ELIZABETH SYMES V. REGINA 1993
A CASE STUDY OF FEMINIST JUDICIAL ACTION IN CANADA

LORI LEE OATES

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ELIZABETH SYMES V. REGINA [1993]

A CASE STUDY OF FEMINIST JUDICIAL ACTION IN CANADA

by

LORI LEE OATES

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Dedication

In Memory of my Grandmothers

Rita Cady Oates,

whom I did not have the good fortune to know

and

Elizabeth Bavis O'Leary,

who gave me my interest in politics.

If judicial objectivity means ignoring the context within which litigants stand or assuming that they live within the judge's social context, then perhaps we ought to rethink its value in our society.

Supreme Court Justice Bertha Wilson

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List of Abbreviations

CACSW	Canadian Advisory Council on the Status of Women
ERA	Equal Rights Amendment
ITA	Income Tax Act
LEAF	(Women's) Legal Education and Action Fund
NAC	National Action Committee on the Status of Women
NAWL	National Association of Women and the Law

Abstract

The question of how resources should be allocated between the sexes is an old one, and one that Canadians have often taken to the courts for resolution. The constitutional entrenchment of the Canadian Charter of Rights and Freedoms, in 1982, made it possible for the judiciary to take an even greater role in the debate over equality rights. In late 1993, Symes v. Regina came before the Canadian Supreme Court and brought gender equality rights to the forefront of public policy debate once again.

Practising lawyer Elizabeth Symes argued that by not allowing the cost of her day-care as a tax deduction, the federal government was in violation of her equality rights. Day-care costs, she claimed, were a cost of doing business. The National Action Committee on the Status of Women publicly opposed her position, fearing that if she won, the only women to benefit would be those whose earnings required them to pay income tax. The Canadian Bar Association, however, defended Symes' position on the grounds that if day care were a cost of doing business, it would facilitate the entry of women into the legal profession. The Ministry of National Revenue argued that the issue at stake was one of tax law, not equality. The majority of the Canadian Supreme Court agreed with the government's position -- that is the male majority of the Canadian Supreme Court agreed with the government. Given that the two female members of the Court had dissented from the opinion of their male counterparts, there was an accusation that if the judiciary

was less male dominated, then women's rights cases would fare better in the courts.

This case, which blatantly divided lawyers, feminists, and the Canadian Supreme Court, is perhaps the best example in Canadian history of the political questions which are often raised by feminist judicial action, the women's movement, and male domination of the legal profession. While the specific issues of the case have been dealt with by the courts, the more general questions which it raised will undoubtedly be with us, as a society, for a very long time. If there is a lesson to be learned from Symes v. Regina, it is that Canadian women can not depend on the courts alone in order to improve their status in relation to men. Now that there is a constitutional guarantee of equality in place, it is more important than ever that women's rights advocates continue to push for more female representation in all branches and all levels of government. Even though a provision for equality rights has been put into writing, it remains the responsibility of every Canadian citizen to ensure that the courts properly enforce this principle.

CHAPTER 1.0

The context of

Symes v. Regina[1993]

The objective of this thesis is to do an analysis of the political, social, and economic issues which were raised by the Canadian Supreme Court case, Elizabeth Symes v. Regina[1993]. As this case is an excellent example of feminist judicial action within the Canadian political system, this thesis will investigate some of the societal issues which face the Canadian women's movement, and also Canadian women in general when feminists decide to use the courts for the advancement of women. However, words like feminist or feminism can be interpreted to mean different things to different readers. Consequently, this thesis will begin by examining various definitions of these concepts.

1.1 The definition of feminism

"Feminism is derived from the Latin *femina*, which means woman or female". However, in modern usage, "... the word feminist is a label for certain ideas, or people who hold such ideas". The word generally refers to an ideology and as its Latin root suggests, "...the ideology is centred on the position of women in human society..." (Dickerson and Flanagan 1994, p.158). Some consider feminism a relatively new ideology, but this is not entirely the case. Like other ideologies such as liberalism, socialism, conservatism, and nationalism, feminism has its roots in the seventeenth century and belongs to the family of ideologies produced by the French Revolution (Dickerson and Flanagan 1994, p.158).

Bryson (1992) however argues that, "The term 'feminist' first came into use in England during the 1880s, indicating support for women's equal legal and political rights with men. It's meaning has since evolved and is still hotly debated" (p.1). Of course, as with any ideology the proponents of feminism often diverge:

> Like other ideologies feminism is a family of belief systems with certain concerns and ideas in common but with many internal differences. The central concern is easily stated: Whatever their other disagreements, all feminists begin from the belief that society is disadvantageous to women, systematically depriving them of individual choice, political power, economic opportunity, and intellectual recognition. Within this broad perspective, there are many schools of thought about the causes of this situation and remedies for it (Dickerson and Flanagan 1994, p.159).

As a result of the fact that feminists don't always agree on the causes of inequality or how to achieve equality for women, there are a number of different kinds of feminism. These include liberal, socialist, Marxist and radical feminism, as well as the less well known cultural, maternal and post modern feminism. Liberal and left wing feminism came into existence during the late eighteenth and early nineteenth centuries. Once this occurred, accounts of unequal rule which had been written by the less powerful appeared in public discourse for the first time. Liberal feminists concentrated on the concept of equality and on the goal of equal citizenship, such as the right to participate in the political process. Socialist feminists argued that eradicating the social and economic subordination of women would aid in the formation of a new society. In Marxist feminism, the "woman question" was understood as something that could be resolved only after capitalism had

been transcended. Marxist feminists also believe that class best accounts for women's condition. By the late nineteenth and early twentieth centuries, North American women struggled to achieve the right to vote and advanced what has been called maternal feminism, arguing that their experiences as mothers would bring a new quality to politics (Vickers 1997, pp.89-90).

Obviously societies change over time and as they do, so do ideologies. For example, radical feminism is very much a product of the twentieth century. "After the Second World War a new form of feminist activism emerges that is still influential today. It's difference lay in being mobilized by a radical form of feminist thought that asserted that gender and sexuality were at the core of women's oppression" (Vickers 1997, p.90).

For the purpose of providing a general definition of feminism women's studies writers have generally been able to find commonalities among the different schools of thought. Bryson (1992) defines feminism as, "...any theory or theorist that sees the relationship between the sexes as one of inequality, subordination or oppression, that sees this as a problem of political power rather than a fact of nature, and that sees that problem as important for political theory and practice" (p.2).

According to Mandell and Duffy (1988), "Feminists are individuals who recognize the importance of (1) understanding women's life experiences, and (2) working towards fuller lives for women (and men)" (p.vii). Randall (1994) says that:

> ...at a minimum feminism involves four assumptions: that women are important; that they have been systematically subordinated to

> male power and interests (although different brands of feminism would formulate this differently); that this subordination has in some sense been rooted in the sexual division of labour within the family; and that it is unacceptable (p.6).

For the purposes of this thesis, feminism will be defined as an ideology regarding the position of women in society. The most central belief is that women are disadvantaged in relation to men. Feminism also holds that women are systematically deprived of political and economic power, and intellectual recognition. Furthermore, women are in a position of subordination and oppression which leaves them with fewer individual choices than males. Finally, feminists believe that this subordination is political rather than biological and that eradicating the subordination of women can create better lives for men and women.

Two concepts which frequently arise in this discussion of feminism are that of *sex* and *gender*. Like feminism, these are concepts which are open to a variety of interpretations. Vickers (1997) states that:

> Sex identifies biological characteristics. They are differently expressed in different places and time... How sex is experienced also varies according to such things as class, race and sexual orientation. Gender describes the social behaviours and roles societies (and grows within them) assign to men and women because of their sex. The characteristics of gender therefore, also vary across cultures and time, although there are some commonalities. That women bear children is a dimension of sex; that they are assigned responsibilities for child rearing is dimension of gender (p.25).

Vickers combines the concepts of sex and gender and refers to them jointly as sex/gender. However, the above definitions will be used for the purposes of this thesis.

1.2 The method of analysis

This thesis is intended to be a social scientific investigation and the case study method of analysis will be used. For the purpose of analysis it has been divided into six chapters. The first introductory chapter discusses methodology, provides background on some of the public policy issues which relate to women, and generally establishes Symes v. Regina as a legitimate topic for investigation within the fields of political science and women's studies. Chapters Two through Five are discussions of some of the more specific public policy issues which were raised by the case such as equality rights, day-care, and income tax law. Finally, Chapter Six covers the conclusions which can been drawn after examining the questions which were raised by this case study.

As a word of caution to the reader, this thesis should not be considered to provide legal analysis. The issues covered within are those which are common to such fields as the social sciences and humanities. The major sources which have been consulted include newspaper and magazine articles, feminist newsletters and journals, and social science texts. However, some of the sources more commonly used within the field of law have also been researched. These include legal journals and periodicals, and of course the written text of the Supreme Court decision in Symes v. Regina[1993]. What this thesis will

not include is primary research of the texts of all the Canadian Supreme Court cases relating to women and the constitution, tax deductions for business persons, or human rights in general. Such research would more appropriately be presented by a student of law.

1.2.1 Social scientific investigation

Generally the purpose of social scientific investigation is to search for patterns in society. "Although social scientists often study motivations that affect individuals, the individual per se is seldom the subject of social science. We do not create theories about individuals, only about the nature of group life" (Babbie 1992, p.32). For instance, this thesis will examine the behaviour of the judges or feminists within a prescribed area of analysis, that area being Canada.

Social science attempts to measure social behaviour using methods of statistical analysis which are similar to that of the physical sciences. "Ultimately, social scientific theory aims to determine the logical and persistent patterns of regularity in social life. Lying behind that aim is the fundamental assumption that life *is* regular, not totally chaotic and random. That assumption of course, applies to all science..." (Babbie 1992, p.32). Of course the physical sciences can generally create more controlled laboratory conditions than those which are available to a social scientist so, "...it would appear that the subject matter of the physical sciences is more regular than that of the social sciences" (Babbie 1992, p.28).

Since the end of the Second World War there has been a movement towards using the social scientific method of investigation, with greater emphasis on systematic explanation, whereas previously emphasis had been on description. In the field of political science this has meant greater emphasis on explaining political behaviour rather than emphasis on describing political institutions (Babbie 1992, p.40). However, it is often the case that the groups being studied are also political institutions, or frequently operate within them. For instance, judges constitute the institution of the Canadian judiciary and it various courts. Some feminists belong to feminist political action groups, some of which have become such a prevalent feature of the Canadian political system, that they are considered institutions. For this reason both description and social scientific analysis is required in this thesis.

1.2.2 The case study method of research

In this thesis there will be both description and systematic analysis using the case study method. Case studies fall into the category of social scientific investigation which is typically referred to as field research. "..field research offers the advantage of probing social life in its natural habitat. Although some things can be studied adequately in questionnaires or in the laboratory, others cannot. And direct observation in the field lets you observe subtle communications and other events that might not be anticipated or measured otherwise" (Babbie 1992, p.288). As will be discussed, there is lack of

quantitative data available regarding the behaviour of women judges for the simple reason that there are so few women judges in the Canadian judiciary. However, Symes v. Regina[1993] provided an excellent opportunity to describe the differences between the behaviour of men and women judges of the Canadian Supreme Court because it divided along gender lines in its decision.

Often, field studies involve researching the activities of people. "The subject of a field study may be specific examples of behaviour. This is the narrowest angle for a study. If the actions become routinized so that they occur over and over again, then they become an activity" (Baker 1988, p.235). For the purposes of the thesis we are examining the behaviour of the Canadian Supreme Court and its agreement or disagreement with the feminist perspective of a practising woman lawyer. Also we are examining the action which feminist political action groups are likely to take, and the policies which they are likely to support. "Generally, field studies are concerned with studying people. In any field, there are people in it who belong to that field, and others who are only visiting or who are outsiders to it. What is most socially interesting about people are the complex types of relationships they have with one another" (Baker 1988, p.234). In this case, the persons who belong to the field of the Canadian Supreme Court are the judges, while the lawyers and interveners are the visitors to that field.

Field researchers must take the role of either a participant, an observer, or some combination of both. "...field researchers need not always participate in what they are

studying though they usually will study it directly at the scene of the action. Raymond Gold... has discussed four different positions on a continuum of the roles that field researchers may play in this regard: complete participant, participant-as-observer, observer-as participant, and complete observer" (Babbie 1992, p.228). For practical reasons, the researcher in this case will be a complete observer. Only a Supreme Court of Canada judge or one of the lawyers involved in the hearing of the case would be able to claim that they were providing analysis as a complete participant. Since analysis began after the Canadian Supreme Court's decision on the case had already been handed down, it was impossible to participate as an observer or even observe as a participant during the hearing of the case. Instead the observation must come from reading the text of the actual decision, news reports, or scholarly journals. A complete observer is arguably the least intrusive of field researchers:

> The *complete observer*... observes a social process without becoming a part of it in any way. Quite possibly, the subjects of study might not realize they are being studied because of the researcher's unobtrusiveness... Although the uncomplete observer is less likely to affect what is being studied and less likely to "go native" than the complete participant, he or she is also less likely to develop a full appreciation of what is being studied. Observations may be more sketchy and transitory (Babbie 1992, p.289).

Whether the researcher takes on the role of participant, observer, or both, it is always necessary for him or her to have some basic knowledge about the field of study. For instance, it would be pointless for a researcher to study a constitutional law case without first having some understanding of how the Canadian legal system works. It is necessary for the observer know something of the language that is used in the legal profession. "Clearly a field researcher needs to be very knowledgeable about the scene under study so that the behaviour can be accurately understood... What may be important in field research is that we understand the field we are viewing well enough that we are able to comprehend what we see. This can be done by trying to put yourself into the environment" (Baker 1988, p.235).

There can be both micro-level and macro-level of analysis. For the purposes of this thesis both micro-level and macro-level of analysis will be used. This means that the analysis focuses on the qualitites or actions of individuals, but also on the larger social structures or patterns of social relationships (Baker 1988, p.4). However, for the most part, the analysis will be macro-level. The micro-level analysis will examen the behaviour of certain individuals who are moving within the broader social structure such as Elizabeth Symes. The Macro-level analysis will examen the written decision of the Canadian Supreme court majority and minority in this case. There will be examination of the institutions referred to as the Canadian Supreme Court and the Canadian judiciary in order to provide a broader perspective on the case. Also the actions of feminist political action

groups such as the Women's Legal Action and Education Fund or the National Action Committee on the Status of Women, will be discussed.

Baker (1988) defines a case study as, "Observational studies of a single environment (an organization, a neighbourhood, a public place). Field research is often based on a single case study" (p.462). The case study method serves a practical purpose in scientific research. " Some methodologists refer to group observational studies and field research under the heading *case studies*... Because *observational studies* in a field tend to be intensive and time-consuming, the researcher often narrows research to a single field" (Baker 1988, p.299). If one were to study the entire body of law regarding equality rights that research would yield a very different type of information. It would give us a picture of the current legal status of women in this country. However, this thesis attempts to determine *why* the legal status of women exists as it currently does in Canada. Making that determination requires examining the political, social, and economic factors which affect the legal status of women. The case study method provides rich data regarding a number of factors that come into play when judges are making decisions on such issues. Political institutions do not exist in a vacuum, and this thesis examens the context in which the judiciary exists, with probing in-depth analysis of one particular case.

1.2.3 The women-centred perspective

As will be discussed, the fields of politics, law, and political science have consistently been dominated by men throughout history. This practice of excluding the female perspective has been rooted to the beginning of political science as a discipline in ancient Greece. "Canadian Mary O'Brien (1981) demonstrates that the separation of women from politics and government had already taken place in the Greek city states of the fifth century B.C. and was legitimized by the writings of theorists such as Aristotle" (Vickers 1997, p.24). Feminists argue that this pattern of excluding women has continued:

> Conventional political institutions and ideologies were created by men in an era of strict demarcation between the political and domestic spheres. Political parties, courts, bureaucracies, and legislatures all developed in a context in which women were legally excluded as political actors, being largely restricted to domestic roles. Thus, throughout the past century, women have had to search for ways to participate in institutions created by men and for men and structured in ways consistent with the life circumstances of a small strata of dominant men (Vickers, Rankin, and Appelle 1996, p.xi).

Harding (1994) echoes the argument that political theory has been developed for the most part by men and without the benefits of women's input or experiences. "...it has never been women's experiences that have provided the grounding for any of the theories from which we borrow. It is not women's experiences that have generated the problems that these theories attempt to resolve, nor have women's experiences served as the test of the adequacy of these theories" (p.17). Today most universities have women's studies programs, and most political science departments offer courses in feminist political theory,

but this sort of analysis is a long way from being part of the mainstream curriculum.

In order to explain why this exclusion of women from politics and political science continues today, Vickers (1997) has introduced what she refers to as the women-centred perspective:

> ...political science needs to be reinvented through a major infusion of insights that come from viewing politics and government from a *women-centred perspective*. Women are still much less likely than men to be ministers, judges, generals or senior bureaucrats... They are more likely to be the ruled than the rulers, the judged than the judges. A similar situation prevails in the main institutions of *civil society*... The difference has given women a perspective on official politics that comes from the bottom up and the outside in. And although the situation is changing – quite slowly in some countries, more quickly in others – the **paradigm** within which political science works reflects the many centuries when politics and government were male activities (p.9).

Every discipline works within its own paradigm and academia, like politics, has been male dominated. Consequently, most disciplines generally work within a paradigm which fails to recognize patriarchy. Politics has also been male dominated and this lack of recognition of the female perspective has definitely been absent from political science."From a woman-centred perspective, the central problem with the political science paradigm is that it fails to recognize the fact that all state-based political systems are **patriarchal** – that is, in no country in the world are women equal participants in the institutions of the state or equal beneficiaries in its distribution of power or in the norms and values sanctioned in law and enforced by those institutions" (p.30).

Vickers (1997) argues that the reason women remain on the periphery of politics and political science is that they continue to operate within a paradigm which considers the absence of women from government as normal:

> The central reason political science accepts women's exclusion from or marginalization in government and the politics of the state as almost natural is that the paradigm has embedded within it the centuries-old conception that women should be limited to the private sphere and excluded from the public one because they lack the independent rationality believed to be needed for political decision-making. This idea was challenged by subsequent theories and by women's activism, which gained them the right to vote. But when women were admitted to citizenship it was on the same basis as men, not as *sexed and gendered women*. Most women's lives differed from most men's, however, making it possible for only a few privileged women to gain political power. Because women have had to act like political men to participate in political decision-making, their presence has effected little change in how political systems work. And although women are by far the largest group of people excluded this way..., political science is little interested in the phenomenon that it can explain only with theories of women's disinterest or their 'deviance' from male norms (pp.30-31).

This thesis provides critical analysis from the feminist perspective and absolutely takes into consideration that political institutions are dominated by men. While much of the information available was not written with a women-centred perspective in mind, a great deal of feminist literature has been consulted.

1.3 Related feminist political action

Chapter Two is titled Related Feminist Political Action in Canada, and provides a discussion of some of the issues which consistently face the women's movement in

advancing the status of women through litigation. It also describes some of the history of the women's movement in Canada. The practice of Canadian women taking their concerns to the courts is not a new one. One of the earliest and best known examples of feminist judicial action is "The Persons Case". "In 1928, the Supreme Court of Canada decided that women were not "persons" who could be summoned to sit as senators. The women who had brought the case to the Supreme Court appealed its judgement to the Judicial Committee of the Privy Council in London, England, where a favourable ruling was secured on October 18, 1929" (Atcheson, Eberts, and Symes 1984, p.12). Apparently, the Supreme Court of Canada's practice of ruling against women's groups is also not a new one.

The period of the analysis in Chapter Two begins in 1960 with the passage of the Canadian Bill of Rights by the Diefenbaker Parliament. This chapter also describes the evolution of the Canadian judiciary's interpretation of gender equality rights prior to the constitutional entrenchment of women's rights in the Canadian Charter of Rights and Freedoms[1982]. Also discussed is the involvement of the Canadian women's movement in the lobby for an improved guarantee of equality during the constitutional talks of the early 1980s. This chapter provides the political and historical context in which Symes v. Regina[1993] was brought to the courts. It attempts to answer the question of where the women's movement in this country should be focussing its resources -- within the legislative or judicial branches of government.

The consensus among feminists, across Canada, appears to be that it is important to respond to litigation which threatens legislated protections of women. However, they also believe it is extremely important for women to bring legal action on behalf of women. Furthermore, despite the constitutional protections provided in the Charter, they also continue to lobby within the legislative arena:

> ...women have not chosen the courts as the sole forum in which to seek advancement of their equality. Women are pressing governments actively and continually for improvements in laws and programs. Nor can women conclude from their experience that governments provide a better forum for their concerns; after all, governments, like the courts, are unrepresentative and too often unresponsive to women's needs. Because women's disadvantage is so entrenched, women do not have the luxury of choosing one forum over the other. The full support of both governments and the courts is needed for women to take their rightful place in Canadian society. Women must press for change in both arenas (Brodsky and Day 1989, pp.3-4).

Feminists in this country typically argue in favour of the banding together of Canadian women into political action groups. This is an argument which was made by Elizabeth Symes herself during the process of preparing for the institution of the equality rights provisions in the Charter. "History has taught us that it is in women's best interests to form coalitions to fight for our rights because if we leave it up to the individual woman to defend her rights, we will get ad hoc results which may well be losses" (Symes and Day 1985, April: p.18). Elizabeth Symes repeated her belief in this particular course of action, before bringing her own case by actively participating in the formation of the Women's

Legal Education and Action Fund, a legal defence fund for Charter challenges which involves itself with equality rights litigation on behalf of Canadian women.

Also provided in this second chapter is a history of Symes v. Regina[1993]. Perhaps the most controversial argument put forth was that of the National Action Committee on the Status of Women. This organization publicly held the position that a win for Elizabeth Symes would benefit only upper class, self-employed lawyers. In discussing this issue, the chapter will critically examine claims that the feminist movement is elitist and consistently unresponsive to the needs of working class women.

1.4 Constitutional equality rights

Chapter Two will also discuss the charge that women's rights are and have been undermined in this country by a white male dominated elitist judiciary. Some feminists argue that the increased involvement of the courts in human rights debates, since the institution of the Canadian Charter of Rights and Freedoms[1982], has had negative consequences for the rights for women. Such critics claim that men have been using the Charter to strike down laws which are beneficial to Canadian women.

As will be discussed in Chapter Two, contemporary feminist literature in this country argues that many of the challenges which have been brought have had the effect of striking down legislated protections such as the Rape Shield Laws and Unemployment Insurance benefits for women who have recently given birth to a child. These are benefits

which attempt to meet the special needs of women which occur as a result of biological differences between the sexes. Women rights activists have put a great deal of resources into gaining such benefits by lobbying in the legislative arena. However, as will be discussed in chapter two, the courts do not view women as disadvantaged and are presently treating gender equality claims as if both groups have already achieved equality.

However, no concept exists in a vacuum. The way in which the judiciary interprets equality is partially determined by the social context in which the judiciary exists. The judiciary is an institution in which decisions are made by human beings. As was stated by feminist writer Audrey Doerr, "beyond judicial interpretation, social and economic factors will also impinge on the meaning and relevance of women's rights as expressed in the Charter. It is one thing to have rights entrenched in a constitution, it is another to exercise those rights in any particular socioeconomic context" (1984, 9[2]: p.37). This theme from Chapter Two, is expanded on in the next chapter, which explains that there are a variety of ways for the judiciary to interpret concepts such as equality and discrimination.

Titled Constitutional Equality Rights, Chapter Three moves from the general topic of feminist political action to the specific constitutional issues which were involved in Symes v. Regina[1993]. The chapter begins by describing the evolution of the concept of equality, and the various approaches to protecting equality and civil rights. The facts and issues of Symes v. Regina[1993] will be discussed as they were viewed by the Canadian

Supreme Court. Also, the application of constitutional equality rights in this particular case, by the Canadian Supreme Court Justices, will be provided in detail.

Elizabeth Symes claimed that by not allowing the full deduction of her nanny's salary, as a cost of doing business, the federal government had violated her constitutional right to gender equality under section 15 of the Charter. Chapter three discusses the opinions of both the male and female judges in relation to the Charter issues and reveals what is perhaps the most interesting aspect of this case -- the division of the highest court in the land along gender lines, with the male members of the Court opposing the position taken by Elizabeth Symes, and the two female members of the Court deciding that day-care costs should be tax deductible as a cost of doing business. The question arose as to whether the gender composition of the Canadian Supreme Court could possibly account for their differing opinions. In examining this issue, the question of whether or not the opinions of female judges are generally different from the opinion of their male counterparts. However, since there are few women judges, compared to the number of male judges, there is an unfortunate lack of quantitative empirical data to aid us in answering this question. This lack of information tells us that there is a need for research on the alleged differences between the opinion of male and female judges.

This particular case also brought the judiciary into the realm of dealing with those factors which affect women's entry into the legal profession. Obviously, there are many forces that determine whether or not women chose to enter, or if they will be accepted by

the field of law. Undoubtedly, some of those factors are social, as well as economic, and this thesis will attempt to address the question of the roles that economic factors and social conditions play in determining whether women enter the paid labour force, and specifically, whether or not they enter the field of law. The issue of how the distribution of wealth in this country affects the roles that women play in our society goes to the very heart of what lawyers were arguing in this case. The women's movement has consistently argued that:

> Women are more likely to be poor than are men. Much of women's poverty is linked to the labour market; because they experience low wages and unstable employment, their incomes are lower than men's. But women's poverty is also associated with numerous other factors, especially their unpaid domestic and child-care work as mothers and wives (Gunderson and Muszynski 1990, p.3).

1.5 Day-care and women in the paid labour force

One of the purposes of this thesis is to establish that a link exists between social conditions and women's entry into the paid labour force. Understanding it requires, among other things, a knowledge of day-care in this country. Chapter Four, titled Day-care and women in the paid labour force, explores the general history of women's entry into the paid labour force after the industrial revolution, and the consequent evolution of day care in the modern industrialized world[1]. Evidence will be presented to show that in Canada it

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[1]The concept of the modern industrialized world, for the purposes of this thesis, refers to Canada, the United States, and the industrialized countries of western Europe.

is typically females who are responsible for the care of children. As a result of many factors in this society, the roles which women play in child bearing and childcare limit the amount of time they can contribute to the paid labour force. Evidence was presented in Symes v. Regina[1993] in an attempt to prove this argument. The information provided to the Canadian Supreme Court by Dr. Patricia Armstrong will be discussed in Chapter Four.

This chapter will also discuss topics such as availability and afford ability of childcare in this country, and the consequences for the status of Canadian women. Historically, there has been a relationship between the availability and afford ability of day-care, and the roles played by women in any particular society. For instance, in the United States during the 1940s, "...a wartime economy opened millions of high paying industrial jobs to women, and governments even began to offer minimal day-care and housing assistance" (Faludi 1991, pp.51-52). The situation has been similar in communist countries such as the former Soviet Union:

> Quickly after coming to power, communist governments legislated legal equality between men and women and also made efforts to destroy 'the monogamous family as the economic unit of society'. Women were encouraged, indeed virtually required, to take paid employment outside the home. Inexpensive and publicly operated day-care facilities were made easily available to facilitate women's entry into the labour force (Dickerson and Flanagan 1994, p.165).

It seems to be a universal trend that when females are needed in the work place, governments find a way of providing for the care of their children.

The availability of day-care is increasingly relevant to the status of women in the western industrialized world. Equally relevant are the number of households which are headed by women. All over the world, families that are run by single mothers are usually among the poorest:

> ...women's poverty also springs from the complex interplay of factors such as divorce and separation and their unique roles as mothers, homemakers, care givers, and nurturer. These social factors place limitations on the paid work that women have been offered or permitted to do, and they are one explanation given for the discriminatory practices of employers (Gunderson and Muszynski 1990, p.9).

As was stated by Gunderson and Muszynski (1990), "The segregation of women into lower-paying occupations is also an important reason for their low pay relative to men's" (p.93). This phenomenon is referred to as the feminization of poverty:

> The term "feminization of poverty" was first used by Diana Pearce in 1978 to describe a basic condition that was emerging in the United States (and Canada) over the 1970s. Women were entering the labour force in increasing numbers, they were the supposed beneficiaries of affirmative action policies and strategies, and they were making significant inroads in the professions. Yet the number of women in poverty was also increasing, and at a much greater rate than for men (Gunderson and Muszynski 1990, pp.8-9).

In this country parents are forced to cope with a lack of available day-care by leaving their children in informal day-care situations which they consider to be less than adequate. The government already plays a role in this area by establishing provincial standards which must be met by day-care centres before they open for business. However, many feminists would argue that governments do not do nearly enough to ensure that the

adequate number of spaces to care for children are provided. As a result, the women's movement lobbies government for better day-care arrangements of all kinds, especially a universal day-care system at the national level.

1.6 Income tax law

Chapter Five, titled Income Tax Law, will set the Symes case in its economic context with a discussion of Canadian taxation law, specifically examining relevant sections of the Income Tax Act. The argument will be made that in the Canadian political system it is often women who are the losers in an elitist, out of date, regressive taxation system. Class discrimination is present and the growing number of women who are of low economic status are the greatest losers of all. As was pointed out in the discussion of Chapter Four, families that are headed by single women tend to be among the poorest and discriminatory taxation practices add to the burden. To prove that class discrimination does in fact exist, current taxation regulations will be examined. For example, the fact that self-employed individuals were able to deduct 80 percent of their entertainment costs as a business expense will be discussed at the time of the Court's hearing of Symes v. Regina[1993].

Elizabeth Symes' claim that it is mainly women who bear the social costs of day-care in this country, was fully accepted by even the male majority of the Supreme Court. Yet the majority also ruled that Symes did not also establish that it is mainly women who

bear the economic costs of day-care. The majority decision left open the possibility that a woman of lower income with a different evidentiary focus might bring a successful court challenge. It is however the position of this thesis that a tax deduction is not the most effective way to help low income parents. This thesis will also argue that the Income Tax Act should continue to come under scrutiny as a document which was written mainly by elite white males and which does not meet the needs of working class families in Canada.

1.7 Conclusion

This thesis will provide a social scientific investigation of some of the social, political, and economic issues relating to the Canadian Supreme Court case Elizabeth Symes v. Regina[1993]. In order to accomplish this goal, the case study method of field research will be used. The purpose is to examen the context in which the case occurred and not to provide legal analysis on all cases relating to constitutional equality or taxation.

The argument will be made that the Canadian women's movement should continue to press for the advancement of women in both the legislative and judicial arenas. It is especially important to achieve more female representation in the legislative, executive, and judicial branches of government. Laws are often made which have negative consequences for women, and they remain less powerful and economically disadvantaged compared to their male counterparts. Also, as women are relatively new to the public

sphere, we as a society have not learned to provide properly for the needs of the working mother.

This case may not be the final opportunity of the Canadian Supreme Court to make public policy on the issue of who should pay for day-care. Undoubtedly, this will not be the last time that the Canadian political and legal systems are called into question as institutions which can not possibly meet the needs of Canadian women in a modern world. Many children will continue to require better day-care, and the work of women will most likely continue to be undervalued as well as underpaid. This thesis argues that much work remains to be done, even in a western industrialized country such as Canada.

CHAPTER 2.0

Related feminist political action

in Canada

2.1 The Bill of Rights

One of the most significant constitutional changes to occur in Canada in recent decades has been the entrenchment of the Canadian Charter of Rights and Freedoms[1982]. Leading up to the early 1980s, Canadian women's organizations had been less than content with Canadian jurisprudence regarding gender equality. The Canadian Bill of Rights was passed by the Diefenbaker parliament in 1960 (Van Loon and Whittington 1987, p.228), and contained within it a guarantee of equality rights.

2.2 Gender equality rights prior to 1982

As late as the 1970s, when the Attorney General of Canada v. Lavelle and Bedard came before the highest court in a challenge to the Indian Act, the ruling of the Canadian Supreme Court was that equality before the law meant only equality in the administration of the law. "The actual substance of the law could discriminate between men and women, as long as the law was applied by its administrators in an even handed way" (Atcheson, Eberts, and Symes 1984, p.15). A similar ruling occurred in 1976 when Stella Bliss challenged the Unemployment Insurance Act because it did not apply to her when she was fired because she became pregnant. Despite the fact that she had worked the required number of weeks she did not qualify for unemployment insurance and the amount of time required to qualify for pregnancy benefits was longer. Ms. Bliss charged that the effect of this rule infringed her equality rights because only women could get pregnant. The

Supreme Court ruled that there was no infringement, even though only women could become pregnant. The court held that the discrimination was the result of nature and not the law (Atcheson, Eberts and Symes 1984, pp.20-21). Once again it was ruled that there was no discrimination because women were being treated as equals in relation to each other, even if women were not being treated as equals in relation to males.

2.2 The lobby for constitutional entrenchment

Lavelle and Bedard and the Stella Bliss cases were especially important because the definition of equality which the courts had applied was one of equality between women, but not equality between women and men. This was precisely what women's rights advocates had hoped to avoid with the constitutionally entrenched Canadian Charter of Rights and Freedoms[1982]. The courts would no longer be able to fall back on the principle of parliamentary supremacy in their reluctance to strike down discriminatory legislation.

On June 14, 1980 there was an executive meeting of the National Action Committee on the Status of Women. The minutes of this meeting reported that Jean Chretien, then Minister of Justice, was unsympathetic to the National Action Committee's request for funding for constitutional research. A sub committee was struck by the executive, in order to work on constitutional issues over the summer. Reportedly, the Canadian Advisory Council on the Status of Women was planning a national meeting of

women's organizations for September. "Research papers had been commissioned; the topics to be covered included the following; the possible effects of an entrenched Charter on women, in general, and on affirmative-action initiatives, in particular; family-law jurisdiction; Indian rights for 'non-status' Indian women; and the effects of multiple jurisdictions on the provision of government services for women" (Vickers, Rankin, and Appelle 1996, p.111).

> The Trudeau government put forward a draft Charter in the autumn of 1980. Several sections of the draft Charter did not differ significantly from the old Bill of Rights. The government held months of public hearings, which gave dozens of interest groups the chance to offer suggestions for improvement. Chief among these groups was the Ad Hoc Committee of Women on the Constitution, a network of feminist lawyers and activists that was brought together by the effort to improve the draft section 15 (the equality clause)... The Ad Hoc Committee also succeeded in inserting section 28 on gender equality into the Charter (MacIvor 1996, pp.176-177).

A draft of the Charter was tabled in the House of Commons. In section 15 the word "equal" was inserted before the word "protection". Yet suspicion remained among feminists who knew the history of the courts in dealing with equality issues. Women's groups continued a strenuous lobby effort for the insertion of the word *before* as well as *under* the law before the word equal in section 15 (Brodsky and Day 1989, p.15). This language was lifted directly from the Fourteenth Amendment of the American Constitution, in order to encourage the use of American jurisprudence in the interpretation of the words "Equal Protection" (The Canadian Advisory Council on the Status of Women

1980, p.7). This wording would provide a guarantee of social equality, whereas the existing Canadian Bill of Rights provided only formal equality. The principle of formal equality held only that no breach of rights existed as long as all women were treated equal in relation to each other, and not necessarily in relation to males (Greene 1989, p.163). However, the wording of the Charter was the same wording used in the American constitutional guarantee of equality, and the principle of social equality was being applied in American jurisprudence .

Canadian women had been granted the equivalent of the American equal rights amendment (ERA), under section 28 of this draft of the Charter -- something which their American counterparts had failed to achieve. Of course there is a different style of government in that country. "Section 28, it was conceded, gave Canadian women an advantage their American sisters did not have..." (Razack 1991, p.39).

Concerns still remained as to how the Canadian courts would interpret the improved guarantee of equality rights which had been provided in this draft of the Charter. It would be easy for the courts to defeat an attempt to gain new rights by ruling that the differences between the two groups were not adverse (Razack 1991, p.39). On the other hand, the Charter could be interpreted in ways that would make it the best and most far reaching guarantee of equality anywhere in the world:

> ...section 15(1) guarantees the "equal benefit of the law", which according to Anne Bayfesky makes it one of the most far-reaching equality clauses of any modern bill of rights. If this clause were taken in its rigid and literal sense, it would seem to imply a very

> radical theory of numerical equality that would enforce absolute equality in the provision of services and benefits. However, ...no right in the Charter can be considered absolute, and judges are usually reluctant to apply legal principles the results of which are markedly out of step with popular expectations (Greene 1989, pp.164-165).

Another draft version of the Charter was complete by the spring of 1981, but the process of constitutional negotiations had stalled:

> The governments of Quebec, Newfoundland, and Manitoba had asked their Supreme Courts to rule on the legality of the Trudeau governments plan to patriate the constitution unilaterally. The British North America Act of 1867, the constitution of Canada, was actually British law. It had not been replaced by a Canadian-made (or "patriated") constitution because Canada did not have a formula for amending the constitution. After a meeting of the federal and provincial governments ended in failure in September 1980, Trudeau had decided to proceed without provincial consent; he would present a new constitution to the British Parliament and ask them to pass it into law. This would legally transfer control over the Canadian constitution to the Canadian Parliament. So the three provinces decided to try to stop the Trudeau government's unilateral patriation plan by appealing to the Supreme Court for a ruling on its legality. The Supreme Court ruled in September 1981 that although the federal government's plan was strictly legal, it violated constitutional convention. It pushed the federal and provincial governments back to the bargaining table, where they struck a deal in November, 1981 (MacIvor 1996, p.177).

Prime Minister Trudeau was in the position of needing to make concessions with the provinces, so in a deal with all of the provinces except Quebec, he accepted an amending formula for the new constitutional document which had been proposed by the premiers. Trudeau also reluctantly accepted a "notwithstanding" clause in section 33. According to the terms of section 33, the Canadian Parliament or a provincial legislature can pass laws

which conflict with particular sections of the Charter. "The law must contain a declaration that it is adopted 'notwithstanding' the Charter, and it can only remain in force for five years before it must be renewed" (MacIvor 1996, p.177).

The notwithstanding clause in section 33 of the Charter created a great deal of concern among feminist organizations, as did the fact that civil rights were to be subject to reasonable limits under section 1 of the Charter. "Immediately the Ad Hoc Committee swung into action lobbying MPs and premiers for one intense week. Finally the first ministers who had signed the deal agreed to reopen it, in order to make sure that the gender equality clause could not be overridden by Parliament or a provincial legislature" (MacIvor 1996, pp.177-178).

The greatest gain came on November 24, 1981, when Jean Chretien, still Minister of Justice, publicly announced that the provinces and federal government had agreed to remove the application of the override clause to the equal rights amendment of Section 28 (Brodsky and Day 1989, p.17).

2.4 1982 – 1985

The argument that constitutional entrenchments of civil rights would lead to the "Americanization" of the Canadian judicial system was a commonly used argument against the Charter. It was felt that such a document would tie the hands of the elected legislature, by putting certain liberties beyond their powers of law making. The un-elected judiciary,

on the other hand, would gain the power to act against the legislature. Under a constitutionally entrenched guarantee of civil rights, such as the Charter, the courts become the final check against legislative interference with such rights, as protected by the constitution. Without an entrenched Charter of Rights, the Canadian Supreme Court's limited powers consisted of determining which areas of legislative jurisdiction belonged to which level of government, now the appointed courts would actually have the power to legislate themselves.

With the Charter finally in place, there was to be a three year moratorium on the application of section 15 during the period between 1982 and 1985. This was meant to provide the federal and provincial governments with an opportunity to bring existing legislation in-line with the new civil rights document.

Feminists were aware that if women were going to bring anti-discrimination cases, then funding would be required. Elizabeth Symes herself participated in the formation of the Women's Legal Education and Action Fund (LEAF).

LEAF has had great success in achieving "intervener status" in some of the most important cases involving women's rights. "An intervener is a party that is not one of the original litigants but that has some stake in the outcome of the case and can present the court with useful evidence" (Greene 1989, p.169). Some of these cases include Borowski v. The Attorney General for Canada (abortion), Seaboyer and Gayme v. Regina (the Rape

Shield law), and Mark Andrews v. The Law Society of British Columbia (judicial interpretation of equality).

2.5 Backlash in the courts

Unfortunately, like many of the advances that have been made for women, the equality rights protections in the Charter have turned out to be less than was hoped for by the women's rights activists who influenced the drafting of the Constitution Act[1982], due to the effects of judicial interpretation as well as social and economic factors. "Beyond judicial interpretation, social and economic factors will also impinge on the meaning and relevance of women's rights as expressed in the Charter. It is one thing to have rights entrenched in a constitution, it is another to exercise those rights in any particular socioeconomic context" (Doerr, 1984, 9[2]: p.35).

The Charter has not worked out to be all that women's rights activists had hoped. "The news is not good. Women are initiating few cases and men are using the Charter to strike back at women's hard won protection and benefits" (Brodsky and Day 1989, p.3). The result of this is that women's groups are better served by putting their funds into lobbying as opposed to judicial action. Unfortunately, the monetary resources of feminist political action groups, such as LEAF, are being eaten up answering litigation brought by men. "Men have initiated more than three times as many sex equality challenges as women have. Many of men's challenges are to legislative protection and benefits such as rape law

reform and unemployment insurance pregnancy benefits, which women have fought for in the political arena" (Brodsky and Day 1989, p.66).

One excellent example of this point is the Canadian Supreme Court case Seaboyer/Gayme v. Regina. In this case, two men had been accused of rape and protested that their right to a fair trial had been infringed by a provision in the criminal code known as the rape shield law. This law prohibited the use of a victim's sexual history as evidence during a trial in which the defendant had been accused of sexual assault (Razack 1991, p.55).

> The lawyers for Seaboyer and Gayme argued that their clients' rights to a fair trial, enshrined in sections 7 and 11(d) of the Charter, were violated by the rape shield rules. Their defences were based on mistaken belief, meaning that they honestly thought the victim had consented to sexual activity, and that this honest belief was founded on the previous sexual histories and reputations of the victims. By excluding these histories and reputations from evidence, they argued the rape shield laws made it impossible for them to present their defence, thus denying them a fair trial. In addition, Seaboyer's defence rested on the claim that the victim had had sex with another man just before the alleged rape, which meant that the physical evidence used against him might not have been valid (MacIvor 1996, pp.180-181).

The rape shield law was deemed to violate male equality rights under the same sections of the Charter which women's groups had lobbied for during patriation talks in the early 1980s. In 1991, the Canadian Supreme Court upheld the court of appeal decision which had struck down the rape shield law with seven of the nine justices holding that section 276 of the Canadian Criminal Code had the potential to exclude otherwise

admissible evidence that may be highly relevant to the defence. Justice Claire L'Heureux-Dube, one of the judges who dissented in Symes v. Regina[1993], and Justice Charles Gonthier argued that, "...in order to achieve fairness and to conduct trials in accordance with fundamental tenets of criminal law, this provision [the rape shield] must be upheld in all its vigour" (MacIvor 1996, p.181). This case illustrates perfectly how men have used the Charter in order to strike down legal protection which women's groups had previously fought for and won in the political arena.

The courts are not inclined to view women as disadvantaged. At present "...the courts are treating women's sex equality claims and men's sex equality claims as if both groups already have equality..." (Brodsky and Day 1989, p.93). Part of the blame for this problem falls on the fact that the judicial system, as a policy making body, is hardly representative of the Canadian population:

> By and large, judges are white, middle class men with no direct experience of disadvantage. And the courts, it had been argued, are not known agents of change. ...women and other disadvantaged groups would be wise to put their efforts into the democratic system, trying to change conditions of disadvantage through political rather than legal means (Brodsky and Day 1989, p.3).

This is in line with Dunn's work Canadian Political Debates (1994). Dunn states that:

> Judicial review is inherently protective of the status quo. Judicial review of rights therefore can be expected to involve the justification of already existing privileges. Certainly women, labour, and various social action groups have seen little cause to celebrate since 1982. Corporations on the other hand, have benefited from Charter-based court decisions (p.100).

Fortunately, as the women's groups of the early eighties had hoped, the courts did eventually rethink definition of equality. Like many legal challenges regarding equality, the landmark case was brought by a male, Mark David Andrews. Andrews was a non-Canadian citizen, and sought to have a regulation of the Law Society of British Columbia struck down under section 15. The regulation, which the Canadian Supreme Court eventually declared to be discriminatory, provided that a lawyer such as Mr. Andrews, who was not a Canadian citizen, could not be a practising member of the Law Society. After making it to the Supreme Court of Canada, Andrews did win his case. However, the six assenting judges disagreed on how the concept of equality should be interpreted.

Undoubtedly, the most notable interpretation was that of Judge McIntrye, who explicitly rejected the notion of formal equality which the court had held under the Canadian Bill of Rights[1960]. McIntrye felt that the principle of formal equality could be used to justify the Nurenburg laws of Adolf Hitler. According to the Nurenburg laws, it did not matter how certain groups (such as Jews, Gypsies, and homosexuals)were being treated as long as they were being treated equally in relation to other members of the same group. The same was true of the guarantee of equality in the Canadian Bill of Rights[1960] as long as the word equality was interpreted by the Courts to mean formal equality. Justice McIntyre noted how the American Supreme Court had rejected this principle in Brown v. The Board of Education. The Canadian Supreme Court had made a similar ruling in Drybones v. Regina, *during the era of the Canadian Bill of Rights[1960]*, and he

acknowledged that the Charter was meant to signal a broader definition of equality (Greene 1989, pp.165-169).

Although the Women's Legal Action and Education Fund (LEAF) has been successful in achieving intervener status on many cases involving equality rights, there remains much work to be done if women's rights are to be properly protected. Despite the fact that some women's groups appear to have a high success rate for winning cases, this can be quite misleading. Often LEAF will agree to fund only those cases which they have the greatest chance of winning. Women's groups rarely have the same level of opportunities as their male counterparts to choose the timing and context in which they will make their arguments (Razack 1991, p.128). That is why, "...even if the results of the interveners are positive and the damage of men's sex equality challenges minimized, increased pro-active strategic litigation by women will be required if women are to make positive gains" (Brodsky and Day 1989, p.93). Also,"Success is seldom categorical since decisions may come to the right conclusion for the wrong reasons, and it is the reasons themselves that will matter in precedent" (Razack 1991, p.128).

While Symes v. Regina[1993] was making its way to the Canadian Supreme Court, during the early 1990s, the question of whether or not it was necessary to have more women involved in the practice of law became important, at least in legal circles, and led to Supreme Court justice Bertha Wilson being chosen to head the Canadian Bar

Association's task force into gender bias in the legal profession (Woodard 1993, Sept.6: p.30).

Wilson was the first woman appointed to the Canadian Supreme Court and was well known for her liberal feminist leanings. The Canadian Bar Association spent approximately $400,000 on the gender bias panel, which ultimately provided 250 recommendations. In essence these recommendations reported the reluctance of large, influential law firms to provide for the demands of family life for women. Wilson's report suggested penalizing those firms which do not make it possible for lawyer-mothers to have both a 20 percent shorter work week, and still be promoted at the same rate as their male counterparts. The report also demanded affirmative action for female law students, and mandatory gender sensitivity courses for judges (Woodard 1993, Sept.6: p.30).

At that time women constituted only 27 percent of practising lawyers, and 28 percent of law professors. Also, females were 50 percent of the students in law schools, and it was projected, based on the rates of growth that were current at that time, that the number of female lawyers would match those of males by the year 2000 (Woodard 1993, Sept. 6: p.30).

However, it would be interesting to see the reasons given by those lawyers who choose not to practice law. It would be interesting to know the percentage of male versus female lawyers who "drop out" of the legal profession, and to examine these numbers in relation to the number of children whose care they are responsible for. It cannot be

assumed that just because women are entering law school at rates similar to their male counterparts, the gender gap in the legal profession will disappear, particularly if women tend to leave the profession at a higher rate than men.

2.6 Elizabeth Symes v. Regina [1993]

Undoubtedly, no one single case has brought the issue of male dominance in the Canadian legal profession to the forefront of public debate more than Symes v. Regina:

2.6.1 The facts

This passage, which was published by The Vancouver Sun as the case made its way to the Canadian Supreme Court describes the circumstances involved:

> Symes is a lawyer and her husband is a computer programmer. They hired a nanny to look after their two daughters, now seven and 11, when they were preschoolers in the 1980s. Symes tried to claim four years of the nanny's salary -- between $10,075 and $13,359 each year as a business expense that she could deduct from her income tax. Revenue Canada refused and instead allowed only the standard personal deduction that any parent can claim for child care. That was $1,000 per child in the early 1980s; it has since risen to $4,000 for each child under six and $2,000 for older children. A lower court said Symes should be able to deduct her nanny's full salary. But the Federal Court of Appeal overturned the decision (1993, March 3: p.A1).

According to The Globe and Mail, "Revenue Canada allowed Ms. Symes to claim the deductions for two years, but later changed its mind and told her that child care must be considered a personal expense rather than a business expense under tax law" (1991,

June 20: p.A2). The government asserted that since the legislators had already provided a child care deduction under section 63 of the Income Tax Act, the cost of a nanny's salary could not be considered a business expense under section 9 of the Income Tax Act. Symes held that tax law should be adapted to a changing society where the cost of childcare presented barriers to women's full participation in the economy (1991, June 20: p.A2). She challenged this issue under sections 15 and 28 of the Canadian Charter of Rights and Freedoms[1982], in the Federal Court of Canada.

2.6.2 Chronology of events

In 1972 the Federal Government adopted section 63 of the Income Tax Act which allowed parents (whether salaried or self-employed) to deduct childcare expenses up to a stipulated maximum per child. In 1982, Elizabeth Symes, a practising lawyer with a husband and two daughters. Ms. Symes hired Ms. Simpson as a nanny to provide full time in-home care for her children at the yearly rate of $13,359. The maximum allowable deduction was raised periodically so that by 1985 the maximum deduction allowed was $2000 per child. The total allowable deduction available to Symes in 1985 would have been $4,000, or 30 percent of her child care costs (Macklin 1992, 5[20]: p.499).

However, Ms. Symes decided to try deducting the cost of her day-care under sub sections 9 and 18(1) of the Income Tax Act. The government argued that to allow the deduction as a cost of doing business would go against the intentions of the legislature.

Symes challenged this interpretation in the Federal Court of Canada. Key was the issue of determining what may qualify as profit for the purpose of determining a tax deduction. For only when income has been deemed profit, can a taxpayer claim deductions as a cost of doing business. "Section 9 of the Act defines the annual taxable income from business as "profit", and section 18(1) provides that in computing income, no deduction shall be made except for outlays or expenses incurred "...for the purpose of gaining or producing income from the business" (Symes[1993], 110: pp.499-500).

Symes won her case at the trial division. Writing for the court was Justice Cullen who examined the very crucial question of what exactly qualifies as "profit". He held that for the purposes of determining whether or not something qualifies as a business expense, it must meet the following criteria. "(1) it must be in accordance with ordinary commercial principles and business practice, having regard to the circumstances to each case; and (2) it must be made or incurred for the purpose of gaining and producing income from the business" (Symes[1993], 110: p.483).

"The decision", he said, "was acceptable according to business principles which include the development of intellectual capital, the improvement of productivity, the provision of services to clients and making available the resource she sells, namely her time" (Symes[1993], 110: p.478). In examining section 63 of the Income Tax Act Justice Cullen found that this section had been enacted "...to facilitate the entry of women into the labour force, thereby promoting economic equality between the sexes as well as

providing relief for low income families" (Symes[1993], 110: p.478).

Justice Cullen concluded that because a nanny's salary was deductible under section 9 of the Income Tax Act, then section 63 could not prevent the deduction. He also provided an analysis of the case under section 15 of the Charter, holding that section 15 thus applied to part of the 1985 taxation year and to the subsequent taxation years. Justice Cullen, relying on the decision of the Supreme Court of Canada in Andrews v. Law Society of British Columbia [1989] concluded that the Minister of National Revenue, by refusing the appellant's deduction, was treating her differently from other taxpayers with expenses that are considered necessary to generate business income (Symes[1993], 110: p.478).

The government appealed the decision to the Canadian Federal Court of Appeal which reversed the decision of the lower court. Writing for the court, Justice Decary:

> ...dismissed the argument that the existence of a legal obligation to care for children was a reason for allowing child care expenses to be deducted as a business expense. According to him, this obligation, imposed equally on both sexes, was a "natural obligation" which affected parents at all times, since '[t]he law does not impose an obligation on the [appellant] to look after her children because she is operating a business' (Symes[1993], 110: p.479).

Also included in the decision of Justice Decary was a statement to the effect that the Income Tax Act had been amended many times to take into account social and economic change (Symes[1993], 110: p.480). This decision at the trial level of the Federal Court of Canada was overturned by the appellate level of the Federal Court of Canada.

Apparently, the judges of the trial and appellate division of the Canadian Federal Court viewed Ms. Symes with different pairs of glasses. The trial judge saw a self-employed woman standing next to a self-employed man, while the judges at the Court of Appeal saw a self-employed woman standing next to a salaried woman. Symes was disadvantaged because of her gender. However she was also privileged by her class. The appeal court judges obviously felt she was using her status as a business woman to try and gain benefits over a salaried women. In fact, the appeal court judges at this level indicated that allowing the business deduction would have been achieved at the expense of salaried women (Macklin 1992, 5[20]: p.508).

The case eventually reached and was decided by the Canadian Supreme Court. In an astounding conclusion to the case, the court split along gender lines. The seven male judges ruled in opposition to tax deductible day care for business persons on the basis that although women clearly paid the social costs of being responsible for childcare, this was not necessarily an indication that women paid the financial cost of childcare. The Income Tax Act could deal only with financial questions. Even though the majority was not required to deal with the question of equality, Justice Iacobucci did provide analysis of section 15(1) of the Charter. He, again, saw Symes not as a woman but as a married woman lawyer. As a member of an elite profession, she could not be considered disadvantaged. However, Iacobucci did point out that perhaps a single mother making the same claim might have been more successful.

The two female judges, favouring Symes's position, were willing to allow the deduction under ss.9 and 18(1). Section 63, they argued, had been implemented for the purpose of being fair to working parents. Denying a tax deduction of day-care costs as a cost of doing business would also be going against the intentions of Parliament. They also believed that not allowing the deduction would violate the equality rights of women entrepreneurs as they were members of an historically disadvantaged group.

Throughout the country, some posed the question of whether white male judges could truly understand the plight of the disadvantaged. In spite of aspirations to objectivity, undoubtedly a person's perspective is determined by their background. With the entrenchment of the Canadian Charter of Rights and Freedoms in 1982, and a major role for the courts in establishing public policy on human rights issues, these questions were now more important than ever.

2.6.3 The issues

It is the responsibility of lawyers and judges to take complex social issues and break them down into their components. The lawyers for Elizabeth Symes claimed that the issue was discrimination under s. 15(1) of the Charter. The government claimed that the issue was whether or not the cost of day-care could be deducted as a cost of doing business. In writing his decision, Justice Iacobucci of the Supreme Court Majority devised

questions on the primary issues in Symes v. Regina[1993]. The Supreme Court minority in Symes v. Regina[1993] also stated these questions as issues in writing their decision:

> 1. If ss.9, 18, and 63 of the Income Tax Act are not open to an interpretation other than that full child care expenses of the Appellant are not deductible as business expenses, does any part, of do any or all of these sections, infringe or deny rights guaranteed by s.15 of the Canadian Charter of Rights and Freedoms?
> 2. To the extent that the above sections of the Income Tax Act infringe or deny the rights and freedoms guaranteed by s. 15 of the Canadian Charter of Rights and Freedoms, are these sections justified by s.1 of the Canadian Charter of Rights and Freedoms and therefore not inconsistent with the Constitution Act, 1982? (Symes[1993], 110: p.481)

2.7 Public debate on the case

2.7.1 The National Action Committee

"The Nanny Case" showed a range of positions within the women's movement. Like Martha Friendly, chairperson of the childcare committee of the National Action Committee on the Status of Women, agreed against the position of Symes that, "It would have been very unfortunate if the existing tax breaks had been extended and made available to a very select and privileged group of people" (Cox 1993, Dec. 18: p.A8).

It is sometimes assumed that feminists all share the same agenda and the same ideology for achieving that agenda. In fact, there are different kinds of feminists, different ideas on how to achieve feminist goals, and of course some women choose not to associate themselves with feminism at all. In this case, the interests of richer self-employed women were at odds with the interests of poorer entrepreneurs, women who worked for a salary,

and unemployed persons. A decision in favour of rich women certainly would not have benefited all Canadian women. This is one explanation for the sometimes slow progress of women's rights -- being such a large portion of the population, women's interests are not monolithic.

2.7.2 Lawyers

There has been much debate within the legal community regarding how women lawyers who are also mothers should be treated in relation to their male counterparts. The Wilson Report suggested that lawyers who are also mothers should have a shorter work week than male lawyers while getting paid the same amount. Rob Martin took the perspective that Elizabeth Symes, and those who support her, are confused about the real meaning of discrimination. Also referring to the Wilson Report he said "...the benchers have swallowed the fairy tale, central to the theology of bourgeois feminism, that you really can have it all, that you can have a family, be a parent, and still make tons of money as a high flying lawyer" (1993, Aug. 20: p.5). He feels that what Symes and other feminist lawyers are asking for is unfair in that women lawyers are not a group which can be considered disadvantaged. "Their implication is that you should get paid the same amount of money, but do less work" (1993, Aug. 20: p.5).

Self labelled "bourgeois feminist" and lawyer Marilyn G. Lee completely disagrees. Lee argues that Martin's treatment of the issue was demeaning to both feminists

and nannies. Furthermore, she states that because employment in the form of day-care makes a contribution to the Canadian economy, it should be viewed in the same manner as other forms of minimum wage employment. Speaking of her own childcare worker she states:

> My nanny contributes to our economy by being employed and I contribute to our economy by employing her. My nanny's income tax deduction is $150 per month and our combined contribution (employer and employee) to the unemployment insurance system is $100 per month. Altogether...contributing over $300 per month to the economic system (such as it is) in this country (1993, April 30: p.5).

In disagreement with Lee, Michael Nash argued, "...there is a problem with the day-care expense deduction but it is not the problem raised by the Charter argument in the Symes case. The problem is that the day-care expense deduction is set at a number which does not encourage nannies to be paid what they are worth" (1993, May 28: p.5). Nash then goes on to point out what he feels is a more appropriate solution to the problem:

> ...it would be more helpful to increase the day-care expense deduction to the level of a living wage, and then increase the general rates of taxation on a progressive basis. That way, employers of nannies would be encouraged to pay nannies better wages, and the richer members of society would make up the revenue lost through increasing the deduction" (1993, May 28: p.5).

2.8 Conclusion

The only conclusion which can be drawn from this discussion of Canadian

feminist political action is that equality rights in the Charter, has both positive and negative aspects. Entrenchment is obviously a very important means of protecting civil rights of the citizens in a democratic society. Unfortunately, we must also deal with the reality that civil rights are provided not only by the judiciary, but also within the context of a political system. Certain individuals and groups have a status within the system which guarantees their control. A guarantee of civil rights is only as effective, or as ineffective, as the institutions which bestows those rights. Society is, after all, a venue of competing interests. The government, by extension, must make decisions regarding the allocation of resources between the interested parties. With the advent of the Canadian Charter of Rights and Freedoms, 1982, the judicial branch of government was given an increased role in the allocation of such resources -- in essence, a political function.

In spite of changes in judges' conceptualizations of equality, the result of constitutionally entrenched rights has not been in the best interest of Canadian women. For these reasons, feminist political action groups in this country must continue lobbying in the political arena where the most important advances for Canadian women have consistently been made.

Historically, political lobbying has been effective in rewriting old laws and establishing new ones which provide special protections to meet the needs of Canadian women. However, it is still important for women to achieve more female representation in all branches, and levels of government, not only within the judiciary.

Canadian women might be wise to bring more constitutional challenges to the courts. Currently, most of the challenges are being brought by men who wish to strike down laws which provide special protection and benefits to women. Consequently, the resources of feminist political action groups, such as the Women's Legal Education and Action Fund, are being eaten up in answering litigation. Women might consider being more pro-active as well as being reactive in using the courts to advance their status.

Elizabeth Symes was pro-active in bringing the issue of tax deductible day-care for business women to the courts. However, in doing this she has the advantages of being a practising lawyer. Most Canadian women would not have access to as much information on their constitutional rights as she does. While it is positive that women lawyers are pro-active in bringing litigation, all Canadian women should have the same conditions in their lives which would permit them to become more aware of their rights. The provision of those conditions, including education of women on such issues, should be a priority for women *and* men in this society.

CHAPTER 3.0

Constitutional equality rights

3.1 Equality

There are various ways of conceptualizing equality. In modern Canadian society, these are arguably, more liberal than some of the interpretations which have been applied across the world and throughout human history. For example, in the ancient Greek world, Aristotle argued that some persons were naturally intended to be slaves, and women were inherently inferior to men, with the exception of men who were slaves. This line of thinking was common in ancient and medieval societies, and in the United States up until 1860. Historically, national origin was considered a mark of status, or justification for enslavement. Within a conquering society, race was a source of superiority and privilege (Feminist jurisprudence 1993, p.18). This was consistent with the conceptualization of equality as persons having similar physical traits being entitled to similar treatment.

The concept of numerical equality saw its birth with the rise of liberalism in Western Europe. This movement began in the seventeenth century with advocates of the recognition of universal natural rights and democratic constitutional government. For perhaps the first time in the history of the western world, unequal treatment had to be justified. Political theorists such as Hobbes, Locke, Rousseau, Kant and most of the major thinkers of the Western tradition presumed the natural equality of all *men* (Feminist jurisprudence 1993, p.18), as opposed to the natural equality of all persons.

Three types of equality were written about by political theorist Ployvios Polyviou: formal, numerical, and normative equality:

> Put very simply, formal equality urges treating equals equally and unequals unequally. It has its origin in the writings of Aristotle. The Supreme Court's decision in A.G. Canada v. Lavelle... in which it was decided that there had been no breach of equality under the Canadian Bill of Rights as long as all Indian women were treated equally, is an example of the formal equality approach. If judges employ this perspective, they could apply the law unevenly so long as they were consistent within groups of "equals" – for example, Indian women, seniors, pregnant women and so on (Greene 1989, p.163).

There are variations on the approaches to numerical equality. The concept presupposes that *all* human beings have traits in common, and therefore should be treated with the same standards of decency. The most conservative approach to numerical equality is the belief that the rules of the economic system, such as taxation law, should apply equally to everyone. This is frequently referred to as *equality of right* and is associated with classical liberalism. A more liberal approach would be *equality of condition*. This principle advocates programs such as affirmative action which, some believe, must be established before all citizens has the same opportunity to make a profit in the market place. This is an ideology that is frequently associated with reform liberalism (Greene 1989, p.163).

Advocates of normative equality, like those who support numerical equality, believe that under ideal conditions human beings should be treated equally. "Instead of asking, as the theories of numerical equality do, how *far* equality of treatment should extend, they attack the problem from the opposite direction" (Greene 1989, p.164). Normative theorists have attempted to establish acceptable conditions for justifiable deviation from equality. Greene (1989) groups normative and numerical theorists together

and refers to their theories jointly as social equality. "At the basis of social equality is the idea that all human beings deserve to be treated as equals and that departures from that principle require convincing justification (Greene 1989, p.164). Some examples of such justification would be s.1 of the Canadian Charter of Rights and Freedoms[1982], which states that all rights in the Charter are subject to *reasonable limits*. "Section 1 was intended to provide judges with some direction in determining limits to Charter rights" (Greene 1989, p.54).

To date, three important features of section 1 have emerged from judicial decisions on the Charter:

> First, the phrase "demonstrably justified" places the onus on the party wanting to limit a right (usually a government) to prove that the limitation is reasonable. In the absence of evidence to the contrary, judges will presume that a limit placed on a right is not reasonable. Second, the phrase"prescribed by law" means that the limit must be "expressly provided for by statute or regulation, or results by necessary implication from the terms of a statute or regulation or from its operating requirements. The limit may also result from the application of a common law rule". In other words, under the rule of law, government may not take action, including action to limit rights, except through law... Third, the Supreme Court of Canada has defined a test for what constitutes a "reasonable limit" (Greene 1989, pp.54-55).

The extent of those reasonable limits is determined by judges who apply what is known as the Oaks Test. "The *Oaks* test has two key components. First, the objective of the government in limiting the right must be of sufficient importance to society to justify encroachment on the right. Second, the limit must be reasonable, and demonstrably

justified in terms of not being out of proportion to the government objective" (Greene 1989, p.55). The limit must therefore satisfy three criteria:

> (a) it must be rationally connected to the government objective and must not be "arbitrary or capricious"; (b) it should impair the right as little as is necessary to achieve the government objective; and (c) even if all points above are satisfied, the effects of the limit cannot be out of proportion to what is accomplished by the government objective – in other words, the cure cannot be allowed to be more harmful than the disease (Greene 1989, p.55).

However, while the constitutional entrenchment of a civil rights document was late to arrive on the scene in Canadian politics, one should not make the mistake of thinking that civil rights had no importance in Canada before 1982. Nevertheless, one can easily make that argument that gender equality was one civil right which remained virtually unprotected prior to the institution of the Charter. Gibson (1990) explains that:

> Many of the protections guaranteed by the Canadian Charter of Rights and Freedoms had been embodied in Canadian law long before the Charter came into existence in 1982. ...the Charter simply gave constitutional status to rights and freedoms we had enjoyed in practice for decades or for centuries. Although the form of protection had been strengthened, the substance of the right had not changed. This was not the case with equality rights. The egalitarian guarantees enshrined in section 15 of the Charter were new in substance as well as in form. The enactment of section 15 was a deliberate attempt to remedy the inadequacies of pre-existing legal protections of equality (p.1).

Gibson is likely referring to the fact that during and prior to the era of the Canadian Bill of Rights[1960] the Canadian courts had been anything but liberal in their interpretation of equality. As discussed earlier, prior to the case in which Mark Andrews v. the Law

Society of British Columbia, equality was interpreted to mean that those persons sharing similar characteristics, such as race or sex, were to be treated equally when compared to the other members of the same group. Once again, this is referred to as formal equality. Whereas, in the case brought by Mark Andrews, the Canadian Supreme Court switched its interpretation of equality so that all groups must now be treated equally, in relation to all other groups. Again, this is referred to as social equality.

3.2 Equality through lawyers

One way in which Canada has attempted to establish equality in recent years has been to have representation of historically disadvantaged groups in the legal profession. Canadian women, minorities, and various other groups have been able to benefit from opening the doors of law schools. Many law schools now have affirmative action programs which ensure that approximately half of those students entering in any given year are female. Also, social action groups consistently lobby for improved representation of women and minority groups within the judiciary. These are somewhat controversial practices. Some would argue that it is pointless to attempt to achieve equality through the representation of historically disadvantaged groups in the legal profession or on the bench. They would argue that persons who attend law school typically have characteristics that set them apart from the rest of their group, and that they typically have more in common with their law school classmates than their own gender or ethnic group. "...the class and

character preferences built into the triple hurdles of university entrance, law school admission, and judicial recruitment, combined with the learned values of the legal "professional project" itself, may seriously limit the immediate impact of women on the bench" (McCormick and Job 1993, 8[1]: p.147).

In the latter part of the last decade, there was growing knowledge that it is difficult for women to balance the demands of motherhood and a law practice. This, combined with the constitutionally entrenched guarantee of gender equality in the Canadian Charter of Rights and Freedoms[1982], provided the impetus behind the increased demands on the part of women lawyers that the legal profession itself take steps towards making it easier for women lawyers to meet the demands of being a mother and practising lawyer. The issue became ever more important as former Supreme Court Justice Bertha Wilson was assigned by the Canadian Bar Association to lead a task force on gender bias in the law. The culmination of public debate on the issue came with the Symes case as it continued to achieve public notoriety. "Mary Eberts, Symes' lawyer, argued that childcare is a necessary expense for self-employed women. And such women are discriminated against if they must pay expenses not faced by male counterparts" (1993, March 3: p.A1).

Regarding the issue of minority and female representation within the judiciary, many theories currently exist. One hypothesis, labelled the "pervasive difference hypothesis" is in favour of appointing more female judges, and is based on the proposition that women judges may emphasize connection and a morality of relationships rather than

of abstract concepts such as logic, objectivity and neutrality (Brockman 1993, 8[1]: p.150). This point was echoed by McCormick and Job:

> ...women professionals will bring with them different perspectives on a limited number of issues (primarily, and possibly only, those most directly related to gender roles in society) that this will have some transitional impact in terms of reorientation of the law that will make it more sensitive to groups and to concerns that have historically been outsiders, after which gender differences in professional behaviour will be less important... Presumably the outcome will be a new *status quo*, one that is based on the participation of women as well as men (1993, 8[1]: p.137).

The first quantitative empirical data which were gathered for the purpose of determining whether the increasing number of women judges can actually affect the outcome of cases, ran into a problem. The research was inconclusive. Even though more female judges are being appointed all the time, the researchers found that in Alberta there were not enough cases involving women judges to provide an adequate data base on the subject (McCormick and Job 1993, 8[1]: p.135). Adding to the limitations of this data was the fact that the area of analysis had been a single Canadian province, and the research was completed in a particular kind of court, that being the trial and appeal levels of the Alberta Supreme Court.

In an effort to create a controlled environment, the researchers drew their conclusions specifically from criminal law cases. They had this to say about the lack of data which are available on female judges:

> ...the number of cases involving them is much lower than for male trial judges or male-only panels. A rather short run of unusual cases

> could badly skew the results, and analysis based on a longer time period might generate different results. It is also true that the first cadre of women judges has had to accommodate itself to a male-dominated profession, and may feel an even greater obligation to follow (and to be seen to follow) the ideology of neutrality and objectivity which attaches to the bench... (McCormick and Job 1993, 8[1]: p.146).

McCormick and Job admit that their findings are merely a preliminary indication of how female judges will behave in relation to their male counterparts. However, in her feminist critique of this research, Joan Brockman argues that any research would be so influenced by the patriarchy that exists in our society that it would be unable to provide us with valid information:

> Legal systems reflect societal norms, and so they also reflect the biases that exist within societies. A non-sexist legal system can only be found in a non-sexist society. Likewise, non-sexist research can only be achieved in a non-sexist society. It is unlikely that we can look at sexism in law or sexism in the social sciences without also examining sexism in society. Whether women judges will be more compassionate and conciliatory and less punitive than men, or more concerned with connection and a morality of relationships than abstraction are interesting questions. From a feminist perspective, these questions cannot be answered at the level of disconnected abstraction engaged in by the authors (1993, 8[1]: p.164).

In response to Brockman's critique, McCormick and Job do not address, but merely point out once again that the data is only preliminary. Interestingly enough they also comment on one of the methodologies suggested by Brockman who feels that the decisions of one female justice be examined in order to establish that women judges do not respond differently to specific legal issues. They note that this is an even less adequate data base

than one which was originally provided by McCormick and Job. Examining the decisions of one judge will likely tell you only about that particular judge.

From the evidence which is available at present, we cannot draw conclusions as to how female judges will behave, and this case study only gives us information on how women judges behaved in one particular case. Symes v. Regina[1993], tells us that gender may influence how judges behave. However, for those who wish to answer the question "Do women judges make a difference?", it will be a long time before enough data is available. The preliminary data suggest that , "...there is little statistically identifiable difference in the performance of men and women judges, even on specific issues such as sexual assault offenses..." (McCormick and Job 1992, 8[1]: p.135). However, what modest differences can be found are in the opposite direction of what has been suggested by comparable research in the United States (McCormick and Job 1993, 8[1]: p.135).

3.3 The Charter and equality issues

Presumably the most basic issue to be decided in "The Nanny Case" was the question of whether or not the Charter need be employed in interpreting this case. The federal government argued that the case was not an issue of equality, but of tax law, and that Charter analysis need not be invoked in deciding the outcome of the case. The theory behind this idea was a legal principle known as the *slippery slope*. This theory argues that if Charter analysis was to be applied to this issue then the courts would be putting

themselves in a position of constantly being called upon to invoke the Charter in taxation issues. Day-care is arguably a matter of a somewhat personal nature, and many would argue that personal questions are not meant to be answered in the courts. If Charter analysis was used in favour of Symes in this case then the court would have opened itself to a great deal of litigation which involved other more personal issues. Audrey Macklin had this to say about the Charter analysis of the case:

> One need not invoke section 15 of the Charter to engage in or justify an exercise of enlightened statutory interpretation. While recognition of childcare costs as business expenses raises certain "flood gated" concerns, I am not convinced that these concerns are insurmountable. The jurisprudence surrounding definition of business expenses suggests that the problem of line-drawing is endemic to the enterprise, and tax judges appear to be undaunted by it in other circumstances. Concerns that deductions for child care today will lead down a slippery slope to deductions for food, shelter and clothing tomorrow seem exaggerated (1992, 5[20]: p.514).

Macklin also deals with the issue of equality between on the one hand, the unemployed, the salaried, and entrepreneurs with little profit, and then self-employed women with substantial profits, as opposed to the issue of gender equality. "Beyond the material implications of Symes' claim, it is important to recognize that her narrow and self-interested approach can only fragment and weaken the movement by and on behalf of all women, rich and poor, toward a comprehensive and accessible national day-care program" (1992, 5[20]: p.515).

A point which is similar in that it also considers relatively poor women and which continued to be raised throughout the debate on the case was how the outcome of the case would affect nannies:

> ...the success of this claim would mean nothing to Ms. Simpson, the woman who in 1985 worked ten hours a day and was paid the equivalent of $5.13 per hour for taking care of Beth Symes two daughters. Those concerned about the welfare of women who purchase *and* who supply childcare services might query whether taxpayers who stand to benefit from a full deduction for child care expenses will feel any responsibility to transfer part of these savings to their employees in the form of higher wages (1992, 5[20]: p.515).

Of course, the most fundamental issue was the question of how the Canadian judiciary is going to define the concept of equality. A second question is that of whether or not it is necessary to consider the experiences of women when defining this concept and allocating power and resources. To answer these questions, the judges were faced with the task of determining the relationships between men, women, work and childcare (Symes[1993], 110: p.482).

3.4 The Charter analysis

3.4.1 The male majority

The majority opinion was written by Justice Iacobucci, with the other six male judges concurring. He begins his Charter analysis by asking whether or not s.15(1) can be applied to the Income Tax Act. This question arises from the notion that by subjecting the

Income Tax Act to Charter analysis, one might risk "overshooting" the purposes of the Charter. He answers this by stating 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..." (Symes[1993], 110: p.550).

The second issue which he dealt with was the question of whether or not the courts should be ruling on difficult economic matters. Some have argued that these matters are better left to the legislatures. Justice Iacobucci, claiming that the courts should not deal with such questions, points out that: "...support to this position comes from cases in which a degree of deference has been exhibited as part of s.1 Charter analysis: see, *e.g., PSAC v. Canada* (1987), 38 D.L.R. (4th)249 at pp.262-263 [1987] 1 S.C.R. 424, 87 C.L.L.C..." (Symes[1993], 110: p.550). Iacobucci therefore decides that s.15(1) can definitely be applied to the Act. He then proceeds to his analysis of s.15(1).

Much like Justice L'Heureux-Dube, Iacobucci discusses the principle of the similarly situated test and the Andrews case which established that this test should not be employed in analysis of equality cases that are brought under the Charter:

> At the outset, it is important to realize that in order to determine whether particular facts demonstrate equality or inequality, one must necessarily undertake a form of comparative analysis. For the purposes of s.15(1), *Andrews, supra*, has rejected that the analysis should be governed by the comparison of similarly situated persons. Section 15(1) guarantees more than formal equality; it guarantees that equality will be mainly concerned with "the impact of the law

on the individual or the groups concerned" (Symes[1993], 110: p.551).

Justice Iacobucci discusses the ruling of Justice McIntyre in the Andrews case in much more detail coming to the conclusion that the justification for discrimination must be determined by the application of s.1 of the Charter. Iacobucci acknowledges that, "...it is clear that law may be discriminatory even if it is not directly or expressly discriminatory. In other words, adverse effects discrimination is comprehended by s.15(1)... A finding of discrimination can be made even if there has been no intention to discriminate" (Symes[1993], 110: pp.552-553). He also points out, however, that according to Justice McIntrye, in order for a regulation to be considered discriminatory, the group which it affects must be considered a *discrete* and *insular* minority, which he borrowed from American jurisprudence. Hence, the court must search for indications of discrimination (Symes[1993], 110: p.553).

Justice Iacobucci then considered the question of whether s.63 of the Income Tax Act is discriminatory in that it prevents a deduction of childcare costs as a business expense. The answer which he provided was:

> ...through s.63, Parliament chose not to deal with the exclusionary interpretation placed upon ss.9, 18(1)(*a*)and (*h*), which has traditionally precluded the deductibility of child care expenses. Parliament chose instead to establish a *separate system* to address such expenses. Having created such a system in s.63, however, the relevant question is not whether the government's response should have been theoretically attached to the so-called normative provisions located elsewhere in the *Act*, since the *Act* is silent with respect to normative tax expenditure classifications. There is no

> Charter "right" which demands that the *Income Tax Act* label a particular deduction as a "business expense deduction". There is only a right to ensure that the *Act's* systematic response to childcare expenses is coherent with the Charter (Symes[1993], 110: pp.555-556).

Then being left with the question of whether or not section 63 can be declared *ultra vires* on the grounds that it violates section 15(1) of the Charter, Iacobucci examined the language and the effect of the statute in order to determine if discrimination exists. He decided that the language used in section 63 in no way expressly limited the childcare deduction to one gender or the other. However, in answer to the question of whether or not the effect is discriminatory, Iacobucci has this to say. "...in order to establish such an effect, it is not sufficient for the appellant to show that women disproportionately bear the burden of *childcare* in society. Rather, she must show that women disproportionately *pay childcare expenses*" (Symes[1993], 110: p.558). Only if women disproportionately pay such expenses can s.63 have any effect at all, since s.63's only effect is to limit the tax deduction with respect to such expenses.

As previously mentioned, one of the key facts used in determining whether or not Elizabeth Symes had suffered discrimination, was the fact that she was a successful practising lawyer. One article, published by The Globe and Mail, referring to the decision of the Federal Court of Appeal tells us that she was accused of "trivializing" the Charter's equal rights protections in section 15 and that it could not accept that she was a member of a disadvantaged group" (Fine 1993, Dec.17: p.A1). Iacobucci argued that, "In rejecting

this conclusion, however, I wish to note that I do not reject that such a distinction might be proved in another case. The appellant in this case belongs to a particular sub-group of women, namely, married women who are entrepreneurs. It is important to realize that her evidentiary focus was skewed in this direction..." (Symes[1993], 110: p.560). Iacobucci blatantly suggested that Symes' elite social class prevented her from being discriminated against. He further makes the point that:

> In another case, a different sub-group of women with a different evidentiary focus involving s.63 might well be able to demonstrate 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 childcare expenses would thus disproportionately fall upon women (Symes[1993], 110: p.560).

Iacobucci provides a lot of details about the kinds of information which an evidentiary focus would require in order to win a case like this one. As to how future case might be decided, the proverbial door is left completely open:

> ...if s.63 creates an adverse effect upon women (or a sub-group) in comparison with men (or a sub-group), the initial s.15(1) inquiry would have been satisfied: a distinction would have been found upon the personal characteristic of the sex. In the second s.15(1) inquiry, however, the sex-based distinction could only be discriminatory with respect to *either* women or men, not both. The claimant would have to establish that the distinction had "the effect of imposing a burden, obligation or disadvantage not imposed upon others or of withholding or limiting access to opportunities, benefits and advantages available to others" (Symes[1993], 110: p.563).

3.4.2. The female minority

The dissenting opinion of Justice Claire L'Heureux-Dube pointed out that the tax system may be a "powerful tool" in blocking equality for women (Geddes 1993, 6[183]: p.3). L'Heureux-Dube started out her analysis by stating, "The goal of s.15 with regard to gender, is the attainment of true substantive equality between men and women and, as a consequence, the value of equality as enshrined in the Charter must be given considerable weight in the case at hand" (Symes[1993], 110: p.506). She then goes no to state that, "Contrary to my colleague, however, I believe that an interpretation which prevents Ms.Symes from deducting her childcare expenses as a business expense under the Act results in an infringement of her right to equality pursuant to s.15 of the Charter" (Symes[1993], 110: p.506).

L'Heureux-Dube, with Justice Beverly McLachlin concurring, discussed the issue of the similarly situated argument which was used in judging equality rights cases prior to the entrenchment of the Charter. The Supreme Court majority in this case felt that a finding in favour of Ms. Symes would have meant a return by the court to the use of this principle. Presumably they meant that Elizabeth Symes was asking to be treated equally in relation to other business persons and differently from the unemployed and salaried persons. To this Justice L'Heureux-Dube said:

> The fact that Ms. Symes has to compare herself to businessmen is not, in my view, a return to the similarly situated test... Ms. Symes is asking that she be treated equally independently of her sex, under the *Act*. She has provided ample evidence that women suffer the

> social cost of childcare and that the expenses of childcare which she incurs, and has paid, is not a purely personal expense but is incurred for the purpose of gaining or producing income from a business. In my view, Ms. Symes suffers an actual and calculable loss as a result of not being able to deduct a legitimate business expense which she incurs. The goal and the requirement of equality, as set out by s.15 of the Charter, makes it unacceptable that Ms. Symes be denied the right to deduct her business expenses merely because such expenses are not generally incurred by businessmen. Denial of these deductions would constitute discrimination under the *Act* (Symes[1993], 110: pp.507-508).

L'Heureux-Dube backs up this position by stating that, "...*all* women suffer severe social *and* financial costs associated with child-bearing and rearing and that these costs are incurred whether a woman is a self-employed small business owner, a lawyer, an employee or a full-time homemaker and care giver" (Symes[1993], 110: p.508). She then deals with the issue that income tax deductions for day-care, while helpful for self-employed women, may not be the best way to help women who work for a salary. As such, income tax deductions help only those with a taxable income. She notes that such deductions will not help the families who can not afford day-care in the first place. Furthermore, the deduction will do nothing to improve the problem of the lack of day-care facilities in this country (Symes[1993], 110: pp.508-509).

However, L'Heureux-Dube goes on to say that the Income Tax Act is a document which is discriminatory in many ways, and that *vertical equality* between the salaried and self-employed has never been maintained. "There has been no concern about this dichotomy, however, with regard to other business deductions allowed under ss.9 and 18

of the *Act* and in my view, the differential treatment of business taxpayers and other taxpayers is not raised in this case" (Symes[1993], 110: p.509). Of course, the issue before the court was not that of equality of class, but rather gender equality -- particularly as it applies to business persons.

Of course, the majority were more than willing to use Ms. Symes' position as a practising lawyer to claim that she was not in a position in which it was possible to be discriminated against. However, as Justice L'Heureux-Dube pointed out, in the case of Andrews v. The Law Society of British Columbia, Mr. Andrews' privileged position as a lawyer was never turned into an issue:

> In *Andrews*, the court did not look at the respondent and justify the infringement of his rights under s.15 on the basis that, in all other aspects of his life, as a white male lawyer of British descent, such discrimination on the basis of citizenship was acceptable since he was better off than most citizens. Neither can this be the standard to which Ms. Symes is held. This is not a case about the advantageous positions in society some women garner as opposed to other women, but, rather, an examination of the advantageous position that business*men*, hold in relation to business*women* (Symes[1993], 110: p.510).

Hence, one could argue that it was the Supreme Court majority which reverted back to the similarly situated argument, while the minority decision remained true to the established principle.

Finally, before going on to discuss how women are affected by the responsibilities of childcare, Justice L'Heureux-Dube discusses the elusive issue of equality. "The proper interpretive approach to issues of equality must recognize that a real solution to

discrimination cannot be arrived at without incorporating the perspective of the group suffering discrimination. In this case, s.15 of the Charter demands that the experience of both men and women shape the definition of business expense" (Symes[1993], 110: p.511).

3.5 Constitutional law

Some critics have argued that no discrimination exists in this case because neither mothers or fathers have access to a tax deduction to cover the cost of day-care. However, Audrey Macklin provides a conclusion which is similar to that which was eventually reached by the female members of the Canadian Supreme Court:

> As a businesswoman who employs a childcare worker, Beth Symes is similarly situated to incorporated businesses which offer child care services to their employees, yet she is denied the deduction for childcare costs which corporate employers can take. As a self-employed woman who pays a childcare worker so she can generate income as a lawyer, she is similarly situated to the businessman who pays club fees so he can mingle with potential clients and generate income as a lawyer yet he can deduct his expenditure and she cannot (1992, 5[20]: p.511).

Macklin implies that this principle is inherently biassed against females, because by definition women are not similarly situated to men. For instance, a single mother who receives social assistance and cannot get a job because she has no childcare, cannot point to a similarly situated man. In fact, the mother's wish is for resources that would help her to become situated more as a man whose participation in the workforce is not precluded

by child rearing responsibilities (as will be discussed further in Chapter 4). Thus, Macklin claims that the test is designed to help those with the least disadvantage, and legitimizes the unequal position of those who are most disadvantaged (pp.511-512).

Macklin is careful to point out that, "If the goal of section 15 in this context is to redress the discriminatory impact of tax laws on members of disadvantaged group, there can be no pretext for confining the inquiry to section 18(1) of the Act or the remedy to business women" (1992, 5[20]: p.512)[2]. Some have argued that no gender discrimination existed in this case because the deduction available for day-care was the same for both men and women. However, the position consistently put forth by feminists, the theme of Macklin's article on the similarly situated test, and indeed a major point of this thesis is that men and women are not similarly situated. Using this test to determine gender discrimination is pointless.

Macklin concludes her article on a similar note. She says that this case tells of the conflicts within the women's movement itself, and of the tension between individual and collective interests that are a part of equality litigation. This is what she calls the *bipolar structure of equal rights litigation*. Macklin feels that private actors moving within the system are left unaccountable to any larger constituency outside the courtroom (1992, 5[20]: pp. 517-517). She is once again raising the issue that has been a constant feature

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[2] Section 15 refers to the Canadian Charter of Rights and Freedoms[1982], while section 18(1) refers to the Income Tax Act[1972].

in the debate over constitutionally entrenched rights. Perhaps political action groups which choose to bring judicial action should be more sensitive to the needs of working class or low income citizens.

3.6 Conclusion

The Symes case illustrates very well the conclusions which were drawn in Chapter Two. In a political system which provides constitutionally entrenched human rights, the groups which have achieved control of the system will also control the way in which the concept of equality is interpreted. In this particular instance, it seems that males have a level of control in the judicial system which helped determined the outcome of the case. It is possible that if the female perspective were more adequately represented then we might be seeing very different outcomes -- a hypothesis which can neither been proven nor dis-proven. There are many different conceptions of equality and discrimination. These concepts clearly meant very different things to the male and female judges sitting on the Canadian Supreme Court at the time when this decision was rendered.

While division along gender lines in this decision could have been a coincidence, we should also realize that it is entirely possible that these judges had different perspectives which were determined by their experience of their respective gendered lives, among other factors. Studies have been done to determine whether female judges actually make a

difference in the outcome of a case. The studies were inconclusive and had used a method and area of analysis that was different than the scope of this thesis.

While the courts have shown little willingness to allow tax deductible day-care for self-employed women, the legislative branch of government might be an effective means of remaking the law so that a woman's special role in childcare is better acknowledged. As established in Chapter Two, political lobbying has proven to be an effective means of achieving special legislative protections for women. The women's rights activists who refused to support the position taken by Elizabeth Symes obviously realize that tax deductible day-care as a cost of doing business would not help Canadian women who are most in need of childcare aid. These activists would be wise to continue putting their time and resources into lobbying the legislative branch of government, in addition to bringing women's rights litigation to the courts so as to achieve reform that will benefit unemployed, self-employed and salaried women. While a great deal has already been achieved by the Canadian women's movement, obviously much work remains to be done.

Finally, political action groups who claim to represent certain segments of society have been bringing judicial action in order to advance the status of their segment of society. However, these organizations have no claim to legitimate representation of these persons. This case illustrates how Elizabeth Symes was trying to have equality applied to women in a certain way, yet it was obvious Symes more adequately represented self-

employed lawyers than women. This demonstrates Macklin's point that there is a bipolar structure to equal right litigation.

CHAPTER 4.0

Day-care and

women in the paid labour force

The term day-care refers to the care of children by someone other than a parent or guardian. Usually it is required either because of the parent's employment, training or educational commitments, or when a parent cannot care for a child because of a medical condition (Shaw 1982, p.1). Today, as more and more mothers are finding it necessary to enter the paid labour force, the issue of who will care for children is in question, and the issue of how much of the cost should be covered by the government is also being raised.

When the National Action Committee on the Status of Women publicly opposed Elizabeth Symes, its position was that if Symes were to win her case, it would do little to address the inadequacies of the day-care system for women who were not independent business persons who are above a certain level of income. In order to establish whether Elizabeth Symes was justified in her argument, it is necessary to examine the situation regarding child care as it currently exists for all Canadian women. In the Symes case, the argument was made that it is women who are primarily responsible for the care of children. This has been the cause of dissatisfaction among women, especially those who wish to participate in the paid labour force. Pupo (1988) agrees that day-care is an issue for all women who are mothers. "Currently, the childcare issues crosses class lines although the economic and structural circumstances of middle class and career women are substantially different from those of working class women, there is little difference in their childcare needs..." (p.221-222).

The National Action Committee(NAC) has argued for some time that the lack of availability of quality day-care is an impediment to women's equality. "For feminists... an accessible flexible, publicly supported childcare system is a necessary first step toward the achievement of equality in the workplace and in the family" (Pupo 1988, p.220). It has also been argued that inadequate day-care has negative consequences for our children. Rifkin (1995) points out that, "With the majority of women now in the workforce, children are becoming increasingly unattended in the home" (p.234).

4.1 The evolution of day-care

As with many features of the lives of modern women, the birth of day-care is linked to the beginnings of the industrial revolution in Great Britain. This all important event brought about many changes in both the public and private sphere. Traditionally, women had stayed in the home while their husbands controlled or were employed in the public spheres of government and business. However, with the advent of industrialization and urbanization, the urban homemaker's life was altered drastically. Because of technological innovations such as the power washing machine, the vacuum cleaner, and the gasoline stove, women had more leisure time on their hands. Also new in the lives of women were grocery stores, bakeries, and department stores. These eliminated the need for housewives with a large family income to can fruit and vegetables, bake bread, or sew clothing (Bacchi 1983, p.15).

With industrialization a new relationship was forming between the family and the state:

> Not only were people learning to cope with new living arrangements and family forms in the transition from rural to urban living, but they were compelled to work under a new set of codes and practices in the movement from independent farming and skilled craftsmanship to co-operation on the production line. It was during this progressive reform period, 1880-1920, that the ideological foundations of the family's connection to the welfare state were laid (Pupo 1988, pp.213-213).

At this point in history it was assumed that the male head of the household would earn enough to support the entire family:

> ...a male worker was paid a 'family wage' which he used to support his wife and children. However, in practice, many working-class families had difficulty surviving on one income since wages were low in the early part of this century. Ironically, one of the factors which kept family wages low was the existence of a reserve army of cheap labour that could be used to replace unruly workers or to meet the demands of busy times who could then be laid off without difficulty. That reserve army was made up largely of married working-class women... During the Depression this paradox became particularly cruel: Employers could no longer afford men's high wages, so many of them laid off men and hired women to replace them (MacIvor 1996, p.101).

Pupo (1988) agrees with this interpretation. "While males were the primary wage earners, working-class women and children entered the wage labour market to supplement the male income, to attain an adequate living standard, or simply to manage in the wake of crisis such as illness, injury, or death. Such crisis sometimes forced working-class families to give up their children to relatives, orphanages, or other institutions..." (p.213). Shaw

(1982) also agrees that,"Women from low income families have always been obliged to seek employment in the labour market out of economic necessity..." (p.1). The need for institutionalized day-care was becoming more and more obvious.

Often, in the absence of the mother older siblings or adult members of the extended family would take part in the responsibility of childcare. However, there was clearly a need for another option (Shaw 1982, p.1). "Day-care in Canada was begun in the mid-nineteenth century by religious, charitable and philanthropic groups to provide care for the young children of working mothers" (Mayfield 1990, p.5).

This establishment of day-care outside the home was part of a greater middle-class reform movement in order to provide care for the children of the poor and the working-class:

> Implicit in this movement were anti-feminist and anti-working-class biases. Reformers and professional day-nursery workers believed that these women lacked expertise in child management and care and needed professionalized help. The professionals were seen as more suitable to socialize children than were 'neglectful' mothers who chose to work outside the home. Moreover, the reformers emphasized the importance of motherhood and the normalcy of women's place in the home, thereby pegging the families (and particularly the mothers) of children in nurseries as abnormal (Pupo 1988, p.222).

Some consider what is called work related day-care to be the most advanced form of day-care which currently exists. This refers to, "...the involvement and support by an employer, labour group, and other organization in the provision of childcare facility or the delivery of a service for the children of employees or members" (Mayfield 1990, p.2).

This form of day-care was first seen during the early days of the Industrial Revolution. As poverty and the need for more workers in factories led to the entry of more females into the paid labour force, "A few of the more enlightened factory owners or managers provided schools or care for the youngest of the children..." (Mayfield 1990, p.5). However, these factories were the exception and not the rule, and this form of day-care was not common.

The Canadian government provided day-care when great numbers of women entered the workforce during the Second World War, while the men were doing battle. "The watershed event in the history of Canadian women's paid labour was World War II. Women's role as a reserve army of labour in the Canadian economy was clearly apparent in the campaigns to recruit women into 'men's' jobs while the men were fighting the war..." (MacIvor 1996, p.103).

Thousands of Canadian women, centred in Ontario and Quebec, worked in munitions factories in order to meet the wartime demand, and other women entered clerical jobs which had been vacated by men. Many of these women were wives and mothers. Their entry into the paid labour force directly contradicted the prevailing opinion that a women who worked outside the home was neglecting her husband. After the government had drawn the available unmarried women into the paid labour force, it began to recruit married women -- some of which had children. "The results were dramatic. In 1939 there were over 600,000 women in the Canadian labour force, of whom 10 percent

were married; by 1944 there were over a million women in the labour force, one-third of them married" (MacIvor 1996, p.103).

In 1942 Canadians saw the passage of the federal-provincial Wartime Day Nurseries Agreement, under which Ontario and Quebec set up day-care centres for the children of female munitions workers. In fact, "Only a few thousand children were actually enrolled in these nurseries, but the recognition by government that women needed help to manage family and work responsibilities marked a symbolic milestone in Canadian public policy" (MacIvor 1996, p.104).

Many women found they enjoyed the role of working mother, however the government did not continue providing day-care once the men had returned from the war:

> The government's efforts to reinforce traditional attitudes among women, to persuade them to give up their jobs and become "happy homemakers" were intensive. They included advertising campaigns on radio, in newspapers and magazines, and via the National Film Board. At the same time, scientific experts were telling women that their natural fulfilment lay in marriage and motherhood, and that they risked terrible physical and psychological problems if they persisted in their "un-natural" pursuits of paid employment -- particularly if they remained single (MacIvor 1996, pp.104-105).

However, at the same time economic reality in Canada was forcing women to enter the paid labour force. Jenson (1996) agrees that, "One of the most dramatic changes in industrial societies in the postwar years has been the shattering of the representation of the 'model worker' as a man earning enough to support his dependent family by working full time, and with job security in industry" (p.92).

As more and more women began entering the paid labour force, the question was raised as to exactly what were the needs of children:

> With increasing emphasis, especially after the Second World War, on the special needs of children and the social and education benefits of pre-school shared childcare, coupled with the economic necessity of the two-family pay-cheques, organized childcare became more desirable within the middle classes. For working-class and especially middle-class families, this represents a shift in historical relations with the community (Pupo 1988, p.222).

The trend of women entering the paid labour force which began after the end of the Second World War has continued. "It was not until the mid-1950s that middle-class women began to go back to work after their children had gone to school or left home. In the 1960s and 1970s the number of years women spent at home shrank steadily. By the 1980s the majority of women stayed in the labour force throughout their child bearing years" (MacIvor 1996, p.102).

With more and more women entering the paid labour force out of economic necessity, the issue of day-care came to public attention once again in the late 1960s and early 1970s. The Royal Commission on the Status of Women from 1967 to 1970 was a formative event in the development of Canadian government policy on women. The report dealt with many issues which continue to be prominent in the women's movement and elsewhere, such as the family, the economy, taxation, immigration, education, the participation of women in public life, and of course day-care (Levan 1996, p.320).

The Canadian Government's recognition of the growing importance of day-care became clear in the 1980s:

> The 1986 *Report of the Task Force on Child Care* systematically documents the need for affordable, accessible quality childcare. It makes 53 recommendations covering parental leaves, training for childcare staff, information and resource banks, taxation issues, subsidization, special needs groups, federal-provincial cost-sharing, licensing, and accessibility. Most of these recommendations, however, are based on the private nuclear model of single or two-parent families. The most critical problem identified by the Task Force is the lack of space in licensed family homes or centres. Currently, the vast majority -- more than 80% -- of children in childcare are in unlicensed arrangements; therefore, responsibility for monitoring supervision, and regulation falls upon parents... Quality of care varies and is not necessarily related to the possession of a license, but rather may be related to the number of children in the situation, ratio of care givers to children, and the working conditions of the care giver... (Pupo 1988, pp. 222-223).

4.2 Day-care in Canada today

This brings us to the current situation with day-care in Canada. The picture today is one of government licensed day-care centres (although the number is inadequate), baby sitters, and unsupervised in home family day-care:

> Options for parents include care in a centre, care in the family home by a relative or sitter, or care in a sitter's or relative's home. Centres may be operated on a profit or non-profit basis and spaces may be publicly subsidized. There are wide provincial variations in the availability of any type of childcare, but four major issues are apparent: quality, affordability, cost, and salaries and working conditions of care givers. These issues underlie lobbyists' programmes (Pupo 1988, p.223).

In this country all day-care centres must be licensed. This means meeting standards set by the provincial governments and complying with regulations relating to records, maintenance and safety. There are regular visits to centres by government personnel in order to ensure that these standards are met. Administration of this program is shared-cost with the federal government meeting an established percentage of the cost and the balance being met by the province. Sometimes this is done in combination with a municipal government (Harris and Melichercik 1986, p.170). The following passage describes an ideal day-care in this country:

> A day-care centre is a place that services, during the day, children aged three and up to the school years, through the use of a program prepared by staff specially educated to work with pre-school children. The program attempts to ensure the children's physical well-being, to deepen their emotional growth, to stimulate their social skills, and to promote the extension of their frame of reference through experiences that facilitate their conceptual growth (Harris and Melichercik 1986, p.169).

However, even this ideal day-care does not even come close to meeting the needs of the families especially because of the hours it is open and the lack of availability.

Parents with children who are of school age may require day-care after school hours. The economic necessity of having to work in a capitalist system does not go away because of the hour of the day and of course it is illegal for children to be left unattended in this country. "In fact, Child Welfare legislation across Canada states that children up to the age of 12 years have to be provided with alternative supervision in the absence of their parents" (Shaw 1982, p.1).

Also, while the staff may be specially trained, this training may be very limited. Harris and Melichercik say that, "The staff in day-care centres varies in training; some have university degrees or early childhood education training provided by the centre" (Shaw 1982, p.170).

However, the greatest problem by far with day-care in this country is the lack of availability. According to a study which was issued by Statistics Canada in 1992, there were more than two and a half million Canadian children in need of some form of day-care for at least an hour during an average week. Roughly one in ten of these children can be accommodated in a licensed childcare centre or family home (MacIvor 1996, p.370). Using these figures it is reasonable to assume that the availability of day-care greatly exceeds the need. Furthermore, "As women's participation rate in the paid labour force approaches that of men in many countries, the 'average' worker is as likely to be female as male" (Jenson 1996, p.92).

"Clearly, the demand for day-care in Canada far outstrips the supply of licensed, approved day-care spaces. It is not surprising, therefore, that there are long waiting lists for day-care spaces. It is also no surprise that parents turn to other alternative forms of day- care for their children, such as baby sitters and unsupervised family day-cares" (Shaw 1982, pp.4-5). However, the use of these different forms of day-care, certainly should not be viewed as a reflection of the demand. Parents are not necessarily happy with the day-care situation which their child is in:

> On the contrary, studies have shown that more than 50% of parents are dissatisfied with their day-care arrangements. Dissatisfaction is particularly high among those using unsupervised family day-care or baby sitters. For most parents, in fact their first preference is to have their children in day-care centres, but they have to use different types of arrangements when they find that group day-care is not available (Shaw 1982, p.10).

Of course inadequate or unavailable day-care has many implications for Canadian society, and Canadian women in particular:

> The unmet need for non-parental quality childcare has several important consequences. First a substantial number of children in Canada may be receiving no supervision or minimal custodial care... Second, the economic factors behind the increased labour force participation of married women and lone-income mothers are not likely to change. Unless women curtail reproduction even more than current low levels, the demand for non-parental childcare should increase, not diminish. Third, the emphasis placed on women as responsible for care giving causes many to resolve their childcare crisis by leaving the labour force. Despite evidence which suggests that younger women are leaving less frequently than are older women and for shorter periods... these exits can curtail the occupations and income of women by reinforcing employer stereotypes about women being intermittent employees and by causing women to suffer reduced or lost seniority-related benefits (Boyd 1988, pp.94).

In the Symes case the question was which gender currently bears the cost of day-care in this country. Although cost was never actually defined, the plaintiff's side continually put forward extrinsic evidence to suggest that child care requires a lot more time from women than their male counterparts. The evidence which was presented to the courts indicated that *day-care is the concern of primarily women*. For men, it is likely that "...the responsibility of children does not impact the number of hours they work. Nor does

it affect their ability to work" (Symes[1993], 110: p.492). Rifkin (1995) agrees with these sentiments. He says, "The increased stress of extended work schedules has been particularly burdensome for women workers, who are, more often than not forced to manage the household as well as hold down a forty-hour job" (p.234). Harman (1995) says that:

> ...while it is absolutely true that more and more men are doing unpaid domestic labour in the home, women continue to do the bulk of the housework. When they also work in the paid labour force, they are often forced to work a "double day" – to do a full day's work outside of home during the day, followed by the equivalent amount of time doing the domestic labour required to keep the household operating (p.253).

Very few men indicate that they make any work related decisions on the basis of child-rearing responsibilities. The same can not be said of the many women. In fact, for women such a separation of family and work related responsibilities is a completely unrealistic notion (Symes[1993], 110: p.492). This was a point which Justice L'Heureux-Dube noted more than once in her written decision. She quoted Dr. Armstrong as testifying that "...research in Canada and abroad has consistently demonstrated that women remain primarily responsible for childcare and that this is so whether women work inside or outside the home" (Symes[1993], 110: p.512). Armstrong then refers to Susan Crampton's study:

> In fact, Statistics Canada reports that working men are chiefly responsible for childcare in only 6% of families... Further, the responsibility for childcare has also had a very real impact on women's patterns of employment. According to Statistics Canada

> Family History Survey, ongoing childcare had a major impact on the continuity of work for the majority of women but almost no impact on men. This is consistent with research done on women in managerial and professional work which identifies having children as a major disruption in career patterns and as a problem for women (Symes[1993], 110: p.512).

Armstrong was not aware of any similar research on men which identified raising children as having a major impact on their careers. Specifically referring to day-care, she also observed that "...the cost alone can consume a large portion of a woman's income. Self-employed women do not differ significantly from women as a whole with respect to the effect of childcare" (Symes[1993], 110: p.513). It is also interesting to note a point that was made by Harman (1995) who says that, "Women who are on the career track may delay childbearing for several years, being aware of the costs to their career, as well as to their financial situation, of having a child. Here, then, it is not unusual to hear a woman say, 'I can't afford to have children'" (p.250).

Specifically referring to female lawyers in writing her decision, Justice L'Heureux-Dube noted that "...male lawyers did not consistently report that childcare had any impact on their career...whereas female lawyers indicated that they suffered financial losses as a result of child care responsibilities (Symes[1993], 110: p.513). Apparently much the same can be said of other profession.

Iacobucci, speaking for the majority of the Supreme Court argued that we all have a choice of whether or not to be responsible for children. To this L'Heureux-Dube answered that:

> While there is a personal component to child-raising, and while the care of children may be personally rewarding, this "choice" is a choice unlike any others. This "choice" is one from which all of society benefits, yet much of the burden remains on the shoulders of women. Women "choose" to participate in an activity which is not for their benefit alone, and in so doing they undertake a function on behalf of society... The decision to have children is not like any other "consumption" decision. To describe the raising of children in comparable terms to "choosing' to purchase a certain kind of automobile or live in a certain dwelling is simply untenable. As well, the many complexities surrounding childcare make it inappropriate to adopt the language of voluntary assumption of costs, where those costs may in fact, be allocated in a discriminatory fashion -- the burden falling primarily on women (Symes[1993], 110: pp.494-495).

4.3 Women and poverty

Although the evidence in Symes v. Regina[1993] appeared to focus on the social costs of day-care for women, there is obviously an economic cost involved as well. According to Pupo (1988), "One of the major focal points in the current Canadian childcare movement is the cost, both direct and indirect, to the families, women, employers, and the state" (p.219). There is subsidization of day-care for lower income families, however there are some problems with the way in which this program is currently being administered:

> The current piecemeal system works to maintain class distinctions and promotes divisiveness among women. Childcare has been developed using the welfare principle of selectively subsidized user-fee services. Assessment for eligibility for subsidy are integrated with welfare services. Subsidized spaces are mainly in non-profit centres. In fact, approximately 50% of all childcare

> spaces in Canada are subsidized... Not only does this segregate children by class, but it divides women (Pupo 1988, p.223).

Obviously, the most prevalent reason for day-care has been the entry of women into the paid labour force. In order to support themselves and their families, many women, including many with young children, find it necessary to enter the paid labour force:

> Even among married women whose families are not close to the poverty line, economic insecurity is a strong motivator encouraging labour force participation. This is a reflection not only of general economic insecurity among middle income families, but of the particular insecurity of women who stay home to raise their children. Such women receive no income for the work they do at home, and they also lack any adequate pension provisions. It is not surprising then, that many women decide to seek employment and take responsibility for their own economic futures (Shaw 1982, p.3).

The point that more and more women are finding it necessary to enter the paid labour force did not go unnoticed by the legal counsel for Elizabeth Symes. Expert witness Dr. Patricia Armstrong indicated that there had been significant social change since the late 1970s and into the 1980s, with the influx of women into the workplace. Many of these women were and are of child bearing years (Symes[1993], 110: pp.477-478).

> Dr. Armstrong testified that dramatic and fundamental changes have been taking place in both the labour market and the family structure over the past 40 years. In 1951, only 24% of Canadian women participated in the labour force. By 1987, this number had risen to 56%... Further, the increase was most dramatic for women in their childbearing years, with nearly three-quarters of women between the ages of 16 and 44 being counted as members of the labour force, particularly in the 1980s. Today, a majority of women, even those with very young children, are now in the labour force (Symes[1993], 110: p.486).

The single most important factor leading to increased female participation in the labour force has been simple economics. According to Boyd (1988) there has been an influx of married women in particular into the paid labour force. One of the explanations for this trend has been the demand for more labour associated with the move to a service economy in the period following World War Two. However, financial need also plays a role. "Analyses of individual and family income distributions indicate that throughout the 1960s and 1970s incomes of husbands alone could not maintain the economic position of their families" (p.92).

However, the cost of day-care was sometimes a factor which actually served as a disincentive for women with children preventing them from entering the labour force:

> A person who works in a paid job and has to pay for child-care expenses, as well as transportation, clothing, and other work-related expenses, is often worse off employed than on social assistance. A study by the Social Planning Council of Metropolitan Toronto, published in 1986, concluded that most single mothers in that city would have to find jobs paying $8 an hour, or twice the minimum wage, to be better off than they are on welfare (Gunderson and Muszynski 1990, p.29)

As one can imagine, these figures have changed since this study was released in 1986, but the cost of day-care remains as a disincentive to work outside the home for women who are also mothers. According to Harman (1995), "...many women cannot make enough money in the paid labour force to pay someone else to look after their children, therefore ensuring that they will stay at home, thus disadvantaging themselves when they do seek

re-entry into the labour force" (p.254). She echoes the argument made by Gunderson and Muszynski:

> Although the cost of childcare varies regionally and the type of service provided, it is reasonably safe to assume that an earner would have to be making a considerable amount more than the minimum wage to justify hiring another person. In addition, a worker requires an appropriate wardrobe and transportation, and often must pay more money for meals than she would expend at home. After taxes, it is not unusual to hear a woman say, "I can't afford to work". What this means is that it would end up costing her more to work and hire someone to look after her child than to stay at home and forfeit her income (Harman 1995, p.250).

Also serving as a disincentive for women's entry into the paid labour force is the gender gap between the wages paid to men and women. Despite the advances which women are believed to have made, the gender gap in wages remains:

> In spite of the enormous growth in females labour participation, and in spite of some women's success in breaking into male jobs, the data clearly show that women continue to be segregated in many of the jobs and industry divisions characterized by low recognized skill requirements and low labour productivity levels. The labour force is divided into women's work and men's work, a situation that has remained remarkably stable over fifty years covered by the last six censuses (Armstrong 1994, p.41).

Some argue that a low minimum wage plays a role in keeping women impoverished. Interestingly enough, "...women are almost twice as likely as men to be working for the minimum wage established by law...Obviously, there are not only men's jobs and women's jobs but also men's wages and women's wages (Armstrong 1994, p.45). Harman

(1995) claims that, "...women continue to make only 65 percent of the salaries that men do" (p.250).

According to Armstrong (1994), "...in 1991 males who had grade eight or less earned more than women with post-secondary certificates or diplomas. Job experience cannot offer much of an explanation either. Women who had been in the job for a year in 1991 earned 70.1 percent of what men earned and those who had been in the job for six to ten years earned 69.8 percent of what men with comparable experience earned" (p.44).

Some attribute the gender gap in wages to changes in the global marketplace. "Restructuring for a global economy has meant the disappearance of full-time jobs in all but the non-commercial services and services to business. Jobs disappeared in the primary industries, in construction and manufacturing, in the distributive and wholesale trades -- in areas where men dominate" (Armstrong 1996, p.52). This trend is having a negative impact on women who wish to work outside the home. "Almost all the full-time job growth has been in the public sector, in areas where women dominate. Although men suffered more in terms of full-time job-loss, they took more than their share of new full-time and part-time work in the female-dominated areas. In other words, some men are moving into women's traditional areas and successfully competing with women" (Armstrong, 1996, p.52).

The trend towards privatization has also had negative consequences for women who wish to work outside the home. "Privatization had primarily served to create part-time or

short-term, non-union jobs, and any new jobs in the 'dynamic' industries are likely to be part-time or part-year and are likely to go to men (Armstrong 1996, p.53). Armstrong (1996) sums up the changes which have occurred in the paid labour force by saying that, "Women's and men's work have become more similar mainly because fewer people of both sexes have a choice about the kinds of paid work they take and because more of the jobs are 'bad jobs'. Job insecurity, less union representation, less opportunity for promotion or skill development, lower wages, and unemployment have come with globalization" (p.53). These sentiments have been echoed by Jenson (1996) who argues that:

> Part-time work, temporary work, and limited-term labour contracts have become increasingly prevalent in the private and public sectors. Women are disproportionately found among workers with such non-standard contracts, especially part-time ones. Furthermore, restructuring has meant that the percentage of the labour force employed in industry has declined while that in the service sector has burgeoned. The latter sector is, of course, the one that employs women disproportionately (p.92).

Obviously, the cost of extending a business deduction to the cost of day-care of self employed persons would not have done anything to reduce the cost of day-care for low income families. It would seem that an increase in government funding for day-care to low income families might be one means of lessening the effects of poverty. Conservative critics continue to argue against increasing the tax burden on all Canadians for the purpose of making it easier for women to enter the paid labour force. Many argue that it does not make sense to subsidize a job which can be done by the mother.

Some argue that at present there is a *culture of poverty* that exists among low-income families and that it causes those who are born into poverty to accept that they will remain poor throughout their lives:

> For many Canadian who have grown up in poverty, the likelihood of having a better life in their adulthood is remote. Some sociologists have attributed this to what they call the "culture of poverty"... By this they mean that poor families tend to develop fatalistic values and attributions about their lot in life, devaluing education, career aspirations and the usual middle-class definition of success. They develop a sense of hopelessness of ever getting out of their situation and live with a type of survival mentality. This, in turn, becomes a self-fulfilling prophecy in which failure is inevitable and poverty is seen to cause more poverty (Harman 1995, p.246).

However, in order to help break the cycle of poverty which currently exists among low income families and welfare recipients, it is necessary for day-care to be more accessible and more affordable.

The majority of the Supreme Court did leave the door open for the cost of day-care of a single mother to be deductible, since this person would be at more of a disadvantage than Elizabeth Symes. However, most feminists would argue that making day-care more affordable is something which should not be done using a tax deduction.

4.4 The future of day-care

As was pointed out during the hearing of the Symes case, 70 percent of employed mothers with children younger than 6 years of age, work full time, as do 75 percent of

employed mothers with school-age children (6 - 15 years). Current forecasts suggest that by the beginning of the twenty-first century, 88 percent of women aged 25 to 34 years will be in the work force. This is noteworthy, since women aged 25 to 34 years are the group most likely to have young children and thus to require day-care. It is reasonable to assume then that the issue of day-care is likely to be a crucial one, for Canadian families, in the future (Symes[1993], 110: pp.486-487).

The National Action Committee on the Status of Women, has been careful in their development of a policy on childcare. The discussion has had two dimensions; there have been discussions about home day-care and profit-making services versus a state-funded, school-like system, and discussion about who should pay and benefit -- parents or stay-at-home mothers. There was little discussion by the National Action Committee of work related day-care, which was frowned for tying women to their employer. The National Action Committee came to support the position of the Day Care Advocacy Association that, "...tax benefits given directly to parents are a waste of money and the least effective way of developing a system of quality day-care services in Canada" (Vickers, Rankin, and Appelle 1996, p.262). This particular feminist political action group appears to have remained constant with its position on day-care, as this policy is much like the public position they held regarding Symes v. Regina[1993].

A point which has frequently been made in reference to government funding of day-care, is the argument that Canada's federal method of governing may be counter-productive to achieving universal day-care:

> It has often been argued that Canada's division of powers leads to inaction in the area of social policy. The provinces are responsible for setting and enforcing standards for the quality of care. Most of the provincial governments also provide some financial assistance to non-profit childcare centres in the form of operating grants or start up grants. They may also subsidize care for children with special needs. Because there has not been a national childcare program, each province has set different standards, and some have had very little money to contribute to childcare (MacIvor 1996, p.374).

This had made it especially difficult for feminist political action groups to achieve their goal of a free universal day-care program for Canada.

4.5 Conclusion

The Symes case did not come close to dealing with the most important issues regarding day-care facing Canadian women in the 1990s. That is the lack of availability and the high cost -- especially to low income families. In keeping with its tradition of opposing income tax deductions as a means of making day-care more affordable, the National Action Committee on the Status of Women chose not to support Elizabeth Symes's position. They argued that a tax deduction for self-employed persons would not benefit the Canadian families who are most in need of funding for day-care.

The most important child related issue for Canadian families is the lack of quality day-care – a point which was confirmed by Statistics Canada in 1992. That is a problem which can only be solved with more government involvement in the funding and providing of access to day-care . According to the figures from a number of sources, most Canadian women are unhappy with the types of care which are currently available. Both Canadian and American authors suggest that their federal government have a history of being able to provide for day-care during a period when women's labour was required in the paid work force. Later when these countries no longer required the extra labour, women were asked to return to their traditional roles as housewives and mothers.

Many Canadian families are struggling desperately to meet the costs of current day-care. Minimum wage is nowhere near high enough to ensure that a single parent is better off doing paid work rather than on social assistance, thus creating a disincentive for single parents to seek employment, particularly single mothers since females consistently earn less money than males in Canada. It is foreseeable that the Canadian government will have to play a greater role in providing day-care as more and more Canadian women find it necessary to enter the paid labour force in order to support themselves and their families. Government aid in the form of subsidizing the cost of day-care for low income families is already being done, however it currently being administered within the welfare system which serves to divide women who need day-care along class lines. Also, most subsidized

spaces are in non-profit centres which has the affect of segregating children according to class.

Universal day-care is a service which feminist political action groups are lobbying for. In order for this to occur the federal and provincial governments must realize that providing day-care is fundamental to the needs of their work force. However, it will likely be a long time before there is universal day-care in Canada giving women the freedom to earn a living which their male counterparts already seem to have.

CHAPTER 5.0

INCOME TAX LAW

One of the most fundamental points which is consistently made by feminist political action groups is that the laws which govern many nations have typically been made by men, and consequently they are for men, and based on the experience of men. This chapter is intended to focus on Canadian income tax law, and more specifically on how income tax laws may encourage or deter individuals from becoming independent business persons. As more and more women are running their own businesses, the question arises as to how existing tax laws and government programs can be made more encouraging to independent business women. Elizabeth Symes argued that one way to accomplish this would be to make day-care tax deductible as a business expense.

5.1 The Canadian taxation system

In this country, all three levels of government are involved with taxation. Municipal governments tax for the purpose of policing, fire stations, water and sewer services, street lights, parks, garbage collection, and recreation programs. Provincial governments tax into order to maintain roads, provide health care and education systems, and programs such as social assistance and public housing. The federal government taxes for the purpose of providing national defence, old age pensions, unemployment insurance, overseas aid, and it is responsible for paying the interest on the national debt, maintaining diplomatic international relations, and a civil service. "About 60% of all taxes are levied

by the federal government. The provincial governments collect about 30%, and municipal governments gather the remaining 10%" (Townson 1993, p.3).

"First, it is worth reiterating the principles that most tax experts agree should govern any tax provisions or policies. Most tax experts subscribe to the following criteria: equity, neutrality, economic efficiency and simplicity" (Maloney 1987, p.2). Many would question the effectiveness of the various levels of government in their attempts at accomplishing these principles. The women's rights advocates in this country are concerned in particular with the principle of equity. In fact, many feminists point out that the level of achieved equity is not acceptable and that government's should go further. As discussed in Chapter Two, the concept of equality is at best a grey area. The same is true of tax equity:

> Equity can be interpreted in two ways. "Horizontal equity" means that those in similar circumstances are treated equally... "Vertical equity" means that people in different circumstances are treated appropriately, according to their differences. For example, vertical equity requires that taxpayers with higher incomes pay a higher rate of tax. In general, equity requires that the tax burden be shared among all taxpayers, whether individuals or corporations, on the basis of their ability to pay. The system is said to be fair, or "progressive", when the burden is lightest on those who can least afford to pay. Those at the higher end of the income scale are more able to pay and are therefore expected to contribute a higher percentage of their income through taxes (Townson 1993, p.5).

As Townson notes, one way of looking at tax equity is one's ability to pay. This is a recognition that the distribution of wealth prior to taxation is unequal and that some people are better able to contribute than others. Some people feel that this inequity should be

reflected in tax law (Maloney 1987, p.2). However, "Equality is not quite the same as equity... Equality encompasses a broader perspective than simply economic well-being, focussing on other social factors, such as age, sex and race, that are not necessarily inherent in traditional tax equity terms. As such, equality is an independently desired objective..." (Maloney 1987, p.2). The background paper on Women and Income Tax Reform (1987), which was prepared by the Canadian Advisory Council on the Status of Women, provides some definitions of equality as they pertain to tax law. "There are two types of equality: rule (or formal) equality and results (or substantive) equality. Rule equality is satisfied by ensuring that there are no overt discriminatory sections in the Income Tax Act (the Act). Results equality requires more: the removal of systemic discriminatory provisions and potentially, affirmative action" (Maloney 1987, p.2).

The principle of neutrality has to do with economic efficiency and liberalism. This principle requires that all types of income and activity be taxed equally in order to ensure that the choices of taxpayers are not distorted. In other words, the government should not base taxation on certain types of incomes or activities because they are deemed to be more desirable or socially acceptable. This principle characterizes classical liberalism's commitment to individual autonomy. However, even to classical liberals, there are some instances where the paternalism of the state is justified (Maloney 1987, p.3).

Another aspect of neutrality is the concept of economic efficiency. "This principle requires that taxes be applied in such a way as to ensure that economic gains are

maximized" (Maloney 1987, pp.3-4). For instance, it is possible through the taxation system to correct "...imperfections in the market system by the imposition of penalties or the awarding of bonuses (Maloney 1987, pp.3-4).

Finally, there is the principle of simplicity. This is to help ensure that the taxation system remains relatively inexpensive to administer. Also, simplicity enables taxpayers to understand and comply with the provisions of the law which affect them. However, as any taxpayer can undoubtedly tell you, tax forms do not achieve simplicity. Apparently the goal of simplicity becomes increasingly difficult to meet. Also, it is unfortunate that simplicity may be achieved at the expense of equity for the simple reason that when the Income Tax Act attempts to take individual circumstances into account, then the system becomes more complicated (Maloney 1987, p.4).

Certain of these principles are saying is that a system of taxation should be fair. So, how fair is the Canadian system? Some would say that our system has become much less progressive in recent years, and some would even go so far as to say that "...the principle of basing taxes on the ability to pay has been undermined" (Townson 1993, p.7). Reportedly, "In the 1980s, the federal government introduced a number of major changes to the tax system. Although key objectives to this tax reform were said to be fairness and simplicity, many people believed that these objectives were not met" (Townson 1993, p.7).

For instance, there has been an increased reliance on what are known as consumption taxes, which are regressive. Instead of being based on ability to pay,

consumption taxes are based on what people purchase or consume. The Goods and Services Tax, Provincial Sales Tax, or the most recent Harmonized Sales Tax would be examples of consumption taxes. The following passages describes why consumption tax are regressive for low income persons:

> An 8% sales tax means that everyone pays a tax of 8% on everything they buy. If two different people, say Jasmine and Ali, each buy $5,000 worth of things in a year, they both pay $400 in tax. But suppose Jasmine is a low-income earner and her annual wages are only $15,000. The $400 tax she pays is 2.7% of her annual salary. Let's suppose Ali is a high-income earner, making $80,000 a year. The same amount of sales tax translates into only 0.5% of his annual salary (Townson 1993, p.7).

5.2 Women and income tax

This trend towards a reliance on consumption taxes has particular significance for women because women generally have lower incomes and must spend much of them on necessities. Consumption taxes also penalize persons who live in high-cost urban areas. "...the almost universal trend of adopting value-added taxes in the 1980s has been recognized as a regressive policy initiative from the vantage point of the poor and women, who, in global terms constitute the majority of the poor. Consumption taxes also disproportionately impact on lower-income groups, who pay a larger chunk of their earnings through this tax (Bakker 1996, p.40).

> To the extent that high-income earners are favoured by the tax system, women for the most part are disfavoured. This happens directly and most visibly because they cannot afford to make use of favourable provisions. But indirectly, women have to bear the

> burden of tax breaks given to higher-income earners, who are mainly men, because taxes generally must be higher than they would otherwise be to compensate for the loss of revenue that tax expenditures involve (Canadian Advisory Council on the Status of Women 1987, p.3).

Without a doubt, a disproportionate number of low-income taxpayers are women. According to Phillips (1996) taxation practices in this country are in fact less progressive than even the harshest critics have generally argued. Reportedly, apart from consumer taxes income levels are almost always used as the sole indicator of one's ability to pay which consequently ignores the additional social and economic benefits enjoyed by wealth holders, and the disadvantages faced by those with little or no wealth. Since wealth is distributed much more unequally than income, in relation to gender, the components of the tax system may be seriously underestimating the taxable capacity of the wealthy, and overestimating that of the poor. This situation has a greater negative impact on those women who are disadvantaged relative to men in terms of wealth and income (p.151).

As pointed out in Chapter Three, there has been a significant increase in the number of women in the paid labour force in recent decades. However, the increase in the amount of money earned by women, has not kept pace. "As you are aware, the majority of adult women now work outside their homes. Among the younger generation of women -- those now between the ages of 20 and 44 -- more than 73% are labour force participants. Almost six million Canadian women are now in the work force. But these

women, by and large, do not earn high salaries and their wages are not keeping up with inflation (Canadian Advisory Council on the Status of Women, 1987, p.4).

An ever increasing number of families are now headed by single parents -- more often than not that translates to single mothers. These families are among the poorest of the poor in this country. The Brief on Tax Reform Presented to the Standing Committee on Finance and Economic Affairs had this to say about the issue: "we are alarmed that the poverty rate among single-parent families headed by women continues to increase steadily, so that in 1985, 60.4% of single parent families headed by a woman who was under age 65 were poor" (The Canadian Advisory Council on the Status of Women 1987, p.5). The higher levels of poverty among families headed by women are the obvious result of two factors -- the first being the gender gap in wages that sees women earning less money than males with the same or similar levels of education and the second being the high cost of day-care, which is an issue for every working mother.

In recent years there has been research by governments and women's rights organizations in order to provide the necessary information for designing a more equitable system of taxation. According to Bakker:

> The Working Group on Women and Taxation of the Ontario Fair Tax Commission has provided a useful set of guidelines for assessing the fairness of the current tax structure from a gender-aware perspective... The impact of the tax system on women should be measured, according to the Working Group's report, on whether it increases economic inequality, reflects this inequality, or reduces it. So, for example, women's primary responsibility for care giving and their disproportionate share of unpaid household work "raises

> questions about the design of the provisions in the tax system that recognizes unpaid work, the tax treatment of unpaid work, the impact of unpaid work on the design of subsidies for retirement savings, and the recognition of the unequal division of unpaid work between custodial and non-custodial parents in the tax treatment of these payments... (1996, pp.41-42).

However, as already pointed out, tax deductions are not the best way to subsidize day-care since it is mainly high income persons who benefit from tax deductions.

5.3 Deduction of day-care costs

Any individual who enters the paid labour force must take into consideration the day to day costs of such things as extra transportation, clothing, and taxes. However, the greatest work related expense that any individual can face is the cost of day-care. For a person who can only work part time, or a person who can only find a low paying job, the extra cost of day-care can make the decision to work outside the home economically irrational. This can be an unfortunate situation for families who are trying to better their situation.

Continuing to add to this problem is the fact that, as pointed out in Chapter Two, up until 1993 the Income Tax Act allowed a deduction of only $2,000 per child per year, for up to four children, to a single parent or the spouse earning the lower income. This amount is not nearly enough to encourage a parent with low-income earning potential to seek work in the paid labour force (Maloney 1987, p.21).

Maureen Maloney's publication Women and Income Tax Reform (1987) takes the position that:

> The amount of the tax relief is inadequate: $2,000 is not nearly sufficient to cover the yearly costs of childcare. A more realistic figure should be introduced. A maximum amount should be imposed, however, to ensure that expensive preferences are not covered... Three-quarters of the cost of an average childcare centre of good quality would be an appropriate maximum. Furthermore, tax relief should be in the form of credit to ensure that all women are equally subsidized for childcare costs, regardless of the amount of income they earned. The dollar figure should also be indexed to ensure that the value of the subsidy is not eroded in periods of high inflation (p.21).

In 1993, the Income Tax Act was amended so that the maximum allowable deduction would be $5,000 for each eligible child under seven years of age, including older children who have severe and prolonged mental or physical disabilities. For children who are older than age seven and up to the age of fifteen years (including children with a mental or physical disability) the maximum deduction was increased to $3,000 (Townson 1993, p.15).

As was also pointed out in Chapter Three, there are a lack of quality day-care facilities which meet government standards in this country. This has led women to seek more informal day-care arrangements, often with relatives. One consequence of informal day-care is that the parents who use it are sometimes unable to provide the receipts which qualify them for existing benefits and deductions. This explains why the National Action

Committee does not support income tax deductions as a means of making day-care more accessible (as was discussed in Chapter Four).

5.4 Questions of law

Clearly, the field of taxation is a very complicated one and making a policy that is fair is often difficult. For often what may look like an excellent policy on the surface may result in serious abuse of the system. Nowhere is this more evident than when one is dealing with the issue of tax deductions available to business persons. The potential for abuse by such persons is almost staggering when one considers the number of such deductions which are available.

At the time when the Canadian Supreme Court rendered its decision on Symes v. Regina[1993], it was possible for a business person to gain a deduction for such things as entertaining a client over lunch provided that said business person could show receipts which proved there was indeed a client present. It was possible to deduct fees for joining a golf club, on the assumption that business meetings are often held over golf. Other deductions which were available to business persons included a large house, driving an expensive car, or giving donations to charity, on the assumption that a such things help a business person to maintain a professional image.

Ms. Symes was well aware of these potential deductions as a practising lawyer. It was her hope to have day-care costs included here. However in 1996 restrictions were put

in place on such deductions for automobile expenses in 1996 (CGA Magazine 1996, 30[3]: p.12) and club dues are no longer always tax deductible (The Financial Daily Post 1996, 9(30): p.32). Perhaps the public attention which the Symes case drew to income tax law has had something to do with this change.

Always at the heart of taxation is the issue of exactly what may qualify as a profit, as only an expense which aids in the gaining of profit can qualify for a tax deduction as a cost of doing business. Justice L'Heureux-Dube dealt with this issue in her written decision. "Profit, although not defined in the Act, has been interpreted to be a net concept. The determination of profit is dependent upon the question of whether an expenditure is a proper business expense to be included in the calculation of such net gain" (Symes[1993], 110: p.482). This has been expanded upon by such judges as Wilson and even Cullen when writing his own interpretation of Symes. According to L'Heureux-Dube, Bertha Wilson had this to say in a 1988 case which applied to the same issue. "The only thing that matters is that the expenditures were a legitimate expense made in the ordinary course of business with the intention that the company could generate a taxable income some time in the future" (Symes[1993], 110: p.483).

The Federal Court of Appeal obviously took a different point of view and overturned Justice Cullen's decision in the lower court. However, the dissenting side of the Canadian Supreme Court chose to agree with the Federal Court. L'Heureux-Dube justified this position by stating:

> I cannot agree with the approach taken by the Federal Court of Appeal. What, in my view, has traditionally been recognized as a "commercial need", has everything to do with those who have traditionally held positions in the commercial sphere -- primarily men. Further, a review of the developments in income tax legislation and its interpretation clearly demonstrates that, as the needs of those pursuing business have changed, the definition of what constitutes a business expense has similarly expanded (Symes[1993], 110: p.484).

5.5 The decision

5.5.1 The male majority

As taxation law can often be a confusing field, Iacobucci begins the statutory interpretation section of his analysis with a brief explanation of the Canadian Income Tax Act and how it affects most persons in this country:

> Canadian residents pay tax pursuant to the basic charging provisions, s.2(1) of the *Act*. Therein, the taxability of residents is established and made referable to the concept of "taxable income". As set out in s.2(2), calculation of a taxpayer's "taxable income" first involves determining the taxpayer's "income for the year". That concept in turn, requires recourse to s.3 of the *Act*, where, in part, it is established that to determine a taxpayer's income for a taxation year requires that one compute the taxpayer's income from each of several sources. As set out in s.3(a), one such source is "income...from...business" (Symes[1993], 110: p.526).

Iacobucci then discusses in more detail, those provisions of the Act applying specifically to business persons such as Elizabeth Symes:

> First, by virtue of s.9(1), a taxpayer's income from business is stated to be the taxpayer's "profit there from for the year", "profit" being nowhere defined in the *Act*. Second, s.18(1)(*a*) provides that in computing business income, no deduction shall be made or

> incurred by the taxpayer for the purpose of gaining or producing income". Finally, in s.18(1)(*h*), a prohibition against deducting "personal or living expenses" is established. The proper approach to these three provisions is the initial point to be examined (Symes[1993], 110: p.527).

The male majority ruled that section 63 of the Income Tax Act eliminated childcare expenses as a business deduction. To make day-care deductible under s.18, they said, would have gone completely against the intentions of Parliament when it created a specific separate "complete code" to deal exclusively with day-care. Of course, this ruling raises the question as to whether childcare expenses could qualify as a business expense in the absence of section 63 (Schmitz 1994, Jan. 28: p.4). Further, Iacobucci wrote that even though Ms. Symes proved that women disproportionately bear the social cost of day-care, this does not necessarily mean that they bear the economic cost:

> Mr. Justice Iacobucci acknowledges that Ms. Symes led ample evidence which "conclusively demonstrates that women bear a disproportionate share of the childcare burden in Canada". But according to the majority, "the s.15(1) issue is whether s.63 of the ITA[3] has an adverse effect upon women in that it unintentionally creates a distinction on the basis of sex" (Schmitz 1994, Jan. 28: p.4).

This interpretation of Iacobucci's decision was echoed by The Calgary Herald article, "Opinion divided on childcare vote. "Justice Frank Iacobucci said Symes failed to prove women pay childcare expenses more than men. He said paying for such care is a joint responsibility of both parents and that allowing self-employed women to claim childcare

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[3] Income Tax Act

as a business deduction could lead to a situation where a family decides a woman will bear all such costs for tax purposes, a choice that is more bookkeeping than reality" (1993, Dec.17: p.A3).

Cristin Schmitz, of Lawyer's Weekly, writes about the major reason for the finding against Symes. "While the majority rejected the Charter argument for women like Ms. Symes who are members of two-parent families, they explicitly left open the door to female single parents -- most of whom are poor -- to bring a Charter s.15 challenge to the restricted, basic childcare deduction in s.63 of the ITA" (1994, Jan.28: p.4). According to The Globe and Mail, the seven male judges took pains to say they were not worried about tackling the government over economic policy; a challenge based on discrimination against a single mother might fare differently, they said, if evidence was presented that childcare expenses fall mostly on them. Low income families might successfully argue that tax rules on childcare discriminate against them, they observed (1993, Dec. 17: p.A2).

The majority felt that the question of which parent will care for the child is a personal issue for the family and not a legal issue for the courts. "In most households involving more than one supporting person, therefore, regardless of 'family decision', the law will impose the legal duty to share the burden of childcare expenses, if not necessarily a duty to share the childcare burden itself..." (Schmitz 1994, Jan. 28: p.4). An article of The Globe and Mail also quoted Iacobucci as stating in his decision "certainly there has been no attempt to involve the circumstances of low-income Canadians in this Charter

challenge" (1993, Dec.17: p.A3). The author of this article felt this was, "...a pointed reference to Ms. Symes's wealthy background" (The Globe and Mail 1993, Dec. 17: p.A3) .

5.5.2 The female minority

The dissenting female minority saw the case in a much different light. They were in favour of Symes' position arguing for the deduction and opposed to the argument that s.63 of the Income Tax Act eliminated the possibility for deduction as a cost of doing business. Writing for the minority, Justice L'Heureux-Dube had this to say under the statutory interpretation section of the dissenting opinion. "In my view, the logical conclusion to my colleague's analysis, although he does not state as such, is that ss.9, 18(1)(*a*) and (*h*) do not prevent the deduction of childcare expenses as a business expense" (Symes[1993], 110: p.482). Cristin Schmitz restated L'Heureux-Dube's position:

> The minority concluded that nothing in the wording of s.63 (the basic childcare deduction) prevented the deduction of childcare expenses under s.9(1). And even if s.63 was ambiguous in its effect on s.9(1), under the general rules of statutory interpretation, any ambiguity was to be resolved in the taxpayer's favour. Thus in the absence of precise and clear wording in the Act on s.63 effect on s.9(1), general childcare expenses ... might co-exist with the deduction of childcare expenses as business expenses... (1994, Jan. 28: p.5).

The minority opinion concluded that the intention of s.63 had originally been to help women. To use it in order to deny women and their families help with the burden of

childcare would go directly against the intention of the legislators (Schmitz 1994, Jan. 28: p.5).

L'Heureux-Dube, along with Justice Beverly McLachlin, noted that business deductions are available for cars, club dues, lavish entertainment, wining and dining clients and charitable donations: so why not childcare costs? According to The Calgary Herald, the two women judges were fully in favour of Symes's claim that her childcare was a legitimate business expense and therefore fully deductible (1993, Dec. 17: p.A3). As was stated in the written Supreme Court of Canada minority opinion:

> In Royal Trust Co. v. Minister of National Revenue (1957), ...the Exchequer Court of Canada held that the appellant trust company should be able to deduct club dues and initiation fees paid on behalf of its executives and senior personnel. The court held that the evidence proved conclusively that the practice of paying club dues resulted in business from which the appellant gained or produced income. In Friedland v. The Queen, [1989]... the taxpayer was allowed to deduct the expenses which he incurred for his Rolls Royce and BMW, to the extent that these automobiles were used for business (Symes[1993], 110: p.489).

They also justified this stance by stating that "...the definition of business expense is an outdated reflection of men's experience and doesn't recognize the modern realities of businesswomen... The real cost incurred by businesswomen with children are no less real, no less worthy of consideration and no less incurred in order to gain or produce income from business..." (1993, Dec. 17: p.A3). Again, it should be noted that there have been changes regarding the deductions for driving luxury automobiles and club dues as a cost of doing business. Perhaps these changes were a result of the great deal of public

attention which was drawn to Canadian income tax practices during the hearing of this case. Naturally the line of reasoning which was put forth by the dissenting justices now appears moot. However, some of the opinions which were put forward by the dissenting justices may have rung true with enough Canadians to suggest a need for change in how we, as a society, wish to tax the business community.

L'Heureux-Dube points out that a judge's personal experience may strongly influence their conclusions, including their interpretation of what may qualify as a business expense:

> When we look at case law concerning the interpretation of "business expense", it is clear that this area of law is premised on the traditional view of business as a male enterprise and that the concept of a business expense has itself been constructed on the basis of the needs of business*men*. This is neither surprising nor a sinister realization, as the evidence well illustrates that it has moved into the world of business as into other fields, such as law and medicine. The definition of "business expense" was shaped to reflect the experience of business*men*, and the ways in which they engaged in business (Symes[1993], 110: p.490).

Showing her sympathy for the situation which is faced by female lawyers, L'Heureux-Dube felt that "to disallow childcare as a business expense clearly has a differential impact on women, and we cannot simply pay lip service to equality and leave intact an interpretation which privileges businessmen and which continues to deny the needs of businesswomen with children" (1993, Dec.17: p.A3). As she stated in the case, "Section 63 and 9(1), in my view, may co-exist. The fact that Parliament enacted a section to benefit all parents in the paid workforce without distinction does not prevent a taxpayer

who is in business from deducting an expense which can be legitimately claimed as a business expense. Section 63 provides general relief to parents, but nothing in its wording implies that deductions available under section 9(1) are abolished or restricted in this respect" (Symes[1993], 110: p.497). This is fully in line with her statement that one's ability to deduct a legitimate business expense incurred in order to gain or produce income from business should not be based on one's sex. Any business persons would be entitled to a deduction if he or she can prove that such expenses have been incurred for business purposes. The reality, however, is that women are more likely to fulfill the role of sole or primary care giver to children and as such it is they who incur and pay for such expenses (Symes[1993], 110: p.485).

5.6 Commentary on income tax law

Ms. Symes' lawyer, Mary Eberts, felt that despite the majority opinion against their case, it was still an important step forward for women's rights relating to income tax. Eberts had this to say:

> In the *Symes* case, the government sought to immunize from Charter review basically all fiscal and taxation policy and they weren't successful in doing that... That will have a major impact on cases like the one that's coming up through the system involving Suzanne Thibaudeau who is challenging the obligation of single custodial mothers to pay tax on child support... (Schmitz 1994, Jan. 28: p.5).

Another lawyer argued that the decision endorsed an age old principle of taxation law. "According to Symes, evidence that a deduction is ordinarily allowed as a business expense by accountants can be an indicator that a particular kind of expenditure is widely accepted as a business expense" (Schmitz 1994, Jan. 28: p.4). Apparently, this case helps establish answers to questions that were previously left open. "It gives guidance on the legal test for "profit" under s.9(1). This will be particularly helpful in determining whether expenditures, such as commuting expenses which have both business and personal aspects -- but which are not specifically mentioned in the ITA -- are deductible" (Schmitz 1994, Jan. 28: p.4).

This raises the question as to whether the Supreme Court's use of "the profit test" is a procedure that discriminates against women, in practice if not by intention. "According to this test, expenses incurred in order to 'approach' the income-producing circle (clothing and commuting expenses, for example) are not deductible, while those which are incurred within the circle itself are deductible" (p.5).

The article quotes law professor Vern Krishna of the University of Ottawa as saying that "...the court has actually expanded the possibility of deducting other business expenses that are not specifically prohibited or constrained by the *Income Tax Act...*" (Schmitz 1994, February: p.1). This time the author refers to "the purpose test":

> ...at the end of the day, the only test which applies is the "purpose" test derived directly from ITAs language in s.18(1)(a): Were the expenses incurred for the purpose of gaining or producing income from a business. Thus expenditures which have a business purpose,

> and which are not specifically constrained or prohibited elsewhere in the Act could qualify... This is an important shift in tax law (Schmitz 1994, February: p.1).

5.7 Thibaudeau v. The Minister of National Revenue

Since the rendering of the Supreme Court of Canada decision in Symes v. Regina[1993], another case, which involves issues of women and taxation, has been making its way through the courts. In May of 1994 the Canadian Federal Court of Appeal handed down its decision regarding tax deduction of child support payments by divorced parents. The case, Thibaudeau v. The Minister of National Revenue looked at the provisions of the Income Tax Act which provided that, "...the payer of child or spousal support (usually a male) is entitled to a tax deduction while the recipient (usually a female) must declare the money as taxable income" (The Toronto Star 1994, May 20: p.A23). The effect of this law was to free up more disposable income with the man's deduction, than the woman needed to pay in taxes. Interestingly enough, "If the woman is in a higher bracket than the man, the system actually harms the family as a whole. In the majority of cases, however, the woman is in a lower bracket and the system provides an advantage" (The Toronto Star 1994, May 20: p.A23). Clearly, the Income Tax Act was written with the traditional family in mind where the husband was the bread winner. It once again became evident that changes to the Act were required as gender roles had changed and consistently more women are entering the paid labour force.

Federal Court Justice Gilles Letourneau gave these as the reasons for his dissent:

> ...statistics compiled by the Finance Department show that 67 percent of divorced families pay *less* tax on support payments under the current regime than they would under the system proposed by the court. If the court's judgement stands, two-thirds of divorced families, which have been given a bit of an income tax break since 1942 to encourage fathers to make their support payments and to assist children of split homes, will find themselves paying more income tax (Gherson 1994, May 11: p.A18).

However, again the problem with the old regime was that it was written with traditional notions of gender and family in mind.

Soon after the decision had been handed down, the federal government appealed the decision to the Canadian Supreme Court. Justice Minister Allan Rock had this to say. " 'Yes I am concerned that those who regard this judgement as a victory for women might say that the government is trying to snatch it back'... But he added that the decision in the Susan Thibaudeau case could, if left to stand, do more harm than good to custodial parents, most of whom are women" (The Montreal Gazette 1994, May 19: p.B1).Once again, the best solution appears to be passing new legislation rather than extending tax deductions through the courts, and the federal government hoped to use the time it takes to have an appeal heard to make appropriate changes to the Income Tax Act. However, women's rights activists felt that the government had waited too long before deciding to update the system. Lisa Addario, the director of legislation for the National Association of Women and the Law (NAWL) said that although the current system of paying child support had its problems "...the government only has itself to blame for the complications which the decision has raised" (The Montreal Gazette 1994, May 19: p.B1).

5.8 Conclusion

The Canadian taxation system, like the taxation system in many other countries, was initially designed by the upper echelons of society. As a result, the system is inherently elitist. The system was also designed at a time when public life was dominated by males. Consequently, it was also designed with the needs of *male* business persons in mind. Hence, by its very nature, the system of taxation in this country is not sympathetic to the needs of female business persons.

Extending business deductions to include those for day-care, may have been the best way of reforming the system so that it meets the needs of Canadian business women. However, this would not have been the best means of reform for all Canadian families and certainly not for all Canadian women. Elizabeth Symes' request would only have served to make taxation more sympathetic to the needs of self-employed women, above a certain level of income, such as practising lawyers -- often fitting into the elite distinction themselves.

It was not appropriate to claim that a business person's day-care should be tax deductible on the basis that sports cars, business lunches, and charitable donations are already deductible for this group. However, if this case proved anything, it is that *deductions on the basis that they are a cost of doing business, have served to put money into the pockets of business persons that an ordinary citizen would have to pay for*. Adding to this problem is the potential for abuse of such deductions. Perhaps the public attention

which Symes v. Regina drew to these practices, served as a catalyst for the changes to income tax law which now disallows such deductions.

CHAPTER 6.0

Conclusions

and recommendations

6.1 Observations

The Canadian Charter of Rights and Freedoms[1982] was an important step forward in the protection of civil rights in this country. The Charter was perhaps most important in redefining the way in which the Canadian judicial branch defines the concept of equality. Women's rights activists who were involved with constitutional talks which led to the entrenchment of civil rights in 1982 achieved their most basic goal of rewording the equal rights guarantee so that it would be applied *before* and *under* the law. Perhaps even more important was the inclusion of an equal rights amendment which ensured that gender equality would not be subject to the reasonable limits prescribed in section one of the constitutional document.

In 1985, when section fifteen of the Charter took full effect, the Canadian Supreme Court did ultimately rethink its interpretation of equality. The judiciary showed its willingness to accept the new application which feminist political action groups had fought for. This signalled a huge shift from the application of equality as it had been under the Canadian Bill of Rights[1960]. The landmark case which formally established the redefinition was that of Mark David Andrews v. The Law Society of Upper Canada. Much like Elizabeth Symes, Mark Andrews was a lawyer, and arguably not an individual who could be considered disadvantaged. Yet, the Canadian Supreme Court ruled that he had been discriminated against by being treated differently than a Canadian citizen. Ironically, the court failed to determine that Andrews could not be discriminated against because of

his elite status as a lawyer, as was clearly asserted by the dissenting judges in Symes v. Regina[1993]. There is a distinction between being denied the right to practice your profession, and being denied the right to a tax deduction, however, since it is primarily women who are responsible for the care of children, the issue of who will pay for day-care is obviously an gender equality issue.

The judiciary is a conservative institution and has shown itself to favour the elite, however, it has also shown itself to favour the rights of men over the rights of women in decision after decision. Perhaps the earliest example was "The Persons Case" in which the Supreme Court determined that a female could not sit on the Canadian Senate because women did not qualify as a person. Fortunately, this decision was later overturned by the Judicial Committee of the Privy Council, in London. However, the Supreme Court's tradition of refusing to advance the status of women continued throughout the 1970s with refusals to acknowledge the native status of an Indian woman who married outside her tribe, and its refusal to provide a new mother with unemployment insurance benefits when she was fired after becoming pregnant. Obviously, the courts are slow to advocate change. This judicial legacy of conservative behaviour may be with Canadians for some time to come, notwithstanding the Court's enhanced powers under the Charter.

For these reasons, judicial action has been, and likely will continue to be slow to advance the status of women. This tells us that the women's movement must continue to respond to anti-feminist litigation to at least try to prevent any further loss of legislative

protections to females. However, in order to actually advance the status of women with litigation, it is even more important that women become more pro-active in bringing pro-feminist constitutional challenges to the courts. At present Canadian women are mostly reacting to the litigation that is brought by men, hence trying to minimize the damage done to rights Canadian women have already achieved. It is unfortunate that so few equality rights challenges are brought by women, but even those that are, such as that taken by Elizabeth Symes are not at all best suited to the economic needs of Canadian women. Also, lobbying in the political arena continues to be extremely necessary, particularly for the appointment of female judges in all levels of the judicial system, and indeed for the representation of women throughout all branches of government. In general, attempting to facilitate the entry of women into the legal profession is certainly an important step towards bringing the women-centred perspective to the practice of making law in this country.

Day-care in this country continues to be inadequate compared to the needs of Canadian families. In order to counteract phenomena such as sex segregation in the work place and the gender gap in wages, it is extremely important for day-care to become more affordable, and more accessible. Since the Second World War when some Canadian women went to work in munitions factories, there have been increasing amounts of female participation in the paid labour force, outside the home. The primary reason for this has been the fact that the so called "family wage" that was being earned by men was no long

enough to support a family. Also there are many families which are headed by females, and they are consistently among the poorest families in the country. This has been attributed to the economic trends involved with globalization. With the decline of industry, and the move to a service economy, many jobs are now low paying, part time, and temporary. The effects of such trends are being felt primarily by women.

The number of spaces that are available in day-care centres which meet government standards is currently much less than the number of children who require day-care. The most accessible day-care is often an informal arrangement with a relative or sitter who provides childcare in their own home. Of course, such informal arrangements are not required to meet the government standards for day-care centres and the children who are cared for in this manner may be receiving a level of care which is less than that which the government advocates. Certainly these informal arrangements are less than Canadian parents themselves want for their children, as is evident by the long waiting lists at centres all over the country. At present, the low minimum wage in combination with the high cost of day-care is the greatest disincentive to entering the paid work force which exists for a parent of low income. This results in a " cycle of poverty" experienced by families who are living on government assistance.

Regarding the Canadian taxation law, it is undoubtedly a system which has developed by and for the elite in this country, and does not properly meet the needs of working class families or the needs of Canadian women in the 1990s. This was evident by

the former law which allowed business persons to deduct eighty percent of their entertainment fees as a cost of doing business. The fact that this law has since been changed is only further evidence that it was unfair. The Canadian Supreme Court majority refused to extend this discriminatory privilege to women who require day-care. However, as many commentators pointed out, discrimination can not be used to justify more discrimination. Elizabeth Symes was only asking for the same privileges that have been extended to her male colleagues, however the Canadian Supreme Court determined that discrimination can not be justified even when it is being used to counteract discrimination by bringing more women into the field of law.

6.2 Recommendations

Given that the judiciary is an institution which is slow to change, feminist political action groups will have to lobby that much harder and that much longer for the appointment of more female judges. Even though results may be a long time in coming, there must be a continuous push to break into the "old boys club" that currently exists in all branches of government. There must also be continuous support and encouragement for women to enter, and remain a part of the legal profession, and this support must come from within the legal profession itself. The need for more women lawyers appeared to be taken very seriously by the Canadian Bar Association with the appointment of former Supreme Court of Canada Justice, Bertha Wilson to lead a task force to investigate gender

inequality within the legal profession. However, none of the more radical suggestions of the task force have been implemented. The Canadian Bar Association did intervene in Symes v. Regina[1993] on the side of Elizabeth Symes and publicly supported her position on the case. However, this support comes from the national level and true support of women lawyers must come from both male and female lawyers within law firms. While some of the changes which were advocated by the task force of Bertha Wilson were controversial, her report should be the starting point for dialogue between male and female lawyers in every law firm in the country, which the provincial Bar Associations should encourage.

In order to effect change that is in the best interest of Canadian women, it is necessary for Canadian women to realize that the judicial branch of government is now available to them as a means of effecting change. However, they should not expect to make great gains in the judiciary for a long while. It will be a long time before we see more equal gender representation in the judicial branch, and women's rights activists would be wise to continue to put a great portion of their resources into lobbying the legislative branch of government.

Key among the reforms needed for better protection and education of our children is the requirement for a higher standard of day-care. This means demanding quality day-care which is both accessible and affordable. Clearly, the solution best suited to the Canadian working class would be for governments to open public day-care centres across

the country until the supply of care meets the demands of working parents. There should then be more subsidies to cover the cost of day-care available to Canadian families. However, the program should not be assessed and administered within the welfare system.

Finally, the Canadian Supreme Court did leave the door open for a similar case to be brought, perhaps by a single mother who can show that women not only bear most of the social costs of childcare, but that they also bear most of the economic costs of day-care. Undoubtedly, Canadian women and the feminist movement in this country should take them up on their offer, as soon as an opportunity presents itself.

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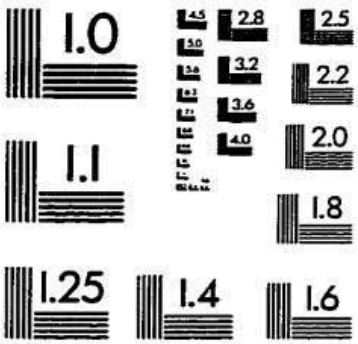

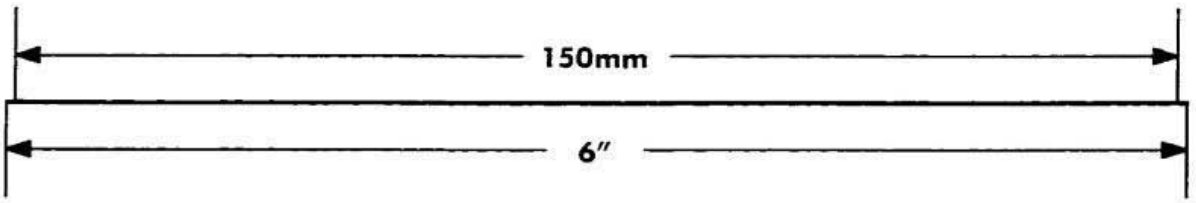

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