

# DAY CARE AND EQUALITY IN CANADA

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### I. Introduction

Is provision of day care an essential requirement for achieving equality of opportunity in the workplace? If yes, can it be supported legally? What methods of day care delivery should be adopted? At what cost and to whom? How can day care best be delivered? What tax questions arise from alternative forms of day care delivery? What tax incentives and subsidies presently exist in the area of childhood dependency? Are these incentives and subsidies equitable? What new proposals are feasible? These are the questions which arise when the topic of day care arises for discussion. It is a complex subject for which there is no easy or single solution. In this paper, I will attempt to address these questions by looking at potential providers of day care and options open to them. Many of these options are being used at the present time and an attempt will be made to critically evaluate them. I will also examine legal implications that arise in terms of equality of opportunity in the workplace and will discuss whether or not the *Canadian Charter of Rights and Freedoms*, or other legislation, can provide any remedies for women who have no access to day care or have access to inadequate day care.

“Day care” is a very difficult term to define. It has become a catchword for a diverse set of needs and services for children and their parents. Generally it refers to care provided to children under 12 years of age by persons other than their parents. Facilities providing the care vary enormously in terms of hours of operation, location, fee structure and the service provided. It can be provided inside or outside the home; by one person or by several. Day care can be provided free, it can be highly subsidized or it can be left entirely with the parent(s) with no interference or support from outside sources. Government subsidization of day care can take a variety of forms, dependent on such factors as income, whether one or both parents are working, whether there is only one parent, whether one or both parents are attending school, and whether the child is handicapped.

Day care centers can be operated as non-profit, public, non-profit private or profit-making private businesses. They may be located in supervised, registered day-homes by qualified care-givers or in private homes by informal arrangement between parents and unqualified care-givers.

Another term it is necessary to define is “parental benefits”. The term includes any benefits given to parents in connection with child birth or child rearing responsibilities. Family allowance payments, tax exemptions or tax credits, day care vouchers, clothing allowances and parental leave are examples of parental benefits which could come from government, unions, employers or philanthropic sources.

The last twenty years in Canada indicate profound cultural change in the role of women. No longer are the vast majority of women living their

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lives as homemakers, tending solely to the needs of husbands and children to the exclusion of any other full time activity outside the home. As of 1981, women comprised more than 40% of all the labor force. Of this working group, 40% were single, separated, widowed or divorced women.<sup>1</sup> In 1980, mothers of about 760,000 children under six years of age were in the labour force; by 1990, the number of such children is projected to reach 10.5 million.<sup>2</sup> The probability of women being employed during child bearing years is obviously very high, yet statistics indicate the role of women as mothers has not changed significantly. Canadian women, by and large, still want to bear children and still have the prime responsibility for their nurturing and care. Herein lies the problem. In today's world, the role of mother must be reconciled with the role of the working woman. If we are to pay any attention to these statistics and acknowledge the inter-relationship between work and family life, the social value of maternity and child rearing must be considered in conjunction with the occupational activities of women.<sup>3</sup>

## II. Government Involvement

At the present time, federal, provincial and municipal governments are involved in day care. The setting of standards and licensing, subsidization and tax legislation all have an impact on day care services. The issues that arise are the adequacy of standards and whether or not these standards can be monitored and enforced; scope of licensing standards, and whether such standards should be expanded to career family day care homes, nursery schools and private arrangements; the adequacy of subsidization, and whether it benefits those who need it the most and whether it unfairly discriminates against one group in favour of another; the fairness of the tax laws, and whether these laws encourage, or discourage, development of new day care facilities and are discriminatory in application, and whether the laws adequately reflect changing cultural norms.

### A. Subsidies

The use of subsidies to observe stipulated practices is a form of persuasion which has proven effective and is now a widely used instrument of government policy. In 1979, governments at all levels spent about \$95 million on day care. Of this, forty million was paid out under the Canada Assistance Plan and \$55 million in lost revenues under the child care expense tax deduction.<sup>4</sup> Subsidization is directly related to the accessibility of day care — both physical availability of supply and ability to use what is available. Accessibility issues involve matters of cost and funding that enable, or deny, parents the ability to receive or purchase day care services for their children. Proponents of high quality care for children argue the present government subsidization is insufficient and the basic funding mechanism is faulty.

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1. Employment and Immigration Canada, *Skills, The New National Training Act: Overview*, (1981), Ottawa, 4.

2. Canadian Advising Council on the Status of Women, "As Things Stand Ten Years of Recommendations" (1983), Ottawa: CACSW.

3. See P. Bradshaw-Camball, *Current Treatment of Work and Family: Is there a Relationship?*, a paper presented at the ASAC Conference, University of Ottawa, Ontario, 1982, for a discussion of this thesis.

4. Day Care Research Group, *The Day Care Kit* (1982) 48 Boustead St., Toronto, Ontario.

The two methods of direct expenditure are the provision of financial assistance for costs of care, on behalf of parents deemed eligible for assistance, and direct grants to programs which reduce charges for all fee-paying parents.

Day care comes under provincial jurisdiction; federal funding is provided under the Canada Assistance Plan (CAP) through the Department of Health and Welfare. Under the terms of CAP, the federal government shares the cost of 50% of provincial expenditures for day care for low income parents.

It is argued that this subsidization scheme is faulty because the federal assistance is only provided to assist people of low income. There is no cost-sharing scheme to cover the majority of middle income families who use day care. Another criticism of the scheme is that the federal cost-sharing depends upon provincial initiatives. Some provinces are much more aggressive in initiating day care programs than others; this results in uneven distribution of federal funding and access to day care throughout the country.

Provincial governments have not been significantly involved in the provision of formal day care programs.<sup>5</sup> The federal funding does not provide directly for capital cost-sharing. The implication that arises from this policy is that the private sector will initiate supply, in response to local demand. This also results in uneven accessibility from province to province and city to city.

## B. Tax Deductions and Exemptions

Significant problems have also been identified in the area of tax deductions and exemptions.

At the present time, the *Income Tax Act* allows a working parent to deduct child care up to a maximum of \$2,000.00 per child for up to four children, or two-thirds of the taxpayer's earned income. The deduction is available to the spouse with the lower income, regardless of sex. No deduction may be made where the child care expenses are paid to the taxpayer's dependant or relative.

A portion of these expenses is recovered through a reduction of personal income taxes but the present allowable deduction in no way reflects the true cost of child care that parents must pay in order to work. Furthermore, the deduction is most beneficial to those in the higher tax brackets. In 1980-81 the average cost of day care in Canada was \$200.00 - \$250.00 per month or \$2,400.00 - \$3,000.00 per year.<sup>6</sup> Under the present level of deductions, a single parent earning \$10,000.00 per year and receiving no child support will save between \$0 - \$100.00. The same single mother earning \$20,000.00 will save about \$500.00 in tax and, if she was earning \$30,000.00, she would

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5. D. Miller, "Day Care Standards of Care and Accessibility" (1982), September/October Perceptions, at 14.

6. Costs are discussed in more detail at 35-40 *infra*.

save about \$650.00. It is easy to see very little relief is provided by the present allowable deductions; the relief the deductions provide is greatest to those with the highest incomes and only those with the disposable income to pay out the expenses benefit from this system.<sup>7</sup>

### C. Family Allowance

The government also recognizes childhood dependency by providing a taxable family allowance to each dependant child of the family and a tax exemption for wholly dependent children. The monetary effect of these benefits also depends upon the income of the supporting parent. On the one hand, the value of the family allowance decreases as income increases but the value of the tax deduction increases as income increases. The net result is again that those with the highest incomes benefit most.

### D. Tax Credits

In the United States, the federal government provides an income tax credit for child care costs. This method reduces the actual tax payable after taxable income has been determined. It allows a tax credit of 20% of employment related child care costs up to \$2,000.00 for one child, or up to \$4,000.00 for two or more children; there is no income ceiling.

In 1978, a tax credit program was introduced in Canada. In 1982, if family income did not exceed \$26,330.00, a federal income tax rebate of \$293.00 per child was provided. For families with an income above this level, the credit was reduced by 5% of the portion above \$26,330.00. Recent amendments to the *Income Tax Act* have provided that this credit will be indexed for 1984, up to \$343.00, and in subsequent years — having the effect of increasing the credit. In addition, the family income threshold will continue to be indexed. It should be noted that for purposes of this credit, the concept of family income will include the income of unmarried parents living together or the income of any other individual claiming the child as a personal deduction.

A criticism of the tax credit is that providing extra cash to needy parents, with which they can purchase day care services, will not result in a good universal day care system which will benefit all children. Research indicates that parents have difficulty in evaluating the quality of care provided to their children.<sup>8</sup> Reasons cited for this are that the necessary information about standards, variety of available programs, and long term effects of different types of care is not readily available. Consequently, parents are more likely to choose centers offering low fees, thus defeating the goal of universal high quality day care and perpetuating segregation of children by socio-economic groups. The affluent and educated parents continue to get the most choice and the best care while the poor get the low cost day care of poor quality. In a study examining trends of child care arrangements, it was found that only 9% of children from families that

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7. These calculations are based on the difference in tax payable if no deduction for child care expenses were permitted, and the tax payable where a \$2,000.00 deduction is permitted.

8. M. Krashinsky, Ontario Economic Council Research Studies, *Day Care and Public Policy in Ontario* (1977).

earned less than \$6,000 per year were in group care facilities compared to 18% of those with family incomes of over \$20,000. This difference was attributed to the fact that group care facilities require payment, while care by relatives, friends, or other babysitters may be free, or at least less costly.<sup>9</sup>

It is often argued lower-middle and middle income families are the real losers in the current funding and tax system. On the one hand, they are ineligible for income subsidies but, on the other, they do not have enough income to pay for services which would entitle them to the benefit of a tax deduction. This portion of the population appears to be the predominant user of the informal type of day care services for which there are no subsidies and often no tax deductions as receipts are often not obtained from care givers. It has been suggested that the present tax system should be modified to either replace tax exemptions with refundable tax credits or to increase universal family allowances to more realistically reflect the true costs of child care.<sup>10</sup> This would make the system more equitable and would help those who need help the most.

### E. Government Enterprises

Many groups espouse the view that high quality day care should be universally available to all children under the age of six as a public service, and be publicly funded and monitored.<sup>11</sup> The rationale for this view would appear to be that the government has responsibilities to both parents and children. It has a duty to protect the child from unsafe or inadequate living conditions and from commercial exploitation.<sup>12</sup> As well, some believe that government has a responsibility to support parents with child care services because of its role in the development of a socio-economic system which requires parents to abandon traditional family support systems. For example, the demand for a mobile workforce has largely removed grandparents from the critical support role they used to play. Therefore, it is argued, the state must help meet these new demands which it has, in large part, created.

The government supported day care system recommended by the Ontario Coalition for Better Day Care is the Family Resource Centre or Neighbourhood Hub Model.<sup>13</sup> The Ontario coalition proposes that centers be located in neighbourhoods — much like elementary schools are — and offer all-day group care, supervised private home care (which would include emergency care for sick children and for children whose parents are ill, or overnight care for children of shift workers) half-day nursery school, parent and child drop-in center, and facilities for parent education. The coalition also recommends that public health services be located in centres and be equipped with facilities to diagnose physical, mental or emotional difficulties.

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9. M. Lueck, A.C. Orr and M. O'Connell, "Trends in Child Care Arrangement of Working Mothers" (1982), Current Population Reports, Series p.-23, No. 117.

10. Canada, Royal Commission on The Status of Women in Canada, *Report* (Ottawa: Information Canada, 1970), 302 (Florence Bird, Chairman).

11. See for example, Ontario Federation of Labour, *Day Care Deadline 1990*, a brief to the Government of Ontario on the Future of Day Care Service in Ontario by the Ontario Coalition for Better Daycare (1981). The coalition is made up of eighteen groups.

12. It has long been accepted that society has both the right and the responsibility to step in to assist a child if his/her parents are unable or unwilling to provide proper care and protection. This is reflected in criminal as well as child welfare legislation.

13. *Supra* n. 11, at 3.

Some of these services are presently available, but are neither coordinated nor offered on a large scale.<sup>14</sup> Other resources the Neighbourhood Model would provide include support for private home care such as a toy lending service, training and advice, and relief staff. Children cared for in private homes would also have access to the neighbourhood center.

The advantage of the Neighbourhood Center is its flexibility. Without imposing a specific mode of day care, it centralizes essential social, educational and health resources in individual communities.<sup>15</sup> Similar facilities would be available in rural communities, but with efficient transportation service provided to users.

The criticism of this alternative is its expense. Its proponents acknowledge that day care facilities would have to expand ten-fold in order to make them widely accessible to the children of working parents and would have to be subsidized to a very high level to meet the needs of the people who require it the most. The Ontario Coalition for Better Day Care has recommended that the federal government pass a new *National Childcare Act* which would replace the *Canada Assistance Act*. Rather than providing assistance to very low income families only, as presently occurs, the Coalition would like to see federal funding on a universal basis as a public service. Together with the federal funding, the coalition recommends that the Ontario and other provincial governments implement a \$5.00 per day space subsidy to all non-profit day care centers. By 1985, the Coalition's goal is to see day care spaces in non-profit programs for 15% of the child population, and universal access by 1990.

Bertrand and Colley, in their Discussion Paper, suggest that the long term objective is for the federal government to pay 50% of all operating, capital and other associated costs of approved day care centers in each province. They recommend that the provincial governments provide the balance of the fees, although they would allow for a small user fee. In the meantime, the authors suggest that the federal and provincial governments each contribute a \$5.00 per day supplement to non-profit centers for every child enrolled, pro-rated depending on age and type of service required.<sup>16</sup> Exemptions would be made on the basis of regional disparity.

In times of huge government deficits, layoffs in industry and controls on public spending it seems somewhat optimistic to believe governments will commit themselves to the substantial outlays of money this plan requires. Indeed, as the federal government is talking openly about doing away with the principle of universality in existing social programs such as family allowances, it is difficult to see any government adopting a universal day care policy.<sup>17</sup>

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14. In Ontario, some half-day nursery schools receive subsidies and the federal government, through Manpower and Immigration and other levels of government, has funded some parent and child drop-in centers.

15. Other advantages cited are: changing needs of growing children could be easily accommodated in a neighbourhood center without relocating children; centers involving parental participation create a much healthier environment for children than those that don't; the center would be cost efficient because it would coordinate and minimize many tasks currently replicated in different locations; the center would upgrade and lend prestige to day-care service thus generally raising day care standards; opportunities for staff development would lower turnover rates; centers would facilitate monitoring of standards; recording problems of childhood problems would be facilitated, thus ensuring ongoing support services. J. Bertrand and S. Colley, NAC Social Services Committee, *Discussion Paper*, at 12.

16. *Ibid.*, at 19.

17. *The Globe and Mail*, "Day Care in the Worst of Times", October 11, 1982, at 6.

### III. Employer Involvement

Employers are also beneficiaries of the efforts of working women. The Ontario Advisory Council on Day Care recommended that employers in Ontario be encouraged to become involved in the provision of day care. The Council states that contributions toward day care costs by business and industry have not been forthcoming, yet it is they who benefit most from having day care available to their employees.<sup>18</sup>

#### A. Workplace Day Care

Workplace day care is a much narrower concept than work related day care. It is used to describe a center located at the same site, or in the same building, as the employees' workplace. The concept of work place, or on site day care, as permanent service to employees is relatively new in Canada.<sup>19</sup> In a recent study conducted by the Social Planning Council of Toronto, of 38 workplace day care centers surveyed, 71% had been in operation for 5 years or less.<sup>20</sup>

By far the largest number of employers involved in workplace day care in Canada are hospitals and health centers. Fifty per cent of the centers in the survey had such facilities<sup>21</sup> but recently other employers have begun to consider the feasibility of providing the service to employees. In Alberta, for example, a number of shopping malls have considered workplace day care, as have a number of large companies in Calgary, such as Trizec Corporation, Petro-Canada Corporation and Imperial Oil.<sup>22</sup>

There are many advantages to on-site day care. It meets needs which other types of day care centers do not. For example, day care unrelated to the workplace does not consider shifts, weekends and holidays for which many workers must have child care; it permits contact between parent and child during the working day, a particularly significant advantage for nursing mothers; and it shortens travelling time to and from work. Effect on travelling time becomes a major advantage of workplace day care if other centers are located outside the community in which the parent lives or works. When the employer subsidizes workplace day care for operating or capital costs, then it also becomes a financial advantage to the working parent. This aspect is becoming increasingly important as inflation causes day care costs, especially wages of day care workers, to rise each year. At the present time, most day care centers are accessible only to the poor who receive income subsidies or to the upper income groups which can afford to pay the ever-increasing fees. A 1979 survey on day care costs reported:

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18. Ontario Advisory Council on Day Care, *Final Report* (Ontario: Ministry of Community and Social Services, January 1976), 25 (Anne M. Barstow, Chairman).
  19. However, the ideas of workplace day care is not. The earliest creches and nurseries operated in Canada in the late 19th century to enable women to work in domestic and other menial jobs, and again were prevalent in wartime when a female labour force was required for wartime production. They disappeared, however, when the men returned from the war and women were once again relegated to the home.
  20. L. Grant P. Sai-Chew and F. Natarelli, the Workplace Daycare Resource Group, Social Planning Council of Metropolitan Toronto, *Children at Work: An Inventory of Work-Related Day Care in Canada* (1982).
  21. *Ibid.* Educational institutions were not included in the survey, but other studies show that on site centers are very common.
  22. These projects have been placed "on hold" with the downturn in the economy. However, all the plans have been quite extensively developed and are ready to go ahead when the employers perceive it is economically feasible for them to do so.

... an expressed preference among parents of virtually all classes and ethnic backgrounds, for supervised and licensed group care for pre-school children. ... under existing market conditions, only those parents at the top and the bottom extremes of the income scale can utilize this mode of child care.<sup>23</sup>

The primary disadvantage of workplace day care is location. Environmental hazards such as pollution and transportation problems in urban areas are cited as the main drawbacks.<sup>24</sup> In places such as universities, health centers, hospitals, government offices and service industries where these drawbacks normally do not exist, workplace day care functions well.<sup>25</sup>

Another disadvantage is cost. If the employer chooses not to contribute to operating costs, fees to parents are often prohibitive even though employer sponsored child care centers reduce costs to parents when compared to costs at alternate centers.<sup>26</sup> It is not uncommon today for parents to pay \$100.00 per week per child for on-site employer sponsored day care.<sup>27</sup>

### 1. Advantages to the Employer

Some research indicates that employers should be happy to provide on-site day care to their employees if for no other reason than self-interest. In 1980, the Women's Bureau of the United States Department of Labour reported the results of a nation-wide survey of employer-sponsored child care centers.<sup>28</sup> One of the issues examined was whether employers benefited from their sponsorship of day care centers and, if so, what were these benefits.

The results of the survey indicated that many benefits resulted from the child care centers. Those mentioned by the employers surveyed included: increased ability to attract employees, lower absenteeism, improved employee attitude toward work, favorable publicity for the employer, a lower job turnover rate and improved community relations.<sup>29</sup>

The University of Minnesota compared absenteeism before and after employees began to use a day care facility provided by their employer.<sup>30</sup> It was found that the absenteeism of workers with children in the day care facility was reduced by 21.4%. The study also compared monthly turnover rates, and found that while the turnover rate was 6.2% for employees not using the Centre, the rate for those using it was only 2.3%; thus the employers had significantly lower costs for retraining personnel. The Hester How Day Care Center in Toronto City Hall, an employer subsidized project, has verified similar employee and employer benefits.

23. Project Child Care Policy Task Force, Social Planning Council, *100,000 Children: Alternatives for Service Delivery* (November, 1979) at 2.

24. Bureau of Municipal Research, *infra*, at 15.

25. See for examples, *supra* n. 20.

26. Women's Bureau, United States Department of Labour, *Child Care Centers Sponsored by Employers and Labour Unions in the United States* (1980) 2-8.

27. See Women's Bureau, Ontario Ministry of Labour, *Inventory of Work Place Day Care* (July, 1983).

28. Women's Bureau, United States Department of Labour, *supra* n. 26.

29. Compare with *The Realities and Fantasies of Industry Related Child Care*, proceedings of a Symposium, The University of Colorado Medical Center, Denver, Colorado (May 21, 1973). But see World of Work Report, *AT&T: Two Experimental Day Care Centers that Closed* (Work in America Institute Inc., 1977).

30. See *The Impact of Child Care on Employee Absenteeism, Turnover and Productivity*, Proceedings of a Symposium, The University of Colorado Medical Center, Denver, Colorado (May 21, 1973).



In a study done by the New Jersey Bell Telephone Company in Newark, New Jersey, it was found that close to 40% of the employees who resigned in 1967 did so because they did not have adequate child care.<sup>31</sup> The same study reported that Rochester Clothes Inc., of New Bedford, Massachusetts, recorded a drop in absenteeism from 12% to 3% when a day care centre was established on their premises in 1965.

Some of the on-site day care facilities started in the United States in the 1960's and early 70's which have since closed, cite cost as the chief reason for closure. Since that time, governments in the United States and Canada have provided more help to employers. Employer contribution in capital expenditures may be amortized and the start-up costs of any non-profit day care center are now eligible for government funding. An employer may also establish a non-profit day care center as a charitable organization as long as it is not for the exclusive use of children of employees. If open to the entire community, the employer not only reaps the benefit of a tax write-off but also all the intangible benefits of being a good corporate citizen.

### **B. Employer Provided Employee Benefit Packages<sup>32</sup>**

At any level of employment, from the blue collar worker to the executive, employee fringe benefits can form a substantial portion of remuneration for work done. If an employee can acquire a benefit by having its cost added to his/her income as a taxable benefit<sup>33</sup> rather than paying for the benefit out of disposable income, a very real impact is felt on earnings. Thus, employer provided employee benefit packages which address child care needs is another approach to day care which should be examined.

To illustrate this concept, assume employee X has a yearly income of \$22,000. Assume her deductions are as follows:

3% of employment .....	\$ 500
Personal .....	3,770
Standard Medical .....	100
U.I.C., Pension .....	<u>600</u>
TOTAL DEDUCTIONS .....	(\$4,970) or \$5,000 <sup>34</sup>

As the total deductions allowable to employee X equal \$5,000, her taxable income amounts to \$17,000. At a tax rate of approximately 20%, employee X must therefore earn \$125.00 for every \$100.00 she spends. If employee X's earnings were in a higher tax bracket, she would have to earn more to spend the same amount of money. The following table illustrates the point.<sup>35</sup>

31. *Ibid.*, at 57.

32. Portions of this section were prepared with the assistance of Professor Catherine Brown, Faculty of Law, University of Calgary. For a more extensive discussion, see Past, Mahoney and Brown (ed.), "Tax Planned Executive Compensation Packages for Women", *Women, the Law and the Economy*, (1985).

33. There is an argument that day care services could qualify as a non-taxable benefit. This is discussed *infra*.

34. All figures are approximate and based on 1983 figures.

35. These figures are based on combined Federal and Provincial tax in Alberta.

Taxable Income	Rate of Taxation	Number of Before Tax Dollars Required To Spend \$100.00
(i) \$ 17,000	20%	\$125.00
(ii) 25,000	25%	133.00
(iii) 30,000	28%	139.00
(iv) 50,000	33%	150.00
(v) 100,000	40%	165.00

There are a number of different ways the employer can provide child care benefits to employees. One way is to provide a direct subsidy to cover the cost, or to assist the employee in purchasing the benefit. Alternatively, the employer can pay for the benefit and pay the employee less salary. A third option would be for the employer to pay for the benefit without reducing the employee's salary. In terms of day care services, these benefits may take the form of the purchase of spaces for employee use in existing centers; the provision of vouchers to the employee to go toward the purchase of child care services; or the provision of monthly child care allowances to employees with children. For subsidies to be equitably distributed, the employer may have to take into account numbers and ages of children and income levels.

An example where the subsidy approach has been adopted is at the Y.W.C.A. in Toronto. In 1976, the C.U.P.E. local negotiated a subsidy of \$15.00 per month for employees with children in day care. The clause was recently renegotiated to \$30.00 per month to include children up to nine years of age.<sup>36</sup>

The value of the economic benefit of the subsidy varies greatly depending on whether or not the benefit is taxable. Section 6 of the *Income Tax Act* appears to characterize day care as a taxable benefit to the employee if it is provided by, or supported by, the employer. The argument can be made, however, that employer-provided day care qualifies as a non-taxable fringe benefit falling within the exceptions to the very widely stated rule in s. 6(1)(a). It may be argued that, regardless of the fact that the opening words of s. 6(1)(a) are extremely wide and *prima facie* make any benefit received by the taxpayer taxable, the "benefit" of day care is neither "received nor enjoyed" by the taxpayer. Rather, day care is a service expense a parent must incur in order to earn an income and that, in addition to being a service to working parents, child care provides a service to employers and thus benefits the economy of the country. An analogous situation to provision of day care for working parents is an employee's use of a com-

36. The clause reads as follows:

"The employer shall pay to each employee who has one or more children under the age of nine a total of \$30.00 each month to help defray the cost of child care. These sums shall be added to the employee's monthly pay.

Nothing in the above provision shall give the employer the right to discriminate against job applicants because of the number of dependants they may have."

pany car. As long as the car is used for business purposes only, the benefit is not taxable. As the taxpayer does not receive day care service as a personal enjoyment or benefit, he/she should not be taxed for it. The *Arsens*<sup>37</sup> case may be authority supporting this argument. In that case, employees were required to make a business trip to Disneyland. Even though the destination had a connotation of "enjoyment" because of its popularity as a holiday resort, the Tax Appeal Board found that the employees received no benefit from the trip because it was initiated at the direction of the employer, for business purposes.

It may be overly optimistic to assume courts or tax appeal boards will adopt such a benevolent attitude towards employer provided day care benefits, but even if the employer provided or supported day care is categorized as a taxable benefit to the employee, it is still more beneficial to the employee to have the employer provide it than to purchase the service in the marketplace. The key to this saving is understanding the difference between before and after tax dollars.

When a benefit is classified as taxable, the value of the benefit is added to the employee's before tax income and then taxed in the normal way at the employee's rate. How does this approach save the taxpayer money? Assume that the cost of day care in the marketplace is \$250 per month or \$3,000 per year. If the taxpayer earns an income of \$22,000 per year, in order to pay this \$3,000 per year, in her tax bracket of 20%, she must earn almost \$4,000. This amount will be reduced to about \$3,500 due to the child care expense deduction. This amount represents more than 1/6 of her salary.

If the employer paid the same \$3,000 to the day care on our individual's behalf, \$3,000 would be added to her income. This would increase her taxable income from \$17,000 to \$20,000 (minus \$2,000 for child care expense deduction = \$18,000) and correspondingly increase her tax rate to almost 25%. Her tax liability as a result of the receipt of this benefit would therefore be \$875.

If we compare the amount of disposable income she would have after tax and day care expenses, in both situations it becomes clear that the effect of receiving the taxable benefit is substantial.

<b>Employee Pays \$3000</b>	<b>Employer Pays \$3000</b>
<b>To Private Day Care</b>	<b>To Private Day Care</b>
\$22,000 salary	\$17,000 taxable income
- 3,450 tax *	+ 3,000 taxable benefit
- 3,000 day care	- 2,000 child care expense (see footnote 7)
<u>15,550 Disposable Income</u>	\$18,000 Taxable Income
	Tax = \$4,325
	\$22,000 salary
	- 4,325 tax
	<u>\$17,675 Disposable Income</u>

37. [1969] Tax A.B.C. 1, 23 D.T.C. 81. See also, *No. 713 v. M.N.R.* (1960), 14 D.T.C. 333; *No. 705 v. M.N.R.* (1960), 24 Tax A.B.C. 228; *Gilles Beaudoin v. M.N.R.*, [1971] Tax A.B.C. 74, (1971) 25 D.T.C. 41.

\* \$22,000 salary minus \$5,000 deductions minus \$2,000 childcare expense deduction results in a taxable income of \$15,000. Tax liability on this amount would equal \$3,450.

To complete this analysis, one must also consider the true cost of providing day care which the employer would bear. If the employer provides the actual day care service, the true cost to the employer of the day care is not really \$3,000. From the employer's perspective, the cost of providing the service is much less than what the employee would pay in the marketplace.

It is arguable that the value of a benefit under section 6 is the cost to the employer, not fair market value. By providing the service, the employer does not pay the profit mark-up the employee pays to an outside profit-making day care enterprise. In addition, not only can an employer likely provide space, maintenance, utilities, etc., more cheaply than if purchased in the market place, he can also provide expert help such as legal, accounting and tax assistance. The employer can also better afford to pay for or provide day care services because corporations derive tax benefits from involvement in day care. All costs to an employer are tax deductible, including child care payments made to an employee, subsidies to an existing non-profit day care center or operating losses.<sup>38</sup> To illustrate the point, assume corporation X is taxed at 50% and \$3,000 per employee per year is expended toward the cost of day care. Of every dollar spent on day care services, fifty cents is deducted from the corporation's taxable income. Thus, the employer's cost of providing \$3,000 of day care is really \$1,500, or less if the service is provided by the employer on a non-profit basis as discussed above.<sup>39</sup> Provincial, municipal and federal government subsidies available to day care operators could further reduce costs to the employer.

A potential problem underlying this analysis is section 63 of the *Income Tax Act*. This section sets out the formula for calculating allowable deductions by taxpayers purchasing day care or baby sitting services. This deduction is generally available to the supporting parent with the lower income or where the incomes of two supporting parents are equal they can jointly elect and each claim half of the deduction. The question arises as to whether or not employees are excluded from the deductions available under section 63 if an employer is providing day care benefits. The basis for the exclusion would, presumably, be that the taxpayer had not actually paid for the day care services. Conversations with local representatives of Revenue Canada indicate that taxpayers receiving day care as a taxable employment benefit could still avail themselves of the section 63 deduction. However, unless this assurance is verified by official action, it is a potential pitfall for those who qualify.

In a non-profit business the tax relief for the employer obviously does not exist but benefits can still accrue to the employer. By offering day care, the non-profit employer may be able to negotiate less salary for employees as a trade-off. This lowering of salary should not be dollar-for-dollar, however, because the employer can provide day care at a lesser expense than the employee can purchase it. Thus, a saving still accrues to the employer.

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38. *The Financial Post*, "Company Day Care Can Pay Dividends", July 25, 1981, at 20.

39. If we assume the employer's cost is \$1,500.00 the amount of disposable income discussed at p. 40 will increase from \$15,000.00 to \$17,765.00 or by more than \$2,500.00.

It may be somewhat optimistic to expect that an employer will voluntarily absorb the full cost of providing day care services for its employees. It may also be undesirable for the employer to have full control over the child care of its employees. Unions are commonly suspicious of workplace day care run by the employer. The Ontario Federation of Labour has adopted the position that employer-run workplace day care is often motivated by the need to keep female workers in a company where the wages are low and working conditions are poor. The Federation fears trade-offs between day care facilities and pay or other benefits; it also believes that employer provided day care could put parents in a subtle 'ransom position' during potential strike situations. Parents and unions, in its view, should have control over quality care.<sup>40</sup>

A more realistic and practical alternative may be for employees to negotiate a partial reduction in salary or to agree to forego salary increases in return for day care facilities which the employees would administer. The most equitable way of dealing with day care expenses is probably somewhere near this middle ground. For example, an employee benefits more from a \$1,500 reduction in salary than from paying a fixed cost from earned income of \$3,750 for day care services.

There is one other problem with compensation and benefit packages. Often such packages do not take into account the fact that two spouses are working and hence double up on benefits such as extended health care, dental care and family insurance coverage.

After randomly checking with some employers in Calgary, it appears that in a number of cases there is a double, or overlapping, coverage when both spouses work. Where employers discover that coverage is already provided to one spouse, the benefit is often simply dropped from the other spouse's benefit package.

One solution to this problem is for employees to check what benefits their spouse has and, if there is double coverage, to negotiate a cash settlement or placement of the benefit elsewhere, such as a day care subsidy. Some employers have instituted 'cafeteria' benefit plans in order to achieve an equal benefit system.<sup>41</sup> Rather than providing workers with a limited number of benefits, some of which may be inappropriate to meet his or her needs, the employer instead offers a range of benefits. These may include employer payment for child care, legal insurance, dental insurance, days off on school holidays, or house or car insurance.

The plan can work in one of two ways. An employer may add new benefits to those already available or the employer may allow the employee to trade benefits. Under the latter approach, for example, an employee could forego medical insurance if she is already covered by her spouse's policy and have the money directed toward a child care benefit or some other alternative benefit. Since most employers pay a substantial amount

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40. Ontario Federation of Labour, *Parental Rights and Day-Care: A Bargaining Guide for Unions* (1982).

41. The Catalyst Career and Family Center of New York conducted a survey of 374 major American corporations in 1981 and found that 8% offer "cafeteria" plans and another 62% favour such flexible plans.

each year for employee benefits, there is a considerable pool of money to draw upon if the employer adopts the 'cafeteria' plan. This alternative is more attractive in the United States than in Canada because of recent tax law amendments which allow employers to offer a range of non-taxable benefits.

If employers are financially unable to support day care for their employees, alternate methods exist to show their sense of social responsibility and their awareness of work pressures on parents. Counselling and referral services are offered by some employers to inform their employees about day care availability and cost. Some maintain a registry of day care services and find and train babysitters willing to care for employees' children. If non-profit referral services already exist, they provide an excellent means for corporate support.

### **C. Flexible Hours and Part-time Work**

Perhaps the greatest assistance employers can offer to working parents is flexible working hours. This benefit can often be offered without any substantial cost to the employer and warrants further exploration and development because in some instances it may provide an alternative to day care services. Working husbands and wives could share the caring responsibility for their children if they worked different portions of the day. Another alternative worthy of consideration is the splitting of full-time jobs into part-time jobs without loss of benefits. This would have the effect of reducing demand for day care services yet allowing parents to maintain their jobs.

## **IV. Union Involvement**

### **A. Union Enterprises**

In addition to their role as a negotiator of benefits for child care, unions can also play an equally important role as the employer in the establishment of child care services for their membership.

In the United States there are unions which entirely operate and administer day care centers. For example, the Regional Joint Boards of the Amalgamated Clothing Workers of America in the Chicago and Baltimore areas run six centers. Financing is obtained from employer contributions, which are tax deductible, to the union health and welfare fund and, in some cases, small sums are contributed by users.<sup>42</sup> In 1972, the British Columbia Government Employees' Union established and operated a day care center in Victoria.

Alternatively, unions and employers may wish to jointly sponsor a day care facility. In some situations, a better approach may be for unions to join forces with other unions to provide day care service near, rather than at, the workplace. Many of the 'on-site' advantages would still exist and a wider segment of the community would be served. This approach would be

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42. See, Women's Bureau, Ontario Ministry of Labour, *Workplace Child Care: A Background Paper* (January, 1981).

more practical where there are not sufficient numbers of parents with children requiring day care on one job site to warrant implementing the service.

Some unions are in favor of on-site day care. In its 1980 statement on day care, the Ontario Federation of Labour reiterated its 1972 position paper which recommended that the Government of Ontario "promote the establishing of day care centers at places of work. In new plants every effort should be made to have facilities planned and built in."<sup>43</sup>

## **B. Negotiating Family Benefits**

If provision of the service by the employer is impractical the employer may be persuaded to purchase spaces in existing centers in the community. This was done by Manulife in Toronto. The employer donated \$12,000 to a nearby center which used the money for renovations to expand its service. In return for the donation, the employees of Manulife were given priority at the center.<sup>44</sup> The C.U.P.E. Local 2189 is a good example of the success which can be achieved in bargaining for family life benefits. Not only does the employer provide a monthly subsidy to assist employees in purchasing child care, provisions such as cumulative sick leave to care for sick family members, maternity leave of six months, paternity leave and reimbursement of reasonable expenses for child care when the employee works unusual hours, have been successfully negotiated.

There is no question that collective agreements are a valuable tool for employees seeking parental benefits from employers. Collective agreements give employees the ability to acquire benefits over and above those available through legislation. In a recent survey of provisions in collective agreements in Canada, 71.4% of the maternity leave provisions negotiated exceeded legislative limits. The greatest number, 617 agreements affecting 792,242 employees, provide at least six months maternity leave.

A plan negotiated in Quebec covering 200,000 public sector workers includes the right to two years' unpaid maternity and paternity leave, during which seniority continues to accrue and fringe benefits can be maintained if the employee elects to pay for them.<sup>45</sup> In the private sector, the Steelworkers Local 7024 recently instituted two weeks of paid leave to care for families upon the hospitalization of a spouse for maternity or other reasons. These breakthroughs may indicate trends for future negotiations. However, it must be noted that the right to collective bargaining is not available to thousands of Canadian mothers employed as waitresses, sales clerks and domestic employees. Only 24% of women in Canada are unionized.

## **C. Union Lobby**

In addition to negotiating for or providing day care services, as described above, unions are also a powerful lobby and can use their organizations to lobby governments to initiate child care research and to provide funding and tax incentives for better child care. Unions can also play a major

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43. See Ontario Federation of Labour, *Position Paper on Day Care* (June, 1972).

44. *Ibid.*, at 11.

45. Women's Bureau, Labour Canada, *op. cit.*, at 12, citing Labour Data Branch, Labour Canada, *Provisions in Collective Agreements in Canada Covering 200 and More Employees (excluding construction)* April, 1982. Cat. No. L82-31-4/1982.

educational role in the community. Within their own organizations, they can insure that day care is provided so that members with children can attend meetings. Unions can also ensure that child care is an important labour issue by including child care as a bargaining goal.<sup>46</sup>

## V. Business Involvement

### A. The Commercial Day Care Center

Most day care in Canada today is provided by profit-making day care enterprises to parents paying fees. A national study on day care was conducted by the Canadian Council on Social Development in 1972. The study found that three out of four day care centers, and more than 50% of nursery schools, were privately operated.<sup>47</sup> In 1979, the Ministry of National Health and Welfare reviewed and updated the study and found that spaces in the commercial day care sector increased by 28.3% over the previous year while the licensed, subsidized sector increased by only 4.8%. In Ontario and Alberta, available spaces in municipally operated day care decreased by 38.7%.

Business people have a very different attitude to day care than most other groups. Rather than focusing on children's or parent's needs, the concern is, above all, cost. The following statement is attributed to a representative of Ohio Bell Telephone involved in the establishment of a workplace day care for the use of employees:

We want to be sure . . . that we're at least not harming the children. A positive effect on the children is a nice fringe benefit. But let me restate that the whole purpose of these programs is to determine whether industrial child care saves us money in the areas of hiring, training, absenteeism, tardiness and attitude.<sup>48</sup>

In another study on workplace day care, the Bureau of Municipal Research canvassed the Board of Trade of Metropolitan Toronto. The Bureau discovered that the Board's Planning and Urban Affairs Committee was primarily concerned with improving effectiveness and efficiency of day care. For example, the committee thought staff/child ratios should be re-examined and increased if no "adverse consequences" resulted; that, rather than create additional day care centers, spaces should be purchased in private homes; and that day care should not be an employer's responsibility.<sup>49</sup>

Proponents of quality day care for children are alarmed at such statements. They feel that where money and profit are the primary concerns, the quality of care suffers. Those who propose universal day care would eliminate public funding of commercial centers altogether. These proponents believe that commercial centers cannot maintain the quality of care required for adequate day care. The need to make a profit results in low

46. At the present time, it seems bargaining by unions concentrates on issues other than day care. In a C.U.P.E. Local 1000 survey, it was found that 68% of the women members are in favour of bargaining for workplace day care but 73% of the male members were not. Issues such as job security, occupational health and safety and layoffs were perceived as top priority bargaining goals.

47. See Canadian Council on Social Development Day Care, *Report of a National Study* (January, 1972)

48. Marcy Cohen et al, *Cuz There Ain't No Day Care (or Almost None) She Said: A Book About Day Care in B.C.* (1973) 38.

49. *Ibid.*, at 33.



wages for under qualified workers, high staff turnover rates and, consequently, poor care for children. As more American commercial chain operations move into Canada,<sup>50</sup> politicians have also questioned the quality of service in commercial day care.<sup>51</sup>

Whatever the fears of day care advocates, the commercial centers are fulfilling a need for day care and are a financial success. Commercial centers provide an alternate, and cheaper, source of day care for middle income parents who want their children in group-care facilities but can neither afford the rates nor gain access to non-profit centers. More government regulated spaces are needed merely to catch up with existing need. In 1975, Phillip Hepworth reported that the deficiency of day care facilities was enormous. At that time, there was an immediate demand for more than 200,000 full-time day care spaces.<sup>52</sup>

In Quebec there exists only one space in day care centers for every 10 children under six years of age who require day care. Over the past 7 years, an average of 1,400 new spaces was created annually but the need is for 3,600 new spaces annually. In the year 1981-82, more spaces were developed in commercial centers (444) than in non-profit centers (400). In 1982-83 no government funds were earmarked for development of new spaces and inadequate funding of existing spaces has caused many centers to close.<sup>53</sup>

## VI. Costs

Costs of day care vary greatly, depending on the type of service selected. Day care is available from private non-profit, profit, public and cooperative ventures. There are full-day, part-time, after school and drop-in services. In some provinces, provincial subsidies may be available to defray day care operating costs but provincial subsidies and standards do not apply to the private, informal child care arrangements.

In 1970, the operational costs for good day care in a group center were approximately \$4.60 per child per day.<sup>54</sup> Today, these costs range from \$30 to \$56 per child per day. Clearly, costs are rising much faster than the salaries of working parents. An attempt will be made here to give a sampling of the costs of a variety of services currently available.

### A. The Non-Profit Center Example

The University of Calgary Day Care Center is a non-profit center offering high quality day care service. Licensed day care centers in Alberta are entitled to claim a monthly operating allowance for each child attending at least 84 hours each month. The amount of the allowance varies according

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50. For example, an American commercial chain which operates 700 centers in the U.S., Manitoba and Ontario has already opened a number of centers in Calgary, Edmonton and Ottawa. Its goal is to gain 40 additional centers.

51. See *Globe and Mail*, "Opposition to U.S. Day Care", June 4, 1981.

52. See Canadian Council on Social Development, *600,000 Children; Report of a Survey of Day Care Needs in Canada* (P. Hepworth, 1975).

53. Claudette Pitre-Robin, "La Situation des Garderies au Quebec en 1982" *Perception*, Sept/Oct. 1982. See also, National Day Care Information Center, *Status of Day Care in Canada 1977*, Social Services Program Branch, Department of National Health and Welfare.

54. Howard Clifford, *Day Care: An Investment in People*. Background Paper, Royal Commission on the Status of Women, 1970.

to the age of the child. As of September, 1983, the actual cost to the day care center and to the parent of providing day care per child per month was as follows:

Age Of Child	Actual Cost Per Month	Provincial Government Operating Grants Available To All	Cost To Parent
0 - 18 months	\$565.00	\$257.00	\$308.00
19 - 35 months	\$439.00	\$131.00	\$308.00
3 - 4 years	\$386.50	\$ 78.50	\$308.00
5 years	\$373.00	\$ 65.00	\$308.00

Lighting, heating and security are provided free of charge by the University, as are the record and bookkeeping tasks. Use of the premises is provided rent free.

### B. The Commercial Center Example

The Kindercare chain of day care centers in the Calgary area charge parents \$250.00 - \$275.00 per month for day care, depending on the age of the child. This is \$58 to \$33 less per month than parents pay who have children at the University day care. The Kindercare centers are licensed, so they receive the same subsidies as the University center, but unlike the University center, must pay utilities and property costs.

Fifteen workers are employed at the University Center to care for 65 children. This ratio conforms to the Alberta minimum standards which are also met by the Kindercare centers. The same commercial centers, in addition to offering significantly lower fees, are also making profits. In 1981, shareholders in the Kindercare chain were paid an estimated 87 cents per share dividend.<sup>55</sup> The University Center does not make a profit and operates on a balanced budget.

The major difference between the University Center and the private center is the wages paid to employees. Kindercare pays its staff on an hourly basis, the range being \$4.35 to \$6.00 per hour, or \$696.00 to \$960.00 per month. Within this range are two overlapping pay scales for junior and senior workers. No formal training is required for employment but on the job training is provided. The employer also has a training incentive program which pays 50% of the cost of further education in an early childhood care program leading to a certificate or diploma. Once a certificate or diploma is achieved, the employee automatically moves into the higher wage scale.<sup>56</sup>

The wage scale at the University on the other hand, ranges from \$1,100.00 per month for junior inexperienced personnel to \$1,940.00 per

55. Joanna Kidd, *Caring for the Little Children*, McLean's Magazine, December 7, 1981, p. 70.

56. This information was obtained from the Calgary manager of Kindercare day care centers.

month for senior program supervisors. At the University center, all employees must be qualified day care workers or have experience in the field and be in the process of achieving accreditation. As might be expected, the staff at the University center tends to be stable and the majority of employees are in the experienced or senior category whereas the commercial center has a high turnover rate and most workers are at the junior level.

As continuity of care is a very important part of a high quality program, it is difficult to maintain high standards with poor wages. In 1979, a study conducted in Toronto revealed that a turnover rate of 50% existed in city day care centers.<sup>57</sup>

### C. Non-Profit Workplace Day Care in Ontario

Even though the cost at the University of Calgary center is significantly higher when compared to the cost at the Kindercare center, it is moderate when compared to other non-profit centers in Ontario. A recent study by the Women's Bureau on non-profit workplace day care revealed that costs to parents ranged from \$220.00 per month to \$420.00 per month.<sup>58</sup> All of the 8 centers surveyed expected operating costs to be covered by fees. Many of the employers provided non-refundable capital funding and some contributed toward maintenance, renovations and rent but contributions by employers did not seem to have any correlation on the fees payable by the parents. For example, the Mutual Life Assurance Company in Waterloo, Ontario opened a center in 1982. Operating costs, which reflect the cost of running the center, are paid by fees. Capital costs were originally paid by the company but they are to be repaid by the day care center over the next few years. The day care center is also responsible for maintenance and rent as well as salaries and food. The fees are presently \$60.00 per week or \$240.00 per month and were expected to increase in 1984 to \$65.00 per week or \$260.00 per month.

Sunburst Children's Center, at Environment Canada in Downsview, Ontario, on the other hand, requires that day-to-day operations, salaries and equipment be paid by user fees but provided a grant of \$12,000 to cover initial equipment cost and free renovations. The facility is rent-free and maintenance is free, yet the fees range from \$287.04 per month to \$351.68 per month, depending on the age of the child.

These fees are significantly higher than those at the University of Calgary and yet the University salaries of day care workers were high when compared to other provincial averages which range from a low of \$677.00 per month in P.E.I. to \$883.00 in Nova Scotia.

### D. Informal Arrangements

Informal in-home care is not subsidized by any level of government. The cost for typical informal or home-care arrangements in Calgary ranges from being free to an average of \$200.00 per month or \$2,400.00 annually.<sup>59</sup> A more formalized arrangement with a live-in babysitter will cost in the

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57. Action Day-Care and Social Planning Council of Metropolitan Toronto, *Effects of Government Restraints on Day-Care Services in Metropolitan Toronto*, Toronto, 1980.

58. Women's Bureau Ontario Ministry of Labour, *Day Care Inventory*, June 1983.

59. This information was obtained by contacting individuals offering babysitting services in their own homes through the Calgary Herald in September 1983.

range of \$469.00 - \$700.00 per month, plus room and board.<sup>60</sup> This salary is based on a forty-five hour week with two weeks paid vacation and all statutory holidays. The babysitter must also have a private room. Agencies charge placement fees ranging from \$250.00 to \$600.00 and usually provide a guarantee which can range from two months to one year.

Parents who hire a worker to come into their homes to provide day care cannot deduct his/her salary as a cost of doing business and earning an income like other employers can. Rather, they are restricted to the child care deduction. This inequity in allowable deductions is an issue which should be addressed in addition to the other reforms suggested under the *Income Tax Act*.

### E. Cost Consequences

Many working parents find the assessed fees at group centers or the cost of a live-in sitter to be prohibitive. Day care fees often amount to more than the cost of tuition at most major colleges and universities. As a result, parents often choose inferior day care or babysitting arrangements. Costs are kept low at poor quality day care centers by paying low or minimum wages, hiring unqualified personnel without offering in-service or further education incentives and by purchasing inferior quality food and equipment for the children. Researchers have found that informal babysitting arrangements are often mediocre, neglectful and abusive.<sup>61</sup> The children of parents able to afford the higher costs of the better day care on the other hand, enjoy the advantages of continuity of care because of low staff turnover, superior education opportunities because of professionally trained staff and high quality equipment and nutritionally superior nourishment because of better quality meals.

In 1982, licensed day care centers in Canada provided only 90,000 spaces for children of working mothers,<sup>62</sup> yet over 3,000,000<sup>63</sup> pre-school and school age children in Canada require alternative care arrangements while their parents work. In other words, licensed, supervised care is available to only 3% of the children even though research indicates most parents prefer group day care to other kinds of child care arrangements.<sup>64</sup>

## VII. Equality Issues\*

It is clear from the previous discussion regarding government subsidies, tax deductions, tax credits and family allowance that the availability of good quality day care in Canada is very uneven. Government assistance, rather than supporting the concept of universal, good quality day care for

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60. In Alberta, the gross minimum wage that can be paid to full-time babysitters is \$459.00 per month plus room and board or a room and board subsidy valued at \$225.00 per month.

61. Laura C. Johnson and Janice Dineen, *The Kin Trade* (1981).

62. Howard Clifford, "Day Care Spaces in Canada 1982", *Day Care*, National Day Care Information Centre, Health and Welfare Canada (1982).

63. Statistics Canada, *Postcensal estimates of population by sex and age, Canada and the provinces, June 1980* (based on 1976 census information); unpublished statistics at 23.

64. Stevanne Auerbach with James A. Rivaldo, *Rationale for Child Care Services: Programs vs. Politics*, (1975) 35.

\* This section was prepared with the assistance of Lisa Costa, barrister and solicitor, Legal Department, City of Calgary.

all children, supports the concept of good day care for children of the very poor or children of those with the highest incomes. The children of families in lower-middle and middle income brackets are losers in the current funding and tax system. It is also apparent that those parents who do not have access or who cannot afford day care for their children are disadvantaged in terms of equality of opportunity on the job compared to those who do not have children requiring care. The question to be dealt with in this section is when the employer is government, are there remedies in human rights statutes to overcome these inequities.

### **A. The Charter of Rights and Freedoms and Affirmative Action**

The possibility that the *Charter of Rights and Freedoms* can be used to compel a government employer to provide child care for employees with children, in order that their income from employment and opportunity to compete for positions may be brought to a level equal to that of employees without children, is a question which must be addressed in considering potential forms of legal action available to a plaintiff who feels inequality of treatment in the workplace.

The phrase "to provide child care" is expressly left undefined but it is suggested that it may take the form of providing grants to allow employees to place children in established child care centers, of establishing child care centers for employees, or of any other scheme appropriate to the circumstances of the position. The discussion is confined to government employers since the *Charter* does not cover private activity.

Major obstacles to using the *Charter* in this manner are as follows:

1. Identifying an "action" which has been undertaken by the government or the legislature which is in breach of the *Charter*.
2. Establishing that people with children are an identifiable group whose rights are guaranteed by the *Charter*, and establishing that because of membership in this group, individuals have been discriminated against.
3. Establishing that the *Charter* grants the Courts the power to provide the remedy of compelling government employers to provide child care, and assuming such a remedy is technically available, persuading the Court to exercise its discretion to use it.

The conclusion here is that the *Charter* is most likely not the most effective tool at this time to compel government employers to provide child care to employees. Two alternatives are suggested which appear more likely to lead to positive results.

### **1. Jurisdiction and Application (ss. 52 and 32(1))**

The most serious problems in compelling government to provide day care to its employees via the *Charter* are jurisdictional. Section 52(1) states as follows:

52.(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Section 32(1) states:

32.(1) This Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

The *Charter* acts as a limitation on the power of legislative bodies. Statutes enacted which are contrary to the *Charter* are *ultra vires* and invalid. The problem which arises in forcing employers to provide day care on the basis of the *Charter* is that no law has been passed which effectively denies parents the right to child care. There is no statute in effect which could be said to contravene the *Charter*. The denial of access to child care results from a failure to act.

Some hope might be found in the opinions of major constitutional commentators who would interpret the *Charter* as applying not only to formalized laws, but perhaps also to administrative action, and even to certain government policies. Peter Hogg makes the following comments on section 32(1):

... any body exercising statutory authority, for example, the Governor in Council or Lieutenant Governor in Council, ministers, officials, municipalities, school boards, universities, administrative tribunals and police officers, is also bound by the Charter. Action taken under statutory authority is valid only if it is within the scope of that authority. Since neither Parliament nor a Legislature can itself pass a law in breach of the Charter, neither body can authorize action which would be in breach of the Charter. Thus, the limitations on statutory authority which are imposed by the Charter will flow down the chain of statutory authority and apply to regulations, by-laws, orders, decisions and all other action (whether legislative, administrative or judicial) which depends for its validity on statutory authority. That is the way in which limitations on statutory authority imposed by ss. 91 and 92 of the B.N.A. Act (and other distribution-of-powers rules) work. There is no reason to treat limitations on statutory authority imposed by the Charter any differently.<sup>65</sup>

Katherine Swinton states as follows:

Does the Charter apply to the area of "quasi-law" — the directives of the Commissioner of Penitentiaries regarding inmate discipline, the internal policy manuals of the Immigration Department, the terms and conditions of employment or other contracts imposed by a government department? It might be argued that all such forms of governmental activity are swept within the Charter, whether or not authorized by formalized regulations or legislation. Indeed, in my submission that is the correct conclusion. Section 32(1) expressly states that the Charter refers to "matters within the authority of Parliament", not just to laws or regulations. This suggests that the courts should focus on the issue of whether there is governmental activity, in deciding whether the Charter applies, rather than focussing on the form thereof.<sup>66</sup>

If these interpretations of the applicability of the *Charter* are accepted by the courts, the Government could conceivably be attacked on the basis of its internal policy of not providing child care for its employees, assuming that a formal policy on this matter could be said to exist. If, as Swinton argues, no "formalized regulations or legislation" need exist before govern-

65. Peter W. Hogg, *Canada Act 1982 Annotated* (1982), 75.

66. Katherine Swinton, "Application of the Canadian Charter of Rights and Freedoms" in *The Canadian Charter of Rights and Freedoms — Commentary* (Walter S. Tarnopolsky and Gerald A. Beaudoin ed. 1982), 50.

ment action can be attacked via the *Charter*, it might be possible to use, for example, the *Public Service Employment Act*,<sup>67</sup> to force the federal government to state a policy on the provision of child care. This legislation provides for the establishment of a Public Service Commission whose duties include appointing qualified persons to or from within the Public Service, (s.5(a)). Section 12(2)<sup>68</sup> states as follows:

12(2). The Commission, in prescribing or applying selection standards under subsection (1), shall not discriminate against any person by reason of sex, race, national origin, colour, religion, marital status or age.

Section 21 provides:

21. Where a person is appointed or is about to be appointed under this Act and the selection of the person for appointment was made from within the Public Service

- (a) by closed competition, every unsuccessful candidate, or
- (b) without competition, every person whose opportunity for advancement, in the opinion of the Commission, has been prejudicially affected,

may, within such period as the Commission prescribes, appeal against the appointment to a board established by the Commission to conduct an inquiry at which the person appealing and the deputy head concerned, or their representatives, are given an opportunity of being heard, and upon being notified of the board's decision on the inquiry the Commission shall,

- (c) if the appointment has been made, confirm or revoke the appointment, or
- (d) if the appointment has not been made, make or not make the appointment,

accordingly as the decision of the board requires.<sup>68a</sup>

If an opportunity for advancement within the Public Service were to become available for which a female public servant was qualified, but of which she was unable to take advantage because it involved, for example, relocating to an area in which child care was not available, she could appeal to the Commission on the basis that failure on the part of the government to provide child care was discrimination on the basis of sex contrary to subsection 12(2) of the *Public Service Employment Act*. This could force the Commission to make a pronouncement of government policy not to provide day care for employees. A door would then be open to an argument based on the *Charter*.

The above example, however, is based on a very narrow fact situation and the problem exists that the Commission would first have to accept that failure to provide child care was discrimination on the basis of sex before it would be necessary to make a pronouncement of government policy. The possibility that the *Charter* could be made to apply to the type of action contemplated by this paper is very dubious unless some other 'legislative hook' were to be found.

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67. R.S.C. 1970, c. P-32.

68. S.C. 1974-75-76 c. 66, s. 10.

68a. R.S.C. 1970, c. P-32, s. 21.

## 2. The Equality Provisions (ss. 15 and 28)

Assuming that through an argument such as the one outlined above, the problem of the applicability of the *Charter* could be overcome, the next step would be to establish that some right or freedom guaranteed by the *Charter* had been infringed.

Since failure to provide adequate and subsidized child care adversely affects so many more women than men, it would be possible to argue that this amounts to "discrimination on the basis of sex." Full time working women in Canada earn 58 cents for every dollar earned by men. Two-thirds of all minimum wage earners in Canada are women.<sup>69</sup> In the United States (presumably these statistics would approximately reflect the Canadian situation) in 1978, nearly two-thirds of working women were single, widowed, divorced or separated, or their husbands earned less than \$10,000 per year. One out of every seven families was headed by a woman. In 1978, 53% of mothers of children under 18 worked.<sup>70</sup> One out of every seven families or 8.2 million families are headed by divorced, separated, widowed or unmarried women while 1.6 million families are headed by single men.<sup>71</sup>

When combined with the prevalent social notion that women have the primary responsibility for child care in our society,<sup>72</sup> it becomes obvious that one of the major obstacles to women achieving economic parity with men in Canada is lack of available, flexible and subsidized child care.

Alternatively, it could be argued that, although not a category enumerated in section 15, discrimination on the basis of "family status" nevertheless violates the *Charter*. According to Hogg:<sup>73</sup>

Section 15 enumerates a number of grounds of discrimination . . . but it makes clear that these grounds are not exhaustive, so that laws discriminating on other inadmissible grounds (for example height, sexual preference) would also be in violation of s. 15.

An argument based on one of the enumerated grounds would, however, for reasons outlined below, likely be stronger (see discussion on the American "levels of scrutiny" *infra*).

It would also be necessary to show that one of the "equalities" guaranteed by subsection 15(1) has been denied. Subsection 15(1) provides that:

15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

Section 28 provides:

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69. Income Distribution by Size in Canada (1980) Statistics Canada, Consumer Income and Expenditures Division Catalogue no. 13-207.

70. Women's Bureau, U.S. Dept. of Labour, *20 Facts on Women Workers* (Aug. 1979).

71. U.S. Dept. of Labour and U.S. Dept. of Health, Education and Welfare, "Female-Headed Families: A Phenomenon of the Seventies", *Employment and Training Report of the President 1979* (1979) at Table 1.

72. Greta Maloney, "Title IX, Disparate Impact and Child Care: Can a Refusal to Cooperate in the Provision of Child Care Constitute Sex Discrimination under Title IX?" (1980-81) 52 *University of Colorado Law Review* 271 at 273, note 8.

73. *Supra*, n. 65, at 51.



28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

Although, because section 15 of the Charter does not come into force until 1985, it is impossible to predict exactly how the equality provisions contained therein will be interpreted by the Courts, it is useful to consider some cases decided on subsection 1(b) of the *Canadian Bill of Rights*. This section referred only to "the right of the individual to equality before the law and the protection of the law." In *Regina v. Drybones*<sup>74</sup> the phrase "equality before the law" was interpreted by Mr. Justice Ritchie as follows:

... I think that s. 1(b) means at least that no individual or group of individuals is to be treated more harshly than another under that law, and I am therefore of the opinion that an individual is denied equality before the law if it is made an offence punishable at law, on account of his race, for him to do something which his fellow Canadians are free to do without having committed any offence or having been made subject to any penalty.<sup>75</sup>

In *Bliss v. A.G. Canada*,<sup>76</sup> a pregnant woman had worked eight weeks, long enough to apply for regular unemployment benefits, but not long enough to qualify for special maternity benefits. She was denied any benefits at all on the basis that she was not available for work. She alleged that this provision of the *Unemployment Insurance Act* contravened the "equality before the law" provision of the *Bill of Rights*. In the Supreme Court of Canada, Ritchie, J. held as follows:

... There is a wide difference between legislation which treats one section of the population more harshly than all others by reason of race as in the case of *R. v. Drybones* (1969), 9 D.L.R. (3d) 473, [1970] 3 C.C.C. 355, [1970] S.C.R. 282, and legislation providing additional benefits to one class of women, specifying the conditions which entitle a claimant to such benefits and defining a period during which no benefits are available. The one case involves the imposition of a penalty on a racial group to which other citizens are not subjected; the other involves a definition of the qualifications required for entitlement to benefits...<sup>77</sup>

W.S. Tarnopolsky argues that this interpretation implies a distinction between "equality before the law" or "equal protection of the law", and "equal benefit of the law". This gap, according to Tarnopolsky has been closed by the inclusion of the "equal benefit of the law" provision in the *Charter*.<sup>78</sup>

Another major test applied by the Court in *Bliss* in deciding the "equality before the law" clause had not been contravened was the "valid federal objective" test formulated by the Supreme Court of Canada in *Regina v. Burnshine*.<sup>79</sup> This test was outlined by Martland J. in *Prata v. Minister of Manpower and Immigration*:

This Court has held that s. 1(b) of the Canadian Bill of Rights does not require that all federal statutes must apply to all individuals in the same manner. Legislation dealing with a

74. [1970] S.C.R. 282.

75. *Ibid.*, at 297.

76. (1978), 92 D.L.R. (3d) 417 (S.C.C.).

77. *Ibid.*, at 423.

78. W.S. Tarnopolsky, "The Equality Rights in the Canadian Charter of Rights and Freedoms" (1983), 61 Can. B. Rev. 242.

79. [1975] 1 S.C.R. 693.

particular class of people is valid if it is enacted for the purpose of achieving a valid federal objective.<sup>80</sup>

This test implies that equality provisions aside, legislation may still be valid if it pursues a "valid federal objective." The test was elaborated by McIntyre J. In *McKay v. The Queen* as follows:

The question which must be resolved in each case is whether such inequality as may be created by legislation affecting a special class — here the military — is arbitrary, capricious or unnecessary, or whether it is rationally based and acceptable as a necessary variation from the general principle of universal application of law to meet special conditions and to attain a necessary and desirable social objective.

... whether any inequality has been created . . . rationally in the sense that it is not arbitrary or capricious and not based upon any ulterior motive or motives offensive to the provisions of the *Canadian Bill of Rights*, and whether it is a necessary departure from the general principle of universal application of the law for the attainment of some necessary and desirable social objective . . .<sup>81</sup>

Although Hogg feels that this test will still be applicable to the interpretation of sections 15 and 1 of the *Charter*,<sup>82</sup> Tarnopolsky posits the argument that this test will no longer be sufficient for subsection 15(1) of the *Charter*, even though section 1 does provide for "reasonable limitations". He contends that what are acceptable legislative distinctions should be decided in a manner similar to that used by United States Courts in cases relating to the 14th Amendment.

The United States Courts have defined three levels of scrutiny in considering whether a law is discriminatory: strict, intermediate and minimal. The first is applied to cases which involve "inherently suspect categories" which are those based on race, religion or nationality. When one of these classifications is involved, "close judicial scrutiny" must be applied and proof must be advanced that the classification was for an "overriding state interest" which could not be accomplished in a less harmful way.

The "intermediate scrutiny test" requires "an important governmental objective" which is "substantially related to the achievement of those objectives."

The "minimal scrutiny test" applies where no inherently suspect class or fundamental constitutional right is involved. The classifications are usually made for economic or social reasons and the onus is on the person challenging the legislation to show that the classification chosen did not have a rational relationship to the object of the legislation.

Tarnopolsky argues as follows:

Applying this American experience to the Canadian situation one could suggest the following. The inclusion in section 15(1) of four equality clauses must have been intended to cover all possible interactions between citizens and the law, not just for protection, but for benefit as well. Since section 15(1) now lists a number of grounds upon which these clauses are to be interpreted and applied, without discrimination, and since section 28 guarantees

80. [1976] 1 S.C.R. 376 at 382.

81. [1980] 2 S.C.R. 370 at 406.

82. Hogg, *Supra* n. 65, at 52.

the rights and freedoms in the Charter equally to male and female persons "notwithstanding anything in this Charter", the listed grounds must now be considered "inherently suspect" and subject to "strict judicial scrutiny".<sup>83</sup>

He goes on to state that in the case of legislation not based on distinctions enunciated in subsection 15(1), particularly legislation having an economic or social purpose, the courts should defer to legislative opinion unless the challenger can show that no rational relationship exists between the legislation and the object of the legislature.

Since section 15 is not yet in effect, it is not possible to know how broadly the courts will interpret the equality provisions. However, in view of the fact that four equality clauses have been included, which as Tarnopolsky argues "must have been intended to cover all possible interactions between citizens and the law, not just for protection, but for benefit as well", it is almost certain that some degree of broadening of the interpretations enunciated in the *Bill of Rights* cases will be involved. The following points will have to be made in arguing that inadequate child care constitutes discrimination on the basis of sex:

1. Women as a group are more prejudiced by inadequate day care than any other group. Hence failure to make adequate daycare available is "discrimination on the basis of sex".
2. In its policy of not providing child care to employees in need of it, the government is denying to these employees "equal benefit of the law".
3. In order to overcome the "valid federal objective test" it must be shown that the policy is "arbitrary, capricious or unnecessary" rather than "rationally based and acceptable as a necessary variation from the general principle of universal application of law to meet special conditions and to attain a necessary and desirable social objective".

If Tarnopolsky's suggested "strict scrutiny test" is accepted, it will have to be shown by the government that the policy exists for an "overriding state interest" which cannot be accomplished in a less prejudicial manner.

### 3. Remedies

Subsection 15(2) would serve to protect from attack under the *Charter*; any program to institute child care which the court might compel; however, it does not empower the courts to compel such a program as a remedy.

Subsection 15(2) provides:

15(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

It is possible, however, that the power could be found in subsection 24(1) which provides as follows:

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83. Tarnopolsky, *supra* n. 78, at 254-55.

24(1) Anyone whose rights or freedoms, as guaranteed by the Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Hogg suggests that this section is so broadly worded that:

... a court which is competent as to subject matter and parties is probably not confined to remedies which are within its usual jurisdiction; the section itself confers the authority to grant an appropriate remedy...

The remedy authorized by section 24(1) is "such remedy as the court considers appropriate and just in the circumstances". This could no doubt include damages, injunctions, declarations and prerogative remedies such as mandamus, prohibition, certiorari and habeas corpus. As suggested in the previous paragraph, it is probable that the court could grant remedies which were not within its usual jurisdiction. Conceivably, totally new remedies could be invented. In any event, a court of general equitable jurisdiction can tailor the injunction to meet new situations, as is illustrated by the development since 1954 of the civil rights injunction to enforce the provisions of the Bill of Rights in the United States (Fiss, *The Civil Rights Injunction* (1978)).<sup>84</sup>

Even if this section were interpreted by the courts as giving them the power to invent "totally new remedies", including one which in effect compels a government to institute a program, it must still be remembered that all remedies are discretionary. In a discussion of the relationship between section 27, which protects Canada's multicultural heritage, and section 15, Tarnopolsky creates a scenario where a claim for grants for cultural activities equal to those given to the two "founding peoples" is made by another ethno-cultural group, on the basis that it is entitled to "equal benefit of the law." In a situation such as this, Tarnopolsky finds it "impossible to envisage a court being prepared to order a government as to whether such money should be spent and how much should be expended in total."

In attempting to convince a court that the power to order mandatory affirmative action programs exists and should be used, it could be argued on the basis of the Canadian *Human Rights Act*<sup>85</sup> that such a remedy would not be out of the ambit of the intent of the legislature in granting wide powers of relief to the courts in subsection 24(1).

Paragraph 41(2)(a) of the *Human Rights Act* provides as follows:

(2) If, at the conclusion of its inquiry, a Tribunal finds that the complaint to which the inquiry relates is substantiated, subject to subsection (4) and section 42, it may make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in such order any of the following terms that it considers appropriate:

(a) that such person cease such discriminatory practice and, in consultation with the Commission on the general purposes thereof, take measures, including adoption of a special program, plan or arrangement referred to in subsection 15(1), to prevent the same or a similar practice occurring in the future;

Subsection 15(1) states:

15.(1) It is not a discriminatory practice for a person to adopt or carry out a special program, plan or arrangement designed to prevent disadvantages that are likely to be suffered by, or to eliminate or reduce disadvantages that are suffered by, any group of individuals

84. Hogg, *Supra* n. 65.

85. S.C. 1976-77, chap. 33.

when those disadvantages would be or are based on or related to the race, national or ethnic origin, colour, religion, age, sex, marital status or physical handicap of members of that group, by improving opportunities respecting goods, services, facilities, accommodation or employment in relation to that group.

By virtue of subsection 63(1), the *Human Rights Act* is binding on Her Majesty in Right of Canada.,

Thus, the federal Human Rights Commission is expressly given the right to compel the institution of an "affirmative action" program where discrimination has occurred. The legislature obviously believes that such a remedy is a valid and effective means of rectifying discrimination.

#### 4. Conclusion

The obstacles to using the *Charter* to compel the provision of child care seem to be overwhelming. The first hurdle is to make the *Charter* apply when, except for the very narrow possibility outlined above, no law is in place which can be attacked. Secondly, there is some doubt as to whether a court would accept the argument that failure to provide child care is discrimination on the basis of sex, since not all women have children, and having a child may be viewed by the court as a voluntary assumption of responsibility. Also, the phrase "equal benefit of the law" has never been interpreted in Canada and it is not certain that its interpretation will be sufficiently more broad than in *Bill of Rights* equality cases to allow success in a case of this nature. The "valid government object test" in one form or another will also have to be faced.

Finally, the courts, although they may be found to have the power to institute the remedy of a mandatory day care program, may be very reluctant to use such a new and powerful tool.

Overall, it is to be expected that the Courts will exercise some degree of caution in interpreting the new *Charter*, and there appear to be too many areas in the type of action contemplated above which involve legally tenuous or fairly radical arguments, for such an action to be successful.

#### B. Affirmative Action through Human Rights Legislation<sup>86</sup>

In the discussion above the remedy contemplated, compelling the government to provide day care, fell short of a full-fledged "affirmative action program". An affirmative action plan has been discussed by the Affirmative Action Division of Employment and Immigration Canada as:

... a comprehensive, plan is an action strategy designed to ensure equality of opportunity at all employment levels and to provide for the implementation of those special measures necessary to ensure equality of results, given the specific conditions existing in the company. The measure of successful implementation of an affirmative action plan is the achievement of goals expressed as changes in the composition at all levels of the company's labour force.

The term "systemic discrimination" to discrimination which is not intentional in that it stems from ill-will on the part of the employer or a

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86. This paper presents only a cursory overview of affirmative action. For a more complete discussion, see Montreal Association of Women in the Law, *Affirmative Action for Women in Canada*.

“pattern of unequal treatment” of potential employees. Rather, it results where “despite the equal application of an employment practice there is a disparate impact on certain groups of workers (such as women) and this impact cannot be related to job performance or the safe and efficient operation of the workplace.”<sup>87</sup> Systemic discrimination was first recognized as a concept by the American Supreme Court in *Griggs v. Duke Power Company*<sup>88</sup> where it was held that practices which restrict opportunities of minorities are discriminatory unless they can be justified by business necessity, even if all employees or potential employees are treated in the same way.

Since the *Griggs* case, numerous decisions have been rendered in Canada which recognize that discrimination need not be intentional or the result of ill-will in order to contravene Human Rights legislation.<sup>89</sup> The Federal Court of Appeal in *CNR v. Canadian Human Rights Commission and K.S. Bhinder*,<sup>90</sup> however, has recently held that section 10 of the Canadian *Human Rights Act* is not broad enough to cover the effects of systemic, or indirect discrimination. Section 10 reads as follows:

10. It is a discriminatory practice for an employer or an employee organization

(a) to establish or pursue a policy or practice, or

(b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment,

that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.

Paragraph 703(a)(2) of the 1964 *Civil Rights Act* of the U.S. upon which *Griggs*, *supra* was decided reads much the same as section 10, except that the words “or otherwise adversely affect” are added after “deprives or tends to deprive.” The lack of these words in section 10, according to the Federal Court of Appeal means that *Griggs* loses its persuasive value, and section 10 cannot, unlike its American counterpart, be interpreted to cover situations where discrimination has not been intentional. Le Dain J. in a strong dissenting judgement in *Bhinder* found that section 10 would cover systemic discrimination. This case is currently under appeal to the Supreme Court of Canada, where, in light of some fairly recent decisions by that court, it is believed to have a good chance of being overturned. In *Athabasca Tribal Council v. Amoco Canada*,<sup>91</sup> the matter in question was an affirmative action program which the Tribal Council sought to have the Energy Resources Conservation Board impose as a condition of its approval of a tar sands project. Ritchie J., speaking for Laskin C.J. and Dickson and McIntyre J.J., held *inter alia* that such an affirmative action program would

87. Patrick Smith, *Politics of Gender: Public Policy on Affirmative Action and Women in the Labour Market*, Women in the Workforce, Affirmative Action and Parental Benefits: Sourcebook National Association of Women in the Law Conference 1983, p. 173 at p. 9.

88. (1971) 401 U.S. 424.

89. See for example, *Ward v. Canadian National Express* (1982), C.H. R.R., Vol 3, Dec. 153, Para. 6153; *Anderson v Atlantic Pilotage Authority* (1982), 82 CLLC 1104.

90. (1983), CHRR, Vol. 4, Dec. 284, Para. 12092.

91. [1981] 1 S.C.R. 699.

not contravene Alberta's *Individual Rights Protection Act*<sup>92</sup> (which prior to this case contained no provision allowing affirmative action programs). The court held that if the preamble to the Act, which included the words "all persons are equal in dignity and rights" were to have meaning and significance, the statute should not be read in such a way as to have the opposite effect. The measures proposed in the affirmative action program did not discriminate against other inhabitants. By a pronouncement such as this, the Supreme Court of Canada can be interpreted as having some sympathy to the notion of systemic discrimination.

The following components of an affirmative action program as outlined by the Montreal Association of Women and the Law<sup>93</sup> are assumed in federal government policy to be necessary elements in an affirmative action program.<sup>94</sup>

1. Equal Opportunity Measures — These are permanent changes to a company's employment system which involve a commitment to refrain from any overt discriminatory practices such as wage differentials between men and women performing the same job.
2. Remedial Measures — These refer to any action designed to redress past discrimination by providing specific benefits such as special training programs for women.
3. Support Measures — These permanent measures alleviate an employment problem specifically affecting the group whose situation the company wishes to improve. For example, in the case of women, it might mean setting up a child care program at the company locale.
4. Goals and Timetables — Goals are program objectives expressed in numerical terms, providing a target towards which to aim. Timetables outline when and what results are expected.

Experience has shown that simply declaring a group which has traditionally been the object of systemic discrimination "equal" and going no further is not sufficient to rectify the situation. What is required seems to be a "systemic remedy" such as the implementation of affirmative action programs. Although all of the provinces except Newfoundland and Quebec have enacted human rights legislation which permits affirmative action programs (Bill 86 which would allow these programs is before the Quebec legislature), there is little indication that employers have taken advantage of these provisions to implement voluntary programs.<sup>95</sup> What is required is some means of compelling employers to implement affirmative action programs.

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92. R.S.A. 1980 c. I-2.

93. Summary of a Report on Affirmative Action Programs for Women in Canada, *supra*. p. 141 at p. 3.

94. Patrick Smith, *supra* n. 87, at 9.

95. But see, *Saskatchewan Telecommunications and Communication Workers of Canada*, (1983) CHRR Vol. 4, Dec. 248 Para. 10870 where the Saskatchewan Human Rights Commission approved an affirmative action program sponsored by Sask. Tel. and agreed to by the Communication Workers of Canada.

The Canadian *Human Rights Act*,<sup>96</sup> as outlined above, specifically allows affirmative action programs as a remedy. So do the Human Rights legislation of Saskatchewan<sup>97</sup> and Quebec<sup>98</sup> (assuming Bill 86 is approved). This remedy has never been applied. However, in *Action Travail des Femmes v. Canadian National Railway* which was heard in May of 1982, the Action Travail des Femmes of Montreal applied to a human rights tribunal for an order imposing an affirmative action program on the Canadian National Railway. This case will undoubtedly set a precedent in the use of this remedy. If the remedy is granted, it is suggested that in future, this will be the most effective means of correcting systemic discrimination against women. Human rights legislation unlike the *Charter*, is applicable to the private as well as to the public sector and it is in the former that willingness to institute voluntary affirmative action programs is most lacking. In addition, human rights legislation does not require, as does the *Charter*, that a law be in effect which can be struck down. What is required is to show that a discriminatory situation exists which requires rectification.

It would not be necessary under human rights legislation to apply for a full "affirmative action" program as a remedy. The remedy sought might be the institution of a "special program, plan, or arrangement" (see Canadian *Human Rights Act* s. 41(2)(a)) in the form of day care facilities alone.

### C. Striking Down Existing Child Care Legislation

An alternative, albeit somewhat negative, also exists in that the *Charter* could be used to strike down existing provincial child care legislation in the hopes that it would be replaced with a scheme that would more fully meet the needs of working women. In Alberta, for example, a single working mother earning less than \$1,100 per month can receive an income subsidy for day care. As a result of the subsidy, she would pay a maximum of \$45 per month for day care for pre-school aged children, regardless of the number of children in day care. The subsidy works on a sliding scale and anyone earning over \$1,440 net per month, would receive no income subsidy for day care. The average cost to parents not receiving an income subsidy for day care is in the area of \$200 - \$300 per month. However, the actual cost of day care is closer to \$600 per child. The difference in cost is made up by an operating allowance granted to licensed day cares pursuant to the *Social Care Facilities Licensing Act*<sup>99</sup> of Alberta.

The effect of the legislation is that parents having good incomes and who can afford to place their children in day care receive a government subsidy for the difference between what they pay and the actual cost of day care. However, for those who earn over \$1,440 per month, too much to qualify for the income subsidy, yet not enough to afford to pay the difference between per capita subsidies and actual cost, this subsidy is not available. These people are often forced to make such arrangements as placing their

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96. S.C. 1976-77, c. 33.

97. R.S.S. 1978, c. S-25, 6 (looseleaf).

98. Bill 86, An Act Amending the *Charter of Human Rights and Freedoms*, 1977 R.S.Q. c. C-12.

99. R.S.A. 1980, chap. S-14.



children with neighbours, relatives or other babysitters. Studies show these children more often than not receive a poorer quality of care than they would have in a licensed day care.

The possibilities exist that the *Social Care Facilities Licensing Act* could be attacked as unconstitutional. It could be argued on behalf of the children that as the result of their parents' economic situation they are being discriminated against in not receiving the same subsidy from the government as children of families with higher incomes.

In this type of argument, the *Charter* appears clearly to be applicable, since a provincial law unfairly favoring one group would be attacked. Although it would not be possible to fit these children into a class enumerated by subsection 15(1), the classes enumerated are not exhaustive (see *supra*, p. 328) and discrimination on any unacceptable grounds may still contravene the *Charter*. The class may only be subject to the equivalent of "minimal scrutiny test," but even so it would be possible to argue that the results of the legislation passed have no rational connection with the purpose of the legislation, if this purpose was presumed to be to keep the cost of day care to the parent down in order that those who are in need will be able to benefit from it.

Also, in this scenario, no special remedy is being sought other than to strike down the law as contravening the *Charter*. This would have the effect of forcing the provincial government to address the issue of child care, and the door would be open to lobbying for more equitable access or universal provision of day care for all parents.

The disadvantage of this course of action is that it is a negative measure and may have the effect of undoing the good which stems from the legislation in question. In effect what is being said is that if a certain group cannot have subsidized child care then no group should have it.

In conclusion, it is submitted that of the alternatives considered in this paper, the positive and comprehensive method of forcing governments to implement affirmative action programs including the "support measure" of providing child care through human rights legislation is the one which is most likely to be effective in improving the situation of the working woman.

Finally, the value of lobbying for legislative change in the area of day care should not be forgotten. It was through this means that paid maternity leave was finally allowed to Canadian women through the *Unemployment Insurance Act*<sup>100</sup> in 1971. Although the means by which women are provided maternity leave could be improved, the government has been made, in a great part through the Royal Commission on the Status of Women and The National Action Committee on the Status of Women, to recognize that such a system is necessary in our society. Women should not be treated unfairly because they bear the primary burden for child bearing and child raising. Ultimately, all of society benefits from mentally and physically

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100. S.C. 1970-71-72, c. 48.

healthy children. The next logical step from providing an income for a pregnant woman is to provide her with the means to care for her child once it is born, without unduly prejudicing her income and chances for career advancement in the process.

### VIII. Conclusion and Recommendations

Day care involves three very important functions, all of which must be considered when provision of the service, in any of its many forms, is contemplated. The three interlocking functions are social service, educational and economic.<sup>101</sup> When one or more of these functions is ignored, the provision of the service is most often, seriously deficient.

The social service aspect of day care recognizes the public interest and requires that socially acceptable standards be observed in the care of children. Minimum standards for licensing group day care centers are legislated across Canada and offer a basic level of protection for children. Where their needs have not been officially addressed, however, is in the private, informal care arrangements the majority of working parents in Canada choose for their children.

The educational function of day care requires that the qualification and training of day care workers be of a high standard and that the equipment and care have educational value. It also requires continuity in employment of care givers. This function is often given a lesser priority than the social services function by commercial and informal care givers. It results from an emphasis being placed on custodial care rather than on the developmental aspects of child care.

The economic functions of day care must address two sets of needs: those of the parents and those of the economy. Clearly, parents benefit from working. Even those whose income is small and who receive little economic benefit, benefit in terms of self-respect. The benefit or contribution of working parents to the economy must also be considered.

It is apparent that lack of adequate day care has not kept women from working. On the contrary, women are in the workforce in greater numbers than ever before which must reflect a demand for their skills.

The question of whether or not working women (the prime nurturers of children) could contribute more to the economy if day care better served their needs seems to be answered in the affirmative whenever the issue is examined. Lack of flexible, high quality care for children is a barrier to advancement and opportunity in the workplace for the parent(s) without it because they cannot fully participate in activities which could allow them to advance or obtain better jobs.

Balanced against the contribution or potential contribution of working parents of children in day care, the cost to society of providing the services

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101. H. Philip Hepworth, *600,000 Children, A Report of a Survey of Day Care Needs in Canada*, Canadian Council on Social Development, 1975.

must be considered. Cost-benefit studies of day care in Canada are lacking but even if they were available, it is doubtful whether a study could reflect the personal, psychological and political factors which have a bearing on the issue. Certainly in economic terms, the cost of good day care is high but if these services did not exist, it is unlikely society would experience an economic gain. Without day care, the economy would lose the contribution of the working parents and costs of social assistance would go up. Another benefit factor difficult to measure is the preventative social service and education function that good day care provides which can best be regarded as an investment in the future.

Universal, free government sponsored day care is an attractive solution to the day care problems in Canada. It is not, however, a realistic alternative in the writer's view given the current economic climate. Consequently, the next best alternative must be pursued which is the involvement of all the stakeholders in adequate day care making a contribution towards its implementation and operation. Governments, employers, union representatives and parents must collaborate to establish a framework of goals which reflect benefits and services of adequate day care and remove barriers to equality for women and segregation by socio-economic groups for children.

This process should be entered into voluntarily but the government should employ persuasive techniques such as greater tax incentives to employers to encourage participation in provision of day care and equitable universal subsidies to allow more parents access to quality care at lower prices. Government should also make employer assisted child care a non-taxable benefit for employees and at the same time, adjust the tax credit system by increasing the tax credit for lower income parents. Money for this scheme could be obtained by abolishing the normal tax deduction for children as long as they are of day care or after school care age. An alternative to adjusting the tax credit system and abolishing normal deductions for children is to increase the value of deductions for children as income decreases. This would have the same effect of assisting those in the lower income brackets by giving them more disposable income.

Government should also take on the responsibility of disseminating accurate information about the availability, cost and quality of day care so that parents could make intelligent decisions when choosing day care for their children.

The concept of shared responsibility for children's care between father and mother should be reflected in any new legislation. Commercial day care and informal babysitting arrangements, although filling an important need, should not be encouraged through tax concessions or subsidies unless a higher standard can be guaranteed through either prerequisite controls or through contract compliance where applicable. Compliance with high standards could also be achieved through a program of government assurances on loans for start-up costs.

Employers should be encouraged to explore ideas such as part-time work and job sharing, the four-day work week, flexible work hours, and extended parental leave to reduce demand for day care services.

If a multi-faceted approach is adopted, a continual evaluation procedure must be established to ensure adaptiveness to changing needs of all concerned. By approaching the day care issue this way, the diverse needs of working parents and organizations that employ them, as well as the social, economic and political uncertainties of the present time, are recognized.