

Symes v. Canada

Women's Court of Canada
[2006] 1 W. C. R. 31

Le Tribunal des Femmes du Canada (TFC) réexamine l'arrêt Symes c. Canada dans lequel la Cour suprême du Canada a refusé à Maître Symes la possibilité de déduire ses frais de garde d'enfants à titre de déductions d'affaires. Selon le Tribunal des Femmes, l'égalité substantive constitue un principe constitutionnel fondamental qui impose la reconnaissance de la valeur morale inhérente de chaque personne physique et admet que la pleine réalisation de cette valeur ne puisse s'atteindre par une simple application uniforme des règles. Comme principe constitutionnel fondamental, cette perspective doit influencer sur le contrôle judiciaire des décisions discrétionnaires du gouvernement et sur l'interprétation des lois. Le Tribunal des Femmes juge que le gouvernement a le devoir non seulement de s'abstenir de toute discrimination, mais aussi de remédier aux désavantages existants en formulant des lois et des politiques appropriées. Les tribunaux, à leur tour, doivent s'assurer que les gouvernements respectent leurs obligations en faisant tout ce qui leur est « pratiquement possible » pour promouvoir l'égalité substantive. Les jugements qui prennent en considération l'égalité substantive doivent, par définition, tenir compte de l'ensemble du contexte de la loi ou de la politique en question. En examinant le contexte pertinent à la revendication de Maître Symes, il est clair que les femmes ont subi, et continuent de subir, des injustices sociales et économiques dans leur travail rémunéré et non rémunéré. L'analyse classique des lois fiscales place les dépenses de garde d'enfants au rang des dépenses personnelles. Le contexte social sous-jacent met en lumière le fait que cette analyse découle de normes culturelles désuètes qui privilégient une conception du monde du travail adapté aux besoins des hommes d'affaires uniquement. Le Tribunal des Femmes du Canada infirme la décision de la Cour suprême et juge que les gens d'affaires qui engagent des frais de garde d'enfants légitimes en vue de gagner ou de produire un revenu d'entreprise ne doivent pas être privés de l'avantage d'une déduction fiscale de leurs dépenses.

The Women's Court of Canada reconsiders the 1993 case of Symes v. Canada, in which the Supreme Court of Canada disallowed Ms. Symes's childcare expenses as business deductions. According to the Women's Court, substantive equality is a fundamental constitutional principle that requires recognition of the inherent moral worth of each individual and acknowledgment that full realization of this worth cannot be achieved through a simple uniform application of rules. As a fundamental constitutional principle, this perspective must inform judicial review of discretionary governmental decisions and statutory interpretation. The Women's Court finds that the government has a duty not only to refrain

from discrimination but also to correct existing disadvantages through the formulation of appropriate law and policy. Courts, in turn, must ensure that governments are fulfilling their obligations by doing all that is “practically possible” to promote substantive equality. Judgments that account for substantive equality considerations must, by definition, take into account the full context surrounding the law or policy in question. In examining the context relevant to Ms. Symes’s claim, the Women’s Court finds that women have suffered, and continue to suffer, social and economic inequities in their paid and unpaid work. While traditional tax analysis characterized childcare expenses as personal expenses, viewing this interpretation in light of the underlying social context reveals that it is based on outdated cultural norms that privilege a conception of working life adapted to the needs of businessmen. The Women’s Court of Canada reverses the decision of the Supreme Court of Canada and holds that business people who legitimately incur childcare expenses for the purpose of gaining or producing income from business must not be deprived of the benefit of a business deduction for their expenses.

Reconsideration of *Symes v. Canada*, [1993] 4S.C.R. 695 (judgment of the Supreme Court of Canada reversed).

The decision of the Women’s Court of Canada was delivered by:

MELINA BUCKLEY

I. Introduction

1. Ms. Symes’s claim is at once simple and complex. She asks this Court to confirm that childcare costs that she incurred to allow her to engage in her business activities are deductible as business expenses under the *Income Tax Act (ITA)*, R.S.C. 1952, c. 148. At one level, this claim is a relatively simple issue relating to statutory interpretation of the proper treatment of childcare expenses under the *ITA*. At another level, it raises complex issues regarding the role of equality rights and women’s status within Canadian society. As in all equality claims, a resolution of the issues requires a deep appreciation of the full political, social, and economic context.

2. Rather than proceeding on two separate tracks of analysis, one dealing with the appropriate statutory interpretation and the other addressing the equality rights analysis under the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11, as was done by the courts, I prefer to look at this claim through statutory interpretation fully infused with equality norms. The Canadian Constitution, and, in particular, the fundamental constitutional principle of substantive equality, demands an ongoing process of scrutiny of the underlying norms that shape laws and policies in order to reveal any

embedded structures of inequality and to contribute to the overreaching goal of substantive equality.

3. Societal responsibility for childcare and its impact on women's equality is as vitally important an issue today, in 2006 before this court, as it was when this claim was decided by the Supreme Court of Canada in 1993. The failure to challenge the long-standing social norms associated with gender roles and the division of labour in the household as well as the lack of recognition for the public good of caring for children continue to cast a long shadow on the struggle for women's equality. To the detriment of children, women, and Canadian society as a whole, only minimal progress has been made in acknowledging and acting upon the collective responsibility for childcare in the intervening years.

4. The tax rules engaged in Ms. Symes's claim afford only a narrow opportunity to recognize the important connection between women's inequality and society's continued failure to ensure that women do not bear unfair burdens as an incident of motherhood. Her claim does not give rise to a comprehensive solution to the urgent need for publicly funded, high-quality childcare. Nor does it acknowledge or rectify the undervaluing of the work of childcare providers, the majority of whom are particularly vulnerable to experiencing poor working conditions and discriminatory pay due to their status as recent immigrants and/or racialized minorities. Lack of comprehensiveness cannot be used as an excuse to ignore an existing inequality. By failing to address the substantive equality concerns in this case, the courts missed an important opening to press for reconstruction of the tax system so that it begins to fully reflect women's realities as well as men's. This omission must be rectified.

5. I conclude that childcare expenses can be claimed as a business expense where the taxpayer demonstrates that they are a legitimate expense that has been incurred for the purpose of gaining or producing income from the business.

II. Factual Context

6. The relevant facts can be easily summarized and are not in dispute. Elizabeth Symes practises in the legal profession and between 1982 and 1985 hired a nanny, Ms. Simpson, to care for her two children so that she could work. During 1982, 1983, and 1984 respectively, the appellant paid Ms. Simpson \$10,075, \$11,200, and \$13,173 to care for her one child and during 1985, she paid her \$13,359 to care for her two children. Ms. Symes deducted the salary she paid to Ms. Simpson as a business expense. The Minister of National Revenue (MNR) disallowed these deductions, although he allowed a revised childcare deduction under section 63(1) of the *ITA* of \$1,000 for the 1982 expense, a \$2,000 deduction for the 1983 and 1984 expenses, and a \$4,000 deduction for the 1985 expense. The MNR disallowed the deductions on the basis that the wages paid were personal or living expenses under section 18(1)(h) of the *ITA*. They were not outlays or expenses

incurred for the purpose of gaining or producing income from business under section 18(1)(a) of the *ITA*.

7. After the appellant's objection to, and Revenue Canada's confirmation of, the notices of reassessment, the appellant successfully challenged these notices in the Trial Division of the Federal Court. The Trial Division held that the appellant could deduct the payments to Ms. Simpson as business expenses ([1989] 3 F.C. 59). The MNR appealed and, in allowing the appeal, the Federal Court of Appeal restored the notices of reassessment ([1991] 3 F.C. 507). The Supreme Court of Canada dismissed the appeal, Justice Claire L'Heureux-Dubé and Justice Beverley McLachlin dissenting. The Women's Court of Canada chose to reconsider this case because of the importance of the equality issues raised by Ms. Symes's claim and the overarching need to clarify the role of equality rights norms in statutory interpretation.

III. Relevant Statutory and Constitutional Provisions

8. Together, sections 9 and 18(1)(a) of the *ITA* provide that a taxpayer cannot deduct from his or her income any expenses unless they are incurred for the purpose of gaining or producing income. Section 18(1)(h) further provides that personal expenses or living expenses are not business expenses and therefore cannot be deducted when computing taxable income, except when incurred while a businessperson is travelling for business purposes.

9. Section 63 of the *ITA* provides a limited deduction for childcare expenses. The deduction is available, in most circumstances, to the lower income-earning spouse in a family unit. It is a non-source-based deduction available to all parents who meet the eligibility requirements of section 63.

10. The relevant legislative provisions are set out at the end of the judgment for ease of reference.

IV. Judicial History

A. Federal Court, Trial Division, [1989] 3 F.C. 59 (Cullen J.)

11. All of the courts separated their analysis into two discussions: (1) a statutory interpretation of whether or not "business expenses" under the *ITA* can encompass childcare expenses; and (2) the application of section 15(1) of the *Charter* to the facts of this case.

12. At trial, Justice Austin Cullen held that a determination of what constitutes a legitimate business expense involves the application of two tests: (1) a "business test" based on "whether the expense or disbursement was consistent with ordinary principles of commercial trading or well accepted principles of business practice" (at 66-7) and (2) a business income test according to which a business expense must be made or incurred for the purpose of gaining or producing income from the business in order to satisfy

section 18(1)(a) of the Act. He reviewed several cases that have interpreted this requirement, before suggesting that courts have given a “progressive interpretation” to section 18(1)(a) (at 71). For Cullen J., the concept of a business expense has been “adapted to reflect the changing ways of doing business” (at 71).

13. In the result, Cullen J. was satisfied that the taxpayer had used good business and commercial judgment in dedicating part of her resources from the practice of law to the provision of childcare. He stated:

This decision was acceptable according to business principles which include the development of intellectual capital, the improvement of productivity, the provision of services to clients and making available the resource which she sells, namely her time.

Further, Armstrong’s evidence supports the notion that the availability of child care increases productivity by enhancing the peace of mind of employees. Enhancing productivity is something that is totally in keeping with well-established business practices. Moreover, Armstrong’s evidence indicates that the absence of child care is a barrier to women’s participation in the economy, in terms of paid work and income-generating work and therefore lowering the barrier by arriving at a satisfactory means of dealing with the costs of child care, would make good business sense (at 73).

14. Having thus found that the childcare expenses satisfied sections 9 and 18(1)(a), Cullen J. examined whether section 18(1)(h) prohibited their deduction as personal or living expenses. On this question, he stated that, on the facts of the case, and particularly because of the appellant’s legal obligation to care for her children “a distinction has been made between child care which allows one to participate in the economy and generate income and child care which allows one to go out on social occasions” (at 74). According to Cullen J., only the latter are discretionary personal living expenses. For these reasons, as a matter of statutory interpretation, and based upon the facts of the case, Cullen J. concluded that the childcare expenses qualified as business expenses deductible in the computation of a taxpayer’s profit. It is noteworthy that in so doing, Cullen J. stated the following: “With respect to section 63 of the Act, I would like to note at this point in my reasons that the defendant has admitted that if the child care expense is a proper business expense pursuant to sections 3, 9 and 18 of the Act, then section 63 cannot prevent it from being allowed as such” (at 75).

15. Despite his conclusions on the interpretive issue, Cullen J. considered the taxpayer's *Charter* argument in the alternative. He recognized that, since section 15(1) did not come into effect until 17 April 1985, and since that section does not operate retrospectively, the taxpayer could not make a *Charter* claim respecting childcare expenses incurred prior to the section's coming into force. Relying on *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, Cullen J. found that to deny the deduction of childcare expenses as part of the profit determination would be to violate section 15(1) of the *Charter*. On the question of discrimination, Cullen J. characterized the Act as facially neutral but held that there was an adverse impact upon the taxpayer, in so far as she was compelled to pay more taxes and take on extra paper work by virtue of the unequal treatment. Viewed another way, he held that the taxpayer was "denied the benefit of a tax deduction" (at 82). Cullen J. tied the discrimination to the "personal characteristics of sex and family or parental status" (at 84). Turning to section 1, he found that no pressing and substantial objective for non-deductibility had been offered.

16. Since Cullen J. found that there was no evidence indicating that Parliament had made a legislative choice against the full deductibility of childcare expenses, he indicated that courts are left to determine, in accordance with the *Charter*, "whether the concepts of profit and business expenses" permit deductibility (at 87). Upon this basis, he concluded that sections 9 and 18(1)(a) permit the deduction of childcare expenses as business expenses. This conclusion was an interpretive one, which was said to be "consistent with the requirements of the *Charter*," and which involved no questions of "'deleting,' 'amending' or 'reading in'" (at 87).

17. In the result, Cullen J. held that the taxpayer was allowed to deduct the payments made to Ms. Simpson as a business expense for taxation years 1982, 1983, 1984, and 1985. This conclusion rested solely upon his approach to statutory interpretation. With respect to his alternative conclusion involving *Charter* analysis, Cullen J. held that the payments for 1985 and subsequent taxation years were also deductible pursuant to section 15 of the *Charter*.

B. Federal Court of Appeal, [1991] 3 F.C. 507 (Décary J.A., Pratte and MacGuigan J.J.A. concurring)

18. The Federal Court of Appeal rejected the trial judge's approach. Justice of Appeal Robert Décary, writing for the court, summarized his overall disagreement with the taxpayer and the court with respect to the proper interpretation of the *ITA*. He stated that

the concept of a business expense has been developed exclusively in relation to the commercial needs of the business, without any regard to the particular needs of

those in charge of the business, and I have difficulty in seeing how a change in the particular needs of these persons could justify modifying an interpretation which has nothing to do with these needs. Having said that, I consider that the case at bar does not require a conclusion on this point for the simple reason that Parliament has itself already amended the Income Tax Act to provide for the specific situation relied on by the respondent (at 523).

19. This decision was set within the legislative context of the fiscal history of childcare expenses, and particularly section 63 of the *ITA*, citing a royal commission report and a government white paper. Focusing as he did on the government policy on childcare expenses, he rejected Ms. Symes's argument that her childcare expenses were made in the ordinary course of business or as part of the income-earning process. He characterized her legal obligation to care for her children as an obligation independent of her business. For him, the childcare obligation is imposed upon both parents and is, in any event, a "natural obligation" (at 522).

20. In support of this conclusion, Décary J.A. examined the language of section 63. His examination caused him to conclude that section 63 was clearly intended by Parliament to apply to "a parent carrying on a business and income earned by the parent from the operation of a business" (at 525). For this reason, he located childcare expenses solely within section 63, excluding such expenses from the concept of "business expenses" implicit within section 18(1)(a). He did not otherwise examine the meaning of "profit" in section 9 of the *ITA*.

21. Décary J.A. also rejected Ms. Symes's section 15(1) claim. While his *Charter* analysis is somewhat convoluted, he was clearly concerned about the propriety of challenging what can be loosely called "socioeconomic legislation" through the *Charter*. Décary J.A. recoiled from the idea that the taxpayer could use section 15 of the *Charter* to obtain a positive guarantee of equality, one which would compel "legislatures to adopt measures enabling . . . her to work" (at 530).

22. Furthermore, he held that "[a]t bottom, the approach put forward by the respondent risks trivializing the *Charter*" because business women were not members of a disadvantaged group (at 528).

23. Based on this foundation, Décary J.A. characterized section 63 as a statutory benefit adopted by Parliament "in the enlightened exercise of its discretion" (at 530). He then came to the following conclusion, which is clearly a conclusion relating to *Charter* analysis per se, rather than to the use of *Charter* values as an aid to statutory interpretation:

By adopting section 63 and deciding to create a new type of personal deduction for parents applying to child

care expenses, Parliament made a political, social and economic choice. On the evidence presented, that choice favours women more than men, and the respondent has no complaint about this. I do not see how a provision which favours all women could directly or indirectly infringe the right of women to equality, and I am not prepared to concede that professional women make up a disadvantaged group against whom a form of discrimination recognized by section 15 has been perpetrated by the adopting of section 63, or would be perpetrated by this Court's refusal to interpret paragraph 18(1)(a) so as to give a self-employed mother an additional deduction for a business expense; and even if there were discrimination within the meaning of section 15, I consider in light of the ample evidence of justification submitted to the Court that it is not the function of this Court to substitute its choice for the one made by Parliament, with full knowledge of the options proposed and in keeping with an overall policy of assisting the family (at 531-2).

24. The court allowed the appeal, restored the notices of assessment, and ordered the appellant to pay the respondent's costs at trial and on appeal.

C. Supreme Court of Canada, [1993] 4 S.C.R. 695

(1) Judgment of the Majority

25. Justice Frank Iacobucci writing for himself and his six male colleagues carried out an extensive review of the case law whereupon he concluded that there had been various legal tests but that the determination of whether an expense is a business or personal expense should have focused on the purpose of the expense.

26. He rejected traditional characterizations of childcare expenses as personal expenses given the increase of women's participation in the workforce. He noted that the traditional analysis was informed by gendered and irrelevant concerns.

27. Further, he found that it is misleading to presuppose that activities occurring within the domestic environment are, for this reason alone, legitimately excluded from the income-producing circle, since the concerns of women have been confined to the domestic environment as a historical matter. He concluded that the respondent government's test focusing on the "income-producing circle" was pernicious given that the Court was asked to

consider whether the needs of women had been disregarded in the definition of “business expenses.”

28. Iacobucci J. found that arguments can be made for and against the classification of the appellant’s childcare expenses as business expenses:

However, in general terms, I am of the view that child care expenses are unique: expenditures for child care can represent a significant percentage of taxpayer income, such expenditures are generally linked to the taxpayer’s ability to *gain* or *produce* income, yet such expenditures are also made in order to make a taxpayer *available* to the business, and the expenditures are incurred as part of the development of another human life. It can be difficult to weigh the personal and business elements at play (at 742).

29. He came close to making a finding for Ms. Symes, agreeing with her that history had tended to conflate the “needs of businessmen with the needs of business” and that it might be correct to assert that the changing composition of the business class and changing social structure demand a reconceptualization of business expenses.

30. However, he found it unnecessary to determine whether such a reconceptualization was appropriate having regard to the presence of section 63 in the *ITA*. In his view, section 63 was a comprehensive code dealing with childcare expenses. His ultimate conclusion was:

For these reasons, a straightforward approach to statutory interpretation has led me to conclude that the *Act* intends to address child care expenses, and does so in fact, entirely within s. 63. It is not necessary for me to decide whether, in the absence of s. 63, ss. 9, 18(1)(a) and 18(1)(h) are capable of comprehending a business expense deduction for child care. Given s. 63, however, it is clear that child care cannot be considered deductible under principles of income tax law applicable to business deductions (at 750-1).

31. Iacobucci J. found that the clear and unambiguous language of section 63 obviates the need to employ *Charter* values to assist in interpretation. In the absence of ambiguity, recourse to *Charter* values in statutory interpretation would result in an interpretative process that effectively precludes section 15 breaches since a court could simply interpret away the discriminatory impact of a provision rather than ruling that the offending provision is unconstitutional and ordering the government to re-craft it. This approach would, in his view,

also be problematic because it would preclude the possibility of government justification under section 1 of the *Charter*. Iacobucci J. recast the appellant's section 15(1) argument, shifting the terrain away from applying section 15(1) to the conceptualization of business expenses and substituting a section 15 challenge to section 63, which had not been argued by Ms. Symes.

32. He found that section 63 did not discriminate on the basis of sex. In his view, section 63 only created a facial distinction between those persons who incur childcare expenses with respect to an eligible child and those who do not. Nor did he find that section 63 had an adverse impact on women:

In my opinion, the appellant taxpayer has failed to demonstrate an adverse effect created or contributed to by s. 63, although she has overwhelmingly demonstrated how the issue of child care negatively affects women in employment terms. Unfortunately, proof that women pay social costs is not sufficient proof that women pay child care expenses. Those social costs, although very real, exist outside of the *Act*. In the same fashion that our income taxation system does not recognize various forms of imputed *income*, it equally does not involve itself with any form of imputed *expense*. In this respect, this appeal was not argued to suggest that the government had a positive obligation to account for the social costs of child care prior to taxing its citizens. Such a suggestion would lead this Court well beyond the confines of the present appeal (at 763).

33. Iacobucci J. appears to be particularly troubled by Ms. Symes's status as a claimant. He was unconvinced by her evidence that she and her husband had made a family decision that she was responsible for childcare expenses. He was unhappy by her focus on her own claim as a self-employed woman and wondered why she had not also addressed the rights of women employees to greater tax relief for childcare expenses. More than anything else, he was perturbed by the fact that this claim was not brought on behalf of a single mother whose claim, he suggested, would be much easier to address on equality rights terms.

(2) Judgment of L'Heureux-Dubé J. (dissent)¹

34. In her dissent, L'Heureux-Dubé J., began with the recognition that although ostensibly about the proper statutory interpretation of the Act,

1. Justice Beverley McLachlin J. (as she then was) concurred in the dissent but, writing her own brief reasons, agreed with Justice Claire L'Heureux-Dubé's interpretation of sections 9, 18, and 63 of the *ITA* and section 15 of the *Charter* and also with her conclusion that the appellant's childcare expenses are deductible as business expenses under section 9 of the *ITA*.

this case reflects a far more complex struggle over fundamental issues, the meaning of equality and the extent to which these values require that women's experience be considered when the interpretation of legal concepts is at issue (at 786). The resolution of the legal issues required an inquiry into "fundamental and complex questions about the visions of equality and inclusivity that mould our legal constructs" (at 776).

35. She substantially agreed with the approach Iacobucci J. had taken with regard to the definition of "business expense," stating that "the logical conclusion to my colleague's analysis, although he does not state it as such, is that sections 9, 18(1)(a), and 18(1)(h) do not prevent the deduction of childcare expenses as a business expense" (at 787). However, her conclusion as well as her analysis of the impact of section 63 of the *ITA* and section 15(1) of the *Charter* were at odds with the majority.

36. Her primary focus was on providing a gendered statutory interpretation. She recognized that business people of either sex can be the primary caretaker of children and therefore should be able to deduct childcare expenses where they are a legitimate business expense that one incurs in order to gain or produce income from a business. While the result was gender neutral, the analysis could not be (at 790-1).

37. She noted that over the past decades, the scope of deductible business disbursements had been expanded a number of times. It had been held to include a wide array of expenditures, such as club dues, meals and entertainment expenses, car expenses, home office expenses, and legal and accounting fees, to name only a few.

38. Of particular relevance to the case at hand, from L'Heureux-Dubé J.'s perspective, was the general recognition that the concept of profit is a net calculation and, as such, it is clear that an employer or a business may claim a deduction for employees' salaries and for employer's contributions to an employee benefit package. A daycare centre may constitute such an employee benefit. If this is so, why should the wages paid to the appellant's nanny not be deductible as a business expense? There was no dispute that salaries paid to employees are deductible as business expenses, provided they are laid out to earn income and are reasonable. Further, under certain circumstances, wages or salaries paid to spouses or children are also deductible as business expenses.

39. She concluded that the reality of Ms. Symes's business life necessarily includes childcare: "The 1993 concept of business expense must include the reality of diverse business practices and needs of those who have not traditionally participated fully in the world of business" (at 802). Furthermore, she rejected the argument that section 63 was a comprehensive code that prevented the deductibility of childcare expenses as business expenses. She concluded that there is nothing in the wording of section 63 that overrides the application of sections 9 and 18. Second, such an interpretation was, in her view, inconsistent with the purpose and historical basis for the enactment of

section 63, with traditional approaches to diverse deductions under the *ITA* and, finally, with the *Charter*:

I suggest that, in this light, many of the same questions, that were examined with regard to the above analysis of ss. 9(1), 18(1)(a) and 18(1)(h), must take place in the context of s. 63. Just as these sections of the *Act* have developed with regard solely to the needs of a traditionally male practice of business, so has the history of s. 63 been tainted by a specific view of the world (at 806).

40. Section 63 provides general relief to parents, but nothing in its wording implies that business expense deductions available under section 9(1) should be abolished or restricted in this respect. Had Parliament intended to submit the deduction of childcare expenses to the application of section 63 it would have expressed it in clear language. She further noted that there are a number of instances under the *ITA* where a taxpayer may claim a deduction under more than one section for an expense incurred for a single purpose. For example, tuition deductions may be deducted under the section for tuition expenses or under general business expenses incurred for the purpose of gaining or producing income.

41. L’Heureux-Dubé J. recognized that the result of her analysis is that business persons will be able to deduct more childcare costs than employed persons. However, this stemmed from the rationale of the *ITA* itself. Business deductions generally are restricted to those in business and are not available to employed people. An employee cannot deduct an office at home, car expenses, meal and entertainment expenses, nor club dues or fees. In addition, employers who hire staff can deduct their salaries and employers who provide daycare for their employees may deduct the expenses. Employees enjoy no such comparable deductions.

42. L’Heureux-Dubé J.’s analysis and result were further strengthened by reference to the equality values in sections 15 and 28 of the *Charter*. She affirmed that the Court must focus on the reality in which Ms. Symes lives—as a lawyer and as a mother: “A reality in which she suffers disproportionately to men and, as such, is discriminated against on the basis of her sex. She has proven that she has incurred an actual and calculable price for child care and that this cost is disproportionately incurred by women” (at 821).

43. In her view, Ms. Symes had suffered an actual and calculable loss as a result of not being able to deduct a legitimate business expense that she incurs. The goal and the requirement of equality, as set out by section 15 of the *Charter*, made it unacceptable that Ms. Symes be denied the right to deduct her business expenses merely because such expenses are not generally incurred by

businessmen. Denial of these deductions would constitute discrimination under the *ITA*.

44. L'Heureux-Dubé J. is not unmindful of the reality that there are many broader issues respecting childcare and women's equality and that income tax deductions are not the best way for government to address these issues. Nevertheless, it is not the responsibility of Ms. Symes to reconcile these deeper dilemmas through her claim.

45. I accept L'Heureux-Dubé J.'s conclusions and find much to commend in her analytical approach. However, I would approach these issues slightly differently as set out in the text that follows.

V. Issues

46. In order to properly decide Ms. Symes's claim, three key preliminary issues must be addressed. The first is the nature and form of equality analysis under the Canadian Constitution. The second is the contextualization of the appellant's claim within a full understanding of the situation of inequality experienced by women in the workplace and the economy. Third, given the difficulties faced by the Court concerning the evidentiary record, this is also an opportune case to clarify the role of the courts in this regard.

47. A constitutionally based interpretation of the relevant tax provisions—that is, an interpretation that is fully infused with substantive equality norms—will resolve Ms. Symes's claim. There is no need to undertake a separate *Charter* analysis in this case.

A. Equality in the Canadian Constitution

48. The Supreme Court of Canada has from time to time employed a substantive equality analysis as an interpretive aid in matters involving the evolution of common law doctrine and in statutory interpretation. Examples of this approach include *Norberg v. Wynrib*, [1992] 2 S.C.R. 226, where the Court incorporated the nature of the inequality between a male physician and his female patient into its application of the tort of battery; *Moge v. Moge*, [1992] 3 S.C.R. 813, where the Court wove an understanding of the complex nature of women's economic inequality into its consideration of the law of spousal support; and *R. v. Lavallee*, [1990] 1 S.C.R. 852, where expert evidence of the psychological experiences of battered women was used to inform the standard of reasonableness to be applied when self-defence is invoked by women who have been victims of domestic violence.

49. The Supreme Court of Canada has also recognized that equality is one of the central values or principles essential to a free and democratic society

(*R. v. Oakes*, [1986] 1 S.C.R. 103 at 136). However, Canadian courts have, until now, failed to give explicit recognition to the importance of equality as a constitutional norm. This omission must be corrected given that it is in large part responsible for the errors made in analyzing Ms. Symes's claim in the courts.

(1) Equality as a Fundamental Constitutional Principle

50. Equality is one of the fundamental constitutional principles that provides the structure for, and informs the interpretation of, the written constitutional text.

51. These principles or “unwritten norms” are the political, social, and legal values or principles upon which the ordering of Canadian society rests. They establish the parameters of our constitutional framework, influence the interpretation of express provisions, and fill in the gaps of written constitutional tests.

52. The Supreme Court of Canada has recognized a number of fundamental constitutional principles including the rule of law, the independence of the judiciary, federalism, democracy, freedom of speech, and the protection of minorities (see *Quebec Secession Reference*, [1998] 2 S.C.R. 217; *Provincial Judges Reference*, [1997] 3 S.C.R. 3; and *Manitoba Language Rights Reference*, [1985] 1 S.C.R. 721).

53. It is time to recognize equality as one of the fundamental constitutional principles that provides the structure for, and informs the interpretation of, the written constitutional text. Equality is the paradigm norm that informs other human rights. Democracy, the protection of minorities, and the rule of law (which encompasses the notion of equal access to justice), stem from, and embody, equality norms. It is essential to recognize that substantive equality is the lifeblood of the Canadian Constitution. Equality in this larger sense connotes an equal right to dignity, autonomy, and participation and means that the fundamental conditions by which all individuals can fully participate in society must be provided through the satisfaction of political, social, economic, and cultural needs.

54. This understanding was first discussed by Dr. Patricia Hughes in “Recognizing Substantive Equality as a Foundational Constitutional Principle” (1999) 22 *Dalhousie Law Journal* 5. She notes that the importance of equality as a social, legal, and political value in Canadian society has been acknowledged in many ways since Confederation, in statutes, official policies and practices, and judicial interpretation. The list of examples of this normative commitment is very long and reveals that, without a doubt, equality has been a fundamental societal value in Canada since its inception. While the progression towards attaining substantive equality has been uneven, the commitment to equality has been steadfast.

(2) Application of the Substantive Equality Norm

55. Many sections of the Constitution are concerned with, and speak to, equality rights, notably sections 15 and 28 of the *Charter*, the official language provisions in sections 16-23 of the *Charter*, the section 36 commitment to promoting equal opportunities and to providing essential public services for the well-being of all Canadians, and many of the provisions concerning Aboriginal rights. The primordial character of substantive equality norms is further reinforced by their central place in the international human rights guarantees that bind Canada, as well as by their centrality in domestic human rights legislation duly enacted within every single Canadian jurisdiction.

56. The pre-eminence of equality in the Constitution and in human rights legislation is indicative of its status as a fundamental constitutional principle. These different iterations of equality are complementary and mutually reinforcing. Yet recognition of equality as a fundamental constitutional principle also serves a broader constitutional purpose. Constitutional principles have a unique role to play in constitutional litigation.

57. Underlying constitutional principles give rise to substantive legal obligations. They are considered to have “full legal force” (*Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753 at 845) and constitute substantive limitations upon government action. These principles may give rise to very abstract and general obligations or they may be more specific and precise in nature. The principles are not merely descriptive, but they are also invested with a powerful normative force and are binding upon both courts and governments (*Quebec Secession Reference*, at para. 54).

58. Fundamental constitutional principles have an important role to play where there is no actual constitutional challenge being made to impugned legislation or government action. It has long been accepted that unwritten constitutional norms may provide a basis for judicial review of discretionary decisions (*Roncarelli v. Duplessis*, [1959] 2 S.C.R. 121; see discussion in *Lalonde c. Commission de Restructuration des Services de Santé* (2001), 56 O.R. (3d) 505 (Ont. C.A.) at para 175-7). Judicial review of discretionary decisions on the basis of fundamental Canadian constitutional and societal values was reinforced by the Supreme Court of Canada’s decision in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

59. While courts must ensure that governments have a “margin of manoeuvre” in exercising discretion, there are significant judicially enforceable limits where fundamental constitutional and societal values are at stake.

60. In the case at bar, the fundamental constitutional principle of substantive equality provides the framework for the review of administrative decisions made in interpreting and applying the *ITA*. Ms. Symes’s claim

requires that the respondent government fully recognize her status as an equal citizen and take her claim for equal treatment into account.

61. Given the confusion in the courts concerning equality analysis, it is important to provide clarification concerning, first, the constitutional norm of substantive equality both as an unwritten fundamental norm that orders Canadian society and informs Canadian law as well as a principle embodied in specific constitutional guarantees of the right to equality and, second, the nature of the government's obligation to promote substantive equality.

62. Canadian equality rights law is predicated on an understanding that there are significant inequalities within Canadian society and that the purpose of equality rights is to uncover and remedy existing inequalities and prevent their re-occurrence. This is the concept of substantive equality. I refer to substantive equality to reflect the concern about content rather than form.

63. Shelagh Day and Gwen Brodsky have developed a helpful definition of substantive equality (*Women and the Equality Deficit: The Impact of Restructuring Canada's Social Programs* (Ottawa: Status of Women Canada, 1998)):

Substantive equality, by contrast to formal equality, posits that:

- equality is not a matter of sameness and difference, but rather a matter of dominance, subordination, and material disparities between groups;
- the effects of laws, policies, and practices, not the absence or presence of facial neutrality, determine whether laws or actions are discriminatory;
- remedying inequality between groups requires government action;
- the so-called "private" realms of the family and the marketplace cannot be set outside the boundaries of equality inquiry or obligation, because they are key sites of inequality;
- neither liberty nor equality for individuals can be achieved unless equality is achieved for disadvantaged groups;
- it is essential to be conscious of patterns of advantage and disadvantage associated with group membership; and
- the test of equality is not whether an individual is like the members of a group that is treated more favourably by a law, policy, or practice; rather, the test is whether the members of a group that has historically been disadvantaged enjoy

equality in real conditions, including economic conditions (at 46-7).

64. One of the singular advantages of the notion of substantive equality is that it conceives of equality in the context of structural inequalities and not on the basis of the sameness/difference duality. The recognition that the moral worth of each individual cannot be acknowledged or realized in the same way has enormous implications for the ordering of Canadian society.

65. Structural inequalities operate through existing social norms and constructs that privilege some people and disadvantage others. These tightly knit norms and structures result in patterns of behaviour, stereotypical attitudes, ideas and values, institutional policies and procedures, and laws that perpetuate these privileges and disadvantages. In the absence of intervention, they continue to recreate inequality in a multitude of ways on an ongoing and daily basis. Decisions and actions that are informed by substantive equality interrupt the operation of patterns that reinforce inequality by giving rise to new behaviours, attitudes, ideas, values, practices, policies, and laws that conform to equality rights norms. The focus of these practices goes beyond remedying inequality and extends to creating equality. Equality can be created and re-created on a daily basis in the same way that inequalities are created and re-created. Constitutional review is one important avenue both for uncovering the structures of inequality as they manifest themselves in government actions, laws, and policies and for initiating steps towards the creation of equality.

66. The fact that there are structural inequalities within Canadian society does not undermine the fundamental nature of the equality norm. Rather it underscores the principle's aspirational character. This character has been adeptly captured with reference to the purpose of section 15 of the *Charter* by Justice Peter Cory in *Vriend v. Alberta*, [1998] 1 S.C.R. 493:

The rights enshrined in s. 15(1) of the *Charter* are fundamental to Canada. They reflect the fondest dreams, the highest hopes and finest aspirations of Canadian society. When universal suffrage was granted it recognized to some extent the importance of the individual. Canada by the broad scope and fundamental fairness of the provisions of s. 15(1) has taken a further step in the recognition of the fundamental importance and the innate dignity of the individual. That it has done so is not only praiseworthy but essential to achieving the magnificent goal of equal dignity for all. It is the means of giving Canadians a sense of pride (at para. 67).

While Cory J. was referring specifically to section 15, his words also speak to the fundamental role of equality as an unwritten norm of the Canadian Constitution.

(3) Government's Obligation to Promote Equality

67. Everyone has a public duty to promote equality. The public ethos that is borne from the fundamental constitutional principle of substantive equality and that is reflected in the equality provisions of the *Charter* involves an obligation on each and every one of us to take appropriate steps to ensure respect for human rights and human dignity everyday. Governments and courts are directly bound by constitutional principles and have specific duties to respect and promote them.

68. Governments have the dual obligation to refrain from discrimination and to ameliorate the position of groups within Canadian society who have suffered disadvantage by taking into account the needs of those groups in formulating law and policy (*Andrews v. Law Society of British Columbia*, *supra*; *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; and *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497).

69. Under the Canadian Constitution, governments have a positive duty to promote equality. The Supreme Court of Canada has recognized this proactive obligation with respect to section 15(1) of the *Charter*. For example, in *Eldridge*, the Court stressed that section 15(1) serves two distinct but related purposes:

First, it expresses a commitment—deeply ingrained in our social, political and legal culture—to the equal worth and human dignity of all persons... Secondly, it instantiates a desire to rectify and prevent discrimination against particular groups “suffering social, political and legal disadvantage in our society” (at para. 54).

70. While the full extent and nature of the positive obligation to promote equality have not been definitively elaborated by the Supreme Court of Canada, that Court has made important strides in this direction, particularly in the human rights context where it has held that employers have to do all that is “practically possible” with respect to ensuring equality rights in the workplace (*British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3). Similarly, the Canadian Constitution requires governments to do all that is “practically possible” to promote substantive equality.

71. As Justice Charles Gonthier emphasized in his reasons in *Nova Scotia (Worker's Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, every act of government must be in full conformity with the Constitution. Thus, all representatives of government, bureaucrat and legislator alike, must take steps to fulfill their duty to promote equality in every action. This primary obligation is a touchstone of constitutionality.

(4) Role of the Courts in Equality Litigation

72. The role of the courts under the Canadian Constitution is to ensure that governments fulfil this broad obligation to promote equality. Courts are required to review government action and government inaction in order to determine whether through executive, administrative, or legislative action the government has: (1) created further inequality or (2) failed to take into account existing inequalities leading to the perpetuation or reinforcement of disadvantage. Each case is an opportunity for the courts to ascertain whether governments have succeeded in discharging their obligations to promote equality generally under the Constitution and pursuant to specific constitutional provisions such as section 15.

73. The role of the courts is to set out the general parameters of what needs to be done to fulfil the constitutional equality obligations. In most cases, governments will retain responsibility to decide how best to carry out the court-enunciated principles.

74. The dialogue between legal and political institutions in this regard is by definition an ongoing process of interpretation. Judicial decisions are constitutional resources that assist governments in fulfilling their constitutional obligations.

(5) Structure of a Substantive Equality Analysis

75. Part of the difficulty that the courts experience in dealing with adverse effects discrimination claims including the case at Bar is that they continue to rely on the same treatment or formal approach to equality. While the courts have adopted the terminology of substantive equality, they are inconsistent in practice, frequently falling back on a more limited, formal understanding of equality. The normative goal of formal equality is neutral treatment. It does not comprehend that a seemingly neutral rule may not be neutral for women because it rests on sexist social structures. Many seemingly neutral rules retain their appearance of neutrality only as long as they are viewed in isolation from social patterns of inequality. In fact, the very idea of neutral rules should be suspect, especially given that many rules are made without the participation and input of women and other disadvantaged or excluded groups in society.

76. The first step in any equality rights analysis, whether it involves interpreting and applying the fundamental constitutional principle of substantive equality or a *Charter* challenge under section 15, is to undertake a full contextual analysis of the inequalities surrounding the claim. Without this first step, there is a strong tendency towards a narrow comparative analysis. In the absence of an appreciation of the context surrounding the claim, results-based comparisons tend to accept and reinforce the existing underlying norms and the status quo of inequality without subjecting them to constitutionally required scrutiny.

77. In contrast, a substantive equality analysis closely examines the beliefs, assumptions, and norms that shape the law and policy in question. Rather than being preoccupied with comparisons, the analysis takes into account the systems and structures that reproduce inequalities and examines the equality context of the particular claim. The values that inform a given law or policy must be fully consistent with substantive equality principles. This deeper equality analysis arises from the concept of the positive constitutional obligation to take into account the needs of disadvantaged groups in laws, policies, and governmental action.

(6) Role of the Judge

78. The constitutional principle of substantive equality places an important obligation on all governmental actors to become aware of, and address, both their own biases as well as the structures of inequality that shape Canadian society. Judges too have an ongoing obligation to reflect upon and transcend their own biases based on their life experience, which may be very different from that of the claimant before them.

79. Judging involves a highly contextualized process of interpretation and reasoning. The nature of judging was aptly described by Justices Claire L'Heureux-Dubé and Beverley McLachlin in *R.D.S. v. The Queen*, [1997] 3 S.C.R. 484, where they used the term "conscious contextual inquiry" (at para. 42). I agree with their comment at paragraph 41 that questions of fact or law are not decided in a vacuum but rather are "the consequence of numerous actors, influenced by the innumerable forces which impact on them in a particular context." The judicial inquiry must perforce extend into the factual, social, and psychological context within which litigation arises. Thus "a conscious contextual inquiry" is an important and widely accepted step towards judicial impartiality.

80. L'Heureux-Dubé J. addressed this issue directly in her judgment in the Court when she refers to Neil Brooks's comments (Neil Brooks, "The Principles Underlying the Deduction of Business Expenses," in Brian G. Hansen, Vern Krishna, and James A. Rendall, eds., *Essays on Canadian Taxation* (Toronto: Richard De Boo, 1978)) about the ways in which

[j]udges know on the basis of their own experience that an expense incurred under certain circumstances would be incurred by them for a personal purpose; they infer, therefore, that it is probable that some other person, under similar circumstances, would incur the expense for the same purpose (at 259).

81. I concur with L'Heureux-Dubé J. that the proper interpretive approach to issues of equality must recognize that a real solution to discrimination cannot be arrived at without incorporating the perspective of the group suffering discrimination. In this case, the substantive equality norm demands that the experience of women as well as men shape the definition of a business expense.

B. The Nature of Women's Inequalities

82. As noted above, the first step in any equality claim before the courts, whether a direct *Charter* challenge is pleaded or the fundamental constitutional principles of substantive equality values are engaged as an aid to interpreting the common law or in the course of statutory interpretation, is to look at the full context surrounding the claim. Constitutional questions must be examined in their broader political, social, and historical context in order to attempt any kind of meaningful constitutional analysis (*R. v. Turpin*, [1989] 1 S.C.R. 1296).

83. Here the claim is based on sex and requires the court to ascertain in broad terms the nature of the inequalities women experience as they pertain to women's role in childcare and to the impact that it has had on women's participation in the paid labour force, as well as on how the paid labour force has been constructed. It is widely understood that women as a group are disadvantaged and that there are economic, social, legal, and political dimensions of this group disadvantage. Sex is not simply a matter of biological characteristics. It involves the socially constructed consequences of being female.

84. Women in Canada generally are economically unequal to men. They are poorer than men and face a higher risk of poverty. Race and disability complicate and deepen this inequality. Being a single mother, a woman of colour, an Aboriginal woman, or a woman with a disability further increases the risk of poverty. Even when their incomes are above the poverty level, women are not economically equal to men. Though women have moved into the paid labour force in ever-increasing numbers over the last decades, they do not enjoy equality in earnings, in access to non-traditional jobs and managerial positions, or in benefits. The gap between men's and women's full-time, full-year wages is, in part, owing to occupational segregation in the

workforce that remains entrenched and to the lower pay that is accorded to traditionally female jobs. Though the wage gap has decreased in recent years, with women employed on a full-time, full-year basis now earning about 72 per cent of the amount earned by men in comparable jobs, part of this narrowing of the gap is due to a decline in men's earnings as a result of restructuring and not to an increase in women's earnings (see, for example, Day and Brodsky, at 6-7).

85. The same pattern of inequality exists for female business owners relative to their male counterparts (Monica Belcourt, Ronald J. Burke, and Hélène Lee-Gosselin, *The Glass Box: Women Business Owners in Canada* (Ottawa: Canadian Advisory Council on the Status of Women, 1991)). Women's businesses are clustered in the retail and service sectors, notorious for their long hours, high personal demands, and low financial returns. As in the work force generally, where women are clustered in jobs such as office work and nursing, the effect of ghettoizing is to lower the financial return to the business owner. The annual incomes reported by the women in the *Glass Box* survey serve to debunk much of the myth of the wealthy businesswoman. One-third of the sample reported received no salary. Twenty per cent made between \$30,000 and \$50,000, and only 15 per cent made over \$50,000. Male business owners reported annual earnings some 66 per cent higher than earnings reported by women business owners.

86. These patterns of sex inequality are reproduced within Ms. Symes's profession, the legal profession, as established by the report of the Canadian Bar Association Task Force on Gender Equality in the Legal Profession, which is entitled *Touchstones for Change: Equality, Diversity and Accountability* (Ottawa: Canadian Bar Association, 1993), and the many other provincial law society reports put into evidence in this case and augmented by the intervenor, the Canadian Bar Association.

87. Day and Brodsky conclude that women's persistent economic inequality is caused by a number of interlocking factors including: the social assignment to women of the unpaid role of caregiver and nurturer for children, men, and old people; the fact that in the paid labour force women perform the majority of work in the "caring" occupations and that this "women's work" is lower paid than "men's work"; the lack of affordable, safe childcare; the lack of adequate recognition and support for childcare and parenting responsibilities that either constrains women's participation in the labour force or doubles the burden they carry; the fact that women are more likely than men to have non-standard jobs with no job security, union protection, or benefits; the entrenched devaluation of the labour of women of colour, Aboriginal women, and women with disabilities; and the economic penalties that women incur when they are unattached to men or have children alone (Day and Brodsky, at 7).

88. The gendered division of labour within the family is one important aspect of women's inequality within society generally and within the paid labour force more particularly. This structure has been elaborated by Susan Okin, *Justice, Gender and the Family* (New York: Basic Books, 1989). I paraphrase her findings in the following way: one way to explain this structure is to begin with the way in which society continues to be organized around the expectation that children and other dependent people ought to be cared for primarily by family members without formal compensation and the fact that at the same time, good jobs, assume that workers are available at least forty hours per week, year round. Due to a combination of social and economic factors, women are predominantly the primary caretakers of children and other dependent persons, and as a consequence, the attachment of many women to the world of employment outside the home is more episodic, less prestigious, and less well paid than men's. Together, these factors mean that women tend to depend on male earnings for primary support of themselves and their children, which contributes to unequal power in the family. These factors also mean that women have less power in a society and economy that values paid work to the exclusion of other types of contributions.

89. Historically, women have had the primary responsibility for household and family dependent care, in particular, for childcare. While this pattern has changed to some degree over the past few decades, with men beginning to share in these responsibilities to greater or lesser extents, this entrenched social pattern is still largely intact.

90. It is important to repudiate the conception of choice as it relates to women's decisions with respect to childbearing, child rearing, and work outside of the home. The social assignment of caregiving responsibility to women seriously circumscribes women's choices and places the primary financial and other burdens on women. There are multiple and persistent difficulties in having and affording outside childcare, and these difficulties translate into barriers to women participating in the paid workforce or business. "Family choices" are made within the constrained circumstances established by these barriers and the structural inequalities that inform them. To analyze these issues within the framework of "family choice" is to ignore the reality that sex-based inequality is perpetuated at all levels of social relations from within families to communities to broader public policy. Rather than falling into the trap of "family choice," the role of equality analysis is to expose these underlying false assumptions.

91. Parental responsibilities have a unique and significant negative impact on mothers' participation in the workforce. However, there is no comparable detrimental impact on father's participation in the workforce. For example, statistics show that, within the legal profession, fathers are the highest income group, earning more than men without children, women without children, and mothers (*Touchstones for Change*).

92. There was a tremendous amount of evidence at trial regarding childcare responsibilities, making it clear that mothers bear the psychological and actual responsibility for making childcare arrangements. As Dr. Armstrong testified, research in Canada and abroad has consistently demonstrated that women remain primarily responsible for childcare and that this is so whether women work inside or outside the home. In fact, Statistics Canada reports that working men are chiefly responsible for childcare in only 6 per cent of families (Susan Crompton, "Who's Looking after the Kids? Child Care Arrangements of Working Mothers," in Statistics Canada, *Perspectives on Labour and Income*, vol. 3, no. 2. (Ottawa: Statistics Canada, 1991) at 68).

93. The responsibility for childcare has a very real impact on women's patterns of employment. According to the Statistics Canada's Family History Survey, ongoing childcare had a major impact on the continuity of work for the majority of women but almost no impact on men. This is consistent with research done on women in managerial and professional work, which identifies having children as a major disruption in career patterns and as a problem for women (see also M. Gunderson, L. Muszynski, and J. Keck, *Women and Labour Market Poverty* (Ottawa: Canadian Advisory Committee on the Status of Women, 1990) at 30). In fact, Dr. Armstrong observes that the cost alone can consume a large portion of a woman's income. Ms. Symes herself testified that in the first few years of her practice, she expended 80 per cent of her earned income on childcare. Dr. Armstrong was not aware of any similar research on men that identifies raising children as having an impact on men's careers.

94. Self-employed women do not differ significantly from women as a whole with respect to the effect of childcare. Nearly half of the respondents in the *Glass Box* study were married with children at home. Unlike men entrepreneurs, most women assumed complete responsibility for home and children. The authors of the *Glass Box* report found that childcare responsibilities formed one of the major obstacles preventing businesswomen from realizing their full potential as entrepreneurs.

95. In the Canadian Bar Association's report *Touchstones for Change: Equality, Diversity and Accountability*, the difficulties many women lawyers face when attempting to balance career and family were highlighted. The report states:

One of the main causes of discrimination against women lawyers is the culture that surrounds work in the legal profession. That culture has been shaped by and for male lawyers. It is predicated on historical work patterns that assume that lawyers do not have significant family responsibilities. The "hidden gender" of the

current arrangements for legal work manifests itself in many ways, including: the extremely long and irregular hours of work; assumptions about the availability of domestic labour to support a lawyer's activities at work; promotion within law firms which is incompatible with the child bearing and child rearing cycles of most women's lives; and the perceived conflict between allegiances owed to work and family (at 65).

96. Provincial law society surveys provided clear evidence that women lawyers bear by far a greater responsibility for childcare than do their male counterparts. The Canadian Bar Association indicates that male lawyers did not consistently report that childcare had any impact on their career (*Touchstones for Change*), whereas female lawyers indicated that they suffered financial losses as a result of childcare responsibilities.

97. This contextual overview makes it clear that women bear a much greater responsibility for childcare in comparison to men and that this responsibility is a major contributing factor in the ongoing inequalities experienced by women in the workplace, in business, and in the legal profession. It is with regard to this context—the reality of women's lives and the severe implications of childcare—that the present equality analysis of the tax provisions must be approached.

C. Record before the Court

98. Before proceeding with our analysis of Ms. Symes's claim, there is one further general issue to be addressed. The Court was highly critical of the record before it. The majority found that it did not have sufficient evidence that women bear the financial costs of childcare as opposed to the social costs of childcare responsibilities, which were so plain as to be subject to judicial notice. Furthermore, the majority was concerned about not having evidence regarding the situation of single mothers, about employed women, about low income Canadians, and so on in relation to the issue of childcare.

99. Iacobucci J.'s comments in this regard are highly problematic. He appears to be calling into question the motive behind Ms. Symes's claim. "Why have you not presented the case for single mothers?" he seems to be saying to her. And I say to him, why is it her responsibility to do so? I would be hard pressed to find an example of a case where a businessman pursuing his legitimate interests would be asked to argue instead for a less advantaged person. It seems a striking example of gender bias that the effect of what the majority in the Court appears to be saying to Ms. Symes is: "Take care of your children and take care of others' children too—even strangers in the context of this litigation—but don't you dare claim for yourself on par with a man."

100. I disagree that there is insufficient evidence to found Ms. Symes's claim. Nevertheless, it is important to underscore that the Court is partially responsible for ensuring a proper record. It is not the individual claimant's responsibility to bring evidence about the potential impact on other groups or sub-groups. The Supreme Court of Canada, like all Canadian courts, has the inherent jurisdiction to appoint counsel or *amicus curiae* where necessary to represent interests affected that are not represented by the parties. Section 62(3) of the *Supreme Court of Canada Act*, R.S.C. 1985, c. S-26, also provides that the Court may receive further evidence of any question of fact through oral examination by affidavit or deposition. These powers are greatly underused and should be employed vigorously in constitutional cases—cases in which the decision on an individual claim has wide-spread and far-reaching impact.

VI. Analysis

A. Deductibility of Childcare Expenses as Business Expenses

(1) Statutory Interpretation to Be Infused with Equality Rights Norms

101. In the context of the Ms. Symes's claim, we must keep foremost in our minds the unequal cost of childcare that women have traditionally borne, the effect of such cost on the ability of women to participate in business or otherwise be gainfully employed and, finally, the impact of childcare on women's financial ability and independence.

102. Women are fulfilling a vital societal function in raising children. The debate in the lower courts concerning whether the responsibility to care for children is a legal or a "natural" one (*per*) (Décary J., at 522)—whatever that means—is very much besides the point. To say, as Iacobucci J. does, that both parents are responsible for childcare is to ignore women's reality—something that is impermissible in an equality analysis. It may be that the contemporary expectation is that parenting should be a shared responsibility; however, the evidence is overwhelmingly clear that we are far from having attained this ideal. Women continue to bear a much heavier burden in this regard and are disproportionately affected by the demands of childcare both socially and financially.

103. Women as a group are economically disadvantaged in part because they bear and raise children and have been assigned the role of caregiver by society. Secondary status and income accompany these roles. To eliminate this inequality would require, among other things, removing the economic penalty from doing "women's work"; valuing the work of caregiving and of nurturing, both socially and economically; and spreading the responsibility for these tasks more evenly across gender and across society.

104. Women's inequality is the result of complex social and economic phenomena. Sometimes it can be uncovered through a direct comparison of the differential treatment experienced by women as compared to men. However, this is not always the case. In some cases, a comparison between women and men obscures, rather than clarifies, the discriminatory law, policy, or action. Rather than an analysis that proceeds on the basis of how women are different from men, in some cases discrimination analysis should proceed on how a law, policy, or practice would be developed if it took into account women's needs and interests. This is the approach needed in this case.

105. The case before us involves the extension of the reasoning in *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219:

Combining paid work with motherhood and accommodating the childbearing needs of working women are ever-increasing imperatives. That those who bear children and benefit society as a whole thereby should not be economically or socially disadvantaged seems to bespeak the obvious. It is only women who bear children; no man can become pregnant. As I argued earlier, it is unfair to impose all of the costs of pregnancy upon one-half of the population (at 1243 (per Chief Justice Brian Dickson)).

106. Primary responsibility for childcare is not an immutable characteristic based on biology in the same way as pregnancy and breastfeeding. Nevertheless, women's primary responsibility for childcare is a pronounced social phenomenon that has a similar impact on women's ability to be full participants in the workforce. It is notable in the *Brooks* decision that the Court paid attention to the larger social context of childbearing and the inequality of women. The Court did not focus solely on the narrow question of the legitimacy of the Safeway disability plan but considered also the broader question of what is necessary for women to be able to function equally in society and in the paid labour force.

107. Both the majority and dissenting reasons in the Court make it clear that the interpretation of a law may change over time in order to coincide with an altered and ever-changing societal context (see E.A. Driedger, *Construction of Statutes*, 2nd edition (Toronto: Butterworths, 1983) at 89; and P.A. Côté, *The Interpretation of Legislation in Canada*, 2nd edition (Cowansville: Editions Yvon Blais, 1991) at 227.) There are many examples where the courts have altered their interpretation of legislation to conform to our changing social framework (see, for example, *Murdoch v. Murdoch*, [1975] 1 S.C.R. 423, and *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436).

108. It is clear that traditional tax analysis characterized childcare expenses as personal expenses. This is precisely what needs to be reconsidered in light of the fundamental constitutional norm of substantive equality. The error in the majority judgment is in separating out the equality analysis from the process of statutory interpretation. Equality rights norms should infuse this interpretive process.

109. Substantive equality rights norms demand that childcare expenses be recognized as deductible business expenses when the taxpayer can demonstrate that they are incurred for the purpose of gaining or producing income. The exclusion of childcare expenses is based on outdated cultural norms that privilege a conception of working life adapted to the needs of businessmen. Under this regime, childcare was and could be relegated to the private realm where it was taken care of by, for the most part, women's unpaid labour. Childcare was not considered a business expense in the past because it was not within the purview of businessmen.

110. As Dorothy Smith points out in "A Peculiar Eclipsing: Women's Exclusion from Man's Culture" (1978) 1 *Women's Studies International Quarterly* 281, when only one sex is involved in defining the ideas, rules, and values in a particular domain, that one-sided standpoint comes to be seen as natural, obvious, and general. The male standard, which is the standpoint of the conventional businessman, frames the backdrop of assumptions against which expenses are determined to be, or not to be, legitimate business expenses. Against this backdrop, it is hardly surprising that childcare was seen as a personal non-deductible expense and as being irrelevant to the end of gaining or producing income from business.

111. The discriminatory impact of this exclusion is obvious when one takes the full context of women's social and economic position into account. The real costs incurred by businesswomen with children are no less real, no less worthy of consideration, and no less incurred in order to gain or produce income from business than any other of the many business deductions available.

112. The existing tax practice of excluding childcare expenses from business expense deductions and labelling them as personal expenses reproduces or reinforces sex inequality. This may be generally true of the tax system as a whole:

[T]ax laws contribute to the marginalization of women in the workplace, and impede a more creative formulation of alternative models of work and family. Major, structural aspects of the tax laws were put in place at a time when traditional families—meaning households with men working outside, and women working inside, the home—were dominant. These aspects persist to this

day, serving as an anchor against the emergence of more modern and flexible family models [footnotes omitted] (Edward J. McCaffery, "Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code" (1993) 40 *UCLA Law Review* 983 at 987-8).

113. The *Charter* requires the Court in this instance to intervene to interrupt this pattern of inequality and to outline the government's responsibility to promote equality. Instead, the Court continues to reproduce the inequality in its reasons. Perhaps the most problematic aspect of this reasoning is Iacobucci J.'s finding that while it had been demonstrated that women disproportionately incur the social costs of childcare it had not been proven that they disproportionately pay childcare expenses (at 763). He goes on to say: "If the adverse effects analysis is to be coherent, it must not assume that a statutory provision has an effect which is not proved. We must take care to distinguish between effects which are wholly caused, or are contributed to, by an impugned provision, and those social circumstances which exist independently of such a provision" (at 764-5). In his view, those social costs "although very real, exist outside of the *Act*."

114. The Court errs when it finds that there is no discrimination unless the harm complained of can be shown to be caused exclusively by the challenged law, as evidenced by a comparison that is conducted within the four corners of the legislation. This is one of the central mistakes made by Iacobucci J. in his analysis of section 63 of the *ITA*. While he is clearly cognizant of the connection between childcare responsibilities and women's inequality in the workplace and economy, he fails to make the connection between these broader inequalities and the equality claim that is asserted by Ms. Symes.

115. Ms. Symes does not need to prove that women disproportionately pay for childcare in order for her claim to succeed. The clear evidence accepted at trial is that she paid for childcare in order to earn income through her professional business. Ms. Symes's situation reflects the norm in Canadian society that women are primarily responsible for childcare and that they pay for it economically. While parents share legal responsibility, this is something of a legal fiction as established by the expert evidence in this case. The reality of Ms. Symes's business life necessarily included childcare.

116. Furthermore, it has been clearly demonstrated that the exclusion of childcare as a business expense is a gendered, discriminatory anomaly rooted in the historical fact that childcare was not even imagined as a possible businessman's expense. Regardless of who actually pays for the childcare, its exclusion as a business expense is sex discrimination. This anomaly must be rectified given the uncontroverted evidence that childcare is overwhelmingly women's responsibility and that women bear a disproportionate social cost as a result.

117. The majority's approach results in shifting the blame onto the rights claimant, Ms. Symes. She is blamed for having been complicit in a "family decision." Her claim was rejected in part because she was seen to have chosen to assume childcare expenses that her husband could have assumed or shared. Her choice was seen as atypical and, therefore, her own fault (Day and Brodsky). On behalf of the majority, Iacobucci J. said:

[T]he appellant and her husband made a "family decision" to the effect that the appellant alone was to bear the financial burden of having children... [T]he "family decision" is not mandated by law and public policy (at 763-4).

118. Ms. Symes's claim is seen by the Court to be unduly opportunistic. And yet she is merely pursuing the full benefit of the *ITA* and the relief that it provides to business persons. Business persons can claim different or greater tax relief than self-employed persons in several ways, including, for example, the greater deductions available for charitable donations. There are several examples of types of expenses that can be claimed under different provisions of the *ITA* including tuition fees. It is completely legitimate for Ms. Symes to take advantage of the more beneficial provision.

119. More generally, we should not lose focus of the claimant's evidentiary burden. She does not need to establish that the defendant intended to discriminate nor must she establish a causal relationship between a specific legal provision and the adverse effects discrimination. If a government law or policy is shown to contribute to, or worsen, women's disadvantaged position, this is sufficient to establish the required connection between the law or policy and the disadvantage for the purposes of constitutional equality analysis.

(2) Parliamentary Intention and the Impact of Section 63

120. The Court erred in finding that Parliament intended to deal with childcare expenses comprehensively in section 63, thereby indirectly eliminating the deductibility of childcare expenses as business expenses in legitimate cases. There is no evidence that Parliament considered the needs of businesswomen in introducing section 63 nor is there any express reference to business expenses in section 63. The focus of the section is clearly on the needs of employed women who comprise the vast majority of women working outside the home and even more so in 1972 when section 63 was introduced. Section 63 was and is an important equality measure, but it does not in any way preclude other forms of tax relief for childcare expenses.

121. As L'Heureux-Dubé J. pointed out in her reasons: "It is highly probable that the legislators did not even put their mind to the fact that women

may some day enter into business and the professions in large numbers and that these women may approach the world of business differently than did their male predecessors. Most importantly, it was certainly not within the legislators' frame of mind that child care would be viewed as anything other than a personal expense" (at 814). This is a crucial point. The respondent government has an obligation to consider the needs of businesswomen in the context of defining legitimate business expenses. This consideration is the first aspect of the equality rights obligation, the procedural duty to take into account the needs of disadvantaged groups through an appreciation of the existing structures of inequality. The second aspect of this obligation is the substantive duty to promote equality by taking measures that result in decreasing disadvantage.

122. Furthermore, such an exclusion would not be constitutionally permissible even if Parliament had intended section 63 to be a "complete code," given the clear adverse impact on women. Having established a tax regime that allows businesspersons to deduct legitimate business expenses, the government must also ensure that the regime is administered on a discrimination-free basis that recognizes and takes into account the different needs of business persons.

123. Given that most women with children who work outside of the home are employed, section 63 is critical. Yet its existence does not detract from a businesswoman's right to have her legitimate business expenses treated fairly. The reasoning of the majority in the Court appears to be premised on the fallacy that there is a finite pot of money for childcare and that the cost of a business expenses deduction for childcare must be deducted from the relief, such as it is, that is provided to employed women or from other childcare initiatives. This is sheer nonsense. It would be just as logical to approach this by thinking of business expenses as a finite pot. If childcare expenses are accepted, then it will be necessary to take away the deduction for golf club memberships or business entertainment expenses.

124. While it is regrettable that this case could not address the childcare needs of all mothers in the paid labour force, it should be noted that this case is not about the advantageous position in society that some women garner as opposed to other women but, rather, about an examination of the advantaged position that businessmen hold in relation to businesswomen.

125. The tax system clearly differentiates between employed and self-employed persons. Some of these distinctions may amount to discrimination if they serve to reproduce inequalities and further disadvantage vulnerable groups. However, this is not the subject matter of this litigation.

B. Disposition

126. Businesswomen and, for that matter, businessmen who legitimately incur childcare expenses for the purpose of gaining or producing income from

business must not be deprived of the benefit of a business deduction for their expenses. Ms. Symes's appeal is allowed and the order of the trial judge is restored.

127. The exclusion of childcare expenses through tax treatment that considers them to be personal expenses as opposed to business expenses aggravates a social inequality that is central to women's disadvantaged social and economic position. Such an interpretation conflicts with the fundamental constitutional principle of equality and is therefore unconstitutional.

128. Recognition of childcare expenses as legitimate business expenses will benefit some women materially, but, perhaps just as importantly, it is a crucial symbolic step that values the dual role of some women as entrepreneurs and mothers. It is one small step towards valuing women in the workplace and the economy by recognizing that the current rules penalize women and by affirming their gender-specific needs and taking them into account in one aspect of the tax system.

129. While each complaint should be framed and adjudicated within an understanding of the full context of women's inequality, each situation that gives rise to a sex discrimination complaint can provide only a partial view into the causes of women's inequality and can only give rise to a partial remedy. The outcome in this case remedies only one small barrier to women's equality. Creating equality is an incremental process.

130. Thus, I disagree with Iacobucci J. that "the tax deduction for child care expenses could not be properly examined by this Court without consideration being given to the entire range of government responses to family and child care issues (at 774)." I concur with L'Heureux-Dubé J. that if each equality claim required that all of the problems of discrimination with respect to a particular group be remedied as the result of one investigation no progress could be made.

131. However, it is clear that adequate childcare is inextricably tied to the promotion of women's equality in the workplace and the economy in a broader sense. Evidence in this case and scholarly commentary concerning the lower court decisions both illustrate the serious shortcomings of supporting childcare through the tax system. Not the least of these limitations is that it is class-biased and does not assist women with the lowest incomes. Furthermore, it does nothing to address critical issues of increasing the supply of high quality childcare that is accessible and affordable to all women and ensuring that childcare providers are paid fair wages and work in healthy working conditions (see Audrey Macklin, "Symes v. M.N.R.: Where Sex Meets Class" (1992) 5 Canadian Journal of Women and the Law 498; C. Young, "Child Care and the Charter: Privileging the Privileged" (1994) 2 Review of Constitutional Studies 20; R. Johnson, *Taxing Choices: The Intersection of Class, Gender, Parenthood and the Law* (Vancouver: UBC Press, 2002); and "Policy Forum: Comments on *Taxing Choices: The Intersection of Class,*

Gender, Parenthood and the Law by Rebecca Johnson” (2003) 51 Canadian Tax Journal 1918-76).

132. In recognition of the limitations of the disposition of this matter relative to the gravity of the issues raised, the Court refers the broader issues with respect to the government’s failure to adequately address childcare, with specific reference to barriers to women’s equality brought to the Court’s attention in this case, back to the government of Canada for further study and recommendation. Such a study should also address the related issue of the work conditions of childcare providers, recognizing that the majority of these workers are particularly vulnerable because they are racialized minorities and/or recent immigrants to Canada. To eliminate the discriminatory impact of the allocation of childcare responsibilities would constitute a huge step towards substantive equality for women in Canada.

Appendix: Relevant Statutory Provisions

Income Tax Act, R.S.C. 1952, c. 148 as amended applicable in taxation years 1983 to 1985, sections 4, 9(1), 18(1), 63, and 67.

- 4 (1) For the purposes of this Act,
 - (a) a taxpayer’s income...for a taxation year from an office, employment, business, property or other source...is the taxpayer’s income...computed in accordance with this Act on the assumption that he had during the taxation year no income...except from that source...and was allowed no deductions in computing his income for the taxation year except such deductions as may reasonably be regarded as wholly applicable to that source...and except such part of any other deductions as may reasonably be regarded as applicable thereto...
- ...
- (2) Subject to subsection (3), in applying subsection (1) for the purposes of this Part, no deductions permitted by sections 60 to 63 are applicable either wholly or in part to a particular source...
- ...
- (4) Unless a contrary intention is evident, no provision of this Part shall be read or construed to require the inclusion or to permit the deduction, in computing the income of the taxpayer for a taxation year or his income or loss for a taxation

year from a particular source or from sources in a particular place, of any amount to the extent that that amount has been included or deducted, as the case may be, in computing such income or loss under, in accordance with or by virtue of any other provision of this Part.

9. (1) Subject to this Part, a taxpayer's income for a taxation year from a business or property is his profit therefrom for the year.

18. (1) In computing the income of a taxpayer from a business or property no deduction shall be made in respect of

(a) an outlay or expense except to the extent that it was made or incurred by the taxpayer for the purpose of gaining or producing income from the business or property;

...

(h) personal or living expenses of the taxpayer except travelling expenses (including the entire amount expended for meals and lodging) incurred by the taxpayer while away from home in the course of carrying on his business;

63. (1) Subject to subsection (2), in computing the income of a taxpayer for a taxation year the aggregate of all amounts each of which is an amount paid in the year as or on account of child care expenses in respect of an eligible child of the taxpayer for the year may be deducted

...

(b) by the taxpayer or a supporting person of the child for the year . . . to the extent that

(c) the amount is not included in computing the amount deductible under this subsection by an individual (other than the taxpayer), and

(d) the amount is not an amount (other than an amount that is included in computing a taxpayer's income and that is not deductible in computing his taxable income) in respect of which any taxpayer is or was entitled to a reimbursement or any other form of assistance, and the payment of which is proven by filing with the Minister one or more receipts each of which was issued by the payee and contains,

where the payee is an individual, that individual's Social Insurance Number; but not exceeding the amount, if any, by which

(e) the least of

(i) \$8,000,

(ii) the product obtained when \$2,000 is multiplied by the number of eligible children of the taxpayer for the year in respect of whom the child care expenses were incurred, and

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

(f) the aggregate of all amounts each of which is an amount deducted, in respect of the eligible children of the taxpayer that are referred to in subparagraph (e)(ii), under this subsection for the year by an individual (other than the taxpayer) to whom subsection (2) is applicable for the year.

...

(3) In this section,

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

(i) to enable the taxpayer, or the supporting person of the child for the year, who resided with the child at the time the expense was incurred,

(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,

...

(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.

(c) “eligible child” of a taxpayer for a taxation year means

(i) a child of the taxpayer or of his spouse, or

(ii) a child in respect of whom the taxpayer deducted an amount under section 109 for the year,

if, at any time during the year, the child was under 14 years of age or was over 13 years of age and dependent on the taxpayer by reason of mental or physical infirmity; and

(d) “supporting person” of an eligible child of a taxpayer for a taxation year means

(i) a parent of the child,

(ii) the taxpayer’s spouse, or

(iii) an individual who deducted an amount under section 109 for the year in respect of the child,

if the parent, spouse or individual, as the case may be, resided with the taxpayer at any time during the year and at any time within 60 days after the end of the year.

67. In computing income, no deduction shall be made in respect of an outlay or expense in respect of which any amount is otherwise deductible under this Act, except to the extent that the outlay or expense was reasonable in the circumstances.