook that women are still trying to operate as independent individuals, as they lobby for equal pay in relation to their male counterparts, and equality on a larger scale.

Is the individual the tax unit which will aid in the achievement of equality under the Act? Yes. 99 Using the individual as the model for taxation, without any modifications for one's family relationships or dependency, treats each relationship in society fairly and

97 Report of the Ontario Fair Tax Commission, Fair Taxation in a Changing World (Toronto: University of Toronto Press, 1993) at 266. Also see M.A. Mahoney, "What is the Appropriate Tax Unit," supra note 33 at 128 and M. Wilkinson, "The Discriminatory System of Personal Taxation: Some Proposals for Reform" (1982) 11 J. Social Pol'y 307 at 307 where the author discusses the British system, which encouraged married couples to aggregate their income. She remarked on married women's lack of economic individuality, stating: The aggregation of the wife's income with that of the husband means that a wife has no privacy in her financial affairs, and it has resulted in the unfair treatment of women by Inland Revenue. For example, correspondence on the wife's financial affairs has been directed to the husband; repayments of tax in respect of over-payments by the wife have been sent to the husband; and the wife's income has been taxed at a higher rate when it has carried the couples total income into a higher tax bracket.

98 Re Section 24 of the B. N. A. Act (1930), 1 D.L.R. 98 (S.C.C.) This case held that women were eligible to become members of the Senate of Canada. The issue in this case was whether the word persons in section 24 of the BNA Act, which dealt with individuals becoming members of the Senate, was restricted to men or whether it referred to women. The court held that the word persons in section 24 includes women, and thus women could become members of the Senate.


... there is no normative inconsistency in basing the tax system on individuals but transfer payments, whether delivered through the tax system or not, on the aggregation of family income. Transfer payments in order to relieve poverty should quite sensibly be based upon some function of consumption instead of control of income.
equitably, as there is no concern for one's relationships. The individual model would not hand over benefits to spousal or family units based on assumptions about how these units operate, while similar groupings are left out of the benefit scheme. Nor would the individual model encourage women's dependency on men, by giving certain spousal units a tax benefit through the spousal tax credit and transference of credits. There would not be a system in place were lip-service is paid to the notion of the individual, but is undermined by the recognition of spousal like relationships.

Such a model would go a ways to ensuring that members of society, particularly women, are strong, self-reliant, fully formed and functioning members of society and not dependent on the mercy of another person. There would be no benefits for relying on one's partner for financial support. Such a stance is necessary in a society where women are currently treated as less than equals. As a society, we must remove structures which have a role in the undoing of women. Nowhere in society is it considered acceptable for men not to be working and contributing members of public life. However, the Act discourages women from becoming public actors. For a group which has historically been denied personhood, it is vital that women are seen as individuals with all the rights and responsibilities of other members in society.

One of the criticisms which can be leveled at the purely individual model is that it disregards an individual's economic responsibilities or the benefits which are incurred through their relationship with others. It does not account for the need to financially support another, or the sharing which occurs with some family members and couples. It operates on the assumption that society is filled with atomistic beings, removed from any relations or obligations to other members of society.

In response to this criticism, it must be clear that this model of the tax unit is not meant to put forth the message that some individuals do not rely on each other for survival. We are all connected to other individuals in society; we are connected to those in the past who, through their labour and ingenuity, have made our physical lives easier to endure. The child relies on
his or her parent for food, shelter and caring; the husband on the wife for emotional support; the companion on the friend for company and intellectual debate. However, the move to a purely individual model is in response to blanket assumptions which are made in the Act about how all relationships function. For example, one assumption is that all couples pool their resources. For this reason, the Goods and Services Tax Credit and the Refundable Child Tax Benefit are income-tested. This means that once the household income reaches a particular level, the benefit is reduced and eventually eliminated. The effect is that individuals at the high end of the economic scale do not receive these benefits. This can be problematic since there is no guarantee that each member of a high income household has access to the income which enters the house. In other words, individuals in need of assistance given out by the tax system are not necessarily receiving it, due to the prevalence of assumptions about how families should operate. This is alarming as the tax system, through its transfer programs, is not fulfilling its mandate. The push towards a purely individual model does not deny our reliance on others in society, however; it argues that the benefit system which currently exists in the Act, based on relationships, and assumptions about how relationships function should be moved out of the Act. Once it is outside of the Act, the program can be evaluated on its own, free of assumptions to determine its purpose and whether it reaches its intended target. In other words, if there is a need which is provided by the transfer program, then a direct government spending program, which can be monitored, may be an ideal course of action.

Another criticism which can be directed at the purely individual model is that it violates the principle of horizontal equity for couples, although it supports the horizontal equity of individuals. Utilizing the individual model under a progressive rate structure, would maintain horizontal and vertical equity between individuals; individuals with similar amounts of income would pay similar amounts of tax, and those with different amounts of income, would pay appropriately differing levels of tax. One individual would not pay less tax because he had a stay at home common-law spouse while another paid more tax because he had a stay at home same-sex partner. However, according to those in favour of increased family support, it is not
the individual alone who should be of concern, but the family. Under a purely individual model, the violation of horizontal equity occurs when there is a disparity in the taxes paid by families with the same income. Take two families with the same income: Family A and Family B. In Family A the income is earned by one spouse, and in Family B, the income is earned equally by both spouses. In a system with the focus on the individual, Family A will pay higher taxes since the income earned by the single-earner in Family A is taxed at a higher marginal rate in comparison to Family B, where each individual has a lower marginal tax rate and a lower level of income.100 Under such a scenario, like families are not treated alike,101 resulting in a violation of horizontal equity between similar families.

In response to this criticism102 it must be stated that we have a taxation system which taxes on the basis of the individual. Since this is the case, it should be of no concern that one possible end result is that some couples with similar incomes pay different amount of taxes. The focus on the individual and equity between all persons has to be at the centerpiece of such a model. How an individual chooses to arrange his or her relationships is not the concern of the tax system. Those who find such a result offensive, do so because they believe the family should be given special consideration and the role of the Act is to provide some level of equity in tax burdens between families. Ensuring that families pay similar levels of tax is not a pressing aim, particularly when under the Act there is no concern for all families, only those that are able to define themselves in a traditional manner.

---100 According to Kenneth J. Boessenkool and James B. Davies, a single-income earner pays too much tax at each level of income. K. J. Boessenkool & J. B. Davies, "Giving Mom and Dad a Break: Returning Fairness to Families in Canada's Tax & Transfer System" November 1998 C.D. Howe Institute Commentary - The Taxation Papers No. 117 at 8; J. S. Barraclough, "Individual or Family: Beyond Ability to Pay, An Examination of the Appropriate Unit of Tax in Relation to the Broad Goals & Policies of the Canadian Tax System" (1993) 57 Sask. L. Rev. 349.

---101 See Judith Grbich, "The Tax Unit Debate Revisited: Notes on the Critical Resources of a Feminist Revenue Law Scholarship" (1990-91) 4 C. J. W. L. 511 at 515, where the author states that the tax unit problem is often set in the context of two families with the same income paying different levels of income tax.

---102 See J. Crago, supra note 86 at 23 and D. G. Duff, Canadian Income Tax Law, supra note 100.
The next section of the paper will further develop the argument that one of the ways to rectify the structural discrimination which gay and lesbian couples experience from not being included in the definition of "spouse" is to move to a purely individual tax unit under the Act without benefits and burdens being based on spousal relationships. This discussion is timely because there is the strong possibility that gay and lesbian couples will be pulled into the definition of spouse and treated like married and common-law couples.\textsuperscript{103} If gay and lesbian people are included in the definition of spouse, some gay and lesbian couples will benefit from this inclusion and others will be disadvantaged. As a result, there is paralysis in the gay and lesbian community over strategies of engagement with the Act. By opting for a purely individual system this debate in the gay and lesbian community is moved beyond the deadlocked position of inclusion\textsuperscript{104} versus exclusion.\textsuperscript{105}

The following provisions which will be discussed effect gay and lesbian couples in either a negative or a positive fashion, because of their exclusion from the definition of spouse;
this effect, along with the problems of each section will be outlined in an effort to convince the reader of the need to move to the purely individual model.

CHAPTER THREE
REASONS FOR THE INDIVIDUAL TAX UNIT

THE INCONSISTENCY OF IT ALL

THE ATtribution RULEs

The attribution rules, which have been in the Act since 1917 are a mechanism for dealing with income splitting.\(^\text{106}\) Income splitting is the transfer of income from a higher income individual to another who pays tax at a lower marginal rate.\(^\text{107}\) Generally, this transaction occurs between taxpayers who share economic interests: trusts, family members and corporations controlled by a family member. Although this type of financial ordering causes the taxpayer to abandon legal ownership of the income, the income is utilized within the confines of the union the transferor has formed and the transferor retains the benefit of its use. Such a scheme ensures that the tax liability on the income is lower and the group benefits from more after tax income.\(^\text{108}\)

To aid in the prevention of income-splitting, sections of the Act outline various scenarios where attribution takes place. First of all, any income or loss from property transferred or loaned by an individual, "either directly or indirectly, to or for the benefit of a person who is the individual’s spouse or who has since become the individual’s spouse" or a related minor\(^\text{109}\) is attributed back to the individual. Thus with the transference of property, the

\(^{106}\) See subsections 56(4), 56(4.2)-(4.3), and sections 74.1 - 74.5 and 75.1, supra note 1.

\(^{107}\) B. Arnold et al., supra note 31 at 141.


\(^{109}\) This term encompasses, not only one's minor children, but the transfer to an individual who is the niece or nephew of the taxpayer, see paragraph 74.1(2)(b). See Interpretation Bulletin IT-510, “Transfers and Loans of
resulting income or loss is not included in the income of the spouse or the minor, but that of the transferor. Where the transfer or loan of property is to the transferor’s spouse, the rules also stipulate that any allowable capital loss or taxable capital gain on the disposition of the property or substituted property is attributed to the transferor.

As is evident from the above discussion, the rules apply to loans of property and transfers which are for the benefit of a person. There are two exception to these rules. Under subsection 74.5(2), if a loan is made and the interest which is charged is not less than the prescribed rate, or an amount that would be agreed upon by arm’s length parties, and the loan was repaid not later than 30 days after the end of the taxation year, any income or loss is not subject to the attribution rules. The second exception to these rules deals with transfers to a minor or a spouse which is made at fair market value. According to subsection 74.5(1), if a transferor receives fair market value in consideration of the transfer, there is no attribution of a gain or loss.

The Act has tried to deal with the phenomenon of using trusts or corporations to split income through the use of attribution rules. Subsection 74.3(1) of the Act stipulates that where a taxpayer has transferred or lent property to a trust, where another person who is a designated person, -- a spouse, non-arm’s length minor, or niece and nephew -- is beneficially interested, the property will be attributed to the transferor. Subsection 74.5(9) provides that

Property Made After May 22, 1985 to Related Minor,” December 30, 1987 which defines related minor as “ a person who is under 18 years of age, and who a) does not deal with the individual at arm’s length (e.g. a parent and a child or other descendant whether by blood relationship or adoption, do not deal at arm’s length) or b) is a niece or nephew of the individual.”

110 See subsections 74.1(1) and (2), supra note 1.
111 Attribution rules do not apply to income which comes from a business where the capital is provided by a spouse or parent.
112 See Income Tax Regulations C. R. C. c. 945 part XLIII.
114 See subsection 74.5(5), supra note 1.
the loan or transfer to a trust will be deemed to be for the benefit of the recipient. Therefore the income is attributable to the transferor.\textsuperscript{115}

When dealing with corporations, attribution rules also apply. Under subsection 74.3(2), where an individual loans or transfers property to a corporation \textsuperscript{116} "either directly or indirectly by means of a trust or any other means whatever," and one of the main purposes of the transfer or loan was to reduce the income of the transferor and to benefit directly or indirectly, a designated person,\textsuperscript{117} the transferor is deemed to have received income as set out in the provision.\textsuperscript{118} Where all the conditions are present, interest is attributed to the transferor or lender of property. The amount of the interest is calculated at the prescribed rate of interest, multiplied by the outstanding amount of the loan or unpaid sale price of the transferred property.\textsuperscript{119}

Two problematic issues arise with these rules. If ours is a system which operates primarily on the premise that the individual is the unit of taxation, why do we need sections which prevent income splitting? One reason is to preserve vertical equity.\textsuperscript{120} Without these rules, due to the progressivity of the system, allowing a high-income taxpayer to reduce his tax liability by transferring income-producing property to a lower-income relative would violate the notion of vertical equity, as the tax liability of the high-income earner would be similar to that of the low-income earner. Even though this appears to be a laudable aim, an underlying

\textsuperscript{115} A person is beneficially interested if they have a right as a beneficiary under a trust to receive any of the income, or capital of the trust. See subsection 248(25). \textit{supra} note 1.

\textsuperscript{116} This form of attribution does not apply if the corporation qualifies as a small business corporation under subsection 248(1). \textit{supra} note 1.

\textsuperscript{117} Other conditions must also be met. The designated person has to be a specified shareholder, meaning that they own 10% or more of any issued shares of any class of the corporation, the transferor must be a resident in Canada, and the corporation must not be a small business corporation.

\textsuperscript{118} See subsection 74.3(2). \textit{supra} note 1.

\textsuperscript{119} There are other rules that deal with income splitting. See section 56(2) which sets out that income will be attributed where a taxpayer directs that such income be paid or transferred to another person, and section 69(1) which is roadblock for a taxpayer who wants to transfer a property that has appreciated in value to a non-arm's length party as a means of income-splitting. Also see section 103(1.1) which tries to prevent income splitting and applies where members of a partnership, who do not deal with each other at arm's length, agree to share the income or loss of the partnership in unreasonable proportions. When this occurs, the partners shares are determined to be what is reasonable, considering all of the circumstances. \textit{supra} note 1.

\textsuperscript{120} C. F. L. Young, "The Attribution Rules," \textit{supra} note 108 at 298.
question still remains: would a true violation of equity occur upon the transfer of property and the recipient paying tax on the income or capital that she received? Under a tax system which uses the unadulterated individual as the tax unit, once the transferee is legally entitled to the capital gain or income, she should be taxed on this property as it belongs to her and not the transferor. However, this is not the case with the current system which uses the individual as the tax unit. Currently, it is the transferor which must face the continued tax burden. So for instance, if a husband transfers property to his spouse, the income which the transferee derives from the property will be attributed to the husband.

Another problem with these provisions is that they are in consistent; income splitting between a taxpayer and a roommate, an adult child or other related adults, except a spouse, is allowable. What is disallowed is income splitting in the family, nuclear or reconstituted, through spouses and related minors. This discouragement of the transfer of property to spouses and related minor children is striking since the categories of spouse and minor child have historically been statuses which have not held any power, and have been under the control of another, i.e. a husband or father. People that existed in the category of wife or child tended to have very little rights in society, economic or otherwise, and therefore could be controlled. By maintaining this distinction to prevent income splitting, the legislation reinforces old notions about women and children: it is not plausible that these individuals could actually own property. The assumption is that they are being used for the financial gain of a husband or father. This way of thinking about children may be justified on the ground that even though a parent transfers property or income to a child, he still controls the child and thus controls the income. However, as it applies to wives this view needs to be uprooted and removed; women no longer exist in an age where they have no legal personality and are unable to own

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121 See L. Zelenak, "Children and the Income Tax" (1995) 49 Tax L. Rev. 349 at 372-373, where the author discusses how to impose tax liability on families that share their discretionary income and notes that one's decision on how to do so is based on whether one adopts a benefit or control principle when looking at this income. Zelenak states: "Under the control principle, the adult earner is the proper taxpayer on all clear income, and the number of dependents with whom he shares consumption of the income should be irrelevant. Under the
property. By focusing on wives and children, these provisions demonstrate their limited application. They target relationships where income splitting seems likely to happen, but fail to account for other areas where it may happen as well. Hence, the rules do not preserve equity between individuals, but try to minimise the use of the family as a means of reducing tax liability.

In keeping with a purely individual tax unit, the attribution rules should be repealed. Abolition of this provision has many features to recommend it. Currently, the exclusion of gay and lesbian couples from the definition of “spouse” means that the attributions rules which are designed to cover spousal relationships do not apply to their relationships. This means that same-sex couples can engage in the forms of income splitting which the attribution rules try to prevent spouses from engaging in. This a financial advantage for some same-sex couples. However, this exclusion is disadvantageous on a symbolic level and suggests that gay and lesbian people cannot form families where members are selfless and look out for each other. These provisions operate on the assumption that families have common economic interests and will work together, even to the extent of outmaneuvering the law to maintain their economic interests. This is because families work as a unit, for the betterment of the unit, which is built on love, caring and compassion. By not including gay and lesbian couples into the definition of “spouse” the prevalent view is that same-sex relationships are so lacking in concern for its members that they would not arrange their economic life in a method that is financially advantageous. Nor is there enough trust to believe that they would share their assets; they do not operate as a family. Repeal would eliminate the negative aspersions cast on gay and lesbian relationships.

Secondly, repeal would ensure more consistency in the system as the individual would be liable for tax payable on income or capital gains from property transferred to her, and the burden of tax would fall on the correct person. People would be seen as individuals in that

*benefit principle, each family member should be taxed on the income he consumes, which makes the number of people sharing the clear income crucial for tax purposes.*
their desires to treat their property as they desire is respected by the government who would not invade their lives and tell them how to behave, based on assumptions about how all families should operate. This push towards greater individuality and respect of individual choice would also have positive ramifications for women.

Men tend to earn higher incomes and have more wealth than women. Under the current manifestations of the attribution rules, men are discouraged from transferring some of their affluence to their spouses. The abolition of these rules may encourage spousal transfers to the lower income spouse, as it would be the owner of the property that is liable for the tax and not the transferor.123 This may lead to a greater distribution of wealth to women who own a disproportionately low percentage of the wealth in Canada.124 In turn, this wealth ownership would also propel women along the way to further economic equality in society.125


> It is arguable, however, that the logic of accepting the individual as the unit of tax should be carried forward to the elimination of the attribution rules. After all, the tax savings caused by income-splitting is purchased at the price of a legal divestment of the income-earning property in favour of another individual... Moreover, the repeal of the attribution rules would provide an incentive to property-owners to share their property with spouses and children, which might contribute in some small way to a more equitable distribution of wealth, especially to women, who often lack the same opportunity to accumulate wealth as men. P. Hogg & J. Magee, supra note 25 at 108.


Solutions, other than repeal, have been proposed to deal with the inherent difficulties of the attribution rules, but they should be rejected due to their inherent problems. One of these solutions is to introduce the married or common-law couple as the unit of taxation to ensure that women have access to property that their husbands want to transfer to them. With the adoption of the marital unit, the attribution rules dealing with spouses, and a number of other provisions — the spousal tax credit and the transfer of credits — could be removed. However, changing the tax unit is a radical way of dealing with attribution problems since it would affect the entire Act. It is also a myopic view because the marital model has its own problems, (as canvassed above) least of which is that it does not take into account the income splitting that occurs with minor children. See L. Zelenak, “Children & the Income Tax,” supra note 121 at 372-379; Martin J. McMahon, “Expanding the Taxable Unit: The Aggregation of the Income of Children and Parents” (1981) 56 New York U. L. Rev. 60 at 61. Martin McMahon investigates the possibility of aggregating children’s income with that of their parents for reporting and computing tax liability.

Another more scultpured solution is to apply a rate of tax that is equal to or higher than the top marginal rate to transactions which are attempts at income splitting. The present sanction of including the income in the transferor’s income has little deterrent effect, to the scheming taxpayer, for if the transfer were not made, the income would still be taxed at that the transferor’s marginal rate. The negative aspect of this proposal
THE FAMILY THAT HANGS TOGETHER BY THE THREAD OF THE ACT

THE ALIMONY PROVISIONS

Support payments paid for the maintenance of a spouse are included in the income of the recipient,\textsuperscript{126} but are deductible to the payor,\textsuperscript{127} as long as they are made under an order of a competent tribunal or a written agreement. By pulling these payments into the Act, the alimony provisions give recognition to the past relationship of husbands, wives, and common-law spouses. While giving these relationships recognition, these provisions treat disintegrated families as entities which will continue to act together to further common economic interests. This becomes evident if one looks to the rationale for this provision. These provisions were intended to alleviate the economic hardship that may have ensued once a marriage was dissolved and a man had two households to support. The idea was that if men were not oppressively burdened with support payments, they would be more likely to comply with support orders.\textsuperscript{128} Since a man was responsible for and tied to his previous wife, this provision would make that obligation easier to fulfill, while also aiding him in the support of

\textit{is that it does not respect legitimate transfers which may occur between husbands and wives. See C. F. L. Young, "The Attribution Rules," supra note 108 at 315. The government has recently attempted to partially put such a system in place. Revenue Canada has responded to the Supreme Court of Canada case of Neuman v. M.N.R. [1998] 1 S.C.R. 770 where the family was able to convince the judge that its income splitting was within the bounds of the Act. Although the decision dealt with income splitting between spouses, Revenue Canada responded by attempting to reduce income-splitting between parents and minor children. The government has proposed that tax will be imposed at the top marginal rate on particular income of individuals who are under the age of 17 starting in the year 2000. The types of income which are covered by this provision are:

1) Taxable dividends and other shareholder benefits of unlisted shares of Canadian and Foreign companies (received directly or through a trust or partnership); and
2) income from a partnership or trust where the income is derived by the partnership or trust from the business of providing goods or services to a business carried on by a relative of the child or in which the relative participate.


For a discussion of Neuman see D. G. Duff, "Neuman and Beyond: Income Splitting, Tax Avoidance, and Statutory Interpretation in the Supreme Court of Canada" (Forthcoming).

126 See paragraph 56(1)(b), supra note 1.
127 See paragraph 60(b), supra note 1.
his new family. This treatment of the disintegrated family unit is problematic for woman, as these sections treat women poorly in relation to men.

Alimony is typically paid when there is a great disparity in income or wealth between the two ex-spouses. Men tend to have more money than women, thus women are generally the recipients of alimony, which once received has to be included in income. This inclusion wreaks economic hardship on these women as it increases their tax liability and reduces the after tax dollars they have to look after themselves. The inclusion is coupled with the absence of a gross up mechanism which would account for the tax which is coming out of the recipient's income. Ideally, such a subsidy to the tax payer should enable the recipient to obtain a greater amount of support which would operate to minimize the effects of the tax payable than what would have been provided if the alimony payments were not included in income. However, the amount of support remains fixed without any concern for the tax consequences of the recipient.

Conversely it is the male payer who receives a benefit in inverse proportion to need. It tends to be men in higher income brackets who receive the greater benefit from the deduction. Due to the functioning of the system, the more income a payer earns, the greater the deduction he can take in computing his income. This means that the higher income spouse is able to reduce the amount of income on which tax is calculated, and thus receives a benefit, while the lower income spouse will have increased her tax liability with the inclusion of the alimony payment. The person in need it does not receive a benefit.

This provision is also problematic for same-sex couples. Gay and lesbian couples currently cannot benefit from these provisions; they do not qualify as "spouses" under the Act. This means that if a member of a same-sex union is paying support to another, the payer cannot deduct the payment from income. Tax liability cannot be reduced on even terms with his/her

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129 P. Hogg & J. Magee, supra note 25 at 380.
130 Durnford & Toope, supra note 128 at 37 - 38.
heterosexual counterpart, nor can the recipient include the payment in his/her income. This result has lead to inconsistency in the law due to the recent case of *M. v. H.*¹³¹

*M. v. H.* dealt with two women who were in a same-sex relationship since 1982. The couple separated in 1992, and M made a claim, *inter alia*, for support under the provisions of the *Family Law Act*¹³² and also launched a constitutional challenge to sections of the *Family Law Act* which defined spouse as "...either of a man and woman who are not married to each other and have cohabited...continuously for a period not less than three years."¹³³ The court found that the *Family Law Act* drew a distinction between common-law, opposite sex spouses and cohabiting same-sex couples, which resulted in the denial of a benefit to M. This denial was found to be in violation of section 15(1) of the *Charter*, resulting in the court striking down the offending legislation, albeit suspending the remedy for six months to give the legislature time to address the issue of same-sex coverage under the *Family Law Act*.¹³⁴

The consequence of this ruling, coupled with the definition of “spouse” in the *Act* is an inconsistency between provincial and federal laws. The Ontario legislation entitles gay and lesbian couples to claim spousal support, like common-law couples; however, the *Act* does not allow them to take part in the inclusion and deduction scheme like common-law couples. The government must act to maintain some level of consistency between provincial and federal laws. One way to do so is to include gay and lesbian couples in the definition of “spouse” under the *Act*. Inclusion would establish consistency between federal and provincial laws and put an end to some discrimination against same-sex couples. However, this cannot be the only method of reform. Simple inclusion would cause gay and lesbian people to embrace provisions which treat women inequitably. To join this system without critical analysis will serve to reinforce women’s poor treatment, and further run the risk that gay and lesbian people will access a system whereupon the dissolution of a spousal unit, the poorer of the two will be

¹³⁴ For the Ontario government’s legislative response see supra note 24.
impacted upon negatively, while the richer, receive benefits. Thus replicating the same problems which women face today.

Another method of reform, in addition to the inclusion of same-sex couples would be to allow the payer to deduct the payment, but the recipient would not be obligated to include it in income. This would result in the recipient of alimony not having to pay taxes on the alimony payment. This reform would focus on the lower income spouse and recognize the financial hardships caused by inclusion, and be an aid in the elimination of women’s poverty. It is also possible to further modify this suggestion so that payments beyond a specific amount would be non-deductible to the payer, and the recipient would only include payments which exceeded a certain dollar value. The benefit of this reform is that it is tailored around the ability to pay of the recipient and payer. The deduction diminishes and disappears as we move into the higher brackets, thus this scheme aids only those who have financial difficulty fulfilling their alimony obligations. The inclusion of the payment is only mandated as the recipient moves higher up the economic scale, resulting in lower income individuals not including the payment in income. This is necessary since alimony may be vital in fostering a subsistence standard of living for a number of women. Conversely, wealthier women would have to include a portion of their payment in income. In essence, the payment will not be included in the income of the recipient until high levels of income are reached.

As ideal as these methods of reform appear, they do not address all of the problems with the current provisions. Therefore, the ideal method of reform is the abolition of the deduction and inclusion system so that we can move closer to a purely individual system. Maintenance of the deduction and inclusion system in any fashion ensures that the post divorce

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135 The individual paying alimony is not obligated to deduct the payments. Section 60 begins: “There may be deducted in computing a taxpayer’s income...” However the wording in subsection 56(1) obligates the recipient to include the payment in calculation of income. It states “...there shall be included in computing the income of a taxpayer for a taxation year. Supra note 1.

136 Durnford & Toope, supra note 128 at 32-33.

137 Durnford & Toope, supra note 128 at 40.
family is viewed as an intact unit, that prevents us from looking at whether women are receiving adequate financial care and penalizes their dependency.

Maintenance of the present system also guarantees further inconsistency in the system. The *Act* tries to minimise income splitting; however, the alimony provisions allow income splitting between the recipient and the payer. Normally, if a high income spouse transferred income to a low-income spouse in the hopes of minimizing his tax liability, he would be unable to do so, because of the attribution rules. But under the alimony provisions of the *Act*, when a divorced or separated couple has money transferred from the high income spouse to the low income spouse, in the form of an alimony payment, it is not caught by the attribution rules, as this income is taxed at the lower marginal tax rate of the recipient. When one contrasts this practice with families which are intact and cannot deduct the same cost against any of their income, the unfairness is further compounded. The fractured family is bound together by these provisions which allow them to circumvent the attribution rules. A move to the unadulterated individual model would ensure that same-sex couples did not have to fit themselves into the dynamic of the supporting husband and dependent wife and that women will no longer be taxed on alimony, which can be detrimental to their financial standing.

**INDEPENDENCE VERSUS DEPENDENCE**

I. **SPOUSAL TAX CREDIT**

Although our system views the individual as a tax unit, the *Act* acknowledges the situation of individuals with dependent family members, through the provision of personal taxation credits, which alleviate the burden of paying taxes at the lower end of the economic

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138 Another problem with the alimony provision is the horizontal inequity it engenders between individuals who receive lump sum payments, payments on a periodic basis, and payments under a court order. Support payments which are lump sum, not court ordered or are not periodic, are not deductible or included in the income of the recipient. See *Sturkenboom v. Canada* (1997), T. C. J. No. 525 (Tax Ct. Can.) where the taxpayer was denied a deduction for alimony paid, for he did not have a court order which required him to make the payments.

scale. One credit which takes into consideration the possibility that one spouse may be dependent on another is the spousal tax credit. Under this provision, a person who during the year had a common-law spouse or was married and supported his spouse and is not living separate and apart from the spouse, because of a breakdown of their marriage can claim a spousal tax credit. The spousal tax credit is calculated by multiplying $5718, which is reduced by the spouse’s income in excess of $538, by seventeen percent. If a spouse has an income which is less than $538, the spousal tax credit will be $972.06 (17% x $5718). If a spouse has income of $6256 or more, then the spousal tax credit will be nil.

When this credit was introduced in the Income War Tax Act as an exemption in 1917, it was intended to serve as a mechanism for recognizing the responsibilities which were attendant with a family. It was aimed specifically at ameliorating the financial circumstances of a taxpayer who had to provide for a wife. The rationale was that a spouse without any taxable income reduced the filer’s ability to pay taxes, as the income-less spouse had to be supported by the other.

There are several reasons why this provision should be removed in the aims of achieving an unadulterated individual system. First, it is counterproductive that in society’s

--- Citation ---
141 Paragraph 118(1)(a), supra note 1.
movement towards women's equality, there exists a provision in the Act which supports women's subordination. This provision supports a family composition where one spouse, as a primary earner, usually the husband, and the other with little or no income, usually the wife, exist together. 147 Such a formulation is stunning, with all the feminist writing on the role of the family in women's subordination. 148 It is further bothersome that this provision supports the circumscribing of women's autonomy. Specifically, this credit is delivered due to women's association with men. It is delivered because women are unable or have decided not to provide for themselves. This way of structuring their lives is given some type of benefit by the tax system.

The curtailing of women's autonomy does not exist solely at the symbolic level, but also on a practical level; women are discouraged from joining the waged labour force, due to the disappearance of this credit if they earn more than the predetermined dollar amount. Further, the credit is given to the husband and not the poorer wife. In essence, husbands are given a benefit because they have decided to support women's dependency. 149 This method of delivery supports the erroneous assumption that women in relationships share, or have access to their husband's income, thus the credit will be passed along to them.

Another problem with this provision is its class bias. This occurs as the effects of this provision is felt most strongly where one spouse has little or no income and the other has some against which the credit can be used. It is usually only a family with a middle to high level of income that can afford to have only one spouse working. Therefore, those couples who have incomes in the middle to high range benefit more from this provision than those in the lower

146 J. R. Kesselman, "Credits, Exemptions, and Demogrannts," supra note 140 at 660.
income range. This is an unfortunate reality, especially in light of the fact that a disproportionate percentage of low-income taxpayers are single parent mothers who cannot make use of this credit. 150

We live in a society where the expectation and avenues exist so that women will be dependent on men for their existence. Women have been socialized to believe that this is a viable option and way to exist in the world. Although we have moved away from this being the only model in society, it does maintain a strong presence in society. However, it is not a necessary state of affairs that women are dependent on men. Different ways of existing in the world are necessary for women when one considers the incidence of divorce in society, and women and children's incidence of poverty following divorce. Women are being done a disservice when they are being convinced that men will support them and their children for the majority of their adult life. The spousal tax credit is one provision which supports this vision of women to their detriment, as it legitimates dependency on a male partner.

In the aims of crafting a system where the individual is the centrepiece, the abolition of this provision is recommended to eliminate the difficulties caused by this provision. With the removal of this provision, there would no longer be an outright disincentive to women's desire to work in the waged labour force, as having the credit diminish as the wife's income increases, sets up a barrier to women's labour force participation and encourages them to stay in the family for their support. There would no longer be any incentive that they remain financially dependent beings. Husbands would not have an incentive to encourage their wives' dependent status nor would they benefit from it. In addition, individuals would not be able to

151 K. Lahey, The Taxation of Women in Canada: A Research Report (Kingston: Queen's University, 1988) at 396. This is to an extent compensated by her ability to claim the “equivalent to spouse” credit in paragraph 118(1)B(b), that is worth the same amount as the spousal credit. Nevertheless, this credit can only be claimed for one dependent, therefore a mother with several children cannot claim this provisions. In addition, due to the non-refundability of this credit it may not be useful if her income is less than $ 2241.62 (the combined amount of her basic personal tax credit and the “equivalent to spouse” credit). KPMG Canada, Budget Commentary -- 1999 Federal Budget, February 16, 1999.
rely on their marital status, dependency or other family ties, and would be forced to rely on themselves for their sustenance.

Some critics of this method of reform fear that it would penalize women who have decided to work only in the home, as it denied them recognition for doing house work.\textsuperscript{151} A response to this concern is to acknowledge that housework and child-rearing are important endeavours which serve a vital role in society; they are the means we use to rear the next generation and to sustain ourselves as we interact with the larger world. However, this credit is an insufficient amount to recognize the work that is done in these areas by women who decide to work in the home. And by having a spousal tax credit, the care of members of society is made into a private issue, with the responsibility placed at the doorstep of the family. Considering the historic oppression which the family has visited on women, it seems unwise to use it as a vehicle for women’s aid for the reason that it may serve as a means of covering up women’s impoverishment in relationships, through the assumption that men will be their providers. This assumption plays itself out in an obvious way, as it is the husband who receives the benefit and not the wife. What needs to be done is that measures are to be employed to compensate and recognize house work, but outside of the taxation system, so that the intended recipient receives the benefit and an adequate level of compensation is given to each woman in need.

The spousal tax credit is another benefit which gay and lesbian couples do not receive, because they are not considered to be “spouses.” Thus, if they model themselves after a family where one partner is a breadwinner and the other earns next to no income, they will be unable to take advantage of this tax credit, although they operate like their heterosexual counterparts. By changing our taxation system to a purely individual system, the concern that gay and lesbian couples may have, that they are supporting a system which paints a very narrow view of the family, will be eliminated. Thus, any dependency that may exist in gay and lesbian

\textsuperscript{151} K. Lahey, \textit{The Taxation of Women in Canada}, \textit{ibid.} at 443; Women & Tax Working Group, \textit{supra} note 22 at III.
relationships would not be supported by the Act, and individuals needs would be addressed through public means in an adequate manner.

II. TRANSFERENCE OF CREDITS

There are provisions in the Act which allow family members to transfer credits to each other. Each credit can be transferred to one’s spouse, and in some cases to one’s supporting parent or grandparent. The credits which can be transferred are the tuition tax credit, the education tax credit, the age credit, the pension credit and the disability credit. These transfers can be very beneficial, as they allow the transferee to reduce tax liability by applying the credits to his or her income. If there is no income to apply the credit against, a transfer will not be possible and any benefit from the unused tax credit will be lost.

This ability to transfer unused credits from one spouse to another is founded on a notion of a family which has one economic interest. The theory is that spouses and family members work together, pool their resources and support each other. Since families that operate in this manner provide a positive benefit to society, the family unit is designated as being worthy of benefit under the Act, and thus is given special treatment. However, it is questionable as to whether the family operate in this manner, and what is more troubling is the family unit which is being endorsed through this mechanism. The family model which is being rewarded is a narrow paradigm and is disadvantageous to women. This will become evident with a brief description of the operation of this provision.

When a transference of credits is warranted, it is the most effective when there is a spouse with little or no income, usually the wife, who transfers the credit(s) to a spouse with income, usually the husband. By having these credits function at their optimal level, where one spouse works, and another does not, these provisions imply a preference for certain types

152 Under subsection 118.5(1) the transfer can be made to a grandparent, supporting parent or spouse.
153 Under subsection 118.6(1) the transfer can be made to a grandparent, supporting parent or spouse.
154 Under subsection 118(2) the transfer can be made to only a spouse.
155 Under subsection 118(3) the transfer can be made to only a spouse.
of relationships. The spousal relationship which is being endorsed under these provisions is one where there is a breadwinner and another person who is dependent -- the traditional family model. By allowing a transference of credits only in cases where there is a great disparity in income between the two spouses, the government supports the economic dependency of women, as it continues to give husband’s benefits for their wives lack of employment. Since the actual credit is given to the wealthier spouse and not the dependent spouse who may need this money, this provision also supports the concentration of wealth in the hands of men and does not account for the possibility that women in relationships do not have access to their partner’s income. By allowing men to benefit from women’s dependent status, the government is going to lengths to legitimize women’s subservient and impoverished state within the family. If we look closely to two other transference-like credits in the Act -- the medical expense credit and the charitable tax credit -- we see that elements of these criticisms are also present in their operation.

a) Medical Expense Tax Credit

The medical expense credit is another provision of the Act which demonstrates the beneficial treatment which is accorded to the heterosexual couple or the family. The medical expense credit is intended to offset expenses incurred in the provision of medical services to a patient. The person who qualifies as a patient is the taxpayer, the taxpayer’s spouse or a dependent of the taxpayer.

An individual may deduct a medical expense tax credit determined by the following formula: the lesser of $1614 or 3% of the person’s net income, is subtracted from the total amount of medical expenses incurred, with the difference multiplied by seventeen percent.

156 Under subsection 118.3(1) the transfer can be made to a spouse or parents.
157 M. Mahoney, “What is the Appropriate Tax Unit,” supra note 33 at 136.
158 Paragraph 118.2(2)(a), supra note 1.
If a spouse without income has medical expenses, but cannot use the medical expense tax credit, as s/he has no tax liability to apply it against, it can still be used by the other spouse to diminish that spouse's tax liability. In allowing spouses to combine their resources, (one partner can deduct the medical expenses of the other partner) this section propagates the erroneous notion that all spouses pool their resources in an effort to further their economic interest. Because of the limits on who can transfer this credit, the traditional family and the marital unit is given preferential treatment. This preferential treatment suggests a belief on the part of the government that it is only these types of relationships which should be supported, in the aim of alleviating the burden of extra medical expenses.

The rationale for the existence of the medical expense credit is to provide economic relief to individuals who have endured extraordinary medical expenses. For those who have incurred a great deal of medical expenses, Revenue Canada recognises that their ability to pay taxes has been hindered, so their tax burden is reduced. This reduction of the tax payable for those who have had to incur a great amount of medical expense is a vital policy goal in this time of fiscal restraint, where practices and procedures which may have been covered by the health care system in the past, are no longer financed by the government. In addition, this coverage has expanded to cover care from non-doctors in recognition that a larger segment of the population is seeking its medical care from non-traditional sources. With this state of affairs, it is obvious that this credit serves an important role in society, by filling in the gaps government has left open.

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161 The Act recognises this as payments made in relation to a private health services plan qualifies as a medical expense which is eligible for credit. Interpretation Bulletin IT- 519R2, "Medical Expenses and Disability Tax Credits," supra note 159.
162 Interpretation Bulletin IT- 519R2, "Medical Expenses and Disability Tax Credits," supra note 159. The section includes chiropractors and naturopaths as medical practitioners.
163 It was implemented to fill the gaps left by the provincial government with its reduction in subsidies for disability related support under provincial social assistance. Federal Budget Supplementary Information, February 18 1995. Interpretation Bulletin IT- 519R2, April 6, 1998 "Medical Expense and Disability Tax Credits," supra note 159. To respond to those taxpayers who are unable to benefit from the medical expense credit because of a low level of income, the government implemented the refundable medical expense supplement. This refundable tax credit is meant for low-income working people who have higher than average
Although gay and lesbian couples have health problems, they do not receive the same benefits under this provision as their heterosexual counterparts, for they are unable to deduct their partner's medical expenses. By allowing heterosexual couples to shift the credit between themselves, even though the person who may eventually claim the credit has not undergone a medical procedure, this provision only supports heterosexual couples and operates on the assumption that they share economic interests.

b) Charitable Donation Tax Credit

Another tax credit which has a transference element is the charitable donation tax credit.164 The charitable donation tax credit allows donations made by an individual to qualified Canadian charitable institutions or the Crown to be eligible for a tax credit. Under this section, the tax credit is calculated based on two percentages: the charitable donation tax credit consists of 17% of the lesser of the individual's total gifts for the year and $200, plus 29% of the donation which exceeds $200.165 Revenue Canada has implemented a policy whereby it allows couples to pool their charitable donations receipts, so either spouse can claim a portion or all of the contributions made by either spouse.166 The credit is the most financially beneficial where the value of this tax credit is nil to the low income spouse, as she has no tax liability to apply the credit against, and the tax credit can be utilized by the higher income spouse to reduce his tax liability.

On a large scale, this tax credit is meant to encourage philanthropy and serve a major role in the arts, social welfare, health, and education; through the subsidization of private gifts

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164 Subsection 118.1(3), supra note 1.
165 See subsection 118.1(1) which sets out a limit to the amount that can be claimed as a gift. Supra note 1.
the government can foster the growth of these pursuits, while minimizing its financial burden. On an individual scale, this tax credit serves to encourages spouses to contribute donations as it reduces the financial hardship which may result because of a contribution.

Gay and lesbian individuals can take advantage of the charitable donation tax credit, but not same-sex couples, as they are unable to use their partner’s contributions. They are not given the same incentive to contribute as are their heterosexual counterparts, causing one to wonder if gay and lesbian couples do not require the same incentive or their money is not as useful as a heterosexual couple’s.

Gay and lesbian couples are unable to reduce their tax payable through provisions which allows for the transference of credits, the charitable donation tax credit and the transference of a medical expense credit for a “spouse.” All of these variant transfers serve vital aims, but in each instance, relief goes only to the nuclear family, although individuals in varying type of relations could benefit from access to these provisions. If the definition of “spouse” did change to include gay and lesbian couples, those gay and lesbian couples, where one couple has little or no income and the other is supported by the other partner, could most effectively utilize these transference provisions. In essence, to receive the most financial

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168 See W. J. Turnier, “Personal Deductions and Tax Reforms: The High Road and the Low Road” (1986) 31 Villanova L. Rev. 1703 at 1723 where the author states that a charitable contribution deduction or credit leads to more plurality in society as it would provide support for a large number of institutions that government would be unlikely to support.

169 See V. Krishna, Income Tax Law supra note 26 at 222. Vern Krishna raises the interesting question of how much incentive this credit actually provides. He states:

It is difficult to be certain about the efficiency of the incentives for charitable giving. To the extent that some taxpayers would contribute to charities and foundations regardless of tax incentives, the amount of the incentive (whether deduction or credit) is a ‘windfall’ for the donor. Thus, the incentive is only efficient to the extent that it induces charitable giving over and above one’s natural instinct to support philanthropic activities.

For a concurring view see M. D. Hughes, “Unmasking the Two Tier Tax Credit Scheme” (1989) 8 Philanthropist 16 at 20-21.
benefit from these provision, gay and lesbian couples would have to present themselves in the paradigm of the traditional family, which supports the dependency of one person on another.

One possible method of dealing with all of these transference provisions is to change the method of delivery. Under this new delivery system, the value of the credit in reducing the higher-income spouse’s tax payable would be delivered in the form of a refundable tax credit to the lower income spouse.\(^{170}\) The value of the credit would be calculated based on how much it would reduce their spouse’s income; lower income spouse would receive a refundable tax credit based on its value to higher income spouses. Such a mechanism would combat the notion that women in relationships have access to the income of their partner, and if they are truly needy, they would receive the additional benefit of having the credit delivered directly to them. However, there is a problem with this recrafting: women would still be receiving this benefit because of their dependency on men.

Perhaps a better way to deal with these provisions and the message they convey is to move closer to the individual model of taxation, so that individuals do not receive rewards through the tax system based on their relationships. Concretely, there should be a removal of provisions which allow couples to shift credits for the benefit of their family or spouses. In other words, there will not be any recognition of familial relationships, as individuals are taxed only on the basis of their income. Tax benefits will not flow from one’s marital status or dependency. The benefit of the elimination of the transference provisions would be the diminishment of the labour force barriers to women, and an increase in neutrality towards all relationships, as there would be no emphasis on family relations.

One concern with the abolition of all transference of credits provisions is that there would be an elimination of any benefits that homemakers receive from their husbands on

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\(^{170}\) A refundable tax credit is also advocated because there are some problems with using a tax credit as a means of giving benefits to individuals and families. Like the deduction, a tax credit does not give assistance to individuals without income and it fails to be fully beneficial for individuals with tax payable which is less than the credit. Such problems can be eliminated by making the tax credit refundable. This requires Revenue Canada to make payments to people who are eligible for the credit, but do not have enough income to employ the credits partially or fully, to minimise their tax payable. P. W. Hogg & J. E. Magee, supra note 25 at 44.
account of the transference of credits. In particular, abolition is seen as harsh when one looks at the medical expense credit. Some believe that it is counter-productive and unsupportive of women if the transference of medical expense credit is eliminated, because this is one of the few sources of recognition that women receive for their work in the home caring for the sick, elderly, and dependent.¹⁷¹ A response to the general concern of adequate compensation for the work that women perform in the home is to note that since the state has increased its reliance on women to raise children and provide for the sick and elderly,¹⁷² there should be more obvious acknowledgment of the service that they provide to society. There is no guarantee that these benefits actually reach women for the work that they perform, and that all those families that receive these benefits actually perform these tasks. If women are to receive some type of monetary reward from staying in the home and caring for its occupants, the amount that is provided through the transference of her credits to her husband is not enough. The transference provisions do a poor job of compensating women for these endeavours, so it could never be convincingly argued that their role was ever to compensate women. Thus, these provisions should be abolished and if some compensation is required, it should be provided in a differing manner. Compensation should be provided directly to the individual in need because she has to care for such a relative. It should not be distributed in its current roundabout fashion to the husband as a way to compensate him for the dependency of his wife. To cushion the elimination of the transference of the medical expense credit, the government could implement social programs to address women’s needs that may exist due to being a

¹⁷¹ According to the Women and Taxation Working Group: “The major sources of assistance with the activities of daily living for those 55 and up are spouses (50 per cent) and daughters (23 per cent).” Women and Taxation Working Group, supra note 22 at 41.

¹⁷² Women & Taxation Working Group, supra note 22 at 41.
family's main caregiver and could expand upon the level of medical services which it provides to Canadians free of charge.\textsuperscript{173}

All of the transference and transference like provisions contain underlying assumptions about how the family functions and what role it plays in individual lives. Usually, the assumption is that the family functions in an altruistic fashion and delivers equality for each of its members. Nonetheless, this viewpoint overlooks the history of inequality which the institution of marriage has laboured under. As Susan Okin states:

Gender-structured marriage is a clear case of socially created and reinforced inequality. In order to think about how to transform personal relations within marriage, it is essential to be fully aware of the present repercussions of the fact that for many centuries marriage has been the paradigmatic contract between unequals, operating so as to accentuate and deepen the initial inequality.\textsuperscript{174}

This notion of a joining of unequals is maintained in these transference provisions. To move in the direction of a society where the starting premise is that all are equal, we need to recognise the affects of these provisions on women's financial and social lives. This cannot occur by pretending or assuming that the traditional model of family is a bastion of growth for all women. Legislators must investigate how these provisions impact on women's lives and remove them, so women can gain equality in all realms of life.

\textbf{COULDN'T WE ALL USE SOME MONEY?}

\textbf{REFUNDABLE TAX CREDITS}

Two sections of the \textit{Act} which deal with refundable tax credits are the Goods and Services Tax Credit and the Child Tax Benefit. These sections take account of marital relationships, but, the marital relationship operates to the financial detriment of the individual; refundable tax credits are income tested, meaning that the credit declines and is eventually

\textsuperscript{173} One way the government may also improve the medical expense tax credit, independent of its transference element, is to re-evaluate the minimum level of three percent of income, since it is unlikely that these expenses are incurred solely as consumption. Medical expenses are a financial burden to the taxpayer and reduce their discretionary income, thus taxpayers should be compensated for them, regardless of their size.
eliminated once a taxpayer's income reaches a prescribed level.\textsuperscript{175} The government combines the income of spouses, thus they will reach the income cut-off more easily than a single person. The notion behind these income-tested provisions is the lower the income, the higher the transfer payment.

The Goods and Services Tax Credit has been designed to minimise the burden of the Goods and Services Tax on lower-income individuals.\textsuperscript{176} This credit is not used to reduce the current tax payable for an individual. Rather, the credit is calculated on the basis of the tax that is payable for the year and is then paid out in quarterly installments in the next year. Where a person has a spouse, the Goods and Service Tax Credit is determined based on the combined income of spouses and only one of the spouses may claim the Goods and Service Tax Credit. The refundable credit given is $199 for each adult and $105 for each child. Once the spouse’s combined incomes reach $25,921, the credit is reduced by 5\% of the family net income above that amount, until it disappears altogether.

The Child Tax Benefit is designed to help reduce the level of poverty that children may find themselves in by providing a minimum standard for the care of children.\textsuperscript{177} The federal government introduced the Child Tax Benefit in 1993 to replace the personal tax credit for a minor dependent, family allowance, and the refundable child tax credit. The Child Tax Benefit is paid to an eligible individual\textsuperscript{178} for a qualified dependent who is a child under 18 years of age.

\begin{itemize}
  \item \textsuperscript{175} S. M. Okin, supra note 148 at 123.
  \item \textsuperscript{177} Section 122.5, supra note 1.
\end{itemize}
age. This benefit is calculated in a four step process. The threshold level of entitlement for the benefit is $1020 per child and an additional $75 for the third subsequent child. An additional $213 is given for each child under seven, where no child care expense deduction is claimed. The $213 is reduced by 25% of the child care expenses claimed for the child. These benefits are then reduced by 5% of the family income, which exceeds $29,590. A National Child Benefit Supplement is then added, which is $955 for the first child, an additional $755 for the next child and $680 for each subsequent child. The National Child Benefit Supplement is will phased out at a family income level exceeding $29,590. The rate of reduction is 11% for one child, 19.7% for two children and 27.6% for three or more children.

Gay and lesbian people can claim the Goods and Service Tax Credit as individuals, as long as their income is not in excess of $25,921. Their exclusion from the definition of “spouse” means that members of a same-sex relationship do not have to claim only one refundable tax credit and have it reduced because their collective income exceeds $25,921. In essence, the exclusion of gay and lesbian couples from the definition of “spouse” means that the limiting aspect of this provision (i.e. the reduction of the credit based on income) will only occur on the basis of the individual’s income, as opposed to the couple’s income. Thus, low-income gay and lesbian couples could receive greater benefits under this provision than their heterosexual counterparts. For those who can claim this credit, this result is in their financial interest, since they will have a larger refundable credit than heterosexual couples with similar amounts of spousal income.

With the Child Tax Benefit, we see that gay and lesbian individuals are eligible to receive this payment and are not hindered by the definition of “spouse” which is employed in

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parent, the parent who primarily fulfills the responsibility for the care and upbringing of the qualified dependent is presumed to be the female parent...

179 For one-child families the rate of reduction is 2.5%. 1999 Official Budget Papers, The Budget Plan 1999, Annex 7, Tax Measures : Supplementary Information and Notice of Ways & Means Motions.
180 Ibid.
181 This amount will be raised to $29,590 in July 2000.
the Act. Unlike a heterosexual couple which is limited in the amount of Child Tax Benefit they receive because they must combine income, gay and lesbian couples do not combine income, so the decrease in the benefit based on family income would be eliminated. In addition, the level of payment begins to decrease with the increasing number of children under the National Benefit Supplement. For instance, if we have in household A a married couple with four children and $20,000 each in income and in household B a same-sex couple with four children, (two belonging to one parent) and each member of the couple earns $20,000 in income, it would be Family B that would receive more of the Child Tax Benefit. Family B would receive more of the Child Tax Benefit because each partner does not reach the income cut-off of $29,590 unlike Family A, which would exceed the cutoff because of its combined income. In addition, each partner in Family B (who is the parent of only two children) will receive $955 for their first child and $755 for their second child under the National Benefit Supplement, totaling $3,420. However, in Family A under the National Child Benefit Supplement, the family will receive $2,930 for all four children and it will be reduced by 27.6% of the family income in excess of $29,590. Thus, with two households, both with the same income divided evenly between the couple, four children and the only difference being that one of the couple is a gay couple and the other is a heterosexual couple, the same-sex family would receive more of the Child Tax Benefit than the heterosexual household.

It is the ability to claim credits like this which have led some in the gay and lesbian community to say that they do not want to be included in the definition of “spouse” as it would minimise their ability to capitalize on such provisions.183 This is a valid concern for those who are on the cusp of poverty, but not one which should impede a march forward towards equality. The march should be towards the purely individual model of taxation and not simply the inclusion of gay and lesbian couples into a system which is flawed. A move to a purely individual unit would rid the system of a provision which is problematic.

183 See G. V. Forster, “Refundable Tax: Credits: An Under-Utilized Source of Funds for the Destitute” (1990) 9 Philanthropists 24 who outlines how the refundable tax credit is beneficial for those who are poor.
One problem with the refundable tax credit is that spousal income is the basis of payment. A spousal income beyond a certain amount will result in the depletion of the Child Tax Benefit or the Goods and Services Tax Credit. By calculating the refundable tax credit in this manner, the assumption that is propagated is that all family members have equal access to income entering the household.\(^{184}\) Thus, individuals in families with middle to high income do not need these payments, as they have the benefit of the breadwinners income. This assumption has been continuously challenged by the knowledge that men do not necessarily share their incomes with their wives. According to Woolley et. al., women and children in households in the middle or high-income levels do not necessarily have access to the primary earner’s income.\(^{185}\) This means that since there is no guaranteed sharing at all levels, it is not only children in low-income families who need the refundable child tax credit, but children of families all along the income spectrum.\(^{186}\) In a move towards the unadulterated individual tax unit, the Goods and Service Tax Credit should not diminish based on the combined income of spouses. Rather, it should be determined based on the income of the individual, since there is no guarantee that couples share resources.\(^{187}\)

When we look at the Child Tax Benefit, another solution should be employed. The Child Tax Benefit should be removed from the Act and become a direct spending program, so

\(^{183}\) See K. Lahey, “Are We ‘Persons’ Yet?,” supra note 12.

\(^{184}\) In Poulter v. Canada (1995), T. C. J. No. 228 (Tax Ct. Can.) the taxpayer raised a similar argument. Poulter was an appeal from an assessment of the taxpayer’s 1992 taxation year. The taxpayer was required to include the income of her common-law spouse in calculations related to child tax benefits. Based on this, the Minister determined the taxpayer ineligible for child tax benefits.

The taxpayer appealed this determination, arguing that her common-law spouse was not the natural father of her child nor was he financially or emotionally responsible for the child. She further asserted that requiring her common-law partner to provide financial information was in contravention of the Privacy Act and the Charter, for it discriminated against her because she was in a common-law relationship with a member of the opposite sex. According to the taxpayer, if she were in a relationship with a woman, her partner would not have to include her income with the appellant’s family income. Thus she was being discriminated against due to her sexual orientation. The argument based on the Privacy Act was dismissed as being improperly prepared, and the Charter argument was dismissed, as the court found that persons living in a common-law relationship are not a distinct and insular minority under section 15(1) of the Charter.

\(^{185}\) F. Woolley, A. Vermaeten & J. Madill, supra note 177 at 33.

that it can reach some of its aims. One of its aims was to put an end to child poverty. Another
was to enable women to have some type of economic independence, since it is recognized that
they tend to be primary care givers.\(^1^9^8\) However, the low-level of payments impede women’s
economic independence, as these payments do not impact substantially on child poverty.
Thus, these women and children are trapped in a continual system of impoverishment. With
the removal of the benefit system from the Act, the issue of child poverty would be dealt with
as an independent social program, and the benefit would be increased so that it is large enough
to give women economic independence.\(^1^9^9\) It would also mean that all children, regardless of
their parents wealth, would be eligible for this payment, thus adequately addressing child
poverty without making assumptions about how high and middle income couples arrange their
lives.\(^1^9^0\) From the outside, a family may appear to be just and equal, in its treatment of all of its
members. However, this must not be assumed before we decide what is actually the case,\(^1^9^1\)
as the family is not always an equitable institution for women,\(^1^9^2\) who perform a
disproportionate share of housework and are primary care-givers.

Women become vulnerable in marriages when they operate along these lines and
become more vulnerable when they divorce and have children to care for without the support,

\(^{1^9^7}\) See P. Hogg & J. Magee, supra note 25 who argue that basing tax benefits on family income is not
consistent with having a tax system that does not impose tax liability on family income.

\(^{1^9^8}\) F. Woolley, A. Vermaeten & J. Madill, supra note 177 at 33.

\(^{1^9^9}\) F. Woolley, A. Vermaeten & J. Madill, supra note 177 at 34.

\(^{1^9^0}\) See J. Kesselman, “Credits, Exemptions and Demogranst,” supra note 140 at 685 who suggests that the
selectivity of such programs may have certain problems such that “Programs confined to lower income groups
often assume harassing administrative features that would not be tolerated by higher income individuals” and
notes that universal programs attract more political backing than selective programs.

\(^{1^9^1}\) S. M. Okin, supra note 148 at 151. Also see C. Vogler & J. Pahl, “Money, Power & Inequality Within
Marriage” (1994) 42 Sociological Rev. 262 at 285-286 where the authors state that gender inequality in
households is greatest where men control the finances. Also see F. R. Woolley & J. Marshall, “Measuring
Inequality Within the Household” (1994) 40 Rev. Of Income and Wealth 415 at 429-430 where the authors
suggest inequality in households is important as it affects policies which deal with the targeting of benefits and
more research must be performed in the area of discerning who generally controls family finances.

\(^{1^9^2}\) See Brenda Cossman who states that the traditional nuclear family is suspect, as women’s subordination is
grounded in the heterosexual patriarchal family with its “...sexual division of labour, the family wage, and the
public/privacy distinction, all of which are central to the subordination of women.” Cossman, supra note 105 at
10.
financial or otherwise, of their ex-spouses. Any assumption about the equality that occurs in
the family should be as minimal as possible, so as to not exacerbate the problems within the
household (i.e. child abuse and domestic violence). This assumption of equality and fairness
in families has resulted in the lack of intervention in the family and the absence of
accountability of family members. This has resulted in control by the physically and
economically dominant member over other members. In essence, women’s economic lives are
privatized in the family and the response of the tax system has been to promote the support of
women in the private realm by their families -- particularly men. To allow this to occur, the
taxation system must cleave to an ideology where women are dependent on men for their
welfare and well-being. This allows a veil to exist around the family in the name of privacy,
which can be dangerous for women and children.

The assumptions which are made renders the inequality which exists between men and
women in the family as the natural and private aspect of the family. The family is viewed as a
bastion of privacy, which is protected from the prying eyes of the state and immune from
commercial concerns during the interaction of members. The notion of the selfish arm’s length
transaction of the market is foreign to the sanctum of the family, where each member’s
economic concerns are to be dealt with by the unselfish breadwinner and nurturing is provided
by self-sacrificing wives. This view of the family results in the assumption that women’s
financial concerns are to be provided by the family. This in turn leads to women’s
dependency, which is endorsed by the spousal tax credit, transference of credits provisions,
women’s inability to ameliorate their economic position by owning property due to the
discouragement of the attribution rules; the pseudo-altruism of the male breadwinner in the
alimony deduction/inclusion system; and the poor distribution of wealth to all women on the
income scale, due to the refundable tax credits being based on the income of both spouses.

193 S. M. Okin, supra note 148 at 170.
194 S. M. Okin, supra note 148 at 129.
Constitutional Studies 221 at 274 - 276.
THE RICH GET TO KEEP THEIR MONEY
INTER-SPOUSAL TRANSFERS

The inter-spousal transfer provisions of the Act operate for the benefit of the married or common-law couple. These sections encourage the pooling and sharing of assets in a family by ensuring that assets are not diminished when they are shared by having to pay taxes. According to Kathleen Lahey, these provisions do not give the taxpayer a benefit in terms of a tax subsidy for partaking in a certain action. Rather, such provisions treat sharing between the family as a norm and ensure that these transactions are not treated like non-family transactions. They put the rules that apply to strangers into abeyance and maintain the wealth of the family, when it is shared, by not imposing tax sanctions. These provisions serve to construct and reinforce the idea that there is economic mutuality in a family. Families are held out as having one economic life, which is deserving of recognition in the Act.

Under these provisions, the Act enables a taxpayer to dispose of property without having to deal with the capital gain consequences. The transferor is deemed to have received proceeds of disposition equivalent with the adjusted cost base of the property. The recipient will be deemed to have acquired the property at that cost. The resulting gain or loss to the transferor will be nil. Any gains or losses that have accumulated in the possession of the transferor will not trigger tax liability when the property is transferred. Tax liability will come into play when the recipient disposes of the property, or is deemed to have disposed of it. These provisions apply to the transfer of property by one spouse to another, and the transfer of farm property from a parent to a child on death or inter vivos. To qualify for the rollover, there must be a transfer of capital property and the transferor and transferee must be resident in Canada. The recipient of the property must be the transferor’s married or common-

197 K. Lahey, Are We ‘Persons’ Yet? supra note 12.
198 B. Arnold et. al., supra note 31 at 584.
199 See subsection 70(6) which deals with death and 73(1) which deals with an inter vivos transaction. Supra note 1.
200 Subsection 70(9), supra note 1.
law spouse, the transferor's former spouse if the transfer is in settlement of rights arising out of their marriage, a spousal trust\textsuperscript{202} or a child of the taxpayer.\textsuperscript{203}

It is clear that these provisions see the family as pooling resources, as the rollover subsection dealing with the \textit{inter vivos} transfer of a farm, from a parent to a child is mandatory,\textsuperscript{204} and the rollover from one spouse to another or to a spousal trust, either \textit{inter vivos}\textsuperscript{205} or on death,\textsuperscript{206} is automatic unless there is an election not to have it apply. This is unlike other rollovers where an election must be made to have it apply.\textsuperscript{207} The mandatory and automatic nature of these rollovers imply that the family is so tightly bound economically that there is no choice to be made under subsections 73(3) and 73(1). The rollover will not be given any thought, because this is the way families operate and it is a natural state of affairs, therefore the only thought to be had is if they decide not to have the rollover apply. The choice has already been made; the starting point is that families operate in this manner. All families are pulled into this system, as assumptions are made about how they operate.

The result of these provisions is that there can be a deferred gain or loss which increases or reduces what would in other circumstances be a capital loss or gain when the recipient disposes of the property. Deferral of the acknowledgment of a capital gain under a rollover section of the \textit{Act} is beneficial to the taxpayer, as it is equal to an interest free loan, equal to the amount of the tax. Conversely, a loss which is postponed is disadvantageous, as it puts off a deduction from the taxpayer's income.

The purpose of the rollover provisions is to facilitate particular transfers of property by making them neutral in a tax sense. For example, the rollover of the family farm to a spouse or a child facilitates the transfer of property from one successive generation to another. Thus,

\textsuperscript{201} Subsection 73(3), supra note 1.
\textsuperscript{202} Subsection 73(1), supra note 1.
\textsuperscript{203} Subsection 73(4), supra note 1.
\textsuperscript{204} Subsection 73(3), supra note 1.
\textsuperscript{205} Subsection 73(1), supra note 1.
\textsuperscript{206} Subsection 73(6), supra note 1.
taxpayers can transfer their property without any deterrence or encouragement by the possibility of being taxed on a capital gain or receiving a deduction for a capital loss.\textsuperscript{208} Another reason for the existence of the rollover is mainly administrative. Between spouses, it is difficult to discern which of the party has beneficial ownership of the property and whose money went it the purchase. The provisions of a rollover for interspousal transfers eliminates the difficulty of tracing.\textsuperscript{209}

The family relationship is given so much privilege that the rollover sections can also apply on the death of the taxpayer. Subsections 70(6) and 70(9) allows for a tax free transfer of property on death. Again, this recognises the importance of this relationship. These provisions suggest that there is no real change of control or enjoyment when there is a transfer of property between a husband and a wife, reinforcing notions about the economic unity of a family.

The exclusion of gay and lesbian couples from the definition of “spouse” results in the rollover provisions being inapplicable to their unions. The consequence of this is that their absence from these sections of the Act impact negatively upon gay and lesbian unions in an ideological and financial manner. These provisions allow certain transfers as they try to encourage family sharing and in a sense reward the heterosexual family form by lessening its tax liability. As the Act leaves out gay and lesbian families, it suggests that its growth and ties are not as valuable as the heterosexual family’s. It demonstrates the legislator’s preference for heterosexual spousal-like relationships, which are assumed to operate as a family and is an institution to be protected. These provision are a blatant violation of the individual as the tax unit, as they aim to allow individuals to benefit from their spousal relationships to minimize or forestall tax consequences.

\textsuperscript{207} If a taxpayer donates capital property to a charity, subsection 118.1(6) provides an elective rollover. A transferor of property to a corporation in return for shares can take advantage of a rollover only if the transferee and the corporation jointly elect. Subsection 85(1), \textit{supra} note 1.
\textsuperscript{208} B. Arnold et. al, \textit{supra} note 31 at 612.
\textsuperscript{209} N. Brooks, “The Irrelevance of Conjugal Relationships,” \textit{supra} note 25 at 94.
the Act above here would be in increase in Revenue. The

According to Cline 31 whom is supplying that the government has not paid gay and lesbian couples into

isolation results. Depending on the gay and lesbian couples financial situation 32 it could be

Financial Advantage and Disadvantage to Gay and Lesbian Couples

sex system, not only those leading in political circles

put all economists on equal footing while encouraging all sections of society to contribute to the

system would remove the traditional “family” from the paradigm which is currently imbibed and

system would be able to avoid contributing to the tax system. A party individual

members do not benefit from their relationships, while others are able to access the same

Thus, an optimal solution would be to remove these rollover provisions so that family

benefit of only paying tax on three-quarters of a capital gain (this will be discussed below).

would be supporting a system which primarily benefits the wealthy who already receive the

with the incentive being the delayed capital gain of loss. However, gay and lesbian couples

loss. Thus may be an encouragement for men who want to transfer property to their wives.

since on the disposition of the property to the wife, there is no recognition of a capital gain or

discussed below) and thus encourages the transfer of capital property from husbands to wives,

because women currently do not own as much property and wealth as men (this will be a

good idea since the provision is somewhat beneficial to women. It is beneficial for women

One response to the implementability of this system is gay and lesbian couples is to pull

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either a positive or a negative experience. According to Claire Young, in terms of dollars, the
lesbian or gay couple in a relationship which mirrors the traditional family (i.e. one spouse is
financially dependent on the other) will face the most benefits from inclusion into the Act,
while groupings of two low-income individuals, where each partner earns the same income
will suffer the greatest financial distress. She states:

My conclusion is that if the “advantage” of being included as spouse under
the Act is determined by reference to tax dollars saved, then it will be the
lesbian or gay couple in a relationship in which one partner is economically
dependent on the other who will benefit the most from being included as
spouses under the Act. Conversely it will be the low income couple in
which each partner earns approximately the same amount of income that
will suffer the greatest disadvantage.²¹¹

To come to this conclusion Young uses three different paradigms of taxpayers to
outline the affect of inclusion in the Act under the definition of “spouse.” The gay or lesbian
couple which falls into the model of two high income spouses will face negative and positive
effects from inclusion into the Act as a “spouse”. One negative effect will be the inability to
claim two principal residence exemptions, since the rule provides that only one residence can
be claimed by a taxpayer, the taxpayer’s spouse or unmarried minor children.²¹²

One benefit of changing the definition of “spouse “to include gay and lesbian couples
for high income spouses, is that that when one of these partners dies, the capital property
owned by the deceased at the time of death will be deemed to have been disposed of by the
taxpayer.²¹³ If the capital property has appreciated in value, it will cause a taxable capital gain.
An exception to this is the rule that if the capital property is transferred to a spouse it is
transferred at its adjusted cost base, and thus rolls over to the other spouse without any

²¹¹ C. F. L. Young, “Taxing Times”, supra note 12 at 546. Also see C. F. L. Young, “Spousal Status, Pension
450 and P. Lefebour, “Same-Sex Spousal Recognition in Ontario” (1993) 9 J. L. & Social Pol’y 272 where the
author discusses this phenomenon in the area of the provisions of employment related benefits.
²¹² Section 54 “principal residence,” supra note 1. Exemption in paragraph 40(2)(b).
²¹³ Subsection 70(5), supra note 1.
immediate tax liability. The capital gain is deferred until the transferee disposes of the property, which thus results in a great deal of savings.

When Young looked at the model of two low income taxpayers, the change in the definition of "spouse" to include them in the Act, would be detrimental. In this model of the two low-income taxpayers it is assumed that each taxpayer would not own their own home, nor would they have any investments or savings. This would mean that they would be unable to take advantage of tax free transfers of property with the inter-spousal transfer provisions. Due to their low level of income as individuals, each likely accessed the Goods and Service Tax Credit and if they had children, the Child Tax Benefit. With their inclusion in the Act, their entitlement to the Child Tax Benefit and the Goods and Service Tax Credit would be less than what they could earn as individuals, as refundable credits are distributed based on the income of both spouse. Thus, the goal of ameliorating the hardship caused by the Goods and Service Tax and caring for children, under the Child Tax Benefit would be lost to those who need it, simply because they are spouses.

The paradigm of one taxpayer with a high marginal rate and another with a low marginal rate, according to Young, experiences the most benefits under inclusion out of any of the three models, although not all of the consequences would be advantageous. Incorporation of same-sex couples into the definition of "spouse" would mean that couples in this model would be able to take advantage of the transference of credits provisions, and the transference elements in the medical expense tax credit and the charitable donation tax credit. Currently, gay and lesbian individuals have access to the medical expense tax credit and the charitable donation tax credit, as well as some transference of credit provisions. However, with a change in the definition of "spouse," they can have the same level of access as their heterosexual counterparts in being able to transfer their unused credits to their partner and pool their medical expenses and charitable donations. All of these provisions offer the most benefit

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214 Subsection 70(6). Also see 73(1) which permits an inter vivos spousal rollover, supra note 1.

where one partner has little or no income, while the other has a great deal more. In such an instance, the couple will receive the maximum allowable dollar value of the credit. With inclusion, same-sex couples will also be able to claim the spousal tax credit, which would ameliorate their situation if they are supporting a partner. This is far more beneficial than the current system where same-sex spouses do not have access to these credits.

Aside from these beneficial provisions, this couple would be subject to the restrictive provisions of the attribution rules which would prevent the reduction of tax payable through income splitting, and the couple’s ability to claim the Goods and Service Tax Credit for the lower income spouse and the Child Tax Benefit for children of the lower income spouse would be eliminated, as the income of the household would be used to determine eligibility.

In contrast to Claire Young, Donald Casswell takes the view that there is no definitive answer as to whether the inclusion of same-sex couples in the definition of “spouse” in the Act will result in the financial disadvantage or advantage of gay an lesbian couple. He states:

There is no universal answer whether the Act’s restrictive definition of “spouse” results in a financial advantage or disadvantage for a same-sex couple in the sense of how much tax they pay as two single persons as opposed to what they would pay if recognized as spouses. The Act differentiates among people on the basis of the sources of their income and amounts of income they have. Thus being treated as two single people may result in a same-sex couple paying less tax than if they were taxed as spouses, whereas another same-sex couple may pay more tax.

This theme is also picked up in Kathleen Lahey’s work, where she investigates the benefits of being excluded from the definition of “spouse” in the Act, by outlining provisions that are intended to force family members to rely on themselves before turning to the state for assistance, provisions that are to prevent spouses from collaborating, and provisions based on the underlying assumption that economies of scale occur in families. She concludes:

Thus it is fair to say that queer communities are concerned -- and rightly so -- that inclusion of same-sex couples in couple-based benefit programmes would benefit some couples at the expense of others...Lesbians and gays with higher incomes also have mixed feelings about legal recognition of

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216 Paragraph 118(1)B(a), supra note 1.
217 D. G. Casswell, supra note 12.
218 D. G. Casswell, supra note 12 at 321-322
relationships. Some people feel that their property or income might be at risk, while some welcome the opportunity to obtain tax benefits as well as secure their partner’s and children’s financial interests.\textsuperscript{219}

The potentiality that inclusion may be negative for some same-sex couples has lead to concerns in the gay and lesbian community. The result of this concern is in-fighting in the gay and lesbian community over inclusion versus exclusion,\textsuperscript{220} as it raises arguments about the detriment that will ensue if gay and lesbian couples are forced to conform to the heterosexual model, with all of its negative features that could prevent gay and lesbian couples from developing more equitable relationships.\textsuperscript{221} However, the debate need not be forestalled by individual fears of paying higher taxes, receiving less benefits, or having to reveal their sexual identity.\textsuperscript{222} This juncture offers society a chance to rethink provisions which impact upon gay

\begin{quote}
Queer communities have reacted rationally and logically to the choices being given to them by this structure. Those who would pay higher taxes, lose social assistance, or otherwise be disadvantaged if they were deemed to be spouses, and those who would run the risk of being forced out of the closet by ascribed status, have quite sensibly pointed out that they have nothing to gain from relationship recognition. Therefore they oppose it. Those who recognize that relationship benefits are premised on the appropriative, hierarchical, or monogamous features of heterosexual relationships have also opposed relationship recognition, and are sometimes joined by those queers who find that drawing attention to these features serves their own privilege. And splitting the community very neatly down a deep fault line, those who have something to gain from relationship recognition endorse it, seek legislation, bring test litigation, seek funding, and try to organize around that goal. By continuing to attach a mix of benefits and burdens to recognized relationships, the state/society has virtually ensured that queer communities themselves will deadlock along lines of gender, race, sexuality, relationship form, and family structure.
\end{quote}

\textsuperscript{219} Kathleen Lahey, \textit{Are We ‘Persons’ Yet?}, supra note 12 at 344 & 346.

\textsuperscript{220} Kathleen Lahey aptly sums up the issue in the debate when she states:

K. Lahey, \textit{Are We ‘Persons’ Yet?} ibid. at 380. For a list of those fighting for inclusion, see C. F. L. Young, “Spousal Status, Pension Benefits and Tax,” supra note 210 at 449.

\textsuperscript{221} There is also the concern that same-sex couples can only be thought of as spouses if the force themselves into the heterosexual paradigm. As Donald Casswell asks: “What of relationships that do not fit within “partnership” as that expression is currently understood? Parent and child relationships? sibling relationships? non-intimate friendships? the menage a trois, the menage a quatre, the menage a plus? People who live in a cooperative with shared parenting responsibilities and perhaps a variety of permutations with respect to sexual relationships and intimacy generally?” D. G. Casswell, supra note 12 at 433.

\textsuperscript{222} Certain administrative features of the \textit{Act} which may uncover the identity of gay and lesbian people warrant using the individual as the tax unit. Since the \textit{Act} makes it necessary for individuals to state the name of their spouses and certify that the information is correct, and clearly outlines that it is an offence to make a false or deceptive return (Section 239(1)), if gay and lesbian couples are considered to be spouses, they would have to give this personal information to Revenue Canada. The information which is given to Revenue Canada is not kept completely confidential. There are several instances where the information may be divulged. For those gay
and lesbian people, and women in a negative way and move to recraft a system which is more equitable. It is not time to be stalled into a discussion of exclusion versus inclusion. Rather, it is time to be propelled into a discussion about how to make the system more fair and effective.

Once we investigate the type of system that gay and lesbian people are jumping into, with its inconsistency, propagation of dependency and its under-inclusiveness with respect to whom it gives benefits to, it is evident that a change is needed. A change is needed because even after formal equality is achieved between same-sex and heterosexual couples, the negative features of the system will still remain. These negative features are rooted in the philosophies which underlie the system.

One philosophy is that long-term heterosexual relationships should be privileged over others. This privileging occurs as these relationships are given recognition in the Act as assumptions are made about how this unit functions in section such as the Child Tax Benefit, the Goods and Service Tax Credit, and the attribution rules which operate to restrict this unit's supposed normal inclination to operate to provide for all members of this union and minimise its collective tax liability. This privileging also occurs as heterosexual couples receive benefits that other groupings cannot receive under the Act, such as spousal tax credit, the transference of credits, the pooling of medical expenses to claim the medical expense tax credit, and the charitable donations tax credit. Those who do not fit into the heterosexual model are not allowed to maintain this privileged stance, they are not even acknowledged. Same-sex couples are not allowed to eat from the tree of benefits to which their heterosexual counterparts have access, nor are they able to bear the burden of responsibility which is assumed to come with the spousal unit.

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and lesbian people who do not wish to reveal their sexual identity, they may have to live in fear that the knowledge will become public, or run the risk of committing and offence under the Act. With a system that no longer allocated benefits or financial burdens on the basis of one's relationship with another, the need to include the name of one's spouse would be unnecessary. See sections 122.64(2), 122.64(3) and 241(4), supra note 1. Also see P. Bendin, "The Requirement of Confidentiality Under the Act and Its Effect on the Conduct of Appeals Before the Tax Court of Canada" (1996) 44 Can. Tax J. 680, where the author discusses how the confidentiality requirement in the Act has to be balanced against the need of the Minister of Revenue to use this information in certain proceedings.
Another underlying philosophy in the Act is that women are dependent beings who must look to the family to alleviate their economic difficulties. This philosophy has been in play in the shaping of the benefit features of the Act. If we look to the spousal tax credit and the transference provisions, we see that they promote women's dependency, in the structure of their operation, the method of delivery and their disincentive to women's labour force participation. If we focus on the attribution rules, the alimony deduction and inclusion section, the Goods and Service Tax Credit and the Refundable Child Tax Benefit we see that they satisfy the other half of the equation in that they reinforce women's poverty and force them to look to their husband for assistance.

In an effort to unearth these philosophies and achieve more equality in the Act, we must move towards a purely individual system to further aid in the disabling of the social hierarchies of sexism and homophobia that we find in the Act. Equality is an important concept and it is necessary to deal with the structural discrimination in the Act. When we look at how this system further impacts upon women, we see that there are more provisions in the Act which, if left unchanged, will continue to have a negative impact.

The next section of this paper will look at the tax base, another structural component of the income tax system, and demonstrate that the manner in which it has been crafted has been detrimental to women in comparison to men, again reinforcing the notion that the criteria of equality must be a component of the Act so that all members of society, whether they be male, female, heterosexual, or homosexual, are treated fairly.

CHAPTER FOUR
THE TAX BASE

SOURCES OF INCOME

When constructing a tax system, deciding on the ideal tax base is one of the most important issues. The decision about what is included in a tax base reflects a society's view on
the appropriate sources of government revenue, the types of wealth that should be free from the reaches of taxation and the activities which should finance our social programs. The decision is usually between taxing income, wealth or consumption.\footnote{See A. Warren, “Would A Consumption Tax Be Fairer Than an Income Tax?” (1980) 89 Yale L. J. 1081 where the author evaluates arguments about the superiority of the consumption tax over the income tax and decides that either can be thought of as an ideal method for implementing distributional equity, but the argument that consumption taxes are superior because they are more fair is unconvincing.} Under the Act, we tax income. Evidence of this is found in the main charging provision of the Act where it is stated that, “An income tax shall be paid, as required by this Act, on the taxable income for each taxation year of every person resident in Canada at any time in the year.”\footnote{Subsection 2 (1), supra note 1.} Although income is the tax base of choice, if we comb the Act carefully, we see provisions for determining a taxpayer’s income without any definition of what constitutes income.\footnote{The definition section of 248(1) does not refer to this concept. Supra note 1.} Thus, to get a sense of what represents income under the Act, one needs to look at history.

Historically, there have been two competing conceptions of income -- the economists view of income and the source concept.\footnote{Arnold et al, supra note 31 at 5. Krishna, Income Tax Law, supra note 26 at 41.} Under the source concept of income, which has been influential in the interpretation and drafting of the Act, income consists of those amounts which recur on a regular basis from a source.\footnote{Arnold et al, supra note 31 at 51 and P. Hogg & J. Magee, supra note 25 at 134. The metaphor which attaches to the source concept is usually one relating to agriculture as a way to distinguish it from capital. In Eisner v. Macomber 252 US 189, at 206 (1919) Justice Pitney of the Supreme Court of the United States stated: “The fundamental relation of "capital" to "income" has been much discussed by economists, the former being likened to the tree or the land, the later to the fruit or the crop; the former depicted as a reservoir supplied from springs, the latter as the outlet stream, to be measured by its flow during a period of time.”} This source concept was quickly adopted in Canada’s first income tax legislation -- the Income War Tax Act in 1917. The Income War Tax Act defined income as follows:

For the purposes of this Act, “income” means the annual net profit or gain or gratuity, whether ascertained and capable of computation as being wages, salary or other fixed amount or unascertained as being fees or emoluments, or as being profits from a trade or commercial or financial or other business or calling, directly or indirectly received by a person from any office or employment, or from any profession or calling, or from any trade, manufacture or business, as the case may be; and shall include the interest, dividends or profits directly or indirectly received from money at interest upon any security or without security, or from stock or from any other
investment, and, whether such gains or profits are dividend or distributed or not, and also the annual profit or gain from any other source...

Once we move to the present day Act, we again see the prevalence of the source concept. For instance, section 3(a) states:

The income of a taxpayer for a taxation year for the purposes of this Part is the taxpayer's income for the year determined by the following rules:
(a) determine the total of all amounts each of which is the taxpayer's income for the year (other than a taxable capital gain from the disposition of a property) from a source inside or outside Canada, including, without restricting the generality of the foregoing, the taxpayer's income for the year from each office, employment, business and property...

From this section it is evident that there are three sources of income -- business, employment or property -- which are subject to tax rules for the calculation of income, as well as sources of income which are not listed by the Act.

Under the economist's view of income, supported by Robert Haig and Henry Simons, the focal point is the increase in the taxpayer's economic power. To measure this increase, the following definition of income was proposed:

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229 How far this ability to apply taxes to unlisted sources of income extends is unclear based on the Supreme Court of Canada's decisions in Fries v. M.N.R. (1990), 90 D.T.C. 6662 (S.C.C.) and Schwartz v. M.N.R. (1996), 1 C. T. C. 303 (S. C. C.). In Fries, the taxpayer participated in a legal strike. He received strike pay from his union, which was equivalent to the net pay he would have received, had he been working. The minister determined this to be income from employment. The taxpayer appealed this ruling on the ground that strike pay did not fall within the definition of income from a source under section 3. The Supreme Court of Canada agreed with the taxpayer, ruling that strike pay was not income from a source.

In Schwartz the court determined that damages that a lawyer received in a settlement based on the cancellation of his contract was not taxable as a "retiring allowance." In this case, a potential employer rescinded a contract of employment before a potential employee had begun work. The court held that the damage settlement was not taxable, because it was not income. It did not qualify as income from employment as the court could not ascertain how much of the settlement was to cover unrealized income under the contract of employment and the portion to be attributed to other concerns.

In addition, the amount did not qualify as a retiring allowance, for a loss of employment was mandated. Since there was no employment, there could not be a loss of employment. Finally, the court decided not to treat section 3 as a general provision that caught income from a source that has not been mentioned. In this case, La Forest J. for the majority reasserted that it was not only those sources which were listed that were the only sources of income. In a concurring judgement, Major J. doubted if there were sources of income other than those explicitly stipulated by the Act.

See Peter Hogg & Joanne Magee who have submitted that Major J.'s view is incorrect, as section 3 sets out the possibility of unspecified sources of income. However, they concede that Major J. may be correct as a matter of practicalities, as courts are reluctant to impose tax liability from sources not explicitly set out in the Act. P. Hogg & J. Magee, supra note 25 at 135.
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. In other words, it is merely the result obtained by adding consumption during the period to "wealth" at the end of the period and then subtracting "wealth" at the beginning. The *sine qua non* of income is *gain*, as our courts have recognised in their more lucid moments -- and gain *to* someone during a specified time interval. [emphasis in the original]251

This wide-ranging concept of income includes gifts, inheritances, windfall gains, capital gains and anything that increases the economic well-being of the tax payer during the tax period.252 It is administratively difficult to ascertain the amount of tax payable while using this concept, for this formulation demands the calculation of goods and services consumed during the tax period in addition to adjustments for the decrease or increase in the values of the assets at the start and end of the taxation period. The requirement of constant valuation of liabilities and assets by each taxpayer makes everyday commerce impossible.253


251 H.C. Simons, *Personal Income Taxation*, *ibid.* at 50. See V. Thuronyi, "The Concept of Income" (1990) 46 Tax Law Rev. 45 where the author attempts to refine the Haig-Simons definition of income by focusing on the criteria of fairness.

252 Simons set this out very clearly when he stated:

1. All gifts, inheritances, and bequests should be treated as income of the recipients for the year in which received.
2. Every transfer of property by gift, inheritance, and bequests should be treated as a realization, at the estimated fair market value, by the donor or by the deceased owner's estate.
3. Gains and losses from the sale of property acquired by gift, inheritance, or bequest should be calculated on the basis of fair market value at the time of transfer (as estimated for purposes of two provisions above). Simons, *ibid.* at 167.

He further stated that a "... solid structure of income-tax legislation must ultimately reach all gains in the hands of the person to whom they accrue (or in the hands of his estate), and it must be such as to require accounting under the income tax for all acquisitions and transfers of property." Simons, *ibid.* at 168.

253 V. Krishna, "Income Tax Law" *supra* note 26 at 41; V. Thuronyi, "The Concept of Income," *supra* note 231 at 48. Henry Simons recognised this problem stating that:
From the economist's model of income springs the comprehensive tax base. Under a comprehensive tax base, the tax base is to be as broad as possible, minimizing the use of exclusions. One of the precepts of this model is that the tax system be as fair as possible to all taxpayers, thus as many things as possible are taxed and there is little deviation from this ideal so that all taxpayers are treated equally in the areas of life which face taxation. Thus, included in the tax base would be all monetary and non-monetary receipts, which would include gifts, leisure, household production and windfalls.234

In 1962, the Royal Canadian Commission on Taxation was formed to investigate the tax system. In 1966, it issued its report. One of its recommendations was that Canada move toward a comprehensive tax base. However, the Carter Commission recognized the need to reformulate the comprehensive tax base so that it would better fit Canadian society. The Carter Commission stated:

The comprehensive tax base has been defined as the sum of the market value of goods and services consumed or given away in the taxation year by the tax unit, plus the annual change in the market value of the assets held by the unit. It would be futile to write such a definition into a taxing statute because it does not provide sufficient delineation, either to taxpayers or tax administrators, to make compliance and enforcement possible. In particular, it would be impossible to measure directly the value of the goods and services consumed by each Canadian individual or family each year. Similarly, an annual valuation of all assets is impractical.235

Another difficulty with the income concept has to do with the whole problem of valuation. The precise, objective measurement of income implies the existence of perfect markets from which one, after ascertaining quantities, may obtain the prices necessary for routine valuation of all possible inventories of commodities, services, and property rights. In actuality there are few approximately perfect markets and few collections of goods or properties which can be valued accurately by recourse to market prices. Thus, every calculation of income depends upon "constructive valuation," i.e., upon highly conjectural estimates made, at best, by persons of wide information and sound judgement; and the results of such calculations have objective validity only in so far as the meager objective market data provide limits beyond which errors of estimate are palpable. One touches here upon familiar problems of accounting and, with reference to actual estimates of income, especially upon problems centering around the "realization" criterion. Simons, supra note 230 at 56.

For his acknowledgment of other problems, see Simon, supra note 230 at 51-58.
234 Arnold et. al, supra note 31 at 60.
235 Carter Commission, supra note 77.
The definition of the comprehensive tax base which the Carter Commission felt would minimise compliance and enforcement problems and would operate well in the Act was one which would tax "...all the net gains, appropriately defined, of each tax unit on an annual basis..." The definition of net gain which the Carter Commission put forth was quite broad. It stated that:

The base of each unit would include the annual net gains less net losses, from:

a) the provision of personal services;
b) the disposal of tangible or intangible property
c) the receipt of gifts or legacies from other tax units;
d) the receipt of windfalls;
e) the ownership of tangible or intangible property;
f) any combination of these "sources..." Some of the major recommendations which came from the Carter Commission were that inheritances and gifts be included in the income of the taxpayer, windfalls gains be included as income and capital gains were to be fully taxable when realized.

The reformulated comprehensive tax base proposed by the Carter Commission was not adopted in the Act. One reason was the stringent criticism this model faced. For instance, the comprehensive tax base was thoroughly criticized by Boris Bittker for making the tax system more complex, in contrast to the simplification it was purported to import in the system.

It was also decried as an ambiguous concept, as the inclusion of some "preferences" in the income tax system would be as compatible with the Haig-Simons definition of income as

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236 Carter Commission, supra note 77.
237 Carter Commission, supra note 77 at 40.
238 Carter Commission, supra note 77 at 39.
239 In its desire to make the income tax base more comprehensive, the Carter Commission recommended that that government transfer payments such as such as unemployment insurance, family allowance, social assistance, workmen's compensation and old age pensions be included in income. Carter Commission, supra note 77 at 521-536. The government heeded some of these recommendations as employment insurance (subparagraphs 56(1)(a)(iv),(v) and(vi)) is included in income. However, when it comes to worker's compensation and social assistance, it seems that contrary to the Carter Commission's intention, it was included in name alone. Social assistance payments and workers compensation are included in a taxpayers net income by virtue of paragraphs 56(1)(a) and(v). However, they are deducted in determining taxable income under paragraph (110(1)(f)). The end result is that there is no tax imposed on these payments. Also see P. Hogg and J. Magee, supra note 25 at 141 and 381-382.
would be their removal.\textsuperscript{240} Although the Act does not have a comprehensive tax base, when we move to discuss the capital gains provisions in the next section, and pensions in the following section, it is evident that the comprehensive tax base is in operation for women, as more of their money is taxed, unlike men's, where more of their income receives preferential treatment.

**CAPITAL GAINS**

I. The History

Prior to 1972, capital gains were not classified as income under the Act.\textsuperscript{241} They were excluded from income on the basis that the gain did not originate from a source, but was the profit which came to fruition when the source was sold. This source theory had its origins in the English tradition of an agrarian economy, where land was thought to be capital and whatever it produced (i.e. fruit, vegetables) was viewed as income.

Canada's first income tax legislation, the *Income War Tax Act*, took its lead from American legislation which held the underlying philosophy that income could come from a wide range of sources.\textsuperscript{242} Most notably, the notion of income included capital gains.\textsuperscript{243}

\textsuperscript{240} B. I. Bittker, “A ‘Comprehensive Tax Base’ as a Goal of Income Tax Reform” (1967) 80 Harv. L. Rev. 925 at 935. See Richard Musgrave’s response to this where he rejects Bittker’s approach as ad hoc when dealing with the comprehensive tax base. In defence of a comprehensive tax base he states that a recognition of a basic concept of income tax “...is a prerequisite to the construction of an equitable income tax and belies that the accretion concept offers the best formulation. On most major issues this concept points to the proper solution, even though it may have to be qualified by considerations of administrative feasibility or, in some instances, may have to give way to other policy objectives.” R. A. Musgrave, “In Defense of an Income Concept” (1967) 81 Harv. L. Rev. 44 at 44.

\textsuperscript{241} R.S.C. 1948 c. 148 as amended.


\textsuperscript{243} In the United States, income taxation was brought in by the 1862 Revenue Act. Tax was imposed on “the annual gains, profits, or income of every person resident in the U.S. whether derived from any kind of property, rents interest...”. After a while the courts held that capital gains were not included in the taxing scheme due to the use of the word annual. However, the sixteenth amendment was enacted to broaden taxing powers, with the result that from 1913 through to 1921 the *Revenue Acts* were interpreted as applying to capital gains. The decision of *Eisener v. Macomber* solidified this view when the Supreme Court of the United States stated that “Income may be defined as the gain derived from capital, from labour, or from both combined, provided it be understood to include profits gained through a sale or conversion of capital assets.” 25 U. S. 189 at 206, 64 Sup Ct Rep. 189 at 192, 64 L. Ed. 521 at 527 (1920). Also see M. Maloney, “Capital Gains Taxation: Marching
However, the *Income War Tax Act* did not accept the wide-ranging vision of income which was present in the United States. Rather, the parts of the *Income War Tax Act* dealing with income developed in reference to English cases, where the Canadian judiciary maintained the distinction between capital and income by following the English judgments of the Privy Council, Canada's highest court of appeal at the time.244

The failure of the Act to tax capital gains was a major criticism of the Carter Commission. The Carter Commission stated:

...the only equitable basis for taxation is to include in the comprehensive tax base the value of all additions to economic power, including so-called capital gains. It may have been appropriate in years past to distinguish, for tax purposes, between gains flowing from property and those resulting from the acquisition and disposition of property, but in the current business and investment environment such a distinction has little if any significance. We are convinced that the failure to tax capital gains in Canada has no basis in principle; that it has led, and will continue to lead, to uncertainty as to which gains on the disposition of property are taxable and which are not; and that it affronts all standards of equity and neutrality which we feel should characterize a tax system. In our view the exclusion of capital gains is no longer defensible, if it ever was. We are convinced that the time has come to abandon this exclusion and to replace it with a more logical, certain and equitable basis of taxation.245

The Carter Commission's criticism was directed at an inequitable system which treated the $100 dollar earned by an employee differently from the $100 dollars which resulted from the sale of property. Their criticism was also directed at the system which reduced neutrality, since individuals would try to structure their transactions so that they resembled capital transactions to take advantage of the non-taxation of capital gains. The Carter Commission stated: "It is probably safe to say that the fact that income from a transaction will be exempt from tax, if realized through the disposition of an investment or a capital assets, is at the root of much of

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245 Carter Commission, supra note 77 at 325.
the very considerable effort directed to tax avoidance under our present system."246 Another criticism leveled at the capital/income divide was that it made for a great deal of uncertainty as judges had to attempt to determine the distinction between capital gains and business income.247 To remedy the problem of the non-taxation of capital gains, the Carter Commission recommended that capital gains be taxed fully on realization.248 The government did not implement the recommendation of the Carter Commission to tax capital gains fully, but it did tax an increasing portion of capital gains as the years progressed.

In the Act of 1972, capital gains were brought into the tax base, with fifty percent of a capital gain being taxable and fifty percent of capital losses being deductible.249 Further change was made to the treatment of capital gains as the years passed. In 1985 the federal government introduced a lifetime exemption of $500,000 from the sale of a capital asset realized by an individual.250 This was to be phased-in over the course of five years, but it was revised in 1988, with the exemption capped off at $100,000, except for the sale of family farms and the shares of qualifying small business corporations. This practice was terminated in 1994. Currently, capital gains are given preferential tax treatment under the Act with the principal

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246 Carter Commission, supra note 77 at 335.
247 On the issue of uncertainty the Carter Commission stated:

The present basic concept of income is so obscure that the tax administration and the courts are required to make distinctions where no real distinction exist. They are required to judge the motivation that guided a taxpayer to a certain result when frequently all the evidence of intention, both primary and secondary, could as easily be interpreted to indicate one intention as the opposite. In our view the present system requires both the administration and the courts to spend excessive amounts of time and skill in the making of hairline distinctions which are inevitable arbitrary, capricious and inequitable. Supra note 242 at 336.

Also see A. F. Sheppard, "Capital Gains: Twenty Years Later", supra note 244 at 88-92.

248 Although this was their recommendation, they recognised the inequity in taxing capital gains only when they were realized. The Carter Commission stated, "We have also pointed out the inequity inherent in the realization approach, in that taxpayers who retain investments which have appreciated in value are, in effect, allowed a tax-free investments of the accumulated gains that are built up free of tax, while others, who turn over their investments, are denied this privilege. Nevertheless, we have suggested that other considerations, for example, the administrative difficulties involved, requires that, in general, the theoretically correct accrual approach must give way to a realization basis for determining income. Carter Commission, supra note 77 at 379.

249 Income Tax Act R.S.C. 1970-71-72, c.63 as amended , s 38-40,
250 Department of Finance, Supplementary Information to Budget May 23, 1985.
residence exemption, the $500,000 exemption which is given to qualified farm property, to shares of a qualified small business corporation, and the taxing of only three-quarters of a capital gain.

II. The Arguments

Those in support of the preferential treatment of capital gains have offered several rationales for its treatment under the Act. One rationale is that the partial taxation of capital gains was a necessary means to offset the onerous process whereby a gain from the sale of capital property is bunched into one year. In the year of disposition, all the gains which have accumulated on the capital property are taxed. This gain is not spread out over the course of years and then taxed at the corresponding rate. Rather, it is bunched together in the year of disposition which then pushes the taxpayer into a higher income bracket, resulting in higher taxes.

One could argue that a simple way to rectify the bunching concern would be to tax capital gains at a full rate and on a yearly basis, when they accrue. Under an accrual method of taxing capital gains, taxpayers would have to prepare an inventory of assets, calculating the value of the property in particular blocks of time depending on which is the most useful, and the taxpayer would either pay tax on the corresponding gain or deduct the corresponding loss. One feature which recommends this method is the resulting minimization of people

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251 Paragraphs 40(2)(b) and (c), supra note 1.
252 Subsection 110.6(2), supra note 1.
253 Subsection 110.6(2.1), supra note 1.
254 Section 38, supra note 1.
258 See R. Krever and N. Brooks, A Capital Gains Tax For New Zealand, (Wellington, N. Z.: Victoria University Press, 1990) at 131-150 where they propose taxing capital gains on an accrual basis. They state:
who reduce market activity by hanging onto assets -- particularly those which have increased dramatically in value -- indefinitely for fear of the taxes which would ensue once the item is sold.\textsuperscript{259} However, if capital gains are taxed on a yearly basis, there may arise the liquidity concern, whereby owners of capital property are forced to sell their property to pay tax\textsuperscript{260}

This places a financial noose around the necks of those capital property owners who do not have a great deal of cash on hand, suggesting the need to tax on the basis of larger blocks of time. The timing of the taxation of capital gains is crucial, as the current system of taxing capital gains on a realization basis raises fairness concerns.

The taxpayer who has been able to defer tax liability by not having to pay the tax on the gain when it accrues, but rather when it is realized, is receiving an interest free loan from the government, equivalent to the amount of tax paid on the accrued amount.\textsuperscript{261} The realization basis of taxing capital gains defers the acknowledgment of gains for a significant period of time, allowing for a great deal of tax planning opportunities. Having control over the timing of the recognition of capital gains is a great deal of power, which is another perk given to owners of capital property. For instance, taxpayers may be able to reduce tax by deciding to realize a capital gain when other income is low so that they may take advantage of a lower tax rate and thus have less tax payable, or they may decide to realize their capital gain at a time when it can be reduced by capital losses.\textsuperscript{262} As Peter Hogg and Joanne Magee state: "To be sure,

\textsuperscript{259} R. Goode, The Individual Income Tax (Washington: The Brookings Institution, 1964) at 207. This is another way of referring to the locking in complaint. A criticism of the current treatment of capital gains is that it "locks" taxpayers into holding assets that have increased in value. This means that investors are reluctant to change their holdings, as doing so would cause them to incur a tax liability, which can be postponed by not selling. Also see P. Hogg and J. Magee, supra note 25 at 292-293 and R. W. Broadway & H. M. Kitchen, Canadian Tax Policy 3rd. Ed. (Toronto: Canadian Tax Foundation, 1999) at 156 for a discussion of locking in.

\textsuperscript{260} R. W. Broadway & H. M. Kitchen, "Canadian Tax Policy" ibid. at 91.

\textsuperscript{261} M. Maloney, "Capital Gains Taxation" supra note 243 at 312 and J. W. Wetzler, "Capital Gains and Losses," supra note 256 at 117.

\textsuperscript{262} Peter Hogg and Joanne Magee give examples of the tax planning advantages found in taxing capital gains on a realization basis. They state: "For example, in 1974, there was a drop in the stock market and taxpayers reported more losses than gains on corporate shares. In the same year, taxpayers reported gains on real estate
sometimes circumstances outside the taxpayer’s control will require a sale of capital property at a time which is inopportune for tax purposes. For the most part, however, the sale of property is a voluntary act, and the taxpayer will not do it without regard for tax considerations. Thus if the accrual method of taxing capital gains is rejected, to remove the benefit found in the realization method, interest could be imposed on unpaid taxes, a credit for losses may be required or a deferral fee for the deferred tax liability.

Another argument used to justify the preferential treatment of capital gains is that capital gains are illusory and result from inflation. Property which has been in one’s possession for an extended period of time will increase in value; however, the increase in value that one experiences with capital property is not a real gain, but the rising of prices due to inflation. When capital property is sold, to correct for this feature of our economy, preferential treatment

which totaled 300 per cent above the gains reported the previous year. It may be surmised that there was a connection between the two figures: what probably happened was that many taxpayers took advantage of their stock exchanges losses to realize gains on real estate. P. Hogg & J. Magee, supra note 25 at 292. See R. W. Broadway & H. M. Kitchen, supra note 259 at 91 where the authors state that this gives the owners of capital property the ability to engage in self-averaging. They state:

At the same time, there is no benefit to allowing taxpayers to choose the timing of realization. The accrual of capital gains may not be even from year to year. The taxpayer, by choosing an appropriate realization schedule, can even out the capital gains for tax purposes and avoid the inequities that arise under a progressive tax system when a taxpayer’s income fluctuates from year to year. In other words, taxpayers with capital assets can engage in self-averaging of their income tax. Of course, because this opportunity is not afforded to other forms of fluctuating income, its availability in this case exacerbates horizontal equity.

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263 P. Hogg & J. Magee, supra note 25 at 292.
Also see M. L. Fellows, supra note 257 at 727-728 who proposes taxing capital gains with an amalgam of an accrual and realization basis. She states:

To avoid liquidity and most valuation problems, the proposal operates in the Code’s familiar fashion of assessing a tax only when a market transaction occurs. However, the difference between the proposed taxing model and the Code is in the manner of computing the tax liability. The method proposed here uses the initial investment and selling prices to estimate the gains and losses for each period the taxpayer holds or produces an asset, computes a tax for each period based on the estimated market price changes, and adjusts the period’s tax for any payment delay. The tax assessed at the time of the realization event is the sum of the time-adjusted tax for each period that the taxpayer holds or produces the asset.

must be given to capital gains, as it is unjustifiable to tax those who have capital income on the basis of an illusory gain, caused by inflation.\textsuperscript{266}

Opponents of the preferential treatment of capital gains respond to this concern using a two-pronged assault. First, they note that preferential treatment is an imprecise method of dealing with inflation, if it is the cause of increased valuation. It is imprecise because all capital income receives favourable treatment, regardless of the effect of inflation. This is problematic since inflation impacts upon some assets differently than others. According to Maureen Maloney, land is more likely to be affected by inflation than a work of art, yet there is no differentiation between these assets. The price of land will rise in times of economic prosperity or plummet in economic recessions, but a work of art will usually stay constant in its value\textsuperscript{267}. However, their treatment under the capital gain regime will be similar. In addition it is not only capital income which is affected by inflation. For instance, an increase in an employee’s wage can be construed as not being a “real” gain, but as the result of inflation. Regardless of the cause of this increase, the employee would have to pay higher taxes. So in keeping with horizontal equity, all types of income should receive the same treatment as capital income.

A second argument which is often utilized to justify favourable treatment of capital gains is that preferential treatment encourages investment in Canadian assets and companies\textsuperscript{268}. Since Canada is a country of conservative investors, preferential treatment is needed to support that Canadian businesses which will create employment that in turn help to build the economy. The counter argument to this position is that preferential treatment of any capital gain does little to encourage risk taking, as the special treatment of capital gains does not encourage investment in innovative or risky corporations. According to Maureen Maloney, people are more likely to make safe investments such as real estate or invest in other items such as jewelry, antiques or land in a foreign country, which does little to aid Canadian corporations or create jobs in

\textsuperscript{266}J. A. Rendall, “Defining the Tax Base,” \textit{supra} note 255 at 149.

\textsuperscript{267}M. Maloney, “Capital Gains Taxation,” \textit{supra} note 243 at 310.

\textsuperscript{268}J.A. Rendall, “Defining the Tax Base,” \textit{supra} note 255 at 150.
Canada. Part of the unconvincing nature of the argument is the recognition that this method of rewarding and increasing risk taking is inefficient, for it is under-inclusive and over-inclusive. The inefficiency occurs because the preferential treatment is beneficial to investments which do not involve risky endeavours, such as real estate and blue chip securities; and of those business people who engage in risky investments, some are unable to transform their profits into capital gains.

III. The Women

If the Act is changed in name alone so that it includes gay and lesbian couples in the definition of "spouse," it will continue to leave in place a system which is beneficial for men, but not as advantageous for women. This is due to the preferential treatment which is given to capital gains. The preferential treatment which is accorded to capital gains represents a large amount of revenue loss on the part of Revenue Canada and a great concession by the taxpaying portion of society. When we look at the taxation statistics, we find that women do not benefit from the subsidy which the federal government has granted to taxpayers with capital gain income, to the same extent as men. As a source of income in the 1996 taxation year, men claimed $6,267,908,000 in taxable capital gains and women claimed $3,006,781,000. The amount of capital gains deduction for men in the 1996 taxation year was $2,036,993,000 and $710,604,000 for women. The preferential treatment which is given to capital gains is more beneficial to men, who tend to own more wealth in society than women. For instance,

\[ \text{M. Maloney, "Capital Gains Taxation," supra note 243 at 315.} \]
\[ \text{N. Brooks & A. Peltona, supra note 257 at 12 and R.W. Broadway & H. M. Kitchen, supra note 259 at 155-156} \]
\[ \text{Revenue Canada, Tax Statistics on Individuals 1996 Tax Year (Ottawa: Revenue Canada, 1998) at 87.} \]
\[ \text{Revenue Canada, Tax Statistics on Individuals 1996 Tax Year (Ottawa: Revenue Canada, 1998) at 87.} \]
\[ \text{See L. Philippa, "Tax Policy and the Gendered Distribution of Wealth," supra note 124 where she discusses how wealth disparity affects women when they interact with the Act.} \]
women do not tend to own their own homes to the extent that men do,\textsuperscript{274} thus they can’t take advantage of the generous principal residence exemption, to the same extent.

Capital gains and losses are usually included in the income of the taxpayer. However, when a taxpayer sells a principal residence, this is not the case.\textsuperscript{275} Under the principal residence exemption, on the sale of a residence designated as a principal residence, a capital gain attributed to the time that the property qualifies as a principal residence will not be taxed.\textsuperscript{276} The result is that the sale of the property is accomplished on a tax free basis.\textsuperscript{277} This exemption operates to encourage home ownership,\textsuperscript{278} which in turn leads to community stability.\textsuperscript{279} Nevertheless, it does not encourage this phenomenon for women, as they are less likely to own a house than men. Thus, this tax expenditure operates in an unequal fashion because women enter the tax system with less likelihood of owning wealth than men. This is exacerbated by a taxation system which demonstrates beneficial treatment towards wealth.

If the definition of “spouse” in the Act is changed to include gay and lesbian couples, the preferential treatment given to capital gains and its gendered impact on women would still remain. But there are other problems with the treatment of capital gains aside from those that relate to gender. One problem is its impact on horizontal and vertical equity. Horizontal equity demands that that those who have equal ability to pay taxes be treated in a similar manner.


\textsuperscript{275} A principal residence refers to a specific property that may be “...a housing unit, a leasehold interest in a housing unit or a share of the capital stock of a co-operative housing corporation...owned jointly or otherwise and ordinarily inhabited by the taxpayer, child, spouse or former spouse,” which is designated by the taxpayer as a principal residence. Section 54 “principal residence,” supra note 1.

\textsuperscript{276} Paragraphs 40 (2)(b - (c) and 54, supra note 1.

\textsuperscript{277} 54 “principal residence,” supra note 1. Only one home can be designated as a principal residence by the taxpayer, unmarried minor children or the taxpayer’s spouse.

\textsuperscript{278} B. Arnold supra note 31 at 648; C. Rand, Understanding the Act (Toronto: Carswell, 1989) at 143; V. Krishna, Income Tax Law, supra note 26 at 189.

\textsuperscript{279} Vern Krishna astutely notes that this rationale does not, however, account for the fact that the exemption is available for capital gains which are not reinvested in another home and is also available on homes outside of Canada. V. Krishna Income Tax Law supra note 26 at 189. Also see A. F. Sheppard, “Capital Gains: Twenty Years Later,” supra note 244 at 99 where the author states that another purpose of the principal residence
With one-quarter of capital gains remaining non-taxable, and other forms of income fully taxable, those that do not have capital income are not treated similarly to recipients of capital gains. For example, an individual who earns $40,000 in a capital gain would pay less tax than one who earned $40,000 in employment income.\textsuperscript{280} This causes one to question the fairness of the system as it is usually the wealthy that obtain capital gains; nevertheless, their financial burdens are minimized notwithstanding that they are not the neediest taxpayers. Another problem with the preferential treatment given to capital gains is that they affect the level of neutrality in the system. Capital gains treatment affects decisions on how resources are allocated, as there is a preference created for investments in equity as opposed to debt instruments. A capital gain on shares will yield a higher amount of after tax income than the same amount of interest income, since the capital gain is only three-quarters taxable when it is realized and the interest is taxed one-hundred percent on an accrual basis.\textsuperscript{281}

Since it is men who benefit from the favoured treatment given to capital gains moreso than women, one possible solution would be to tax a lower portion of women’s taxable capital gains. Therefore, women would have more access to owning capital gains as less of their money would be going towards taxes and some of it could be diverted to wealth ownership. However, this solution opens up some difficulty. First of all, it may only serve to make the select number of women who are wealthy, even wealthier. Secondly, a man who has less capital assets than a woman, will pay equivalent or higher taxes on the same capital gain, resulting in a violation of horizontal equity. What these problems highlight is that this proposal does not eliminate the class issue deeply embedded in the preferential treatment given to capital gains.

An equitable solution to addressing the class bias in the special treatment given to capital gains would be to tax capital gains at the full rate so that the wealthy do not benefit from exemption is to provide protection from inflation. As house prices tend to rise in general prices, all of the money will be needed to purchase a similar house.\textsuperscript{280} Individuals are allowed to claim certain deductions from employment income; however, this is limited under section 8(2), supra note 1.
this government subsidy.\textsuperscript{282} Full taxation of capital gains means that taxes would be imposed based on an individual's ability to pay taxes. It is unfair that those who can most afford it are only required to pay taxes on three-quarters of their capital income. This expenditure is a benefit for those who can most afford to derive their income from capital gains -- the wealthy. Full taxation would also serve to maintain equity in the system as individuals with similar amounts of income would pay similar amounts of tax, regardless of the source of the income. Currently, individuals with the same amount of dollar incomes are facing different tax burdens, depending on the source of this amount. For instance, two taxpayers with the same amount of income from different sources, such as employment and capital gains, would pay different levels of taxation. Individuals with capital gains receive preferential treatment, but those who derive their income from employment, will have to pay tax on all of their income. Finally, full taxation of capital gains would lead to further simplicity in the Act. There would be no need to distinguish between income and capital gains, thus eliminating the provisions in the Act dealing with capital gains and the court cases that delve into the capital gain/income distinction.\textsuperscript{283}

\textsuperscript{281} Paragraph 12(1)(c) and subsections 12(4) - (9), \textit{supra} note 1.
\textsuperscript{282} Since the capital gain will be taxed at the full rate only upon realization, there will be still be a benefit to the taxpayer who holds onto the capital gain, the equivalent of an interest free loan. To combat this there could be a deferral charge applied to minimize the benefits of deferral the holding period.
\textsuperscript{283} This distinction has led to a great deal of litigation. The question is usually whether a profit which has been realized on the sale of property is a capital gain or business income. If the sale is determined to be a realization on investment, then the profit from the sale is considered to be a capital gain. If the sale of the property is determined to be an "adventure in the nature of trade or trade," then the profit is classified as a business income. P. Hogg & J. Magee \textit{supra} note 25 at 290-291. See \textit{Scott v. M.N.R.} (1963), 38 D.L.R. (2d) 346 (S.C.C.) where the Supreme Court of Canada ruled that a lawyer who had bought 149 agreements and mortgages over an eight year period at a reduced price and then realized a profit as he held onto them until maturity, was a trader and thus his gains were income from business. Conversely, in \textit{Wood v. M.N.R.} (1969), S.C.R. 330, the Supreme Court of Canada ruled that a lawyer who bought 13 mortgages at a reduced price over a seven year period using his own money and then realized a profit, as he held the mortgages until they matured, was considered to be an investor who had realized capital gains. The court in \textit{Wood} ruled that the smaller number of transactions and the use of personal savings was in keeping with personal investments and not carrying on business. For a few more examples of this litigious issue also see \textit{Dhillon v. Canada} (1997), 97 D. T. C. 1310 (Tax Ct. Can.); \textit{Laurent J. Deshaies Inc. v. M.N.R.} (1992), 93 D. T. C. 867 (Tax Ct. Can.); \textit{Robert E. Angus v. The Queen} (1996), 96 D.T.C. 1824 (Tax Ct. Can.); \textit{Ross J. McGroarty v. M.N.R.} (1994), 94 D.T.C. 6276 (Fed. Ct. Trial Div.); \textit{Ethicon Sutures Ltd v. M.N.R.} (1983), 85 D.T.C. 5290; \textit{Credit Foncier Franco-Canadien v. M.N.R.} (1970), 70 D.T.C. 1609 (Fed Ct. Trial Div.); \textit{Kourdi v. Canada} (1999), 99 D. T. C. 5428 (Fed. Ct. App.); \textit{Landry v. Canada} (1996), 97 D. T. C. 575 (Tax Ct. Can.); \textit{Iula v. Canada} (1994), F.C.J. No 1196 (Fed Ct. Trial Div.); \textit{T. Eaton Co. v. Canada} (1999), 3 F. C. 123 (Fed. Ct. Trial Div.); \textit{Paquet v. Canada} (1994), 95
Although full taxation of capital gains may not seem to help women as it is both women and men who are paying increased tax, it would be useful as those who have the means and receive the benefit from this system are contributing more. There will be more wealth to distribute through the tax system and through some ingenious policy and proposals there may be a way for women to receive some of the increased wealth which is being filtered through to the tax system.

PENSIONS

The sections of the Act which pertain to employment pensions illustrate that once the Act is changed to include gay and lesbian couples in the definition of “spouse,” what remains is a system which is inequitable, inconsistent and unfair to women.

I. REGISTERED PENSION PLANS AND ROSENBERG

Registered Pension Plans (RPPs), to which both the employer and the employee contribute, are heavily subsidized by the tax system in three key ways. First of all, the contributions made by employers and employees are tax deductible.284 Secondly, the contribution that an employer makes is not taxed as a benefit of employment to the employees.285 The funds which have accumulated in a RPP on a tax-free basis are only taxed when the taxpayer withdraws money from the plan.286 Thirdly, the income earned by the funds invested in the registered pension plan is not taxable.287 This tax assistance is so large that for 1998, the value of the deferral and the deduction was estimated to be in excess of $18 billion, the largest tax expenditure for that year.288

284 See subsection 147.2(4) and paragraphs 20(1)(q)(t) Reg. 8502(b)(i) and 8503(4)(a), (b) and subsection 147.2(1), Reg. Part XXVII.
285 Subparagraph 6(1)(a)(i), supra note 1.
286 Subparagraph 56(1)(a)(i), supra note 1.
287 Paragraph 149 (1)(o.1), supra note 1.
Before the case of Rosenberg, if a plan provided survivor benefits, on the death of the plan member (either pre- or post-retirement), those benefits could only be provided to a "spouse."\(^{289}\) If the plan provided these benefits to anyone other than a spouse, the Minister had the option of refusing to register the plan or reregister an existing plan.\(^{290}\) Since the definition of "spouse" in the Act excluded gay and lesbian couples, partners of gay and lesbians were unable to receive survivor benefits. Thus, if an employer wanted to implement a pension plan with spousal survivor benefits for all employees, a separate plan for lesbian and gay employees would have to be established, the end result being that the plan would not receive any tax subsidy.

In an employment setting, the contribution to a plan is mandatory. Therefore if a separate pension plan is not established by the employer, lesbian and gay employees would have to contribute to a plan which did not give them the same benefits as their heterosexual counterparts.\(^{291}\) These complex issues were grappled with in Rosenberg v. Canada (Attorney General).\(^{292}\)

In Rosenberg, the applicants, Nancy Rosenberg and Margaret Evans were involved in separate lesbian relationships. Each woman was an employee of the Canadian Union of Public Employees (C.U.P.E.). C.U.P.E. was very generous to its employees, providing many benefits to them, their spouses and their children. Since 1989, C.U.P.E. had decided to recognise same-sex couples on the same footing as heterosexual spouses when it dealt with entitlement to all spousal benefits offered by C.U.P.E. One benefit which C.U.P.E. offered was a pension plan which provided survivor benefits to spouses of employees. Under a mandatory condition of employment, all C.U.P.E. employees had to join the plan. The

\(^{289}\) Regulations 8502(c), 8503(2) and 8506, supra note 101.
\(^{290}\) To qualify for registration see subsection 147.1(2), supra note 1.
\(^{291}\) C. F. L. Young, "Taxing Times," supra note 12 at 541.
applicants attempted to have their partners named as beneficiaries under the plan. C.U.P.E. in turn agreed that survivor benefits were to be given to the same-sex partners of its employees. However, the difficulty arose from the necessity of registering the plan so that the employee’s and employer’s contributions and the plan’s earnings could benefit from a tax deferral. Although C.U.P.E.’s existing pension plan was registered with Revenue Canada, it had to reapply to include the new definition of spouse in the pension plan. This application was denied. This meant that spousal survivor benefits under the registered pension plans were not available to same-sex partners. If a plan set out that survivor benefits were to go to a same-sex partner, the plan would not be registered and would not receive the tax benefits which accrue when a plan is registered.

At the Ontario Court of Appeal, the Attorney General conceded that such a provision was discriminatory on the ground of sexual orientation and in violation of section 15 of the Charter. Thus, the issue was whether the violation of the Charter was reasonable and demonstrably justified under section 1. The Ontario Court of Appeal determined that the discrimination could not be upheld under section 1 of the Charter. The court determined that the appropriate remedy was to read the words “or the same sex” into the definition of spouse in section 252(4) of the Act for the purpose of the registration of pension plans and amendments to registered pension plans.

This ruling was a positive event for the individuals involved, as it recognises gay and lesbian relationships. The absence of a more expansive ruling which would have added the phrase “or the same sex” to the definition of spouse generally may have more to do with the wishes of the appellants than that of the judges. Abella J.A. stated, “Although the word "spouse" is used elsewhere in the Act, the appellants have made it very clear that they are

1 See paragraphs 8(1)(m) and 20(1)(q), supra note 1.
2 T. Barclay, “For Richer or Poorer,” supra note 292 at 215.
3 Rosenberg, supra note 16.
4 Rosenberg, supra note 16.
seeking to deal with the definition of spouse only as it relates to the issue of pension registration.\textsuperscript{297}

It may be said that at a time when members of disadvantaged groups are looking to the courts to be protectors of equality, it is a shame that the judiciary in this case was too reticent to question whether the definition of “spouse” be broadened on a larger scale. However, once one understands the complexity of the debate over inclusion or exclusion in the gay and lesbian community, one recognises that the appellants may have been skeptical that a large scale attack on the \textit{Act} would be accepted and recognised that complete inclusion in the \textit{Act} would be financially detrimental for some gay and lesbian people.

II. REGISTERED RETIREMENT SAVINGS PLAN

Registered Retirement Savings Plans have numerous beneficial aspects supported by the \textit{Act}, which gay and lesbian couples cannot take advantage of. The \textit{Act} subsidizes the use of a RRSP as contributions to an RRSP are tax deductible\textsuperscript{298} and the income which is earned by a RRSP is protected against taxation while in the plan.\textsuperscript{299}

There is a limit to the amount that a taxpayer can contribute to an RRSP. As long as the taxpayer does not exceed this limit, he is entitled to contribute to his spouse’s plan. Such a system is beneficial in a situation where one partner has little or no income and the other has a great deal more. It allows for income splitting, for the taxpayer with the higher income can contribute to his spouse’s RRSP.\textsuperscript{300} Where the spouse is young, a longer accumulation period is advantageous, as the money does not face any tax consequences for a lengthy period of time. When the funds are withdrawn, there will be a direct tax savings due to the spouses lower

\textsuperscript{297} Rosenberg, supra note 16.
\textsuperscript{298} Paragraph 60(6) and subsections 146(5), (5.2), (6.1), supra note 1.
\textsuperscript{299} Subsection 146(4) and paragraph 149(1)(f), supra note 1.
\textsuperscript{300} Subsections 146(1) 146 (5.1), supra note 1.
marginal tax rate and the lower tax liability on the income. In addition to the tax savings given to the taxpayers on a deferral basis, the taxpayer will receive a deduction for this contribution for tax purposes in the year of the contribution and the attribution rules do not apply.301

There are other advantages to the RRSP. When a taxpayer with an RRSP dies, the money in that plan can be rolled over to the spouse of the taxpayer. Thus, the tax which would have been payable by the taxpayer in the terminal year, or by the receiving spouse, would not be payable at the time of death if the plan qualified as a refund of premiums.302 To qualify for this rollover, the spouse would have to place the money received from her deceased’s plan in her own RRSP or in an annuity contract. This feature can lead to a great deal of savings which will be determined by the value of the funds in the RRSP and the marginal tax rate that would have been applied to it.303 The purpose of such a provision is to enable a non-income-earning spouse to acquire an independent income on retirement with the tax system’s blessing.304

III. EVALUATION

The tax treatment of both RPPs and RRSPs is based on certain policy goals. One goal is to ensure that individuals have sufficient retirement income so that they do not become a state burden.305 The other is to increase private savings in the present to meet future pension needs.306 Although these are laudable ends, the provisions dealing with RRSPs and RPPs have several problematic areas.

301 But the attribution rules do apply where in a particular year, a taxpayer collapses a registered retirement savings plan that her spouse has contributed. The amount which is received by the taxpayer, which is her spouses contribution for the year and in the preceding two years will be attributed to the contributing spouse, and included in his income for that year. Subsection 146(8.3), supra note 1.
302 See paragraphs 60(1)(iv) and (v), supra note 1.
306 B. Austin, “Policies, Preferences and Perversions,” ibid. at 577. According to Maureen Donnelly, when the government reformed the pension rules in 1991, the system was changed to accord with the following principles:
First, the value of the deduction for a contribution to a tax assisted RRSP increases as the marginal rate of the taxpayer increases. Those taxpayers in a higher income bracket receive more tax assistance for any amount than those who have a lower tax rate. For instance, with those taxpayers who each contribute two-hundred dollars to an RRSP, they each receive a varying subsidy, with the high-income earner receiving the most. A higher-income taxpayer with a tax rate of twenty-nine percent will receive a subsidy of fifty-eight dollars. The taxpayer with a marginal rate of seventeen percent will receive a subsidy of thirty-four dollars, whereas a taxpayer without taxable income will not receive any aid. Thus, higher income taxpayers receive more aid for retirement savings than those with lower marginal rates. In addition, the amount of allowable contribution rises as the amount of income rises; thus, a high income earner can contribute a larger figure and receive a greater benefit. This is a great tax deferral system for the investment income of those in high tax brackets.

Secondly, although the government encourages saving for retirement through the tax assistance it provides to RPPs, this publicly funded subsidy is delivered in a fashion which eliminates many members of society from any entitlement. It is those individuals who work for large employers who can financially afford to have a pension plan. Individuals who work in part-time labour, for small employers who cannot afford to offer these plans, in non-unionized work, and those who are unemployed or self-employed will not have the benefit of

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1. Elderly Canadians should be guaranteed a reasonable minimum income. 2. The opportunities and arrangements available to Canadians to provide for their retirement should be fair. 3. Canadians should be able to avoid serious disruption of their pre-retirement living standards upon retirement... to create a system which would better reflect the needs of a labour force in which women have become increasingly active.


308 This rough calculation is only based on federal rates of tax. Once federal surtax is imposed and provincial taxes are included, the subsidy increases. See subsection 180.1(1) where a surtax of 3% is added and where federal tax is in excess of $12,500, the surtax of 5%. Supra note 1.

309 B. Austin, "Policies, Preferences and Perversions," supra note 305 at 585.
government tax assistance. It is generally women who fit into the above labour-force categories, thus they cannot benefit from the tax benefits provided by the government.

A woman who does not have access to a work related pension plan can contribute to a RRSP; however, this depends on having discretionary income to place in a RRSP. Since women tend to earn less money than men, they are less likely to contribute to this plan. Thus, women are denied tax assistance enjoyed by men. As a result, they are unable to save for their retirement to the same degree as men. When we look at elderly women, this is alarming as elderly women have a greater rate of poverty.

Since women’s participation in the paid labour force is lower, they do not have the same level of access to RPPs as men. If they have no income, they cannot contribute to an RRSP. There is a recognition in the Act of this problem, and it has special rules for spouses. For instance, RPPs can provide survivor benefits so that an individual receiving pension payments can, on his death, have the payments go to a spouse. Another mechanism in the Act which attempts to aid women is the ability of the individual to contribute to a RRSP in their spouse’s name. These provisions illustrate a problem with the tax assistance given to pension plans and RRSPs. Tax assistance is provided to individuals on the basis of their relationship with another person. Individuals who are single and individuals in same-sex relationships


More women than men tend to be employed on a part-time basis. Of men 25 years and above, 5.9% engage in part-time work whereas with women 25 years and above, 22.9% tend to engage in part-time employment. Statistics Canada, Labour Force Information (Ottawa : Ministry of Industry, 1998) Table 9A "Selected Labour Force."

For women who work primarily in the home and therefore are not a part of the waged labour force, RPPs are not of benefit to them. Barbara Austin states that, “A pension model that assumes a thirty-five year stint in the paid labour force does not reflect the experience of most women” B. Austin, “Policies, Preferences and Perversions,” supra note 305 at S87.


B. Austin, “Policies, Preferences and Perversions,” supra note 305 at S87.

Under section 118.8, persons who are unable to use pension credits can transfer them to a spouse. Thus, heterosexual couples have an advantage over same-sex couples and individuals in the tax treatment of their retirement income.
are discriminated against.\textsuperscript{316} It appears that legislators are turning a blind eye to the reality of some women's lives. Presently, more women than ever before are living without a spouse. "Lone-parent families headed by women are also especially likely to have low incomes. In 1993, 60\% of all families headed by lone-parent mothers had incomes which fell below the Low Income Cut-offs."\textsuperscript{317}

One solution to these problems is to put in place a system which is less exclusionary and wider-ranging. For instance, instead of providing tax relief with a deduction, which is worth more to the taxpayer with a higher marginal tax rate than those at a lower rate, it could be provided through a tax credit. The conversion to a credit would make the tax credit worth the same in tax dollars which are saved by taxpayers. It makes little sense to provide more support to those with high incomes than those with lower incomes. Taking this further, if it was a refundable tax credit, those who did not pay tax would benefit from the tax assistance as long as they had money to contribute to a RRSP or RPP.

For those who are excluded from the process altogether, measures need to be developed to include them. As Claire Young states:

> But the problems caused by the general relegation of the issue of retirement savings to the private sphere must not be underestimated. In particular, their relegation contributes to the poverty experienced by so many elderly women. By making tax subsidies for retirement saving dependent, in many cases, on being in heterosexual familial relationship, the state reinforced the private family as responsible for the financial welfare in retirement of many women.\textsuperscript{318}

\textsuperscript{316} C. F. L. Young, "Public Taxes, Privatizing Effects," \textit{supra} note 310 at 321.

\textsuperscript{317} Statistics Canada, \textit{Women in Canada}, 3rd ed. (Ottawa : Ministry of Industry, 1995) at 85. Another inconsistency with the tax assistance which is provided through these provisions is that the primary rationale for the tax assistance is that it operates as an incentive for Canadians to save for their retirement. Yet, there is no stipulation that money which is accumulated through an RRSP be used for retirement. A taxpayer may withdraw funds from an RRSP at any time before retirement, for any purpose, although these funds must be included in taxable income. This is in contrast to a registered pension plan, where the funds are to only be used as a pension at retirement. Report of the Ontario Fair Tax Commission, \textit{supra} note 19 at 329. It would seem equitable that funds in an RRSP also be locked in and only used for retirement, if the tax assistance was really to foster retirement savings.

\textsuperscript{318} C. F. L. Young, "Public Taxes, Privatizing Effects," \textit{supra} note 310 at 323.
A solution, in keeping with the early discussion of the tax unit is to reduce the tax assistance given to private pension plans and reroute these funds to create a wider-reaching public pension system that would embrace those left out of the system. Such a system would provide retirement income for more of the retired, particularly elderly women, who are in desperate need of this type of government aid.

CHILD CARE EXPENSE DEDUCTION

The choice to have children is a complex issue for women, who are disproportionately responsible for child care when they are part of an intact family, and head the majority of single parent households. Women must contend with their desires to raise children, societal expectations, and factor in economic and opportunity costs when making this decision. The tax system aids in alleviating the burden of this decisions, to an extent, by abating the financial aspect as it relates to funding child care. The tax system gives relief for expenditures which deal with child care costs and child dependency. Child care costs refers to expenses incurred, such as care for the child so that the parent can work outside of the home. Child dependency refers to providing the child with the necessities of life so that s/he can grow and develop.

The child care expense deduction in section 63 is designed to "...provide some relief for taxpayers who incur child care expenses in order to work, carry on a business or undertake certain training activities." However, the relief that is given under the child care expense

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319 According to Statistics Canada, "women continue to make the large majority of lone parents. In 1991, over 80% of all one-parent families were headed by women, a figure that has remained relatively constant since the 1960s." Statistics Canada, Women in Canada" 3rd ed. (Ottawa: Ministry of Industry, 1995) at 18.

320 The primary way of funding child care in Canada is under the tax system. Section 63 allows a deduction for child care expenses. In 1996 the amount of the deduction claimed was $2,249,348,000. Men claim $585,281,000 for the deduction whereas women claimed $1,663,970,000. Revenue Canada, Tax Statistics on Individuals 1996 Tax Year (Ottawa: Revenue Canada, 1998) at 87.

321 Section 63, supra note 1.

322 See sections 122.6 - 122.6, supra note 1.

323 Interpretation Bulletin IT-495R2, "Child Care Expenses" January 13, 1997. Child care expenses services are to have been provided to enable the supporting person or the taxpayer: (i) to perform the duties of an office or employment;
deduction is inadequate. It is primarily women who claim this deduction, because it is to be claimed by the lower income spouse and women tend to earn less income than men. The provision ensures that more of women’s income goes towards child care, without the corresponding relief for the necessary social function they perform in raising children. According to the Women and Tax Working Group: “While the benefits which children ultimately provide are enjoyed by society as a whole, the cost of raising children is borne for the most part by their parents.” This section of the paper again serves to highlight that the Act is pulling more of women’s income into the tax base and further compounding their economic inequality in society. At a time when the Act is open for possible reform with the definition of “spouse,” this provision should be revamped so that it no longer burdens women by contributing to their impoverishment.

(ii) to carry on a business either alone or as a partner actively engaged in the business;
(iv) to carry on research or any similar work in respect of which the taxpayer or supporting person received a grant, or
(v) to attend a designated educational institution or a secondary school, where the taxpayer is enrolled in a program of the institution or school...” See section 63(3)’ supra note 1

See section 63(1) which stipulates that the deduction for child care expenses is limited to the supporting person with lower income. When the child care expense deduction was enacted in 1972, the section applied to only working mothers and a circumscribed group of men that included separated and unmarried men who had eligible child care expenses. According to Professor Labey, section 63 was initially brought in as a response to women’s concerns. From its outset, the provision was designed to aid in women’s equality by removing conditions of disadvantage. It was to aid women in providing adequate care for children while they worked, as the government recognised the stereotypical expectations which were placed on women to care for their children. In addition, with the sex specificity in restricting the deduction to women, the government could limit the revenue cost of this benefit, since women’s incomes were lower than men. K. Labey, “the Impact of the Canadian Charter,” supra note 43 at 141 and B. J. Arnold, “Section 63: the Deduction for Child Care Expenses” (1973) 2 Can. Tax J.176 at 179 where the author outlined the discriminatory nature of this provision.

The Act was amended for the 1983 tax year in response to a decision by the Canadian Human Rights Tribunal that the measure discriminated in favour of women. See Bailey v. The Queen (1980), 1 C. H. R. R. D/193); Interpretation Bulletin IT-495 Special Release “Child Care Expenses” June 21, 1985. Also see F. Woodman, “The Charter and the Taxation of Women” (1990) 22 Ottawa L Rev. 625 at 645 who states that this change in the legislation does not change the fact that it is women who primarily claim this deduction.

Women & Tax Working Group, supra note 22 at 27.

I. Inadequacy

In computing income for a taxation year, a taxpayer is allowed to deduct an amount paid as child care expenses, which have arisen for services provided in the year. The deduction is limited to the lesser of 2/3 of the taxpayer's earned income and an amount which is equal to the aggregate of $7000 for each child who is either under the age of seven at the end of the year or has a severe and prolonged mental or physical impairment, and $4000 for each other "eligible child" as defined in subsection 63(3). The deduction for child care expenses under section 63 is limited to the supporting person with the lower income, which tends to be the mother.

One of the problems with the child care expense deduction is the inadequacy of the amount of subsidy it offers. It is this inadequacy of the amount which underlies the challenge against the child care expense deduction in the noteworthy case of Elizabeth Symes v. The Queen. The appellant, Beth Symes, was a successful self-employed lawyer who had two daughters. One daughter was born in 1981 and the other was born in 1985. In 1982, Beth Symes and her husband, a computer programmer, hired a woman to provide in-home care during the week from 8:30 a.m. to 6:30 p.m. This live in nanny allowed both Beth Symes and her husband to engage in the demands of their careers. Symes argued that her child-care

327 Child care expenses include payments made for: "...baby sitting services, day nursery services or services provided at a boarding school or camp...." Section 63(3) does not include an exhaustive list and also includes payments made to a day camp or day sports school and an educational institution that provides child care services. See Interpretation Bulletin IT-495R2, "Child Care Expenses" January 13, 1997.
328 See section 63(1), supra note 1.
329 See section 63(1), supra note 1. There are instances where child care expenses will not have to be deducted by the supporting person with the lowest income: if the supporting person is incapable of caring for children due to physical or mental infirmity, full time attendance at school, imprisonment for not less than two weeks in the year, and living away from the supporting spouse with a higher income at the end of the year for not less than 90 days due to marital breakdown beginning in the year. See section 63(2). The provision also recognizes that the possibility exists that the parents may earn the same amount of income so a joint election may be filed and the deduction will be split. Section 63 (2.1), supra note 1.
331 Supra note 42. For a summary of the case see, D. M. McAllister, "The Supreme Court in Symes: Two Solitude's" (1994) 4 N. J. C. L. 248.
expenses were deductible as a business expense. He also argued that to disallow this deduction would deny her equal benefit of the law and discriminate against her on the basis of her gender in violation of the equality section in the Charter.

The position Symes had attempted to argue was provocative. Cases prior to Symes dismissed the notion of child care expenses being a business expense, even before the implementation of section 63. Paragraph 18(1)(h) stipulates that deductions for personal or living expenses are not allowed when one is calculating business income. The rationale underlying this provision is clearly elucidated by Neil Brooks:

This principle, that an expense incurred for a personal purpose should not be deductible, has an intuitive appeal. A person's personal habits of consumption, such as whether he or she likes vacations, fur coats, sporting goods or otherwise has expensive tastes, should not determine in any way the income tax he or she pays. It can be assumed that when a person exchanges income for a consumption item his or her total welfare has been increased. When a person spends money solely in pursuit of additional income, on the other hand, this money only increases welfare to the extent that it produces additional income. Because the additional income is taxed, the money spent for the purpose of earning it should be deductible.

The underlying purpose for this distinction can be stated clearly; however, making the distinction can be quite troublesome, as some expenditures have historically been viewed as personal expenses and others viewed to be business expenses, and then there are those that are a combination of the two. When it came to which category child care expenses fell into he Supreme Court of Canada in Symes did not have to deal with the issue as to whether child care expenses were a hybrid, personal or business expense.

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334 See MacQuistan v. M.N.R.(1965), 65 D.T.C. 236 (Tax App. Board) and Lawlor v. M. N.R. (1970), 70 D.T.C. 1248 (Tax App. Board) The ratio of the court in MacQuistan in denying the tax payer a deduction for child care as an expense of earning income was that "...an expense so incurred is a "personal or living expense"...and thus not deductible. I may elaborate by remarking that it is no more an expense of earning income than is the employment in a private residence of a cook or a housemaid and no one would argue that the wages of either the latter were deductible from the employer's taxable income."
The Supreme Court of Canada held that child care expenses were not deductible as a business expense under section 9 and paragraph 18(1)(a) of the Act. To come to this conclusion, Iacobucci J. recognised that the rules dealing with deductibility had emerged at a time when business-persons were primarily males who had stay-at-home wives to look after their children. He stated that in light of the changing composition of the business class and changing social structures, it is evident that women are now business-persons, and caring for children is part of any business arrangement. Thus, it is time for the courts to re-conceptualize business expenses. Nevertheless, Iacobucci J. did not follow this suggestion, instead he stated, "...I find it unnecessary to determine whether reconceptualization is appropriate having regard to the presence of s. 63 in the Act," as 63 was a complete provision that did not leave room for the deductibility of child care expenses as business expenses.

In relation to the Charter issue of whether section 63 disproportionately limited the child care expense deductions incurred by women, the court concluded that it did not. Although Symes had elucidated how child care negatively affected women in the area of employment, evidence that women paid social costs was not enough proof that women paid child care expenses. The court stated that section 63 did not create a distinction based on sex, the only affect of section 63 was to limit the tax deduction for a child care expense.

If Beth Symes had been successful in her case, it would have been those women who earned business income rather than those who are employees that would have been received the most benefit. This is because the Act determines tax liability based on the source of the income. This means that there are different rules for computing business income and employment income. One rule in particular is that the self-employed person can deduct from

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336 Supra note 42 at 6017.
337 Supra note 42 at 6017.
338 L'Heureux-Dube J. in dissent, found that section 63 did not preclude the deduction of child care expenses as a business expense. She stated that at the minimum its effect on section 9 was ambiguous and the ambiguities can be resolved in favour of the taxpayer. She found the tax provisions in question to be gendered in nature and that they should be interpreted to take into account the actual expenses which business women incur in the area of child care. An interpretation that precluded a taxpayer from deducting child care expenses as business income...
income, expenses which have been incurred to produce business income. On the other hand, the Act disallows the deduction of expenses incurred to earn employment income. Symes had attempted to deduct the wage which she paid to her nanny as a business expense. Her argument was that her child care expenses were like other business expenses and should fall within the provisions of the Act, which deal with business expenses. With her focus on the self-employed business woman, Symes’ victory would have been utilized by the self-employed, a small number of women, and have no positive effects for the majority of women in society that are employees. Such a bias in favour of the self-employed would impact negatively on unskilled women. It would further exacerbate the differential treatment between those who are employees and those who are self employed, as a greater number of deductions is currently offered to an individual earning business income as opposed to one

expenses was an infringement of the taxpayer’s equality rights under section 15 of the Charter. Symes, supra note 42 at 6003.

339 Section 8 allows certain deductions for taxpayers who’s income comes from employment or office. This is limited by subsection 8(2) which allows only the deductions in section 8. There are fewer deductions allowed for office and employment than business. Employed people cannot deduct expenses incurred as a consequence of their employment, such as equipment, travelling expenses, uniforms or books. In addition, income from business in section 9 is considered to be profit. Profit refers to a net figure, the figure after one deducts from the gross revenue, the expenses needed to generate that revenue. See P. Hogg & J. Magee supra note 25 at 159.

340 A successful win for Beth Symes would have been an empty victory for other women. A win would have done little to ease the transition into the paid labour force for women who want to enter the workforce, but are unable to because their child care responsibilities are onerous and thus forced to stay at home. A tax deduction for child care expenses does little for those who are unable to pay for it in the first place, or if their income is so low, they pay little or no tax. In addition, Symes’ success would have done little for her nanny who she was paying $5.13 per hour to look after her two children. The question which Audrey Macklin quite rightly asks is: If Beth Symes had been successful in her claim and other professional women in her position had stood to benefit, would she and the rest of them have felt any responsibilities to transfer part of their savings to their hired help in the form of higher wages? Between Beth Symes and her nanny, the nanny who is employed for next to nothing to carry out women’s work, seems to be the most disadvantaged. Another factor which adds to this mix is that a large portion of women who engage in the provision of domestic service in Canada are immigrant women of colour. The majority of their employers are white. See A. Macklin, supra note 332 at 514; C.F.L. Young, “Child Care and the Charter: Privileging the Privileged” (1994) 2 Rev. Of Constitutional Studies 20 at 32.


342 One way to get around this division between employed women and business women is to remove this discrepancy by having legislators recognize child care expense for the employed as well as the business community. Business people should be able to receive the child-care expense deduction as a business expense where it is in excess of section 63. Section 8 should incorporate a provision which allows deductions from
earning employment income. It would also violate the principles of equity and neutrality, as those who gain income from employment would have to adhere to the restrictions under section 63; while the self-employed, are given the ability to deduct child care cost as a business expense.

This issue of the sources of income also impacts detrimentally, on poor women and women with few sources of income. The deductible amount is the lesser of the allowable portion of the expense and two-thirds of the taxpayer’s earned income. This earned income includes salaries, wages received in respect of office and employment, scholarships, bursaries, and research grants, but it does not include all taxable income. Child and spousal payments do not qualify as earned income. Thus, if a woman has income which is part employment income and part support, she can only use the child care expenses to reduce her employment income. Those women whose only source of income is spousal support or child support cannot deduct child care expenses and women who do not have any income cannot take advantage of this deduction. This provision again does not treat women with similar amounts of income in the same fashion due to the source of the income. It refuses to recognize that those without income from sources that are not considered to be earned income could also benefit from the child care expense deduction system.

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343 This was the subject of a Charter challenge in O. P. S. E. U. v. National Citizens Coalition Inc. (1990), 90 D.T.C. 6326 (Ont C.A.). O. P. S. E. U., the appellant trade union, alleged that tax laws which allowed a taxpayer earning money from a business to deduct payments made to the defendant National Citizens Coalition and not allowing a person earning employment income to do the same was a violation of freedom of expression and association under section 2 and equality under section 15 of the Charter. Blair J.A., for the court, dismissed the equality issue stating that taxpayers who earned employment income, who are the large majority of the working population, are not a group suffering discrimination on the grounds similar to those enumerated in s. 15(1) of the Charter, since they are not a “discrete and insular minority” which section 15 protects. In dismissing the appellant’s section 2 argument, the court noted that the Act’s different method of taxing business and employment income did not restrict the member's freedom of expression or association, for they were free to express themselves however they wanted.

344 See subsection 63(3) definition of “earned income,” supra note 1.

345 It also excludes dividends, interest, royalties, and rent property. It excludes income received from a trust and income from annuities. Also excluded is RRSP income, employment insurance benefits and workers compensation. See C. Hung, “Thoughts on Tax Reform and Policy: The Deduction for Child Care Expenses” (1998) 15 C.F.L.Q. 251 at 272 -278.
Other features of section 63 demonstrate that it is limited as a means of subsidizing child care expenses, which women disproportionately tend to claim because of their lower income and the societal expectation and reality that they are responsible for child care.\textsuperscript{346} For instance, a taxpayer is only eligible for the child-care expense if the care is not given by a person under 18 and related to the child or the parent.\textsuperscript{347} This aspect emphasizes the government's reluctance to recognize the work that women do in the area of childcare and possibly any other work in the home.\textsuperscript{348} If the mother of this child decides to stay at home and look after this child, as it tends to be women who do so, this is not considered to be of value, even if the husband decided to pay the wife, as the government refuses to allow a deduction for this task.\textsuperscript{349} This feature may also have an effect on different classes of women. For instance,

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\textsuperscript{346} In the 1996 taxation year, men claimed $585,281,000 and women claimed $1,663,970,000 in child care expenses. Revenue Canada, Statistics on Individual : 1996 Tax Year (Ottawa: Revenue Canada, 1998) at 87 line 27.

\textsuperscript{347} When child care is provided by individuals, it must be by a person who is other than: 1. the child's father or mother; 2. a supporting person of the child, 3. someone who is under 18 and related to the child 4. and a person who the taxpayer or a supporting claims a tax credit under section 118. Subsection 63(3) "child care expense," supra note 1. Also see Interpretation Bulletin IT -495R2 "Child Care Expenses," January 13, 1997.

\textsuperscript{348} Housework, which is a form of imputed income, is currently devalued. Women tend to perform the majority of housework. Peter Hogg and Joanne Magee define imputed income as "The value of the benefit derived by a person from his or her own personal services (such as dressmaking, gardening, automobile maintenance or whatever else people do for themselves) or from the use of his or her own property (such as a house, a cottage, or an automobile." P. Hogg & J. Magee, supra note 25 at 91. Also see R. Goode, The Individual Income Tax (Washington: The Brookings Institution) at 150; and Thomas Chancellor, "Imputed Income and the Ideal Income Tax" (1988) 67 Oregon Law Review 561. Also see A. F. Sheppard, "The Taxation of Imputed Income and the Rule in Sharkey v. Wernher" (1973) 51 Can. Bar Rev. 617 who discuss the taxation of imputed income and concludes that the courts and Parliament have to an extent recognised some imputed income, but outlines that taxing all imputed income is impracticable. See M. A. Haskell & J. Kaufman, "Taxation of Imputed Income: The Bargain-Purchase Problem" (1964) 17 Nat'l Tax J. 232 at 23-234 who feels that imputed income should be valued and taxed, but not imputed income of the sort that represents the household services which wives produce.

For a contrary view see N. Staudt, "Taxing Housework" (1996) 84 Georgetown L. J. 1571; M. Maloney, "Women and Act: Marriage, Motherhood, and Divorce" (1989) 3 C. J. W. L. 182 at 203; and K. Lahey, "The Tax Unit in Income Tax Theory" in E.D. Pask, K. E. Mahoney & C. Brown eds., Women, the Law and the Economy (Toronto : Butterworths, 1985) at 282, who argues that housework should be valued and taxed so that this aspect of women's lives is not demeaned and women are not economically vulnerable.

\textsuperscript{349} See Boland v. Canada (M.N.R.) (1993), 93 D.T.C. No 746 (Tax Court of Canada) where the husband attempted to deduct child care expenses, under section 63, that he paid to his wife. The appellant argued that he was discriminated against on the basis of family status under section 15 of the Charter since amounts paid for child care to specific persons related to the child was not deductible. The court did not allow the appellant to make the deductions. It ruled that there was no infringement of section 15 of the Charter, as stay at home spouses were not a vulnerable group in society and did not constitute a distinct and insular minority as required by section 15 of the Charter.
women may tend to rely on relatives of the child, particularly siblings. Since it appears that the subsidy may only be given to those that fit the model the government has proscribed, the benefit may be denied to those who need this benefit the most.

II. Business or Personal?

As a way of informing the public and legislators of the effects of various forms of preferential treatment in the tax system, the concept of tax expenditure has been devised. Jonathan Kesselman defines a tax expenditure as:

...any form of incentive or relief granted via the tax system rather than via governmental expenditures. Typical devices include deductions, exemptions, allowances, exclusions and credits. The central idea behind the concept is that incentives or relief provided through tax are analogous to conventional expenditures or subsidies to attain similar purposes. Therefore, it is argued, the tax revenue forgone by these devices should also be counted in government budgets as “tax expenditures.”

According to tax expenditure analysis theory, any special exclusion from income, such as a deduction, rate reduction, or tax credits which departs from the normative tax system are considered to be tax expenditures. Thus instead of the government delivering a subsidy for an activity through a direct grant, the government uses the tax system to deliver this benefit.

Fundamental to the tax expenditure concept pioneered by Stanley Surrey is the notion that our income tax system consists really of two parts: one part comprises the structural provisions necessary to implement the income tax on individual and corporate net income; the second part comprises a system of tax expenditures under which Governmental financial assistance programs are carried out through special tax provisions rather than direct Government expenditures. The second system is grafted on to the structure of the income

352 Underlying the concept is a Haig-Simons definition of taxable income, which is grounded in the accretion approach to net income, and thus similar to the comprehensive tax base; however, this definition covers only very basic details and requires extension to bring it up to date. S. S. Surrey & P. R. McDaniel, The Tax Expenditure Concept (Cambridge: Harvard University Press, 1985) at 4-5.
tax proper; it has no basic relation to that structure and is not necessary to its operation.\textsuperscript{353}

It is this duality that results in the controversy in this area. The debate is over how to determine the normative benchmark structure of the tax system and when a tax expenditure is in place.\textsuperscript{354} Generally, those tax allowances which are designed to move income from a gross to a net basis are not counted as tax expenditures; this usually includes deductions for business expenses and other expenses which have been incurred for income producing activities.\textsuperscript{355} If a provision is considered to be a deviation from the normative structure it will be classified as an expenditure. If this is the case, it is then scrutinized to determine whether it operates as well as a direct transfer program..\textsuperscript{356} The child care expense deduction has had its share of difficulty, due to the confusion over the separation of personal child care expenditures from those which are


\textsuperscript{354} J. R. Kesselman, "Non-Business Deductions," \textit{supra} note 350; N. Bruce, \textit{Pathways to Tax Expenditures}, \textit{supra} note 351 at 22. Also see V. Thuronyi, "Tax Expenditures A Reassessment" (1988) Duke L. J. 1155 and V. Thuronyi, "The Concept of Income," \textit{supra} note 231 at 94 where the author states that the tax expenditure concept is flawed. He asserts that the normative benchmark is unconvincing and subjective. He further argues that it is inappropriate to claim that tax expenditures are really spending programs rather than tax provisions, as the line between tax provisions and spending programs is arbitrary. Thus the author argues for a set of tax provisions which are substitutable. These are provisions which can be replaced with a government program and accomplishes the current tax provisions aims. Also see W. Andrews, "Personal Deductions in An Ideal Income Tax" (1972) 86 Harv. L. Rev. 309 where the author grapples with this issue as he re-examines the content of the normative tax structure in conjunction with a discussion of personal deductions, to determine in what context deductions can bee seen as refinements of the normative structure, rather than departures. Also see W. J. Turnier, "Personal Deduction and Tax Reform: The High Road and the Low Road" (1986) 31 Villanova L. Rev. 1703 who discusses the role of personal deductions in maintaining this normative tax structure.

\textsuperscript{355} D. Wildasin, "Tax Expenditures: The Personal Standard" in N. Bruce ed., \textit{Tax Expenditures and Government Policy} (Kingston: Queen's University, 1988) at 155. According to Broadway and Kitchen the benchmark structure for personal income tax includes salaries and wages, income from business and all capital income. Those portions of the tax system that aim to account for inflation (i.e. the preferential treatment of capital gains) would be classified as tax expenditures. Aspects which have as their aim the need to eliminate double taxation such as the dividend tax credit are not tax expenditures, but are part of the benchmark. The basic personal credit which applies to all individuals is part of the benchmark, but the other credits which are selective are tax expenditures. They also assert that since the tax unit is the individual, those aspects which relate to families and dependents are expenditures, as well as any tax deferrals, since we tax on a yearly basis. R. W. Broadway and H. M. Kitchen, \textit{supra} note 259 at 109.

\textsuperscript{356} However, there is not clear criteria in place to help to decide between a direct spending program and a tax expenditure. S. Surrey & P. R. McDaniel, \textit{supra} note 352 at 27. Also see J. R. Kesselman, "Direct Expenditures Versus Tax Expenditures for Economic and Social Policy" in N. Bruce ed., \textit{Tax Expenditures and Government Policy} (Kingston : Queen's University, 1988) at 2832 where the author tries to develop a framework for choosing between direct spending programs and subsidies in the tax system. Also see N. Brooks, "Comment" in N. Bruce \textit{ibid.} at 328 -329 where the author argues convincingly that in most instances direct subsidies should be used rather than tax expenditures.
required to earn income. Some have characterized it as a pure tax expenditure, to remove some of the difficulties that women face in entering the workforce and the expense of caring for children. Others see it as an expense solely for the purpose of earning income.

However, the approach taken by David Steele, may be more accurate. According to his view, there is a range of relationships between the production of income and expenditures which run from expenditures which are solely for business purposes (such as advertising expenditures) through to hybrid expenditures which contain a business and personal element (such as business meals) to expenditures which are purely for personal consumption (such as attending a play for personal enjoyment). Child care expenses sit between a purely personal expense and a purely business expense. They are personal in the sense that they represent an expense which serves a benefit to parents, who have made the decision to have children. On the other hand, they are also business expenses, as the care for one’s children is a necessary cost so that individuals can earn income. Since childcare expenses are conceptualized as both a deductible business expense and a personal living expense, there should be an investigation into this partial expenditure, like all expenditures, to see if it is properly designed to run in the most efficient manner. One area of investigation should be its method of delivery which has been the subject of criticism.

Under the tax system, activities are subsidized via a tax deduction or a tax credit. The child care expense provision provides aid through a deduction. The difference between these two methods is significant. Deductions are allowances or expenses which are subtracted from

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358 See Audrey Macklin who claims that child care costs can be placed under the concept of an expenditure incurred for the purpose of producing income from a business. She states that "[t]hey are no more “personal,” nor are they any “less connected to the commercial needs of business” than certain expenses businessmen have managed to deduct under section 18 thus far.” A. Macklin, “Symes v. M.N.R.,” supra note 332 at 514.
359 D. A. Steele, supra note 335 at 329. See V. Krishna, “Does Supreme Court Expand Deductibility of Business Expenses in Symes” (1994) 4 Can. Current Tax 35 at 37 where the author raises the question the handling of other “mixed purpose” expenses.
360 According to Peter Hogg and Joanne Magee: “Under tax expenditure analysis, the question is whether a tax expenditure is appropriately designed to achieve its purpose in the most cost-effective way.” P. Hogg & J. Magee, supra note 25 at 49-50.
the assessed income in determining taxable income; a tax credit is a subtraction from tax payable. A deduction is worth more in tax dollars saved to the taxpayer who pays tax at a higher rate, than to an individual who pays tax at a lower rate, because the value of the deduction is dependent on the rate at which the taxpayer is taxed, whereas a tax credit is worth the same amount of money to all taxpayers with a taxable income. The fact that the Act provides subsidies by way of deductions in the computation of income rather than as tax credits is said to discriminate against low income taxpayers,351 as a deduction is worth more in terms of tax dollars saved to the taxpayer who pays at a high rate than it is to the one who has less income and pays at a lower rate.352

Does that mean that the better method of delivery is in the form of a credit? Some women's groups argue against the deduction for this reason.363 However, other authors take a different approach. 364 Some commentators suggest that before determining whether the appropriate method of delivery is either a deduction or a credit, one is to determine the role the tax provision is going to play. If the role of this provision is to be one of an incentive which encourages a particular activity then a deduction is preferable as the credit may dilute the affect

351 According to Maureen Maloney, there is no justification for delivering this relief as a deduction as opposed to a credit. She states that if the government's intention is to encourage women who are wealthier to work in the labour market and to establish elitism in the labour market, then a deduction is ideal. If this is not the government's aim, then a tax credit would be the ideal mechanism. A tax credit would give the same amount of relief to all working mothers, regardless of their income. M. Maloney, "Women and the Act: Marriage, Motherhood & Divorce (1989) 3 C. J. W. L. 182 at 206. Also see the National Association of Women and the Law, Women and Tax Policy (Ottawa: National Association of Women and the Law, 1991) at 3; and C. F. L. Young, "Child Care -- A Taxing Issue?"(1994) 39 McGill L. J. 539 at 558.

352 In addition to the higher income family being given a larger financial advantage, if there is no income to claim the deduction against, no benefit is given to families without tax payable. It is also significant that a claim under section 63 can reduce a person's entitlement to the child tax benefit supplement under subsection 122.61(1). The supplement is reduced by 25% of the child care expenses deduction claimed for qualified dependents by the individual or the individual's "cohabiting spouse." Interpretation Bulletin IT-495R2, "Child Care Expense" January 13, 1997.

353 Supra note 361.

of the incentive as credits will be the same for all taxpayers.\footnote{365} In addition to the incentive affect of the provision, one needs to determine the role the expense is to have on income. According to Wayne Thirsk, "If adjustments to taxable income are called for, deductions that operate directly on the level of taxes are required." \footnote{366} Therefore, if an expense is the cost of earning income, then a deduction will serve to refine the measurement of taxable income. Thus to apply a credit in place of a deduction for expenditures that serve such a purpose will "...ignore the importance of this measurement problem and apply the criterion of progressivity to inappropriate circumstances."\footnote{367} This suggests that if child care costs are properly understood as costs of earning income, a deduction is appropriate to reflect the refinement of income like other business expenses.\footnote{368} If it is sustained that the purpose of the deduction is to refine income, then the concern about the deduction being worth more to the higher income is hard to defend, as in general business subsidies are not characterized as an upside-down subsidy, although taxpayer's in different tax brackets receive a different value. This effect is merely a consequence of our progressive rate structure.

III. Reform

Having agreed with the position that child care expenses are a hybrid expense and in light of the Symes ruling, it is difficult to argue that child care expenses are a purely business expense. Child care expenses are both a personal and a business expense, which may be part of the reason for its treatment in the Act: it is delivered as a deduction, akin to other business expenses.
expenses, yet there is a limit placed on the level of allowable deduction. So what is to be done with this hybrid expense?

We should move away from the concern of its method of delivery being either a credit or a deduction and implement a publicly funded, universally available child care system which would aid women in attaining their economic independence.\textsuperscript{369} If the present deduction is eliminated and the excess tax revenues are utilized to finance child care as we do for other social programs, such as education and health, then this system can come to fruition. With the elimination of the current deduction, the extra revenue could be used to create and operate day care facilities. The benefit of such a scheme is that it brings the state back into the process of providing child care and takes it off of the shoulders off the family, and off women in particular. The government does provide some subsidy for child care, thus suggesting that it is not the sole domain of the family. However, once the deduction is provided the government ceases to have any function, leaving the provision of child care to the private market. This method limits the options which women have, as women who cannot fit themselves under the strictures of section 63 since they have no “earned income” to apply the deductions against, or need to find work and therefore rely on employment insurance, will be forced to rely on their family members to provide child care.\textsuperscript{370}

\textsuperscript{369} Women & Tax Working Group, supra note 22 at 33.
\textsuperscript{370} Another method of reform to deal with the inadequacy of the deduction, is to allow women to claim amounts which exceed the limit for the child-care expense deduction as a business expense. The notion is that since child care expenses were generated to earn income, they should be deductible on level with other expenses, such as business expenses, instead of being a limited deduction as it presently stands. But there are obvious problems with this notion. One is that the deduction is not used solely to allow women to work, but to attend at educational facilities. Second, the Supreme Court of Canada has ruled that excess child care expenses cannot be deducted as a business expense since section 63 is a complete code. Third, this deduction would not be of any benefit for those women who only have employment income. An alternative to this is to award a refundable tax credit. The amount given for the refundable credit could be increased to reflect the actual costs of child care. As the section currently stands, the provision is not beneficial to women who do not have any tax liability. If the provision was structured as a refundable tax credit, women without tax liability would still get some benefit. Thus the subsidy would cover those whose income is so low that that they would not benefit from the deduction. The difficulty with the refundable credit is the method of determining who will be eligible to receive the refundable tax credit. If it is phased out based on the level of family income, it may exclude those who have a high family income, but are in need of the credit. In essence, the ability to determine those who are truly needy, may be compromised by whatever limits are invoked by the government.
CONCLUSION

Currently, women, gay couples, and lesbian couples are not treated with respect and dignity, nor are they being accorded equality under the Act. This result is in keeping with a society that has been embedded with homophobia and sexism. As we have progressed as a society, we have been able to recognise and remove most of the practices which are blatant examples of discrimination, except for when it comes to gay and lesbian people. In addition to dealing with blatant examples of discrimination, our additional challenge, is to restructure practices which result in structural discrimination. In an effort to meet this challenge, this thesis has outlined the obvious forms of discrimination and the not so obvious forms in the Act. This exercise is not to suggest that all of the answers to our societal woes lie in the correction of the Act, but it is a recognition that this is a good starting place, as the Act is a reflection of the views that we hold as a society. These views play themselves out in the Act and the disadvantageous position which various groups have in society are then reinforced through tax policy.

As part of the social transformation of our societal landscape, the Act must be revised so that all members of society are treated equally. It must also be restructured so that the process of social ordering which it engages in, is one which is beneficial to all members of society and reflects the reality of our daily lives.