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Lisa Philipps
Margot Young
Allard School of Law at the University of British Columbia, myoung@allard.ubc.ca

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SEX, TAX AND THE CHARTER:
A REVIEW OF THIBAUDEAU v. CANADA

Lisa Philipp's and Margot Young*

Section 15 of the Charter offers the promise of redressing many systemic inequalities in the law. This paper considers the implications of section 15 for the taxation of child support payments, an issue raised in the Thibaudeau case. While endorsing the Federal Court of Appeal's decision that the current tax regime is unconstitutional, the authors take issue with the Court's reasoning in reaching this result. In the first part of their paper, the authors address a number of shortcomings in the Court's equality analysis, arguing that the process employed by the Court ignored critical aspects of equality theory. The process of categorization in equality analysis (its inevitability, inexactness and complexity) is discussed. In the second part of the paper, the arguments raised by the federal government to justify its legislative scheme are examined. Most troubling, the authors argue, is that each rationale proceeds from and reinforces familial ideologies which render child support largely a matter of private transfers from men to women. Lastly, a cautionary note about the use of the Charter to redress social and economic inequality is provided. Judicial decisions under section 15 of the Charter should be considered only as the beginning of a larger political process intended to relieve conditions of disadvantage.

Les droits à l'égalité promettent de redresser de nombreuses inégalités systémiques de la Loi, y compris en matière d'impôt sur le revenu. Le présent article examine les implications de toute analyse effectuée à cette fin en vertu de l'article 15 de la Charte en ce qui touche l'imposition des pensions alimentaires reçues par les conjoints ayant la garde — question soulevée par le cas Thibaudeau. Bien qu'appuyant la décision de la Cour d'appel fédérale ayant conclu que le régime fiscal actuel est inconstitutionnel, les auteurs remettent en question le raisonnement qui la motive. En première partie, elles relèvent plusieurs carences de l'analyse de la Cour et notent que d'importants aspects du processus de catégorisation employé renforcent en fait les stéréotypes liés au sexe tout en ignorant des inégalités complexes qui se chevauchent. En seconde partie, les auteures examinent les arguments que présente le gouvernement fédéral pour justifier son texte législatif. Ce qu'elles estiment le plus préoccupant est le fait que chaque argument renforce l'idéologie familiale dominante qui perçoit surtout le soutien de l'enfant comme un transfert privé entre homme et femme. Finalement, l'article lance une mise en garde contre le recours à la Charte en vue de redresser toutes ces inégalités socio-économique. De l'avis des auteures, les décisions judiciaires prises en vertu de l'article 15 de la Charte ne devraient être considérées que comme le commencement d'un processus politique plus vaste visant à éliminer certains désavantages.

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3 By referring to poverty's gendered profile we do not wish to adopt uncritically a stance captured by the popular slogan 'feminization of poverty.' For the classic account of poverty as a female problem see D. Pearce, "The Feminization of Poverty: Women, Work and Welfare" (1978) 11 Urban and Social Change Rev. 28. As a number of commentators have pointed out, while women are represented disproportionately within the ranks of the poor, so too are men of colour, and disabled men. See, for example, J. Brenner, "Feminist Political Discourses: Radical Versus Liberal Approaches to the Feminization of Poverty and Comparable Worth" (1987) 1 Gender and Society 447; P. Sparr, "Reevaluating Feminist Economics: Feminization of Poverty Ignores Key Issues" (September, 1984) Leftfield 12. Not unpredictably, poverty is distributed along the same lines as other disadvantages in our society. Race, disability, age, and gender all help to configure its demographics. R.S.C. 1985, c.1 (5th Supp.) [hereinafter the "ITA"].
principles that permit no political shades or shaping. Thus, Galligan J. of the Ontario High Court of Justice has written in *Ontario Public Service Employees Union v. National Citizens Coalition Inc.* that:5

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

And in *Thibaudeau*, Létourneau J.A., in a comment distressingly revealing of the understanding of social policy that informs his dissent, stated: “The *Income Tax Act* is essentially economic legislation, which may even be described as amoral ....”6

Yet, the Canadian public has not been so reluctant to attach a larger political significance to *Thibaudeau*. Both this case and the earlier decision in *Symes v. Canada (M.N.R.)*7 have generated numerous commentaries about the gender and class politics of certain tax provisions. The Canadian media, in reaction to the Court’s decision in *Thibaudeau*, ran a host of articles, editorials, opinion pieces, and letters commenting upon the issues the case raises.8 The federal government has responded by setting up a national task force looking into the issues underlying *Thibaudeau.*9 Hearings organized by

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5 87 D.T.C. 5270 at 5272, aff’d 90 D.T.C. 6326 (Ont. C.A.). This passage was also quoted with approval by the Federal Court of Appeal in *Canada (M.N.R.) v. Symes*, 91 D.T.C. 5397 at 5405-06, in rejecting another s.15 challenge to the *ITA*. For a discussion of the *Symes* case, see text accompanying notes 60-63, infra.

6 *Thibaudeau*, supra note 2 at 289.

7 [1993] 4 S.C.R. 695 [hereinafter *Symes*].


9 S. Finestone, Secretary of State (Status of Women) and liberal MPs D. Walker and G. Sheridan have been appointed to the task force. The task force was due to report in mid-August, 1994.

10 A recent Toronto hearing of the task force met with raucous challenges to Sheila Finestone’s chairship. Representatives of the men’s rights group “In Search of Justice” called for her removal claiming that she is a male-bashing supporter of women’s rights. Individuals making submissions to the task force from feminist perspectives were also boooed and heckled by the audience. See A. Mitchell, “Men boo women at support hearings” *[Toronto] Globe and Mail* (7 July 1994) A1.
misconceptions about how categorization should function in equality law. The first part of our argument is that the Court relies upon an overly simplistic construction of sex difference as a marker of group identity. We discuss the ideological nature of such an understanding of sex difference, arguing that the Court in Thibaudeau is drawing upon certain prevailing notions of sex identity. Secondly, we point to the Court’s failure to comprehend the complex and overlapping nature of group identities generally. The result of these shortcomings is a section 15 analysis that is a poor fit with existing antidiscrimination law.

In Part II of the paper we consider the government’s failed attempt to justify the taxing provision under section 1 of the Charter. We agree with the majority’s conclusion in Thibaudeau that the law fails to meet its ostensible objectives. Our complaint, however, lies with the Court’s unquestioning acceptance of the governmental objectives themselves. The rationales offered to justify the taxation of child support are plagued by contradictions and incorrect statements about the principles of tax law and policy. More importantly, these rationales bet the law’s reliance upon a set of problematic assumptions as to how women and men relate, or should relate, to one another and to child care responsibilities. A close analysis of the government’s section 1 argument shows that the taxation of child support is structured by our society’s dominant familial ideology, which assigns unpaid child care to women, and makes the welfare of women and children a question of private transfers from individual men. This part of our critique points once again to the need for recognition of the political and ideological content of tax laws, and to the importance of Charter review as one means of expanding tax discourse to get at inequities which have eluded traditional analysis.

In Symes, Iacobucci J. attempted to dispel the notion that tax laws are somehow protected from Charter scrutiny, or are entitled to special deference by virtue of their status as “economic” legislation. While allowing that “a degree of deference” may be warranted in applying section 1, he denied that this should affect any of the earlier stages of Charter analysis and stated that the ITA “is certainly not insulated against all forms of Charter review.” A further clear direction of this nature is badly needed. The dissent of Létourneau J. in the Federal Court of Appeal in Thibaudeau, as well as some of the arguments made during the Supreme Court hearing, indicate that this particular prejudice is not going to expire easily.

But despite what we see as the merits of constitutional review in this case, our discussion also reveals the limits of litigation strategies as vehicles for achieving social justice. We turn to this issue in the concluding section of the article, which examines the potential impact of Thibaudeau on the larger struggles around child support and poverty that underpin the legal details of the case. While we conclude that a Supreme Court ruling in favour of Thibaudeau is desirable because it could alleviate hardship for many divorced women and their children, we identify two dangers which may also attend such a decision. Most immediately, there is a risk that non-custodial fathers will seek and obtain excessive downward variations of child support. We respond to this concern with an argument about the kind of approach that family courts and lawyers should take to such applications. The second danger, which is more difficult to address, is that a favourable decision may actually reinforce the trend towards greater privatized responsibility for “dependents” within the nuclear family. Ultimately, we conclude that an adequate response to the problems raised in this paper would involve a much broader move to depolarize and “defamilialize” not just the tax treatment of child support but the social benefits and entitlements of women and children more generally.

11 Symes, supra note 7 at 753. Also at 753, Iacobucci J. confirmed that “the danger of ‘overshooting’ relates not to the kinds of legislation which are subject to the Charter, but to the proper interpretive approach which courts should adopt as they imbue Charter rights and freedoms with meaning” (emphasis in original).
12 Jean-Marc Aubry, lawyer for the federal government, suggested that the case is “above all a tax issue” and that it “has nothing to do with concepts of equality or inequality, nothing to do with human dignity.” See S. Fine, “Judges skeptical over child-support” Globe and Mail (5 October 1994) A1.
Part I. Equality and Sex Difference: Section 15 of The Charter and Adverse Impact Discrimination

The facts giving rise to the Thibaudeau case are simple and familiar. Suzanne Thibaudeau has custody of two children from her former marriage. For the tax year in question (1989), Ms. Thibaudeau received a monthly payment of $1,150 for child maintenance from the children’s father, her former husband. She received no allowance for herself.\(^\text{14}\)

At issue is the tax status of this child maintenance payment. Section 56(1)(b) of the ITA requires that the recipient of child maintenance payments from a former spouse include such payments in computing her income.\(^\text{15}\) Absent the provisions of this paragraph, it is unlikely that such payments would be taxable.\(^\text{16}\) Another provision, section 60(b), allows the former spouse making the maintenance payments to deduct such payments in computing his income for tax purposes. Together these two provisions are part of what is known as the inclusion/deduction system for child maintenance payments. Thibaudeau raised before the Tax Court the claim that the inclusion of child maintenance payments within her income violated her section 15 equality rights under the Charter.\(^\text{18}\) More specifically, Thibaudeau claimed that the ITA unconstitutionally discriminated against her on grounds analogous to those enumerated in section 15, namely, her status as a separated custodial parent receiving maintenance payments for children.

The Tax Court dismissed Thibaudeau’s claim, despite the Court’s initial finding that the applicant was in fact, for the purposes of section 56(1)(b), a member of a group characterized by factors analogous to those enumerated in section 15.\(^\text{19}\) The Judge (Garon T.C.C.J.) found that the effect of section 56(1)(b) — rendering child maintenance income for tax purposes — did not result in prejudicial consequences for the appellant. He reached this assessment by accepting the argument that as long as the family court or the parties themselves in voluntary agreement took into account the tax consequences to both the payer and the recipient, the parent who receives the payment suffers no prejudice.\(^\text{20}\) Child maintenance levels would be correspondingly “grossed up.”\(^\text{21}\) The Judge pointed to recent case law establishing a judicial responsibility to so factor in tax consequences.\(^\text{22}\) If the court fails to do this, the Judge argued, the recipient’s remedy lies in the exercise of her right to appeal to obtain the adjustment to which she is entitled to under law. And, he stated, a responsibility lies with those custodial parents negotiating their own child support to satisfy themselves that the agreement takes into account tax consequences. As a result, Thibaudeau’s claim was ultimately rejected as she had not shown that the section in question creates

\(^\text{14}\) Thibaudeau is described by the Court as “gainfully but fairly modestly employed” (supra note 2 at 265 [emphasis added]). Such a description is certainly consistent with statistics on the general economic status of women. Single-parent mothers have the highest poverty rate of any family group. In 1992, 58.4% of families headed by single women lived in poverty: National Council of Welfare, Poverty Profile 1992 (Ottawa: Ministry of Supply and Services Canada, Spring 1994) at 14-15. Women generally face a higher risk of poverty than men. In 1992, women had a poverty rate of 17.4% while men had a rate of 13.1% (ibid. at 69). For a more detailed discussion of women and poverty, see J. Pulkinson, “Private Troubles, Private Solutions: Poverty Among Divorced Women and the Politics of Support Enforcement and Child Custody Determination” (1994) 9 Can. J. Law & Society 73 at 76-85.

\(^\text{15}\) Although the ITA itself uses gender-neutral language, our use of gender-specific language is both purposeful and important. Critical to the perspective informing this paper is the factual reality that the vast majority of individuals receiving child maintenance payments are women while those providing the payments are men. According to Revenue Canada figures, 98 percent of those reporting receipt of alimony or child support for tax purposes are women. (A. Mitchell, “Men boo women at support hearing” Globe and Mail (7 July 1994) A6). Although some men do receive child maintenance payments from their ex-spouses, separated custodial parenthood is predominantly a female experience. To mask this reality by use of gender-neutral language would hide what makes this an issue of gender inequality, as it would deny the specific experiences of women as a disadvantaged group.

\(^\text{16}\) See infra, text associated with notes 199-203.

\(^\text{17}\) See also ss. 56(1)(c), 56.1, 60(c), and 60.1 of the ITA.

\(^\text{18}\) Thibaudeau, supra note 2 at 2111.

\(^\text{19}\) The group is described by the Tax Court as composed primarily of separated or divorced women with personal financial self-sufficiency who have custody of children for whom they receive taxable alimony payments (ibid. at 2118).

\(^\text{20}\) Ibid. at 2121.

\(^\text{21}\) This “gross up” thus should reflect both the tax savings realized by the payer and the tax costs experienced by the recipient. As our later discussion of the reality of how child maintenance levels are set (or not set) illustrates, this is a rather problematic assumption. See text associated with notes 170-174, infra.

\(^\text{22}\) Garon, T.C.C.J. cites a number of cases establishing such a legal principle. See supra note 18 at 2120.
a distinction that has the effect of imposing burdens, obligations, or disadvantages on an individual or group not imposed on others.23

Thibaudeau applied for judicial review of this decision to the Federal Court of Appeal. Leave to intervene was granted to the group “Support and Custody Orders for Priority Enforcement” (SCOPE). The participation of SCOPE at the review level resulted in an important expansion of the grounds on which discrimination was claimed. Thibaudeau continued to frame her claim in terms of her status as a separated custodial parent receiving child maintenance payments while SCOPE added the claim of sex-based discrimination.24

The Federal Court of Appeal judgment, written by Hugessen J.A. and concurred in by Pratte J.A., accepted Thibaudeau’s argument, structuring it as a claim of discrimination on the basis of family status. The Court found that this discrimination could not be saved by section 1 of the Charter. SCOPE’s argument about sex discrimination was rejected: the Court held that section 56(1)(b) did not differentiate on the basis of sex, an initial conclusion that barred further analysis of possible sex discrimination.25

Our analysis of these results in Thibaudeau has two parts. The first is an examination of Hugessen J.A.’s treatment of SCOPE’s claim of sex discrimination. It is our argument that in articulating a test for adverse impact discrimination to deal with SCOPE’s claim, Hugessen J.A. mistakenly inserted a qualitative requirement, a consideration improperly invoked at this stage of the section 15 analysis. Our second focus is less obvious, perhaps, but is equally important. We look at Hugessen J.A.’s conceptualization of the difference between the two sexes and how this manifests both a particular and traditional understanding of sex identity and a more general miscomprehension about the process of categorization essential to equality theory and doctrine. It is these larger, ideological misunderstandings which ultimately account for Hugessen J.A.’s problems with adverse impact doctrine and for the difficulty he has juggling the complementary complaints of family status and sex discrimination raised by the claimant and intervenor.

Equality Tests and Sex Discrimination

In Andrews, the Supreme Court of Canada marked out afresh the analysis to be followed in determining whether there has been an initial infringement of section 15. The Court was forced to do so by the confusion surrounding the manipulation of the more traditional test of equality, the “similarly situated test”: the notion that equality entailed treating “likes alike.”26 As has been restated endlessly, the similarly situated test is essentially empty.27


24 We use the term “sex” to capture the identity associated with male and female groups. Thus the term is used interchangeably with “gender,” superficially because this is how the term functions in discussions of s. 15 and more philosophically because we believe that both sex and gender are socially constructed. For discussion of this latter point, see J. Butler, Gender Trouble: Feminism and the Subversion of Identity (New York: Routledge, 1990); C. Smart, “Law, Feminism and Sexuality: From Essence to Ethics?” (1994) 9 Can. J. Law & Society 15; A. Fausto-Sterling, “The Five Sexes: Why Male and Female Are Not Enough” (March/April 1993) The Sciences 20. See also text accompanying note 95, infra.

25 The federal government has successfully sought both an appeal of the judgment and a stay of the Court of Appeal’s declaration of unconstitutionality pending the result of the appeal. (Supreme Court of Canada: Bulletin of Proceedings: June 17, 1994 Motions 14.6. 1994 at 1036.) The appeal was argued before the Supreme Court in October 1994.

26 The similarly situated test was described by McLachlin J.A. (as she then was) in the British Columbia Court of Appeal in the following way: “the essential meaning of the constitutional requirement of equal protection and equal benefit is that persons who are ‘similarly situated be similarly treated’ and, conversely, that persons who are ‘differently situated be differently treated’” (Andrews v. Law Society of British Columbia (1986), 2 B.C.L.R. (2d) 305 (C.A.) at 311). The source of such an understanding of equality is the Aristotelian statement that “things that are alike should be treated alike, while things that are unlike should be treated unalike in proportion to the unalikeness” (Ethica Nicomaches trans. W. Ross, Box V3, at 1151a06 (1925)). The modern formulation of this as the “similarly situated test” owes much to an article by J. Tussman and J. TenBroek, “The Equal Protection of Laws” (1949) 37 Calif. L. Rev. 341. For a critical discussion of the test’s application in the Canadian context, see G. Brodsky and S. Day, Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back? (Ottawa: Canadian Advisory Council on the Status of Women, 1989) at 147-65.

Specifically, two sorts of problems can be identified. First, in a world of infinite variety and difference, the test provides no guidance as to when two individuals or two groups of individuals are to be considered alike or similarly situated. Instead, it is left to the political and ideological intuitions of the decision-maker to construct these initial yet crucial assumptions. And, more often than not, current political prejudices dressed up as rationality, common sense, or nature — precisely the sorts of assumptions equality doctrine, in theory, aims to challenge — structured these starting premises. The result was a number of cases in both the United States and Canada where equality doctrine served only to reinforce existing systemic discrimination.

MacKinnon describes these deliberations with respect to sex equality as an endless and ultimately fruitless obsession with the question of whether men and women are the same or different in any specific instance. If they are the same, then different treatment is illegitimate. If they are different, then equal treatment is illegitimate. And, MacKinnon argues, women are put in the untenable position of needing to be just like men in order to justify demands for basic respect and equal status in society and of having also to assert an essential alienness in order to legitimate recognition of the special needs that flow from their distinctive social treatment and identity. For an expansion of these ideas, see C. MacKinnon, “Legal Perspectives on Sexual Difference” in D. Rhode, infra note 93.

It is worth adding that it is not our contention that judicial deliberation ever escapes the fact of ideological influence. Rather, we identify this as a distinct problem of the similarly situated test because the test makes it particularly easy both to do this and to deny it at the same time. (For a more extensive illustration of judicial importation of ideological thought into legal discourse, see M. Kline, “The Colour of Law: Ideological Representations of First Nations in Legal Discourse” (1994) 3 Social & Legal Studies 451 [hereinafter “Colour of Law”]).

Several early cases illustrate this manipulation of the notion of similarly situated. See, for example, Bliss v. Attorney General of Canada, [1979] 1 S.C.R. 183 at 190, where Ritchie J. stated in relation to disadvantage in the employment context on the basis of pregnancy that “any inequality between the sexes in this area is not created by legislation but by nature.” For a discussion of how this works in the context of sex discrimination, see C. MacKinnon, Sexual Harassment of Working Women (New Haven: Yale University Press, 1979) at 120: “In this way, substantive judgements are made about which differences between the sexes are ‘real’ or ‘relevant’ (in terms of permissible differential consequences) without explicitly investigating which real differences and consequences may result from sexism itself.”

Sex, Tax, and the Charter

The second and connected problem with the similarly situated test is that this conception of equality reduces itself to considerations of formal equality concerns alone. By formal equality, we mean an understanding of equality that prescribes similar treatment of all individuals regardless of varying personal circumstances. Individual treatment is assessed outside of its actual context or impact; individuals are viewed as abstracted from group membership or affiliation. Distinguished from this is a substantive notion of equality which places the individual back into her or his social, political, and economic context, recognizing that, in a world of systemic group-based inequalities, formally similar treatment of individuals may result in great actual inequality. Now, the similarly situated test does not, in itself, mandate a formal equality approach (because it really says nothing specific about the most important judgments that need to be made in relation to equality). That is, it doesn’t rule out a substantive approach to the issue of equality — it simply leaves the issue open. But this fact, in combination with the prevailing liberal ideological orientation of legal actors, has meant that equality analyses were more often than not marked by failure to contextualize the claimant’s situation and thereby take into account the substantive effects of the treatment in question. So understood, equality doctrine becomes unable to recognize much inequality which, of course, restricts its remedial potential.

One way of thinking about these two problems with the similarly situated test and their relation to each other is to look at how the results each problem identifies deal with difference. The first problem (rationalization or naturalization of the different treatment) uses individual context — personal attributes of the claimant — to locate a difference that disqualifies the equality claim. The claimant is, by virtue of her or his personal context, not similarly situated and therefore cannot complain about unequal treatment. The second problem — formal abstraction — ignores the broader context that would make seemingly similar treatment actually different. Here the claimant again loses out, but this time because no different treatment is recognized on which to base an equality claim. Either way, a critical equality perspective is avoided through manipulation of the characteristics of similarity and difference.

For a critique of formal equality, see Brodsky and Day, supra note 26 at 150-51.
The test that replaced the similarly situated formulation — the 'enumerated and analogous grounds' test — is initially discernible in Andrews and further clarified in R. v. Swain and R. v. Turpin. We identify this new test as being only roughly mapped out in Andrews because of its somewhat ambiguous articulation by McIntyre J., the author of the majority opinion on the section 15 aspect of that case. While McIntyre J. does clearly reject the similarly situated test, he continues to discuss discrimination as something identifiable in terms of inappropriate or even irrelevant stereotyping. So, for example, McIntyre J. states that:

[d]istinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.

This formulation of discrimination, based as it is on the assumed reasonableness or appropriateness — terms McIntyre J. does not use but implicitly invokes — of the distinction at stake, suffers from the same flaws as the similarly situated test. It fails to recognize that apparently reasonable or neutral ways of distinguishing individuals — such as merit or capacity — are just as suspect as traditionally identified discriminatory grounds, such as race and gender (grounds, incidentally, once assumed to be unproblematic). And, if one unpacks the analytic steps that underlie the claim that a distinction is reasonable, one discovers the similarly situated test. A claim, for example, that it is reasonable to exclude women from firefighting is based on the assumption that women naturally do not have the physical capacity of men, that they are not similarly situated. Likewise, the claim, say, that it is reasonable not to promote female candidates who have children, based on the common sense knowledge that such women will not put their work ahead of everything else, again relies on the notion that such women are not similarly situated to male candidates. This is an example of the first problem identified in relation to the similarly situated test. The problem of difference is located in the claimant rather than in the social structures — here the criteria and equipment used in firefighting or the social organization of child care — in which the claimant finds herself situated. So despite his attempt to leave behind the similarly situated test, McIntyre J.'s invocation of merit or of natural capacities threatens to fold his judgment back into the very test he rejects.

Yet, McIntyre J.'s judgment is clear in its explicit rejection of the similarly situated test and as such must be read as pointing to a different way of identifying treatment that is contrary to section 15. This is possible if certain elements of the judgment are emphasized. His invocation of the discrete and insular minority test, when read in conjunction with Wilson J.'s plurality judgment, does lay a basis for a new section 15 test. The test can be summarized as follows. First, it calls for a determination of whether or not the state action in question establishes an inequality. Does the legislation, say, create a distinction in treatment or impact between the claimant and others? Second, the claimant must establish that the effect of the impugned distinction is discriminatory. This means both that it imposes a burden, obligation, or disadvantage on the claimant not imposed on others and that the imposition

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32 Andrews, supra note 23.
35 In Andrews, McIntyre J. said of the "similarly situated test": "mere equality of application to similarly situated groups or individuals does not afford a realistic test for a violation of equality rights. For, as has been said, a bad law will not be saved merely because it operates equally upon those to whom it has application" (Andrews, supra note 23 at 167). He continues (at 168) to conclude: "... the test cannot be accepted as a fixed rule or formula for the resolution of equality questions arising under the Charter."
36 Ibid. at 174-75.
37 See, for example, Bradwell v. State of Illinois, 83 U.S. (16 Wallace) 130 (1872).
of such a burden rests upon grounds enumerated in section 15 or on grounds analogous to those enumerated.\footnote{In some of the cases dealing with s. 15, the assessment of social and political context is set out as a separate third step (see Swain, supra note 33 at 992). Andrews, arguably, and Turpin, certainly, do not do this. Instead, Wilson J. in Turpin is clear that the determination of discrimination itself involves examination of the larger context: "[I]n determining whether there is discrimination ... it is important to look ... to the larger social, political and legal context" (see Turpin, supra note 34 at 1331). We would argue that this latter understanding of the elements of the Andrews and Turpin tests is preferable, as it gives a substantive aspect to what is meant by discrimination and therefore fits with the underlying purpose of s. 15.} This last two-fold step completes the analysis of whether an infringement of section 15 has occurred. Any further considerations — such as the reasonableness or justifiability of the particular distinction at stake — lie within a section 1 analysis.\footnote{McIntyre J. writes in Andrews, supra note 23 at 182:}

A complainant under s. 15(1) must show not only that he or she is not receiving equal treatment before and under the law or that the law has a differential impact on him or her in the protection of benefit accorded by law but, in addition, must show that the legislative impact of the law is discriminatory ... [A]ny consideration of factors which could justify the discrimination and support the constitutionality of the impugned enactment would take place under s.1.

Wilson J. in Turpin, supra note 34 at 1325-35 reiterates more forcefully this division of analysis as does Lamers C.J. in Swain, supra note 33 at 992.

There has been some debate in the literature about whether non-analogous grounds will also be recognized under s. 15. For a re-cap of this debate, see P.W. Hogg, Constitutional Law of Canada, 3d ed. (Toronto: Carswell, 1992) at 1164, fn. 77 [hereinafter Hogg].\footnote{This articulation of s. 15 equality rights shifts the focus of analysis to one that is group based and away from a purely individual focused analysis. For a discussion of this assessment, see Galloway, infra note 51.}

Analogous grounds include grounds that identify a “discrete and insular minority,”\footnote{For the American statement of this notion, see United States v. Carolene Products Co., 304 U.S. 144 (1938). Hogg takes issue with this understanding of analogous grounds, arguing that it is the involvement of immutable personal characteristics that identifies analogous groups (Hogg, supra note 41 at 1167-71). But such an understanding of what is analogous seems hard to maintain. It is so, first, because not all of the grounds identified by the Supreme Court as potentially analogous share the characteristic of imminibility. For example, place of residence is not ruled out as a possible ground of discrimination (Turpin, supra note 34 at 1333). Unless one allows a very loose and socially contoured understanding of imminibility to be operative — in which case, it is unclear why we should state the requirement at all — many forms of discrimination currently and powerfully at play will escape s. 15 scrutiny. Second, the requirement of imminibility would lead the analysis back to assessment of the characteristic at issue and away from a more substantive examination of the effects of disadvantage. It locates the problem in the individual, not in the social structures which often normalize or naturalize the individual’s situation. It would do this by focussing solely and formally on the nature of the distinction, ignoring the Court’s call for a purposive, contextual and larger understanding of s. 15 protection. In some sense, then, Hogg’s test would collapse the Andrews test back into early rejected versions of the similarly situated test. Yet, one can still take issue with the Court’s use of the discrete and insular minority notion, although for different reasons. The term fails to capture both the nature of discrimination as it is actually experienced by disadvantaged groups in Canadian society and the extent to which the dimensions along which discrimination is deployed overlap and are “layered” (see text associated with notes 127-35,infra). Many groups one would want s. 15 to protect, that is, groups subject to historical and current disadvantage and stereotyping, are by virtue of the extent and complexity of their disadvantage not “discrete and insular” (for a discussion of this critique, see Gibson, supra note 38). For example, persons living in poverty are not very helpfully described as a discrete group. They are a heterogenous group, with many different life circumstances and personal attributes, linked together only by the economic disadvantage they share. The requirements of discreteeness and insularity could deny recognition of poverty as a ground for systemic disadvantage, something it obviously is. On this point, see M. Jackman, “Poor Rights: The Charter to Support Social Welfare Claims” (1993) 19 Queen’s L.J. 65; M. Jackman, “Constitutional Contact with the Disparities in the World: Poverty as a Prohibited Ground of Discrimination Under the Canadian Charter and Human Rights Law” (1994) 2 Review of Const. Studies 76.} a phrase the Court adopts from American jurisprudence. Wilson J., in that part of her judgment in Andrews which concurs with McIntyre J.’s equality analysis, emphasizes that the determination of what is a “discrete and insular minority” for these purposes will look to “the context of the place of
the group in the entire social, political and legal fabric of our society.”44 In Turpin, writing for the Court, Wilson J. qualifies this by stating that this term functions as one of the “analytical tools” useful in determining whether the interest the claimant advances is of the sort section 15 protects.45 The point of so defining discrimination is, Wilson J. argues in Andrews, that legislative distinctions “should not bring about or reinforce the disadvantage of certain groups and individuals by denying them the rights freely accorded to others.”46 This is the purpose underlying section 15.

This understanding of discrimination also has implications for grounds already enumerated in section 15. Here the Court’s requirement of a larger context of disadvantage means that groups identified by the enumerated ground must also be independently already disadvantaged.47 It means that the immediate disadvantage the legislation imposes, even along enumerated lines, will generally only be a constitutional concern if it occurs against a backdrop of previously existing disadvantage.48 This is what will distinguish the group under issue from other, relatively privileged, groups experiencing similar negative treatment, as any negative treatment these latter groups experience will not feed into and contribute to a general preexisting pattern of disadvantage. And this, after all, is the concern the Supreme Court has identified with section 15 equality rights: “remedying or preventing discrimination against groups suffering social, political and legal disadvantage in our society.”49 The consequence of this is that it will only be in rare circumstances that members of groups lying on the privileged side of the distinction will be able to initiate successful equality claims. So, as between otherwise privileged men and women, say, prejudicial treatment women experience will usually (until the world changes) be played out against a backdrop of general gendered social disadvantage.50 Negative treatment of such men will probably not. Thus, it may be only rarely that these men will be able to claim section 15 protection when experiencing disadvantage imposed by state action.51 Weatherall v. Canada (Attorney General) supports this understanding when La Forest J., for the Court, accepts that similar treatment (frisk searches by members of the opposite sex) will have a different effect for discrimination law on men as opposed to women, although, as we suggest later, this case is less than straightforward in its reasoning.52 The different effect is, at least in part, due to the different current and historical position of women in society.53 Racialized groups will similarly have a background condition of disadvantage accentuating any negative differential treatment they receive. The dominant white group, otherwise undifferentiated, will likely not.

Thus, the questions the Andrews test asks represent a concern about the kind of impact the negative treatment will have. Will it contribute to an already present pattern of disadvantage, of prejudice, or will it have an effect that is not otherwise compounded? Between any two groups — one of

44 Supra note 23 at 152.
45 Supra note 34 at 1333.
46 Supra note 23 at 152.
47 One might attempt to limit the impact of the contextualization requirement by distinguishing between enumerated and non-enumerated groups with respect to its application. Why, however, would one want to make this distinction? Such a distinction belies the Court’s oft-repeated intent to give a purposive interpretation to all Charter provisions, imports an unnecessary and meaningless formal distinction into equality doctrine and is at odds with how the Court proceeds in a number of cases involving an enumerated ground. See R. v. Hess; R. v. Nguyen, [1990] 2 S.C.R. 906 [hereinafter Hess]; Weatherall v. Canada (Attorney General) (1993), 105 D.L.R. (4th) 210 (S.C.C.) [hereinafter Weatherall]; and Swain, supra note 33, all of which involve an enumerated ground.
48 Wilson J. in Turpin, supra note 34 at 1332 writes:

A finding that there is discrimination will, I think, in most but perhaps not all cases, necessarily entail a search for disadvantage that exists apart from and independent of the particular legal distinction being challenged.

49 Per Wilson J. in Turpin, supra note 34 at 1333.
50 This is not to say that all women are equally disadvantaged or that no women are relatively privileged. It is simply to acknowledge that women face a gendered reality men do not.
51 We say “rarely” because the Supreme Court appears to have left room for invalidating state action that so disadvantages men as to affect their overall social position and status and thus constitute them as a generally disadvantaged group. See Hess, supra note 47 at 928; Weatherall, supra note 47 at 210 in relation to men’s status qua men with respect to use of s. 15. For a discussion of this issue, see D. Galloway, “Three Models of (In)Equality” (1993) 38 McGill L.J. 64 at 75. For a critique of the argument that otherwise advantaged groups cannot claim s. 15 in relation to a legislative disadvantage, see D. Gibson, supra note 38.
52 Ibid. Also see text associated with note 105, infra.
53 Ibid.
whom suffers historic or systemic negative stereotyping or disadvantage, the other who doesn’t — there always will be a difference in constitutional relevance even where the law in question applies the same immediate treatment to both. This is why the Supreme Court has explicitly built in a requirement of contextualization. Only through such means can equality doctrine attempt to insure that the remedial potential of section 15 is not muted and abused by attending to the equality complaints of the already relatively privileged.

The result of this reconceptualization of the section 15 test is that the similarly situated test is improved upon in two ways. First, assessment of the rationality of the distinction in question is rendered irrelevant. It is no longer one of the questions properly asked under a section 15 analysis.54 Instead, as mentioned, such justificatory concerns are saved for the section 1 analysis.55 Thus, common prejudices and unexamined political assumptions arguably have reduced play, at least in relation to the initial stage of the test.56 Second, the court is specifically directed to contextualize, to look to wider social and historical patterns of disadvantage, as part of answering the question whether the treatment at issue will be actionable under section 15. Thus, the doctrine is forced to move away from a purely formal analysis of inequality.

54 This point needs qualification as our analysis gives a somewhat false picture of the coherence of the total body of Supreme Court doctrine in the area of equality law. In particular, two cases come to mind that muddy the waters we have in the last part of this discussion so painfully cleared. The Supreme Court decisions in Hess and Weatherall diverge significantly from the analysis we argue successfully emerges from Andrews and Turpin. However, we would argue that Hess and Weatherall should not be read as displacing the analogous groups test. Instead, they represent a particular and conceptually troubled application of equality doctrine to the enumerated ground of sex. For a more detailed discussion of this, see note 47, supra.

55 To return to this earlier point, Wilson in Turpin, supra note 34 at 1325 states the following: “In defining the scope of the four basic equality rights it is important to ensure that each right be given its full independent content divorced from any justificatory factors applicable under s. 1 of the Charter.” She goes on to say at 1328 that the “test of whether a distinction is ‘unreasonable,’ ‘invidious,’ ‘unfair,’ or ‘irrational’ imports limitations into s. 15 which are not there.”

56 We do not mean to imply that judicial ideology is thus rendered irrelevant to a s. 15 analysis. For a discussion of how insertion of preconceptions and biases are facilitated by the Andrews test, see text accompanying note 123, infra.

Hugessen J.A.’s analysis of SCOPE’s sex discrimination claim purports to follow this model but runs afoul of the analytical separation the process sets out. He begins by looking to see whether or not there is an initial inequality — the first step of the Andrews test. This stage in Thibaudeau is somewhat complicated by the need to incorporate an adverse effects analysis. The text of section 56(1)(b) contains no reference to either sex. Thus the section cannot on its face be found to discriminate on the basis of sex. Instead, SCOPE’s claim requires a finding that the effect of the provision is discriminatory. SCOPE needs to show that the legislation has an adverse impact on women. On its own this is not a problematic requirement: the Supreme Court of Canada has recognized the legitimacy of such an approach to establishing unequal treatment and has stated that it is the effect of the discriminatory action, in every case, ‘that is the focus of anti-discriminatory provisions.’57 But, Hugessen J.A. incorrectly adds (and this is a problem) a qualitative dimension to the adverse effect that must be found at this stage.

Hugessen J.A. does this by stating that in order to establish adverse effect discrimination on the basis of sex, it is not sufficient to show that more women are affected. Rather, one must show that those women affected, regardless of their number, are more adversely affected — that is, differently affected — than the equivalent group of men. Hugessen J.A. states this in the following manner.58

Indeed, in my view it is not because more women than men are adversely affected, but rather because some women, no matter how small the group, are more adversely affected than the equivalent group of men, that a provision can be said to discriminate on grounds of sex.


58 Supra note 2 at 271 (emphasis in original).
So, the difference between men and women negatively affected has to be qualitative not merely quantitative.\textsuperscript{59} Thus, a showing of adverse effect discrimination demands that the burden the legislation alone places on any one woman be different from that placed on any one man. This effectively means that any demonstration of a similar burden being placed on both an individual woman and an individual man would rule out the possibility that the prejudicial effect could be understood as sufficiently sex-specific to constitute sex discrimination.

Hugessen J.A. relies on \textit{dicta} by Iacobucci J. in \textit{Symes}\textsuperscript{60} to support these statements, giving a reading to Iacobucci J.’s comments that is far from convincing. Because Hugessen J.A.’s understanding threatens to mark out a new and disturbing course for adverse effect doctrine, it is worth sidetracking somewhat to review the \textit{Symes} case and to make more explicit our argument that Hugessen J.A.’s interpretation of it should be rejected.

In \textit{Symes}, the Supreme Court of Canada had been asked to declare that if child care expenses are not deductible as a business expense under the \textit{ITA}, such a denial of deductibility was an infringement of rights guaranteed by section 15 of the \textit{Charter}. Beth Symes, a full-time partner in a law firm, had argued that the wages she paid to a child-care giver constituted legitimate business expenses, under the terms of section 9 and 18 of the \textit{ITA}, as the employment of a nanny enabled her to engage in an income producing business. Alternatively, should such an interpretation of business expenses be denied by the Court (and it was, on the grounds that section 63, by granting a more limited form of deduction for child care expenses, effectively precluded any other deductibility), Symes argued that this understanding of business expenses had a disparate negative impact on women and thus infringed section 15’s guarantee of sex equality. Iacobucci J. refused to make this constitutional finding, stating that it had not been established that women disproportionately bear the \textit{financial} burden of child care, despite Symes’

clear showing that the \textit{social} costs of child care were disproportionately born by women.\textsuperscript{61} Only if women disproportionately paid child care expenses would sections 9, 18(1), and 63 of the \textit{ITA} have any gender-specific effect. Thus the first step of the \textit{Andrews} test — identification of different treatment on the grounds claimed — was not met.

While a frustrating refusal to judicially “connect the dots,”\textsuperscript{62} this decision does not, as such, close the door to judicial recognition of sex discrimination in Thibaudeau’s context. Iacobucci J. noted that:

If, for example, it could be established that women are more likely than men to head single-parent households, one can imagine that an adverse effects analysis involving single mothers might well take a different course, since child care expenses would thus disproportionately fall upon women.

However, Iacobucci J. went on to make a series of \textit{obiter} comments on the nature of discrimination and, in so doing, generated some confusion as to how the Supreme Court understands indirect discrimination. These comments were relied upon by Hugessen J.A. to anchor his ultimately destructive treatment of the doctrine in \textit{Thibaudeau} and thus deserve examination.

Iacobucci J. correctly recalls that in previous Supreme Court of Canada cases on adverse effect discrimination, the Court had noted that the discriminatory actions in question (pregnancy discrimination and sexual harassment in \textit{Brooks v. Canada Safeway Ltd.}\textsuperscript{64} and \textit{Jansen v. Platy Enterprises Ltd.}\textsuperscript{65} respectively) could only negatively affect some women and no men. These statements were made in support of seeing pregnancy discrimination and sexual harassment as sex discrimination and specifically

\textsuperscript{59} Hugessen J.A. writes at 271, \textit{ibid.}: “But surely it cannot be the case that legislation that adversely affects both men and women is discriminatory on the grounds of sex solely because the women (or men) in question are more numerous.” And, also at 271: “The focus, surely is not on numbers but on the \textit{nature} of the effect; on quality rather than quantity.”

\textsuperscript{60} \textit{Supra} note 2 at 270.

\textsuperscript{61} \textit{Symes, supra} note 7 at 763.

\textsuperscript{62} L’Heureux-Dubé J. in her dissenting judgment in \textit{Symes} does not hesitate to infer from the conclusion that women disproportionately pay the social costs of child care that women also disproportionately pay child care expenses. She terms such an inference “inescapable,” noting as well that in the immediate case before the Court Ms. Symes had proven that she did incur such expenses. See \textit{Symes, supra} note 7 at 821 per L’Heureux-Dubé J.

\textsuperscript{63} \textit{Symes, supra} note 7 at 766-67.

\textsuperscript{64} [1989] 1 S.C.R. 1219 [hereinafter \textit{Brooks}].

\textsuperscript{65} [1989] 1 S.C.R. 1252 [hereinafter \textit{Jansen}].
rejecting the claim that sex discrimination was not present in a situation where only some, not all, women were affected. Iacobucci J. notes that, in contrast, the discrimination alleged in Symes could negatively affect both some men as well as many women. The question is thus raised whether such prejudicial effects are gender-specific enough to constitute sex discrimination.

Iacobucci J. addresses this concern by reminding us that there is a difference between being “negatively affected” by a provision and being able to establish that such a negative effect is in fact an “adverse effect” in law. This makes sense, as we know that the last step of the Andrews test requires that the effect be looked at in context. Similar treatment of two differently situated groups will thus have a different legal character under section 15 with respect to each group. However, what becomes confusing about Iacobucci J.’s dicta at this point is whether he is saying more than this.

The Court in Thibaudeau believes that he is. Hugessen J.A. apparently is troubled by the notion that two groups, both with members who are negatively affected by the same treatment, can nevertheless be distinguished for the purposes of equality law. He resolves this dilemma by asserting that Iacobucci J. must mean that the treatment itself must be different: that women must be more and thus differently adversely affected, not that simply more women are adversely affected. Yet, such an understanding of Iacobucci J.’s statements is incompatible with other statements Iacobucci J. makes (one of which is reproduced above) about the facts in Symes possibly showing adverse effects discrimination on the basis of family or parental status. To resolve this apparent contradiction, Hugessen J.A. reads Iacobucci J.’s use of the terms “disproportionately” affected and “more likely to suffer” as importing a qualitative aspect, and thus uses Symes to support the result in Thibaudeau, as described earlier.

There are a number of problems with this understanding of the law on adverse effect discrimination. Most obviously, it involves an interpretation of Iacobucci J.’s words that seems forced and artificial. As well, regardless of whether Hugessen J.A. does or does not correctly invoke Symes, the resulting statement of adverse effects discrimination that emerges from Thibaudeau fits badly with previously articulated principles of equality doctrine and theory. As such, it should not be adopted, for the following reasons.

Hugessen J.A.’s importation of a qualitative consideration at this stage of a section 15 analysis simply collapses the different steps of the analysis set out in Andrews. In so doing, Hugessen J.A.’s judgment undermines the advance Andrews represents in our understanding of equality concerns. The Andrews framework already takes into account the character of the effect on the targeted group. It does this by forcing the decision-maker to assess the historical and social context of the group in question. This is, as mentioned, the last stage of the Andrews’ test. At this stage the court must determine whether the group of which the claimant is a member is one already historically or currently disadvantaged.

Why would Hugessen J.A. want to insert another qualitative distinction into the first step of the Andrews analysis? Surely a quantitative difference alone would satisfy the Court’s concern that section 15 deal with those cases where different treatment contributes to the overall maintenance of already existing patterns of disadvantage or discrimination. And, if it turns out that the group under study is an otherwise disadvantaged group (according to the last step of the inquiry), then the impact of the legislation on it will always, in any case, be qualitatively different from any impact the legislation will have on the privileged group from which it is distinguished. This is the inevitable import of the rationale underlying Andrews’ last requirement. Besides, if the last stage of the test cannot be satisfied — meaning that the disadvantage in question is not overlaid on to a general pattern of disadvantage — then the claimant’s challenge can be dismissed. So the requirement of qualitative

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66 This limits the applicability of statements made in both of these cases to a very specific set of facts and to a particular theoretical concern. For more discussion of this point see text associated with notes 114-15, infra.
67 Symes, supra note 7 at 770.
68 See text associated with supra note 63.
69 Thibaudeau, supra note 2 at 271.

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difference at the first stage is unnecessary and misleading. The inquiry into existing disadvantage that the last stage of the test requires is more than adequate insurance that examination of context and differential impact takes place. Hugessen J.A.'s analysis at the first stage need only inquire into whether there is any difference, and a quantitative difference will suffice.\footnote{Such a quantitative requirement is consistent with American jurisprudence dealing with adverse impact discrimination under The Civil Rights Act of 1964, Title VI (42 U.S.C. §2000e et seq., federal human rights legislation). The United States Supreme Court has held that "to establish a prima facie case of discrimination, a plaintiff need only show that the facially neutral standards in question select applicants ... in a significantly discriminatory pattern" (per Stewart J., Dothard v. Rawlinson 433 U.S. 321 at 797 (1977), 53 L. Ed. 2d 786, 96 S. Ct. 2720). Thus, a height and weight requirement that excluded roughly 41% of women and somewhere around 3.5% of men was found by the Court to have a discriminatory impact on women (ibid.). In the same case, Rehnquist J., stated that a finding of discrimination is sufficiently based on "a significant discrepancy between the numbers of men, as opposed to women, who are automatically disqualified by reason of the height and weight requirements" (ibid. at 803). Similarly, tests which result in a 58% pass rate for whites and a 6% pass rate for blacks have been found, for that reason, to be prima facie discriminatory on the basis of race (Griggs v. Duke Power Co., 401 U.S. 424 (1971), 28 L. Ed. 2d 158, 91 S. Ct. 849). Antidiscrimination law has not developed in this way under the American Bill of Rights as the Supreme Court has held that a violation of the constitutional guarantee of equal protection of the laws requires overt differential treatment or a finding of intent to discriminate (Washington v. Davis 426 U.S. 229 (1976); Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979); McCleskey v. Kemp, 481 U.S. 279 (1987)).}

However, insertion of a qualitative requirement during the first stage of the analysis — although certainly redundant — is not necessarily damning had Hugessen J.A. done it properly. Unfortunately he does not. His error — a significant one — is failing to contextualize the experiences at stake in the analysis. Rather than looking at the wider social context in which men and women taxpayers function, Hugessen J.A. searches for a qualitative distinction within the state action itself. But, the Supreme Court has made clear that contextualization is an important part of any section 15 analysis. This is why the Court required contextualization as a distinct stage. As Wilson J. in Turpin writes.\footnote{Supra note 34 at 1332.}

A determination as to whether or not discrimination is taking place, if based exclusively on an analysis of the law under challenge is likely, in my view, to result in the same kind of circularity which characterized the similar situated similarly treated test clearly rejected by this Court in Andrews.

After all, contextualization is what saves a section 15 analysis from being reduced to ineffectual statements of formal equality. Hugessen J.A. sidesteps this safeguard by importing the qualitative assessment into the first step and neglecting to carry it out in a way that is sensitive to context. His formulation of the adverse impact discrimination test as requiring a qualitative difference observable in isolation from a contextualized analysis allows him to "preempt the Supreme Court's "reminder" to contextualize. Thus Hugessen J.A.'s test reverts to the problems experienced by the earlier similarly situated test, representing a backwards step for equality doctrine. He misses seeing that the identical treatment of women and men, once one factors in the specific contexts of the subgroups involved, will seldom, if ever, have the same meaning for anti-discrimination law.

Had Hugessen J.A. given appropriate contextualized consideration to the effect of section 56 in Thibaud, what would he have found? A number of things seem obvious. Female custodial parents face a hostile world. They are disadvantaged in terms of labour force participation and access to education and training opportunities. Their skills and labour are less valued than those of male custodial parents. This is in large part because, as women, they are already embedded in society-wide patterns of gender-based disadvantage and prejudice.\footnote{To the extent that male separated custodial parents face similar burdens to those experienced by their female counterparts, it is possible to say they have been "feminized."

This is not to deny that many men are disadvantaged on grounds other than gender. So men of colour, or poor men, are not necessarily properly considered privileged. It is merely to assert that the disadvantages many men experience in our society are not attributable to their gender in the way that the disadvantages many women experience are.} Male custodial parents, while they may share some of the immediate disadvantages which are imposed on separated custodial parents, like section 56(1)(b), do not share this larger context of gender disadvantage. Still attached to these men are those privileges and advantages granted to men and denied to women.\footnote{This is not to deny that many men are disadvantaged on grounds other than gender. So men of colour, or poor men, are not necessarily properly considered privileged. It is merely to assert that the disadvantages many men experience in our society are not attributable to their gender in the way that the disadvantages many women experience are.} Because of this, there

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will seldom be an absence of qualitative difference in something done to women, relative to the same thing done to men. Only by ignoring this context can Hugessen J.A. conclude that men and women are equally burdened by section 56(1)(b) of the *ITA*.

**Sex Difference and the Categorization Process**

The failings of Hugessen J.A.'s analysis do not lie simply in a misapplication of doctrinal requirements. They can more importantly be accounted for in terms of his reliance on prevailing ideological assumptions about the difference between men and women and the nature of group identification generally. The following discussion examines this claim, arguing that the ideological assumptions informing Hugessen J.A.'s judgment are in tension with more sophisticated social and legal understandings of gender and group identity.

Our intent in this paper is not to engage in a detailed discussion of ideology and its effects within law. Rather, it is to outline the main features of the critical framework within which we have placed our analysis. There are multiple definitions and theoretical uses of the term 'ideology.' For our purposes, we use the term to mean specific clusters of beliefs, attitudes and images through which meanings and values are attached to people, practices, policies, and institutions, in such a way that the power relations of a society are presented as natural and uncontestable. The concept of ideology thus "presumes that the 'common sense' of a society has developed historically, within particular relations of race, gender, class and sexual identity and so on." Ideologies are to some degree internalized by individuals, particularly (though not exclusively) by members of the dominant social group, so that they operate as an unstated framework of assumptions informing all our thought processes, transforming how we understand daily experiences. Whether or not they are self-consciously recognized, ideologies affect what explanations of events we are likely to accept or reject, what aspects of social relations we tend to regard as natural, normal or essential, and what alternative visions of the world we are prepared to consider as reasonable or realistic.79

We do not suggest that the images presented by dominant ideologies describe the lived realities of all, or even very many, people. These ideological paradigms do not necessarily coincide with people’s diverse experiences, nor are they the only sets of beliefs or assumptions which exist in our society about social and political order. As Marlee Kline points out, ideologies are not smoothly and unproblematically reproduced,80 and strands of resistance can arise within discourse to challenge dominant ideologies.81 So with respect to any one area of social and political life there will be multiple, cross-cutting, competing, and often contradictory pictures of ideal orderings.

Nor do we intend that ideology simply be understood as a false or illusory belief system. The concept of ideology has often been criticized as implying that there is a single, objectively knowable, real world which is hidden from those who "buy into" ideological beliefs. The result of such a concept, the critique argues, can be the casual dismissal of differences in experience and political vision as "false consciousness." In response to this danger, then, one must be careful to assert that, while ideology is partial and politically charged, it is no different in this regard from all knowledge or forms of truth. A reductive notion of ideology as merely and uniquely falsehood can be avoided if we recognize that ideologies have real, material effects in constituting daily life, particularly for the less powerful in society. Ideologies are inseparable from material interests in the sense that they are "a constituent of the unconscious in which social relations are lived."82 An ideology’s

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intractability and power is partially explained by the fact that it accurately captures some of what individuals understand to be important in their lives. Thus, ideologies both distort and reflect life as individuals experience it.

The concept of ‘discourse’ is useful here as a complementary theoretical tool to aid in preventing the misunderstanding of ideology as a belief system singularly opposed to truth or reality. Discourse theory refocuses the analysis on the role of language in constructing the truth and knowledge of a society. Individual experience is seen as inseparable from and constructed through language, or discourse. There is, in other words, no one experience or subject existing outside the historical context of a society. Rather, everything is a reflection at some point of individual subjectivity and all subjectivity is the product of the society and culture in which the individual lives. Subjectivity is never fixed or stable within the individual; it is continually reconstituted through discourse.83

The relationship between ideology and discourse is also the subject of much academic musing. Ideology can be thought of as one of the forces operating within discourse to construct our knowledge and experience of the world. Relying on work by Stuart Hall, Kline writes, “ideology is related to discourse in the sense that discourse is the ‘arena or medium in which ideology functions’”84 and is given expressive existence. Law in general, and tax law in particular, are discursive fields in which ideologies have their effect, and through which dominant ideologies are reinforced, or occasionally challenged. So discourse theory usefully captures the fluidity and local, dispersed nature of power relations. The concept of ideology remains important, however, as it recognizes the effect of a set of larger structures of power that, to an important extent, is historically continuous and often depressingly determinative and coherent.

It is vital to emphasize that although dominant ideologies may not completely describe either the lived realities or the aspirations of many individuals, such ways of envisioning the world nevertheless have power in constituting the parameters of daily life for everyone in our society. This is, perhaps, especially true for those who do not conform to dominant ideological visions. We take Shelley Gavigan’s point that the struggles of people who can never fit the ideal “illuminate, rather than negate,”85 the oppressive potential of an ideology’s stipulation of the norm.

A number of specific ideologies are relevant to our discussion of Hugessen J.A.’s judgment in Thibaudeau. For the remainder of this first part of the paper, the focus of which is sex equality issues, we examine particular ideological understandings of sex difference and of group identity generally. The second part of the paper, which examines the section 1 arguments put forward in defence of the ITA’s inclusion/deduction provisions, will focus on familial ideology.

It is possible to identify a dominant understanding of sex difference which, because it operates at such an inchoate yet powerful level in shaping how society generally views gender identity, origin and relations, deserves standing as ideology. This dominant understanding postulates a fundamental opposition between the sexes that has its origin in immutable biological factors. Sex and its associated behaviours are seen as biologically determined. Scientific proof of sexed natures is sought through appeal to such things as “anthropomorphic studies of other mammals, to instincts, hormones or to the physical processes of reproduction.”86 Social differences between actual men and women are justified by reference to a “fixed and unchanging natural order.”87 The essential nature and meaning of having a male or a female body are assumed to be the product of simple biological truths; thus, sex differences that are observable are justifiable with reference to standards of natural femininity and masculinity.88 And, the consequences of such an understanding of sex have significant implications for social ordering and political structures. In particular, this set of beliefs about sex identity forms a major structural support of patriarchy: it legitimates the sexual division of labour, current

85 “Paradise Lost”, supra note 13 at 606.
86 Weedon, supra note 83 at 128.
87 Ibid.
88 And, tautologically, observations of social differences also stand as evidence of the inevitability of sex difference.

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forms of femininity, and women’s subordinate position in society as a whole.89

Hugessen J.A.’s judgment illustrates this dominant ideological understanding of sex identity. To begin with, his judgment imputes the origin of sex difference to determinate and oppositionally ordered differences. He states that sex as a ground of discrimination differs significantly from other enumerated grounds in two ways. First, it lends itself to identification of only two groups. Unlike race, Hugessen J.A. offers by way of illustration, which can identify any number of subsets, sex can identify only two subgroups: women and men. Moreover, and this is Hugessen J.A.’s second point, these two subgroups can only properly be described as opposites: “One excludes the other. A male is always the opposite of a female and vice versa.”90 Any characteristic that is female is matched by an opposite characteristic of maleness. This means that any adverse effect that is to be linked to sex discrimination can’t affect both men and women, even if in so doing it still disproportionately affects one sex. Sex based characteristics can by definition only be associated with one of the sexes. Therefore, because Thibaudeau’s situation as a separated parent receiving child support is not unique to women, the state’s action of taxing support payments cannot be seen as sex-linked.91 Characteristics which identify members of both sexes cannot be sex-based, as anything that identifies one sex is the opposite of that which identifies another sex. Hugessen J.A. holds this to be a simple question of logic.92

89 Weedon, supra note 83 at 126.
90 Hugessen J.A. states that: “[t]here is an almost infinite number of religions, nationalities, etc. and no two subsets within any of those categories could properly be described as opposites. There are only two sexes” (Thibaudeau, supra note 2 at 271).
91 With respect to Thibaudeau’s claim, Hugessen J.A. thus states:

1 ... have no doubt that s. 56(1)(b) impacts adversely on more women than men. That is because mothers are far more likely to be custodial single parents than fathers. Since, however, the legislation must also impact in exactly the same way on custodial fathers, although in very much smaller numbers, I do not see how it can be said to differentiate or to discriminate on the basis of sex (ibid. at 272).
92 Ibid. at 271.

In fact, biological characterization of the sexes, let alone the social manifestation of that biological state, is not simply a question of logic, even at its most basic level. Researchers into the biology of sex have long had

94 Thibaudeau, supra note 2 at 272.
difficulty clearly grouping all individuals into one or other of the sexes. Intersexuality — the mixture of male and female biological characteristics — complicates the tidy cultural assumption of straightforwardly sexed individuals. Hermaphrodites and male and female pseudohermaphrodites all demonstrate the enormous variation of the distribution of sex characteristics. Indeed, it seems much more “logical,” at the biological level, to treat sex as a “vast, infinitely malleable continuum that defies the constraints of ... categories.”

There is no essential and fixed set of biological facts from which to construct our social/sexed selves.

Even if the biological determination of sex was more certain and cleanly aligned with the two categories of male and female than it actually is, the social consequences or the meaning of such biological facts would still remain open. Facts acquire significance and gain meaning only when wrapped with specific cultural import by such things as laws, customs, beliefs, emotion, and imagination. That is, facts gain their meaning through a range of discourses. “[T]he language of biology participates in other kinds of languages and reproduces that cultural sedimentation in the objects it purports to discover and neutrally describe.”

Our construction of two sexes — both biologically and behaviourally — lies at the cultural level and falsely claims biological derivation in its assertion of authority. The capture of social possibilities by dominant understandings of appropriate gender behaviour is never complete. What may be true generally of men and women loses any predictive value at the individual level, in terms of both biological and social characteristics.

The consequence of this is that Hugessen J.A.’s notion of sex difference works at the level of individual behaviour for, at best, only a few characteristics we associate with sex. Pregnancy is the most obvious and — apart from other aspects of women’s reproductive physiology, perhaps breast feeding — may be the only gender dimension along which discrimination occurs that fits with Hugessen J.A.’s analysis. That is, it is among the very few sexed characteristics that do not occur in both male and female populations. All other characteristics that one associates with one sex or the other point, potentially, to at least some members of the ‘opposite’ sex. What Hugessen J.A. fails to realize — and what our brief discussion above illustrates — is that categorization (how we demarcate the female and the male) is only a theoretical device; its relationship with the real world is necessarily a complicated one. As theorists note, while it is true that our culture identifies only two sex categories and while everyone is more or less permanently assigned to one or the other, it also is true that the meanings of gender as individuals experience them are much more complicated, ambiguous, and contradictory. Thus sex difference is no different from other differences. Like race, class, ability, or family status differences, sex differences are loosely and only in a very general sense reliably grouped.

The previous discussion points to the complexity and untidiness of sex identity categories — an argument that illustrates more general observations about the multidimensionality and fuzziness of the line one must draw between groups whenever a definite list of certain group-linked characteristics

96 Fausto-Sterling, supra note 24 at 21.
98 Weedon, supra note 83 at 127.
99 Butler, supra note 24 at 109.
100 Gayle Rubin makes the argument that the creation of the two groups of female and male is a product of culture, not biology: “Gender is a socially imposed division of the sexes ... Men and women are, of course, different. But they are not as different as day and night, earth and sky, yin and yang, life and death. In fact, from the standpoint of nature, men and women are closer to each other than either is to anything else — for instance, mountains, kangaroos, or coconut palms ... But the ideal that men and women are two mutually exclusive categories must arise out of something other than a nonexistent ‘natural’ opposition.” See “The Traffic in Women: Notes on the ‘Political Economy’ of Sex” in R.R. Reiter, ed., Towards an Anthropology of Women (New York: Monthly Review Press, 1975) at 179-80.
is attempted. The ideology of sex difference has thus obscured the actual multidimensionality of biological and social sex traits by its employment of a common sense account of a fixed, binary, and biological sexed order. It is worth adding to this discussion the reminder that, despite this inexactitude, assignment of identities based on these characteristics has important social, political, and economic consequences for individuals.\(^{104}\) This is, after all, simply a more specific instance of the general point we made earlier about ideologies: that they have material consequences both for those who conform to them and for those who do not. With respect to sex discrimination, this means that one has both to acknowledge that gender has “ubiquitous relevance” and to question the assumption that the male and female sexes have essential and naturally gendered natures ordered oppositionally to each other.\(^{105}\)

Hugessen J.A. is not alone in his incorporation of an inadequate understanding of sex difference into his analysis of sex discrimination. The Supreme Court, itself, has exhibited similar ideological misunderstandings of the difference sex makes. In Hess and Weatherall, both sex discrimination cases, the Supreme Court defaulted on correctly applying the test it mapped out in Andrews and in Turpin. Both of these cases purported to follow the Andrews test but, in effect, involved judicial discussion of whether men and women are similarly situated with respect to the treatment in question. This occurred, in both cases, at the point when the Court became concerned with the reasonableness or reliability of the gender distinction drawn by the state action at issue.

One convincing way of explaining the doctrinal irregularities of these cases is by reference to the ideological pull which biological renderings of sex difference have for individuals in our society. The judges appeared unable to disassociate the idea of natural distinction from discussion of sex difference. In Hess this meant that Wilson J., as part of her section 15 analysis, justified the different treatment of men and women with respect to statutory rape in terms of a natural sex difference between “penetrators” and the “penetrated.” In Weatherall, the Court, although admittedly not engaging in a detailed section 15 analysis, invoked biological difference in assessing the significance of chest frisking for men and women as part of the reasons justifying the different treatment to which male and female prisoners are potentially treated.

These manifestations of a biological or natural understanding of sex inevitably fold the section 15 analysis back into the similarly situated test. Somehow eclipsed is earlier jurisprudential insistence that section 15 is not the place for considerations of reasonableness or attempts at justification. Conceptions of sex differentiation as invoking possibly natural and therefore legitimate distinctions foil attempts to move beyond the similarly situated test. This slippage serves as a strong reminder of the dangers the similarly situated test represents to the progression of equality law. Such eagerness to locate natural differences facilitates the unchallenged assertion of traditional notions of sex difference in precisely the context — equality law — where such notions are most appropriately reexamined. Here too, it appears, sex has yet to shed its ideological naturalistic heritage.

Categorization and Adverse Effect Doctrine: The Indistinctiveness of Group Identification

As we have shown, the gender ideology that underpins Hugessen J.A.’s reliance on a deterministic biological understanding of sex difference results in a particular doctrinal statement: that adverse effect discrimination cannot be found where the treatment in question affects members of both sexes. We have discussed this in terms of locating a difference in treatment, in locating a differential adverse effect. We now turn to illustrating how the general lesson of the inexactitude of category definition has already been recognized elsewhere in anti-discrimination law. We argue that Hugessen J.A.’s understanding of discrimination, informed as it is by a mistaken picture of sex categories, is at odds with the general evolution of anti-discrimination doctrine. The development of equality law has had two important stages, both of which are consistent with precisely that same understanding of the complicated and inexact nature of identification of group characteristics we claim Hugessen J.A.’s judgment lacks. The importance of this discussion is that not only is Hugessen J.A.’s notion of sex difference faulty from an analytical perspective, but it also is inconsistent with how equality doctrine generally has treated the boundaries between categories used in equality law. The message of this observation is simply, once again, that the picture of sex difference Hugessen J.A. employs is a hindrance rather than an aid to a proper

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\(^{104}\) Weedon, supra note 83 at 125-26.

\(^{105}\) Thorne, supra note 93 at 112.
treatment of sex discrimination.

The first identifiable stage in the development of discrimination law involves a recognition of adverse impact discrimination, something this paper has already discussed. To repeat, legal differentiation that is on its face neutral as it does not explicitly single out a certain group for special treatment has been held still to discriminate if its effects are such. In Ontario Human Rights Commission and O’Malley v. Simpson Sears Ltd.\(^{106}\) the Supreme Court of Canada described adverse effect discrimination (here in the context of employment) as follows:\(^{107}\)

It arises where an employer ... adopts a rule or standard ... which has a discriminatory effect upon a prohibited ground on one employee or a group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force.

This is a critical acknowledgment about the ‘mechanics’ of discrimination. Absent such a recognition of adverse effect, equality doctrine simply would be unable to address substantial amounts of very effective discrimination. This is because any single group identity has significant and multiple consequences for a wide variety of social behaviours and circumstances: for example, one’s gender affects a wide range of occupational, familial, and social choices. The link between these group identifications and certain observable social phenomena is tight enough on a general, statistical level, that any one of these indicators can usually operate to distinguish the majority of one group from the majority of those not associated with that group, despite the formal neutrality of the distinction it draws. In fact, the tightness of the linkage provides gender ideology with its appearance of ‘truth.’ For example, think of the social characteristic of primary responsibility for child rearing or the physical characteristic of strength. Neither of these characteristics is necessarily attached to an individual of one or the other sex. Some men provide primary child care and some women are stronger than most men. These characteristics could be considered formally sex-neutral. Yet both are clearly associated with the general population of one of the sexes and as such can be seen to be sex-associated descriptors. To use the example cited by Hugessen J.A., if one were to select for a certain job eligibility on the basis of great physical strength, chances are that most (but not all) successful applicants would be male. So one can quite effectively discriminate on the basis of sex by use of such formally neutral characteristics. This functional division of traits between the sexes forces recognition of adverse impact discrimination.

Moreover, we are not always conscious of the ways in which the distinctions we draw, say in law, will implicate group identities and single out specific groups for distinctive treatment. This is because the constellations of factors or characteristics that go into the construction of identities often masquerade as unconnected, purely individual traits, behaviours, choices, or situations. Yet, in social reality they may be tightly linked to one group or another. So the law has had to recognize that state action may be discriminatory even though on its face and in terms of the intentions informing it there is no obvious evidence that such discrimination is occurring.\(^{108}\) Discrimination can be merely the unintended “by-product of innocently motivated practices or systems.”\(^{109}\) The doctrine of adverse effect discrimination recognizes this.

A second evolution in equality doctrine has also been mandated by how differences that matter in terms of group identification have to be understood. Not only do a range of characteristics attach to any significant group identity but these characteristics are themselves inexactely distributed within the group they describe. As already discussed in the specific context of sex identity, no one characteristic will necessarily be true of all members of a group. This again is simply a reflection of the imperfect distribution and nature of the characteristics we use to construct different identities. Discriminatory practices, therefore, will seldom be perfectly inclusive. This, for example, is the clear message of the Supreme Court of Canada’s decision in Brooks.\(^{110}\)

\(^{106}\) Supra note 57.

\(^{107}\) O’Malley, supra note 57 at 551.

\(^{108}\) Thus, O’Malley established that the issue with which anti-discrimination provisions are concerned is the impact or effect of the discriminatory act upon the person affected, not the motivations underpinning the discriminatory action (supra note 57).


\(^{110}\) Supra note 64.
and followed in *Janzen.* Equality doctrine has had to recognize discrimination in cases where some individuals in the discriminated-against sex go unaffected and are in fact immune from ever being affected by the immediate discrimination in question.\textsuperscript{112} Even potential to bear children — one of the most reliable sex descriptors — does not locate all women within the female sex. Many women — for either social or biological reasons — have no child-bearing potential. And we don’t insist that they thereby technically cannot be considered women.\textsuperscript{113} Equality doctrine has had to allow that such incomplete coverage is still consistent with a claim of sex-specificity.

What equality doctrine must also recognize is that the same logic that forces this second development also dictates that discrimination be recognized in cases where the prejudicial treatment has similar negative effects on some individuals of the non-targeted group. Thus, the flip side to the recognition that discrimination exists even where not all members of the targeted group are affected is the recognition that discrimination also exists where some members of the non-targeted, ‘oppositional’ group also are similarly affected. Both simply are unavoidable products of how group categorization must be understood.

The Supreme Court cases which deal with underinclusive group identification, *Brooks* and *Janzen,* do not explicitly make this argument. Yet, it is certainly possible to view them as consistent with it. At issue in these cases, as already mentioned, was the existence of sex discrimination even though the actions in question did not affect all women. What was important in each case was to establish a link to sex through the underinclusive action in question.\textsuperscript{114} The Court did not hesitate to do this, but in doing so clearly was not speaking to the question of overinclusivity — the situation in *Thibaudeau.* In *Brooks,* the option of recognizing overinclusive discrimination appears to be explicitly left open by the Court when it states, in reference to the fact that the characteristic in question (pregnancy) pertains only to the targeted group (women), that “[m]any, if not most, claims of partial discrimination fit this pattern.”\textsuperscript{115} Thus, the Court acknowledges the possibility that at least some claims of partial discrimination will fit another pattern.

Again, because of the inexactitude with which group-identifying characteristics are distributed in the population — for both social and biological reasons — most characteristics, while they may describe many (but not all) members of one group will also point to some (but fewer) nonmembers.\textsuperscript{116} This is, after all, simply reflective of the fact that much of our group-specific profile is a product of social forces, of social interpretation and manipulation of a rather small and indeterminate set of biological characteristics. So, to use race as an example, one must understand race as a socially and culturally created distinction. The divisions it draws lack any decisive biological basis; characteristics that generally identify only one

\textsuperscript{111} *Supra* note 65. In this case the Court stated at 1288: “discrimination does not require uniform treatment of all members of a particular group.”

\textsuperscript{112} This statement is, of course, not meant to imply that discrimination has such a discrete and specific effect as to remain devoid of indirect consequences for those immediately affected members of the targeted group. For example, all women suffer from the implications for women’s political status and power that devaluation of some women’s child-bearing labour has. And discrimination against pregnant women can inhibit other women in similar circumstances from becoming pregnant. See the discussion in D. Majury, “Equality and Discrimination According to the Supreme Court of Canada” (1990-91) 4 C.J.W.L. 407 at 430. The point is, rather, that the discriminatory effects that are being complained about may not immediately touch all women and yet must still be seen as sex discrimination.

\textsuperscript{113} Although, on a wider ideological level, our society may encourage these women to feel a sense of personal inadequacy or failure in terms of their gender role.

\textsuperscript{114} Thus, Dickson C.J. emphatically writes: “[H]ow could pregnancy discrimination be anything other than sex discrimination? ... Discrimination on the basis of pregnancy is a form of sex discrimination because of the basic biological fact that only women have the capacity to become pregnant” (*Brooks, supra* note 64 at 1242: emphasis in the original).

\textsuperscript{115} *Supra* note 64 at 1247. We would modify this statement somewhat by arguing that most cases will not fit the pattern of *Brooks.* Few sex-linked characteristics have the sex-specificity pregnancy does.

\textsuperscript{116} This is not true for those characteristics that have strong biological aspects — such as child-bearing potential, something that clearly requires a certain physiology. No one categorized as male can (at least currently) bear children and the appearance of the ability in someone thought of as male would surely force rethinking of his (?) gender classification, as the necessity of the parenthetical “?” indicates. But it is certainly true for most other significant group-linked characteristics. This is still not to say, however, that biology is determinate of sex. Rather it illustrates the point that our culture is strongly influenced by a belief in the biological inevitability of sex.
racialized group’s members also will usually apply to some non-members.

Moreover, to insist upon ‘watertight’ compartmentalization would render equality doctrine simply irrelevant to addressing discrimination as real individuals experience it. Think of the social and economic characteristics that we know are disproportionately associated with women — things like vulnerability to sexual harassment, primary responsibility for child care, economic hardship. Surely the fact that some men also exhibit such characteristics or share such experiences should not mean that we can not talk meaningfully about these as current sex-linked social and economic circumstances. This is particularly true of claims about sex discrimination, as the nature of the category of sex and the social consequences it distributes are such that with respect to many, if not most, sex-based characteristics there will be overlap between female and male populations.

To summarize this last discussion, the same reasons that moved equality theorists generally to acknowledge the importance of recognizing adverse impact discrimination and that convinced the court that an adverse impact doctrine would be meaningless unless it stipulated that not all members of the targeted group need be adversely affected, also point to the importance of not limiting the doctrine to those cases where only members of the targeted group are adversely affected in the manner under consideration. All of these developments are necessitated by the nature of group differences: their complexity, subtlety, and contingency. And nowhere is this more true than in relation to sex differences.

Intersectionality and Group Identification in Equality Law

We mentioned that Hugessen J.A.’s problem in articulating a sensible adverse effects doctrine stems from two problems with his understanding of categorization. The first of these — illustrated by his conceptualization of sex differences — we have just discussed. The second problem relates to the larger question of conceiving of identity categories at all; of associating individuals with discrete group memberships. Hugessen J.A.’s understanding of this question also shapes his analysis.

Categorization is an inevitable component of equality claims. An individual situates her or his complaint as one involving equality by claiming a larger group identity that is, she or he asserts, the basis for the discriminatory action in question. Because equality is a comparative term, it is always necessary to locate any individual claimant within a larger relative context.\(^{117}\) Equality is a relation that exists or does not exist between persons or groups. Someone or some group is always equal or unequal relative to some other individual or group. Whether one views such equality in purely formal terms or more substantively, the necessity of a comparator base remains. Were one simply to assess an individual’s or a group’s situation in isolation from the rest of society, one’s consideration could look to certain concerns of well-being or liberty, say, but not to those of equality.

When we engage in this comparative exercise, we need to identify the groups between whom the comparison will take place. This is clearly true for the similarly situated test. So, for example, in Bliss, the relevant groups were pregnant and non-pregnant persons. And such group identification is also necessary, although perhaps less obviously, for the more substantive version of equality emerging from the recent section 15 cases. Even in the “analogous groups” test one has to categorize in order to set up the opposition that is essential to assessing whether differential benefits or burdens are distributed by the state. This simply is the first step of the test articulated in *Andrews*,\(^{118}\) where the Court decided that the group identification to be attached to Andrews for the purpose of his claim was that of non-citizen. Thus the “categorization game,” as one judge\(^{119}\) has so aptly termed this process, is still on-going, despite the Supreme Court of Canada’s rejection of the similarly situated test. It simply is not possible to avoid the assessment of relative circumstance for which the similarly situated test was criticized and rejected.\(^{120}\)

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\(^{117}\) McIntyre J. thus describes equality in *Andrews* as: “a comparative concept, the condition of which may only be attained or discerned by comparison with the condition of others in the social and political setting in which the question arises.” See *Andrews*, *supra* note 23 at 164 and *Hogg*, *supra* note 41 at 1160-61.

\(^{118}\) *Supra* note 23.

\(^{119}\) Kerans J.A., in *Mahé v. Alta (Gov’t)* (1987), 54 Alta. L.R. (2d) 212, as referred to by McIntyre J. in *Andrews*, *supra* note 23 at 168.


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The contingent and complicated nature of group identification, as it affects this categorization process, raises two specific problems for equality doctrine generally. First, it provides a site for easy insertion of judicial prejudices or biases into equality analyses, thus countering the claim that the ‘politics’ have been removed from section 15 analysis. Second, it renders the equality analysis judges are forced to employ somewhat artificial, at best, and meaningless, at worst. We will discuss each of these problems in turn.

The first problem simply reflects the fact that, because individuals belong to multiple, overlapping groups, there will be a range of choice in the selection of the group membership that best represents the distribution of the harm involved. In any case there is no “natural joint” at which to carve up the legally relevant universe. Yet, group selection is critical. Identification of the groups at issue will often determine the success of the section 15 claim. It mattered in Bliss, for instance, that the Court saw the relevant distinction as between pregnant and non-pregnant persons and not between men and women. So too it mattered in Weatherall — a post-Andrews case — that the applicant was identified as a member of the general group of men. Had he been considered representative of the group of male prisoners, the result might well have been different; it is at least arguable that male prisoners suffer the kind of historical disadvantage and stereotyping that identify discrete and insular minorities. And, of course, group identification mattered in Symes. Characterizing the group to which Beth Symes belonged simply as “women” rather than as “married women who are entrepreneurs” would change the equality issue at stake in the case.

But because group identity is such an indeterminate question, the judges’ own assumptions will be very powerful in shaping the choices that are made. What kinds of distinctions invoke what sorts of group membership is very much a question that lies at the heart of equality law. The problem is that the sort of assumptions that may very well inform the judge’s opinion at this point are precisely the assumptions that an effective equality rights provision should be challenging: judicial assumptions about the ‘rationality’ or legitimacy of the distinction at stake. After all, discrimination more often than not is unconscious, a by-product of traditional and systemic understandings of the world. It would be naive, and probably unfair, to expect judges to be immune from these aspects of dominant culture, at least with respect to every possible dimension along which discrimination occurs. A judge may not perceive that one kind of distinction invokes an enumerated or analogous ground of discrimination as she or he may not be immune from dominant social understandings that view such a distinction as involving only personal or individual characteristics and, therefore, not problematically replicated at the legislative level. Yet, the progressive potential of equality theory is strongly tied to its ability to link particular social characteristics and legally

one presents Beth Symes as disadvantaged and the other as privileged. See also, N. Iyer, “Categorical Denials: Equality Rights and the Shaping of Social Identity” (1993) 19 Queen’s L.J. 179.

This problem of uncritical judicial acceptance of “commonsensical” distinctions is most starkly illustrated by the following statement made by Dickson J. in C.N.R. v. Canada, supra note 57 at 1139 and echoed by McIntyre J. in Andrews, supra note 23 at 174-75:

Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual’s merits and capacities will rarely be so classed.

By drawing a distinction between group based characteristics and individual attributes, the Court creates wide judicial latitude in the classification of the ground of distinction at stake. If it is merely an individual attribute the legislation invokes, not a group characteristic, then discrimination will not be found. Yet it is precisely this distinction between individual attribute and group characteristic that equality doctrine should force us to question. To assume the distinction unproblematically allows for judicial obfuscation of the kind of examination equality theory demands we do. It ignores the social construction of difference and the fact that differences that manifest themselves at the level of the individual have their origin in large systems and structures of social differentiation.

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relevant group identities traditionally assumed to be unconnected. In such a
manner, for example, has sexual harassment become associated with sex
discrimination\(^\text{124}\) and literacy or scholastic requirements with race
discrimination.\(^\text{125}\)

Ironically, because of this need to combat judicial blindness to the current
pattern of stereotyping or discriminatory disadvantage, it may often be
easier for groups attempting more radical equality challenges to do so on the
basis of an analogous ground. To use an enumerated ground to push equality
theory ahead requires convincing a judge that characteristics not traditionally
seen as, for example, gendered or racially specific are in fact so. The
enumerated grounds comprise those grounds of discrimination that are
generally accepted as at least formally suspect and that often have well-worn
pictures of what they represent associated with them. Because we are all
familiar with these bases of discrimination many of us have quite fixed, and
therefore probably somewhat facile, notions of what such grounds involve.
Thibaudeau illustrates this irony. Hugessen J.A. is unwilling to expand his
ideas about sex identity so as to permit a linkage between separated custodial
parenthood and gender. The appellant in Thibaudeau has better luck using the
non-enumerated ground of family status.

The second problem for equality doctrine occasioned by the contingent and
complicated nature of group identity — artificiality of analysis — is an
inevitable weakness of any equality discussion. Naming the dimension along
which inequality occurs will necessarily oversimplify the experiences of the
involved individuals. Any attempt to abstract from individual experience and
speak more generally of larger social, collective phenomena — like racism or
sexism — runs the risk of reducing a complex experience to a unidimensional
one. Individuals do not fall neatly into the subdivisions of human experience
equality law identifies. Instead, they inhabit the intersections of many
categories or types, their range of social possibilities formed by these
different social divisions and their consequences “abrade, inflame, amplify,
twist, dampen, and complicate each other.”\(^\text{126}\)

What gets treated as

analytically tidy is in reality as wonderfully complex as any given individual.
Even to pick gender as the ground of discrimination in Thibaudeau, ignores
the possible relevance of poverty, of family status, and of age in shaping any
particular woman’s experiences of discrimination. This reality of compound
discrimination likely will be present in many equality cases. It is, after all, not
coincidental that different indicia of disadvantage occur in tandem with
each other and tend to augment each other’s effects.

A consequence of ignoring this pattern of disadvantage is that
discrimination that is compound will fail to be recognized. Such
discrimination falls neatly into none of the single dimensions which together
construct its character. Thus for women of colour, their disadvantage is
neither in terms solely of their race nor of their gender. It is a complex
function of both dimensions that cannot be understood by its disaggregation
into the different single grounds our legal and political tradition identifies.
If we insist that such separation occur, the discrimination at stake becomes
invisible. It gets “characterized away.”\(^\text{127}\) This is another aspect of the
categorization game discussed earlier.\(^\text{128}\) Individuals get conceptually
shuffled from group to group until the desired discrimination or absence of
discrimination is located.\(^\text{129}\) Recognition of only a singular ground of
discrimination poorly captures the reality of the harm and character of
discrimination for many who suffer from it. It is simply another instance of
disregard for any reality that fails to conform to that of the dominant groups:
another form of discrimination, this time perpetrated by discrimination law

\(^{127}\) J. Freeman, “Defining Family in Mossop v. DSS: The Challenge of Anti-Essentialism
and Interactive Discrimination for Human Rights Litigation” (1994) 44 U.T.L.J. 41.

\(^{128}\) Ibid

\(^{129}\) As an example of this, Duclos chronicles how failure to recognize interactive
discrimination in human rights law can render invisible the unique disadvantage
of women of colour. N. Duclos, “Disappearing Women: Racial Minorities in Human
Rights Cases” (1993) 6 C.J.W.L. 25. Duclos describes the process whereby
discrimination is “disappeared” through the law’s inability to recognize more than
“one-step” divergence from the norm, that is, possession of more than a single
characteristic on the basis of which discrimination occurs. In Thibaudeau,
the appellant was lucky. At least, the Court accepted one of the grounds of
discrimination offered to locate her treatment within s. 15. And perhaps it was easier
to do this in relation to family status as such discrimination was intentional on the
face of the legislation.

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some sort of abstraction of individual experience, it is impossible to speak of
discrimination as a systemic phenomenon, to understand how it works and
what its harm is. Categorization therefore is necessary. But it does mean that
judges should be hesitant about the lines they draw — this is the first part of
our argument about the Thibaudeau decision — and they should be prepared
to recognize multiple, interactive grounds of discrimination — this is the
second part of our argument. Judges must be willing to grant the contingency
of group characteristics and to expose to close examination their own
assumptions about group identities and traits. Part of doing this demands that
decision-makers must always consider the groups at issue in context. If recent
equality theory and doctrine tells us anything, it is that group identification or
characterization makes sense in terms of real individuals' experiences only if
it is drawn up to reflect the world as real individuals experience it, and as
they describe it. Without such contextualization, to use Wilson J.'s
language in Turpin, "the section 15 analysis may become a mechanical and
sterile categorization process conducted entirely within the four corners of the
impugned legislation." 135

The Federal Court of Appeal’s judgment in Thibaudeau is a good
illustration of a failure to contextualize and admit the contingent and
interactive nature of the group identification process of equality doctrine. By
isolating family status from sex, Hugessen J.A.’s analysis describes only an
imaginary world. To regard treatment of separated custodial parents receiving
child support as not implicating larger cultural assumptions about gender is
to disable any meaningful discussion of disadvantage the group might
face. To regard treatment of cultural assumptions about its gender is to
disable any meaningful discussion of disadvantage the group might face. This
is merely to say that the fact that the majority of custodial parents are female is
not simple coincidence. Yet Hugessen J.A. seems determined to treat it as
such. Even his recollection of a number of traditional expressions or
stereotypes that invoke different varieties of family status — “happily married
man,” “old maid,” “gay bachelor,” “merry widow,” and “married woman” 136

130 These individuals fall within the “but-for” category. But for one aspect of
disadvantage, they resemble dominant, privileged groups. White, middle-class,
straight, able-bodied women would be examples of such individuals: but for their
gender they bear the same equality profile as the most privileged group that sets the
social norm. For a discussion of this argument, see K. Crenshaw, “Demarginalizing
the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination
Theory, Feminist Theory and Antiracist Politics” (1989) Univ. of Chicago Legal
Forum 139.

131 Crenshaw, ibid.; Duclos, supra note 129; Iyer, supra note 122.

132 Ryder uses this model in his discussion of Mossop to illustrate the problematic
character of analyses that fail to recognize interactive grounds of discrimination.
In that case, it is the Supreme Court’s separation of sexual orientation from family
status that is so unconvincing and unreal. See B. Ryder, “Family Status, Sexuality
and ‘The Province of the Judiciary': The Implications of Mossop v. A.G. Canada”
(1993) 13 Windsor Y.B. Access Just. 3. See, also, Freeman, supra note 127;
Crenshaw, supra note 130; Iyer, supra note 122; Report of the Canadian Bar
Association Task Force on Gender Equality in the Legal Profession, Touchstones for
Change: Equality, Diversity, and Accountability (Ottawa: The Canadian Bar
Association, 1993) at 15-16.

133 Freeman, supra note 127 at 74.

134 Freeman makes this latter point when she argues that characterization of the
discrimination should be informed by the view of those affected by it (supra note
127 at 79).

135 Supra note 34 at 1332.

136 Thibaudeau, supra note 2 at 276.
— ignores the fact that all of the examples he cites are gendered.\textsuperscript{137} Hugessen J.A. fails to see that much of what is compelling about seeing family status as an analogous ground, in this case, has to do with the gender of those singled out.\textsuperscript{138}

Perhaps, \textit{Thibaudeau} is not the best case to argue for recognition of interactive discrimination. It is arguable that sex discrimination alone captures most of what is compelling about the discrimination women in Suzanne Thibaudeau’s situation face. Assumptions about child care work, financial dependency on one’s male partner, reduced career marketability — all indicia of the disadvantage separated, custodial parents face — are facets of the more general ideological complexes that order dominant understandings of gendered behaviour. After all, acceptance of the often complicated and interactive nature of discrimination does not rule out identification of single focus discrimination in cases where it is appropriate. But why would one want to do this here? The more dimensions one acknowledges, the better one captures what the harm is. What is clear about Hugessen J.A.’s treatment of Thibaudeau’s claim is that the separation he draws between gender and familial status is an artificial one. If both are to be recognized under section 15, then in Thibaudeau’s case, to recognize familial status and not gender is unsupported. Construing family status as distinct from gender for a woman in Thibaudeau’s situation really does fail to capture the full situation.

Thinking about equality is analytically difficult, particularly when ‘common sense’ or ideological assumptions about such things as gender, race, or class identity are in tension with our equality aspirations. The exercise is particularly difficult in relation to sex discrimination because of the complicated nature of sex difference and the intimacy and immediacy of sex identity to us all. At a minimum, the Supreme Court needs to issue clear and simple guidelines to aid lower courts in their equality analyses and to remind lower courts of the kind of caution and judicial hesitancy that must be exhibited: that is, to acknowledge explicitly both the necessity and the political contingency of categorization in any equality analysis. Absent such a structure, one can only expect to see more confused and troubling statements about when equality rights are or are not implicated.

\section*{Part II. The Privatization of Women and Children’s Welfare: Section 1 of the \textit{Charter} and the Government’s Justifications for Taxing Child Maintenance Payments}

In this Part we examine the arguments put forward by the government to justify any initial equality problems section 56(1)(b) might present. This discussion will take us deeper into the principles of taxation law. As in Part I, however, our analysis necessarily takes place at both doctrinal and theoretical levels.

Hugessen J.A. rejected the government’s argument that infringement of Suzanne Thibaudeau’s equality rights could be excused under section 1 of the \textit{Charter}. His judgment focused on the lack of fit between the mechanics of the legislation and the government’s purported desire to assist custodial families. We argue that while this analysis was useful and the Court arrived at the right conclusion on section 1, it missed many of the most troublesome aspects of the legislation. A number of glaring errors and inconsistencies in the government’s tax policy argument went unchallenged. Moreover, the Court failed to make a vital connection between the mechanical flaws of the inclusion/deduction system, and familial ideology which constructs women and children’s welfare as the private responsibility of husbands and fathers. It is important to go beyond Hugessen J.A.’s section 1 analysis to illuminate this connection, because of what it reveals about the subtle and complicated forms that gender bias can take in income tax law, and because it redoubles the case in favour of abolishing the current regime for taxing child support.

Ironically, what our critique also reveals is the limited scope which the Supreme Court of Canada has to redress the very social inequalities which

\textsuperscript{137} What these phrases also illustrate and what has also gone unnoted in other cases — including the Supreme Court in \textit{Canada v. Mossop}, [1993] 1 S.C.R. 554 — is the heterosexual dimension to family status. These phrases demonstrate that to think of family status abstracted from sexual orientation is also absurd. The dimensions of sex, sexual orientation, and family status all cross cut each other, rarely occurring around issues of family ordering in isolation from each other.

\textsuperscript{138} The link between family status and gender that is operative in Suzanne Thibaudeau’s case is not always true of other forms of discrimination in which family status is relevant. For instance, in cases where availability of benefits, say, is denied on the basis of failure to conform to heterosexual norms of intimate relationships, resulting disadvantage is a result of interactive discrimination on the basis of family status and sexual orientation.

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have made this case so politically interesting and controversial. While striking down section 56(1)(b) is desirable because it would alleviate immediate hardships for many divorced women and their children, it would do remarkably little to break down the larger hegemony of a privatized model of support and dependency in which women’s labour in the home and the market remains unpaid or underpaid. Thus, our critique ultimately serves to highlight the need for further political strategies to grapple with this complex social problem.

Hugessen J.A.’s section 1 analysis followed the familiar course laid out in *R. v. Oakes*. He found that while the governmental objective of providing a “tax subsidy” to separated families was sufficiently important to warrant a *Chart* breach, the provision failed to meet the last two stages of the test, what Hugessen J.A. calls the “minimum impairment and proportionality” requirements. Central to this finding was the empirical evidence reviewed by the Court as to the actual effects of the income tax scheme on separated parents. The theory behind the deduction/inclusion mechanism is that taxing support payments in the recipient’s hands will leave more after-tax income to support the children, since her tax rate will be lower than the payer’s. However Hugessen J.A. quoted extensively from studies submitted by the parties, exposing the multiple reasons why custodial parents and children often do not derive any benefit from such income splitting. Since even the government’s own empirical evidence did not significantly improve this

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139 [1986] 1 S.C.R. 103 [hereinafter *Oakes*].
140 *Thibaudeau*, supra note 2 at 282.
141 *Thibaudeau*, supra note 2 at 285. The reasons why the “tax subsidy” objective is not realized include the following: under the current rate schedule payers of child support are in a higher tax bracket than recipients in only slightly more than 50% of cases; payers are under no legal obligation to share any tax saving with the custodial parent and in many cases are resistant to doing so; many support arrangements are negotiated in private without legal or tax advice; not all lawyers or judges consider tax implications and those that do often rely on rough estimates; even where tax implications are raised the argument for a higher award may be foreclosed by the “glass ceiling” which slides in to limit the amount of support to what is considered normal or reasonable; and even a support award which does make adequate provision for tax implications may soon be overtaken by a myriad of changes in the parties’ tax positions.

142 Ibid. It is unclear to us why Hugessen J.A. did not center his analysis around the “rational connection” requirement in *Oakes*, in particular the need for laws to be carefully designed to achieve their objectives. The flaws he identifies with the legislation would have fit very neatly into this part of the s. 1 analysis. Ultimately, however, it may not matter which route Hugessen J.A. chose to get to his conclusion on s. 1.
implementation — it accepted at face value the policy rationales put forth to justify the legislation. In this part of the paper, we go beyond Hugessen J.A.’s analysis to challenge the governmental objectives themselves. In addition to the “tax subsidy” goal, which Hugessen J.A. regarded as “clearly the most important,” there are several other rationales offered by the federal government to justify the inclusion/deduction system. An inter-governmental study, quoted by Hugessen J.A., refers to three other justifications:

First, it is a principle of taxation that, where a deduction has been claimed by a payer in respect of a payment, the recipient of that payment should pay income tax on it. Second, by requiring support recipients to include the amount of child support within their income, the system recognizes the basic principle of fairness that tax payers with the same incomes from different sources should pay the same amount of tax. Third, the tax assistance offered by the deduction may provide an incentive for the payer to make regular and complete payments.

Finally, the federal government is arguing elsewhere, in a similar case pending before the courts, that the deduction/inclusion provisions serve the further objective of helping to support the payer’s new family, if he has remarried or entered a new common law relationship.

On their face, these are not outrageous or unusual justifications, and like much that seems commonsensical they appear not to require close evaluation. However, there are a number of stark contradictions in the government’s section I argument as well as several misstatements and distortions of income tax law and policy. At the very least these problems, even if seen as mere technical errors in design or argumentation, severely undermine the government’s case. At worst, however, the justifications exhibit a more fundamental problem in their implicit reliance upon certain assumptions about the nature of families. Indeed, what the government’s argument exposes is how closely the deduction/inclusion mechanism depends upon our society’s dominant familial ideology — how thoroughly it takes for granted that “the family” is (among other things) heterosexual, altruistic, and organized around a gendered division of economic and reproductive responsibilities. This, in our view, is what lies at the heart of the section 1 issues in Thibaudeau.

The next section will elaborate briefly on the content of this dominant familial ideology, and how it affects the construction and regulation of family relationships within law, and particularly within tax law. With this framework in mind, we will turn to examine in some detail each of the government’s policy rationales for the deduction/inclusion system. Our analysis leads to the conclusion that the state should stop taxing custodial parents on child support payments, but also points out that much more than this immediate result is needed to ensure greater economic security for all single parent mothers and their children.

Familial Ideologies in Taxation Discourse

Feminist scholars across disciplines have produced a substantial body of literature on issues surrounding the family — a fact which should surprise no one given the historical (and continuing) importance of the domestic realm in women’s lives. While this literature has celebrated positive aspects of motherhood and family life, it also has drawn connections between familial ideology and oppression based on gender, sexuality, race, and class. There are many unresolved debates within this scholarship, but there are two major themes we want to draw out. First, empirical research indicates that family forms and relationships in Canada are remarkably diverse and probably have never conformed widely to a single ‘traditional’ model. Second, and in tension with this first point, is the fact that one particular construction of the ‘family’ nonetheless has achieved dominance in the current era as the norm or standard against which people’s lives are measured and compared, and

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143 Thibaudeau, supra note 2 at 281.


145 See the Justice Department’s Memorandum in response to the Interveners in Schaff v. The Queen (para. 48), filed in the Federal Court of Appeal (Ct. File No. A-523-93). The hearing of the Schaff appeal has been adjourned pending the Supreme Court of Canada’s decision in Thibaudeau.

through which they are regulated.\textsuperscript{147} This image is one component of a dominant familial ideology which operates powerfully within tax law, as well as within other legal and extra-legal discourses.\textsuperscript{148}

The dominant ideology of ‘family’ in our society conceives of the ideal social unit as middle class, white, and heterosexual, comprised of a male breadwinner, a female dependent, and children. Within this ideology the family is governed by a ‘natural’ and gendered division of roles and by norms of altruism, its ‘economic’ needs met by men and its ‘care’ and social maintenance provided by women. Inequality between men and women is assumed and constituted as natural and private.\textsuperscript{149}

According to this picture, women’s work in the home is not economically relevant but is something they just do out of non-material and natural motivations. Men are believed to earn their market incomes through their own individual effort and, thus, are entitled and best equipped to control how those earnings are distributed within the family. The result is that women’s economic lives are privatized, their economic needs assumed to be met, and their unpaid labour recognized through private transfers of income and wealth from men.\textsuperscript{150} Women’s individual economic welfare thus is equated and assumed to be coterminous with the welfare of the family, which in fact refers to the economic power of its male breadwinner.\textsuperscript{151} In this manner, the economic status of women in heterosexual relationships is simply folded into that of their male partners. Moreover, the actual distribution of household incomes and wealth is shielded from political scrutiny by the ideology of family privacy.\textsuperscript{152}

\textsuperscript{147} See Gavigan, “Paradise Lost,” supra note 13 at 605.
\textsuperscript{148} As discussed in Part I of the paper (see notes 76-85 and associated text), we are painfully aware that the meanings of “ideology” and “discourse,” and the relationship between them, are heavily contested. We have found the following works to be particularly helpful on ideologies and/or discourses surrounding the family: M. Barrett, Women’s Oppression Today: The Marxist/Feminist Encounter, revised ed. (Great Britain: Verso, 1988); “Postmodernist Challenges,” supra note 81; “Family Inside/Out,” supra note 84; S.A.M. Gavigan, “Law, Gender and Ideology” in A. Bayefsky, ed., Legal Theory Meets Legal Practice (Edmonton: Academic Printing & Publishing, 1988); “Paradise Lost,” supra note 13; M. Kline, “Complicating the Ideology of Motherhood: Child Welfare Law and First Nations Women” (1993) Queens L.J. 306 [hereinafter “Complicating Motherhood”]; “The Colour of Law,” supra note 28; “The Family and the Market,” supra note 79; and Weedon, supra note 83.
\textsuperscript{152} We agree with Nicola Lacey’s comment that: “the ideology of the public/private dichotomy allows government to clean its hands of any responsibility for the state of the ‘private’ world and depoliticizes the disadvantages which inevitably spill over the alleged divide by affecting the position of the ‘privately’ disadvantaged in the ‘public’ world” (see her “Theory into Practice? Pornography and the Public/Private Dichotomy” (1992) J. Law & Society 93 at 97). One way the concept of ‘family
to the survival of First Nations people in a racist society. These different cultural, class, and racial traditions of family life may rely upon values and beliefs that in many ways challenge the dominant conception.

The need to take this diversity of experience into account in analyzing the effects of familial ideology is clear. For us, they tend to confirm the discursive power of the dominant family norm, which continues to have tremendous currency in our general political culture and in specific areas of legal regulation despite its lack of fit with the experiences of many people. The difficulties facing lesbian mothers in custody litigation may be partly explained in these terms, for example, as can the negative way in which courts have sometimes perceived First Nations mothers whose children receive care from a wider network of extended family. By delegitimizing the mothering practices or abilities of certain women and labelling their families deviant, the dominant familial ideology normalizes the law’s denial of custody to these women. To paraphrase our earlier definition of ideology, it presents the power relations of our society as natural and uncontestable.

See “Complicating Motherhood,” supra note 148; and Monture, supra note 152.

Resistance to familial ideology emanates from numerous sources. Indeed, the Supreme Court of Canada has problematized some aspects of the ideology in recent family law decisions, by rejecting the dominant construction of women’s work in the home as economically irrelevant: see Moge v. Moge, [1992] 3 S.C.R. 813; and Peter v. Beblow (1993), 44 R.F.L. (3d) 329. For a commentary on how the Moge decision challenges the traditional construction of husbands and wives see A. Diduck and H. Oron, “Equality and Support for Spouses” infra note 178.

See “(Re)placing the State,” supra note 150; and “Paradise Lost,” supra note 13. For more detailed discussions of how lesbians are constructed as “bad mothers,” particularly if they are open and politicized about their sexuality, see K. Arnup, “ ‘Mothers Just Like Others’: Lesbians, Divorce, and Child Custody in Canada” (1989) C.J.W.L. 18 at 23-32; D. Day, “Lesbian/Mother” in S.D. Stone, ed., Lesbians In Canada (Toronto: Between the Lines, 1990); and R. Robson, Lesbian (Out)Law: Survival Under the Rule of Law (New York: Firebrand Books, 1992) c.11.

See “Complicating Motherhood,” supra note 148.
Similar effects can be observed within tax law. The ITA, like many statutes, adopts an explicitly heterosexual definition of spousal relationships.\(^{161}\) But beyond this, various provisions of the ITA are more subtly designed around the set of assumptions we have described about the nature of economic relations within the family. Provisions such as the marital credit\(^{162}\) and the deductions for alimony and maintenance\(^{163}\) for example, tend to give men control over the distribution of tax benefits among members or former members of the heterosexual family and to presume they will share those benefits with dependent women and children, in the spirit of altruism which is assumed to characterize all family relations. Likewise, eligibility for child tax benefits and refundable sales tax credits is determined on the basis of aggregate spousal income, not the income of individual taxpayers.\(^{164}\) Once this aggregate exceeds a certain threshold, the refundable credits are reduced or entirely lost. Where all or most of the income is received by a male breadwinner, the ITA assumes it is used to improve the welfare of all family members. According to the ‘common sense’ of the legislation, we can expect the needs of women and children to be met privately by male breadwinners in these circumstances.\(^{165}\) When these assumptions do not match up with everyday realities, women are impacted in unexpected and potentially harmful ways. Furthermore there is a danger of this harmful impact being overlooked or denied, or being accepted as natural or inevitable, because of the power the dominant ideology has in constructing truth and knowledge within law and other discourses. Though they may be benevolently motivated, taxation policies which react to women’s lack of economic power by simply leaving space for support to be provided to them privately, by men, may do nothing more than legitimate women’s and children’s continuing poverty.


\(^{162}\) Section 118(1)(a).

\(^{163}\) Supra note 17.

\(^{164}\) Sections 122.6-122.64 and 122.5.


We return to the inclusion/deduction system specifically, to examine more closely the policy rationales put forward by the government in its section 1 argument in light of this model of familial ideology. The government’s case is plagued by inconsistencies, misstatements of tax law and policy, and dubious assumptions about how the quantum of child support is set in practice. All of these problems indicate that the deduction/inclusion system is badly designed to implement even the most coherent of the government’s stated objectives. More fundamentally, however, they reveal the shortcomings of the objectives themselves. The government’s policy argument draws upon familial ideology in a way that defeats the very purpose the government ostensibly cares about — providing adequate levels of support to single parent women and their children.

Demonstrably Justified? The Government’s Argument

1. The First Justification: The inclusion/deduction system provides a tax subsidy that benefits custodial families by enabling higher support awards.

On its face, this is a valid and important objective. It is true that the aggregate resources of two ex-spouses will be maximized if the tax burden on child support is borne by the parent in the lower tax bracket. Indeed, the federal government reports that it collected some $330 million less in income tax revenues in 1991 as a result of allowing separated couples to split income in this manner.\(^{166}\) This means that tax savings were in fact realized by some separated couples where the person paying maintenance was subject to a higher tax rate than the person receiving it and paying tax on it. But as the Federal Court of Appeal found, this rate differential only occurs in just over half of all cases. More importantly, even where it does occur, the tax saving is realized not by the parent with custody of the children, but by the non-custodial parent who gets the tax deduction. The government’s tax subsidy

\(^{166}\) “Judges skeptical over child-support” Globe and Mail (5 October 1994) A1. It should be kept in mind that this figure includes revenues collected on behalf of the provinces. The cost to the federal government alone in 1991 was $205 million: see Canada, Department of Finance, Government of Canada: Personal and Corporate Income Tax Expenditures (Ottawa: Department of Finance, December 1993) at 17.

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Rationale works only if one assumes that fathers who deduct child support payments will share the benefit of their tax savings with the mother. For the reasons cited by Hugessen J.A., this assumption is extremely dubious.\footnote{Thibaudeau, supra note 2 at 282-85. See also note 143. For further analyses of why women often fare poorly in private negotiations with male partners or ex-partners, even when both are fully aware of their formal legal rights, see M. Neave, "Resolving The Dilemma of Difference: A Critique of 'The Role of Private Ordering in Family Law'" (1994) 44 U.T.L.J. 97 at 110-130; and C.M. Rose, "Women and Property: Gaining and Losing Ground" (1992) 78 Virginia L.R. 421.}

Let us be clear about just what would be required for this tax subsidy objective to be achieved. It is often assumed that what is needed in these cases is simply to 'gross-up' the support award by an amount sufficient to cover the associated tax liability, or to set the quantum high enough to leave a sufficient net payment in the custodial parent’s hands after she pays her taxes. This approach aims at "transferring the recipient’s tax burden to the payer spouse."\footnote{J.W. Durnford and S.J. Toope, "Spousal Support in Family Law and Alimony in the Law of Taxation" (1994) 42 Can. Tax J. 1 at 28.} But all this achieves is to preserve the level of pre-tax child support; to prevent it from actually being eroded by the inclusion/deduction system. It does not in any way increase the after-tax resources going to the children. The "tax subsidy," meaning the difference between the amount of the payer’s tax savings and the amount of the recipient’s tax liability, is still retained in full by the non-custodial father. The courts, the parties' professional advisors, or the parties themselves would need to compute this differential and translate it (or at least some portion of it) into a higher support award. In other words, the support payments would have to be increased by more than the amount of the mother’s tax cost.\footnote{Other commentators who (surprisingly) seem to accept the simple 'gross-up' approach as sufficient include E.D. Pask, "Gender Bias and Child Support: Sharing the Poverty?" (1993-94) C.F.L.Q. 33 at 92-93; and L. Vandervoort, "Equal Liability for Child Maintenance: The Income Tax Implications" (1983) 30 R.F.L. (2d) 315 at 317. Even E. Zweibel and R. Shillington, whose work the Court cited in Thibaudeau, are sometimes unclear about the difference between 'grossing up' to compensate for the recipient's tax liability, and increasing the payments to include all or a part of the payer's tax subsidy: see Child Support Policy: Income Tax Treatment of Child Support and Child Support Guidelines (Toronto: The Policy Research Centre on Children, Youth and Families, undated) at 12, 15. In more recent work Zweibel clarifies this point and calls specifically for a sharing of the payer's tax subsidy: see "Thibaudeau v. R.: Constitutional Challenge to the Taxation of Child Support Payments" [1994] 4 N.J.C.L. 305 at 337. It should be noted that the sheer complexity of the ITA is a significant barrier to any but the most rough and ready attempts to address tax consequences. Although computer software is now available in some provinces to assist in these calculations, it is disturbing to think that many lawyers and judges do not have the tax expertise to make a critical assessment of the assumptions and choices made by the designers of such software programs. See Pask, ibid. at 91-96 and Appendix 2. See also K. Douglas, Child Support: Quantum, Enforcement and Taxation, Background Paper (Ottawa: Research Branch, Library of Parliament, November 1993) at 7, 8; and Durnford and Toope, supra note 168 at 28, 29.} The chances of this being worked out correctly, of the non-custodial parent being willing to concede it, or of courts being prepared to order it consistently, seem extremely slim.\footnote{[1994] 8 W.W.R. 589.}\footnote{Ibid. at 606-7.}

The recent Alberta Court of Appeal decision in Levesque v. Levesque\footnote{Ibid.} illustrates this danger all too well. Attempting to lay out some badly-needed guidelines regarding the quantum of child support, the Court referred to Thibaudeau and stressed the importance of factoring tax implications into every award.\footnote{Ibid. at 91-96 and Appendix 2. See also K. Douglas, Child Support: Quantum, Enforcement and Taxation, Background Paper (Ottawa: Research Branch, Library of Parliament, November 1993) at 7, 8; and Durnford and Toope, supra note 168 at 28, 29.} But the Court focused exclusively on grossing up the amount to compensate for the custodial parent’s tax liability, and made no remarks at all about sharing the tax saving realized by the payer. While this certainly is better than ignoring tax consequences altogether, it does nothing to advance the "tax subsidy" objective which, supposedly, is the most important rationale for the deduction/inclusion system.

The failure to account adequately for the tax implications of support is not simply a logistical problem, or one that could be solved by better educating taxpayers or legal system personnel in the arcane of tax law, although lack of technical knowledge is certainly a contributing factor. The roots of the problem lie in the power imbalance between men and women, and the way familial ideology tends to naturalize this gender inequality and place it beyond the bounds of state responsibility.

The inclusion/deduction scheme is a perfect example of a tax policy which is informed by the dominant image of the family discussed earlier. The
government says that its objective is to enhance the level of financial support available for custodial families. At one level this acknowledges the need for a public response to women and children’s post-divorce poverty. Rather than providing a deduction or credit directly to the household in need, however, the method chosen for delivering this subsidy is to leave more after-tax resources in the hands of the payer, almost always the man. Increasing men’s welfare is somehow conflated with assisting women. While a few women may muster the finances and psychic strength to litigate over support, the vast majority will be left to obtain whatever they can of this public subsidy from men through private negotiation. Research has shown that even during marriage it is wrong to assume that men willingly share their incomes equally with their wives.173 If the assumption of economic integration and solidarity is problematic during the subsistence of a marriage, it is much more so following divorce. The evidence which now exists about post-separation economic disparities between men and women overwhelmingly confirms that co-operation and equal sharing most often are not the operative values in a divorce settlement.174 Indeed the inclusion/deduction system may even add
to the conflict. In the words of one commentator, “apart from the personal strife which may have led to the breakdown of the marriage, the tax system essentially puts the parties in an adversary system with regard to the financial arrangements.”175

What all this suggests is that the inclusion/deduction system is an ineffective and misguided strategy for getting more resources into the hands of divorced mothers and their children. Its flaws cannot be adequately remedied by educating lawyers, judges or anyone about how to compute the tax implications of support. No amount of technical expertise will alter the underlying problems involved in treating a divorced couple as a family unit and providing a subsidy to the payer of support instead of to the custodial household. The system assumes a level of marital and ex-marital economic cooperation that does not jibe with the real world, and which reinforces women’s dependency on the private resources and frai-mindedness of individual men. Thus, at the same time as the government claims to be intervening on behalf of single parent women, the design of the tax provisions effectively reprivatises the gendered inequalities associated with divorce, rendering invisible the extent to which men actually are sharing the public subsidization of their child support obligations with women.

We do not wish to suggest that private support should be entirely abandoned or rejected as a source of financial relief for low income women. Many women are financially dependent, at least to some extent, upon male partners or ex-partners. Gender bias in the labour market is still a reality, as is the gendered division of domestic labour. The law must continue to recognize and enforce these support obligations, in order to protect women and children from the immediate harms of poverty.176 However even this

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176 See A. Diduck and H. Orton, “Equality and Support for Spouses” (1994) 57 Modern L. Rev. 681, for an excellent discussion of the social changes and improvements in women’s economic position which must precede any move to abolish private maintenance. This is part of a larger dilemma familiar to equality rights theorists — the problem that members of historically oppressed groups can be harmed both by recognizing and by ignoring their social differences: see M. Minow, *Making All the Difference: Inclusion, Exclusion and American Law* (Ithaca: Cornell University Press, 1990) at 20-21. For a thoughtful discussion of the potential problems with ignoring

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argument cannot justify the inclusion/deduction system, as it does not in itself deliver any additional support to single parent families. It does not compel any transfer of tax savings from the payer to the recipient of support, or increase women’s leverage in the negotiation or enforcement of divorce settlements. Women’s only access to the tax subsidy is private, through their ex-husbands, unless they can obtain a Court order entirely outside the tax system taking proper account of tax implications in setting support levels. In fact the ITA can actually worsen the financial situation of the custodial parent, if she agrees to a particular level of maintenance without being aware that she will be liable for income tax on this amount. The inclusion/deduction system thus does more to reinforce and even enhance men’s economic power over women than it does to protect women from poverty. This criticism is particularly cogent when one considers that there are far more effective means by which the government could advance its declared purpose, if it really wanted to. A tax credit provided directly to all single parents (not just those leaving a heterosexual marriage) would be one method. Another would be to use the revenue recouped through a repeal of the deduction/inclusion regime to fund a significant public child care initiative.

These proposals bring us face to face with the institutional limits of the judicial process as a vehicle for waging equality struggles. At most, the


Zweibel and Shillington, supra note 169 at 26-29 and 49, evaluated a number of tax reform options, and concluded that the best one would utilize a combination of direct transfers and refundable tax credits to deliver anti-poverty benefits to custodial households, and would treat child support payments as tax-neutral intra-family transfers.

The present Liberal government proposed in its campaign ‘Red Book,’ as well as in its first budget, to devote $120 million in 1995-96 and $240 million in 1996-97 to the creation of subsidized child care spaces, provided real economic growth exceeds 3%: see Canada, Department of Finance, The Budget Plan (February 1994) at 17, Table 3, and 18. Repealing the deduction/inclusion system would add around $200 million to federal coffers annually, to help meet this commitment: see supra note 166 and associated text. However, the most recent budget tabled in February 1995 was noticeably silent on this issue, suggesting the government plans to renege on its promise.

Supreme Court of Canada may strike down the tax provision being challenged by Suzanne Thibaudeau. Even if the Court declared the entire deduction/inclusion scheme to be unconstitutional, its abolition would simply leave women at square one — dependent upon a notoriously unreliable system of private child support. What really is needed is to replace this system, and the deduction/inclusion mechanism, with a more public form of support provided directly to single parent families in need. But the courts cannot design or implement such social programs. Thus, a judicial decision to strike down legislation under section 15 of the Charter should create no illusions that the inequality complained of has been adequately addressed. Instead, we should regard such decisions as indicators that further state action is likely required to begin redressing a serious social problem that the court has flagged for us. We revisit this point in our conclusion.

To return to the government’s section 1 argument in Thibaudeau, the “tax subsidy” objective is at first glance the most compelling rationale provided for the inclusion/deduction system. However we have argued that this policy goal is flawed because it presumes that heterosexual family relationships naturally involve a gendered division of labour and a fair distribution of market incomes by male breadwinners. In any event, the gap between the “tax subsidy” objective and the design and operation of the provisions is so vast that this cannot be accepted as a sound policy argument for their retention, let alone meet the standard necessary to justify violation of a Charter right. A careful assessment of the other four justifications offered by the government exposes similar problems, which in each case also are linked to the dominant familial ideology.

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179 Susan Boyd warns that this is one of the pitfalls of litigation strategies, and shows how apparently progressive judgments may also legitimate state policies which aim to privatize economic responsibility for dependent individuals within the family: see “(Re)placing the State,” supra note 150 at 65-73.

180 Interestingly, it appears this may not have been the driving motivation behind the provisions when they were first introduced: see the discussion below in relation to the government’s fifth justification.
2. The Second Justification: To provide an incentive for non-custodial parents to pay their child support.

As Durnford and Toope note, it is difficult to prove or disprove whether deductibility affects compliance behaviour, as there are a variety of factors which may be involved in any individual’s decision to pay or not pay his child support. In any case, others have pointed out that if the deduction has any incentive effect it must be minimal given the notoriously high rates of default on child support payments. Apart from this, it seems curious that the government should offer financial incentives to any citizen to induce him to comply with what are his legal and moral obligations pursuant to a private agreement or a court order. The state normally responds to other instances of non-compliance with enforcement and penalty measures. What makes the difference here? It is our argument that the choice of the carrot over the stick in this case reflects, at least in part, underlying beliefs about the nature of fatherhood.

Within the ideological picture of the nuclear family described earlier, men are presumed not to be primarily responsible for, interested in, or skilled at caring for children. This leads to a tendency to regard any involvement by a father with his children as praiseworthy, somehow exceptional, ‘above and beyond the call of duty’. Such involvement is seen as something to be encouraged and rewarded, rather than demanded and expected. Perhaps, then, this in part explains the attraction of tax breaks as a response to pervasive paternal non-payment. The incentive argument reinforces the idea that fathers who take care of their children should be lauded for their generosity, or that such support calls for special, non-punitive encouragement.

Supra note 168 at 12-13, 37.

See, for example, Ontario Fair Tax Commission, supra note 173 at 273-275; and Zweibel and Shillington, supra note 169 at 18.


It is true that in recent years some provinces have grown impatient with the high incidence of child support default and have instituted more aggressive enforcement systems. However the central political motivation for such measures often appears to be the reduction of budgetary spending on social assistance, rather than a revision of social attitudes about the nature of paternal responsibility. See the Family Maintenance Enforcement Act, S.B.C. 1988, c.3, as am. by S.B.C. 1994, c.36; the Family Support Plan Act, S.O. 1991, vol.2, c.5; and the Enforcement of Maintenance Orders Act, S.S. 1984-85-86, c.E-9.2, as amended by S.S. 1992, c.5. For a review of some of these initiatives see Douglas, supra note 170 at 12-3. Quebec recently has announced a similar program, and in the wake of Thibaudeau the federal government has declared its intention to create a national enforcement system. Justice Minister Allan Rock is promoting the plan on the basis that it could reduce federal expenditures on social assistance by $1.5 billion: See “Crackdown on ‘deadbeat dads’ discussed:” Globe and Mail (4 August 1994) A1; and “Nation-wide enforcement of child support planned” Globe and Mail (25 November 1994) A1.

assistance because of this upside down effect. There are many more effective options within and beyond the tax system for alleviating poverty.

Finally, the arguments about incentive to pay and ability to pay really beg the specific question raised by Thibaudeau, which relates to the fairness of the inclusion side of the tax regime. Whatever the rate of section 56(1)(b), the government could still leave the section 60(b) deduction in place, if it is considered desirable as an incentive to grant a form of financial assistance to people paying child support. This, of course, raises the third governmental objective, to which our discussion now turns.

3. The Third Justification: To recognize the principle of reciprocity in the tax system, that a payment which is deducted by the payer should be taxed in the hands of the payee.

It is perhaps sufficient to note that the statement of this objective is entirely circular as a rationale for the deduction/inclusion system. Even on its own terms, it suggests only that if the inclusion of child support payments in income is found to be unconstitutional, the government should also repeal the deduction. And, portraying the ITA in this rigid, ledger-like manner fails to acknowledge its role as a vehicle for delivering subsidies and affecting social policy. In this sense, the third objective conflicts with the first two rationales considered above — to provide a subsidy to separated families and an incentive to pay child support.

Apart from concerns of inconsistency, it simply is wrong to suggest that reciprocity has been a governing principle in the interpretation or application of our tax laws. The basic unit of taxation under the ITA is the individual. The criteria for claiming deductions thus are specific to individual taxpayers and the nature and purposes of their outlays or expenses. As a general rule, the ITA does not make the right to a deduction contingent upon the payment being taxed to someone else, or vice versa. The treatment of other taxpayers, even if they are parties to the same transaction, simply is not relevant to an individual’s tax position.

The lack of any general reciprocity principle in the ITA was confirmed recently by the Supreme Court of Canada in Antosko v. The Queen, a case involving the sale of a debt instrument and the deduction and inclusion of accrued interest by the parties. Revenue Canada argued that the transferee should be prohibited from deducting interest accrued prior to the transfer, because the transferor was tax exempt and had not included such interest in

See for example R.W. Boadway and H.M. Kitchen, 2d ed., Canadian Tax Policy Canadian Tax Paper No.76 (Toronto: Canadian Tax Foundation, 1984) at 62, 63. Indeed in its 1987 tax reform proposals the federal government cited this upside down subsidy problem as its reason for converting a host of personal deductions to tax credits:

The conversion of exemptions to credits is a key element in achieving a fairer income tax system. A tax credit deducted from an individual’s tax liability is the clearest and most direct form of tax relief, since all taxpayers who qualify receive the same tax reduction regardless of their income. In contrast, a tax exemption or deduction is subtracted from the income on which taxes are calculated. Its value therefore depends on a taxpayer’s marginal rate of tax and is greater for those in higher-income brackets.


income. The Court rejected this argument, finding nothing in the wording of the relevant section to make the deduction expressly contingent upon an inclusion by the other party. Rather, the provision simply set out a number of preconditions for claiming the deduction, which the taxpayer had met. In similar fashion, sections 56(1)(b) and 60(b) use parallel criteria to require inclusion or permit deduction of child support payments, but they do not cross-reference one another or link the tax liability of ex-spouses in any way. Indeed the case for reciprocity is even weaker than in Antosko, where the deduction and inclusion provisions were at least consolidated in a single section. The Antosko decision indicates that if such reciprocity is desired it must be stated explicitly. As the Court noted, a number of provisions are in fact structured this way.\(^{190}\)

It is true that in the case of maintenance and alimony, Revenue Canada attempts to impose a rule that a recipient must include maintenance in income whenever the payer is entitled under the terms of the ITA to claim a deduction.\(^{191}\) This, however, is not dictated by the legislation itself. Rather it is an administrative policy that needs to be read in light of the Department’s mandate to enforce the ITA and collect revenue. Indeed, it has been reported that Revenue Canada does not always adhere to its own policy of strict reciprocity. The Department has been known to take contrary positions on the meaning of these provisions in different cases, depending on whether they are contesting a deduction or arguing in favour of inclusion.\(^ {192}\) In any event, the courts have stated clearly that Revenue Canada’s administrative policies do not have the force of law.\(^ {193}\)

It may be that in designing the overall tax system, it is seen as advantageous from a revenue perspective to draft different provisions so that there is generally parallel treatment for expenses and receipts. Even at this level, however, there is no absolute rule to this effect, and there are statutory provisions which clearly contemplate the possibility that taxpayers on different sides of a transaction will not receive parallel treatment.\(^ {194}\)

The assertion of this (highly unusual) reciprocity requirement may say more about how the separated couple is being constructed as a social and economic unit than about the principles of tax law. After all, despite the formal autonomy which inheres in the individual unit of taxation, as feminist scholars have pointed out, there are many tax provisions which tend to subsume women into their husbands’ tax profiles.\(^ {195}\) The government’s reciprocity rationale suggests that separated spouses can be treated as an integrated unit, given the continuing economic dependency implied by the presence of a support obligation. It also assumes they will have access to information about one another’s tax returns. This image of the former couple as a unit may also explain the government’s reluctance to let go of the fantasy that divorcing spouses are generally likely to get together and cooperate to share the benefits of the income splitting which the inclusion/deduction system makes possible.\(^ {196}\)

4. The Fourth Justification: To recognize the basic principle of fairness that taxpayers with incomes from different sources should pay the same amount of tax.

Though it does not use the words, the government is plainly referring to the tax policy principle known as ‘horizontal equity.’ What the government appears to be saying is that child support received by single mothers is no different from other economic receipts such as wages, dividends, or interest, and that it would be unfair to other taxpayers to insulate one form of receipt from taxation.

\(^{190}\) Ibid. at 6332. An example the Court did not mention is the provision enacted in 1988 as part of the new general anti-avoidance rule, to ensure that if one party to a transaction is reassessed on anti-avoidance grounds, another party can apply for a corresponding adjustment of tax liability; see s. 245(6).

\(^{191}\) Interpretation Bulletin IT-118R3, para. 1.

\(^{192}\) See Durnford and Toope, supra note 168 at 43.

\(^{193}\) See Nowegijick v. The Queen 83 D.T.C. 5041 at 5044 (S.C.C.).
There are a number of problems with this rationale. First, it assumes that child support meets the definition of "income from a source" in our tax law. The weight of opinion suggests this is not a correct assumption. Our tax system is based upon a "source concept" of income, which means that no amount is taxable unless it flows from an identifiable source, or, alternatively, is brought into the tax base by a specific legislative provision. The ITA lists three main sources from which income can flow — employment, business and property — and leaves open the question of what other sources might exist. Our courts have been extremely reluctant, however, to identify any other sources beyond those three named by the Act. As such, gifts, inheritances, lottery winnings, and strike pay, among other things, are typically regarded as non-taxable "windfalls."

Section 56 of the ITA expressly brings into the tax base a number of items which may not otherwise be taxable because it is not clear they arise from a source, as understood in tax law. Besides alimony and maintenance, these include prizes, scholarships, research grants, severance payments and retiring allowances. Hugessen J.A. may have been alluding to this phenomenon when he stated that "if it were not for [section 56(1)(b)] such alimony would not otherwise be taxable in the hands of the recipient under the general charging sections of the Act." As the Ontario Fair Tax Commission has concluded, it is likely more appropriate to describe child support payments as "the reimbursement of costs borne by the custodial parent which both parents are obliged to share." It seems particularly inappropriate to treat such payments as income to the custodial parent given that they are not received for her own personal use but for the benefit of the children.201

Aside from the technical argument of whether child support constitutes income from a source, however, the government's argument overstates the historical importance of horizontal equity in the design of the tax system. There have always been a range of other public policy objectives and political pressures competing with horizontal equity. This is reflected in the panoply of incentives and tax concessions in the ITA for particular types of investments or income.202 Furthermore, the government appears to misunderstand the tax policy principle of horizontal equity. That principle does not draw a simple mathematical equation between "incomes from different sources," as the government's argument suggests. Horizontal equity is normally stated more broadly to require that people in "similar circumstances," or with "similar abilities to pay," or with "the same level of well-being" be treated similarly.203 On its face this is a simple and obvious proposition. The problem lies in reaching agreement about what characteristics are relevant in determining whether people are similarly circumscribed.204

201 See Maloney, "Women and the Income Tax Act," supra note 185 at 208. Neil Brooks has made the point (in a slightly different context) that we should tax people only on amounts they control, not amounts they merely benefit from: see comment on J.B. Davies, "The Tax Treatment of the Family" in R.M. Bird and J.M. Mintz, eds., Taxation to 2000 and Beyond, Canadian Tax Paper No. 93 (Toronto: Canadian Tax Foundation, 1992) at 206-7.


203 See, for example, Broadway and Kitchen, supra note 186 at 7-9; and Davies, "The Tax Treatment of the Family," supra note 201 at 168. In Symes, Iacobucci J. adopted the following definition: [horizontal equity merely requires that 'equals' be treated equally, with the term 'equals' referring to equality of ability to pay," supra note 7 at 738, quoting from V. Krishna, "Perspectives on Tax Policy" in B.G. Hansen, V. Krishna, J.A. Rendall, eds., Essays on Canadian Taxation (Toronto: Richard DeBee, 1978). See also the dissenting judgment of L'Héreux-Dubé J. in Symes at 815, where she states that horizontal equity "requires that we tax individuals in similar circumstances the same.

Among tax policy analysts there are many different takes on how people’s economic positions should be measured for horizontal equity purposes, but it is widely recognized that a straight comparison of financial receipts would be inadequate. Some account must be taken of other factors such as the nature of the receipts, the kind of economic power they represent, the relative non-discretionary expenses of taxpayers with different needs or responsibilities to dependents, and the relative costs of living for people in different circumstances. Some argue that non-financial aspects of economic welfare must also be factored in, such as the value of leisure time, and the imputed income arising from property ownership or unpaid household labour. Others take the position that we should not be comparing taxpayers’ incomes at all but, rather, their levels of consumption. Thus, the government’s bald assertion that “taxpayers with incomes from different sources should pay the same amount of tax” really just begs the question.

In order to be at all meaningful, a horizontal equity argument would have to address the nature of the economic benefit conferred by child support as compared to other types of receipts, as well as the particular circumstances of persons receiving child support as compared to other taxpayers. We suggest that this type of analysis would not support the inclusion of child maintenance in income. Compared to other groups in our society, single mothers bear a heavy load of non-discretionary financial responsibilities and suffer extraordinary costs and disadvantages in terms of both the financial recognition given to their child caring work and their access to market opportunities. Indeed this group is disadvantaged even in relation to single parent fathers, who are less likely to encounter labour market discrimination and more likely to have credentials or assets which provide income earning opportunities. To equate a single mother’s child support with the wages or business profits earned by any other person is absurd. It ignores the special circumstances of single mothers, and the special non-discretionary expenses which child support payments must be used to defray.

The concept of ‘horizontal equity’ is one of the best illustrations of how traditional tax policy analysis can sometimes construct an artificial world which conveniently leaves out important differences and similarities which people experience in real life. Even the more sophisticated and nuanced accounts of horizontal equity often tend to reduce people to their financial accounts and income tax returns, and to overlook things like the lack of economic recognition for women’s child care work. That such omissions go unremarked upon in much mainstream tax policy analysis reflects the power of dominant ideologies of family life which naturalize women’s care giving activities.

The prevailing view of the tax system as morally and ideologically neutral works to shield these underlying beliefs from political scrutiny. This is one of the reasons why it is critical that tax legislation be fully open to review under the Charter. The constricted notions of ‘equity’ which have governed the design and interpretation of our tax laws have not been sufficiently flexible to address the profound biases against women in the tax system. These concepts need to evolve toward the more three-dimensional vision of equality which the Charter permits and even requires, according to the Supreme Court of Canada. While Charter litigation alone cannot deliver social justice in its broadest sense, in the tax area we believe equality rights analysis could at least help to open up tax discourse to such considerations. It would be ironic if the government’s skewed version of horizontal equity in the Thibaud case was allowed to displace the contextualized and substantive understanding of equality upon which the Court has increasingly insisted in its section 15 jurisprudence.

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205 Davies examines in detail from an economics perspective the difficulty of determining what constitutes horizontal equity as between different family types, such as couples with children and single parent households: see “The Tax Treatment of the Family,” supra note 201.


5. The Fifth Justification: To help support the payer’s new family, where the payer has remarried or is living common-law.

Like the incentive argument, this really is a justification for the deduction side of the system, and does not directly address the challenge raised by Ms. Thibaudeau to the inclusion side. If this policy objective is sufficiently compelling, there is no reason why the deduction in section 60(b) could not be left in place, even if section 56(1)(b) is struck down. Even if one accepts, however, that the fate of the two provisions is linked, we find this fifth justification for the current system thoroughly unconvincing.

State support for new dependents of the payer is undoubtedly needed in many cases where divorce creates financial hardships for all concerned. However the tax deduction for child support is a very poorly targeted and troublesome response to this concern. It delivers assistance to the non-custodial parent regardless of whether he has formed such relationships, and contains no means test to exclude high income payers who don’t face the problem. Not only does this create an upsidedown subsidy problem, since the value of the deduction increases with income, but it delivers the subsidy even to a taxpayer who could not possibly warrant it because he has not entered a new relationship, or has a new partner who supports herself and possibly him as well.

Indeed, this fifth rationale is heavily laden with familial ideology in its unreflective characterization of the new partner as a dependent. First, it assumes that in his future relationships the payer will take on the breadwinner role. The implication, of course, is that his new (female) partner normally will be without her own source of market income. While this may still describe the life experiences of some men and women, it should not be adopted wholesale as a universal presumption or goal of our tax system. At least with respect to the taxation of child maintenance, our view is that it does not serve women’s interests well to treat the traditional gender hierarchy within families as a norm to which we aspire and around which we should construct our public policies. Secondly, this fifth rationale suffers from the same dubious assumption which plagues the ‘tax subsidy’ argument — that men will universally share such tax benefits with their families, even in the absence of any legal requirement to do so. Again, if the government’s objective is to ensure adequate incomes for women and children, policies which leave them reliant upon the private largesse of men clearly are not the best way to achieve this.

Perhaps most tellingly, the government’s fifth objective is in direct tension with its first one, of enabling higher support awards to be made for the benefit of the children from the previous relationship. If the tax savings are devoted to supporting the new family, how can they also be used to increase the level of child support?

It is interesting to note that in the brief Parliamentary debates surrounding the enactment of the first tax provisions regarding alimony in 1942, this concern about the husband’s new family figured very prominently, overshadowing all of the other rationales now offered for the inclusion/deduction system. Without attaching too much significance to the views of a few Members of Parliament, it is worth repeating the legislators’ discussion as it illustrates some of the points we have made in this article about the familial ideologies which shape both the law and the government’s arguments in Thibaudeau.

Mr. HANSON: Do you allow that alimony payment as a deduction?

Mr. ILSLEY: No.

Mr. HANSON: Such a man who has married again is in a very tight spot. I think he ought to have a little consideration; that should be allowed as a deduction.

Mr. BENCE: I was going to say a word on that point. It seems to me most unfair that when a man is divorced and is supporting his ex-wife by order of the court, he should not be allowed to deduct, for income tax purposes, the amount paid in alimony. If that were done, the ex-wife could be required to file an income tax return as a single woman, as she should, and she would have to acknowledge receipt of that income in making up that return. In many cases the man has married again, but still he must pay a very high tax on the $60, $70 or $80 a month he must pay his former wife. I am not thinking of it so much from the point of view of the husband, though I believe he is in a very bad spot. In the cases with which I have become acquainted, the husband has defaulted in his payments because he has not been able to make them, and in those cases it is the former wife who suffers, and accordingly I believe she should be given as much consideration as the husband.

209 We owe thanks to Barbara Flewelling, a Taxation Law student in the spring of 1994, for bringing this point to our attention.
Mr. ILSLEY: I agree that there is a great deal of injustice to the husband, and perhaps indirectly to the wife, under the law as it stands now, and much consideration has been given to some method by which the law might be changed ...

[This was followed by some discussion of the taxation of alimony in Great Britain and the United States]

Mr. GREEN: I really think it is an impossible situation, with the tax so greatly increased as it has been this year. After all, our law recognizes divorce, and once the parties are divorced they are entitled to marry again. In some cases that have been brought to my attention the husband has remarried and had children by the second wife, but is forced to pay income tax on the alimony that he pays the first wife, and I suggest that the position is absolutely unfair.

Mr. ILSLEY: I agree that it is, in a great many cases.210

The debate then went on to other matters. In this short exchange can be detected many of the assumptions and views referred to earlier about the economic relationship between women and men in marriage. Sympathy is accorded to defaulting husbands, who are perceived as deserving assistance and encouragement to meet their support obligations. There is no trace of outrage about their non-compliance with the law, nor is there any mention of enforcement or penalties. Moreover it is assumed that women will fare better if their ex-husband's tax burden is reduced, even though their own will be increased. This is typical of the way women's economic lives are conflated with their male partners', even after divorce. The entire discussion is structured by a world view in which private relations of support and dependency between men and women are seen as uncontroversial and natural. Perhaps this would have been consistent with many people's everyday experiences in 1942. In any event, the excerpt is devoid of any other idea about how women's welfare might be assured. Even when proposing a new form of public assistance to divorced families, the legislators saw that assistance as being properly delivered to the (ex-)husband, who would control its distribution and use it to support his former wife and/or his new family.

Like the government's first four arguments, then, this fifth one provides a very weak justification for the taxation of custodial parents on their child support. The argument at best justifies maintaining the deduction for payers. Even then, there is an extremely poor fit between the ostensible objective and the tax deduction mechanism, and both aspects of the argument rest upon an archaic and oppressive view of low income women as the private responsibility of individual men.

Conclusion

No section 15 commentary seems complete these days without some discussion of the strategic merits, from a larger political perspective, of pursuing social justice concerns through Charter litigation. This issue was starkly raised by the Symes case and occasioned tremendous debate within feminist communities. Granting tax deductions to those few women earning business income does nothing to help employed women (easily the vast majority of women who work outside of the home), who equally face a conflict between marketplace opportunities and child care responsibilities.211 So, as between Beth Symes and other women, most of whom probably cannot use the deduction even were it available, the unfairness of locating more resources in Symes' hands seems overwhelming. Equally persuasive is the argument that tax deductions of any sort are unfair because they most benefit those with large incomes and in so doing simply decrease the degree to which the tax system is progressive and redistributive. But this larger, and definitely more compelling, economic justice concern was not formally at issue in Symes (despite Iacobucci J.'s invocation of it to justify his rejection of the claim). L'Héroux-Dubé J. was right when she stated in the dissenting judgment in Symes, that this equality relation was not the focus of the section 15 inquiry. Rather, the issue was the more narrow one of the equality relation

210 Canada, House of Commons, Debates (17 July 1942) at 4360-4361. The full legislative history of the inclusion/deduction system is discussed in Krever, supra note 185 at 661-664.

211 Employees are far more limited than business persons in terms of the deductions they may claim in computing income. Symes sought to deduct the full amount of her nanny's salary under the broad general authority granted to self-employed persons to deduct all expenses incurred for the purpose of earning their business income (ss. 9 and 18(1)(a)). Taxpayers earning employment income may claim only those items expressly permitted under the ITA (s. 8(2)). Had the Supreme Court ruled in favour of Symes, employees would still be entitled only to the limited deduction for child care expenses allowed under s. 63.
between business men and business women. If the state is going to grant
certain deductions, it has to at least not do so in ways discriminatory to those
women analytically equivalent to the men for whom the deductions are
allowed. Section 15, after all, only has a limited purview and is not intended
or analytically able to address all inequalities in any one case. So in Symes,
L’Heureux-Dubé J.’s dissent is probably the better analysis of the issues and
section 15 doctrine, even though the result of her judgment, had it carried the
Court, would have been regressive from a larger social justice perspective.

What does this say about section 15 litigation? It says that at least in some
instances successful equality arguments under the Charter can be politically
undesirable; that Charter litigation often is unable to comprehend the larger,
more nuanced, and compelling political picture. The privileged as well as
the oppressed will attempt to make equality claims and one of the
characteristics of legal argument is narrowness of focus. So, challenges to
inequities within the tax system are not necessarily about fixing the overall
injustice of a system insufficiently progressive but often are, at least
functionally, about enhancing and securing the elite economic status certain
groups already have. This is particularly true of equality litigation that simply
‘fine-tunes’ rather than attempts a major re-structuring, given that our tax
system is already one that favours the wealthy and maintains an unequal
distribution of economic power.

Thibaudeau fortunately presents less urgently these larger political
dilemmas. Here the claimant belongs not to a group already relatively
privileged but to a group whose economic and social status clearly marks it
as disadvantaged. As previously mentioned,215 poverty statistics and social
profiles of custodial separated parents show that these individuals are
disproportionately female and poor. Of course, to jettison section 56(1)(b)
would not alone solve the economic problems of such families. But any
improvement in the personal economic situation of Suzanne Thibaudeau and
others like her would seem like progress, however minute, towards a more
equitable society. At least on an individual scale, it might put more money in
the hands of families who really need it. However we hasten to qualify this
optimistic view by mentioning two possible pitfalls to be avoided should the
challenge succeed.

The first potential pitfall is that some non-custodial parents would likely
move to reduce their child support payments in the immediate aftermath of
the decision. We are assuming that if the Supreme Court of Canada strikes
down section 56(1)(b), the federal government will act quickly to repeal the
counterpart deduction in section 60(b) as well. Payers would argue that since
the custodial parent is no longer liable for tax on the payments, and since the
payer’s after-tax cost may be higher without a deduction, a lower quantum of
support is called for. The concern, of course, is that many support orders or
agreements were never adequately adjusted for tax consequences in the first
place, so that a downward adjustment following Thibaudeau would simply
reinstate the discriminatory effect of the tax regime.

Thus, in any court application or private proposal to reduce child
maintenance as a result of Thibaudeau, there should be a heavy burden on the
payer to show that tax consequences were factored into the original agreement
or award, how they were factored in, and what effect they had on the quantum
of support. This burden will be difficult to discharge in many cases. Durnford
and Toope report that “judges frequently fail to provide a precise financial
breakdown in the support order that would reveal the extent to which the
impact of taxation has been taken into consideration.”216 However, it should
not simply be assumed that tax implications were taken into account
originally. In addition, the payer should be required to show a diminished
ability to pay based on his tax position and overall financial status at the time
of the proposed variation. Losing the deduction may have little financial
significance, for example, to a payer who can shelter his income from taxation
through the use of capital gains exemptions, dividend tax credits, depreciation,
limited partnership losses, or other avenues of tax relief. Moreover the payer

213 For a discussion of these problems in relation to the first equality cases under the
Charter, see Brodsky and Day, supra note 26.

214 For a thoughtful discussion of these concerns in the context of considering how a
successful result in Symes would have played into an already unjust distribution of
child care resources, derailing calls for affordable, accessible, and quality child care
at the same time, see Young, “Child Care and the Charter,” supra note 186.

215 Supra note 3.

216 Supra note 168 at 28.
may have greater resources than he did when support was originally set, and a greater capacity to pay even after taking into account an increased tax burden.

Indeed, if lawyers and courts are going to entertain proposals for downward variation on income tax grounds, they should also be examining other changes in circumstance which might call for a larger support payment. If the (ex-)husband’s income has increased, for example, or if the costs of caring for the children have turned out to be greater than originally estimated, these factors should mitigate against the payer’s case for a reduction in support, and perhaps lead to a higher level of support being awarded. This type of approach was recently endorsed in Willick v. Willick,217 where the Supreme Court of Canada offered some guidelines with respect to variation of child support orders. In her concurring minority reasons, L’Heureux-Dubé J. stressed the importance of looking beyond the specific change which prompts an application to vary support, to the parties’ overall financial situation.218 Moreover, where circumstances have changed “so as to render the original order irrelevant or inappropriate,” the court should look broadly at the parties’ present means and needs in considering the application.219 As examples of the factors courts may consider, L’Heureux-Dubé J. cited inflation, the increased costs associated with children as they grow older, and the assumption of responsibilities associated with a new family.220

We acknowledge that even after all these factors are taken into account, downward variations might still be warranted in some cases if the deduction is abolished. In our view, however, child maintenance should not in any case be reduced below the net after-tax amount the custodial parent was previously clearing. The needs of the children should be paramount in all this, and we note the following cautionary words of L’Heureux-Dubé J. in Willick:221

218 Ibid. at 442-43.
219 Ibid. at 445.
220 Ibid. at 447. Sopinka J.’s majority reasons are ambiguous as to the range of factors open to consideration in an application to vary child support: at 15-6.
221 Ibid. at 441.

... one cannot ignore, in dealing with variation orders, that the consequences suffered by children of a decrease in support may be markedly more dramatic than the benefits realized by a payer who successfully varies a support obligation downward following an adverse change in circumstances.

Lawyers and courts asked to handle such variations should take the utmost care to ensure that children’s needs are not sacrificed in order to maintain a mathematically precise division of financial responsibilities between their parents.

There is also a second pitfall which may be associated with Thibaudeau, in terms of the case’s effect on the larger political project of reducing women and children’s economic suffering. We are mindful of Susan Boyd’s recent warning that progressive decisions by judges may create the impression that the social injustice brought to light in court has been remedied, obviating the need for further action.222 Victory on a highly specific legal issue, no matter how immediately positive, will almost necessarily fall short of addressing the systemic inequalities which form the backdrop to the litigation. This would certainly be true of the Thibaudeau case. To add to the concern, Boyd shows how decisions that favour women’s immediate interests may actually reinforce the trend towards privatizing economic responsibility for dependent individuals, and replicate prevailing ideologies about women’s proper role in the family. For example, family law decisions which increase women’s entitlements to matrimonial assets or income upon divorce may symbolically be important and may provide tangible benefits to many women, but they also ironically legitimate the notion that women’s poverty is best redressed by improving their access to men’s private property. The Thibaudeau case promises to raise just such a dilemma. A favourable ruling would do no more than protect women’s private claims on their former husbands’ incomes from incursion by the state through taxation. It would not begin to address the deeper causes and more serious effects of gender inequality. As a society we should learn to see judicial decisions under section 15 of the Charter as beginnings rather than ends. They can highlight sites of inequality which need our attention, but they cannot substitute for positive social action to eliminate the systemic economic disadvantages faced by women and children.

222 (Re)Placing the State,” supra note 150.