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# Tax Policy, Theoretical Explorations, and Social Realities

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**KEYWORDS:** TAX POLICY ■ PENSION PLANS ■ WOMEN ■ THEORY ■ SOCIAL CLASS ■ PUBLIC POLICY

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For many years I have been trying to persuade my tax students that tax policy is not just a fiscal or economic issue. Rather, the tax rules implemented by all levels of government in Canada are a major political tool used to direct social policy. Consequently, tax law is not merely a series of technical rules that is solely the domain of the “experts.” It is a living, breathing body of jurisprudence that can be truly understood only when one places it in the social context in which it operates. Yet when one looks for Canadian books to assign to tax policy students that are based on these premises, the choice is limited. As Neil Brooks has pointed out, most of the tax policy literature has been normative in nature in that it has used the “traditional theories, principles, and tools of public finance.”<sup>1</sup>

## TAXING CHOICES

*Taxing Choices*<sup>2</sup> is a welcome addition to the tax policy literature for many reasons. The book is published as part of the UBC Press “Law and Society Series,” thus signalling its unique position in tax policy literature. Its narrow focus is a case

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1 Neil Brooks, “Policy Forum: Comments on The Politics of Taxation in Canada, by Geoffrey Hale” (2002) vol. 50, no. 6 *Canadian Tax Journal* 2025-28, at 2025.

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

(*Symes v. Canada*)<sup>3</sup> and the tax rules that the case dealt with—namely, the child-care expense deduction (section 63 of the Income Tax Act)<sup>4</sup> and the deductibility of business expenses (section 9 and paragraph 18(1)(a)). But the subtitle of the book (*The Intersection of Class, Gender, Parenthood, and the Law*) gives us an idea of its broader focus. Rebecca Johnson uses an analysis of the *Symes* litigation to make a series of very important contributions to our understanding of how we might think about this case and, at a broader level, about tax policy generally. First, she places the analysis of the tax rules that were the subject of *Symes* squarely in the social and economic context in which they operate. Second, she recognizes that questions about tax policy are political questions. Third, a major theme of the book is that it discusses the challenges associated with using (tax) law as a tool by which to achieve social and political change. This analysis draws on much of the general literature on using law as a tool for social change,<sup>5</sup> but it also adds new insights in the tax law context.

From my perspective as a tax academic, the most exciting contribution made to the tax policy literature by *Taxing Choices* is that it takes theory, and not just tax policy theory, seriously. It canvasses feminist theories, the impact of the public/private divide, and the debates surrounding issues of choice. Underpinning these theoretical explorations is a particular attention to intersectionality<sup>6</sup> and especially the intersection of class and gender. While some might say that theoretical analysis can be rather abstract, Johnson has avoided that trap by grounding her theoretical analysis in a concrete case. And it is not just any case. *Symes* is a tax case that grabbed the imagination of the public, a case that made headlines in the press, one about which it seemed everyone had an opinion.<sup>7</sup> It was a case with a litigant who

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3 [1993] 4 SCR 695.

4 RSC 1985, c. 1 (5th Supp.), as amended (herein referred to as “the Act”). Unless otherwise stated, statutory references in this review are to the Act.

5 A review of the bibliography to *Taxing Choices* demonstrates an impressive breadth of theoretical literature from many disciplines. Indeed, one of the strengths of this book is the way Johnson uses this literature to illuminate our understanding of issues of tax law and policy.

6 Feminist theories of intersectionality recognize that the experience of women is not a universal one, that there are differences in the way differently situated women may experience oppression. Thus, for example, women of colour may experience sexism in a different way than white women experience it.

7 The case generated a huge amount of academic writing. See, for example, Donna M. Eansor and Christopher Wydrzynski, “‘Troubled Waters’: Deductibility of Business Expenses Under the Income Tax Act, Child Care Expenses and *Symes*” (1993) vol. 11, no. 2 *Canadian Journal of Family Law* 249-85; Audrey Macklin, “*Symes v. M.N.R.*: Where Sex Meets Class” (1992) vol. 5, no. 2 *Canadian Journal of Women and the Law* 498-517; Gabrielle St-Hilaire, “Fange législative: La déduction des frais de garde d’enfants à l’article 63 de la Loi de l’impôt sur le revenu” (1998) vol. 10, no. 1 *Canadian Journal of Women and the Law* 17-59; Claire F.L. Young, “Child Care and the Charter: Privileging the Privileged” (1994) vol. 2, no. 1 *Review of Constitutional Studies* 20-38; and Claire F.L. Young, “(In)visible Inequalities: Women, Tax and Poverty” (1995) vol. 27, no. 1 *Ottawa Law Review* 99-127. As Johnson illustrates in *Taxing Choices*, it also generated considerable public comment in the press: supra note 2, at 143-58.

for some was a heroine, for others a villain.<sup>8</sup> It is a story that forces us to think hard about how gender discrimination might be made invisible by the privilege of class. Rebecca Johnson has taken the concept of the “story” seriously. In keeping with the literary theme, the book opens with a poem, and the heart of the book is written as a play.

## THEORETICAL EXPLORATIONS AND TAX SUBSIDIES FOR RETIREMENT SAVING

Perhaps the best way to underscore the important contribution of Johnson’s work to tax policy analysis is to apply her insights to a current tax policy issue. In this section I use her work to frame a critical analysis of tax preferences for retirement saving. My starting point is twofold. First, for a variety of reasons, women have less access to these tax subsidies than men. Second, even if women do have access to tax preferences for retirement saving, they receive fewer of these subsidies than men do. Using Johnson’s theoretical analysis, I shall endeavour to throw light on why the current tax rules with respect to registered pension plans (RPPs) and registered retirement savings plans (RRSPs) discriminate in this fashion. Key to my analysis is a point that is central to Johnson’s work—namely, that tax law does not operate in a vacuum and any inadequacies in the rules can be fully understood only when they are examined in the full social and economic context in which they operate.

Considerably more elderly women live below the poverty line than elderly men.<sup>9</sup> While there are a variety of reasons for this state of affairs, I suggest that one is women’s lack of income, relative to that of men, from pension plans such as RPPs and RRSPs. Statistics have consistently shown that fewer women than men are members of RPPs, and women contribute less to these plans.<sup>10</sup> With respect to RRSPs, fewer women than men contribute, they contribute less than men, and they have less money in their RRSPs than men do.<sup>11</sup> The result is that “public” retirement programs such as old age security (OAS) and the Canada Pension Plan (CPP) represent the

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8 Johnson, supra note 2, at x to xii.

9 For example, in 1999 (the latest year for which figures are available) the poverty rate for women over 65 increased from 47.9 percent to 48.5 percent, while the rate for men over 65 fell from 35.1 percent to 31.9 percent: National Council of Welfare, *Poverty Profile, 1999* (Ottawa: National Council of Welfare, 2002).

10 In 1998, 38 percent of employed women and 42.3 percent of employed men belonged to occupational pension plans. While the difference in membership rates is not great, women contribute considerably less to RPPs than men because contribution amounts are based on salary and women tend to have lower salaries than men.

11 In 1999, 45 percent of men made contributions to RRSPs compared with 37 percent of women: Boris Palameta, “Who Contributes to RRSPs? A Re-examination” (2001) vol. 13, no. 3 *Perspectives on Labour and Income* (Statistics Canada catalogue no. 75-001-XPE) 7-13, at 7. For a more detailed breakdown of these statistics, see Claire F.L. Young, *Women, Tax and Social Programs: The Gendered Impact of Funding Social Programs Through the Tax System* (Ottawa: Status of Women Canada, October 2000), 43-46.

main source of income for elderly women, while the largest share of the income of elderly men comes from “private” retirement plans such as RPPs and RRSPs.<sup>12</sup>

Pension plans such as RPPs and RRSPs are heavily subsidized by the tax system. In the case of RPPs, employers and employees who contribute to these plans receive a tax deduction, and the income that accrues in the plan does so on a tax-free basis. Similarly, contributions to RRSPs are tax-deductible, subject to a limit on the amount, and again the accruing income is sheltered from tax. The result is a significant tax saving up front when the contributions are made and a deferral of tax on the income generated by the plans until funds are removed from the plan. For 2003, the estimated value of the tax deduction and sheltering of income from tax for RRSPs is \$11.88 billion (rising to \$12.67 billion in 2004), and the value for RPPs is \$6.23 billion.<sup>13</sup> Taken together, these two items constitute the largest personal tax expenditure for the year. The problem is that these tax subsidies are being enjoyed primarily by men, and women are being disadvantaged by their lack of access to them.

I now turn to a consideration of how some of Rebecca Johnson’s theoretical work might throw light on the issue of women’s unequal access to tax subsidies for retirement savings and possible approaches to remedy this problem. I draw on her analysis of the public/private divide, the intersection of class and gender, and the discourse of choice. My aim is to demonstrate how her work in *Taxing Choices* can, more generally, be applied to theorize other tax policy issues.

### The Public/Private Divide

As Johnson explains, the public/private divide is a conceptual framework that we use to draw the boundary between those matters that fall in the public domain and those that are private in nature.<sup>14</sup> Thus, we have, for example, the (public) state in contrast to the (private) market or the (private) family and sometimes the (public) market in contrast to the (private) family. The division, however, is not always a rigid one. As Susan Boyd has illustrated, the public/private divide is “an ideological marker that shifts in relation to the role of the state at particular historical moments, in particular contexts, and in relation to particular issues.”<sup>15</sup> Johnson begins her analysis of this theoretical framework by tracing the evolution of “matters of the family”

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12 Health Canada, “Senior Men and Women—Different Income Sources,” *Statistical Snapshot of Canadian Seniors* no. 20 (2001). I refer to RPPs and RRSPs as “private” pension plans because, unlike OAS, they are based on contributions by individuals to their own personal pension plans (RRSPs) or contributions by individuals and their employers to pension plans that are provided in the private market (RPPs).

13 Canada, Department of Finance, *Tax Expenditures and Evaluations 2002* (Ottawa: Department of Finance, 2002), table 1.

14 Johnson, *supra* note 2, at 13.

15 Susan B. Boyd, “Challenging the Public/Private Divide: An Overview,” in Susan B. Boyd, ed., *Challenging the Public/Private Divide: Feminism, Law, and Public Policy* (Toronto: University of Toronto Press, 1997), 3-33, at 4.

falling into the private sphere during the 19th and most of the 20th centuries.<sup>16</sup> Her point is that child care has been viewed in the past as a private matter, not one for public intervention, even though at various moments in time the state did see lack of child care as an impediment to women's participation in the paid labour force and thus worthy of some intervention on its part. One example was the enactment of the child-care expense deduction. At the same time, however, tax law and jurisprudence have always cast child care as a personal matter, and thus the costs have been held to be non-deductible personal expenses rather than deductible business expenses. As Johnson demonstrates, in *Symes*, the Federal Court of Appeal and the Supreme Court of Canada consistently viewed child care as a private responsibility. Neither court was prepared to see the costs associated with child care as ones incurred in the public domain—that is, the public market (or business) in contrast to the private family.

Theories of the public/private divide go a long way toward helping us understand why and how the current tax rules with respect to retirement savings favour men over women. It is important to note at the outset that the following consideration of the impact of the tax rules, like Johnson's analysis of *Symes*, is one that places the rules in the social and economic context in which they operate. My fundamental point is that the government is using public funds (tax subsidies) to encourage us to save for retirement, and it is doing so in a manner that relies on pension plans provided by the private market or the private individual (or family). This policy disadvantages women in comparison with men.

Take, for example, tax preferences for RPPs. The main reason that employers are given a tax deduction for contributions made to an RPP on behalf of their employees is to defray part of the cost of making those contributions, and thus to encourage employers to set up pension plans for their employees. The tax system is being used to encourage private market activity. But this policy is flawed when one examines its impact on women. Even though more women than ever are working outside the home, the employment rate for women lags behind that of men, with only 55 percent of women employed compared with 67 percent of men;<sup>17</sup> consequently, many women have no access to the tax subsidies for RPPs. It is not only women's lack of participation in the paid labour force that limits their ability to benefit from RPPs. The kind of work that women do in the private market is also a major factor. Only those who work for relatively large employers able to afford to provide an occupational pension plan will benefit. Those who work part-time, for example, generally do not have access to RPPs, and since the late 1970s, women have accounted for 70 percent of part-time workers.<sup>18</sup> The trend toward encouraging us to rely on income from private pension schemes in our retirement clearly

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16 Johnson, *supra* note 2, at 17-25.

17 Statistics Canada, *Women in Canada: Work Chapter Updates*, catalogue no. 89F0133XIE (Ottawa: Statistics Canada, April 2002), 10, table 2.

18 *Ibid.*, at 6.

disadvantages women in comparison with men because women have less access to the occupational pension plans and, therefore, to the accompanying tax subsidies.

There is another aspect to the issue of women's access to private pension plans. As mentioned above, tax subsidies are given to the private market to encourage it to provide pension plans. When the market does not or cannot respond to this encouragement, the tax system turns to the private family to fill the gap by permitting RPPs to provide spousal benefits after the death of the contributor. It also allows a tax deduction for contributions to spousal RRSPs, with the accompanying sheltering of income in the plan. These measures are intended to provide some relief for those women who do not have access to RPPs. But such an approach is also problematic. Tax-subsidized benefits are being provided to individuals solely on the basis that the recipient is in a spousal relationship. Single persons are discriminated against. The tax system has viewed some forms of dependency as deserving of tax relief, and the result is the privatization of economic responsibility for dependent persons. At the same time, the number of women living in relationships with men is decreasing and more women than ever are living alone, making the policy even less effective.<sup>19</sup>

### The Intersection of Class and Gender

The intersection of class and gender lies at the heart of both the *Symes* decision and Rebecca Johnson's book. At the Federal Court of Appeal, Elizabeth Symes was portrayed as a successful businesswoman who, in comparison with other women, was highly privileged. Indeed, when drawing this comparison, Decary J accused her of "trivializing the Charter" because she argued that she was discriminated against on the basis of her sex.<sup>20</sup> At the Supreme Court of Canada, Iacobucci J hinted that Symes was being selfish because she did not consider "low income Canadians" when she made her claim.<sup>21</sup> It seems that her class trumped her gender in the eyes of both the Federal Court of Appeal and the Supreme Court of Canada, with the result that her sex discrimination argument failed. While Johnson notes that the majority at the Supreme Court of Canada "seems to see that categories of disadvantage are complexly interrelated and to recognize the need for a contextual intersectional analysis,"<sup>22</sup> the result demonstrates some superficiality of analysis. The Supreme Court of Canada invokes class in a way that makes Symes the selfish one, the person who is to be blamed for not taking into account the oppression of others less well off than herself.

As Johnson notes, a proper understanding of the intersection of class and gender would be more complex than the one advanced by the Supreme Court of Canada.

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19 Young, *supra* note 11, at 13.

20 *Canada v. Symes*, [1991] 3 FC 507, at 528 (CA).

21 Johnson, *supra* note 2, at 138.

22 *Ibid.*, at 139.

Theories of intersectionality look at the way that gender intersects with other facets of women's lives, including, for example, race, class, and sexual orientation. The point of such an analysis is, as Johnson says, "to see whether or not the experiences of those located at the intersections can provide insights crucial to the construction of better theories."<sup>23</sup> In the context of tax subsidies for retirement saving, paying attention to the intersection of class and gender reveals some particular problems that are not so evident if the analysis is only gender-based.

One of the government's rationales for giving such significant tax preferences for contributions to RRSPs has been that these expenditures will help those without access to occupational pension plans (predominantly women) to save for their retirement. Despite this policy, there are still many women who are without access to RRSPs and therefore cannot take advantage of the tax preferences for these plans. The main reason is that they do not have the discretionary funds to contribute to RRSPs. We know that women tend to earn less than men and tend to be less wealthy than men. Latest figures indicate that women as a group earn considerably less than men.<sup>24</sup> The result is that women are not contributing to RRSPs to the same extent as men. In 1999, for example, the overall participation rate in RRSPs for men was 43 percent, while for women it was only 34 percent.<sup>25</sup> A significant reason for the difference in rates was the large number of low-income women who made no contributions.<sup>26</sup> Class has therefore complicated the gender analysis in this example. There is another important point to be made. Women of colour, aboriginal women, and women with disabilities earn less than their male counterparts and less than other women.<sup>27</sup> Again, the intersection of race and disability with gender may result in a more disadvantaged group within an already disadvantaged group.

There is another, more structural tax issue to be considered as we discuss the impact of the intersection of class and gender on how we devise incentives to encourage us to save for our retirement. In addition to allowing income generated in RPPs and RRSPs to accrue on a tax-free basis, contributions to these plans are deductible in the computation of income. The problem is that the value of a tax deduction is tied to the rate at which a taxpayer pays tax. This means that a tax deduction is worth more in terms of taxes saved to those with high incomes who pay tax at high rates than to those with lower incomes who pay tax at a lower average tax rate. The result is that generally men will benefit more than women from the tax subsidies for retirement savings by reason of their higher incomes.

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23 Ibid., at 7.

24 In 2000, the average earnings of women in Canada were \$24,390, while those of men were \$38,347, meaning that women are earning only 70 cents for every dollar earned by men. See Statistics Canada, "Earnings of Canadians: Highlight Tables, 2001 Census" (available online at <http://www12.statcan.ca/English/census01/products/highlight/Earnings>).

25 Statistics Canada, *Retirement Savings Through RPPs and RRSPs*, catalogue no. 74F0002XIB (Ottawa: Statistics Canada, July 2001), 30.

26 Ibid.

27 Young, *supra* note 11, at 13.

One of the benefits of an intersectional analysis is that it allows us to be more specific in our focus when considering how to remedy inequities such as those discussed above. In the case of tax preferences for retirement saving, the question is whether the tax system can ever be an appropriate tool by which to deliver these subsidies. While changes could be made to the tax system that would alleviate some of the problems, I argue that merely tinkering with the tax rules is not enough. For example, one change could be to convert the tax deduction for contributions to RRSPs to a tax credit, which would mean that taxpayers would receive the same amount in terms of taxes saved, regardless of their level of income. But a tax credit is of no value to those who pay no tax because of their low incomes. I suggest that even if the credit were made refundable so that both taxpayers and non-taxpayers would receive it (as with the goods and services tax credit), such a system would be very difficult to administer. As I have discussed, many of the problems stem from lack of access to the tax subsidies, and those problems cannot be resolved through changes to the tax rules. As long as women continue to have less access than men to RPPs because of the nature of the work that they do and are unable to contribute to RRSPs because of their low incomes, working to improve the current tax rules in respect of these “private” pensions will not get to the root of the problem. I suggest that a better approach is to limit the amount spent on tax preferences for retirement saving and to redirect the surplus to measures that improve the “public” pension schemes such as the OAS and CPP.

### **The Discourse of Choice**

One of the main themes running through the decision of the majority in *Symes* is the discourse of choice. As Johnson illustrates, the perception that it is a personal choice of women to have children underlay the court’s lack of understanding of Symes’s predicament. A stark example of this point was the questioning by Major J of counsel for the intervenor Canadian Bar Association.<sup>28</sup> Major J clearly saw having children as a personal choice made by Symes, a choice freely made and one for which she should bear all the consequences. Johnson discusses how the rhetoric of choice is used in a binary fashion—either one has a choice or one does not. Choice is neutral; it is unimpeded by the impact of one’s race, class, or gender on one’s choice. Any constraints on choice are invisible when the binary approach is taken.

In the context of saving for retirement, the discourse of choice goes like this. Women can choose to put their money in an RRSP or to spend it on something else. They can choose to work full-time or part-time, thereby determining whether or not they get access to an occupational pension plan. They can choose to work in the home and not work in the paid labour force. The impact on those “choices” of their education, their income level, their role as mothers, their race, their sexuality, and so on is immaterial and erased from the picture. The result is that there is no reason for the government to take women’s lack of access to tax subsidies for

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28 Johnson, supra note 2, at 88-89.

retirement saving seriously because they have chosen a course of action that does not entitle them to the subsidies, whether that be working for an employer who provides an RPP or simply making a contribution to an RRSP.

## CONCLUSION

One of the biggest compliments one can pay an academic writer is to say that his or her work will endure, that the writer's ideas will not become dated quickly, and that he or she has produced a body of work that can and will be used by others to advance our knowledge. I believe that Rebecca Johnson has accomplished all of this. In this comment I have tried to illustrate how her work can and should be used to theorize an important tax policy issue that has not, as yet, been subject to the theoretical frameworks that she applied to the child-care expense deduction and the *Symes* decision. There is much more work to be done in terms of applying different theoretical frameworks drawn from a variety of disciplines to tax policy issues, and this book has given us a great start.