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Tax Evasion and Social Security Abuse — Some Tentative Observations

Reuben Hasson

In this article, Professor Hasson finds that in the area of social security abuse the most serious problems arise not because people are abusing social security programs but because people who qualify for benefits are not receiving them. He also notes that the government commits enormous resources to policing social security schemes and advertising the seriousness of such abuse, and that civil servants are often instructed to, in effect, mistreat claimants. In contrast, the government loses billions of dollars annually through tax evasion while failing to take a number of obvious steps to reduce its incidence. Furthermore, many people appear to view tax evasion with equanimity. The author explores the possible reasons for this perception. He concludes that tax evasion is a much more serious crime than social security abuse, and that at the very least tax evaders and social security abusers ought to be treated equally. Reuben Hasson is a professor of law at Osgoode Hall Law School.

The task of comparing welfare abuse with tax evasion is a challenging one, fraught with formidable difficulties.

First, there is no consensus as to what constitutes abuse. Thus, some people think tax avoidance is undoubtedly an abuse, whereas many sane, law abiding people see tax avoidance as being socially and ethically desirable. To take an example from the welfare law field — drawing compensation simultaneously from two social security programs is regarded by some as being socially undesirable, others view it with equanimity.

Assuming that a definition could be agreed upon, a second difficulty in this field is simply the difficulty of measuring the extent of abuse. This difficulty frustrated even the British Royal Committee on the Abuse of Social Security Benefits (the Fisher Committee). After hearing evidence from government departments, social work agencies, Members of Parliament and anyone who had an interest in the subject, the Committee concluded:

It would be very desirable, if it were possible, to know exactly how much abuse of the social system by wrongful claims actually goes on. So long as knowledge of the full extent of abuse is incomplete and fragmentary, any judgment as to how serious a problem it is and what resources it is justifiable to devote to alternative means of suppressing it must be based on impression and guess work.

The difficulty in estimating the extent and cost of welfare abuse is infinitely greater in a federal country such as Canada than in a unitary country such as the United Kingdom. Whereas social security is centrally administered in the United Kingdom, the administration of social welfare in Canada is divided between federal, provincial and municipal governments in a scheme of frightening complexity.

Measuring tax evasion is as difficult as measuring...
social security abuse. A thoughtful economist has written, "By definition, its extent is not known, and in truth, is not open even to reliable estimation." 7

Instead of comparing the extent of abuse, one might compare other aspects of abuse, for example the sanctions administered for tax evasion and social security fraud. But, even here, difficulties abound. For one thing, it is not enough to count the number of prosecutions in the field of tax evasion and compare it with the number of prosecutions in the field of social security. In social security the usual sanction applied to someone wrongfully claiming benefit is to deny the benefit. 8 Yet the denial of benefit to a claimant may be more severe financially than a fine or a prison sentence. Even if social security decisions were published — and for the most part they are not 9 — there would still be no way of telling how many people who rightfully claim welfare benefits are not given them.

With the understanding that my remarks are subject to these reservations, I shall try to demonstrate that there is very little abuse in the social security field and that, indeed, the major problem in the area of social security is that people are denied benefits either in violation of legal principles or on the basis of criteria that are not made public. 10 In contrast, I feel that the public purse suffers great losses in the field of tax evasion. I think that we could (and should) be more energetic and imaginative in preventing tax abuse and that, generally, a double standard pervades our attitudes towards, and perception of, tax and social security abuses.

Part I — Social Security Abuse

In order to illustrate these points, I shall first examine three areas of social security: workers' compensation, unemployment insurance and welfare. I shall then deal with tax evasion.

Workers' Compensation

It is doubtful whether any subject of Canadian public policy has been more fully examined than workers' compensation. In Ontario alone, there have been three Royal Commission Reports, 11 one Task Force Inquiry 12 and a review by a group of pension consultants. 13 In no single review of the provincial Acts that I am aware of has the problem of false claims been mentioned as being of any significance.

I think that the reason why there is so little abuse in workers' compensation is that it is very difficult to feign injury and it is very difficult to pass off an injury that occurred, say, at home as being one that occurred at work. 14 Very occasionally, perhaps, a claimant is able to persuade a board that a non-work-caused injury occurred at work, 15 but — and this illustrates my point about the difficulty of defining at least serious abuse — in the very rare case where a claimant is able to obtain workers' compensation benefits for an accident that occurred outside the factory gate, I am afraid that I am unable to feel any great sense of outrage. For the purpose of a national social security scheme, it is impossible to justify, either on policy grounds or in terms of ethics, discrimination between those persons who suffer injuries at the work place and those who suffer them elsewhere.

However, even accepting a distinction between work- and non-work-related injuries, it is distressing to find that most workers' compensation boards 16 do not attempt to lay down criteria for determining whether an accident arises out of and in the course of employment. Consider, for example, the four following Ontario

7. See Christopher, "Tax Avoidance", supra note 2, pp. 79, 89.
8. Thus, in the United Kingdom in 1974, 2335 cases were investigated for fictitious desertion and 9,993 cases for undisclosed cohabitation. The investigations resulted in 45 per cent and 41 per cent respectively of allowances being reduced or withdrawn for each group of claimants who were investigated; see figures cited in F. Field et al., supra note 1, p. 153.
9. Even those decisions which are reported are so inadequate that the claimant cannot make any kind of intelligent decision as to whether he or she wants to appeal. The point has been well put by Professor Ison when commenting on decisions of the Ontario Workmen's Compensation Board. Ison says of these decisions, "They are simply a brief recitation of some of the evidence followed by a decree. They do not state what principles are being applied, or how these principles are derived nor do they portray in any other way any movement of the mind from premises to conclusion". See his paper, "Contemporary Developments and Reform in Personal Injury Compensation," in New Developments in the Law of Torts, Law Society of Upper Canada Special Lectures. Toronto: Richard De Boo, 1973, pp. 521,547. The decisions of the Ontario Social Assistance Review Board are at least as bad as those of the Ontario Workmen's Compensation Board.
10. We have no Canadian estimates as to how many Canadians who are entitled to welfare benefits do not obtain them. In the United Kingdom, Professor David Donnison, Chairman of the Supplementary Benefits Commission, has estimated that 25 per cent of those who are entitled to welfare benefits do not obtain them; see his speech, "Policies and Priorities for Supplementary Benefits," given to the London Branch of the British Institute of Management on November 16, 1976 at p. 11.
11. See the reports by Mr. Justice Middleton (1932), Mr. Justice Roach (1950), and Mr. Justice MacGillivray (1967).
14. Even the most liberal workers' compensation board in the country has set out fairly stringent criteria for determining whether accidents are work-related or not. See, for example, decision No. 145 of the British Columbia Workers' Compensation Board dated October 3, 1975.
15. See, for example, the tragic case reported in The Globe and Mail on April 17, 1980. A Hamilton man was convicted of defrauding the Workmen's Compensation Board of $7,344.40. The accused was sentenced to a five month jail term. The claimant had lost the sight in one eye in a 1973 car accident. He did not obtain compensation in respect of that accident. In 1974, he suffered an accident at work which he claimed had caused him to lose the sight in his eye. The claimant obtained benefits from the Board for twenty-one months before the true facts were discovered. Under a rational compensation scheme, such cases simply could not occur.
16. The only exception to this statement appears to be the British Columbia Worker's Compensation Board.
cases. In the first case, a wood lathe operator injured his hand while turning a piece of wood for his personal use. In the second case, an employee injured his eye while lighting a cigarette while on his way to the washroom. In both these cases, the Board held that under the terms of the Workmen's Compensation Act the claimant was not entitled to receive protection for personal acts.

These cases should be contrasted with the case of the employee who suffered a lumbar strain when picking up a can of cola from a dispensing machine located in the canteen. In another case, an employee was injured as she was re-entering the factory gates after returning from a dental appointment. In both these latter cases, the employees where held to be entitled to compensation because they were acting within the scope of their employment.

It seems to me that the theory which allowed the claimants in the last two cases to recover — that is, that an accident which occurs on the employer's premises is one that arises out of and in the course of employment — should have been applied to allow recovery in the first two cases.

Even more disturbing than the frolics of the boards with regard to the “scope of employment” doctrine is the extremely harsh attitude taken by the boards towards compensation for industrial diseases. “Accidents, poisonings and violence” accounted for only 24.4 per cent of the deaths of people aged between 20-60 in 1974. Disease accounted for 75.6 per cent of the deaths. However, when workers' compensation figures for the Alberta, British Columbia and Manitoba Boards are examined, only between 2 per cent and 17 per cent of awards were made in respect of death from disease. Of the total number of permanent disability awards only 3.4 per cent to 11.3 per cent are awarded in respect of disease, and of these, the majority are for hearing loss. If claims for hearing loss are excluded, only 0.8 per cent to 1.7 per cent of the total number of permanent disability awards are for disease. Workers might be excused for thinking that the Workmen's Compensation Act should be renamed the Workers' Compensation (Trauma) Act.

In recent years some commentators have focused their attention on what they perceive to be an abuse in the system of workers' compensation. That abuse may be described as the problem of overlapping benefits or overcompensation of workers. Thus, in December 1979, the Ontario Workmen's Compensation Board pointed out in its Grey Paper that as a result of some workers obtaining Canada Pension Plan benefits, disability insurance and wage loss plans, in addition to their workers' compensation benefits, some workers might be financially better off while injured than while working. Yet although this is true for a small percentage of workers, any 'overcompensation' is not likely to last long: workers' compensation benefits and other collateral benefits are not usually inflation-proof. If the ceilings on workers' compensation benefits were to be removed and a system of inflation-proofing of benefits were to be introduced, then it might make sense to speak of over-compensation as being a problem. At present, however, the problem is one of under-, rather than over-compensation.

I cannot leave the subject of overcompensation without mentioning that, in the field of personal injury litigation, overcompensation of accident victims is generally regarded with equanimity and sometimes with positive enthusiasm. Not only are accident victims awarded substantial sums for pain and suffering, but accident victims are not required to deduct from their awards either private insurance benefits, Canada Pension Plan benefits, wage payments by the employer or any other collateral benefit. Any attempt to change the collateral benefits principle in this area would provoke the wrath of most lawyers. Ironically, most of these lawyers applaud the principle that there should be no overlapping benefits in workers' compensation cases.

Unemployment Insurance

There is some evidence that a great many Canadians believe that the Unemployment Insurance Act is

21. Id.
23. Even in provinces such as British Columbia where worker's compensation benefits are inflation-proof, private insurance disability benefits are not inflation-proof.
24. See the award of $100,000 for pain and suffering and loss of amenities awarded by the Supreme Court of Canada in Andrews v. Grand & Toy Alberta Ltd. (1978), 83 D.L.R. (3d) 452, 491. It would be fair to say that this sum is regarded as being extremely (or excessively) moderate by commentators and practitioners.
27. See e.g., Harris v. Manchester (1975), 50 D.L.R. (3d) 90 (Man. Q.B.).
28. The one exception to this principle is to be found in the various provincial no-fault road accident benefits; see, for example, The Insurance Act, R.S.O. 1970, c. 224.
being abused by claimants. Thus a review sponsored by the Unemployment Insurance Commission in 1977 found that "71 per cent of Canadians felt that the U.I. program should be tightened."²⁹ In February 1978, the Toronto Globe and Mail reported that 84 per cent of Canadians thought that the Act needed to be tightened up to prevent abuse.³⁰ In my view, the Act does not need tightening up, because it is being administered in a very unsympathetic manner. It is necessary to divide the areas of alleged abuse into separate categories.

Unemployment Insurance Fraud. Penalties may be imposed either under section 47 or under section 121 of the Act upon someone who falsely claims benefits and upon people who make false statements. Section 47 imposes administrative penalties whereas section 121 imposes criminal penalties.³¹ The figures for the number of penalties imposed in recent years are as follows:³²

<table>
<thead>
<tr>
<th>Year</th>
<th>No. of Claims</th>
<th>s.47 Penalties</th>
<th>s.121 Penalties</th>
</tr>
</thead>
<tbody>
<tr>
<td>1974</td>
<td>1,974,000</td>
<td>22,474</td>
<td>924</td>
</tr>
<tr>
<td>1975</td>
<td>2,438,000</td>
<td>26,853</td>
<td>1,800</td>
</tr>
<tr>
<td>1976</td>
<td>2,429,000</td>
<td>38,151</td>
<td>4,660</td>
</tr>
<tr>
<td>1977</td>
<td>2,500,000</td>
<td>60,000</td>
<td>6,500</td>
</tr>
<tr>
<td>1978</td>
<td>2,809,000</td>
<td>50,000</td>
<td>6,700</td>
</tr>
</tbody>
</table>

The total number of claimants subject to either penalty or prosecution rose from 1.19 per cent in 1974 to 2.66 per cent in 1977. In 1978 this figure dropped to 2.01 per cent, but it seems clear that the last four years have seen stricter control over claimants.

The annual reports of the Unemployment Insurance Commission do not give any breakdown of how many of these convictions and penalties are imposed for failure to disclose earnings as opposed to, say, incorrectly stating the number of jobs searched for or merely making false statements. The British Royal Committee on the Abuse of Social Security Benefits found that 86 per cent of the prosecutions were for the failure to report the receipt of earnings above that permitted.³³ I am prepared to assume that most prosecutions in Canada are, similarly, for failure to report outside earnings.

In assessing the moral culpability and therefore the seriousness of the abuse committed by claimants who fail to report outside earnings, I would like to make a plea in mitigation and urge that the law be changed. As the law stands at present, a claimant is entitled to earn a sum equal to 25 per cent of his or her weekly benefits.³⁴ However, for every $1 earned above that amount, his or her benefits are reduced by $1. This means that earnings in excess of 25 per cent are taxed at a rate of 100 per cent. If, as has been argued for so long, penal rates of taxation encourage tax evasion,³⁵ then surely we ought to be concerned about a system that imposes a rate of taxation that is without parallel in the field of income taxation.

In considering the amount and seriousness of abuse, as it is reflected by the numbers of prosecutions, one must also consider that included in these statistics are a number of cases in which claimants are prosecuted for making a false statement even though the government suffers no financial loss. The kind of cases that give me particular concern are those of the employees who report themselves as being unemployed when they are sick. In such a case, claimants have undoubtedly committed an offence by making a false statement but the government has suffered no financial loss since employees are entitled to sickness benefit in any event.³⁶ What is the point in bringing such prosecutions? The federal government has spent vast amounts of money telling us that unemployment insurance fraud is a serious problem.³⁷ If it used some of this money to advertise the fact that sickness and pregnancy benefits are available under the Act, then such cases might not arise.

The Problem of the Workshy. The problem of the workshy unemployment insurance claimant is one that has received extensive attention from the politicians and from the mass media. The difficulty, however, is that like 'abuse', 'workshyness' is a very subjective concept. Thus, individuals who refuse a lower-paid and less prestigious job would not regard themselves as being workshy; but the Commission might take precisely that view and disqualify (and/or disentitle) them. The Unemployment Insurance Act, subsection 40(3), requires a claimant after a "reasonable interval" to lower his or her sights in terms of the jobs that she or he is willing to accept. The problem, however, is that the claimants do not know what constitutes a "reasonable interval" and by how much their expectations must be lowered. According to the authors of a study prepared for the Law Reform Commission, Unemployment Insurance Benefits, claimants in the first three weeks of

³⁰. See the figures quoted in a letter to the editor by Mr. L.E. St. Laurent, Executive Director, Benefits, Canada Employment Commission, Globe and Mail, February 28, 1978.
³¹. A section 47 penalty is imposed when there are felt to be "mitigating or extenuating circumstances," whereas a criminal penalty is imposed when there are felt to be no such circumstances. For a partial list of these 'extenuating' circumstances, see P. Issallys and G. Watkins, Unemployment Insurance Benefits, a study prepared for the Law Reform Commission of Canada. Ottawa: Minister of Supply and Services, 1977.
³². See the Annual Reports of the Unemployment Insurance Commission, 1974-79.
³³. See Report, supra note 4, p. 227, para. 492.
³⁵. The argument that "penal" rates of taxation encourage evasion was advanced as early as 1922; see e.g., Bastable, Public Finance 310 (3d ed., 1922) quoted in Blum & Kalven, "The Uneasy Case for Progressive Taxation," 19 U. Chicago L. Rev. 417, 444, n. 80 (1952).
³⁶. See, e.g., CUB 3123 (December 23, 1971).
unemployment are entitled to regard as suitable only such jobs as are in their own occupation and which pay their normal rate of earnings. After this period, skilled

workers with more than one year's experience in their occupation receive an extension of one week for every year of experience, up to a maximum of thirteen weeks. At the end of this time, claimants must expand the scope of their search to include other occupations, at a progressively lower rate of earnings in relation to their previous earnings (five per cent less per week). An employee is not, however, required to accept a job if the rate of pay is lower than the prevailing wage for the particular occupation or if the conditions of employment are less favourable than those observed by collective agreements or recognized by good employers.

It is scandalous that this rule is unpublished, but even more shocking is the fact that the Commission "has instructed its Agents not to inform claimants to be particularly demanding in terms of a new job until the lapse of the 'reasonable interval'. If the claimant questions the Agent regarding the length of the interval he is told simply that it depends on the type of employment, the experience of the claimant in his occupation and the length of time on unemployment. No specific time limit is mentioned."39

If such a practice existed in the field of taxation law, there would (rightly) be outcries invoking the principle of the rule of law. Strangely, however, we seem to accept this bizarre denial of the principle in unemployment insurance.

I should also mention, in discussing workshyness, the peculiar view taken by the Commission, and supported by the jurisprudence, that an employee may be deemed to have refused employment even if the employee is unable to commute to the job. The Commission has taken the view that transportation arrangements are the concern solely of the employee.40

I cannot leave the problem of workshyness without referring to the guide issued to benefit control officers. This guide includes the following statements:

5. Tell the truth. A bluff may occasionally be justified; deliberate falsehoods, never.
6. Do not underestimate the mental capacity and ability of your subject.
11. Be dominant without being domineering.41

In my view, such instructions could not be justified in a police training manual.42 They are even more inappropriate in a scheme where the emphasis should be on giving assistance to people who are in a difficult posi-

tion, usually through no fault of their own. Statements such as the ones I have quoted can only tend to produce harsh and unsympathetic treatment for claimants.

The Problem of Overpayments. In recent months, public attention has again focused on the problem of overpayments in unemployment insurance. It will be remembered that as a result of a computer error, overpayments amounting to $4.3 million were made recently to claimants in Nova Scotia, Quebec and British Columbia.43 But in no case of overpayment that I know of has it been shown that the recipients were acting other than in good faith. Despite this fact, the reporting of overpayment cases by the press does not make this clear and there is a strong suggestion, which is picked up by many readers, that the benefits were not received in good faith. The Commission also seems to take the view that these receipts of benefit constitute a serious form of abuse, to judge from the aggressive measures it has taken, in many cases, to recover these overpayments.

By contrast in the area of private insurance, the courts have allowed insured persons to recover on their policies by rectifying an incorrect answer given by the insured in the proposal form.44 Further, the courts have held, in the case of group insurance, that an employee's dependents' rights cannot be extinguished by a misrepresentation made by an employer.45 If privately insured people are entitled to recover even where, on a strict reading of the policy, they are not entitled to do so, and even though they are responsible for the errors which might be thought to have extinguished their rights, it is difficult to see why unemployment insurance recipients should be treated differently.

In short, I think there is very little evidence of abuse in the field of unemployment insurance. To the extent that there is abuse, this might be reduced by taxing casual earnings above the permitted amount at a more reasonable rate. The more serious abuses, to my mind, are perpetrated by officials. In a number of cases prosecutions are needlessly brought.46 Further, an employee may be disqualified or disentitled because of secret rules which the Commission resolutely refuses to make public.47 Also, benefit control officers are trained to take a hostile and adversarial position towards their

38. See s. 40(2), Unemployment Insurance Act, 1971.
40. See, e.g., CUB 2599 (May 12, 1966).
42. If such instructions were included in a police training manual, one would hope that bodies such as the Canadian Civil Liberties Association would be exercised and outraged.
43. See 1 Low Income Law (No. 2) 16 (1979).
46. See note 36, supra.
47. See text at note 39, supra.

CANADIAN TAXATION/SUMMER, 1980
Welfare Abuse

Although we do not know whether a great percentage of Canadians believe that claimants are abusing the welfare system, it would not be surprising if welfare fraud provoked more anger than unemployment insurance abuse. First of all, I think our society is prepared to be a little more charitable towards those people who have purchased some degree of protection with their premiums. The welfare defrauder, on the other hand, is seen as not having paid anything for his or her protection; he or she is therefore regarded as an undeserving recipient of charity. Second, we seem able to identify a little more readily with the unemployed ("there but for the grace of God go I") than with people who have received an even more cruel buffetting from fate.

I propose to discuss the problems of welfare abuse under various headings.

Welfare Fraud. We have no figures for the number of people who are prosecuted for welfare fraud. Nor do we know for what kinds of fraud such persons are prosecuted. According to the British Report of the Committee on Abuse of Social Security benefits, 74 per cent of those convicted for welfare fraud were convicted for failure to report outside earnings. One would have thought that the figures might be comparable in Canada, but the Ontario figures under the Family Benefits Act for 1977-78 show a striking difference. In that year, 14.3 per cent of cases ‘actively reviewed’ were in respect of ‘income and entitlement’ requirements and 3.7 per cent of cases ‘actively reviewed’ were in respect of mothers who had worked more hours than allowed. These figures might be different for other provinces and, indeed, they might be different for Ontario in other years. In any event, whatever the figures for the number of people who are prosecuted for failure to declare outside earnings, I think that — as in the case of unemployment insurance — we encourage welfare fraud by taxing outside earnings (with the exception of a very low amount) at a rate of 100 per cent.

In most cases of welfare fraud, I find it difficult to feel any outrage because of the scandalously low level of welfare benefits. There is some evidence that some courts share — at least in part — my view. Thus, in Simm, decided by the Manitoba Court of Appeal in September 1975, a mother claimed in respect of two children when she had only one. She was ordered to make full restitution but a three month prison sentence was reduced to a suspended sentence. In Said, a case decided by the Manitoba Provincial Court in 1979, the accused failed to report a common law spouse and one year’s employment. As a result, she had received $14,000 over 4½ years. Upon conviction she was placed on one year’s probation and was not required to make any restitution.

It is not only the fact that welfare benefits are scandalously low that influences my thinking on this issue. I am also influenced by the fact that in many, if not most, cases the people who commit welfare fraud are frequently in dire financial and emotional straits. In this connection, I would like to cite a paragraph from the evidence of the Family Service Units to the British Committee on the Abuse of Social Security Benefits:


48. See text at note 42, supra. It should also be noted that a high percentage of benefit control officers are recruited by the Commission from the ranks of former policemen, private detectives and investigators for commercial collection agencies. As was pointed out in a study prepared for the Law Reform Commission of Canada, Unemployment Insurance Benefits supra note 31, p. 75: . . . these hiring practices may create a risk that benefit control operations be occasionally tainted with the ethics and the (sometimes strongly criticized) methods of private agencies.
49. See text at note 30, supra.
50. Not only does society see welfare as charity but there is also evidence that welfare recipients see themselves as recipients of charity; see the surveys by Briar, “Welfare from Below: Recipients’ Views of the Public Welfare System,” 54 California L. Rev. 370 (1966) and by Handler & Hollingsworth, “Stigma, Privacy and Other Attitudes of Welfare Recipients,” 22 Stanford L. Rev. 1 (1969).
51. See Report, supra note 4, p. 227, para. 492.
52. Information supplied by Mr. D. Alfieri, Director, Income Maintenance Branch, Ministry of Community and Social Services of Ontario, February 26, 1980.
53. The provisions on outside earnings which the claimant is allowed to declare outside earnings, I think that — as in the case of unemployment insurance — we encourage welfare fraud by taxing outside earnings (with the exception of a very low amount) at a rate of 100 per cent.
54. The position of the welfare claimant is worse than that of the unemployment insurance claimant on at least two other grounds. The welfare claimant will be penalized for having ‘excessive’ assets; see General Welfare Assistance Act Regulations, R.R.O. 383, s. 12, and the Family Benefits Act Regulations, R.R.O. 1980, s. 12.
55. The position of the welfare claimant is worse than that of the unemployment insurance claimant on at least two other grounds. The welfare claimant will be penalized for having ‘excessive’ assets; see General Welfare Assistance Act Regulations, R.R.O. 383, s. 11(1)(i), and the Family Benefits Act Regulations, R.R.O. 287, s. 8.
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All the cases of abuse described by FSU workers occurred in families living for long periods on extremely low incomes, one third in single parent families with the additional stresses experienced. The vast majority were, in the opinion of the workers not 'rogues' wilfully abusing social security, but ordinary claimants either unknowingly or in desperation making wrongful claims in order to ease unbearable situations, created in the main by the vicious circle of long-term poverty, and in some instances by personal problems including psychiatric ill health.

Similarly, the Edinburgh Council on Social Service told the same Committee:

In general, we feel that the majority of people who resort to such devices to defraud the (Supplementary Benefits) Commission do so out of the necessity to obtain an income at subsistence level rather than from irresponsible choice.

Welfare Abuse - Who's Abusing Whom? One of the critical problems in welfare law is to try to ascertain whether the correct legal principles are being applied. If we are deprived of this information, as we frequently are, it becomes impossible to determine whether the claimant is abusing the welfare system or is being abused by it. The difficulty is that the decisions of social welfare agencies — even when published — are often impossible to divine. The point can be made by looking at the application of the cohabitation rule since the critically important decision of the Ontario Divisional Court in Re Proc.

In that case, the Divisional Court stated that realistic criteria must be applied in determining whether the claimant is cohabiting so as to deprive her of welfare benefits. Since that decision was handed down, Professor R.W. Kerr of the University of Windsor Law School has examined forty-two decisions of the University of Saskatchewan. If we were in the green fields of taxation law, there would be interpretation bulletins to cover these and similar cases, but in the wilderness of welfare law claimants and their legal advisers are required to engage in a bizarre roulette game.

To take one final example of welfare law where there appear to be no signposts, consider the interpretation of the "disabled" person's allowance in the provincial welfare statutes. Under the provincial welfare statutes a claimant is entitled to a special allowance if he or she can show that he or she is disabled. Unfortunately, the case law on the meaning of "disabled" is impossible to decode; it might be read as suggesting that a claimant is disabled if he or she needs constant care and attention but there is no tribunal decision of which I am aware, that states that this is the test.

The Welfare Claimant's Right to Appeal. One might be forgiven for assuming that in a civilized system of jurisprudence, aggrieved persons should know of their right to appeal, but a survey by the Canadian Civil Liberties Association revealed that approximately half of the welfare claimants who had been denied welfare benefits did not know that they had a right of appeal. The number of persons in various cities who did not know that they had a right to appeal an adverse welfare decision are as follows:

[T]here is very little evidence of abuse in the field of unemployment insurance.

Social Assistance Review Board on the cohabitation rule. From his survey, Professor Kerr concludes that it is impossible to tell whether the principles in Re Proc are being applied or not. A recent Ontario Court of Appeal decision suggests that the welfare authorities are continuing to act as if the Proc case had never been decided.

The cohabitation cases are of special importance because it seems that in Ontario, at least, most welfare fraud prosecutions are brought against claimants who are "not living as single persons." Thus in 1977-78, 63.5 per cent of cases 'actively reviewed' involved claimants not living as single persons.

The cohabitation cases constitute only one example of the welfare tribunals' failure to spell out any general principles. Thus, in determining whether there is a need for a "special allowance," the welfare tribunals have concluded that a welfare claimant is not entitled to a "special allowance" to enable her to bear the expense of obtaining a divorce. Similarly, a claimant is not entitled to a "special allowance" in order to declare bankruptcy. However, a deserted wife may be able to claim for the cost of completing her degree in chemistry at the University of Saskatchewan.

58. See Report, supra note 4, p. 168, para. 367.
59. Id.
60. (1974), 53 D.L.R. (3d) 513. The Ontario Court of Appeal dismissed the appeal of the Minister without written or recorded reasons on April 1, 1975; see Comment, "Proc in the Ontario Court of Appeal," 4 Bull. Canadian Welfare Law (No. 1) 44 (1976).
62. Professor Kerr concludes that the "decisions of the Ontario Assistance Review Board evidence little appreciation of the Court's direction (in Proc's) case to apply an economic test, and leave room to suspect a continued application of moral standards." id., p. 34.
63. See Re Warwick and the Minister of Community and Social Services (1978), 91 D.L.R. (3d) 131.
64. See information supplied by Mr. D. Alfiere, Director, Income Maintenance Branch, Ministry of Community and Social Services of Ontario, February 26, 1980.
69. Because the test is an extremely stringent one, numerous claimants with severe disabilities bring claims only to be told that they do not qualify for the "disability" benefit. In fact, I have not been able to find a single reported case where someone has been entitled to a "disability" benefit.
70. See Welfare Practices and Civil Liberties: A Canadian Survey. Toronto: Canadian Civil Liberties Education Trust, 1975, p. 81. The United Kingdom Committee on Welfare Abuse supra note 4, found that most welfare recipients did not know of their right to appeal an unfavourable welfare decision; see the Report, p. 173, para. 381.
Did not know of their right to appeal an unfavourable welfare decision

<table>
<thead>
<tr>
<th>Location</th>
<th>Percentage of Sample</th>
</tr>
</thead>
<tbody>
<tr>
<td>Toronto</td>
<td>206 or 56%</td>
</tr>
<tr>
<td>Hamilton</td>
<td>39 or 45%</td>
</tr>
<tr>
<td>Halifax</td>
<td>57 or 44%</td>
</tr>
<tr>
<td>Fredericton</td>
<td>69 or 75%</td>
</tr>
<tr>
<td>Winnipeg</td>
<td>28 or 28%</td>
</tr>
<tr>
<td>Regina</td>
<td>22 or 43%</td>
</tr>
</tbody>
</table>

It is inconceivable that anything remotely approaching this number of taxpayers are ignorant of their right to appeal adverse tax rules or criminal convictions for tax evasion. Further, the taxpayer with problems frequently has the means to obtain very good counsel, whereas it is probable that the welfare defrauder will often get only summary justice.71

**The Welfare Claimant and the Right of Search.**

Complaints are sometimes made about the extensive powers that exist in welfare cases. For example, section 7 of the Ontario *General Welfare Assistance Act* provides that:

In determining the eligibility of an applicant... a welfare administrator shall make or cause to be made a visit to the home of the applicant for the purpose of enquiring into the living conditions and financial and other circumstances of the applicant.72

This section leaves all sorts of questions unanswered. For one, does this periodic review include subsequent visits to the recipient’s home? How extensive or restrictive are the powers of inspection on such occasions? Do these powers have any limits?

In a great number of cases, no appointment is made by the welfare department before they make their searches. The figures found by the Canadian Civil Liberties Education Trust were as follows:74

<table>
<thead>
<tr>
<th>Location</th>
<th>Percentage of Sample</th>
</tr>
</thead>
<tbody>
<tr>
<td>Toronto</td>
<td>164 or 49%</td>
</tr>
<tr>
<td>Hamilton</td>
<td>30 or 36%</td>
</tr>
<tr>
<td>Halifax</td>
<td>54 or 55%</td>
</tr>
<tr>
<td>Winnipeg</td>
<td>23 or 23%</td>
</tr>
<tr>
<td>Fredericton</td>
<td>42 or 69%</td>
</tr>
</tbody>
</table>

Welfare workers are prepared to concede that there are times when recipients expressly objected to their visits. One welfare worker, for example, recalled a situation when his visit coincided with the visit of the recipient’s friends. The recipient took exception to the worker’s being there because he did not want his friends to know that he was on welfare.75

It is not difficult to imagine the outcry that would arise from taxpayers and from the legal profession if such wide-ranging powers existed to control tax avoidance and evasion.

**The Welfare Claimant and Abuse.** I want, finally, to deal with the degrading remarks made to welfare claimants. In their survey of 427 welfare recipients, the Canadian Civil Liberties Education Trust found that 96 or 23 per cent complained of “rude and degrading” treatment by the department. For example, in Winipeg, a 46 year old divorced woman, suffering from arthritis and varicose veins, reported that, upon refusing her choice of a main floor apartment, the welfare worker said “We can carry you on our backs, ha-ha.” In Regina, when a crib was requested for a newly born child, the welfare official is reported to have advised the family to use a cardboard box. Finally, in Toronto, a 25-year old separated woman said that her worker gave her the following advice, “You’ve got an arse, go out to hustle to make money, other women do.”76 Such behaviour is morally outrageous; certainly taxpayers are not subjected to it, even if they are delinquent and have

[As] in the case of unemployment insurance — we encourage welfare fraud by taxing outside earnings ... at a rate of 100 per cent.


73 See *General Welfare Assistance Act Regulations*, R.R.O. 383, s. 7.

74 See *Welfare Practices and Civil Liberties — A Canadian Survey, supra* note 70, p. 36.

75 Id., p. 37.

76 Id., p. 77.

77 For a start, we could have a universal accident and sickness compensation scheme. In the second place, we could ensure adequate retirement pensions for the elderly. Finally we could have a serious job creation program. I think that once we had achieved these aims, the number of people we would have take care of would not be large.
PART II  Tax Evasion

Frustrating though it is to seek meaningful information on welfare abuse, it is even more difficult to obtain meaningful information on tax evasion. Welfare abuse has been seen as being a serious enough problem to warrant some study. There is, after all, the Report of a prestigious British Committee on the subject,7 there is, after all, the Report of provincial reports on workers' abuse has been seen as being a serious enough problem to warrant some study. There is, after all, the Report of provincial reports on workers' compensation,7 and several reports on unemployed persons.8 In the field of tax evasion, writing seems to be largely limited to problems of procedure.81

This is startling since the estimates of the amount of revenue lost through tax evasion are enormous.82 Thus, Mr. Anthony Christopher of the U.K. Inland Staff Federation estimated in March 1979 that the amount lost through tax evasion by the self-employed alone exceeded £200 million in a year. More recently, according to Sir William Pile, Chairman of the Board of Inland Revenue, “it is not implausible” that earnings which evade tax might be as much as £10 billion a year. If that sum were subject to tax it would yield revenue totalling £3-4 billion a year.83 In Canada, Mr. James Gourlay of Revenue Canada has estimated that the amount lost through tax evasion in Canada exceeds $3 billion a year.84

If tax evasion is as serious a problem as these figures indicate, the question arises as to why we know so little about it. I think that one reason why tax evasion excites so little outcry and passion is that it is so pervasive. As Edmond Cahn wrote in his book, The Moral Decision:

In small, medium and large amounts at each passing hour this kind of chicane is practised by citizens of all ranks and of every level of repute.85

I believe that tax evasion is pervasive because first, even rich taxpayers are able to rationalize their tax evasions to themselves. After all, the loss of revenue caused by one person's evasion of tax is so minute that it is impossible to measure in any system of accounts.86 Second, I think that tax evasion is pervasive because it has become known that the number of audits carried out is extremely small;87 this means that the tax evader's chances of being caught are remote. Third, tax evasion is legitimized by the fact that we condone tax avoidance. Moreover, we define tax avoidance extremely broadly. This also encourages tax evasion. In this light, one might consider the following examples which were cited by Mr. W.Z. Estey, Q.C. (as he then was) of the difficulty in drawing the line between tax avoidance and tax evasion at the 1968 Canadian Tax Foundation Conference:

4. A taxpayer is a majority shareholder in a limited company and he places his wife on the payroll although she does not in fact work for the company. The identity of the wife is disclosed in all accounting records.
5. A taxpayer forms a partnership with an infant son who makes no contribution to the capital and does little or no work. If the partnership agreement is bona fide apart from these elements, is this tax evasion if it results in a lowering of the total income tax paid by the partnership as against the preceding proprietorship?88

If these cases are regarded as 'borderline', one must not be too surprised if taxpayers, with or without legal advice, are able to devise similar 'borderline' cases. They may also feel that rather than devise a borderline transaction, they might just as well evade tax because the 'borderline' transaction appears to them to be a case of tax evasion.

My own view is that the fact that a certain practice is widely engaged in cannot give it legitimacy. I agree with the Trade Union Council's General Council's statement when it stated that it regarded “tax evasion as theft and believe that it should be treated as such.”89 Unlike some people who are convicted of welfare fraud,90 tax evaders cannot be under any illusion as to whether they are violating the law. Further, unlike many people who commit welfare fraud,91 very few tax evaders could...
plead that they evaded taxes because of "brutal need." If
Finally, I take the view that tax evasion is a particularly
reprehensible form of theft because many of the people
convicted of tax evasion are already able to deprive the
state of $30 billion through tax incentives and a fur-
ther enormous amount through tax planning and tax
avoidance.

I would like to consider what steps are taken
against tax evaders and to consider possible im-
provements in the operation of the system.

Prosecutions for Evasion and Civil Penalties. Be-
 tween April 1, 1978 and March 31, 1979 the Depart-
ment completed the investigation of 949 cases of sus-
ppected tax evasion and levied $29,870,000 in taxes and
civil penalties. During the same period, 196 cases were
prosecuted in the courts and fines of $2,543,000 were
imposed. From my reading of the cases prosecuted, the
Department clearly seems to concentrate its attention on
taxpayers who avoid substantial sums of money. I ap-
plaud this exercise of prosecutorial discretion and only
wish that the same restraint prevailed in the area of
welfare abuse prosecutions.

I should mention at this point that according to
Statistics Canada 1973, the figures show that 14 out of
7,476 convicted of tax offences were sent to prison,
whereas 132 people out of 1,766 convicted under the
Unemployment Insurance Act were sent to prison. It
is impossible to justify this kind of inequality of treat-
ment.

Between April 1, 1978 and March 31, 1979, 1,801
individuals received civil penalties of $4,458,324 for
failing to file tax returns. In the same period, 17,728
were prosecuted and total fines of $1,818,473 were
levied.

Audits. The amount of tax collected from in-
dividual taxpayers through the use of audits is set out
below:

<table>
<thead>
<tr>
<th>Year</th>
<th># of Audits</th>
<th>Tax Collected</th>
</tr>
</thead>
<tbody>
<tr>
<td>1971</td>
<td>88,743</td>
<td>$155,879,000</td>
</tr>
<tr>
<td>1972</td>
<td>90,025</td>
<td>$153,240,000</td>
</tr>
<tr>
<td>1973</td>
<td>NA</td>
<td>NA</td>
</tr>
<tr>
<td>1974</td>
<td>81,119</td>
<td>$240,867,689</td>
</tr>
<tr>
<td>1975</td>
<td>66,604</td>
<td>$229,444,387</td>
</tr>
<tr>
<td>1976</td>
<td>78,700</td>
<td>$327,901,000</td>
</tr>
<tr>
<td>1978</td>
<td>91,014</td>
<td>$434,630,831</td>
</tr>
</tbody>
</table>

In terms of percentage, fewer tax returns were audited
in 1978 than in 1972. Indeed, the percentage of returns
audited has decreased from 0.93 per cent in 1971 to 0.62
per cent in 1976.

These figures are striking when set against those of
the United States IRS which audits about 1.8 million in-
dividual returns or about 2 per cent of the total number
of files returned. Even this figure is considered disgracefully low by some Congressmen. Congressman
Benjamin Rosenthal, in particular, has been extremely
critical of the low number of individual returns
audited.

When we turn to corporate audits, the number of
 corporations audited has gone down in the last five
years from 6.5 per cent to 4.6 per cent.

In my view, there is an urgent need to increase
greatly the number of audits. This is especially the case
in light of the evidence of Mr. Bruce McDonald, Deputy
Minister, Taxation, Department of National Revenue,
that "Our expected minimum intake from spending a
dollar on auditing tax returns is to get $3 back."

Tax Clearance Certificates. Unlike most countries,
Canada does not have a system of tax clearance cer-
tificates. As a result of this indefensible gap in the law
from 1967 to 1973, $19.78 million owing in taxes by
4,024 former residents was written off. It is impos-
sible to imagine that a loophole of this character would
be allowed to exist in any area of welfare law. Indeed, in
welfare litigation the government has sometimes closed

92. This vivid phrase was used by the United States Supreme Court
to describe the situation of those receiving welfare: see Goldberg v.
93. See Tamagno, "Comparing Direct Spending and Tax Spending," 1
Canadian Taxation (No. 4) 42 (1979).
94. To my knowledge, no one has attempted an estimate of the
amount of revenue lost through tax avoidance and tax planning
in Canada, the United Kingdom or the United States.
95. See Revenue Canada, Taxation, Inside Taxation. Ottawa:
Minister of Supply and Services, 1978, p. 46.
96. See Statistics Canada, Statistics of Criminal and other Offences,
1973, Table B, Convictions of Offences Punishable on Summary
Conviction.
97. See supra note 95, p. 45.
98. Figures derived from Inside Taxation, supra note 95.
99. The figures for the number of individual audits in the financial
year ending 1978 were 1.8 million or 2.0 per cent of the total tax-
PAYERS; see TIME, Sept. 17, 1979. In the fiscal year ending 1979,
the number of audits had gone up to 2.13 per cent of all returns;
see THE NEW YORK TIMES, April 13, 1980.
100. According to Mr. Singleton B. Wolfe, Assistant Commissioner
for Compliance at the IRS, at least 3.5 per cent of individual
returns should be audited, see THE NEW YORK TIMES, April 13,
1980.
101. See statement by Mr. Bruce McDonald, Deputy Minister, Taxa-
tion Department of National Revenue before the Finance, Trade
and Economic Affairs Standing Committee, Tues. Nov. 13,
1979, vol. 10, 36. This state of affairs is truly remarkable when it
is realized that the number of sophisticated tax frauds has risen
remarkably during the last few years.
102. Id., p. 37. According to Mr. Singleton Wolfe, Assistant Com-
missioner for Compliance at the IRS and extra dollar spent on
auditing brings in $4 to $5 of additional revenue. If the extra
dollar were devoted to finding non-filers, the pay-off would be
12 to 1; see THE NEW YORK TIMES, April 13, 1980.
103. See Pinos, "Take the Money and Run", 1 Canadian Taxation
(No. 1) 43 (1979).
the 'loophole' before the decision in a particular case has been handed down.\footnote{104}

Extending the Withholding Principle. At present we apply the withholding principle only to wage earners. The difficulty with this system is that whereas, in the United States for example, 97 to 98 per cent of salaries are reported by taxpayers, only 84 to 92 per cent of dividends are reported as income, and only 60 to 64 per cent of self-employment income is voluntarily reported.\footnote{105} As Mr. Donald Lubick, Assistant Secretary of the Treasury, has pointed out, the withholding principle could be extended to other categories of income such as interest or dividends.\footnote{106} The principle of information reporting could be applied to transactions such as tip income and barter transactions.\footnote{107} In my view, there is an urgent need to study the feasibility of adopting such principles in this country. But, if we are unable to require tax clearance certificates for departing residents, then I am not sanguine as to our ability to extend the withholding principle.

I do not believe that we are making very strenuous efforts to curb tax evasion. We seem unable to take even small steps such as requiring a tax clearance certificate. We conduct an extremely low number of audits even when the evidence shows that the return on carrying out audits is extremely high.\footnote{108} We have also shown no initiative in exploring new ways of preventing tax evasion. I should like to make it clear that the principal responsibility for our indifferent attitude does not lie with Revenue Canada but with political leaders who spend most of their time worrying about alleged abuses in the unemployment insurance system,\footnote{109} while giving very little thought to the problem of tax evasion.

\section*{PART III Conclusion}

It seems to me to be clear that the evidence shows that we take a far more serious view of welfare abuse than we do of tax evasion. The chief reason for this difference in treatment is that we regard tax evaders as 'productive' people, whereas we see people who are on welfare as being 'non-productive'.

In the case of the 'productive' tax evader we are afraid that we have imposed too high a rate of taxation and our feelings about pursuing him or her are often ambivalent. To be sure, we do not allow the tax evader to escape scot-free, but we are not nearly as energetic as we might be in making tax evasion more difficult. In short, we fear that at least some tax evasion might be justified because we have imposed 'penal' rates of taxation on, say, doctors or engineers.\footnote{110} We are afraid that certain classes of productive workers will emigrate. In my view this fear is fanciful; high-paid persons will not emigrate because they already enjoy a tax haven in this country.\footnote{111}

It is true that recipients of public welfare are unproductive and there is little prospect of their emigrating. But it seems to me that there are two points to be made here. In the first place, recipients of public welfare need not be unproductive. Jobs could be found for the disabled,\footnote{112} we could regulate layoffs\footnote{113} and we could protect job security far more conscientiously than we do at present.\footnote{114} Second, I believe that we pay a heavy price for abusing those who claim social security benefits. People who are abused are likely to lose respect for law and order: the violence that is done to the social fabric by those who feel themselves to be abused exceeds the loss of a few million dollars taken from the state.\footnote{115}

In short, evenhandedness in our treatment of tax evaders and welfare abusers is not only an ethical imperative, it is also practical politics.

\begin{footnotes}
104. The classic example is \textit{Re Fawcett and Board of Review} (1973), 1 O.R. (2d) 772 (Ont. C.A.). See also \textit{Re Elliott and Attorney General of Ontario} (1973), 2 O.R. 534 (Ont. C.A.), a decision which was immediately reversed by an amending regulation.
105. See the statement by Mr. Donald C. Lubick, Assistant Secretary of the Treasury (Tax Policy) before the Subcommittee on Oversight of the House Ways and Means Committee, September 10, 1979, p. 3.
106. The \textit{XRS Report} for 1976 estimated unreported interest income at $5.4 billion to $9.4 billion and unreported dividends at $2.1 billion to $4.7 billion; see \textit{The New York Times}, April 13, 1980.
107. In this connection, see the proposals made by Mr. Lubick, \textit{supra} note 105, pp. 4-5.
108. See text at note 102, \textit{supra}.
109. Incredibly, even at the present time speeches are made by prominent politicians emphasizing the need "to tighten up" the \textit{Unemployment Insurance Act}. I have argued above that the administration of unemployment insurance is already too harsh; see text at notes 29-48, \textit{supra}.
110. To the best of my knowledge, there is no empirical evidence that 'penal' rates of taxation have caused large (or even small) scale emigration from Canada.
111. See for example the reports of the National Council of Welfare, \textit{supra} note 2.
114. Note, for example, the derisory tariff of notice periods required under the \textit{Employment Standards Act}, 1974:
\begin{tabular}{|l|l|}
\hline
\textbf{Length of Service} & \textbf{Minimum Period of Notice} \\
\hline
Between 3 months and 2 years & One week \\
Between 2 and 5 years & Two weeks \\
Between 5 and 10 years & Four weeks \\
Over 10 years & Eight weeks \\
\hline
\end{tabular}
\textit{See The Employment Standards Act, S.O. 1974, c. 112.}
115. For an attempt to measure the economic costs of unemployment (i.e., loss of production, loss of (tax revenue and payment of unemployment insurance benefits) in the United Kingdom between 1974-77, see Burghes and Field, "The Cost of Unemployment," in F. Field (ed.), \textit{The Conscript Army: A Study of Britain's Unemployed}. London: Routledge & Kegan Paul, 1977, p. 78. The authors do not estimate the other costs of unemployment — for example a higher crime rate, a higher rate of mental illness and suicide and a higher incidence of marital breakdown.
\end{footnotes}