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WHAT'S SEX GOT TO DO WITH IT? TAX AND THE 'FAMILY' IN CANADA

CLAIRE F L YOUNG*

This article considers the tax treatment of spouses and common law partners. It questions whether tax expenditures that take spousal or common law status into account can be justified or whether some or all of them should be eliminated. The article traces the expansion in Canada of the definition of common law partners for tax purposes to include same-sex couples. It examines the political picture and concludes that the federal government had a keen interest in expanding the definition of common law partner for tax purposes because it resulted in a tax windfall for the government and was a key tool in implementing a neo-liberal privatisation agenda. The article concludes that many of the tax rules that take spousal or common law status into account should be repealed. Some rules are inequitable and discriminate against couples with low incomes while others are so inherently flawed and poorly targeted that they do not achieve their policy goals.

I INTRODUCTION

The last 30 years in Canada have seen dramatic changes in the legal definition of 'family' and 'spouse' as well as our social understanding of these relationships. In the 1960s when the Carter Commission recommended that husband and wife be the unit of taxation 'family' consisted of husband and wife together with their children. Non-marital conjugal relationships were not recognised in law. Today in Canada we recognise common law relationships through ascription for many legal purposes. Based on a period of cohabitation, many but not all, of the rights and duties of marriage have been extended to common law cohabitants.¹ Furthermore common law relationships include both heterosexual and same-sex relationships. Most recently, in July 2005 the federal government legalised civil same sex marriage across Canada. Both opposite sex and same sex partners can now choose whether to marry or not; even if they do not, they may still be ascribed spousal status for various purposes, based on a period of cohabitation.

These changes, and in particular, the recognition of same-sex relationships for tax purposes have led me to re-examine how we treat spousal and common law relationships in tax law and policy.² It is important, however, to emphasise that I am not critiquing the inclusion of lesbians and gay men as common law partners. That change was an important part of the struggle for equality and indeed was a milestone in that quest. But, as I have discussed in other work, I argue that we need to rethink the broader issue of why we take marital or familial relationships into account at all for tax purposes.³ I believe that the issue is also one that also has relevance in the

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¹ 'Common law' is the term used in Canada to describe two people living in a conjugal relationship that is recognized in law for some purposes. The Australian equivalent is 'de facto'.

² Throughout this article I refer to 'spousal and common law relationships'. The Canadian Income Tax Act ('ITA') defines 'spouse' as a married person and 'common law partner' as an individual living in a conjugal relationship with the taxpayer for at least one year.

³ Claire F L Young, 'Taxing Times for Lesbians and Gay Men: Equality at What Cost?' (1994) 17(2) *Dalhousie Law Journal* 534.

Australian context where indications are that the government plans to expand the current tax concessions for families.⁴

My focus in this article is not on the issue of whether the tax unit should be the individual or the married or common law couple.⁵ That issue is one that I believe has been well and truly buried in Canada⁶ and, I would hope, also in Australia. Rather my focus is on those tax rules that currently take spousal and common law relationships into account for a variety of purposes. These include, among others, measures such as tax credits or offsets for dependent spouses, tax expenditures for children and some of the superannuation provisions (Australia) and pension provisions (Canada). My analysis is in three parts. First, I trace some of the recent developments that led to the inclusion of same sex couples as common law partners for tax purposes in Canada. Then I turn to the political picture and consider the government's keen interest in taking familial or spousal relationships into account for tax purposes. Finally, I turn to some of the particular tax rules that take spousal status into account. In a nutshell my question is can they continue to be justified or should we be looking to eliminate all reference to spousal and common law relationships from our tax legislation? My conclusion is that many of these provisions should be removed from the Canadian *Income Tax Act* ('ITA'). The reason that they are no longer valid varies from rule to rule. For example, some rules are inequitable and discriminate without good reason against those couples with low incomes and in favour of those with high incomes. Others, including those that focus on dependency, are inherently flawed and poorly targeted so that they do not achieve their policy goals. Some rules can be critiqued on the basis that they are simply part of a neo-liberal privatisation agenda that encourages individuals to rely on the private family for their economic security. These rules exclude those not in spousal or common law relationships from a variety of very important benefits delivered by the tax system.

II CHANGING DEFINITIONS OF SPOUSE IN CANADA AND THE TAX CONSEQUENCES

In order to place the tax rules in the broader social context of changing definitions of family and spouse, it is important to trace some of these recent changes. Since the 1970s Canada has increasingly recognised common law heterosexual relationships through ascription. As mentioned, the result is that many of the rights and responsibilities accorded to married couples are now accorded to common law couples. During the mid 1990s the *Charter of Rights and Freedoms*⁷ and, in particular the equality provision s 15(1), was used with great success to

⁴ See, eg, 'Tax Breaks Should Go to Families' *The Australian* (Sydney) 20 January 2006, at 2. This article quotes the then Minister for Revenue, Mal Brough, as stating that he made 'no apologies' for the preferential tax treatment for families. Furthermore, Treasurer Peter Costello stated that families would get 'a helping hand in relation to tax and family assistance packages', in the 2006 Budget. See, 'Singled out for Tax Slug' *The Australian* (Sydney) 20 January 2006, 11.

⁵ For an excellent collection of articles on the issue of the appropriate tax unit, see John G Head and Richard Krever (eds), *Australian Tax Research Foundation Conference Series No 16: Tax Units and the Tax Rate Scale* (1996). In particular, see Michael McIntyre, 'Marital Income Splitting in the Modern World: Lessons for Australia from the American Experience' at 1-33 and Neil Brooks, 'The Irrelevance of Conjugal Relationships in Assessing Tax Liability', 35-80.

⁶ For example, see Law Commission of Canada, *Beyond Conjuality: Recognizing and Supporting Close Personal and Adult Relationships* (2001) in which the Commission recommended that 'the individual, rather than the conjugal couple or some other definition of the family unit, should remain the basis for the calculation of Canada's personal income tax', Recommendation 19, 71.

⁷ *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act 1982* (Canada), enacted as Schedule B to the *Canada Act 1982* (UK), c 11, ('the Charter').

challenge heterosexist definitions of spouse. The result is that since the mid 1990s, same-sex couples have increasingly — though unevenly across the provinces — been treated as common law couples. In 1999, the Supreme Court of Canada rendered the most important judicial decision to date on same sex spousal recognition in *M v H*,⁸ striking down as unconstitutional a definition of ‘spouse’ in a family law statute that had been limited to opposite sex cohabitants. The result was that lesbians and gay men could now sue each other for spousal support on the breakdown of their relationships. This case generated many legislative changes at both federal and provincial levels to extend spousal or equivalent status to same-sex cohabitants.⁹

Meanwhile on the tax front, the Ontario Court of Appeal had held in 1998 in *Rosenberg v Canada (Attorney-General)*¹⁰ that the words ‘or same-sex’ should be read into the definition of ‘spouse’ in the *ITA*, for the purposes of registration of pension plans. The case was brought by two women who worked for one of Canada’s large unions, the Canadian Union of Public Employees (CUPE). CUPE had a standard employment pension plan which included a provision for survivor benefits. Pension plans in Canada are heavily subsidised by the tax system, with deductions for contributions by employers and employees, and sheltering from tax of all income earned by the plan until the pension is received. In order to qualify for these subsidies the plan must accord with the requirements of the *ITA* and that included a definition at that time of spouse that was restricted to heterosexual couples. CUPE decided to extend its plan to its lesbian and gay employees on the same terms as it applied to its heterosexual employees but the government refused to accept this amendment. By reading the words ‘or same-sex’ into the definition of spouse in the *ITA* for the purpose of pension plans the court effectively extended entitlement to survivor benefits under occupational pension plans to the partners of lesbians and gay men who die while covered by the plan.¹¹ Interestingly, unlike other cases involving successful *Charter* challenges on the basis of sexual orientation, the federal government did not appeal this decision.

Both the *M v H* and *Rosenberg* had other far-reaching consequences. In 2000 the federal government enacted the *Modernization of Benefits and Obligations Act*¹² which amended 68 pieces of legislation to include same-sex couples in an array of laws that assign rights and responsibilities based on spousal status. Sections 130-46 of the *Modernization of Benefits and Obligations Act* amended the *ITA* to redefine spouse to include married persons and to add a new definition of common law partner which includes a person cohabiting in a conjugal relationship with the taxpayer for a period of at least one year.¹³ Meanwhile the Law Commission of Canada launched a major research project titled ‘Beyond Conjuality: Recognizing and Supporting Close

⁸ *M v H* [1999] 2 SCR 3.

⁹ For example, the *Definition of Spouse Amendment Act*, SBC 1999, c 29; the *Definition of Spouse Amendment Act*, SBC 2000, c 24; *An Act to Amend Certain Statutes because of the Supreme Court of Canada’s Decision in M v H*, SO 1999, c 6.

¹⁰ *Rosenberg v Canada (Attorney-General)* (1998) 38 OR (3d) 577.

¹¹ For an in depth analysis of this case, see Claire F L Young, ‘Spousal Status, Pension Benefits and Tax: *Rosenberg v Canada (Attorney-General)*’ (1998) 6 *Canadian Labour and Employment Law Journal* 435.

¹² *Modernization of Benefits and Obligations Act*, SC 2000, c 12.

¹³ Section 248 of the *ITA* provides that ‘common law partner’ with respect to a taxpayer at any time, means a person who cohabits at that time in a conjugal relationship with the taxpayer and (a) has so cohabited with the taxpayer for a continuous period of at least one year, or (b) would be the parent of a child of whom the taxpayer is a parent, if this Act were read without reference to paragraphs 252(1)(c) and (e) and subparagraph 252(2)(a)(iii), and for the purposes of this definition, where at any time the taxpayer and the person cohabit in a conjugal relationship, they are, at any particular time after that time, deemed to be cohabiting in a conjugal relationship unless they were not cohabiting at the particular time for a period of at least 90 days that includes the particular time because of a breakdown of their conjugal relationship.

Personal Adult Relationships’ which entailed a ‘fundamental rethinking of the way in which governments regulate relationships’.¹⁴ In brief it concluded that governments rely too heavily on conjugal, as in marital, and common law relationships in accomplishing state objectives. The Law Commission of Canada suggested that the government re-evaluate the way in which it regulates relationships and devised a four part methodology to be facilitate this re-evaluation. Two questions posed by this new methodology were, ‘Do relationships matter? If the law’s objectives are sound, are the relationships included in the law important or relevant to the law’s objectives?’¹⁵ The Law Commission’s research paper reviewed a variety of pieces of federal legislation, including the *ITA*.

In the early 21st century, a renewed struggle for same-sex marriage emerged, having been put on hold in Canada in the mid-1990s in favour of seeking the rights available to unmarried opposite sex cohabitants. Several successful *Charter* challenges were raised to the common law rule that defined marriage as between one man and one woman.¹⁶ As a result, same-sex couples acquired, with startling rapidity, the right to marry in several provinces and one territory. In October 2004, the federal government sought the opinion of the Supreme Court of Canada on the question of whether same-sex marriage for civil purposes was consistent with the *Charter* and on 19 December 2004 the Supreme Court of Canada held that it was.¹⁷ On July 20, 2005, Bill C-38, the *Civil Marriage Act* received Royal Assent and was proclaimed into law, legalising civil same-sex marriage across Canada. Civil marriage in Canada is now defined as ‘the lawful union of two persons to the exclusion of all others.’

Without diminishing the struggle that lesbians and gay men have endured to secure legal recognition of their relationships, or its potential to challenge heterosexual norms and definitions of family, I argue that the recent tax changes in Canada to include same-sex couples as common law partners have done nothing to challenge the socio-economic inequalities embedded in the tax rules that apply to spouses and common law partners. Indeed expanding the definition of those who are treated as spouses for tax purposes has simply reinforced those inequalities. It is time to revisit and rethink why we take spousal and common law relationships into account for tax purposes. Other than the recent work of the Law Commission of Canada¹⁸ which was part of a larger project examining the numerous laws that take spousal status into account, no attention has been paid by legislators over the last four decades to the fundamental tax policy question of why we take spousal and common law relationships into account for certain tax purposes and whether such a policy can be justified.

While many see the federal government’s decision to enact the *Modernization of Benefits and Obligations Act* and thus expand the group accorded common law status for tax purposes as progressive, we need to be cautious. Certainly there is an assumption by many that it is to their advantage to be treated as spouses and common law partners for tax purposes.¹⁹ There is a sense

¹⁴ Above n 6, ix.

¹⁵ *Ibid*, xii.

¹⁶ See, eg, in Ontario, *Halpern v Canada (Attorney-General)* (2003) 169 OAC 172 (CA); in British Columbia, *EGALE Canada Inc v Canada (Attorney-General)* (2003) 228 BCCA 406.

¹⁷ *Reference re Same-Sex Marriage* [2004] 3 SCR 698.

¹⁸ Above n 6.

¹⁹ The author spoke with several groups of lesbian and gay individuals about the impact on them of the changes to the definition of spouse in the *ITA* and generally speaking most of those individuals believed that they would benefit from the change, even though in reality the result of the change was that many of them would pay more tax than they were currently paying.

that there are more tax breaks for couples and that the tax bill of a couple will be lower than it would be if they were taxed as individuals. As I have demonstrated in previous work, this is not necessarily true.²⁰ In fact the impact of being treated as spouses or common law partners varies according to three factors: the amount of income of each of the partners, the nature of that income and the relative distribution of that income as between the partners. As I shall discuss in more detail later, generally speaking, in Canada the couple in which there are two low rate taxpayers pays more tax when they are treated as a couple rather than as individuals. The couple in which there are two high rate taxpayers and the couple in which one person is a high rate taxpayer and the other has little or no income both tend to benefit in terms of taxes saved when treated as a couple.

Canada has a self-assessing income tax system. If one meets the common law partner test of living in a conjugal relationship for one year, one must declare that status on the tax return and that status is ascribed to you with the result that all the rules that apply to common law partners apply to you. There is no choice in the matter. Thus it is extremely important that the rules that take spousal status into account operate in a fair and efficient manner.

In this article I focus on two distinct aspects of these recent developments. First, I contend that the government's decision not to appeal *Rosenberg*, and its willingness to include same-sex couples as common law partners for tax purposes was a pragmatic political decision, a decision that was not based on any analysis of the change from a tax policy perspective. As I shall discuss in more detail, such a change resulted in a tax windfall for the federal government in terms of the amount of tax collected. Much of the windfall was due to a reduction in the amount of tax credits available to common law partners, a reduction that resulted from the aggregation of income when determining entitlement to those credits. At the same time including same-sex couples as common law partners accords perfectly with the neo-liberal agenda of privatisation of the economic security of citizens. That is the tax system is increasingly being used to encourage individual family members to provide care for each other, thereby relieving the state of its responsibility.

III THE POLITICS OF IT ALL

A *The Tax Windfall*

Income tax law is one of the most important political tools that a government has at its disposal. Tax laws are used to direct economic and social behaviour in a myriad of different ways. Many of the most important measures we use to achieve social policy goals are tax expenditures. Tax expenditures are defined as any deviation from the benchmark personal income tax structure. They include measures such as deductions in the computation of income, tax credits, exemptions from tax and deferral of tax payable. Tax expenditures are the functional equivalent of direct government expenditures with one main difference. Instead of being delivered as a direct grant to an individual, tax expenditures are delivered by the tax system. The distinction is significant. While we tend to analyse the impact of a technical tax provision by reference to criteria such as horizontal and vertical equity, neutrality and simplicity, we apply different criteria to a tax expenditure. As the Law Commission of Canada has said: 'Could the objective be better served through the use of some other government policy instrument?'²¹ To

²⁰ Above n 3.

²¹ Above n 6, 65.

this question I would add, is the measure fair or does it discriminate in an inappropriate manner against some taxpayers and in favour of others? Whether a particular measure is a technical tax rule or a tax expenditure has been the subject of much debate. Each year Canada publishes a list of all tax expenditures and their cost.²² For Canadian purposes the benchmark for the personal tax system, that is those rules that are not considered to be tax expenditures, includes the tax rates and brackets, the unit of taxation, the taxation period (the calendar year), the treatment of inflation and the constitutional immunity from taxation of Canada and the provinces.²³ All other measures are tax expenditures or memorandum items.²⁴

As mentioned, inclusion of same-sex couples as common law partners for tax purposes resulted in a tax windfall for the government because some individuals were required to pay more taxes when treated as part of a couple than they previously paid as individuals. While the federal government has not published the amount of this windfall, history tells us that the windfall can be considerable. In 1993, when the federal government amended the definition of spouse to include 'common law' heterosexual spouses, the Department of Finance estimated that the change would result in increased tax revenues over a 5 year period of \$9.85 billion.²⁵ The primary reason for the increased tax revenues is attributable to the rules that require the aggregation of the incomes of spouses and common law partners for the purpose of computing entitlement to the refundable GST tax credit and the Canada Child Tax Benefit. Entitlement to both these tax credits depends on one's level of income and as income increases the amount of the credit is reduced and eventually phased out completely. Therefore, for example, two individuals with incomes of \$20,000 who are now included as common law partners will lose entitlement to either all or part of these refundable tax credits. The impact of this change is especially harsh on those with low incomes, the very group the tax credits are intended to benefit. There is also a gendered impact. Given that women tend to earn less than men and have lower incomes, it is likely that more women than men will lose these credits.²⁶

B *The Privatisation Agenda*

One of the cornerstones of neo-liberalism is an increased reliance on the private sector, including the private family and the private market, rather than the state, to provide for the welfare of citizens. As Lisa Philipps has said 'the drive towards privatization in Canada has at its heart one central claim: that private choice is better than public regulation as a mechanism for allocating resources and ordering social affairs'.²⁷ Increasingly in Canada the law, and in this context tax law, is being used as a tool of privatisation.²⁸ Tax expenditures in particular are often used as a private mechanism to achieve social or economic goals. That is, while we see the state as 'public' in contrast to the private market or family, by using tax expenditures delivered to the

²² For the most recent account see, Canada, Department of Finance, *Tax Expenditures and Evaluations 2005* (2005).

²³ See Canada, Department of Finance, *Tax Expenditures: Notes to the Estimates/Projections 2004* (2004).

²⁴ Memorandum items include, among others, items 'for which there may be some debate over whether they should be considered tax expenditures', *ibid*, 7.

²⁵ Department of Finance, Canada, *Budget Papers: Supplementary Information* (25 February 1992), 138-9.

²⁶ In Canada, women who work for a full year, full time earn 73 cents for every dollar earned by men, see, Cindy Wiggins, 'Women's Work: Challenging and Changing the World' (Paper presented at the Canadian Labour Congress Women's Conference, 25 May 2003) <<http://canadianlabour.ca/updir/workwomenen.pdf>>.

²⁷ Lisa Philipps, 'Tax Law and Social Reproduction: The Gender of Fiscal Policy in an Age of Privatization' in Brenda Cossman and Judy Fudge (eds) *Privatization, Law and the Challenge to Feminism* (2002), 41.

²⁸ For a detailed discussion of the role of law in the drive towards privatization see Cossman and Fudge, *ibid*, 30-6.

private sector to reinforce private responsibilities the state is to a certain extent abdicating its public responsibility for that social or economic goal.

In this article, I focus on just one aspect of that privatisation, that is the trend to place responsibility on individual family members to provide care for each other, thereby relieving the state of its responsibility in that regard. That 'care-giving' can take many forms including the actual care-giving of the elderly and disabled and the economic support of family members. My contention is that by taking spousal and common law partner status into account with respect to entitlement to and allocation of a variety of tax expenditures, the tax system is one important tool in this privatisation.

One Canadian example of this privatisation may also have resonance in Australia. The Canadian government has made it clear that the future for Canadians in terms of their economic security in retirement is to contribute to private pension plans such as occupational pension plans (Registered Pension Plans, RPPs) personal plans (Registered Retirement Pension Plans, RRSPs) and not to rely on the more universal Old Age Security (OAS) or the Canada Pension Plan (CPP).²⁹ As a result these private plans are heavily subsidised by tax expenditures, including tax deductions for contributions to the plans, and a sheltering of all income earned by the plan from tax until either the contributions are withdrawn or the plan matures. The value of these tax expenditures is a staggering \$31 billion for 2005, making tax expenditures for retirement savings the single largest tax expenditure in Canada.³⁰ The situation in Australia is similar to that in Canada. The superannuation system is heavily subsidised by the tax system, although the nature of the tax expenditures is a little different from that in Canada. Tax concessions for superannuation in Australia constitute the largest single tax expenditure, estimated at \$12.76 billion for 2004-5.³¹

At a general level, the major problem for many is a lack of access to these plans. This is especially true for women whose lack of participation in the paid labour force in comparison to that of men means that many women are excluded from these plans.³² In addition, the kind of work that women do is a major factor. Only those who work for relatively large employers, economically able to provide a pension plan, will benefit. Those who work part-time, in non-unionised jobs, or for small employers unable to finance these plans do not benefit. In Canada women have consistently formed 70 per cent of the part time labour since the mid 1970s.³³ Similarly in order to access RRSPs, one must have the discretionary income to make the contribution. Given that women earn less than men it is not surprising that more men than women make these contributions and thereby benefit from the tax expenditure.³⁴

²⁹ The Old Age Security is a non-contributory plan consisting of a flat rate monthly sum paid to those over 65, although as income increases there is a clawback through the income tax system of part of the pension. Nevertheless it is the most 'universal' pension plan in Canada. The Canada Pension Plan is a contributory income replacement plan and benefits are based on labour force participation. Both these plans are described as 'public' pensions in contrast to the private RPPs and RRSPs.

³⁰ Above n 21 at Table 1.

³¹ See Miranda Stewart, 'Are You Two Interdependent? Family, Property and Same-sex Couples in Australia's Superannuation Regime' (2006) 28 *Sydney Law Review* 437.

³² Only 57 per cent of women over 15 are employed in Canada, compared to 68 per cent of men (latest figures available), see Housing, Family and Social Statistics Division, 'Women in Canada: Work Chapter Updates' (2004) <<http://www.statcan.ca/english/freepub/89F0133XIE/89F0133XIE2003000.pdf>> 29 September 2006.

³³ *Ibid.*

³⁴ Above n 26.

To a certain extent the government has recognised and attempted to remedy women's unequal access to private pension plans and the accompanying tax subsidies. Consequently, the *ITA* permits contributions to a 'spousal' RRSP. A taxpayer may contribute, up their own maximum limit,³⁵ to a plan in their spouse or common law partner's name and receive the same tax benefits that they would have received had they made the contribution to their own plan. Thus, there is the opportunity to establish a pension plan for one's spouse or common law partner and the ability to income split with that person by diverting future income to them. The advantages can be significant where the spouse or common law partner has little or no other income when they retire. Similarly in Australia the splitting of superannuation contributions between spouses is permitted effective 1 January 2006.³⁶

While the Canadian 'spousal' RRSP and the ability to split superannuation contributions in Australia are well intentioned measures, they remain a highly private and limited response to a public issue, that is women's lack of access to pension and superannuation plans. This lack of access in turn contributes to the fact that so many elderly women live in poverty.³⁷ Essentially the private family is encouraged to provide for its own economic security in retirement, albeit with a tax break to encourage it to do so. But many cannot take advantage of this opportunity. Low income taxpayers may not have the discretionary funds to contribute on their spouse's behalf. Additionally single women have no access to this expenditure. Given that 43 per cent of single women over 65 live below the poverty line compared to 5 per cent of women over 65 who have a spouse, it appears that the subsidy is being misdirected.³⁸ By linking this tax expenditure to spousal status, the government is directing the benefit to a very limited group of people, a group that may not be the neediest. Furthermore, in Canada at least, statistics show that fewer people than ever are living in a married or common law relationship.³⁹ As the Women and Taxation Working Group of the Ontario Fair Tax Commission stated 'the concept of a couple as a life-long economic unit with joint income, wealth, and expenses may no longer be appropriate given changing family structures, increasing divorce rates, and falling marriage rates'.⁴⁰

There is another important tax break with respect to private pensions that is only available to those in a spousal or common law relationship. If a taxpayer dies the funds in their unmatured RRSP may be transferred on a tax-free basis to their spouse or common law partner provided the spouse or common law partner contributes that amount to their own RRSP.⁴¹ In Australia, a tax exempt death benefit from a superannuation fund may be paid to a person who was in an 'interdependency relationship' with the deceased. The definition of 'interdependency relationship' would include a person who was married to or a de facto spouse of the deceased.⁴² The tax advantages of these rules are significant because, for example, in Canada without the

³⁵ For 2005, the limit is \$16,500.

³⁶ *Taxation Laws Amendment (Superannuation Contribution Splitting) Act 2005 (Cth)*.

³⁷ In Canada, 71 per cent of those over 65 living below the poverty line in 2000 were women, Statistics Canada, 'Analyzing Family Income' (2001) <<http://www12.statcan.ca/english/census01/products/analytic/companion/inc/analys.cfm>>.

³⁸ *Ibid*.

³⁹ Statistics Canada, '2001 Census: Marital Status, Common-Law Status, Families, Dwellings and Households' *The Daily*, 22 October 2002 <<http://www.statcan.ca/Daily/English/021022/d021022.pdf>> at 29 September 2006.

⁴⁰ Ontario Fair Tax Commission, Women and Tax Working Group, *Women and Taxation* (1992), 22.

⁴¹ The rules in the *ITA* are quite complex and certain conditions must be met. The rollover also applies with respect to a transfer to a child or grandchild of the deceased who was financially dependent on the deceased at the time of death.

⁴² Section 27AAB of the *Income Tax Assessment Act 1936 (Cth)*.

rollover the fair market value of the property held in the RRSP would be included in income in the deceased's terminal year. Once again, however, we are using the tax system to encourage the private family to provide for the economic security of its members. We are directing significant tax subsidies to a very limited group of people, a group that statistics tell us may not be the most in need.

As I have demonstrated reliance on the private sector for the economic security of individuals is problematic for a variety of reasons. At a general level such privatisation policies tend to diminish the role that the state plays in ensuring a fair level of income for all its citizens. The state is delegating its responsibility to the private sector, with virtually no strings attached. Encouraging the private family to fill the role previously taken by the state leaves gaps in the social security network, gaps which those without spouses or common law partners often fall through. The result is often a retirement lived in poverty. The current privileging of private pension plans also reduces the resources available for the more universal state pensions, pensions on which women in particular depend for their economic security in retirement.⁴³

Various suggestions for remedying some of the problems I have discussed have been made in the past.⁴⁴ These suggestions range from a total removal of all tax preferences for private pension plans to a revamping of the current tax rules to try to make them more equitable. In the context of this discussion about the tax preferences for spouses and common law partners, I suggest that all of these rules be repealed. Applying tax expenditure analysis to these provisions, one can conclude that they are not the best way to achieve the policy goal of ensuring that Canadians, and women in particular, are economically secure in their retirement. As I have discussed, they are too limited in scope and benefit some at the expense of others with no rational justification for that discrimination.

IV OTHER SPOUSAL TAX EXPENDITURES

A *The Dependent Spouse and Common Law Partner Credit*

The spousal and common law partner tax credit is available to a taxpayer who supports their spouse. Put simply, the taxpayer is entitled to a tax credit of just over \$1,000 which is reduced in amount if the spouse or common law partner's income exceeds approximately \$680, with the credit being eliminated once the spouse or common law partner's income exceeds approximately \$7,000. In Australia there is a similar provision, namely the Dependent Spouse Tax Offset. This provision provides a tax offset of \$1,610 for 2005/6 with the offset being eliminated once the spouse's income exceeds \$6,722. It should be noted, however, that this provision is more limited in application than the Canadian spousal or common law partner tax credit. As the Law Commission of Canada has said of the Canadian credit, it 'appears to be designed to promote economic dependency in conjugal relationships'.⁴⁵

⁴³ During the past 20 years, 99 per cent of the income gain of the 10 per cent of elderly women living alone with the lowest incomes was from higher direct government payments. For the 20 per cent of women in the middle of the income distribution, direct government transfers accounted for more than 80 per cent of their gain, see Statistics Canada, 'Analyzing Family Income' (2001) <<http://www12.statcan.ca/english/census01/products/analytic/companion/inc/analys.cfm>>.

⁴⁴ For a more detailed description of some of the recommendations, see Claire F L Young, *Women, Tax and Social Programs: The Gendered Impact of Funding Social Programs through the Tax System, Status of Women, Canada* (2000) 48-51.

⁴⁵ Above n 6, 74.

There have been many critiques of the Canadian spousal and common law partner tax credit.⁴⁶ First, because more women than men work in the home and not in the paid labour force it is men who predominantly claim the spousal and common law partner tax credit. Several issues arise when one considers the impact on women of provisions such as the spousal and common law partner tax credit. Provisions based on dependency are a disincentive to women's participation in the paid labour force. When the tax costs such as the loss of the credit are taken into account, there is a real disincentive to women in spousal or common law relationships entering the paid labour force. This disincentive is exacerbated by other costs incurred by women who choose to work outside the home, such as child care costs, travel costs, clothing and the monetary and non-monetary costs associated with replacing the household labour. Furthermore, when one considers that many women are the secondary earners in their relationships, and that they work for relatively low wages, the combination of these factors and the loss of the tax credit have a particularly detrimental effect on women's choice to work outside the home.

Another important critique of dependency provisions is that rules like the spousal and common law partner tax credit affirm that a woman's dependency on man deserves tax relief. Again, this undermines the autonomy of women and it results in a certain privatisation of economic responsibility for dependent persons. Tax policy has responded to women's lack of economic power by leaving it to the family (the private sector) to assume responsibility for women's lack of resources. Furthermore, the tax subsidy is delivered to the economically dominant person in the relationship and not the 'dependent' person who needs it. This manner of delivery assumes that income is pooled and wealth distributed equally within the relationship. However research has shown that such pooling is not the norm in relationships, with one study demonstrating that it only occurs in one fifth of households surveyed.⁴⁷ Many women do not have access to or control over income earned by their spouse and predicating tax policies on the assumption that they do is unfair.

The spousal and common law partner tax credit is a measure that can be viewed as one that gives public recognition to the work done by women in the home. Indeed it is the only measure (tax or otherwise) that places a 'value' on household labour. But if it is intended to recognise the contribution made by those who work in the home then, as mentioned above, the tax credit should go to the person who performs that labour and not the person who benefits from it. Further, viewing the tax credit as a measure that values household labour is problematic. Because the 'value' placed on the labour is so low, the measure can only be considered to reinforce the perception that household labour, including child-care has little value. That in turn contributes to the under-valuation of work such as child-care, even when it is performed in the open market, as evidenced by the low salaries paid to child-care workers.

Another justification for the spousal or common law partner tax credit is that it recognises the reduced ability to pay tax of an individual who supports a person who is economically dependent on them. But this argument is not persuasive. It ignores the benefit that accrues to the individual from work performed in the home, such as housework and child-care, by the person whom they support. Indeed this home labour may well increase the ability to pay of the individual because

⁴⁶ See, eg, Law Commission of Canada, which recommended that the spousal tax credit be repealed and replaced with 'enhanced or new programs that more carefully target caregivers and children': *ibid*, 77. See also Claire F L Young, *What's Sex Got To Do With It? Tax and the 'Family'*, Report for Law Commission of Canada (2000). Much of the following material is based on that research report.

⁴⁷ Carolyn Vogler and Jan Pahl, 'Money, Power and Inequality within Marriage' (1994) *Sociological Review* 263, 285.

there is no need to have recourse to the private market in order to obtain the services provided in the home by the spouse who is supported by the individual. This point was not lost on the Canadian Royal Commission on the Status of Women in 1970 when it rejected the Carter Commission recommendation that the family be the unit of taxation. At that time the Royal Commission on the Status of Women noted that ‘in most cases the wife who works at home as a housekeeper, far from being a dependent, performs essential services worth at least as much to her as to her husband as the cost of food, shelter and clothing that he provides for her’.⁴⁸ Given all these problems it is not surprising that various individuals and organisations have called for the repeal of the spousal or common law tax credit.⁴⁹

As mentioned earlier in this article, the impact of the rules that take spousal or common law status into account varies depending on the level of income of the spouses or common law partners and the distribution of income within the relationship. There is no question that those couples with high incomes and significant wealth can benefit tremendously from some of the tax rules. One example is the ability to transfer capital property to your spouse or common law partner on a tax-free basis, either *inter vivos* or on death. Canada’s tax treatment of capital differs from that of most other jurisdictions. There are no estate taxes, succession duties or gift taxes in Canada. Rather when capital property is transferred from one person to another, either by way of a gift or bequest, the general rule is that the transferor is deemed to have disposed of the property at fair market value.⁵⁰ The result is that if the fair market value of the property at the time of transfer is more than the cost of the property to the transferor, a capital gain arises and one half of the gain is included in the transferor’s income. A significant exception to this rule is that if the transfer is to a spouse or common law partner a rollover of the property occurs, so that the taxpayer is deemed to dispose of the property for proceeds of disposition equal to their cost for the property and the spouse or common law partner is deemed to acquire the property at an amount equal to those proceeds of disposition. The result is a significant deferral of tax until the spouse or common law partner ultimately disposes of the property. The rollover is available both on an *inter vivos* basis and on death and is also available with respect to a transfer to a former spouse or former common law partner in settlement of rights arising from the marriage or common law partnership.⁵¹

These rules serve a variety of purposes. From a practical perspective, if transfers between spouses were taxable events, the Canada Revenue Agency (CRA) would have to trace all such transactions in order to ensure that any tax owing was paid. Given the informal context in which these transactions occur, such a task would be difficult. Another problem is that because these transactions do not take place in the open market, there may be a liquidity problem with no cash available to pay the tax. The rollover rules are also intended to encourage the redistribution of property within the relationship, especially from men, who tend to own more capital property than women, to their spouse or common law partner. It is questionable, however, how effective they are in this regard. There are many reasons why an individual may choose not to transfer

⁴⁸ Canada, Royal Commission on the Status of Women in Canada, *Report* (1970), 293-4.

⁴⁹ See, eg, the Law Commission of Canada, above n 6, 77; Maureen Maloney, ‘What Is The Appropriate Tax Unit for the 1990s and Beyond?’ in Allan Maslove (ed) *Issues in the Taxation of Individuals* (1994) 146; Young, above n 45, 113.

⁵⁰ Section 69 of the *ITA*.

⁵¹ Section 70(6) of the *ITA* provides the rollover for transfers as a consequence of death to a spouse or common law partner or to a spouse trust and ss 73(1) and (1.01) of the *ITA* provide the rollover for *inter vivos* transfers to a spouse or common law partner.

property to their spouse on an *inter vivos* basis, including concern about transferring control of that property to the spouse or common law partner. These rules are also affected by the operation of the attribution rules. If capital property that is transferred to a spouse or common law partner at less than fair market value generates income, that income is attributed to the transferor and not taxed to the spouse or common law partner, thereby preventing income splitting with respect to income from property.⁵² Given that most of these transfers are presumably gifts, the attribution of income may well operate to deter taxpayers from entering these transactions.⁵³

It is impossible to determine whether the rollover rules do encourage the redistribution of wealth on an *inter vivos* basis in spousal and common law relationships. While CRA classify these provisions as tax expenditures, they do not put a value on the expenditures because ‘the data is not available to support a meaningful estimate/projection’.⁵⁴

These rules can be critiqued on a variety of bases. First, they only benefit those couples with considerable wealth who own capital property. In the absence of gift taxes or estate taxes, these rules provide a huge benefit to those couples because there is no taxation of any appreciation in the value of the capital property owned by the couple so long as it is owned by either of the spouses or common law partners. Second, while it may be difficult to trace intra spousal *inter vivos* transfers, the same cannot be said of transfers on death where the will or other documents relating to probate or intestacy will provide information about the transfer.

The rollover rules are predicated on an assumption of economic interdependence⁵⁵ and economic mutuality, that is, what is mine is yours and what is yours is mine. Yet not all spousal and common law relationships are founded on economic interdependence, nor is there an economic mutuality within the relationship with respect to property. Thus the rollover rules can be said to be over inclusive. They are rules that apply in situations which do not reflect their underlying policy. This problem led the Law Commission of Canada to recommend the extension of the rules to all persons living in economically interdependent relationships.⁵⁶ I disagree with their recommendation and believe that the *inter vivos* rules, at least, should be repealed outright. First, as mentioned above the application of the attribution rules may deter taxpayers from entering into these transactions, thereby obviating the need for the rollover rules. Secondly, tracing problems are not unique to intra spousal or common law partner transfers. Transfers to adult children or close friends can be difficult to trace. Furthermore, the *ITA* provides for a self-assessing system in which taxpayers are required to declare a variety of transactions that cannot always be traced, including gifts to third parties. Finally, there is of course, always the problem of defining ‘interdependence’ if one chooses to expand the group eligible for the tax break.

B Provisions that are Based on an Assumption of Economies of Scale in Relationships

Some of the provisions that apply to spousal and common law relationships take into account the economies of scale in terms of consumption and household production that are assumed to

⁵² *ITA* s 74.1.

⁵³ *ITA* s 74.2 also provides that a transfer of capital property to a spouse or common law partner must be at fair market value in order to avoid the attribution of any capital gain arising from that transfer to the transferor when the spouse or common law partner disposes of the property.

⁵⁴ Department of Finance, above n 22, 15.

⁵⁵ The Law Commission of Canada described economic interdependence as the ‘raisin d’être of the rollover rules’, above n 6, 89.

⁵⁶ *Ibid* recommendation 25.

arise from spouses and common law partners living together. These economies of scale arise from sharing the cost of certain items, such as rent, household expenses, including durable consumer assets such as furniture and kitchen appliances as well as the benefits from shared household work. The theory is that the savings from these shared expenses and labour increase a taxpayer's ability to pay tax. In some instances the assumption of an enhanced ability to pay means that entitlement to certain tax credits and deductions is reduced for the couple. For example, the child-care expense deduction provides a deduction in the computation of income of a limited amount of child care expenses.⁵⁷ In spousal or common law relationships, however, the deduction must be taken by the taxpayer with the lower income. This rule effectively reduces the value of the deduction because that value is tied to the rate at which tax is paid with high rate taxpayers saving more in terms of taxes payable than low-rate taxpayers.

Other provisions take into account the assumed increased ability to pay that flows from economies of scale by aggregating the incomes of spouses and common law partners for the purposes of determining entitlement to tax credits. For example, the GST tax credit is intended to compensate low-income individuals for the regressive impact of the 7 per cent GST. The credit is a refundable credit of \$227 for individuals. Because it is targeted at low income individuals, it is phased out by 5 per cent of the individual's income over approximately \$30,000. However, the income of spouses and common law partners is aggregated for the purpose of computing entitlement to the GST tax credit with the result that the amount they receive as a couple will be less than they received as two individuals.⁵⁸ In addition, spouses and common law partners are only entitled to the basic GST credit, while in certain circumstances individuals may also receive an additional credit. As mentioned earlier, this reduction in the amount of the GST credit is one of the reasons that the inclusion of lesbians and gay men as spouses resulted in a tax windfall for the government.

The issue of aggregating the income of families or spouses when determining entitlement to tax credits, or indeed any transfer program such as the Family Tax Benefit in Australia, is complex. But to the extent that this is based on an assumption of economies of scale, it is highly problematic. First, economies of scale arise in a variety of situations other than spousal or common law relationships. As the Law Commission of Canada noted, 'even if consumption economies exist when individuals live together and share resources, and even if one takes the view that they should be taken into account in government transfers, conjugal cohabitation has become an increasingly poor proxy for the identification of such economies'.⁵⁹ Many others such as students or good friends share accommodation and the associated expenses. The tax system takes no account of their economies of scale when determining entitlement to tax credits. In addition, individuals enter into all kinds of arrangements that produce economies of scale, such as car pooling, sharing a baby sitter for their children, recycling consumer durables by passing them on to a friend when new purchases are made. Again the tax system takes no account of these transactions. Given that it is virtually impossible to identify when household economies arise or to define the nature of the relationships in which they do arise, tax provisions should not be based on an assumption that such economies exist and enhance the ability to pay of spouses and common law partners.

⁵⁷ *ITA* s 63.

⁵⁸ The Law Commission of Canada noted that the 'GST credit received by each member of a cohabiting couple is reduced to about 65 per cent of the amount that would be received by them as individuals', above n 6, 79-80.

⁵⁹ *Ibid* 80.

I agree with the Law Commission of Canada which concluded that ‘income security programs should not assume that the benefits of individual income are always shared with others in conjugal relationships and that sharing never occurs in other relationships’⁶⁰ and share their view that entitlement to tax credits such as the GST tax credit should be determined by reference to individual income and not spousal or family income.

V CONCLUSION

In this article I have used the recent developments in Canada to extend the definition of spouse in the *ITA* to include lesbians and gay men as a catalyst to rethink why we take spousal relationships into account at all for tax purposes. In no way do I intend to diminish the remarkable struggle of lesbians and gay men for equality, but I do argue that the consequences of attaining spousal status for tax purposes has had a negative impact on many because of a reduction in the value of some tax expenditures, which in turn has meant an increase in the amount of tax they are required to pay. The negative consequences are both classed and gendered with those with lower incomes, and women in particular, bearing their burden. The result is a reinforcement of existing inequities which privilege those with high incomes at the expense of those with low incomes. Tax expenditures that take spousal status into account must operate in a fair, equitable and efficient manner and as I have discussed many of the current tax rules offend these basic tax policy principles. I believe that it is time to take the report of the Law Commission of Canada seriously and consider repealing many of the tax rules that take spousal status into account.

⁶⁰ Above n 6, 82.