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## Child Care – A Taxing Issue?

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## Child Care — A Taxing Issue?

Claire F.L. Yongg\*

While child care policy has been the subject of many governmental inquiries and much lobbying activity during the past twenty years, little substantive progress has been made towards implementing comprehensive state funding for child care. State funding of child care in Canada is currently primarily limited to the federal income tax system. It is provided through section 63 of the *Income Tax Act*, which allows a limited deduction to be made from earned income.

The author reviews the current deduction for child care and examines its limitations. She also demonstrates how the income tax system as a whole discriminates against women, particularly against women with lower incomes. This discrimination within the taxation context reinforces the overall invisibility and devaluation of child care. The system fails to ameliorate the continuing disproportionate impact that the child care provision has on Canadian women. The author discusses the recent Supreme Court of Canada decision in *Symes*, which drew further attention to this issue. The appellant taxpayer did not succeed in her attempt to claim child care expenses as a business expense deduction beyond the restricted child care deduction. A five-judge majority of the Supreme Court held that section 63 of the *Income Tax Act* is a comprehensive provision that precludes the additional deduction of child care costs. The author uses *Symes* to illustrate some of the negative consequences of using the tax system to subsidize child care, but concludes that despite these limitations, there is a role for the tax system to play.

The author believes that, in the face of judicial and political reality, the tax system will remain the primary source of government funding. It is argued that the tax system could, and should, use a fairer and more efficient subsidy than that which is now provided. A framework is proposed for a new child care tax subsidy intended to replace the current deduction: a refundable tax credit, an accelerated capital cost allowance for expenditures on child care facilities, and zero-rating of child care for the purposes of the Goods and Services Tax. Given the recent political withdrawal from a more comprehensive federal child care policy, a tax provision that is as equitable as possible may be the most effective mechanism for improving the affordability and accessibility of child care services in Canada.

Alors que, durant les vingt dernières années, les questions concernant les frais de garde d'enfants ont fait l'objet de plusieurs enquêtes gouvernementales et de revendications par de nombreux groupes de pression, peu a réellement été fait dans le but de mettre sur pied une aide financière étatique pour les frais de garde d'enfants. Présentement, au Canada, l'aide financière étatique pour les frais de garde d'enfants est tirée principalement du système fédéral d'impôt sur le revenu. On la retrouve sous le couvert de l'article 63 de la *Loi sur l'impôt sur le revenu*, qui prévoit une déduction limitée sur les revenus salariaux.

L'auteure étudie la présente déduction pour les frais de garde d'enfants et examine ses limites. Elle démontre également comment le système de l'impôt sur le revenu, dans son ensemble, est discriminatoire vis-à-vis des femmes, et plus particulièrement vis-à-vis des femmes à faibles revenus. Dans le domaine fiscal, cette discrimination renforce l'invisibilité et réduit l'importance de la garde des enfants. Le système ne fait rien devant l'impact disproportionné et continu que cause aux femmes la disposition législative relative aux frais de garde d'enfants. L'auteure traite de la récente décision de la Cour suprême du Canada dans l'affaire *Symes*, qui a accordé davantage d'attention à cette question. L'appelante, une contribuable, n'a pas réussi à obtenir que ses dépenses pour les frais de garde de son enfant soient incluses dans la déduction à laquelle elle a droit pour ses dépenses d'affaires. La Cour suprême, par une majorité de cinq juges, a jugé que l'article 63 de la *Loi sur l'impôt sur le revenu* est une disposition complète qui empêche toute déduction additionnelle pour les frais de garde d'enfants. L'auteure fait appel à l'affaire *Symes* pour illustrer certaines des conséquences négatives que peut entraîner le recours au système fiscal afin de subventionner les frais de garde d'enfants, mais elle conclut que malgré ses limites, le système fiscal a un rôle à jouer sur cette question.

Face à la réalité juridique et politique actuelle, l'auteure croit que le système fiscal demeurera la source première d'aide financière gouvernementale. Elle soutient que le système fiscal pourrait, et même devrait, offrir un soutien financier plus juste et plus efficace que celui qui existe présentement. Elle propose une structure comprenant une nouvelle approche fiscale aux frais de garde d'enfants afin de remplacer la déduction actuelle : un crédit d'impôt remboursable, une allocation accélérée du coût en capital pour les services de garde d'enfants et le «zero-rating» des frais de garde d'enfants pour la taxe sur les produits et services. Étant donné les dernières réticences gouvernementales en matière de frais de garde d'enfants, une disposition fiscale aussi équitable que possible constitue peut-être le mécanisme le plus efficace pour améliorer l'accessibilité des services de garde d'enfants au Canada et en réduire les coûts.

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**Introduction**

It is incontrovertible that lack of affordable and accessible child care is a significant impediment for women with children who need or wish to work outside the home. Indeed, over twenty years ago the Bird Commission, when reviewing the lack of child care facilities and funding in Canada, said, "We are faced with a situation that demands immediate action."<sup>1</sup> This is even more true today when 64 percent of women with children under six work outside the home.<sup>2</sup> Lack of access to child care is, however, more than a barrier to women's participation in the paid labour force. It is also, as I shall discuss, an equality issue in the workplace and beyond. The role that the State should play in providing child care, and how child care should be funded, have been the subjects

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<sup>1</sup>Canada, *Report of the Royal Commission on the Status of Women in Canada* (Ottawa: Information Canada, 1970) at 263.

<sup>2</sup>National Action Committee on the Status of Women, *Review of the Situation of Women in Canada 1992* (Toronto: National Action Committee on the Status of Women, May 1992) at 6 [hereinafter *Women in Canada 1992*].

of much debate in Canada.<sup>3</sup> The Supreme Court of Canada held in *Symes v. Canada*<sup>4</sup> that child care expenses may not be deducted as a business expense under the *Income Tax Act*.<sup>5</sup> *Symes* has drawn attention to the child care issue,<sup>6</sup> and while the case was limited to the issue of the deductibility of these expenses under the *Act*, it raised more general questions about the funding of child care in Canada, and particularly, the role of the *Act* as a tool to deliver some of that funding.<sup>7</sup> Federal funding is currently provided primarily through the income tax system, in the form of a deduction for child care expenses.<sup>8</sup> A smaller amount of funding is also distributed through the *Canada Assistance Plan Act*,<sup>9</sup> under which the federal government cost-shares with the provincial governments the provision of limited assistance for persons "in need".<sup>10</sup>

This paper focuses on funding child care through the tax system. I shall review how the tax system currently subsidizes child care, examine the limitations of this system and consider policy issues underlying the debate about the efficacy of its use for this purpose. Can the tax system accomplish more than it does at present, by delivering a child care programme that is equitable for all women and that increases access to affordable, high quality child care? This question became even more pressing with the federal government's 1992 announcement that it would not proceed with the proposed National Strategy on

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<sup>3</sup>See Canadian Advisory Council on the Status of Women, *Caring for Our Children* (Brief presented to the Special Committee on Child Care) (Ottawa: Canadian Advisory Council on the Status of Women, 10 June 1986); National Association of Women and the Law (Brief presented to the Special Committee on Child Care) (Ottawa: National Association of Women and the Law, 10 June 1986); Status of Women Canada, *Report of the Task Force on Child Care* (Ottawa: Supply & Services Canada, 1986) [hereinafter *Cooke Report*]; Canada, Special Committee on Child Care, *Sharing the Responsibility* (Ottawa: Queen's Printer, 1987) [hereinafter *Martin Report*]; National Council of Welfare, *Child Care: A Better Alternative* (Ottawa: Supply & Services Canada, December 1988); Jane Beach, "A Comprehensive System of Child Care" (Paper presented to the National Child Care Conference and Lobby, October 1992) [unpublished].

<sup>4</sup>[1993] 4 S.C.R. 659, 110 D.L.R. (4th) 470 [hereinafter *Symes* (S.C.C.) cited to S.C.R.], aff'g [1991] 3 F.C. 507, 91 D.T.C. 5397 (C.A.) [hereinafter *Symes* (F.C.A.) cited to F.C.], rev'g [1989] 3 F.C. 59, (*sub nom. Symes v. R.*) 8 D.T.C. 5243 (T.D.) [hereinafter *Symes* (F.C.T.D.) cited to F.C.].

<sup>5</sup>R.S.C. 1985, c. I-5 [hereinafter *Act*].

<sup>6</sup>See e.g. George Corn, "Child Care Expenses: Deductibility as Business Expenses or Personal Living Expenses" (1991) 3 Can. Curr. Tax 91; David A. Steele, "The Deductibility of Childcare Expenses Re-Examined: *Symes v. R.*" (1991) 7 Can. Fam. L.Q. 315; Faye Woodman, "The Charter and the Taxation of Women" (1990) 22 Ottawa L. Rev. 625; Claire Young, "*Symes v. The Queen*" (1991) British Tax Rev. 105; Audrey Macklin, "*Symes v. MNR: Where Sex Meets Class*" (1992) 5 C.J.W.L. 498; Donna M. Eansor & Christopher Wydrzynski, "Troubled Waters: Deductibility of Business Expenses under the *Income Tax Act*, Child Care Expenses and *Symes*" (1993) 11 Can. J. Fam. L. 249.

<sup>7</sup>See *Symes* (S.C.C.), where L'Heureux-Dubé J., in her dissenting judgment, said:

Further, I am not unaware that income tax deductions are undoubtedly not the best way for the government to provide assistance with regard to the high cost of child care and that the allowed deductions under s. 63 are not representative of the real cost of child care. Perhaps child care should not even be subsidized through the tax system but, rather, provided for in another manner (*supra* note 4 at 823).

<sup>8</sup>Section 63 of the *Act* provides a deduction for child care expenses. See the discussion of the operation of section 63 at Part II, below.

<sup>9</sup>R.S.C. 1985, c. C-1. This article will not discuss this method of funding in any detail.

<sup>10</sup>*Ibid.*, s. 6(2)(a).

Child Care.<sup>11</sup> The abandonment of that programme, which had included increases in the amount allowable as a child care deduction under the *Act*, and the replacement of the Canada Assistance Plan with a new federal-provincial cost-sharing programme, left the future of the state funding of child care uncertain.<sup>12</sup> This uncertainty remains following the election of the new Liberal government in the fall of 1993. That government has committed itself to "a realistic and fiscally responsible program to increase the number of child care spaces in Canada,"<sup>13</sup> but details of how this will be accomplished have not yet been announced.

My thesis is that, while funding child care through the tax system raises some social policy and tax policy issues that must be resolved, there is a clear role for the tax system to play in subsidizing child care. This is especially true given the evident reluctance of the government to proceed with increased funding through other measures like direct grants or federal-provincial cost-sharing programmes. I shall propose a taxation model that takes into account some problems of the current tax provisions and attempts to redress them in order to provide a fairer and more efficient subsidy.<sup>14</sup>

## I. Limitations of the Law

At the outset, it is important to note the instrumentality of an approach that advocates using the tax system to address — even partially — an issue of such significant social and economic dimensions. While the tax system is a powerful economic and social tool, and while it is important to reflect on that power and its effects, we must not be blind to the limitations of legislative changes to that system. At a general level, as much feminist work in legal areas other than tax has shown, while legislative changes have been beneficial for many women, they have failed to materially transform women's lives.<sup>15</sup> Such changes operate

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<sup>11</sup>Health and Welfare Canada, *National Strategy on Child Care* (Ottawa: Supply & Services Canada, 1987).

<sup>12</sup>The abandonment of the National Strategy on Child Care was announced in the February 1992 budget. At that time, the only part of the programme that had been fully implemented was the changes to the section 63 child care deduction, including increases in the deductible amount.

<sup>13</sup>The Liberal Party of Canada, in "Creating Opportunity: The Liberal Plan for Canada" (15 September 1993), presented the party's campaign platform. The government also announced that no child care programme would be put in place until the economy grew by 3 percent in a given year (Susan Delacourt, "Throne Speech Sets Modest Goals" *The [Toronto] Globe and Mail* (19 January 1994) A2).

<sup>14</sup>In this article, I refer to the section 63 deduction for child care expenses as a subsidy. This is consistent with the classification of the deduction as a tax expenditure. See Department of Finance, *Government of Canada Personal Income Tax Expenditures* (Ottawa: Department of Finance, December 1992). The significance of classifying a deduction as a tax expenditure is that it is considered to be a departure from the normative tax system and as such to be evaluated not only by reference to traditional tax criteria but also by reference to budgetary criteria. In short, it is viewed as a spending measure. It should be noted, however, that in *Symes (S.C.C.)* (*supra* note 4 at 759), Iacobucci J. was of the view that to classify "the child care expense deduction as a tax expenditure in this case can be problematic."

<sup>15</sup>Much has been written on this issue. In *Feminism and the Power of Law* (London: Routledge, 1989) at 5), Carol Smart argues that we need to de-centre law and "think of non-legal strategies and ... discourage a resort to law as if it holds the key to unlock women's oppression." In the Cana-

within and are constrained by the strict boundaries of the patriarchal and capitalist society and institutions of which they become a part. The income tax system operates within those same boundaries and constraints, and we must be aware of this when we consider strategies for funding child care. Furthermore, the inherent biases of the *Act* and its discriminatory application to women mean that any use of the *Act* to deliver a subsidy for child care is potentially fatally flawed unless these limitations are recognized and redressed.<sup>16</sup> We must ensure that the inequities of the tax system are minimized to the greatest extent possible in any child care programme funded by that system.

Many lobby groups and others resist the idea of using the *Act* to subsidize child care because they are aware of its discriminatory application to women.<sup>17</sup>

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dian context, some feminist work on equality rights has focused on the limits of law. See e.g. Judy Fudge, "The Public/Private Distinction: The Possibilities of and the Limits to the Use of Charter Litigation to Further Feminist Struggles" (1987) 25 Osgoode Hall L.J. 485; Canadian Advisory Council on the Status of Women, *Canadian Charter Equality Rights for Women* by Gwen Brodsky & Shelagh Day (Ottawa: Canadian Advisory Council on the Status of Women, 1989); Amy Bartholemew, "Achieving a Place for Women in a Man's World: Or Feminism with No Class" (1993) 6 C.J.W.L. 465. See also Susan B. Boyd "(Re)Placing the State: Family, Law and Oppression" (1994) 9 Can. J.L. & Soc. 39.

<sup>16</sup>As previously mentioned, the *Act* is an instrument for directing social and economic behaviour. One consequence of this is that it has inherent biases. Current Canadian tax policy favours certain activities over others and treats different groups of taxpayers differently. For example, investment in certain forms of equity is favoured over investment in debt by taxing only three quarters of a capital gain, or in some cases exempting the entire capital gain from tax, while interest income is fully taxable. Residents are taxed differently than non-residents because a withholding tax is often applied to non-residents' income in situations when it is not applicable to a resident. These biases are not, however, necessarily discriminatory treatment as defined by the Supreme Court of Canada. In *R. v. Swain* ([1991] 1 S.C.R. 933 at 992, 5 C.R. (4th) 253), Lamer C.J., for the majority, synthesized the jurisprudence on discrimination, including the precedential judgment of McIntyre J. in *Andrews v. Law Society of British Columbia* ([1989] 1 S.C.R. 143, [1989] 2 W.W.R. 289), this way:

The court must first determine whether the claimant has shown that one of the four basic equality rights has been denied (i.e., equality before the law, equality under the law, equal protection of the law and equal benefit of the law). This inquiry will focus largely on whether the law has drawn a distinction (intentionally or otherwise) between the claimant and others, based on personal characteristics. Next, the court must determine whether the denial can be said to result in "discrimination". This second inquiry will focus largely on whether the differential treatment has the effect of imposing a burden, obligation or disadvantage not imposed upon others or of withholding or limiting access to opportunities, benefits and advantages available to others. Furthermore, in determining whether the claimant's s. 15(1) rights have been infringed, the court must consider whether the personal characteristic in question falls within the grounds enumerated in the section or within an analogous ground, so as to ensure that the claim fits within the overall purpose of s. 15 — namely, to remedy or prevent discrimination against groups subject to stereotyping, historical disadvantage and political and social prejudice in Canadian society.

<sup>17</sup>The Cooke Committee, for example, was opposed to the provision of new funding for child care through the *Act*. The National Council of Welfare, responding to the National Strategy on Child Care, in its report, *Child Care: A Better Alternative* (*supra* note 3), was critical of using the *Act* to fund child care. The report said, "Unlike the federal strategy, which perpetuates the old system of a mix of subsidies for child care and tax benefits for parents, our alternative puts all available resources into child care services and none into tax breaks" (*ibid.* at 31). The Canadian Advisory Council on the Status of Women also advocates less reliance on the tax system. Its brief to

The tax system as a whole,<sup>18</sup> and particularly the *Act*, discriminates against women in many ways;<sup>19</sup> the discrimination I shall focus on in this article is the oppressive impact on the disproportionate number of women who are poor.

In 1991 the average female-headed family had an income that was less than half that of the average male-headed family.<sup>20</sup> The National Council of Welfare has observed that there is "guaranteed poverty for large numbers of Canadian women at some point in their lives."<sup>21</sup> For these women, some of the 1987 tax reform measures have had a particularly adverse effect. For example, the number of tax brackets was reduced from ten to three, and the top federal

the Cooke Committee, *Caring for Our Children* (*supra* note 3), stated:

The CACSW believes that, in the long term, there should be a major restructuring of federal funding on child care to ensure its provision as a universal program comparable to education and health.

The CACSW has recommended that, in order to improve the availability of day care services in the short term, the federal government extend the range of child care costs eligible for cost sharing under the Canada Assistance Plan to include capital construction costs and start-up grants for all child care spaces in provincially approved agencies.

Finally, the Ontario Fair Tax Commission, in its report, *Women and Taxation* (Toronto: Fair Tax Commission, November 1992), was divided on the issue. The report said:

A universally available, publicly-funded child care system is one of the requirements for economic independence for women. Some working group members believe this form of child care will not be a reality for women in the near future. Consequently, tax-delivered assistance should be redesigned to make it more equitable. ... Other working group members believe public support for child care should not be delivered through the tax system (*ibid.* at 49).

<sup>18</sup>I use the term "tax system" when my comments do not apply only to income taxes. Other taxes relevant to this issue are consumption taxes, with the most important example being the Goods and Services Tax.

<sup>19</sup>There is a small body of Canadian feminist literature on the impact of the tax system on women. See e.g. Louise Dulude, "Joint Taxation of Spouses — A Feminist View" (1979) 1:4 *Can. Taxation* 8; Maureen Maloney, "Women and the Income Tax Act: Marriage, Motherhood and Divorce" (1989) 3 *C.J.W.L.* 182; Kathleen Lahey, "The Tax Unit in Income Tax Theory" in Diane Pask, Kathleen Mahoney & Catherine Brown, eds., *Women, the Law and the Economy* (Toronto: Butterworths, 1985) 277; Louise Dulude, "Tax and Family Laws: A Search for Consistency in Family Law in Canada" in Elizabeth Sloss, ed., *Family Law in Canada: New Directions* (Ottawa: Canadian Advisory Council on the Status of Women, 1985) 63; Louise Dulude, "Taxation of the Spouses: A Comparison of Canadian, American, British, French and Swedish Law" (1985) 23 *Osgoode Hall L.J.* 67; Canadian Advisory Council on the Status of Women, *Women and Income Tax Reform* by Maureen Maloney (Ottawa: Canadian Advisory Council on the Status of Women, 1987); National Association of Women and the Law, *Women and Tax Policy* (Ottawa: National Association of Women and the Law, 1991); Faye Woodman, "The Charter and the Taxation of Women" (1990) 22 *Ottawa L. Rev.* 625; Jack London, "The Impact of Changing Perceptions of Social Equity on Tax Policy: The Marital Tax Unit" (1988) 26 *Osgoode Hall L.J.* 287; Brigitte Kitchen, "The Patriarchal Bias of the Income Tax in Canada" (1986) 11 *Atlantis* 35. More recently, the Ontario Fair Tax Commission (*supra* note 17 at 47) concluded, "[C]hanges should be made to the tax system to enhance progress towards the elimination of inequities faced by women and to address provisions that systemically discriminate against women."

<sup>20</sup>The figures were \$49,812 for male-headed families and \$23,812 for female-headed families (Statistics Canada, *Income Distribution by Size in Canada 1991* (Ottawa: Minister of Industry, Science and Technology, December 1992)). It should be noted that, in families consisting of a married couple, the male spouse is considered the head, regardless of income.

<sup>21</sup>National Council of Welfare, *Women and Poverty Revisited* (Ottawa: Supply & Services Canada, Summer 1990) at 3.

rate was lowered from 34 percent to 29 percent. This reduction in the progressivity of the tax rate structure placed a proportionately higher burden on those with lower rather than higher incomes. In addition, the introduction of the Goods and Services Tax ("GST"), a flat rate consumption tax, has meant a further decrease in the progressivity of the tax system.<sup>22</sup>

To the extent that the *Act* provides tax deductions, not tax credits, for certain expenses, it discriminates against low income taxpayers. This is because the value of a deduction is tied to the rate at which the taxpayer is taxed. In other words, a deduction is worth more in terms of tax dollars saved to the taxpayer who pays tax at a high rate than it is to the one who has less income and pays tax at a lower rate. A tax credit, by contrast, is worth the same amount of money to all taxpayers with taxable income. The deduction for child care expenses is an obvious example of this inequity in action.<sup>23</sup> While women form the majority of the poor in Canada, it is single mothers who are the poorest of the poor: 35.6 percent of all single women live below the poverty line, and on average, their income is \$3,756 below the poverty line; 60.6 percent of all single mothers live below the poverty line, and on average, they live \$8,232 below that line, farther below than any other group.<sup>24</sup> For these women, any deduction for child care expenses is worthless.

Why then would one advocate using a tool that discriminates against many women to deliver a subsidy that is directed primarily to women? The answer is that, even though the tool is flawed, there is scope within the system to design a provision that is fair and that does not discriminate, either against women or between different groups of women. Furthermore, while tax measures alone cannot perform the task of social reconstruction, there is a role for them as one tool in conjunction with others in the quest for more accessible and affordable child care. Indeed, I contend that making the current tax rules more equitable and target-efficient may well be a catalyst for other substantive changes that will increase access to child care for those who need it. Improvements to the tax system can be a precursor to systemic change.

## II. Section 63 of the *Income Tax Act*

Section 63 of the *Act* provides the only direct tax relief for child care expenses. This provision, introduced in 1972,<sup>25</sup> was apparently intended to assist

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<sup>22</sup>An income tax credit with respect to the Goods and Services Tax was implemented when the tax was introduced in an attempt to reduce some of the regressive effects of the flat rate tax (*Act*, *supra* note 5, s. 122.5). The amount of that credit is, however, insufficient to mitigate entirely the regressive effect of the Goods and Services Tax.

<sup>23</sup>For an analysis of the discriminatory effect of the tax treatment of retirement income and savings for retirement, see the Ontario Fair Tax Commission, *supra* note 17 at 18-22.

<sup>24</sup>In 1990, 14.6 percent of all Canadians lived below the poverty line. See National Council of Welfare, *Poverty Profile, 1980-1990* (Ottawa: Supply & Services Canada, Autumn 1992).

<sup>25</sup>Section 63 was added to the *Act* by S.C. 1970-71-72, c. 63, s. 1, in force 1 January 1972. It originally only permitted the deduction to be taken by women and a very limited group of men that included unmarried or separated men who incurred eligible child care expenses. Section 63 was made gender-neutral by S.C. 1984, c. 1, s. 25, applicable to the 1983 and subsequent taxation years.



women with children to enter the paid labour force.<sup>26</sup> It has become clear that, if this is its intention, it is, for many reasons, completely inadequate. This is primarily a consequence of its limited application. Briefly, section 63 permits a deduction in the computation of income for child care expenses paid with respect to an eligible child. Allowable child care expenses include amounts paid for babysitting services, day nursery services and boarding school or camp fees, although there are weekly maximums prescribed in the latter two categories.<sup>27</sup> The child care expense must have been incurred to enable the taxpayer or supporting person who resided with the child to perform the duties of employment, carry on a business, undertake certain occupational training or carry on grant-funded research.<sup>28</sup>

The section further defines an eligible child as a dependent child, under fourteen, of the taxpayer or the taxpayer's spouse, provided that the child's income does not exceed the basic personal amount.<sup>29</sup> As of January 1st, 1993, the amount of the child care expense deduction is \$5000 for each child under seven (or who has a prolonged mental or physical impairment) and \$3000 for each child aged seven to thirteen. The deductible amount is limited to the lesser of the amounts described or two-thirds of the taxpayer's earned income for the year. In two-parent families, the deduction must be claimed by the person earning the lower income, except where she or he is a full-time student, in prison, incapable of caring for the children, or living apart from the other person for at least ninety days by reason of the breakdown of their relationship.

The limitations of section 63 as an effective subsidy for child care expenses are readily apparent. Notably, the amount that may be deducted does not reflect the actual cost of child care.<sup>30</sup> This limitation is exacerbated by the fact that sec-

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<sup>26</sup>The proposal to include a deduction for child care expenses in the *Act* was explained in the following manner: "Costs of looking after young children when both parents are working, or when there is only one parent and that parent is working, would be allowed as a deduction subject to certain conditions. This new plan is intended primarily to benefit mothers who need to work to support their families ..." (Canada, *Proposals for Tax Reform* by Edgar J. Benson, Minister of Finance (Ottawa: Queen's Printer, 1969) at 10).

<sup>27</sup>It is interesting to note that the deduction for child care expenses subsidizes the cost of sending a child to a sports camp or private boarding school, institutions not usually considered to be child care facilities.

<sup>28</sup>See text accompanying note 34, regarding a challenge to the scope of this section, pending before the Federal Court (Trial Division). Joy Stevens is arguing, in part, that to deny her a deduction for child care expenses incurred to attend university on a full-time basis is to discriminate against her contrary to section 15 of the *Canadian Charter of Rights and Freedoms* (Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*]). Section 15 reads in part:

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

<sup>29</sup>The basic personal amount is the amount of the single status deduction in paragraph 118(1)(c) of the *Act*.

<sup>30</sup>Recent figures put the cost of regulated child care in Canada at an average of \$6882 per year for infants, \$5436 for preschoolers, and \$2640 for school-aged children. See National Action Committee on the Status of Women, *Review of the Situation of Women in Canada 1993* by Punam Khosla (Toronto: National Action Committee on the Status of Women, July 1993) at 19. Costs vary

tion 63 provides a deduction from income and not a tax credit, which ties the value of the deduction to the taxpayer's tax rate. For example, the taxes saved in respect of a child care expense of \$10,000 are \$5000 for a person paying tax at a combined federal-provincial rate of 50 percent, but only \$2500 for a person paying tax at a rate of 25 percent. This establishes a hierarchy of taxpayers which is in inverse relation to their ability to pay for child care. At the top are those with the highest incomes. Below them, in declining order, are taxpayers with lower incomes. At the bottom are taxpayers to whom the deduction is worthless because they have little or no income to which to apply the deduction. The requirement that couples allocate the deduction to the lower income person also limits the value of the deduction.<sup>31</sup>

As mentioned, the deductible amount is the lesser of the allowable portion of the expense and two-thirds of the taxpayer's earned income. "Earned income" includes employment income, business income, disability payments made under the Canada Pension Plan, training allowances and scholarship monies.<sup>32</sup> It does not, however, include all taxable income. Unemployment Insurance benefits are not earned income, nor are alimony or child support payments.<sup>33</sup> Therefore, a mother whose income is a combination of alimony and/or child support payments and employment income, for example, may only apply the child care expenses to reduce her employment income. This means that, when her employment income is reduced to zero by her child care expenses, she may not apply the unused portion of the expenses to reduce the tax on her alimony and/or child support payments.

The definition of "earned income" is being challenged in a case to be heard in early 1994 by the Federal Court (Trial Division). Joy Stevens, a full-time theology student, is arguing that to deny her a deduction under section 63 for otherwise eligible child care expenses, because child support is not considered to be earned income, is to discriminate against her in contravention of section 15 of the *Charter*.<sup>34</sup> *Stevens* illustrates the inconsistent effect of a provision that is intended to assist women with children who work outside the home. Although the taxpayer is furthering her education in order to return to the workforce, she

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widely across the country. In 1990, for example, the average price tag for all types of paid day care was \$4385. Day care in Toronto, however, cost \$6612 per year — over \$2200 more than the national average. See Bruce Cohen, "Federal Deduction Is Falling Way Behind the Cost of Day Care" *Financial Post* (23 November 1990) 21.

<sup>31</sup>It should be noted that the deduction under section 63 may be of more value to those in lesbian or gay relationships. Because the *Act* does not recognize such relationships, these couples are not required to allocate the deduction to the individual with the lower income and, in cases where each individual in the couple is the parent of a child, each one may claim the deduction, a benefit not available to heterosexual couples. Lesbian and gay taxpayers do, however, suffer a disadvantage under section 63. They may not take the deduction in respect of a child who they are co-parenting, unless they are the biological or adoptive parents of the child, which will rarely be the case.

<sup>32</sup>*Act*, *supra* note 5, s. 63(3)(b).

<sup>33</sup>However, subsection 56(1) of the *Act* requires, among other things, the inclusion of alimony (spousal) and child support payments as part of income.

<sup>34</sup>The taxpayer is also arguing that to deny the deduction of these expenses because they were incurred to attend university on a full-time basis and not for one of the reasons listed in paragraph 63(3)(a) is also a contravention of section 15 of the *Charter*.

is denied the deduction because only paid labour outside the home is recognized as a legitimate endeavour for which one may receive a child care subsidy.

In order to deduct child care expenses, a taxpayer must file receipts with the Minister which include the social insurance number of the individual providing the child care services.<sup>35</sup> The problem with this requirement is that in many instances receipts are not provided by the caregiver, reflecting the often informal nature of many child care arrangements.<sup>36</sup> For example, unlicensed day care is the most frequently used type of child care in Canada.<sup>37</sup> The requirement for receipts for an expense incurred so frequently in the informal market puts a far more onerous burden on a taxpayer than, for instance, the requirement for receipts for business expenses, which are generally incurred in the formal market where the issuance of receipts is the norm.

Child care is only considered an eligible expense if it is not provided by a parent of the child or a person under eighteen who is related to the taxpayer.<sup>38</sup> This restriction demonstrates the reluctance of the State to subsidize child care provided within the private family, and consequently reinforces the invisibility and undervaluation of child care. It also has a harsher effect on some women than on others. First Nations children, for example, are often cared for within an extended family unit, and care may be given by siblings or other relatives under eighteen.<sup>39</sup> Poor women who cannot afford to purchase child care services often rely on relatives, including siblings of the child, to provide child care at a cost less than that incurred in either the formal or extra-familial informal market. In both of these examples, because the *Act* recognizes only those child care arrangements that fit within a traditional white middle class norm, the subsidy for child care is denied to those who may need it most.<sup>40</sup>

### III. Child Care Policy in Canada

Child care policy has been a subject of ongoing study. The last twenty years have seen the release of numerous reports on the issue by different bodies, but despite various recommendations made in them, there has been remarkably little change in government policy. The decision to fund child care partially through the tax system was implemented in 1972 as part of an overall tax reform process. While technical changes to the provision have been made over the

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<sup>35</sup>*Act, supra* note 5, s. 63(1). It should be noted that the administrative practice spelled out in the *General Income Tax Guide* (Ottawa: Revenue Canada, 1993) is that the receipts need not be submitted when the tax return is filed. Nevertheless, it is a statutory requirement that could be enforced at any time. For most other deductions under the *Act*, receipts need only be provided on request by the Minister.

<sup>36</sup>See Part V.D., below, for other implications of this requirement.

<sup>37</sup>Less than 11 percent of children in Canada receiving child care are in any form of licensed child care, according to statistics compiled from Statistics Canada & Health and Welfare Canada, *National Child Care Study* by Donna S. Lero *et al.* (Ottawa: Statistics Canada, 1992).

<sup>38</sup>*Act, supra* note 5, s. 63(3)(a)(ii).

<sup>39</sup>For an analysis of these issues, see Marlee Kline, "Complicating the Ideology of Motherhood: Child Welfare Law and First Nations Women" (1993) 18 *Queen's L.J.* 306.

<sup>40</sup>Whether the deduction *should* be available for care by a parent or sibling under eighteen is a complex one, raising the issue of the public/private distinction. It is, therefore, beyond the scope of this article.

years, its general policy has remained unchanged despite widespread support for either abandoning or reducing reliance on the tax system as the primary method of delivering funding for child care.<sup>41</sup>

In 1984, the Commission on Equality in Employment, chaired by Rosalie Abella, argued that child care is a necessity and not a luxury,<sup>42</sup> and this theme underlies many of the reports which followed. In 1986, the Task Force on Child Care (“Cooke Committee”) conducted the most comprehensive examination of child care to date.<sup>43</sup> It undertook twenty-five research projects, invited twelve hundred groups to make submissions, received more than two hundred briefs and made fifty-three recommendations. Perhaps its most important recommendations were that “the federal, provincial and territorial governments jointly develop complementary systems of child care and parental leave that are as comprehensive, accessible and competent as our systems of health care and education,” and that “all new financing initiated by the federal government be directed only to services that are licensed and monitored by provincial or territorial governments.”<sup>44</sup> The government responded to the Cooke Committee’s report by establishing a parliamentary Special Committee (“Martin Committee”), which proposed a \$700 million child care package.<sup>45</sup> The *Martin Report* parted company with the *Cooke Report* on many issues, most significantly in its recommendation that the child care expense deduction be replaced by a refundable child care tax credit at a cost of \$414 million, thereby continuing partial reliance on the tax system to fund child care.

The Conservative government’s response to both these reports was its announcement in December 1987 of the National Strategy on Child Care (“National Strategy”).<sup>46</sup> This programme proposed to increase the amount of the tax deduction for child care expenses and to replace the day care provisions of the Canada Assistance Plan with a new scheme which would commit the federal government to spending \$4 billion over seven years on capital and operating grants and increasing the number of day care spaces by 200,000.<sup>47</sup> In its 1988 report,<sup>48</sup> the National Council of Welfare criticized the National Strategy and its reliance on the tax system as a continuing method of subsidizing child care. It recommended that more money be spent on public sector rather than private sector child care places. The discussion proved moot, however, as later that year the *Canada Child Care Bill*, which had included many of the new government proposals, died on the order paper when a general election was called. The Conservatives followed their return to power with the announcement of the withdrawal of the previously announced \$4 billion investment to create new child

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<sup>41</sup>*Supra* note 17.

<sup>42</sup>Canada, *Report of the Commission on Equality in Employment* (Ottawa: Supply & Services Canada, 1984).

<sup>43</sup>*Cooke Report*, *supra* note 3.

<sup>44</sup>*Ibid.* at 373.

<sup>45</sup>*Martin Report*, *supra* note 3.

<sup>46</sup>*National Strategy on Child Care*, *supra* note 11.

<sup>47</sup>This plan was included in Bill C-144, *Canada Child Care Act*, 2d Sess., 33d Parl., 1986 [hereinafter *Canada Child Care Bill*].

<sup>48</sup>*Child Care: A Better Alternative*, *supra* note 3.

care spaces,<sup>49</sup> and in February 1990, a cap was placed on transfers to the provinces under the *Canada Assistance Plan*.<sup>50</sup> Two years later, the government announced that it was abandoning its National Strategy.<sup>51</sup> The most recent report on child care is the ambitious *National Child Care Study*,<sup>52</sup> which paints a dismal picture of child care in Canada today.

Child care has been and continues to be perceived as a women's issue,<sup>53</sup> but we must be careful about identifying it solely as such, as this only perpetuates the notion that women should be responsible for the care of children. While research shows that child care in heterosexual relationships is still performed primarily by women,<sup>54</sup> many feminists argue that the sharing of child care responsibilities by women and their male partners is an essential step in women's struggle for equality.<sup>55</sup>

Although men are spending more time with their children and thus may be playing a more significant role in their lives, women still devote considerably more time than men to primary child care. "Primary child care" is not merely interacting with children, but is defined as including activities like physically caring for children (dressing, feeding and washing); reading; talking or playing with children; helping, teaching or reprimanding children; and caring for children during illness and overseeing their medical care.<sup>56</sup> Statistics show that while 67 percent of mothers spend some time on these activities on a daily basis, only 33 percent of fathers do so. Furthermore, the highest participation rate for fathers is on Sunday at 41 percent, while for mothers it is on weekdays at 70 percent, an indication that women continue to take primary responsibility for children during periods that are traditionally the time most paid labour is performed.<sup>57</sup> Another example of the responsibility taken by women for children during the regular work week is that the number of days women take off work for family reasons increased from an average of 1.9 days per year in 1977 to 5.2 days in 1990.<sup>58</sup> Men's time off work for family responsibilities has remained rel-

<sup>49</sup>See e.g. the comments of Mary Clancy, Member of Parliament, *House of Commons Debates* (26 February 1992) at 7609, and those of the Hon. Benoît Bouchard, *ibid.* at 7613.

<sup>50</sup>*The Government Expenditures Restraint Act*, S.C. 1991, c. 9, s. 2 [hereinafter *Expenditures Restraint Act*].

<sup>51</sup>The only part of this plan that was implemented was the increases to the amount of the section 63 deduction for child care expenses.

<sup>52</sup>*Supra* note 37.

<sup>53</sup>For a discussion of this issue, see Norene Pupo, "Preserving Patriarchy: Women, the Family and the State" in Nancy Mandell & Ann Duffy, eds., *Reconstructing the Canadian Family: Feminist Perspectives* (Toronto: Butterworths, 1988) 207-37.

<sup>54</sup>Margrit Eichler, *Families in Canada Today: Recent Changes and Their Policy Consequences*, 2d ed. (Toronto: Gage, 1988); Arlie Hochschild & Anne Machung, *The Second Shift: Working Parents and the Revolution at Home* (New York: Viking, 1989); Statistics Canada, *Where Does Time Go?* by Andrew S. Harvey, Katherine Marshall & Judith A. Frederick (Ottawa: Minister of Industry, Science and Technology, 1991).

<sup>55</sup>See e.g. Nancy Chodorow, *The Reproduction of Mothering: Psychoanalysis and the Sociology of Gender* (Berkeley: University of California Press, 1978).

<sup>56</sup>This definition is from *Where Does Time Go?*, *supra* note 54 at 59.

<sup>57</sup>*Ibid.*

<sup>58</sup>For further discussion of this issue, see Nancy Zukewich Ghalam, *Women in the Workplace*, 2d ed. (Ottawa: Minister of Industry, Science and Technology, 1993) at 11: "In 1991, 11 percent

actively static during the same time period, increasing slightly from .7 days in 1977 to .9 days in 1990.<sup>59</sup>

The fact that child care is performed primarily by women<sup>60</sup> and is viewed as a “women’s issue” has resulted in an invisibility and undervaluation of women’s child care work,<sup>61</sup> which is exacerbated by the belief that women are the “natural” carers for children.<sup>62</sup> The invisibility of child care work is the result of several factors. The child care work of those women who participate in the labour force on a full-time basis, while occupying a significant proportion of their time, is seen as secondary to their paid labour. For those women who do not work outside the home, child care activities also become invisible as they disappear into that activity described as housework.<sup>63</sup> This invisibility of child care work contributes to its undervaluation, which becomes dramatically apparent in an examination of workers’ salaries. In 1991, the average salary of female child care workers was \$13,252,<sup>64</sup> placing them at the very bottom of Statistics Canada’s list of the ten lowest paid professions. Significantly, when men performed this work, they were much better paid. The average salary for male child care workers for the same period of time was \$20,987, over 50 percent more than that of women.<sup>65</sup>

The inordinately low salaries paid to child care workers are somewhat puzzling given the high demand for child care and the shortage of spaces in child care facilities. One would expect market forces to prevail and push salaries upwards. That this has not happened is further evidence of the role that the invisibility of child care labour and its stereotyping as “women’s work” play in contributing to its undervaluation. Another factor may well be that child care services are often provided by immigrant women, a group which has consistently been treated as cheap labour.<sup>66</sup>

There is an important relationship between the invisibility and undervaluation of child care and its chronic underfunding.<sup>67</sup> As mentioned earlier, federal

of women in two-parent families with at least one child under age 6 and 6 percent of comparable lone mothers missed time from work each week because of personal or family responsibilities.”

<sup>59</sup>Ernest Akyeampong, “Absences from Work Revisited” (1992) 4:1 *Perspectives on Labour and Income* 44.

<sup>60</sup>This is true both in terms of child care duties performed by parents and with respect to child care provided by paid child care workers, of whom 96.6 percent are women. See Statistics Canada, *The Daily* (13 April 1993).

<sup>61</sup>Evelyn Ferguson, “The Child-Care Crisis: Realities of Women’s Caring” in Carol Baines, Patricia Evans & Sheila Neysmith, eds., *Women’s Caring: Feminist Perspectives on Social Welfare* (Toronto: McClelland & Stewart, 1991) 73 at 74, 81-85.

<sup>62</sup>*Ibid.* at 85-86.

<sup>63</sup>See Eichler, *supra* note 54 at 164, where she defines housework as comprising three major functions: housekeeping, child care and the provision of personal services.

<sup>64</sup>Statistics Canada, *supra* note 60.

<sup>65</sup>*Ibid.*

<sup>66</sup>For an analysis of the history of foreign domestic workers in Canada and their exploitation, see Audrey Macklin, “Foreign Domestic Worker: Surrogate Housewife or Mail Order Servant?” (1992) 37 *McGill L.J.* 682.

<sup>67</sup>On the more general issue of the privatization of the costs of reproduction, see Jane Ursel, *Private Lives, Public Policy: 100 Years of State Intervention in the Family* (Toronto: Women’s Press,

funding of child care is primarily delivered through two systems. Under the Canada Assistance Plan, the federal government pays 50 percent of provincial and municipal costs of providing social assistance to persons "in need" and social services to those "in need" or "likely to become in need". These services include child care. In 1991, however, the federal government limited the amount of these payments, effectively capping them at the 1990 rate for provinces not receiving equalization payments.<sup>68</sup> If a family is not eligible for payments under the Canada Assistance Plan, its only available source of funding is the tax system and its deduction for child care expenses. As discussed above,<sup>69</sup> despite recent amendments to the *Act* to increase the amount of this deduction, it does not reflect the actual cost of child care and its operation is inequitable. Nevertheless, it remains the tool preferred by the federal government to subsidize child care, and consequently, it makes sense to think about improvements that can be made to it.<sup>70</sup>

Much has been written about the role that the lack of child care plays as an impediment to the entry or re-entry of women into the paid labour force.<sup>71</sup> It has been calculated that women unable to participate in the paid labour force because they are unable to obtain child care form a significant percentage of the "hidden unemployed"<sup>72</sup> — those persons who are no longer included in the official unemployment figures because they have given up looking for full-time work.<sup>73</sup>

Lack of adequate child care also dictates the nature of the work many women are able to do. For some women it means not working outside the home, and for others it means part-time work, shift work or work at a location close to home, children or school.<sup>74</sup> Overall, the limited availability of affordable,

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1992), in which the author provides an historical analysis of the relationship between the family and the State.

<sup>68</sup>*Expenditures Restraint Act*, *supra* note 50.

<sup>69</sup>See text accompanying note 30.

<sup>70</sup>This article was completed in January 1994. At the time of writing, there has, as yet, been no indication that the Liberal government, elected in November 1993, is considering other methods of funding child care.

<sup>71</sup>See e.g. *Cooke Report*, *supra* note 3; Eichler, *supra* note 54; Canadian Advisory Council on the Status of Women, *Women and Labour Market Poverty* by Morley Gunderson & Leon Muszynski with Jennifer Keck (Ottawa: Canadian Advisory Council on the Status of Women, 1990); *Women in Canada 1992*, *supra* note 2; Ann Duffy & Norene Pupo, *Part-Time Paradox: Connecting Gender, Work and Family* (Toronto: McLelland & Stewart, 1992).

<sup>72</sup>Social Planning Council of Metropolitan Toronto, "Hidden Unemployment Updated" (1986) 5:5 *Social Infopac* 5.

<sup>73</sup>Despite the barrier imposed by the lack of available and affordable child care, women with children are entering the paid labour force in greater numbers than ever. Between 1976 and 1990, the annual average participation rate for mothers with children younger than three increased from 31.7 percent to 60.1 percent (Statistics Canada & Health and Welfare Canada, "Parental Work Patterns and Child Care Needs" in vol. 4, *National Child Care Study*, *supra* note 37). In 1991, 64 percent of women with children under six worked outside the home (*Women in Canada 1992*, *supra* note 2).

<sup>74</sup>Of persons with the primary care of at least one child under thirteen, almost one half do not work a standard work week. (A standard work week consists of weekdays only on a fixed early day or daytime schedule generally ending before 6:00 p.m.) ("Parental Work Patterns and Child Care Needs". *ibid.* at 74). See also the discussion of the *National Child Care Study* in Alanna

accessible child care adds to the stress experienced by women with children who participate in the paid labour force. Family responsibilities are also cited as a common reason that women leave their employment.<sup>75</sup>

Child care is also an economic issue for women in a broader sense. Women earn less than men,<sup>76</sup> and lack of access to affordable child care contributes to this inequality in several ways. Obviously, the part-time work done by so many women is less remunerative than full-time work, but the child care crisis also means that many women work in jobs that require fewer overtime hours or that permit them to take unpaid time off during school vacations. Women without access to child care also forego education or training opportunities that could lead to jobs with higher salaries. It should be stressed that this is not just a workplace equality issue. Women's abilities to pursue other activities, both in and outside the home, are also affected by their child care responsibilities. This may manifest itself in several ways, including the inability of women with children to engage in remunerative activities in the home, like artistic endeavours, or non-remunerative but socially vital activities outside the home, like volunteer work. In fact, one of the recommendations made by the Canadian Advisory Council on the Status of Women in its brief to the Cooke Committee was that "child care services should be available to those parents who have no paid employment for a maximum of one day a week."<sup>77</sup>

An examination of child care policy raises complex questions about the interconnection between the State and the family<sup>78</sup> and the role played by the dominant perception of women, particularly mothers, as the primary carers for children.<sup>79</sup> We must recognize that universal child care is not perceived as desirable by those with an interest in ensuring that women continue to work in the home and provide child care for free. Additionally, if women are able to participate in the paid labour force in greater numbers and on a full-time basis, men will face, in times of high unemployment like the present, competition for jobs that women were not previously in a position to seek. The social and economic complexity of child care subsidization is emphasized by the absence of consensus amongst child care advocacy groups, whose demands vary. Differences among the various child care lobby groups and other organizations that speak on the issue of child care tend to arise over three specific issues. The first is the

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Mitchell, "Irregular Shifts Cause Child-Care Woes, Study Says: Survey Finds 45 Percent of Working Parents with Children under 13 Don't Work 9 to 5" *The [Toronto] Globe and Mail* (28 July 1992) A6.

<sup>75</sup>National Council of Welfare, *Incentives and Disincentives to Work* (Ottawa: Supply & Services Canada, 1993) at 19.

<sup>76</sup>The average wage for full-year, full-time employment in 1991 was \$38,567 for men and \$26,842 for women, meaning that women earn 69.6 percent of what men earn (Statistics Canada, *Earnings of Men and Women 1991* (Ottawa: Minister of Industry, Science and Technology, 1993)).

<sup>77</sup>*Caring for Our Children*, *supra* note 3 at 3. The recommendation further stated, "The CACSW also recognizes the important contribution that stay-at-home parents make in the nurturing of children and realizes that 24-hour child care is stressful."

<sup>78</sup>For more discussion of this issue, see Ursel, *supra* note 67.

<sup>79</sup>For a discussion of the role of ideology in the child care debate, see Katherine Teghtsoonian, "Families, Ideologies and Child Care Policy Debates in Canada" (Paper presented at the annual meeting of the Canadian Political Science Association, June 1992) [unpublished].



topic of this article: the method of delivering funding for child care and, in particular, whether or not the primary funding should be through the tax system or through direct grants to child care facilities. The second significant difference arises over the respective roles of the public sector (the State) and the private sector (including the family) in providing child care. Some argue for more reliance on the State as the provider of these services, on the grounds that recourse to the private sector does not address the structural problems of the current patriarchal system. Others are more prepared to see a role for private arrangements as a means of increasing access to child care.<sup>80</sup> The third issue — that of choice — grows out of this debate because for some women universal day care is not the preferred option, as they wish to be able to care for their children themselves within the home and be compensated for providing that care. Differences also occur over strategies for change.<sup>81</sup> There are, however, some common themes. These include universality (or some degree thereof), affordability and high quality child care.<sup>82</sup>

#### IV. Symes and the Tax Debate

The issue of subsidizing child care through the tax system has received much attention lately because of the Supreme Court of Canada's recent decision in *Symes*.<sup>83</sup> The taxpayer, a full-time practising lawyer and, at that time, a partner in a law firm, claimed that her child care expenses should be deductible as a business expense under section 9 and paragraph 18(1)(a) of the *Act*.<sup>84</sup> The Court held that child care expenses could not be deducted as a business expense on the basis that section 63 (the current child care deduction) precluded any further deduction for these expenses. In addition to the direct restriction of the deductibility of child care expenses imposed by *Symes*, this case also illustrates another limitation of using the tax system to fund child care. There is no question that, had Ms Symes been successful and been permitted to deduct these expenses as a business expense, the result would have favoured some women over others, thereby providing the subsidy in an unfair manner. This does not mean, however, that the tax system should not be used to deliver this subsidy. Rather, we must recognize the limitations illustrated so clearly by *Symes* and devise a model that avoids them and is equitable for all women.

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<sup>80</sup>For a discussion of this issue, see Evelyn B. Ferguson, *Another Look at Woman's Place: Liberal and Socialist Feminist Perspectives on Childcare* (Working Paper on Social Welfare in Canada No. 20) (Toronto: University of Toronto Press, 1986).

<sup>81</sup>For an analysis of some of these differences see Katherine Teghtsoonian, "Promises, Promises: 'Choices for Women' in Canadian and American Child Care Policy Debates" (1994) *Feminist Studies* [forthcoming].

<sup>82</sup>See e.g. Martha Friendly, "Child Care in a Public Policy Context" (Paper presented to the National Child Care Conference and Lobby, 15 October 1992) [unpublished], who noted that the goals of the Canadian Day Care Advocacy Association are that child care be universally accessible, publicly funded, comprehensive and high-quality.

<sup>83</sup>*Supra* note 4.

<sup>84</sup>Section 9 provides that a taxpayer's income from business is the profit from the business, and paragraph 18(1)(a) provides that no expense is deductible "except to the extent that it was made or incurred by the taxpayer for the purpose of gaining or producing income from the business ..."

Symes made a two-part argument. She contended, first, that the salary paid to the nanny who cared for her children was a business expense incurred to gain or produce business income. Had she not had child care help, she would not have been able to practise law, and consequently, would have earned no income from her business. Her second argument was that to disallow her the deduction of these business expenses was to deny her the equal benefit of the law on the basis of her sex, in contravention of subsection 15(1) of the *Charter*, because the disallowance has a disproportionate impact on women who are primarily responsible for child care.

At the Federal Court (Trial Division),<sup>85</sup> Cullen J. held that Ms Symes's expenses should be deductible under section 9 and paragraph 18(1)(a) of the *Act* for two reasons. He found, first, that the issue had to be interpreted in light of the "social and economic realities of the times."<sup>86</sup> He relied on the expert evidence of Dr. Patricia Armstrong, a sociologist, that the influx of women with children into the workforce in the 1970s and 1980s represented a significant social change. He then held that Symes had "exercised good business and commercial judgment in deciding to dedicate part of her resources from the law practice to the provision of child care,"<sup>87</sup> and that, consequently, the child care expenses not already deductible under section 63 were deductible as a business expense. He held, further, that Revenue Canada's denial of the deduction was discrimination against Ms Symes on the basis of her sex, noting that as a result she was "not treated like a serious business person with a serious expense incurred for a legitimate purpose."<sup>88</sup>

That decision was overturned by the Federal Court of Appeal. Décarry J.A., writing for the Court, held that child care expenses were not a business expense under paragraph 18(1)(a) because they were a "parental" expense under section 63 and were only deductible in accordance with that section.<sup>89</sup> He also rejected Ms Symes's *Charter* argument because, unlike Cullen J., who viewed Ms Symes as a business woman standing next to a business man, Décarry J.A. chose to compare Ms Symes to other women who did not earn business income. He pointed out that Ms Symes was not arguing that, if she were successful, the *Act* would then discriminate against women employees in favour of self-employed women. He stated, "I am not prepared to concede that professional women make up a disadvantaged group against whom a form of discrimination recognized by section 15 has been perpetrated."<sup>90</sup>

The Supreme Court of Canada upheld the decision of the Federal Court of Appeal. Iacobucci J., for the majority, held that the expenses were not deduct-

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<sup>85</sup>*Symes* (F.C.T.D.), *supra* note 4 at 72.

<sup>86</sup>*Ibid.* at 73.

<sup>87</sup>*Ibid.* at 71.

<sup>88</sup>*Ibid.* at 81. It should be noted that because Cullen J. had already ruled that the expense was a deductible business expense his application of the *Charter* was not gratuitous.

<sup>89</sup>*Symes* (F.C.A.), *ibid.* at 525. This reasoning was not advanced at the trial level because counsel for Revenue Canada conceded that if the child care expenses were proper business expenses under sections 3 and 9 and paragraph 18(1)(a) of the *Act*, then section 63 would not prevent them from being deductible as business expenses.

<sup>90</sup>*Ibid.* at 531.

ible under section 9 and paragraph 18(1)(a) of the *Act* because, he wrote, "the *Income Tax Act* intends to address child care expenses, and does so in fact, entirely within s. 63."<sup>91</sup> Iacobucci J. endorsed Décaré J.A.'s description of section 63 as a self-contained and complete code for the deduction of child care expenses, which precludes any further deduction for these expenses.<sup>92</sup> He also characterized the *Charter* issue in terms of whether section 63 of the *Act* disproportionately limited the deduction with respect to child care expenses incurred by women. He reached the conclusion that it did not. In a statement with which L'Heureux-Dubé J. strongly disagreed in her dissent, Iacobucci J. said, "[T]he appellant taxpayer has failed to demonstrate an adverse effect created or contributed to by s. 63, although she has overwhelmingly demonstrated how the issue of child care negatively affects women in employment terms. Unfortunately, proof that women pay social costs is not sufficient proof that women pay child care expenses."<sup>93</sup>

In dissent, L'Heureux-Dubé J. disagreed on all of these issues. She held that the child care expense was deductible under section 9 and paragraph 18(1)(a) of the *Act* as a business expense. She stated, first, that the presence of section 63 did not preclude the deduction of child care expenses under another provision of the *Act*. She then asked whether the expenses ought to be deductible as business expenses. Acknowledging the necessity of child care for women with children who wish to participate in the paid labour force, she found that they should be. L'Heureux-Dubé J. also discussed the gender-biased nature of the relevant tax provisions, describing the interpretation of "business expense" as one "wrought with male perspective and subjectivity."<sup>94</sup> She concluded that "[t]he concept of business expense should be interpreted in a way that takes into account the realities of businesswomen's expenses in relation to child care."<sup>95</sup>

The facts in *Symes* illustrate not only the problems inherent in the operation of section 63, including the inadequate amount of the subsidy, but also illustrate many other negative consequences of arguing for more subsidization of child care through the tax system. Indeed, those negative consequences form a subtext to the *Symes* case and the remedy sought by the appellant. Put generally, any legal challenge to a tool used to deliver a subsidy is first constrained by the limitations of that tool. To the extent that our tax system privileges wealth, any challenge to it, with respect to the funding of a programme such as child care, is constrained by that privilege. *Symes* provides a graphic example of this point.

The *Act* allows self-employed taxpayers to deduct expenses incurred to gain or produce income, but specifically prohibits the deduction of expenses

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<sup>91</sup>*Symes* (S.C.C.), *ibid.* at 750.

<sup>92</sup>It should be noted that Iacobucci J. did address the issue of whether child care expenses could be a deductible business expense under section 9 and paragraph 18(1)(a) of the *Act*, although he did not reach a conclusion on the issue.

<sup>93</sup>*Symes* (S.C.C.), *supra* note 4 at 765. L'Heureux-Dubé J. responded that *Symes* "has proven that she has incurred an actual and calculable price for child care and that this cost is disproportionately incurred by women" (*ibid.* at 821).

<sup>94</sup>*Ibid.* at 807.

<sup>95</sup>*Ibid.* at 816-17. It should also be noted that Iacobucci J. suggested, in his discussion of paragraph 18(1)(a) (*ibid.* at 744), that there might be a need to reconceptualize the concept of business expense in light of the changing composition of the business class.

incurred to earn employment income.<sup>96</sup> The appellant claimed a deduction for child care expenses in the computation of her business income, a deduction which, had she been successful, would not have been available to the vast majority of women.<sup>97</sup> Women form less than 25 percent of the self-employed in Canada.<sup>98</sup> If the *Act* is used to subsidize child care for the self-employed, the result is merely more privilege for the already privileged.<sup>99</sup> Since the government has acknowledged that funding for child care is limited, success for Ms Symes and a consequent diversion of existing funds (or a limited amount of new funding) to those privileged by wealth and/or class would have been inappropriate. It would have served to reinforce the inequitable provision of the subsidy, especially for those who are economically or socially disadvantaged. Furthermore, if child care expenses had been held to be a deductible business expense under section 9 and paragraph 18(1)(a), they would have been deductible by all business persons, including men. Because women earn an average of 69.6 percent of what men earn,<sup>100</sup> it seems likely that in heterosexual couples in which both partners earn business income and incur child care expenses, the male partner would take the deduction since it would be worth more to the partner with the greater income. As men form 75 percent of the self-employed, it is also likely that the male partner would be the only one able to take advantage of this deduction. Obviously, this result would have been inconsistent with the policy underlying the current section 63 deduction for child care expenses, which is to reduce the disincentive for women to participate in the paid labour force.

## V. Recommendations for Change

Despite the problems identified above, it is my opinion that the tax system may play a role as a tool to deliver some subsidy for child care expenses. In this Part, I suggest some changes designed to make the current rules fairer and more effective. I also recommend some additional tax measures directed at making child care less of a private matter and more of a public responsibility.

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<sup>96</sup>Subsection 8(2) prohibits the deduction of any expense incurred to earn employment income, other than one of the very limited expenses listed in section 8. Child care expenses are not so listed and therefore would not be deductible.

<sup>97</sup>While the majority of the Supreme Court in *Symes* did not give this as a reason for holding that the expense was not deductible, Iacobucci J. did refer to it in his discussion of section 1 of the *Charter*. He said:

We were invited to consider the *Charter* only with respect to self-employed women, and it was suggested to us that a remedy could be granted, without the need to consider the position of other women, other parents, or the government's overall response to child care needs. ...

This Court was invited to use the *Charter* to rectify a disadvantage allegedly suffered by businesswomen *vis à vis* businessmen, and, in the process, this Court was invited to ignore the effect of allowing a complete deduction on the rest of the system. At the s. 1 stage of *Charter* analysis, however, such an instrumental approach is inappropriate (*Symes* (S.C.C.), *supra* note 4 at 773).

<sup>98</sup>Statistics Canada, *Women in Canada: A Statistical Report*, 2d ed. (Ottawa: Supply & Services Canada, 1990) at 90.

<sup>99</sup>For further analysis of this issue, see Claire Young, "Child Care and the Charter: Privileging the Privileged" (1994) *Rev. Const. Studies* [forthcoming].

<sup>100</sup>Statistics Canada, *Earnings of Men and Women, 1991* (Ottawa: Minister of Industry, Science and Technology, January 1993).

My starting proposition is that child care funding through the tax system is not a total solution to the child care crisis. It is important to recognize the role that the tax system has to play as *only one part* of a multi-faceted strategy aimed at providing affordable, accessible child care. Despite the numerous reports and recommendations made over the years, many of which have recommended an approach to the funding of child care that is not so reliant on tax measures, the tax system remains its primary source of funding. Current political reality dictates that it is highly unlikely that in the immediate future the government will go beyond the tax system to subsidize child care. As Joe Clark, then Minister for Constitutional Affairs, commented in 1992, "Whether or not Canada has a national child care programme is a matter of political will."<sup>101</sup> It seems that, with the abandonment of the National Strategy on Child Care, the political will for universal child care has evaporated.<sup>102</sup> Indeed, the only measures included in the National Strategy on Child Care that have been implemented are those related to changes to the tax provisions, including increasing the deductible amounts under section 63. It is therefore appropriate to consider how the tax system can be most effectively used in this area.

#### A. Tax Credit

Perhaps the most significant inequities in the application of the deduction for child care expenses arise because the expense is a deduction and not a tax credit. In order to redress this inequality, the current deduction should be converted to a tax credit and function as a subsidy which would be worth the same to all taxpayers. Its value, in other words, would not depend on the taxpayer's tax rate.<sup>103</sup> The amount of the credit should also bear a closer relationship to the cost of child care than does the current deduction. This latter change would not only more accurately reflect the actual cost of child care, but could also go some way towards remedying the undervaluation of child care work, perhaps resulting in an increase in salaries paid to child care workers. If it is considered appropriate to limit the amount of the tax credit, this should be carried out in a progressive manner.<sup>104</sup> Such a measure would adhere to the concept of basing tax liability on the ability to pay by ensuring that those who most need the benefit would receive a greater tax subsidy than would those with higher incomes.

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<sup>101</sup>The Right Honourable Joe Clark, Address (Faculty of Law, University of British Columbia, 17 September 1992) [unpublished].

<sup>102</sup>The question of whether or not the National Strategy on Child Care might be revived in the future was dealt with rather succinctly by Donald Blenkarn, a Conservative Member of Parliament and Chair of the Finance Committee, who described the strategy as "down the sewer. It is not a program that can be or should be" (Kirk Makin, "A Tory Feminist Faces a Choice" *The [Toronto] Globe and Mail* (7 April 1993) A1). See also the Liberal government's position on this issue (*supra* note 13).

<sup>103</sup>This is not a novel suggestion and has been made by the National Council of Welfare (*supra* note 3 at 20), the Ontario Fair Tax Commission (*supra* note 17 at 31), and the Special Committee on Child Care (*supra* note 3).

<sup>104</sup>A useful model is the new child tax benefit (section 122.6), which provides a tax credit that is gradually reduced for families above certain income thresholds.

### **B. Eligibility for the Tax Credit**

An important question is whether the restrictions on the types of activity that currently qualify the taxpayer to claim the deduction should be retained. The *Act* limits the deduction to taxpayers who require child care in order to work outside the home in the paid labour force, or to take occupational training for which they receive funding under the *National Training Act*,<sup>105</sup> or to carry out grant-funded research.<sup>106</sup> It is clear that for many women the government's stated policy of removing impediments to their full participation in the labour force is meaningless. What about women with children who are actively seeking employment but have no income, women who take non-eligible training or skills-updating courses after childbirth, or women who are full-time students studying prior to employment? All these women face the same child care expenses as women eligible to take the deduction, but receive no tax subsidy for them. Lack of affordable, accessible child care is more than an issue of workplace equality. The needs of women who choose to work in the home and care for their children in that environment should also be recognized by the tax system, as has been proposed by the Canadian Advisory Council on the Status of Women.<sup>107</sup> I suggest that eligibility for the credit be drafted in a manner that does not tie it so closely to activities that generate income. Eligibility requirements should take into account the needs of all women with children who are studying or training prior to entering or re-entering the paid labour force.<sup>108</sup>

### **C. Refundability of the Tax Credit**

Whether or not the credit is restricted to those currently eligible for the deduction or expanded to include all or some of the groups described above, it should be fully refundable in order to ensure that those without taxable income receive the benefit. Its delivery should also be modelled on that of the child tax benefit which, in addition to being fully refundable, provides for cheques to be issued monthly for amounts calculated on the basis of the previous year's income. Providing the benefit up front and on a regular basis instead of delaying "payment" until a tax return is filed, signifies that the credit for child care expenses is a subsidy that is part of a social programme.

### **D. Receipts**

The statutory requirement that receipts which include the social insurance number of the payee be filed by the taxpayer with her return should be removed. Presumably the reason that a receipt and the social insurance number of the payee are required is to minimize the number of fraudulent claims and to ensure that, where a deduction is taken, the payee includes the amount in her income.

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<sup>105</sup>R.S.C. 1985, c. N-19.

<sup>106</sup>*Act*, *supra* note 5, s. 63(3)(a).

<sup>107</sup>*Caring for Our Children*, *supra* note 3 at 3.

<sup>108</sup>Consideration should also be given to the needs of women who do not work outside the home, for to discriminate against them by denying them the tax credit is to perpetuate the misconception that work outside the home is of more value than the work performed in the home. It perpetuates the further misconception that work inside the home has no cost attached to it.

Yet why child care expenses are singled out for this restriction and not, for example, moving expenses (section 62) or attendant care expenses (section 64), is not clear. The presumption may be that child care expenses are more likely to be incurred in the informal market where the provision of receipts is not the norm — the same point, however, could be made about moving expenses.

The requirement is sexist in effect because it is in respect of a deduction for an expense primarily incurred by women for services also primarily provided by women. It is also racist in effect. Child care services, particularly in the private sector, are often provided by immigrant women.<sup>109</sup> By statutorily requiring child care workers to provide their social insurance numbers, while not requiring the same of providers of other tax deductible services, the government places an added burden primarily on these immigrant women. The rationale for this policy is questionable, particularly in light of the fact that child care workers are so grossly underpaid. Many of those providing the service do not earn enough to be liable for income tax, so the requirement for provision of their social insurance numbers is not strictly a tax enforcement measure. If, as one can speculate, it is really an attempt to enforce the *Immigration Act*<sup>110</sup> and to ensure that only those with legal status in Canada, who are consequently able to secure a social insurance number, may work in Canada, then it is highly inappropriate to use tax legislation in this manner. It is also probably ineffective. Denying the tax deduction to a woman who is trying to obtain child care in a market where the demand is significant and the supply limited does not automatically result in her use of only those providers who have social insurance numbers. It often simply means she resorts to the informal market and the provision of services in the underground economy.<sup>111</sup> It also signals how the tax system perpetuates the invisibility and undervaluation of child care. I suggest that the rules that apply to most other deductible expenses — that receipts be maintained and submitted on demand — should apply to child care expenses.<sup>112</sup>

### E. Advertisement of Entitlement

There is evidence that many women eligible to deduct child care expenses do not do so.<sup>113</sup> Since the tax system is the primary method of funding child care, Revenue Canada should embark on an advertising campaign to inform women about the availability of the current deduction. If the deduction is converted to a tax credit, it is even more critical that it be well advertised. Unlike

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<sup>109</sup>For a discussion of this issue, see Macklin, *supra* note 66.

<sup>110</sup>R.S.C. 1985, c. I-2.

<sup>111</sup>The recent appointment process in the United States of an Attorney General illustrates this point. Zoe Baird, who was nominated by President Clinton for the position of Attorney General, was forced to step down during the Senate Committee hearings when it was revealed that she had employed an illegal immigrant as a nanny for her children.

<sup>112</sup>It is highly likely that the requirement for the provision of receipts is disproportionately onerous for poor women. They are more likely to resort to the informal market for child care services, because they are unable to afford the usually more expensive licensed child care.

<sup>113</sup>See *Cooke Report*, *supra* note 3 at 170: "In the 1981 taxation year, child care expenses were claimed for the care of 575, 881 children, or about 44 percent of the estimated number of children receiving non-parental care."

the personal tax credit, eligibility for which is determined by Revenue Canada when a return is filed, if the child care expense credit were not claimed by the taxpayer, entitlement would not be determinable on assessment. Publicity about eligibility will also be essential because women with no taxable income might not file returns at all and therefore would not receive the refundable credit. Advertising entitlement to a tax credit is not a novel concept, having been undertaken with respect to the refundable Goods and Services Tax credit.

#### F. Primary Caregiver

The child care expenses credit should go to the primary caregiver<sup>114</sup> of the child, and in the case of heterosexual couples, there should be a rebuttable presumption that the primary caregiver is the female partner.<sup>115</sup> A model for this suggestion is the child tax benefit, which replaces the family allowance and refundable child tax credit, and is payable to the parent who “primarily fulfils the responsibility for the care and upbringing”<sup>116</sup> of the child. This parent is “presumed to be the female parent.”<sup>117</sup> The *Act* does not define “care and upbringing” but provides that factors to be considered in determining what constitutes care and upbringing may be set out in regulations made on the recommendation of the Minister of National Health and Welfare.<sup>118</sup> At present no such regulations have been issued.

As I have discussed, child care continues to be performed primarily by women, and this has contributed to its invisibility and undervaluation. Including a rebuttable presumption that a woman is the primary caregiver of her child for the purposes of the child tax credit may, to the extent that it reinforces this state of affairs, be problematic. But the purpose of this change would be to recognize through the law, specifically through the tax system, the role that women do play as primary caregivers. This legal legitimation of the role would go some way towards removing both the undervaluation and invisibility of this work. A second aspect to this point is that the presumption operates in the context of a law that is designed to remove one of the barriers to women’s participation in the paid labour force. That increased participation may also play a role, together with more structural changes, in shifting the current gendered division of child care labour.<sup>119</sup>

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<sup>114</sup>For a description of the primary caregiver presumption in child custody law, see Susan B. Boyd, “Potentialities and Perils of the Primary Caregiver Presumption” (1990) 7 Can. Fam. L.Q. 1.

<sup>115</sup>Consideration must be given to how such a proposal would affect those families that do not fit the model of the “traditional” family. Such families might include those who live in extended families, such as First Nations and other groups, in which primary child care is provided by family members other than a parent. I suggest that, because the presumption is rebuttable, there is scope within this rule to recognize and respect such caregiving relationships.

<sup>116</sup>*Act*, *supra* note 5, s. 122.6(“eligible individual”)(b).

<sup>117</sup>*Ibid.*, s. 122.6(“eligible individual”)(f).

<sup>118</sup>*Ibid.*, s. 122.6(“eligible individual”)(h).

<sup>119</sup>See Boyd (*supra* note 114) for a discussion of the limitations of the primary caregiver presumption for problems like the gendered division of child care, as well as a potential role for it in conjunction with more structural changes.



### G. Accelerated Capital Cost Allowance

Tax measures intended to assist in achieving the goal of accessible, affordable child care need not be limited to deductions or credits for the person who incurs child care expenses. Other measures that would work towards the same goal include, for example, giving an accelerated capital cost allowance for capital expenditures associated with the cost of constructing and operating child care facilities. This would permit those who construct or operate these facilities, often employers, to claim a deduction for depreciation of the assets at a rate in excess of the actual rate of depreciation. This could result in a significant tax saving. Capital cost allowance is, of course, currently available for these expenditures at varying rates depending on the nature of the capital asset, but increasing it to, for example, 100 percent for the capital costs associated with the construction of a building, would ensure a full deduction of those expenditures once the building was in use. If a taxpayer with a federal-provincial combined marginal tax rate of 50 percent incurred capital expenditures of \$500,000, the tax saving would be \$250,000.<sup>120</sup> Furthermore, if accelerated capital cost allowances were available for capital assets like equipment acquired during the operation of child care facilities, the tax subsidy would continue beyond the period of immediate use and form an ongoing tax incentive.

### H. Zero-Rating for the Purposes of the Goods and Services Tax

Another innovative use of the tax system to reduce the cost of child care would be to zero-rate the cost of all child care spaces for the purposes of the Goods and Services Tax. This would ensure that no GST was payable on these services and would permit the supplier of these services to claim back any GST paid on the goods and services provided to him or her. At present, child care services are exempt from the GST,<sup>121</sup> but any perceived advantage to this exemption is illusory for those who use child care services. This occurs because even though child care services themselves are not taxed, the supplier of those services is taxed on the goods and services she or he uses to provide them. Because the child care service is exempt from tax, the supplier does not receive an input tax credit with respect to the GST paid on the goods and services used to provide the child care service. Presumably this inability to recover the GST paid results in the GST being passed on to the consumer through higher charges for child care services. Zero-rating would ensure that no GST would be payable, either by the supplier of the services or the consumer.

## VI. Consequences of Using the Tax System to Deliver the Subsidy for Child Care

As I have indicated, there are potential problems with using the tax system to deliver a subsidy for child care. None of these problems are, in my opinion, insurmountable, as I shall discuss in this Part.

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<sup>120</sup>100 percent capital cost allowance is currently available for Class 12 assets which include, among other things, certified feature films. The fast "write-off" of capital cost allowance acts as a significant incentive to investment (*Income Tax Regulations*, C.R.C., c. 945, Sch. II).

<sup>121</sup>*Excise Tax Act*, R.S.C. 1985, c. E-15, Sch. V, part IV.

Perhaps the most persuasive argument against using the tax system to fund child care is that this method of public subsidization contributes to the privatization of child care. Unlike direct subsidies paid in the form of operating or capital grants to non-profit child care facilities, tax subsidies are received by individuals, with respect to any child care expense. There are no limits on the forms of the child care that qualify for the subsidy. That is, any child care service provided by any person, other than the parent of the child or a relative under eighteen, in the case of the current section 63 deduction, may be deducted. But it is irrelevant for tax purposes whether the child care is provided by the private or public sector and, in the case of a day care facility, whether the facility is licensed or unlicensed, or whether it is a non-profit facility or one that is run for profit.

This non-accountability for the nature of child care services, combined with the lack of spaces for children in licensed child care facilities, contributes to the privatization of child care.<sup>122</sup> The role of the State is therefore contradictory. It does provide a subsidy for child care; in that respect, it takes some responsibility for the provision of child care and recognizes that it is not the sole responsibility of the family. But at the same time, the State ceases to play a role once that subsidy has been provided, leaving the availability and nature of child care to the private sector and the “market”.

Many of those who lobby for improved child care have been careful to stress the need for a system that involves more participation by the State — participation that goes beyond funding. The Canadian Day Care Advocacy Association has lobbied strongly for both increased funding for public non-profit child care facilities and increased government regulation of child care.<sup>123</sup> The Cooke Committee noted that parents prefer to use licensed, regulated child care if it is available, and consequently, it recommended that all new financing initiated by the federal government be directed only to services licensed and monitored by provincial or municipal governments.<sup>124</sup> The National Council of Welfare also recommended the creation of more licensed child care spaces and less reliance on informal arrangements.<sup>125</sup> None of these recommendations has been implemented, and the result is the considerable and continued recourse to private arrangements, such as the use of nannies and other domestic workers. A significant problem with a child care system which operates primarily in the private sphere is that domestic workers are underpaid and, in most cases, are non-

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<sup>122</sup>*National Child Care Study*, *supra* note 37.

<sup>123</sup>See Judith Martin, “High Quality Child Care: A Pre-Condition to Equality of Employment” (1991) 11 *Canada Woman Studies* 91; Canadian Day Care Advocacy Association, *Vision* (Ottawa: Canadian Day Care Advocacy Association, 1990).

<sup>124</sup>*Cooke Report*, *supra* note 3 at 99-101. It should be noted that the licensing and regulation of child care is a contentious issue. Some feminists argue that the professionalization of child care is not always in the best interests of children or their mothers. For a discussion of this issue, see Ferguson, *supra* note 61 at 87-88.

<sup>125</sup>The National Council of Welfare stated, “The federal government should reverse its decision to supplement the refundable child tax credit as part of its child care strategy and should use the money instead to increase the supply of licensed child care spaces and to provide more subsidies for maintaining those spaces” (*supra* note 3 at 40).

unionized.<sup>126</sup> Furthermore, many of these workers are immigrant women who work for low wages under conditions which may subject them to racism and other forms of exploitation. They are required by the *Immigration Act*<sup>127</sup> to live in the home of their employers, increasing their vulnerability to abuse. The use of the tax system to provide a subsidy that will be used in the private sector serves to reinforce the subordination and oppression of these women. One cannot, however, assume that a less private child care system, such as one that relies primarily on publicly-funded licensed day care facilities, would automatically redress the problems of racism and the oppression of immigrant domestic workers. The issue is a complex one; many factors, like current immigration policies and the undervaluation of child care work, contribute to the present state of affairs.

Those who believe the reluctance of the State to recognize the importance of child care is a significant impediment to equality for women find it difficult to argue in favour of a measure that, while it involves the expenditure of public funds, will likely increase reliance on the private sector. But it must be recognized that the "private" nature of child care is not solely the result of its funding through the tax system. Perceptions of the family and its responsibilities contribute to this privatization.<sup>128</sup> In an ideal world, there would be a national child care programme through which the State and society generally would take more responsibility for the regulation and provision of the service. Unfortunately, there has never been such a programme in Canada, and the demise of the proposed National Strategy on Child Care, as well as public pronouncements by politicians,<sup>129</sup> suggest that creating such a programme does not appear to be part of the political agenda at present. It is important to ensure, therefore, that the current system is not simply dismissed as flawed. Rather, steps should be taken to recognize its weaknesses and to improve tax measures so that they are more fair and more responsive to the needs of women with children. For example, recent studies indicate that, given a choice, parents prefer to use licensed day care facilities.<sup>130</sup> The tax system, as I have indicated, can be used to address this issue directly by selectively providing tax deductions such as accelerated capital cost allowances for initial and ongoing capital expenditures. The availability of the deduction could be dependent upon specific criteria being met by the oper-

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<sup>126</sup>See Ferguson, *supra* note 61 at 78.

<sup>127</sup>*Immigration Regulations*, C.R.C., c. 940, s. 2(1) (definition of "live-in caregiver").

<sup>128</sup>See Boyd, *supra* note 114.

<sup>129</sup>See Clark's statement in the text accompanying note 101, and Blenkarn's comment, *supra* note 102.

<sup>130</sup>See Donna Lero & Irene Kyle, "Day Care Quality: Its Definition and Implementation" in *Child Care: Standards and Quality* (Ottawa: Supply & Services Canada, 1985); *Cooke Report*, *supra* note 3 at 98-99. It seems that little progress is being made in the effort to provide more publicly licensed and regulated child care spaces. The National Action Committee on the Status of Women states:

Between 1990 and 1991 the number of regulated child care spaces in Canada grew by only 2.95%, the lowest percentage increase since 1978. While it may seem progressive that regulated child care is increasing at all, in reality the number of children with working mothers has grown at a much greater rate. In 1991, there were 800,000 more children with a working mother for whom there was no regulated child care space than there were in 1974 (*supra* note 30 at 19).

ators of the day care facility, which would ensure that certain minimum standards are met. This mechanism could be used to subsidize both the creation of the child care spaces and the ongoing operation of child care facilities.

Another concern is that the use of the tax system to partially subsidize child care may lessen demands on the State to provide a national child care programme. Funding through the tax system has, in the past, been used to justify the limited funds available for subsidizing public sector child care. For example, when the National Strategy on Child Care was abandoned in 1992, it was done at the same time that the limits on the deductible amounts under section 63 were increased. One can also speculate about the effect a successful appeal by Ms Symes would have had in terms of removing the pressure from the State to respond to the current child care problem. Potentially, there might have been some demobilization of the child care lobby if self-employed women had been permitted to deduct their child care costs as a business expense. As Brenda Cossman said, “[Symes] has divided the child care lobby, and ... demobilized a powerful section of that lobby — upper income self-employed professional parents — who stand to benefit from the business expense deduction.”<sup>131</sup>

Clearly, in the past, the fact that some relief for child care expenses has been provided by the tax system has allowed the State to claim that action is being taken to address the child care crisis. The future may, however, be different. As more women enter the paid labour force, the issue of child care underfunding is increasingly taken up by diverse lobby groups. For example, the lack of affordable, accessible child care has been addressed in many very recent reports, including several that had different issues as their primary focus.<sup>132</sup> Symes has also fostered considerable discussion of the child care funding issue in the media and elsewhere. It is not an issue that is likely to disappear. Improving the current provisions of the *Act* so that they operate more equitably and efficiently could, therefore, be an important first step. Such a measure might, by reducing the restrictions on eligibility for tax relief for child care expenses, increase the demand for child care which cannot be met by the informal market, thereby putting pressure on the State to provide more child care spaces.

The tax system is increasingly being used to fund social programmes. Funding child care in this manner is consistent with this trend. A recent example of a social programme that is now funded under the *Act* is the new child tax benefit,<sup>133</sup> which is a composite benefit that includes two previous tax measures (the child tax credit and the refundable child tax credit) as well as the family allowance, a benefit not previously delivered by the tax system. One reason the gov-

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<sup>131</sup>“Dancing in the Dark: A Review of Gwen Brodsky and Shelagh Day’s *Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back?*” (1990) 10 Windsor Y.B. Access Just. 223.

<sup>132</sup>The most recent example of a report on child care is the *National Child Care Study* (*supra* note 37), which consists of eight volumes. Other recent reports which have not focused directly on the issue, but have considered it as part of the larger issue of women’s equality, include the Ontario Fair Tax Commission’s report (*supra* note 17 at 27), and that of the National Action Committee on the Status of Women (*supra* note 30 at 19).

<sup>133</sup>*Act*, *supra* note 5, ss. 122.6-122.64.

ernment appears to favour using this strategy is that the universality of social programmes can be diminished by including them in a progressive tax system. In the case of the child tax benefit, the amount of the benefit is reduced for taxpayers with incomes above certain threshold amounts. It is interesting to note, however, that in the case of child care, at present the reverse is true; that is, the amount of the benefit increases as income increases.

Use of the tax system to fund social programmes is frequently criticized because the amount expended on a particular programme may be difficult to ascertain. That criticism is not as valid today as it was in the days prior to the publication of itemized tax expenditure accounts. While there have been significant gaps in time between the release of the several tax expenditure accounts, it does appear that the government is committed to their publication.<sup>134</sup> The most recent documentation available is the *Government of Canada Personal Income Tax Expenditures*, released in December 1992, which put the amount expended on the child care deduction at \$245 million for 1988 and \$265 million for 1989. While the considerable length of time between the making of the expenditure and the publication of its total amount is regrettable, if the government continues to release tax expenditure accounts, it will be possible to monitor the amount spent on child care through the tax system.

It has also been argued that a tax expenditure is an inferior policy instrument because it is administered by Revenue Canada, not by the government department with expertise in the particular social programme.<sup>135</sup> Does Revenue Canada have the skills necessary to administer a child care subsidy programme? The answer depends to a certain extent on how specialized the particular programme is. Currently the child care deduction is relatively unrestricted by factors that require specialized administration, so I suggest that this is not a problem. Should changes be made to the subsidy that would require expertise in child care, either with respect to policy or administration, the Department of Finance and Revenue Canada would have to enlist the talents of those with experience in child care policy issues.

There is a final, added advantage to delivering subsidies for programmes like child care under the *Act* — political expediency. Politicians are familiar and relatively comfortable with using the *Act* to subsidize activities. Each year there is a budget and the *Act* is opened up for amendment. The budget system allows

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<sup>134</sup>Tax expenditure accounts were released in 1979, 1980, 1985 and 1992. See Department of Finance, *Government of Canada Tax Expenditures Account: A Conceptual Analysis and Account of Tax Preferences in the Federal Income Tax and Commodity Tax Systems* (Ottawa: Department of Finance, 1979); Department of Finance, *Government of Canada Tax Expenditure Account: An Account of Tax Preferences in Federal Income and Commodity Tax Systems, 1976-1980* (Ottawa: Department of Finance, December 1980); Department of Finance, *Account of the Cost of Selective Tax Measures* (Ottawa: Supply & Services Canada, August 1985); Department of Finance, *supra* note 14. See also Satya Poddar, *Integration of Tax Expenditures into the Expenditure Management System: The Canadian Experience* in Neil Bruce, ed., *Tax Expenditures and Government Policy* (Kingston, Ont.: John Deutsch Institute for the Study of Economic Policy, Queen's University, 1988) 259, where he discusses the important role that tax expenditure analysis has played in the federal government's policy making.

<sup>135</sup>See Neil Brooks, "Comment" in Bruce, ed., *ibid.* at 328.

changes to be made on a frequent basis and, unlike, for instance, the now defunct *Canada Child Care Bill*, amendments to the *Act* that make it to bill form are usually enacted. This means less uncertainty in terms of legislative change and also allows more frequent fine-tuning of particular provisions.

### Conclusion

Despite the structural inequities that I have discussed and the limitations on the transformative power of law, my conclusion is that there is still a role for the tax system to play in delivering a subsidy for child care. The current provision has, as I have indicated, many flaws, including the limited amount of the subsidy and the fact that it is worth more to a taxpayer with a higher income. The remedy sought by Ms Symes was not appropriate because its application was limited to self-employed women and would have provided a deduction favouring those with higher incomes. However, a provision can be designed which does not replicate these inequities. Other tax measures, including subsidies for those who establish or operate child care facilities, can also be devised. These recommendations will not, of course, substitute for measures like direct grants to subsidize the operation of child care facilities. But given the government's historical attachment to the tax system as the primary method of funding child care, it makes sense to think about strategies to improve its current provisions.

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