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## TAX: WOMEN, WORK, AND FAMILY

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## TAX: WOMEN, WORK, AND FAMILY

*Ann O'Connell\** & *Kerrie Sadiq\*\**

### I. INTRODUCTION

Social attitudes towards childcare responsibilities have come a long way in recent decades. However, entrenched views on gender roles often mean that the maternal care of children is still seen as optimal. When women with children need or choose to work outside the home, either as an employee or in carrying on a business, inevitably the vexed issue of childcare expenses comes up. Most women consider whether there are subsidies or concessions available to at least partially offset the costs of such expenses, accepting the fact that the tax system does not allow for a tax deduction against any income earned from outside work.

In this essay, we challenge taxpayers, especially those who bear the cost of childcare (mainly women), to reconsider whether those expenses should be a tax deduction or whether it is appropriate to accept a system that offers what are generally considered, and labelled, concessions and/or subsidies. The objective of this essay is to revisit the arguments surrounding the tax recognition of such expenses and to make two basic points: First, using the jurisdictions of the United States, the United Kingdom, Australia, and Canada, we argue that the reasoning in the cases is flawed and gender-biased. Second, we argue that the tax theory relating to childcare costs is opaque, enforces stereotypical constructs of working women, and has not kept pace with the changing nature of the economy.

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This essay is inspired by Professor Kathleen Lahey's contribution in chapter 2 of *Feminist Judgments: Rewritten Tax Opinions*.<sup>1</sup> That chapter is a must read for anyone who has failed to appreciate the gender inequality in tax systems globally, and the taxation gender bias in the childcare system specifically. Her chapter provides an in-depth discussion of the Canadian decision of *Symes v. Canada*.<sup>2</sup> By contrasting the all-male majority judgment that denied the deduction with the minority judgment of the two women members of the court—Justice Claire L'Heureux-Dubé with whom Justice Beverley McLachlin concurred—Lahey provides an important example of the inherent bias that women face in the tax system. In particular, Lahey draws out the inherent bias that women face when decisions are made by men whose perceptions of “objective facts” are shaped by their own unconscious frames of reference.<sup>3</sup>

Justice L'Heureux-Dubé rejected the male view of childcare expenses and noted in her judgment that the “interpretation of a law may change over time in order to coincide with an altered and ever-changing societal context.”<sup>4</sup> She also noted that:

The [traditional interpretation] of “business expense” was shaped to reflect the experience of businessmen . . . . As a consequence, the male standard now frames the backdrop of assumptions against which expenses are determined to be, or not to be, legitimate business expenses. Against this backdrop, it is hardly surprising that child care was seen as irrelevant to the end of gaining or producing income from business but rather as a personal non-deductible expense.<sup>5</sup>

She went on to state that such expenses could be viewed as incurred in earning income. “The present world of business is increasingly populated by both men and women, however, and the meaning of ‘business expense’ must

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<sup>1</sup> Kathleen A. Lahey, *Feminist Judging for Substantive Gender Equality in Tax Law: Changing International and Comparative Constitutional Contexts*, in *FEMINIST JUDGMENTS: REWRITTEN TAX OPINIONS* 22 (Bridget J. Crawford & Anthony C. Infanti eds., 2017).

<sup>2</sup> [1993] 4 S.C.R. 695 (Can.).

<sup>3</sup> Lahey, *supra* note 1, at 38.

<sup>4</sup> *Symes*, [1993] 4 S.C.R. at 793.

<sup>5</sup> *Id.* at 798.

account for the experiences of all participants in the field. Child care is vital to women’s ability to earn an income.”<sup>6</sup>

The judgement by Justice L’Heureux-Dubé is unique in both its boldness and candor. In the opinion of the authors of this essay, it is also correct in its views on the deductibility of childcare costs. Further, it demonstrates how the position that many jurisdictions have taken can be seen to be flawed. Unfortunately, the majority judgment, delivered by Justice Frank Iacobucci on behalf of the seven male judges on the Canadian Supreme Court, which denied a deduction for childcare costs on the basis that the outgoing was considered to be personal or living expenses,<sup>7</sup> is a position taken by many other Western jurisdictions—a point we discuss below.

## II. GENDER-BIASED JUDGING

Courts in the United States in *Smith v. Commissioner*,<sup>8</sup> the United Kingdom in *Halstead v. Condon*,<sup>9</sup> Australia in *Lodge v Federal Commissioner of Taxation*,<sup>10</sup> and Canada in *Symes v. Canada*<sup>11</sup> have all held that the cost of childcare incurred to enable a parent to engage in paid work is not tax deductible. Each of the cases dealt with the particular statutory provisions of the relevant jurisdiction, but the cases have a common theme—they all held that the costs of childcare did not satisfy the nexus required for the expense to be deductible, or alternatively, were “private or domestic” in nature. In all but one of the cases, the taxpayer was a woman in the workforce. The cases were also generally concerned with business taxpayers rather than claims by employees, although the reasoning does not appear to turn on this distinction.

In the oldest of the four cases, the United States decision in *Smith v. Comm’r*, the petitioners were husband and wife, Henry and Lillie, who both

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<sup>6</sup> *Id.* at 698.

<sup>7</sup> *Id.*

<sup>8</sup> 40 B.T.A. 1038 (1939), *aff’d*, 113 F.2d 114 (2d Cir. 1940) (per curiam).

<sup>9</sup> [1970] 46 TC 289 (Eng.).

<sup>10</sup> [1972] 128 CLR 171 (Austl.).

<sup>11</sup> [1993] 4 S.C.R. 695 (Can.).

worked outside the home.<sup>12</sup> Consistent with a patriarchal view of society and demonstrating the inherent bias of a male judiciary, the Board of Tax Appeals (Board) noted that “the working wife is a new phenomenon. . . . The wife’s services as custodian of the home and protector of its children are ordinarily rendered without monetary compensation.”<sup>13</sup>

Flawed reasoning is evidenced in the Board’s attempted nexus between work undertaken in the home by a parent and work undertaken in the home by an employee. The Board stated, “There results no taxable income from the performance of this service and the correlative expenditure is personal and not susceptible of deduction. Here the wife has chosen to employ others to discharge her domestic function . . . .”<sup>14</sup> The latter sentence suggests that, while the taxpayers were husband and wife, it was the wife who should be considered the claimant.<sup>15</sup> It further suggests that the “choice” of the wife to undertake paid work as well as her domestic responsibility for the household should be taken into account in determining the deductibility of the expense.<sup>16</sup> In essence, childcare expenses were considered inherently personal. The decision was affirmed without an opinion by the Court of Appeal for the Second Circuit.<sup>17</sup> Subsequent to this decision, a limited deduction for childcare costs was allowed in the United States, but this was later replaced with a tax credit.

*Halstead v. Condon*, a United Kingdom case, differs from the other cases discussed in the fact that the taxpayer was a widower who was left with the sole responsibility of raising his two children after his wife passed away.<sup>18</sup> The contrast is not so much the different gender of the taxpayer. Nor is it the High Court’s decision, which found that the “expenditure was not ‘wholly, exclusively and necessarily’ incurred in the performance of the [taxpayer’s]

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<sup>12</sup> *Smith*, 40 B.T.A. at 1038.

<sup>13</sup> *Id.* at 1039.

<sup>14</sup> *Id.* (citation omitted).

<sup>15</sup> *See id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Smith v. Comm’r*, 113 F.2d 114 (2d Cir. 1940) (per curiam).

<sup>18</sup> *Halstead v. Condon* [1970] 46 TC 289, 289 (Eng.).

duties” on the basis that it had nothing to do with the way he performed his duties as a clerk for the council.<sup>19</sup>

Rather, it was the decision on appeal of the General Commissioners that is most insightful.<sup>20</sup> The General Commissioners initially allowed a deduction on the basis that, had childminders not been employed, the taxpayer could not continue his employment, clearly suggesting that the taxpayer had no choice.<sup>21</sup> The General Commissioners went so far as to distinguish the earlier decision of *Bowers v. Harding*, which had held that childcare expenses were not deductible on the basis that taxpayers who were husband and wife had an alternative (presumably that the wife undertake the relevant tasks).<sup>22</sup> Whereas in the current case the only option for the taxpayer was to give up his employment.<sup>23</sup> However, Justice Megarry, sitting in the Chancery Division of the High Court, was not persuaded that this made the expenses deductible.<sup>24</sup>

During the early 1970s, the Australian High Court was also asked to determine the deductibility of childcare expenses. In *Lodge v Federal Commissioner of Taxation*, consistent with other jurisdictions, a single judge of the High Court found that while the expenditure was incurred for the purpose of earning assessable income and was an essential prerequisite of the derivation of that income, its character was neither relevant nor incidental to the carrying on of the taxpayer’s business.<sup>25</sup> Justice Mason (who went on to become Chief Justice of the High Court) concluded:

Nevertheless its character as nursery fees for the appellant’s child was neither relevant nor incidental to the preparation of bills of cost, the activities or

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<sup>19</sup> *Id.* at 292 (citing Income Tax Act 1952, 15 & 16 Geo. & 1 Eliz. c. 10, sch. 9, para. 7).

<sup>20</sup> *See id.* at 291–93.

<sup>21</sup> *See id.* at 292–93.

<sup>22</sup> [1891] 3 TC 22 (Eng.).

<sup>23</sup> *Halstead*, [1970] 46 TC at 292–93.

<sup>24</sup> *Id.*

<sup>25</sup> *Lodge v Fed. Comm’r of Taxation*, [1972] 128 CLR 171, 176 (Austl.).

operations by which the appellant gained or produced assessable income. The expenditure was not incurred in, or in the course of, preparing bills of cost.<sup>26</sup>

In other words, the expense was not incurred in carrying on the relevant business activity.<sup>27</sup> Justice Mason also noted that he would have come to the same conclusion if the taxpayer was not carrying on a business but rather was an employee.<sup>28</sup> Twenty years after *Lodge*, a similar case was run and lost in *Symes v. Canada*, which Lahey details in her chapter.<sup>29</sup>

In each of the four cases, it is striking that the idea of “choice” is considered in the context of women choosing to enter the workforce and choosing to incur childcare expenses. Also, inherent in the decisions is the notion that it is a woman’s responsibility to run the household and that, by paying someone to do this, she is merely substituting her own obligations for unpaid labour with paid assistance. These notions go to two legal concepts considered in the cases. The first is the positive test of the requirement of a nexus between the incurring of an expense and the earning of income, while the second is the negative test of whether the expenditure is private or domestic. In relation to the positive nexus, the point made in several of the cases was that the payment for childcare put the taxpayer in a position to earn income rather than being incurred “in” earning income. This argument equates the cost of food and shelter—likely to be incurred whether the taxpayer works or not—with childcare. Although the courts were generally satisfied that the taxpayer could not work without incurring the expense (the “but for” test), they paid insufficient attention to the fact that the expense was incurred *only* because the taxpayer was in paid work. In this regard, it is possible to think of other deductions that allow the taxpayer to engage in paid work or to work more efficiently but are not directly related to the production of income. For example, attendance at conferences, self-education, and the hiring of secretaries and cleaning staff can be the bases of deductions not directly related to generating income.

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<sup>26</sup> *Id.*

<sup>27</sup> An alternative approach to the facts of this case is presented in Kerrie Sadiq, *Lodge v Federal Commissioner of Taxation*, in AUSTRALIAN FEMINIST JUDGMENTS: RIGHTING AND REWRITING LAW 90–97 (Heather Douglas et al. eds., 2014).

<sup>28</sup> *Lodge*, [1972] 128 CLR at 176.

<sup>29</sup> Lahey, *supra* note 1, at 36–37.

This suggests that there must be another explanation for the nondeductibility of childcare expenses: that the expenses are “private or domestic,” a negative test which excludes the deductibility of an expense if met. Private expenditures could be said to be those which relate to the taxpayer personally, while domestic expenditures could be said to relate to the taxpayer’s household. Again, the concept of “choice” is taken into account to characterize an expense relating to childcare as private or domestic expenditure on the basis that it reflects a choice made by the taxpayer and that it is necessarily family related. Needless to say, decisions about childcare are intensely personal, but that does not necessarily mean that the expense is private. What has not been considered is that the costs are only incurred because of the work-related activity, and not to allow the parent to engage in recreational activities.

### III. TAX POLICY RESPONSES

The response to the cases has varied but in general all jurisdictions have introduced measures to ameliorate the cost of childcare: sometimes through the tax system, sometimes outside of the tax system. However, none of the jurisdictions has addressed the decided case law by recognizing the cost of childcare as a legitimate tax deduction.

Tax policy that prevents a deduction for childcare costs is not only inconsistent with gender equality within the tax system, but also contradicts many social and fiscal policies that advocate for broad gender equality and center on ensuring women are able to participate in the workforce without bias. To a limited extent, this has been recognized via a variety of legislative responses. In the context of childcare costs, responses range from those that are reliant on the tax system (e.g., rebates and offsets) to those that are regulated outside the tax system and consist of a direct subsidy or the provision of childcare centers. In some countries, assistance has taken the form of tax relief to the taxpayer (a limited deduction in Canada, a tax credit in the United Kingdom and United States) or the employer (Australia) or direct subsidies paid to the parent (Australia pre-July 2018) or childcare provider (Australia post-July 2018). Even when the tax system has allowed relief, this has generally been means tested and capped. However, all jurisdictions have stopped short of recognizing that the cost of childcare is incurred in earning assessable income either as an employee or in carrying on a business.



The measures introduced suggest that the theoretical basis for the provisions is to provide a tax subsidy to assist low-income earners to join or remain in the workforce, rather than a recognition that the cost of childcare is a cost of working. The use of credits and the imposition of means testing and caps on relief also reflect a view that the provision of a deduction for childcare would benefit women with high incomes, presumably at the expense of all other working women. However, the same argument could be made about all deductions, yet there is no argument that when business taxpayers travel for work they should only claim the cost of “reasonable” hotels, or that there should be some other cap on the deduction.

There may also be an unstated reason underlying the decisions, namely the possible impact on the tax base of allowing such a deduction. This is not a valid reason for denying a deduction for an expense that is clearly a cost incurred in earning income, and moreover, one that disproportionately impacts the female population. Another argument for the limitations on relief is that there is no need to encourage high income earners into the workforce. On the other hand, the cost of childcare might be a real deterrent to women with lower incomes. Again, this reflects the view that such measures are about subsidies rather than recognition of the cost of working, especially for women.

In considering the issue of tax recognition of childcare costs, it is useful to consider three basic propositions:

1. Women are less likely to be in the paid workforce than male counterparts (although the statistics have improved over the past 50 years);
2. Women earn less than their male counterparts; and
3. Society expects women to bear the primary responsibility for childcare.<sup>30</sup>

It could therefore be argued that women deserve to have the true cost of childcare recognized by the tax system. The cost of such a measure would of course be significant, but that should not preclude a reassessment of the

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<sup>30</sup> EILEEN GREEN ET AL., CTR. FOR SOC. & POLICY RESEARCH, BARRIERS TO WOMEN'S EMPLOYMENT AND PROGRESSION IN THE LABOUR MARKET IN THE NORTH EAST OF ENGLAND 4 (2004), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.455.9113&rep=rep1&type=pdf>.

current position which fails to accept the role and significance of women in the workforce and the constraints imposed on them by societal expectations.

#### IV. CONCLUSION

In Australia, it has been nearly fifty years since a single judge held that the cost of childcare was not deductible to a single mother even though he found that she could not have worked without incurring childcare expenses. In 1972, only 39.5% of Australian women between the ages of twenty-five and sixty-four were in the workforce, compared to 60.5% of Australian women participating in the workforce in January 2018,<sup>31</sup> but this still remains lower than the male participation rate. In 2017, the Australian government launched a strategy to meet Australia's G20 commitment to reduce the gender participation gap by 25% by 2025.<sup>32</sup> Although the strategy refers to the importance of childcare and the impact of tax on decisions by women about whether to work, the strategy does not address the possibility that such costs be treated as deductible. We suggest it is time that such a proposition was given serious consideration.

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<sup>31</sup> Press Release, Austl. Bureau of Statistics, Female Labour Force Participation Reaches All-Time High (Feb. 15, 2018, 11:30 AM), <http://www.abs.gov.au/ausstats/abs@.nsf/lookup/6202.0Media%20Release1Jan%202018>.

<sup>32</sup> DEP'T OF PRIME MINISTER & CABINET, COMMONWEALTH OF AUSTL., TOWARDS 2025: AN AUSTRALIAN GOVERNMENT STRATEGY TO BOOST WOMAN'S WORKFORCE PARTICIPATION 5 (2017), <http://womensworkforceparticipation.pmc.gov.au/sites/default/files/towards-2025-strategy.pdf>.

