

Complementary and Alternative Medicine and the Medical Expense Tax Credit: A Case for Legislative Reform[†]

Mary Shaw*

Since 1942, Canada's *Income Tax Act* has provided tax relief to taxpayers who spend substantial amounts of their income on out-of-pocket medical expenses.¹ Since 1988, this relief comes in the form of a tax credit, an amount that is directly deductible against income tax payable.² Not all medical expenses are eligible. In particular, the statutory scheme excludes some, but not all, medical services and treatments that can be broadly categorized under the term 'complementary and alternative medicine.'³

Specifically, the *Income Tax Act* provides that only amounts paid for services provided by practitioners who are authorized to practice in the jurisdiction where the service is provided are creditable. Thus, availability of the medical expense tax credit [METC] will depend on whether a taxpayer's province of residence has chosen to regulate a particular area of practice. Consequently, some taxpayers who turn to alternative medicine are denied tax relief for their medical expenses. Also not eligible for the credit are the natural health products that make up the pharmacopoeia of many alternative practitioners. As a result, many Canadians are fully taxable on amounts paid for medical treatment. Frank Tall, a Toronto math professor who suffers from allergies and environmental sensitivities, is one of these.⁴ Mr. Tall spends approximately \$5000 per year on homeopathic treatments. Since the 2001 tax year, he has attempted to claim the medical expense tax credit, but the Canada Revenue Agency [CRA], which is responsible for administering the *Income Tax Act*, has denied the claim.

[†] Readers should note that shortly before publication, the *Traditional Chinese Medicine Act, 2006, S.O. 2006, c. 27*, which will regulate the practices of traditional Chinese medicine and acupuncture in the Province of Ontario received Royal Assent on December 20, 2006. This paper has not been revised to reflect this development in the law.

* Mary Shaw wrote this paper while a law student at the University of Victoria. She would like to thank Nola Ries for her guidance and encouragement.

¹ R.S.C. 1985 (5th Supp.), c. 1 [ITA].

² David M. Sherman, *Taxes, Health & Disabilities* (Scarborough, Ont.: Carswell, 1995) at 125.

³ The term 'complementary and alternative medicine' encompasses a wide array of health services outside the traditional allopathic model. As used in this paper, it includes chiropractic, naturopathy, homeopathy, massage therapy, midwifery, traditional Chinese medicine, and massage therapy, as well non-pharmaceutical medicines, vitamins, herbs, minerals, etc.

⁴ "Buddhist Calls Income Tax Policies Discriminatory," *CBC News* (17 October 2005), online: CBC <<http://www.cbc.ca/story/canada/national/2005/10/17/buddhist-tax-challenge051017.html>>.

Mr. Tall contends that the denial of his claim constitutes a breach of his equality rights under section 15 of the *Canadian Charter of Rights and Freedoms*.⁵ He argues that a statutory scheme that disallows claims for amounts spent on alternative medicine discriminates against members of ethnic and religious minorities who, by reason of their ethnicity and/or religion, feel compelled to seek medical treatment outside the Western allopathic model.⁶ A detailed analysis of section 15 jurisprudence is required in order to predict whether such a claim, and in particular Mr. Tall's claim, is likely to succeed. This paper offers such an analysis and concludes that the METC provisions do not offend *Charter* equality rights.

However, regardless of the outcome of the *Charter* analysis, there is an important policy question about whether or not the medical expense credit *should* provide relief to Canadians who use alternative medicine, given its increasing importance as a primary health care tool. All Canadian provinces have seen fit to regulate at least one, and in many cases more than one category of alternative medical practitioner, and the trend is toward extending regulation to cover previously unregulated service providers.⁷ Some provinces even provide public insurance for certain alternative medical services, and all Workers' Compensation Boards cover them.⁸ In addition, employer-paid group health insurance plans, which are not a taxable benefit, often provide coverage for a variety of alternative medical services.⁹ Under these circumstances, it is difficult to justify a regime that denies tax relief to Canadians who are not so fortunate as to be covered by an insurance plan.

In fact, there are several compelling arguments for expanding the METC to alternative medical treatments and services. The third section of this paper will briefly consider these arguments, as well as those against inclusion. A detailed explanation of the METC provisions will provide the basis for both the *Charter* and policy analysis. I will therefore begin by examining the statutory scheme that determines which expenses qualify, which do not, and for whom.

⁵Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

⁶"Buddhist Calls Income Tax Policies Discriminatory," *supra* note 4.

⁷For example, Newfoundland passed legislation with respect to massage therapy in 2001 and Ontario is currently working toward regulation of traditional Chinese medicine and acupuncture. See Appendix and Ontario Ministry of Health and Long-Term Care, News Release, "Ontario Closer to Regulating Traditional Chinese Medicine" (2 July 2005) online: Ministry of Health and Long-Term Care <http://www.health.gov.on.ca/english/media/news_releases/archives/nr_05/nr_072905.html>.

⁸Rona Achilles *et al.*, "Complementary and Alternative Health Practices and Therapies: A Canadian Overview" (York University Centre for Health Studies, 1999), online: York University <http://www.yorku.ca/ychs/Compl_Altern_Health.pdf> [York University CAM Study].

⁹*Ibid.*

The Statutory Scheme

The medical expense tax credit is found in subsection 118.2 of the *Income Tax Act*.¹⁰ It is unnecessary to elaborate on the formula used to calculate the credit (found in subsection 118.2(1)), other than to note that there is no credit for medical expenses of less than the lesser of three percent of income or \$1,813. Below that threshold, taxpayers are fully taxable on amounts paid for medical expenses. Thus, the section is intended to provide relief where out-of-pocket medical expenses become a significant financial burden.

As an example of the value of the credit, a taxpayer with taxable income of \$50,000 per year and eligible expenses of \$10,000 would receive a federal credit of \$1360. The taxpayer would also be entitled to a provincial tax credit, the amount of which depends on the tax rate in his province of residence. If our hypothetical taxpayer were a B.C. resident, his provincial credit would amount to \$514.25, for a total of \$1874.25 in tax relief.¹¹ A taxpayer may also claim medical expenses incurred for treatment of his dependents. However, he is not entitled to a credit for any amount reimbursed under a group or private insurance plan.

Subsection 118.2(2) provides for a wide variety of eligible medical expenses. Taxpayers can claim a credit for amounts expended on caregiver services, guide dogs, home renovations (where required to accommodate a disability), artificial limbs, and transportation (where the taxpayer must travel a significant distance for treatment). The focus in this paper will be on credits for medical services and drugs, located in paragraphs 118.2(2)(a) and (n). These provisions will be considered separately.

Medical Services

Paragraph 118.2(2)(a) provides:

a medical expense of an individual is an amount paid

(a) to a medical practitioner, dentist or nurse or a public or licensed private hospital in respect of medical or dental services provided to a person ... in the tax year in which the expense was incurred;¹²

The term “medical practitioner” is defined in subsection 118.4(2) as follows:

¹⁰ *ITA*, *Supra* note 1.

¹¹ The provincial credit is calculated according to the formula set out in section 4.5 of the *Income Tax Act*, R.S.B.C. 1996, c. 215. Section 4.5 referentially incorporates the eligibility criteria set out in the federal *Income Tax Act*.

¹² *ITA*, *supra* note 1. The excised parts of the section refer to the taxpayer’s dependents, whose medical expenses can also be claimed under the section.

For the purposes of sections 63, 118.2, 118.3 and 118.6, a reference to an audiologist, dentist, medical doctor, medical practitioner, nurse, occupational therapist, optometrist, pharmacist, psychologist or speech-language pathologist is a reference to a person authorized to practise as such,

(a) where the reference is used in respect of a service rendered to a taxpayer, pursuant to the laws of the jurisdiction in which the service is rendered,¹³

Thus, fees paid to any medical practitioner authorized to practice under the laws of the jurisdiction in which he provides the service may be claimed pursuant to the medical expense tax credit. For example, fees paid for laser eye surgery performed by a doctor or an eye exam performed by an optometrist would constitute eligible expenses because doctors and optometrists must be licensed in all provinces.

Interestingly, and perhaps surprisingly given the purpose of the credit, CRA considers cosmetic surgery to be an eligible medical expense (e.g., hair transplants, botox injections, liposuction, and breast augmentation surgery).¹⁴ It takes the position that “when an amount is paid to a medical doctor in respect of surgery of any kind, whether cosmetic or elective, there is a presumption that the surgery is beneficial to the patient’s health.”¹⁵ This logic may be suspect; there is a compelling argument that the increasing popularity of cosmetic surgery is a symptom of a broader societal malaise characterized by unhealthy and unrealistic physical ideals and fetishization of youth. However, the CRA’s position can likely be explained by the wording of subsection 118.2(2), rather than by a carefully considered policy choice. As the section is now worded, in order to deny a claim, the CRA would have to take the position that cosmetic surgery was not a medical service. This position would be difficult to defend where a medical doctor had performed the procedure.¹⁶

In contrast, even where the object is purely therapeutic, not all services provided by alternative practitioners are eligible. In order to determine the eligibility of fees paid for services provided by alternative practitioners, it is necessary to look to provincial legislation. As seen above, subsection 118.4(2) provides that the taxpayer will be permitted to claim the service if the practitioner is “authorized to practice” according to the laws of the province. There is substantial variation among provinces with respect to which alternative medical practitioners are regulated. The table below lists a number of alternative practitioners in the left column.

¹³ *ITA*, *supra* note 1.

¹⁴ C.R.A. Document no. 2004-007823117 (June 29, 2004); C.R.A. Document no. 9907115 (April 26, 1999); C.R.A. Document no. 9523196 (October 23, 1995). Accessed at <www.cchonline.ca>.

¹⁵ C.R.A. Document no. 9907115 (April 26, 1999). Accessed at <www.cchonline.ca>.

¹⁶ Quebec has amended its METC to make cosmetic surgery ineligible for a provincial credit. See “2005 Quebec Budget Highlights” (21 April 2005), online: Deloitte <<http://www.deloitte.com/dtt/newsletter/0,1012,sid%253D3634%2526cid%253D80957,00.html>>.

On the right are the provinces in which each of these would qualify as a medical practitioner under the *Income Tax Act*:

| Type of practitioner | Regulated jurisdictions ¹⁷ |
|--|--|
| massage therapists | Ontario, BC, Nfld. |
| chiropractors | all provinces and Yukon |
| naturopaths | BC, Sask., Manitoba, Ontario |
| acupuncturists | BC, Alberta, Quebec |
| midwives | BC, Alberta, Manitoba, Ontario, Quebec, Nfld., (Sask. legislation is not yet in force) |
| traditional Chinese medicine practitioners | BC |

The table demonstrates that, with respect to the medical expense tax credit, the federal income tax regime effectively treats taxpayers differently depending on the province in which they reside. A British Columbia taxpayer can receive a credit for fees paid to any of the practitioners listed above, whereas a Nova Scotian can only receive a credit for chiropractic care. It is notable that the provinces least likely to regulate tend to be the less populous and less prosperous provinces. It is also striking that in four provinces, a woman cannot receive a credit for fees paid to a midwife but can claim the cost of breast augmentation surgery. I will return to this issue below.

Taxpayers have challenged the disallowance of claims for the services of massage therapists, naturopaths, and acupuncturists without success. In one recent case, a New Brunswick resident challenged CRA's denial of her claim for naturopathic care, acupuncture and massage therapy received in New Brunswick.¹⁸ Despite its finding of fact that at least the naturopath was authorized to practice pursuant to Ontario law, the Tax Court reluctantly denied the appeal, since it found that subsection 118.4(2) admits of no other interpretation than that amounts paid for medical services are eligible for the METC only if the service provider is authorized

¹⁷ See Appendix for relevant legislation.

¹⁸ *Davar v. The Queen*, 2005 TCC 715, [2005] T.C.J. No. 536.

to practice according to the laws of the jurisdiction where the service was rendered. Justice Miller wrote:

“there is no doubt in my mind that pain and suffering can be relieved by the alternative treatments. Sometimes the law leads society in a certain direction, but often times societal behaviour leads the law...it is a matter of the law eventually catching up...and I am hopeful the legislators will do that...[t]hey...are not there yet regarding the types of alternative treatment expenses you seek”¹⁹

Drugs and Medicaments

Section 118.2(2) also provides for a credit for amounts paid for prescription drugs. Specifically, 118.2(2)(n) provides that:

[an amount paid] for drugs, medicaments or other preparations or substances ...manufactured, sold or represented for use in the diagnosis, treatment or prevention of a disease, disorder, abnormal physical state, or the symptoms thereof or in restoring, correcting or modifying an organic function, purchased for use by the patient as prescribed by a medical practitioner or dentist and as recorded by a pharmacist.²⁰

This section has a uniform effect across the country. Only medicines prescribed by a medical practitioner and recorded by a pharmacist are eligible. Over-the-counter medicines and natural health products may be eligible, but only if they have been dispensed by a pharmacist:

The requirements of paragraph 118.2(2)(n) set out above do not preclude claims in respect of drugs and other substances, including vitamins and minerals, which also happen to be available over the counter without a prescription. In our view the cost of the drug or substances described above would only qualify if they were prescribed by a medical practitioner, [are “manufactured, sold, or represented for use in: (i) the diagnosis, treatment or prevention of a disease, disorder or abnormal physical state, or (ii) the treatment of the symptoms of a disease, disorder or abnormal physical state, or (iii) restoring, correcting or modifying an organic function,] and are dispensed by a licensed pharmacist who records the prescription in a prescription record...²¹

¹⁹ *Ibid.* at para. 7-8.

²⁰ *ITA*, *supra* note 1.

²¹ C.R.A. Document no. 2004-0106591E5 (February 10, 2005). Accessed at <www.cchonline.ca>.

This limited exception for the cost of natural health products in certain circumstances offers little or no benefit to consumers of natural health products for three reasons. First, natural health products are often not prescribed by a practitioner with the authority to write a legal prescription. Second, though a doctor may use a prescription pad to record the medication, the pharmacist/pharmacy may sell the medicine without charging a dispensing fee or recording it in a prescription record. Third, the tax benefit of receiving an otherwise non-prescription item as a prescription will often be outweighed by the additional cost of the dispensing fee. Consequently, the METC is effectively unavailable when Canadians use natural health products as an alternative or complement to prescription drugs.

Subsection 118.2(2)(n) has been the subject of numerous court challenges by taxpayers whose METC claims for natural health products have been denied by the CRA. In most cases, the court has upheld the CRA's position (outlined above) and denied claims for natural health products.²² In others, the Tax Court adopted a creative interpretation of s. 118.2(2)(n) to allow a taxpayer's claim for physician-prescribed natural products purchased in a pharmacy, but not dispensed by a pharmacist, and held that a cash register receipt for the purchases constituted sufficient evidence for a claim under subsection 118.2(2)(n).²³ The reasoning in the latter cases has since been overruled by the decision of the Federal Court of Appeal in *Ray v. Canada*.²⁴

Ms. Ray suffered from chronic fatigue syndrome and fibromyalgia. She challenged the CRA's denial of her claim for the cost of physician-prescribed vitamins, herbs, organic and natural foods, and bottled water. The trial judge found as a matter of fact that the prescribed treatments provided significant relief from Ms. Ray's debilitating symptoms and enabled her to live a substantially normal life. He/she went on to find that "[i]f the medications are prescribed by a doctor and they make the difference between life and death or functioning or not functioning, they should fall under paragraph 118.2(2)(n)" and that in such cases, the "recorded by a pharmacist" requirement could be disregarded.²⁵ In a unanimous decision, the Federal Court of Appeal held this conclusion to be an error in law, stating, "it is not open to this court ... to disregard statutory requirements imposed by Parliament, even if they are difficult to rationalize on policy grounds."²⁶ It held that a cash register receipt was insufficient to satisfy the requirement of recording by a pharmacist.

With respect to both medical services and drugs and medicaments, courts have adopted an interpretation of the statutory language that is true to its plain meaning and consistent with the CRA's interpretation of the *Income Tax Act*. This

²² See e.g. *Brown v. Canada*, 2004 TCC 117, [2004] T.C.J. No. 57; *Poesiat v. Canada*, 2003 TCC 515, [2003] T.C.J. No. 503; *Lajeunesse-Lebel v. Canada* [2002] T.C.J. No. 46 .

²³ *Pagnotta v. Canada* [2001] T.C.J. No. 582, [2001] 4 C.T.C. 2613 [*Pagnotta*]; *Frank v. The Queen* [2001] T.C.J. No. 416, [2001] 3 C.T.C. 2596.

²⁴ 2004 D.T.C. 6028, 2004 FCA 1 [*Ray*].

²⁵ *Ray v. The Queen* 2004 DTC 2120 at para 20-21, [2002] T.C.J. No. 500.

²⁶ *Ray, ibid.* at para. 11.

interpretation affords limited room for tax relief for users of complementary and alternative medicine. However, what emerges from the judgments is a theme of compassion for the plight of taxpayers whose quality of life has been substantially improved by the services of alternative practitioners and natural health products. In many cases, the court has invited Parliament to update the METC to include a broader array of eligible products and services, reflecting modern trends in health care. To date, the Department of Finance has not moved to significantly expand the credit in this manner. However, the 2005 budget did include a plan to extend the credit to certain drugs not now covered by paragraph 118.2(2)(n). Under the proposed amendment, drugs purchased under Health Canada's Special Access Programme, which permits purchase of drugs not yet approved for sale in Canada in emergency cases and in cases where there are no appropriate conventional therapies, would be covered. The proposed amendment would also make medical marihuana eligible for the METC.²⁷

In light of the government's slowness in addressing this issue, it is not surprising that individual taxpayers have attempted to force its hand by resorting to the *Charter of Rights and Freedoms*. In particular, taxpayers have argued that the METC provisions violate the equality rights guaranteed by section 15 of the *Charter*. The next section will review this jurisprudence, and then analyse the claim that subsections 118.2(2)(a) and (n) of the *Income Tax Act* discriminate on the grounds of religion and/or ethnicity.

Section 15 of the *Charter*

Subsection 15(1) of the Charter of Rights and Freedoms provides:

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.²⁸

The Supreme Court of Canada's unanimous decision in *Law v. Canada* is the leading case on how to analyze section 15 claims.²⁹ It provides that a rights claimant must meet three criteria in order to establish a violation:

First, does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential

²⁷ Canada, Department of Finance, "Budget 2005 Budget Plan, Annex 8: Tax Measures Supplementary Information", online: Department of Finance <www.fin.gc.ca/budget05/bp/bpa8ae.htm#disability>.

²⁸ *Charter*, *supra* note 5.

²⁹ [1999] 1 S.C.R.497, 170 D.L.R. (4th) 1 [Law].

treatment between the claimant and others on the basis of one or more personal characteristics? If so, there is differential treatment for the purpose of s. 15(1).³⁰

Thus, the impugned provision may make explicit reference to a personal characteristic, for example, age. Alternatively, though neutral on its face, it may have the effect of disadvantaging the claimant on the basis of some personal characteristic. An example of the latter is *British Columbia v. BCGSEU*, in which the physical requirements for forest firefighters were found to discriminate against women.³¹ Though the fitness requirements made no explicit reference to sex, they were unattainable by most women and were not established to be necessary for effective performance of the job.

At this first stage of the *Law* test, the rights claimant must identify the personal characteristic upon which the impugned law allegedly discriminates. Also, since equality is an inherently relative concept, the claimant must identify a comparator group, which will be made up of those the law is said to treat more favourably. “The comparator group should mirror the characteristics of the claimant or claimant group relevant to the benefit or advantage sought, except for the personal characteristic related to the enumerated or analogous ground raised as the basis for the discrimination.”³² If the court disagrees with the appropriateness of the personal characteristic and comparator group identified by the claimant, it may refine the comparison.³³

Once the comparator group has been determined, the court will proceed to the second stage of the analysis:

Second, was the claimant subject to differential treatment on the basis of one or more of the enumerated and analogous grounds?³⁴

³⁰ *Ibid.* at para. 39.

³¹ *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees’ Union (B.C.G.S.E.U.)*, [1999] 3 S.C.R. 3, 176 D.L.R. (4th) 1 [*BCGSEU*].

³² *Hodge v. Canada (Minster of Human Resources Development)*, 2004 SCC 65, [2004] 3 S.C.R. 357.

³³ The Supreme Court did just this in *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, 2004 SCC 78, [2004] S.C.R. 657. *Auton* involved a section 15 challenge to the BC government’s decision not to fund a particular treatment for autism. The rights claimant argued that the failure to fund the treatment constituted discrimination on the grounds of mental disability and argued that the appropriate comparator group was non-disabled children and their parents, as well as adult persons with mental illness. Lower courts accepted this characterization, but on appeal to the Supreme Court of Canada, the Court found that appropriate comparator group was “a non-disabled person or a person suffering a disability other than a mental disability (here autism) seeking or receiving funding for a non-core therapy important for his or her present and future health, which is emergent and only recently becoming recognized as medically required.” Though the case was disposed of on other grounds, adding the recent and emergent element of the therapy into the analysis would have been fatal to *Auton*’s case because the comparator group also did not receive funding for non-core recent and emergent therapies.

³⁴ *Law*, *supra* note 29 at para. 39.

In addition to enumerated grounds such as race and religion, section 15 prohibits discrimination based on analogous personal characteristics that are either unchangeable or that the law cannot reasonably expect a person to change. Examples of personal characteristics found to be analogous grounds in past cases include homosexuality, citizenship, and aboriginality/residence.³⁵ However, not every immutable personal characteristic will constitute an analogous ground. As observed by Wilson J. in her majority reasons in *R. v. Turpin*:

In determining whether there is discrimination on grounds relating to the personal characteristics of the individual or group, it is important to look not only at the impugned legislation which has created a distinction that violates the right to equality but also to the larger social, political and legal context ... A finding that there is discrimination will ... in most but perhaps not all cases, necessarily entail a search for disadvantage that exists apart from and independent of the particular legal distinction being challenged.”³⁶

This approach led her to the conclusion that province of residence was not an analogous ground in the case at bar because the category of persons disadvantaged by the law, persons charged with murder outside Alberta, did not constitute a historically disadvantaged group. Consequently, even though the impugned provisions resulted in unequal treatment, they were found not to be discriminatory in purpose or effect.³⁷ In contrast, where the personal characteristic in question is associated with prior disadvantage, that characteristic is more likely to constitute an analogous ground.

Given its significance in the METC context, it is appropriate to elaborate briefly on province of residence as a possible analogous ground. Though Wilson J. rejected it as an analogous ground in *Turpin*, she was careful to say that she “would not wish to suggest that a person’s province of residence...could not in some

³⁵ See *Vriend v. Alberta*, [1998] 1 S.C.R. 493, 156 D.L.R. (4th) 385 (homosexuality); *Law Society British Columbia v. Andrews*, [1989] 1 S.C.R. 143, 56 D.L.R. (4) 1 (citizenship); *Corbierre v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, 173 D.L.R. (4th) 1 (aboriginality-residence).

³⁶ *R. v. Turpin*, [1989] 1 S.C.R. 1296, 48 C.C.C. (3d) 8 at para. 45 [*Turpin*]. This case was a section 15 challenge to sections of the Criminal Code that provided that persons charged with murder were to be tried by judge and jury, except in Alberta, where an accused could elect to be tried by a judge alone. The accused, who had been charged with murder in Ontario, argued that the provisions discriminated against him based on his province of residence. The approach outlined in the quote above led Wilson J. to the conclusion that province of residence was not an analogous ground in this case, because persons charged with murder outside Alberta did not suffer prior disadvantage.

³⁷ The requirement that the personal characteristic in question constitute an ‘analogous ground’ has been the subject of much criticism. Some commentators argue that section 15 should also protect against discrimination based on a consideration of the specific circumstances of the claimant, the position taken by L’Heureux-Dube J. in *Egan v. Canada* [1995] 2 S.C.R. 513, 124 D.L.R. (4th) 609. They argue that this more flexible approach would better protect vulnerable groups. See Daphne Gilbert, “Time to Regroup: Rethinking Section 15 of the Charter” (2003) 48 McGill L.J. 627. Such an approach would strengthen a section 15 claim in the METC context, but given that *Law* remains the leading case, that analysis is beyond the scope of this paper.

circumstances be a personal characteristic of the individual or group capable of constituting a ground of discrimination.”³⁸ She did not elaborate on what those circumstances might be.

Province of residence is different from other characteristics previously held to constitute analogous grounds because it is neither unchangeable nor infrequently changed. People can and do change their province of residence all the time. For this reason, Peter Hogg argues that province of residence is a matter of personal choice and should, therefore, never constitute an analogous ground.³⁹ A contrary position is taken by Gibson, who emphasizes “the powerful deterrents to migration that so frequently exist in the real world.”⁴⁰ This latter view rings true if we consider the position of a seventy year-old resident of a rural community who has all of her family and friends living nearby. In such a case, it seems somehow inaccurate to characterize her province of residence as merely a matter of personal choice. However, even if province of residence could constitute an analogous ground on this reasoning, a claimant would still have to satisfy the third element of *Law*:

[D]oes the differential treatment discriminate in a substantive sense, bringing into play the *purpose* of s. 15(1) of the *Charter* in remedying such ills as prejudice, stereotyping, and historical disadvantage?⁴¹

Iacobucci J.’s reasons go on to provide further guidance on how to answer this question:

It may be said that the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.⁴²

In other words, if the law makes a distinction, based on an enumerated or analogous ground, that is discriminatory in the sense that it is injurious to the claimant’s human dignity or treats him as less deserving of consideration than others, it will violate section 15. This assessment has both a subjective and objective component. It must be conducted from the point of view of the reasonable person “dispassionate and fully apprised of the circumstances, possessed of similar attributes to, and under similar circumstances as, the claimant.”⁴³ In considering the question, the court will

³⁸ *Turpin*, *supra* note 36 at 1333.

³⁹ Peter W. Hogg, *Constitutional Law of Canada: 2005 Student Edition* (Scarborough, Ont.: Thomson Carswell, 2005) at 1136.

⁴⁰ Dale Gibson, *The Law of the Charter: Equality Rights* (Calgary, Alta.: Carswell, 1990) at 159.

⁴¹ *Law*, *supra* note 29 at para. 39.

⁴² *Ibid.* at para. 51.

⁴³ *Ibid.* at para. 60.

look to the following (non-exhaustive) list of contextual factors, to the extent that each is relevant in the particular circumstances:

- A) Pre-existing disadvantage, stereotyping, prejudice, or vulnerability experienced by the individual or group at issue...
- B) The correspondence, or lack thereof, between the ground or grounds on which the claim is based and the actual need, capacity, or circumstances of the claimant or others ...
- C) The ameliorative purpose or effects of the impugned law upon a more disadvantaged person or group in society...
- D) The nature and scope of the interest affected by the impugned law.⁴⁴

Despite the extensive guidance *Law* provides on how to determine whether an impugned law has violated human dignity, the Supreme Court judges continue to come to jarringly different conclusions about whether there has been discrimination in particular cases.⁴⁵ The disagreement appears to stem from the extent to which different judges expect the reasonable rights claimant to be aware of the considerations the court will address in section 1 (e.g. larger public policy and fiscal concerns). *Lavoie v. Canada* is one example.⁴⁶ It involved a challenge to preferential treatment of Canadian citizens in hiring for public service jobs. In the result, the provision was upheld, with some judges finding no section 15 violation and others finding that it was saved by section 1. Arbour J., who concurred in the result but dissented on the section 15 question, found that a reasonable (non-citizen) rights claimant would not perceive the preferential hiring provision as injurious to her human dignity:

Virtually all liberal democracies impose citizenship-based restrictions on access to their public services. These restrictions indicate widespread international agreement that such restrictions do not implicate the essential human dignity of non-citizens and that the partial and temporary difference of treatment imposed by these restrictions is not discriminatory.⁴⁷

In Mr. Justice Arbour's view, the reasonable rights claimant would both be aware of and in agreement with this widespread international acceptance that a law that disadvantages non-citizens with respect to public sector employment does not violate human dignity. In coming to the opposite conclusion, Bastarache J. emphasized the importance of employment to livelihood and sense of self-worth, the lack of any apparent link between citizenship and the ability to perform a particular job,

⁴⁴ *Ibid.* at para. 88.

⁴⁵ See *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 S.C.R. 429; *Lavoie v. Canada* 2002 SCC 23, [2002] 1 S.C.R. 769 [*Lavoie*].

⁴⁶ *Lavoie, ibid.*

⁴⁷ *Lavoie, ibid.* at para. 101.

and the reasonable association of the distinction with “stereotypical assumptions about loyalty and commitment to the country.”⁴⁸

Thus, the unanimous acceptance of a three-step test against which equality claims are to be assessed has done little to increase the predictability of outcomes in section 15 cases that reach the third stage of the *Law* test. However, the foregoing summary of the court’s approach to section 15 claims will assist in the examination of potential equality challenges to the METC.

Prior to proceeding with that examination, I note that even if a rights claimant is able to establish a section 15 violation, the legislation may still be upheld if it complies with section 1:

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.⁴⁹

I will not undertake a detailed analysis of section 1 because, as the discussion that follows will show, it is unlikely that any claimant will succeed in showing that either s. 18.2(2)(a) or (n) violate equality rights under the *Charter*.⁵⁰

Section 15 and the Medical Expense Tax Credit

The Tax Court of Canada has applied the *Law* criteria in a number of cases in which taxpayers challenged the constitutionality of subsections 118.2(2)(a) and (n).⁵¹ In every case, the court has found that the provisions do not violate section 15. Both the arguments made by the taxpayer and the Court’s reasons vary according to whether the taxpayer was making a claim for medical services (subparagraph 118.2(2)(a)) or drugs/medicaments (subparagraph 118.2(2)(n)). I will therefore summarize the Charter reasoning in two representative cases.

Noddin v. The Queen is a New Brunswick case in which the Appellant, who suffered from severe chronic pain, challenged CRA’s denial of her claim for massage therapy expenses under paragraph 118.2(2)(a).⁵² The therapy was received

⁴⁸ *Lavoie, ibid.* at para. 52.

⁴⁹ *Charter, supra* note 5.

⁵⁰ Whether an impugned provision is a reasonable limit justified in a free and democratic society is determined according to the test set out in *R. v. Oakes*, [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200. To be saved by section 1, a law that violates a *Charter* right must have a pressing and substantial objective, and the means chosen to achieve that objective must be proportional to its importance. Proportionality will be assessed by addressing three questions. First, is there a rational connection between the measure and the objective? Second, does the measure impair the right or freedom as little as possible? Third, is there proportionality between the effects of the measure and the substantial and pressing objective?

⁵¹ See *Noddin v. Canada*, 2004 D.T.C. 3577, 2004 TCC 687 [*Noddin*]; *Pagnotta, supra* note 20; *Lewis v. Canada*, 2004 TCC 237 [*Lewis*], 2004 TCJ 145; *Laurie v. Canada*, 2003 TCC 105, [2003] 3 C.T.C. 2369.

⁵² *Noddin, ibid.*

in New Brunswick, where massage therapists are unregulated. Consequently, despite the fact that the massage therapist in this case was authorized to practice under Ontario law, her fee did not qualify for the METC. Ms. Noddin claimed that this constituted discrimination based on her province of residence.

The court took the view that the law did not discriminate on the basis of province of residence, since a New Brunswick resident would be entitled to the medical expense tax credit for massage therapy services received in a province where those services were regulated. Thus, the law made no distinction with respect to any personal characteristic of the taxpayer. The court found that the distinction made by the law was whether there was “some legislated assurance of competence of the person administering the service.”⁵³ It went on to find, citing *Turpin*, that even if the law had distinguished on the basis of province of residence, there was no basis to consider it an analogous ground under section 15. Finally, it held that even if the first two elements of *Law* had been satisfied, the denial of Ms. Noddin’s claim due to an absence of provincial regulation “could not be said to have the effect of treating [her] as less worthy of concern or respect, or in a way that offends her human dignity.”⁵⁴

The Charter analysis in *Noddin* is brief and formalistic. Although Ms. Noddin would have been entitled to the METC if she had received treatment in Ontario, the cost of traveling to Ontario for that purpose would likely far exceed the value of the credit. Thus, even if the provision does not make a formal distinction based on province of residence, this is its effect. Though effects-based discrimination normally requires prior disadvantage, the effect in this case is so direct that it could credibly be argued to be a formal distinction. Alternatively, a claimant might argue an adverse effects claim based on historical disadvantage associated with New Brunswick’s status as a poorer, less populous province.

In addition to finding that the provision made no distinction on the basis of province of residence, the court went on to say, based on *Turpin*, that province of residence *could not* be an analogous ground. The court did not even acknowledge Judge Wilson’s assertion that the finding in *Turpin* did not foreclose the possibility of province of residence constituting an analogous ground in a different case.⁵⁵ Again, New Brunswick’s status as one of the poorer, less populous provinces could support an argument in favour of province of residence as an analogous ground. The limited resources of the government may constrain New Brunswick’s ability to enact regulatory regimes even if it might wish to do so. Moreover, the smaller population base supports fewer practitioners, which may foreclose the possibility that regulatory regimes could be financed by the license fees of practitioners.

⁵³ *Ibid.* at para. 8.

⁵⁴ *Ibid.* at para. 10.

⁵⁵ *Supra* note 36 and accompanying text.

In the end, even if the court had engaged in a more nuanced analysis of the first two criteria, it would likely have come to the same conclusion on the province of residence question. In addition, Ms. Noddin would have failed to meet the third element of the *Law* test, because subsection 118.2(2)(a) did not treat her as less deserving of concern or respect in a manner that offended her human dignity. The clear policy objective of the provision, as noted by the court, is to make the credit available only where there is some “legislated assurance of competence of the person providing the service.” In other words, public safety is the underlying reason for the distinction. The federal government has limited ability to obtain assurance of competence by any means other than provincial regulation because it does not have the constitutional authority to regulate in this area.⁵⁶ A reasonable person in Ms. Noddin’s position, aware of these constraints, would be unlikely to view her effective exclusion from the METC as a violation of her human dignity. Consequently, the exclusion of fees paid to unregulated practitioners is unlikely to constitute a violation of section 15 equality rights on the ground of province of residence.

The other case, *Lewis v. Canada*, is fairly representative of section 15 claims challenging paragraph 118.2(2)(n), the credit for prescription drugs. Ms. Lewis suffered from multiple chemical sensitivities, chronic fatigue syndrome, and fibromyalgia. The CRA denied her claim for doctor-prescribed vitamins and supplements on the grounds that they did not meet the requirements of subsection 118.2(2)(n). Ms. Lewis argued, unsuccessfully, that the provision violated section 15 by discriminating on the basis of her medical condition. The court held that the impugned provision did not draw a distinction based on medical condition; in order to qualify for the credit, any Canadian with any medical condition would have to meet the “recorded by a pharmacist” requirement in paragraph 118.2(2)(n). Ms. Lewis was thus unable to meet the first element of the *Law* test.⁵⁷

Since the drug credit provision draws no formal distinction based on a personal characteristic, a rights claimant could only establish a section 15 violation if he could show that the provision “fail[ed] to take into account his already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics.”⁵⁸ Frank Tall’s claim, based on ethnicity and/or religion, would be similarly structured. Specifically, he would have to argue that a law which denies a tax credit for natural health products to all Canadians unfairly disadvantages those Canadians who, due to religion or ethnicity, are substantially more likely to use them.

⁵⁶ By virtue of subsections 92(13) (property and civil rights) and 92(16) (matters of a merely local or private nature) of the *Constitution Act, 1867* (U.K.) 30 & 31 Vict. c. 3, reprinted in R.S.C. 1985, App. II, No. 5, regulation of health care professionals is within the sphere of authority of the provinces.

⁵⁷ *Lewis*, *supra* note 51.

⁵⁸ *BCGSEU*, *supra* note 30 and accompanying text.

However, any rights claimant who sought to argue that some groups are more likely to use natural health products due to their religion and/or ethnic background would have to establish this with evidence unless the truth of his section assertion was self-evident.⁵⁹ For Mr. Tall this will likely be an insurmountable challenge. Buddhism emerged approximately 2,500 years ago in India. Homeopathy originated in Europe in the late 18th century. There is no historical connection between them. Buddhist philosophy accepts traditional allopathic medicine as a useful tool in combating illness, but it holds that overall health also requires attention to be paid to spirituality:

Buddhism in no way rejects modern medicine and the powerful array of diagnostic and therapeutic tools at its disposal. Rather, it states that these can be put to most effective use in combating illness when based on, and reinforced by, a deeper understanding of the inner, subjective processes of life.

Central to the Buddhist approach to health and healing is its emphasis on spiritual strength and an overriding sense of purpose, or mission, in life based on compassionate action for others.

...the Buddhist understanding of health sees disease as a reflection of the total somatic system, or life itself, and seeks to cure it through a fundamental reorientation of a person's life-style and outlook.⁶⁰

Buddhist philosophy does not prescribe homeopathic medicine as a sole or even preferred method of treatment. Consequently, a section 15 claim alleging that Buddhists are particularly disadvantaged by the exclusion of homeopathic services and treatments from the METC is likely to fail. Any other claim based on ethnicity would be equally weak unless the claimant could marshal evidence to show that persons of the ethnicity in question are particularly disadvantaged by the denial of a tax credit for alternative medicine. Logically, any such claim would also have to rely on a link between ethnicity and culture, or on the argument that conventional medical treatments are less effective on members of that ethnicity. Given the multicultural nature of Canada, which tends to undermine any assertion of direct correspondence between ethnicity and culture, and the absence of any evidence that conventional medicine is less effective for any individual ethnic group, a Charter challenge to the METC on this ground is almost certain to fail.

One can imagine other equality claims based on ethnicity or religion that are an intuitively better fit than the claim made by Mr. Tall. For example, a Chinese user of Traditional Chinese Medicine (TCM) may feel that there is an element of ethnic or cultural discrimination in the METC's exclusion of unregulated practitio-

⁵⁹ *Law, supra* note 29 at para. 77.

⁶⁰ "Buddhism and Health: Healing the Ills of Body and Spirit", online: (October 1996) Soka Gakkai International Quarterly <http://sokagakkai.info/html/viewpoint1/today1/budd_health1.html>.

ners and natural health products. However, such a claimant would still face significant obstacles in meeting the first of the *Law* criteria. Again, the first element of the *Law* test asks whether

the impugned law (a) draw[s] a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail[s] to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?⁶¹

As noted, the METC provisions in question draw no formal distinctions on the basis of personal characteristics (with the possible exception of province of residence).⁶² A successful claimant must therefore establish that the provisions result in differential treatment on the basis of a personal characteristic associated with prior disadvantage. Persuading the court that Chinese ethnicity was the relevant personal characteristic would be a significant problem for our hypothetical rights claimant for at least two reasons. First, the court would likely want some evidence that a substantial number of Chinese in Canada do use TCM. Though the court might be willing to take judicial notice that most people who use TCM are Chinese, it does not follow that most, or even a substantial proportion of Chinese do so.⁶³ Second, since the METC denies a tax credit for a wide array of alternative medical services and treatments used by persons of all ethnic groups, it would also be difficult to establish that Chinese persons are disproportionately disadvantaged as compared to non-Chinese.

Are there any other equality grounds on which a claimant might successfully challenge the METC? It is striking that so many of the litigants in cases challenging sections 118.2(2)(a) and (n) suffer from environmental/chemical sensitivities, chronic fatigue syndrome, and/or fibromyalgia. These are all chronic conditions for which conventional medicine often fails to provide relief. Thus, a claimant might attempt to argue a claim on the grounds that the relevant personal characteristic is 'persons who suffer from serious medical conditions that do not respond well to conventional medical treatment.' The appropriate comparator group might be articulated as 'persons who suffer from serious medical conditions that respond well to conventional medical treatment.' The claimant would argue that a person in latter group is entitled to a tax credit for his out-of-pocket medical expenses, a benefit denied to the claimant, who may accumulate thousands of dollars in expenses annually for natural health products.⁶⁴

⁶¹ *Law*, *supra* note 29 at para. 39.

⁶² See *supra* note 51 and accompanying text.

⁶³ It is unlikely that any relevant reliable data has thus far been collected. Researchers working on the York University study, the most comprehensive study of complementary and alternative therapy conducted in Canada conducted to date, were unable to obtain the co-operation of ethnocultural organizations in gathering similar information. *Supra* note 5.

⁶⁴ This analysis will focus on the credit for prescription drugs rather than services. If services were added

This would be an adverse effects claim since the legislation makes no explicit distinction based on whether a taxpayer's condition is responsive to conventional medical treatment. Consequently, the taxpayer would have to establish that persons who suffer from medical conditions not responsive to conventional treatment suffer from prior disadvantage. This would be a significant challenge, but not the only one. There are also problems with the articulation of the personal characteristic/comparator group. For example, taxpayers suffering from medical conditions that are responsive to conventional medical treatment also do not qualify for the credit if their medicine is obtained over-the-counter. These taxpayers are also disadvantaged by the 'recorded by a pharmacist' requirement.

However, the most significant hurdle in persuading a court to accept this articulation of the personal characteristic and comparator group is related to other characteristics of typical consumers of complementary and alternative medicine. Surveys indicate that its heaviest users are persons with higher levels of education and income.⁶⁵ This is hardly surprising, since lower income Canadians are less likely to have the financial resources to pay for medical treatment outside the publicly funded health care system. Faced with this evidence, a court might be inclined to refine the rights claimants' characterization of personal characteristic and comparator group. Specifically, it might find that the distinction effectively made by the law is 'persons who suffer from a medical condition that is not responsive to conventional medical treatment *and* who can afford to pay out-of-pocket for alternative treatments not covered by public insurance.' The effect of such a finding would no doubt be fatal to the claim. Section 15 is meant to protect society's disadvantaged and marginalized, not its affluent and educated. Using it to protect the interests of higher-income Canadians by expanding the METC would be inconsistent with that purpose.

Even if the claim were to pass the first stage of the *Law* test, it would fail on the second and third criteria. The lack of prior disadvantage in an adverse effects claim would likely be enough in the circumstances to prevent a finding of analogous grounds. Moreover, the rational and informed (well-educated) rights claimant would arguably understand that, rather than indicating a disrespect for the human dignity of the claimant, the ineligibility of non-prescription treatments reflects the a time lag between social change and legislative response. The section was written at a time when it was not foreseen that significant numbers of people would be spending thousands of dollars a year on natural health products. It was also written

to the mix, the claimant would have to attempt to establish a claim based a combination of characteristics, in this case, province of residence and a medical condition not responsive to conventional treatment. Intersectional claims have been successful in the past. One example is *Corbierre*, *supra* note 35 where a status Indian living off reserve who was denied the right to vote in band council elections was successful in establishing a claim based on the ground of aboriginality residence. In this context, the claimant would have to refute the finding in *Noddin* that s. 118.2(2)(a) does not discriminate based on province of residence. *Noddin*, *supra* note 51.

⁶⁵ *York University CAM Study*, *supra* note 8 at xiii.

long before the federal government began regulating those products as a means to ensure their safety.

There is one final note related to human dignity. As noted above, cosmetic surgery and a wide range of cosmetic procedures are currently eligible for the METC while some alternative medical services and natural health products are not. There is a reasonable argument that a tax credit scheme that includes tooth whitening, but excludes the services of a midwife (in four provinces), is incompatible with treating all persons (women?) with equal respect, concern, and human dignity. However, in the context of a section 15 claim, a litigant would have similar problems to those discussed above in articulating a comparator group that the court could accept. I will not analyze this claim in depth, as I suspect that the prospect of such a lawsuit would probably provide the requisite motivation for the federal government to follow Quebec's lead in making cosmetic procedures ineligible, thereby undermining the claim.⁶⁶

The exclusion of natural health products and some complementary and alternative medical services from the medical expense tax credit may be flawed public policy, but it does not discriminate within the meaning of section 15 of the *Charter*. Nonetheless, it is past time for Parliament to reconsider the list of eligible expenses. As the Tax Court has acknowledged, social change often leads legal change. It is time for Parliament to catch up.

A Case For Legislative Reform

[S]ooner or later the government will have to consider an amendment to this legislation to extend the tax credit to cover the natural remedies and alternative forms of treatment that are becoming prevalent, and are proving to be effective in certain cases. The distinction made by the law has no apparent medical basis. The situation cries out for reform.⁶⁷

Studies reflect the increasing importance of complementary and alternative medicine as an integral part of the Canadian health care system. A 1999 study by the Fraser Institute indicated that 73% of Canadians have used alternative therapies in their lifetime.⁶⁸ The Canadian AIDS Society estimates that 18 to 39% percent of persons with HIV rely on various alternative therapies and supplements to manage the side effects of their illness, with some individuals spending up to \$250 per month on these treatments.⁶⁹ As noted above, private and group health insurance

⁶⁶ See *supra* note 16.

⁶⁷ *Claussen v. The Queen* [2003] T.C.J. No. 15, [2003] 2 C.T.C. 2363.

⁶⁸ Cynthia Ramsey, Michael Walker & Jared Alexander, The Fraser Institute, "Alternative Medicine in Canada: Use and Public Attitudes", online: (March 1999) 21 Public Policy Sources <[http://www.fraserinstitute.ca/admin/books/files/Altmed\(v8\).pdf](http://www.fraserinstitute.ca/admin/books/files/Altmed(v8).pdf)>. Note however, that this study included prayer as an alternative therapy.

⁶⁹ Canadian AIDS Society, "HIV and Disability Policy: Evaluating the Disability Tax Credit and

plans have added coverage for alternative therapies and Workers Compensation Boards often cover these services. Finally, courts have repeatedly acknowledged the profound impact complementary and alternative medicine can have in improving the lives of those with medical conditions that have not responded well to conventional medical treatment.

There is also a growing body of scientific evidence supporting the effectiveness of complementary and alternative therapies. For example, natural health products have been found to aid in the prevention and treatment chronic disease: calcium supplements can reduce the incidence of hip fractures; folic acid can prevent serious and costly birth defects; and omega-3 fatty acids can have a beneficial effect on cardiovascular disease.⁷⁰ Other studies have shown that acupuncture increases effectiveness of *in vitro* fertilization, decreasing the number of treatments required to achieve a pregnancy.⁷¹ Thus, in addition to the prevention and/or mitigation of common medical ailments, complementary and alternative treatments may offer the promise of substantial savings to the public health care system.⁷²

Effectiveness and economics ground a strong argument for the inclusion of some complementary and alternative therapies as fully insurable services under the public health care system, where they would also be available to those who cannot afford their cost. As noted above, some provincial health plans already do fund certain non-traditional treatments, but where these are not covered, the METC provides a significant incentive for individuals to expend private resources on alternative therapies.⁷³ And if additional tax relief encourages the use of supplements that lower the risk of developing costly illnesses later, or treatments that ultimately reduce reliance on publicly insured services, then expanding the METC could be one means of addressing rapidly increasing health care costs.

Medical Expense Tax Credit: A Brief Prepared for the Technical Advisory Committee on Tax Measures for Persons with Disabilities” (August 2003), online: Canadian AIDS Society <<http://www.disabilitytax.ca/subs/cas-e.pdf>>.

⁷⁰The Lewin Group, “Improving Public Health, Reducing Health Care Costs: An Evidence Based Study of Five Dietary Supplements” (September 2004), online: Dietary Supplement Information Bureau <<http://www.supplementinfo.org/images/healthimpactssummaryfinal.pdf>>.

⁷¹See for example W. Paulus, “Influence of Acupuncture on the Pregnancy Rate in Patients Who Undergo Assisted Reproduction Therapy” (2002) 77:4 Fertility and Sterility 721; “Acupuncture Benefits for Fertility” (May 3, 2006), online: University of Adelaide <www.adelaide.edu.au/news/news11641.html>.

⁷²One study estimates savings of \$6 billion annually in the treatment of cardiovascular disease with daily use of omega 3 fatty acids, flaxseed and folic acid. See Bruce Holub, “A New Direction in Health Care: Preventative model for health care using functional foods, nutraceuticals desperately needed in Canada” (2002), online: University of Guelph <<http://www.uoguelph.ca/hb+ns/UNIV1200W05/UNIV1200W05HolubPreventiveModelCanada.pdf>>.

⁷³Research has shown that individuals’ health care spending choices are influenced by changes in the tax price of the care. See Michael Smart & Mark Stabile, “Tax Credits, Insurance, and the Use of Medical Care” (2005) 38 Canadian Journal of Economics 345 at 348.

However, even if questions remain about the efficacy of some forms of complementary and alternative medicine, there are other compelling reasons for the federal government to expand the METC. One is that the current system provides indirect tax relief for these services to those who access them through employer-provided group health insurance schemes at work. Unlike most benefits of employment, employees are not taxed on the value of these insurance plans.⁷⁴ The failure to accord a similar tax break to Canadians who pay out-of-pocket for these services violates a basic tax policy principle — horizontal equity, which holds that persons in similar positions should be taxed similarly.⁷⁵ The link between provincial regulation and availability of the credit also violates this principle.

Moreover, the federal government has stated the following with respect to the *Natural Health Product Regulations*, which came into force January 1, 2004:⁷⁶

These Regulations are intended to ensure that all Canadians have ready access to natural health products that are safe, effective and of high quality, *while respecting freedom of choice and philosophical and cultural diversity.* (emphasis added)⁷⁷

If autonomy and cultural diversity are important values, and a tax credit makes the choice to use natural health products more economically feasible, it makes sense to extend s. 118.2(2)(n) to include natural health products. In order to take advantage of the safety assurance that the licensing scheme provides, the legislation could specifically permit a credit only for NHPs licensed under the *Regulations*.⁷⁸

⁷⁴ *ITA*, *supra* note 1 at subpara. 6(1)(a)(i).

⁷⁵ Tim Edgar & Daniel Sandler, eds., *Materials on Canadian Income Tax*, 13th ed. (Scarborough, Ont.: Thomson Carswell, 2005) at 66.

⁷⁶ SOR/2003-196. Section 1 defines natural health products as follows:

“natural health product” means a substance set out in Schedule 1 or a combination of substances in which all the medicinal ingredients are substances set out in Schedule 1, a homeopathic medicine or a traditional medicine, that is manufactured, sold or represented for use in

- (a) the diagnosis, treatment, mitigation or prevention of a disease, disorder or abnormal physical state or its symptoms in humans;
- (b) restoring or correcting organic functions in humans; or
- (c) modifying organic functions in humans, such as modifying those functions in a manner that maintains or promotes health.

However, a natural health product does not include a substance set out in Schedule 2, any combination of substances that includes a substance set out in Schedule 2 or a homeopathic medicine or a traditional medicine that is or includes a substance set out in Schedule 2.

Schedule 1 includes plant materials, fungus, algae, many vitamins, amino acids, essential fatty acids, minerals, and probiotics. This represents a substantial part of the pharmacopoeia of alternative medical practitioners. These products must be available over-the-counter, which forecloses the possibility that they would be issued pursuant to a prescription and recorded by a pharmacist.

⁷⁷ Health Canada, *Overview of the Natural Health Products Regulations Guidance Document*, online: Health Canada

<http://www.hc-sc.gc.ca/dhp-mps/prodnatur/legislation/docs/regula-regle_over-apercu_e.html>.

⁷⁸ Similar reasoning can be employed to argue that over-the-counter drugs should also be eligible for the METC. Most healthy Canadians are unlikely ever to spend enough to qualify for the credit. But for those who do, what is the rationale for excluding over-the-counter drugs or NHPs? The most obvious reason is

Limiting the credit to regulated products would also ensure that expanding the credit would not lead to a slippery slope toward credits for other items such as organic food and bottled water.

Safety would still be a concern with respect to alternative medical services. Under the current legislation a service provider is a “medical practitioner” under subsection 118.4(2) only if she is authorized to practice by provincial legislation. This reflects a reasonable desire not to implicitly endorse unregulated practitioners who may be providing substandard service. It may also reflect a desire to minimize fraud.⁷⁹ However, it is problematic that the federal tax regime directly disadvantages residents of provinces that do not regulate. Of course, the federal government does not have the constitutional authority to engage in direct regulation of health care providers, but it could pursue other avenues, including accepting authorization to practice in any province or completion of an accredited educational program as sufficient to render services creditable in unregulated jurisdictions.⁸⁰ Expansion of the credit in this manner is not unprecedented; since its inception in 1942, the METC has undergone numerous amendments to expand the number of goods and services that qualify for the credit.

Fairness considerations aside, exclusion of natural health products and some alternative medical services reflects an antiquated model of health care that is out of step with the range of services now available and the actual health care needs of Canadians. This exclusion undermines the very purpose of the credit: providing tax relief to Canadians who face an onerous financial burden due to out-of-pocket expenses for medical treatment. The federal government should move quickly to expand the medical expense tax credit to include natural health products and begin looking for ways to remove the inequities created by the linking of eligibility of alternative medical services to provincial regulation.

that it would be unduly costly for the CRA to receive and process large numbers of receipts for negligible amounts of money.

⁷⁹ It would be comparatively difficult to hold an unregulated practitioner accountable for aiding a taxpayer to claim more for the METC than he actually spent for medical services due to the absence of a governing body with the authority to discipline unethical/criminal practitioners.

⁸⁰ See David G. Duff, “Disability and the Income Tax” (2000) 45 McGill L.J. 797 at 813 for a summary of the history of the METC.

Appendix: Legislation regulating complementary and alternative health professions in Canadian provinces

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| Alberta | <i>Chiropractic Profession Act</i> , R.S.A. 2000, c. C-13 <i>Health Disciplines Act</i> , R.S.A. 2000, C. H-2 <i>Acupuncture Regulation</i> , Reg. 42/88 <i>Midwifery Regulation</i> , Reg. 328/94 |
| British Columbia | <i>Chiropractors Act</i> , R.S.B.C. 1996, c. 48 <i>Health Professions Act</i> , R.S.B.C. 1996, c. 183 <i>Massage Therapists Regulation</i> , Reg. 484/94 <i>Midwives Regulation</i> , Reg. 103/95 <i>Naturopathic Physicians Regulation</i> , Reg. 449/99 <i>Traditional Chinese Medicine and Acupuncturists Regulation</i> , Reg. 385/2000 |
| Manitoba | <i>The Chiropractic Act</i> , C.C.S.M. c. C100 <i>The Midwifery Act</i> , C.C.S.M. c. M125 <i>The Naturopathic Act</i> , C.C.S.M. c. N80 |
| Ontario | <i>Chiropractic Act, 1991</i> , S.O. 1991, c. 21 <i>Drugless Practitioners Act</i> , R.S.O. 1990, c. D.18 (naturopaths) R.R.O. 1990, Reg. 278. <i>Massage Therapy Act, 1991</i> , S.O. 1991, c. 27 <i>Midwifery Act, 1991</i> , S.O. 1991, c. 31 |
| New Brunswick | <i>The Chiropractors Act, 1997</i> , S.N.B. c. 69. |
| Newfoundland | <i>Chiropractors Act</i> , R.S.N.L. 1990, c. C-14 <i>Midwifery Act</i> , R.S.N.L. 1990, c. M-11 <i>Massage Therapy Act, 2005</i> S.N.L. 2005 c. M-1.2 |
| Nova Scotia | <i>Chiropractic Act</i> , S.N.S. 1999 (2 nd session), c. 4 |
| Quebec | <i>An Act Respecting Acupuncture</i> , R.S.Q. c. A-5.1 <i>Chiropractic Act</i> , R.S.Q. c. C-16 <i>Midwives Act</i> , R.S.Q. c. S-0.1 |
| Prince Edward Island | <i>Chiropractic Act</i> , R.S.P.E.I. 1988, c. C-7.1 |
| Saskatchewan | <i>The Chiropractic Act</i> , 1994, S.S. 1994, c. C-10.1 <i>The Naturopathy Act</i> , R.S.S. 1978, c. N-4 <i>An Act respecting Midwives</i> , Bill No. 44 of 1999 (not in force) |

