DECISION RENDERED ON OCTOBER 14, 1980
TD-6/80

CANADIAN HUMAN RIGHTS TRIBUNAL
IN THE MATTER OF THE CANADIAN HUMAN RIGHTS ACT,
S.C. 1976-77, C.33 AS AMENDED.

AND IN THE MATTER OF A HEARING BEFORE HUMAN
RIGHTS TRIBUNAL APPOINTED UNDER SECTION 39
OF THE CANADIAN HUMAN RIGHTS ACT.

BETWEEN:
ROBERTA BAILEY, WILLIAM CARSON,
REAL J. PELLERIN,
MICHAEL MCCAFFREY, and
THE CANADIAN HUMAN RIGHTS COMMISSION

-COMPLAINANTS
- and -
HER MAJESTY THE QUEEN IN RIGHT
OF CANADA, AS REPRESENTED BY THE
MINISTER OF NATIONAL REVENUE

-RESPONDENTS
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1. INTRODUCTION - THE NATURE OF THE COMPLAINTS

Several complaints were the subject of the hearing before this Tribunal. By consent of counsel, they were heard together, the evidence and argument in respect of each applying to all.

The first Complainant, Roberta Agnes Bailey, filed a Complaint (Exhibit #C-1) on the basis that she had claimed a "married status" deduction in respect of William Carson in filing her income tax return for 1977, which deduction is provided for in paragraph 109(1)(a) of the Income Tax Act, (hereafter the ITA) S.C. 1970-71-72, c.63, as amended, but the deduction was not permitted by the Minister of National Revenue because she was not married to William Carson. That is, William Carson was not considered to be her "spouse" within the meaning of paragraph 109(1)(a) of the ITA. The married status deduction is available only to a "married person who supported his [or her] spouse". Ms. Bailey and Mr. Carson had lived together for some five years and she had supported him in 1977.

None of the evidence in the hearing was in dispute. The issues turn simply upon questions of law. William D. Carson filed a Complaint (Exhibit #C-1) on the same basis, that is, the failure of Revenue Canada to permit his "common-law wife's claim for a married status deduction" (Exhibit #C-1).

Both Ms. Bailey and Mr. Carson alleged that the Respondent, Her Majesty the Queen in Right of Canada, as represented by the Minister of National Revenue, engaged in a discriminatory practice under section 5 of the Canadian Human Rights Act, alleging that the Minister adversely discriminated against Roberta Bailey in disallowing her deduction from income for the purposes of income tax assessment.

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The Canadian Human Rights Commission satisfied itself that the Complaint had been substantiated in that the ITA differentiates adversely, and the Respondent, in applying subsection 109(1) of the ITA, had differentiated adversely in relation to Ms. Bailey on the

ground of marital status (Exhibit #C-1). Clearly, the Commission was correct in its conclusion as to the factual situation. The issue for the Tribunal then is - given these facts, did the Respondent engage in a discriminatory practice as covered by section 5 of the Canadian Human Rights Act?

Mr. Real Pellerin of New Brunswick filed a Complaint (Exhibit #C-2), the details of which are:

My wife and I separated [sic] without a formal agreement; I retained custody of our child. The Revenue Canada authorities refused my claim for child care expenses because there was no separation [sic] agreement at that time. They would not take this position towards a woman.

Thus, although section 63 of the ITA affords a deduction, within limits, to an individual taxpayer for child care expenses, Mr. Pellerin's claimed deduction for child care expenses in filing his tax return for 1976, 1977 and 1978 was disallowed because he, being a male taxpayer, did not meet the more stringent criteria applicable to the male taxpayer.

Section 63 of the ITA permits the deduction of child care expenses by a woman without requiring that any conditions be met, but requires, among other things, that a man who is separated from his wife be separated pursuant to "a decree, order or judgment of a competent tribunal or pursuant to a written agreement".

The Complainant, Michael McCaffrey, alleged discrimination for the same reason, as Revenue Canada had disallowed a deduction sought in his 1978 tax return for "child care expense because I have no written

separation agreement and because I am a male mother" (Exhibit #C-2). Michael McCaffrey's Complaint against the Respondent involves substantially the same issues of fact and law as the Complaint of Real J. Pellerin. Therefore, the Pellerin and McCaffrey Complaints have been dealt with together. These Complaints allege that Her Majesty the Queen, as represented by the Minister of National Revenue, adversely differentiates against males in administering and enforcing section 63 of the ITA.

The Canadian Human Rights Commission therefore initiated a Complaint that "Her Majesty the Queen, as represented by the Minister of National Revenue, has engaged and engages in a discriminatory practice under section 5 of the Canadian Human Rights Act on the prohibited ground of sex, by adversely differentiating against males by administering and enforcing

section 63 of the Income Tax Act" (Exhibit #C-2). Again, the factual situation of adversely differentiating treatment on the basis of sex is not assailable, and admitted. The issue for the Tribunal is - given this factual situation, did the Respondent engage in a discriminatory practice as covered by section 5 of the Canadian Human Rights Act?

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2. THE GENERAL STRUCTURE OF THE CANADIAN HUMAN RIGHTS ACT AS PERTINENT TO THIS INQUIRY

The Canadian Human Rights Act sets forth a special regime for the investigation, settlement and adjudication of complaints of discriminatory practices within given defined areas of federal legislative jurisdiction. 1 The administration of the Canadian Human Rights Act is the responsibility of the Canadian Human Rights Commission. Under Part III of the Canadian Human Rights Act, the Commission determines, according to prescribed criteria, whether it must deal with a complaint (section 33), may designate a person to investigate the complaint (section 35), and upon receiving the investigator's report, may take the appropriate action in respect thereof by referring the complaint to another authority, adopting the report, or dismissing the complaint (section 36). A conciliator may be appointed (section 37).

A Human Rights Tribunal may be appointed by the Canadian Human Rights Commission to inquire into the complaint at any stage after the filing of the complaint (section 39). Section 40 sets forth the duties and powers of the Tribunal, and sections 41 and 42 set forth the nature of the order a Tribunal can make, if a finding is made that the complaint is substantiated at the public hearing conducted by the Tribunal. The various forms of relief allowed include an order against the discriminating person to compensate the victim, to cease discriminating and adopt a program to prevent the discriminatory practice in the future, and to make available to the victim on the first reasonable occasion the opportunities or privileges that the victim was denied by the discriminatory practice.

1 See Lodge v. Minister of Employment and Immigration (1979) 25 N.R. 437 (F.C.A.) at 439, per Le Dain, J. affg. [1979] F.C. 458 (F.C.T.D.).

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General Structure of the Canadian Human Rights Act Page 5
as Pertinent to this Inquiry

A "discriminatory practice" is defined in section 31 as meaning "any practice that is a discriminatory practice within the meaning of sections 5 to 13". Section 4 provides that any such discriminatory practice may be the subject of a complaint under Part III, and section 32 within Part III sets forth the framework

for filing complaints with the Commission.
The complaints before this Tribunal each allege a "discriminatory practice" in contravention of section 5, which reads:

It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public
(a) to deny, or to deny access to, any such good, services, facility or accommodation to any individual, or
(b) to differentiate adversely in relation to any individual, on a prohibited ground of discrimination.

Section 3 reads:
For all purposes of this Act, race, national or ethnic origin, colour, religion, age, sex, marital status, conviction for which a pardon has been granted and, in matters related to employment, physical handicap, are prohibited grounds of discrimination. [emphasis added]

An appeal of the decision of the Tribunal (if composed of fewer than three members) on any question of law or fact or mixed law and fact, lies to a Review Tribunal (section 42.1).

All of the above referred to procedural steps preceeding the appointment of this Tribunal, were properly and duly followed by the Canadian Human Rights Commission.

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3. PRELIMINARY ISSUE AS TO WHETHER THE HUMAN RIGHTS TRIBUNAL HAS JURISDICTION

The Respondent raised as a first, preliminary issue before the Tribunal the determination as to whether the Tribunal, appointed by the Canadian Human Rights Commission pursuant to section 39 of the Canadian Human Rights Act, has any jurisdiction to proceed to inquire into the complaints in respect of which the Tribunal has been constituted, notwithstanding the fact that the Attorney General of Canada had previously applied in the Federal Court of Canada, Trial Division to prevent the Tribunal from inquiring into the complaints.

The Applicant’s position is that in making income tax assessments, the Department of National Revenue is not providing a service within the meaning of section 5, but that even if that is a service of the kind referred to, it is not the Department which differentiates on the basis of marital status or sex but the law as set out in the Income Tax Act, which it is the Department’s duty to

follow, that any relief of a kind which it is open to a Human Rights Tribunal to afford, under section 41 would

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involve conflict with the provisions of the Income Tax Act and an abrogation or alteration of the law therein set out, which was not intended by the Canadian Human Rights Act and which, if it were intended, would be ultra vires. Counsel, therefore, asked the Court to prohibit the proposed proceedings before the Human Rights Tribunal. 1

Associate Chief Justice Thurlow dismissed the application, stating in part:

In my opinion the Commission did not act beyond its authority under subsection 39(1) in appointing the Tribunal. It might have done so at any stage after the filing of the complaints. In these cases, it did so at the stage where an investigation had been held and the investigator's report had been approved. If, as I think, the constitution of the Tribunal was within the authority of the Commission, the effect of sections 40 and 41 was to confer on the Tribunal

1 Attorney General of Canada v. Peter Cumming, the Canadian Human Rights Commission, Roberta Bailey, William Carson, Real Pellerin and Michael McCaffrey 79 DTC 5303 at 5306 per Thurlow, A.C.J.

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the authority to hold an enquiry and at its conclusion to determine the whole question whether or not any of the discriminatory practices alleged in the complaints had been established, including any question that might be involved therein as to whether or not the conduct complained of and established was capable in law of being discrimination prohibited by the Act.

It appears to me that in substance what the Court is being asked to do on this application is to pre-empt the Tribunal and to decide a question that the statute gives the Tribunal the authority to decide. To accede to the application involves a decision that what is complained of cannot be unlawful discrimination, that the Tribunal can only dismiss the complaints and that, therefore, the Tribunal has no jurisdiction to hold its inquiry or even to decide that unlawful discrimination has not been established and that the complaint should be dismissed.

The Court is undoubtedly entitled, when the jurisdiction of an inferior tribunal turns on a clear and severable

question of law arising on undisputed facts, to decide that point of law and, if the conclusion from it is that the Tribunal does not have jurisdiction, to prohibit the Tribunal from proceeding.

Here there may well be questions of law that may arise on

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the complaints. There is the issue as to whether the Department of National Revenue, in assessing taxes, is engaged in the provision of services within the meaning of section 5 of the Canadian Human Rights Act. There is the question whether, if the Department is engaged in the provision of services within the meaning of section 5, the Department's action in applying discriminatory provisions of the Income Tax Act is in itself an unlawful discriminatory practice. If so, there is the question whether any of the kinds of relief specified in section 41 would be appropriate or ought to be afforded. This may involve the question whether

provisions of the Income Tax Act which discriminate on bases prohibited by the Canadian Human Rights Act have been pro tanto repealed. And there may be others.

With respect to the first of these questions, which appears to me to be one that goes to the jurisdiction of the Tribunal, I am not prepared to accept the board proposition that in assessing taxes under the Income Tax Act the Department of National Revenue is not engaged in the provision of services within the meaning of section 5 of the Canadian Human Rights Act. The statute is cast in wide terms and both its subject-matter and its stated purpose suggest that it is not to be interpreted narrowly or restrictively. Nor do I think that discrimination on any of the bases prohibited by the Act cannot conceivably occur in the provision of such services to the public.

Apart from that broad question, what appears to me to be involved in the present situation is whether in providing a service to the public the carrying out by the Department of a law which differentiates on prohibited bases is in itself unlawful discrimination within the meaning of the Canadian Human Rights Act. It may be that these complaints will involve little or nothing but that question of law. But even if it turns out that that question or some narrower variation of it is the only question that requires to be decided in order to reach a conclusion, it appears to me to be a question which does not go to the Tribunal's jurisdiction to deal with the complaints but is one for the Tribunal to decide, to

whatever extent it may be necessary to do so, to reach its conclusion as to whether on the facts elicited at the inquiry unlawful discrimination has been established. 2

In my opinion, this decision effectively disposes of the Respondent's submission on this preliminary issue before the Tribunal (in effect a continuation of its application before the Federal Court, or appeal in respect of the Federal Court's decision) that the Tribunal is without jurisdiction.

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2 Ibid at 5307-9.
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4. THE MEANING OF "MARITAL STATUS" WITHIN SECTION 3 OF THE CANADIAN HUMAN RIGHTS ACT

The Bailey/Carson Complaints allege a discriminatory practice in respect of Ms. Bailey not obtaining the deduction afforded by paragraph 109(1)(a) of the ITA on the prohibited ground of discrimination of "marital status" referred to in section 3 of the Canadian Human Rights Act. It was not disputed by the Respondent that there was discrimination on the factual basis of this prohibited ground of discrimination. It was disputed, of course, that this admitted factual situation amounted to discrimination in law. However, I mention in passing that "marital status" is more difficult to define than most other prohibited grounds of discrimination.

In Louis A. Blatt v. The Catholic Children's Aid Society of Metropolitan Toronto 1 , an Ontario Board of Inquiry considered the meaning of "marital status" as used in The Ontario Human Rights Code, R.S.O. 1970, c.318 as am. The Complainant's employment was terminated because he lived in a "common-law" relationship. The Board's decision, in dismissing the Complaint, was on the basis that the termination was based on a moral judgment about the Complainant's "life style" and not on his "marital status".

In reaching his decision, the Chairman, Prof. Bruce Dunlop, stated:

Marital status is not more fully defined in the Code, nor in any other statute, nor the common law. A dictionary adds little to one's understanding since "marital" means "of, or pertaining to marriage" (OED) and status means, among other things, "legal standing or position" and "condition in respect, e.g. of ... marriage or celibacy".

1. February 21, 1980.
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(OED again) But one may say that until recent years, at least, the law in this jurisdiction has recognized only two conditions in respect of marriage. One either was married or one was not; though which category one fell into could sometimes be a tricky question. One could even believe one was married, and not be, and vice versa. The expression "common law marriage", at least in this jurisdiction, was a euphemism for "living as though

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married without being married". The pejorative expression was "living in sin". Recently the Family Law Reform Act, 1978 (Ont.) c.2, without using the term "marriage", has moved to give rights inter se to parties to such relationships that they hitherto have not possessed. It recognizes that cohabitation without marriage should in certain circumstances lead to rights of support because, in fact, it leads to dependancy. Does the Act thereby create a new form of marriage? Or, alternatively, does it create a third status between "married" and "single" that must be referred to as a "marital status"? It appears to the Board that the language of the statute carefully avoids either result. In any event, the complainant's relationship was not one to which the Act would have applied. It lasted less than two years. 2

In Kerry Segrave v. Zeller's Ltd. 3 , an Ontario Board of Inquiry held that a man who was discriminated against in respect of employment because he was divorced, had a valid complaint under The Ontario Human Rights Code that he had been discriminated against on the basis of "marital status".

One can say, to use Prof. Dunlop's words, that Ms. Bailey and Mr. Carson are "living as though married without being married", and that describes their "marital status". Thus, they seek the deduction extended by paragraph 109(1)(a) of the ITA which has the purpose of exempting some additional income of the married taxpayer from tax because of his or her marital status, i.e. having a spouse to support during the year. Ms. Bailey seeks the deduction because she fits the situation and meets all the criteria except that Mr. Carson is not her spouse by

2. Supra, n.1 at 5-6.
3. September 22, 1975.
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marriage. Notwithstanding being in the same factual situation (except for marriage) as a married taxpayer supporting a spouse, Ms. Bailey's different "marital status" is fatal. Thus, the Bailey/Carson Complaints are properly framed in referring to the prohibited ground of "marital status".

5. THE INCOME TAX ACT PROVISIONS UNDER CONSIDERATION BY THIS TRIBUNAL: PARAGRAPH 109(1)(a) AND SECTION 63

(a) The provisions of the ITA under consideration are paragraphs 109(1)(a), (b) and (c), and section 63, which read:

DEDUCTIONS PERMITTED BY INDIVIDUALS
109(1) For the purpose of computing the taxable income of an individual for a taxation year, there may be deducted from his income for the year such of the following amounts as are applicable:

MARRIED STATUS
(a) in the case of an individual who, during the year, was a married person who supported his spouse, an amount equal to the aggregate of

(i) $1,600*, and
(ii) $1,400* less the amount, if any, by which the spouse's income for the year while married exceeds $300*,

WHOLLY DEPENDENT PERSONS
(b) in the case of an individual not entitled to a deduction under paragraph (a) who, during the year,

(i) was an unmarried person or a married person who neither supported nor lived with his spouse, and

(ii) whether by himself or jointly with one or more other persons, maintained a self-contained domestic establishment (in which the individual lived) and actually supported therein a person who, during the year, was

(A) wholly dependent for support upon, and
(B) connected, by blood relationship, marriage or adoption, with the taxpayer, or the taxpayer and such one or more other persons, as the case may be, an amount equal to the aggregate of

(iii) $1,600*, and
(iv) $1,400* less the amount, if any, by which the income for the year of the dependent person exceeds $300*;

SINGLE STATUS
(c) in the case of an individual not entitled to a deduction under paragraph (a) or (b), $1,600*.

*Amounts subject to indexing.
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this Tribunal: Paragraph 109(1) and Section 63.

CHILD CARE EXPENSES
63(1) There may be deducted in computing the income for a taxation year of a taxpayer who is

(a) a woman, or
(b) a man

(i) who at any time in the year was not married,
(ii) who at any time in the year was separated from his wife pursuant to a decree, order or judgment of a competent tribunal or pursuant to a written agreement,

(iii) whose wife is certified by a qualified medical practitioner to be a person who,

(A) by reason of mental or physical infirmity and her confinement throughout a period of not less than 2 weeks in the year to bed, to a wheelchair or as a patient in a hospital, asylum or other similar institution, was incapable of caring for children, or

(B) by reason of mental or physical infirmity, was in the year, and is likely to be for a long-continued period of indefinite duration, incapable of caring for children, or

(iv) whose wife was confined to prison throughout a period of not less than 2 weeks in the year,

amounts paid by the taxpayer in the year as or on account of child care expenses in respect of the taxpayer's children, to the extent that

(c) payment of the amounts is proven by filing with the Minister receipts each of which contains the Social Insurance Number of any individual payee who issued the receipt, and

(d) the aggregate of the amounts so paid by the taxpayer in the year does not exceed the least of

(i) $4,000,
(ii) the product obtained when $1,000 is multiplied by the number of the taxpayer's children in respect of whom the child care expenses were incurred, and

(iii) 2/3 of the taxpayer's earned income for
the year.

APPLICATION OF SS.(1) IN CERTAIN CASES
(2) For the purposes of subsection (1),

(a) where the taxpayer is a man, subparagraph (1)(d)(i)
shall be read as follows:

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"(i) the lesser of $4,000 and an amount equal to
the product obtained when the number of weeks in
the year throughout which

(A) he was not married,
(B) he was separated from his wife pursuant
to a written agreement, or

(C) his wife was confined as described in
clause (b)(iii)(A) or subparagraph (b)(iv) or
was incapable as described in clause
(b)(iii)(B),

as the case may be, is multiplied by the lesser of
$120 and the product obtained when $30 is
multiplied by the number of children in respect of
whom the child care expenses were incurred"; and

(b) where the taxpayer is a wife described in
subparagraph (1)(b)(iii) or (iv),

(i) subparagraph (1)(d)(i) shall be read as
follows:

( ) $4,000 minus the amount deductible by virtue
of this section in computing the income for the
year of the taxpayer's spouse", and

(ii) subparagraph (1)(d)(ii) shall be read as
follows:

"(ii) the amount, if any, by which
(A) the product obtained when $1,000 is
multiplied by the number of his children in
respect of whom the child care expenses were
incurred,

exceeds
(B) the amount deductible by virtue of this

section in computing the income for the year
of the taxpayer's spouse".

DEFINITIONS
(3) In this section
"CHILD CARE EXPENSE"

(a) "child care expense" of a taxpayer means an expense incurred by the taxpayer for the purpose of providing in Canada, for any child of the taxpayer, child care services including baby sitting services, day nursery services or lodging at a boarding school or camp, if

(i) the child was, during the year, ordinarily in the custody of the taxpayer and

(A) under 14 years of age, or
(B) 14 years of age or over and dependent by reason of mental or physical infirmity,

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(ii) the services were provided to enable the taxpayer

(A) to perform the duties of an office or employment,

(B) to carry on a business either alone or as a partner actively engaged in the business,

(C) to undertake an occupational training course in respect of which he received an adult training allowance paid to him under the Adult Occupational Training Act, or

(D) to carry on research or any similar work in respect of which he received a grant, and

(iii) the services were provided by a resident of Canada other than a person

(A) in respect of whom a deduction has been made under section 109 in computing the taxable income for the year of the taxpayer or his spouse, or

(B) who, during the year, was under 21 years of age and connected with the taxpayer or his

spouse by blood relationship, marriage or
adoption,

except that
(iv) any such expenses incurred in the year for a
child's lodging at a boarding school or camp, to
the extent that the aggregate thereof exceeds the
product obtained when $30 is multiplied by the
number of weeks in the year during which the child
was so lodged, and

(v) for greater certainty, any expenses described
in paragraph 110(1)(c) and any other expenses that
are incurred for medical or hospital care;
clothing, transportation or education or for board
and lodging (except as otherwise expressly provided
in this paragraph),

are not child care expenses; and
"EARNED INCOME"
(b) "earned income" of a taxpayer means the aggregate of
(i) all salaries, wages and other remuneration,
including gratuities, received by him in respect
of, in the course of, or by virtue of offices and
employments, and all amounts included in computing
his income by virtue of sections 6 and 7,

(ii) amounts included in computing his income by
virtue of paragraph 56(1)(m), (n) or (o), and

(iii) his incomes from all businesses carried on
either alone or as a partner actively engaged in
the business.

CUSTODY
(4) For the purposes of this section, it shall be
assumed that a child of a woman and a man who were living
together without being married to each other was
ordinarily in the custody of the woman and not in the
custody of the man.

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(b) Paragraph 109(1)(a) - Married Status Deduction
The Carter Report 1 recommended that the family (including the husband, wife and any dependent children) should be considered as a single taxpaying unit, with the incomes of all members being combined for tax purposes and a family rate scale then applied to the taxable income of the family unit as a whole. Althouth the proposal was not adopted, the computation of an individual's tax does in part take into account family responsibilities through the

determination of personal exemptions. This has been true of the income tax system since its inception in 1917. 2

Personal exemptions or basic deductions are somewhat arbitrary deductions available to individual taxpayers in computing taxable income. The basic policy premise is that a taxpayer needs a minimal tax-free income to maintain himself and his dependents. Thus, the exemption is based upon the individual's personal and family status.

Section 109 falls within Division C of Part I of the Income Tax Act. The computation of taxable income is the third step, after the determination of liability for tax and computation of income, leading to the determination of the tax payable by a taxpayer under Part I of the Act.

Paragraphs 109(i)(a) to (c) set out the basic deduction or, as it is more often called, the "personal exemption", to which all individual taxpayers are entitled, depending upon their marital status. Strictly speaking, an "exemption" is an indentifiable type of income not subject to tax. Therefore, the deductions under consideration are not properly referred to as exemptions. Rather, these deductions might better be described as personal "allowances", as allowances represent the elimination

1 Canada. Royal Commission on Taxation, 1967 (Carter Commission), Vol. 1, at 17-19; Vol. 3, c.10, at 122-125.

2. The Income War Tax Act, 1917 7-8 George V. Chap. 28 s. 6(1).
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of a portion of income, regardless of its source or nature, from being subject to tax. The deductible amount is subject to an annual upward adjustment under section 117.1 for 1974 and the following taxation years. Such adjustments are designed to compensate partially for the erosion of the value of the dollar due to inflation.

Coupled with indexing, the exemption for a married person supporting his spouse in 1978 was $4,560, in 1979 $4,970 and for 1980 will be $5,420. The word "married" applies to any person who is married under a form of marriage recognized by the laws of Canada and who is not a widower or widow, nor divorced or separated. The exemption is not confined to the male spouse. If the female spouse supports her husband, she may claim it. However, the taxpayer must be "a married person who supported his [or her] spouse".

The Department of National Revenue has always been of the view, and has so administered the Act, that a common-law spouse does not qualify as a "spouse", (See Interpretation Bulletins IT-429, May 22, 1979, and IT-191, December 23, 1974, s. 15), and

similarly, the courts have held that a common law spouse does not qualify as a "spouse" for the purpose of paragraph 109(1)(a). 3

A spouse is considered to have "supported" the other spouse when the one provides the other with a home, food, clothing, and the necessary amenities of life consistent with their position and mode of living. The full married exemption may be reduced depending upon the receipt by the supported spouse of income of his or her own in the year.

3 See, for example, Toutant v. MNR, [1978] CTC 2671 (TRB).

Paragraph 109(1)(b) must be noted as well. An individual who is unable to come within paragraph 109(1)(a) as a married person who supported his spouse, may claim an exemption equivalent to married status for the support of some other person. However, the exemption is conditional, inter alia, upon the taxpayer maintaining a self-contained domestic establishment and actually supporting therein a person who, during the year, was wholly dependent upon the taxpayer for support and connected by blood relationship, marriage or adoption with the taxpayer. As such, paragraph 109(1)(b) does not provide an exemption in respect of support for a common-law spouse. The usual claim for a deduction under this provision will be by a single parent maintaining his or her child in a self-contained domestic establishment.

It is to be noted, however, that paragraph 109(1)(b) can sometimes place common-law spouses at an advantage from a tax standpoint vis-à-vis married taxpayers. If the common-law spouses are both earning income, both will have the "single status" deduction afforded by paragraph 109(1)(c). However, if they have a child, then one spouse can also claim the marital equivalent deduction afforded by paragraph 109(1)(b). 3a This deduction can be taken only once, and if the two spouses fail to agree upon who will take it, then neither can take the deduction (subsection 109(2)). The common-law union family (i.e. common-law spouses with a child) is at a tax advantage, everything else being equal, compared to the family in which the parents are married. In the latter case, one

3a. Subsection 109(2) places three limitations upon the paragraph 109(1)(b) deduction. A taxpayer can take the paragraph 109(1)(b) deduction for only one person; if taken, the child deduction under paragraph 109(1)(d) cannot be taken; and only one taxpayer can take a deduction in respect of the same dependent person or the same domestic establishment.

parent can take the child deduction provided by paragraph 109(1)(d), 3b but it is only approximately one-third the marital status equivalent deduction extended by paragraph 109(1)(b). 4

However, in the situation before this Tribunal, as set forth in the Bailey/Carson Complaints, Ms. Bailey, who simply supported a common-law spouse, Mr. Carson, was unable to avail herself of the deduction afforded by paragraph 109(1)(a) and, therefore, was in a disadvantageous position from a tax standpoint. If they were married, Ms. Bailey could have obtained the paragraph 109(1)(a) deduction.

3b. Subsection 109(3) should be noted as it provides, inter alia, a presumption that a child of a married couple is wholly dependent on his father.

4 Although it is irrelevant to the issue to be considered by this Tribunal with respect to either paragraph 109(1)(a) or section 63, an observation in respect of section 63 is appropriate in the context of the comments made in the text of the decision at this point. Section 63 provides that a married taxpayer cannot deduct a payment to his wife to look after the children. However, subsection 63(4) states that the children of a common-law marriage are deemed to be in the custody of the woman. Thus, a common-law husband cannot deduct expenses paid to his common-law wife. However, there is no prohibition preventing the common-law wife taking the deduction for a payment to her common-law husband to take care of the children, whereas a married woman would be precluded: sub-paragraph 63(3)(a)(iii). Section 63, therefore, does to this extent at least afford preferential treatment to the single taxpayer in a common-law union.

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(c) Reasons for the Exclusion of Common-Law Spouses with Respect to the Paragraph 109(1)(a) Deduction.

There is a paucity of literature as to Parliment’s intention in discriminating against common-law marriages for the spousal deduction. An examination of the Debates of the House of Commons reveals only four occasions between 1940 and 1980 when the issue was raised. On may 4, 1959 during Question Period, Mr. Harold Winch (Vancover East) commented that:

Under Canadian divorce laws the husband or wife of such a person (who refuses to be divorced) cannot obtain a divorce in order to live a normal life and it sometimes happens that they become involved in what is known as a common law way of living with a person to whom they are not or cannot be married due to circumstances beyond their control. As far as my knowledge goes a common law

wife is recognized in most circumstances under provincial laws ... I do not, of course, mean a common law wife of a few weeks or months; I refer to a common law arrangement over a period of years as a result of which there are children.

... it was not until two weeks ago that I became aware that a common law spouse is not recognized as a dependent of the breadwinner under the Income Tax Act. I believe that this places a heavy and unnecessary burden on the person who seeks to live a normal life and for reasons that are perhaps totally beyond his or her control and they enter into a common law arrangement.

... I should like to ask the minister if it is not possible to recognize common law wives as dependents in reasonable circumstances for income tax purposes. Nearly all provinces recognize common law situations under certain circumstances.

The then Minister of Finance, the Hon. Donald Fleming responded: Mr. Chairman, when the Income Tax Act refers to marriage or spouses or husbands or wives it refers to those who have that quality under the law. This

1. Canada. Parliament. House of Commons. Debates, 2nd Session, 24th Parl., May 4, 1959 at 3287.

statute does not take into account of any illicit relationships in that regard. In the case of children, of course, an illegitimate child could qualify as a dependent under this act, but in the case of the woman in such a relationship she could not be treated as a wife for the purposes of this act. The hon. gentleman asks if this could be changed. Yes, Parliament could change it, but that is not proposed. 2

Mr. Fleming’s answer did not offer a rationale for the discrimination. This did not occur until October, 1971, during Parliment’s second reading of Bill C-259, the Bill 3 that incorporated the government’s White Paper Proposals for Tax Reform. 4

On four separate occasions, while the House was in committee of the whole on Bill C-259, Mr. Robert McCleave (Halifax - East Hants) inquired into the reasons for the distinction between legally married couples and common law couples. Mr. Patrick Mahoney (Calgary South), the parliamentary secretary to the then Minister of Finance, replied that:

[t]he problem is one of the administration, not in any strict sense of the word, but rather in the establishment of the common law relationship ... I am sure the government agrees the taxing statute is not a place where moral sanctions are applied or moral rewards are handed out. In his comments, the hon. member at least intruded an element of morality to bring out the point. He referred to paramour and concubine. This presupposes that the couple are at least of the [opposite] sex, yet today that is not necessarily the situation that prevails. What are we to do about these things?

2 Ibid at 3298.

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3 Debates June 18, 1971 at 6892; Herb Gray (Windsor West) moved that Bill C-259 be read the second time September 13, 1971, Debates September 13, 1971 at 7750. Third Reading December 17, 1971.

4 The White Paper, "Proposals for Tax Reform" was tabled in the House November 7, 1969 - Debates, November 7, 1969 at 659.

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How do you prove what is a common-law relationship? What is a common law relationship that the tax assessor should take into account in deciding whether the marriage exemption should be granted? Is it a transitional relationship of a day or two or a week or two? What precisely is a common law relationship to which the hon. member referred?

The hon. member distinguished two categories in this particular unchurched or unendorsed situation. One is where the couple are not, because of some other legal impediment, able to get married. In the other case he cited, the couple is free to marry, but do not do so. My reaction to that is very much like the reaction which we encountered in attempting to extend the small business incentive to unincorporated business. I am sorry we did not find a way to do it. On the other hand, the option of incorporation is open to most small businesses. Similarly, in this case, the option of matrimony is open to most taxpayers. 5

The Hon. Edgar J. Benson, the Minister of Finance, continued this line of argument the next day:

... I would simply like to say that while I obviously am sympathetic in this case, it is very difficult to establish what a common law relationship is. Do you allow people to claim married status because somebody has

a girlfriend whom he visits every now and then? The law is pretty definitive in respect of what married status is ... at least there is more evidence ... I believe that in the law it would be impossible to define the kind of relationship that is recognized if you were to consider allowing common law marriages under the Income Tax Act. 6

The argument raised by both Mr. Mahoney and the Hon. Edgar Benson, that the Minister of National Revenue would not be able to properly determine what is or is not a common-law marriage, receives some, though not unanimous, support from the commentators. One noted legal scholar, Prof. William Klein, has stated:

5 Debates, October 25, 1971 at 9008.
6 Ibid, October 26, 1971 at 9048.

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[i]t certainly seems clear that no rule could be devised to distinguish between those unmarried couples who are like husband and wife and those who are merely "shacking up" ... Or at least no rule could be applied without flagrant disregard for commonly shared notions of the proper limits on the powers and activities of government employees ... how much time can a man spend at the woman's home and what other conduct can he engage in before he stops being a mere "date" or "boyfriend" and becomes a putative spouse? Furthermore, who determines the relevant facts on the basis of what kinds of leads or suspicions and how? 7

Klein also raised the possibility of infringement upon the personal or private lives of taxpayers in the policing of the section, to ensure adherence to the criteria of the personal deduction.

If "marriage" for tax purposes was to embrace the common-law relationship, what would be the parameter for the term? Would two single people, unrelated by blood, living in the same household, qualify for the deduction?

Would gender be a decisive factor, i.e. in homosexual relationships? If it were, would the Department of National Revenue then be liable to a further complaint based upon discrimination on sex grounds? A recent article suggests the possible additional problem of "sham" common-law relationships. Individuals might be "married" to qualify for the deduction, and then "separate" to avoid income attribution. 8 Perhaps the relationship that, at first impression, provides the strongest argument

7 William A. Klein, "Familial relationships and economic wellbeing: family unit rules for a negative income tax", (1971) 8 Harvard Journal on Legislation 361 at 388-93.

8 Arthur Drache, Financial Post, June 10, 1980.

to permit the deduction is one in which there is a child of the couple. 9

Notwithstanding the above problems, the Family Law Section of the Canadian Bar Association in Ontario has suggested that paragraph 109(1)(a) "be extended to unmarried persons for whom a legal obligation to provide support arises under provincial law, whether such payments are made pursuant to domestic contract or

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court order". 10 This approach has the merit of continuing to tie the deduction to the underlying policy basis for which the section 109 deductions are extended - taxpayers need some income to meet the basic necessities of life for themselves and their dependents, and the threshold for income taxation should exempt such basic amount of income. The problem of defining a common-law relationship, for the Canadian Bar Association, is resolved by reference to the laws of the province in which the couple lives. 11

However, this approach might result in an additional problem inequity in the Income Tax Act dependent upon the particular province of residency of the taxpayer. There are situations of inequity in taxation in the United States because the status of marriage can be defined differently from jurisdiction to jurisdiction. 12

9 supra n. 7 at 394.

10 Barbara Suzuki, "Recommendations of the Family Law Section Committee of Income Tax and the Family" Canadian Bar Association (Ontario), January 25, 1979 at 5.

11 Ibid at 6. See also Susan Eng, "Tax Consequences of Provincial Family Law Reform Legislation" (1978) 26 Canadian Tax Journal 554.

12 Comment "The Haitian Vacation: the applicability of Sham Doctrine to year-end divorces" (1979) 77 Michigan Law Review 1332 at 1339-44.

A recent speaker before a conference of the Canadian Tax Foundation commented on the problem of differing provincial marriage laws and their impact on the ITA:

The change in marital property laws proposed by the various provinces which I have briefly discussed would appear to me to have different income tax implications for residents of different provinces ... Perhaps practitioners will remember, without fond memories, the succession duty and gift tax situation which existed during the period 1972 to 1977 when there were at least five provinces in the field, each with its own particular statutes. In the opinion of many this situation led towards a balkanization of the country. May I respectfully suggest that the marital property picture is subject to the same danger. Perhaps it would be naive to suggest that the provinces should enact a uniform matrimonial property law so that all citizens of Canada would be treated equally in this respect, but it is surely not inappropriate to suggest that every effort should be expended by the federal government to ensure that the tax treatment of these citizens should not be dependent upon the province of their marriage or of their

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temporary residence. Any other result is clearly against all concepts of equity in taxation. 13

However, there is, of course, already significant differentiation in the incidence of income taxation due to residency simply because of the varying provincial income tax rates.

Whether or not a Minister of Finance may be sympathetic to an amendment in the deduction so as to encompass common-law relationships, the sole apparent reason for the distinction is administrative convenience, that is, it is perceived that if the definition of ’marriage’ is expanded, there will be tax avoidance, and hence, render administration of enforcement more difficult. Whether or not this reason, albeit important, is sufficient

13 Canadian Tax Foundation. Report of Proceedings of the twenty-ninth Tax Conference, Toronto 1977 at 239 (Mr. Robert Goodwin).

will be discussed shortly.
The U.S. equivalent to paragraph 109(1)(a) of the ITA is Internal Revenue Code section 151(b). 14 In contrast to Canada, the U.S. allows married taxpayers to file joint returns. However, by section 151(b) a taxpayer is permitted, if he files a separate return, to deduct $1,000 from his income for his "spouse", provided

the spouse has had no gross income for that taxable year and the spouse is not dependent upon another taxpayer. The term "spouse" is not defined in the Internal Revenue Code. The cases, though, suggest that "spouse" means either a "husband" or a "wife". The Corpus Juris Secundum 15 defines spouse as "a legal wife or husband". 16 Husband and wife are generic terms "with a very definite and precise meaning, "one which implies necessarily a lawful marriage". 17 Words and Phrases 18 suggests that "spouse" is either the legal or ordinary meaning 19 connoting the relationship in both a legal marriage and a common-law union. In the supplement, "spouse" is more narrowly defined as having reference to "an existing legal marriage arising from lawful wedlock " 20

14 Title 26 U.S.C.A. 1 to 160 at 568 (St. Paul, Minn.: West Publishing Co.)

15 Vol. XLI (St. Paul, Minn.: West Publishing Co.).
16 Ibid at 393.
17 Ibid.
18 Permanent Edition, volume 39A (St. Paul, Minn.: West Publishing Co.).

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19 Ibid at 537.
20 1980 Supplement at 91.
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The jurisprudence in respect of s.151(b) of the Internal Revenue Code interprets the term "spouse" therein as referring to a married person and, therefore, the deduction afforded by s.151(b) is not available to the person supporting a partner in a common-law union. 21 The determination of "marital status" in section 143 supports this interpretation, as it refers to an individual as being "married" and then makes reference to his "spouse".

The analogous provision in the Internal Revenue Code to paragraph 109(1)(b) of the ITA for our purposes is section 151(e), which provides an additional exemption of $1,000 for each "dependent" as defined by section 152(a). The latter provision excludes a "spouse" from being a dependent for the purpose of section 151(e), but does provide that a "dependent" includes:

An individual [other than a spouse] ... who, for the taxable year of the taxpayer, has as his principal place of abode the home of the taxpayer and is a member of the taxpayer’s household.

Thus, the common-law spouse who otherwise meets the criteria of section 151(e)(1) would be a "dependent" of his or her common-law partner, entitling the latter to the $1,000 exemption given by section 151(e)(1). As such, the American legislation is more liberal than its Canadian counterpart and would not

discriminate on a basis of marital status in respect of the Bailey/Carson situation, since in the U.S., Ms. Bailey could take the deduction for Mr. Carson as a "dependent" under s. 151(e)(1).

21 Sheppard v. C.T.R. 1959, 32 T.C. 942.

However, there is one qualification. Section 152(b)(5) provides:

An individual is not a member of the taxpayer's household if at any time during the taxable year of the taxpayer the relationship between such individual and the taxpayer is in violation of local law. [emphasis added]

State law may render a common-law relationship unlawful, and thus the deduction in section 151(1)(e) is not available in respect of a common-law spouse in such states. 22

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22 Untermann v. C.I.R., 1962, 38 T.C. 93; Turnipseed v. C.I.R., 1957, 27 T.C. 758.

(d) Section 63 - Child Care Expenses Deduction

Payments for "child care expenses" made by a female taxpayer may, within specific limits, be deducted in computing income. The limiting factors provide that a taxpayer cannot deduct for child care expenses in any year more than the least of (i) $4,000, (ii) two-thirds of earned income, and (iii) $1,000 multiplied by the number of children in respect of whom the taxpayer incurred child care expenses. Such expenses include babysitting services, day nursery services, and lodging at a boarding school or camp. The child care expenses must have been provided to enable the taxpayer to earn employment or business income.

Subsection 63(1) of the ITA prescribes conditions that a man must satisfy before he is allowed to deduct child care expenses in computing his income for a taxation year, but does not require a woman to satisfy these conditions in allowing her to deduct child care expenses in computing her income for a taxation year. For a man to be able to claim a deduction for child care expenses, he must be unmarried or separated from his wife, or his wife must be incapable of caring for children because of physical or mental infirmity or her confinement to prison. In brief, while all women qualify for the deduction, all men do not. The special rules set forth in paragraphs 63(1)(b) and 63(2)(a) for the male taxpayer also provide for a lesser overall maximum amount. An example is given by Prof. B.J. Arnold in a 1973 article (I have updated the figures to reflect later amendments to the Act).

For a male taxpayer the overall maximum amount is the lesser of $4,000 or the amount obtained when $30 for each of the taxpayer's children (to a maximum of four) is multiplied by the number of weeks during which the taxpayer

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satisfied one of the four conditions qualifying him for the deduction. In other words, an unmarried or separated male taxpayer is only entitled to take a deduction for that part of the taxation year during which he is unmarried or separated. Consider the example of a taxpayer whose wife was confined to hospital for a period of four weeks and who has two children. In the absence of the special rule in subsection (2)(a) of section 63, the taxpayer's deduction would be limited to $2,000,

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$1,000 for each child. 5 The application of the special rule, however, results in the deduction being limited to a total of $240 ($30 for each child multiplied by 4, the number of weeks the taxpayer's wife was confined in hospital). In the case of a "confined wife" both the $4,000 overall limitation and the $1,000 per child limitation are reduced by the amount the wife's husband deducted as child care expenses in the year. 22a (5 This result is obtained by applying section 63(1)(d). It assumes that two-thirds of the taxpayer's earned income exceeded $1,000.)

While society is changing rapidly, it is undoubtedly still true to say that in most cases today, where both parents are working, the husband will have the larger income. Hence, given a progressive tax rate structure to the ITA, it would be more advantageous for him to take the deduction if the ITA allowed him to do so as the high-income taxpayer than for his wife, the low-income taxpayer, to take it. Section 63 prevents this by precluding married men from taking advantage of the deduction. If both parents were working, and the husband had the higher income and could take the deduction there would be a greater loss of tax revenue, given the progressive tax rate.

However, the exclusion of married men from section 63 can result in discrimination against deserted husbands, and this was seen at the time of the debate on tax reform.

22a Arnold, B.J., "Section 63. The Deduction for Child Care Expenses" (1973) 21 Canadian Tax Journal 176 at 177. See also Arnold, "The Deduction for Child Care Expenses in the United States and Canada: A Comparative Analysis", (1973) 12 Western Ontario L.R. 1.

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Mr. Lambert (Edmonton West): Mr. Chairman, there is one point I wish to raise. I am going to strike out for male liberty in respect of this provision. Many people have been talking about single parents and there has been a suggestion that it is always the mothers of children who are involved. This act does not provide for the father at all except if he should be separated from his wife pursuant to a written separation agreement. This is repeated time and time again in the act. A man can qualify for the child care allowance for his children only if he is no longer married, second, if he is living separate and apart from his wife pursuant to a written agreement or, third, if the wife is certified by a qualified medical practitioner to be a person who by reason of mental or physical infirmity is confined for a period of not less than two weeks to an institution.

Mrs. MacInnis: How about widowers?

Mr. Lambert (Edmonton West): The widower is not specifically provided for, nor is the man whose wife decides she wants to play in greener pastures and has left him with children. We know this happens. Perhaps it does not happen quite as often as the case of a husband deserting, but there are many instances in which the wife deserts and leaves the children with the husband.

It seems to me the separation of these parties should be wider than pursuant to a written agreement. The widower, of course, is covered by the provision that he is not married since under these provisions he is not considered to be married. I must say there are many instances in which the wife has deserted the husband and has left the children with him. He would be in no position to negotiate an agreement, nor would there be a compelling reason to do so.

Perhaps a court order should be included. Suppose the parties were separated merely by means of a court order: say, for instance, that the family court decides for the benefit of the children or for other reasons that the husband shall live separate and apart from the wife. If the children are in the custody of the husband, surely to goodness he should be entitled to receive the child care allowance. One provision which might be abused in the deduction referred to in section 63(1)(b)(iii)(A) where the wife may be confined to bed, there is a certificate that she is so confined for a period of two weeks, and

there is need for child care. I think something could be worked out under that provision.

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I ask the parliamentary secretary why the benefit is restricted to the taxpayer who is the father of children and who is separated pursuant to a written agreement. I know there might be opportunities for the parties to decide to live apart in order to see if they can get some edge. But surely to goodness where it is proved that the wife has decamped, or where a court has ordered the parties to live apart with the husband having the care and custody of the children that should be sufficient for him to qualify for the child care allowance.

Mr. Mahoney: ... Section 63 makes it very clear that if the lady in the house is earning an income she is automatically qualified to claim this, but the man in the house has to pass a number of tests in order to be able to claim it, as was alluded to by hon. member of Edmonton West. Either they are separated or he is not married and is supporting children for one reason or another, being a widower or divorced or his wife is separated from him pursuant to a written agreement, or his wife is mentally or physically incapacited for a period of time during the

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year which would permit him to claim this allowance under section 63.

In passing I might refer to the comments of the hon. member for Edmonton West and note that of course in this particular area in almost every circumstance that I could conceive which the hon. member mentioned, the taxpayer would be entitled to claim a full, married exemption on behalf of a dependant other than his wife if the circumstance which he described existed. I would like to look at his comments to see if by any chance we have provided a situation where a man could not claim either the child care deduction or the married exemption on behalf of a dependant other than his wife. However, I do not believe that that situation exists. I think he is entitled to one or the other in those circumstances.

Mr. Lambert (Edmonton West): What if he puts the children in a boarding school and avails himself of the provisions governing the placing of children in a boarding school, with its limitations? He would be denied that? 22b

As Mr. Mahoney states, the deserted husband with a child to support can take the marital status equivalent deduction of

paragraph 109(1)(b) (which provision we have already considered in the context of the Bailey/Carson complaints). However, it is not a satisfactory answer to suggest the logic is that a deserted husband should therefore not receive the child care expense

22b Debates, Nov. 1, 1971, at 9226, 9227.
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deduction of section 63, because a deserted wife in the same factual situation of supporting a child has the benefit of both the paragraph 109(1)(b) and section 63 deductions. The female, deserted spouse, is in a significantly better tax position than the male, deserted spouse.

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(e) Background and Policy Basis with Respect to the Enactment of Section 63

Before discussing section 63 specifically, it is necessary to review briefly some fundamental premises to the Income Tax Act, so as to then be able to better understand both the underlying policy rationale and the reasons for the substantive details of section 63.

The economist, Robert Murray Haig, defined "income" as "the money value of the net accretion to economic power between two points of time", the Carter Report stating that, "We are completely persuaded that taxes should be allocated according to economic power of indidividuals and families". 23

The Income Tax Act of 1972 departs markedly in many specific instances from the "comprehensive tax base", but the fundamental premise that "income" means "net accretion to economic power" underlies the Act. Thus, subsection 9(1) refers to a taxpayer’s income from a source that is a business or property as being his "profit" therefrom for the year. Generally acceptable accounting principles are to be followed with respect to computing profit from a business or property unless the Act departs, for example, either in rendering expenses non-deductible, or in allowing expenses to be deducted that accounting principles would disallow.

It follows logically that outlays or expenses made or incurred by the taxpayer for the purpose of gaining or producing income from the business or property are deducted from gross income to arrive at net income or "profit" for tax purposes. 24

23 Canada Report of the Royal Commission on Taxation. (Carter Commission), vol. 1 Introduction, Acknowledgements and Minority Reports, Ottawa: Queen's Printer 1966 at 9-10.

24 Subsection 9(1) and paragraph 18(1)(a). See for example, The Royal Trust Co. v. MNR [1957] C.T.C. 32; (1957) 11 DTC 1055 (Exch. Ct.).

A second principle is that an expense to be deducted must be incurred in the course of carrying on the business, that is, personal or living expenses are not deductible. 25 This is logical, in that personal and living expenses are to a considerable extent discretionary in nature, and to allow them to be deductible would erode the tax base. The person who consumed all his income would pay no tax.

In so far as employment income is concerned, a perceived difficulty in administration of the ITA is that taxpayers will claim expenses as deductions that are not related to earning income from the employment. Also, if an expense is related to the employer's business, the employer will usually pay the expense, reimburse the employee, or at least pay the employee an allowance to meet employment-related expenses. Therefore, the statutory approach with respect to employment income is to require gross salary or wages to be included for tax purposes less only those deductions specificially authorized by the ITA. These include a general employment expense deduction 26 up to $500, in recognition of the fact that most employees have some expenses incurred in the course of earning their employment income for which they are not reimbursed by their employers.

Therefore, in summary, the norm for deductible expenses is that they must be incurred in the course of carrying on the business or employment. Hence, the expense of getting to the place of business or employment is not deductible. 27 The classification does not change by reason of the fact that, but for those expenses the taxpayer could not have engaged in his business or employment.

25 Paragraph 18(1)(h).
26 Paragraph 8(1)(a).
27 Dr. Ronald K. Cumming v. MNR [1967] CTC 462 (1967) 21 DTC 5312 (Exch. Ct.); Martyn v. MNR (1962), 35 Tax ABC 428; 62 DTC 341 (T.A.B.).

The ITA has drawn the line between expenses incurred in the carrying on of a business on the one hand and personal or living

expenses on the other. The former can be viewed as 'costs of earning a living' and the latter simply as the 'cost of living'. Once any deductions are allowed in respect of the latter, it is very difficult to know where to stop. If travelling expenses to get to the place of work are deductible, then what about the taxpayer's cost for food, clothes and lodging outside the course of carrying on his business? But for such expenses, he would not be able to function. However, to allow these expenses as deductions, especially when the nature and quantity depends upon the discretion and tastes of the taxpayer, would seriously erode the tax base.

The ITA recognizes that every individual taxpayer does need a minimal amount of money with which to live, and therefore, there should be an allowance deductible in computing taxable income for all individual taxpayers. Hence, the ITA provides the personal allowances or exemptions in section 109(1)(a) (discussed supra), at issue in the matters before this Tribunal raised by the Bailey/Carson complaints.

Therefore, departures from the norm (no deductibility for personal or living expenses beyond the personal exemptions in section 109) are exceptional and to successfully claim such a deduction, the taxpayer must come precisely within the language of the ITA.

Examples of departures are the provisions allowing deductions in respect of charitable donations and medical expenses. Deductions for charitable donations 28 are founded on a policy premise of allowing tax

28 Paragraph 110(1)(a) ITA.
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subsidies for certain activities perceived as beneficial to society, with the private sector (donating taxpayers) deciding upon the recipients of the expenditures. Certain medical expenses are allowed as deductions 29 on the policy premise that they are extraordinary expenses (i.e. above a threshold amount that the taxpayer might incur in the ordinary course of events), they are non-discretionary, and they do reduce one's income and hence, one's economic power.

Prior to the enactment of section 63, child care expenses were held by the courts not to be deductible on the basis that they were personal expenses. 30

Moreover, given the limitations on the deduction as section 63 is drafted, it is clear the deduction does not reflect actual expenditures for child care and does not serve as an income defining function. Such expenses are not viewed by the ITA as

'costs of earning a living' but rather, simply as 'costs of living'.

Child care expenses are not properly characterized as business or employment expenses, although commentators often blur the distinction. For example, Blumberg states:

Child care ... is ... an expense which necessarily arises only when both parents are employed ... A working mother's provision for child care is a nondiscretionary expense directly related to the fact of her employment ... A proper analysis of borderline expenses that might be characterized as either business or personal should entail a careful inquiry into the nature of the expense.

29 Paragraph 110(1)(c) ITA.
30 Arnold, B.J., "The Deduction for Child Care Expenses in the United States and Canada: A Comparative Analysis", (1973) 12 Western Ontario L.R. 1 at 26.

Would it have been incurred absent gainful employment? If so, it is not deductible. 31

The classification of child care expenses as business/employment expenses or personal expenses is somewhat difficult at first glance, as the expenses are related to business/employment. But for the expenditure, there could not be business/employment income. Once a mother decides to work (assuming her husband is employed), child care is a nondiscretionary expense directly related to the fact of her business/employment.

However, child care expenses have always been conceptualized and classified as personal living expenses in both Canada and the U.S, by the courts before statutory reform, and in the present legislative provisions which afford deductibility.

In the scheme of the ITA, the child care expenses provision is grouped with other, miscellaneous, "Deductions in Computing Income" in subdivision e, Division B, Part I. Section 62 allows deductibility for "moving expenses", another 'but for' type of expense. Paragraph 60(f) allows for the deduction of tuition fees at the secondary school, vocational school and university levels. But for education, a taxpayer is not likely to earn as much income. It is to the general advantage of society not to have a tax disincentive to the mobility of labour or educational betterment, and hence, deductions are given.

31 Blumberg, G., "Sexism in the Code: A Comparative Study of Income Taxation of Working Wives and Mothers", 21 Buffalo L. Rev. 49, at 64, 65, (1971) cited by Keane, "Federal Income Tax Treatment of Child Care Expenses", 10 Harvard Journal on Legislation, 1, at 31 (1972).

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However, the point that such deductions are seen by the ITA as being in the nature of personal expenses is reinforced by the fact that the deductions afforded by subdivision e cannot generate a loss to be taken against income from other sources. 32

Prior to 1972 in Canada, and 1954 in the United States, expenses for child care incurred by a non-working parent entering the labour force were not deductible from earned income. The expenses were not considered to be employment-related, but personal expenses. Everyone incurs expenses such as food and clothing, which are a necessary prerequisite to being able to earn income, but which are not incurred in the course of earning income. As discussed, deductible expenses have been generally limited to the latter category, i.e. earned in the course of carrying on the business or employment. This position, taken by both the Department of National Revenue in Canada and the Department of the Treasury in the United States, has been concurred in by the courts in both countries. 33

The 1954 amendment to the U.S. Internal Revenue Code was for a specific and limited purpose - to give relief to low income families, particularly those headed by female one-parent families. 34

32 A negative balance caused by subdivision e deductions cannot be utilized (paragraph 3(c)). In contrast, a loss from employment, business or property can be taken against income from all sources (paragraph 3(d)) and utilized, within limits, in other taxation years as a "non-capital loss" (Paragraphs

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111(1)(a), (8)(a)).
33 See Bowers v. Harding [1891] 1 Q.B. 560; No. 68 v. MNR 52 DTC 333; Nadon v. MNR 66 DTC 1, King v. MNR 71 DTC 18; Lawlor v. MNR 65 DTC 1248, being Canadian decisions, and Smith v. Commissioner 40 BTA 1038 (1939) aff'd per curiam, 113 F2d 114 (2d Cir. 1940).

34 Arnold, supra n. 30 at 31.
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The 1967 report of the Carter Commission recommended that tax credits for working mothers be instituted. 35 The Carter Report

gave a preference for a system of tax credits for working mothers with children rather than allowances, tax credits being seen as a more efficient means of reducing the tax burden on low-income families, this being seen as the primary purpose of allowances. An allowance, given the progressive tax rate structure, will benefit the high-income taxpayer as he 'saves' more tax. As well, creidts would offer a greater incentive to women to enter the labour force.

The Government's Proposals for Tax Reform accepted the principle of aiding mothers, but preferred to provide a deduction to a tax credit. 36 The Government recognized that women were discriminated against in the labour market and that some provisions of the ITA may be a deterrent to women entering the labour force. 37

As well, tax relief was viewed as a move towards the fulfillment of desired norms of employment, including equality of opportunity and treatment for female labour, enunicated by the International Labour Organization of

35 Canada Report of the Royal Commission Taxation, volume 3 Taxation of Income: Part A - Taxation of Individuals and Families, Ottawa: Queen's Printer and Controller of Stationery, 1967 at 19, 180, 193-4 - "When wives work some additional family housekeeping expenses may result... for a family with children, additional non-discretionary expenses clearly arises when both parents work" (at 193).

36 E.J. Benson Minister of Finance, Proposals for Tax Reform Ottawa: Queen's Printer for Canada, 1969 at 10, para. 1.33 "Costs of looking after young children when both parents are working, or when there is only one parent and that parent is working, would be allowed as a deduction subject to certain conditions. This new plan is intended primarily to benefit mothers who need to work to support their families, and would be in addition to the normal exemption for children."

37 See the Report of the Royal Commission on the Status of Women; Advisory Council on the Status of Women, The Person Paper: Taxation Untangled 1st ed. Ottawa: January, 1977 at 8-9. See

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also, Louise Delude for the Advisory Council on the Status of Women, "Background Study on Women and the Personal Income Tax System" (1976).

which Canada is a member. 38 The ILO in 1965 adopted Recommendation No. 123 that governments were "to promote the prospects of women in work by ensuring, for instance ... equality of opportunity treatment in employment. 39

The House of Commons Standing Committee of Finance, Trade and Economic Affairs stressed that the deductions should only be for the needy, those who work due to necessity rather than choice. 39a As well, the suggestion was made that the deduction should be allowed to the parent with the lowest income. 39b This would have removed the sex bias found in the provision as enacted. These two suggestions were not followed.

38 See for a comment on this issue of mobility, Mr. Arthur C, Parks' (Chief Economist, Atlantic Provinces Economic Council) evidence, Minutes of Proceedings and Evidence, Standing Committee on Finance, Trade and Economic Affairs, 1970 at 79-111.
"We looked to all these things together: the ability to deduct child care allowances; the deduction, available to encourage labour mobility and all this sort of things as a package and as being good, particularly in an area which requires a great deal of structual change and where labour mobility is part and parcel of the problem."
See also the submission by the Atlantic Provinces Economic Council, Appendix at 49-13 79-221:
"The emanicipation of the female, the rapidly changing rural-urban distribution of population, the emergence of the service sector as a significant employer of women..point to a rapidly changing society. These trends coupled with the increased population resulting from the past-war baby boom, many of whom are career-oriented wives and mothers point the need for some form of compensation for expenses incurred by both parents holding a job. Thus, we view the proposal for the deduction of child care expenses as a farsighted view by the government."
See also the comments by J.R. Brown, Department of Finance at 31:13 to 31:39.

39 ILO, 64th session, 1978. Report III (Part 4B, Third Item on the Agenda: Information and Reports on the Application of Conventions and Recommendation). General survey relating to the Employment (Women with Family Responsibilities). Recommendation, 1965 (No. 123), Report of the Committee of Experts on the Application of Conventions and Recommendation, (Article, 19, 22 and 25 of the Constitution) - Vol. 13, Geneva: International Labour Office 1978.

39a Canada Parliament 18th Report of the Standing Committee on Finance, Trade and Economic Affairs Respecting the White Paper on Tax Reform 2nd Sess., 28th Parl. at 93-30.

39b Ibid.
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During debate in the House of Commons, Government members emphasized that the deduction would assist women in entering or re-entering the labour force. 40 As well, better child care was seen as alleviating Juvenile delinquency. 41

A United States commentator has articulated another good reason for the child care expense deduction that may well have been implicit to the willingness for reform in Canada.

"A deduction for household and child care expenses incurred by a wage-earner is entirely appropriate, however, as a technique for equalizing the tax bases of wives who work at home to produce household and child care services of significant value and wives who earn wages. The deduction establishes neutrality between the two types of work available to the individual, household and wage work." 42

If a wife produced tax-free income, there being no tax on imputed income, (i.e. the value of the services as a homemaker to her family is not income for tax purposes) of say $100 a day as a homemaker, and wishes to become a wife earning $200 a day, which income will be taxed, and pays $20 a day in child care expenses, her standard of living has only increased by $80 less the tax payable on the $200. Without a deduction of $20, her tax base would be $20 greater, i.e. $200, rather than $180. Viewed in this context, child care expenses tend to be seen more easily as taking on the character of expenses that are part of the income-earning process, and not just 'but for' expenses. That is, they tend to be seen as a 'cost of earning a living' and not merely as a 'cost of living'. Properly categorized, as discussed, they are merely a 'cost of living'.

40 Canada, House of Commons Debates, June 28, 1971 at 7390 (Mr. E.D. Osler, Winnipeg South Centre).

41 Ibid, Nov. 1, 1971 at 9230 (Mr. Gilbert).
42 William D. Popkin, "Household Services and Child Care in the Income Tax and Social Security Laws", (1975), 50 Indiana Law Journal, 238 at 246.

As another American Commentator, in considering the 1954 U.S. Amendment stated:

[r]ightly or wrongly mothers rather than fathers are generally regarded as having the primary family responsibility for child rearing during working hours. When a mother wants to work she generally must find a substitute to assume this responsibility in her absence. The expenses of this care are to enable the mother to

work and are the incident to the process of earning income; the failure to allow child care expenses as an offset to the wife's income for tax purposes results in a tax on her gross earnings rather than her net earnings. 43

He therefore viewed the U.S. child care expenses deduction as an attempt "to strike a balance between deductible business related expenses and non-deductible personal expenses for dependent care ... to accommodate the changing economic position of wives and mothers" 44 who need to work.

The Hon. Edgar J. Benson commented in his Budget speech:
[T]his will go a long way toward removing a deterrent that many women say prevents them from taking jobs. In some cases the deduction may be claimed by the father... In many cases genuine hardship will be relieved. 45

Mr. J. R. Brown, Senior Tax Advisor, Department of Finance, stated at the Standing Committee of Finance hearings on the Government's proposals for tax reform in 1970:

... the principle behind the proposal is that if - let me again talk in terms of a wife - a wife is considering whether to return to the workforce ... and she has small children at home, one of the expenses she faces and one of the considerations that face her is that she may have to pay to have those children looked after.

43 Alan L. Feld, "Deductibility of Expenses for Child Care and Household Services: New Section 214," (1971-72) 27 Tax L. Rev. 415 at 425-6.

44 Ibid. at 447.
45 Debates. June 18, 1971 at 6894.
46 Canada. Parliament. House of Commons. Standing Committee of Finance, Trade and Economic Affairs, 1970 at 31:22.

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Therefore, the child care expenses deduction was enacted for the reasons that such expenses can be viewed as a prerequisite to

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earning income, an extraordinary personal expense (when compared to single or non-parent taxpayers) and to faciliate entry into the work force by mothers.

... the intention was to recognize that if the parents were not home because they were working, then the cost of looking after the children obviously had to be deducted in considering the net income of the family. So that...

it was felt that it was necessary to look to both circumstances [the individual deducting the expense and the family unit]. Otherwise if we were to look in an independent way, we might end up giving child care expenses where the husband was working but the wife was at home, or vice versa... The very nature of the deduction led to a consideration of the positions in the home... this arises out of the nature of the overall White Paper proposal. 47

This statement reflects, in part, the traditional view that it is the wife's responsibility to take care of the children and, therefore, she is entitled to the deduction.

The deduction was recognized as a "special tax allowance to working mothers" 48 and the principle was acceptable to all provinces and organizations that submitted briefs to the Committee.

As already discussed, section 63 discriminates against males. A preliminary point, already noted, is that the husband, where there are two fulltime working parents, is not allowed to take the deduction. Undoubtedly, a basic reason for this approach is that in most cases today the husband has the higher income and thus there would be a greater loss of revenue, given the progressive tax rate, if he were permitted the deduction. Husbands of wives completing their education may also have need to deduct child care expenses

47 Ibid at 31:14.
48 Ibid at 70:145.
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for income tax computation. 48a However, paragraph 63(1)(b), in setting up the stringent criteria by which a male taxpayer parent may obtain the deduction, discriminates, in particular, against deserted husbands 49 such as the complainants Pellerin and McCaffery. The Standing Committee of Finance, Trade and Economic Affairs, in recommending the adoption of section 63 did so with the proviso that "it should also be made clear that the deduction would be allowed to the parent with the lower earned income". 50 This approach would have been similar to the amended s. 214 of the Internal Revenue Code. 51

Indeed, a former Minister of National Revenue, the Hon. Robert Stanbury, in response to a question by Mr. Duncan Beattie

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(Hamilton-Mountain) stated his preference for the lower earned income approach. 52

What rationale, then, exists for the discrimination against males? Mr. R.B. Bryce, the Economic Adviser to Prime Minister Trudeau at the time, suggested one explanation to the Committee.

Bear in mind that, if one permits the husband to take it, because his income is higher, you face the comparison between two wives who are working. One whose husband, let us say, is

48a Lewis Ayala v. MNR, 78 CTC 2299 (TRB), discussed infra.
49 Arnold, B.J. "Section 63: The Deduction for Child Care Expenses" (1973) 21 Canadian Tax J. 176 at 178.

50 Standing Committee on Finance, Trade and Economic Affairs supra n. 46 at 93:30.

51 United States Code Congressional and Administrative News, 92nd Congress 1st Session, Revenue Act of 1971, Pub. L. 92-178, s. 210 (Dec. 10, 1971) amending Int. Rev. Code of 1954, s. 214. See New York University Proceedings of the 34th Institute of Federal Taxation, vol. 1 at 158.

52 Debates, March 1, 1973 at 1791.
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earning $30,000 a year and one whose husband is earning $6,000 a year. Are you going to give more for the child-care allowance where the wife goes to work in the case where the husband's income is up in the 50 per cent marginal bracket or are you going to give an amount based on the wife's income? There is a question, of equity involved here as well as tax-saving. 53

Mr. Brown went further:
... one application of logic might say that it should be the parent with the lower income since that parent presumably is the one exercising economic choice, but I think... that it might be more practical to consider the wife... as the one who should deduct, making it an easier more understandable law. I think that what is hoped for here is that in those instances where there is a wife, she would deduct it from net income... the theory of the deduction was to try to come to grips with the decision that had to be made. Would both parents go to work or would one go to work and one stay at home? ... it really would be the parent with the lower income if one were to be absolutely logical in an economic sense. I think traditional is a better word. Therefore, I think the proposition would be that if both the husband and wife

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were working, it would be the wife who would make the deduction. 54

In 1971, effective January 1, 1972, section 214(d) of the Internal Revenue Code adopted a uniform ceiling applicable to both single and married taxpayers. The original section 214 had treated

unmarried women differently from unmarried men, 55 who generally could claim the deduction only if they were widowers, and may have been unconstitutional. 56

53 Standing Committee on Finance, Trade and Economic Affairs supra, n. 46 at 31:14.

54 Standing Committee on Finance, Trade and Economic Affairs supra, n. 46 at 31:14. to 31:15.

55 John B. Keane, "Federal Income Tax Treatment of Child Care Expenses". (1972) 10 Harvard Journal on Legislation, 1 at 11.

56 See Reed v. Reed, 40 U.S. Law Week 4013, Nov. 23, 1971. But see also Charles E. Moritz, CCH Dec. 30, 386, 55 TC 113 (1970). Both cases are referred to in Hjorth, "A Tax Subsidy for Child Care: Sec. 210 of the Revenue Act of 1971", (1972) 10 Taxes 133, at 134.

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By This Tribunal

Consequential upon further tax reform in 1976, Internal Revenue Code s. 44A 57 (replacing section 214) nov provides a credit against tax of 20 percent of qualifying child care expenses, being expenses incurred to enable the taxpayer to be gainfully employed, with maximum limits upon the credit of $1,000 for one qualifying dependent and $4,000 if there are two or more.

Qualifying expenses to be considered in the calculation are limited by the amount of the individual’s earned income. If an individual is married, a joint return must be filed and the limiting amount for qualifying expenses becomes the income of the spouse with the lower income. There is no differentiation as between male and female taxpayers, and a married individual filing a separate return is considered not married for the purpose of this provision if during the last six months of the taxation year such individual’s spouse was not a member of the individual’s household.

A policy reason behind the child care expenses deduction in the ITA was to faciliate females with children entering into the labour force. The rationale for the discriminatory aspect was an attempt to narrow the applicability of the section to those for whom it was primarily designed - working mothers. It is certainly arguable that an injustice has occured particularly to deserted husbands such as Messers. Pellerin and McCaffrey. This admitted injustice must be placed in context. As one commentator, Mr. J.R. Allan, has said in general upon tax reform:

[s]ince many of the changes have been complex, and since

they typically interact with one another, it would be extremely difficult to determine and analyze their effects, even if they impinged on all taxpayers in a relatively uniform manner. Since the economic

57 Added Pub. L. 94-455. Title V, s. 504(a)(1), Oct. 4. 1976, 90 Stat 1563, and amended Pub. L. 95-600, Title I, s. 121(a), Nov, 1978, 92 Stat. 2779.

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and demographic circumstances of taxpayers, in fact, differ widely, the determination of the effects of even a single tax charge may be an extremely difficult matter. It is thus hardly surprising that after a period of frequent and rapid change there should be great uncertainty and controversy about the effects of the changes that have been made. 57a

Arthur Drache makes a similar point in a recent article:
The major obstacle to achieving equity is the fact that full equity means a highly complex Act. Most of the arcane provisions of the Act result from the attempt to achieve fairness. The Act often starts off with a broad rule, in many instances a harsh rule and then provides exceptions to it on the grounds of fairness. As more and more situations appear to be analogous to those for which an exception has been granted, more exceptions are made. The end result is that the provision becomes complex in the extreme. The officers are thus faced with the task of fulfilling the equity goal at the cost of simplification or, conversely, abandoning changes which might be desirable in policy terms, but are too complex to administer. At least one major change to the child care expense deduction, which was approved at all levels on policy grounds, was abandoned because the required legislation would be so complicated as to defy understanding. 58

The final context in which section 63(1) must be seen is that, in reality, it is an expenditure by the Government. It represents the redistribution of economic resources by the Government via the income tax system - in other words - section 63 provides for a significant "tax expenditure".

A tax expenditure is any form of incentive or relief granted via the tax system rather than via government expenditure. Typical devices include deductions, exemptions, allowances, exclusions, and credits. The central idea behind the concept is that incentives or relief provided through tax devices are analogous to

57a J.R. Allan et al, "The effects of tax reform and post-reform

changes in the Federal personal income tax 1972-75", (1978) 26 Canadian Tax J. 1 at 29.

58 Arthur Drache, "Introduction to income tax policy formulation: Canada 1972-76", (1978) 16 Osgoode Hall Law Journal 1 at 4.

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conventional expenditures of subsidies to attain similar purposes... the tax revenue foregone... should also be counted in government budgets... Underlying the concept is a Haig-Simon definition of taxable income based on the accretion approach to net income. 59

For 1979, the federal government has estimated that section 63 will result in an expenditure by government of some 40 million dollars. 59a A main purpose of income taxation is revenue generation to finance government direct expenditures for services. Revenues foregone through the child care expense deduction against taxable income can be viewed as an indirect expenditure by government via the income tax system. One commentator estimates that in 1975 the total amount expended directly by all levels of government in Canada for day care services approximated the amount of tax revenue lost in the same year through the reduction in respect of taxable incomes because of the child care expense deduction afforded federal taxpayers. 60 In 1973, two out of every five mothers and one out of every three mothers with preschoolers were in the labour force in Ontario. 60a Section 63 is essentially a remedial measure, a tax expenditure by the Government to rectify prior and present discrimination against women in the labour force and to mitigate against the otherwise deterrent effect of

59 John R. Kesselman, "Non-business deductions and tax expenditures in Canada: Aggregates and distribution". (1977) 25 Canadian Tax. J. 160 at 161; see also (1979) 1(2) Canadian Taxation: A Journal of Tax Policy at 3-62.

59a Canada, Department of Finance, Government of Canada Tax Expenditure Account: A conceptual analysis and account of tax preferences in the federal income and commodity tax systems (Ottawa: Department of Finance, 1979) at 47, 94.

60 Anna Fraser, The More You Have, The Mare You Get: An examination of Section 63 of the Income Tax Act, The Child Care Deduction. Project Child Care Working Paper #5, a joint project of the Community Day Care Coaliatian of Metropolitan Toronto, and the Social Planning Council of Metropolitan Toronto, 1978.

60a Day Care and Public Policy in Ontario, Michael Kisslinsky, University of Toronto Press, Toronto, 1977.

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the ITA in respect of women joining the labour force. 60b Commentators upon the child care deduction provision in both Canada and the United States emphasize that it "is a classic example of tax subsidy... because it is not a true cost of earning of living". 70 If such expenses were in fact an ordinary and necessary expense of earning a living, there should not be an arbitrary limit on the amount deductible. 71

The United States Congress was perhaps primarily concerned with alleviating hardship cases, as there were many women widowed by World War II and the Korean War "who were compelled to make day care arrangements for their children in order to work". 72 Other purposes seen as underlying section 214 of the Internal Revenue Code were:

If the purposes behind section 214--to free parents to work, to provide educational opportunities for poor children, and to provide opportunities for child care professionals--are to be realized, the present tax deduction for child care expenses should be reformulated or an alternative non-tax program should be funded. 73

60b Allan supra n. 57a at 30; Drache, supra n. 58 at 11.
70 Hjorth, "A Tax Subsidy for Child Care: S.210 of the Revenue Act of 1971", (1972) 10 Taxes 133, 138. See also the comment, "The Child Care Deduction: Issued Raised by Michael and Elizabeth Nammack and the Pending Amendment to Section 214", (1971-72) 13 Boston College Industrial Commercial Law Review, 270 at 280.

"The policy that section 214 is intended to implement has been described above: The deduction was designed to enable certain women and certain classes of men similarly situated--to work despite the responsibility for depends requiring personal care. In essence, then, the deduction was intended as a subsidy to fill a particular need rather than as an instrument of general tax policy. A review of the legislative history reveals clearly that the child care deduction was designed as a subsidy."

71 Section 214 of the U.S. Internal Revenue Code also provides an income limitation phaseout. Hjorth, supra n. 70 at 138.

72 Keane, supra n. 55 et 4.
73 Keane, supra n. 55 at 27.

The point is, the child care deduction is a way of channeling

government financed assistance for child care, although it may not be the best mechanism.

An expenditure program has several advantages over the tax subsidy as a way of channeling government financial assistance for child care. First, the amount of relief that can be given through tax subsidies is a function of each taxpayer's income and is limited by it. Second, a direct expenditure program does not rely on passive incentives; expenditures in needed areas can be assured by federal direction. In addition, when appropriations are limited, a direct expenditure program can be designed in such a way as to target scarce funds. Tax provisions roughly establish priorities, because the tax laws distribute benefits in a passive manner; a qualifying taxpayer can decide how much federal aid to allocate to himself by choosing how much to spend for child care. Finally, child care provided through direct expenditure programs can probably be evaluated and monitored more efficiently than can subsidies which are channeled through tax relief. 74

I have considered at some length the background with respect to section 63 for two reasons. The first is more obvious - that such consideration is, of course, relevant to the general consideration of the issues before this Tribunal. One must discuss and understand section 63 before one can proceed to determine the critical issue as to whether it constitutes a discriminatory practice within the meaning of section 5 of the Canadian Human Rights Act. However, a second reason may not be so apparent, but must be emphasized. If section 63 represents a provision constituting a form of "tax expenditure" to subsidize certain taxpayers, as I find it does, then the essential nature and function of section 63 is not unlike a statutory provision that provides a conventional direct expenditure by government. The observer might well regard a direct government expenditure as a "service" and, it must be emphasized, section 5 of the Canadian Human Rights Act addresses itself to "... a discriminatory practice in the provision of services..."

74 Ibid.

For example, the universal family allowance in Canada, as a direct expenditure by government, can be viewed as a "service" since its inception in 1945.

The refundable child tax credit, introduced by amendments to the ITA in 1978 75 , and made applicable to the 1978 and subsequent taxation years, extended the existing child benefits system significantly, introducing to the ITA the concept of a 'negative income tax'. The amount of the credit is $200. per eligible child,

reduced by 5% of the amount of family income over the indexed family income limit ($21,360 for 1980). To the extent that child

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tax credits exceed income tax otherwise payable, the taxpayer may be entitled to a refund, as the credits are deemed to be paid by him an account of his income tax. The provision, therefore, affords assistance as well to those who paid no federal income tax. The refundable child tax credit can also be viewed as a "service".

If direct government expenditures are "services" within the meaning of section 5 of the Canadian Human Rights Act, then is an indirect government expenditure that amounts to a tax subsidy, such as that extended through section 63 of the ITA, a "service" as well within the meaning of section 5 of the Canadian Human Rights Act? This issue will be discussed shortly

75 Section 122.2 ITA.
>6.
INTERPRETATION OF THE CANADIAN HUMAN RIGHTS ACT Page 53

We have seen that the ITA differentiates adversely with respect to common law spouses on the ground of marital status, in that the deduction afforded by paragraph 109(1)(a) of the ITA is not extended to a common law spouse taxpayer such as the complainant, Ms. Bailey, in supporting her common law spouse, the complainant, Mr. Carson. The ITA also differentiates adversely with respect to males on the ground of sex, in that the child care expense deduction afforded by section 63 is extended to males on different, more stringent, criteria than for females. In particular, as compared to women, deserted husbands such as the complainants, Pellerin and McCaffrey, are differentiated adversely with respect to the child care expense deduction.

The issue now to be considered is whether either or both of such discriminatory factual situations are covered by section 5 of the Canadian Human Rights Act. How is that section and the Canadian Human Rights Act generally to be interpreted?

It is purposeful to first consider generally the interpretation of human rights legislation and then the interpretation of the Canadian Human Rights Act specifically.

(a) The Interpretation of Human Rights Legislation Generally
There is a clear consensus in Boards of Inquiry decisions across Canada that human rights legislation is remedial legislation. Boards of Inquiry have held that human rights legislation must be interpreted fairly and liberally so as to ensure the attainment of the goals indicated in the statutory provisions.

>Interpretation
of the Canadian Human Rights Act Page 54

In Robert Heerspink v. The Insurance Corporation of British

Columbia 1 , Chairman Leon Getz discussed at length the proper interpretative approach to human rights legislation. In the Heerspink complaint, the respondent cancelled a policy for fire insurance it held on the complainant's property. No reason was given for the cancellation, but the complainant alleged that it was because he had been charged with possession of and trafficking in marijuana. He alleged that this violated section 3 of the British Columbia Human Rights Code which makes discrimination in the provision of services unlawful.

The issue facing the Chairman was whether the effect of section 3 was to derogate from the common law of contractual relationships. The Chairman concluded that the statute worked a fundamental change in the common law.

"If there is any doubt about this, that doubt should in my opinion, be resolved in favour of the Code.

It must be borne in mind that the Human Rights Code is in some respects legislation of a rather special character. Speaking of analogous legislation in England, the Race Relations Act of 1965 and 1968, Lord Morris recently observed that they introduced into the law of that country 'a new and guiding principle of fundamental and far-reaching importance'. [Charter v. Race Relations Board, [1973] 1 All E.R. 512, 518 (H.C.)]. It seems to me that the Code, equally, introduced into the law of British Columbia, a similar new and guiding principle of fundamental and far-reaching importance. It is of the very nature of the issues with which it deals that it should be expressed in words of general and far-reaching significance. It is concerned not with the specific and isolated abuse that was so characteristic of the concerns of legislation enacted in an earlier era, an era in which 'legislatures interfered as little as possible with the fundamental traditions of society, and the courts were but carrying out the legislative purpose when they invoked this presumption [against interference with common law rights] in order to confine the operation of an Act within narrow bounds'. [Willis, Statutory Interpretation in a Nutshell, (1938) 26 Can. Bar Rev. 1, 20]. It is concerned, rather, with broad categories of behaviour, and requires an interpretive approach that is

1. March 16, 1977.
>Interpretation
of the Canadian Human Rights Act Page 55

consistent with its character. In my view, it demands that 'fair, large and liberal construction and interpretation as best ensures the attainment of its objects' that is called for by section 8 of the Interpretation Act, S.B.C. 1974, c.42." 2

In Re Attorney-General for Alberta and Gares 3 , the court was called upon to resolve an ambiguity in the term "employ" in section 5 of Alberta's Individual Rights Protection Act 4 . The complaint was an allegation that female employees were being paid less than

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their male counterparts. Justice McDonald cited the preamble of the Individual Rights Protection Act and concluded:

"From the preamble it becomes clear that the prohibition in section 5 was designed to protect the 'equal... rights of all persons... without regard to... sex...'. This leads me to the conclusion that the word 'employ' in section 5(1), if ambiguous, should be given a liberal construction as best ensures the attainment of the object of the statute." 5

In a Saskatchewan case, Barry Singer v. William Iwasyk and Pennywise Foods Ltd. 6 , the complainant alleged that the respondent was displaying a sign which indicated discrimination against a class of persons because of their colour in contravention of section 4(1) of the Fair Accommodation Practices Act, R.S.S., 1965, c. 379, as amended. The sign, located at a drive-in restaurant, was a caricature of a small, dark skinned person wearing a chef's hat and a grass skirt and bearing the words "Sambo's Pepperpot". Advertisements of the restaurant, including matchbooks and automobile stickers, depicted the same caricature in association with the words "Jez aint none better". The Chairman, Judge Tillie Taylor, had the task of deciding whether the caricature indicated discrimination against black people, in contravention of section 4(1).

2. At 13-14. An appeal to the Supreme Court of British Columbia before the Honourable Mr. Justice Meredith upheld the Board of Inquiry decision (see Robert Heerspink v. The Insurance Corporation of British Columbia [1976-78] I.L.R. 859 (B.C.S.C.)).

3. (1976) 67 D.L.R. (3d) 635.
4. S.A. 1972, 21 Elizabeth II, c.2.
5. Gares at 687.
6. November 5, 1976.

In her decision, the Chairman concluded:
"The meaning of section 4(1) must be arrived at in the context of the province's Human Rights legislation as a whole. The Saskatchewan Human Rights Commission Act, 1972, S.S., c.108, as amended, places upon the Saskatchewan Human Rights Commission the duty to follow the principle that every person is free and equal in dignity and rights without regard to race, colour, etc. In keeping with the provisions of The Interpretation Act, of the Province of Saskatchewan, to the effect that, as is stated in section 11 thereof:

’every Act shall be deemed remedial and shall receive such fair, large and liberal construction, and interpretation as best ensures the attainment of the

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object of the Act,’
the Commission is bound to approach the interpretation of section 4(1) of the Fair Accommodation Practices Act with the purpose of protecting the dignity and rights of black and coloured persons and any others affected by the Sambo caricature..." 7

In her decision, Judge Taylor said that the "Commission could have taken the position that this part of the section is too weak and uncertain and therefore unenforceable". 8 However, she concluded:

"We have decided that since our legislation is remedial, designed to secure the rights of our citizens to non-discriminatory treatment, it is our obligation to adopt a liberal interpretation of the law in order to fulfill the legislative objective as set forth in section 7(a) of the Saskatchewan Human Rights Commission Act, namely to:

’(a) forward the principle that every person is free and equal in dignity and rights without regard to race, creed, colour, religion, sex, nationality, ancestry or place of origin.’ 9

One of the very first decisions under The Ontario Human Rights Code 10 was by Judge J.C. Anderson 11 who formed a Board of Inquiry

7. At 4-5.
8. At 7.
9. At 7. The decision was reversed on other grounds by Justice Hughes of the Court of Queen’s Bench, October 5, 1977. [1977] 6 W.W.R. 699.

10. An Act to establish the Ontario Code of Human Rights and to provide for its Administration, S.O. 1961-62, 10-11 Elizabeth c.93.

11. August 15, 1963.

which heard a race discrimination complaint of Alvin Ladd and two others against Mitchell’s Bay Sportsman Camp. The complainants alleged that they were discriminated against because of their race by being denied rental of certain of the respondent’s facilities. Although the complainants and the respondent reached a settlement during the progress of the Inquiry, Judge Anderson had this to say about the Code:

"The preamble of the Ontario Human Rights Code states that recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world and that

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public policy in Ontario is that every person is free and equal in dignity and rights without regard to race, creed, colour, nationality, ancestry or place of origin. And the aim of the Code is to create on the community level a climate of understanding and mutual respect in which all people of whatever racial, religious or cultural background are made to feel that they are all equal in dignity and rights." 12

The Ontario Human Rights Code includes within its preamble and section 9 the following precepts:

Whereas recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world and is in accord with the Universal Declaration of Human Rights as proclaimed by the United Nations;

And Whereas it is public policy in Ontario that every person is free and equal in dignity and rights without regard to race, creed, colour, sex, marital status, nationality, ancestry or place of origin;

.....
S.9 ... The Commission shall
(a) forward the principle that every person is free and equal in dignity and rights without regard to race, creed, colour, age, sex, marital status, nationality, ancestry or place of origin;

12. At 2-3.
>Interpretation
of the Canadian Human Rights Act Page 58

A few years later, similar sentiments were echoed in the case of Nora Gordon v. Bessie Papadropoulos. 13 Chairman Dean R. St. J. Macdonald said this about the Ontario Human Rights Code:

"The Code from the outset was intended to be something more than a mere declaration of desirable values enforcible solely through the processes of education and persuasion. While the Code may not represent criminal law strictly considered, enforcible by the imposition of heavy penalties, it nevertheless reflects governmental belief that 'artificial barriers denying equality of opportunity... can be breached and torn down'.

(Debates of the legislature of Ontario, December 14, 1961 at 419)...

The Commission has an important institutional duty to bolster respect for the principle of equality, to reaffirm expressly and powerfully that this principle has a community status superior to that of a pious slogan, and to publicize the fact that uncompromising condemnation of racial discrimination is

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a part of the public morality of the province. This duty is most effectively discharged by the Commission's adoption from time to time of a posture of vigorous enforcement." 14

In Allen Walls v. Louis Lougheed 15 , a Board of Inquiry chaired by Professor Horace Krever, the complainant alleged discrimination in the rental of an apartment because of his race and colour. Chairman Krever said:

"The purpose of the Code is to bring about a state of affairs in which the recognition that every person is free and equal in dignity and rights irrespective of race or colour would find a realization in the conduct of residents of this Province. Effect could not be given to this purpose if a narrow and restrictive interpretation were placed on the language of section 3(a). In coming to this conclusion, I am mindful of the provisions of section 10 of the Interpretation Act, R.S.O. 1960, c.191, which reads as follows:

'Every Act shall be deemed to be remedial... and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.'"

13. May 31, 1968.
14. At 8-9.
15. August 21, 1968.

Later decisions confirm the validity of this interpretative approach to human rights legislation and consistently reject narrowing the scope of the interpretation of The Ontario Human Rights Code.

Chairman Edward Ratushny, in Roland Cooper v. Belmont Property Management and Others 16 , which involved an allegation of race and colour discrimination in employment, cited the same provision, being s.10 of The Interpretation Act R.S.O., 1970, c.225, in order to give the interpretation of the word "marital status" a "fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit".

Having to choose between a restrictive and a liberal interpretation, Chairman Ratushny adopted the view that a restrictive interpretation approach should be disregarded in the

case of modern statutory offences which pertain to "a special type of social purpose statute". He concluded that The Ontario Human Rights Code "is obviously such a statute". 17

Chairman Sidney Lederman also adopted the view that The Ontario Human Rights Code is "a humanitarian remedial statute which

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fulfills a public purpose", in the complaint of Betty-Anne Shack v. London Driv-Ur-Self Limited and Others 18 . In that case, the complainant was alleging sex discrimination in the denial of employment. The respondent maintained that sex was a bona fide occupational qualification, and Chairman Lederman ruled that any exception to the Code was intended to be strictly construed and that the burden to prove this exception would lie on the person who was asserting it. Chairman Lederman justified

16. July 27, 1973 at 4.
17. At 5.
18. June 7, 1974.

this approach by taking cognizance of section 10 of The Interpretation Act which provides that, as we have already seen, every Act is to be deemed remedial and is to receive a fair, large and liberal construction and interpretation.

More recently, the same Chairman, in a decision dated May 19, 1977, in the complaint of Brett Bannerman on behalf of Debbie Bazso, alleging discrimination in the denial of "services and facilities" because of her sex by the Ontario Rural Softball Association, had to decide whether the respondent provided services and facilities within section 3 of the Human Rights Code. Chairman Lederman again endorsed a liberal interpretation of the legislation and referred to section 10 of The Interpretation Act. 19

Finally, in the August 15, 1978 Ontario Court of Appeal decision with respect to the appeal of a decision in a Board of Inquiry chaired by Professor Mary Eberts, Cummings and Ontario Minor Hockey Association 20, Chief Justice Evans said:

"... while I agree that the language in a statutory code of this nature should be given a wide and liberal interpretation, I do so with the caveat that the language should not be distorted to arrive at a conclusion which will tend to defeat the purpose for which the Ontario Human Rights Code was presumably enacted." 21

19. Debbie Bazso v. Ontario Rural Softball Association, May 18, 1977 at 13. This decision was reversed on other grounds on appeal. Re Ontario Rural Softball Association and Bannerman (1978) 21 O.R. (2d) 395 (H. Ct. of Justice, Div. Ct.).

20. (1978) 21 O.R. (2d) 389; Affirmed (1979) 10 R.G.L. (2d) 121. Both the Cummings and Bennerman cases dealt with factual situations of girls playing on boys' teams. The decisions turned on the issue of the interpretation of section 2(1) of the Ontario Human Rights Code.

21. At 392.

(b) The Interpretation of the Canadian Human Rights Act Specificially

In interpreting the Canadian Human Rights Act, two provisions of the Interpretation Act, R.S.C. 1970, c.I-23, are pertinent:

10. The law shall be considered as always speaking, and whenever a matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to the enactment and every part thereof according to its true spirit, intent and meaning.

11. Every enactment shall be deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

In construing the meaning of the Canadian Human Rights Act, its purpose must be kept in focus. Section 2 states:

The purpose of this Act is to extend the present laws in Canada to give effect, within the purview of matters comming within the legislative authority of the Parliament of Canada, to the following principles:

(a) every individual should have an equal opportunity with other individuals to make for himself or herself the life that he or she is able and wishes to have, consistent with his or her duties and obligations as a member of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex or marital status, or conviction for an offence for which a pardon has been granted or by discriminatory employment practices based on physical handicap.

Mr. Daniel Hill, former chairman of the Ontario Human Rights Commission has stated:

[m]odern-day human rights legislation is predicated on the theory that the actions of prejudiced people and

their attitude can be changed and influenced by the process of verification, discussion, and the presentation of socio-scientific materials that are used to challenge popular myths and stereotypes about people... [it] is a skillful blending of educational and legal techniques in the pursuit of social justice. 22

Mr. Hill's remarks emphasize that the function of the Ontario Commission is to remedy actions by individuals who discriminate against other individuals on a prohibited ground. In my view, this statement accurately sets forth the concept of human rights

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legislation that underlies the Canadian Human Rights Act. 23

22. Walter Surma Tarnopolsky, The Canadian Bill of Rights 2nd revised ed., Toronto: McClelland and Stewart, 1975 at 70.

23. See, in particular, sections 2(a), 3, 5 to 13 of the Act.

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Subsection 63(1) of the Canadian Human Rights Act further provides:

This Act is binding on Her Majesty in right of Canada.

In my opinion, given the purpose of the Canadian Human Rights Act, as expressed in section 2, and given subsection 63(1) and the general rules of statutory interpretation, it is clear that the Act generally, and section 4 in particular, apply to the executive branch of government, and that a Minister of the Crown can be made the subject of an order under section 41 if appropriate. 23a

Resort can be had to international law and international obligations assumed by Canada, in interpreting the meaning of the Canadian Human Rights Act. 24

The International Covenant on Civil and Political Rights, acceded to by Canada on March 23, 1976, provides:

Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional process and with the provisions of the present Covenant, to adopt such legislative or

other measures as may be necessary to give effect to the rights recognized in the present...

23a. Note that subsection 63(1) has the effect of precluding the operation of section 16 of the Interpretation Act, R.S.C. 1970, c.I-23, which states: "No enactment is binding on Her Majesty or affects Her Majesty or Her Majesty's rights or prerogative in any manner, except only as therein mentioned or referred to."

24. Driedger at 129, 130, 161, 162. See, for example, Solomon v. Commissioners of Customs and Excise, cited by Driedger.

Article 3
The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

.....
Article 23
4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

.....
Article 26
All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Canada also acceded to the Optional Protocol to the International Covenant on Civil and Political Rights as of the same date, which provides that to further achieve the purposes set forth in the Covenant on Civil and Political Rights, the Human Rights Committee of the United Nations may receive communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant after having exhausted all available domestic remedies. 25

25. See Preamble and Article 2. A case from Canada involving a disenfranchised Indian woman is pending before the United Nations' Human Rights Committee.

Paragraph 40(3)(c) of the Canadian Human Rights Act provides;
In relation to a hearing under this Part, a Tribunal may
(c) receive and accept such evidence and other
information, whether on oath or by affidavit or

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otherwise, as the Tribunal sees fit, whether or not
such evidence or information is or would be
admissible in a court of law.

Accordingly, leaving aside the matter of the general rule of evidence that "Parliamentary debates are not admissible to show Parliamentary intent" 26 , in my view paragraph 40(3)(c) allows the Tribunal to consider the minutes of standing committees of Parliament, as well as the record of debates in the House of Commons. The Tribunal must be careful in the weight given to such evidence. Of course, the view expressed by a Minister or Member of Parliament cannot be assumed to be the intention of Parliament. However, I think the evidence is relevant. In particular, I think it is useful to know the views of the Minister of Justice who sponsored the passage of the bill on behalf of the Government. When the Minister of Justice explains the meaning of a bill to a standing committee or to the House of Commons, it may be asserted at the least that a common understanding of Parliament in passing the legislation, as to what was meant with respect to the wording thereof, was premised upon the Minister’s explanation.

The Honourable Ron Basford, Minister of Justice in 1977, responsible for the drafting of the legislation (Bill C-25) and its passage through the House of Commons, commented upon the meaning of section 2 at the Standing Committee stage of Bill C-25:

26. E.A. Driedger, The Construction of Statutes, Butterworths: Toronto, 1974, at 130. But see, Reference Re Anti-Inflation Act [1976] S.C.R. 373.

Mr. Chairman, Clause 2 is a general statement of the purpose of the legislation which is clearly stated. It is somewhat like a preamble but not precisely. The first purpose is to express the purpose of the bill, to aid in its interpretation. The second is to state the scope of the bill’s application in relation to the anti-discrimination provisions.

Generally, in explaining the main coverage of the bill, its major areas would cover employment by departments and agencies of the federal government and entities such as railways, banks and airlines engaged in nongovernmental activities that fall within federal

jurisdiction; public or commercial housing facilities or accommodations provided by any of the above; and services provided by the above.

The Canadian Bar Association has expressed some concern about Clause 2, that it could be interpreted to limit the application of the bill, which is not our view and we feel that that concern is not valid. The clause is a general statement of the purpose which should serve to ensure that the bill's provisions are interpreted in accordance with this very broad statement of purpose.

The National Action Committee suggested a paramountcy clause which we feel again is not necessary. It, of course, will be the effect of the legislation unless its application to a subsequent piece of legislation is specifically excluded or limited, and this of course would be true of a paramountcy clause. So we would accomplish little by such a clause. 27

.....
My understanding is that this legislation, of course, supersedes any existing legislation unless there is a specific exemption of it, and, therefore, would apply to any provisions of the Official Secrets Act. It is my understanding that to include political belief or sexual orientation would, of course, obviously affect the hiring practices, or, more appropriately, the promotion practices of the Public Service Commission because, of course, what we have made very clear is that this legislation is binding on the Public Service Commission as on the private sector. This has been - going back to Mr. Woolliam's argument - one of the reasons for putting forward a commission, namely, to have the same standard both in the human rights sense and in the labour sense, applying and being administered by the same body applicable both to the public and the private sector. 28 [Emphasis added].

The emphasized statements suggest clearly that the Minister was of the view the Canadian Human Rights Act applies to federal statutory provisions.

27. Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs, House of Commons, May 10, 17, 1977, at 11:28, 11:29.

28. Ibid, at 11:40.

Mr. Basford stated further that "goods" [and by implication, "services"] "is not specifically defined or given a special meaning and therefore it would be given its ordinary meaning". 29

Mr. Basford emphasized that the Canadian Human Rights Act should be given a broad interpretation so as to fulfill its purpose, as articulated in section 2, but did visualize limitations upon its operation. Introducing the bill for second reading, he commented upon the implicit restriction in the Act with respect to any assertion that inability or refusal to provide government services no matter what language is spoken might be a prohibited ground of discrimination:

To suggest that the multitude of languages freely spoken by many Canadians may be a prohibited ground... would result in services, employment and accommodation having to be made

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available in all of those languages. While we all agree that people should not be discriminated against because of the particular inflection of their voice... it is another matter to impose a legal obligation for the provision of services and accommodation in those other languages. 30

This view was supported by Walter Tarnopolsky, an adviser to the Department of Justice for Bill C-25. During the Committee hearings, Professor Tarnopolsky stated that "the way in which the first provisions - say Clause 3 on - are worded, one speaks only of discriminatory acts". 31 More significantly, both Professor Tarnopolsky and Mr. Basford stated that, for other policy reasons, restrictions were and should be placed upon the operation of the Canadian Human Rights Act. Specifically, they referred to the absence of "citizenship" as a prohibited ground, so as not to interfere with provincial remedial action to increase the number of Canadians in university teaching positions. 32

29. Ibid , at 11:48.
30. Debates, June 2, 1977 at 6199.
31. Justice and Legal Affairs, at 11:50.
32. Ibid, at 11:49-11:50.
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of the Canadian Human Rights Act Page 67

Two Members of Parliament spoke to a similar point. Mr. Arnold Malone (Battle River), commenting on the need for the extension of the tax deduction for handicapped persons to include those with severe back pain or those who had suffered a debilitating heart attack, stated:

As I said, passage of this bill will not, by itself, bring full equity to all Canadians. Unless we change our other laws and regulations we shall not see full human rights in Canada. 33

Mr. Claude-Andre Lachance (Lafontaine-Rosemount) reiterated this observation:

Bill C-25... is an important step in the total process involved in implementing an articulated Canadian policy to the protection of human rights. 34

These quotations emphasize two important aspects concerning the scope of the Canadian Human Rights Act - the Act is not, of course, all-encompassing, with Mr. Malone's comment implying its ineffectiveness in respect of ITA provisions; and the achievement of human rights is a multifaceted process, with the Canadian Human Rights Act being only one significant aspect thereof.

Responding to Mr. Eldon Wooliams' (Calgary North) query about the relationship of the Canadian Human Rights Act to the Canadian Bill of Rights, Mr. Basford stated,

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Obviously the Bill of Rights has nothing to do with Clause 2(b). The Bill of Rights... sets out, amongst things that are not included in here, certain standards against which federal legislation and regulations are to be written and dealt with...

The Bill of Rights, while it acts as a guide for the drawing and interpretation of federal legislation and regulation, does not provide any mechanism to deal with individual cases of discrimination. It, in my view, would prevent... government or Parliament

33. Debates, February 24, 1977 at 3406.
34. Ibid, February 11, 1977 at 2988.

from passing a Public Service Staff Relations Act that would be discriminatory in terms of the Bill of Rights. It would not assist the individual Pakistani who applies for a public service competition and is refused that competition simply because the three commissioners were, in fact, against Pakistanis... it does not provide a remedy for that particular Pakistani. I think that is why we need this type of legislation. 35

Professor Tarnopolsky concurred with the Minister of Justice's remarks:

It just seems to me that it (Clause 2(a)) covers what s.1(b) of the Bill of Rights cannot cover and that is the details of the administration in order to actually overcome the common law position which is very restrictive as far as preventing discrimination is concerned. 36

Mr. Basford, on this point, continued:
I see them [Bill C-25 and Bill of Rights] as doing quite different however, complementary things, but this bill can

provide rights and remedies that are not available under the Bill of Rights nor available under the common law. 37

To illustrate his point, Mr. Basford offered the hypothetical of a desk clerk denying a black a room at an Ottawa hotel:

He is not being denied by operation of the law; he is being denied by operation of the bigotry of the people running the hotel, or the particular waiter or room clerk... I think the establishment of a commission provides a mechanism and a remedy, a solution for the individual who is discriminated against, not by reasons of the provisions of the law but by the actions of individuals [emphasis added]. 38

This commentary, at the Committee stage during the review of

Bill C-25, upon the intent of the Canadian Human Rights Act does not direct itself that specifically to the question as to whether the Act was intended to apply to an offending provision of another statute. The examples given in the statements perhaps imply that the intent of the Act was simply to deal with discriminatory practices where a statutory provision

35. Justice and Legal Affairs, at 11:31.
36. Ibid at 11:36.
37. Ibid.
38. Ibid at 11:32-11:33.

was neutral. However, it may be that the examples were framed in this language because the usual factual situation involving a discriminatory act or practice would not result from the proper administration of a statutory provision which itself differentiates adversely on a prohibited ground. The usual factual situation would be the commission of a discriminatory practice through differentiating adversely on a prohibited ground in the course of administering a service where the statutory provision is itself neutral.

Moreover, the Canadian Bill of Rights seeks to prevent discrimination resulting from the operation of federal law and this expresses norms for the drafting and interpretation of federal statutes. However, as the commentary at the Committee stage suggests, the thrust of human rights legislation generally is directed at remedying private acts of discrimination. Clearly, the Canadian Human Rights Act covers this ground, within the sphere of legislative competence of Parliament. Moreover, it seems to me that the statute also clearly covers an act of discrimination by a government official in administering a service where the statutory provision pursuant to which the service is being provided, is itself neutral. But what about the situation where the government official properly administers a statutory provision which itself differentiates on a prohibited ground?

There are various provisions in the Canadian Human Rights Act which do specificially exclude its application vis-à-vis other federal legislation. For example, subsection 63(2) states:

Nothing in this Act affects any provision of the Indian Act or any provision made under or pursuant to that Act.

This subsection has been carefully drafted. The reference obviously includes a reference to the statutory provisions of the Indian Act, and such

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provisions as Indian band council by-laws made thereunder, and is not simply in respect of administrative action under the Indian Act.

Similarly, subsection 48(1) of the Canadian Human Rights Act exempts pension funds or plans established by an Act of Parliament.

Parts I and Il and this Part do not apply to or in respect of any superannuation or pension fund or plan established by an Act of Parliament enacted before the coming into force of this section.

The Canada Pension Plan Act, R.S.C. 1970, c.C-5, differentiates on the basis of age (section 44); the Public Service Superannuation Act, R.S.C. 1970, c.C-36, discriminates on the basis of age (section 13 and 14). Similarly, paragraph 14(d) of the Canadian Human Rights Act makes reference to section 10 of the Pension Benefits Standards Act, R.S.C. 1970, c.P-8, which refers to the age of 45 for certain purposes.

These excepting provisions suggest that the Canadian Human Rights Act otherwise applies to federal statutory provisions.

However, there is no ’primacy’ clause, in the Canadian Human Rights Act such as is found in the human rights legislation of several of the provinces, 39 which would be the clearest approach in dealing with the matter of the relationships between two inconsistent statutes. Perhaps the absence of a primary clause suggests only that "the government did not intend the Act simply to prevail over all other (at least existing) legislation which did not specifically exclude its application". 40 The absence of a primacy clause does not mean there could never be an inconsistency.

39. Alberta Individual Rights Protection Act, S.A. 1972, c.2 as am., s. 1(1).
Saskatchewan Human Rights Commission Act, ss. 1972, c. 108 as am., ss. 44,48
Québec Charter of Human Rights and Freedoms S.Q. 1975, c.6, as am., ss. 51, 52.

Nova Scotia Human Rights Act, S.N.S. 1969, c.11, as am., s.13.
Prince Edward Island Human Rights Code, S.P.E.I. 1975, c. 72
as am., s. 1(2)

40. Anne Bayefsky, "The Jamaican Women Case and the Canadian Human Rights Act: Is Government Subject to the Principle of Equal Opportunity?" to be published shortly in the University of Western Ontario Law Review.

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of the Canadian Human Rights Act Page 71

In my opinion, after reviewing the provisions of the Canadian Human Rights Act itself, the commentary in respect of the proposed legislation at the Committee state in Parliament, and giving a liberal interpretation to a remedial statute the broad purpose of

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which includes the principle that "every individual should have an equal opportunity...", I find that the Canadian Human Rights Act can have application in respect of provisions of other federal statutes.

This is, a discriminatory practice of a government official pursuant to a federal statutory provision that itself differentiates adversely on a prohibited ground may constitute a discriminatory practice within the meaning of section 5 of the Canadian Human Rights Act. Does it in respect of one or more of the complaints before this Tribunal?

>7.
DO EITHER OR BOTH PARAGRAPH 109(1)(a) AND Page 72
SECTION 63 OF THE INCOME TAX ACT PROVIDE
"A SERVICE"?

In my view, which I will expand upon shortly, the administration of the ITA, a federal statute, on a basis of a prohibited ground of discrimination, would be a "discriminatory practice in the provision of... services..." within the meaning of section 5 of the Canadian Human Rights Act. However, it is the ITA itself in respect of both sections 109 and 63 that causes the adverse differentiation in treatment in the situations posed by the Complaints. The Minister, in administering the ITA, is simply following the law. Therefore, the next issue is - is the statutory adverse differentiation by the ITA on a prohibited ground of discrimination covered by section 5 of the Canadian Human Rights Act? To consider this, we must first determine whether either or both of the ITA provisions relate to "the provision of... services".

The Trial Division of the Federal Court in Lodge 1 seems to have been of the opinion that "services" did not even go so far as to embrace administrative actions.

That said, for purposes of this application, I will assume everything alleged in the complaint to be true. On that assumption, a number of the prohibited grounds of discrimination, as defined by section 3 of the Act are established...

Section 5 is the only section describing a discriminatory practice upon which the applicants rely and, again assuming everything alleged in the complaint to be true, it simply does not disclose a discriminatory practice as defined by section 5. If I had any real doubt about that I should be entirely disposed to seek the jurisdiction upon which I could properly base an order having the desired effect. However, the enforcement by the respondent of the provisions of the Immigration Act is simply not a denial of or a denial of access to "goods, services, facilities or accommodation customarily available to the general public". It is not a discriminatory practice and the reason for its enforcement, even if established to be as reprehensible as the applicants allege, cannot make it what it is not. 2

However, it is clear that the Federal Court of Appeal left this question open.

1. Lodge et al. v. Minister of Employment and Immigration, [1979] F.C. 458 (F.C.T.D.

2. This excerpt from the decision of the Trial Division is quoted by Le Dain, J. in the Federal Court of Appeal, (1979) 25 N.R. 437 (F.C.A.) at 444-445.

>Do
Either or both Paragraph 109(1)(a) and Section 63 Page 73
of the Income Tax Act Provide "A Service"

So long as the validity of the deportation orders in the appellants' case has not been successfully challenged, it cannot be said that the Minister would be exceeding his statutory authority or otherwise acting contrary to law in executing them. The Court cannot make a finding that there has been a discriminatory practice within the meaning of the Canadian Human Rights Act. The jurisdiction to make such a finding has been confided to the specialized agency and tribunals provided for by the Act. Such a finding involves a question of fact to be determined on the basis of an investigation by the Commission and a hearing by a Human Rights Tribunal. Whether such a finding would technically affect the validity of the deportation orders, or whether it would merely give rise to the relief provided by s. 41, is another question. The point is that the Court must treat

the deportation orders as presently valid and the Minister as under a statutory duty to execute them.

.....

Having concluded for these reasons that an injunction will not lie for a purpose such as that invoked in the present case, I do not find it necessary to express an opinion as to whether the application of the inquiry and deportation provisions of the Immigration Act is a service customarily available to the general public within the meaning of s. 5 of the Canadian Human Rights Act. The question as to the extent, if any, to which the administration and application of the federal statutes, whether regulatory in purpose or not, fall under the Canadian Human Rights Act is, of course, a serious one. There may be important distinctions to be drawn between different aspects of the public service, based on the facts established in each case. It is preferable, I think, that these questions should be determined in the first instance by the Commission, as s. 33 would appear to intend, before a court is called upon to pronounce upon them. In the present case the Commission has indicated a disposition to entertain the complaint. It has argued in this Court that it has jurisdiction. It has contended that in making specific reference to the

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terms of paragraph (a) of s. 5 of the Act the Trial Judge has not considered the application of paragraph (b), which provides that it is a discriminatory practice in the provision of a service customarily available to the general public "to differentiate adversely in relation to any individual" on a prohibited ground of discrimination. That contention may be true. For the reasons already given it is sufficient to say that it was not an error to refuse an injunction in the present case. The appeal should therefore be dismissed with costs. 3

3. Ibid at 447-448.

>Do

Either of both Paragraph 109(1) (a) and Section 63 Page 74 of the Income Tax Act Provide "A Service"?

The Court held that while an injunction would "lie against a public authority to restrain the commission of an act that is ultra vires or otherwise illegal" 4 the validity of the deportation orders was unquestioned, and, therefore, the Minister was within and acting pursuant to his statutory authority. The question as to whether there was a discriminatory practice within the meaning of the Canadian Human Rights Act was left open for the Commission and a hearing by a Human Rights Tribunal.

In interpreting a statute, Driedger, The Construction of Statutes, 5 states:

Our third problem is what is the grammatical and ordinary, or the natural and ordinary sense of the words. The two expressions obviously mean the same thing, namely, the sense obtained by the application of the rules of grammar giving the words their ordinary meaning. A meaning may be said to be ordinary if it is found in the dictionary. But there may be many meanings. Compilers of dictionaries usually place first in the list of meanings of a word the meaning most commonly used. This meaning is variously called the ordinary, common, popular or primary meaning. And there may be different ordinary meanings of the word or different subject-matters. 6

.....
And it is the ordinary meaning as applied to the subject matter that must normally be taken. This is not an absolute rule, for in the end, the meaning of the word is governed by the context.

Section 5 of the Canadian Human Rights Act reads:
It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public.

(a) to deny, or to deny access to, any such good, service, facility or accommodation to any

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individual, or
(b) to differentiate adversely in relation to any individual, on a prohibited ground of discrimination.

4. Ibid at 446.
5. At p.6.
6. The Hon. Ron Basford stated during the Committee Readings on Bill C-25 that "goods [and by implication, "services"] is not specifically defined or given a special meaning and therefore it would be given its ordinary meaning," Minutes of Proceedings and Evidence of the Standing Committee of Justice and Legal Affairs, House of Commons, May 10, 17, 1977, at 11:48.

>Do

What does the word "services" mean? The Oxford English Dictionary says 7 that the noun "service" appears to have been materially influenced by association with the verb and includes the following definitions:

The condition of being a servant; the fact of serving a master.

.....
The condition of employment of a public servant.
.....
The work or duty of a servant; the action of serving a master.
.....
The serving the sovereign or the state in an official capacity; the duties of work of public servants.
.....
The action of serving, helping, or benefiting; conduct tending to the welfare or advantage of another.

Webster's 8 defines "service" in part as:
Performance of official duties of a sovereign or state: official function; ... also, a form of particular duty of such work; as jury service.

The World Book Dictionary 9 defines the noun "service" as:
A helpful act or acts; aid; being useful to others
.....
Arrangements for supplying something useful or necessary
.....
Usually services, a performance of duties, and the definition of "serve" as a verb includes:

To be a servant; give service; work; perform duties

.....
To perform official or public duties.

It is trite to state that democracy means rule by the people and representative government is necessary to achieve self-government, the goal of democracy, given a large group of people in a country. Popular sovereignty means government is to serve the people. In a modern, pluralistic country, while most goods and services are produced and provided by individuals or

7. Volume IX, Oxford, Clarendon Press, at 515-518.
8. Webster's New International Dictionary of the English Language, G.&C. Merriam Company, Springfield, Mass., 1961, at 2288.

9. The World Book Dictionary, volume 2 (1979 ed) Doubleday & Company Inc.

>Do

private groups or entities, public governments regulate economic activities and also produce and provide goods and services. The federal government provides services to the general population. Services are provided both through legislative enactment (for

example, the family allowance) and in administering its responsibilities as established by the legislation enacted by Parliament (for example, providing the appropriate information and forms to citizens to be able to obtain family allowance, as well as sending out family allowance cheques, etc).

The British North America Act itself refers to "public service" (section 106). Parliament has enacted legislation such as the Public Service Inventions Act 10 the Public Service Employment Act 11 , the Public Service Staff Relations Act 12 and the Public Service Superannuation Act 13 . Certain federal government functions are often referred to as being a "service", for example, the "postal service", "unemployment insurance service", and "foreign service offices" of the Department of External Affairs.

We must also keep in mind the purpose of the Canadian Human Rights Act as set forth in paragraph 2(a). Driedger states:

The object of the Act may be resorted to, not only to make a choice between alternative meanings, but also to determine the scope of the words. 14

Is the Minister of National Revenue, in making assessments under the ITA providing "services... customarily available to the general public" within the meaning of section 5 of the Canadian Human Rights Act? The Respondent argued (Transcript, p.15) that even if the Tribunal were to find that the Minister of National Revenue differentiated adversely on the prohibited ground of discrimination,

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10. R.S.C., c.P-31,
11. R.S.C., c.P-32
12. R.S.C., c.P-35.
13. R.S.C., c.P-36.
14. E.A. Driedger, The Construction of Status, Butterworth’s Toronto, 1975, at 16.

>Do

the discriminatory practice (given the Complaint alleged discrimination contrary to section 5 of the Canadian Human Rights Act) must be "in the provision of goods, services, facilities or accommodation customarily available to the public". Put simply, there cannot be a breach of the statute unless the act of discrimination falls within the language of the statute.

The relevant word of the statute for our purposes is "services". Is the Minister providing services in making assessments?

The Minister of National Revenue is under a statutory obligation to administer and enforce the ITA (subsection 220(1). Subsection 152(1) of the ITA requires the Minister to "examine each return of income" and "assess the tax for the taxation year" on the basis of the tax liability imposed by the ITA. With respect to the Complaints before this Tribunal, it is undisputed that the Minister has assessed on the basis of the ITA, that is, in accordance with the law as set forth in sections 109 and 63. Therefore, it is not the administration of the ITA that is the real issue, but rather the substantive provisions of the ITA itself which allegedly "differentiate adversely in relation to" the Complainants on "prohibited grounds of discrimination", being marital status (Bailey) and sex (Pellerin and McCaffrey), respectively.

If there was adverse differentiation in the provision of services in the administration of the ITA on a prohibited ground of discrimination, then the situation would be relatively clear and easy. At most, the Minister discriminated in following the Act because the ITA itself discriminates.

In doing so, was the Minister providing "services"? It would be an easier factual situation, of course, if the Minister was providing information, transportation or the like to the public, and adversely discriminated on a prohibited ground in respect thereof.

The Respondent’s argument 11 sought to limit "services" to the doing of something directly to help the public. In my view, this is too narrow

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11. See last paragraph of Respondent’s Memorandum of Fact and Law, paragraph #16.

>Do

an interpretation of the meaning of "services" 12 in section 5 of the Canadian Human Rights Act. The Minister of National Revenue does, indeed, perform such duties within his overall responsibility. The Department provides forms, information booklets and guides for use by the public through its District Taxation Offices. Since September 14, 1970, binding advance rulings can be obtained from the Department by taxpayers upon request (see Information Circular No. 70-6R, Dec. 18, 1978 and Information Circular No. 74-8R, August 2, 1977).

Information Circular 78-17, December 29, 1978, the subject of which is "Guidelines for Individual Tax Return Preparers", includes as the initial paragraph thereof:

The purpose of this Circular is to set out some guidelines for accountants and other tax return preparers in completing individual income tax returns and to

provide some insight into the assessing procedures that necessitate the Department's requirements. Cooperation by tax return preparers will provide not only a substantial saving to the Department in reduced processing costs but a speedier service to the taxpayer. (emphasis added)

The administrative discretion of the Minister is very broad in terms of "departmental practice", in some instances construing the law against the strict language of the particular section of the Act, and even on occasion ignoring a court decision where to do otherwise would be unreasonable or impractical. 13

One can even argue that the "assessment" process is a "service" within the meaning of the Canadian Human Rights Act. That is, one can assert that the "administrative function" of a Minister, i.e. the manner in which a department carries out its statutory obligations, is a "service" within the meaning of the Canadian Human Rights Act.

12. Examples of court decisions involving issues other than in respect of human rights, in which the word "service" has received a broad interpretation, include Peterson Truck Co. v Socony Vacuum Exploration Co., (1956), 1 DLR (2d) 158 (Alta. C.A.), and Laphkas v. The King [1942] S.C.R. 84. An Alberta Board of Inquiry decided in a 1972 case, Weaselfat v. Driscoll, that services include the extension of credit.

13. E.g. Trapp v. MNR [1946] CTC 30. See Stikeman, Canada Tax Service, D511, D512.

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If an individual was differentiated against adversely in the administration of statutory responsibilities on a prohibited ground of discrimination, in my opinion there would be a breach of the Canadian Human Rights Act.

The ITA itself provides for Ministerial discretion in several sections. For example, subsection 31(2) confers upon the Minister the discretionary power to determine that farming is not part of the taxpayer's chief source of income for the purpose of section 31. For example, subsection 74(5) provides that where a husband and wife are partners in a business, the income of one spouse from the business for a taxation year may, in the discretion of the Minister, be deemed to belong to the other spouse.

It is my view, not necessary for this decision, that in respect of such described situations, the Minister is providing

"services" within the meaning of section 5 of the Canadian Human Rights Act.

Thus, I would find that the Canadian Human Rights Act applies to practices of government officials in performing duties pursuant to statutory provisions (which do not in themselves discriminate) which provide that such officials shall exercise discretion. 14

A restricted meaning to the word "service" may have been given in the recent Supreme Court of Canada decision, Gay Alliance Toward Equality v. The Vancouver Sun & British Columbia Human Rights Decision, 15 which involved the refusal of the defendant newspaper to publish an advertisement of the plaintiff.

14. This issue was raised in Lodge v. Ministry of Employment and Immigration (1970), 25 N.R. 437 (F.C.A.), but not resolved. See Anne Bayefsky "The Jamaican Women Case and the Canadian Human Rights Act: Is Government Subject to the Principle of Equal Opportunity"? to be published in a forthcoming issue of the University of Western Ontario Law Review, for a good discussion of the case and this issue.

15. [1979] 4 W.W.R. 118 (S.C.C.).
>Do
Either or Both Paragraph 109(1)(a) and Section 63 Page 80
of the Income Tax Act Provide "A Service"?

Referring to the words "accommodation, service or facility" found in section 3 of the British Columbia Human Rights Code, 16 Martland, J. said:

"Service' refers to such matters as resturants, bars, taverns, service stations public transportation and public utilities. 17

Martland, J. found that the service in question was subject

"to the right of the newspaper to control the content of such advertising", 18 that is, the scope of the service offered was limited, and it was not a situation where a service was generally offered but refused to an individual because of a personal characteristic.

However, Laskin, C.J.C., in dissenting, stated:
Counsel for the Vancouver Sun would have it that although it could not discriminate against a person on the ground that he had only one eye--that would be a discrimination related to an attribute of the person--it could refuse an advertisement soliciting subscriptions to a periodical for the blind because of newspaper policy against accepting such an advertisement. 19

He referred to this argument of counsel as "desperate" and found that the newspaper could not sucessfully defend on the basis that "reasonable cause" (as permitted by section 3 in limited circumstances) existed for such discrimination. Dickson, J, in his dissent (Estey J. concurring) was of the same view. 20

In my opinion, with respect, the reasoning of Martland, J. in Gay Alliance is limited to the unique factual situation before the court in that case, and the reasoning of the dissenting justices is more appropriate to the situation before this Tribunal.

16. S.B.C. 1973, c.119.
17. [1979] 4 W.W.R. 118 at 125 (S.C.C.).
18. Ibid, at 125, 126.
19. Ibid, 126 at 133.
20. Ibid, 134 at 148, 149.
>Do

I have already considered at length the policy rationale with respect to both paragraph 109(1)(a) and section 63. These provisions provide tax expenditures by the federal government, in effect providing tax subsidies to certain taxpayers. This analysisis is more easily made in respect of section 63, but in my view is also true of paragraph 109(a) as well. In my opinion, these provisions constitute "services" of government, just as direct expenditures do. 21

However, the Government of Canada itself would agree that the paragraphs 109(a) and (b) deductions constitute tax expenditures.

One question that is usually viewed as relating to the tax unit rather than to the tax base is the benchmark tax treatment of exemptions in respect of dependents. However, the Carter Royal Commission argued first that comprehensively defined income should be used for tax

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purposes, and second that the tax base should be discretionary economic power. The commission defined discretionary economic power as comprehensively defined income adjusted by deductions or tax credits in recognition of differences in individual circumstances such as sickness and family status (e.g. single, married, number of children). Thus, it included the treatment of dependants in part under its discussion of the tax base. While allowance for such circumstances may well be a desirable policy goal, any preferential treatment can be made in many different ways, for example through family allowances, child exemptions, and tax credits. Also, given the individual as the basic tax paying unit, as discussed below, these deductions or tax credits are not neutral between taxpayers with different sized families. These tax provisions are thus functionally equivalent to

direct expenditures and are non-neutral. Their classification as tax expenditures serves the informational purpose of bringing their magnitude to light. 22 (emphasis added)

If direct government expenditures are "services" within the meaning of section 5 of the Canadian Human Rights Act, then in my opinion indirect government expenditures such as those extended through section 63 and paragraph 109(1)(a) of the ITA are "services" as well within the meaning of section 5 of the Canadian

21. See the discussion, supra at page 52.
22. Canada, Department of Finance, Government of Canada Tax Expenditure Account: A conceptual analysis and account of tax preferences in the federal income and commodity tax systems (Ottawa: Department of Finance, 1979) at 17, 79. The 1979 tax expenditure due to para. 109(1)(a) is estimated to be $1.355 billion; Ibid, at 42.

Human Rights Act.
Extending a liberal interpretation to the Canadian Human Rights Act and keeping in mind its remedial function and purpose, in my view these statutory provisions constitute "services" within the meaning of section 5 of the Canadian Human Rights Act. Moreover, while the issue was not raised et the hearing, I expressly find that the "services" pursuant to sections 109(1)(a) and 63 of the ITA are "customarily available to the general public" within the meaning of section 5 of the Canadian Human Rights Act. I favour the interpretation that best gives effect to the purpose of the Canadian Human Rights Act.

Given this conclusion, it is necessary to now consider the apparent inconsistency between the Canadian Human Rights Act and sections 109(1)(a) and 63 of the Income Tax Act.

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8. THE PROBLEM RESOLVING THE APPARENT CONFLICT BETWEEN THE CANADIAN HUMAN RIGHTS ACT AND THE INCOME TAX ACT

It is often stated that where two statutes are inconsistent or repugnant, the later will be read as having impliedly repealed the former. 1 However, there is an important exception to that proposition:

Now if anything be certain it is this, that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation

indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so. 2

That is, the general statute must yield regarding the special statute as an exception to the general. The notion is that Parliament in enacting the later presumably impliedly excluded the subject matter of the earlier one.

As Driedger emphasizes:
[t]he purpose of the implied repeal rule is to resolve a conflict between two statutes.
.....
[T]here are cases where the inconsitency is only partial... between statutes, and the conflict is resolved by restricting the scope of general words, by selecting one meaning in preference to another, or by making one provision an exception to the other. The word "repeal" is hardly appropriate. In these situations the resolution of the inconsistency can be expressed only by reading in words of exception or qualification that the legislature must be taken to have put in impliedly. That is an addition rather than a subtraction. And if the evidence for these implied words of reconciliation (i.e., the conflicting provision) is now removed by the legislature, then the implied words of reconciliation go with it, and the words of the statute must be given their full force. Better to leave it to the legislature to say what is repealed. 3

1. Driedger, The Construction of Statutes, (Toronto: Butterworths, 1974) at 174.

2. Seward v. Vera Cruz, (1884) 10 A.C. 59 at 68 per the Earl of Selbourne L.C., cited by Driedger at 175.

3. Driedger supra n. 1 at 182,185.
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Driedger goes on to say:
A conflict between provisions in different Acts can often be reconciled... by modifying the grammatical and ordinary sense, by reducing the scope or ambit of general words, by choosing between alternative meanings, by ignoring words or introducing words of reconciliation, such as "except", "notwithstanding", "subject to", in order to indicate that one provision is excepted from or qualified by the other. 4

Therefore, there is the maxim that says special legislation is not derogated from by general legislation, unless the two are absolutely repugnant and inconsistent with each other. 4a

The Respondent argued that the legislative function of Parliament cannot be delegated, 4b but that is not the real issue. There is, of course, really not any suggestion in the Canadian Human Rights Act that this Tribunal has the power to legislate. The real issue is whether Parliament has repealed by implication the offending provisions of the ITA itself in enacting the subsequent Canadian Human Rights Act.

Keeping in mind these two general principles of statutory interpretation, utilized where two statutes are apparently inconsistent or repugnant, I shall now review briefly, first, relevant American experience, and second, experience in interpreting the Canadian Bill of Rights.

Reference to experience in the United States is helpful, although both the differences in U.S. legislation as compared with Canadian legislation, and the unique constitutional backdrop must always be kept in mind.

4. Supra n. 1 at 185.
4a. Maxwell on the Interpretation of Statutes (7th ed.), 1962, quoting Sweard v. The Vera Cruz (1884) 10 App. Cas. 59 at 68.

4b. Attorney-General of Nova Scotia v. Attorney-General for Canada (1951) S.C.R. 31. However, Parliament may delegate to a subordinate body (other than a Provincial legislative) its legislative powers, Re Gray (1918) 57 S.C.R. 150 per Duff J. at 170.

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The protection of equality before the law is extended through the 14th amendment to the U.S. Constitution. The amendment has long been held not to invalidate special statutes that:

... may press with more or less weight upon one than upon another so long as they are designed not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little inconvenience as possible, the general good. 5

The problem is to determine when the special statute is unconstitutional. American scholars have referred to the test employed as the "reasonable classification" test, which requires that a statutory law distinguishing one group from another be based upon a classification that is reasonable, a reasonable classification being "one which includes all persons who are

similarly situated with respect to the purpose of the law" 6 , and the purpose itself not being discriminatory per se. 7

Let us now consider some recent cases of statutory discrimination considered by the United States Supreme Court. In Frontiero v. Richardson 8, Mrs. Frontiero, a a member of the armed forces, argued that a statutory provision which permitted

5. Barbier v. Connolly, (1855) 113 U.S. 27 at 31, cited by R. Michael M'Gonigle, "The Bill of Rights and the Indian Act: Either? Or?", (1977) 15 Alberta Law Rev. 292 et 298.

6. Tussman and ten Broek, "The Equal Protection of the Laws", (1949) 37 Calif. L. Rev. 341 et 346, cited by M'Gonigle, supra n. 5.

7. Ibid at 353-361.
8. 93 S. Ct. 1764 (1973); 441 U.S. 677 (1973).
>The

dependent wives of armed forces personnel to automatically obtain certain benefits, but in contrast required dependent husbands to prove actual dependence on the female spouse member of the armed forces, was unconstitutional. The Department of Defence responded that the distinction was valid because historically a husband was not usually dependent on his wife, whereas the wife of an armed forces' serviceman generally was so dependent, arguing that administrative convenience and resulting saving in expenditure occurred through this practice. 9

The Court rejected the Department's reasoning although it was divided on whether or not sex discrimination required a "rational" or "compelling interest" underpinning to be valid. The distinction between the two tests is one of degree - a "compelling interest" being more restrictive than a "rational" test, the latter requiring only that the statute not be "palpably arbitrary and wholly unrelated to a permissible state policy". 10 The compelling interest test necessitates that this rational basis be compelling, i.e. the legislative authority could not have drafted the statute by any other less discriminatory method. In the Frontiero case none of the judges accepted the argument that "administrative

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convenience" was a rational basis. Mr. Justice Brennan was of the opinion as well (unnecessary to the decision) that a compelling interest would have been necessary for the Court to accept discrimination on the basis of sex. The Court concluded that "there can be no doubt that 'administrative convenience' is not a shibboleth, the mere recitation of which dictates constitutionality". 11

9. At 1771.
10. Emily Sanford Read, in a comment upon Kahn v. Shevin, (1975) 24 Emory L.J. 169 at 170.

11. At 1772.
>The

This position was reiterated in Taylor v. Louisana 12 in which the Supreme Court held a statute unconstitutional that restricted female jurors to those selected from a list of females who volunteered to serve on a jury. The statute permitted women automatic relief from jury duty on the basis that a woman's daily domestic responsibilities took precedence over jury duty, thereby bypassing a burdensome administrative scheme in use for men which made a determination on the merits of each individual case. Under the statute a woman could not be selected for jury duty unless she had previously filed a written declaration of her desire to be eligible.

However, Mr. Justice Anderson, in Gruenwald v. Gardner 13 , stated:

It is only the "invidious discrimination" or the classification which is "patently arbitrary [and] utterly lacking in rational justification" which is barred by either the "due process" or "equal protection" clauses... There is here a reasonable relationship between the objective sought by the classification, which is to reduce the disparity between the economic and physical capabilities of a man and a woman - and the means used to achieve that objective in affording to women more favourable benefit computations. There is moreover nothing arbitrary or unreasonable about the application of the principle underlying the statutory differences in the computations for men and women. 14

The Gruenwald case considered Social Security benefits regulations that deleted from consideration the three years of lowest earnings of a woman's work career (in contrast to the approach with respect to a man's) so as to compensate for the statistically probable discrimination she encountered from employers in respect of salary received.

12. 95 S. Ct. 692 (1974); 419 U.S. 522 (1974).

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13. 390 F 2d 591 (1968).
14. At 592.
>The

Mr. Justice Douglas, in Kahn v. Shevin 15 , expressed a similar view. The Kahn case is particularly relevant to the

questions before this Tribunal because it involved a special deduction from property tax for widows in Florida. Mr. Justice Douglas, for the majority, held that the statute was not unconstitutional:

While the widower can usually continue in the occupation which preceded his spouse's death, in many cases the widow will find herself suddenly forced into a job market with which she is unfamiliar, and in which, because of her former economic dependency, she will have fewer skills to offer...

This is not a case like Frontiero... where the Government denied its female employees both substantive and procedural benefits granted males "solely... for administrative convenience" ... We deal here with a state tax law reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for which that loss imposes a disproportionate heavy burden... A state tax law is not arbitrary although it "discriminate[s] in favour of a certain class... if the discrimination is founded upon a reasonable distinction, or difference in state policy... 16

Mr. Justice Brennan, who had delivered the majority judgement in Frontiero, dissented in Kahn. He argued that if the legislature wanted to help poor widows as a group, it could have done so by placing a means test in the statute. In this way, only the target group would be covered. There was no compelling interest in using the broad classification "widows", which aided women who did not require the help, and thereby discriminated against "widowers". 17

15. 94 S. Ct. 1734 (1974); 416 U.S. 351 (1974).
16. At 1737.
17. Ibid. at 1740.

The American cases suggest that discrimination on the basis of sex in a statute is permissible if the distinction is made to

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remedy prior discrimination against the class, and not merely to prefer one sex over another. 18

In rationalizing the various decisions in respect of statutory discrimination, one commentator upon the Kahn case has concluded that:

[I]n areas of taxation, economic regulation, and social welfare, the Court [has considered the] rational basis test [particularly appropriate because such legislation must often] single out different classes for special

treatment in order to achieve a regulatory, remedial, or protective purpose... It is recognized that many schemes of taxation constitute practical and workable solutions to local problems and often must result in some inequality. In drafting state reform measures it is a well-established judicial policy that a legislature may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. 19

The U.S. Supreme Court in Kahn employed a two-pronged test - the purpose of the statute and the effect on those who suffer discrimination - within the general approach of allowing "the state to experiment with different ways to rectify the effects of past discrimination". 20

In my view, this test is essentially the same as the standard recommended by Professor Tarnopolsky when discussing the Canadian Bill of Rights:

To sum up, without repeating the discussion too much, s.1(b) of the Bill of Rights requires a comparison between the person before the court and others in his class. That in itself is not enough, because it does not help in determining whom the person is compared to. That should be at least partly determined by the second step in the process, i.e., assessing whether an inequality in fact constitutes inequality before the law. The purpose of Parliament in enacting the law providing for the distinction must be considered. The onus of showing inequality must be on the one who alleges it. The judges must, in cases of any doubt, resolve the issue in favour of upholding the law. However, the Bill of Rights indicates that Parliament directed the courts to make the

18. A.W. Turner, "Constitutional Law--Tax Exemption for Widows Upheld over Sex Discrimination Challenge" (1979) 53 N. Carolina L.R. 551 et 557-559; Morris Hill, "Discrimination against unwed mothers", (1973) 11 Indiana L.R. 551 at 552; Eddie Correria, "Constitutional Law", (1976) 29 Oklahoma L.R. 771 at 719-720. See also Weinberger v. Wiesenfeld 955 S. Ct. 1225 (1975) per Brennan, J. at 1232: The "mere recitation of a compensatory purpose is not an automatic shield".

19. Emily Sanford Read, "Khan v. Shevin" (1975) 24 Emory L.J, 169 at 171-2.

20. Turner supra n. 18 at 558-9, 560.

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assessment. This assessment must be made on the basis of a standard like: "Is the distinction in the law or process reasonably justifiable in a liberal-democratic state which is committed to a policy of equality of opportunity tempered with the aim of striving for equality in fact." 21

Let us now consider some of the pertinent cases dealing with the Canadian Bill of Rights.

In Luis Ayala v. Her Majesty the Queen 22 , the plaintiff, a social worker whose wife was a full-time student, sought to deduct for income tax purposes an amount paid in respect of daycare expenses for his two pre-school children. The plaintiff did not come within any of the categories set forth in paragagraph 63(1)(b) of the ITA. However, if his wife had earned income, she would have been entitled to the child care expenses deduction. The Tax Review Board 23 rejected the plaintiff's contentions that the plaintiff's situation resulted in section 63 constituting discrimination by reason of sex, and consequential inequality before the law contrary to paragraph 1(b) of the Canadian Bill of Rights 24 , which reads:

1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of... sex, the following human rights and fundamental freedoms, namely,
(b) the right of the individual to equality before the law and the protection of the law;

Moreover, section 2 of the Canadian Bill of Rights provides:

2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgement or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to....

21. W.S, Tarnopolsky, The Canadian Bill of Rights (2nd ed.) McClelland and Stewart: Toronto, 1975 at 316.

22. 79 D.T.C. 5083 (F.C.T.D.).
23. 78 D.T.C. 1262, 1978 C.T.C. 2299.
24. R.S.C. 1970, Appendix 111.

Mr. Justice Collier dismissed Mr. Ayala's appeal in the Federal Court, relying upon the Supreme Court of Canada's decisions in R v. Drybones 25 , R v. Burnshine 26 , Prata v. MMI 27 , and Bliss v. A.G. Canada 28 .

Drybones concerned an Indian in the Northwest Territories who had been convicted under paragraph 94(b) of the Indian Act 29 for being drunk off a reserve, which provided for a fine of not less than $10.00 and not more than $50.00 or to imprisonment for a term not exceeding three months. In contrast, under the generall applicable territorial Liquor Ordinance, a non-Indian could only be convicted if he was drunk in a public place, and there was no minimum fine and a maximum imprisonment of only 30 days. The Supreme Court of Canada found that Drybones was denied equality before the law because Indians were treated more harshly under the applicable federal legislation, and, therefore, paragraph 94(b) of the Indian Act was inoperative and Drybones' conviction was overturned.

This approach of a comparative basis for the determination of "equality before the law" has been refined in later decisions. In R v. Burnshine 30 the issue turned upon the differential treatment in respect of periods of incarceration of indiduals under the Prisons and Reformatories Act, depending upon their location in the country. Martland, J. spoke for the entire court in stating that the petitioner, to be successful in rendering the legislation inoperative on the basis of denying equality before the law as provided by the Canadian Bill of Rights, was obliged "at least, to satisfy this Court that, in enacting s. 150, Parliament was not seeking to achieve a valid federal objective". 31

25. [1970] S.C.R. 282.
26. [1975] 1 S.C.R. 693.
27. [1976] 1 S.C.R. 376.
28. [1978] 6 W.W.R. 711 affirming Re AG. v. Bliss (1977) 77 DLR (3d) 609 (F.C.A.).

29. R.S.C. 1970, c.I-6.
30. [1975] 1 S.C.R. 693.
31. Ibid at 707, 708.
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The dissent 32 was on the basis that the provision in the offending

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legislation for the imposition of a greater punishment in British Columbia than in eight other provinces for the same offence, was a denial of equality before the law.

As to the effect of the Drybones decision, Martland, J. said:
It was felt by the majority in that case that the section deliberately created a specific type of offence, subject to punishment, which could be committed only by Indians,

and that, in consequence, an inequality before the law had been based upon racial grounds. The scope of this judgment was spelled out by Ritchie J., who delivered the majority reasons, at p. 298, as follows:

It appears to me to be desirable to make it plain that these reasons for judgment are limited to a situation in which, under the laws of Canada, it is made an offence punishable at law on account of race, for a person to do something which all Canadians who are not members of that race may do with impunity; in my opinion the same considerations do not by any means apply to all the provisions of the Indian Act. 33

Thus, the expression "equality before the law" in paragraph 1(b) of the Canadian Bill of Rights "cannot be interpreted literally as meaning that all persons must have, under all statutes, exactly the same rights and obligations." 34 Paragraph 1(b) of the Canadian Bill of Rights does not stipulate "that all federal statutes must apply to all individuals in the same manner."

In Prata v. M.M.I., 35 an individual who had been ordered deported, sought to appeal to the Immigration Appeal Board to exercise its discretion on compassionate or humanitarian grounds. However, by virtue of a Minister's certificate filed stating that it would be contrary to the national interest for the Board to exercise its discretion pursuant to the power conferred by section 21 of the Immigration Appeal Board Act, the Board's discretionary power had been removed.

32 Ibid, per Laskin, J, as he then was, 709, at 716, 718. (Spence and Dickson JJ. concurring).

33 Ibid at 706, (cited by Collier, J. in Ayala v. The Queen, 79 DTC 5083 at 5084).

34 Pratte, J. in Bliss v. Attorney General of Canada. (1977) NR 254 at 259 FCA).

35 [1976] 1 S.C.R. 376.
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Chief Justice Jackett of the Federal Court of Appeal said:
... it is of the essence of sound legislation that laws

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be so tailored as to be applicable to such classes of persons and in such circumstances as are best calculated to achieve the social, economic or other national objectives that have been adopted by Parliament. Application of a substantive rule of law to one class of persons and not to another cannot, as it seems to me, of

itself, be objectionable discrimination from the point of view of s. 1(b) of the Canadian Bill of Rights. This is not to say that there might not be a law that is essentially discriminatory by reference to some other prejudice, in the same sense as a law can be discriminatory "by reason of race, national origin, colour, religion or sex". Such a law, to the extent that it was thus discriminatory, would not, I should have thought, be a law based on acceptable (that is, it would not be acceptable, having regard to the Canadian Bill of Rights, unless enacted "Notwithstanding the Canadian Bill of Rights") legislative objectives adopted by Parliament and would, to that extent, run foul of s. 1(b) of the Canadian Bill of Rights. 35a

In the Supreme Court of Canada Martland, J. stated:
The second ground of appeal is that the provisions of the Canadian Bill of Rights prevent the application of s. 21 in accordance with its terms, in the circumstances of the present case.

It is contended that the application of s. 21 has deprived the appellant of the right to "equality before the law" declared by s. 1(b) of the Canadian Bill of Rights. The effect of this contention is that Parliament could not exclude from the operation of s. 15 persons who the Crown considered should not, in the national interest, be permitted to remain in Canada, because such persons would thereby be treated differently from those who are permitted to apply to obtain the benefits of s. 15. The purpose of enacting s. 21 is clear and it seeks to achieve a valid federal objective. This Court has held that s. 1(b) of the Canadian Bill of Rights does not require that all federal statutes must apply to all individuals in the same manner. Legislation dealing with a particular class of people is valid if it is enacted for the purpose of achieving a valid federal objective (R. v. Burnshine).

35a. [1972] F.C. 1405 at 1414.
36. [1976] 1 S.C.R. 376 at 382, (cited by Collier. J. in Ayala v. The Queen 79 DTC 5083 at 5085.

>The
Problem Resolving the Apparent Conflict Between Page 94
the Canadian Human Rights Act and The Income Tax Act

In Bliss a woman, having ceased employment to give birth to a a child, claimed unemployment insurance benefits, as she could not

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find employment, but was denied them by virtue of section 46 of the Unemployment Insurance Act, 37 1971 which precluded types of benefits to female claimants for an eight weeks period before birth and six weeks after birth. She asserted that section 46 of the

Unemployment Insurance Act was inoperative because it contravened paragraph 1(b) of the Canadian Bill of Rights. Pratte, J., in the Federal Court of Appeal, stated:

Section 46 of the Unemployment Insurance Act does not stand alone. It must be read with section 30 and the other provisions of the Act. It is apparent, in my view, that Parliament considered that unemployment caused by pregnancy was something different from unemployment caused by sickness or unemployment which gives rise to the payment of regular benefits. While such a distinction may be thought to be unwarranted, it cannot be said to be entirely without foundation. Unemployment caused by pregnancy, contrary to the other kinds of employment which give rise to the payment of benefits, is usually the result of a voluntary act. Moreover, Parliament possibly considered desirable that pregnant women refrain from work for 14 weeks on the occasion of their confinement. It was not illogical, then, to deny them during the time, the benefits which are payable only to those who are available for work and to grant them the right to receive benefits of a new kind, payable without regard to the capacity to work or the availability for work. Having thus created this new kind of benefits in favour of pregnant women, Parliament had to determine on what conditions they would be payable. More precisely, it had to determine after what period of employment women would be entitled to receive them. That period might have been the same as the one required in respect of the ordinary benefits, in which case the Respondent's claim would not have been rejected by the Commission. Parliament chose to provide that the period of employment required to qualify for the pregnancy benefits, which are in certain respects more generous than the ordinary benefits, should be longer than the period required for those other benefits.

37. S.C. 1970-71-72, c. 48.

That decision may be thought to have been unwise, but nevertheless, it cannot be said that it was founded on irrelevant considerations; it follows that, in my view, the legislation adopted to implement that decision was "enacted for the purpose of achieving a valid federal objective", See Prata v. MMI, 3 NR 484; [1976] 1 S.C.R. 376 at 382), and did not infringe anyone's right to "equality before the law". 38

A further appeal to the Supreme Court of Canada failed,

Ritchie, G., stating:
It was, in my view, necessary for the effective exercise of the authority conferred by s. 91(2A) of the BNA ACT that Parliament should prescribe conditions of entitlement to the benefits for which the Act provides. The establishment of such conditions was an integral part of a legislative scheme enacted by Parliament for a valid federal purpose in the discharge of the constitutional authority entrusted to it under s. 91(2A), and the fact that this involved treating claimants who fulfill the conditions differently from those who do not, cannot, in my opinion, be said to invalidate such legislation.. 38a

Mr. Justice Ritchie's words, taken literally, imply that his test is somewhat narrower than that of Martland, J. in Burnshine, as he seems to suggest that any "conditions of entitlement" would suffice. A "valid federal purpose" must not be equated with any legislative reason whatsoever so long as there is a constitutional basis for the legislation.

However, Ritchie, J. went on to state:
As I have indicated, s. 46 constitutes a limitation on the entitlement to benefits of a specific group of individuals and as such was part of a valid federal scheme. There is a wide difference between legislation which treats one section of the population more harshly than all others by reason of race as in the case of R. v. Drybones, supra, and legislation providing additional benefits to one class of women, specifying the conditions which entitle a claimant to such benefits and defining a period during which no benefits are available. The one case involves the imposition of a penalty on a racial group to which other citizens are not subjected; the other involves a definition of the qualifications required for

38. (1977) 16 N.R. 254 at 261.
38a. [1978] 6 W.W.R. 771 at 713, affirming Re A.G. v. Bliss (1977) D.L.R. (3d) 609 (F.C.A.).

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entitlement to benefits, and in my view the enforcement of the limitation provided by s. 46 does not involve denial of equality to treatment in the administration and enforcement of the law before the ordinary courts of the land as was the case in Drybones.

This latter test was applied in this court when considering the meaning of equality before the law in A.G. Can. v. Lavell; Isaac v. Bedard, [1974] S.C.R. 1349 at 1365-66, 23 C.R.N.S. 197, 11 R.F.L. 333, 38 D.L.R.

(3d) 48, and the same reasoning was adopted by Martland J. on behalf of the majority of the court in R. v. Burnshine, [1975] 1 S.C.R. 693 at 703-704, [1974] 4 W.W.R. 49, 25 C.R.N.S. 270, 15 C.C.C. (2d) 205, 44 D.L.R. (3d) 584, 2 N.R. 53. 38b

Collier, J. of the Trial Division of the Federal Court held in Ayala that there was a valid federal objective with respect to section 63 of the ITA. He said:

In respect of s. 63 the legislators sought, as I see it, to provide some relief to a working parent, having custody of children, who incurred child care expenditures.* That in my view, is a valid federal objective. It is not made invalid because one class of taxpaying parent (whatever male or female) was given relief, and other classes of taxpaying male parents were not.

(*See ss. 63(3) for the meaning of child care expenses.) There is not, in s. 63, to my mind, discrimination by reason of sex, inequality before the law, or both, or a combination. The legislation is directed to the status of certain parents who incur child care expenses. The qualifications for deductions, in respect of a female parent, are less restrictive than in the case of a male parent. One can speculate on the reasons for the difference: the role, historically at least, of women in providing most of child care during infancy; or perhaps again historically, the economic earning power of the working women compared to the working man. 38c

38b. Ibid, at 718.
38c. 79 DTC 5083 at 5085 (FCTD).
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In my opinion, this Tribunal should first, identify the purpose of the legislation and determine whether the legislation was for the purpose of attaining a valid federal objective; and second, evaluate the reasonableness of the classification for those who are affected by it. As a Canadian author has stated:

"the legislature does make distinctions between groups based upon accepted purposes and values and these result in actual differences in the rights of groups under the law. In this factual sense they are "unequal" but being fairly so, there is no inequality in their being treated differently. It is only where the original distinction is itself based upon an unacceptable purpose - "discrimination" - that there is inequality. In that case, equals are not being treated equally". 39

However, in evaluating the reasonableness of the classification for those affected by the offending legislation, the Supreme Court of Canada cases on the Canadian Bill of Rights adopt a very conservative approach. The test really becomes--was the classification by the legislation based upon considerations perceived by Parliament as relevant to its purpose? In making this consideration, I believe the views of the present chief justice of the Supreme Court of Canada in Curr v. R., 40 are very pertinent as a guideline to follow:

"... compelling reasons ought to be advanced to justify the Court in this case to employ a statutory (as contrasted with a constitutional) jurisdiction to deny operative effect to a substantive measure duly enacted by a Parliament constitutionally competent to do so, and exercising its powers in accordance with the tenets of responsible government, which underlie the discharge of legislative authority under the British North America Act." 40a

Mr. Justice Pratte, in the Federal Court of Appeal, in Bliss v. Attorney General of Canada 41 , stated:

It is natural that the rights and duties of individuals vary according to their situation. But this is just another way of saying those rights and duties should be

39. M'Gonigle, "The Bill of Rights and The Indian Act: Either Or?" (1977) 15 Alberta L. Rev. 292 at 299-300.

40. [1972] S.C.R. 889.
40a. Ibid, at 899.
41. (1977) 16 N.R. 254.
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the same in identical situations. Having this in mind, one could conceive "the right to equality before the law" as the right of an individual to be treated by the law in the same way as other individuals in the same situation. However, such a definition would be incomplete since no two individuals can be said to be in exactly the same situation. It is always possible to make distinctions between individuals. When a statute distinguishes between persons so as to treat them differently, the distinctions may be either relevant or irrelevant. The distinction is relevant when there is a logical connection between the basis for the distinction and the consequences that flows from it; the distinction is irrelevant when that logical connection is missing. In the light of those considerations, th right to equality before the law could be defined as the right of an individual to be treated as well by the legislation as

others who, if only relevant facts were taken into consideration, would be judged to be in the same situation. According to the definition which, I think, counsel for the Respondent would not repudiate, a person would be deprived of his right to equality before the law if he were treated more harshly than others by reasons of an irrelevant distinction made between himself and those other persons. If, however, the difference of treatment were based on a relevant distinction (or, even on a distinction that could be conceived as possibly relevant) the right to equality before the law would not be offended. 42 (emphasis added.)

It is to be noted as well that the European Court of Human Rights in the Belgian Linguistic 43 case employed a test analogous to the 'resonable classification' test in interpreting Article 14 of the European Convention of Human Rights which provides that, "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour..."

"Article 14 does not forbid every difference in treatment in the exercise of the rights and freedoms recognized... one would reach absurd results were one to give Art. 14 an interpretation as wide as that... One would, in effect be led to judge as contrary to the Convention every one of the many legal or administrative provisions which do not

42. at 259-260.
43. European Court of Human Rights, Series A, Judgement of July 23, 1968, cited by Anne Bayefsky, "The Jamaican Women Case and the Canadian Human Rights Act Is Government Subject to the Principle of Equal Opportunity?", to be published in a forthcoming issue of the University of Western Ontario Law Review.

secure to everyone complete equality of treatment in the enjoyment of the rights and freedoms recognized. The competent national authorities are frequently confronted with situations and problems which, on account of differences inherent therein, call for different legal solutions: moreover, certain legal inequalities tend only to correct factual inequalities... It is important then, to look for the criteria which enable a determination to be made as to whether or not a given difference in treatment contratrevenes Article 14. On this question, the Court, following the principles which may be extracted from the legal practice of a large number of democratic states, holds that the principle of equality

of treatment is violated if the distinction has no objective and reasonable justification." 44 [emphasis

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added].
Are the distinctions in paragraph 109(a) and section 63 of the ITA reasonably justifiable in Canada, "committed to a policy of equality of opportunity [expressly set forth in section 2 of the Canadian Human Rights Act], tempered with the aim of striving for equality in fact" 44a.

44. Ibid.
44a. Tarnopolsky, supra, n. 21 at 316.

On the one hand, we have the principle of equal opportunity as policy called for by the Canadian Human Rights Act. On the other, we have policy as enunciated through paragraph 109(1)(a) and section 63 of the ITA, however, these provisions constitute a discriminatory practice (in the de facto sense at least) in that taxpayers receive adversely differentiating treatment on the basis of marital status and sex. 45

A balancing of these competing interests is inherently necessary in giving affect to the Canadian Human Rights Act. We have already discussed at length the legislative purposes in respect of the ITA provisions. The objective of Parliament is clearly valid - given the need for federal government revenues and income tax as the main means thereof, it is therefore necessary to set forth the deductions to be computed by an individual in determining his or her income for tax purposes. Clearly, it is not the federal objective in respect of either provision to discriminate adversely on a prohibited ground.

But is the differentiating treatment in respect of taxpayers employed by the ITA reasonable, given the competing objective of the principle of equal opportunity expressed by the Canadian Human Rights Act? Given the scheme chosen for personal deductions in section 109 of the ITA, paragraph 109(1)(a) was drafted as being limited to a married taxpayer as a matter of administrative convenience, to prevent tax avoidance and consequential loss

45. An incidental point is that a principle of equity fundamental to tax policy is that taxpayers in the same position as to an increase in income over the year should be taxed in the same manner. However, the ITA does, of course, depart in significant respects, for example, in taxing only one half of a capital gain. See ss. 38, 39 ITA.

of revenue. However, it does not appear that it would be very difficult to modify paragraph 109(1)(a) such that a fairly precise but non-discriminatory factual test could determine the matter, such as the test adopted in the U.S. Internal Revenue Code. As discussed, 46 s.151(e) allows an exemption for each dependent as defined by s.152. S.152(a) defines "dependent" as an individual over half of whose support for the year was received from the taxpayer, and includes (s.152(a)(9)) an individual who for the year has as his or her principal place of abode the home of the taxpayer and is a member of the taxpayer's household. This status must be maintained during the entire taxation year. 47 The rules further provide (s.152(b)(5)) that an individual is not considered a member of the taxpayer's household if at any time during the year the relationship between such dependent and the taxpayer is in violation of local law. Alternatively, paragraph 109(1)(b) could be embraced to include the common law spouse, through such a test. National Revenue might argue that there is difficulty in 'policing' such factual situations. However, there is already a factual test (marriage and support) inherent to paragraph 109(1)(a). Moreover, this is not a unique problem in the Income Tax Act, given that revenue collection is, and must be, predicated upon honesty in self-assessing and self-reporting. It is improbable that there would be any substantial loss of revenue due to more taxpayers (those common-law spouses who support their spouses) taking a deduction because such taxpayers who have children would already utilize the marital status equivalent deduction given

46. Supra, at pages 27, 28.
47. Trowbridge v. C.I.R., 1958, 30 C.T.C. 879.

by paragraph 109(1)(b) which would be lost if a marital deduction could be taken via paragraph 109(1)(a). 48 It is doubtful if there are a great many common law unions where there are no children but one spouse has no income.

However, the 'loss of revenue' argument is not really relevant in view of the fact that both the married taxpayer with a dependent spouse, and the unmarried taxpayer with a dependent common law spouse (everything else being equal) have identical needs for an amount of untaxed income with which to support themselves and their dependents. The essential policy premise to paragraph 109(1)(a) (a taxpayer's need for a minimal amount of untaxed income to support himself and his dependent spouse) suggests that the deduction should be extended to the taxpayer within a common law union. The present limited scope of paragraph 109(1)(a) tends to defeat its policy objective, but the limitation appears to be perceived by Parliament (more particularly, the Departments of National Revenue and Finance of the federal Government, being responsible for tax collection and tax policy) as necessary to the administration of revenue collection.

It is noted that the paragraph 109(1)(b) deduction has several

'factual test' type limitations, the deduction being given only
(b) In the case of an individual not entitled to a
deduction under paragraph (a) who, during the year,

(i) was an unmarried person or a married person
who neither supported nor lived with his spouse and
was not supported by his spouse, and

48. The taxpayer would, however, gain the deduction for a child extended by paragraph 109(1)(d), but this would simply put the taxpayer with a common law spouse and child in the same position as a married taxpayer with a child.

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(ii) whether by himself or jointly with one or
more other persons, maintained a self-contained
domestic establishment (in which the individual
lived) and actually supported therein a person who,
during the year, was

(A) wholly dependent for support upon, and
(B) connected, by blood relationship,
marriage or adoption, with the taxpayer, or the
taxpayer and such one or more other persons, as the
case may be, ...

Moreover, the phrase "connected, by... marriage" is given its ordinary meaning, as it is excepted by the general definition given to the phrase in subsection 251(6) of the ITA. Thus, for example, if the Complainant, Ms. Bailey were a widow, she could take the deduction extended by paragraph 109(1)(b) for a dependent father-in-law. 49

To not extend the deduction to a taxpayer such as the Complainant, Ms. Bailey, has the effect of denying equality of opportunity, as the taxpayer with a common law dependent spouse is left with less after-tax income and hence, less economic power, than her/his married counterpart. It would appear that this discrimination could be remedied without significant legislative problems. If the loss of revenue is significant, because many more taxpayers can take the deduction, then the quantum of revenue loss can be controlled by extending less of a deduction to all taxpayers than the amount of deduction given at present via paragraph 109(1)(a) to some taxpayers.

49. Interpretation Bulletin IT-191, s.22; Pembroke Ferry Ltd. v. M.N.R. 6 Tax ABC 389. Thus, it cannot be argued that the reason for the limitations upon the relationships that can give rise to the deductions in paragraphs 109(1)(a) and (b) is based upon a notion that a married taxpayer should be able to obtain a deduction for his spouse or child because of a legal

obligation to support imposed by provincial law. As well, support obligations can, of course, arise at provincial law in respect of a child from a common law union, and with family law reform, support obligations can arise as between common law spouses. See, for example, the Ontario Family Law Reform Act, 1978, S.O. c.2, ss. 14, 15.

The further argument might be made, however, that to extend a dependency deduction, beyond the relationships defined by paragraphs 109(1)(a) and (b) of the ITA, in the manner of the Internal Revenue Code, would mean that a taxpayer can take a deduction for any dependent person, and can take the deduction for more than one such dependent. Thus, for example, a taxpayer in a homosexual relationship could take the deduction. To extend a deduction to such a relationship seems consistent with the essential policy premise of paragraph 109(1)(a) - a taxpayer needs a minimal amount of tax free income to support himself and a dependent. If Parliament wishes either to discourage or ignore such a relationship by imposing what would be in effect a tax penalty by not having the deduction go to such a relationship, Parliament can certainly do so, but should squarely address the moral and political issue. However, the avoidance of having to make a decision about this problem (if such is the case) should not be used as an excuse to deny the deduction in question for common law spouses. It would seem that the rationale for that exclusion at present is simply administrative convenience, and not upon any moral disapproval by Parliament, and as I have said, I do not think the administrative convenience rationale is a necessary or reasonable basis for the limitation. Factual criteria could be set forth, as in the U.S. Internal Revenue Code, to embrace the common law spouse, however, if Parliament wishes to limit the extension of the deduction simply to a taxpayer with a dependent common law spouse, it can build the necessary limitation into legislation. If such a limitation (a limitation that would, in effect, deny the deduction to a taxpayer supporting a dependent in a homosexual relationship) was seen as subject to the possibility of being rendered inoperative due to being in conflict with the Canadian Human Rights Act, 50 an exception could be made by

50. However, it would appear that ’sexual orientation’ is not covered by the present Canadian Human Rights Act. As well, under the general rules of statutory interpretation, a later, specific, statutory provision that expressly discriminates might be held to not be in conflict with the earlier, general, Canadian Human Rights Act.

amendment to that statute. As well, an 'expanded' provision

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whereby a deduction could be taken by a taxpayer with a common law spouse could be limited to one deduction only for the taxation year.

It might be argued by some that to allow common law spouses to receive similar treatment to that of married spouses in respect of income tax deductions would result only in a few individuals being helped, and thus the ability of the Canadian Human Rights Act to effectuate its policy of equality of opportunity would be only marginally improved. However, this misses the essential point. It is only through vigilance in respect of individual cases that the overall betterment of a civilized democratic society that espouses values as to basic 'human rights', is achieved. Through extending equality of opportunity in fact to the individual, society as a whole gains substantially, certainly in terms of maintaining and enhancing its very basic values and social well-being, and also as well, in terms of its ultimate economic prosperity.

Is the classification of paragraph 109(1)(a) of the ITA reasonable in extending the deduction only to married taxpayers? In my view it is not reasonable. However, in my opinion, the classification by the legislation is based upon considerations perceived by Parliament as relevant to the fundamental purpose of the income tax legislation, being revenue collection.

In considering section 63, we have seen that its purpose is to facilitate the entry of women into the labour force by removing a deterrent to women in this regard, a child care expenditure being an extraordinary personal expense that is a prerequisite to earning income once the decision has been made to work. Thus, the basic policy premise to section 63 is to further equality of opportunity to a group, women, perceived as being in a disadvantageous economic position. However, the provision is extended to men in limited circumstances, and thus although its thrust is directed primarily in aid of women, the objective is not to differentiate adversely

simply on the basis of gender. That is, section 63 cannot be looked upon simply as an 'affirmative action' type of approach, because its scope is not limited just to women. The limitations are imposed upon male taxpayers because of the traditional view (undoubtedly, if unfortunately, based upon present fact) that the married female taxpayer generally earns less income then her husband. If the higher income taxpayer (usually the husband at present) could take the deduction, more revenue would be lost to the federal treasury, due to the progressive tax rate. Thus, by directing the deduction in favour of the female taxpayer, section 63 seeks not only to assist women in entering the labour force, but

to achieve this without the loss of more tax revenue than is necessary to this limited main purpose.

However, it would appear section 63 could easily be modified such that the deduction could be taken by any person (who otherwise meets the qualifying criteria) but where there are two spouses who are not separated, it would be taken by the spouse 50a with the

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lower income. This approach would be similar to that of the U.S. Internal Revenue Code. As discussed, 51 the Code provides that married taxpayers can only receive the child care deduction if a joint return is filed (s.44A(f)). However, an individual is considered not married (s.44A(f)(4)) if he files a separate return, maintains as his home a household which constitutes for more than one-half of the taxable year the principal place of abode of the child, furnishes over half

50a. I refer here to married spouses. For common law spouses perhaps the preferred approach (to avoid differentiating treatment) would be to establish a factual test similar to that discussed supra with respect to possible revision to paragraphs 109(a), (b) of the ITA. That is, if two persons were considered spouses on a factual test such as to qualify for the marital status or married equivalent deductions, (whether or not the deduction was taken in fact i.e. if both spouses are working each would probably be taking the deduction extended by paragraph 109(1)(c)) then they would be considered spouses for the purpose of the section 63 deduction, i.e. the one with the lowest income would be the only one who could take the deduction.

51. Supra, at pages 46 and 47.

of the cost of maintaining such household during the year, and during the last six months of such year, such individual’s spouse is not a member of such household. Therefore, a deserted spouse supporting a child could also take the deduction. This would remove the present discrimination inherent to section 63 with respect to deserted husbands. In any event, it does not seem necessary, even if the present approach of section 63 (placing limitations upon the male taxpayer in obtaining the deduction) is maintained, to include the present particular limitation upon the deserted husband. As we have seen, the U.S. Internal Revenue Code adopts the simple approach of considering a taxpayer not married if during the last six months of the taxation year such taxpayer’s spouse was not a member of the individual’s household.

Perhaps the scope of the provisions should also be extended to include a deduction to the taxpayer spouse who has child care expenses necessitated by a spouse returning full-time to university. This would also tend to further the main policy

objection of section 63 - to facilitate the entry of women into the labour force. 51a

Just as with paragraph 109(1)(a), both the policy objective of equality of opportunity and good tax policy mean treating taxpayers in essentially the same factual situation the same way for the purpose of determining liability for income tax.

Is the classification of section 63 of the ITA reasonable in placing the limitation it does, which defeats the deserted husband?

In my view, it is not reasonable. However, as with paragraph 109(1)(a), the classification by the legislation is based upon considerations perceived by Parliament as relevant to the fundamental purpose of the income tax legislation, being revenue collection.

51a. But for the possible views of tax policy officals, see the quotation in the text of this decision referred to in note 3 at pages 114, 115.

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the Canadian Human Rights Act and the Income Tax Act

Therefore, it is my opinion, and I so find, that there is no conflict between the provisions of the Income Tax Act that are the subject of the Complaints before this Tribunal, and the Canadian Human Rights Act, such that operative effect should be denied to those income tax provisions.

My ultimate disposition of the Complaints may seem surprising, given that I have found the Income Tax Act provisions have differentiated adversely on prohibited grounds and in an unreasonable manner. However, in my view I am bound by the Supreme Court of Canada decisions on the Canadian Bill of Rights, both in terms of binding precedent and in terms of the reasoning, with which I agree. Put succinctly, the Complaints do not meet the guideline already referred to that:

"... compelling reasons ought to be advanced... [to justify the Tribunal]... to employ a statutory (as contrasted with a constitutional) jurisdiction to deny operative effect to a substantive measure duty enacted by a Parliament constitutionally competent to do so, and exercising its powers in accordance with the tenets of responsible government, which underlie the discharge of legislative authority under the British North American Act." 52

(emphasis added)
In my view, it is not sufficient that the classification provisions of the offending statute simply are unreasonable, to render those provisions inoperative as being in conflict with the

Canadian Human Rights Act. The offending provisions are not in conflict to the point of being inoperative in law if the classification of the legislation is based upon considerations perceived by Parliament as relevant to the fundamental purpose of the income tax legislation, being revenue collection. Paragraph 109(1)(a) and section 63 of the Income Tax Act meet that test.

52. Curr v. R. [1972] S.C.R. 889 at 899, per Laskin, J., as he then was.

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the Canadian Human Rights Act and the Income Tax Act
If the Complaints before this Tribunal had arisen in the context of a constitutionally entrenched Canadian Bill of Rights that included the substantive scope of sections 3 and 5 of the present Canadian Human Rights Act, then in my opinion, a court's decision in respect of the conflict between such constitutional provision and both paragraph 109(1)(a) and section 63 of the Income Tax Act might have been otherwise, given the findings I have made.

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UNDER THE CANADIAN HUMAN RIGHTS ACT Page 110

Respondent's counsel argued that the Tribunal, upon a finding that there was a contravention of the Canadian Human Rights Act, is limited to making an order under section 41. Subsection 41(2) reads:

If, at the conclusion of its inquiry, a Tribunal finds that the complaint to which the inquiry relates is substantiated, subject to subsection (4) and section 42, it may make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in such order any of the following terms that it considers appropriate:

(a) that such person cease such discriminatory practice and, in consultation with the Commission on the general purposes thereof, take measures, including adoption of a special program, plan or arrangement referred to in subsection 15(1), to prevent the same or a similar practice occurring in the future;

(b) that such person make available to the victim of the discriminatory practice on the first reasonable occasion such rights, opportunities or privileges as, in the opinion of the Tribunal, are being or were denied the victim as a result of the practice;

(c) that such person compensate the victim, as the Tribunal may consider proper, for any or all of the

wages that the victim was deprived of and any expenses incurred by the victim as a result of the discriminatory practice; and

(d) that such person compensate the victim, as the Tribunal may consider proper, for any or all additional cost of obtaining alternative goods, services, facilities or accommodation and any expenses incurred by the victim as a result of the discriminatory practice.

In brief, the argument is that if Parliament has legislated discrimination, even if it is contrary to the Canadian Human Rights Act, then it is only Parliament that can rectify the situation through amending legislation.

Sections 47 and 22(1)(e) provide:
47(1) The Commission shall, within three months after the 31st day of December in each year, transmit to the Minister of Justice a report on the activities of the Commission under Part II and this Part for that year including references to and comments on any matter referred to in paragraph 22(1)(e) or (f) that it considers appropriate and the Minister shall cause the report to be laid before Parliament within fifteen

days after receipt thereof or, if Parliament is not then sitting, on any of the first fifteen days next thereafter that Parliament is sitting.

47(2) The Commission may, at any time, transmit to the Minister of Justice a special report referring to and commenting on any matter within the scope of its powers, duties and functions where, in its opinion, the matter is of such urgency or importance that a report thereon should not be deferred until the time provided for transmission of its next annual report under subsection (1), and the Minister shall cause each such special report to be laid before Parliament within fifteen days after receipt thereof or, if Parliament is not then sitting, on any of the first fifteen days next thereafter that Parliament is sitting.

22(1) In addition to its duties under Part III with respect to complaints regarding discriminatory practices, the Commission is generally responsible for the administration of Parts I, II and III and

(e) may consider such recommendations, suggestions and requests concerning human rights and freedoms as it receives from any source end, where deemed by the Commission to be appropriate, include in a report mentioned in section 47 reference to and comment an any such recommendation, suggestion or request.

First, in my view the Tribunal is limited to the remedies set forth under section 41 and they do not extend to allowing a Tribunal to make an order rendering a statutory provision inoperative. The most a Tribunal can do is simply make a decision that a statutory provision is inoperative. Given my interpretation of the Canadian Human Rights Act, that sections 3 and 5 can apply to other federal statutory provisions, I am cognizant that I may now be suggesting that there can be sometimes a legal wrong (a breach of sections 3 and 5 of the Canadian Human Rights Act due to an inconsistent federal statutory provision) without a remedy, and I appreciate the anomaly which this view suggests. Given the absence of a remedy, the most in effect that a Tribunal can do is

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declare that a statutory provision should be rendered inoperative. Second, assuming that either or both paragraph 109(1)(a) and section 63 had been held to be in contravention of the provisions of the Canadian Human Rights Act, in my opinion this Tribunal would be unable to make an order to direct the Minister of National Revenue to permit the deductions sought by the Complaints. Even if

the Tribunal were to declare inoperative these legislated provisions, this would not assist the Complaints. The Tribunal cannot go the necessary step further to amend the legislation to provide deductions to the Complaints. Perhaps the argument could be made with respect to the child care expense deduction problem that the wording of the subsection begining with subparagraph 63(1)(b)(i) and ending with subparagraph 63(1)(b)(iv) could simply be declared inoperative. The balance of the subsection would then permit all parent taxpayers, whether male or female, to deduct child care expenses. However, in my opinion this result providing a tax deduction where it was not intended by Parliament would have the effect also of amending the tax legislation, which this Tribunal cannot do. It is only Parliament that has the competence to amend legislation. 1

Moreover, the situations before this Tribunal are not like the one in Drybones, which involved the court rendering inoperative a statutory provision that was directed at simply one group, Indians. The consequence of that decision was not to affect adversely the rights of any other persons. To render sections 63 and 109(1)(a) of the ITA inoperative would affect adversely hundreds of thousands, perhaps millions, of taxpayers who take either or both deductions. The effect of such a decision would be as if to amend

the tax legislation in respect of those taxpayers, and as I have said, this is beyond the power of the Tribunal.

The bottom line is that any actual relief for the Complainants must come through legislative change, whether or not they were successful before this Tribunal. Only Parliament has the competence to pass, amend, alter or withdraw statutes, but a provision can be declared inoperative by virtue of the Canadian Bill of Rights, as evidenced by the Drybones case. 2 Given my

1. cf. Ayala v. The Queen 79 DTC 5083 at 5086.
2. See Tarnopolsky, The Canadian Bill of Rights, Chapter LV "The Effect of the Canadian Bill of Rights on Canadian Law", especially at 135-141, 153-162.

interpretation of the Canadian Human Rights Act, that it can apply to other federal statutory provisions, a decision might be made

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that a section of a federal statute is (in effect, should be, given the absence of an effective remedy) inoperative due to conflict with the Canadian Human Rights Act because either the statutory provision is not enacted for a valid federal purpose or the classification established by the legislation is not based upon considerations perceived by Parliament as relevant to the purpose of the legislation.

Finally, in my view, in all events, the only appropriate remedy available with respect to the Complaints before this Tribunal (that discrimination exists by virtue of statutory provisions of the ITA), if it had been found that there was discrimination in law on a prohibited ground contrary to section 5 of the Canadian Human Rights Act, would be a report to the Minister of Justice pursuant to subsections 22(1)(e) and section 47 of the Canadian Human Rights Act. None of the remedies listed under subsection 41(2) could be applied effectively as against the Minister of National Revenue. As the Tribunal cannot amend the ITA, and cannot order that both sections 63 and 109(1)(a) be rendered inoperative, the Minister of National Revenue has the responsibility, pursuant to the statutory obligations imposed upon him by the ITA, of perfroming the duties required of him by Parliament. The Minister can neither cease the discriminatory practice (paragraph 41(2)(a)) nor can he "make available to the victim... such rights... as, in the opinion of the Tribunal, are being or were denied the victim" (paragraph 41(2)(b)). To do either would cause the Minister of National Revenue to contravene subsection 152(1) of the ITA. Nor may the Minister compensate the victim. Subsection 17(1) of the Financial Administration Act provides for relief from the incidence of tax under the ITA by compensation to a person in "the public interest", but only by the Governor-in-Council on the recommendation of the Treasury Board.

In my opinion, this Tribunal does not have the jurisdiction to order third parties, the Governor-in-Council,

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or the Treasury Board, to do or to cease doing anything. Subsection 41(2) is very specific in that regard. The Tribunal can issue orders only to "the person found to be engaging or to have engaged in the discriminatory practice".

Finally, given the nature of paragraph 109(1)(a) and section 63 of the Income Tax Act, as discussed in the decision of this Tribunal, the Canadian Human Rights Commission may well wish to report to the Minister of Justice, as provided for by paragraph 22(1)(e) and subsection 47(1) of the Canadian Human Rights Act, suggesting that consideration be given to recommending to Parliament appropriate statutory reform of the mentioned provisions of the Income Tax Act.

I am aware that consideration has apparently been given in the past by the Department of Finance to amending section 63 to remove the discriminatory aspects.

Not only do tax participants attempt to cope with the existing environmental uncertainty they also hedge

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against unforseen contingencies. Even those participants who are the most skilled and experienced at making sophisticated assessments of political climate know that they can be wrong. To avoid the embarrassment of getting into trouble, participants assume they face an overly hostile climate.

Consider the case in the May ’76 budget when the personal income tax deductions for child care expenses were doubled from $500 per child to $1,000 with the family limit increased from $2,000 to $4,000. In examining this proposal, not only was the tax community concerned that "the size of the deduction had gotten out of date since it was introduced in 1972", but also that only women were getting favourable treatment under the provision. Women’s groups, along with the Interdepartmental Committee on the Status of Women, were pressing the tax community for change, claiming the deduction should be allowable for both husband and wife.

The tax community considered two alternatives. One was to allow either husband or wife to claim the deduction provided that one of the principal persons in the family was full time in school. This created a substantial problem since it "opened the thing up to a rip roaring rip-off" in the case where a husband with high income takes the deduction at a substantial tax saving

while his wife is full time in school. The other alternative was to allow the secondary (lower) income earner in the family to claim the deduction. This sounded "O.K." but it had a problem in the case where a wife was making more money than the husband and hence the wife would no longer be able to claim the deduction. As an official explained, this meant, "there would be some losers, only a few, but just enough to make the whole thing awkward". The tax community, after consideration by its top members, "decided to leave it the way it was since there was no satisfactory answer, and to only raise the limits on the deduction." The tax community perceived that only a few losers, i.e., those families where the wife's income was greater than the husband's, were sufficient to justify not changing the tax law. The community was uncertain about the conflict it might generate from a few families. To hedge against this uncertainty, it assumed the worse by constructing an overly pessimistic scenario of a hostile political climate. As a result there was no change in the tax. 3

If this description of the considerations made is accurate, in my view, the rejection of the proposed amendment to extend the deduction to the lower income earner, where both spouses are working, was done for reasons that do not accurately reflect the policy objectives underlying section 63. In particular, the point is that by directing the deduction in favour of the female

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taxpayer, section 63 seeks not only to assist women in entering the labour force, but to achieve this without the loss of more tax revenues than is necessary to this limited main purpose. In my view, it was not the intent of Parliament to discriminate against men, as a policy objective, even though discrimination was the known result given the approach taken. It was simply perceived that this was the only viable legislative approach, given the underlying policy objectives. However, as discussed at length in this decision, 4 the deduction does not have to be given always to the female spouse, where both spouses are working, to achieve the policy objectives of Parliament. Finally, if I am wrong in my analysis as to the policy objectives of Parliament in enacting section 63, reconsideration should be given at this time as to what the current policy objectives should be.

3. David A. Good, The Politics of Anticipation: Making Canadian Federal Tax Policy, Carleton University, Ottawa, 1980 at 31.

4. Supra, at pages 105 to 107.

For the reasons given, the Complainants are unsuccessful, and the Complaints are dismissed.

Dated at Toronto this 26th day of September, 1980.

Peter Cumming
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