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Reuben A. Hasson

Osgoode Hall Law School of York University

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In Defence of Simple Solutions for Simple Problems - A Reply

REUBEN HASSON

Economic conservatives make things unnecessarily difficult for themselves and for the rest of us. Minor reforms are opposed because, we are told, the problem we are looking at is part of a Bigger Problem. Sometimes the admonition is helpful; it is useful, for example, to remind someone who wants to compensate all victims of car accidents that she or he is selecting an arbitrarily chosen group of accident victims. It is useful to point out to such a reformer that a scheme to compensate all accident victims or all accident and sickness victims makes more sense.

The difficulty with the Bigger Problem approach is that the description of the Bigger Problem is, in many cases, arbitrary. Thus, for Professor Belobaba, the Tax Rebate Discounting Act is part of the wider problem of the access of low-income groups to consumer loans. In his words:

What then, was the real cause of the tax discounting 'problem'? The below-market rate ceilings of the federal small loans law which effectively excluded the low-income borrower from the traditional money-lending markets. That and not tax discounting was the 'problem'.

The suggestion, then is that the legislature should not have dealt with the consumer tax-discounter problem until it had dealt with the whole problem of access to consumer loans. The difficulty with this approach is that the tax discounting problem can be viewed as part of other problems. Thus, it is just as plausible to argue that the tax discounting problem is as much a problem in tax administration as it is a consumer loan problem. (That is why this debate appears in this journal and not, say, in the *Canadian Journal of Business Law*). Even if viewed as a loan problem, the holder of the tax refund can be seen as lending money to the government. Finally, the tax-discounting problem may be seen as a problem in policing standard form contracts; in fact, that is how the problem was presented in litigation before the British Columbia Supreme Court.¹

From the above,² it will be seen that it is just as plausible to argue that the tax discounting problem be dealt with as part of a general reform of tax administration or that it be dealt with as part of the general problem of policing unfair contracts. Given this embarrassingly rich range of options, it seems to me to make sense to deal with the tax discounting problem as a problem in its own right.

In my view, the solution to the tax discounting 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 to the taxpayer as soon as possible. To permit a third party to take 15 per cent of the amount the government owes the taxpayer seems to me to amount to an arbitrary 15 per cent deduction for no reason that has been (or could be) advanced. Professor Belobaba would, presumably, find it intolerable if litigants with valid claims against third parties had to give their lawyers 15 per

Reuben Hasson is a professor at Osgoode Hall Law School, York University.

cent of the sums the lawyers recovered. Under our system, the third party pays the claimant the entire amount owing together with costs.³ I see no reason why the government should be in a different position from an ordinary debtor.

It might be argued that such a reform, while fair to taxpayers, is unfair to tax discounters, in that it would put them out of business. There are two replies to this; there is no constitutional right to practise a certain livelihood. Once society has deemed that a certain profession is unproductive or harmful,⁴ it is entitled to prohibit that particular activity. In the second place, there is nothing to prevent those who were previously tax discounters from operating as ordinary moneylenders, pawnbrokers, etc.

I appreciate that it would take time to develop a more accurate tax deduction procedure. But I think it is of critical importance that this be done and be done as a matter of urgency.⁵ In the meantime the government could immediately advance holders of tax refunds 85 per cent of the money owing them and then pay them the remaining 15 per cent in, say, ten to twelve weeks.

Professor Belobaba and the "Economic Impact Assessment"

In another part of his article, Prof. Belobaba criticizes the federal government for not undertaking an "economic impact assessment" of the Tax Rebate Discounting Act. I would like to indicate my skepticism as to what an economic impact assessment would yield. If one is interested in controlling the amount of money that tax discounters make and assuring equity⁶ to holders of tax refunds, one chooses a figure that is meant to be fair to both sides. I cannot see how the figure ultimately chosen can help but be arbitrary, no matter how exhaustively the problem is studied. In the case of the Tax Rebate Discounting Act, the spokesmen for the tax discounting industry claimed that being allowed to keep only 15 per cent of the tax refund was outrageously unfair to them. If consumers who sold their tax refunds were asked their opinion, they might well conclude that 15 per cent was too high a figure for the tax discounter to retain.⁷ If one is interested in fairness between tax-refunders and tax discounters and one is addicted to market solutions one will come up with a measure such as the Tax Rebate Discounting Act.

It is true that spokesmen for the industry claimed that a 30 per cent discount rate was the minimum necessary to break even, but there is no explanation of how this figure was arrived at. One must be a little skeptical of the industry's claim that a 15 per cent maximum would drive them out of business,⁸ in view of the fact that the tax-discounting business seems to have remained unaffected in British Columbia despite the passage of the Consumer Protection Act in that Province in March 1977. Under the British Columbia statute, as under the federal measure, the tax discounter was required to hand back a minimum of 85 per cent.⁹

One reason why the tax-discounters may have been able to continue business as before in British Columbia is that some (or all) of the tax-discounters might have been operating illegally. This is suggested by the facts of a recent case from that province. *In re Hanson and Harbour Tax Services Ltd. (No. 1)*,¹⁰ the tax-discounter was interpreting the 85 per cent hold-back provision in the following manner. Instead of withholding \$150 out of \$1,000 and giving the holder of the refund \$850, the defendant was making a deduction of \$400 for every \$1,000 refund. The \$400 was made up of \$150 discount and a hold-back of \$250. By operating in this manner, the defendant had failed "... on its own admission, to pay at least \$25,000 due to its customers as of February 23, 1978. A much larger amount will now be due to its customers."¹¹

It will be noticed that not a single holder of a tax refund seems to have challenged the legality of what the defendant did and that it took the activist consumer agency about a year to challenge the legality of the defendant's actions. No criminal prosecution has been launched against the defendant yet and it is in unlawful possession of more than \$25,000. The defendant, in this case, seems to have profited from its breach of law, as many enterprises do. How does one estimate the amount that tax-discounters will make through breaches of the law in any "economic impact assessment" of the law?

Although the Tax Rebate Discounting Act provides that a tax-discounter who fails to hand back 85 per cent of the refund is liable to pay a fine of up to \$25,000, my guess is that tax-discounters will violate the 85 per cent hold-back provision and wait to be prosecuted. If the fines imposed under the Combines Investigation Act for false advertising are any guide,¹² the tax-discounters have little to fear. All they need do is to change their method of doing business and use a "tied sale" arrangement. Under a "tied sale" agreement,¹³ the tax-discounter will agree to purchase the tax refund provided that the holder of the tax refund also purchases goods and services of a certain kind from the discounter. The goods that the discounter sells could be watches, brooches, records, etc. These articles could be bought for, say, \$20 and sold for \$100.

As a result of this arrangement, the tax-discounter has effectively and legally outflanked the Tax Rebate Discounting Act. Theoretically, this practice could be enjoined under the Combines Investigation Act but this is somewhat problematic.¹⁴ Even if this kind of "tied" selling is eventually enjoined, it creates a situation where the tax-discounter will disappear to be replaced by the black marketeer. The tax-discounters will not easily give up a highly profitable business. If, in order to retain this business, they feel they have to avoid or evade statutes, they will do so. In common with most consumer protection statutes in this country,¹⁵ the Tax Rebate Discounting Act will, in my opinion, prove to be of marginal importance and effect.

Conclusion

I have serious doubts about the Tax Rebate Discounting Act. In the first place, it legitimizes a business which ought not to exist and which exists solely because the government cannot be bothered to set up a more accurate system for deducting taxes. Second, I fear that the Tax Rebate Discounting Act will be evaded (as it was in British Columbia for more than a year) or avoided by its practitioners. These are my concerns about the Tax Rebate

Discounting Act. Sadly, Professor Belobaba's article does not attempt to address these concerns. #

NOTES

1. See *Hanson, Director of Trade Practices v. John's Tax Services*, unreported, March 5, 1975 (B.C.S.C.).
2. One other plausible way of describing the tax discounting problem is as one of employment. Many of the people with tax refunds are seasonal employees; a very sensible way of dealing

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Rejoinder

A Three-Point Rejoinder to Professor Hasson's "Reply"

1. A more accurate tax deduction procedure would of course be a "simple solution" to the discounting problem. This point was obvious to all concerned. Unfortunately, however, the adoption, institution and implementation of a PAYE system for Canadian taxpayers could take years. Prof. Hasson's "simple solution" thus had to give way to a more realistic concern: what, if anything, should be done in the interim? The resolution of this question, of course, was considerably more complicated.
2. Prof. Hasson's second point that the Tax Rebate Discounting Act would be "evaded . . . or avoided" and thus prove to be "of marginal importance and effect" has validity but, again, is somewhat misdirected. My concern here was not the post-enactment enforcement problem. I have written elsewhere about the consequences of governmental and judicial under-enforcement of otherwise sound consumer protection legislation and the inevitable relegation of these measures to a "name only" status.* Here I was concerned that the federal legislation was from the outset analytically unsound. This being so, under-enforcement would be a boon.
3. Prof. Hasson's "skepticism" about the benefits that an economic impact analysis of the TRDA would have yielded deserves a rejoinder. In his view economic impact assessment is nothing more than "choosing a figure that is meant to be fair to both sides" and worse, doing so arbitrarily. Furthermore, he asks, "how does one estimate the amount that tax-discounters will make through breaches of the law in any economic impact assessment of [that] law?" In my respectful opinion, Prof. Hasson totally misconstrues the function of impact analysis, economic or otherwise. An economic impact analysis has nothing whatsoever to do with "choosing a figure" or estimating breach-related gains. Its only function is to provide some measure of the street-level impact of a proposed regulation. In the context of the TRDA an economic impact analysis might well have revealed the unintended consequences of de facto prohibition. Unfortunately, no such analysis was undertaken.

* Belobaba, "Unfair Trade Practices Legislation: Symbolism and Substance in Consumer Protection," 15 *Osgoode Hall L.J.* 327 (1977).

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with tax discounting problem would be to regulate seasonal employment in various industries.

3. I appreciate that the operation of the costs rules will mean that sometimes a successful party has to bear some of the cost of recovery himself. However, it is the intention of the legal system to give the successful plaintiff full recovery plus costs.
4. See, for example, the ban on referral sales: *Combines Investigation Act*, R.S.C. 1970, c.C-23, as amended by S.C. 1974-75-76, s. 18.
5. Prof. Belobaba mentions the possibility of adopting the PAYE system of tax deduction currently in use in the United Kingdom and notes that this system of tax deduction results in a more accurate calculation of the British taxpayer's tax liability. However, the desirability of moving to the British system is not discussed. Jo Tunnard in her pamphlet, *The Trouble with Tax* (Child Poverty Action Group, May 1978) points out that some families have suffered great hardship as a result of being coded on emergency tax for anything up to two years. The author recommends that a "claim for allowances" form be available at places of work and be given by the employer to each taxpayer starting a new job. The taxpayer would use this form to claim all appropriate allowances and the payer would be coded provisionally from the information on the form; see *id.*, p. 20.
6. Prof. Belobaba has, elsewhere, argued strongly for equity in the field of consumer transactions; see his article, "Unfair Trade Practices Legislation: Symbolism and Substance in Consumer Protection," 15 *Osgoode Hall L.J.* 327 (1977).
7. Prof. Belobaba complains that the tax discounting industry was given only one day's notice to appear before the Senate Committee. I find it disturbing that the Senate Committee made no attempt to find out the views of those who had sold their income tax refunds.
8. One must be a little suspicious of the attitude of groups that are about to be regulated; one might point, for example, to the very strong opposition of industry groups to a change from negligence to strict liability as a test for liability for defective products. This strong opposition is expressed despite the fact that there is little, if any, difference between negligence and strict liability.
9. *Consumer Protection Act*, S.B.C. 1977, c.6, s. 37.
10. 86 D.L.R. (3d) 365 (1976).
11. *Id.*, p. 373.
12. See M.J. Trebilcock et al., *A Study of Consumer Misleading and Unfair Trade Practices*, Vol. 1, Ottawa: Information Canada (1976). The authors state: "In most cases, therefore, the charge can be laid that the fines bear no relation to the profits made by the accused from the illegal enterprise. Sometimes they are so low as to amount to little more than a licence fee to continue in the prohibited conduct;" *id.*, p. 72.
13. A tied sale might be enjoined by the Restrictive Trade Practices Commission at the behest of the Director of Investigation and Research but this is not an easy task; for a full discussion see Connelly, "Exclusive Dealing and Tied Selling under the Amended Combines Investigation Act," 14 *Osgoode Hall L.J.* 521 (1976).
14. *Id.*

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3. *Toronto Star*, April 30, 1977, p. 14. See also the testimony of W.D. Scott of Revenue Canada in *Senate Committee Proceedings*, *supra* note 2, p. 97.

4. *Senate Committee Proceedings*, *supra* note 2, pp. 93-97.
5. *Senate Committee Proceedings*, *supra* note 2, pp. 11, 54, 62. See also Social Profile Survey of the Community Income Tax Services of Alberta (unpublished, 1977).
6. Mr. James McGrath, M.P., *Can. H. of C. Deb.*, April 17, 1978, p. 4590.
7. See, for example, *Native People*, February, 1975, and the lead editorial entitled "Legal Robbery." Every major newspaper in Canada carried similar editorials encouraging government regulation. *Infra* note 17.
8. *Consumer Protection Act*, R.S.N.S. 1967, c.53 as amended by S.N.S. 1977 c.24 s.1; *Credit and Loan Agreements Amendment Act*, S.A. 1976, c.11. In the spring of 1978, Bill 233 received first reading in the Alberta legislature. The Bill would require both disclosure and a minimum 90 per cent "hand-back."
9. *British North America Act*, 1867, s.91(19). In an interview on April 3, 1977, the Honourable Sidney Handleman, then Minister of Consumer and Commercial Relations for the Province of Ontario suggested that any provincial attempt to regulate the discount rates "would be laughed out of court." *Toronto Star*, April 3, 1977.
10. S.3(2)(o) of the *Trade Practices Act*, S.B.C. 1974, c.96, as amended, and B.C. Reg. 134/75 (Order in Council 562, February 6, 1975).
11. See, for example, *Hanson, Director of Trade Practices v. John's Tax Services*, unreported, March 5, 1975, (B.C.S.C.).
12. *Consumer Protection Act*, S.B.C. 1977, c.6, s.37.
13. *Income Tax Act*, R.S.M. 1970, c.I-10, as amended by S.M. 1976, c.67, s.15.1. *Income Tax Act*, R.S.S. 1965, c.32, as amended by R.S.S. 1976-77, c.32. *Income Tax Discounters Act*, S.O. 1977, c.55.
14. As the Hon. Larry Grossman, Ontario Minister of Consumer and Commercial Relations put it, the tax discounter "will be put virtually out of business." *Globe and Mail*, November 9, 1977, p. 1.
15. According to W.D. Scott of Revenue Canada, the 95 per cent "hand-back" requirement was not working in Ontario because "the charges for the preparation of the returns [were] being added on to the 5 per cent so that the actual discount [was] greater than that amount." See *Senate Committee Proceedings*, *supra* note 2, p. 86.
16. See, for example, the series in the *Toronto Star*, April 29-30, 1977. And see testimony of the Hon. Warren Allmand, Minister of Consumer and Corporate Affairs in *Senate Committee Proceedings*, *supra* note 2, p. 15.
17. See, for example, the *Cape Breton Post*, April 9, 1978 ("Calculated on a per annum basis the astronomical interest rates would make a seasoned gangster blush!") *Toronto Star*, April 30, 1977 ("No one in Canada should have to pay more than 24 per cent interest on a loan. Usury has no place in today's society.")
18. Bill C-16, 1976 (30th Parl. 2d Sess.), given first reading Oct. 27, 1976.
19. *Id.*, ss. 2(4) and 8(1).
20. R.S.C. 1970, c.S-11, as amended.
21. The *Small Loans Act*, first enacted in 1939 and revised in 1956, applies to loans up to and including \$1500 and imposes interest rate ceilings by a series of step-rates: 24 per cent per annum for the first \$300, 12 per cent for the \$300 to \$1000 portion of the loan and 6 per cent for the \$1000 to \$1500 portion. The imposition of a below-market rate ceiling effectively excludes the high-risk low-income borrower from most if not all of the traditional credit markets. See *infra* note 41.

22. For a criticism of the "unwarranted credit rate charge" as an unworkable and retrogressive measure, see Minitier, "Annual Workshop on Commercial and Consumer Law: What Was Said," 2 *Can. Bus. L.J.* 364, 382-87 (1978). See also Ziegel, "Low-Income Consumers Need Credit at Reasonable Rates," *Toronto Star*, Nov. 4, 1976.
23. *Supra* note 1.
24. The Hon. Warren Allmand, *H. of C. Deb.*, *supra* note 6, p. 4590.
25. Mr. James McGrath, *id.*
26. Ss. 4-6 and Sched. I, II.
27. S. 3(1).
28. S. 3(2)
29. The Hon. Warren Allmand, *H. of C. Deb.*, *supra*, note 6, p. 4590.
30. Bill Clark, *id.*, p. 4591.
31. The Hon. Warren Allmand, *id.*, p. 4592.
32. Committee Report, *Senate Committee Proceedings*, *supra* note 2, p. 7.
33. *Id.*
34. *Supra* note 31.
35. The Government's calculation of the tax discounter's rate of return on his investment was premised on a "turn around" period of four to six weeks. The industry's data suggested that the average "turn around" was in excess of 12 weeks. See *Senate Committee Proceedings*, *supra* note 2, p. 42. Furthermore, the government's "Alberta Study" that suggested a "loss rate" on files handled of only 2 or 3 per cent, was undermined by the evidence presented by the tax discounters which showed (1) that only two of twelve Alberta firms were surveyed and (2) that the survey was done in June when most of the refunds had not yet been received from Revenue Canada. The real "losses" arose out of files that were being held by Revenue Canada for examination and these statistics would not have been available until September or October. See *Senate Committee Proceedings*, *supra* note 2, pp. 44, 61. At worst the data was highly suspect. At best the evidence was, as Senator Manning noted, "completely conflicting." *Id.* p. 81.
36. See *Senate Committee Proceedings*, *supra* note 2, pp. 41, 61. The Hon. Warren Allmand suggested that his department had "wide consultations" with the tax discounters. This certainly was true with respect to the proposed *B.D.P.A.* Bill C-45, however, in stipulating a discount rate ceiling, provided a regulatory approach that was fundamentally different from that of the *B.D.P.A.* In its Report, the Senate Committee noted that "no opportunity was afforded to the tax discounters to be heard; nor was there any consultation when the Bill was brought forward." *Supra* note 2, p. 7.
37. Senator Manning, *Senate Committee Proceedings*, *supra* note 2, p. 81.
38. Mr. R. Thiemer, *Senate Committee Proceedings*, *supra* note 2, pp. 48-56.
39. *Supra* note 32.
40. See, for example, the comments of Senator McIlraith, *Senate Committee Proceedings*, *supra* note 2, p. 21. One option open to Revenue Canada would be the adoption of the PAYE (Pay As You Earn) system that is currently in place in the U.K. The PAYE system of tax deduction has resulted in a more accurate calculation of the British taxpayer's tax liability. Five out of six PAYE files need no further revision after the end of the tax year. For a description and evaluation of the PAYE system see the *Report of the Commissioners of Her Majesty's Inland Revenue for the Year Ended March 31, 1977* (Cmnd. 7092, 1977).
41. There is almost no evidence that the imposition of rate ceilings enables a high-risk borrower to obtain the same quantity of credit as before the ceilings, but at cheaper interest rates. If legislation fixes ceilings above market rates it has no effect on the rate. If ceilings are set at market rates they are likewise redundant. If ceilings are set below market rates, one of two consequences is likely. The first is that credit will simply become unavailable to the poor who, because of their low and insecure incomes, are seen by lending institutions as being higher risks. Alternatively, if their need is such that they have no choice, the poor will be driven into the illegal money market of the loan shark where interest rates are staggeringly high and where the baseball bat replaces the writ of seizure.
- Prices and the Poor: A Report by the National Council of Welfare on the Low-Income Consumer in the Canadian Marketplace*, 32-33 (1974). For a more extensive discussion of the exclusionary consequences of below-market rate ceilings see Cayne and Trebilcock, "Market Considerations in the Formulation of Consumer Protection Policy," 23 *U.T.L.J.* 396 (1973). See also Trebilcock and Shulman, "The Pathology of Credit Breakdown," 22 *McGill L.J.* 449 (1976).
42. Cayne and Trebilcock, *supra* note 41, p. 414.
43. The ramifications of publicly subsidized consumer loans are discussed in Note, "An Alternative to the UCCC: Publicly Subsidized Consumer Loans," 4 *Golden Gate L.R.* 239 (1973).
44. The Hon. Warren Allmand, *supra* note 6, p. 4591.
45. Mr. R. Thiemer, *Senate Committee Proceedings*, *supra* note 2, p. 55.
46. *Senate Committee Proceedings*, *supra* note 2, pp. 51-63.
47. As one tax discounter commented: "This piece of legislation will make no sense at all because it purports to make regulations when in effect what it does is eliminate business. It does not make any sense at all . . ." —Mr. R. Dawson, *Senate Committee Proceedings*, *supra* note 2, p. 63.
48. For a discussion of legislative ad hocery in the context of consumer trade practice regulation see Belobaba, "Unfair Trade Practices Legislation: Symbolism and Substance in Consumer Protection," 15 *Osgoode Hall L.J.* 327 (1977).
49. Stigler, *The Citizen and the State: Essays on Regulation*. Chicago: U. Chic. Press, 1975, p. 24.
50. The Canadian literature in this area is growing. See, for example, Trebilcock, Waverman and Prichard, "Markets for Regulation: Implications for Performance Standards and Institutional Design," in *Government Regulation: Issues and Alternatives 1978*. Toronto: Ont. Econ. Council, 1978.
51. [I]t seems likely that the media, recognizing the limited investments in information that most people find it rational to make in public policy issues, are likely to "trivialize" complex policy questions both in terms of the identification of the nature of the issues and in terms of the proposed prescriptions for matters of public concern so that stories can be "turned over" at a sufficient rate to retain the public's attention. Such a media strategy is of course largely a reflection of the public's own natural enough desire to believe that all problems are solvable, even if this entails no more than supporting a collective decision, manifested in laws or regulatory arrangement, simply telling the problem to go away.
- Trebilcock, Waverman and Prichard, *supra* note 50, p. 32-33.