

# REFERENTIAL TAX LEGISLATION: THE ROLE OF PROVINCIAL LAW IN THE MEDICAL EXPENSE TAX CREDIT

Bradley Richard Thompson\*

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*Since 2001 there has been an explosion of Tax Court of Canada decisions interpreting “medical practitioner” for purposes of determining a taxpayer’s eligibility for the medical expense tax credit. In each decision, the definition of medical practitioner was indirectly provided by provincial (or other non-federal) law. This article considers the role of non-federal law in the current interpretation of “medical practitioner” under subsection 118.4(2) of the Act. Based on the history of the provision and the policy implications of deferring to non-federal law in this context, it is argued that the role of non-federal law under the medical expense tax credit is atypical and its consequences are difficult to justify from a federal tax policy perspective. Further, it is argued that the current reliance on non-federal law represents an unexplained and dramatic policy shift following the 1988 amendments that converted the prior deduction for certain medical expenses into tax credits. This policy shift results from the definition of “medical practitioner” as “a person authorized to practice as such ... pursuant to the laws of the jurisdiction in which the service is rendered” (the words “as such” were added making it a reflective definition). Case law following the 1988 amendments interpreted the definition of “medical practitioner” to require a substantive determination under provincial (or other non-federal) law. Implications of, and alternatives to, defining this term under provincial law are explored. The constitutional basis for incorporating provincial law in this fashion is discussed, concluding that the decided constitutional authorities cast significant doubt on the federal government’s competence to adopt provincial law in this fashion on a division of powers basis.*

*Although the scope of this paper is limited to the role of non-federal law in the context of the medical expense tax credit, the implications of the reliance of non-federal law pervade the interpretation of federal taxation law in Canada.*

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\* Tax lawyer (email: brt@bradleyrichardthompson.com). I would like to thank Rita Araujo of the Department of Justice, Wesley Novotny of Bennett Jones LLP, Christopher Slade of Deloitte Tax Law LLP and an anonymous reviewer for constructive comments to previous versions of this paper. The views expressed are solely those of the author.

*Depuis 2001, il est remarquable de constater un grand essor quant au nombre de décisions rendues par la Cour canadienne de l'impôt portant sur l'interprétation du terme « médecin » (medical practitioner) aux fins de déterminer si un contribuable a droit au crédit d'impôt pour frais médicaux. Dans chacune de ces décisions, la définition de « médecin » était indirectement tirée de lois provinciales (ou d'autres lois n'étant pas du ressort fédéral). Le présent article se penche sur le rôle que peuvent avoir les lois de compétence non fédérale dans l'interprétation actuelle du terme « médecin » prévu au paragraphe 118.4(2) de la Loi de l'impôt sur le revenu. Compte tenu de l'historique de cette disposition et des répercussions de principe qu'il pourrait y avoir de s'en remettre au droit ne relevant pas du ressort fédéral dans ce contexte, l'auteur émet l'opinion que le rôle que jouent les lois, autres que fédérales aux fins du crédit d'impôt pour frais médicaux est atypique et les conséquences qui en découlent sont difficiles à justifier du point de vue de la politique fiscale fédérale.*

*En outre, l'auteur soutient que ce recours aux lois de compétence non fédérale est le reflet d'un changement radical et inexplicé de politique à la suite de modifications législatives apportées en 1988 et qui ont eu pour effet de convertir les déductions pour certains frais médicaux en crédits d'impôt.*

*Ce changement de politique découle de la définition de « médecin » qui est décrit comme étant un individu qui « doit être autorisé à exercer sa profession [...] conformément aux lois de la juridiction dans laquelle le service est rendu ». (En anglais : « a person authorized to practice as such ... pursuant to the laws of the jurisdiction in which the service is rendered »; l'expression « as such » ayant été ajoutée, l'auteur qualifie ainsi la définition de « réfléchie », c'est-à-dire, que la définition du terme est reflétée dans la définition comme telle.)*

*La jurisprudence qui a suivi les modifications de 1988 a interprété la définition de « médecin » comme nécessitant une décision sur le fond conformément aux lois provinciales (ou autres que fédérales). Les conséquences liées au fait de définir ce terme en vertu du régime provincial, ainsi que les solutions de rechange, sont examinées. L'auteur discute également du fondement constitutionnel de l'intégration de lois provinciales de cette façon et en vient à la conclusion que la jurisprudence établie en matière constitutionnelle jette un sérieux doute sur la compétence du gouvernement fédéral d'adopter le droit provincial de cette manière en fonction du partage des compétences.*

*Bien que la portée de cet article se limite au rôle que joue le droit ne relevant pas de la compétence fédérale dans le contexte des crédits d'impôt pour frais médicaux, les répercussions du recours à ce droit non fédéral sont omniprésentes dans le contexte de l'interprétation du droit fédéral en matière fiscale au Canada.*

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... the only excuse for legislation by reference [is] the hardness of the hearts and the softness of the heads of His Majesty's Commons.<sup>1</sup>

### 1. Introduction

The motivation for Sir Cecil Carr's sharp epigraph of 1940 was that laws are unintelligible without access to (and a willingness to read) all laws incorporated by reference. More cynically, Carr further observed that "keeping Parliament in ignorance of what [the bill] was about, was the only way in which legislation was now possible."<sup>2</sup> In Canada, in addition to the intractability of legislation that incorporates disparate statutes, under our federal system of government references are often to laws enacted by a different level of government altogether.

This is particularly the case with the modern *Income Tax Act (ITA)*.<sup>3</sup> The current version of the Act refers the reader to non-federal statutes recognizing professionals,<sup>4</sup> statutes establishing plans leading to a designation,<sup>5</sup> foreign taxation statutes (providing, *inter alia*, for whether payments are deductible, whether there is a deemed fair market value disposition, whether an amount is subject to tax in the foreign country),<sup>6</sup> statutes providing whether the exercise of a right is prohibited,<sup>7</sup> and statutes governing whether partners are limited partners or limited liability partners,<sup>8</sup> to name a very few. Such references are explicit demonstrations that the Act is an accessory statute; it is not a complete system of law. It

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<sup>1</sup> Sir Cecil T Carr, "Legislation by Reference and the Technique of Amendment" (1940) 22:1 J Comp Leg'n and Int'l L 12. For a North American evaluation of referential legislation of the same era, see Horace Emerson Read, "Is Referential Legislation Worth While?" (1940) 18 Can Bar Rev 415.

<sup>2</sup> Carr, *ibid* at 18.

<sup>3</sup> RSC 1985, c 1 (5th Supp), as amended [ITA]. Unless otherwise indicated, statutory references are references to the ITA.

<sup>4</sup> ITA subparagraph 8(1)(i)(i).

<sup>5</sup> ITA paragraph 8(6)(a).

<sup>6</sup> ITA subsection 15(4), paragraph 55(3.01)(e), and clause 56(1)(a)(i)(C.1), respectively.

<sup>7</sup> ITA subsection 17(11.1).

<sup>8</sup> ITA paragraph 40(3.14)(a).

necessarily relies, sometimes expressly, sometimes implicitly or through judicial determinations, on other laws.

This article looks at the policy and the constitutionality of the incorporation of provincial law in the context of the medical expense tax credit (METC).

## 2. Interpretation

The METC is available under current law in respect, *inter alia*, of “medical expenses” incurred in a taxation year that exceed \$2,052 or three per cent of a taxpayer’s income for the year. Since 1988 the Act has defined medical expenses for such purposes to include “an amount paid to a *medical practitioner* ... in respect of medical ... services.”<sup>9</sup> The only statutory guidance on who is a medical practitioner, amounts paid to whom are eligible for the METC, is that “a reference to ... medical practitioner is a reference to a person *authorized to practise as such ... pursuant to the laws of the jurisdiction in which the service is rendered.*”<sup>10</sup>

The incorporation by reference under the METC regime is therefore as vast as it is general; all of the laws of all of the jurisdictions in which medical services may be performed on Canadian taxpayers are potentially incorporated. The vastness of this incorporation does not appear to be in dispute, or particularly controversial.<sup>11</sup>

There has been an explosion of informal procedure Tax Court litigation over this incorporation.<sup>12</sup> *The Queen v Couture*<sup>13</sup> is the only

<sup>9</sup> *ITA* para 118.2(2)(a) [emphasis added].

<sup>10</sup> *ITA* subsection 118.4(2) [emphasis added].

<sup>11</sup> See CRA document no 2009-0319341E5 (May 19, 2009).

<sup>12</sup> See e.g. *Tall v R*, 2009 DTC 187 (TCC [Informal Procedure]) (breast massage and reiki); *Parent v R*, [2008] 4 CTC 2094 (TCC [Informal Procedure]) (naturopathy); *Pickwood v R*, 2005 DTC 1000 (TCC [Informal Procedure]) [*Pickwood*] (social worker); *Noddin v R*, 2004 DTC 3577 (TCC [Informal Procedure]) [*Noddin*] (massage therapy); *Laurie v R*, [2003] 3 CTC 2369 (TCC [Informal Procedure]), 2003 TCC 105 [*Laurie*] (massage therapy); *Davar v R*, 2005 DTC 1671 (TCC [Informal Procedure]) [*Davar*] (naturopathy, massage therapy and acupuncture); *Pagnotta v R*, [2001] 4 CTC 2613 (TCC [Informal Procedure]), 2001 TCC 20004291 [*Pagnotta*] (massage therapy); *Bley v R*, [2001] 2 CTC 2532 (TCC [Informal Procedure]) (massage therapy); *Zack v R*, [1998] 1 CTC 2734 (TCC [Informal Procedure]) (music therapy); *Roy v R*, 2004 CarswellNat 4481 (TCC [Informal Procedure]) (therapist); *Chevalier c R*, [2008] 4 CTC 2009 (TCC [Informal Procedure]) [*Chevalier*].

<sup>13</sup> 2009 DTC 5040 (FCA) [*Couture*] rev’g 2008 DTC 3357 (TCC [Informal Procedure]) [*Couture TCC*].

Federal Court of Appeal decision. The facts in *Couture* are generally representative of the other METC cases. The taxpayer paid an acupuncturist for treatments in London, Ontario. The taxpayer claimed a METC on her income tax return for such expenses. Canada Revenue Agency (CRA) disallowed the METC because the Province of Ontario did not authorize such occupation/practice (nor, we assume, did the City of London or the federal government or any other jurisdiction in which the service was rendered). On this basis, the acupuncturist was not a “medical practitioner” and the amounts paid were not eligible for the METC.

The Tax Court allowed the taxpayer’s appeal. Boyle J held that the acupuncturist was a “medical practitioner” on the basis that Ontario had passed a 1991 statute removing a prohibition against acupuncture in the province. He reasoned that “[a] specific provincial law which allows a person to do something authorizes a person to do it. There is no reason not to equate ‘authorized’ with ‘permitted.’”<sup>14</sup>

In its brief appellate reasons, the Federal Court of Appeal categorically rejected the equation of “authorized” and “permitted.” Relying on dictionary definitions of the word “authorized” that require some level of formal approval, the Court ruled that “[t]he mere fact that an action is no longer prohibited does not lead to the conclusion that such action has been formally approved.”<sup>15</sup> The Court did not adopt the Crown’s position that “authorized” is synonymous with “regulated,” but did read “authorized” as requiring formal approval by Ontario.<sup>16</sup> In the taxation year at issue in *Couture*, Ontario had not formally approved acupuncturists.

In 2006, two years following the taxation year at issue in *Couture*, the Ontario legislature tabled the *Traditional Chinese Medicine Act (TCMA)*.<sup>17</sup>

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<sup>14</sup> *Couture TCC*, *supra* note 13 at para 31.

<sup>15</sup> *Ibid* at para 14.

<sup>16</sup> A case that appears not to have been considered by the FCA or the Tax Court of Canada is *Montgomery v R*, 99 DTC 5186 (FCA) rev’g 97 DTC 5510 (FCTD) rev’g [1996] 1 CTC 2796 (TCC). In this case, Rothstein JA held that the phrase “professional status recognized by statute” under subparagraph 8(1)(i) of the Act meant something less than fully regulated. Presumably “authorized ... pursuant to the laws” is a higher standard than “recognized by statute,” but under *Couture* apparently not so high as to require regulation. As discussed below, prior to 1988 amendments to the METC a medical practitioner needed to be “qualified” in the relevant jurisdiction in order to engender a METC, which may or may not have implied a regulatory framework under which the particular practitioner is qualified.

<sup>17</sup> SO 2006, c 27. It appears as though important parts of this legislation were never proclaimed and currently Traditional Chinese Medicine is not a service expenses in respect of a practitioner of which give rise to a METC. See CRA document no. 2010-0359241E5 (dated May 5, 2010).

Under the *TCMA* (had it become law) “a member is authorized” to “perform a procedure on tissue below the dermis and below the surface of a mucous membrane for the purpose of performing acupuncture.”<sup>18</sup> The *TCMA* received royal assent in December 2006, but the operative provisions governing acupuncturists, by the express terms of the statute, were only to come into force by cabinet proclamation. At the time of writing, some six years following royal assent, there has not been a proclamation in respect of the practice of acupuncture in Ontario.

Somewhat remarkably, based on the non-operative *TCMA* and *Hansard*, the Tax Court has concluded that during the 2007 taxation year acupuncturists were “medical practitioners” in Ontario. In *Murphy v R*,<sup>19</sup> the Tax Court held that the *TCMA*, coupled with statements of the cabinet minister in introducing the legislation, resulted in sufficient “formal recognition” to satisfy the requirement articulated by the FCA in *Couture*. The Crown argued that nothing had changed since *Couture* insofar as there was no operative change to provincial law. The Tax Court, however, did “not accept this premise and conclusion as it defies reality at the present time.” Further the Tax Court judge took “judicial notice to the effect that acceptance of acupuncture by the Ontario public is a growing phenomena (sic)” and concluded that “[c]onsidering the common usage of the terms, an acupuncturist is a medical practitioner but, of course, not a medical doctor, physician or surgeon.”

Between *Couture* and *Murphy* there was a reversal as to the substantive entitlement to federal tax relief, despite no change in federal law (or, for that matter, no operative change in provincial law). Unlike *Couture*, the Crown chose not to appeal *Murphy*.<sup>20</sup>

The interpretation of “authorized to practice” endorsed by the Federal Court of Appeal in *Couture* extends beyond practices that may be viewed as “alternative.” Subsection 118.4(2) of the *ITA* similarly requires chiropractors, speech therapists, occupational therapists and physical therapists, for example, to be “authorized to practise as such ... pursuant to the laws of the jurisdiction in which the services are rendered” in order for the recipient of such therapies to be entitled to a METC. By way of concrete examples, Appendix A is an adaptation of a table published by CRA outlining several health professions and indicating whether a METC is available for expenses incurred in relation to a practitioner of such profession in a given province or territory. Chiropractors, for example, are

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<sup>18</sup> *Ibid*, s 4.

<sup>19</sup> 2010 DTC 1293 (TCC [Informal Procedure]) [*Murphy*].

<sup>20</sup> It does not appear as though CRA has acquiesced to the decision in *Murphy*.

not “medical practitioners” in Nunavut and the Northwest Territories. Dental assistants are “medical practitioners” in seven of thirteen Canadian provinces and territories. Expenses in respect of a psychologist are not creditable in Yukon, but are elsewhere in the country. And Traditional Chinese Medicine Practitioners are “medical practitioners” in British Columbia but not anywhere else in the country.

As becomes obvious from the patchwork depicted at Appendix A, and evidenced by the explosion of Tax Court litigation, expenses in respect of fairly standard medical services either are, or are not, eligible for the METC depending on the province or territory in which the service is rendered. As should also be evident from the professionals listed at Appendix A, most if not all of these services are legal, relatively widespread and to varying degrees are condoned by each Canadian province or territory. In other words, there is no suggestion that massage therapists are professionals *non grata* in any jurisdictions; they are only “authorized to practise as such,” and therefore creditable, however, in BC, Newfoundland and Labrador and Ontario.

The Tax Court has observed that requiring non-federal law to sanction medical practitioners to engender a METC can give rise to “result[s that] may seem harsh, [but] Parliament has seen fit to limit the medical expense credit to payments to certain types of health professionals.”<sup>21</sup> It has also noted that “the law has not yet caught up to societal behavior”<sup>22</sup> but that “it is not for [the Tax Court] to rewrite the legislation. But by bringing your concerns to this Court, you will, as many others have, make the legislators aware of your concerns regarding alternative treatments.”<sup>23</sup>

The inequity of allowing or disallowing METCs for identical services based on province has received less sympathy at the Tax Court. This inequity has typically been addressed in the context of a challenge under section 15 of the *Charter of Rights and Freedoms*. In *Noddin*, the Tax Court appears to have acknowledged that there is unequal treatment but was of the view that “the cause of [the taxpayer’s] dissatisfaction is a legitimate policy choice that Parliament has made, and is entitled to make.

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<sup>21</sup> *Pickwood*, *supra* note 12 at para 13.

<sup>22</sup> *Chevalier v R*, *supra* note 12 at para 19.

<sup>23</sup> *Davar*, *supra* note 12 at para 9. Remarkable about these *dicta* is that they are in terms of “Parliament,” “the law” and “the legislators,” apparently directed at the federal government and the Act. This is remarkable because it is not the federal government that (directly, at any rate) created the limitations giving rise to the harsh and retrograde results.

It does not warrant any judicial intervention.”<sup>24</sup> In *Laurie*, by contrast, the Tax Court denied the premise:

Subsections 118.2(1) and (2) permit a deduction of an amount paid to a “medical practitioner,” the definition of whom in Nova Scotia does not include a massage therapist. There is no differential treatment imposed upon the Appellant on the basis of his personal characteristics. Every taxpayer in Nova Scotia is subject to the same treatment.<sup>25</sup>

### 3. History

The historical development of the METC is relevant to this discussion for two reasons. First, it informs the policy generally. Second, the history suggests that the 1988 amendment to the Act was not intended to have the impact that it ultimately has had.

The history of Canadian tax relief for above-average unreimbursed medical expenses dates to 1942.<sup>26</sup> In its initial form, taxpayers were entitled to a deduction equal to

that portion of medical expenses in excess of five per centum of the income of the taxpayer ... if payment is *made to any qualified medical practitioner ... registered under any Dominion or provincial legislation ...*<sup>27</sup>

In 1948, the tax relief for medical expenses evolved to provide a deduction for

an amount equal to that portion of medical expense in excess of 4% of the taxpayer income incurred ... if payment was *made to a medical practitioner ... qualified to practise under the laws of the place where the expenses were incurred ...*<sup>28</sup>

This formulation was unchanged until 1988 when the deduction was replaced by the current METC. Between 1948 and 1988 for a taxpayer to qualify for tax relief in respect of medical expenses (assuming other conditions were satisfied), the payee needed to have been a medical practitioner and to have been “qualified to practice” under the laws where

<sup>24</sup> *Noddin*, *supra* note 12 at para 12.

<sup>25</sup> *Laurie*, *supra* note 12 at para 9.

<sup>26</sup> 6 George VI, c 28 at 5(6). See David G Duff, “Disability and the Income Tax Act” (2000) 45 McGill LJ 797 at n 71 and accompanying text; see also *Ali v R*, 2006 DTC 2982 (TCC [Informal Procedure]).

<sup>27</sup> 6 George VI, c 28 at 5(6) [emphasis added].

<sup>28</sup> 11-12 George VI, c 52 (the *Income Tax Act* at the time) at 26(b) [emphasis added].



the expenses were incurred. This formulation resulted effectively in a two-step interpretation akin to interpretations adopted in *Pickwood* and the Tax Court decision in *Couture* of (a) whether the payee was a medical practitioner under an ordinary meaning and evolving definition; and (b) that the services of the medical practitioner were not provided illegally in the relevant jurisdiction.

The 1988 amendments introduced two words that changed forty years of statutory continuity. The amendment modified the sentence structure tying medical practitioner to his or her registration, qualification or authorization for the first time since 1942, introducing the words “as such.”

The Technical Notes to the 1988 amendments seem to support the view that radical change was not the intent:

New subsection 118.2(2) sets out the various expenses that are considered qualifying medical expenses [including paragraph 118.2(2)(a), providing the credit in respect of amounts paid to medical practitioners]. These expenses were formerly listed in subparagraphs 110(1)(c)(iii) to (xvi). *There has been no substantive change to the qualifying expenses*, apart from the change in the minimum age of the full-time attendant referred to in clause 118.2(2)(c)(ii)(B), formerly subclause 110(1)(c)(iv.1) (B)(II), from 21 years of age to 18 years of age.<sup>29</sup>

As a practical and legal matter, prior to the 1988 amendments the set of professionals constituting “medical practitioners” had evolved beyond medical doctors, although the statute only recognized payments to a “medical practitioner, dentist or nurse.” The courts and tax administrators interpreted “medical practitioner” as referring to doctors, dentists, osteopaths, chiropractors, naturopaths, optometrists, podiatrists, chiropodists, podiatrists, therapists, masseurs, nurses (including practical nurses that make nursing their full-time occupation).<sup>30</sup>

As early as 1948, the breadth of the federal interpretation of the term “medical practitioner” had also been put in issue. In the 1948 debates in the House of Commons, the Minister of Finance participated in the following exchange:

Mr. GRANT: I think at the present time most people are prepared to admit that chiropractic and osteopathic treatment have their place in correcting one's ills, and so forth. I do not see anything in this clause to provide that payments made to that

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<sup>29</sup> Technical Notes to 1988 amendment.

<sup>30</sup> See Interpretation Bulletin [Cancelled] IT-225R “Medical Expenses” dated September 26, 1984 and Interpretation Bulletin [Cancelled] IT-509 “Medical Expenses” dated October 9, 1987.

profession on account of one's health may be deducted as medical expenses. Is there any reason why that should not be included?

Mr. ABBOTT [Minister of Finance]: The language of the act is medical practitioners. I do not know what stand the Department of National Revenue has taken administratively as to whether chiropractors are recognized as coming within that description or not.

Mr. GRANT: They do not.

Mr. ABBOTT: My hon. friend says they do not.

...

Mr. ABBOTT: It is a matter of interpretation of the phrase "medical practitioner." I understand that the Department of National Revenue has not included chiropractors in that interpretation. *Of course it would be open to the courts to take a different view if the matter were brought before them.*<sup>31</sup>

It was clear in 1948 that provincial law would not determine who is and who is not a medical practitioner; rather, it would be open to the courts to determine whether the Department of National Revenue's interpretation of the term was too narrow given the modern (at the time) view of what is a medical practitioner. It is also worth highlighting that prior to the introduction of universal health care the METC would have presumably applied to fairly basic care not covered by a provincial plan.

Relief under the current METC is still granted if amounts are paid to a "medical practitioner," but such term has been redefined as "a person authorized to practise *as such* ... pursuant to the laws of the jurisdiction in which the service is rendered." The structural change to the definition of medical practitioner – the introduction of "as such" – has caused the courts, culminating in the Federal Court of Appeal decision in *Couture*, to interpret "medical practitioner" in a manner that abandons the practice of the first 46 years of tax relief for medical expenses. Based on what appears to be an innocuous change, the Tax Court is repeatedly concluding, and CRA has ultimately taken as its position,<sup>32</sup> that there is a significant

<sup>31</sup> *House of Commons Debates*, June 23, 1948 at 5720 [emphasis added].

<sup>32</sup> Interpretation Bulletin [Cancelled] IT-519 "Medical Expense and Disability Tax Credits," dated March 31, 1989 first interpreted the new METC regime. In this Bulletin, "medical practitioner" was defined to "encompass[] a broad range of individuals in the medical profession" and further that "[m]edical practitioners authorized to practice in accordance with the [relevant] laws include the following: (i) an osteopath, (ii) a chiropractor, (iii) a naturopath, (iv) a therapist (or therapist) (v) a chiropodist (or podiatrist), (vi) a Christian Science practitioner, (vii) a therapist who is a member of the Canadian Institute of Psychoanalysis, and (viii) a psychologist authorized to practice under the laws of a province to the extent fees are for therapy or rehabilitation of the patient." In 1995 CRA revised IT-519 and reformulated its interpretation of "medical practitioner." The list of professions was expanded to include different classes of psychoanalysts, speech-language pathologists or audiologists,

difference between a “medical practitioner qualified under provincial law” and a “medical practitioner authorized to practise as such pursuant to provincial law.” The introduction of “as such” would appear to change everything.

Rather than continuity and an evolving standard, the post-1988 METC regime represents rupture and discontinuity. The 1948 question of whether a chiropractor or osteopath is a medical practitioner was reopened and delegated to non-federal jurisdictions. The regime shifted from treating all Canadians equally with respect to medical expenses to treating Canadians unequally.

#### 4. Policy

In this section we analyze three distinct implications of the incorporation of non-federal law into the METC: (1) undercutting the overarching policy of horizontal equity of the METC; (2) effectively abdicating the federal role of policy-making in the METC context; and (3) providing odd incentives to seek out medical services in particular jurisdictions. We then address three alternatives to incorporating non-federal law.

##### *A) Overall Policy of the METC – Horizontal Equity*

The overarching policy of the METC from its inception has been to provide taxpayers relief with respect to above-average unreimbursed medical expenses in order to effect a degree of horizontal equity under the assumption that medical expenses are non-discretionary and non-personal expenses that should be excluded from the tax base.<sup>33</sup> A consequence of

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occupational therapists, acupuncturists and dieticians. The lead-in to the list was also amended to read as follows: “Medical practitioners authorized to practice in accordance with the [relevant] laws *can* include (*depending on the applicable province or jurisdiction, as the case may be*) the following...” [emphasis added]. In its original 1989 version, CRA appears to have been taking the position that “medical practitioner” was to be provided a federal definition dissociated from provincial laws (though presumably subject to the requirement that the province authorizes the practitioner). In 1995 CRA appears to have changed its interpretation to place more emphasis on provincial law recognition of what is a medical practitioner. A curious aspect of CRA’s 1995 interpretation (and reiterated in its 2001 IT-519R2), is that it nevertheless lists what generally was dissociatively a “medical practitioner” under prior law rather than merely stating that it is a question of provincial law. The Crown in the decided cases before the Tax Court has affirmatively distanced itself from the statements in IT-519R2; see e.g. *Homa v R*, 2008 DTC 2973 (TCC [General Procedure]).

<sup>33</sup> Duff, *supra* note 26 at 813-14. Whether medical expenses should give rise to tax relief on a horizontal equity basis (versus some other basis or not at all) has spawned a significant body of literature. See William D Andrews, “Personal Deductions in an Ideal

incorporating non-federal law in the determination of what transactions reduce a taxpayer's tax base is that identical services received in different parts of the country are taxed differently. In tax policy terms, what the METC attempts to provide in terms of horizontal equity, the reference to non-federal law undercuts by incorporating different rules for different geographical locations.

The METC in the first instance stands for the policy proposition that all taxpayers are generally entitled to reduce their tax burden in proportion to what are thought to be non-discretionary/non-personal medical expenses because such expenses reduce a person's taxable base and capacity to bear taxation. What constitutes a non-discretionary/non-personal medical expense varies, however, from jurisdiction to jurisdiction. This results (intentionally or unintentionally) in an overall policy proposition that is difficult to defend: an individual's tax base varies from jurisdiction to jurisdiction based on factors that are arguably not relevant in determining an individual's tax base – in particular, whether a third party payee is subject to provincial legislation. An individual in the Northwest Territories who incurs expenses in respect of a chiropractor is treated as having a higher capacity to bear taxation than an otherwise identical person in any other Canadian jurisdiction (other than Nunavut) who has incurred identical expenses because the Northwest Territories' legislature has not passed legislation authorizing chiropractors to practise as such in its jurisdiction.

### *B) Meta Policy: Federal Tax Policy Delegated to Non-federal Jurisdictions*

The METC regime is silent as to what "jurisdiction" is vested with defining "medical practitioner." The language of the statute – "the jurisdiction in which the service is rendered" – would literally encompass the federal government itself, non-Canadian jurisdictions, supranational jurisdictions, and others. Obviously, any such jurisdictions have disparate laws, or no laws, formally approving of medical practitioners.

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Income Tax" (1972) 86 Harv L Rev 309 for the view that medical expenses should result in tax relief on a horizontal equity basis. See Mark G Kelman, "Personal Deductions Revisited: Why They Fit Poorly in an 'Ideal' Income Tax and Why They Fit Worse in a Far from Ideal World" (1979) 31 Stan L Rev 831 for a contrary view. The question of whether tax relief for medical expenses is a worthy policy objective, and if so on what basis, is a necessary precedent to, but is beyond the practical scope of, the examination of the mechanism for implementing tax relief for medical expenses. For purposes of this article it is assumed that the federal objective of the METC (whether correct, laudable, effective or otherwise) is to effect some aim of horizontal equity in defining the tax base.

Presumably the drafters of the legislation had Canadian provinces in mind and one might rationalize that deference to the provinces for the definition of medical practitioner is sensible on the basis that the provinces generally have jurisdiction over health, and thus, logically, the provinces should be involved in determining whether a given outlay is paid to a medical practitioner.

Only one decision at the Tax Court has grappled with the policy of incorporating non-federal laws to define medical practitioner. In *Noddin*,<sup>34</sup> the Tax Court observed that “[c]learly the policy objective is that the credit is to be available only where there is some legislated assurance of competence of the person administering the service.”<sup>35</sup> The policy articulated in *Noddin* may well have been the intent of incorporating non-federal law into the METC. The effect of the incorporation, however, is much greater than assuring the competence of persons administering medical services.

Non-federal law concerning the METC has the effect of determining whether a person administering a service is, in substance, a medical practitioner at all for purposes of the METC. If a province has no legislation on a particular practice, then the legal vacuum removes such practice from the definition of “medical practitioner” altogether. Taking a step back from the language of the statute, the overarching policy of the METC would seem to be satisfied if all other elements of the METC are satisfied and the payee is incompetent (legislatively or otherwise). For instance, the METC should hardly be denied on the basis that a medical practitioner committed malpractice because of his or her incompetence. Similarly, the expense is no less a *bona fide* medical expense from the taxpayer’s perspective (and his capacity to bear taxation) if paid to a person fraudulently holding herself out as a medical practitioner formally approved by the jurisdiction.

Regulating and monitoring the competencies of medical practitioners is obviously a worthwhile policy objective. It is not, however, a federal tax policy objective (nor, as discussed in detail below, does it obviously fall within any constitutional powers of the federal government). If the *ITA* were simply to provide a METC in respect of expenses incurred for “chiropractic services” there would be no more or less assurance that chiropractors in a given jurisdiction are regulated or competent because this provincial responsibility is entirely independent and aimed at different objectives than a METC. Further, penalizing the payor for a perceived shortcoming of the payee is a rather indirect method for providing

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<sup>34</sup> *Supra* note 12.

<sup>35</sup> *Ibid* at para 8.

“assurance of competence of the person administering the service.” In the first instance, therefore, from a “meta-policy” perspective there is a questionable element of the federal government mucking around with laws authorizing medical practitioners.

In the second instance, there is a questionable element with respect to the federal government expressly providing non-federal jurisdictions with the power to define the substance of federal tax policy, and something as fundamental as the tax base. To frame this issue, it is useful to contrast the incorporation of non-federal law in the METC context with other instances in which non-federal law is thought to (appropriately) impact the application of federal tax law.

It is well understood that because the *ITA* is an accessory statute, it may have different application from one province to another depending on the provincial private law. Typical reliance on provincial private law under the Act is driven by legal form and for this reason does not typically give rise to horizontal equity concerns.<sup>36</sup> If provincial private law ascribes a given form to a transaction, the Act will generally treat the transaction in accordance with its form. Perceived different tax treatment arises where similar economics and legal relationships in one province result in a different legal form than would arise in another in a similar situation, and the Act taxes the different forms differently. For example, a contract of purchase and sale creating similar economics and enforceable rights in two provinces may cause title to pass at a different time in one province than the other.<sup>37</sup>

It seems incorrect to speak about a given outlay for medical services in a province in which the medical practitioner is formally approved as providing different economics or being different in legal form from an identical outlay for identical services in a province in which such medical practitioners are not formally approved. In both transactions, the taxpayer advances funds in exchange for identical services. No private law rights or

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<sup>36</sup> Sections 8.1 and 8.2 of the federal *Interpretation Act*, RSC 1985, c I-21, expressly sanction the application of different provincial private laws to the extent relevant in the application of a federal statute. By their terms, however, these sections do not encompass the reliance on provincial law in the context of the METC. Section 8.1 of the *Interpretation Act* provides that “if in interpreting an enactment it is necessary to refer to a province’s rules, principles or concepts forming part of the law of property and civil rights, reference must be made to the rules, principles and concepts in force in the province at the time the enactment is being applied.” While subsection 118.4(2) of the *ITA* appears to mandate reference to provincial rules, it is not a reference to the law of property or civil rights, but rather is a reference to provincial public laws formally approving of medical practitioners.

<sup>37</sup> See e.g. *Wardean Drilling Ltd v MNR* (1969), 69 DTC 5194 (Ex Ct).

obligations relevant to characterizing the form of the transaction as a contract for services would seem to turn on the characteristics of the payee.

The substance of the tax law – whether a payment under a legal contract for the provision of services is an outlay that is in substance a medical expense – is determined based on the characteristics of the payee. Provinces and other non-federal jurisdictions are empowered to determine what is an outlay for a medical service in its jurisdiction by passing or not passing legislation authorizing different classes of practitioners. Although it is less obvious, this is not much different than providing non-federal jurisdictions with the authority to define depreciation rates and asset classes for purposes of federal capital cost allowances.

There is nothing obviously evil with having a substantive tax policy objective that dictates different treatment of identical transactions in different parts of the country or based on the characteristics of different payees. For example, federal tax breaks to businesses in economically depressed regions of the country can be defended on a principled basis. Similarly, if a principled basis could be articulated, a METC regime that provides different tax relief in different regions of the country could be justified. What becomes less principled, and harder to justify as a matter of federal tax policy, is when the actual rules giving rise to the disparate results in different parts of the country are not federal rules at all. At a minimum, one would expect the substantive policy of the federal government to somehow rationalize or explain the reliance on provincial law that give rise to the disparate results.

From a meta-policy perspective the federal government has legislated an incomplete tax policy and non-federal jurisdictions complete the substantive definition of medical practitioner. This is different from the *ITA* applying *qua* accessory statute to the private law relationships of taxpayers determined under non-federal law. The consequence of this policy approach is for the federal policy concept of an individual's capacity to bear tax to be at the discretion of non-federal jurisdictions.

### *C) Incentives: Medical Tourism*

A knock-on effect of taxing identical transactions differently is that the different tax treatments arguably create incentives to seek out favourable jurisdictions to effect such transactions. The fact that foreign jurisdictions can determine whether a person is a medical practitioner for purposes of the METC is recognized by CRA in a published interpretation.<sup>38</sup> This interpretation was in the context of a taxpayer enquiring as to the

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<sup>38</sup> CRA Document no 2009-0319341E5 (dated May 19, 2009).

credibility of the costs for stem cell therapy that was not available in Canada for a degenerative neuromuscular disease. CRA responded to the taxpayer that “[t]he term medical practitioner can include individuals such as a medical doctor, dentist, pharmacist, nurse or optometrist provided that he or she is authorized to practice in the stated profession according to the laws of the jurisdiction in which the service is rendered” and further that “[t]he fact that the jurisdiction is outside Canada would not be relevant in applying these definitions.”

The question of obtaining Canadian tax relief for medical services provided outside of the country is also not a new issue. In the 1948 debates in the House of Commons the following exchange took place:

Mr. SINNOTT: Suppose a man goes to Rochester for an operation which costs him \$2,000. Is there any provision to take care of that cost?

Mr. ABBOTT: Yes. He can claim \$2,000 as a deduction from his income to the extent to which it is in excess of four per cent of his income.<sup>39</sup>

Deference to foreign law for the substantive definition of a medical practitioner is, however, a new issue. Under the 1948 statute, an operation in Rochester would have been eligible for the deduction because the person providing the operation would be a “medical practitioner” for federal tax purposes and qualified in the state of New York.

Under the post-1988 version of the Act, if the definition of medical practitioner is incorporated from the laws of the foreign jurisdiction, to what degree will (or should) the Canadian tax system recognize practitioners that would not be authorized to practise in Canada? On one hand, it could be argued that the Act should not be paternalistic in who it regards as a medical practitioner, that it should respect the decision of foreign jurisdictions to authorize disparate medical practitioners to practise as such and should take its foreign law as it finds it. It is not clear, however, that that would be the policy choice made if legislators or the public were to put their minds to the issue.

#### *D) Alternatives to Referential Legislation*

Referential rules in the *ITA*, though common, are the exception to the rule. In the context of the METC, alternative approaches to propagating the policy of the METC onto economic actors in the real economy could include (1) defining medical practitioner federally; (2) leaving all operative terms undefined; or (3) structuring the reference to provincial law as so-called conditional legislation.

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<sup>39</sup> *House of Commons Debates*, June 23, 1948 at 5721.



### 1) Define Federally

The federal government could pass the definitions necessary to carry out the substance of its tax policy objectives. In the context of the METC, this could likely take any of several definitional forms, two of which are as follows.

The first form would be to define in the statute the type of transactions, and in particular the type of services received, that are eligible for the METC. Not surprisingly, this is the approach taken in the United States under the *Internal Revenue Code (IRC)*<sup>40</sup> where reliance on state (or non-tax federal) law is generally anathema to US federal income tax law. Subject to a number of conditions and limitations,<sup>41</sup> under section 213 of the *Internal Revenue Code*, US taxpayers are entitled to a deduction for unreimbursed expenses for “medical care.” Medical care for such purposes is defined, *inter alia*, as “the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body.” The *Treasury Regulations* go into a further 10,000 words of detail. One exclusion under the regulations germane to the policy discussion above is that “[a]mounts expended for illegal operations or treatments are not deductible;”<sup>42</sup> there would not, however, appear to be any other assurance of legislative competence of the service providers (presumably a state policy objective).

The second form would be for the federal government to pass a proxy for the substance of what is a medical expense. For instance, the federal government could pass its own list of “medical practitioners,” payments to whom qualify for the METC. Arguably, the reference to non-federal law in the current METC is itself a proxy. Rather than define medical expenses, or to legislate its own proxy, the federal government has used the proxy of whether a practitioner is authorized by a jurisdiction in order to conclude that the expense in question is a medical expense. The problem with any proxy is that it may not correlate perfectly with the concept it is intended to capture giving rise to false positives<sup>43</sup> or false negatives.<sup>44</sup>

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<sup>40</sup> USC title 26 (1986).

<sup>41</sup> The deduction is subject to a 7.5% floor as compared to the 3% floor in Canada, possibly reflective of differing historical views between the United States and Canada of the public/private responsibility for health care costs.

<sup>42</sup> *Treasury Regulations*, 26 CFR § 1.213-1(e)(4)(ii).

<sup>43</sup> For example, cosmetic surgery prior to the 2010 federal budget was generally eligible for a METC if provided by a medical practitioner. Arguably this was a “false positive” that was remedied by express statutory amendment.

<sup>44</sup> In this author’s opinion chiropractor services in the Northwest Territories and Nunavut are “false negatives.”

## 2) *Undefined Terms*

The technique of leaving operative terms in the *ITA* undefined is arguably the most popular technique used by the Department of Finance for propagating abstract tax policy onto economic actors through the Act.<sup>45</sup> The courts have a long pedigree of interpreting undefined terms in the *Act* and there is some consensus following *Will-Kare Paving & Contracting Ltd v R*<sup>46</sup> on the correct approach to interpreting undefined terms in the Act.

Prior to the 1988 amendments to the METC creating the reflective definition through the words “as such,” the term “medical practitioner” was an undefined term. During the 46-year period in which the term was undefined, it was generally interpreted using an ordinary meaning approach rather than ascribing it a technical or legal meaning. This approach would appear to be correct. The concept of medical practitioner is not used in a narrow legal sense in the METC regime, especially in light of the fact that under subsection 118.2(2), it is used as a catch-all concept. Once the ordinary meaning of such concept was determined, and as it evolved, it was applied uniformly from province to province and territory to territory.

## 3) *Conditional Legislation*

A third alternative would be the use of so-called conditional legislation. This alternative would be ideal if the federal lawmakers were legitimately concerned by the potential that a federal tax credit might be granted in respect of services rendered in a province when the province has expressly disapproved of such services under one of its heads of power.<sup>47</sup> Such legislation could take the form of passing the substance of the definition in prose or passing a federal list of medical practitioners or leaving the term undefined, but in whichever case also providing an opt-out clause for the provinces.

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<sup>45</sup> For detailed discussion of this topic see David A Ward, “Finding the Meaning of Undefined Terms in the Income Tax Act,” in *Report of Proceedings of Fifty-Fourth Tax Conference* (Toronto: Canadian Tax Foundation, 2003) 39:1-15.

<sup>46</sup> [2000] 1 SCR 915 [*Will-Kare*].

<sup>47</sup> This is a slightly different policy concern than that identified by the Tax Court in *Noddin*, *supra* note 12. The policy suggested in *Noddin* was the policy of assuring the legislative competence of the payee through provincial legislation. Conditional legislation would provide a complete federal regime independent of provincial law, but would permit provinces to opt out of the federal regime with respect to particular practise(s).

This type of federal legislation was held to be constitutional in *Reference re: Act to Amend the Lord's Day Act (Man)*.<sup>48</sup> Very generally, in the *Lord's Day Act Case* the federal government had passed a criminal law making it illegal to do certain things on Sundays in Canada. This law, however, also provided that it applied "except as provided by any provincial Act or law now or hereafter in force." The Judicial Committee of the Privy Council observed that this bi-jurisdictional regime governing Sundays

is a very different thing from saying that in [the federal Act] the Dominion Parliament has manifested an intention to give the force of law to legislation passed by a provincial legislature professing to do what a province under its own powers of legislation cannot do, viz., to create an offence against the criminal law...<sup>49</sup>

The basic idea of federal conditional legislation is that the federal government creates a complete substantive regime, but whether such regime applies in a province at all depends on the existence of provincial legislation either opting in or opting out of the federal regime. In particular, in a conditional regime, the provincial law does not supplement or complete an otherwise incomplete federal substantive regime, but rather determines whether the federal law/policy applies in its jurisdiction.

The interpretation given the METC regime by Boyle J in *Couture* at the Tax Court could arguably be construed as interpreting the METC regime as conditional legislation:

[T]he Crown was, however, unable to direct me to anything in that Act, nor could I find anything in that Act, which prohibited the practice of traditional Chinese medicine or acupuncture in Ontario in 2003 and 2004. Indeed, Professor Cheung's Institute appears to have been an entirely above board and legitimate business operating lawfully in Ontario in 2003 and 2004. With respect to that argument, I do not see anything in the Ontario Regulated Health Professions Act which suggests that Professor Cheung's Institute was not authorized to practise traditional Chinese medicine and acupuncture in 2003 and 2004.

In other words, "authorized to practise as such ... pursuant to the laws of the jurisdiction in which the service is rendered" is a form of legislative opt-out for the provinces. If a given jurisdiction prohibited a given medical

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<sup>48</sup> [1925] AC 384 (PC) [*Lord's Day Act Case*]; see also *Gold Seal v Dominion Express Co* (1921), 62 SCR 424.

<sup>49</sup> *Lord's Day Act Case*, *ibid* at para 18. Some commentators have argued that the *Lord's Day Act Case* was wrongly decided on the basis that the provinces had been given licence to enact criminal laws. See e.g. Peter W Hogg, *Constitutional Law of Canada*, loose-leaf (Toronto: Carswell, 2007) at § 14.5(c) and authorities cited at note 128 therein.

practise then amounts paid to such practitioner would be deemed not to have been made to a medical practitioner and thus would not be eligible for the METC. The Federal Court of Appeal in *Couture* obviously disagreed that the METC created a legislative opt-out, rather interpreting it to require the provincial law to complete an otherwise incomplete federal regime. This raises the question of whether the incorporation of provincial law under the METC, as interpreted by the Federal Court of Appeal in *Couture*, is itself constitutional.

### 5. *Constitutionality*

A cynical view, such as that of Sir Cecil Carr from the epigraph to this paper, is that referential tax legislation is designed to obfuscate the actual legislation from the legislator. In the case of the METC, for example, no legislator will investigate the laws of each province and other jurisdictions in which medical services may be provided to a Canadian taxpayer. Given the lack of any debate over the fairly significant 1988 policy shift of defining “medical practitioner” under provincial law after 46 years of operating under a federal definition, there may be a good argument to be made that in the METC context legislators were indeed in the dark.

Less cynically, referential tax legislation can be seen as a form of legislative short-cut to complete the tax law. In the METC context, legislators opted for parsimony over completeness. Since the practice of medicine is generally a matter of provincial jurisdiction, it was logical to defer to provincial laws for the definition of medical practitioner. The issue discussed in this section is the constitutional status of a federal statute adopting provincial laws formally approving medical practitioners.<sup>50</sup>

#### *A) Legislative Inter-Delegation*

The seminal case on legislative delegation is *Nova Scotia (A-G) v Canada (A-G)*.<sup>51</sup> This case arose in the context of a bill in the legislature of Nova Scotia purporting to delegate to the

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<sup>50</sup> The federal taxing power is subject to the same constitutional limitations on delegation as other federal powers; see GV La Forest, *The Allocation of Taxing Power Under the Canadian Constitution*, 2d ed (Toronto: Canadian Tax Foundation, 1981) at 40. Many of the METC cases tried at the Tax Court have contained a *Charter*-based constitutional challenge, which invariably failed. See e.g. *Chevalier, Tall and Noddin*, all *supra* note 12. See also, Mary Shaw “Complementary and Alternative Medicine and the Medical Expense Tax Credit: A Case for Legislative Reform” (2006) 8 Health LJ 45.

<sup>51</sup> [1951] SCR 31 [*Nova Scotia Delegation Case*].

Parliament of Canada authority to make laws in relation to any matter relating to employment in any industry, work or undertaking in respect of which such matter is, by section 92 of The British North America Act, 1867, exclusively within the jurisdiction of the Legislature of Nova Scotia.<sup>52</sup>

This bill would have also authorized the Nova Scotia legislature to pass laws under a reciprocal federal delegation. The Supreme Court unanimously held that the bill would be unconstitutional if enacted. The Court subscribed to the general premise that sections 91 and 92 of the *Constitution Act, 1867*<sup>53</sup> create “watertight compartments” and that jurisdiction cannot be conferred by consent. Taschereau J observed that

it is clear that the delegation of legislative powers by Parliament to the ten provinces on matters enumerated in Section 91 of the B.N.A. Act could bring about different criminal laws, different banking and bankruptcy laws, different military laws, different postal laws, different currency laws, *all subsections in relation to which it has been thought imperative that uniformity should prevail throughout Canada.*<sup>54</sup>

Rand J picked up on the same theme:

[B]y delegation Nova Scotia might impose an indirect tax upon citizens of Alberta in respect of matters arising in Nova Scotia; or it might place restrictions on foreign or interprovincial trade affecting Nova Scotia which impinge on interests in Ontario. The incidence of laws of that nature is intended by the constitution to be determined by the deliberation of Parliament and not of any Legislature. In the generality of actual delegation to its own agencies, Parliament, recognizing the need of the legislation, lays down the broad scheme and indicates the principles, purposes and scope of the subsidiary details to be supplied by the delegate: under the mode of enactment now being considered, the real and substantial analysis and weighing of the political considerations which would decide the actual provisions adopted, would be given by persons chosen to represent local interests.<sup>55</sup>

Following the *Nova Scotia Delegation Case* the Supreme Court’s view evolved to permit incorporation by reference in certain cases.<sup>56</sup> In *R v Smith*, for example, the Supreme Court upheld the validity of an act pursuant to which the federal government “adopted, as its own legislation,

<sup>52</sup> *Ibid* at 32.

<sup>53</sup> (UK) 30 & 31 Victoria c 3 [*Constitution Act, 1867*].

<sup>54</sup> *Nova Scotia Delegation Case*, *supra* note 51 at 45 [emphasis added].

<sup>55</sup> *Ibid* at 48-49.

<sup>56</sup> *Ontario (A-G) v Scott*, [1956] SCR 137 [*Scott*]; *R v Glibbery*, [1963] 1 OR 232, (1962) 36 DLR (2d) 548 [*Glibbery*]; *Coughlin v Ontario (Highway Transport Board)*, [1968] SCR 569 [*Coughlin*]; *R v Smith*, [1972] SCR 359 [*Smith*].

in each province to which the Act applies, [certain] legislation of that province as it may exist from time to time.”<sup>57</sup>

The *Nova Scotia Delegation Case*, however, has not been entirely eliminated as a bar to delegation through incorporations by reference and other devices. It continues to stand for the proposition that the federal government cannot legislate an expansion of its powers or the powers of a provincial government. A consequence of this proposition, borne out by the jurisprudence, is that the federal government is only able to incorporate provincial laws that it could have passed directly under one of its heads of power.<sup>58</sup>

There are two general instances recognized by case law where provincial law incorporated by a federal statute qualifies. The first is where the provincial and federal governments have jurisdiction over the same pith and substance in respect of which they are legislating, differing generally only as to scope. The second are instances in which the exercise of a provincial head of power has an incidental or ancillary effect on a subject matter beyond the competence of the provincial governments. In these latter situations, the federal government could fully occupy the field into which the provincial legislation is (permissibly) encroaching,<sup>59</sup> or it could adopt the provincial legislation in the exercise of the federal jurisdiction.

The best example of the first type of incorporation is section 88 of the *Indian Act*,<sup>60</sup> which provides as a general rule that “all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province.” Under subsection 91(24) of the *Constitution Act, 1867*, the federal government has jurisdiction over “Indians, and Lands reserved for the Indians” and has occupied the subset of this jurisdiction relating to laws of general application by a wholesale incorporation of provincial laws. The provinces obviously have the same jurisdiction limited territorially and to the exclusion of persons covered by the federal *Indian Act* (and perhaps others).

Case law has recognized the validity of incorporations similar to that under the *Indian Act*. In *Glibbery*,<sup>61</sup> the federal government had

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<sup>57</sup> *Smith, ibid* at 366.

<sup>58</sup> *Glibbery, supra* note 56; see also GV La Forest, “Delegation of Legislative Power in Canada” (1975) 21 McGill LJ 131 at 139; Hogg, *supra* note 49 at § 14.4(c).

<sup>59</sup> In such cases the provincial legislation may become subordinate to the federal law through the doctrine of paramountcy.

<sup>60</sup> RSC 1985, c I-5.

<sup>61</sup> *Supra* note 56.

incorporated portions of the *Ontario Highway Traffic Act*<sup>62</sup> into its *Government Property Traffic Act*<sup>63</sup> to be applied on federal property (largely military bases) in the province of Ontario. The federal government could have passed the laws contained in the *Ontario Highway Traffic Act*, albeit with limited application to federal property within the province. The Ontario Court of Appeal distinguished the facts considered in *Glibbery* from the *Nova Scotia Delegation Case* as follows:

*There is not here any delegation by Parliament to a Province of legislative power vested in the Dominion alone by the B.N.A. Act and of a kind not vested by the Act in a Province. Delegation by Parliament of any such power would be clearly unconstitutional: [Nova Scotia Delegation Case]. The power here sought to be delegated was not of such a type but was in relation to a matter in which the Province was independently competent. Parliament could validly have spelled out in its own regulations the equivalent of relevant sections of the Highway Traffic Act as they existed from time to time but it was more convenient to include them, as has been done, by reference to contemporary legislation in the Province. There should be no objection to delegation of this type made for a valid Federal purpose to save repetition in its own regulations of valid Provincial legislation.*<sup>64</sup>

Similarly, in *Coughlin*<sup>65</sup> and *Smith*,<sup>66</sup> the federal government had jurisdiction over the inter-provincial transport of goods by motor vehicle, while the provinces had intra-provincial jurisdiction over the same. The federal government exercised its jurisdiction by deferring to the provincial law already in place and the provincial boards already charged with administering the provincial laws. Akin to *Glibbery*, the federal government could have passed the substance of the provincial statutes regulating intra-provincial transport and had such enactment apply to inter-provincial transport.

This first type of valid incorporation by reference does not describe the METC. The federal government could not “have spelled out its own [laws] the equivalent of the relevant sections” in the provincial laws formally approving of medical practitioners. The federal government could technically never directly pass the laws it is purporting to adopt under the METC. The federal government could directly pass laws that define medical practitioner federally for purposes of the METC and the *Act*, but that does not shoehorn the METC into the rationale of cases like *Glibbery*.

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<sup>62</sup> RSO 1060, c 172.

<sup>63</sup> RSC 1952, c 324.

<sup>64</sup> *Glibbery*, *supra* note 56 at para 10 [emphasis added].

<sup>65</sup> *Supra* note 56.

<sup>66</sup> *Supra* note 56.

An example of the second type of federal incorporation is *Furtney v The Queen*.<sup>67</sup> This case considered a provision of the *Criminal Code*,<sup>68</sup> which provided that it was

lawful for a charitable or religious organization, *pursuant to a licence issued by the Lieutenant Governor in Council of a province or by such other person or authority in the province as may be specified by the Lieutenant Governor in Council thereof*, to conduct and manage a lottery scheme in that province ...<sup>69</sup>

The appellants challenged this law on the basis that it constituted an improper delegation to a provincial body of a matter within the exclusive competence of the federal government (among other grounds). Stevenson J observed that “[a]ll parties agree that the prohibition of gaming is an exercise of the criminal law power”<sup>70</sup> and continued that “the regulation of gaming activities has a clear provincial aspect under s. 92 of the *Constitution Act, 1867* subject to Parliamentary paramountcy in the case of a clash between federal and provincial legislation.”<sup>71</sup> The Supreme Court distinguished *Furtney* from *Johnson v A-G Alberta*,<sup>72</sup> a case involving provincial legislation dealing with gambling on the following basis:

That case does not decide that the province cannot prohibit and punish in the interest of public morality because such legislation is, in pith and substance, criminal law. The legislation in question there could find no legitimate anchor in s. 92.<sup>73</sup>

In *Furtney*, the provincial law was constitutional because it was in pith and substance related to a provincial head of power. The quasi-criminal aspect, however, was ancillary and incidental to the provincial regulation of gaming. Since the regulation of gaming is also an exercise of the criminal law power, the federal government would have been competent to enact the substance of the provincial laws that it incorporated by reference. With respect to, and to the extent of, the portions of the provincial laws that occupy the criminal law field in an ancillary and incidental way, the provincial and federal governments’ jurisdictions overlap. As Stevenson J noted, any such overlap is always subject to the federal government asserting its paramountcy by occupying the field. The federal government, however, could equally occupy the field by incorporating the valid provincial legislation as its own.

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<sup>67</sup> [1991] 3 SCR 89 [*Furtney*].

<sup>68</sup> RSC 1985, c C-46.

<sup>69</sup> *Ibid*, s 207 [emphasis added].

<sup>70</sup> *Supra* note 67 at 101.

<sup>71</sup> *Ibid* at 103.

<sup>72</sup> [1954] SCR 127.

<sup>73</sup> *Furtney*, *supra* note 67 at 103.



Elmer A Driedger has described the second type of valid incorporation by reference as follows: “to adopt *the text or substance* of a provincial statute in relation to a provincial subject as the federal law in relation to a federal subject.”<sup>74</sup> As an example, Driedger cites a provision of the *Criminal Code* which generally provided that persons qualified and summoned as jurors, according to the laws of a province, shall be duly qualified to serve as jurors in criminal cases in such province. In other words, the *Criminal Code* incorporated for its ends the provincial laws dealing with empanelling a jury. Driedger notes “Parliament could have repeated those very same rules in the *Criminal Code in extenso*.”<sup>75</sup>

This second type of valid incorporation by reference also does not describe the METC. The provincial law incorporated under the METC is not tax law that is validly passed by provinces ancillary to a provincial head of power. Laws authorizing medical practitioners within a province are squarely within provincial jurisdiction. The federal government is adopting laws which, subject to the discussion in the next section, it could not have passed directly. In the case of the adoption under the METC there is the added twist that the provincial law is incorporated for different purposes federally than for which it was passed provincially. The fact that there is this disconnect between the provincial and federal purposes could be seen as additional support that it is an impermissible adoption of law: the federal government cannot abdicate legislating in its exclusive sphere of competence by adopting the laws of the provinces aimed at different ends.

The unifying principle in the incorporation by reference case law described above is that in each case of federal incorporation of provincial law, both levels of government had jurisdiction over the incorporated law, differing generally only as to scope<sup>76</sup> or as to the pith and substance in relation to which the law is passed (necessarily in this latter case, the law being incorporated will be ancillary to the pith and substance of one of the

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<sup>74</sup> Elmer A Driedger, “The Interaction of Federal and Provincial Laws” (1976) 54:4 Can Bar Rev 695 at 703 [emphasis added].

<sup>75</sup> *Ibid* at 708.

<sup>76</sup> *Scott, supra* note 56 (province of Ontario incorporating laws of other jurisdictions regarding enforcement of family law judgements; Ontario is independently competent to pass laws on enforcement of family law judgements); *Glibbery, supra* note 56 (federal government incorporating portions of the *Ontario Highway Traffic Act*; federal government could have passed the equivalent of the provincial statute with different scope); *Coughlin, supra* note 56 (federal government incorporated provincial transport of goods by motor vehicle laws; federal government could have passed the equivalent of the provincial statute with different scope); *Smith, supra* note 56 (same); *Dick v The Queen*, [1985] 2 SCR 309 (laws of general application of the provinces incorporated under section 88 of the *Indian Act*).

levels of government). The decided case law is clear that the incorporation of a provincial law by the federal government is not a delegation of legislative power when the provinces and the federal government are both competent to enact the incorporated law.

### *B) Direct Federal Jurisdiction*

There are two ways of approaching the constitutionality of the federal government's incorporation of provincial legislation by reference under the METC. Above, the discussion focused on whether there are heads of provincial and federal power that sufficiently overlap to justify the incorporation. Alternatively, if there is a secondary policy under the METC of providing for, encouraging or ensuring the competencies of the medical practitioner performing the medical services, then arguably such legislation (including the incorporation of such legislation passed by a provincial legislature) could fall directly under the federal government's jurisdiction over health.

Jurisdiction over health is not as clear-cut as one might expect. The Supreme Court in *Schneider v R*<sup>77</sup> has observed that

“[H]ealth” is not a matter which is subject to specific constitutional assignment but instead is an amorphous topic which can be addressed by valid federal or provincial legislation, depending in the circumstances of each case on the nature or scope of the health problem in question.<sup>78</sup>

The federal government has historically intervened in the “health” jurisdiction under the federal spending power<sup>79</sup> and criminal law power; provinces' jurisdiction generally arises from its jurisdiction over hospitals, property and civil rights and matters of a merely local or private nature.<sup>80</sup> The question in the METC context is whether the federal government's power to determine the tax base of individuals under the federal spending power provides a constitutional basis for the federal government to

<sup>77</sup> [1982] 2 SCR 112.

<sup>78</sup> *Ibid* at 142.

<sup>79</sup> See Hogg, *supra* note 49 at § 6.8(a) (federal spending power is “a power which is nowhere explicit in the *Constitution Act, 1867*, but which must be inferred from the powers to levy taxes (s. 91(3)), to legislate in relation to ‘public property’ (s. 91(1A)), and to appropriate federal funds (s. 106)”).

<sup>80</sup> See Martha Jackman, “Constitutional Jurisdiction Over Health in Canada” (2000) 8 Health L J 95. In modern society it is not obvious that formally approving of medical practitioners is such a local concern. According to Jackman, *ibid*, at the time of Confederation health care was not considered a matter of national importance. At this time health care was traditionally and customarily provided on a very private and local level.

incorporate provincial legislation that formally approves medical practitioners.

The observation advanced here is that the use of the federal spending power is generally (if not exclusively) aimed at creating “legitimate national standards”<sup>81</sup> through the provision of federal funds to provinces that voluntarily meet standards established by the federal government. As noted throughout this article, the federal METC in fact does the opposite by incorporating provincial laws: it creates standards that vary widely and from province to province.

Additionally, the fact that the federal government acts through the federal spending power generally implies that the federal government does not have the power to legislate directly in the given field. In the health context specifically, under the *Canada Health Act*,<sup>82</sup> a model of the exercise of the federal spending power, the federal government does not pass any laws dealing with the direct provision of health services. Instead, the *Canada Health Act* creates standards that, if passed by the provinces into law, will give provinces access to federal funding. In the METC context the federal legislation does exactly the opposite, not only does it expressly adopt laws within the field into which it is encroaching, the laws it adopts do not create national standards at all. The METC creates a situation where the federal government is arguably exercising the federal spending power in the absence of a federal policy objective. The federal tax base and income tax receipts are determined by provincial policies aimed at different ends.

The federal spending power in connection with the *ITA* has been considered in *Winterhaven Stables Ltd v Canada (AG)*.<sup>83</sup> This case is somewhat of a logical bookend to the legislative delegation case law in the context of tax legislation carrying out provincial objects. Recall the reaction of courts to legislative delegation between Parliament and provincial legislatures was that delegation would effectively result in the wrong legislative body deliberating over policies reserved for the other. In the context of the exercise of the federal spending power through the *ITA*, *Winterhaven Stables* held that (a) raising money through direct taxation in order to fund federal spending in provincial jurisdictions does not constitute “Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes,” which is the exclusive jurisdiction of the provinces under subsection 92(2) of the *Constitution Act, 1867*; and (b)

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<sup>81</sup> *Winterhaven Stables Ltd v Canada (AG)* (1988), 53 DLR (4th) 413 (Alta CA) [*Winterhaven Stables*].

<sup>82</sup> RSC 1985, c C-6.

<sup>83</sup> *Supra* note 81.

that the exercise of the federal spending power through legislation such as the *Canada Health Act* is not unconstitutional.

*Winterhaven Stables* was a constitutional challenge to the *ITA* itself, heard in the Alberta Court of Appeal in 1988.<sup>84</sup> The plaintiff sought a declaration that the *ITA* is *ultra vires* Parliament because of Parliament's exercise of the federal spending power. Since the federal revenues raised through taxes were used to fund provincial programs<sup>85</sup> such as health care, the plaintiff argued that such taxation constituted direct taxation within the province to raise revenue for provincial purposes, a power reserved for the provinces under subsection 92(2) of the *Constitution Act, 1867*.

The Alberta Court of Appeal held that the *ITA* was constitutional because the revenues raised could not be traced to expenditures made for provincial purposes. The Court observed that monies raised under the *Act* are paid into the Consolidated Revenue Fund and that all federal expenditures are drawn from that fund. The Court agreed with the trial judge that

[t]he accounts are structured so that the source of all revenues cannot be distinguished. It is therefore not possible to trace the payments made by the federal government to the provinces for provincial purposes to any specific source....

I do not believe that it can be said that the *Income Tax Act* has as its intended object the raising of money for provincial purposes. It simply raises money to be used as authorized by Parliament. The monies received under the *Income Tax Act* are intrinsically mixed with other monies and some of these funds are transferred to the provinces. *They are undoubtedly then used for provincial purposes. It is however clear that the main object of the Income Tax Act is not to raise money by direct taxation for provincial purposes. It is concerned with raising money by taxation.*<sup>86</sup>

Because there is no direct connection or tracing from monies raised in Alberta and the provincial purposes to which federal money is put within

<sup>84</sup> The Crown argued that the appropriate forum should be the Tax Court insofar as the central issue concerned the plaintiff's liability for taxes under the *ITA*. The Alberta Court of Appeal endorsed the reasoning of the trial judge that "the plaintiff's claim is not the appeal of a tax assessment but rather a challenge to the *vires* of the *Income Tax Act*" and ruled that the Alberta courts were a proper forum for consideration of such issues.

<sup>85</sup> The list of programs raised by the plaintiff included programs established and administered under the *Federal-Provincial Fiscal Arrangements and Post-Secondary Education and Health Contributions Act, 1977*, SC 1976-77, c 10; the *Canada Assistance Plan Act*, RSC 1970, c C-1; the *Canada Health Act*, SC 1984, c 6; the *Medical Care Act*, SC 1966-67, c 64; the *Hospital Insurance-Diagnostic Services Act*, SC 1957, c 28; the *Blind Persons Act*, SC 1955, c 26; and the *Disabled Persons Act*, SC 1953-54, c 55.

<sup>86</sup> *Supra* note 81 at 431 (quoting the trial decision, 29 DLR (4th) 394 at 418) [emphasis added].

Alberta, the *Act* was viewed as independently being an exercise of “the raising of Money by any Mode or System of Taxation” under subsection 91(3) of the *Constitution Act, 1867*. The argument that the funds were raised for provincial purposes failed because the funds raised could not be traced to the provincial purposes to which they were admittedly used.<sup>87</sup>

In contrast to the federal legislation considered in *Winterhaven Stables*, rather than raising revenues, the METC effectively foregoes revenues. The tracing argument used to support the constitutionality of the *ITA* in *Winterhaven Stables* would therefore not readily apply to save the METC. By its nature, the METC is directly tied to the activity engendering the tax relief. There is no comingling of fungible monies in a common account. The weight of a federal tax relief determined directly by provincial legislation aimed at provincial matters.

The incorporation of provincial law into the METC regime – and the disparate tax treatment of medical expenses across the country – are therefore not rationalised by *Winterhaven Stables*. There would appear to be no feature of Canadian federalism that constitutionally supports the federal tax relief in respect of provincial policies in this fashion. The METC between 1942 and 1988 much more resembled the type of legislation that was upheld in *Winterhaven Stables* along with the *ITA*. The federal government had a pan-Canadian definition of medical practitioner (legitimate national standard) that, if the provinces did not disqualify a practice under their jurisdiction over health, could support federal tax relief for a resident of a particular province.

It is difficult to support the federal approach to legislating the METC under existing constitutional authorities and conceptually it is a departure from the federal government’s typical role in health care. The fact that the METC regime may not be explained by existing constitutional authorities, and is arguably unconstitutional following the 1988 amendments is further reason to think that the introduction of the words “as such” were not intended to shift the substance of the definition of medical practitioner from the federal government to provincial (and other non-federal) governments.

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<sup>87</sup> *Ibid* at 433. The Alberta Court of Appeal also considered whether certain of the federal spending statutes themselves were a constitutional exercise of federal powers. The plaintiff argued that “these statutes are, in pith and substance, legislation in relation to matters exclusively within the legislative competence of the provinces.”

## 6. Conclusion

The role of non-federal law under the METC regime is not typical. Courts have recognized that reliance on non-federal law under the METC can give rise to results that are harsh and retrograde. Further, reliance on non-federal law can give rise to results that are difficult to rationalise as sound federal income tax policy or as a sound legislative framework.

Existing constitutional authorities do not explain the interaction of federal and provincial laws under the METC regime. The federal government has a long history of intervening in the field of health, but such interventions are typically to create national standards. Under the METC with respect to services provided by medical practitioners, the federal government provides federal tax relief that is entirely contingent on provincial legislation.

Some form of regime providing tax relief for significant unreimbursed medical expenses would seem to be above reproach. There is surely sound federal policy (even in a world of publicly funded basic health care) for providing tax relief for significant private outlays with respect to health. The Tax Court and the Federal Court of Appeal have consistently concluded that providing a national standard is not possible under the 1988 legislative formulation of the METC. The statutory framework should be reformulated in a way that taxes Canadians identically in respect of transactions that are in form and substance identical, and that is consistent with the division of legislative powers contained in the *Constitution Act, 1867*.

**Appendix A: Medical practitioners “authorized to practise as such” in Canada’s 13 provinces and territories**

<b>Profession</b>	<b>AB</b>	<b>BC</b>	<b>MB</b>	<b>NB</b>	<b>NL</b>	<b>NS</b>	<b>NT</b>	<b>NU</b>	<b>ON</b>	<b>PE</b>	<b>QC</b>	<b>SK</b>	<b>YT</b>
Acupuncturist	x	x									x		
Audiologist	x	x	x	x					x		x	x	
Chiropodist		x	x	x					x			x	
Chiropractor	x	x	x	x	x	x			x	x	x	x	x
Combined Lab and X-Ray Technologist	x												
Dental Assistant	x		x	x	x	x				x		x	
Dental Nurse			x										
Dental Technician or Technologist	x	x	x	x	x	x			x	x	x	x	x
Dental Therapist					x		x	x				x	x
Dietician	x	x	x	x	x	x			x	x	x	x	
Emergency Medical Technician	x	x										x	
Hearing Aid Practitioner	x	x									x		
Licensed or Registered Practical Nurse	x	x	x	x	x	x	x		x	x	x	x	x
Massage Therapist		x			x				x				
Medical Laboratory Technologist	x		x	x		x			x		x	x	
Medical Radiation Technologist	x			x		x			x		x	x	
Midwife	x	x	x	x		x	x	x	x		x	x	
Naturopath	x	x	x			x			x			x	
Occupational Therapist	x	x	x	x	x	x			x	x	x	x	
Ophthalmic Medical Assistant							x	x					
Optician	x	x	x	x	x	x			x	x	x	x	
Psychotherapist													
Physiotherapist or Physical Therapist	x	x	x	x	x	x			x	x	x	x	x
Podiatrist	x	x	x	x					x		x	x	
Psychological Associate		x							x				
Psychologist	x	x	x	x	x	x	x	x	x	x	x	x	
Registered Nursing Assistant	x		x	x			x	x		x	x		x
Registered Nutritionist	x			x		x					x		
Registered Psychiatric Nurse	x	x	x									x	x
Respiratory Therapist	x		x	x		x			x		x	x	
Social Worker	x	x	x	x	x	x				x	x	x	
Speech Language Pathologist	x	x	x	x					x		x	x	
Traditional Chinese Medicine Practitioner		x											

*Adapted from a similar table published by CRA on August 1, 2012*

