

Article rank | 6 Jan 2016 | National Post - (Latest Edition)

Vern Krishna Vern. Krishna@TaxChambers.ca Vern Krishna is a professor in the common law section of University of Ottawa Law School and counsel with TaxChambers LLP
Financial Post

Revamp child-care tax law 3

Current rules punish working mothers

The Prime Minister earns more than \$ 327,000 a year, and has two nannies on his household staff to look after his children. The nannies are paid \$ 15 to \$ 20 an hour during the day, and \$ 11 to \$13 for a night shift, which is roughly in line with amounts paid to private nannies. Unlike ordinary Canadians, the Prime Minister enjoys a special exemption from tax on his nanny care benefits. Other Canadians who are not in the top one per cent of income earners are taxable on such benefits under antiquated rules crafted decades ago.





ADRIAN WYLD / THE CANADIAN PRESS FILES

Prime Minister Justin Trudeau and his wife Sophie Grégoire-Trudeau with their children. Now is the time for the Prime Minister to improve childcare by writing sensible tax rules similar to those that he enjoys, says Vern Krishna.

Today, females outnumber males roughly 65- to- 35 in medical and law schools. These numbers reflect permanent shifts in general university demographics. Our tax laws remain fossilized in the social demographics of the last century.

The cost of child care is the single biggest impediment for families, particularly working women, who wish to participate in the workforce. Child care is a basic function of family life. If a mother must work by bringing in care for her children, the cash that the family pays for such care is clearly related to earning income. Unfortunately, the income tax system is not nearly as sympathetic to nanny expenses for Canadians in the 21st century.

The fundamental principle for the deductibility of business expenses is that the taxpayer should incur them for the primary purpose of earning income. The existence of a business purpose is a question of fact. The present regime of childcare deductions, however, is a haphazard conglomerate of rules that are not particularly well-suited to the needs of the new economy, and are a disincentive for women who wish to pursue their professional careers. Many parents incur childcare expenses primarily and predominantly for the purpose of allowing them to work, either as employees or in business. Indeed, in many families, both parents must work for economic survival. While all parents must care for their children, parents who work outside the home as employees, or engage in business, incur incremental childcare expenses that are linked directly and solely to the purpose of earning income. Given the direct causal relationship between childcare expenses and the earning of income, they should be deductible as business expenses under conventional tax principles. But for the childcare expense, the mother — and it is the mother in most cases — could not work and earn income outside the home. The Income Tax Act provides a modest measure of monetary relief to spouses and common-law partners who pursue gainful occupation outside the home, or undertake education or retraining, and pay someone to look after their children while they are at work or school. The relief, however, is restricted and subject to numerous technical rules.

The deductible expense is limited to two-thirds of the taxpayer's annual earned income, to a maximum of \$8,000 for each eligible child under seven, \$ 5,000 for older children, and \$ 11,000 in respect of a child certified by a medical doctor to be disabled. In most cases, only the lower-income spouse (usually women) can claim the deduction, unless she is confined to a mental asylum or a prison for at least two weeks in the year. The Supreme Court of Canada said in a 1993 case called *Symes v. Canada* that these specific provisions are a complete code for the deductibility of childcare expenses and, therefore, individuals who are in business cannot claim such expenses under the general rules that apply to business expenses.

To be sure, the government has legitimate concerns about the deductibility of childcare expenses and the potential loss of tax revenues. But we need to balance these concerns against the enormous costs to society in educating professionals at public expense, and then losing their services because of antiquated tax rules. Losing the services of female family physicians, for example, further constrains the supply of medical services just when Canada's aging population is increasing its demands on the public health-care system. If the government is concerned with long waiting times for access to family physicians, it might consider enhancing tax incentives to increase the supply of such services.

Working women are caught between a rock and a hard place. The Supreme Court says that the statutory provisions dealing with child care are a

complete code. Individuals cannot therefore deduct such expenses under the general principles of tax law. Meanwhile, taxpayers cannot challenge the inadequacy of the tax code because it is complete, and only Parliament can change it. Thus, the statutory rules that purport to help working mothers boomerang and penalize professional women. Now is the time for the Prime Minister to improve childcare services in Canada by writing sensible tax rules similar to those that he enjoys.

Why? Because it is 2016.