

MARGINALIZING TRANS MEDICAL EXPENSES: LINE-DRAWING EXERCISES IN TAX

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This article explores the treatment of trans medical expenses under American and Canadian tax laws. In both tax systems, medical expenses are deemed worthy of tax relief, while many cosmetic procedures are excluded. This article argues that tax administrators and the judiciary are influenced by social stigma when they employ the distinction between cosmetic and medical expenses to exclude or allow trans medical expenses. In the American context, this article focuses on the Internal Revenue Service's reasons for deeming a trans woman's gender dysphoria-related medical expenses to be ineligible for the medical deduction. It then turns to the taxpayer's subsequent appeal to the U.S. Tax Court in O'Donnabhain v. Commissioner, 134 TC no. 4, and the Court's determination that, while the taxpayer's sex reassignment surgery and hormone therapy were eligible expenses, her breast augmentation was not deductible. The article follows by outlining the Canadian medical expense tax credit to determine how similar trans medical expenses might be treated in light of a budget amendment in 2010 prohibiting claims for most cosmetic procedures. The article concludes that in both the American and Canadian context, trans people are held to a higher standard than required under each respective tax statute, with their gender dysphoria-related medical expenses needing to be documented as "medically necessary" to avoid categorization as ineligible cosmetic expenses.

Le présent article examine le traitement des frais médicaux liés à la dysphorie sexuelle en vertu des lois fiscales américaines et canadiennes. Dans les deux régimes fiscaux, les frais médicaux sont considérés comme admissibles à un allègement fiscal, tandis que plusieurs interventions esthétiques sont exclues. Le présent article fait valoir que les administrateurs fiscaux et la magistrature sont influencés par les stigmates sociaux lorsqu'ils ont recours à la distinction entre les frais d'intervention esthétique et les frais médicaux pour exclure ou justifier les frais médicaux liés à la transition. Dans le contexte américain, le présent article se penche sur les motifs formulés par l'Internal Revenue Service pour juger inadmissibles à la déduction pour frais médicaux les frais médicaux liés au trouble d'identité sexuelle d'une femme transgenre. Il examine ensuite l'appel interjeté ultérieurement par la contribuable à la US Tax Court dans O'Donnabhain v. Commissioner, 134 TC no. 4, ainsi que la décision de cette cour selon laquelle la chirurgie pour changement de sexe et l'hormonothérapie de la contribuable constituaient des frais admissibles, alors que son augmentation mammaire n'était pas

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déductible. L'article décrit ensuite le crédit d'impôt canadien pour frais médicaux pour déterminer comment des frais médicaux similaires liés à la dysphorie sexuelle pourraient être traités à la lumière d'une modification budgétaire de 2010 interdisant les réclamations pour la plupart des interventions esthétiques. L'article conclut que, tant aux États-Unis qu'au Canada, les personnes transgenres doivent satisfaire à une norme plus élevée que celle que prévoit la loi fiscale à laquelle elles sont assujetties, leurs frais médicaux liés à la transition devant être documentés comme étant « médicalement nécessaires » pour éviter d'être qualifiés de frais d'intervention esthétique inadmissibles.

I. AT THE MARGINS OF TAX'S RULES

Tax law often requires the creation of distinct categories. The resulting line-drawing exercises assign different tax treatments to items depending on which side of the line they fall. It is items at the margins of those lines that often preoccupy the tax community. Courts grapple with categorization exercises; practitioners dream up creative recharacterization plans; and scholars analyze the propriety of both what gets in and what is left out of existing categories. Some items, for example current versus capital expenses, might run into categorization issues because it is not immediately clear from their nature and their use how they should be categorized. Other expenses trouble tax categories not because they are close to the margins of the rule, but rather because those incurring the expenses are themselves marginalized. Trans people's¹ gender dysphoria-related medical expenses fall into the latter category, as highlighted in *O'Donnabhain v. Commissioner*,² a recent American case in which a trans woman appealed the Internal Revenue Service's disallowance of her claims for medical expenses for treatment of her Gender Identity Disorder.³ The tax authority determined that the expenses did not qualify for the U.S. medical expense tax deduction because they were cosmetic in nature. Ms. O'Donnabhain's appeal to the U.S. Tax Court was successful in part, but the treatment of her medical expenses by both the tax authority and the judiciary illustrates how stigma can influence categorization exercises in tax.

¹ "Trans people" in this article refers to individuals who might incur gender dysphoria-related medical expenses, including transgender, transsexual, genderqueer, and two-spirit people. "Trans medical expenses" and "gender dysphoria-related medical expenses" refer to transition and trans identity-related healthcare including surgeries, mental health services, hormone therapy, and other therapies and treatments. This article refers to sex reassignment surgery rather than gender reassignment surgery because that is the term used by the Canadian and American tax authorities and in the US Tax Court decision referred to throughout this article.

² *O'Donnabhain v Commissioner*, 134 TC no 4 (2010) [*O'Donnabhain*].

³ The term "Gender Identity Disorder" is used when referring to Ms. O'Donnabhain's diagnosis because that is the term used in the US Tax Court decision, *ibid*. Otherwise, this article generally uses the term "gender dysphoria" to describe, as explained by the World Professional Association for Transgender Health, "people who experience dissonance between their sex as assigned at birth and their gender identity." See World Professional Association for Transgender Health, "Medical Necessity Statement" (June 17, 2008), online: WPATH <http://www.wpath.org/uploaded_files/140/files/Med%20Nec%20on%202008%20Letterhead.pdf>. This terminological choice also reflects the replacement of the diagnosis of "gender identity disorder" with the diagnosis of "gender dysphoria" in the fifth edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-5), see American Psychiatric Association, "Gender Dysphoria" (2013), online: DSM-5 <<http://www.dsm5.org/documents/gender%20dysphoria%20fact%20sheet.pdf>>.

A. Policing tax relief for medical expenses: categorizing trans medical treatments

This article explores the treatment of gender dysphoria-related medical expenses under American and Canadian tax laws. In both tax systems, medical expenses are deemed worthy of tax relief, while many cosmetic procedures are excluded from deductibility. This distinction between cosmetic and medical expenses creates discretion that tax line drawers employ to exclude or allow trans medical expenses. Health professionals, the judiciary, and tax administrators police the lines of eligibility for tax relief. While health professionals stand as the ultimate gatekeepers of medical care for trans people,⁴ the particular focus of this article is how tax administrators and the judiciary's use of tax rules in assessing trans medical expenses is influenced by social stigma. As a result, this paper argues, trans people face a heavier compliance burden than required under the statutory tax provisions for medical expenses in both the U.S. and Canada to ensure that their gender dysphoria-related medical expenses are deemed eligible for tax relief. To overcome decision-makers' bias, trans medical expenses need to be documented as "medically necessary" to avoid categorization as ineligible cosmetic expenses.

A number of commentaries have explored the recent U.S. Tax Court decision in *O'Donnabhain* and what it reveals about both normative trans narratives and the American medical expense deduction.⁵ The medical expense tax credit in Canada has also received some attention after a recent provision was introduced barring most cosmetic medical treatments from qualifying for the credit.⁶ No Canadian article, however, has specifically considered the availability of the medical expense tax credit to Canadian trans people seeking relief for their gender dysphoria-related medical expenses. Nor has any article undertaken a comparative approach of the treatment of gender dysphoria-related medical expenses by the U.S. and Canadian tax systems. This article seeks to begin to fill those voids by adding a comparative legal and tax-policy perspective to the growing body of literature addressing both the *O'Donnabhain* decision and the treatment of trans people under the law.

⁴ Due to this article's focus on tax relief for medical expenses, the article remains within the medical paradigm. Several articles, however, have highlighted and problematized the role of health professionals and medical legitimization in determining whether trans people have access to trans medical care. For an overview, see Lauren Whitney Herman, "A Non-Medicalized Medical Deduction?: *O'Donnabhain v. Commissioner* & the I.R.S.'s Understanding of Transgender Medical Care" (2012) 35 *Harvard J L & Gender* 487 at 496. See also Dean Spade, "Resisting Medicine, Re/modeling Gender" (2003) 18 *Berkeley Women's LJ* 15 for a discussion of the challenges of using medical evidence responsibly in trans advocacy.

⁵ See e.g. Max V Camp, "*O'Donnabhain V Commissioner*: Treatment Costs for Gender Identity Disorder Are Tax-Deductible Medical Expenses" (2011) 20 *Law & Sexuality* 133; Stephanie Chen, "Examining *O'Donnabhain v. Commissioner*, 134 T.C.No. 4 (2010): Sex Reassignment Surgery as a Tax Deductible Medical Expense" (2012) 21 *S Cal Interdisciplinary LJ* 603; Herman, *supra* note 4; Anthony C Infanti, "Bringing Sexual Orientation and Gender Identity into the Tax Classroom" (2009) 59:1 *J Legal Educ* 3; Anthony C Infanti, "Dissecting *O'Donnabhain*" (March 16, 2010) 126 *Tax Notes* 126 [Infanti, "Dissecting *O'Donnabhain*"]; Alesdair H Ittelson, "Trapped in the Wrong Phraseology: *O'Donnabhain v. Commissioner* - Consequences for Federal Tax Policy and the Transgender Community" (2011) 26 *Berkeley J Gender L & Just* 356; Tamar E Lusztig, "Deducting the Cost of Sex Reassignment Surgery: How *O'Donnabhain v. Commissioner* Can Help Us Make Sense of the Medical Expense Deduction" (2011) 3 *Columbia Journal of Tax Law*; Eric Steven Smith & Ryan H Pace, "Deductible Cosmetic Surgery and the Treatment of Transgenderism: An Analysis of the Medical Expense Deduction Post-*O'Donnabhain*" (February 2012) 2012 *American Taxation Association Midyear Meeting: JLTR Conference*, available online: SSRN <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2003902###>.

⁶ Ling Chu, Alan Macnaughton & Nicole Verlinden, "Curtailing Income Tax Relief for Cosmetic Medical Expenses" (2010) 58:3 *Can Tax J* 529.

B. A Comparative Study of Trans Medical Expenses under the American and Canadian Tax Systems

The article begins by establishing that there is substantial agreement amongst medical professionals that sex reassignment surgeries, hormone therapies, and other trans identity-related procedures are the appropriate and medically necessary treatment for gender dysphoria. It highlights that, despite this majority medical position, sex reassignment surgeries are only limitedly funded by public and private insurance plans in the U.S. and Canada. In this context of restricted insurance coverage, relief under the tax system becomes particularly valuable. The article then reviews the American federal medical expenses deduction and its requirements. The focus is on the IRS's reasons for disallowing Ms. O'Donnabhain's claims and the later determination by the U.S. Tax Court that some but not all of her Gender Identity Disorder-related expenses were deductible. The article subsequently outlines the medical expense relief provided through the Canadian federal tax system to determine whether similar trans medical expenses would be eligible,⁷ particularly in light of a recent budget amendment prohibiting claims for cosmetic procedures. It concludes by arguing for the potential benefits of a Canadian legislative amendment that explicitly deems trans medical expenses as expenses eligible for tax relief.

II. THE LANDSCAPE: GENDER DYSPHORIA AND INSURANCE COVERAGE

The determination of what procedures constitute medical care — in other words, the appropriate treatments for a health-related diagnosis — is generally left to medical professionals. Under both the American and Canadian medical tax relief provisions, medical expenses need not be covered by any private or public insurance plan in order to be eligible expenses. Instead, the tax legislation criteria apply. Still, it is useful to highlight below that, despite the general agreement in the medical community that sex reassignment procedures are an appropriate and medically necessary treatment for gender dysphoria, insurance coverage for these medical expenses is limited in both Canada and the U.S. This limited insurance coverage for sex reassignment surgeries illustrates another occasion of trans people being unable to access a benefit—not because their expenses sit on the margins between experimental and widely accepted medical treatments, but rather because rule makers are biased by societal stigma, which affects how they exercise their discretionary line-drawing power.

A. The medical community and sex reassignment surgeries

Multiple professional medical orders recognize sex reassignment surgeries as an appropriate therapy for those with gender dysphoria. Amongst others, the American Medical Association has passed a resolution stating that the organization supports full insurance coverage for sex reassignment surgeries, as has the American Psychological Association, the American Academy of Family Physicians, the American College of Obstetricians and Gynecologists, and the World Professional Association for Transgender Health.⁸ The Canadian Professional Association for Transgender Health has also taken a

⁷ For the purposes of the article, neither state nor provincial/territorial tax treatments of medical expenses are addressed.

⁸ Lambda Legal, "Professional Organization Statements Supporting Transgender People in Health Care" (Last revised June 8, 2012), online: Lambda.com <http://www.lambdalegal.org/sites/default/files/publications/downloads/fs_professional-org-statements-supporting-trans-health_1.pdf>; World Professional Association for Transgender Health, *supra* note 3.

strong position advocating for full coverage of gender dysphoria-related health care across Canada,⁹ including sex reassignment surgery and related trans medical treatments. Canadian provinces that fund sex reassignment surgeries for people with gender dysphoria explicitly state that these operations are publicly funded because they constitute medically necessary treatments.¹⁰

B. Limited coverage under public and private insurance plans

1. The American context

In the U.S., trans people who qualify for the state-federal public health insurance program Medicaid for low-income people are generally eligible to have their hormone treatments covered but, despite a wave of recent legal changes increasing access to coverage, sex reassignment surgeries are still not eligible for coverage in many states.¹¹ A similar rule applied to Medicare, the U.S. public health insurance program for seniors and people with disabilities, but that program's 33-year ban on coverage for sex reassignment surgery was overturned in a landmark decision issued in May 2014.¹² Many private insurance plans also still restrict coverage for sex reassignment surgeries.¹³ Advocates and individual trans people continue to press for access to sex reassignment surgeries under Medicaid programs and private insurance plans, with frequent new developments to be watched over the next few years. Non-surgical medical treatments, such as psychological visits, are insurable to the extent that such services are otherwise covered by the recipient's public or private insurance plan.

2. The Canadian context

In Canada, public health insurance is available for all citizens and permanent residents, as well as certain qualifying refugees.¹⁴ Coverage for sex reassignment surgeries under the public medical

⁹ Canadian Professional Association for Transgender Health, "An Open Letter to All Ministers of Health in Canada" (February 13, 2012), online: CPATH <<http://www.cpath.ca/wp-content/uploads/2010/05/LetterMinistersHealth2012English2.pdf>>.

¹⁰ See e.g. British Columbia Ministry of Health, *Sex Reassignment Surgery in British Columbia: New Standards of Care*, online: Ministry of Health <<http://www.health.gov.bc.ca/msp/infoprac/physnews/srs-in-british-columbia.pdf>>.

¹¹ National Center for Transgender Equality, "Transgender Healthcare Insurance Laws" (January 30, 2015), online: National Center for Transgender Equality <<http://transequality.org/issues/resources/transgender-healthcare-insurance-laws>>.

¹² Roni Caryn Rabin, "Medicare to Now Cover Sex-Change Surgery", *The New York Times* (May 30, 2014), online <<http://nyti.ms/1kunE36>>.

¹³ Human Rights Campaign, "'Finding Insurance for Transgender-Related Healthcare'" (last modified December 15, 2014) online: HRC <<http://www.hrc.org/resources/entry/finding-insurance-for-transgender-related-healthcare>>; *supra* note 11.

¹⁴ Health-care coverage and supplemental health benefits including prescription drugs are severely restricted for some refugees, although certain refugees have access to public insurance for health and drug benefits. These restrictions are the subject of numerous advocacy efforts and a Federal Court of Canada decision currently under appeal. See Citizenship and Immigration Canada, "Interim Federal Health Program: Summary of Benefits" (last modified February 3, 2015), online: Citizenship and Immigration Canada <<http://www.cic.gc.ca/english/refugees/outside/summary-ifhp.asp>>; Sean Fine, "Ottawa's Refugee Health-Care Cuts 'Cruel and Unusual,' Court Rules" *The Globe and Mail* (July 4, 2014), online: <<http://www.theglobeandmail.com/news/politics/ottawas-refugee-health-cuts-cruel-and-unusual-court-rules/article19459837/>>; The Canadian Press, "Temporary Refugee Health Care Fix Requires New Appeal, Judge Rules" *CBC News* (February 6, 2015), online: <<http://www.cbc.ca/news/politics/temporary-refugee-health-care-fix-requires-new-appeal-judge-rules-1.2947613>>; Canadian Council for Refugees, "Refugee Healthcare", online: Canadian Council for Refugees <<https://ccrweb.ca/en/ifh>>.

insurance plan varies from province to province, with some provinces/territories not covering sex reassignment surgeries, others recently reinstating funding after having previously defunded the procedures, and some recently introducing funding for first time.¹⁵ Even where coverage for sex reassignment surgeries is available, there are generally restrictions on the types of surgeries covered, as well as limited access to actual coverage due to burdensome criteria and the requirement that services be obtained only from specified medical practitioners.¹⁶

Quebec is the only province in Canada with a large-scale public prescription plan. Quebec residents who are not covered by a supplemental private plan receive mandatory prescription coverage under the Quebec provincial public drug plan if they otherwise qualify for public health insurance benefits. In other provinces, access to prescription coverage is limited to those who have either private insurance or are part of a small section of the provincial population that qualifies for prescription support, for example, seniors and recipients of income assistance.¹⁷ As in the U.S., for Canadian trans people the cost of hormone therapy is covered to the extent that they have insurance coverage for other prescription drugs. Access to public insurance-covered psychological services is quite limited in Canada, and most individuals will only receive insurance coverage for psychological services to the extent that their private insurance covers those services.

C. Tax relief for medical expenses

The exclusion from many insurance plans of sex reassignment surgeries underlines the importance of relief from the tax system for trans people bearing the cost burden of their gender dysphoria-related medical treatments. In Canada, the average costs of sex reassignment surgeries ranges from \$10,000 to \$60,000.¹⁸ Within this context of limited coverage, the medical expense tax provisions offer the possibility of relief for both American and Canadian trans people who undergo gender dysphoria-related medical treatments not covered by insurance plans. Tax relief for trans medical expenses also eases the financial burden for treatments that are only partially covered by insurance, just as the medical expense tax provisions assist many Americans and Canadians with other high medical costs. Although the importance of tax relief may fade if trans people are increasingly successful at advocating for coverage of their trans medical care by private and public health plans, given the uneven and frequently shifting landscape of trans medical care coverage throughout the U.S. and Canada, tax relief is likely to remain a key consideration in the foreseeable future.

While some argue that many lower-income trans people cannot afford sex reassignment procedures and are therefore unlikely to obtain tax relief for medical expenses as the provisions are currently structured, others note that some lower-income trans people save for their trans medical procedures for

¹⁵ See e.g. Minister of Health and Long-Term Care, “Relisting of Sex Reassignment Surgery under OHIP” (June 20, 2008), online: Minister of Health and Long Term Care Processing Sites <<http://www.health.gov.on.ca/en/pro/programs/ohip/bulletins/4000/bul4480.pdf>>; CBC News, “Nova Scotia to Fund Sex Reassignment Surgery” (June 12, 2013), online: <<http://www.cbc.ca/news/canada/nova-scotia/story/2013/06/12/ns-gender-reassignment-surgery.html>>; *National Post*, “Alberta Reinstates Funding for Gender Reassignment after Delisting Surgery in 2009” (June 7, 2012) online: <<http://news.nationalpost.com/2012/06/07/alberta-gender-reassignment-surgery>>.

¹⁶ *Daily Xtra*, “Sex Reassignment Surgeries Funded in all but Two Provinces” (July 24, 2014) online: <<http://dailyxtra.com/canada/news/sex-reassignment-surgeries-funded-in-two-provinces-89914>>.

¹⁷ Certain refugees qualify for income assistance, see *supra* note 14.

¹⁸ CBC News, “Nova Scotia to Fund Sex Reassignment Surgery,” *supra* note 15.

many years, and the possibility of tax relief for those individuals would be quite significant.¹⁹ Regardless, this article does not engage in a critical analysis of the distributive economics of the relief provided by the Canadian and American tax system for medical expenses. Instead, it begins from the presumption that the medical expense tax provisions have the potential to offer tax relief to at least some trans people and focuses on analyzing the current administrative and judicial application of the line-drawing exercises inherent to the current rules.

III. TAX RELIEF FOR MEDICAL EXPENSES UNDER THE AMERICAN FEDERAL TAX SYSTEM

A. The medical expense deduction

Under the American federal tax system, medical care expenses paid out of pocket by taxpayers for themselves, their spouse, or their dependants, and for which no reimbursement was received, may qualify as itemized deductions under § 213 of the *Internal Revenue Code*.²⁰ A threshold test limits the deductibility of qualified expenses to the amount by which medical expenses exceed 10% of the taxpayer's adjusted gross income.²¹ Medical care expenses are defined under § 213(d). First, § 213(d)(1)(a) provides a broad inclusion test. It establishes that medical care expenses are amounts paid "for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body." § 213(d)(1) goes on to delineate other medical expenses eligible for the deduction, provided that they fall within specified parameters, including transportation for medical care,²² amounts paid for prescription drugs,²³ the costs of a long-term care facility,²⁴ and medical insurance.²⁵

The general inclusion test set out in § 213(d)(1)(a) allows for medical care expenses that fall within either of two categories. The first type of eligible expenses fall under the prong of amounts incurred "for the diagnosis, cure, mitigation, treatment, or prevention of disease." The second prong allows those expenses incurred "for the purpose of affecting any structure or function of the body." Medical necessity is not the test for determining whether medical care expenses qualify under § 213(d)(1)(a); rather, as described by Justice Holmes in *O'Donnabhain*, the test is more akin to a "subjective good faith therapeutic intent on the part of the patient."²⁶

¹⁹ For more on lower-income trans people's access to tax relief for medical expenses, see Herman, *supra* note 4 at 505; Ittelson, *supra* note 5 at 381-83; and Lusztig, *supra* note 5 at 95.

²⁰ All subsequent references to American tax legislation refer to the *Internal Revenue Code*.

²¹ This figure applies to years beginning after December 31, 2012. The previous threshold of 7.5% still temporarily applies to people over 65 years of age and their spouses through taxation years ending before January 1, 2017. See Internal Revenue Service, "Topic 502- Medical and Dental Expenses" (Reviewed or Updated April 15, 2013), online: IRS <<http://www.irs.gov/taxtopics/tc502.html>>.

²² § 213(d)(1)(B).

²³ § 213(b) and § 213(d)(3).

²⁴ § 213(d)(1)(C).

²⁵ § 213(d)(1)(D).

²⁶ *O'Donnabhain*, *supra* note 2 at 91. See also Lusztig, *supra* note 5 at 98.

B. The cosmetic medical expense exclusion

It was not until 1990 that a new rule was added to the American medical expense deduction to exclude amounts paid for certain cosmetic surgeries and procedures. The impetus was a historically expansive interpretation of the definition of medical care, in particular IRS rulings concluding that face-lift procedures, hair transplants, and electrolysis to remove unwanted hair were qualified expenses under the second prong of the medical care definition because they “affect[ed] [a] structure or function of the body,” even though the procedures were not medically prescribed.²⁷ In response, the U.S. Congress amended the *Internal Revenue Code* to explicitly exclude from the rubric of medical care expenses those surgeries and procedures undertaken purely for cosmetic purposes.²⁸

The cosmetic exclusion rule is found in § 213(d)(9), which deems cosmetic surgeries and similar procedures to fall outside the definition of “medical care” unless specific criteria are met. There are two avenues by which a cosmetic surgery or procedure might avoid exclusion. First, under § 213(d)(9)(a), cosmetic surgeries or procedures will still qualify as medical care expenses if they are “necessary to ameliorate a deformity arising from, or directly related to, a congenital abnormality, a personal injury resulting from an accident or trauma, or disfiguring disease.” This first category establishes a rule where anything deemed a cosmetic surgery or similar procedure must meet a necessity requirement to be an eligible expense. The second category exemption is created under § 213(d)(9)(b). It excludes from the definition of cosmetic surgery those procedures or surgeries that “meaningfully promote the proper function of the body or prevent or treat illness or disease.” Expenses that fall under this second exception do not need to meet a medical necessity test. Instead, they should be able to qualify under a less burdensome standard that is similar to (or the same as) the “good-faith therapeutic intent” that Justice Holmes described as the threshold required for medical care expenses to qualify under § 213(d)(1)(a).

C. Drawing the lines around Ms. O’Donnabhain’s itemized deductions

1. Ms. O’Donnabhain’s expense claims

On her 2001 federal income tax return, Ms. O’Donnabhain claimed \$21,741 in medical care expenses as itemized deductions.²⁹ These expenses were amounts paid for breast augmentation surgery, sex reassignment surgery, and hormone therapy, all incurred as part of her transition from male to female. The IRS disallowed the deductions on the basis that they were cosmetic procedures, excluded under § 213(d)(9).³⁰

2. The internal revenue service’s reasons for disallowance

In its Chief Counsel Advice memorandum, the IRS relied on two main reasons for the disallowance.³¹ First, the IRS asserted that the sex reassignment expenses were cosmetic in nature and did not qualify under the exceptions for certain cosmetic procedures. Second, the IRS concluded that sex reassignment surgery is a controversial treatment for Gender Identity Disorder. Each of these claims is canvassed

²⁷ Camp, *supra* note 5 at 136; Lusztig, *supra* note 5 at 100.

²⁸ *Ibid.*

²⁹ O’Donnabhain, *supra* note 2 at 13.

³⁰ *Ibid.* at 14; Lusztig, *supra* note 5 at 105.

³¹ Internal Revenue Service, Chief Counsel Advice Number 200603025, “Medical Expense Credit” (October 14, 2005).

below to highlight how they are both influenced by a bias against trans people's gender dysphoria-related medical treatments and an awareness of the social stigma facing this population.

a. The “cosmetic” bias

The IRS's starting point that Ms. O'Donnabhain's expenses are cosmetic in nature betrays a bias that sex reassignment surgery is “an elective, purely cosmetic treatment”³² with no therapeutic value. The IRS uses the space created by the line between cosmetic and medical to anchor its assertion that the expenses are not deductible. A reasoned assessment, free of societal bias against trans people, would not identify any of the expenses Ms. O'Donnabhain claimed as akin to those for cosmetic surgeries and procedures. As pointed out by Ms. O'Donnabhain's expert witness in the subsequent U.S. Tax Court case, “normal genetic males do not generally desire to have their penis and testicles removed.”³³

From a line-drawing perspective, Ms. O'Donnabhain's claims are not an example of expenses that should trouble tax authorities because they are on the rule's margins, straddling the line between medical and cosmetic. The hormone therapy, breast augmentation, and sex reassignment surgery expenses incurred by Ms. O'Donnabhain are not procedures that most people designated as male at birth would undertake under any circumstances, particularly not for cosmetic purposes. Lauren Whitney Herman canvasses the reasons that scholars have forwarded in arguing that sex reassignment procedures are not cosmetic.³⁴ Scholars comment that gender dysphoria-related medical procedures do not improve people's appearances in the cosmetic sense, within the range associated with their sex assigned at birth. In fact, the social stigma that trans people are exposed to when they undergo trans medical procedures vitiates any claim that those procedures bring benefits akin to those achieved from appearance-boosting treatments such as facelifts, Botox treatments, and liposuction.³⁵ Unlike cosmetic surgeries and treatments, gender dysphoria-related medical procedures fundamentally alter a body's hormonal and anatomical functioning.³⁶ Finally, access to sex reassignment surgeries is granted not merely by paying a hefty sum, as in the cosmetic domain, but instead only after trans people meet the standards set by whatever medical professionals are acting as gatekeepers to the particular procedures sought.³⁷

Recall that for a medical care expense to be deductible under the broadly inclusive medical care test set out in § 213(d)(1)(a), it need not meet a medical necessity standard but rather demonstrate a “good-faith therapeutic intent” on the part of the patient.³⁸ The IRS has issued rulings allowing deductions under § 213(d)(1)(a) for clarinet lessons, therapeutic swimming pools, chiropractors operating without a license, and for the costs of prayer by a Christian Science Practitioner.³⁹ Certainly, operating on a good faith basis, without a bias towards trans people, it is most likely on a balance of probabilities that someone undergoing gender dysphoria-related surgeries and treatments would be doing so for some therapeutic purpose. The only basis on which to start with the assumption that the procedures were

³² As stated in the Congress report describing the reasoning for adding the rule barring cosmetic surgeries and procedures that did not meet prescribed conditions; see H Conf Rept 101-964, at 1031 (1990), 1991-2 CB 560, 562.

³³ *O'Donnabhain*, *supra* note 2 at 16.

³⁴ Herman, *supra* note 4 at 499.

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ *O'Donnabhain*, *supra* note 2 at 91.

³⁹ Lusztig, *supra* note 5 at 97.

undertaken for elective, purely cosmetic reasons is one that questions the legitimacy of trans people, their gender dysphoria, and the trans medical treatments they undergo. It is this bias that influenced the IRS interpretation of the medical tax deduction's cosmetic/medical distinction and resulted in the tax authority pushing Ms. O'Donnabhain's expenses past the margins of deductibility.

b. The “controversial” bias

The bias driving the IRS to file Ms. O'Donnabhain's expenses in the cosmetic category is also found in the second reason provided in its 2006 memorandum, in which the Office of the Chief Counsel opined that “[w]hether gender reassignment surgery is a treatment for an illness or disease is controversial.”⁴⁰ In support of this statement, the Office of the Chief Counsel cited an article by the former psychiatrist-in-chief at the Johns Hopkins Hospital who took a stand against sex reassignment surgery in the late 1970s on the basis that there was not adequate evidence that such surgery improved trans people's quality of life.⁴¹ While the Johns Hopkins Hospital did stop performing sex reassignment surgeries in 1979,⁴² this solitary example of an article published in a religious journal,⁴³ written by a psychiatrist whose affiliated hospital changed its position on sex reassignment surgery more than 25 years prior hardly constitutes an evidence-based response. Consider the volume of medical research the IRS appears to have ignored regarding modern treatment of gender dysphoria—a body of evidence that led Justice Gale to conclude that sex reassignment procedures are medically necessary for those with serious Gender Identity Disorder.⁴⁴ The Chief Counsel Advice memorandum goes on to comment that the costs of sex reassignment surgeries would only be deductible medical expenses if the legislature clearly expressed such intent. The conviction that trans medical expenses are outside the scope of the medical care umbrella is so strong that the IRS states it would require a specific legislative pronouncement on the subject to bring these expenses into the realm of deductibility.

3. The tax court decision

Ms. O'Donnabhain appealed to the U.S. Tax Court. In a case of first impression, Justice Gale wrote, in a majority opinion joined by seven other judges, that the amounts paid for hormone therapy and sex reassignment surgery were deductible medical care expenses because they were paid to treat a disease pursuant to § 213 (d)(1)(A) and § 213 (9)(B). Three other judges, Justice Halpern, Justice Holmes, and Justice Goeke, wrote concurring opinions, while five judges dissented in part and concurred in part.

Justice Gale canvassed the expert witness testimony and the evidence before the Court regarding Gender Identity Disorder and sex reassignment as a treatment, concluding that the sex reassignment surgery and hormone therapy were eligible expenses.⁴⁵ The breast augmentation, however, was determined to be a cosmetic surgery under § 213(d)(9)(B), and therefore excluded from deduction under

⁴⁰ Internal Revenue Service, Chief Counsel Advice Number 200603025, *supra* note 31.

⁴¹ *Ibid.*

⁴² Associated Press, “Johns Hopkins Drops Sex-Change Operations” (August 13, 1979), online: Google News <<http://news.google.com/newspapers?nid=1454&dat=19790813&id=n8csAAAIBAJ&sjid=OhMEAAAIBAJ&pg=5707,2956813>> at 2B.

⁴³ *O'Donnabhain*, *supra* note 2 at 54, 93; Jami Kathleen Taylor, “Transgender Identities and Public Policy in the United States: The Relevance for Public Administration” (2007), 39 *Administration & Society* 833 at 846.

⁴⁴ Cited in detail in *O'Donnabhain*, *supra* note 2 at 50-59.

⁴⁵ *Supra* note 2 at 48-60.

§ 213(d)(9)(A).⁴⁶ Justice Gale determined that it did not qualify as an exception to the rule barring deductions for cosmetic procedures because the surgery was undertaken to improve Ms. O'Donnabhain's appearance and did not meaningfully promote her body's proper functioning or treat a disease.⁴⁷

For the purposes of this article's exploration of the use of line-drawing exercises in tax, two parts of the Tax Court decision are discussed. First, a brief analysis is provided of the majority's finding that Ms. O'Donnabhain's sex reassignment surgery not only constituted medical care but was specifically "medically necessary." Second, reflections are offered on the decision to categorize the breast augmentation surgeries as cosmetic and the analytical route taken to support this categorization.

a. Invoking medical necessity

The majority specifically made the finding that the sex reassignment surgery was a medically necessary treatment for Ms. O'Donnabhain to treat her Gender Identity Disorder.⁴⁸ This determination employs a tax line-drawing exercise to pull the stigmatized expense as far away from the cosmetic surgery domain as possible. While this finding was likely made as an effort of utmost caution to insulate the decision on appeal,⁴⁹ under the statutory language of § 213(d)(9)(B), the majority did not need to conclude that the sex reassignment surgery was medically necessary for it to qualify as medical care and be excluded from the definition of cosmetic surgery.⁵⁰ The majority even acknowledged that the provision contains no medical necessity requirement but nonetheless went on to make a medical necessity assessment.⁵¹

Evidence of the influence of the stigma inherent in popular narratives about trans people is found in the disagreements between judges as to whether the Court's categorization exercise should have ended at the determination that the expense claims were medical care or continued on to the medical necessity finding. Justice Holmes concurred with the majority's conclusion but objected to the finding that the sex reassignment surgery was medically necessary.⁵² Chastising his fellow members of the bench, he protested that their medical necessity determination "drafts our Court into culture wars in which tax lawyers have heretofore claimed noncombatant status."⁵³ He then referenced "the crash course on transsexualism that this case has forced on us."⁵⁴ As Anthony Infanti points out, the Tax Court is frequently called upon to study in detail the nature of all sorts of expenses in different social and economic domains. Despite the many other crash courses the judges have likely taken to evaluate a broad range of expenses, this is the first time a lamenting reference to the need to take a "crash course"

⁴⁶ *Ibid* at 60-63.

⁴⁷ *Ibid*.

⁴⁸ *Ibid* at 64-67.

⁴⁹ Justice Halpern makes exactly this assessment in his concurring reasons, stating, "[w]ithout deciding whether section 213(d)(9) requires a showing of medical necessity, the majority nonetheless finds that petitioner's sex reassignment surgery was medically necessary... Apparently, the majority is preparing for a perhaps different view of the statute by the Court of Appeals." *Ibid* at 81.

⁵⁰ See e.g. Herman, *supra* note 4 at 488, 511-14.

⁵¹ *O'Donnabhain*, *supra* note 2 at 64-65.

⁵² *Ibid* at 82.

⁵³ *Ibid*.

⁵⁴ *Ibid*.

is found in American tax jurisprudence.⁵⁵ Justice Holmes' remarks indicate that he is keenly aware of a general societal bias against trans people, and he would prefer not to know the details of their lives nor take a public position regarding the necessity of their medical care.

Justice Gale's majority reasons, on the other hand, bore what Infanti describes as a "cautious," "clinical" and "detached" tone,⁵⁶ in an effort to "to cloak himself and the other judges joining the majority opinion in the mantle of the dispassionate, impartial judge."⁵⁷ The desire to insulate the majority from its potentially controversial decision that sex reassignment surgery constituted a medical expense eligible for tax relief led Justice Gale to categorize the expense under the safest terminological shelter available: the domain of the medically necessary. From the cover of his clinical and detached approach, however, Justice Gale also came to the odd conclusion that the breast augmentation surgery was not deductible because it was undertaken solely for cosmetic purposes. This conclusion is explored below.

b. Categorizing "normal" breasts

Justice Gale held that Ms. O'Donnabhain's breast augmentation was an ineligible cosmetic surgery because it was undertaken to improve her appearance and it did not qualify for either of the exceptions outlined under § 213(d)(9)(B) because the surgery did not "promote the proper function" of her body nor constitute treatment for her Gender Identity Disorder. Several scholars have evaluated this conclusion with mixed opinions about its correctness,⁵⁸ but this article argues that the breast augmentation should have been deductible. What is most interesting about the judicial analysis concluding that the breast augmentation was a cosmetic procedure is the Court's exercise of its discretion in evaluating the evidence to bring the expense over to the cosmetic side of the line.

Key for Justice Gale were notes by Ms. O'Donnabhain's plastic surgeon, Dr. Toby Meltzer, in which he described her pre-surgery breasts as "approximately B cup breasts with a very nice shape."⁵⁹ Justice Gale relied on this phrase as evidence that Ms. O'Donnabhain's breasts were already in the "normal" female range and any surgery undertaken was merely to improve her breasts' appearance. The problem with this assessment, as Justice Halpern highlighted in his concurring opinion, is that it misinterprets a clinical evaluation as an aesthetic one. At trial, Dr. Meltzer testified that his assessment regarding Ms. O'Donnabhain's breasts was a comparison to the breasts of other transsexual women. He noted that Ms. O'Donnabhain's breasts in fact exhibited the characteristics of the type of breasts that grow on "genetic" males, because of where the breast mass was located in relation to her nipples.⁶⁰ Dr. Meltzer explained that the purpose of the breast augmentation procedure was "to give her a female looking breast, which is quite different from a male breast."⁶¹ If Justice Gale had believed Dr. Meltzer's testimony, then Ms. O'Donnabhain's surgery should not have been characterized as a cosmetic surgery and barred from deductibility.

⁵⁵ Infanti, "Dissecting O'Donnabhain", *supra* note 5 at 1404.

⁵⁶ *Ibid* at 1403.

⁵⁷ *Ibid* at 1404.

⁵⁸ See e.g. Infanti, "Dissecting O'Donnabhain", *supra* note 5 at 1404, Herman, *supra* note 4 at 500-501; Chen, *supra* note 5 at 628-30.

⁵⁹ *O'Donnabhain*, *supra* note 2 at 12, 62-63.

⁶⁰ *Ibid* at 62.

⁶¹ *Ibid* at 70.

Justice Gale's choice to rely on the doctor's notes, which he described as bearing more weight because of their contemporaneous nature, exhibits an interesting paradigm shift within the same majority opinion. When he was evaluating the sex reassignment surgery and hormone therapy expenses, Justice Gale's deference towards medical professionals was high, so much so that he adopted their opinions to function as evidence of the medical necessity of sex reassignment surgery. When assessing the breast augmentation claim, however, suddenly the deference was gone. On the evidence, it was open to the Court to make a finding that the breast augmentation "treat[ed]" Ms. O'Donnabhain's Gender Identity Disorder and was therefore not cosmetic surgery, pursuant to § 213(d)(9)(B), and not excluded from deductibility under § 213(d)(9)(A). Instead, the Court used its fact-finding discretion to determine that the breast augmentation surgery was either for appearance only (Justice Gale) or that Ms. O'Donnabhain showed insufficient documentation in support of her claim that the surgery was for the treatment of her Gender Identity Disorder (Justice Halpern).

What is distinct about the breast augmentation that made Justice Gale exercise his line-drawing authority differently? Once again, Justice Holmes provided assistance in revealing the influence of societal attitudes on judges. He opined that breast augmentations are one of the most common cosmetic surgeries in the United States and are likely to be considered cosmetic surgeries by the general public unless they are undertaken after a serious illness or trauma.⁶² With this candid statement, Justice Holmes revealed that the U.S. Tax Court is not just engaged in a technical line-drawing exercise that emphasizes close textual interpretation; the Court is also balancing the views of the public in assessing the most reasonable and palatable conclusion. Justice Gale can shelter sex reassignment surgery and hormone therapy under the terminological safety of medical necessity. Others, though, not willing to go *that* far will allow those expenses under the wider rubric of medical care. None of the justices writing for majority or concurring with their result, however, could fathom declaring breast augmentations deductible as a treatment for gender dysphoria when similar procedures would not be deductible for people designated female at birth. It seems that only with airtight documentation that the procedure is treating gender dysphoria might a trans taxpayer overcome this anxiety.

With adequate documentation available, it is quite possible that the IRS would deem amounts incurred by trans people for procedures such as a breast augmentation to be eligible expenses. *O'Donnabhain* was a case of first impression, with trans medical expenses never having been considered before by the U.S. Tax Court and unlikely to be considered again in the near future. In refusing to categorize Ms. O'Donnabhain's breast augmentation as a medical care expense but providing a clear recipe of more stringent documentation for future claimants, perhaps the Court preferred to defer allowances of breast augmentation expenses to an administrative space likely to attract less public attention.

Vigilant documentation is exactly what the Tax Court's line-drawing exercises have left trans people needing to do to ensure their medical expenses claims are approved in the future. Advocacy organizations such as Gay and Lesbian Advocates & Defenders (GLAD) suggest documenting the

⁶² In *O'Donnabhain*, *supra* note 2 at 103, Justice Holmes wrote that "breast surgery is likely one of the commonest types of cosmetic surgery and (if not undergone after cancer surgery or trauma or the like) highly likely to be within the common public meaning of that phrase."

medical need for each procedure undertaken.⁶³ Much if not all of this documentation will likely adhere as closely as possible to the medical necessity narrative, even though many transition-related expenses should be eligible simply because they constitute medical care.

IV. TAX RELIEF FOR MEDICAL EXPENSES UNDER THE CANADIAN FEDERAL TAX SYSTEM

A. The medical expense tax credit

In the Canadian federal tax system, amounts paid by a taxpayer for medical care for themselves, their spouse or common-law partner, and their children under the age of 18 may qualify as eligible expenses for the purposes of the medical expense tax credit. The tax credit is equivalent to a specified percentage (15% in 2013)⁶⁴ of expenses above a certain threshold. In 2013, the threshold amounts were the lesser of \$2,152 or 3% of the taxpayer's net income in that year.⁶⁵ There is an additional refundable medical expense supplement targeting lower-income taxpayers with high medical expenses, up to a maximum supplement of \$1,142 (in 2013) or 25% of the eligible medical expenses that exceeded the medical expense tax credit threshold amount, if that figure is lower.⁶⁶ The additional refundable medical expense supplement introduces a reducing rate beginning at \$25,278 (in 2013) of combined spouse and taxpayer net income and is phased out at a maximum combined net income of \$48,118 (in 2013).⁶⁷

The general parameters for eligible expenses are set out in subsection 118.2(2) of the *Income Tax Act*.⁶⁸ A lengthy number of expenses are included in the medical expense definition, but it is sufficient here to focus on a few. Paragraph 118.2(2)(a) qualifies as eligible expenses, payments for medical or dental services provided to a "medical practitioner, dentist, nurse, or hospital." Paragraph 118.2(2)(n) includes prescription drugs in the definition of eligible expenses. Amongst multiple other expenses delineated in the provision, paragraph 118.2(2)(g) allows deductions for transport to medical services within certain limitations.

⁶³ Gay and Lesbian Advocates & Defenders, "Win in *O'Donnabhain* Tax Court Case: GID Qualifies as Medical Care" (Updated January 2012), online: GLAD <<http://www.glad.org/uploads/docs/publications/odonnabhain-win.pdf>> at 2.

⁶⁴ Canada Revenue Agency, General Income Tax and Benefit Guide – 2013 - Federal Tax and Credits (Schedule 1), "Line 330 – Medical Expenses for Self, Spouse, or Common-Law Partner, and your Dependent Children Born in 1996 or Later" (December 15, 2013).

⁶⁵ There is also tax relief at the provincial-territorial level with varying rates, as well as separate (but generally parallel) eligibility rules for the province of Quebec; but for the purposes of this article, provincial and territorial tax relief for medical expenses is not addressed.

⁶⁶ Canada Revenue Agency, Income Tax Folio S1-F1-C1: Medical Expense Tax Credit, (Modified October 18, 2013), online: CRA <<http://www.cra-arc.gc.ca/tx/tchncl/ncmtx/fls/s1/f1/s1-f1-c1-eng.html#N11086>>; Canada Revenue Agency, "Line 452 - Refundable medical expense supplement" (Modified January 3, 2013), online: CRA <<http://www.cra-arc.gc.ca/tx/ndvdl/tpcs/ncm-tx/rtrn/cmpltng/ddctns/lns409-485/452-eng.html>> [CRA, "Line 452"]; Canada Revenue Agency, 2013 Indexation Adjustment for Personal Income Tax, Benefit Amounts, and the Annual Dollar Limit for Tax-Free Savings (TFsAs), (Modified December 11, 2012), online: CRA <<http://www.cra-arc.gc.ca/nwsrm/fetshts/2012/m12/fs121211-eng.html>> [CRA, "2013 Indexation"].

⁶⁷ *Ibid*, CRA, "Line 452"; *ibid*, CRA, "2013 Indexation".

⁶⁸ *Income Tax Act*, RSC 1985, c 1 (5th Supp.) [*Act*]. All subsequent references to Canadian federal tax legislation refer to the *Act*.

As the rule stood for amounts paid for medical services prior to March 4, 2010, it appears that Ms. O'Donnabhain's claims for her breast augmentation, sex reassignment surgery, and hormone therapy would each have been eligible for the Canadian medical expense tax credit. The breast augmentation and the sex reassignment surgery constitute amounts paid to a medical practitioner or hospital under paragraph 118.2(2)(a), and the hormonal therapy is a prescription drug qualifying under paragraph 118.2(2)(n). There was little room for discretionary line-drawing around trans medical expenses with such a simple rule.

B. The cosmetic expense rule

The Canadian medical expense tax credit existed for decades without any preclusion of cosmetic medical expenses. The absence of a specific cosmetic expense rule was despite the fact that cosmetic medical procedures have been available since tax relief for medical expenses was first introduced in 1942.⁶⁹ The absence of a cosmetic expense rule was not unusual; before Canada implemented the new cosmetic purposes exclusion, of the 20 original OECD countries, only the U.S. and Australia had a rule limiting taxpayers from claiming cosmetic expenses under their respective tax relief provisions for medical expenses.⁷⁰

The new cosmetic expense rule, introduced in the 2010 federal government budget, is found in paragraph 118.2(2.1). It effectively limits the eligibility of amounts paid for cosmetic medical procedures. Expenses can avoid this categorization by falling under one of two exceptions. Under the first exception, expenses will escape exclusion if the procedures were not undertaken for "purely cosmetic purposes." Under the second exception, the expenses are not caught by the cosmetic medical expense rule if the procedures were "necessary for medical or reconstructive purposes." Much like the cosmetic expense rule under American federal tax law, one of the exceptions under the Canadian rule has a more stringent medical necessity requirement, and the other exception for procedures not undertaken "purely for cosmetic purposes" appears to be more expansive.⁷¹ The Canadian "purely cosmetic purposes" test is arguable more generous than the American exception in § 213(d)(9)(b) requiring that the procedures "meaningfully promote the proper function of the body or prevent or treat illness or disease." Under the Canadian "purely cosmetic purposes" test, it appears that a procedure could be undertaken for predominantly cosmetic reasons, but if it had a subsidiary medical purpose, it could still qualify for the medical expense tax credit.

C. Trans medical expenses under the Canadian medical expense tax credit

How then might trans medical expenses be categorized under the Canadian rules for medical expenses? In Ling Chu, Alan Macnaughton, and Nicole Verlinden's study of the new Canadian cosmetic purposes exclusion, the authors warn that social prejudices influence tax categorization exercises and observe that such bias seems to have been behind tax authorities' challenges to gender dysphoria-related medical expenses in *O'Donnabhain* and in a similar case in Australia.⁷² Just as Ms. O'Donnabhain's

⁶⁹ Chu, Macnaughton & Verlinden, *supra* note 6 at 532.

⁷⁰ *Ibid* at 543-44.

⁷¹ Commentators have already interpreted the "purely cosmetic purpose" as the potentially more expansive of the two exceptions under which taxpayers may need to meet a lower standard of proof, see *ibid* at 540-541.

⁷² *Ibid* at 567.

trans medical expense claims were denied by the IRS, and her breast augmentation was later deemed an ineligible cosmetic expense by the U.S. Tax Court, a tax authority or judicial decision-maker influenced by societal stigma against trans people may use their discretion to interpret the Canadian cosmetic expense rule as denying certain trans medical expenses.

1. Ms. O'Donnabhain's claims under Canadian federal tax law

Under the current statutory provisions, all of Ms. O'Donnabhain's trans medical expenses would be eligible for the medical expense tax credit, and should not be assessed against the cosmetic expense rule because gender dysphoria-related medical treatments are not undertaken for cosmetic purposes. Ms. O'Donnabhain's claims for breast augmentation and sex reassignment surgery are eligible expenses that should fall under paragraph 118.2(2)(a) of the *Act* as amounts paid to medical practitioners or to a public or private hospital for medical services. The amounts paid for her hormone therapy are eligible expenses pursuant to paragraph 118.2(2)(n) as a medication prescribed by a medical practitioner to treat her gender dysphoria that is only available through a pharmacist who records its purchase.

Tax authorities should not need to consider whether these gender dysphoria-related procedures qualify under the exceptions to the cosmetic expense rule because trans medical expenses are fundamentally not cosmetic in nature. As reviewed earlier in this article in the context of *O'Donnabhain*, gender dysphoria-related medical procedures do not belong under a cosmetic umbrella with facelifts, Botox treatments, and breast augmentations undertaken for non-reconstructive reasons. Sex reassignment surgeries, hormone therapy, and breast augmentations are widely recognized by numerous professional medical associations as medically respected treatments for gender dysphoria.⁷³ They should not trouble the line between medical and cosmetic because they are not procedures undertaken to achieve a “better” appearance that is within the range of the anatomical and bodily “normality” of the sex assigned at birth.⁷⁴ If Ms. O'Donnabhain's medical expenses were nonetheless assessed under the cosmetic expense rule, they would remain eligible expenses because they fit under both exceptions to the rule. To avoid the risk of having their expense claims denied, trans people are likely to face, or self-impose, the higher burden of documenting that their expenses fit under the stricter “necessary for medical... purposes” exception.

A recent Canada Revenue Agency technical interpretation concluded that a trans woman's sex reassignment surgery, facial feminization surgery, reduction of Adam's apple, travel costs, and accommodation in a private health facility would be eligible expenses for the purposes of the medical tax expense credit.⁷⁵ The Canada Revenue Agency interpretation raised the cosmetic expense rule, and noted that whether expenses were for “purely cosmetic purposes only” and whether they were necessary for “medical or reconstructive” reasons is assessed on a case-by-case basis depending on the facts.⁷⁶ The

⁷³ Lambda Legal, *supra*, note 8.

⁷⁴ *Supra* note 6 at 537. The authors reference a definition from the United Kingdom's “Expert Group on the Regulation of Cosmetic Surgery: Report to the Chief Medical Officer,” which defined cosmetic surgery as “[o]perations and other procedures that revise or change the appearance, colour, texture, structure, or position of bodily features, which most would consider otherwise to be within the broad range of ‘normal’ for that person.”

⁷⁵ Canada Revenue Agency, View 2012-0463201E5, “Medical Expenses- Sex Reassignment Surgery” (September 25, 2012). Such interpretations represent what the tax authority believes to be the correct position at the time it was issued, but may not be the authority's current position.

⁷⁶ *Ibid.*

tax authority then went on to emphasize the importance of documentation in evaluating each case, stating that “the determination in a particular situation would be based on a consideration of all the relevant facts and supporting documentation including the opinion of a qualified medical practitioner.”⁷⁷

The general understanding that sex reassignment surgery and hormone therapy fundamentally alter a body’s hormonal and anatomical functioning may make these procedures more likely to pass inspection by the Canadian tax authorities and judiciary as eligible medical expenses. The procedure amongst Ms. O'Donnabhain's claims most likely to be challenged as undertaken purely for cosmetic purposes would probably be the breast augmentation surgery, as these surgeries are commonly recognized as cosmetic procedures when performed on women assigned female at birth. Indeed, in the Canada Revenue Agency's summary of what expenses would generally be considered ineligible cosmetic procedures, the tax authority specifically lists “augmentations (such as chin, cheek, lips)” and “body shaping, contouring or lifts (such as, body, breasts, buttocks, face, and stomach).”⁷⁸ To overcome the potential mischaracterization by the tax authority of a breast augmentation obtained as treatment for gender dysphoria as cosmetic, the taxpayer may have to substantiate why a breast augmentation in this context is different from one undertaken for cosmetic reasons by a woman assigned female at birth. As Ms. O'Donnabhain's surgeon, Dr. Meltzer, explained to the U.S. Tax Court, for trans women, a breast augmentation is a treatment for gender dysphoria.⁷⁹ Even if a trans woman grows breasts through hormonal treatment, a subsequent breast augmentation has the goal of changing those breasts’ male anatomical characteristics.⁸⁰

It is useful to consider how a common surgery for trans people on the masculine spectrum, a bilateral mastectomy with male chest reconstruction, would be treated under the same Canadian federal tax rules. Like the breast augmentation, the expense incurred for this surgery is an amount paid for a medical service to a medical practitioner or hospital under paragraph 118.2(2)(a) of the *Act* and should be an eligible expense. As a treatment for gender dysphoria, the procedure is clearly not cosmetic, and should not trouble the cosmetic/medical line. Due to social stigma causing misconceptions about gender dysphoria-related medical care, the tax authority would likely proceed to assess the procedure against the cosmetic expense rule. Masculinizing hormone therapy for trans people does not remove breast tissue; to accomplish this goal breast tissue must be removed surgically. A reconstruction is then often required to mold the chest area into a masculine appearance. The procedure would meet both exceptions to the cosmetic expense rule, as it is not undertaken for “purely cosmetic purposes” and undergoing the surgery was necessary for medical and reconstructive purposes. Would an expense claim for a bilateral mastectomy with male chest reconstruction obtained as treatment for gender dysphoria face the same level of scrutiny from the Canada Revenue Agency as a breast augmentation similarly undertaken as a treatment for gender dysphoria? A standing question is how bias might influence a tax decision-maker's

⁷⁷ *Ibid.*

⁷⁸ Canada Revenue Agency, Medical Expense Tax Credit (METC) – Cosmetic Procedures (May 3, 2010), online CRA <<http://www.cra-arc.gc.ca/gncy/bdgt/2010/mdcl-eng.html>>.

⁷⁹ *Supra*, note 2 at 62-63, 70-71.

⁸⁰ *Ibid.*

evaluation of an expense for a trans surgery that, unlike breast augmentation, is not as strongly associated in the public mind with cosmetic surgery.⁸¹

From the Canada Revenue Agency's technical interpretation, the only reference to date by the tax authority to the eligibility of trans medical expenses for the medical expense tax credit, we see the heavy compliance burden placed on taxpayers claiming these expenses. Under the interpretation, each taxpayer needs to prove to discretionary decision-makers that each expense incurred for a gender dysphoria-related treatment is not excluded by the cosmetic medical expense rule. Taxpayers claiming trans medical expenses will be cognizant of the risk that the Canadian federal tax authority may employ similar arguments as Justice Gale of the U.S. Tax Court and determine that certain trans medical procedures were undertaken for purely cosmetic purposes. To avoid this characterization, taxpayers are likely to ensure that their trans medical expense claims are sheltered under the best possible terminological safety—the wider domain of the “medically necessary” exception to the cosmetic expense rule—rather than finding refuge under the less stringent exception that the procedures were not for “purely cosmetic purposes.” Indeed, a recent information sheet aimed at some trans individuals in Canada advises a high level of prudence, stating that “[d]ocumentation needs to be provided showing that the treatment was medically necessary, including a letter from a qualified medical professional.”⁸² Trans people are well aware of the stigma with which discretionary decision makers exercise their authority. Most taxpayers who incur expenses for a wide range of non-medically necessary medical services might simply add their receipts to a medical expense file for tax time. Given the current lack of certainty as to the eligibility of trans medical expenses, however, taxpayers claiming these expenses face the additional compliance requirement of a “medical necessity” recommendation to ensure that their gender dysphoria-related expenses qualify for tax relief.

D. A Canadian legislative amendment to include trans medical expenses

A legislative amendment that explicitly states that trans medical expenses qualify as eligible medical expenses would ease the higher compliance burden now facing Canadian taxpayers claiming these expenses. Chu, Macnaughton, and Verlinden propose a legislative amendment that would carve out trans medical expenses as eligible expenses while barring psychological arguments for otherwise ineligible cosmetic expenses.⁸³ The commentators further note that very little tax revenue is foregone by explicitly including sex reassignment surgeries as eligible expenses. As taxpayers contemplate incurring out-of-pocket expenses for trans medical procedures not covered in part or in full by public or private insurance, certainty as to whether tax relief is available to alleviate costs may be a key factor in their decision-making. A legislative amendment would reduce the need for trans people to rely on the healthcare system for their supporting documentation requirements, a welcome change in a context where trans people's access to gender dysphoria-related healthcare is already limited. Increased certainty

⁸¹ Note that the Canada Revenue Agency states that, “[b]reast implants and related procedures for reconstructive purposes,” are eligible for the medical expense tax credit, Canada Revenue Agency, Income Tax Folio S1-F1-C1, *supra* note 66 at para. 1.145.

⁸² Ayden Scheim, “Sources of Insurance Coverage and Tax Credits for Transition-related Medical Expenses” (Prepared for Public Service Alliance of Canada: Local 610, June 2013), unpublished, on file with author.

⁸³ Chu, Macnaughton & Verlinden, *supra* note 6 at 568.

would also ease the current administrative burden on tax authorities, clarifying eligibility, and removing the need for a detailed analysis of a taxpayer's documents supporting each expense claimed.

A legislative amendment that specifically deemed trans medical expenses as expenses eligible for the medical expense tax credit could go beyond surgical, hormonal, and mental health treatments and include other common gender dysphoria-related expenses such as chest binders, electrolysis, and laser hair removal. Section 118.2 of the *Act* already spends considerable space delineating the eligibility of expenses for people with particular medical needs, including products and services purchased without a prescription, such as amounts incurred for purchasing gluten-free food for people with celiac disease under paragraph 118.2(2)(r), amongst other delineated eligible expenses. A separate provision regarding trans medical care and related treatments and products would fit well within the existing statutory framework for medical expenses.

Given the medical tax expense credit's role in off-setting high health care expenses, increasing the affordability of gender dysphoria-related treatments by explicitly designating these expenses as eligible for tax relief fits well within the credit's goals. It would also send a strong message to trans people that their medical needs are recognized and respected by the federal government. Chu, Macnaughton, and Verlinden further suggest that, in the absence of a legislative amendment, an immediate action the Canada Revenue Agency could take would be to clearly indicate that sex reassignment surgeries are eligible expenses for the purpose of the medical expense tax credit.⁸⁴ Although not binding on the tax authorities, a clear statement, articulated in a manner more accessible and wide reaching than the existing technical interpretation, would increase certainty for people claiming trans medical expenses and, if clear guidelines were provided, might lower the current compliance burden.

V. EQUITY IN LINE-DRAWING

For tax policy makers, part of the task of creating good policy is a cognizance of the influence of social stigma on tax administrators and the judiciary. That bias would cause trans medical expenses to trouble the cosmetic/medical line was predictable; that trans people are held to higher documentation standards for their gender dysphoria-related medical expenses in both the United States and Canada is the result. Other expense items in tax that trouble categories are resolved not only through the courts, but also by an active legislator, who constantly amends voluminous tax codes to reflect social and economic evolution and government priorities. Sometimes governments introduce tax legislation to override court decisions because of displeasure with the results of the ruling, usually a potential loss of tax revenue; and on other occasions, governments introduce tax amendments aimed at pleasing or ameliorating the situation of a target population. Yet, with limited social power, trans people are unlikely to see amendments to tax legislation, in either country, that explicitly write in trans medical expenses as qualified medical care or services, and trans people will likely continue to be further beholden to their medical practitioners, in this context to access tax relief. Regardless, ideally legislating specific rules that account for the potential biases of those exercising tax's line-drawing authority should be unnecessary. Purposive statutory interpretation by decision makers who aspire to objectivity should

⁸⁴ *Ibid.*

include the need to ensure that equal burdens are being imposed across taxpayers seeking access to the same tax benefit.