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SQUEEZING BLOOD FROM STONES:  
THE INCOME TAX INDUSTRY IN CANADA

Lorne Sossin*

I. INTRODUCTION
To discourage the use of credit as a subsistence income supplement requires policies that promote stable economic growth and employment opportunities for all social and economic classes and, ultimately, a guaranteed annual income. Regulation of the debtor-creditor relationship will not touch the heart of the problem of overcommitment: insufficient income.¹

[T]ax rebate discounting is socially unacceptable. The industry creates its own demand, it exploits the poor and it exploits fear. There are no benefits, social or economic, to be gained from discounting, except for those who profit from it. ... By taking their customer’s money, tax discounters do not perform a service, they only reinforce their impoverishment and powerlessness.²

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I wish to thank Rueben Hasson, Neil Brooks, Ron Manzer, Richard Day and Carolyn Tuohy for their helpful comments and encouragement.


The purpose of this paper is to critically examine the income tax discounting industry in Canada. What I wish to argue is that an analysis of the income tax discounting industry reveals the way in which the redistributive premise of the income tax has been undermined by the privatization of perhaps the most important aspect of tax administration for low-income taxpayers, namely, the delivery of tax refunds and credits. In the case of the income tax industry, it is ultimately those low-income consumers with limited access to credit who are compelled to pay for a service they ought not to need.

Paying taxes is, like avoiding or evading them, a form of political interaction. The process of voluntary tax compliance in some sense both reflects and reproduces the pattern of social relations which characterize the welfare state. The welfare state initially represented an accommodation between capital and labour interests to institutionalize class conflict and thus permit a regulated form of market capitalism to sustain itself. As a result of the growth of these mediating institutions and the increasing pervasiveness of state intervention in the market, however, citizens have become transformed into dependent clients and consumers. The result of both of these trends is that the market itself has become depoliticized—people are reduced to interacting with bureaucracies as acquisitive, contractual parties. For clients with few resources to bargain strategically in this interest-group dominated policy process, and little understanding of the stakes of the process or their interests in it, this often results in disempowerment and exploitation.

This is especially prevalent in the case of the income tax, which requires taxpayers to assess their own liability to the state, or more typically for low-income Canadians, the state’s liability to them in the form of a refund or tax credit. This process ought to be empowering for low-income taxpayers, however its privatization by tax discounters results in the opposite occurring. This industry has emerged out of, and profited by, the ignorance, fear and poverty of the least advantaged sector of consumers. The aim of this paper is to account for this disempowerment and to suggest the most appropriate path to redressing it.

Income tax discounters range widely in size, rates, reliability and expertise, though most operate by deducting a portion of a refund as a “fee” for filling out the taxpayer’s return and providing a discounted refund in advance of when the government makes the refund available. This enterprise has mushroomed in Canada despite the fact that a central part of Revenue Canada’s
mandate is to provide free and complete taxfiling services, and the fact that the returns themselves have becomes increasingly simplified.  

While the problem of tax discounting has been canvassed previously both from the standpoint of the legislative debate surrounding the federal regulation of the industry and from the standpoint of the policy rationales against legitimating the industry through such regulation, I propose to analyze tax discounting from the related but somewhat broader vantage of consumer disempowerment. What I wish to argue is that, contrary to the purpose of a progressive redistributive income tax, which is precisely the empowerment of socioeconomically disadvantaged citizens, the tax discounting industry instead has transformed the income tax into merely another consumer relationship over which low-income citizens with few resources exercise little choice, and of which these taxpayers have little understanding. The story of the tax discounting industry's regulation becomes, then, the reflection of how little influence low-income consumers have over the market in which they are more or less captive, and by which they are further disempowered.

This essay is divided into three parts. The first part provides the context into which tax rebate discounting emerged, emphasizing both the growing fear and mistrust of Revenue Canada and the scarcity of credit for low-income Canadians that combined to create a favourable climate for the rise of a private, money-lending tax rebate service. The second part charts the growth of the tax discounting industry and the government's attempt to regulate it. The third part analyzes the disempowerment of low-income consumers that is reinforced and reproduced through conventional consumer protection legislation. Finally, by way of conclusion, I shall argue that the solution to the problem of tax discounting lies not with reforms to consumer statutes, but with redefining income tax administration so as to transform the tax process into an empowering experience in political participation for the poor.

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3. Indeed, calculating programs currently exist that would allow taxpayers to fill in their returns merely by answering a series of prompted questions. The resulting information could be sent electronically to Ottawa, and a print-out provided for the taxpayer's records. Rather than making these programs available for free at Revenue Canada district offices, the department decided instead to allow this service to become privatized. See "Jelinek Pushes Computerized Tax Returns" Globe & Mail, March 18, 1992, A4; see generally R. Couzin, "Simplification and Reform" (1988) 26 Osgoode Hall Law Journal 435

II. SERVICE OVER ENFORCEMENT: REVENUE CANADA AND CONSUMERISM IN THE 1980s

I intend to begin my study where most other critical analyses of tax discounting have ended, namely with Revenue Canada. Advocates of abolishing tax discounting argue that Revenue Canada should provide accelerated service to low-income taxpayers so that their refunds arrive sooner, thus obviating the market for tax rebate discounting. I contend that while delays in returning refunds, economic need and the lack of alternative sources of consumer credit for low-income taxpayers may be said to have caused the problem of tax discounting, it is not coincidental that the income tax industry emerged and flourished in the mid-1970s and 1980s at a time when Revenue Canada was subject to an intensive negative public relations campaign that fostered fear and mistrust of the tax administrator. It is, in other words, the politics of tax administration as much as its procedures, that provided the conditions for the growth of tax discounting.

Led by the Conservatives while in opposition, a groundswell of protest against Revenue Canada had, by the early 1980s, come to embody the disenchantment many Canadian people felt towards Trudeau’s liberal government, and the Canadian welfare state generally. The Conservatives established a task force to roam the country conducting public hearings on what was termed, “Revenue Canada’s abuse of Canadian taxpayers.”5 Pierre Bussieres, the beleaguered liberal Minister responsible for Revenue Canada, defensively commissioned his own internal report on the Department from a high-profile consulting firm.6 Revenue Canada’s mandate, whether to enforce the Act and treat taxpayers as potential tax evaders, or to provide services to the public, became for the first time the subject of intense interest in the media, in the legislatures, and on street-corners throughout Canada.

The catalyst for the events that culminated in the flurry of task forces and reports maligning Revenue Canada, and that seemed to touch a raw national nerve, was the allegation that tax assessors in the Kitchener, Ontario district office operated under performance quotas as a result of which they were required to recover a certain amount of taxes in order to qualify for satisfac-


6. This report started under the Liberals was completed after the Tories had taken power and largely mirrors the Beatty Task Force’s Report though it is much broader and more detailed. See W. Farlinger (Woods Gordon), Report on Revenue Canada (Ottawa: Supply and Services, 1984)
tory performance ratings. The story broke when a collections officer garnered the bank account of a single mother only to find it was a joint account with her son. Headlines in the local paper the following day satirized the attempt by Revenue Canada to gouge a young boy’s savings. The Department at first denied the allegations of a quota system, then admitted them in part. One tax assessor tendered a public letter of resignation, and the tax collection practices of Revenue Canada quickly became a regular topic of conversation in Parliament.

Tales of harassment quickly emerged from virtually every corner of the country, which all more or less contained a similar theme; innocent, middle-class taxpayers (usually small business-owners, dentists, other professionals, fishermen, artists, or artisans) found themselves hounded by Revenue Canada’s aggressive auditors and victimized by what became widely perceived as the tax department’s incompetence. The most excoriating treatment occurred in conservative newspapers such as the Toronto Sun, which ran headlines such as “RevCan like Gestapo,” and “Revenue Canada’s a Monster: Feds Built Frankenstein.”

The media typically focused on one taxpayer’s struggle against an imposing and faceless administrative behemoth. The story of Miriam Waddington exemplifies this pattern. She was a poet nearing retirement in 1984, and recounts the tragi-comic tale of how revenue officials hounded her about travel and household expenses; they assumed since she was working on a book that she must be wealthy and hiding her income from the tax department. She professed, “I feel harassed and insulted just because I am an artist … they go after people who can’t protect themselves—older women, retired professors—who can’t hire tax helpers, who don’t have tax shelters and who lack the income to buy them.”

One tax collector with whom I spoke confirmed the impression that Revenue Canada was out to get “the little guy,” but this situation, he explained, had

8. See the Toronto Sun, March 22, 1984, 31; and March 28, 1984, 3.
10. Ibid., 40.
far more to do with the socio-economic context of tax collection, than with the heartlessness of the Department’s officials:

Suppose that a business is represented by a good tax lawyer and a good accountant, they get respect. Some guy has a shop, is an immigrant maybe, not very sophisticated, does not hire a professional because either he can’t afford do or doesn’t want to spend the money, he’s going to be pounced on. In that sense, there seems to be a cowardice in the bureaucracy that administers the Act even now.

It was not the inequities in tax planning, however, that were identified as the source of Revenue Canada’s lack of even-handedness. Rather, the bureaucracy was portrayed as omnipotent and every taxpayer a helpless victim. Even the New Democratic Party added its voice to the chorus of critics of Revenue Canada’s enforcement practices. The image of the wealthy elite of Canada, flanked by an entourage of tax lawyers and accountants, exploiting a myriad of tax breaks, deferrals, deductions and loopholes, had successfully been replaced by the image of the embattled small businessperson, whose hard earned profits were being siphoned by callous tax collectors. Between 1982 and 1983, the number of Canadians who believed that Revenue Canada treated taxpayers “fairly” dropped from 60 to 54 per cent.11

Perrin Beatty exclaimed upon the publication of the report of the Progressive Conservative Task Force on Revenue Canada, “The first impression we had was the fear in which National Revenue is held by so many Canadians.”12 What Beatty did not speculate on is the extent to which the atmosphere of fear his report and the public hearings which preceded it, had contributed to, rather than merely reflected, the climate of the country.

The image created (or, perhaps, merely amplified) by the report was of a cynical, self-serving bureaucracy confronting an honest but suspicious taxpaying public. Beatty’s task force heard that Revenue Canada “have demoralized and created fear and mistrust among the people” in Charlottetown,13 that the department is “unfair, chauvinistic, vindictive and out to grab

11. This poll was conducted by Revenue Canada and reported in the Toronto Star, February 6, 1984, A10.

12. This remark was quoted in an editorial which appeared in the Globe & Mail, Tuesday, April 10, 1984. Beatty elaborates on this theme in the report, where it is noted, “What we heard disturbed us deeply. We were struck by the fear with which ordinary Canadians greet a call from the tax department, a fear that is sometimes cultivated by Revenue Canada in its attempts to frighten ordinary taxpayers.” See Beatty, supra note 5, 3.

every tax dollar it can," in Thunder Bay,\textsuperscript{14} and that "taxpayers may resort to violence if Revenue Canada continues to harass, abuse and intimidate them," in Kitchener.\textsuperscript{15}

With the Progressive Conservative government in power, what had been a tacit feature of Canada's tax system since the tax reform of 1972 became explicit, namely, that tax avoidance measures open only to the minority of mostly high-income taxpayers earning income from business or property, were to be, in effect, encouraged and rewarded by the government; this gave expression not only to the agenda of the New Right to allow those with capital to keep more of their income and thereby stimulate investment and growth, but also to the crassly partisan nature in which Revenue Canada had become an instrument for the Conservative's bid for power. As one prominent accountant recounts,

\begin{quote}
The government often increased the rewards for those who could stretch the law, often introducing tax shelters and incentives. This resulted in enormous monetary pay-offs to a flourishing tax avoidance industry, in which staggering profits could be earned by underwriters, promoters, middlemen and consultants who could mine the Income Tax Act ...\textsuperscript{16}
\end{quote}

The government issued a document shortly after assuming power entitled, "Revenue Canada, Taxation's Mandate and Operational Principles."\textsuperscript{17} Among the "Operational Objectives", the word "enforcement" does not appear once, whereas the "rights and needs of taxpayers," "good service to the public," and "accountability to guarantee that the system is operated efficiently and fairly" are all given prominent attention. Under the heading "services to the public," eleven paragraphs are set out (as opposed to the mere five operating principles that precede them), detailing the courteous, informative, and helpful approach to tax administration that Revenue Canada officials are to adopt.\textsuperscript{18}

\textsuperscript{14} The Chronicle-Journal, March 9, 1984, 1.
\textsuperscript{15} Toronto Star, March 7, 1984, A3.
\textsuperscript{17} Issued under the authority of the Minister of National Revenue, July 26, 1984.
\textsuperscript{18} Ibid., 6. Paragraph 8 is of particular interest; it states, "good service to the public also requires effective communications with tax practitioners so as to obtain and maintain their trust and cooperation."
By the close of the 1980s, the budgetary and ideological shift from tax enforcement to taxpayer services had transformed the perception, if not the operation, of tax administration in Canada. One tangible and far-reaching consequence of this shift is that the number of audits of high-income taxpayers and investigations for tax evasion decreased steadily during the second half of the 1980s.19

Although Revenue Canada was now presented to the Canadian public as a declawed service bureaucracy, these same forces created a climate in which few taxpayers were encouraged to trust the public bureaucracy with their tax preparation. Indeed, it is Revenue Canada's main client base, namely high-income Canadians, who regularly (through their lawyers and accountants) tangle with tax officials over complex tax avoidance and tax planning schemes, that arguably benefitted most by the turn away from enforcement and toward the provision of service. The legacy left to low-income taxpayers was both a fear of the tax bureaucracy, and an allure for tax avoidance which seemed dependent on obtaining the expertise of a "tax professional."

By the early 1990s, Revenue Canada itself has begun to speak of tax administration as an exercise in "customer service." In June of 1991 at the National Director's conference held in Montebello, Quebec, 130 senior tax administrators met to discuss such topics as "Reaching Out to New Clients" and "Service Through Leadership."20 Like any good restaurant or hotel, taxpayers are now asked to fill out cards rating the service of regional offices; an investigation of the change in tax administration reported confidently that, "The department expects the cards will help in its effort to provide a genuinely friendly service."21

The main beneficiaries of Revenue Canada's new kinder and gentler brand of administering the income tax have been, as noted earlier, the wealthy.22

19. In 1982, nearly 2% of individuals were subject to an income tax audit (the overwhelming majority of these would target high-income individuals); by 1990, this figure had dropped to below 1%. Corporate audits declined as well over this period, and the number of tax evasion prosecutions fell by approximately 25%. See Report of the Auditor General, 1990 (Ottawa: Supply and Services, 1990), 560-2.


21. Ibid.

22. A recent internal audit of Revenue Canada discloses, for example, that delinquent accounts have risen to an unprecedented $3.5 billion. Even the government concedes that the department has leaned "too far in the direction of service and permissiveness." See "Friendly Persuasion a Taxing Problem" Globe & Mail, March 22, 1992, A4.
While high-income taxpayers often assume an adversarial posture with the tax collector, the majority of taxpayers only come into contact with Revenue Canada when they receive their tax refund on income withheld at the source of their employment. For the fiscal year 1988-89, for example, 17,615,022 tax returns were filed; of these, 13,048,144 taxpayers received a refund from the government. Although it is possible for taxpayers to calculate the exact refund owing to them at the close of a calendar year, they must wait approximately three months before receiving the cheque from the government.

While this delay in acquiring refunds had characterized tax administration throughout the postwar era, it was in the credit scarce years of stagflation in the mid-1970s that small-scale money-lenders began offering to discount these tax refunds and providing the recipients with the cash immediately upon calculating the refund owing. The refund thus served as collateral enabling someone regardless of their credit rating to obtain a short-term loan. This service, however, came at a high price. By the late 1970s, unregulated discount rates were reaching as high as 40-50 per cent, or expressed as an annual rate of interest, approximately 200 per cent. Exploring the dynamics of this income tax industry, and its implications for low income consumers, will be the subject of the following section.

III. TAX REBATE DISCOUNTING: REGULATION AND PRIVATIZATION

At the same time as Revenue Canada was allegedly being transformed into a “service” bureaucracy by the Progressive Conservatives, tax rebate discounting was growing rapidly into a large and profitable “service” industry in Canada. In 1984, the industry generated revenues of a quarter of a billion dollars and forty-one million dollars in profit. This industry is mass-marketed in the months leading up to the taxfiling deadline of April 30, and target


24. For a description of the rise of the tax rebate discounting industry, see E. Belobaba, *supra* note 4. Belobaba characterizes the rise of tax discounters as occurring “overnight,” noting the main source of clients centred in inner-city low-income districts.


low and middle income taxpayers to whom they claim to offer "case in hand," and "peace of mind."\textsuperscript{27}

Martha Milczynski, an advocate for the abolition of the tax rebate discounting industry describes, the process by which the transaction occurs:

A person must take all their tax information slips to the tax discounter. She or he must provide their social insurance number and written authorization ... The discounter then prepares the return and the customer signs an agreement or contract. This document is usually drafted in the form of a purchase and sale agreement and includes the assignment of power of attorney over to the discounter limited to the nature of the transaction ... The client then receives a cheque for at least 85 per cent of the value of the full refund. The 15 per cent share for the discounter is all inclusive; there cannot be any other additional charges for tax return preparation. The entire process takes as little as a few hours or up to two days.\textsuperscript{28}

Milczynski goes on to chronicle a variety of abuses to which consumers of this service have been subjected (most commonly filling out one return for the benefit of the client and a return claiming a much higher refund which is then sent to Revenue Canada); interestingly, responsibility for enforcing the provisions of the Act lay with the Consumer Services Branch of the Ministry of Consumer and Corporate Affairs, not with Revenue Canada. Revenue Canada will, however, notify Consumer and Corporate Affairs if unregistered discounters come to their attention, and do routinely provide statistics on the number of taxpayers who utilize discounters and related data.

Revenue Canada also figures in the popularity of tax discounting. Among the reasons cited by the tax rebate discounter's association to account for the industry's popularity is that, "people fear Revenue Canada and are intimidated by any contact with the department."\textsuperscript{29} At first glance, it makes little sense that individuals, whose only interaction with a government department is the receipt of a cheque (and which, unlike other welfare departments, issues the cheque unconditionally once a return is filed, with no subsequent follow-up contact or supervision), should be intimidated or afraid. It is only in the context of the general disdain for the "red tape" of bureaucracy and the

\begin{itemize}
  \item \textsuperscript{27} See L. Sloane, "Doing Taxes for the Lazy, the Nervous, and the Rich," New York Times, January 12, 1992, 10. H & R Block's director of marketing in the United States, Jeanie Lauer, is quoted as commenting that the company views its competition as individuals who fill out their own tax returns.
  \item \textsuperscript{28} Milczynski, supra, note 2 at 77.
  \item \textsuperscript{29} The Canadian Tax Refund Discounters Association, "Position Paper on Tax Rebate Discounting" (May 1985).
\end{itemize}
specific vilification of Revenue Canada in the 1980s, that this reaction becomes explicable. It is also worth noting, that the main clients of this industry include some of the people with the fewest resources and fewest skills for interacting with government—immigrants, and the poor.30

A closer examination of the tax discount rebating market reveals the vulnerability of its client base. Over 63% of the 385,000 discounter's clients in 1985 earned less than $8,000 annually.31 Only 11% of those clients reported incomes that exceeded $20,000 and nearly one-third reported incomes of below $2,000. The average tax discounted refund, including the child tax credit which until reforms in 1985 comprised close to 40% of the industry's revenues, was $800. H & R Block, the largest tax discounter in Canada operating over 1,000 outlets, reported that only 20% of the returns it processes exceed $1,000.32 Nevertheless, by 1982, the company was posting profits of over $25 million in Canada. The Tax Refund Discounter's Association itself concluded, "on the whole, we help people whom other traditional lenders and providers of credit will not assist."33

As an advocate from the Association Cooperative d'economie familiale argues,

We are not opposed to companies filling out tax returns. We are opposed to people having to buy their tax refund ... we think it is immoral to sell their own refund to people who are supposed to be reimbursed by the government. We are talking about the very poor and about the fact that a good part of their refund is paid to discounters because of Revenue Canada's delay in sending out the refund.34

The tax discounters themselves, naturally, portray their business somewhat differently:

Tax discounting is a unique business and should not be compared to conventional money-lending. We enter into a buy-sell agreement with a client, but are dependent on a third party, which is Revenue Canada, to repay us. The cost of the service is the discount percentage, similar to commission percentages paid in the real estate or stock brokerage business ... In the final analysis, it is dollars, not annual percentages, that determines an effective price and resultant profit. That is why the banks and other national financial insti-

31. See House of Commons, Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-83" [hereinafter Minutes] December 10, 12, 1985, 1:15.
32. Ibid., 1:60.
33. Ibid., 1:32.
34. Ibid., 1:13.
tutions are not interested in providing an alternative service—loans on small amounts for short periods of time and without repeat or other types of sale potential, simply do not produce enough dollar revenue to cover expenses or opening an account, let alone prepare an income tax return...35

Tax discounting became something of a cause celebre for the media in the late 1970s, which decried this new brand of money-lender as little more than a loan shark.36 The public outcry led to a variety of legislative action at a provincial level.37 Rather than abolish the industry, however, as the U.S. chose to do,38 or reform Revenue Canada's system of delivering refunds and credit in order to make tax discounting unnecessary as the Senate committee on banking, trade and commerce suggested after conducting hearings on possible policy alternatives,39 the federal government decided instead to regulate it, enacting the Tax Rebate Discounting Act (TRDA) in 1978.40 The ostensible goal of the legislation was to provide uniform discount rates, and standards of disclosure, while ensuring a “reasonable profit” for tax discounters.41

The TRDA provided that the portion of the refund that the discounter could legally charge was limited to 15 per cent (for a low-risk loan that rarely exceeds three months and can extend over as little as three or four weeks); expressed as an interest rate, this fee would, conservatively based on four months for the refund to arrive, top 60 per cent annually. For a return processed in three months, this rate would jump to over 90 per cent.

Regulation of tax discounting resulted in consistent growth for the industry. From 1974 to 1984, the percentage of taxfilers making use of professional services rose from 17 per cent to 37 per cent, in large part due to the impact of tax discounters. One of the reasons for the industry’s rise is that entering

35. Ibid., 1:34.
37. See Income Tax Discounters Act, S.O. 1977, c.55 which mandated that tax discounting be limited to 5%; Manitoba and Saskatchewan passed similar statutes, while the B.C. Consumer Protection Act limited the discount to 15%. Quebec has made it illegal to discount any refund given under the provincial income tax.
38. In fact, tax discounting is not itself illegal in the U.S., but a regulation enforced by the Internal Revenue Service makes the practice subject to a civil penalty of $500.
40. R.S.C. 1985, T-3. For a review of previous attempts to regulate tax rebate discounting at the provincial level, see E. Belobaba, supra note 4.
the income tax business is extremely easy. In order to become a tax discounter, an individual or business need only register with the Ministry of Consumer and Corporate Affairs, obtain a discounter code (in return for which the address of the discounter and the address where refunds are to be mailed must be disclosed), and the requisite number of Schedule I and II forms needed. No investigation is undertaken of prospective discounters, and no criteria have been set out, other than the possession a mailing address, on the basis of which to refuse to register a tax discounter.

i) Enforcement

Reuben Hasson, writing shortly after the passage of the Tax Rebate Discounting Act, warned that its enforcement would be hampered in part by an absence of complainants. This prediction has largely come to pass. Last year, the Ministry received approximately 75 complaints regarding tax discounting (out of approximately one million returns which are currently being discounted annually); nearly all these complaints concerned clients disgruntled over attempts by a discounter to recover debts incurred as a result of the discounter having overestimated the refund owed by Revenue Canada. Given the skills of the majority of tax discounters' clients and the complexity of the arrangements involved, it thus falls to the Ministry with the occasional tip from Revenue Canada or an outsider, to effectively police the Act.

The Act sets out a variety of offences to be enforced by the Ministry of Consumer and Corporate Affairs; these include the failure to disclose required information (i.e. expected refund from government, amount provided to taxpayer after discounting service charge, payment as a percentage of expected refund, and the discount rate expressed as an annual interest rate), failure to give client notice of the actual amount of the refund and finally the failure to maintain records and provide Ministry access to those records. All the offences contained in the Act are punishable on summary conviction and subject to a maximum fine of $25,000, and proceedings may be instituted at any time within two years of the commission of the offence.


43. Hasson, supra note 4.


45. See sections 4-7.

46. Section 7.
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While comprehensive statistics are difficult to obtain, and are not compiled systematically by the Ministry of Consumer and Corporate Affairs, it is possible to sketch in broad strokes the scope of enforcement under the TRDA. As outlined below, there are currently a little over 200 discounters in Canada. The Ministry conducts random annual audits of a significant proportion of these discounters, though most are "paper audits" carried out by mail rather than on-site audits which are generally costly. Approximately between ten and twenty investigations result from these audits or from other tips (generally from Revenue Canada). Of these investigations, two or three are referred to the RCMP for prosecution. Marion Clark, the senior administrator of the Act, noted that on average, one or two convictions are entered, though it is not rare for there to be no convictions in a given year; moreover, the penalties are rarely substantial either due to the amounts of money involved or the practice of plea bargaining. Summaries of these successful prosecutions are enclosed in newsletters distributed to all registered tax discounters as a form of deterrence.

These summaries are representative of the types of offenders violating the Act. Bonnell Cole Computer Services Ltd. of Cornerbrook Newfoundland, for example, pleaded guilty on February 2, 1989 to six counts under s.3(1) of the Act for acquiring the right to refund tax for less than the minimum consideration allowed and one count under s.4(1)(a) which stipulates that the discounter must pay the client by cash or cheque the full payment required. The company was fined $500 on each count for a total of $4,000. Another recent case involved Accucash Tax Refund Service of Toronto. This discounter pleaded guilty to three counts under s.3(1) and three counts under s.4(1)(b)(i) for not disclosing required information to clients. The woman who operated the company received a conditional discharge, six months probation, and 75 hours community service.

In one of the larger recent cases, Paul Fontaine of La Roche, Saskatchewan was convicted on September 20, 1991 of 75 charges under s.5(b) of the Act

47. Section 8.
48. Conversation with Marion Clark, supra note 44.
49. Ibid.
50. Ibid.
51. Ibid.
52. See, for example, Consumer and Corporate Affairs Canada, "Convictions under the Tax Rebate Discounting Act" (IB-10312/1991-07).
which requires the discounter to advise the client of the actual refund received from Revenue Canada using a prescribed form. He was also convicted under s.6.1 of providing false or misleading information to a peace officer responsible for the administration of the Act. This discounter had previously been convicted under the Act in 1988. Mr. Fontaine received a suspended sentence of 18 months in relation to these charges and fined a total of $7,500.

The paucity of complainants and paltriness of the fines for convicted discounters are indicative of the problems with enforcing consumer protection legislation—it tends to reproduce and legitimate a certain relationship between vendor and consumer rather than intervene effectively on the consumer’s behalf. This trend is further reinforced by the judicial treatment of such legislation.

ii) Case-Law

Even prior to the enactment of the TRDA, the courts were reluctant to find tax discounting unconscionable. Representative of the judiciary’s approach to consumer protection generally, the approach to tax discounting they initially favoured was to proceed on a case by case basis to determine the legality of the practice. There have been extremely few reported decisions interpreting the TRDA, and none at all since its revamping in 1985 (discussed below). This is a reflection of the small numbers of prosecutions launched, the frequency of plea bargaining, and perhaps also the low priority given to consumer protection litigation involving relatively small amounts of money. The first reported case examining the TRDA, predictably, involved a challenge to the constitutionality of the federal government’s entry into the field of tax discount regulation. In Krassman v. The Queen, the legislation was upheld as intra vires the federal government’s criminal law power.

In R. v. Takiff, a convicted discounter with two previous convictions was sentenced on a total of sixteen counts to a fine of $100 and restitution. The Crown’s appeal of this sentence on the basis of its excessive leniency was dismissed; the discounter in question operated alone and was nearly 72 years old at the time. The Crown similarly lost their appeal (this time from an

53. *Hanson Director of Trade Practices v. John’s Tax Service*, (March 5, 1975) (B.C.S.C.)[unreported]


55. See also discussion of case law in Milczynski, *supra*, note 2 at 78-80.

56. (1979), 102 D.L.R. (3d) 262 (Fed. Ct.).

acquittal) in *R. v. Theissen*. In this case, consideration for the discounting of a client's tax refund was given in the form of a reduction on a pre-existing debt obligation between the two parties. This was held to not constitute a discounting arrangement as no consideration by cash or cheque changed hands, and thus the violation of the disclosure requirements of the Act were held inapplicable.

In *R. v. Bowes*, the convicted discounter won an appeal to have her sentence reduced based on her reputation in the community, cooperation with authorities, restitution of the monies owing, and the fact that the trial judge erred in considering additional potential infractions that were not in issue. The judge compared infractions of the Act with tax evasion, implying that these were mere regulatory or administrative violations, not genuine criminal offences. What these two violations clearly share, in my view, is the manipulation of the income tax process resulting in the defrauding of low-income Canadians. The imbalance of the court's approach to fraud is further dramatized by the fact that defrauding unemployment insurance or welfare schemes continue to commonly result in incarceration. It is thus not so much the fraudulent activity that determines criminality in the eyes of the court, but rather who benefits from the fraud.

What emerges from all of these reported decisions, and the unreported convictions outlined earlier, is an undercurrent in both RCMP and judicial thinking that violations of tax discounting are not to be taken seriously. The offenders are generally small-businesspeople; the offences usually unsophisticated. The victims of these offences have little status in the general community, fewer skills and resources than other victims of theft or fraud, and the amounts of money involved are generally small (except of course in the eyes of the low-income consumers). Marion Clark confided that while the Ministry issues press releases on convictions regularly, they are almost never picked up as newsworthy by the media—in contrast to the saturation of the media with positive adds by H & R Block and other large discounters during the taxfiling season, with promises of quick, hassle-free "cash-back" and the lure of what this money can buy.

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60. See for a discussion of this issue, R. Hasson, “Tax Evasion and Social Security Abuse—Some Tentative Observations” (1980) 2 Canadian Taxation, 106
The disadvantage of the low-income consumer in the case of tax discounting is thus reinforced in the legislation, its enforcement and its adjudication. Accounting for this disempowering experience with consumer protection policy for low income people will be the subject of the following section.

IV. CONSUMER PROTECTION LEGISLATION AND THE INCOME TAX INDUSTRY
There are a number of methods by which the state can intervene in the market to protect vulnerable consumers: these include requiring disclosure of certain information, setting guidelines or standards, licensing, and price controls or interest rate ceilings.61 The government has utilized each of these mechanisms in the case of the TRDA. However, as Milczynski notes, the media continued to focus on the "inherent injustice" of tax discounting even after the TRDA was enacted.62 Further government intervention seemed necessary to shore up both the industry's image and the credibility of the government itself. The Ministry of Consumer and Corporate Affairs released a discussion paper of proposed amendments in June of 1985 as a response to calls for reform.

In addition, a consultation process was launched to reform the legislation. Despite growing calls for the abolition of the industry altogether, the Ministry of Consumer and Corporate Affairs proposed five relatively modest initiatives: 1) reducing the cost of tax discounting; 2) improving the administration and enforcement of the Act; 3) instituting periodic payments of the Child Tax Credit; 4) encouraging alternative sources of discounting services at banks and credit unions; and 5) launching a consumer information program.63 These actual legislative amendments forwarded were relatively minor revisions to the disclosure and record-keeping provisions, as well as an alteration in the rates that could be charged by the tax discounter.

While the rate of return for tax discounters remained at 15% on the first $300 of a tax return, only 5% could be discounted on any remaining portion of a return above this amount. The tax discounting industry claimed that this would put them out of business, and that a black market in tax returns would arise in its wake to victimize low-income Canadians.64 As the following

62. Milczynski, supra, note 2 at 83.
63. Minutes, supra, note 31 at 2:1.
figures from the Ministry of consumer and Corporate Affairs indicate, how-
never, the change in rates enacted in late 1985 and applicable to the 1986
taxfiling season proved far from fatal to the industry. Like the initial experi-
ence with state regulation in 1978, the effect of the 1985 amendments seems
to have been the consolidation rather than the contraction of the income tax
industry, as the following figures from the Ministry of Consumer and Cor-
porate Affairs illustrate:

<table>
<thead>
<tr>
<th>Year</th>
<th>Tax Discount Companies</th>
<th>Locations</th>
</tr>
</thead>
<tbody>
<tr>
<td>1984</td>
<td>256</td>
<td>1497</td>
</tr>
<tr>
<td>1985</td>
<td>220</td>
<td>1549</td>
</tr>
<tr>
<td>1986</td>
<td>191</td>
<td>1486</td>
</tr>
<tr>
<td>1987</td>
<td>182</td>
<td>1474</td>
</tr>
<tr>
<td>1988</td>
<td>207</td>
<td>1596</td>
</tr>
<tr>
<td>1989</td>
<td>210</td>
<td>1653</td>
</tr>
</tbody>
</table>

Not only has the number of discounter outlets risen since the 1985 amend-
ments, but more significantly, the number of clients and the volume of profits
has escalated steadily.

<table>
<thead>
<tr>
<th>Year</th>
<th>Total Refunds Discounted</th>
<th>Value of Refunds Discounted ($)</th>
<th>Average Value of Disc. Return</th>
</tr>
</thead>
<tbody>
<tr>
<td>1986</td>
<td>722,251</td>
<td>537,715,631</td>
<td>744</td>
</tr>
<tr>
<td>1987</td>
<td>880,587</td>
<td>605,329,974</td>
<td>687</td>
</tr>
<tr>
<td>1988</td>
<td>906,537</td>
<td>686,874,615</td>
<td>758</td>
</tr>
<tr>
<td>1989</td>
<td>965,889</td>
<td>827,735,280</td>
<td>857</td>
</tr>
<tr>
<td>1990</td>
<td>1,025,264</td>
<td>917,989,656</td>
<td>895</td>
</tr>
<tr>
<td>1991</td>
<td>1,171,641</td>
<td>1,073,123,539</td>
<td>916</td>
</tr>
</tbody>
</table>

Those observers critical of the government's attempt at reform would likely not be surprised by these figures. Milczynski, for example, surveyed the government's proposals for reforming the tax rebate discounting industry in 1985 and characterized the Minister's suggestions as "showing a callousness and lack of concern. His initiatives will not bring about meaningful change but protect an industry that should not exist at all."

These sentiments echo the position taken in the consultations by the National Anti-Poverty Organization (NAP). NAP favoured repealing the TRDA, and adopting the American approach of making tax discounting a civil offence. NAP also reported rumours circulating about "fly-by-night" discounters who travel to remote communities, and specifically native reserves, and exact huge profits on exorbitant discounting rates before disappearing. The National Action Committee on the Status of Women (NAC) presented a brief supporting NAP's position and emphasizing the detrimental consequences of single mothers discounting their child tax credits.

Another reform that emerged in 1985 with respect to tax discounting was the institution of periodic payments of the child tax credit over three intervals during the year, so as to minimize the business this credit generated for the tax discounters. This recommendation was made by NAC, who argued that tax discounting, because it relied for 40% of its revenue on the child tax credit, had a disproportionately negative effect on female consumers and especially single mothers with low incomes. This was one area in which NAC and the NAP diverged; the latter argued that the child tax credit represented the only lump sum large enough to enable low-income families to purchase expensive durable goods, and therefore should be preserved.

Briefs were also submitted by H & R Block and the Tax Refund Discouter's Association, maintaining that the service they provided was meeting a demand for low-income consumer credit and that the proposed rates were only barely sufficient to cover costs. Furthermore, they claimed that aiding low-income taxpayers in the preparation of their income tax returns constituted a "valuable social service." The H & R Block representative, revealingly, portrayed his company as the advocate of low-income Canadians in their interaction with Revenue Canada:

 Revenue Canada is a collection and assessing agency. We should not expect that a collection and assessing agency of that dimension with the number of

65. See National Anti-Poverty Organization, "Tax Rebate Discounting" (August, 1985)
66. Ibid., 1:23.
people we have in this country scattered throughout this wide country of ours should perform highly advocate-style services on behalf of taxpayers. They have a job to do and it is a big one.67

The sword placed above low-income taxpayers in this scenario is double edged: as noted in the first section, Revenue Canada is reducing its commitment to enforcement in the interests of becoming a service bureaucracy, thus allowing high-income taxpayers increased opportunity and incentive to engage in tax avoidance; simultaneously, however, the only service low-income taxpayers truly need is privatized on the very rationale that Revenue Canada is unsuited to providing such service to taxpayers. In both cases, Revenue Canada's supposed insensitivity to the interests of taxpayers generally is used to justify policies that place low-income taxpayers, specifically, in a less favourable positions. Moreover, because of the distorted image of Revenue Canada disseminated by advantaged taxpayers with an interest in restraining the enforcement scope of the department, no political constituency has arisen in Canada lobbying for more vigorous or expanded tax administration on behalf of the poor.68

The Ministry of Consumer and Corporate Affairs, notionally a bureaucracy acting in the interests of low-income consumers, has come out clearly in favour of the income tax industry. M. Cote, the minister at the time of the 1985 amendments, and a former Chartered Accountant, made the following remarks regarding the government’s proposals:

I think that the measures and the amounts that we are introducing are reasonable. There is room to make a reasonable profit. And again, I have the protection of the consumer in mind when I introduced these measures. I am not saying that I want to have the discounters out of business, but I think there is enough room for them there to find their own interests.69 (my emphasis)

By removing the freedom of discounters to set whatever rates the market will bear, the government through its regulation has provided discounters with a secure, reliable and legitimate source of profit. This result, however, is neither atypical nor surprising. That producer groups tend to exercise more influence in the regulatory policy-making process has been well documented; more-

67. Ibid., 1:60.


69. Ibid., 2:22-3.
over, producer groups continue to exercise this influence on the bureaucratic organizations created to administer the regulatory apparatus established.\(^7\)

The minister, however, seemed favourably predisposed to the industry’s interests before the consultations even commenced. He stated baldly in his submission that the government accepted the value of the tax discounting industry. This acceptance, though, was not based on any concrete knowledge of, or sensitivity to, the unique aspects of the industry for low-income taxpayers, but on broad conservative political grounds. Consider Cote’s justification for the government’s policy decision to preserve the discounting industry:

> First of all, I reject arguments favouring a complete ban on discounting. In a free market economy, Canadians should be able to use discounters if they wish. There is a demand for the service in the marketplace. On the other hand, I would like to emphasize the importance of protecting consumers against unscrupulous discounters and loan sharking.\(^\text{71}\)

The minister’s remarks, of course, assume that all consumers are more or less equally positioned in the marketplace, which is clearly not the case. As noted above, the vast majority of people who go to tax discounters are poor. Tax discounting does not represent for these clients an option to choose in a free marketplace, but often the only option they have.\(^\text{72}\) Unlike middle-class consumers, the poor are unable to access conventional sources of consumer credit. Whether it be the result of job instability, educational deficiency, insufficient income, or other factors related to socioeconomic disadvantage, traditional lenders will not deal with this class of borrower.\(^\text{73}\)

This lack of competition exists not only between tax discounters and other credit sources for low-income consumers, but within the tax discounting field as well. No major banks and only a scattering of credit unions and caisse populaires offer a similar service to the tax discounters. This lack of competition encourages inefficiencies which are invariably borne by the consumer in the long run.\(^\text{74}\) Low-income consumers, additionally, generate inefficien-

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72. See Ramsay, supra, note 61 at 24-32.

cies of their own; they are on average more likely to be buy impulsively, engage in less long-term planning, are more easily pressured and generally have more of a tendency toward psychoneurotic symptoms in consumer situations. Consumer credit exacerbates these tendencies by both promoting a “consumptive ethic,” and “subverting the sovereignty of the consumer over his own wants.”

The Canadian approach with respect to consumer protection for the poor has been to legislate interest rate ceilings, such as contained in the now defunct Small Loans Act, though it addresses neither of the structural inefficiencies noted above. Jacob Zeigel, in his brief to the Special Senate Committee on Poverty in 1970, called for comprehensive and coherent interest rate ceilings as a means of protecting unsophisticated borrowers and encouraging more prudent vendor behaviour. What has resulted instead is a patchwork of incoherent regulations and legislation that create an environment in which it is difficult to know what rules apply to what kind of interest rates in relation to which types of credit. Moreover, it is generally not difficult to either bury additional interest charges in the cost of other goods or services or, as in the case of tax discounting, to characterize the charge as something other than interest on a loan—in this case, a commission on a buy-sell agreement.

Nonetheless, consumers are not only disempowered by those tax discounters who violate or subvert the regulatory legislation governing the industry; arguably, they are disempowered precisely by this protective legislation itself. It is symbolic legislation, circumscribing rather than proscribing industry practices; what is required in its place, I maintain, is substantive reform aimed at the conditions that make possible (and profitable) the industry itself.

75. See Trebilcock and Cayne, *supra* note 73, at 406. The authors caution, “Effective policy will, however, ultimately have to take into account the cultural conditions which underlie the particular needs of the poor.”
76. Trebilcock, *supra*, note 1 at 419.
V. CONCLUSION: TOWARD THE EMPOWERMENT OF LOW-INCOME CONSUMERS

Trebilcock and Cayne in their survey of consumer protection policies in the early 1970s note that the only category of legislative or regulatory action that will clearly, and in all cases benefit or empower the poor, are redistributive ones. Rather than intervening to encourage competition or set prices in the market, the authors suggest considering an alternative strategy for transferring (and transforming) consumer power:

The graduated system of income taxation, for example, could be easily geared to strike at excessive corporate or individual profits, and it has the advantage of producing measurable consequences. In addition, it allows the policy maker to rely on an administrative apparatus already in existence and obviates the difficulty of defining precisely what constitutes an excess profit, and that of delineating the markets in which such conditions exist.79

The problem is, however, that Canada’s progressive income tax does not redistribute income effectively. The wealthiest quintile of Canadians has consistently accounted for between 41 and 43 per cent of total income earned annually in Canada throughout the postwar era, while the poorest quintile has accounted for between 3.6 and 5 per cent of total income earned annually.80 Despite the redistributive promise of a progressive income tax,81 the operation of this tax in Canada, along with the variety of regressive sales taxes and property taxes that comprise Canada’s “tax mix,” has effectively allowed the

78. On the distinction between symbolic and substantive legislative action, see E. Belobaba, “Unfair Trade Practices Legislation: Symbolism and Substance in Consumer Protection” (1977) 15 Osgoode Hall L.J. 327 at 329. Belobaba draws this distinction on the criteria of government commitment to enforcement, without which, he argues (at 387) “the paramountcy of symbolism over substance becomes inevitable. Should this materialize, consumerism will confront one of its gravest challenges to date: the realization that ‘government ... has become the biggest consumer fraud around.’”

79. Supra, note 73 at 410.


81. Currently, the tax rate schedule is as follows: 17% on 28,275 or less; $4,807 + 26% on the next $28,275; and on any income above $56,550, $12,158 + 29% on the remainder. Provincial tax rates are added as a percentage of the federal tax rate; the highest of these rate is 62% in Newfoundland, while the lowest is 44% in the Northwest Territories. Additionally, certain provinces impose a surtax—for example, Ontario levies a surtax of 10% of tax over $10,000.
rich to become enriched (and shelter their wealth), while simultaneously it has hindered the poor from escaping poverty. Moreover, this has not happened accidentally, or as a result of the neutral machinations of an invisible hand. Rather, in the concise opinion of Linda McQuaig, "we don't have a progressive tax system because the rich have indicated that they don't want one." As Neil Brooks argues, the impact of the income tax in Canada has been, generally, to entrench and extend the inequalities produced by the market:

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

Given the starkly inequitable realities of market capitalism, a neutral income tax has never been an option; it must either promote inequality or redress it. Neutrality in the discourse of income taxation, rather, refers to provisions that ideally do not privilege one kind of economic or social activity over another. The goal of a neutral income tax is to tax people on the basis of the choices they make (whether to devote their income to savings or consumption, to real estate or retail, and so on), not to make the income tax itself the basis for those choices. However, the operation of the income tax's administration clearly does promote certain taxpayer behaviour. With respect to high income taxpayers, it provides the rationale for the existence of the tax planning industry and, as noted in the first section, a flourishing practitioner community of lawyers and accountants; with respect to low-income taxpayers, as discussed above, it provides the opportunity on which tax discounting depends for its existence.

A neutral income tax, as well as an equitable one, are both goals that are advanced by putting an end to the practice of tax discounting. Milczynski concludes her review of income tax rebate discounting by suggesting that the

federal or provincial government simply provide, at minimal cost, the rebate service to people expecting a refund who fall below a pre-determined level of income. She acknowledges, however, that this still amounts to the satisfaction of a market that ought not to exist at all:

The Tax Rebate Discounting Act was not enacted in response to the demands by consumers to have access to such a service. The "demand" came later, after the Act had the effect of establishing and officially sanctioning tax discounting as a form of financial service. The Act was originally designed to dispense with the scattered nefarious operations charging astronomical rates. It was only after 1979 that the large companies with substantial advertising budgets entered into and effectively took over the market. Thus, it was the passage of the Tax Rebate Discounting Act that fuelled the growth of tax discounting and essentially caused many of its problems.84

This claim requires elaboration. After all, as the pawnbroking industry demonstrates, there has always been a need for small loans to high-risk, low income consumers.85 Pawnbroking, like tax discounting, is an industry that relies for its sustenance on the disempowerment of low-income consumers, and the inescapable lure of consumption that the power of credit holds for them. Interestingly, to avoid the patchwork of regulations and interest rate ceilings that have sprung up in the United States, pawnbrokers like the tax discounters in Canada, have begun characterizing their business as a buy-sell agreement rather than as a loan.86 Regulation of pawnbroking in the United States has had, on a much larger scale, a similar impact on the industry as regulating tax discounters in Canada. Small pawnbrokers have been squeezed out of the American market as multi-outlet chain pawnbrokers expand—"Cash America," for example, now boasts 120 outlets in four states. The pawnbroker industry also claims that it provides a socially useful function by extending credit to those whose only other alternative would be a loan shark.87

As this analogy indicates, tax discounters did not invent the demand for small loans over short time periods. What the discounters did accomplish, rather, was the partial privatization of the income tax, and it is this privatization that responds to a need that did not exist before the industry emerged. Given the

84. Milczynski, supra, note 2 at 86.
86. Ibid., at 755.
87. See J. Oeltjen, "Pawnbroking: Coming to America" (1990) 38 Buffalo L. Rev. 223.
redistributive intent of Canada’s income tax, the privatization of tax administration for the poor is particularly offensive. Like any privatization scheme, power is removed from any political institution at least nominally accountable to all segments of society and is entrusted to the market which is accountable only to the extent of a consumer’s wealth and influence. If privatization is the crux of the discounting dilemma, then the solution lies not with price controls and market regulation, but with the government assuming its appropriate responsibilities for tax administration.

In the view of Reuben Hasson, “the solution to the tax discounting problem is extremely simple. Since the government has withheld too much tax from a class of taxpayers, the government owes those taxpayers precisely the amount of tax withheld. That amount should be paid as soon as possible.” 88 Other critics, as we have seen, call alternatively for taking the discounters’ market away by deregulating the industry and encouraging banks and other financial institutions to offer more competitive rates on high-risk, small loans. 89

I would go further, contending that what is at issue is not only a technical problem of providing refunds on time, or a fiscal policy dilemma of making available short-term credit on less usurious terms; rather, it is bound up in a deeper problem of how interventionalist the income tax process ought to be in empowering low-income citizens. As mentioned at the outset, the grist for the mill of tax discounting is not insufficient credit for the poor, but insufficient income, and at a structural level, insufficient power in the market and in legal and political institutions. As the policy process surrounding reforms to the TRDA revealed, the interests of low-income consumers rarely determine the government’s consumer protection legislative agenda.

In my view, to conclude, Revenue Canada’s mandate ought to include an advocacy role on behalf of the poor, both in increased enforcement to ensure compliance by high-income taxpayers, and in increased service to low-income taxpayers, including the timely delivery of refunds and credits and any aid required in filling out returns. This would not, of course, redress the inequities that undermine the redistributive potential of the income tax, but it would result in the abolition of private tax discounters. Moreover, it would also serve as an important step towards the social and political empowerment of low-income taxpayers, which is a precondition of progressive tax reform and the harbinger of social justice for consumers in the marketplace.


89. See Trebilcock, supra, note 1 at 451; see also Belobaba, supra, note 4.