

WHAT'S SEX GOT TO DO WITH IT?: TAX AND THE "FAMILY"

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Introduction

The last 30 years in Canada have seen dramatic changes in the the legal definition of "family" and "spouse" as well as our social understanding of these relationships. In the 1960s when the Carter Commission recommended that the family be the unit of taxation "family" consisted of husband and wife together with their children. Non-marital conjugal relationships were not recognised in law. Today in Canada we recognise common law relationships¹ through ascription for many legal purposes. Based on a period of cohabitation, many but not all, of the rights and duties of marriage have been extended to common law cohabitants. Furthermore common law relationships include both heterosexual and same-sex relationships. Most recently in July 2005 the federal government legalized civil same sex marriage across Canada. Both opposite sex and same sex partners can now choose whether to marry or not; even if they do not, they may still be ascribed spousal status for various purposes, based on a period of cohabitation.

These changes, and in particular, the recognition of same-sex relationships for tax purposes have led me to re-examine how we treat spousal and common law relationships in tax law and policy.² My focus is not on the issue of whether the tax unit should be the

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

² Throughout this paper I refer to "spousal and common law relationships". The ITA defines "spouse" as a married person and "common law partner" as an individual living in a conjugal relationship with the taxpayer for at least one year.

individual or the married or common law couple.³ That issue is one that I believe has been well and truly buried in Canada⁴ and, I would hope, also in Australia. Rather my focus is on those tax rules that currently take spousal and common law relationships into account for a variety of purposes. In a nutshell my question is can they continue to be justified or should we be looking to eliminate all reference to spousal and common law relationships from our tax legislation? In order to answer this question I examine some of Canadian tax rules that apply to spouses and common law partners and the policy underlying those rules. My conclusion is that many of these provisions should be removed from the *Income Tax Act* (hereinafter the ITA). The reason that they are no longer valid varies from rule to rule. For example, some rules are inequitable and discriminate without good reason against those couples with low incomes and in favour of those with high incomes. Others, including those that focus on dependency, are inherently flawed and poorly targeted so that they do not achieve their policy goals. Some rules that can be critiqued on the basis that they are simply part of a neo-liberal privatisation agenda that encourages individuals to rely on the private family for their economic security. These rules exclude those not in spousal or common law relationships from a variety of very important benefits delivered by the tax system.

Changing Definitions of Spouse

In order to place the tax rules in the broader social context of changing definitions of family and spouse, it is important to trace some of these recent changes. Since the 1970's Canada has increasingly recognised common law heterosexual relationships through ascription. As mentioned, the result is that many of the rights and responsibilities accorded to married couples are now accorded to common law couples. During the mid

³ For an excellent collection of articles on the issue of the appropriate tax unit, see John G. Head and Richard Krever eds. *Tax Units and the Tax Rate Scale*, Australian Tax Research Foundation, Conference Series 16 (1996). In particular, see Michael McIntyre, "Marital Income Splitting in the Modern World: Lessons for Australia from the American Experience" at 1-33 and Neil Brooks, "the Irrelevance of Conjugal Relationships in Assessing Tax Liability" at 35-80.

⁴ For example, see Law Commission of Canada, "Beyond Conjuality: Recognizing and Supporting Close Personal and Adult Relationships (Ottawa, 2001) in which the Commission recommended that "the individual, rather than the conjugal couple of some other definition of the family unit, should remain the basis for the calculation of Canada's personal income tax", Recommendation 19 at 71.

1990's the *Charter of Rights and Freedoms*⁵, and in particular the equality provision, section 15(1) was used with great success to challenge heterosexist definitions of spouse. The result is that since the mid 1990's, same-sex couples have increasingly, though unevenly across the provinces been treated as common law couples. In 1999, the Supreme Court of Canada rendered the most important judicial decision to date on same sex spousal recognition in *M. v. H.*⁶, striking down as unconstitutional a definition of "spouse" in a family law statute that had been limited to opposite sex cohabitants. The result was that lesbians and gay men could now sue each other for spousal support on the breakdown of their relationships. This case generated many legislative changes at both federal and provincial levels to extend spousal or equivalent status to same-sex cohabitants.⁷

Meanwhile on the tax front, the Ontario Court of Appeal had held in 1998 in *Rosenberg v. Canada (Attorney General)*⁸ that the words "or same-sex" should be read into the definition of "spouse" in the *ITA*, for the purposes of registration of pension plans. The case was brought by two women who worked for one of Canada's large unions, the Canadian Union of Public Employees (CUPE). CUPE had a standard employment pension plan which included a provision for survivor benefits. Pension plans in Canada are heavily subsidised by the tax system, with deductions for contributions by employers and employees, and sheltering from tax of all income earned by the plan until the pension is received. In order to qualify for these subsidies the plan must accord with the requirements of the *ITA* and that included a definition at that time of spouse that was restricted to heterosexual couples. CUPE decided to extend its plan to its lesbian and gay employees on the same terms as it applied to its heterosexual employees but the government refused to accept this amendment. By reading the words "or same-sex" into the definition of spouse in the *ITA* for the purpose of pension plans the court effectively extended entitlement to survivor benefits

⁵ *Charter of Rights and Freedoms*, Part 1 of the Constitution Act, being Schedule B to the Canada Act 1982 (U.K.) 1982, c.11 (hereinafter referred to as the *Charter*).

⁶ *M. v. H.* (1999) 171 D.L.R. (4th) 577 (S.C.C.), [1999] 2 S.C.R. 3.

⁷ For example, the *Definition of Spouse Amendment Act*, S.B.C. 1999, c. 29 and the *Definition of Spouse Amendment Act*, S.B.C. 2000, c. 24; *An Act to Amend Certain Statutes because of the Supreme Court of Canada's Decision in M. v. H.*, S.O. 1999, c. 6.

⁸ *Rosenberg v. Canada (Attorney General)*, (1998), 38 O.R. (3d) 577.

under occupational pension plans to the partners of lesbians and gay men who die while covered by the plan.⁹ Interestingly, the federal government did not appeal this decision.

Both the *M v H* and *Rosenberg* had other far-reaching consequences. In 2000 the federal government enacted the *Modernization of Benefits and Obligations Act*¹⁰ which amended 68 pieces of legislation to include same-sex couples in an array of laws that assign rights and responsibilities based on spousal status. Sections 130-146 of the *Modernization of Benefits and Obligations Act* amended the *ITA* to redefine spouse to include married persons and to add a new definition of common law partner which includes a person cohabiting in a conjugal relationship with the taxpayer for a period of at least one year.¹¹ It is interesting to note that the *ITA* is one of very few pieces of legislation to retain both a definition of “spouse” as a married person and a definition of “common law partner”, even though there is currently no distinction in terms of the application of the *Act* to married persons and common law partners.

In the early 21st century, a renewed struggle for same-sex marriage emerged, having been put on hold in Canada in the mid-1990s in favour of seeking the rights available to unmarried opposite sex cohabitants. Several successful *Charter* challenges were raised to the common law rule that defined marriage as between one man and one woman.¹² As a result, same-sex couples acquired, with startling rapidity, the right to marry in several provinces and one territory. In October 2004, the federal government sought the opinion of the Supreme Court of Canada on the question of whether same-sex marriage for civil

⁹ For an in depth analysis of this case, see Claire F.L. Young, 1998. “Spousal Status, Pension Benefits and Tax: *Rosenberg v. Canada (Attorney-General)*.” *Canadian Labour and Employment Law Journal* 6: 435-453.

¹⁰ *Modernization of Benefits and Obligations Act*, S.C., C-23, ch. 12, (2000).

¹¹ Section 248 “common law partner” with respect to a taxpayer at any time, means a person who cohabits at that time in a conjugal relationship with the taxpayer and

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

¹² e.g., in Ontario, *Halpern v. Canada (Attorney General)* (2003), 169 O.A.C. 172 (C.A.); in British Columbia, *EGALE Canada Inc. v. Canada (Attorney General)* (2003), 228 BCCA 406.

purposes was consistent with the *Charter* and on December 9, 2004, the Supreme Court of Canada held that it was (*Reference re Same-Sex Marriage*). On July 20, 2005, Bill C-38, the *Civil Marriage Act* received Royal Assent and was proclaimed into law, legalizing civil same sex marriage across Canada. Civil marriage in Canada is now defined as “the lawful union of two persons to the exclusion of all others.”

Progress at What Cost?

Without diminishing the struggle that lesbians and gay men have endured to secure legal recognition of their relationships, or its potential to challenge heterosexual norms and definitions of family, I argue that the recent tax changes in Canada to include same-sex couples as common law partners have done nothing to challenge the socio-economic inequalities that arise from the impact of many of the rules that apply to spouses and common law partners. Indeed expanding the definition of those who are treated as spouses for tax purposes has simply reinforced those inequalities. In this context it should be noted that the Law Commission of Canada solicited working papers on this issue¹³, and in 2001 published its Report “*Beyond Conjuality: Recognizing and Supporting Close Personal and Adult Relationships*”.¹⁴ In that report it called for changes to be made to many of the tax rules that apply to spouses and common law partners, including the repeal of some of the provisions.

While many see the federal government’s decision to enact the *Modernization of Benefits and Obligations Act* and thus expand the group accorded common law status for tax purposes as progressive, we need to be cautious. Certainly there is an assumption by many that it is to their advantage to be treated as spouses and common law partners for tax purposes.¹⁵ There is a sense that there are more tax breaks for couples and that the tax bill of a couple will be lower than it would be if they were taxed as individuals. As I have

¹³ See Kathleen Lahey, *The Benefit/Penalty Unit in Income Tax Policy: Diversity and Reform*, (Ottawa: Law Commission of Canada, 2001) and Claire F.L. Young, *What’s Sex Got To Do With It?: Tax and the Family*, (Ottawa: Law Commission of Canada, 2000).

¹⁴ *Supra*, note 4.

¹⁵ The author spoke with several groups of lesbian and gay individuals about the impact on them of the changes to the definition of spouse and generally speaking most of those individuals believed they would benefit from the change even though in fact many of them would pay more tax as a result of the change.

demonstrated in previous work, this is not necessarily true.¹⁶ In fact the impact of being treated as spouses or common law partners varies depend on three factors: the amount of income of each of the partners, the nature of that income and the relative distribution of that income as between the partners. As I shall discuss in more detail later, generally speaking, in Canada the couple in which there are two low rate taxpayers pays more tax when they are treated as a couple rather than as individuals. The couple in which there are two high rate taxpayers and the couple in which one person is a high rate taxpayer and the other has little or no income both tend to benefit in terms of taxes saved when treated as a couple.

Canada has a self-assessing income tax system. If one meets the common law partner test of living in a conjugal relationship for one year, one must declare that status on the tax return. One cannot choose to be or not be a common law partner. If you meet the statutory test of common law partner, that status is ascribed to you and all the rules that apply to common law relationships apply to you. Thus it is extremely important that the rules that take spousal status into account operate in a fair and efficient manner.

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

¹⁶ Claire F.L. Young, "Taxing Times for Lesbians and Gay Men: Equality at What Cost?" *Dalhousie Law Journal* 17(2): 534-559.

second part of my paper looks at some of the current rules that apply to spouses and common law partners and argues that they are rules whose time has come and gone.

The Politics of It All

A Tax Windfall

Income tax law is one of the most important political tools that a government has at its disposal. Tax laws are used to direct economic and social behaviour in a myriad of different ways. Many of the most important measures we use to achieve social policy goals are tax expenditures. Tax expenditures are defined as any deviation from the benchmark personal income tax structure. They include measures such as deductions in the computation of income, tax credits, exemptions from tax and deferral of tax payable. Tax expenditures are the functional equivalent of direct government expenditures with one main difference. Instead of being delivered as a direct grant to an individual, tax expenditures are delivered by the tax system. The distinction is significant. While we tend to analyse the impact of a technical tax provision by reference to criteria such as horizontal and vertical equity, neutrality and simplicity, we apply different criteria to a tax expenditure. As the Law Commission of Canada has said “Does it serve a legitimate government objective? Is it well designed to achieve its objective? Could the objective be better served through the use of some other government policy instrument?”¹⁷. To these questions I would add, is the measure fair or does it discriminate in an inappropriate manner against some taxpayers and in favour of others? Whether a particular measure is a technical tax rule or a tax expenditure has been the subject of much debate. Each year Canada publishes a list of all tax expenditures and their cost.¹⁸ For Canadian purposes the benchmark for the personal tax system, that is those rules that are not considered to be tax expenditures, includes the tax rates and brackets, the unit of taxation, the taxation period (the calendar year), the treatment of inflation and the constitutional immunity from

¹⁷ *Supra* note 4 at 65.

¹⁸ For the most recent account see, Canada, Department of Finance, *Tax Expenditures and Evaluations, 2005* (Ottawa, 2005).

taxation of Canada and the provinces.¹⁹ All other measures are tax expenditures or memorandum items.²⁰

As mentioned, inclusion of same-sex couples as common law partners for tax purposes resulted in a tax windfall for the government because some individuals were required to pay more taxes when treated as part of a couple than they previously paid as individuals. While the federal government has not published the amount of this windfall, history tells us that the windfall can be considerable. In 1993 when the federal government amended the definition of spouse to include “common law” heterosexual spouses, the Department of Finance estimated that the change would result in increased tax revenues over a 5 year period of \$9.85 billion.²¹ The primary reason for the increased tax revenues is attributable to the rules that require the combining of spouses and common law partners’ incomes for the purpose of computing entitlement to the refundable GST tax credit and the Canada Child Tax Benefit. Entitlement to both these tax credits depends on one’s level of income and as income increases the amount of the credit is reduced and eventually phased out completely. Therefore, for example, two individuals with incomes of \$20,000 who are now included as common law partners will lose entitlement to either all or part of these refundable tax credits. The impact of this change is especially harsh on those with low incomes, the very group the tax credits are intended to benefit. There is also a gendered impact. Given that women tend to earn less than men and have lower incomes, it is likely that more women than men will lose these credits.²²

¹⁹ See, Canada, Department of Finance, *Tax Expenditures: Notes to the Estimates/Projections, 2004* (Ottawa, 2004).

²⁰ Memorandum items include, among others, items “for which there may be some debate over whether they should be considered tax expenditures”, *ibid.* at 7.

²¹ Canada, Department of Finance, Budget Papers, Supplementary Information, February 25, 1992, at 138-139.

²² In Canada, women who work full year, full time earn 73 cents for every dollar earned by men (latest figures available), see, Cindy Wiggins, "Women's Work: Challenging and Changing the World" (Research Paper prepared for the 2003 Canadian Labour Congress Women's Conference, May 2003); available online at: <http://action.web.ca/home/clcpolcy/attach/Womens%20Work%20%20Challenging%20and%20Changing%20the%20World.pdf>

The Privatization Agenda

One of the cornerstones of neo-liberalism is an increased reliance on the private sector, including the private family and the private market, rather than the state, to provide for the welfare of citizens. As Lisa Philipps has said “the drive towards privatization in Canada has at its heart one central claim: that private choice is better than public regulation as a mechanism for allocating resources and ordering social affairs”²³

Increasingly in Canada law and in this context, tax law, is being used as a tool of privatisation.²⁴ In this paper, I focus on just one aspect of that privatisation, that is the trend to place responsibility on individual family members to care for each other, thereby relieving the state of its responsibility in that regard. That “caregiving” can take many forms including the actual caregiving of the elderly and disabled and the economic support of family members. My contention is that by taking spousal and common law partner status into account with respect to entitlement to and allocation of a variety of tax expenditures, the tax system is one important tool in this privatization.

In Canada the government has made it clear that the future for Canadians in terms of their economic security in retirement is to contribute to private pension plans such as occupational pension plans (Registered Pensions Plans, RPP) personal plans (Registered Retirement Pension Plans, RRSP) and not to rely on the more universal Old Age Security or the Canada Pension Plan.²⁵ As a result these private plans are heavily subsidised by tax expenditures, including tax deductions for contributions to the plans, and a sheltering of all income earned by the plan from tax until either the contributions are withdrawn or the plan matures. The value of these tax expenditures is a staggering \$31 billion for 2005, making tax expenditures for retirement savings the single largest tax expenditure in

²³ Lisa Philipps “Tax Law and Social Reproduction: The Gender of Fiscal Policy in an Age of Privatization” in Brenda Cossman and Judy Fudge eds. *Privatization, Law and the Challenge to Feminism*, University of Toronto Press (Toronto, 2002) at 41.

²⁴ For a detailed discussion of the role of law in the drive towards privatization see Cossman and Fudge, *ibid.* at 30-36.

²⁵ The Old Age Security is a non-contributory plan consisting of a flat rate monthly sum paid to those over 65, although as income increases there is a clawback through the income tax system of part of the pension. Nevertheless it is the most “universal” pension plan in Canada. The Canada Pension Plan is a contributory income replacement plan and benefits are based on labour force participation. Both these plans are described as “public” pensions in contrast to the private RPPs and RRSPs.

Canada.²⁶ The problem for many women is a lack of access to these plans. Women's lack of participation in the paid labour force in comparison to that of men means that many women are excluded from these plans.²⁷ In addition, the kind of work that women do is a major factor. Only those who work for relatively large employers, economically able to provide a pension plan, will benefit. Those who work part-time, in non unionized jobs, or for small employers unable to finance these plans do not benefit. In Canada women have consistently formed 70% of the part time labour since the mid 1970s.²⁸ Similarly in order to access RRSPs, one must have the discretionary income to make the contribution. Given that women earn less than men²⁹ it is not surprising that more men than women make these contributions and thereby benefit from the tax expenditure.

To a certain extent the government has recognised and attempted to remedy women's unequal access to private pension plans and the accompanying tax subsidies. Consequently, the ITA permits contributions to a "spousal" RRSP. A taxpayer may contribute, up their own maximum limit,³⁰ to a plan in their spouse or common law partner's name and receive the same tax benefits that they would have received had they made the contribution to their own plan. Thus there is the opportunity to establish a pension plan for one's spouse or common law partner and the ability to income split with that person by diverting future income to them. The advantages can be significant where the spouse or common law partner has little or no other income when they retire.

While the "spousal" RRSP is a well intentioned measure, it remains a highly private and limited response to a public issue, that is the fact that so many elderly women live in

²⁶ *Supra* note 18 at Table 1.

²⁷ Only 57% of women over 15 are employed in Canada, compared to 68% of men (latest figures available), see Housing, Family and Social Statistics Division "Women in Canada: Work Chapter Updates" (Ottawa: Statistics Canada, 2004); available on-line at <http://www.statcan.ca/english/freepub/89F0133XIE/89F0133XIE2003000.pdf>.

²⁸ See, Housing, Family and Social Statistics Division "Women in Canada: Work Chapter Updates" (Ottawa: Statistics Canada, 2004); available on-line at [http://www.statcan.ca/english/free pub/89F0133XIE/89F0133XIE2003000.pdf](http://www.statcan.ca/english/free%20pub/89F0133XIE/89F0133XIE2003000.pdf)

²⁹ *Supra* note 22.

³⁰ For 2005, the limit is \$16,500.

poverty.³¹ Essentially the private family is encouraged to provide for its own economic security in retirement, albeit with a tax break to encourage it to do so. But many cannot take advantage of this opportunity. Low income taxpayers may not have the discretionary funds to contribute on their spouse's behalf. Additionally single women have no access to this expenditure. Given that 43% of single women over 65 live below the poverty line compared to 5% of women over 65 who have a spouse, it appears that the subsidy is being misdirected.³² By linking this tax expenditure to spousal status, the government is directing the benefit to a very limited group of people, a group that may not be the neediest. Statistics show that fewer people than ever are living in a married or common law relationship.³³ As the Women and Taxation Working Group of the Ontario Fair Tax Commission stated "the concept of a couple as a life-long economic unit with joint income, wealth, and expenses may no longer be appropriate given changing family structures, increasing divorce rates, and falling marriage rates".³⁴

There is another important tax break with respect to private pensions that is only available to those in a spousal or common law relationship. If a taxpayer dies the funds in their unmatured RRSP may be transferred on a tax-free basis to their spouse or common law partner.³⁵ In order to qualify for this tax free rollover the spouse or common law partner must contribute the amount to their RRSP. The tax advantage is significant because without the rollover the fair market value of the property held in the RRSP would be included in income in the deceased's terminal year. Once again, however, we are using the tax system to encourage the private family to provide for the economic security of its members. We are directing significant tax subsidies to a very limited group of people, a group that statistics tell us may not be the most in need.

³¹ In 2000, 71% of those over 65 living below the poverty line were women, see Statistics Canada, "Analysing Family Income" available on-line at

<http://www.12.statcan.ca/english/census01/products/analytic/companion/inc/canada.cfm#14>.

³² See Statistics Canada, "Analysing Family Income" available on-line at

<http://www12.statcan.ca/english/census01/products/analytic/companion/inc/canada.cfm#4>.

³³ Statistics Canada, "2001 Marital Status, Common-Law Status, Families, Dwellings and Households," *The Daily*, (Ottawa: October 22, 2002).

³⁴ Ontario Fair Tax Commission, Women and Tax Working Group, *Women and Taxation* (Toronto: Ontario Fair Tax Commission, 1992) at 22.

³⁵ The rules in the ITA are quite complex and certain conditions must be met. The rollover also applies with respect to a transfer to a child or grandchild of the deceased who was financially dependent on the deceased at the time of death.

As I have demonstrated reliance on the private sector for the economic security of individuals is problematic for a variety of reasons. At a general level such privatization policies tend to diminish the role that the state plays in ensuring a fair level of income for all its citizens. Encouraging the private family to fill the role previously taken by the state leaves gaps in the social security network, gaps which those without spouses or common law partners often fall through. As discussed the result is often a retirement lived in poverty. The current privileging of private pension plans also reduces the resources available for the more universal state pensions, pensions on which women in particular depend for their economic security in retirement.³⁶ Various suggestions for remedying some of the problems I have discussed have been made in the past.³⁷ These suggestions range from a total removal of all tax preferences for private pension plans to a revamping of the current tax rules to try to make them more equitable. In the context of this discussion about the tax preferences for spouses and common law partners, I suggest that all of these rules be repealed. Applying tax expenditure analysis to these provisions, one can conclude that they are not the best way to achieve the policy goal of ensuring that Canadians, and women in particular, are economically secure in their retirement. As I have discussed they are too limited in scope and benefit some at the expense of others with no rational justification for that discrimination.

Other Tax Expenditures

The Dependent Spouse and Common Law Partner Credit

The spousal and common law partner tax credit is available to a taxpayer who supports their spouse. Put simply, the taxpayer is entitled to a tax credit of just over \$1,000 which is reduced in amount if the spouse or common law partner's income exceeds approximately \$680, with the credit being eliminated once the spouse or common law

³⁶ During the past 20 years, 99% of the income gain of the 10% of elderly women living alone with the lowest incomes was from higher direct government payments. For the 20% of women in the middle of the income distribution, direct government transfers accounted for more than 80% of their gain, see Statistics Canada, "Analysing Family Income" last modified March 3, 2004; available on-line at <http://www.12.statcan.ca/english/census01/products/analytic/companion/inc/canada.cfm#14>.

³⁷ For a more detailed description of some of the recommendations, see Claire F.L. Young, *Women, Tax and Social Programs: The Gendered Impact of Funding Social Programs Through the Tax System*, Status of Women, Canada, (Ottawa, 2000) at 48-51.

partner's income exceeds approximately \$7,000. As the Law Commission of Canada has said "the credit appears to be designed to promote economic dependency in conjugal relationships".³⁸

There have been many critiques of the spousal and common law partner tax credit.³⁹ First, because more women than men work in the home and not in the paid labour force it is men who predominantly claim the spousal and common law partner tax credit. Several issues arise when one considers the impact on women of provisions such as the spouse and common law partner tax credit. Provisions based on dependency are a disincentive to women's participation in the paid labour force. When the tax costs such as the loss of the credit are taken into account, there is a real disincentive to women in spousal or common law relationships entering the paid labour force. This disincentive is exacerbated by other costs incurred by women who choose to work outside the home, such as child care costs, travel costs, clothing and the monetary and non-monetary costs associated with replacing the household labour. Furthermore, when one considers that many women are the secondary earners in their relationships, and that they work for relatively low wages, the combination of these factors and the tax disincentives have a particularly detrimental effect on women's choice to work outside the home.

Another important critique of dependency provisions is that rules like the spousal and common law partner tax credit affirm that a woman's dependency on man deserves tax relief. Again, this undermines the autonomy of women and it results in a certain privatization of economic responsibility for dependent persons. Tax policy has responded to women's lack of economic power by leaving it to the family (the private sector) to assume responsibility for women's lack of resources. Furthermore the tax subsidy is delivered to the economically dominant person in the relationship and not the 'dependent' person who needs it. This manner of delivery assumes that income is pooled and wealth distributed equally within the relationship. However research has shown that such

³⁸ *Supra* note 4 at 74.

³⁹ See, for example, Law Commission of Canada, which recommended that the spousal tax credit be repealed and replaced with "enhanced or new programs that more carefully target caregivers and children", *ibid.* at 77.

pooling is not the norm in relationships, with one study demonstrating that it only occurs in one fifth of household surveyed.⁴⁰ Many women do not have access to or control over income earned by their spouse and predicating tax policies on the assumption that they do is unfair.

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

Another justification for the spousal or common law partner tax credit is that it recognises the reduced ability to pay tax of an individual who supports a person who is economically dependent on them. But this argument is not persuasive. It ignores the benefit that accrues to the individual from work performed in the home, such as housework and child-care, by the person whom they support. Indeed this home labour may well increase the ability to pay of the individual because there is no need to have recourse to the private market in order to obtain the services provided in the home by the spouse who is supported by the individual. This point was not lost on the Royal Commission on the Status of Women in 1970 when it rejected the Carter Commission recommendation that the family be the unit of taxation. At that time the Royal Commission on the Status of Women noted that "in most cases the wife who works at home as a housekeeper, far from being a dependent,

⁴⁰ Carolyn Vogler and Jan Pahl, "Money, Power and Inequality within Marriage" (1994) *Sociological Review* 263 at 285.

performs essential services worth at least as much to her as to her husband as the cost of food, shelter and clothing that he provides for her”.⁴¹

Given all these problems it is not surprising that various individuals and organizations have called for the repeal of the spousal or common law tax credit.⁴²

As mentioned earlier in this paper, the impact of the rules that take spousal or common law status into account varies depending on the level of income of the spouses or common law partners and the distribution of income within the relationship. There is no question that those couples with high incomes and significant wealth can benefit tremendously from some of the tax rules. One example is the ability to transfer capital property to your spouse or common law partner on a tax-free basis, either *inter vivos* or on death. Canada’s tax treatment of capital differs from that of most other jurisdictions. There are no Estate Taxes, Succession Duties or Gift Taxes in Canada. Rather when capital property is transferred from one person to another, either by way of a gift or bequest, the general rule is that the transferor is deemed to have disposed of the property at fair market value.⁴³ The result is that if the fair market value of the property at the time of transfer is more than the cost of the property to the transferor, a capital gain arises and one half of the gain is included in the transferor’s income. A significant exception to this rule is that if the transfer is to a spouse or common law partner a rollover of the property occurs with the taxpayer deemed to dispose of the property for proceeds of disposition equal to their cost for the property and the spouse or common law partner acquiring the property at an amount equal to those proceeds of disposition. The result is a significant deferral of tax until the spouse or common law partner ultimately disposes of the property. The rollover is available both on an *inter vivos* basis and on death and is also

⁴¹ Royal Commission on the Status of Women in Canada, Report (Ottawa: Information Canada, 1970) at 293-294.

⁴² See, for example, the Law Commission of Canada, *supra* note 4 at 77, Maureen Maloney, “What is the Appropriate Tax Unit for the 1990s and Beyond?” In Allan Maslove ed. *Issues in the Taxation of Individuals* (Toronto: University of Toronto Press and the Ontario Fair Tax Commission, 1994) at 146 and Claire Young, *supra* note 13 at 113.

⁴³ Section 69 of the ITA.

available with respect to a transfer to a former spouse or former common law partner in settlement of rights arising from the marriage or common law partnership.⁴⁴

These rules serve a variety of purposes. From a practical perspective, if transfers between spouses were taxable events, the Canada Revenue Agency (CRA) would have to trace all such transactions in order to ensure that any tax owing was paid. Given the informal context in which these transactions occur, such a task would be difficult. Another problem is that because these transactions do not take place in the open market, there may be a liquidity problem with no cash available to pay the tax. The rollover rules are also intended to encourage the redistribution of property within the relationship, especially from men, who tend to own more capital property than women, to their spouse or common law partner. It is questionable, however, how effective they are in this regard. There are many reasons why an individual may choose not to transfer property to their spouse on an *inter vivos* basis, including concern about transferring control of that property to the spouse or common law partner. These rules are also affected by the operation of the attribution rules. If capital property that is transferred to a spouse or common law partner at less than fair market value generates income, that income is attributed to the transferor and not taxed to the spouse or common law partner, thereby preventing income splitting with respect to income from property.⁴⁵ Given that most of these transfers are presumably gifts, the attribution of income may well operate to deter taxpayers from entering these transactions.⁴⁶

It is impossible to determine whether the rollover rules do encourage the redistribution of wealth in spousal and common law relationships. While CRA classify these provisions as tax expenditures, they do not put a value on the expenditures because “the data is not available to support a meaningful estimate/projection”.⁴⁷

⁴⁴ Section 70(6) of the ITA provides the rollover for transfers as a consequence of death to a spouse or common law partner or to a spouse trust and section 73(1) and (1.01) of the ITA provides the rollover for *inter vivos* transfers to a spouse or common law partner.

⁴⁵ Section 74.1 of the ITA.

⁴⁶ Section 74.2 of the ITA also provides that a transfer of capital property to a spouse or common law partner must be at fair market value in order to avoid the attribution of any capital gain arising from that transfer to the transferor when the spouse or common law partner disposes of the property.

⁴⁷ Canada, Department of Finance, *supra* note 19 at 15.

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

The rollover rules are predicated on an assumption of economic interdependence⁴⁸ and economic mutuality, that is, what is mine is yours and what is yours is mine. Yet not all spousal and common law relationships are founded on economic interdependence, nor is there an economic mutuality within the relationship with respect to property. Thus the rollover rules can be said to be over inclusive. They are rules that apply in situations which do not reflect their underlying policy. This problem led the Law Commission of Canada to recommend the extension of the rules to all persons living in economically interdependent relationships.⁴⁹ I disagree with their recommendation and believe that the rules should be repealed outright. First, as mentioned above the application of the attribution rules may deter taxpayers from entering into these transaction, thereby obviating the need for the rollover rules. Secondly, tracing problems are not unique to intra spousal or common law partner transfers. Transfers to adult children or close friends can be difficult to trace. Furthermore, the ITA provides for a self-assessing system in which taxpayers are required to declare a variety of transactions that cannot always be verified, including gifts to third parties.

Provisions that are based on an assumption of economies of scale in relationships

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

⁴⁸ The Law Commission of Canada described economic interdependence as the “raison d’être of the rollover rules”, *supra* note 4 at 89.

⁴⁹ *Ibid.*, Recommendation 25.

are assumed to arise from spouses and common law partners living together. These economies of scale arise from sharing the cost of certain items, such as rent, household expenses, including durable consumer assets such as furniture and kitchen appliances as well as the benefits from shared household work. The theory is that the savings from these shared expenses and labour increase a taxpayer's ability to pay tax. In some instances the assumption of an enhanced ability to pay means that entitlement to certain tax credits and deductions is reduced for the couple. For example, the child-care expense deduction provides a deduction in the computation of income of a limited amount of child care expenses.⁵⁰ In spousal or common law relationships, however, the deduction must be taken by the taxpayer with the lower income. This rule effectively reduces the value of the deduction because that value is tied to the rate at which tax is paid with high rate taxpayers saving more in terms of taxes payable than low-rate taxpayers.

Other provisions take into account the assumed increased ability to pay that flows from economies of scale by aggregating the incomes of spouses and common law partners for the purposes of determining entitlement to tax credits. For example, the GST tax credit is intended to compensate low-income individuals for the regressive impact of the 7% GST. The credit is a refundable credit of \$227 for individuals. Because it is targeted at low income individuals, it is phased out by 5% of the individual's income over approximately \$30,000. However, the income of spouses and common law partners is aggregated for the of computing entitlement to the GST tax credit with the result that the amount they receive as a couple will be less than they received as 2 individuals.⁵¹ In addition, spouses and common law partners are only entitled to the basic GST credit, while in certain circumstances individuals may also receive an additional credit. As mentioned earlier, this reduction in the amount of the credit, is one of the reasons that the inclusion of lesbians and gay men as spouses resulted in a tax windfall for the government.

⁵⁰ Section 63 of the ITA.

⁵¹ The Law Commission of Canada noted that the "GST credit received by each member of a cohabiting couple is reduced to about 65 percent of the amount that would be received by them as individuals", *supra* note 4 at 79-80.

There are several problems with taking economies of scale into account for the purposes of determining the amount of and entitlement to tax subsidies, or indeed subsidies of any nature. First, economies of scale arise in a variety of situations other than spousal or common law relationships. As the Law Commission of Canada noted, “even if consumption economies exist when individuals live together and share resources, and even if one takes the view that they should be taken into account in government transfers, conjugal cohabitation has become an increasingly poor proxy for the identification of such economies”.⁵² Many others such as students or good friends share accommodation and the associated expenses. The tax system takes no account of their economies of scale when determining entitlement to tax credits. In addition, individuals enter into all kinds of arrangements that produce economies of scale, such as car pooling, sharing a baby sitter for their children, recycling consumer durables by passing them on to a friend when new purchase are made. Again the tax system takes no account of these transactions. Given that it is virtually impossible to identify when household economies arise or to define the nature of the relationships in which they do arise, tax provisions should not be based on an assumption that such economies exist and enhance the ability to pay of spouses and common law partners.⁵³ There is another point to be made about provisions such as the GST tax credit which are directed at low income individuals and which result in an increased cost for spouses or common law partners. To the extent that we believe that the tax system should not affect our choice about whether to cohabit or not, the substantial cost of the loss of the GST tax credit, or the Canada Child Tax Credit may well influence taxpayer behaviour in this regard.

Conclusion

In this paper I have used the recent developments in Canada to extend the definition of spouse in the ITA to include lesbians and gay men as a catalyst to rethink why we take spousal relationships into account at all for tax purposes. In no way do I intend to diminish the remarkable struggle of lesbians and gay men for equality, but I would argue

⁵² Supra note 2 at 80.

⁵³ In this context it should be noted that the Law Commission of Canada recommended that the GST tax credit should not be reduced for those in spousal or common law relationships, supra note ?? at 82.

that the consequences of attaining spousal status for tax purposes are both classed and gendered in their impact. The result is a reinforcement of some of the existing inequities which privilege those with high incomes at the expense of those with low incomes. As I have demonstrated, the incentive for the government to make this change was strong. Not only did tax revenues for the government increase in amount, but the change also bolstered the ongoing policy of placing the responsibility for the economic security of citizens on the private family rather than the state. It is time that we reconsidered all the tax rules that take spousal status into account and ensure that they are in fact operating in an equitable manner and are based on sound tax policy principles.