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# Feminism, Law, and Public Policy: Family Feuds and Taxing Times

Susan B. Boyd

*Allard School of Law at the University of British Columbia, [boyd@allard.ubc.ca](mailto:boyd@allard.ubc.ca)*

Claire F.L. Young

*Allard School of Law at the University of British Columbia, [young@allard.ubc.ca](mailto:young@allard.ubc.ca)*

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# FEMINISM, LAW, AND PUBLIC POLICY: FAMILY FEUDS AND TAXING TIMES<sup>©</sup>

BY SUSAN B. BOYD AND CLAIRE F.L. YOUNG\*

This article offers a retrospective analysis of feminist research on tax and family law and developments in these fields since the early 1980s. We identify the sometimes contradictory trends—both in legislation and in case law—that raise questions about the influence that feminist research has had on these areas of law. We then flag some ongoing challenges confronting feminists engaged in law reform efforts. Some common themes will emerge, but notable differences are also evident in the ways that feminist thought has played out in tax and family law.

Cet article offre une analyse rétrospective de la recherche féministe sur le droit fiscal et familial ainsi que sur les développements dans ces domaines depuis le début des années 80. Nous identifions les tendances parfois contradictoires, dans la législation ainsi que dans la jurisprudence, qui mettent en doute l'influence que la recherche féministe a eu dans ces domaines de droit. Nous soulignons par la suite quelques défis courant confrontant les féministes employées à des efforts de réforme de loi. Quelques thèmes communs émergent, mais des différences marquantes sont également évidentes dans la manière dont la pensée féminine a joué un rôle dans le droit fiscal et familial.

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## I. FEMINIST RESEARCH ON FAMILY LAW AND TAX LAW

The mid-1980s was generally an exciting intellectual period for those with an interest in law. Feminist legal studies was just taking off in Canada, as was the law and society movement. The *Canadian Journal of Women and the Law* was first published in 1985.

Although the fields of tax law and family law were barely touched by feminism in the early 1980s, this situation quickly changed. Tax law had been viewed in law schools as a highly technical field, largely devoid of policy considerations. Family law was not viewed quite as rigidly, but it was seen as a marginal field of law, something that female lawyers might be best suited to practise.<sup>1</sup> Family law was not even identified as a discrete field of law in the *Supreme Court Reports* until the 1980s,<sup>2</sup> although taxation had been included since the late 1880s. This all began to change by the mid-1980s, a time when the *Canadian Charter of Rights and Freedoms*<sup>3</sup> was in its infancy.

### A. *Family Law: Feminist Insights of the 1980s*

The mid-1980s saw the development of an emerging literature examining the operation of family law in its social context; exciting new feminist voices were available. By the mid-1980s, Canadian family law had responded to social forces such as the Women's Liberation Movement and the increasing participation of women in the labour force, as well as the introduction of the equality rights section of the *Charter*.<sup>4</sup> A no-fault approach was applied to divorce law, which now assigned reciprocal, and ostensibly gender-neutral financial obligations between husbands and wives rather than incorporating assumptions about female dependency and male economic obligation. Feminists were aware that this gender-neutral

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<sup>1</sup> See Canada, The Canadian Bar Association Task Force on Gender Equality in the Legal Profession, *Touchstones for Change: Equality, Diversity and Accountability* (Ottawa: The Canadian Bar Association, 1993) at 86-87 (Chair: Bertha Wilson).

<sup>2</sup> Alison Harvison Young, "The Changing Family, Rights Discourse and the Supreme Court of Canada" (2001) 80 *Can. Bar Rev.* 749 at 754.

<sup>3</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*]. An important conference in 1986—somewhat extraordinarily called *The Socialization of Judges to Equality Issues*—assembled a number of feminists and other equality seekers in Banff, and culminated in the publication of *Equality and Judicial Neutrality* in 1987, which had a number of feminist contributions, including some on family law, though not on taxation. See Sheilah L. Martin & Kathleen E. Mahoney, eds., *Equality and Judicial Neutrality* (Toronto: Carswell, 1987).

<sup>4</sup> See e.g. Salina M. Shrofel, "Equality Rights and Law Reform in Saskatchewan: An Assessment of the Charter Compliance Process" (1985) 1 *C.J.W.L.* 108.

approach might pose difficulties for women. Shelagh Day presciently cautioned:

Amendments to definitions of “dependants” and provisions for husbands to make financial claims on their wives can give the false impression that men and women are on an equal economic footing. This juridical equality may obscure the fact of women’s continuing economic dependency and vulnerability.<sup>5</sup>

Judges such as Rosalie Abella and practitioners such as Louise Lamb and Jean McBean were asking feminist questions about family law during the 1980s.<sup>6</sup> As well, the (now defunct) Canadian Advisory Council on the Status of Women published an important book and several papers on the impact of family law on women.<sup>7</sup> Feminist family law professors were especially influenced by feminist academics in other countries, such as Martha Fineman<sup>8</sup> in the United States, and Carol Smart<sup>9</sup> in England, who were opening up family law to critical inquiry. These authors questioned how trends towards gender neutrality and formal equality were compromising women’s position in family law. As discourse drawing on liberal notions of the autonomous individual<sup>10</sup> concerning the “clean break” of partners upon divorce, self-sufficiency, and freedom of contract emerged in Canada during the 1980s,<sup>11</sup> these questions became crucially important. Women were often precluded from economic remedies upon separation and divorce, especially in the context of spousal support law after the *Pelech*

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<sup>5</sup> Shelagh Day, “The Charter and Family Law” in Elizabeth Sloss, ed., *Family Law in Canada: New Directions* (Ottawa: Canadian Advisory Council on the Status of Women, 1985) 27 at 52.

<sup>6</sup> Rosalie Silberman Abella, “The Critical Century: The Rights of Women and Children from 1881-1982” (1984) 18 *Gazette* 40; Rosalie Silberman Abella, “Economic Adjustment on Marriage Breakdown: Support” (1981) 4 *Fam. L. Rev.* 1; Rosalie Silberman Abella, “Family Law Perspectives” (1982) 16 *Gazette* 204; Louise Lamb, *Bill C-47: Joint Custody, Child Support, Maintenance Enforcement and Related Issues* (Ottawa: National Association of Women and the Law, 1985) [Lamb, “Bill C-47”]; Louise Lamb, “Involuntary Joint Custody” (1987) 5 *Horizons* 31; and Jean McBean, “The Myth of Maternal Preference in Child Custody Cases” in Martin & Mahoney, *supra* note 3, 184.

<sup>7</sup> Sloss, *supra* note 5; Roxana Ng, S. Monteath & M. Stokes, *Is 50-50 Equitable Division? Some Implications for Women of Ontario’s Family Law Reform Act* (Ottawa: Canadian Advisory Council on the Status of Women, 1979).

<sup>8</sup> See e.g. Martha Fineman, “Implementing Equality: Ideology, Contradiction, and Social Change: A Study of Rhetoric and Results in the Regulation of the Consequences of Divorce” (1983) *Wis. L. Rev.* 789.

<sup>9</sup> See e.g. Carol Smart, *The Ties That Bind: Law, Marriage and the Reproduction of Patriarchal Relations* (London: Routledge & Kegan Paul, 1984).

<sup>10</sup> Suzanne Silk Klein, “Individualism, Liberalism and the New Family Law” (1985) 43 *U.T. Fac. L. Rev.* 116.

<sup>11</sup> Often traced back to *Messier v. Delage*, [1983] 2 S.C.R. 401, Lamer J. dissenting.

trilogy of 1987.<sup>12</sup> Yet, as Mary Jane Mossman and Morag MacLean have pointed out, in social welfare law it was assumed that women would depend on family members for financial support.<sup>13</sup> These and other assumptions were ultimately to the detriment of financially needy women who neither qualified for social assistance nor had access to financial support of family members. The *Pelech* trilogy generated considerable feminist commentary that may in fact have been the most influential of all the feminist work we will mention, as we see below in Part II.

Feminists were also opening new lines of inquiry about how familial ideology—for instance, expectations of mothers—influenced judicial decisions.<sup>14</sup> It came to be recognized that women's lives were disciplined, or regulated, by this discourse in judicial decisions. Women who best fit the expectations of the good wife and mother tended to be the most successful in legal disputes, while those who departed from those expectations were often penalized. Women's autonomy to make lifestyle choices was thus restricted if they wished to be successful in legal disputes. Feminists also examined how these ideological expectations played out for women in child custody law at a time that witnessed the rise of the fathers' rights movement, joint custody, and mediation.<sup>15</sup> Although obtaining custody of children has never been a straightforward matter for mothers when fathers choose to contest the issue,<sup>16</sup> the new liberal individualist discourses rendered custody disputes even more precarious for women. The Canadian Journal of Women and the Law published a special issue on child custody law in 1989 that highlighted many of these issues including the particular challenges faced by First Nations and lesbian mothers.<sup>17</sup>

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<sup>12</sup> *Pelech v. Pelech*, [1987] 1 S.C.R. 801 [*Pelech*]; *Richardson v. Richardson*, [1987] 1 S.C.R. 857 [*Richardson*]; and *Caron v. Caron*, [1987] 1 S.C.R. 892 [*Caron*].

<sup>13</sup> "Family Law and Social Welfare: Toward a New Equality" (1986) 5 Can. J. Fam. L. 79.

<sup>14</sup> See e.g. McBean, *supra* note 6.

<sup>15</sup> See e.g. Martha J. Bailey, "Unpacking the 'Rational Alternative': A Critical Review of Family Mediation Movement Claims" (1989) 8 Can. J. Fam. L. 61; Susan B. Boyd, "Child Custody, Ideologies, and Employment" (1989) 3 C.J.W.L. 111; Lamb, "Bill C-47," *supra* note 6; and Martha Shaffer, "Divorce Mediation: A Feminist Perspective" (1988) 46 U.T. Fac. L. Rev. 162.

<sup>16</sup> Susan B. Boyd, *Child Custody, Law, and Women's Work* (Don Mills: Oxford University Press, 2003) [Boyd, *Child Custody*]. See also Karina Winton, "'The Spoilt Darling of the Law': Women and Canadian Child Custody Law in the Postwar Period (1945-1960)" (2002) 19 Can. J. Fam. L. 193.

<sup>17</sup> Patricia A. Monture, "A Vicious Circle: Child Welfare and the First Nations" (1989) 3 C.J.W.L. 1; Katherine Arnup, "'Mothers Just Like Others': Lesbians, Divorce, and Child Custody in Canada" (1989) 3 C.J.W.L. 18.

B. *Tax Law: Feminist Scholarship of the 1980s*

The 1980s also marked the emergence of feminist work in the tax area. Indeed, 1985 was a key year with two publications by Louise Dulude<sup>18</sup> and one by Kathleen Lahey.<sup>19</sup> These two authors drew, in part, on feminist scholarship in family law in their consideration of whether the appropriate tax unit was the individual, the family, or the married couple. They argued strongly that Canada should not introduce the family, or indeed couples, as the tax unit, an option that had been proposed in the past.<sup>20</sup> One could say their critique was successful; since that time there has been no serious consideration of proposals for a change to the unit of taxation in Canada, despite arguments by social conservatives for use of the marital unit.<sup>21</sup> The authors also discussed the impact of the “hybrid” system that Canada had (and still has), which retains the individual as the unit but also takes spousal status into account for certain purposes. Thus, they looked at rules such as the spousal exemption (now the Spousal Tax Credit) and considered the negative impact that the rules could have on the autonomy of women. Lahey, in particular, critiqued that provision on the basis that the tax benefit of the exemption went primarily to men. Thus, she argued, the exemption should be recast.<sup>22</sup>

In 1987, Maureen Maloney produced a background paper for the Canadian Advisory Council on the Status of Women titled “Women and Income Tax Reform.”<sup>23</sup> That report was more far-reaching than previous

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<sup>18</sup> “Tax and Family Laws: A Search for Consistency” in Sloss, *supra* note 5, 63; “Taxation of Spouses: A Comparison of Canadian, American, British, French and Swedish Law” (1985) 23 Osgoode Hall L.J. 67.

<sup>19</sup> “The Tax Unit in Income Tax Theory” in E. Diane Pask, Kathleen E. Mahoney & Catherine A. Brown, eds., *Women, the Law, and the Economy* (Toronto: Butterworths, 1985) 277 [Lahey, “Tax Unit”].

<sup>20</sup> Both the Royal Commission on Taxation (the Carter Commission) and the Royal Commission on the Status of Women (the Bird Commission) had recommended that the family be the unit of taxation in Canada. See Canada, *Report of the Royal Commission on Taxation: Taxation of Income*, Vol. 3 (Ottawa: Queen’s Printer, 1966) at 12-13, 122-23; Canada, *Report of the Royal Commission on the Status of Women* (Ottawa: Information Canada, 1970) at 291-307.

<sup>21</sup> The Law Commission of Canada, drawing on much feminist work in the tax area, recommended that “the individual, rather than the couple or some other definition of the family unit, should remain the basis for the calculation of Canada’s personal income tax.” See *Beyond Conjugalities: Recognizing and Supporting Close Personal Adult Relationships* (Ottawa: Minister of Public Works and Government Services, 2001) at 71.

<sup>22</sup> Lahey, “Tax Unit,” *supra* note 19 at 291-92.

<sup>23</sup> *Women and Income Tax Reform* (Ottawa: Canadian Advisory Council on the Status of Women, 1987).

work and applied a feminist critique to the personal, corporate, and sales tax systems in Canada. The following year, Kathleen Lahey wrote the definitive work of that era on women and tax law—a 550-page report funded by the Social Sciences and Humanities Research Council of Canada entitled “The Taxation of Women in Canada.” Not only did that document (unfortunately never published, albeit widely circulated) lay the foundation for much future feminist writing in the area, but it is frequently referred to today because it so clearly set out the challenges for the future.

Interestingly, and unlike in family law, virtually no feminist work on tax emanated from the United Kingdom and very little emanated from the United States during this time.<sup>24</sup> Canada was therefore a leader with respect to feminist explorations in the tax area. However, much of this work was based on a vision of the income tax system as one with two primary purposes: to raise revenue and to redistribute income. Thus, the focus was on issues such as the appropriate tax unit (all three authors); the over-taxation of women (Lahey); and the favouring of high-income earners over low-income earners, which has a negative impact on women who tend to earn less than men (Maloney). That early work did not focus to any great extent on the expenditure side of the tax system, an issue to which we shall return.

### C. *Into the 1990s*

The 1980s marked a flourishing of feminist literature inquiring into the complex ways that family and tax laws affected women’s lives and women’s decisions. Since that time, many feminist scholars have continued and extended the parameters of that work, including Lisa Philipps<sup>25</sup> in the tax area, and Mary Jane Mossman,<sup>26</sup> Diane Pask,<sup>27</sup> Carol Rogerson,<sup>28</sup> and

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<sup>24</sup> An exception in the United States was the work of Grace Blumberg. See e.g. Grace Blumberg, “Features of Federal Income Tax Law Which Have a Disparate Impact on Women and Working Couples” (Paper presented to the Joint Economic Committee for Economic Problems of Women, 93rd Cong., 1973) at 228-53, 273-78; Grace Blumberg, “Sexism in the Code: A Comparative Study of Income Taxation of Working Wives and Mothers” (1971) 21 *Buff. L. Rev.* 49.

<sup>25</sup> See e.g. Lisa Philipps, “Tax Law: Equality Rights: *Thibaudeau v. Canada*” (1995) 74 *Can. Bar Rev.* 668.

<sup>26</sup> See e.g. Mary Jane Mossman, “Running Hard to Stand Still: The Paradox of Family Law Reform” (1994) 17 *Dal. L.J.* 5 [Mossman, “Running Hard”].

<sup>27</sup> E. Diane Pask, “Gender Bias and Child Support: Sharing the Poverty” (1993) 10 *Can. Fam. L.Q.* 33.

<sup>28</sup> See e.g. Carol Rogerson, “Spousal Support after *Moge*” (1997) 14 *Can. Fam. L.Q.* 281.

Jane Pulkingham<sup>29</sup> in the family law area (to name a few). Some feminist scholars such as Margrit Eichler<sup>30</sup> and Ellen Zweibel<sup>31</sup> looked at both family law and tax in their work, reflecting in part the growing interest in how tax law related to child support.

In family law, though less so in tax law, feminist practitioners such as Miriam Grassby and Cynthia Devine published work identifying problems in their fields,<sup>32</sup> as did Supreme Court of Canada Justice Claire L'Heureux-Dubé.<sup>33</sup> Moreover, both the National Association of Women and the Law (NAWL) and the Women's Legal Education and Action Fund (LEAF) increasingly achieved a presence in both the family law and tax fields by publishing in the area.<sup>34</sup> LEAF intervened in cases such as *Moge v. Moge*<sup>35</sup> and *Thibaudeau v. Canada*,<sup>36</sup> and NAWL presented briefs to the government.<sup>37</sup> NAWL adopted a more proactive approach in the tax field as it began to appear before the House of Commons Finance Committee in the early 1990s to make representations about budget issues as they

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<sup>29</sup> Jane Pulkingham, "Private Troubles, Private Solutions: Poverty among Divorced Women and the Politics of Support Enforcement and Child Custody Determination" (1994) 9 C.J.L.S. 73.

<sup>30</sup> Margrit Eichler, *Family Shifts: Families, Policies, and Gender Equality* (Toronto: Oxford University Press, 1997).

<sup>31</sup> See e.g. Ellen Zweibel, "Child Support Policy and Child Support Guidelines: Broadening the Agenda" (1993) 6 C.J.W.L. 371.

<sup>32</sup> See e.g. Miriam Grassby, "Spousal Support—Assumptions and Myths Versus Case Law" (1995) 12 Can. Fam. L.Q. 187; Miriam Grassby, "Women in Their Forties: The Extent of Their Rights to Alimentary Support" (1991) 30 R.F.L. (3d) 369; Cynthia Devine et al., *Fairness in Family Law: A Study by the Manitoba Association of Women and the Law Inc.*, ed. by Mona G. Brown & Sheryl Rosenberg (Winnipeg: Manitoba Association of Women and the Law, 1994).

<sup>33</sup> See e.g. Claire L'Heureux-Dubé, "Making Equality Work in Family Law" (1997) 14 Can. J. Fam. L. 103.

<sup>34</sup> Karen Busby, Lisa Fainstein & Holly Penner, eds., *Equality Issues in Family Law: Considerations for Test Case Litigation* (Winnipeg: Legal Research Institute of the University of Manitoba, 1990) [Equality Issues].

<sup>35</sup> [1992] 3 S.C.R. 813 [*Moge*]. *Moge* addressed the question of whether a long-standing order for spousal support to be paid by a husband to a wife emanating from a divorce from some years previous should be terminated.

<sup>36</sup> [1995] 2 S.C.R. 627 [*Thibaudeau*]. For a collection of LEAF's factums, including these two cases, see Women's Legal Education and Action Fund, *Equality and the Charter: Ten Years of Feminist Advocacy before the Supreme Court of Canada* (Toronto: Emond Montgomery, 1996).

<sup>37</sup> See e.g. National Association of Women and the Law, *Child Support Guidelines* (Ottawa: National Association of Women and the Law, 1995); National Association of Women and the Law, *Response to Custody and Access: Public Discussion Paper* (Ottawa: National Association of Women and the Law, 1994).



affected women.<sup>38</sup> Relatively few initiatives were taken, though, to invoke the *Charter* in relation to either family law or tax law. During this period there was, of course, an animated debate about the merits and disadvantages of *Charter* litigation as a strategy for advancing women's equality interests. Some argued that due to the public/private divide, barriers arose in relation to using the equality rights section as a tool for advancing women's rights.<sup>39</sup> Particular difficulties arose in relation to attempts to use the *Charter* to challenge issues in family law given the construction of many family law issues as residing in the private sphere.<sup>40</sup> As we shall see, the two attempts to invoke the *Charter* in relation to tax law were not greeted with resounding success. Coincidentally, both cases related to highly gendered issues within the family: child care and child support.

Meanwhile, however, some feminist scholarship was challenging the very boundaries of what we think of as family law, moving beyond traditional topics related to separation and divorce and turning attention towards how law regulates familial relations in a variety of fields such as social welfare and child welfare law.<sup>41</sup> In turn, these topics often raised questions of difference among women along lines of class, race, and sexual orientation, and inquiry broadened to take more specific account of the ways in which Aboriginal women and lesbians were affected by family law.<sup>42</sup>

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<sup>38</sup> See e.g. National Association of Women and the Law, *Background Paper in Support of Tax Resolutions* (Ottawa: National Association of Women and the Law, 1991).

<sup>39</sup> Judy Fudge, "The Public/Private Distinction: The Possibilities of and the Limits to the Use of Charter Litigation to Further Feminist Struggles" (1987) 25 Osgoode Hall L.J. 485.

<sup>40</sup> Susan B. Boyd, "The Impact of the Charter of Rights and Freedoms on Canadian Family Law" (2000) 17 Can. J. Fam. L. 293. But see LEAF's efforts in this direction in *Equality Issues*, *supra* note 34.

<sup>41</sup> Shelley A.M. Gavigan, "Familial Ideology and the Limits of Difference" in Janine Brodie, ed., *Women and Canadian Public Policy* (Toronto: Harcourt Brace, 1996) 255; Shelley A.M. Gavigan, "Paradise Lost, Paradox Revisited: The Implications of Familial Ideology for Feminist, Lesbian and Gay Engagement to Law" (1993) 31 Osgoode Hall L.J. 589; Dorothy E. Chunn, "Feminism, Law, and Public Policy: 'Politicizing the Personal'" in Nancy Mandell & Ann Duffy, eds., *Canadian Families: Diversity, Conflict and Change* (Toronto: Thomson-Nelson, 1995) 177; Dorothy E. Chunn, *From Punishment to Doing Good: Family Courts and Socialized Justice in Ontario, 1880-1940* (Toronto: University of Toronto Press, 1992).

<sup>42</sup> See e.g. Katherine Arnup, "Finding Fathers: Artificial Insemination, Lesbians, and the Law" (1994) 7 C.J.W.L. 97; Shelley A.M. Gavigan, "A Parent(ly) Knot: Can Heather Have Two Mommies?" in Didi Herman & Carl Stychin, eds., *Legal Inversions: Lesbians, Gay Men, and the Politics of Law* (Philadelphia: Temple University Press, 1995) 102; Marlee Kline, "Complicating the Ideology of Motherhood: Child Welfare Law and First Nation Women" (1993) 18 Queen's L.J. 306; Monture, *supra* note 17.

Traditional boundaries were also challenged in the tax area. Issues such as the taxation of wealth (as opposed to income),<sup>43</sup> the role of familial ideology as well as technical discourse in tax law,<sup>44</sup> and the relationship between the tax system and retirement savings<sup>45</sup> were the subject of feminist scrutiny. As with family law, some feminist work examined the differences among women,<sup>46</sup> although issues of race have not received as much attention in Canada as in the United States.<sup>47</sup>

Overall, by the mid-1990s, feminists had identified the following key issues confronting women in tax and family law:

1. Women's economic insecurity, which was often related to their familial and caregiving roles and, in particular, their unpaid labour in the home;
2. The perils of formal equality and gender neutrality for women, both of which were connected to liberal individualist ideology that favoured the unencumbered male; and
3. The impact of familial ideology, particularly for women who strayed from normative roles expected of wives and mothers, such as lesbians, First Nations women, low-income single mothers, and full-time employed mothers.

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<sup>43</sup> Lisa Philipps, "Tax Policy and the Gendered Distribution of Wealth" in Isabella Bakker, ed., *Rethinking Restructuring: Gender and Change in Canada* (Toronto: University of Toronto Press, 1996) 141.

<sup>44</sup> Lisa Philipps, "'The Family' in Income Tax Policy" (1995) 16 *Pol'y Options* 30; Lisa Philipps, "Discursive Deficits: A Feminist Perspective on the Power of Technical Knowledge in Fiscal Law and Policy" (1996) 11 *C.J.L.S.* 141 [Philipps, "Discursive Deficits"].

<sup>45</sup> See Barbara Austin, "Policies, Preferences, and Perversions in the Tax-Assisted Retirement Savings System" (1996) 41 *McGill L.J.* 586; Claire F.L. Young, *Women, Tax, and Social Programs: The Gendered Impact of Funding Social Programs Through the Tax System* (Ottawa: Status of Women Canada, 2000) at 41-53 [Young, *Women, Tax, and Social Programs*].

<sup>46</sup> Claire F.L. Young, "(In)visible Inequalities: Women, Tax and Poverty" (1995) 27 *Ottawa L. Rev.* 99.

<sup>47</sup> There has been more focus in the U.S. tax policy literature on issues of race. See e.g. Karen B. Brown & Mary Louise Fellows, eds., *Taxing America* (New York: New York University Press, 1996); Dorothy A. Brown, "Race, Class, and Gender Essentialism in Tax Literature: The Joint Return" (1997) 54 *Wash. & Lee L. Rev.* 1469; and Stacey Y. Adams, "Income, Deductions and Wealth: A Survey of Policy Remedies to the Intersection of Color, Gender and Taxation" (2001) 28 *S.U.L. Rev.* 255.

## II. IMPACT OF FEMINIST WORK ON LAW AND PUBLIC POLICY

Although the burgeoning feminist research on family law and taxation was of high quality, the really important question is what influence it had on law and public policy. At this juncture, something must be said about the multifaceted roles played by both family law and tax law.

While tax has in the past been viewed as private law, that is, as a relationship between the taxpayer and the tax collector, that vision is archaic and flawed. It also ignores several realities, including the fact that our tax system has a redistributive function: by imposing marginal tax rates that increase as income increases, a redistribution of income is accomplished. More importantly, however, the view of tax law as private ignores the expenditure function of the tax system. Put simply, the government uses the tax system to subsidize numerous endeavours. Measures such as tax deductions, tax credits, and tax deferrals all result in less tax payable by the taxpayer. The amount of the reduction in tax is, in fact, a subsidy, or the functional equivalent of a grant. That is to say, the government could have delivered the subsidy by way of a direct grant to the individual, but instead has chosen to deliver it through the tax system. For example, the refundable child tax credit (a tax expenditure) replaced the family allowance grant given to mothers in recognition of the costs of raising children.<sup>48</sup> This spending function of the tax system makes it a supremely important public policy instrument.<sup>49</sup>

Similarly, in the family law arena, the characterization of family law as purely private law—or the notion that family law exclusively regulates private relations between individuals in families—is out of date. It is now widely acknowledged that family law reflects fundamental Canadian social issues, such as changing definitions of family. In part, it is the fact that family law in conjunction with constitutional law provides a forum for those social issues to be determined—for example, same-sex relationship recognition and the determination of who qualifies as family—that has rendered family law a more public field.<sup>50</sup> As well, feminists have pointed out that the public, or the state, has an interest in family law's ability to

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<sup>48</sup> For an analysis of the child tax credit see Young, *Women, Tax, and Social Programs*, *supra* note 45 at 32-36.

<sup>49</sup> The Department of Finance has published tax expenditure accounts each year since 1997. See e.g. "Tax Expenditures and Evaluations 2003," online: Department of Finance <[http://www.fin.gc.ca/toce/2003/taxexp03\\_e.html](http://www.fin.gc.ca/toce/2003/taxexp03_e.html)> .

<sup>50</sup> Young, *supra* note 2.

enforce private economic obligations between family members.<sup>51</sup> As we will see, this insight has been crucial in understanding the downside to some apparent feminist success stories in spousal support law, as well as the legal recognition of same-sex partners as spouses.

To return to our original question, then, what influence has feminist work had on law and public policy? Unquestionably, there has been a feminist influence, albeit not notably until the early 1990s and then, we would suggest, for a rather short period and in a somewhat limited manner. The limited impact of feminism in part reflects the continuing difficulty that feminists have encountered in bringing differences among women to the forefront of law reform initiatives, and in particular, to the forefront of litigation.<sup>52</sup> The feminist influence that has been seen was promoted by the increasing attention that appellate judges—especially on the Supreme Court of Canada—were paying to the values promoted by the *Charter*, notably in relation to equality rights.<sup>53</sup> This influence was particularly noticeable in family law, and less so in tax law. However, even in family law, the influence of *Charter* rights discourse also had a downside. At the very least, it could be a double-edged sword, for example, by offering fathers' rights advocates a tool to challenge laws perceived to favour women. At worst, it exacerbated differences among women by enhancing the legal position of women who were more privileged, for instance, by their class or race, relative to less advantaged women.

Four themes are discernible in relation to law and public policy. These themes are not to be viewed in isolation, but rather are related to, and often in tension with, one another. Indeed, a key challenge for feminists in the future is how to engage with these sometimes contradictory, perennial themes. While the themes show the enduring nature of the problems identified by feminists—for example, economic insecurity and familial ideology—these problems are not static, but rather assume different forms over time. As a result, feminist strategies may need to change accordingly. The four themes are:

1. Liberal Individualism (women as autonomous, self-sufficient agents);

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<sup>51</sup> See e.g. Susan B. Boyd, "(Re)Placing the State: Family, Law, and Oppression" (1994) 9 C.J.L.S. 39 [Boyd, "(Re)Placing the State"].

<sup>52</sup> This inability has not been for lack of academic discussion about the consequences of actual differences. For example, in October 1993, the Institute of Feminist Legal Studies of Osgoode Hall Law School held a workshop titled, "What Difference Does Difference Make?"

<sup>53</sup> Young, *supra* note 2.

2. Privatization of Economic Responsibilities;
3. Gender Neutrality and Formal Equality; and
4. Familial Ideology: The Post-Divorce Family Unit.

A. *Liberal Individualism*

1. Arguing for Substantive Equality in Support and Property Law

By the 1990s, numerous feminist scholars and practitioners had pointed to the problematic impact on divorcing women of the emphasis on self-sufficiency and freedom of contract in the 1987 Supreme Court of Canada *Pelech* trilogy,<sup>54</sup> which permitted spousal support to be limited by domestic contracts except in limited circumstances. Authors such as Carol Rogerson,<sup>55</sup> Brenda Cossman,<sup>56</sup> Diana Majury,<sup>57</sup> and Martha Bailey<sup>58</sup> emphasized that the gender-based inequality of women within heterosexual families had not yet disappeared, despite the increased number of women in the labour force. They argued that judges needed to consider this inequality as well as unequal bargaining power as they interpreted legislation, particularly in the spousal support context. These feminists suggested that in this area, as in others, judges needed to adopt a substantive equality approach rather than a formalistic approach. It was premature to treat women and men identically in family law, or in bargaining over domestic contracts, because women and men were not yet equal within families, or indeed, within society. As well, women continued to contribute considerable unpaid labour within the family, and that labour needed to be recognized.

The 1992 Court decision in *Moge* dramatically shifted this area of family law and is renowned for having moved spousal support law towards a recognition of women's systemic inequality, caused in part by the law's failure to recognize their unpaid labour.<sup>59</sup> LEAF intervened in that case to

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<sup>54</sup> *Supra* note 12.

<sup>55</sup> "The Causal Connection Test in Spousal Support Law" (1989) 8 Can. J. Fam. L. 95.

<sup>56</sup> "A Matter of Difference: Domestic Contracts and Gender Equality" (1990) 28 Osgoode Hall L.J. 303.

<sup>57</sup> "Unconscionability in an Equality Context" (1991) 7 Can. Fam. L.Q. 123.

<sup>58</sup> "Pelech, Caron, and Richardson" (1989) 3 C.J.W.L. 615.

<sup>59</sup> *Moge*, *supra* note 35.

argue that the spousal support provisions in the *Divorce Act*<sup>60</sup> must be guided by the *Charter* guarantees of gender equality, interpreted as substantive equality.<sup>61</sup> Although the Court did not explicitly acknowledge that spousal support provisions must be interpreted and applied in a manner consistent with constitutional equality standards, Justice L'Heureux-Dubé implicitly did so when she articulated a model of equitable sharing of the economic consequences—both disadvantages and advantages—of the marriage and/or its dissolution for the majority of the Court. It became acceptable again to acknowledge the social fact that women—both in modern and in traditional relationships<sup>62</sup>—tend to assume more responsibility than men for domestic labour and child care, and that women's inequality in the labour force is connected to that reality. The Court's decision in *Peter v. Beblow*, which expanded the application of constructive trust or unjust enrichment law in relation to property claims by unmarried partners, also reflected this acknowledgement of the value of women's unpaid labour in the home.<sup>63</sup> In family law in the early 1990s, then, the liberal individual was re-situated in her gendered, familial context, at least in relation to economic remedies vis-à-vis her spouse. As we shall see, however, this same contextual approach did not prevail in relation to child custody law.

## 2. Retaining the Liberal Individual in Tax Law

In contrast, the liberal individualist model of responsibility, which obscures both the social relations of gender and the sexual division of labour, was alive and well in the tax law of the 1990s. The *Symes* case illustrates this point.<sup>64</sup> Beth Symes argued that her child care expenses should be deductible under the *Income Tax Act*<sup>65</sup> as a business expense,

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<sup>60</sup> R.S.C. 1985, c. 3.

<sup>61</sup> See especially *Moge v. Moge* in Women's Legal Education and Action Fund, *Equality and the Charter: Ten Years of Feminist Advocacy before the Supreme Court of Canada* (Toronto: Emond Montgomery, 1996) 323 at 329. For a discussion of this case, see Alison Diduck & Helena Orton, "Equality and Support for Spouses" (1994) 57 Mod. L. Rev. 68.

<sup>62</sup> But see Beverley McLachlin, "Spousal Support: Is It Fair to Apply New-Style Rules to Old-Style Marriages?" (1990) 9 Can. J. Fam. L. 131.

<sup>63</sup> [1993] 1 S.C.R. 980. In this case, McLachlin J. wrote for the majority of judges, while Cory J. wrote a concurring judgment (for L'Heureux-Dubé and Gonthier JJ.). Both judgments cited *Moge*, *supra* note 35.

<sup>64</sup> *Symes v. Canada (TD)*, [1989] 3 F.C. 59; *MNR v. Symes*, [1991] 3 F.C. 507 (C.A.) [*Symes FCA*]; and *Symes v. Canada*, [1993] 4 S.C.R. 695 [*Symes SCC*].

<sup>65</sup> R.S.C. 1985 (5th Supp.), c. I-5 [*ITA*].

given that she incurred the expenses to “gain or produce income” within the meaning of the *ITA*. She also argued that to deny her the deduction of this business expense discriminated against her on the basis of sex, in contravention of section 15(1) of the *Charter*, because women bear the disproportionate burden of childcare expenditures. The Court did not accept this argument, and held that the expenses were not deductible because another provision of the *ITA* (section 63) allowed deduction of a limited portion of the expenses. The *Symes* case was controversial for many reasons, one of which was for the fact of who stood to benefit from the new tax subsidy had *Symes* been successful. Indeed, in contrast to cases such as *Moge*, LEAF refused to intervene and support *Symes*, in part out of a concern that a victory for *Symes* would only have benefited business women (and men), and not employed or indeed unemployed women.<sup>66</sup> Here, however, we will focus on the approach of the Federal Court of Appeal and the Supreme Court of Canada in denying *Symes*’ claim, and what it reveals about their resistance to placing the liberal individual in her social context.

As Rebecca Johnson argues in her outstanding book,<sup>67</sup> the *Symes* case was all about issues of gender, class, and, to a certain extent, the unequal division of childcare labour in families. Yet two of these issues were erased by the Federal Court of Appeal and the Supreme Court. For example, rather than analyzing *Symes*’ position as that of a business woman relative to a business man in terms of the refusal of Revenue Canada to permit the deduction, the Federal Court of Appeal compared *Symes* to other women who did not earn business income. Justice Decary accused her of “trivializing” the *Charter* and said that he was “not prepared to concede that professional women make up a disadvantaged group.”<sup>68</sup> Gender was rendered invisible. What is especially interesting about Justice Decary’s decision is the theme that emerged and that continues in later cases: the use of class to trump gender. Justice Decary viewed Beth *Symes* as privileged by class, and that allowed him to ignore the gendered nature of *Symes*’ claim. Certainly Beth *Symes*, a practising lawyer, was more privileged than many women by reason of her education and occupation, but at the same time, that privilege should not have been permitted to erase her gender disadvantage.

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<sup>66</sup> It should be noted, however, that the *Symes* case was brought forward after years of unsuccessful lobbying for increased direct child care funding. The litigation was partly in response to the lack of political action. See Rebecca Johnson, *Taxing Choices: The Intersection of Class, Gender, Parenthood and the Law* (Vancouver: University of British Columbia Press, 2002).

<sup>67</sup> *Ibid.*

<sup>68</sup> *Symes FCA*, *supra* note 64 at 531.

At the Supreme Court, the majority concluded both that section 63 of the *ITA* was a complete code for the treatment of child care expenses, so that there was no issue of deducting these as a business expense, and that Symes had failed to demonstrate that women carry a disproportionate burden of child care expenses. In reaching the latter conclusion, the majority did acknowledge that child care responsibilities have a negative impact on women's participation in the paid labour force, but then quickly brushed that point aside. As Justice Iacobucci stated,

[Symes] has failed to demonstrate an adverse effect created or contributed to by s. 63, although she has overwhelmingly demonstrated how the issue of child care negatively affects women in employment terms. Unfortunately proof that women pay the social costs is not sufficient proof that women pay child care expenses.<sup>69</sup>

Thus the disproportionate impact of child care responsibilities on working women was erased by the Court. In contrast, and in the minority, the two women on the Court took a very different approach. For them the gendered nature of caregiving was obvious and relevant. As Justice L'Heureux-Dubé said, Symes "has proven that she has incurred an actual and calculable price for child care and that cost is disproportionately borne by women."<sup>70</sup> The difference between the majority judgement of Justice Iacobucci and the minority judgement of Justice L'Heureux-Dubé was stark, and indeed, the judgments have been described as two solitudes.<sup>71</sup> As we discuss below, these solitudes—in terms of understanding the complexities of the feminist critique of tax law—continued in *Thibaudeau*, the next section 15(1) tax case contemplated by the Supreme Court.<sup>72</sup>

Thus, in contrast to the success in terms of the recognition of women's systemic inequality with respect to spousal support in *Moge*, tax law remained impervious to a substantive equality analysis of issues such as the gendered nature of caregiving and women's inequality in the labour force. This reluctance likely stemmed in part from the Court's perception that tax law is simply a set of codified rules for raising revenue, the interpretation of which is best left to tax lawyers who understand their complexities. Even though the Supreme Court did discuss some of the socio-economic issues involving business women and their child care responsibilities, it was unable to make the link between those issues and tax law. The unencumbered liberal individual remained at the heart of tax law.

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<sup>69</sup> *Symes SCC*, *supra* note 64 at 765.

<sup>70</sup> *Ibid.* at 821.

<sup>71</sup> Debra McAllister, "The Supreme Court in *Symes*: Two Solitudes" (1994) 4 N.J.C.L. 248 at 263.

<sup>72</sup> *Thibaudeau*, *supra* note 36.



## B. *Privatization of Economic Responsibilities*

The recognition of women's inequality within the heterosexual family that was achieved in the *Moge* case was of crucial importance and had a ripple effect in relation to other economic disputes in family law. However, the Court's decision in *Moge* did not escape the critical eye of feminist legal scholars. For instance, Colleen Sheppard noted the Court's failure to situate its discussion of the economic responsibilities of individual spouses within the larger context of gender, race, and language-based discrimination.<sup>73</sup> Mrs. Moge was an immigrant woman with a limited knowledge of English and little educational training. As a result of the narrow consideration of the causes of the economic difficulties faced by Mrs. Moge, Sheppard argued, the case supported the adoption of a privatized response to economic inequality.

Feminists in the 1990s began to examine the paradox that, despite considerable reform activity in spousal support and property law, women and children were "running hard to stand still"<sup>74</sup>; they were experiencing seriously high levels of poverty after marriage breakdown. Family law reform activity gave the appearance that women and children's poverty had been dealt with at a public policy level. Yet family law remedies were seriously limited due to their location in the private sphere of the family: a woman or child's economic remedy was only as good as the wealth of her former spouse, and her ability to pursue an effective legal remedy.<sup>75</sup> Enforcement of private judgements for matrimonial property or financial support also remained a serious problem, as the tragic story of Rosa Becker revealed.<sup>76</sup> Despite the clear limits of privatized remedies, public remedies available through the social welfare system were being steadily cut back as economic restructuring, financial retrenchment, and privatization became favoured public policy tools of government.<sup>77</sup> In other words, the issue of

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<sup>73</sup> "Uncomfortable Victories and Unanswered Questions: Lessons from *Moge*" (1995) 12 Can. J. Fam. L. 283.

<sup>74</sup> Mossman, "Running Hard," *supra* note 26.

<sup>75</sup> Boyd, "(Re)Placing the State," *supra* note 51.

<sup>76</sup> *Pettkus v. Becker*, [1980] 2 S.C.R. 834. A few years after winning this landmark Supreme Court of Canada case awarding her a share of the property of her common law partner, Rosa Becker committed suicide on November 5, 1986. During the intervening years, Lothar Pettkus made it extremely difficult for Rosa Becker to receive what she was owed. When some of his property was liquidated, the money went to Rosa's lawyer. By the time she died, Rosa had received none of the compensation owed to her. See Nora Underwood, "Rosa Becker's Hollow Victory" *Macleans* (24 November 1986) 50.

<sup>77</sup> See Brenda Cossman & Judy Fudge, eds., *Privatization, Law, and the Challenge of Feminism* (Toronto: University of Toronto Press, 2002).

women's and children's poverty was being privatized again (not that it ever had been fully addressed in relation to public policy).

In particular, as child poverty was increasingly highlighted as a social concern, child support emerged during the 1990s as a public policy issue and not simply a private obligation as between separated parents.<sup>78</sup> Numerous government studies on child support appeared, culminating in the introduction in 1997 of several legislated changes: child support guidelines, stricter enforcement, and changes to the income tax law rules on inclusion and deduction of child support payments. These changes were widely viewed as a response to feminist concerns, particularly by fathers' rights advocates and some members of the Canadian Senate. Paradoxically, however, public discourse around child poverty has increasingly been severed from that around women's poverty.<sup>79</sup> Nevertheless, these changes to child support law generated a backlash against feminism—and against mothers—that in turn generated problems in relation to child custody law. The now infamous Special Joint Parliamentary Committee on Custody and Access was instituted to review custody and access law, responding to a notion that fathers should have more rights vis-à-vis children if they were going to have enhanced (privatized) financial obligations towards their children (and, as they viewed it, towards their mothers).<sup>80</sup>

Also relevant to privatization were the several challenges brought during the 1990s to the legal failure to recognize same-sex relationships. These challenges—supported generally by feminist groups such as LEAF—culminated in *M. v. H.*,<sup>81</sup> where the Supreme Court of Canada declared Ontario's definition of spouse for the purposes of spousal support claims under the *Family Law Act*<sup>82</sup> to be unconstitutional because it excluded same-sex, but included opposite-sex, cohabitants. This decision prompted numerous law reforms, both federal and provincial, which extended the legal recognition of same-sex partners for many purposes. While this development marks a stunning reversal of discriminatory trends against lesbians and gay men in Canadian law, its rationale provided by the Supreme Court is, in part, problematic. The majority judgment

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<sup>78</sup> Mary Jane Mossman, "Child Support or Support for Children? Re-thinking 'Public' and 'Private' in Family Law" (1997) 46 U.N.B.L.J. 63.

<sup>79</sup> Wanda Wieggers, *The Framing of Poverty as "Child Poverty" and its Implications for Women* (Ottawa: Status of Women Canada, 2002).

<sup>80</sup> Bonnie Diamond, "The Special Joint Committee on Custody and Access: A Threat to Women's Equality Rights" (1999) 19 Can. Woman Stud. 182.

<sup>81</sup> [1999] 2 S.C.R. 3.

<sup>82</sup> R.S.O. 1990 c. F.3.

acknowledged that the purpose of spousal support law is to provide for the equitable resolution of economic disputes that arise when intimate relationships break down between individuals who have been financially interdependent, rather than to reinforce rigid gender roles. In that regard, Justices Cory and Iacobucci recognized that same-sex relationships were capable of being both conjugal and lengthy. So far, so good. However, the Supreme Court also emphasized another important objective of support law: to alleviate the burden on the public purse by shifting the obligation to provide support for needy persons to parents and spouses.<sup>83</sup> The connection could not be clearer between recognizing spouses—even same-sex spouses—and neo-liberal objectives, including privatization. As Hester Lessard has stated:

The de-gendered, potentially non-heterosexist, individual responsibility model of family has a number of attractions from a neo-liberal perspective. This model is simultaneously more inclusive of a range of possible spouses and family formations, conceptually structured to obscure a systemically entrenched sexual division of labour, and in its “responsibility” language, more explicit in its commitment to the role of family in privatizing social needs.<sup>84</sup>

In *M v. H*, we thus saw the explicit connection between expanding economic obligations between domestic partners and the privatization of economic responsibilities within the family, an imperfect system of providing economic security at best, as well as one that prompts the diminishing of publicly funded systems.<sup>85</sup>

It was not only cases such as *M. v. H.* that contributed to this privatization. The *Modernization of Benefits and Obligations Act*,<sup>86</sup> which was enacted soon after the Supreme Court decision in *M. v. H.*, amended sixty-eight pieces of federal legislation to recognize same-sex relationships. One of those was the *ITA*,<sup>87</sup> which was amended to include same-sex cohabitants as common law partners, along with opposite-sex cohabitants. As a result, all income tax rules that looked to spousal status now applied equally to same-sex couples. The Minister of Finance was no doubt in favour of such a change because it resulted in an estimated tax windfall to the government

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<sup>83</sup> *Supra* note 81 at 72.

<sup>84</sup> Hester Lessard, “Mothers, Fathers, and Naming: Reflections on the Law Equality Framework and *Trociuk v. British Columbia (Attorney General)*” 16(1) C.J.W.L. [forthcoming in 2005] [Lessard, “Mothers, Fathers, and Naming”].

<sup>85</sup> Susan Boyd, “Family, Law, and Sexuality: Feminist Engagements” (1999) 8 Soc. & Leg. Stud. 369; Brenda Cossman, “Family Feuds: Neo-Liberal and Neo-Conservative Visions of the Reprivatization Project” in Cossman & Fudge, *supra* note 77, 169 [Cossman, “Family Feuds”].

<sup>86</sup> S.C. 2000, c. 12.

<sup>87</sup> *Supra* note 65.

of over 30 billion dollars. The main reason for this windfall is that many economically needy individuals now found themselves ineligible for the Canada Child Tax Benefit or the GST tax credit, because eligibility for those benefits is determined on the basis of combined spousal income. The result is an overall reduction in the value of the credit because the taxpayers are no longer treated as individuals, which means they pay more tax or, to put it another way, they receive less of the tax subsidy. The family must now pick up the economic shortfall. The paradox of the recognition of same-sex partners is that the privatization of economic well-being is increased, with a disproportionate impact on low-income persons and women, whose domestic labour is typically taken for granted and left largely uncompensated.

### C. *Neutralizing Gender Again: The Rebirth of Formal Equality*

The impact of the recognition of women's inequality within marriage in the *Moge* case in relation to spousal support in the early 1990s was limited in another way. The Supreme Court decision in *Moge* did not signal the beginning of a systematic gender-based analysis across family law and tax law. To the contrary, in several areas, gender neutrality now prevails to the point where offering a feminist analysis is frowned upon. As this problem is so fundamental, we offer several examples at some length.

Child custody law provides a prime example, despite (or perhaps because of) it often being characterized as a key site for "the gender wars." In this field, partly due to the rise of rights discourse and the influence of the fathers' rights movement, and partly because of long-standing feminist pressure on men to assume more responsibility for childcare, judges and public policy makers have become increasingly reluctant to emphasize gendered social patterns.<sup>88</sup> Even though studies show that mothers continue to assume primary responsibility for children and related domestic labour,<sup>89</sup> in legal fora a great resistance has grown to acknowledging this gender-based pattern. Numerous legal trends have diminished the custodial parent's—usually the mother's—decision-making powers and enhanced the powers of fathers. In other words, mothers carry significant caregiving

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<sup>88</sup> Boyd, *Child Custody*, *supra* note 16.

<sup>89</sup> Canadian statistics regarding the sexual division of unpaid housework in general indicate a slight increase in male participation in household work. Generally, however, men still engage in more paid work, while women continue to be primarily responsible for childcare and domestic labour. See Erin Anderssen, "Census: Women Do Lion's Share at Home" *The Globe and Mail* (12 February 2003) A7; Amber Gazo-Windle & Julie Ann McMullin, "Doing Domestic Labour: Strategizing in a Gendered Domain" (2003) 28 Can. J. Soc. 341.

responsibilities but have lost the ability to make autonomous decisions in relation to those responsibilities. Conversely, non-custodial parents, mainly fathers, have gained rights without necessarily assuming responsibilities. Statistically, the evidence for this trend is that joint legal custody orders upon divorce increased in number dramatically from the 1980s to the end of the 1990s. Joint custody awards are consistently rising and now approach 40 per cent of divorce orders involving children, although it is clear that children continue to live primarily with their mothers.<sup>90</sup>

Parents are thus being treated as gender-neutral entities in custody law, and feminist efforts to point to the ongoing gendered nature of parenting responsibilities have not been embraced with enthusiasm by most judges or law reformers. Two key custody cases that went to the Supreme Court of Canada in the 1990s, *Young v. Young*<sup>91</sup> and *Gordon v. Goertz*,<sup>92</sup> revealed an increasing marginalization of the analysis offered by Justice L'Heureux-Dubé, who emphasized the gender of parenting as part of the social context surrounding child custody disputes.<sup>93</sup> In law reform initiatives, feminist voices raising concerns about legislative trends towards shared parenting and maximum contact between children and non-custodial parents were also marginalized (although arguably these voices tempered the extent to which Bill C-22, *An Act to Reform the Divorce Act*, moved towards a shared-parenting norm).<sup>94</sup> As Hester Lessard so eloquently puts it in her analysis of *Trociuk v. British Columbia (Attorney General)*,<sup>95</sup> "formal equality presumes the fundamental interchangeability of male and female parents as members of the liberal community."<sup>96</sup> Feminist analysis, which

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<sup>90</sup> Statistics Canada reports that of the 37,000 dependents for whom custody was determined through divorce proceedings in 2000, custody of 37.2 per cent of dependents was awarded to the husband and wife jointly: "Divorces" *The Daily* (2 December 2002), online: Statistics Canada <<http://www.statcan.ca/Daily/English/021202/d021202f.htm>>. Even when joint custody is awarded, children are likely to reside primarily with their mothers. See Nicole Marciel-Gratton & Céline Le Bourdais, *Custody, Access and Child Support: Findings From the National Longitudinal Survey of Children and Youth* (Ottawa: Department of Justice, 1999) at 20-21.

<sup>91</sup> [1993] 4 S.C.R. 3.

<sup>92</sup> [1996] 2 S.C.R. 27.

<sup>93</sup> See Susan B. Boyd, "Contextualizing the Best Interests of the Child: Justice L'Heureux-Dubé's Approach to Child Custody and Access Law" in Elizabeth Sheehy, ed., *Adding Feminism to Law: The Contributions of Justice Claire L'Heureux-Dubé* (Toronto: Irwin Law, 2004) 165.

<sup>94</sup> Susan B. Boyd, "Walking the Line: Canada's Response to Child Custody Law Reform Discourses" (2004) 21 Can. Fam. L.Q. 397; Helen Rhoades & Susan B. Boyd, "Reforming Custody Laws: A Comparative Study" (2004) 18 Int'l J.L. Pol'y & Fam. 119 [Rhoades & Boyd, "Reforming Custody Laws"].

<sup>95</sup> [2003] 1 S.C.R. 835 [*Trociuk*].

<sup>96</sup> Lessard, "Mothers, Fathers, and Naming," *supra* note 84.

places male and female parents in their gendered social context (as well as their racialized and sexuality contexts), runs counter to this dominant formal equality discourse.

Less obviously perhaps, the same-sex marriage impetus also reflects a gender-neutral trend in family law. The recognition of same-sex relationships rests largely on the notion that same-sex partners can be just as loving and committed as opposite-sex partners—in other words, that gender is not relevant. For instance, the success of *M. v. H.* rested partly on the fact that spousal support laws were gender neutral: obligations between husbands and wives were reciprocal, not resting on their gender; so why should same-sex partners be omitted from spousal support obligations? While offering a logical rationale for the extension of spousal support obligations, this gender-neutral rhetoric also tends to occlude the extent to which marriage is, for many women, the legal institution within which they experience economic and psychological disadvantage that results in a diminishing of their autonomy. Somewhat perversely, then, the struggle for legal recognition of same-sex marriage has diminished our ability to offer a feminist analysis of women's continuing systemic inequality within heterosexual relationships, or the other ways in which marriage contributes to systemic inequalities.<sup>97</sup>

Two recent Supreme Court of Canada cases on domestic contracts, *Hartshorne v. Hartshorne*<sup>98</sup> and *Miglin v. Miglin*,<sup>99</sup> exemplify the resistance to acknowledging women's systemic inequality within marriage. In these cases, the discourse that dominated the *Pelech* trilogy<sup>100</sup>—of choice and individual responsibility, and freedom from state-imposed norms—emerge once more, despite the fact that *Miglin* ostensibly overrules the *Pelech* trilogy. *Hartshorne* is the Court's most recent pronouncement on freedom of contract in family law. Here, a well-educated woman trained in law, who had been previously married, and who had legal advice about the unfairness of the marriage agreement she was being asked to enter, signed the contract, albeit under protest. She “chose” to bargain away her rights, apparently with her eyes wide open, and the Supreme Court took this “choice” seriously in determining that the contract was “fair.”

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<sup>97</sup> For our effort to do so, see Susan Boyd & Claire Young, “From Same-Sex to No Sex?: Trends Towards Recognition of (Same-Sex) Relationships in Canada” (2003) 1 Seattle J. Soc. Just. 757.

<sup>98</sup> [2004] 1 S.C.R. 550 [*Hartshorne*]. For two commentaries on *Hartshorne*, see Martha Bailey, “Marriage à la Carte: A Comment on *Hartshorne v. Hartshorne*” (2004) 20 C.J.F.L. 249 [Bailey, “Marriage à la Carte”]; Martha Shaffer, “Domestic Contracts, Part II: The Supreme Court's Decision in *Hartshorne v. Hartshorne*” (2004) 20 C.J.F.L. 261. Shaffer's analysis is closer to that offered here.

<sup>99</sup> [2003] 1 S.C.R. 303 [*Miglin*]

<sup>100</sup> *Supra* note 12.

The constraints on Mrs. Hartshorne's choice—which, in our view and in the view of the dissent written by Justice Deschamps, were highly gendered—were not taken seriously. First, she met her husband, who was older than her, at the law firm where he was a partner and where she articulated and became an associate. Second, he presumably had greater bargaining power than she did: he had assets worth 1.6 million dollars when they married whereas she had debts. Third, Mr. Hartshorne required signing of the agreement on the wedding day, having made it clear that the marriage would not otherwise occur. Fourth, the couple already had a one-year-old child at the time of the marriage. Mrs. Hartshorne had given up her legal career at the time of the birth of their first child, and then continued as primary caregiver for this and their second child. After separation, Mrs. Hartshorne had custody of both children, one of whom had special needs. The Supreme Court characterized this decision that Mrs. Hartshorne mind the home front as hers alone,<sup>101</sup> not a decision taken by the couple. Yet the trial judge noted that Mr. Hartshorne had supported Mrs. Hartshorne's decision to remain out of the labour force to care for their children.

Fairness was also characterized in a narrow manner in *Hartshorne*. The Court analyzed the issue of fairness in terms of two individuals who made promises about the disposition of assets in the event of divorce. This “fair” settlement left Mrs. Hartshorne at divorce, after twelve years of cohabitation and nine years of marriage, during which she did not work outside the home and was economically dependent on Mr. Hartshorne, with only 27 per cent of the value of the matrimonial home (280 thousand dollars). Mr. Hartshorne left with 1.2 million dollars. Notably, Justice Bastarache said he was not unmindful of the systemic problems discussed in *Moge*, but stated, “ultimately, it is fairness between the parties that is at issue here.”<sup>102</sup> In other words, Justice Bastarache severed an analysis of systemic, gender-based inequality—and of the larger social context emphasized in *Moge*—from an analysis of what is fair between two presumptively equal individuals. *The Globe and Mail* endorsed the approach: “There’s a word for that reasoning: fair.” Since the engaged couple could have realistically contemplated the ultimate implications of their marriage agreement, and there was no duress or coercion, “people who signed agreements should be expected to live up to the obligations they undertook.”<sup>103</sup> The use of the word “people” in the editorial is indicative

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<sup>101</sup> *Hartshorne*, *supra* note 98 at 584.

<sup>102</sup> *Ibid.* at 576.

<sup>103</sup> “After the Prenuptial Pact,” Editorial, *The Globe and Mail* (27 March 2004) A22.

also of the approach of the court: women and men are deemed to be formally equal in the eyes of the law. If women emerge from marriages in poor economic positions and with childcare responsibilities, it is not the job of family law to redress this problem, provided that such a problem could have been contemplated at the signing of a contract. The Court was content to return Mrs. Hartshorne to what they assumed would have been her (poor) market position anyway: poorer than Mr. Hartshorne.<sup>104</sup> The fact that Mrs. Hartshorne's gender might have some influence on both her market position and the result of her marriage breakdown went largely unnoticed.

Some feminist commentators suggest that the *Miglin* decision, and presumably the *Hartshorne* decision as well, rest on narrow facts, and that the *Moge* analysis of Justice L'Heureux-Dubé regarding marriage as an economic partnership has not necessarily been eroded.<sup>105</sup> Hopefully, this assessment is true. However, we would suggest that these two recent decisions on domestic contracts convey a message that women lawyers, and perhaps other professional women, should beware: their legal training places them at risk of never receiving a sympathetic ear from a judge. So they had better make sure that their domestic partner signs an agreement that will not leave them with responsibility for children and with limited resources. They will be held to the bargain, no matter how unfair its outcome. Possibly, judges will be more sympathetic towards non-professional women, but this case was decided under British Columbia family law legislation that is far more flexible than most other provinces in terms of allowing judges to consider the fairness of outcomes. Most, if not all, other provinces have a higher unconscionability threshold for judicial intervention in contracts. So women outside British Columbia are likely to be in an even worse position should they try to challenge domestic contracts in which they bargained away matrimonial property rights.

The liberal individual unfettered by gender or familial ideology has arguably returned to family law, at least in the contractual context. In fact, family law seems to offer different messages regarding economic remedies, depending on whether women are perceived as having made a choice or not, either by marrying or by contracting.<sup>106</sup> In *Nova Scotia (Attorney*

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<sup>104</sup> *Hartshorne*, *supra* note 98 at 584. Mr. Hartshorne had argued, and the Court appeared to agree, "that there is no indication that twelve years of practising law would have yielded the respondent more assets than those with which she is leaving this marriage."

<sup>105</sup> E. Llana Nakonechny, "Spousal Support Decisions at the Supreme Court of Canada: New Model or Moving Target?" (2003) 15 C.J.W.L. 102.

<sup>106</sup> See Bailey, "Marriage à la Carte," *supra* note 98.



*General*) v. *Walsh*,<sup>107</sup> in which the Court upheld the constitutionality of excluding common law couples from statutes on division of matrimonial property, the Court sent a clear message that choosing marriage indicates a decision to be covered by statutory rules on property division. Not choosing marriage, or failing to contract into a matrimonial property regime, indicates a desire to be a liberal individual. After *Hartshorne*, even if married, those who choose to relinquish their rights in a domestic contract will have a tough time re-opening that agreement. Conversely, women who do not sign away rights in a domestic contract may well be able to obtain matrimonial property rights or spousal support under the reasoning of *Moge*, and more recent cases such as the 1999 decision in *Bracklow v. Bracklow*.<sup>108</sup> In that case, the wife, who had worked for some time during the marriage and contributed financially as well as with unpaid labour to the household, eventually became physically and mentally disabled. The Court signaled that there was a “basic social obligation” between spouses (at least, married spouses), which meant that the husband in that case owed a duty of spousal support even though it was through no fault of his own that the wife’s economic prospects had suffered such decline.<sup>109</sup> Unlike *Moge*, however, *Bracklow* rested less on a gender-based analysis of economic disadvantage within marriage, and more on an understanding of basic social obligations of (ostensibly genderless) marital partners, which is consonant with the privatizing trend in family law.<sup>110</sup>

Echoes of the choice discourse that characterizes a formal equality approach also emerge in the way the tax system is used to deliver social programs. As mentioned earlier, the tax system has an expenditure function and is increasingly being used to deliver social programs. For example, the tax system is the primary method by which the government funds child care.<sup>111</sup> Another example of a social program funded by the tax system is

<sup>107</sup> [2002] 4 S.C.R. 325.

<sup>108</sup> [1999] 1 S.C.R. 420 [*Bracklow*].

<sup>109</sup> Note, however, that upon rehearing the trial judge determined that Mr. Bracklow’s obligation was time limited in scope. *Bracklow v. Bracklow* (1999), 181 D.L.R. (4th) 522 (B.C.S.C.).

<sup>110</sup> Indeed, McLachlin J. refers explicitly to placing the primary burden of support on partner not the state: *supra* note 107 at 23, 31.

<sup>111</sup> There is some debate about whether the child care expense deduction is a tax expenditure. The Department of Finance lists all the tax expenditures, but categorizes the child care expense deduction as a “memorandum” item, that is, an item that is not technically a tax expenditure. See Department of Finance, *Tax Expenditures and Evaluations, 2003* (Ottawa: Department of Finance, 2003) online Department of Finance <[http://www.fin.gc.ca/toce/2003/taxexp03\\_e.html](http://www.fin.gc.ca/toce/2003/taxexp03_e.html)> [Finance, *Tax*]. Clai Young disagrees with this categorization because the tax deduction is a subsidy that is intended to assist families in paying for child care. On this point, see also Sheila Block & Allan Maslove, “Ontario Tax Expenditures” in Allan Maslove, ed., *Taxes as Instruments of Public Policy* (Toronto: University

retirement savings. The government encourages citizens to save for retirement and to contribute to “private” pensions such as occupational pension plans (called RPPs) and Registered Retirement Savings Plans (RRSPs) by giving significant tax breaks.<sup>112</sup> Retirement saving is subsidized extensively through the tax system through the use of tax preferences in respect of contributions to RPPs and RRSPs. These tax preferences take the form of a tax deduction for contributions to the plans and the even more valuable sheltering of income earned by the plans until the funds are withdrawn, generally in retirement. For 2004, the value of both types of preferential tax treatment for RPPs is projected to be over 14 billion dollars while the amount of the subsidy for RRSPs is projected to be over 16 billion dollars.<sup>113</sup> Put another way, the government is spending more than 30 billion dollars a year to persuade citizens to contribute to these private pension plans and together these subsidies constitute the largest personal tax expenditure each year.

One major problem with this policy is that it operates on an assumption of unfettered choice and gender neutrality. No account is taken of the socio-economic realities that shape women’s lives in comparison to those of men. Furthermore, it assumes that everyone has equal access to these tax subsidies. If an individual “chooses” not to take advantage of them, then she must bear the consequences. Yet when we look at how one gains access to these expenditures, we see that the gender neutrality embedded in tax rules clearly discriminates against women.<sup>114</sup>

First, far fewer women than men have access to occupational pension plans, largely due to women’s mode of participation, or lack thereof, in the paid labour force. Even though more women than ever work outside the home, the employment rate for women is considerably less than

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Toronto Press, 1994) at 178.

<sup>112</sup> This policy is also part of the privatization of responsibility for economic security alluded to earlier. We hear dire threats that the Canada Pension Plan is underfunded and that the Old Age Security (OAS) cannot be relied on in the future. Already we see the demise of the universality of the OAS, with the tax clawback. The government, aided by the private sector banks and trust companies, put a lot of energy into touting RRSPs as the way to go. The message is, “Look to the private sphere, not the state, for your economic security in old age.” That sphere includes the private market in the form of your employer in the case of occupational pension plans, banks and trust companies in the case of RRSPs, and also includes the private family—your spouse for example—with respect to pension survivor benefits or spousal RRSPs.

<sup>113</sup> See Finance, *Tax*, *supra* note 111.

<sup>114</sup> Several other tax subsidies for personal savings also reflect the privatization policy of placing responsibility on individuals to provide for themselves and their families rather than on public programs. Examples are the tax deductions in the *ITA* for contributions to the Home Buyer’s Plan (section 146.01), the Lifelong Learning Plan (section 146.02) and the Registered Education Savings Plan (section 146.1).

that of men. In 2001, 56 per cent of women over age fifteen had jobs, while the figure for men was 67 per cent.<sup>115</sup> For aboriginal women and women with disabilities the participation rate is disturbingly low. Indeed Disabled Women's Network Ontario (DAWN) has estimated that 65 per cent of women with disabilities who wish to work are unemployed.<sup>116</sup> For these women, there is no choice. But it is not only women's lack of participation in the paid labour force that limits their ability to benefit from these tax subsidies. The kind of work that women do is also a major factor. Only those who work for relatively large employers, economically able to provide a pension plan, will benefit. Those who work part-time (and women have formed at least 70 per cent of part time workers since the 1970s)<sup>117</sup> and those who are self-employed or unemployed cannot benefit. Moreover, the "choice" to work part-time, or to be self-employed and work at home, is often not a real choice. Childcare responsibilities frequently require that women take part-time jobs or jobs with more flexible work hours.

In relation to the approximately 17 billion dollars spent on subsidizing contributions to RRSPs, the government would say that gender is taken into account because the RRSP is primarily intended to assist women who may not have access to occupational pension plans. That sounds fair until one examines the statistics. First, more men than women contribute to RRSPs. In 2000 (the latest figures available), 3.5 million men contributed while the figure was only 2.8 million for women.<sup>118</sup> That figure is particularly shocking because men have greater access to occupational pension plans, and many men may have therefore exhausted their available contribution room on that plan so they cannot contribute to an RRSP even if they have the money to do so. For many women, in contrast, an RRSP is their only private pension plan. Second, women contribute significantly less money than men to RRSPs and therefore they receive less of the tax subsidy. In 2000, men contributed a total of 17.5 billion dollars while women contributed only 10.6 billion dollars.<sup>119</sup>

The government policy on retirement savings is based on an assumption of choice: women can contribute to RRSPs if they wish. Yet that

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<sup>115</sup> Housing, Family and Social Statistics Division, *Women in Canada: Work Chapter Updates* (Ottawa: Statistics Canada, 2004).

<sup>116</sup> Canadian Labour Congress, *Women's Work: A Report* (Toronto: Canadian Labour Congress, 1997) at 5.

<sup>117</sup> *Supra* note 115 at 8.

<sup>118</sup> "Income Statistics 2002-2000 Tax Year, Final Basic Table, All Returns by Age and Sex" online: Canada Customs and Revenue Agency <<http://www.cra-arc.gc.ca/agency/stats/gb00/pst/final/tables-e.html>>.

<sup>119</sup> *Ibid.*

assumption is fallacious because women's incomes are lower than men's and so women will have less discretionary income to contribute. Increasing the amount that can be contributed to an RRSP, as the government has done lately, is of no benefit to those women who cannot afford to use all the RRSP room available to them. Moreover, the tax subsidy is, in part, delivered by way of a tax deduction, the value of which depends on the rate at which tax is paid. A contribution of 10 thousand dollars by a high-rate taxpayer paying at an average rate of 40 per cent yields a tax savings of 4 thousand dollars, whereas for a person with a low income (more often a woman) who pays tax at an average rate of 10 per cent, the tax savings is only 1 thousand dollars.

The current policy with respect to the subsidization of retirement saving can thus be seen as a failure for women, many of whom continue to live in poverty in their retirement. They do not get their fair share of the tax subsidies in part because no account is taken of the socio-economic realities of women's lives and the impact these realities have on their ability to make choices given by the tax system. Unequal gender relations are neutralized and women are falsely assumed to be formally equal in the context of economic decisions, just as in the *Hartshorne* case.<sup>120</sup>

D. *Familial Ideology: The Post-Divorce Family Unit, or "Reconstructing" the Patriarchal Nuclear Family*

In the previous section, we suggested that as the twentieth century waned, women's unequal position within the family and in relation to employment was rendered increasingly invisible in tax and family law. Ironically, at the same time, the conditions that reproduce women's inequality within the family (including familial ideology) were being reconstructed in the name of children. Dawn Bourque has called this trend "reconstructing the patriarchal nuclear family."<sup>121</sup> As we shall see, the Supreme Court of Canada calls it the "post-divorce family unit." Family law has, it seems, moved from a central preoccupation with adult relationships to a concern with preserving parent-child relationships. This preoccupation endorses at a superficial level the notion of formal equality between mothers and fathers and is connected to the privatization of economic

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<sup>120</sup> *Hartshorne*, *supra* note 98.

<sup>121</sup> Dawn M. Bourque, "Reconstructing' the Patriarchal Nuclear Family: Recent Developments in Child Custody and Access in Canada" (1995) 10 C.J.L.S. 1.

responsibilities for children.<sup>122</sup> It also has a highly gendered impact on women, who retain de facto, even if not de jure, primary responsibility for children.

Considerable efforts have been made in child custody law, as well as in law reform initiatives, to enhance the contact between non-custodial parents (mostly fathers) and children. In some countries, mothers who fail to facilitate contact in the manner expected are vilified and labeled “implacably hostile” or “no-contact mothers,” and these trends are evident in Canada as well.<sup>123</sup>

Meanwhile, child support obligations have been enhanced between fathers and children. These trends play out differently for biological and non-biological fathers, but are relevant to both. There is less emphasis on a biological father’s adult relationship with a mother when determining his parental status, rights, and responsibilities; his status as a “natural” parent suffices. However, mothers are still highly relevant in terms of cementing the father-child relationship: mothers are being legally constituted in a way that obliges them to ensure that their children build relationships with biological fathers, sometimes regardless of whether the parents ever cohabited together or with the children, and often compromises their own autonomy.<sup>124</sup> In the case of non-biological fathers, child support law has increasingly imposed financial obligations on men who are regarded as “standing in the place of a parent,”<sup>125</sup> usually by reference to the man’s relationship with the mother of the child. Once married to, or cohabiting with, a child’s mother, it will be harder for a step-parent to avoid child support obligations. Together these trends can be summarized as a move in the legal system to create “post-divorce family units,” or, as Bourque would put it, to re-privatize the family in its traditional, patriarchal, nuclear form.<sup>126</sup> Familial ideology has experienced a rebirth in the name of children

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<sup>122</sup> Susan Boyd, “Legal Regulation of Families in Changing Societies” in Austin Sarat, ed., *The Blackwell Companion to Law and Society* (Oxford: Blackwell Publishers, 2004); Lessard, “Mothers, Fathers, and Naming,” *supra* note 84.

<sup>123</sup> See Helen Rhoades, “The ‘No-Contact Mother’: Reconstruction of Motherhood in the Era of the ‘New Father’” (2002) 16 *Int’l J.L. Pol’y & Fam.* 71; Felicity Kaganas & Shelley Day Sclater, “Contact Disputes: Narrative Constructions of ‘Good’ Parents” (2004) 12 *Fem. Legal Stud.* 1; and Boyce, *Child Custody*, *supra* note 16, c. 6.

<sup>124</sup> Trociuk, *supra* note 95; Lessard, “Mothers, Fathers, and Naming,” *supra* note 84. If trends in Australia are any indication, even lesbian co-mothers will not necessarily be permitted to define their own nuclear family unit in isolation from the biological father/sperm donor of a child. Fiona Kell, “Redefining Parenthood: Gay and Lesbian Families in the Family Court—the Case of *Re Patricia*” (2002) 16 *Austl. J. Fam. L.* 17.

<sup>125</sup> *Chartier v. Chartier*, [1999] 1 S.C.R. 242. See Cossman, “Family Feuds,” *supra* note 85.

<sup>126</sup> Bourque, *supra* note 121.

These trends can also be discerned in tax law. In 1995, two years after the *Symes* decision, the Supreme Court released its decision in *Thibaudeau*.<sup>127</sup> Suzanne Thibaudeau argued that the requirement that she include child support payments from her ex-husband in income for the purpose of income tax discriminated against her on the basis of her family status in contravention of section 15(1) of the *Charter*. In addition, a coalition of intervenors argued that the requirement to include child support payments in her income was also discriminatory on the basis of sex as it had an adverse impact on women compared to men. The inclusion/deduction system, as it was called, not only required recipients of child support (generally women) to include the amount in income, but it also gave a tax deduction to payors of support (generally men). The rationale was that giving men a tax deduction for child support payments while requiring women to include the amount in their income actually resulted in a tax subsidy that would help defray the extra expense of raising children when parents had divorced or separated. The subsidy arose because women tend to earn less than men and thus pay tax at a lower rate. So, for example, if the amount of child support is 10 thousand dollars a year and the father earns a high income and pays tax at an average rate of 45 per cent but the mother has a lower income and pays tax at an average rate of 20 per cent, she pays 2 thousand dollars in taxes but he saves 4 thousand dollars in taxes owing. The difference, 2,500 dollars, is the tax subsidy. The problem, of course, is who actually gets that subsidy: generally it is not shared between them because it is reflected in the payor's saved taxes and not the amount of the award received by the mother (even if grossed up).

In *Thibaudeau*, the Supreme Court split on gender lines, as it had done in *Symes*, with the men on the Court finding that the requirement to include child support payments in income did not discriminate against Suzanne Thibaudeau, and the two women on the Court dissenting. Once again, the majority was totally resistant to any notion of the gendered impact of these tax rules.<sup>128</sup> The way the Court was able to reach that conclusion was by refusing to view a woman who is separated from her husband as someone who was no longer attached to her previous partner. The majority found that the "post-divorce family unit" was better off with the inclusion/deduction system because it usually generated a tax subsidy for the couple and thus there was no discrimination against Suzanne

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<sup>127</sup> *Thibaudeau*, *supra* note 36 at 687, 702.

<sup>128</sup> This raises the question of what impact class played in this decision. As with Beth Symes, the Court had before them an articulate, educated, middle-class woman in Suzanne Thibaudeau.

Thibaudeau.<sup>129</sup> This logic provided an elegantly devious way to erase women from the picture of how the inclusion/deduction system worked. Even though a woman separates from her male partner and has custodial responsibility for children, which is a highly gendered experience, she suddenly becomes part of this ungendered “post-divorce family unit.” This is also a novel twist given the use of this same phrase in the United States to refer to the custodial parent and child<sup>130</sup> and given that the unit of taxation in Canada is the individual. Suzanne Thibaudeau should have been treated as such.

Thinking back to the discussion of child custody law, it appears that once a couple has a child, it remains a family forever. Neither separation, nor divorce, nor even remarriage by one or both of the parties dissolves the family, at least insofar as the inclusion/deduction rules apply to it. Moreover, viewing divorced or separated individuals as part of a couple for tax purposes reinforces the role of the privatized family as exclusively responsible for the support of children, even when the family, as such, no longer exists.<sup>131</sup>

Interestingly, the problematic Supreme Court decision in *Thibaudeau* produced a political victory of sorts. The combination of an outcry in the press and outstanding lobbying by women’s groups led to legislative change.<sup>132</sup> The federal government repealed the inclusion/deduction rules as they applied to child support orders made or varied after April 30, 1997. In conjunction with the provinces, it also strengthened enforcement measures for child support and introduced the child support guidelines. At the same time, it took the surplus tax dollars that arose with the repeal of the rules and used some of them to enhance the Working Income Supplement of the Child Tax Credit. Some progress thus emerged from the *Thibaudeau* struggle, albeit progress that accords with the privatization of economic responsibilities for children and that plays into reinforcement of the ongoing economic ties between parents who no longer live together.

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<sup>129</sup> *Thibaudeau*, *supra* note 36 at 675-76.

<sup>130</sup> *Tropea v. Tropea*, 87 N.Y.2d 727 (N.Y. C.A. 1996).

<sup>131</sup> Claire F.L. Young, “It’s All in the Family: Child Support, Tax and *Thibaudeau*” (1995) 6 Const. Forum Const. 107.

<sup>132</sup> Jennifer Quaile, “‘At the Mercy’ of Patriarchy: Women and the Struggle over Child Support” in T. Brettel Dawson, ed., *Women, Law and Social Change*, 3d ed. (Toronto: Captus Press, 1998) 531.

### E. *Summary of Impact of Feminist Challenges*

The feminist-inspired challenge to the unencumbered individual of liberalism in the 1992 Supreme Court decision in *Moge* was thus limited and did not extend to tax law. As well, *Moge* can be read as part of a larger trend towards privatizing the economic insecurity of women and children. Moreover, we have witnessed the rise, again, of formal equality and gender neutrality, along with a new spin on familial ideology: the post-divorce family unit.

Putting these trends together, women can be said to be at risk in the family law context. Under child custody law, they will be held responsible not only for primary care for children but also for ensuring that fathers have a relationship with their children. This responsibility may include fathers who have a biological tie with the children but not necessarily a social-parenting relationship. Overall, trends in parenting law indicate that mothers will increasingly confront resistance if they attempt to raise their children autonomous from identifiable fathers.<sup>133</sup> Moreover, mothers are increasingly reliant on men to obtain the financial means to support their children. If the fathers of their children are willing and able to pay under the child support guidelines, this privatized remedy may not cause hardship. However, enforcement remains a problem. In addition, the child support system now binds mothers to the other parent of their children well into the future and prevents women from being autonomous from their ex-partners when they need to be. Furthermore, child support takes priority over spousal support under the new guideline approach, and we have seen that if women sign away their financial remedies, they will not be treated sympathetically by the courts.

The challenges in the tax law context resonate with those in family law. The biggest challenge is that as long as the tax system is used to deliver sophisticated social programs, in whole or in part, tax law and policy must take into account hitherto ignored realities such as the gendered nature of child care, the adverse impact on women of privatization of responsibility for economic security, women's unequal access to well-paying jobs, and the undervaluation of women's labour in the home. Only then can we really understand the impact of these tax policies on women and decide whether the tax system can, in fact, ever be an effective tool by which to implement complex social and economic policy.

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<sup>133</sup> *Johnston-Steeves v. Lee* (1997), 209 A.R. 292 (C.A.); *Trociuk*, *supra* note 95.



### III. CHALLENGES FOR THE FUTURE

By the turn of the twenty-first century, it was increasingly unpopular to talk about gender-specific patterns in the family and in society. There was more talk of post-feminism and the need to offer women choice in the form of their relationships. Feminists who focused on women's material inequality were often cast as old-fashioned thinkers who had not moved with the times, who constructed women as victims, and who invoked antiquated notions about the role of the state in supporting economic well-being. Feminists who focused on child custody law were charged with failing to acknowledge men's potential and the extent to which fathers were now parenting equally. It was also suggested that adults who "choose" to have children must realize that they will have to compromise their own interests for the sake of those children. It was apparently unseemly to talk about women's (in)equality when children were at issue.

Women in the early twenty-first century certainly have a greater array of lifestyles from which to choose than was true even two decades ago. However, the terrain on which these choices are made remains starkly uneven. In an era of increased individual responsibility for one's socio-economic well-being and for one's personal choices, which corresponds with the diminishing role of the social welfare state, women who choose badly are left with the consequences for which they themselves are blamed.<sup>134</sup> Women who live in poverty are too often blamed for their social condition, and they are also encouraged to rely on family—which sometimes means returning to abusive partners—in order to find financial support for themselves and for their children. Women with young children are encouraged to retool for the workplace, often without daycare support or adequate jobs available to them. Women constitute two-thirds of the population working in minimum wage jobs,<sup>135</sup> earning salaries that make it virtually impossible to support themselves, let alone their children (twenty seven thousand single parents in Canada are earning minimum wage).<sup>136</sup> This over-representation of women spans all age groups, with rates for women nearly doubling those for men. This problem is not, then, diminishing for the younger generation of women. Many of these jobs that

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<sup>134</sup> In the context of poor women and bad choices, see *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429; Gwen Brodsky, "Gosselin v. Quebec (A.G.): Autonomy with a Vengeance" (2003) 15 C.J.W.L. 194 at 205-07.

<sup>135</sup> Deborah Sussman & Martin Tabi, *Minimum Wage Workers* (Ottawa: Statistics Canada, 2004); Mark Hume, "Number of minimum-wage earners falling, Statscan finds" *Globe and Mail* (27 March 2004) A13.

<sup>136</sup> Hume, *ibid.*

women “choose” fall within the “precarious work” category: minimum wage jobs with few hours and without health, dental, or pension benefits.<sup>137</sup>

The image of the successful career woman who juggles a well-paying job with a family may dominate the media, but in reality it represents a minority of women. More commonly, Canadian women struggle to provide for their families, and the faces of the women who are struggling are disproportionately those of women with disabilities, First Nations women, and women of colour. In contrast, the faces of women appearing in high-profile family law and tax law cases are disproportionately those of white women with higher education and skills. *Moge* was the exception. For obvious reasons, these women more often obtain legal representation in a time of severely decreased legal aid. Our legal precedents are therefore based on women with some degree of privilege, *Hartshorne* providing a recent example. This is not to say that these women had no legitimate legal complaint. But it is a problem if they are taken as emblematic of the modern woman, that is, divorced but with professional skills that she can polish for quick re-entry to the labour force.

A key objective for feminists must then be to find remedies that address the needs of the most disadvantaged women, who have not been represented often in litigation. Strategies might include the following tactics:

- Ensuring that women have financial security for themselves and those they care for, and have their unpaid work recognized, but not requiring them to be tied legally or psychologically to former spouses in order to be financially secure;
- Recognizing that the tax system may not be the way to deliver the social programs that are so important to women’s economic well-being, such as childcare and retirement saving; and
- Moving away from the privatizing trends that have particularly adverse impacts on women.

Yet, we identify at least three impediments to these feminist legal struggles. First is the limited value of the *Charter* as a tool for change in family law and tax law. Second is the lack of access to justice in this era of cuts to legal aid and women’s centres, which in turn diminishes the extent to which women who are racialized, poor, disabled, or immigrant will

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<sup>137</sup> See Leah F. Vosko, *Temporary Work: The Gendered Rise of a Precarious Employment Relationship* (Toronto: University of Toronto Press, 2000).

appear in the legal system. Third, the trend of renewed liberal individualism, with its rhetoric of autonomy and choice, poses great difficulty for feminists when it comes to influencing public policy, especially with respect to the intersection of race, class, sexuality, and disability with gender. Each impediment will be discussed in turn.

In the mid-1980s, it was easier to be relatively optimistic about the potential of the *Charter* as a tool through which to challenge discriminatory provisions. Numerous examples of sex discrimination in the *ITA* appeared to fit within section 15(1), although there was concern about how section 1 might play out. Since that time, and with the defeats in *Symes* and *Thibaudeau*, along with the continued imperviousness of the tax system to the feminist critique, we have become more pessimistic. Our pessimism relates to two particular themes. First, even though the courts have said that the *ITA* is subject to *Charter* scrutiny, they continue to view it as a highly complex technical instrument, the fundamental purpose of which is to raise taxes. As Kathleen Lahey has said, "although the courts have insisted that fiscal legislation should be subjected to the same level of scrutiny as other types of legislation, they have actually paid Parliament greater deference on income tax policy than on other matters."<sup>138</sup> In *Thibaudeau*, Justice Gonthier, speaking for the majority, referred to the "special nature" of the *ITA* and alluded to the revenue-raising function of the tax system when he said that it is the "essence of the *ITA* to make distinctions, so as to generate revenue for the government while equitably reconciling a range of divergent interests."<sup>139</sup> Unless the courts are willing to grapple with the tax expenditure side of the tax system, it is all too easy to ignore its discriminatory impact. In family law too, the *Charter* has had a relatively limited role, particularly now that the more blatant discrimination on the face of statutes has been removed, notably in relation to same-sex relationship recognition.<sup>140</sup> Although *Charter* values have had some indirect impact on cases such as *Moge*, substantive equality analysis has played a less-clear role since that time.

The second problem in relation to the *Charter*, one that lurks beneath the surface, relates to the cost of remedying the discrimination. Assuming that one can argue that the impact of the current tax rules

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<sup>138</sup> Kathleen Lahey, "The Impact of the *Canadian Charter of Rights and Freedoms* on Income Tax Law and Policy" in David Schneiderman & Kate Sutherland, eds., *Charting the Consequences: The Impact of Charter Rights on Canadian Law and Politics* (Toronto: Published in Association with the Centre for Constitutional Studies, University of Alberta, University of Toronto Press, 1997) 109 at 110. See also Philipps, "Discursive Deficits," *supra* note 44.

<sup>139</sup> *Thibaudeau*, *supra* note 36 at 675-76.

<sup>140</sup> Boyd, "The Impact of the *Charter*," *supra* note 40.

respecting retirement savings does discriminate against women in contravention of section 15, then the question becomes whether that discrimination can be saved under section 1. At this stage of the analysis, the significant cost that would arise from the measures required to end the discrimination can become an impediment. In *Egan v. Nesbit*,<sup>141</sup> a case in which a gay man challenged the heterosexual definition of spouse in the *Old Age Security Act*,<sup>142</sup> Justice Sopinka talked about balancing competing interests. The basis for his section 1 analysis was that *Egan* was about socio-economic policy, as is the *ITA*. The costs of extending benefits and the government's limited resources were central to his reasoning. As he said "it is not realistic for the Court to assume that there are unlimited funds to address the needs of all."<sup>143</sup> The relevance of cost in determining whether discrimination may be justified is not resolved. As Margot Young has observed, "[R]ecent human rights jurisprudence and legislation warn against assuming that cost, from the perspective of denial of equality rights, will safely continue to be largely irrelevant."<sup>144</sup>

The second impediment relates to access to justice. We have discussed key cases in our respective areas and made the point that the litigants in those cases tended to be middle-class, professional women. Where is the voice of other, less-advantaged women? Certainly, organizations such as LEAF do intervene in many of these cases in order to expand the discourse and the range of voices heard. But at the individual level, women are facing a crisis in terms of their access to legal advice and justice. Legal aid in Canada has been decimated, especially in relation to family law. In British Columbia, women's centres have lost their funding and cannot offer the informal legal support that has been so important to women over the years. It is of little use to have improvements to legislation and positive judicial precedents if women cannot get access to the legal remedies offered by legislation and cases. Improved legal aid is crucial, preferably in the form of legal aid clinics, although even then, women in rural areas will face challenges in gaining access to legal advice.

The third impediment is that feminists have experienced difficulties in being heard in public policy debates over recent years. The Department of Justice consultations with women's groups no longer occur. A notable lack of gender-specific analysis of spousal abuse and caregiving can be

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<sup>141</sup> *Egan v. Nesbit*, [1995] 2 S.C.R. 513 [*Egan*].

<sup>142</sup> R.S.C. 1985 c. O-9.

<sup>143</sup> *Supra* note 141 at 572.

<sup>144</sup> Margot Young, "Change at the Margins: *Eldridge v. British Columbia (AG)* and *Vriend v. Alberta*" (1998) 10 C.J.W.L. 259.

detected in the government documents in the custody and access law reform process in recent years that prompted some women's groups, including NAWL, to boycott a public consultation in 2001 and instead to frame their response to the consultation document in the form of a brief.<sup>145</sup> The now-shelved Bill C-22 (*An Act to Amend the [child custody parts of the] Divorce Act*) was arguably influenced somewhat by the many well-researched submissions by women's groups during the law reform process, and the "one size does not fit all" philosophy underlying Bill C-22 reflected an effort to avoid the pro-contact ethos of the Australian and English legislation, which has generated great problems for women and children, especially in situations of abuse.<sup>146</sup> However, Bill C-22 carefully avoided any references to gendered patterns within families: mothers and fathers were leveled in public discourse.

When it comes to tax policy decisions, feminists still have little influence. Certainly, NAWL does stalwart work with its annual budget submissions, well thought out and beautifully crafted proposals that would, if implemented, make a big difference to ensuring that our tax system is more reflective of the needs of women. To date, NAWL has tackled numerous important issues such as the caregiver credit, personal income tax cuts, the childcare expense deduction, the inclusion/deduction rules respecting spousal support payment, and myriad important issues for women. NAWL's central message has been "good fiscal policy making must take gender into account."<sup>147</sup> Unfortunately, a meaningful incorporation of these ideas into the budget measures has not yet occurred. At a broader level, the Joint Commonwealth Secretariat and the International Development Research Centre research team has been working on The Gender Responsive Budget Project, but again, some wonderful ideas and measures have yet to make their way into the legislation.

Finally, there is the ongoing problem of women being viewed as a homogenous group. We are mindful of lessons about intersectionality learned from our former colleague Marlee Kline, who challenged feminists to be attentive to how law affected women whose race, class, gender, and sexuality intersected in complex ways.<sup>148</sup> Ten years ago, it was observed that judges had an easier time comparing the status of a white woman to that of

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<sup>145</sup> Ontario Women's Network on Custody and Access, *Brief to the Federal, Provincial, Territorial Family Law Committee on Custody, Access and Child Support* (Ottawa: NAWL, June 2001) at 6.

<sup>146</sup> Rhoades & Boyd, "Reforming Custody Laws," *supra* note 94.

<sup>147</sup> The National Association of Women and the Law, Pre-Budget Submission to the Standing Committee on Finance, House of Commons, October 2001.

<sup>148</sup> Marlee Kline, "Race, Racism, and Feminist Legal Theory" (1989) 12 Harv. Women's L.J. 115-50. In 2004, a special issue of C.J.W.L. will publish several articles in memory of Marlee Kline's work.

a white man.<sup>149</sup> It was harder to introduce the impact of race, for instance, into this comparison. Now, however, even differences between white women and white men are being obviated in law and public policy, or at least, no one wants anymore to explicitly identify such differences in public documents. Thus, it may be even more difficult to ensure that the voices of women whose experiences differ because of their race or class are heard and that law and public policy appropriately address the impact of class, race, sexuality, and disability. It may be that feminists have not pushed far enough their analysis of precisely how factors such as race and gender intersect: our impression is that the literature is far richer than either law or public policy on this point.

Feminists have had to work hard to deal with these intersections in our work, not always with success. In family law reform, for instance, briefs often mention diversity of women, but solutions still seem geared towards straight, white women. In relation to the high profile *Van de Perre v. Edwards*<sup>150</sup> case involving custody of a mixed-race child, it seemed difficult to prompt a meaningful feminist discussion of how complicated the intersections were between gender, race, and class. Interestingly, while avoiding a broad analysis that might have acknowledged the impact of systemic, institutionalized racial oppression on racialized children, the Court briefly addressed issues that have in the past been raised by feminists: the significance of the history of care of a child and the questionable significance of a father offering a “substitute” mother in the form of a wife/step-mother as opposed to being judged on his own merits. However, it did so in a way that could be read as diminishing the importance of race and racism. Justice Bastarache, for the Court, indicated that “racial identity is but one factor that may be considered in determining personal identity; the relevancy of this factor depends on the context. Other factors are more directly related to primary needs and must be considered in priority.”<sup>151</sup> The Court emphasized that actual parenting should be taken into account rather than lifestyle or family form, again a point that feminists have made in the past. As a result, the case of the low-income Caucasian single mother who had cared for the child since birth was strengthened in relation to the wealthy African-American married father with a stay-at-home wife. How we can analyze this case without prioritizing either race or gender remains a challenge.

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<sup>149</sup> Nitya Duclos, “Disappearing Women: Racial Minority Women in Human Rights Cases” (1993) 6 C.J.W.L. 25.

<sup>150</sup> [2001] 2 S.C.R. 1014.

<sup>151</sup> *Ibid.* at 1036-37.

Meanwhile, on the culture front, we have seen the push for separat dispute resolution mechanisms for those who wish to be governed by Islamic family law, and apparently, some positive reception of this proposal despite the resistance of the Canadian Council of Muslim Women.<sup>152</sup> This initiative may or may not be the kind of answer that Marlee Kline would have suggested when she called for greater attention to race and culture. We have yet to have some of those difficult conversations about when, and precisely how, race and culture should be taken into account in law reform without diminishing women's autonomy.<sup>153</sup>

On a more positive note, feminists continue to take significant initiatives on these and other issues. Feminists in Vancouver have initiated an important ongoing project on poverty and human rights that focuses on social and economic rights and considers, among other things, the intersections of gender, poverty, and race.<sup>154</sup> At a recent feminist meeting on family law reform organized by NAWL, these questions were also central. The group discussed the dangers of simply putting wording on race and culture into child custody statutes, without providing context for how racism operates. Also identified were the particular difficulties confronting Aboriginal women in remote communities, and the extreme lack of access to justice that they face. The discussion was sobering, in that it pointed to the rather limited success that feminist engagement with family law reform has had to date, and how superficial is a review of case law and legislative change, such as we have offered in this lecture. The women at that meeting concluded that enormous work still needed to be done with feminist input at all levels, and committed themselves to undertaking that work. For those who might suggest that feminism is dead, or has become a caricature of itself, we disagree at the most profound level.

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<sup>152</sup> See Alia Hogben, "Sharia as Family Law in Canada?" (2004) 23 *Jurifemme* 3, 11.

<sup>153</sup> For a recent article that enters this conversation, albeit not in our fields, see Maneesha Deckha, "Culture as Taboo? Feminism, Intersectionality, and Culture Talk in Law" (2004) 16 *C.J.W.L.* forthcoming.

<sup>154</sup> Online: The Poverty and Human Rights Centre, <<http://www.povertyandhumanrights.org>>.