# An Embedded Review

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Few of the people I know would find tax law fascinating, or see it as a particularly useful way to think about theory, evidence, class, race, gender, politics, parenthood, strategy, and contradictions. Yet Rebecca Johnson's analysis of the *Symes* Charter challenge to the Income Tax Act manages to convince me that tax law can be all of this and more. Her historical examination allows us to understand much larger issues through the lens of one case focused on the question of whether or not business women should be able to deduct their child-care payments as a business expense.

I should begin by saying that I am what today might be called an embedded reviewer. I was an expert witness in the *Symes* case, appearing before Justice Cullen at the trial court. Johnson dissects that evidence and my role in the case as part of her analysis, although somehow in the process my name mysteriously changes from Pat to Patricia. Because I was an expert witness, I was asked to review the book and bring my perspective to bear on the book and the case.

Experts are in an odd position, not just in reviewing a book about a case they testified in, but also in providing expert testimony. Although they are called by one side, they are expected to be and remain objective and bias-free. Indeed, the question of my bias is raised by Johnson. She reports that in the cross-examination on qualification by John Power, QC, lawyer for the Crown, I was specifically and repeatedly asked about my published articles that included references to Marxism. As she points out, this questioning could be "a way of trying to discredit"[1] me as an unbiased witness, and my response suggests that this is how I interpreted the questioning. But in an approach that is typical of the book, Johnson is not satisfied with a single, or simple, explanation. "Another way of reading Power's comments [is] to see them not as an attempt to discredit via politics but via irrelevancy."[2] Rather than seeing Marxism as bias, she suggests that Power may be using it as an indicator of just how useless my expert testimony would be in understanding the

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1 Rebecca Johnson, *Taxing Choices: The Intersection of Class, Gender, Parenthood, and the Law* (Vancouver: UBC Press, 2002).

2 Ibid., at 62.

issues before the court. Johnson's point is substantiated when she later discusses the Crown's claim that information on women and work is not useful in the case. For Power, "the case is not about childcare burdens but about the meaning of business expense under the *Income Tax Act*."[3] Although Justice Cullen disagrees with Power about the relevance of the expertise, Johnson shows how the Crown is able to both accept my expertise and treat it as beside the point. In the process, Johnson demonstrates the usefulness of placing the cross-examination on qualifications in a larger context—a context not only of politics and bias but also of perspectives on social relations and individuals.

This is not to suggest that Johnson represents herself as an objective and distant analyst, simply setting out the facts. She does clearly state her views on the case and the outcome. However, she does so by drawing out the multiple ways each step can be understood and how each step needs to be understood in its own political, social, and economic context. An emphasis on context was central to my testimony, as Johnson explains. It is equally critical to Johnson's own analysis.

She provides a succinct summary of my evidence, stressing the growing labour force participation of women that is combined with their continuing primary responsibility for child care. This evidence she links to her theoretical discussion of C. Wright Mills's distinction between private troubles and public issues. The expert testimony explicitly places child care as both women's work and a public issue in contrast to the Crown's initial argument that child care is the result of an individual choice and a parental responsibility. At the Federal Court Trial Division, Justice Cullen uses the expert evidence to conclude that "earlier cases on childcare expenses have been overcome by a changed social reality."[4] According to Johnson, Justice Cullen ruled that the Income Tax Act "must be interpreted in a way that recognizes the specific experience of women as principally responsible for childcare."[5]

The Federal Court of Appeal decision is described by Johnson as one based on a notion of child care as a "natural obligation" that "affects both parents equally."[6] Business need is an "ungendered category" for the court, according to Johnson, as opposed to the evidence on the gendered nature of care responsibilities presented by the expert witness. "Clearly, the expert evidence of Dr. Armstrong does not influence the perceptions of the Court of Appeal."[7] Yet, by the time the case reaches the Supreme Court, the majority judgment can claim that, as Johnson puts it, "the changing social trend provides a justification to reconsider the characterization of childcare" and, according to the judgment, "the point could have been accepted even without the assistance of an expert."[8] Here the expert evidence is irrelevant

3 Ibid., at 64.

4 Ibid., at 75.

5 Ibid., at 76.

6 Ibid., at 79.

7 Ibid., at 80.

8 Ibid., at 90-91.

because everyone knows that women with children are moving into the labour force and that things have changed in relation to child care. The judgment goes on to say that pregnancy and childbirth decisions are influenced by a host of factors, and for them to "be characterized as an entirely personal choice, is to ignore these influences altogether."[9] Not only has the line between public and private been redrawn, so also has the definition of the need for expert evidence on the issue.

The changes in the competing assumptions about public/private divides become transparent through Johnson's analysis and provide just one example of the way Johnson is able to clarify the larger theoretical issues buried in the details of each step of the case. Not incidentally, at least from my perspective, she also demonstrates the contingent role of expert evidence.

Johnson notes that the evidence also sets out to establish that the increasing number of self-employed women were not mainly rich white lawyers. More often, self-employed women do service work in places such as day-care centres, beauty salons, and catering operations. Increasingly, they are clerical or health-care workers. Like lawyer Elizabeth Symes, however, they have hours that do not fit well with the usual child-care services. Unlike Symes, few have the income to support a nanny. This latter point was of concern to many feminists, Johnson says, because such women "would be unable to pay for childcare even *with* the deduction."[10] Given Johnson's emphasis on how much is made of Symes's privilege, it is surprising that these points about the self-employed virtually disappear not only in the case but also in Johnson's later discussion.

Class is considered as a central issue both within the feminist debates about the case and within the court. Nevertheless, much of the discussion seems to assume that self-employed "business" women, as Power implies, are all rich white women. "Such women, Power suggests, are less than deserving subjects for public concern."[11] At the Supreme Court, Justice Iacobucci chastises Symes for her "focus upon self-employed women,"[12] although Symes is repeatedly referred to throughout the case as representing a subgroup of self-employed women. The emphasis on Symes's privilege is itself an example of the kind of individualization Johnson usefully exposes as central to the defence. Johnson opposes individualization in such Charter challenge cases, as well as the blame-and-shame approach integral to the rejection of Symes's claims. But she does not further discuss the notion of Symes as representative of businesswomen and the claim that most self-employed women would see no gains from the tax deduction of child-care costs as a business expense. Given that all self-employed women would be able to make the claim, it is important to examine the theoretical as well as the practical implications for this diverse, and growing, group of women.

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9 Ibid., at 91.

10 Ibid., at 51 (emphasis in original).

11 Ibid., at 71.

12 Ibid., at 95.

It is equally important to consider the variable-hours problems that many self-employed women face when trying to use day care. Johnson notes that Symes raises this issue when explaining why she has employed a nanny instead of using a day-care centre. This issue of hours is directly linked to the issue at the centre of the case—namely, tax deductions. Symes agreed with those, including me, who saw tax deductions as regressive. The regressive nature of tax deductions was one reason the members of the National Action Committee's child-care committee approached Symes in an effort to discourage her from proceeding with the case. Johnson speculates that NAC thought that the case could contribute to the further privatization of child care and splinter the women's movement as well as the day-care movement. What neither Johnson nor NAC addressed, however, is the problem faced by women whose hours do not fit with those of day-care centres, even when there are good universal programs. Of course, self-employed women are not the only people who work hours other than 9 to 5. But if we are interested in universal access to child-care support, questions raised by the *Symes* case regarding variable hours need to be considered.

Similarly, the characterization of Symes as an exploiter of her nanny remains virtually unchallenged. Symes paid for benefits on behalf of her nanny, who was responsible only for the care of the children and not for any other duties not directly related to the children. For this work, Mrs. Simpson was paid just over the minimum wage. Johnson describes the cross-examination in the lower court that focused on these details, drawing out the implications of these questions for the portrayal of Symes as a privileged white woman. Later on in the text, she outlines Michael Mandel's critique of Symes, a critique that saw her case as a "scam against women."[13] Missing from the analysis, however, is the attempt to highlight how important it is to make the hidden child-care work in the household visible and valued. Johnson certainly recognizes that Symes responds to questions about her financial relationship with her nanny by saying that the wages are insufficient and the care providers underpaid. But she does not consider how making child-care expenses tax-deductible by the self-employed could influence the wages and conditions of child-care work in the home. I understood that the association representing domestic workers supported the case because they thought it would then be easier to demand benefits and minimum wages as well as limits on the kinds of work they were required to perform in households. Would allowing deductions for child care as a business expense also allow the regulation of employment to help ensure that such workers receive benefits and at least minimum wage?

Such a consideration leads to the question of strategy. Just as Johnson helps us see the theoretical implications of the emphasis on child care as a personal choice, of the public/private assumptions made by the actors, and of the class position of Symes, so too does she help us see the strategic implications of using the legal system as a means of making advances for women. Johnson captures and expands on the

13 Ibid., at 179.

diverse assessments of both the initiation of the case and the various decisions. As she promises, her focus on "the politics of need" reveals "that much of the conflict among the experts can profitably be understood as conflict occurring on these different axes of struggle"[14]—namely, equal rights and needs discourse. Here, she means by "experts" the range of feminists and others who commented on the case. Johnson convincingly argues that the conflict was "less a conflict between class and gender, than it was a set of conflicts about the most appropriate strategy to advance needs grounded in both class and gender."[15] The analysis of experts' voices is nuanced, theoretically informed, and explicitly conscious of the differences among those approaching the case from different social locations. It is nicely complemented by her analysis of intersectionality in the non-expert public response taken from press coverage and a *Montreal Gazette* survey. Perhaps I liked it so much because she also captures my own ambivalence about the case.

Where does Johnson come down in the end? While she finds the reasons of the "Supreme Court dissent far more persuasive than those of the majority," she remains "unconvinced that a win for Symes would have resulted in the progressive changes desired by supporters or the regressive possibilities feared by detractors."[16] But she does not simply set out two sides; rather, she draws out the contradictory implications while supporting Symes's attempt to create "an occasion where complex questions about childcare and the public/private divide could be litigated."[17] In the process, she raises fundamental questions about the legal process itself. "How does one represent one's client in a fashion that both advances the interests of women as a group and yet also advances the interests of that specific woman?"[18] For Johnson,

> the insight of much intersectional theory is that no woman is representative of all. This does not, it seems to me, lead one to conclude that it is impossible to speak about women. It does, however, suggest the importance of women analyzing the implications of gender from the perspective of their local situations.[19]

Johnson's analysis allows us to do just that.

And where do I come down? I agree with Johnson that Symes "placed the recognition problem front and centre: women share in the burdens and responsibilities of the business world but are denied full recognition of their participation through gendered codes for business."[20] For most women, the work is not possible without child-care support. The issue was not only economic but social recognition.

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14 Ibid., at 159.

15 Ibid.

16 Ibid., at 176.

17 Ibid., at 183.

18 Ibid.

19 Ibid., at 184.

20 Ibid., at 186.

Justice L'Heureux-Dubé's dissent made it clear "that *all* women suffer severe social *and* financial costs associated with child-bearing and rearing and that these costs are incurred whether a woman is a self-employed small-business owner, a lawyer, an employee or a full-time homemaker and caregiver."[21] Indeed, both the majority decision and the dissent recognized women's structured responsibilities, and this was important to establish. I agree as well with Johnson's argument that Symes's "claim was a direct challenge to the alleged gender neutrality of taxation,"[22] another critical point to establish for all women. Unfortunately, even Justice L'Heureux-Dubé did not see the case brought before the court as requiring "a critical examination of the interplay of socio-economic class in the income tax system."[23]

I think that the costs for Symes were significant and that her personal financial gains would have been insignificant, making the characterization of her as "selfish" by many of the actors rather difficult to understand. We cannot tell whether a win for her would have been a win for many; nor can we estimate what the government response to such a win might have been. What we do know is that we still do not have either child care as a business expense for self-employed women or equal access to public day care, at least not outside Quebec. The alternative strategies have not worked either.

So I remain somewhat ambivalent about the case but not about the book. It is an excellent resource for anyone interested in the law, in feminist theory, and in women's strategies for equality.

21 *Symes v. Canada*, [1993] 4 SCR 695, at 823 (emphasis in original).

22 Johnson, supra note 1, at 188.

23 Supra note 21, at 824.