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WELFARE STATE CRIME IN CANADA: THE POLITICS OF TAX EVASION IN THE 1980s

by
Lorne Sossin*

This paper considers the phenomenon of tax evasion in the 1980s in Canada as an outgrowth of a crisis in the welfare state. The lack of social protest over the high incidence of tax evasion among the wealthiest stratum of Canadian individuals and corporations is, on this view, linked to the transformation of politicized citizens into depoliticized clients. Tax evasion, along with legal tax avoidance both proliferated in the 1980s which reflects the convergence of a number of events including the increase in use of tax expenditures, the decreasing emphasis on enforcement in tax administration, the rise of neoconservatism and, more generally, the internalization within the income tax system of the contradictions of welfare state capitalism. This paper suggests that the premise of the income tax within the framework of the welfare state is needed and also advocates practical measures for addressing both the high incidence and the social acceptability of tax evasion in Canada.

Le crime contre l'État-providence au Canada: la politique de la fraude fiscale aux années 80

Selon l'auteur, la fraude fiscale résulte d'une crise de l'État-providence. Si on ne proteste pas contre la fréquence de la fraude parmi les personnes et commerces canadiens les plus riches, dit-il, c'est que nos citoyens sont devenus des clients dépolitisés. La fraude fiscale qui, comme la dérobade fiscale légale, a proliféré aux années 80, a des causes multiples, y compris l'usage augmenté des dépenses comme déductions des impôts, la vérification moins assidue, la montée du néo-conservatisme et, plus généralement, les contrecoups pour le système fiscal des contradictions de l'État-providence capitaliste. L'auteur prétend que l'impôt sur le revenu fait partie intégrante de l'État-providence, et il propose des mesures concrètes pour lutter à la fois contre la fréquence de la fraude fiscale au Canada et contre le fait qu'elle ne choque personne.

Many taxpayers have little or no opportunity to avoid complying with the law.¹

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¹ W. Farlinger (Woods Gordon), *Report on Revenue Canada, Taxation: Summary Report* (Ottawa: Supply and Services, 1985), 18:19.

I. INTRODUCTION

The purpose of this essay is to critically analyze the incidence and implications of tax evasion in Canada during the 1980s. More generally, I wish to explore whether tax evasion is criminal at all, and additionally what makes it a particular kind of phenomenon unique to the welfare state. I argue that the structures of the welfare state legitimate tax evasion by constructing it as a minor regulatory infraction rather than as a violation of any esteemed social value. The rise of the "New Right" in the 1980s and the concurrent alterations to the income tax and its enforcement over this period has elevated tax evasion into a crisis of the Canadian welfare state.

Tax evasion, I argue, should not be seen so much as a fraudulent activity, but rather as a pathological response to the fraudulent logic of the welfare state. It is not so much deviant or marginal conduct as an exaggeration of conduct (namely, tax avoidance) that is explicitly encouraged under Canada's income tax system. Tax evasion seems to have been rendered socially acceptable in virtually all quarters of society; however, the structure of the tax system ensures that, for the most part, only the most advantaged taxpayers can profitably engage in it. Corporations and high-income taxpayers are favourably positioned to evade income taxes, both because the Income Tax Act is riddled with incentives for investment and the accumulation of profit, and because those who earn income from business and property are accorded more privacy in their economic conduct. Despite the egalitarian protestations of our liberal democratic institutions, privacy in this context appears to be more of a privilege than a right in Canada. Tax evasion, therefore, is as much aimed at depriving the welfare state of administrative control, as it is aimed at depriving the public treasury of revenue.

This essay is divided into four parts: the first introductory section outlines what governmental mechanisms exist to investigate and prosecute tax evasion; the second part of the essay analyzes how the dynamics of the welfare state transform politically active citizens to whom tax evasion would be socially unacceptable into depoliticized clients for whom tax evasion is one of the perks of success in the market; the third part examines how Canada's income tax system has internalized the contradictions of the welfare state; and finally, the fourth section of the essay explores the incidence and implications of tax evasion itself and suggests, by way of a conclusion, an alternative approach to addressing this phenomenon.

While most people have a tangible image in their head when they speak of tax evasion, it is far from a precise categorization. Canada's income tax system relies essentially on voluntary compliance. Every resident of Canada or non-resident earning income in Canada has a statutory obligation to file an income tax return with the government.² Compliance is easily assured in the case of salaried taxpayers as they generally have their income tax deducted at the source of their em-

² See sections 150(1) and 151 of the *Income Tax Act*.

ployment. Typically, a larger amount is deducted than owed and thus the majority of Canadian taxpayers receive a refund cheque after filing their income tax return. In fact, more than 75 per cent of all returns filed are for salaried employees who have their income tax withheld by their employers and remitted directly to the government.³ The average income of these taxpayers is \$25,554.⁴ Out of the 17,615,022 income tax returns filed in 1988, for example, 13,048,144 taxpayers received refunds.⁵ For individuals earning money from business, property, or investments and for all corporations—generally the categories of taxpayers earning the highest incomes—the Department of National Revenue must rely on the willingness of these taxpayers to comply by revealing their taxable income to the department. When taxpayers do not comply, however, the department has a variety of mechanisms at its disposal to enforce a taxpayer's income tax liability; these include audits, investigations, inquiries, and ultimately garnishing wages, profits, and the seizure of assets.⁶

The absence of compliance, to complicate matters, can constitute either tax avoidance or tax evasion. Tax avoidance can lead to the demand for repayment of the taxes in question and to the imposition of civil penalties; tax evasion, on the other hand, may include these consequences but additionally may lead to a criminal prosecution and, in very rare cases, incarceration.⁷ More commonly, where the department believes a taxpayer to have underreported or not reported taxable income, a reassessment is issued and additional tax assessed with no added penalty.

While tax evasion is by its definition illicit, tax avoidance has both a legitimate and an illegitimate connotation, though it is often as difficult to define as it is to enforce. All successful tax planning, after

³ In 1988, for example, this included 11,226,240 taxpayers out of the total 17,071,350 who filed. However, statistics on source deductions reveal that, in actuality, 13,666,992 taxpayers were subject to deductions at source, which would account for over 80% of all taxfilers. See Revenue Canada, *Inside Taxation, 1988-89* (Ottawa: Supply and Services, 1990) at 32 and 69; see also Revenue Canada, *Taxation Statistics, 1988* (Ottawa: Supply and Services, 1990) at 77. Simply because an individual earns income through salary, however, does not mean they are disadvantaged. For high-income employees, a number of tax minimization schemes are allowed by the Act including deferred income arrangements, retirement planning packages and income splitting.

⁴ *Ibid.*

⁵ *Ibid.*, Table 2.

⁶ For a review of these powers see, N. Brooks & J. Fudge, *Search and Seizure Under the Income Tax Act* (Ottawa: Law Reform Commission of Canada, 1985); W. Innes, *Tax Evasion in Canada* (Toronto: Carswell, 1987); *Income Tax Enforcement, Compliance and Administration: Corporate Management Tax Conference 1988* (Toronto: Canadian Tax Foundation, 1988); and *Dealing with Revenue Canada: The Art of Avoiding Expensive Mistakes* (Toronto: The Canadian Institute, 1990). See also Revenue Canada, Information Circular 71-14R3, "The Tax Audit," June 18, 1984; and Information Circular 73-10R3, "Tax Evasion," February 13, 1987.

⁷ See sections 238 and 239 of the *Act* for the criminal sanctions; see sections 162 and 163 for the civil penalties.

all, is aimed at a minimization or avoidance of taxes for the benefit of the taxpayer.⁸ Determining which of the many schemes that have been devised to attain this objective are legitimate and which are illegitimate, and which then cross the line from avoidance to evasion, is a discretionary authority vested in Revenue Canada and supervised by the courts upon judicial review when such exercises of discretion are challenged. The most recent statutory embodiment of this discretion is contained in the new General Anti-Avoidance Rule enacted as part of Finance Minister Michael Wilson's 1987 tax reform package.⁹

Tax evasion is somewhat more distinctive as it entails a wilful act or omission: either intentionally failing to file a return, omitting income received, misrepresenting reported income, arranging for the receipt of income in a jurisdiction outside the scrutiny of Revenue Canada, or misrepresenting a transaction so as to gain a tax benefit. The culpability of the tax evader, however, rests with the intent or *mens rea* demonstrated.¹⁰ While tax evasion may thus be easier to proscribe, it is more difficult to prosecute, especially when the alleged tax evader is a corporate entity with potentially diffuse and multifarious intentions.¹¹

Before exploring the criminality of tax evasion in Canada in more detail, however, it is first necessary to understand the political and

⁸ For the earliest judicial sanction of the principle of tax minimization, see *Duke of Westminster v. Inland Revenue Commission*, [1936] A.C. 1 (H.L.). See also *Ayrshire Pullman Motor Services and D.M. Ritchie v. Commission of Internal Revenue* (1929), 14 T.C. 754 at 763 where it was held, "No man in this country is under the smallest obligation, moral or other, so as to arrange his legal relations to his business or to his property so as to enable Inland Revenue to put the largest possible shovel into his stores."

⁹ Section 245 of the *Act*; see V. Krishna, *Tax Avoidance: The General Anti-Avoidance Rule* (Toronto: Carswell, 1990).

¹⁰ See for a discussion of the importance of *mens rea* *R. v. Hummel*, [1971] C.T.C. 803 (B.C. Prov. Ct.), where Robinson J. held that the characterization of income as capital, which at that time would have rendered the gain untaxed, was held to itself not establish guilty intent. It is not clear if this test also includes wilful blindness - that the taxpayer should have known that they were evading taxes though they may have been under the subjective belief that they were not; see *R. v. Lundy* (1972), 26 D.T.C. 6093 at 6116 (B.C. Prov. Ct.).

¹¹ The other issue raised by the question of intent is to what extent the corporate veil may be pierced to extend liability for tax evasion to officers, agents and directors of corporations. Section 242 of the *Act* stipulates:

"Where a corporation is guilty of an offence under this *Act*, an officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in, or participated in, the commission of the offence is a party to and guilty of the offence and is liable on conviction to the punishment provided for the offence whether or not the corporation has been prosecuted or convicted."

Corporations, though, are routinely charged with tax evasion in circumstances where no officers or directors are charged. See for a discussion, W. Innes, *Tax Evasion in Canada* (Toronto: Carswell, 1987) at 117-8.

economic forces which serve to make tax evasion possible, desirable and socially acceptable in Canada.

II. REVENUE, LEGITIMACY AND INEQUALITY: THE WELFARE STATE IN CANADA

The welfare state refers to both a legislative scheme intended to regulate and moderate the socioeconomic inequality fostered by the market, and an administrative scheme intended to intervene in social and economic life to enforce those legislative goals. While welfare legislation may enhance beneficiaries' freedom by providing workers with the right to organize or the indigent with financial security, it does so by organizing the private lives of these dependent persons on a contractual rather than consensual basis. This contractual relationship between beneficiaries and the state imposes a calculus of liabilities and benefits, rights and entitlements, on interaction that might otherwise, ideally, embody political agreements on the distribution of needs and resources. Citizens of the polity are transformed into clients of public administration as this pattern of dependency develops. The welfare state, on this view, results in the reification of social life, and the administration of people as though they were things.

Once stripped of any meaningful inter-subjective content, and once reliant on large, efficient bureaucracies, social relations in the welfare state become ideally suited to the corporation—an artificial legal entity made up not of people, but of contractual parties. This system depends for its existence and stability not on political mechanisms for establishing and actualizing the collective will of the citizenry, but on legal mechanisms for defining and enforcing contracts. The increasing juridification of both private and public bureaucracies has been largely complementary. As Gerald Frug has observed, "[t]he law defines, perpetuates, explains, justifies and reassures us about bureaucratic organization."¹² Others have gone further, of course, arguing that the role of law in enforcing contracts is itself fundamentally ideological.¹³ I argue that the increasing clientelization of the Canadian citizenry is consistent with the increasing legalization of tax administration witnessed in the 1980s.¹⁴

The premise and the purpose of the welfare state is, in short, to absorb and depoliticize socioeconomic struggles; this is accomplished through the pervasive organization and supervision of social relations and intense legal and regulatory intervention in the market. However,

¹² G. Frug, "The Ideology of Bureaucracy in American Law" (1984) 97 *Harvard L. Rev.* 1276 at 1285-6.

¹³ See R. Unger, "The Critical Legal Studies Movement" (1983) 96 *Harvard L. Rev.* 561 at 619; see also E. Mensch, "Contract Law as Ideology," in A. Hutchinson ed., *Critical Legal Studies* (New York: Rowman and Littlefield Publishers Inc., 1989); and P. Gabel & J. Feinman, "Contract Law as Ideology," in D. Kairys, ed., *The Politics of Law* (New York: Pantheon, 1982) 172.

¹⁴ See L. Sossin, "Revenue, Ideology and Legitimacy: The Politics of Canadian Tax Administration, 1980-90," Paper presented at the Annual Meeting of the Canadian Political Science Association, Charlottetown, P.E.I., May 31, 1992.

the behaviour of the market conforms to the needs and actions of globally (or, at least, continentally) oriented corporate interests over which the state exercises little influence. The state is thus fundamentally reactive, and this structural relationship with market forces provides both the rationale and necessity for the Keynesian policies adopted by advanced capitalist states in the postwar era.¹⁵

This regime of state intervention embodies a particular accommodation between capital and labour that hinged on the full-time wage earner being the norm for labour and the achievement of full employment. During the initial period of postwar growth and expansion, the success of the full employment policies advocated by the British economist John Maynard Keynes, and adopted by most advanced capitalist states including Canada, suggested that this accommodation could be sustained by the compensatory and redistributive structures of the welfare state.¹⁶ By adjusting public spending and taxation in reaction to the cyclical fluctuations of the market, rates of investment, employment and industrial growth were susceptible to manipulation and regulation by the state.

One area in which those class relations had become embedded in the state apparatus is that of taxation. The welfare state must, if it is to survive, design a system able to simultaneously obtain sufficient revenue, encourage capitalist expansion and maintain overall legitimacy in the equity and fairness of the tax process. This is especially critical in a tax system predicated on voluntary compliance where, if

¹⁵ It is because of this symbiotic relationship that some critical observers have argued that “public” functions of social, political and economic regulation in the welfare state have been increasingly transferred to “private” corporations, which, merely because they are private, are not subject to the procedural due process rights and entitlements that govern public bodies and agencies. See A. Hutchinson, “Mice Under a Chair: Democracy, Courts and the Administrative State” (1990) 40 *U.T.L.J.* 374. See also J. Fox & M. Ornstein, “The Canadian State and Corporate Elites in the Postwar Period” (1986) 36 *Can. Rev. Sociology and Anthropology* 481.

¹⁶ See J.M. Keynes, *The General Theory of Interest, Employment and Money* (London: Macmillan, 1936); for a good summary of the economic strategy, its rise and decline, see P. Hall, *Governing the Economy: The Politics of State Intervention in Britain and France* (New York: Oxford University Press, 1986), 69-99. Peter Hall explains both the terms and the stakes of this Keynesian compromise:

Up to this point, working-class political parties and the spokesmen for capital had been locked in a virtually irreconcilable conflict. Labour argued that the working-class goals of full employment and a reasonable distribution of income could be attained only through nationalization of the means of production. The supporters of private capital, of course, opposed any arrangement that would have deprived them of ownership and control over the means of production. The programs of the postwar welfare state went some distance toward resolving the problem of income distribution; but it was only the advent of Keynesianism that resolved the conflict over full employment. If Keynesian policies worked, the working class could be guaranteed full employment through the management of aggregate demand, without depriving capitalists of ownership and control over the investment and resource allocation decisions of industry.

citizens perceive the legitimacy of the tax system (or of the policies in which tax revenues are invested) to be discredited, they can register protest by avoiding or evading their tax burden. Indeed, popular tax revolts continue to be one of the very few public issues capable of galvanizing large-scale grass roots political participation. Recent movements against the Goods and Services Tax and the Market Value Assessment of Property Taxes illustrate the primacy taxes occupy in the political psyche of Canada.

The welfare state has attempted to reconcile its competing mandates by constructing a tax system that appears to be progressive and redistributive, but in fact permits those with higher incomes and more complex ways of obtaining income to avoid more of their tax burden, and those with lower incomes to avoid less. This view is consistent with James O'Connor's observation that:

tax struggle is the oldest form of class struggle ... the state must attempt to establish equitable forms of taxation in order to conceal the inequitable content of the tax structure and the exploitive nature of the class structure.¹⁷

In the operation of Canada's welfare state, class conflict is not exacerbated by taxation so much as institutionalized by it.

Jurgen Habermas elaborates on the conflicting priorities of taxation in welfare state capitalism:

(the state) bears the infrastructural costs directly related to production (transportation and communications systems, scientific-technical progress, vocational training)... It bears the costs of social consumption indirectly related to production (housing construction, transportation, health care, leisure, education, social security). It bears the costs of social welfare, especially unemployment [insurance].... In the end, these expenditures have to be financed through taxes. The state apparatus is, therefore, faced simultaneously with two tasks. On the one hand, it is supposed to raise the requisite amount of taxes by skimming off profits and income and to use the available taxes so rationally that crisis-ridden disturbances of growth can be avoided. On the other hand, the selective raising of taxes, the discernible pattern of priorities in their use, and the administrative performances themselves must be so constituted that the need for legitimation can be satisfied as it arises.¹⁸

The contradiction of the state, then, and the boundary of its autonomy, is that it cannot appear in the business of merely fostering private accumulation of wealth if it is to be legitimated on its liberal democratic premise, and yet neither can it afford to alienate the forces of private accumulation upon which it has become dependent for its material sustenance.

Politics in this scheme is reduced to contests over distributive issues, such as how high taxes should be or how long unemployment insurance should be paid; it does not challenge the ownership of property, the accumulation of capital and only rarely calls into question the entitlement to publicly funded goods and services. The basic

¹⁷ J. O'Connor, *The Fiscal Crisis of the State* (New York: St. Martins Press, 1973) at 203.

¹⁸ J. Habermas, *Legitimation Crisis*, trans. T. McCarthy (Boston: Beacon Press, 1975) at 61.

power structure of the welfare state must be accepted as given. Individuals confront the state, in other words, in a spirit of calculation, as fragmented actors in a system of interest groups that, in the case of the taxpayer, encourages certain facets of their life to be revealed to the state and others to be concealed.¹⁹

Thus, the state can only facilitate accumulation if, and for as long as, it maintains sufficient legitimacy in the population. In the case of the welfare state, its legitimacy has historically hinged on the decommodification of the market. The rise of the welfare states in North America and Western Europe were shaped by particular constellations of class forces and thus vary on a number of significant points; they all share, however, the incorporation of social rights into state intervention in the market as a precondition for legitimacy.²⁰ As Esping-Andersen explains:

the outstanding criterion for social rights must be the degree to which they permit people to make their living standards independent of pure market forces. It is in this sense that social rights diminish citizens' status as commodities.²¹

By decommodifying labour through, among other forms of state intervention, income security, unemployment insurance, old-age pensions, and regulated collective bargaining, the welfare state promised the possibility of the amelioration of poverty and deprivation as well as the integration of unions and labour groups into political institutions, both of which were considered necessary in the aftermath of the Second World War to ensure the stability and security of capitalist growth.

Variations in welfare structures caused by the particular political development of each state, Esping-Andersen argues, result in differing levels of decommodification.²² Canada (along with the United States) is classified as a pure case of liberal hegemony in which labour has for the most part been subservient to the demands of capital. On the decommodification scale used by Esping-Andersen to compare the eighteen welfare states he studies, only Australia, New Zealand and the United States were held to have welfare systems which decommodified the market less than Canada.²³ What this indicates is the extent to which the state in Canada has historically been implicated in, and dependent on, the private accumulation of capital.

Claus Offe has pointed out that the welfare state has never been an autonomous source of prosperity.²⁴ In the 1970s, the formula of economic intervention developed by advanced capitalist states began to unravel. Rather than stimulate increased growth and redistribution

¹⁹ See A. Cairns, "The Past and Future of the Canadian Administrative State" (1990) 40 *U.T.L.J.* 319 at 359-60.

²⁰ See G. Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Cambridge: Polity Press, 1990). See also D. Ashford, *The Emergence of the Welfare States* (Oxford: Basil Blackwell, 1986).

²¹ Esping-Andersen, *ibid.* at 3.

²² *Ibid.* at 1.

²³ *Ibid.* at 50-4.

²⁴ Quoted in *ibid.* at 57.

through higher employment, government spending began instead to fuel inflation, which in turn caused unemployment rates to rise, strikes and labour unrest to proliferate, and a tight monetary policy to be instituted to fight inflation. An unprecedented fiscal crisis arose as governments slid into increasingly crippling debt. Public expenditures began to be viewed as a burden to the production of wealth rather than its prerequisite. It was in part due to this fiscal crisis, and to its attendant legitimization and rationality crises, that the conservative capitalist strategies of the New Right found such fertile soil in the mid-1970s and early 1980s.

The New Right refers to a curious amalgam of fundamentalist religious conservatism and individualist economic conservatism that joined forces under the leadership of Ronald Reagan in the United States and Margaret Thatcher in Britain (and is commonly contrasted to the more elitist and more marginal "Old Right" that reached its apex of influence during Barry Goldwater's 1964 bid for the U.S. presidency).²⁵

With the rise to power of Brian Mulroney in 1984, this movement began to exert considerable influence over the agenda of welfare state reform in Canada.²⁶ Drawing philosophical, economic and strategic inspiration from postwar conservative scholars such as Sir Keith Joseph, Frederick Hayek, Robert Nozick, Milton Friedman, and Enoch Powell, the New Right advanced a comprehensive agenda to roll back both the size and the mission of the state in market capitalism. The role of the state was conceived as maintaining the framework within which markets can freely operate, not to provide entitlements to services in order to satisfy public wants. In other words, people should satisfy their wants as private consumers of the market, not as public clients of the welfare state.

The philosophy of the New Right was premised on the "trickle-down" notion of prosperity and growth which claimed that if the wealthiest stratum of society is offered the opportunity to enrich themselves, they will invest their wealth in stimulating economic growth. This in turn will provide more jobs, a higher standard of living and result in overall prosperity. Specific conservative policy initiatives concerned the deregulation of industry, privatization of state owned or operated enterprises, supply-side incentives (through monetary controls and tax cuts) as well as the trimming or eliminating of a host of welfare expenditures characterized as luxuries that could no longer be afforded. Combined with increased military spending (as in the case

²⁵ See the discussion of this split in the conservative capitalist movement (the authors eschew the term "New Right") in K. Hoover & R. Plant, *Conservative Capitalism in Britain and the United States: A Critical Appraisal* (London: Routledge, 1989) at 76-92. See also P. Marshak, *The New Right and the Restructuring of Global Markets* (Montreal: McGill-Queen's University Press, 1991) at 111.

²⁶ Its impact on Canadian political discourse, however, can be traced back considerably farther; see S. Clarkson, *Canada and the Reagan Challenge: Crisis in the Canadian-American Relationship* (Ottawa: Canadian Institute for Economic Policy, 1982).

of the United States), and soaring debt-loads (as in the case of the U.S. and Canada), these measures combined to fashion a period of consistent growth in the United States, Britain, Canada and other advanced capitalist countries between the recessions which marred the beginning and the close of the 1980s.²⁷

One of the central and most resonant planks of the New Right has been the need to utilize the tax system to encourage the accumulation of wealth, provide an incentive for increased productivity and attract domestic and international capital for investment. High marginal tax rates are held to act as disincentives to business and individual investment, as a disproportionate share of the returns on investment are taxed.²⁸ People are thus encouraged to consume rather than risk their wealth in the market, which in turn diminishes productivity and increases inflation.

For the New Right, income taxation is viewed simply as a species of legal theft. As one columnist advocating this perspective recently analogized, shielding income from the tax collector is like taking off your gold jewellery before embarking on an evening stroll in a dangerous neighbourhood—a prudent and justifiable reaction to a threatening world.²⁹ It is the payment of taxes that requires justification to this school of thought, not the evasion of taxes.

Despite the widespread marketing of this perspective in Canada, it has not succeeded in undermining the Canadian public's acceptance of the welfare state's premise: the structural power arrangements that produced the welfare state, it would appear, remain inviolable. Indeed, the sweeping election victories of the NDP in Ontario, Saskatchewan and British Columbia in the early 1990s would arguably not have been possible had the neo-conservative critique of the welfare state been completely embraced in the 1980s, although the growth of the Reform Party over this same time period demonstrates the continuing presence and influence of this critique of the welfare state in Canada. It is also possible, however, that the concurrent rise of the Reform Party and the electoral successes of the NDP are more a product of dissatisfaction with the incumbent government than with any deeper sentiments about the neo-conservative agenda. Nevertheless, it is apparent that, rather than the project itself, it is the size and operation of the welfare state that has come under increasing scrutiny and criticism. Keith Banting offers the following account of the ambivalent and uniquely

²⁷ See the figures published in IMF, *World Economic Outlook* (May 1990), 130, cited in A. Donner, "Recession, Recovery, and Redistribution: The Three R's of Canadian State Macro-policy in the 1980s," in D. Drache & M. Gertler, eds., *The New Era of Global Competition: State Policy and Market Power* (Montreal: McGill-Queen's University Press, 1991) 26 at 28. Of the three states, Canada's GDP grew at the highest rate, fluctuating between 3% and 6% from 1983 to 1989.

²⁸ See G. Gilder, *Wealth and Poverty* (New York: Basic Books, 1981) at 77. For a Canadian perspective on the similar philosophy, see P. Malvern & G. Venderberg, *Fighting Back: Tax Evasion and the Great Canadian Tax Revolt* (Toronto: Methuen, 1984).

²⁹ See K. Selick, "Let's Not Confuse Tax Evader with Unemployment Insurance Cheater," *Ontario Lawyer's Weekly* (27 January, 1989) 16.

Canadian reception of the conservative capitalist message in the 1980s:

Throughout the postwar era, the prevailing assumption was that a welfare state would complement the market economy; it would be an instrument of counter-cyclical stabilization, it would ensure an educated and healthy workforce; and it would provide the complex social infrastructure essential to an urban economy. While such ideas never commanded universal assent, their reign was reasonably secure during the decades of sustained economic growth. The problems of the past ten years, however, have revived older conceptions of fundamental incompatibility between economic efficiency and social equity. A resurgent conservative critique insists that the modern welfare state and its associated taxes undermine growth by stifling entrepreneurship, distorting the incentive structure, interfering with the operation of labour markets, and reinforcing dependency among the recipient population. That is not to say that Canada has entered a new era of unchallenged conservative ideological hegemony—there is vigorous resistance to any such shift within important elements of the political system, and only a limited resonance in public attitudes as a whole.... The basic legitimacy of the welfare state is not an issue for the Canadian public.³⁰

In my view, the aspect of the New Right's critique that has found the deepest and most enduring appeal is its claim that Canadians are over-taxed, despite reservations (discussed below) about the equity of how the tax burden is shared. The emphasis on taxation in the public relations war against the welfare state is not surprising, given the central role of the income tax in the institutionalization of class conflict. As O'Connor notes:

Every important change in the balance of class and political forces is registered in the tax structure. Put another way, tax systems are simply particular forms of class systems. ... Ruling classes normally attempt either to conceal or to justify or to rationalize tax exploitation ideologically.³¹

III. THE INCOME TAX: ENFORCEMENT, EXPENDITURES AND EQUITY IN THE 1980S

In order to understand the changing dynamics of tax evasion in the 1980s, it is necessary not only to analyze the changing dynamics of the welfare state and the forces which led to the rise of the New Right, but also the character of Canada's tax system itself. In this section, I argue that the distortions which preserve the contradictions of the welfare state are reflected and reproduced in the structures of the tax process.

Through a variety of statutory mechanisms, Canada's income tax system explicitly allows and encourages the wealthy to prosper;³² it is

³⁰ K. Banting, *The Welfare State and Canadian Federalism*, 2d ed. (Montreal: McGill-Queen's University Press, 1987) at 185.

³¹ O'Connor, *supra* note 17 at 202-203.

³² For a recent survey of some of the most explicit ways in which the tax system does this, see G. Bruce Doern, "Tax Expenditures and Tory Times," in K. Graham, ed., *How Ottawa Spends 1989-90: The Buck Stops Where?* (Ottawa: Carleton University Press, 1989). See also N. Brooks, "The Changing Structure of the

nevertheless widely presented to the public as punitive toward those who are prosperous. The emphasis of the New Right and a source of its success has been, as noted above, to portray the progressive income tax as a barrier to increased investment in economic growth. This perspective and its “trickle-down” acceptance throughout society, of course, did not originate in the 1980s. In Louis Eisenstein’s study entitled *The Ideologies of Taxation*, published over thirty years ago,³³ two perceptions are identified as the central tenets of a conservative approach to income tax: 1) that the income tax be tied to one’s ability to pay (and not to the redistribution of wealth); and 2) that one’s tax burden not act as a barrier or deterrent to investment. Eisenstein points out that an argument for both these claims can be found in the classical discourse of liberalism (for example, a redistributive income tax must, by definition, discriminate against the prosperous, and therefore contradicts a pure notion of equality in government interference).³⁴

Contrary to the empirical implications of the New Right’s critique of the income tax, there seems to be little historical or empirical correlation between tax incentives and economic performance; in other words, when progressive or high tax rates have been imposed, or capital gains from investments taxed, or tax avoidance rigorously deterred, or tax evasion vigorously prosecuted, business investment usually perseveres, and indeed, often continues to be profitable; when the reverse occurs, there are usually other more determinant factors influencing investment and business conduct.³⁵

However, the ingenuity of Eisenstein’s contribution to the study of income taxation stems from the second tier of his argument, namely, that favouring equality along the classical liberal model offers clear advantages to those who happen to be wealthy already. In other words, since the market creates inequality, any government regulation of the market (which is what any income tax represents) that treats all individuals as equal only reinforces and reproduces that inequality. The history of income distribution in Canada bears out this assertion. The wealthiest quintile of Canadians has accounted for between 41 and 43 per cent of total income earned annually in Canada throughout the postwar era, while the poorest quintile has accounted for between 3.6 and 5 per cent of total income earned annually.³⁶ Despite the re-

Canadian Tax System: Accommodating the Rich,” (1992) 30 *Osgoode Hall L.J.* (forthcoming).

³³ Eisenstein, *Ideologies of Taxation* (New York: The Ronald Press, 1961).

³⁴ See generally, M. Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982).

³⁵ See L. McQuaig, *Behind Closed Doors* (Toronto: Viking, 1987) at 66. See also F. Block, “Rethinking the Political Economy of the Welfare State,” in F. Block et al. eds., *The Mean Season: The Attack on the Welfare State* (New York: Pantheon, 1987) at 113-18.

³⁶ See figures from Statistics Canada, *Income Distribution by Size in Canada, Canada Year Book*, quoted in J.H. Perry, *A Fiscal History of Canada The Postwar Years*, Canadian Tax Paper No. 85 (Toronto: Canadian Tax Foundation, 1989), Table 28.1, 752.

distributive promise of a progressive income tax,³⁷ the operation of this tax in Canada, along with the variety of regressive sales taxes and property taxes that comprise Canada's "tax mix," has actually allowed the rich to become enriched, and hindered the poor from escaping poverty. Moreover, this has not happened accidentally, or as a result of the neutral machinations of an invisible hand. Rather, in the concise opinion of Linda McQuaig, "we don't have a progressive tax system because the rich have indicated that they don't want one."³⁸

Given the realities of market capitalism in Canada, a neutral income tax has never been an option; both the tax and the way in which it is enforced either promotes inequality or redress. Neutrality in the discourse of income taxation, rather, refers to provisions that do not privilege one kind of economic or social activity over another. The goal of a neutral income tax is to tax people on the basis of the choices they make (whether to devote their income to savings or consumption, to real estate or retail, and so on), not to make the income tax itself the basis for those choices (as in the proliferation of sham tax avoidance transactions or the desirability of losing money in certain circumstances so as to shelter other gains). As a result of a tax policy system embedded in interest-group pluralism and dependent on the vagaries of the market, however, this neutrality has not been realized either. The impact of the income tax on spending and saving habits, though, should not obscure the more fundamental impact of the income tax on the equity of the distribution of income in the welfare state. The impact of the income tax on equity in Canada, as asserted in the following passage by Neil Brooks, has been to entrench and extend the inequalities produced by the market:

The overall tax system is viciously regressive: income from property bears a much lighter tax burden than income from labour; many high-income taxpayers and multinational corporations pay income tax at extremely low effective rates and in some cases not at all; the government spends billions of dollars in corporate tax expenditures and yet most have been shown to be ineffective and to have an adverse impact on the economy; the income tax subsidizes the lifestyles of the rich; and most personal tax expenditures benefit high income taxpayers disproportionately more than low-income taxpayers.³⁹

It is beyond the scope of this study to detail all the various specific deductions, exemptions, credits, rollovers and deferrals in the *Act* which give effect to the above remarks. Some general remarks, however, may serve to elaborate on this claim. For example, the range of

³⁷ Currently, the tax rate schedule is as follows: 17% on 28,275 or less; \$4,807 + 26% on the next \$28,275; and on any income above \$56,550, \$12,158 + 29% on the remainder. Provincial tax rates are added as a percentage of the federal tax rate; the highest of these rate is 62% in Newfoundland, while the lowest is 44% in the Northwest Territories. Additionally, certain provinces impose a surtax for example, Ontario levies a surtax of 10% of tax over \$10,000.

³⁸ *Supra* note 43 at xxvii.

³⁹ N. Brooks, "Future Directions in Canadian Tax Law Scholarship," (1985) 23 *Osgoode Hall L.J.* 441 at 470-471. See also L. Sossin, "Squeezing Blood From Stones: The Income Tax Industry in Canada" (1992) 8 *J.L. & Social Pol'y* 178 at 200-203.

deductions open to a corporate or individual taxpayer earning income from business or property are far broader than those available to an ordinary taxpayer earning income from salary.⁴⁰ These deductions include office supplies, travelling expenses, moving expenses, legal expenses, and interest on any debt incurred for the purposes of realizing income, among a host of others. Most galling to many critics, corporations and individuals earning income from business investments are even permitted to deduct expenses incurred in lobbying the government for more deductions. Further, income earned from investments, such as the sale of stocks, companies, personal property or real estate are taxed at a preferential rate (three-quarters) as capital gains, rather than merely as all other forms of income.⁴¹ Prior to 1972, capital gains were not taxed at all. While those earning profits from business and property suddenly found an increased proportion of the annual income taxable, Canada's wealthy were more than compensated by the simultaneous repeal of the inheritance, estate and gift taxes. This allowed wealth to be transferred from one generation to another without any effective recapture by the state, further thwarting whatever redistributive ambition Canada's tax system harboured.⁴² Reviewing the implications and consequences of this tax reform, Neil Brooks and Linda McQuaig recently wrote the following:

Most Canadian had never known about the tax anyway, since it only applied to those with large wealth holdings ... But the lack of any public debate was astonishing, since the revenue loss was enormous. Over the next twenty years alone, it would save Canada's wealthy families well over \$20 billion, by conservative estimates ... the removal of the inheritance tax was, in the long run, more significant than the imposition of the capital gains tax.⁴³

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- ⁴⁰ In the *Act*, section 18 sets out those exceptions to the general rule that all expenses incurred in the earning of income from business or property are deductible, and section 8 sets out those exceptions to the general rule that no deductions are permitted for expenses incurred in the earning of income from office or employment.
- ⁴¹ This practice is a holdover from the principle that all income must emanate from a source, and it is the income, not the source, that is taxable, so that in the metaphor of a farm (popularized in the early common law jurisprudence on taxation), the fruit of the trees are taxable as income, but the trees themselves are not taxed at all. Prior to the tax reform package of 1972, capital gains were not taxable income at all in Canada. See B.J. Arnold *et al*, eds., *Materials on Canadian Income Tax*, 8th ed (Toronto: De Boo, 1989) at 573-656.
- ⁴² On the regressive effects of repealing these taxes, see J. Bossons, "Economic Overview of the Tax Reform Legislation," *Report of the Twenty-Third Tax Conference, 1971* (Toronto: Canadian Tax Foundation, 1972), 45-67; J. Head, "Canadian Tax Reform and Participatory Democracy," quoted in W.I. Gillespie, *Tax, Borrow & Spend: Financing Federal Spending in Canada, 1867-1990* (Ottawa: Carleton University Press, 1991) 206.
- ⁴³ N. Brooks & L. McQuaig, "In Tories They Trust" (1992) 26:5 *This Magazine* 13. The authors go on to point out that, in order to soften the blow of the capital gains tax, wealthy families were permitted to place taxable income in trusts. The Trudeau government enacted provisions that would defer the tax liability on these trusts for 21 years. This period of grace ended January 1, 1993, and as a result of intense lobbying by the high-income taxpayers and their representatives, the

In addition to a lesser rate of taxation for capital gains, a generous lifetime exemption of \$100,000 in tax-free capital gains is also provided.⁴⁴ Buildings, equipment and other capital investments may be depreciated annually by businesses to offset income earned, despite the likelihood that much of this property will appreciate in value over time. The recapture of taxes on these profits takes place only when the item is sold or transferred or when, in the case of an individual, the taxpayer dies or establishes residency abroad. The effect of this provision is to provide an enormous interest-free loan in the form of a tax deferral to the taxpayers who can afford to invest surplus income.

Virtually all of the advantages given to taxpayers privilege corporations. Moreover, for the purposes of the income tax, corporations are nominally treated as any other taxpayer earning income from business, property and investments,⁴⁵ though corporations are subject to a separate rate schedule.⁴⁶ Though corporations are recognized as taxpayers conceptually indistinguishable from individuals, they present the income tax system with some extraordinary dilemmas. For example, many corporations both generate taxable income and distribute taxable stock dividends to shareholders and thus are notionally "double-taxed" on these profits.⁴⁷

This is off-set, however, by the plethora of tax expenditures contained in the *Income Tax Act* designed to provide corporations with incentives to invest, subsidies to operate, and a low-risk environment in which to accumulate wealth. In the postwar era of increasing state regulation and modification of the market, the tax system has taken on an increasingly interventionist role in the economic well-being of the country. This has transformed the income tax from a means of gathering revenue and redistributing income, to an engine of economic development and a safety-net for capital investment. One of the most vivid illustrations of the way in which the income tax has been transformed is the rise in prominence of tax expenditures, that is, tax-breaks for individuals and corporations pursuing certain designated economic or social activities.⁴⁸ These tax expenditures have

government has proposed a bill that would, further delay repayment and allow for huge tax savings and deprive the public treasury of vast debts it has now been owed a generation. Brooks and McQuaig express alarm over the virtual absence of public awareness and debate over the implications of this proposed legislation.

⁴⁴ Farmers and small business-persons are given a lifetime exemption of \$500,000.

⁴⁵ Among corporations, though, technical distinctions are made between private corporations, Canadian-controlled private corporations, public corporations, charitable corporations and so forth.

⁴⁶ The combined federal and provincial corporate income tax rate has decreased from 46% in 1972 to 38% after the conservatives tax reform package in 1988—this rate is reduced to 22% for corporations eligible for a small business deduction.

⁴⁷ See D.P. Jones, "Corporations, Double Taxation and the Theory of Integration" (1979) 27 *Can. Tax. J.* 405.

⁴⁸ The Finance Department defines a tax expenditure as taking the form of exemptions, deductions, credits, reduced tax rates and deferrals. Tax expenditures provide special tax treatment to selected individuals and groups in society. While the nature of these activities varies considerably, mining, oil exploration, small

rapidly come to replace direct subsidies as a less visible and hence less politically controversial means of furthering specific policy aims. By the late 1970s, the growth of tax expenditures consistently outpaced the growth of direct government subsidies.⁴⁹

The use of tax incentives to stimulate business investment intensified after the institution of the tax reform package in 1972 which made capital gains taxable. These expenditures were first enacted on a wide scale by the Trudeau government in 1976 in the face of increasing budget restraint, a sagging investment climate, and the freedom from the constraints that the previous minority government, aligned with the NDP, had placed on the Liberals prior to 1974. In 1975, for instance, a 5 per cent investment tax credit was employed on capital expenditures; it was initially intended to last through the recession of the mid-1970s but was later extended.⁵⁰ Governments from both parties found these incentives more politically expedient than direct subsidies; however, they also proved less efficient at accomplishing their stated objectives and, resulted in tax officials administering policy initiatives for which they are both untrained and unsuited. The growth of tax expenditures was curtailed somewhat by a brief period in the late 1970s during which a list of lost revenues due to these expenditures was calculated and published. This controversial practice was quickly stopped. By 1980, there were 200 tax expenditures built into the *Act*; this figure had ballooned to 300 by 1985. By 1983, the government was estimated by Revenue Canada to be losing, or rather the Finance Department investing in the economy, approximately \$23 billion annually through tax expenditures.⁵¹ Donald Savoie, in his study *The Politics of Public Spending in Canada* attributes Canada's staggering \$300 billion national deficit in large part to the federal government's "failure to tax".⁵² Despite measures such as the child tax credit or tuition tax credit and a host of expenditures made

business ventures, and farming are some examples of prominent areas of expenditures in the *Act*. For the first public accounting of these expenditures and their cost to the taxpayers, see Department of Finance, *Government of Canada Tax Expenditures Account* (Ottawa: The Department, 1979); for comment on this inaugural report, see N. LePan, "Measurement of the Revenue and Distributive Effects of Tax Expenditures" *Canadian Taxation* 2 (1980), 220; Brooks, *supra* note 39 at 465-8; for recent developments, see Doern, "Tax Expenditures and Tory Times"; see generally S. Surrey and P. McDaniel, *Tax Expenditures* (Cambridge: Harvard University Press, 1985).

⁴⁹ See E. Tamagno, "Comparing Direct Spending and Tax Spending" (1979) 1 *Canadian Taxation* 42 at 44.

⁵⁰ For a complete list of the early expenditures incorporated in the *Act*, see F. Harman & J. Johnson, "An Examination of Government Tax Incentives for Business Investment in Canada" (1978) 26 *Can. Tax J.* 691; see also R.M. Bird, *Tax Incentives for Investment: The State of the Art*, Canadian Tax Paper No. 64 (Toronto: Canadian Tax Foundation, 1980).

⁵¹ This figure is cited by D. Savoie, *The Politics of Public Spending in Canada* (Toronto: University of Toronto Press, 1990) at 332. An audit of tax expenditures for the year 1982-3 estimated this figure to be \$28 billion; see *Report of the Auditor General, 1986* (Ottawa, Supply and Services, 1986), 4:17.

⁵² *Ibid.* at 329.

on behalf of farmers, the recipients of tax expenditures tend to be corporations with capital to invest and reserves of income to shelter. Indeed, while the share of income tax revenue contributed by corporations was roughly equal to that of individuals in the initial postwar years; by 1989, individuals contributed 7.4 times the share of taxes as compared to corporations. Personal taxes increased close to 15 per cent during the 1980s, while the corporate tax burden was reduced by close to 35 per cent, leaving Canadian corporations at the close of the decade with an unusually light burden of income taxation relative to other advanced industrial countries.⁵³

The effect of these measures aimed at allowing corporations to generate more profits, however, is to undermine any moral or economic rationale for deterring illegitimate tax avoidance or for punishing tax evasion. According to the report on Revenue Canada commissioned by the Liberal government shortly before its departure in 1984, "[m]uch tax reduction or avoidance is not only sanctioned by government policy, by law or by administrative practice, but is actually encouraged through various forms of tax incentives."⁵⁴ The Auditor General estimated that by 1982, a pool of losses through unused tax credits offered to corporations had reached \$18.5 billion.⁵⁵ As these corporations attempt to convert these unused credits into cash, the Finance Department is compelled to deter their efforts, thus adding further complexity to the *Act*, and further incentives for corporations to invest in tax planning. The Auditor General concluded:

It is virtually impossible to eliminate taxpayer induced avoidance mechanisms. The legislative drafters and their advisers do not have the resources or the incentives of the private sector experts who devise them.... These avoidance mechanisms also have a negative effect on the equity and integrity of the tax system and on the attitudes to voluntary compliance. Access to such mechanisms is usually restricted to those who can afford very expensive advice. Those who cannot may therefore be denied equitable and even-handed treatment.⁵⁶

The example of tax expenditures reveals how Canada's tax legislation privileges certain sectors of the economy and segments of the population in relation to the rest. The income tax system has been a favoured vehicle for successive Canadian governments to placate the policy preferences of special interest groups; the result, not surprisingly, has been an income tax skewed to benefit groups which were able to bring to the policy process resources, influence and hence access.

The pathologies of Canada's tax system, however, include more than merely the many tax advantages to the wealthy incorporated into the *Income Tax Act*. As the Auditor General alluded to above, the self-assessment nature of the income tax allows those with sufficient

⁵³ For an elaboration on these figures from Statistics Canada and the OECD, see M. Hurtig, *The Betrayal of Canada* (Toronto: Stoddart, 1991) at 146-57.

⁵⁴ Farlinger, *supra* note 1 at 17:22.

⁵⁵ *Report of the Auditor General, 1986*, 4:32.

⁵⁶ *Ibid.* at 4:34.

means the freedom to employ tax planners (generally, lawyers and accountants) to ensure that their tax burden is avoided to the maximum extent allowable "by law". This feature of Canada's tax system has given rise to vast amounts of time and effort deployed in seeking new and ever more sophisticated means of tax minimization on behalf of the high-income taxpayer population.

For the wealthier taxpayers, the value of the investment in tax planning and in executing tax avoidance transactions easily outpaces the expense. For the middle and low-income salaried taxpayers, however, the income tax is not a luxury they can afford to do without. Harvey Perry, one of the former members of Canada's Royal Commission on Taxation, observed recently that corporations have become equally concerned with a tax dollar saved as with a dollar of profit earned.⁵⁷ It occupies much corporate energy, and preoccupies a significant proportion of this country's professional labour. Vern Krishna goes further, contending, "tax avoidance often provides as much of an impetus towards the global economy as any other single direct economic stimulus."⁵⁸ Avoidance, of course, can either be achieved legislatively (for instance, by permitting tax avoidance transactions), judicially (for instance, by narrowly interpreting the powers of the Revenue Department to investigate avoidance) and administratively (for instance, by budgetary cutbacks to auditing or by self-imposed restraint in enforcement on the part of Revenue Canada). In Canada, all three methods have been successfully employed, which has resulted in tax avoidance becoming a boom industry in the 1980s. Consider the following figures on the rates of audits undertaken by Revenue Canada:

Table 1.1: Enforcement Coverage as a Percentage of Tax Returns⁵⁹

	1980	81	82	83	84	85	86	87	88	89
Individuals	1.5	1.5	2.0	1.5	1.0	1.0	1.0	1.0	1.0	1.0
Corporations	3.5	3.0	2.5	2.5	2.5	2.0	2.0	2.0	2.0	1.5

Over seven hundred fewer corporations were audited in 1989 than in 1984 when the Progressive Conservatives took office.⁶⁰ This is all the more significant given that the number of corporate income tax returns rose from approximately 500,000 in 1980 to 900,000 in 1989.⁶¹

⁵⁷ See J. Harvey Perry, *A Fiscal History of Canada—The Postwar Years*, Canadian Tax Paper No. 85 (Toronto: Canadian Tax Foundation, 1989) at 337.

⁵⁸ V. Krishna, *The Fundamentals of Canadian Income Tax*, 3d ed. (Toronto: Carswell, 1989) at 850.

⁵⁹ *Ibid.*, exhibit 24.3 at 560. I have rounded the figures for simplicity. Despite this decline, \$952 million in additional revenue was assessed through audits in 1989/90. See *Report of the Auditor General, 1990* (Ottawa: Supply and Services, 1990) at 553-5.

⁶⁰ *Ibid.* at 562.

⁶¹ Revenue Canada, *Taxation 1990-91 Estimates: Part III*, figures 6 and 7.

Additionally, 45 per cent of Revenue Canada's audits target taxpayers who report income in excess of \$3 million.

Despite this decline in auditing coverage, a greater proportion of audits are currently directed towards corporations than previously; this is largely because audits of corporations have historically yielded far greater amounts of additional tax assessed (nearly double the amount in 1988, for instance) and thus this shift offsets the decreasing budgetary allotments to auditing overall.⁶² For example, in 1984 approximately 467 million dollars in additional taxes were assessed overall compared to 952 million dollars in 1989.⁶³ Whereas the average audit of an individual's tax return resulted in an average of \$6,382 in additional tax assessed, the average audit of a corporation netted \$41,004 additional tax revenue.⁶⁴ It is worthwhile emphasizing that this sort of routine underreporting is not treated as tax evasion or even as tax avoidance; indeed, once such practices are uncovered, they attract no legal consequences beyond the added liability to the taxpayer.

Approximately 10,000 tax practitioners are arrayed against Revenue Canada's enforcement apparatus.⁶⁵ While these professionals range in talent, expertise and expense, they share the same fundamental purpose; virtually all seek to minimize the tax burden of their clients. Tax lawyers are said to owe a duty not only to their client but also to the "system" as a whole.⁶⁶ While it is difficult to discern this facet of the tax community's role, it is clear that tax practitioners have an influential impact on the public's consciousness of the tax system. What is actually in the interest of the corporate and high-income taxpayers who comprise the bulk of the tax community's clientele (such as more restrained tax enforcement and less restrained protection of taxpayer's rights), becomes universalized by these advocates to be in the interests of overall fairness and prosperity. Tax administrators, notionally entrusted with ensuring the equity of the income tax, and with whom the majority taxpayers have no contact save for a refund cheque, are painted by large segments of this community as autocrats to be feared and mistrusted.⁶⁷ Linda McQuaig offers a vivid depiction of this characterization:

The bad guy in the game is always some faceless bureaucrat at Revenue Canada whose powers seem unlimited. He can probe relentlessly into the client's most intimate financial details, demand endless documentation, reject expenses that may seem perfectly justifiable. His decision can be appealed to the courts but that is such a tiring, expensive, unpredictable, route and it leaves the taxpayer once again in the hands of an austere, outside authority. It's not surprising that the tax practitioner comes to see his clients as victims and quickly sheds any

⁶² *Report of the Auditor General, 1990, supra* note 59 at 563.

⁶³ *Ibid.*

⁶⁴ *Ibid.* at 575.

⁶⁵ McQuaig, *supra* note 35 at 118.

⁶⁶ See B. Wolfman & J. Holden, *Ethical Problems in Federal Tax Practice*, 2d ed. (Charlottesville, Va: The Michie Company, 1985) at 1.

⁶⁷ For a brief overview of the negative publicity Revenue Canada endured in the 1980s, see *supra* note 39 at 181-86.

moral qualms about doing everything possible to protect them from the heavy, omnipotent hand of the state.⁶⁸

It is not merely the intimate involvement of the tax community in the tax process that ought to be critically scrutinized but the *exclusivity* of that community's involvement. This community has evolved from reacting to tax reform to shaping it. Since the demise of the MacEachen reform package of 1981, in which the tax practitioner community was not significantly consulted and subsequently lobbied successfully to scrap the reform legislation, the pattern that has traditionally characterized tax reform in Canada seems to be changing.⁶⁹ Tax reform now seems to be driven by technical and revenue generating concerns (or, in short, the concerns of the tax community and their high-income clientele); any notion that income taxation and social justice necessarily intermingle has, to a significant extent, been ignored. As James Gilles remarked on the occasion of the twentieth anniversary of the Carter Commission Report:

In 1987, the situation is quite different: the political support for reform is not a consequence of any comprehensive analysis of equity, justice or anything else. Rather, it is based on a widely shared, uncomplicated view that tax laws are too complex and need to be simplified.... There is some belief that the system contains inequities and that it is not entirely fair, but most politicians know that equity is not a major vote-turning issue.⁷⁰

The focus on simplification, however, misses the point that equitable compliance is the heart of the issue, not the grammatical structure of the *Act*. Robert Couzin states, "a tax measure may generally be said to enhance tax simplification if it facilitates compliance."⁷¹ This leads to a circular argument, as it is in many ways precisely the widespread incidence of avoidance and evasion that makes the technical complexity and specificity of the *Act* necessary in the first place.⁷² The increasing technical specificity of the *Act* has, additionally, led to the acceptance of the principle that everything that is not expressly prohibited under the *Act*, is permitted by law. Arguably, then, the popularity of the simplification movement in tax reform masks what is actually at stake in the reform debate, namely, the fairness, legitimacy and justice of the tax system. The goal in exposing the distortions manifest in the tax system is to reveal that taxation is, in the final analysis, invariably a form of (if not a forum for) politics, and therefore potentially, a site of social transformation.

Tapping the reservoir of discontent with the present tax system can thus lead to political solutions to the problem of social and economic inequality. The discontent, to be sure, does exist. For example, in a

⁶⁸ *Supra* note 35 at 116.

⁶⁹ See W.I. Gillespie, "Tax Reform: The Battlefield, The Strategies, The Spoils" (1983) 26 *Canadian Public Administration*, 182-202.

⁷⁰ *Supra* note 116 at 346.

⁷¹ R. Couzin, "Simplification and Reform" (1988) 26 *Osgoode Hall L.J.* 433 at 435.

⁷² See *ibid.* at 442. Couzin argues, "The correlation between complexity in the income tax law and its administration and the effort to manage, if not eliminate tax avoidance or abuse is undoubtedly high."

preliminary study on taxpayer attitudes in Canada conducted by Neil Brooks and Anthony Doob, over 90 per cent of the questioned Canadian taxpayers shared a belief that people are able to avoid paying their fair share of the tax burden by hiring experts to find loopholes for them; in the same survey, over 80 per cent expressed the opinion that corporations and businesses are taxed too little.⁷³ The majority said that taxing capital gains at preferential rates was unfair. The study also revealed that the overwhelming majority of Canadians expressed the belief that they are overtaxed.⁷⁴ Finally, in a general representation of disenchantment with the tax system, over half of the surveyed group in that study thought that the tax system, overall, was unfair.⁷⁵ Alan Cairns notes in his study of the response to the malaise of Canada's welfare state, "exit is a blunt response widely employed by both capital and citizens."⁷⁶ What Cairns does not explore is the difference in the nature and implications of the response depending on whether it is capital or citizens that are exiting, and further, depending on whose capital and which citizens are exiting.

IV. TAX EVASION AND WELFARE STATE CRIME IN THE 1980s

Tax evasion is a species of fraud.⁷⁷ However, as I have endeavoured to show, it is better understood as a product of, rather than a threat to, the income tax system in Canada. As one Revenue Canada official has cautioned, "any attempt by government to create equity in taxation will be ineffective if evasion is not brought under control."⁷⁸ The study by Brooks and Doob on the incidence of tax evasion in Ontario revealed what many familiar with tax culture in Canada have suspected for years, namely, that tax evasion is widespread.⁷⁹

⁷³ N. Brooks & A. Doob, *Making Taxpayer Compliance Easier: Preliminary Findings of a Canadian Survey*, Paper prepared for the Internal Revenue Service (U.S.) conference on taxpayer behaviour in November of 1990, 5.

⁷⁴ The figure Brooks & Doob, *ibid.*, cite is 80%, while 39% indicated that they would prefer fewer government services in return for lower tax rates. Only 9% indicated a preference for higher tax rates in return for better quality government services. See Brooks & Doob, *Making Tax Compliance Easier*, 3; An American survey yielded similar results, see Yankelvitch, Skelly and White Inc., "Taxpayer Attitudes Study" (1984) quoted in E. Bardach, "Moral Suasion and Taxpayer Compliance" (1989) 11 *Law & Policy*, 52; see also Y. Song & T. Yarborough, "Tax Ethics and Taxpayer Attitudes: A Survey" (1978) 38 *Public Administration Rev.* at 442-52.

⁷⁵ Brooks & Doob, *ibid.*

⁷⁶ *Supra* note 19 at 354.

⁷⁷ A senior Revenue Canada official elaborated on this, stating, "tax evasion is a fraud on all Canadian taxpayers." See G. McCracken, "Preventing Tax Evasion through Enforcement: The Government Perspective" in *Income Tax Enforcement, Compliance, and Administration, Corporate Management Tax Conference, 1988, Toronto (Canadian Tax Foundation, 1988)* at 2:10.

⁷⁸ *Ibid.* at 2:1.

⁷⁹ *Supra*, note 73, in which 18.5% of the respondents to the survey were classified as tax evaders. See also the rather sensationalist account of this modest research project in the *Globe & Mail* (19 February 1991) A1.

It is estimated that between 5 and 20 billion dollars are lost to tax evasion annually.⁸⁰ Unlike the United States, where tax evasion occupies a high profile in the national psyche,⁸¹ tax evasion generates very little publicity in Canada. Like other forms of corporate or “white collar crime,” tax evasion is regarded as more a violation of an administrative regulation than a breach of the social contract; it is a practice to be discouraged but not to be punished.⁸² As Harry Glasbeek notes with respect to the difference between the killing of a person by a person (to which the *Criminal Code* applies) and by a corporation (to which an administrative statute governs), “the only thing which differentiates them is the *unseen* factor: the purposes to which they aim.”⁸³ The purpose of the criminal law is to govern social relations, while the purpose of the administrative regulatory statutes is to govern market relations. This distinction, however, is rarely tenable. The statement of the court with respect to sentencing for tax evasion in the case of *R. v. Horowitz*⁸⁴ is illustrative of this conundrum:

I, frankly, am not interested in the question of penalty as a punishment as such ... Probably the most important principle is in relation to the deterrence of others. Perhaps the reason there is some confusion, in the mind of the public, as to whether this is a truly criminal offence—such as an offence under the *Highway Traffic Act* and other types of offences against statutory enactments... arises from some feeling, in certain quarters at least, that any imposition of taxes by a government is so unpopular that any infraction of the law is an infraction against some vague and faceless entity and that such an offence is different from others. ... I think it is important that the public realize that such evasion is a criminal offence and that punishment is—and when I speak of punishment I mean penalization not retribution—bound to follow.

The difference between penalization and retribution is important: people are penalized for merely breaking the rules; retribution, how-

⁸⁰ S. Berger, “The Unrecorded Economy—Concepts, Approaches, and Preliminary Estimates for Canada” in Statistics Canada, *Can. Statistical Rev.*, monthly catalogue no. 11-003E, cited in McCracken, “Preventing Tax Evasion.” See also N. Brooks & A. Doob, “Tax Evasion: Searching for a Theory of Compliance Behaviour” in M. Friedland, ed., *Securing Compliance: Seven Case Studies* (Toronto: University of Toronto Press, 1990) 122.

⁸¹ See D. Burnham, *A Law Unto Itself: Power, Politics and the IRS* (New York: Random House, 1989) at 70-91. Interestingly, the IRS has broken down tax evasion by sources and estimates (on the basis of 1982 figures) that out of approximately 97 billion dollars of taxable revenue lost to the underground economy, 66 billion resulted from unreported income earned by individuals, 12 billion resulted from overstated expenses, deductions, and tax credits, 5 billion resulted from non-filing, 4 billion resulted from non-compliance by corporations, and finally, 10 billion resulted from unreported income from illegal transactions. These figures are cited by Brooks and Doob, “Tax Evasion,” *ibid.* at 123.

⁸² See C. Tolefson, “Ideologies Clashing: Liberalism, Criminal Law and the Regulatory Offence” (1992) 30 *Osgoode Hall L.J.* (forthcoming); see also C. Goff & C. Reasons, *Corporate Crime in Canada* (Scarborough: Prentice Hall, 1978); and H.J. Glasbeek, “Why Corporate Deviance is not Treated as Crimes: The Need to Make ‘Profits’ a Dirty Word” (1984) 22 *Osgoode Hall L.J.* 393.

⁸³ Glasbeek, *ibid.* at 412-3.

⁸⁴ (1971), 25 D.T.C. 5350 (Ont. Co. Ct.).

ever, is reserved for people who infringe social values of collective importance. The question of the criminality of income tax offences was settled, though not necessarily resolved, by the Supreme Court's recent decision in *R. v. McKinlay Transport Ltd.*⁸⁵ Unlike offences under the then *Combines Investigation Act* which were held to be quasi-criminal, the *Income Tax Act* was deemed "essentially a regulatory statute since it controls the manner in which income tax is calculated and collected."⁸⁶ The purpose of the offences set out in the *Act* was characterized as to further compliance, not to penalize criminal conduct.⁸⁷ The effect of this characterization, however, has wide implications. Wilson, writing for the majority in *McKinlay*, found that since the statute was regulatory and not criminal, the privacy interest protected for those suspected of having committed an offence under the *Income Tax Act* is less than were it criminal legislation. The search and seizure provisions which were being challenged in the case were thus upheld.⁸⁸ The following arguments of Young and Reid were cited with approval in this regard:

There is, therefore, a large circle of social values and business activity in which there is a very low expectation of privacy. The issue is not *whether* but rather when, how much, and under what conditions information must be disclosed to satisfy the state's legitimate requirements. Every person who fills an annual tax return may be said to enjoy a low expectation of privacy with respect to information about his income.⁸⁹

More recently, the Supreme Court seems to be veering away from rigid classifications of what is "criminal" and what is "regulatory," as evidenced by the recent decision in *R. v. Wholesale Travel Group Inc.*⁹⁰ In that decision, La Forest J. noted (at 209), "what is ultimately important are not labels (though these are undoubtedly useful), but the values at stake in the particular context." Labels not only continue, to some extent, to shape the boundaries of legal rights, they also define what it means to contravene the law.

Not surprisingly, given the judicial pronouncements noted above, people convicted under the provisions of the *Income Tax Act* are much less likely to face incarceration than those convicted of other types of fraud under the *Criminal Code*.⁹¹ Even more telling, and less explicable according to the dichotomy between criminal and regulatory

⁸⁵ [1990] 1 S.C.R. 627.

⁸⁶ *Ibid.* at 641.

⁸⁷ For a case exploring this distinction in more detail, see *R. v. Grimwood*, [1987] 2 S.C.R. 755.

⁸⁸ See more recently however, *Baron v. Canada*, [1993] S.C.J., No. 22298 (21 January 1993), striking down the search and seizure provision under s.231.3 as infringing s.8 of the *Charter*.

⁸⁹ A. Reid & A. Young, "Administrative Search and Seizure Under the *Charter*" (1985) 10 *Queen's L.J.* 392 at 399-400.

⁹⁰ [1991] 3 S.C.R. 154. See also *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research)*, [1990] 1 S.C.R. 425; and *Kourteassis v. M.N.R.* (1989), 50 C.C.C. (3d) 201 (B.C.C.A.), [1993] S.C.J., judgment released April 22, 1993.

⁹¹ See K. Dye, *Report of the Auditor General, Canada* (Ottawa: Supply and

offences, defrauding the tax system attracts little of the derision reserved for those individuals who defraud the welfare system.⁹²

Though prosecutions and convictions for tax evasion have historically been rare, perhaps reflecting a symbolic more than substantive approach to enforcement, they declined significantly during the 1980s, as illustrated by the following figures on prosecutions for individual tax evasion.

Table 1.2: Prosecutions⁹³

	Total Cases	Cases Resulting in Prosecutions by Dept. of Justice	Penalties and Fines (\$000)	Jail Terms
1984-85	539	163	9,044	2
1985-86	501	148	11,313	6
1986-87	561	130	8,285	4
1987-88	468	123	8,373	4
1988-89	459	103	12,471	4

Another enforcement practice that purposefully dwindled during the 1980s is the publicizing of tax evasion proceedings, thus undermining any deterrent value such prosecutions might otherwise have had. As the Auditor General explains:

Prosecutions of tax evaders are carried out primarily to deter others from similarly breaching the tax laws. Deterrence requires publicity. Until recently the Department actively promoted, within the constraints imposed by law, publicity for its prosecutions through such means as news releases and periodic notices to various professional organizations ... In 1987, however, the Department adopted a policy of not initiating contacts with the media on specific prosecutions.⁹⁴

Thus, while all but one prosecution for tax evasion received some media attention in 1981, nearly half the prosecutions in 1988 received no coverage at all.

The decision to bring a prosecution for tax evasion is made at the discretion of the Justice Department on the recommendation of the Department of National Revenue, Taxation.⁹⁵ Most routine charges of

Services, 1990). The Auditor General adds, "We are not suggesting that the penalties for tax evasion are inappropriate when compared to other types of fraud. That is a value judgment that Parliament, the government and the public must make. The point of this illustration, and of our comments on the decline in enforcement coverage and publicity for prosecution of tax evaders, is to show the values that shape tax administration." See also for a discussion of fiscal crimes and sentencing generally, *Canadian Sentencing Digest*, Quantum Service (Toronto: Carswell, 1982) at 219.

⁹² See R. Hasson, "Tax Evasion and Social Security Abuse—Some Tentative Observations" (1980) 2 *Canadian Taxation* 98 at 106.

⁹³ *Revenue Canada, Taxation Estimates, Part III* at 46.

⁹⁴ *Ibid.* at 560.

⁹⁵ See *Report of the Auditor General* at 561.

tax evasion are pursued as summary offences.⁹⁶ It is the policy of the department not to recommend prosecutions for tax evasion under \$100,000, unless other aggravating factors are involved, despite the fact that under the *Criminal Code*, fraud over \$1,000 is considered an indictable offence.⁹⁷ While such prosecutions carry the potential of a maximum ten-year jail sentence, the average duration of convicted tax evaders is approximately ten months.⁹⁸

Despite the evidence which suggests that tax evasion is not taken very seriously in Canada, and the consistently decreasing budgetary allocations to audits and enforcement generally, this does not seem to be the determining factor in motivating tax evasion. Brooks and Doob report that economic, sociological and psychological theories of reward and punishment are of limited explanatory value in the sphere of tax compliance; rather, they conclude, "to explain taxpayer compliance we would appear to need a model based on more complex and subtle principles of human behaviour."⁹⁹ The multiplicity of justifications for evading taxes also explains why much of the literature exploring the implications of tax evasion is so tentative, though most commentators seem to agree that tax evaders perceive little social cost in their activities.¹⁰⁰ However, the fact that tax evasion entails little social stigma or cost requires explanation. Were the consensus in our society to coddle those individuals and corporations who seek to shield their profits from the taxation, one would hardly expect to find stringent and comprehensive sanctions in the *Income Tax Act* itself. Yet, the range of penalties and the powers of enforcement at the tax administrator's disposal are wide-ranging and far-reaching.¹⁰¹ One way of reconciling this discrepancy is by accepting that the welfare state has an interest both in condemning tax evasion and in condoning

⁹⁶ Revenue Canada, *Taxation Operation Manual, Special Investigations*, 1117.3 (1989).

⁹⁷ These other factors may include the fact that the taxpayer is a repeat offender, that there has been tampering of evidence or intimidation of witnesses, or that there is evidence that the offender has been counselling others on the practice of tax evasion. See *ibid.*, 1117.2 (1990).

⁹⁸ *Supra* note 95.

⁹⁹ *Supra* note 80 at 157. For example, in response to the question "What is the most important reason why people cheat on their income tax?" the following answers were recorded: To beat the system or win out (13%); They think they can get away with it (30%); They think everyone does it (13%); They think the tax system is unfair (33%); and They do not like how the government spends their money (10%).

¹⁰⁰ See for example, Brooks & Doob, *supra* note 80; C. Boyd, "The Enforcement of Tax Compliance: Some Theoretical Issues" (1986) 34 *Can. Tax J.*, 588; M. Spicer, "Civilization at a Discount: The Problem of Tax Evasion" (1986) 39 *National Tax J.*, 13; M. Spicer & L. Becker, "Fiscal Inequality and Tax Evasion: An Experimental Approach" (1980) 33 *National Tax J.* 171; and A. Witte & D. Woodbury, "The Effect of Tax Laws and Tax Administration on Tax Compliance: The Case of the U.S. Individual Income Tax," (1985) 38 *National Tax J.* 1.

¹⁰¹ E. Greenspan, "Tax Evasion is a Crime!" (1988) *Income Tax Enforcement, Compliance and Administration*, Corporate Management Tax Conference 1988, 1.

it, just as it must simultaneously intervene in the economy to commodify and decommodify social relations. In other words, one of the effects of institutionalizing class conflict is to make income taxation mandatory for low-income taxpayers and optional for high-income taxpayers.

While the incidence of tax evasion is not class or income specific, the phenomenon of tax evasion does reflect the inequities of the Canadian tax system as well as the imbalances of its administration and enforcement. While not all tax evasion is sophisticated (that is, people such as waiters and taxi drivers who conduct a high proportion of cash transactions may regularly engage in tax evasion), cases of tax evasion involving large sums of money generally are.¹⁰² Although tax evasion is not more prevalent in one socioeconomic stratum, the damage it causes to the overall equity of the tax system increases proportionally to the amount of taxes lost and the wealth of those being enriched by them. As Doob alleged upon publication of the taxpayer survey he co-authored, "it is really the rich who are cheating. ... It appears that if people have an opportunity to cheat, they'll do so."¹⁰³ What Doob implies is not that the rich are more or less honest but that the tax system provides the rich the opportunity to avoid and evade taxes that is denied to the middle and low income taxpayers.

The amount of money involved in this illegal transfer of income from the government to whom it is due, to the taxpayers with no legal claim to keep it, is indeed staggering. What has commonly been referred to as the "tax gap" represents the amount of money lost to Revenue Canada through the unreported economy each year, that is, the amount of money which would be taxable if the *Income Tax Act* were universally and perfectly enforced. Unlike the Internal Revenue Service in the United States which conducts large-scale, comprehensive surveys on its underground economy, little is known about this area in Canada. Recent government estimates put the "tax gap" currently at approximately 20 billion dollars annually.¹⁰⁴

The Auditor General of Canada estimates that \$1.2 billion in potential tax revenue is forfeited every year.¹⁰⁵ Other studies basing their figures on rough estimates suggest that up to 8 per cent of Canada's GDP consists of unreported economic activity, resulting in an annual loss of up to 12 per cent of tax revenues collected.¹⁰⁶

Tax evasion, I have contended, is the natural consequence of a system of taxation legitimated on the basis that people pay taxes because governments have the right and the power to levy them, rather than on the basis that taxes are socially just. Tax evasion becomes more

¹⁰² See McCracken, *supra* note 77 at 2:3.

¹⁰³ See the interview with Anthony Doob & Neil Brooks about their report in *The Toronto Star* (29 January 1989) A1.

¹⁰⁴ McCracken, *supra* note 77 at 2:1.

¹⁰⁵ *Report of the Auditor General, 1990*, *supra* note 59 at 555.

¹⁰⁶ See M. Ethier, "The Underground Economy: A Review of Economic Literature and New Estimates for Canada," in F. Vaillancourt, ed., *Income Distribution and Economic Security in Canada* (Toronto: University of Toronto Press, 1985) 77.

prevalent, in short, as the tax process becomes less connected to shared convictions about equity and justice. As a representative judicial pronouncement on tax evasion states, “nobody owes any public duty to pay more than the law demands: taxes are enforced extractions, not voluntary contributions. To demand more in the name of morals is mere cant.”¹⁰⁷ Thus, in order to grapple with the phenomenon of tax evasion, one must first understand why citizens should choose to voluntarily pay their taxes in the first place.¹⁰⁸

Eugene Bardach, in a recent article entitled, “Moral Suasion and Taxpayer Compliance,” explores what he contends to be the inadequacy of the four conventional rationales for paying one’s taxes.¹⁰⁹ In his view, these rationales are: 1) since people benefit from government services, they should pay for them; 2) lawfulness and law-abidingness are useful things, and so tax laws should be obeyed; 3) voluntarism is a useful social principle, so cooperation with the government should be voluntary; and 4) it affirms communal commitment to democracy to cooperate in paying taxes.¹¹⁰

Bardach argues for a moral justification for paying taxes premised on the principle of reciprocity, interpersonal equity, and fairness, emphasizing that tax evasion is not a victimless crime. Put simply: when a taxpayer evades or illegitimately avoids taxes, others must bear a disproportionate share of the assigned tax burden. Thus, both more aggressive enforcement by the state, and more pressure among taxpayers on potential evaders, would be premised on the protection of other citizens who bear their just share of the tax burden. In short, no one deserves a free ride. The weakness of this formulation, however, is precisely what Bardach takes to be its strength, namely, that it does not legitimate state intrusion into the realm of the taxpayer’s liberty, but instead appeals to the notion of equity embedded in the foundations of the liberal democratic society. Bardach adds, “Once government comes to be seen as the necessary evil that it is, it is but a short step to see the evil in being forced to pay your own taxes while your neighbour manages to escape paying his.”¹¹¹

The moral justification that strikes me as both more tenable, and more in line with the search for a “crime prevention” approach to deterring tax evasion, is that the state is not “a necessary evil” but, potentially, the regulator of social justice. The income tax, on this view, is not a burden (or not merely a burden), but ideally a consensual agreement between citizens as to the appropriate relationship of intervention and interdependence between the state and market. The income tax can become a vehicle both for the equitable raising of revenue, and for social transformation aimed at reversing the depoli-

¹⁰⁷ *C.I.R. v. Newman*, 159 Fed 2d. 848 at 851 (1947), quoted in Krishna, *supra* note 58 at 834.

¹⁰⁸ See M. Allingham & A. Sardno, “Income Tax Evasion: A Theoretical Analysis” (1972) 1 *J. Public Economics* 323.

¹⁰⁹ E. Bardach, *supra* note 74 at 49.

¹¹⁰ *Ibid.* at 61.

¹¹¹ *Ibid.* at 64.

ticization of the public sphere of the welfare state.¹¹² Corporations, though, do not fit easily into this vision of a community of needs and resources. Neither moral suasion nor social transformation can have any meaningful impact on artificial persons and mere legal constructs. Given this socially focused goal, the only feasible way in which to treat corporations would seem to be to “unveil” them and reveal the officers, directors and shareholders that either guide their actions or benefit from them. While it may be more sensible to determine the “ruling will” behind a corporate entity than to ascribe to that entity a fictional, self-generating will of its own,¹¹³ for the purposes of the income tax, corporations are treated as independent of their constituent components.

However, there is a more practical and complementary option with far more profound consequences for corporate deviance that I would advocate in response to tax evasion. Corporations convicted of tax evasion ought to be subject to the tax owed, set fines and a probationary order. The probationary order, as with individuals, would put the corporation under state surveillance for a specified period of time: business records would have to be periodically disclosed, transactions reported, restructuring made subject to government approval, and of course, tax returns scrupulously scrutinized. The logic behind this form of punishment is that it recognizes that the fundamental goal of criminal law is to regulate human freedom through knowledge. As Foucault argued in *Discipline and Punish*, state authority is exercised over individuals by requiring them to submit to increasingly dense and cross-fertilized networks of surveillance and examination.¹¹⁴ Perhaps, it is more properly understood in reverse terms. As Kathy Ferguson observes, “service bureaucracies give rise to knowledge about clients through their power over them.”¹¹⁵ Tax evasion, on this view, demonstrates the extent to which privileged individuals and corporations have been permitted to exist outside the ambit of the welfare state apparatus.

In the case of corporations and high-income individual taxpayers, what is being withheld from the state is not merely revenue but also knowledge and information. Both from the policy perspective of individual and general deterrence, strictly supervised individual or corporate probation seems an effective means of both reversing and redressing tax evasion. As noted above, only a select group of individual and corporate taxpayers are given the freedom to choose for themselves what information to provide the state about their economic

¹¹² I pursue this argument and its implications for a more democratized form of tax administration in L. Sossin, *Revenue, Ideology and Legitimacy: The Politics of Tax Administration in Canada* (Toronto: Ph.D. Dissertation, University of Toronto, 1993) at 300-316.

¹¹³ See *R. v. Fane Robinson Ltd.*, [1941] 3 D.L.R. 409 (Alta. S.C.A.D.).

¹¹⁴ M. Foucault, *Discipline and Punish: The Birth of the Prison* (New York: Vintage, 1979) at 176-7.

¹¹⁵ K. Ferguson, *The Feminist Case Against Bureaucracy* (Philadelphia: Temple University Press, 1984) at 136.

activities. The penalty for choosing not to provide the required information ought to be the retraction of this liberty.

As discussed above with relation to search and seizure provisions, the Supreme Court has already affirmed that business records generally are to be accorded less privacy protection than personal records, and that records relevant for income tax investigations in turn warrant less protection than other business documents. Given the invasive powers entrusted to tax administrators to enforce the *Act*, and the social value in attaining increased surveillance over corporations and high-income taxpayers generally, it would seem incongruous to maintain that subsequent to a tax evasion conviction, the privacy of a taxpayer, especially a corporate one, ought to outweigh the interests of the state in individual punishment and general deterrence.

One of the main drawbacks of a probationary sentence for individuals or corporations is that capital is becoming increasingly fungible; it can be shifted relatively easily between jurisdictions, whereas tax enforcement is limited in its resources to trace capital. Therefore, unlike a fine which exacts a certain penalty for every infraction, a probationary sentence may prove easy to avoid. More severe punishment, such as incarceration in the case of individuals, and curtailing the right to conduct business or revoking legal rights altogether in the case of a corporation, ought to be reserved for tax evasion offenders who do not abide by their probationary orders.

In order to justify this form of crime-prevention oriented punishment, however, the social acceptance which tax evasion enjoys must be undermined. This can only be accomplished by the repoliticization of the public sphere and the revitalization of the citizen in the welfare state; taxpayers, and especially middle and low income taxpayers, must be transformed from clients to agents in a renewed welfare state. In the same spirit by which environmental pollution offences have been transformed from low profile breaches of municipal by-laws to high profile violations of moral norms, tax evasion will have to undergo a similar fall from grace. It would be strange, however, to imagine a moral system more preoccupied with clean air and safe water than with social justice.

The solution to tax evasion ultimately rests, however, not only with exposing or denouncing the offender for what he, she or it is, but with intensified compliance. Audits, examinations and investigations should be dramatically increased and tax administrators should be far more activist in their use of the anti-avoidance provisions contained in the *Act*. The administration of the income tax should not become merely another mechanism for socializing the cost of promoting and maintaining socioeconomic inequality in Canadian society. Imposing probationary orders on tax evaders should not, for example, serve to legitimate the notable absence of regulation or surveillance on the accumulation of capital generally. Rather, it should be used to demonstrate the merits of regulating the "private" acquisition of income. The premise and promise of the welfare state must be reclaimed, and this can only be realized through ensuring continued decommunica-

tion of the market, and the preservation of equitably regulated capitalist enterprise.

This ambitious project requires, in the long term, reconciling the ideological contradictions that threaten to collapse the welfare state. An integral facet of this process, I have argued, is infusing the administration and enforcement of the income tax with the same purposive, redistributive spirit as contained in the *Act* itself. Additionally, the *Act* itself must be substantively altered to remove the crass incentives for high-income taxpayers to further enrich themselves.

While the goal may be focusing the politics of income taxation on questions of enforcement and administration, a necessary step towards this end remains refocusing the attention of taxpayers on questions of redistribution. After all, a central reason why tax administration has been so successfully employed to create an environment conducive to tax evasion is the absence of a political constituency which advocates progressive tax reform.¹¹⁶ Tax legislation and the enforcement of that legislation should, in my view, be seen as intimately related problems with interrelated solutions. Thus, to conclude, tax evasion represents a violation of fundamental social values leading to deleterious economic and political consequences which ought not to be accepted by the Canadian public. In this paper, I have suggested a different approach for both apprehending and addressing the incidence of tax evasion. However, the only lasting solution to tax evasion is social justice.

¹¹⁶ See for a discussion of this, K. Woodside, "The Symbolic Politics of Corporate Income Taxation: Canada and Britain, 1945-80," in A. Stone & E. Horphan, eds., *The Political Economy of Public Policy*, 208. See also J. Gilles, "Federal Tax Reform in a Pluralistic State: Can It Be Done?," in N. Brooks, ed., *The Quest For Tax Reform* (Toronto: Carswell, 1988) 343; and L. MacDonald, *Taxing Comprehensive Income: Power and Participation in Canadian Politics, 1962-1975* (Ottawa: Carleton University Press, 1985).