

A SOFTLY GREYING NATION: LAW, AGEING AND POLICY IN CANADA

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I. INTRODUCTION

In the past half century, Canadian society has undergone substantial transformation, becoming more culturally heterogeneous, shifting from rural to urban economies, and witnessing large numbers of people living to be old. While in the 1960s and 1970s the country focussed on achieving social justice across broad populations, in the 1980s and 1990s, Canada began to awaken to a need for a special place for older adults within "A society for all ages", taking several first steps to achieve this goal. Today, the capacity of the country to recognize and respond appropriately to the social as well as legal needs and interests of older adults is continually being reshaped and tested.

A. *Legal Background*

Canada operates under two legal regimes: common law which is utilized in nine provinces and three territories; and a codified system of civil law, which applies within the province of Québec.¹ Since 1996, aboriginal communities have also begun to take a role in the administration of justice in a manner in accordance with their culture.

In Canada, the federal and provincial or territorial governments have specific areas of law and services over which they have constitutional responsibility. For example, the federal government is responsible for the *Canada Health Act*,² but provinces and territories are responsible for the administration of health care coverage. Criminal law comes under federal jurisdiction, while each province is responsible for the administration of justice.³ Many areas of law affecting older adults, including family relations, marriage, property rights, adult protection,

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¹ Canada e-Book, *Canada's legal system*, http://142.206.72.67/04/04b/04b_005_e.htm (Dec. 2, 2003).

² R.S., c. C-6 (1985). See also Health Canada, *Canada Health Act Overview*, http://www.hc-sc.gc.ca/ahc-asc/media/nr-cp/2002/2002_care-soinsbk4_e.html (Nov. 25, 2002).

³ Criminal Code of Canada, R.S.C., c. C-46 (1985).

health consent, human rights, and employment laws fall within provincial or territorial responsibility, leading to considerable variation across the thirteen jurisdictions. The federal government, on the other hand, is responsible for income tax laws, old age security, employment insurance, standards for certain labour sectors, and the administration of the Canada Pension Plan. The federally enacted *Canadian Charter of Rights and Freedoms*⁴ ("the Charter") affirms that every citizen is guaranteed certain rights and liberties consistently applied across the land, vis à vis "government" actions.

B. General Background on Demographic-Ageing

Canada has been fortunate to witness the burgeoning growth of older adults in the population over the past century. The percentage of people living to be 65 years old or older grew from 5 percent in 1901 to 7.6 percent in 1961, and to 13.3 percent in 2006. The percentage of older adults is expected to further increase to 21.4 percent by 2026 and to 24.5 percent by 2036.⁵ Nonetheless, there is considerable diversity across the country in the percentage, distribution and life circumstances of older adults. For example, they represent a much smaller percentage in some groups such as aboriginal seniors.⁶

The average Canadian lifespan at birth for women grew from 65.3 years in 1931 to 82.8 years in 2001, and from 62.2 years in 1931 to 78.0 years in 2001 for men.⁷ As is the case for almost every other developed nation in the world, Canada's median age has been increasing for decades, but again with important variations among groups. As of July 1, 2006, the median age of the Canadian population as a whole reached a record high of 38.8 years,⁸ but was only 24.7 years within the aboriginal population.⁹

Canadian men and women also enjoy one of the longest life expectancies in the industrialized world. In 2003, Canadian men could expect to live an average of 17.4 years and Canadian women 20.8 years beyond the age of 65, an increase of 4.1 years and 5.0 years, respectively,

⁴ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982 (U.K.), being Schedule B to the *Canada Act 1982* (U.K.), 1982.

⁵ Martin Turcotte & Grant Schellenberg, *Statistics Canada, A Portrait of Seniors in Canada 2006*, 11, <http://www.statcan.ca/english/freepub/89-519-XIE/89-519-XIE2006001.pdf> (Feb. 2007); Andrew Wister et al., *Factbook on Aging in British Columbia 2* (4th ed., Gerontology Research Centre Simon Fraser University 2006).

⁶ Statistics Canada, *Canada's Aboriginal Population in 2017*, <http://www.statcan.ca/Daily/English/050628/d050628d.htm> (June 28, 2005).

⁷ Wister et al., *supra* n. 5, at 11.

⁸ Statistics Canada, *The Daily, Canada's Population By Age And Sex*, <http://www.statcan.ca/Daily/English/061026/d061026b.htm> (Oct. 26, 2006).

⁹ Turcotte & Schellenberg, *supra* n. 5, at 221-69.

since 1950. Average life expectancy at 85 years is also increasing (it was 5.8 additional years for men and 7.1 years for women in 2003).¹⁰ In marked contrast, aboriginal people's life expectancy has been about seven years less on average for men and five years less for aboriginal women than for non-aboriginals.¹¹

(i) *Key Demographic Trends*

From 1946 to 1964, Canada saw a large growth in its population. This “baby boomer” cohort now accounts for one third of the country’s population,¹² leaving important social legacies for their children. Canada has witnessed decreasing family size for half a century, as women married later, had children later and entered and remained in the work force. Between 1950 and 2003, the average number of children in Canadian families decreased from 3.73 to 1.53 children.¹³ While there have been political efforts during the past two decades to “offset” the potential population “imbalance “ through immigration from Asia, the Caribbean, and Central or South America, immigration has been recognized as unlikely to be useful by itself in achieving population growth in Canada in the future.¹⁴

Although the country’s success of having large numbers of persons living to be old should be considered a significant achievement, there has been a trend among governments in several parts of Canada to characterize the changing demography and indicators, such as increasing dependency ratio of the older adults to working age adults, as evidence of an impending crisis likely to cause a burden on health care and social systems. On the other hand, prominent demographers point out that while the population structure is changing, the total dependency rates of young and old combined is relatively steady and that an aging population is only one small factor in any emerging cost changes being experienced.¹⁵

¹⁰ Statistics Canada, *Report on the Demographic Situation in Canada 2003 and 2004* 38, <http://www.statcan.ca/english/freepub/91-209-XIE/91-209-XIE2003000.pdf> (June 2006).

¹¹ Statistics Canada, *Aboriginal peoples of Canada*, <http://www12.statcan.ca/english/census01/Products/Analytic/companion/abor/canada.cfm> (last accessed May 3, 2007).

¹² David K. Foot, Richard A. Loreto, & Thomas W. McCormack, *Canada in the 21st Century* 4-6, <http://strategis.ic.gc.ca/pics/ra/4foolo-e.pdf> (Nov. 1998).

¹³ Statistics Canada, *Report on the Demographic Situation in Canada 2003 and 2004* 31, <http://www.statcan.ca/english/freepub/91-209-XIE/91-209-XIE2003000.pdf> (June 2006).

¹⁴ Statistics Canada, *The Daily, Canada's Population by Age and Sex*, <http://www.statcan.ca/Daily/English/061026/d061026b.htm> (Oct. 26, 2006).

¹⁵ See e.g., *The Overselling of Population Aging: Apocalyptic Demography, Intergenerational Challenges, and Social Policy* (Ellen Gee & Gloria Gutman eds., Oxford University Press 2000); see also Monica Townson, *Status of Women Canada, Reducing Poverty Among Older Women: The Potential of Retirement Incomes Policies*, http://www.swc-cfc.gc.ca/pubs/pubspr/0662659271/index_e.html (Aug. 2000).

(ii) *Politics and Participation of the Older Population*

In Canada, the influence of “grey power” (the ability of older adults to shape the public discourse of ageing) is currently modest at best, at least in relation to the numbers of older persons. Indices such as attending public meetings, following news and current affairs, or voting appear to suggest that seniors in Canada are more politically engaged than younger persons. In 2003, one in five seniors reported attending a public meeting in the past year; nine in ten said they followed the news and current affairs daily. Almost 90 percent of seniors voted in the 2000 federal election.¹⁶

However, Canadian seniors rank well below other age groups in their participation in common political activities, such as: contacting newspapers or politicians; signing petitions; and boycotting products or participating in a demonstration.¹⁷ Moreover, there is considerable heterogeneity of interests among seniors in Canada reflective of socio-economic, cultural, regional, gender and age cohort differences. This means that there are often competing views among older adults about what their pressing needs and priorities are, and how those goals should be achieved.

The general capacity of seniors and seniors’ organizations to “have the ear of government” and promote political change or to promote their interests may be modest at the provincial or federal level.¹⁸ Seniors’ organizations face a number of significant challenges, including very restrictive tax law rules regarding political advocacy by registered charitable organizations.¹⁹ As many seniors’ organizations are registered charities, that legal status limits their ability to be strong social or political advocates. Similarly, there has been very little representation of older adults’ interests (*e.g.* through intervener status) in many types of legal cases on issues that affect the lives of older adults, including prominent end of life decisions and human rights cases.²⁰

Provincial government decision-making structures have shifted in recent years in many jurisdictions. There is often increased distance between policymakers and the public, and, in many cases, this distance has led to less transparency of the decision-making systems. This may

¹⁶ National Advisory Council on Aging, *Seniors in Canada - 2006 Report Card* 51, Chart 5.2, Minister of Public Works and Government Services Canada (2006).

¹⁷ *Id.* at 58.

¹⁸ Charmaine Spencer, *Grey Power in Canada (Part 1)* 5-8, 19 GRC News 2 (2000), http://www.sfu.ca/grc/grcn_pdfs/vol19no2.pdf.

¹⁹ *Id.*

²⁰ Marie Beaulieu & Charmaine Spencer, *Older Adults' Personal Relationships and the Law in Canada: Legal, Psycho-Social and Ethical Aspects* (Law Commission of Canada 1999).

make it much harder for seniors and others who support them to negotiate through systems, set or shift the political agenda in any meaningful way.

On the other hand, there is often an optimistic belief among some baby boomers that they will be able to substantially effect systematic change by virtue of their numbers, and that any previous "failure" of other generations has simply been a lack of effort. However, in reality, boomer activism has not been borne out at other points in their lifespan, except for very limited consumer purposes.²¹ Late life activism tends to reflect early life involvement at a community level or in political activity or unions.

In terms of available formal structures to assure older adults' interests are advanced, one half of Canadian provinces have an advisory council on aging, including Alberta, British Columbia, Newfoundland and Labrador, and New Brunswick.²² Others have established special seniors' secretariat (Prince Edward Island, Nova Scotia, Ontario, and Manitoba) or, as is recently the case in Québec and New Brunswick, a minister that is responsible for seniors. Typically, these only provide consultative or coordination information to other departments.²³ If department budgets are indicative of political power, the secretariats tend to have modest power at best.

The federal government established a Secretary of State (Seniors) in 2006, a position that is assigned to assist federal Cabinet ministers. In March 2007, the federal government also established a National Seniors Council to advise the Government on seniors' issues of national importance.²⁴ This Council replaced the National Advisory Council on Aging (Conseil consultatif national sur le troisième âge), which had been in operation since 1980, and was operationally supported by a team of federal public service employees. Its function was to assist and advise the federal Minister of Health on all matters related to the aging of the Canadian population and the quality of life of seniors.

²¹ Charmaine Spencer, *Grey Power in Canada (Part Two)* 1-5, 22 GRC News 2 (2003), http://www.sfu.ca/grc/grcn_pdfs/vol22no2.pdf.

²² Office of the Premier, Ministry of Community Services, *Premiers council on seniors and aging issues*, http://www2.news.gov.bc.ca/news_releases_2005-2009/2005OTP0117-000884-Attachment1.htm (Oct. 3, 2005).

²³ See e.g., *Ontario Seniors' Secretariat*, <http://peel.cioc.ca/details.asp?RSN=16440> (last accessed May 3, 2007); see also *Senior's Secretariat, Giving Nova Scotia Seniors a Voice*, <http://www.gov.ns.ca/scs/> (last accessed May 3, 2007) (In Nova Scotia, for example, the secretariat is described as the provincial government agency responsible for coordinating the planning and development of policies, programs and services for seniors).

²⁴ Human Resources and Social Development Canada, News Release, *Canada's New Government takes major steps to support seniors*, <http://www.ccnmatthews.com/news/releases/show.jsp?action=showRelease&searchText=false&showText=all&actionFor=638726> (Mar. 5, 2007).

(iii) *Gender Considerations*

Gender has an important influence on aging in Canada. Because of factors such as distinctive roles and responsibilities, longevity, chronic health differences, socio and economic circumstances, as well as cumulative challenges and inequalities, older women and older men are likely to be affected by different social and legal issues. Canada has only slowly begun to explicitly recognize that undifferentiated analyses of ageing and policy can hide important differences among women and men in later life.

Canada signed the *Convention to Eliminate all Forms of Discrimination Against Women* 25 years ago. However, in broad social terms, the needs of older women have been largely under-represented in efforts to promote the rights and interests of women. While there have been some efforts to apply a “gender lens” to federal programs and policies in order to understand potential differential impacts that specific policies may have on men and women, the intersection of aging and gender is much less well recognized at the policy level.

Gender analysis needs to consider the short and long-term impact of policies and social trends across the lifespan, the cumulative impact of discrete government policies, as well as the differential impact of policies on older couples and unattached older persons (widowed, divorced, separated, ever single and living alone). For example, while the poverty rate among older couples in 2003 was relatively low at 5.1 percent, the poverty rate among unattached older women is much higher at 40.9 percent (and is approximately ten percentage points higher than among unattached older men).²⁵ Within a province, it is not uncommon to see the poverty rate among older women as double that of older men.²⁶

For over three decades, the federal government has had a special office and program (Status of Women Canada) to promote the social, economic and political equality of women.²⁷ Recently, just as issues affecting the security of older women were starting to be raised, the scope of the Office changed, along with the reduced resources for promoting equality. There is a concern that this will represent retrenchment, and that future government directions may focus largely

²⁵ National Council on Welfare, *Poverty Profile 2002 and 2003* 39, http://www.ncwcnbes.net/documents/researchpublications/ResearchProjects/PovertyProfile/2002-03Report_Summer2006/ReportENG.pdf (Summer 2006).

²⁶ *Id.*

²⁷ Andree Coté, *History of the Status of Women's Canada: Women's Program and Why It Matters*, <http://www.fafia-afai.org/files/Backgrounder%20on%20SWC%20Womens%20Program%20and%20Why%20It%20Matters%20Sept%202014%202006.pdf> (Sept. 2006).

on formal equality, not substantive equality for women, a result which can have significant negative implications for older women. There have also been some beginning efforts at the grassroots level in recent years to build the knowledge of middle aged and older women about the feminization of poverty and the key issues affecting their income security in later life.

II. THE PLACE OF ELDER LAW

Elder law is a relatively new development in law and policy in Canada. Since the 1980's, a number of legal issues that form part of the field and practice of elder law have been offered at some Canadian universities within gerontology, criminology, and health sciences courses. These have typically focused on mental capacity, guardianship and end of life issues. While traditional fields of legal practice such as Wills and Estates have a long history of serving predominantly older clients, the legal field in Canada has only relatively recently begun thinking about law and aging as a special field of practice, or to consider aging as another important lens to understand the law and its effects.

In May 2007, the Supreme Court of Canada held that there is no overall constitutional right to legal counsel, although a right to counsel may be recognized in specific and varied situations under the *Charter*.²⁸ This recent decision has important implications for older adults. Legal services are largely beyond the financial capacity of many older adults, leaving many without access to justice or to rely on "self help." Within the last few years, some provincial public legal education organizations began offering basic legal information for older adults. These written materials typically focus on provincial or federal benefits and services for seniors, or on victimization issues, and may be available in several languages in some jurisdictions.²⁹ Public legal education in Canada tends to remain a passive system, where older adults must know where to seek information. Legal information on the Internet remains marginally accessible to most seniors, even if one assumes some are in contact with people who will have access to this technology.³⁰ With the possible

²⁸ *British Columbia (Attorney General) v. Christie*, 2007 S.C.C. 21 (May 25, 2007).

²⁹ See e.g., Legal Services Society, *When I'm 64: A Guide to Benefits and Services for People Aged 60 and Over*, http://www.lss.bc.ca/assets/resources/pubs_w/wi64.pdf (Jan. 2006).

³⁰ For a discussion of public legal education's potential in meeting the needs of low income persons through Internet presence, see Lois Gander, Lecture, *The role of public legal education in poverty law services*,

<http://www.legalresourcecentre.ca/docs/povjun03.doc> (June 2003); see also Lois Gander, Lecture, *The role of the internet in providing public legal education services to disadvantaged individuals and communities*, <http://www3.extension.ualberta.ca/lsp/povjun03.doc> (last accessed May 3, 2007). And, for an illustration of the type of information available, see *Older Adults*

exception of poverty lawyers working in some jurisdictions, legal aid in Canada has not covered many of the legal issues commonly affecting older adults. Moreover, older adults' incomes may be slightly over financial thresholds for legal aid eligibility. Legal aid typically focuses on family law and defense of criminal charges. The Advocacy Center for the Elderly ("ACE") is the one notable exception to this general lack of legal aid services.³¹ Serving the City of Toronto in Ontario, ACE began providing the first specialized legal aid services to older adults in 1985 and is still unique within the country.³² ACE has helped develop promising practice approaches, critical thinking and systemic advocacy in a number of key areas, including housing issues affecting older adults, abuse and neglect issues, and care facility rights.

The national development of elder law skyrocketed after 2002, when the Canadian Bar Association ("CBA") first recognized it as new area of legal practice. CBA's formation of the National Elder Law Section ("NELS") led to significantly more opportunities for private and public sector lawyers and their support staff to become informed and sensitized to legal and related issues of aging. They now have access to online and in person courses,³³ provincial and national conferences, as well as national exchanges such as "Elder Member Listserv." The NELS has now grown to over 1000 members. Also, for the first time, Canadian lawyers became engaged as an association with provincial and federal governments to consider, advocate, and elaborate on new laws, policies and law reform, sometimes joining with colleagues in other professions such as medicine, social work, and gerontology, many of whom had long been involved in these issues.

Unlike the development of the elder law practice in the United States, which was given impetus in the early 1980's and financial viability by assisting older clients with later life planning, Medicaid eligibility and private guardian/conservatorship services, Canada's subsidized health care system, its system of public guardians or public trustees (and in Québec Public Curator), along with the absence of a culture or industry of lawyers acting as private guardians or trustees, may explain, in part, the later start to the development of elder law as a

Knowledge Network's focus on abuse, <http://www.oak-net.org/index.html> (last accessed May 3, 2007).

³¹ See Advocacy Ctr. For the Elderly, <http://www.advocacycentreelderly.org> (accessed June 1, 2007).

³² Legal aid clinics exist in some form in all provinces. These are subsidized by provincial government funding for persons with revenues and/or assets under a certain threshold, usually the poverty line. See Advocacy Ctr. For the Elderly, *About ACE*, <http://www.advocacycentreelderly.org/nav/about.htm> (accessed June 1, 2007).

³³ E.g., Legal Education Society of Alberta (LESA), available at <http://www.lesa.org> (accessed June 1, 2007).

special practice area in Canada. Canada, however, has been quickly catching up.

Although it is too early to determine, the private practice of elder law would likely challenge most lawyers to market and sustain financially as a stand alone practice. That may change for some in time as the aging population grows and elder law becomes better known. In the meantime, elder law is being marketed and practiced in conjunction with, or as a complement to, other specializations, notably wills, estates and trusts and health law, as a way to provide a more complete, holistic, package of services to a growing older clientele.

To help meet that knowledge demand among lawyers and other professionals, the first national comparative law text was published in 2005 on basic issues of elder law.³⁴ Selected issues of law and aging (which were previously taught as occasional courses or course sections in health or gerontology within faculties of medicine or social work) are now beginning to be taught as comprehensive courses of law. This new trend started first at McGill University's Faculty of Law in 2005 with a national comparative law course. Courses soon followed in three other provinces (Saskatchewan, Alberta and British Columbia). The first elder law course for provincial, territorial and federal judges was offered through the National Judicial Institute in Ottawa in 2005.

While at least one university has been giving some of its law students experience with older adults through law clinics for several years, the first comprehensive clinical course in Elder Law was introduced in the spring of 2007 at McGill's Faculty of Law through the Centre for Legal Information on Aging/Centre légale d'information pour les aînés ("CLIA"). This *pro bono* clinic will be supported by students and senior lawyers and notaries, and is an initiative of the National Institute of Law, Policy and Aging/Institut national du droit de la politique et du vieillissement ("NILPA"), in alliance with the Faculties of Medicine and Social Work at McGill University, and the Institut universitaire de gériatrie de Montréal.

Research on legal issues has also increased at universities and within governments as the urgency of addressing the complex set of needs, rights and benefits of older Canadians and the impact of aging on society is given greater priority and receiving more government and institutional funding. In this regard, two specialized legal centers dedicated to research, education and advocacy, have been established -- the Canadian Centre for Elder Law Studies, which is affiliated with the British Columbia Law Institute, and NILPA, based in Montreal.

³⁴ Ann Soden, *Advising the Older Client* (1st ed., LexisNexis Canada 2005).

III. THE ELDER LAW LANDSCAPE IN CANADA

A. *The Right to Social Security*

Unlike some countries, Canada has not entrenched a “right to social security” in law *per se*.³⁵ However, Canada has established a relatively robust three-tier retirement system comprised of: (a) a contributory employment-based pension (Canada Pension Plan (CPP)/ Québec Pension Plan (QPP)); (b) a basic social security program (Old Age Security/Guaranteed Income Supplement); and (c) where available, workplace pensions and self contribution retirement savings. The maturation of public pensions, in particular, has helped to significantly reduce the poverty rate of Canadian seniors in the past quarter century.³⁶ Nonetheless, the income gap between men and women in later life remains very evident and reflective of life long disparities. For example, in 2004, the mean *before-tax* income of women over 65 was 67 percent of that of men.³⁷

(i) *Canada Pension Plan (CPP)*

First developed in 1966,³⁸ this employment-based pension plan provides a monthly income, a lump sum death benefit, survivor benefits and disability benefits in cases of “permanent disability.”³⁹ The province of Québec provides an equivalent Québec Pension Plan (QPP) for its residents.⁴⁰ The CPP/QPP is funded by contributions by employees and employers, not by general tax revenues.

The pension amount received starts after a person applies (normally at age 65). However, a person can apply as early as 60 (and will receive a permanently reduced amount), and as late as age 70 for an enhanced amount. Low income people aged 60 and over who receive social assistance are typically required by provincial law to apply for CPP benefits early, but with the permanently reduced amounts.⁴¹ The CPP is recognized for having a number of important benefits over

³⁵ See e.g., International Covenant on Economic, Social and Cultural Rights, Art. 9.

³⁶ Turcotte & Schellenberg, *supra* n. 5, at 66.

³⁷ The constant before-tax income difference between men and women in 2004 was \$10,800 (\$21,400 vs. \$32,500), virtually unchanged from 2000, Turcotte & Schellenberg, *supra* n. 5, at 29.

³⁸ Human Resources Development Canada, *Pension Timeline*, http://www.civilization.ca/hist/pensions/cpp-timeline_e.html (last accessed May 3, 2007).

³⁹ Canada Pension Plan, R.S.C., c. C-8 (1985).

⁴⁰ Régie des rentes Québec, *A retirement pension under the Québec Pension Plan*, <http://www.rrq.gouv.qc.ca/en/retraite/rrq> (last accessed May 24, 2007).

⁴¹ Lillian Zimmerman & Charmaine Spencer, *Bismarck meets the Boomers: Does mandatory retirement have a future* (Gerontology Research Centre, Simon Fraser University forthcoming).

workplace pensions: it covers all sectors of the economy; is completely portable; covers part-time and self-employed workers; and accommodates family responsibilities to some degree.⁴²

The CPP is intended to replace about 25 percent of the person's income.⁴³ The average CPP pension for women in October of 2005 was approximately \$334 (or 63 percent of the average \$527 received by males). Couples can split their CPP benefits to reduce the payable tax, if they desire. The pension credits may also be divided upon marriage dissolution.

(ii) Old Age Security (OAS)

This is a federally administered public pension program enacted by the *Old Age Security Act*.⁴⁴ It provides older adults with a modest monthly pension at age 65 if they have lived in Canada for at least 10 years, and a partial pension for immigrants once they have met the 10-year requirement.⁴⁵ The OAS is fully indexed to annual cost of living. The program is financed from federal general tax revenues. Although often considered a "universal benefit," it is gradually "clawed back" at higher levels of income.⁴⁶

Low income seniors (predominantly older women and immigrants)⁴⁷ who receive the Old Age Security may also be eligible for the Guaranteed Income Supplement (GIS). Close to one half of women aged 80 and older depend on the GIS. This may, however, under represent the level of need. As a result of lack of awareness of the GIS benefit and the cumbersome annual renewal process, persons aged 80 and over are the group of older adults most likely to not receive the GIS even though they are eligible. In some jurisdictions, more than 60 percent of seniors received GIS, and this rises to 80 percent of women aged 80 and older.⁴⁸ OAS and GIS benefits amount to a total of about

⁴² Townson, *supra* n. 15.

⁴³ National Council on Welfare, *A Pension Primer 1999*, <http://www.newcnbes.net/documents/researchpublications/OtherPublications/1999Report-PensionPrimer/ReportENG.htm> (last accessed May 26, 2007).

⁴⁴ R.S., c. O-9 (1985).

⁴⁵ Human Resources Development Canada, *Overview of the Old Age Security program*, <http://www.hrsdc.gc.ca/asp/gateway.asp?hr=/en/isp/oas/oastoc.shtml&hs=ozs> (last accessed May 3, 2007).

⁴⁶ *Id.*

⁴⁷ National Advisory Council on Aging, *supra* n.16, at 33.

⁴⁸ National Advisory Council on Aging, *supra* n.16, at 34.

\$28 billion per year—14 percent of the federal government's total yearly spending.⁴⁹

Receipt of the GIS is often a springboard for other provincial or territorial government benefits. There is also an Allowance for 60 to 64 year-old spouses or common-law partners of pensioners who receive GIS, as well as a survivors' Allowance payable to 60 to 64 year-old widowed spouses or common-law partners.⁵⁰ Canada has international social security agreements with a number of countries to enable people who have lived or worked in another country to be eligible for benefits in Canada or in that other country.⁵¹

While this public pension system of OAS/GIS has improved the poverty situation of seniors in Canada, seniors' organizations have recommended a number of needed improvements. These focus on: coordinating programs; improving adequacy to meet at least basic poverty lines such as Low Income Cutoffs;⁵² and redressing the punitive nature by which the GIS is "clawed back" from seniors who have small amounts of income above the identified income thresholds.⁵³

Many recently immigrated seniors are more likely to have low incomes, reflective of the 10-year residency requirement before they can apply for Old Age Security and the GIS.⁵⁴ As a result, they must manage without these and other important government benefits throughout that period.⁵⁵ When a family member or other person sponsors an older adult to come to Canada, that individual is fully responsible for that person's needs. If the sponsorship breaks down, and the older person becomes in need of social assistance, the social assistance payments by government now become a debt that the sponsor must repay.

There has been little litigation on the public pension system. However, in 1995, the Supreme Court of Canada heard *Egan v. Canada* ("Egan"),⁵⁶ an equality rights case involving federal legislation that denied old age security benefits to persons in same-sex relationships. In *Egan*, the Court found that federal legislation violated Section 15 (discrimination based on sexual orientation) of the *Charter*, but upheld

⁴⁹ Office of the Auditor General of Canada, *Old Age Security-Human Resources and Social Development Canada and Service Canada*, <http://www.oag-bvg.gc.ca/domino/reports.nsf/html/20061106ce.html> (Nov. 28, 2006).

⁵⁰ Human Resources and Social Development Canada, *Income Security Programs*, http://www.hrsdc.gc.ca/en/gateways/nav/top_nav/program/isp.shtml (accessed May 3, 2007).

⁵¹ Service Canada, *International Benefits*, <http://www.hrsdc.gc.ca/asp/gateway.asp?hr=en/isp/ibfa/intlben.shtml&hs=sya> (last accessed May 3, 2007).

⁵² National Advisory Council on Aging, *supra* n.16, at 18.

⁵³ *Id.*

⁵⁴ *Id.* at 33.

⁵⁵ *Id.* at 33.

⁵⁶ [1995] 2 S.C.R. 513.

the specific measure under consideration as a reasonable limit in Canadian society. This case was the first time where a majority of the Supreme Court recognized that sexual orientation is a prohibited ground of discrimination under Section 15. Over the next five years, however, the federal government made changes to pension eligibility to the Old Age Security program and the Canada Pension Plan to include common law relationships and people in same-sex relationships, subject to having lived together for a specified time.

(iii) *Workplace (Employment, Occupational) Pensions Plans*

Less than 50 percent of seniors receive monies from a private (workplace) pension plan, directly or through survivor benefits.⁵⁷ Historically, there have been important differences for men and women in the Canadian labour force, both in terms of having access to workplace pensions and the adequacy of those pensions. In 2001, over 60 percent of women in the workforce did not have access to workplace pensions.⁵⁸ The majority of women continue to work in sectors that have lower rates of workplace pensions and women's work trajectory is often different with more time spent out of the workforce. On average, women working fulltime earn only 71 cents for every \$1 men earn,⁵⁹ reflecting significant structural inequities.⁶⁰ These economic realities have long-term implications for them in later life. Immigrants are also much less likely to have private (workplace) pension plans than non-immigrants.

In 2003, workplace plans represented 41 percent of older men's incomes but only 26 percent of older women's, with the remainder being made up of OAS/GIS, CPP, or savings. Only 12 percent of immigrants aged 60 or older in 2003 had any private pension income; and this pension money accounted for only 13 percent of their total income. While divorced or separated women have been legally entitled since the 1970s to claim a portion of their former spouse's workplace pension as a divisible family asset, most still do not, which may increase their risk of poverty in later life.

⁵⁷ National Advisory Council on Aging, *Aging in Poverty in Canada 2005*, 13, <http://dsp-psd.pwgsc.gc/Collection/H88-5-5-2005E.p-df>.

⁵⁸ *Id.* at 11.

⁵⁹ Statistics Canada, *The Daily, Women in Canada*, Mar. 7, 2006, <http://www.statcan.ca/Daily/English/060307/d060307a.htm>.

⁶⁰ Some of the challenges of trying to achieve and legally enforce pay equity can be seen in the Supreme Court of Canada decision in *Newfoundland (Treasury Board) v. N.A.P.E.*, [2004] 3 S.C.R. 381, 2004 SCC 66.

B. *Personal Retirement Savings*

Since the mid 1970s, the federal government has promoted individual saving for retirement by providing an income tax deduction for retirement savings registered in special plans. These plans largely benefit higher income individuals, reducing their marginal taxes more. Unlike workplace pension vehicles, these retirement savings are not a “pension plan.” The policy has been criticized on several fronts: as abdicating public responsibility; as a major tax diversion that reduces taxes to government to the detriment of funding for social programs for low income persons;⁶¹ and for being promoted to low income earners who actually risk losing benefits in later life by having these savings.

C. *The Right to Health Care*

(i) *Receiving Health Care*

Canada has a universal Medicare program under the *Canada Health Act*.⁶² Passed in 1984, the *Act* serves as a foundation for the provision of health care services in the country. It set out two major categories of health care services: (1) Insured Health Services (these traditional health services are defined as medically necessary hospital services, physician services and surgery-dental services provided to an insured person); and (2) Extended Health Care Services, which include nursing or long-term residential care, home care, and ambulatory health care services.

Provinces have assumed responsibility for the extended health care services. Each jurisdiction has individually determined the types and level of services they will provide. This contributes to the variability among provinces in terms of regulations, range and extent of services available, models of service delivery and funding models and user charges.⁶³ Each province sets priorities and sets up its own health system in different ways.

⁶¹ See e.g. Claire F.L. Young, Status of Women Canada, *Women, Tax and Social Programs: The Gendered Impact of Funding Social Programs Through the Tax System*, 42-43, http://www.swc-cfc.gc.ca/pubs/pubspr/066265028X/200010_066265028X_e.pdf (Oct. 2000).

⁶² R.S., c. C-6 (1985).

⁶³ See Marcus Hollander et al., The Identification and Analysis of Incentives and Disincentives and Cost-Effectiveness of Various Funding Approaches for Continuing Care (Technical Report No. 1), <http://www.hollanderanalytical.com/downloads/id-tech-1.pdf> (May 2000); see also Marcus Hollander, *Unfinished Business: The Case for Chronic Home Care Services, A Policy Paper*, http://www.hollanderanalytical.com/downloads/unfinished_business.pdf (Aug. 2003);

Karen Parent et al., *Analysis of Interfaces Along the Continuum of Care, Technical Report No. 2*, <http://www.hollanderanalytical.com/downloads/continuum-tech-2.pdf> (Feb. 2002).

Reflective of the universal Medicare system, 95 percent of seniors in Canada have access to a regular family doctor.⁶⁴ Only a small percentage of seniors (6.6 percent) report unmet health needs, mainly attributable to long waiting times or accessing specialized services for a newly-diagnosed medical condition.⁶⁵ However, the country has been experiencing a “health care gap” between need and appropriate resources across age groups and the population. A high median age among health care professionals, significant lack of physicians and nurses who specialize in geriatrics and a growing trend to substitute nursing care with less formally skilled practitioners in institutional settings can significantly affect older adults’ ability to receive appropriate and good quality care, and may increase the likelihood of some to experience medical neglect.⁶⁶

During the past decade, there has been pressure at the political level to allow a greater level of privatization into the health care system, a move which has met significant public resistance. In 2005, the Supreme Court of Canada considered a case involving a provincial government’s prohibition of private insurance for health care procedures covered under provincial Medicare.⁶⁷ In that case, the Court ruled that a province could not prohibit persons from obtaining this type of private insurance, and identified the problem of health service delays. Although the specific issue involved in the case was fairly narrow, it has been politically characterized in some quarters as “evidence” to legally permit increased health care privatization.

(ii) *Discrimination in Health Care*

Older adults’ medical care can be negatively affected by direct and indirect discrimination. Although each province and territory has human rights legislation that prohibits discrimination in terms of “services ordinarily available to the public,” at least one province does not offer age discrimination protection in the area.⁶⁸ There have been few, if any, human rights cases put forward by older adults to help shape the understanding of what this term means in the context of health care.

⁶⁴ Charmaine Spencer, *A Way Forward: Abuse Prevention in Institutional Settings - National Snapshot* (University of Toronto: Institute for Life Course and Aging forthcoming).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Chaoulli v. Québec (Attorney General)* [2005] 1 S.C.R. 791, 2005 SC 35.

⁶⁸ See e.g. Alberta’s *Human Rights, Citizenship and Multiculturalism Act*, [RSA].1980 c, H-14, § 4; British Columbia’s *Human Rights Code*, [RSBC 1996] c.210, s. 8(1); Saskatchewan *Human Rights Code*, SS 1979, c. S-24.1 (includes “age” as a protected category, but defines it as only including persons aged 18 to 65).

Older adults in many jurisdictions may experience forms of individual or systemic discrimination in terms of accessing appropriate health services (for example, limits on number of health conditions to be discussed in an appointment; physicians discharging patients with multiple health problems to manage their workloads, or discharging smokers from their patient list). Older adults are generally disadvantaged in equality cases, as litigation of human rights cases does not survive the person.

(iii) *Advance Care Planning and Living Wills*

The right of the capable individual to consent or refuse treatment is well established in Canadian common law. Included is the right to identify in advance what types of care the individual might want or not want in the event of incapacity. For over a quarter century, Canadian common law has stood by the legal principle that a doctor is not free to disregard a patient's advance instructions.⁶⁹ Across the country, there are a wide range of legal tools that have been created to aid personal decision-making in the context of health care, personal care and end of life care. Each province and territory has its own structure and systems for these decisions. Depending on jurisdiction, these may include: statutorily recognized temporary substitute decisionmakers; use of personal care directives; instructional directives (without or without also naming a proxy); and the choice of nominating someone to speak on the behalf of the person who is now unable to communicate his or her own wishes. As a result, these legal instruments now play important roles in planning for incapacity.⁷⁰ All Canadian provinces and territories have legislation dealing with advance health care directives except Nunavut, which provides for powers of attorney for property and financial matters only. Most advance directives cover health care and personal care, such as hygiene, nutrition and where the person will live or receive treatment.

There is concern among some legal practitioners that acute care and long-term care staff often misunderstand the purpose of advance care planning instruments and there is a real risk of their misuse.⁷¹ The matter

⁶⁹ See *Malette v. Schulman* (1990) 72 O.R. (2d) 417 (C.A.); *Fleming v. Reid* (1991) 4 O.R. (3d) 74 (C.A.).

⁷⁰ *Advising the Older Client*, *supra* n. 34, at 109 (contributor Gerald Robertson's article, *Enduring Powers of Attorney and Health Care Directives*).

⁷¹ Jane E. Meadus, Judith A. Wahl, & Pauline Rosenbaum, *Written Submission to the Standing Committee on Social Policy on Bill 140, An Act respecting long-term care homes 2*, <http://www.advocacycentreelderly.org/pubs/Nursing/Submission.pdf> (Jan. 17, 2007). "A 2004 research study of advance directive policies in long term care homes in Ontario found that "policies regarding advance directives in long-term care centres in Ontario generally do not comply with the spirit or the letter of the applicable laws". *Id.* at 53. See also Judith Wahl, *Testimony to the Special*

of *requiring* advance care planning by seniors, especially as a condition for receiving services, has been receiving increased attention in Canada at a policy level. This may be driven less out of respect for personal autonomy in making decisions, and more by the mistaken belief that advance directives will help reduce health care costs.

(iv) *Euthanasia*

In Canada, active euthanasia is prohibited under the Criminal Code of Canada ("the Criminal Code").⁷² Those who help hasten a person's death risk being charged with: aiding or abetting a person to commit suicide;⁷³ failing to provide the necessities of life;⁷⁴ or second degree murder (manslaughter).⁷⁵ The legal issues of euthanasia and assisted suicide were subjected to considerable public discussion at the Senate level in Canada in the mid-1990s, following a *Charter* case.⁷⁶ The case involved a woman with a severe disability (Lou Gehrig's Disease) who was seeking medical assistance to end her life at a future point. Any physician who aided her would have risked being charged under section 241 (b) of the Criminal Code. The Court concluded that although the Criminal Code effectively denied her right to security of the person (as the law did not permit her personal autonomy to control how long and how she lived), this denial was considered in accordance with the Canadian principles of fundamental justice.

Subsequent to the case, the country installed a Special Senate Committee on Euthanasia and Assisted Suicide, leading to important hearings on end of life care.⁷⁷ As a result of those deliberations, Canada developed a special Secretariat on Palliative and End of Life Care and a national palliative care strategy.⁷⁸ Since then, there has been private

Senate Committee on Aging, May 28, 2007,
http://www.parl.gc.ca/39/1/parlbus/commbus/senate/Com-e/agei-e/44655-e.htm?Language=E&Parl=39&Ses=1&comm_id=600.

⁷² R.S.C., c. C-46 (1985).

⁷³ Criminal Code of Canada, R.S.C., c. C-46, § 241(b) (1985) (aids or abets a person to commit suicide).

⁷⁴ Criminal Code of Canada, R.S.C., c. C-46, § 215 (1985) (duty of persons to provide necessities).

⁷⁵ See e.g., *R. v. Latimer*, 2001 SCC 1 (2001), a case involving active euthanasia by a father against his disabled child. Robert Latimer was charged with second degree murder.

⁷⁶ *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519.

⁷⁷ Parliament of Canada, Special Senate Committee on Euthanasia and Assisted Suicide, *Of life and death - Final report*, <http://www.parl.gc.ca/35/1/parlbus/commbus/senate/Com-e/euth-e/rep-e/LAD-TC-E.HTM#Tablepercent20ofpercent20Contents> (June 1995).

⁷⁸ See Health Canada, *Canadian Strategy on Palliative and End-Of-Life Care*, http://www.hc-sc.gc.ca/hcs-sss/alt_formats/hpb-dgps/pdf/pubs/2005-strateg-palliat/2005-strateg-palliat_e.pdf (last accessed June 2, 2007).

member bills put forward to amend the Criminal Code to legalize active euthanasia, but these have not been put to a vote.

D. The Right to Adult Protection

(i) Abuse and Neglect Protections

Abuse and neglect of older adults is a complex social and legal issue, with multiple dimensions and a diverse typology.⁷⁹ In community settings, the perpetrators may be the person's spouse, one or more family members, paid care providers, or casual acquaintances. The abuse may be recent or long standing (having begun earlier in a relationship and continued into later life). While some abuse or neglect cases involve older persons who may have limited or deteriorating mental capacity, the vast majority do not. As a result, the response to preventing or addressing abuse and neglect in later life does not easily fit within one type of legal or social approach.

Most Canadian jurisdictions integrate the protection and legal interventions for abused or neglected older persons through the use of: (a) family violence protection laws (restraining orders, peace bonds); (b) mental health, adult guardianship and substitute decision-making laws (to aid mentally incapable adults); (c) public guardian and trustee law (for cases involving financial abuse and mental incapability); and (d) in the case of Québec, into its human rights law.⁸⁰ Regional networks as well as a national network have developed in Canada to help communities work together to better understand and address the underlying causes of abuse and neglect of older adults in appropriate ways.⁸¹

Many of these provincial or territorial laws use criteria other than older age as the threshold for protection and government intervention.

⁷⁹ Some Canadian academics have drawn a conceptual distinction between frauds or other criminal matters where older adults are victimized by strangers as distinct from "abuse" and "neglect" by persons in positions of trust, power or authority. See e.g. Canadian Network for the Prevention of Elder Abuse, *What is senior abuse*, http://www.cnpea.ca/what_is_abuse.htm.

⁸⁰ Québec Charter of Human Rights and Freedoms, R.S.Q. 2006 c. C-12, Part I, Chapter IV, § 48, <http://www.cdpdj.qc.ca/en/commun/docs/charter.pdf> (Apr. 19, 2006) ("Every aged person and every handicapped person has a right to protection against any form of exploitation. Such a person also has a right to the protection and security that must be provided to him by his family or the persons acting in their stead.")

⁸¹ See e.g., Canadian Network for the Prevention of Elder Abuse, <http://www.cnpea.ca> (accessed June 2, 2007); The Ontario Network for the Prevention of Elder Abuse, <http://www.onpea.org/en/Home.htm> (accessed June 2, 2007); Réseau québécois pour contrer les abus envers les aînés, <http://www.rqcaa.org/accueil.php?lang=en> (accessed June 2, 2007).

Unlike the United States, but similar to England,⁸² most Canadian jurisdictions have steered clear of requiring mandatory reporting for abuse or neglect of adults in the community. Moreover, special adult protection laws geared to addressing some aspect of abuse, neglect or self neglect among “vulnerable adults” exist in five provinces and one territory and vary in definition and scope.⁸³ These special statutes first developed in the 1970s.

Although there have been private members bills put forward from time to time, there is no specific criminal charge of “elder abuse” in Canada. This reflects a belief that the existing criminal law provisions are sufficient, a recognition of the underlying paternalism of a criminal offence premised on the assumption that older adults are necessarily vulnerable,⁸⁴ and the lack of concrete evidence from other jurisdictions that special criminal laws for abuse in later life reduce the likelihood of harms occurring or effectively remedy the harms. Under the Criminal Code, the court may consider a number of circumstances in determining the appropriate sentence for theft, assault, manslaughter or any other criminal matter. Special circumstances may include whether the crime involved abuse of a spouse or partner,⁸⁵ a relationship of trust or authority,⁸⁶ or whether it was motivated by prejudice, bias or hatred of an individual or group, based on a number of listed factors, including age and disability.

The country has made major efforts since the mid 1990s to better understand and address the underlying causes of abuse and neglect of older adults. The overall development of services and resources for abused or neglected older adults is improving but still lags significantly behind other areas of family violence prevention. In 2004, in the case of *Nova Scotia (Minister of Health) v. J.J.*,⁸⁷ the Supreme Court of Canada considered the role of the provincial courts in scrutinizing services being provided to vulnerable adults under adult protection laws.⁸⁸ In *Re: J.J.*, the Family Court judge declined to authorize a plan to transfer the protected adult to a facility out of the region. The Supreme Court of

⁸² See Rachel Filinson, “No Secrets” and Beyond: Recent Elder Abuse Policy in England, 18 *J. of Elder Abuse & Neglect* 1 (2007).

⁸³ These are Yukon, British Columbia, New Brunswick, Nova Scotia, Prince Edward Island, and Newfoundland and Labrador.

⁸⁴ For a general discussion on assumptions about age, capacity and vulnerability across the lifespan, see e.g., Law Commission of Canada, *Does age matter? Law and relationships between the generations* (Feb. 2004).

⁸⁵ Criminal Code of Canada, R.S.C., c. C-46, § 718.2 (ii) (1985) (“Other sentencing principles”).

⁸⁶ Criminal Code of Canada, R.S.C., c. C-46, § 718. 2 (iii) (1985) (arguably, this would include professionals and paid caregivers).

⁸⁷ [2005] 1 S.C.R. 177.

⁸⁸ *Nova Scotia (Minister of Health) v. J.J.* [2005] 1 S.C.R. 177, 2005 SCC 12.

Canada determined that the courts were not limited to accepting or vetoing care plans put before them by the adult protection services; judges also had a responsibility to determine whether the plan was consistent with the best interests and welfare of the protected person.

To reduce barriers within the justice system and better aid older adults who have been victimized by family or others, there have been efforts in some jurisdictions to build the knowledge of police, victim services, Crown Prosecutors and the judiciary, especially to actively avoid the stereotyping of older adults as incapable, mistaken or unreliable persons. These educational efforts also often focus on nurturing a sound understanding of the dynamics of abuse or neglect in later life, both in community and institutional settings, as well as its impact on the individual, family and communities.

The availability of new technology such as video recording to tape victims statements have helped police efforts in some municipalities to improve the likelihood of securing a conviction in the event the older adult subsequently becomes ill or becomes mentally incapable. The recent Supreme Court of Canada case *R. v. Khelawon*,⁸⁹ an assault case involving hearsay evidence of a deceased resident of a care home, highlights the real risk of perpetrators simply outliving their older victims.

“Elder neglect” is uncommon in Canada as a criminal matter. However, when extreme neglect occurs, it may lead to a charge as failing to provide necessities of life where one person is physically or otherwise dependent on another, or, as happened in a recent case, indirect contributions to the person’s death may be raised to manslaughter.⁹⁰

With regard to abuse in care facilities, most provinces have enacted or incorporated policies to deal with abuse in institutional settings such as *licensed* care facilities. However, there are far fewer safeguards for unregulated collective settings such as retirement homes or personal care homes, or assisted living, and these types of facilities increasingly comprise the bulk of units where physically or mentally frail older adults will receive care and support in later life.⁹¹

In licensed care, these safeguards include general quality of care standards, mandatory reporting for abuse, some type of inspection process or general oversight process. Depending on jurisdiction, these may or may not be incorporated into statutes or regulations. A few provinces have enacted special recognition (bill of rights) for residents in

⁸⁹ [2006] S.C.R. 57.

⁹⁰ Peter Brieger, *National Post*, *Son guilty of manslaughter for neglect of elderly mom*, <http://www.canada.com/nationalpost/news/story.html?id=edcc6f00-4413-4a74-9320-ad2c6558906b> (Feb. 8, 2007).

⁹¹ Spencer, *supra* n. 64.

the care facilities, along with residents', users' or family councils.⁹² Two jurisdictions (Alberta and Manitoba) have enacted special laws for the protection of persons in care, and have established a special office to oversee this.⁹³ However, the legal thresholds for abuse and neglect under these laws result in two thirds of the cases being deemed "unsubstantiated."⁹⁴

(ii) *Guardianship*

Canada uses a wide terminology for guardianship, which can include trusteeship, committeeeship, guardianship, and protective supervision. The procedure for obtaining guardianship of the physical person and or the estate (property, assets and financial affairs) of a mentally incapable person is set out in provincial and territorial "mental incompetency" and adult guardianship laws and related legislation.⁹⁵ The field of guardianship and substitute decision-making has undergone considerable change in the past 25 years.⁹⁶

All provinces except one provide some form of statutory guardianship that uses certificates declaring the person as mentally incapable.⁹⁷ The advantage of these tools is ease of use; but there is considerable difficulty for the person to later regain control over finances. The statutory guardianship orders may contravene the *Charter* as not meeting basic principles of fundamental justice.⁹⁸

Court-ordered guardianship is intended to be used as a last resort. Legislation in several jurisdictions requires that less restrictive and intrusive alternatives to court-ordered guardianship be explored.⁹⁹ Alternatives to guardianship now include: adult protection legislation for short-term intervention by health and social services personnel; health care consent legislation codifying the common law of consent; and enshrining the use of an adult's spouse, near relatives or friends as substitute decisionmakers. In some cases, imaginative and innovative use of the law of trusts, particularly the creation of income and discretionary trusts, may provide for the financial needs of the incapable adults. These are usually created for aging intellectually disabled persons by their

⁹² For an overview of the legislative and regulatory schemes within Canada, see Spencer, *supra* n. 64.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ Soden, *Advising the Older Client*, *supra* n. 34, at 82-107 (contributor Robert M. Gordon, *Guardianship of the Person and Estate*).

⁹⁶ *Id.* at 105.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 86-91.

parents.¹⁰⁰ Enduring powers of attorney are seen as valuable for their ease of use and not requiring judicial intervention, but are also recognized as open to abuse.¹⁰¹ Some provinces have put legal safeguards in place to reduce these potential risks.

Canada has made significant efforts to use guardianship as a last resort, and to find less intrusive but as effective means of meeting older adults' needs. There have also been efforts to tailor the guardianship so that it only covers specific needs, such as over finances or the person. The Civil Code of Québec¹⁰² provides several protective measures that offer legal protection to older persons who become unable to take care of themselves or their property. These take the form of mandate, curatorship, tutorship or advisership.¹⁰³ Guardianship by government representatives has been largely actively avoided at a policy level because of the cost to the public coffers. However, the approach is sometimes criticized as creating the risk of accepting almost anyone as a guardian, including unscrupulous persons.

E. *The Right to Institutional Long-Term Care*

In 2001, 7.4 percent of Canadian seniors and 32 percent of those aged 85 and over lived in facilities that provided health care as well as personal support or assistance.¹⁰⁴ Access to publicly funded long-term care (skilled nursing) facilities is typically controlled by health and social services that utilize an assessment process. Increasingly, in many parts of the country, only the frailest and medically compromised are being admitted to the licensed skilled care facilities.

As previously mentioned, provinces tend to draw a legal distinction between skilled nursing care facilities and other congregate environments such as assisted living or other supportive care environments. The former tend to have certain minimum standards, and the latter tend to operate in a relatively non-regulated environment.¹⁰⁵ In several Canadian jurisdictions, assisted living and supportive housing for seniors is specifically excluded from basic landlord tenant law protections, leaving residents to rely on operator drafted adhesion contracts.¹⁰⁶ Quebec and Ontario are two notable exceptions.¹⁰⁷

¹⁰⁰ *Id.* at 105.

¹⁰¹ Robertson, *supra* n. 70, at 113.

¹⁰² S.Q. 191, c. 64.

¹⁰³ Soden, *Advising the Older Client*, *supra* n. 34, at 186-196 (contributor Pierre Deschamps, *General Planning for the Older Client (Part III - Québec)*).

¹⁰⁴ National Advisory Council on Aging, *supra* n. 16, at 10.

¹⁰⁵ Spencer, *supra* n. 64.

¹⁰⁶ Soden, *Advising the Older Client*, *supra* n. 34, at 317 (contributors Margaret Hall and Charmaine Spencer's article, *Assisted Living*).

There are currently significant systemic legal issues arising in long-term care that may undermine older adults' rights and harm their care. Among these are: inappropriate admission to care; inappropriate terms in admission contracts; failure to obtain proper health care consent; abuse of residents (including rights violations); resident neglect; inappropriate use of physical and chemical restraints or improper use of "secure units"; and misuse of advance care planning documents.¹⁰⁸ In the past decade, there have been increasing concerns about the quality of the care in the facilities, the staffing levels and training, and the lack of qualified dementia care across the care and housing continuum.¹⁰⁹

F. *The Right to Community Based Long-term Care*

(i) *Home Care*

As previously mentioned, home care falls under provincial jurisdiction as extended health care under the Canada Health Act.¹¹⁰ Provinces and territorial governments largely operate under the policy assumption that formal government services only act as a default safety net for persons without any family support. While provincial governments' spending on home care has increased significantly within the past decade, a smaller proportion of seniors now receive government subsidized home care, and those receiving home care can still have important unmet needs.¹¹¹

Over 80 percent of care is provided by family (usually the aging spouse); and at a policy level, this has largely been treated as "cost free" care.¹¹² This ignores the heavy costs to middle aged and older women who are predominantly the caregivers.¹¹³ In particular, it has been noted

¹⁰⁷ Residential Tenancies Act, 2006, S.O. 2006, c. 17, Part IX (Care Homes); Civil Code of Quebec, Q.S.Q. 191, c. 64, arts. 1892 to 1978. Note, however, the Quebec Civil Code provisions do not include any room "situate in a health or social services institution."

¹⁰⁸ Meadus, Wahl, & Rosenbaum, *supra* n. 71, at 2.

¹⁰⁹ Spencer, *supra* n. 64.

¹¹⁰ R.S.C., c. C-6.

¹¹¹ Gisèle Carrière, *Statistics Canada, Seniors' Use of Home Care*, 17(4) Health Report, 43-50, <http://dsp-psd.pwgsc.gc.ca/Collection-R/Statcan/82-003-XIE/82-003-XIE2005004.pdf> (2006).

¹¹² Janet Fast, Deanna L. Williamson & Norah Keating, *Hidden costs of informal elder care 1999*, J. of Family and Economic Issues, Vol. 20(3), 301-326, 322, Sept. 1999. For a general discussion on the economic impact of elder care in Canada, see also Janet Fast, Jacquie Eales & Norah Keating, *Economic Impact of Health, Income Security and Labour Policies on Informal Caregivers of Frail Seniors*, March 2001, http://www.swc-cfc.gc.ca/pubs/pubspr/0662654765/200103_0662654765_2_e.html (accessed May 3, 2007).

¹¹³ Marika Morris et al., Canadian Research Institute for the Advancement of Women (CRIAW), *The Changing Nature of Home Care and Its Impact on Women's Vulnerability to Poverty*, http://www.swc-cfc.gc.ca/pubs/pubspr/0662280857/199911_0662280857_1_e.pdf (Nov. 1999); see also Janet Fast et al., *Status of Women Canada, Economic Impact of Health, Income Security and*

that employed women, those who have concurrent child-care responsibilities, those who live at a moderate distance from their care receiver, and family caregivers are served the least well by existing policy approaches to informal caregivers.¹¹⁴

(ii) *Filial Responsibilities*

The old age security system is seen as the primary financial support to older adults. However, each provincial and territorial jurisdiction has a form of law that requires some degree of filial financial responsibility to parents.¹¹⁵ There has been very little litigation in this area and the laws may be considered as vestigial to the 1930s Depression, when governments had difficulty providing for older members of the population.

The courts have interpreted an adult's responsibility to his or her parents as secondary to the adult's responsibility to support his or her children and spouse. Courts avoid judging the quality of the family relationship in childhood to determine how "deserving" older adults might be for financial support, and some analysts note use of these laws can destroy already fragile ties between family members.¹¹⁶ Recently, after a review of the function and application of the financial responsibility provisions of the law, one provincial law reform body called for its repeal.¹¹⁷

Section 215 (1) of the Criminal Code of Canada also imposes a duty on certain persons to provide the necessities of life to another who is "unable by reason of detention, age, illness, mental disorder or other cause to withdraw self from that charge and is unable to provide self the necessities of life."¹¹⁸ The person may be subject to a criminal charge if he or she fails in that duty and the failure endangers the life of the person or is likely to permanently endanger the health of the other person. These charges are rarely laid.

Labour Policies on Informal Caregivers of Frail Seniors, http://www.swc-cfc.gc.ca/pubs/pubspr/0662654765/200103_0662654765_e.pdf (Mar. 2001).

¹¹⁴ Fast et al., *supra* n. 113.

¹¹⁵ Soden, *Advising the Older Client*, *supra* n. 34, at 380 (contributors Nicholas Bala et al., *Family Law for the Canadian*).

¹¹⁶ Christa Bracci, *Ties that bind: Ontario's Filial Responsibility Act*, 17 Canadian J. on Fam. L. 455-500 (2000).

¹¹⁷ British Columbia Law Institute, *Parental Support Obligation in Section 90 of the Family Relations Act*, BCLI Report No. 48, at 42 (Mar. 2007), http://www.bcli.org/pages/projects/parentalsupport/Parental_Support_FRA_section_90_Report.pdf (accessed June 2, 2007).

¹¹⁸ Criminal Code of Canada, R.S.C. c. C-46, § 215 (1) (1985).

(iii) *Support of Family Care (End of Life)*

In January 2004, the federal government enacted changes to employment insurance law to permit eligible workers to receive compassionate care (employment insurance) benefits. The benefits are only paid for a maximum of six weeks to a person who has to be absent from work to provide care or support to a gravely ill family member at risk of dying within the next 26 weeks.¹¹⁹ The policy requires family to obtain a medical certificate of impending death from the physician. The definition of "family member" was expanded in 2006.¹²⁰ However, the scope and other eligibility criteria such as substantial diminution of weekly income significantly limit its use by family.¹²¹ On the other hand, almost every province permits some *unpaid* compassionate care leave in its employment standards,¹²² as does the federal government under the Canada Labour Code in its standards for federally regulated employees.¹²³

G. *The Right to Labour*

Labour is a shared federal-provincial responsibility, with each government regulating those sectors for which it has constitutional responsibility.¹²⁴ Canada has provided a number of protections for workers in employment laws and human rights laws to safeguard them from discrimination in the workplace. In some provinces, such as British

¹¹⁹ Service Canada, *Employment Insurance (EI) Compassionate Care Benefits*, http://www1.servicecanada.gc.ca/en/ei/types/compassionate_care.shtml (May 8, 2007).

¹²⁰ Service Canada, *Employment Insurance Compassionate Care Benefits - who is considered a family member?*, http://www1.servicecanada.gc.ca/en/ei/types/compassionate_care.shtml#family (accessed May 26, 2007).

¹²¹ Katie Osborne & Naomi Margo, Health Council of Canada, *Compassionate Care Benefit: Analysis and Evaluation*, 20, 28, http://www.healthcouncilcanada.ca/docs/papers/2005/Compassionate_Care_BenefitsEN.pdf (accessed May 30, 2007) (while the government estimated that there might be up to 270,000 compassionate care claimants a year, in 2004/5, only 7,150 claim benefits were paid across the country).

¹²² See e.g., Laws of Manitoba, The Employment Standards Code Amendment Act, <http://web2.gov.mb.ca/laws/statutes/2003/c00703e.php> (accessed June 2, 2007); Legislative Assembly of British Columbia, *Employment Standards (Compassionate Care Leave) Amendment Act*, 2006, http://qp.gov.bc.ca/38th2nd/1st_read/gov08-1.htm.

¹²³ Canada Labour Code, R.S.C., c. L-2, § 209.2 (1985); see generally Yosie Saint-Cyr, *Compassionate Care EI Benefits-A Reminder*, <http://www.hrinfodesk.com/Articles/compassionatecarebenefitsandleave.htm> (accessed June 2, 2007).

¹²⁴ Michel Fourzly & Marc Gervais, *Human Resources and Social Development Canada, Collective Agreements and Older Workers in Canada* (Human Resources and Social Development Canada Labour Program 2002), 6, <http://www.hrsdc.gc.ca/en/lp/spila/wlb/pdf/caowc-dftacc-en.pdf> (2002).

Columbia, this protection only goes to age 65.¹²⁵ Even with age-based equality rights, older adults who work are in a vulnerable position in hiring and employment, as well as in work conditions. Sponsored older immigrants who tend to have low education and lack English or French language skills may be particularly vulnerable to labour exploitation.

More than 22 percent of recent retirees return to some paid work after a “first retirement,” and for over one third of them, it is for financial reasons.¹²⁶ The “official” unemployment rate among seniors is low compared to other age groups, but is growing.¹²⁷

(i) *Mandatory Retirement*

No Canadian law specifically endorses mandatory retirement. However, a combination of lack of human rights protections or employment standards against age discrimination in some jurisdictions and high court judicial interpretations created a legal environment in the late 1980s and early 1990s that effectively permitted mandatory retirement as reasonably justified across many occupations. During that period, the Supreme Court of Canada heard a series of legal challenges under the *Charter* to mandatory retirement policies in union and university contracts, with significant differences in views evidenced among the judiciary. Mandatory retirement policies have increasingly been recognized as having a differential negative impact on women and recent immigrants, as both groups tend not to have the traditional work force trajectory of men.

In 2006, Ontario removed the upper age limit in its human rights law, effectively abolishing a significant proportion of mandatory retirement in that jurisdiction.¹²⁸ Mandatory retirement was already banned in several provinces and territories, including Alberta, Manitoba, Quebec, Prince Edward Island, Nunavut, the Yukon and the Northwest Territories. However, today, even where age protection exists, older employees may be required to retire in some occupations if it is deemed a *bona fide* occupational requirement.

It has been suggested that the driving force for changes to mandatory retirement in Canada will be business economics, not human rights considerations.¹²⁹ In 2002, about 14.5 percent (one in seven) of

¹²⁵ Human Rights Code, R.S.B.C., c. 210, § 1 (1996); *see also* Saskatchewan Human Rights Code, S.S. 1979, c. S-24.1, § 2 (1).

¹²⁶ National Advisory Council on Aging, *supra* n. 16, at 53-54.

¹²⁷ National Advisory Council on Aging, *supra* n. 16, at 53-54.

¹²⁸ Human Rights Code R.S.O., c. 19, § 10 (1990) (as amended).

¹²⁹ Soden, *Advising the Older Client*, *supra* n. 34, at 251-304 (contributor Charmaine Spencer, *Discrimination- the law and older adults in Advising the Older Client*).

seniors “indicated they were forced into retirement because of mandatory retirement policies.”¹³⁰ An additional 25 percent “involuntarily” retire for health reasons, or because of job disruptions such as layoffs or restructuring.¹³¹ Older workers' knowledge and skills often do not match current business needs, impeding potential re-employment. Although this has been recognized for almost two decades,¹³² at a policy level, there have been relatively weak efforts in the federal and provincial employment training schemes or within private industry to effectively retain or retrain older workers.¹³³ Moreover, there has been little if any legal discussion of the inequity underlying this omission.

(ii) *Early Retirement*

Until recently, the trend in Canada has been towards early retirement (i.e., before the age of 65), particularly among people who had pensionable benefits.¹³⁴ Early retirement was often encouraged during periods of high unemployment, particularly among older workers, in the hope of creating more job openings for younger workers. The proportion of older workers receiving unemployment benefits includes many who have not been able to find employment, and for all intents and purposes, are involuntarily “retired.”¹³⁵ This is often the case for manual workers for whom demand is low and who are often in poor health.¹³⁶

(iii) *Phased Retirement*

The Income Tax Regulations¹³⁷ regarding employees accruing pension benefits under a defined benefit Registered Pension Plan (RPP)

¹³⁰ National Advisory Council on Aging, *supra* n. 16, 52.

¹³¹ National Advisory Council on Aging, *supra* n. 16, 53-54.

¹³² See e.g. Mary Trueman, *Training of Older Workers in Canada, Training Discussion Paper No. 22* (ILO Publications 1989).

¹³³ Marjorie Armstrong-Stassen & Andrew Templer, *Adapting Training for Older Employees: the Canadian Response to an Aging Workforce*, 24 J. of Mgt. Dev. 57 (2005).

¹³⁴ See Patrick Kieran, *Early retirement trends, Perspectives on Labour and Income*, 2 (9), Statistics Canada Cat. No. 75- 001-XIE, 7-13, <http://www.statcan.ca/english/studies/75-001/archive/2001/pear2001013004s4a01.pdf> (accessed May 29, 2007).

¹³⁵ Geoff Rowe & Huan Nguyen, *Older workers and the labour market, Perspectives on Labour and Income*, 3 (12), Statistics Canada Cat. No. 75- 001-XIE, 23-26 (2002), <http://www.statcan.ca/english/freepub/75-001-XIE/0120275-001-XIE.pdf> (accessed May 29, 2007). See also Wendy Pyper & Philip Giles, *Approaching retirement, Perspectives on Labour and Income*, 3 (9), Statistics Canada Cat. No. 75- 001-XIE, 5-12 (2002), <http://www.statcan.ca/english/freepub/75-001-XIE/0090275-001-XIE.pdf> (accessed May 29, 2007).

¹³⁶ Wendy Pyper, *Aging, health and work, Perspectives on Labour and Income*, 7 (2), Statistics Canada Cat. No. 75- 001-XIE, 5-15 (2006), <http://www.statcan.ca/english/freepub/75-001-XIE/10206/art-1.pdf> (accessed May 29, 2007).

¹³⁷ C.R.C., c. 945 (enabled by Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)).

currently prevent employers from offering phased retirement programs that would permit older workers to continue working part-time, while at the same time receiving a partial pension. Amendments to the Income Tax Regulations were proposed in 2007 to allow an employee to receive pension benefits from a defined benefit RPP and simultaneously accrue further benefits, subject to certain constraints. These changes will be in effect for the first time in 2008.

H. Income Tax Law

Income tax policy and the laws supporting it carry a number of special provisions for older adults. In addition to the basic “personal tax credit,” seniors benefit from an “age credit” to help reduce the amount of taxes owing.¹³⁸ Some may also be eligible for disability credits in case of permanent disability, and deductions for out of pocket medical expenses.¹³⁹ On a spouse’s death, registered retirement benefits can be “rolled over” to the surviving spouse without triggering tax consequences.¹⁴⁰ Very recently, changes to income tax regulations have begun permitting income splitting for seniors.¹⁴¹

IV. FUTURE TRENDS

Several needs related to older adults are beginning to be recognized and addressed in Canada. There is a substantial and growing need for continuing education on issues of law and aging available for the legal profession and professionals in other disciplines who represent or serve older people. There is a pressing need to better inform/educate the general public about issues affecting older adults and families or others who may be helping them. This begins with raising public awareness about rights, obligations, benefits, and resources relevant to the lives of older adults. This can occur in many different ways, including consumer guides and handbooks, internet sites, group presentations and individual counselling through specialized legal information clinics. While ‘self-help’ tools and resources available at no

¹³⁸ *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.). For general description, see Canada Revenue Agency, “What you can deduct,” <http://www.cra-arc.gc.ca/tax/individuals/topics/income-tax/return/completing/deductions/menu-e.html> (accessed May 29, 2007).

¹³⁹ *Id.*

¹⁴⁰ Canada Revenue Agency Income Tax Interpretation Bulletin, IT 500 R, “Registered Retirement Savings Plans -- Death of an Annuitant”, § 27-28 (Dec. 18, 1996), <http://www.cra-arc.gc.ca/E/pub/tp/it500r/it500r-e.html> (accessed May 29, 2007).

¹⁴¹ Department of Finance Canada, “Tax relief for seniors”, http://www.fin.gc.ca/pensioncalc/factsheet_e.html (accessed May 29, 2007).

or a nominal cost will be an increasingly valuable aid to many older adults, these courses depend on the individual's ability to access and utilize the tools. In recent years, a number of Canadian guides have been under development by non-profit associations to aid the understanding of older adults, family caregivers and persons working with older adults of general legal and ethical issues related to care giving, end of life, filial support, and substitute decision making.¹⁴²

There is an ongoing need to improve access to justice for older Canadians. Older adults on fixed incomes often have their legal needs overlooked, and can find access to legal remedies highly problematic. They often have little or no means to afford legal assistance for relatively simple, but sometimes time-consuming, legal matters. Many older adults may experience difficulties communicating in English or French, or may lack basic literacy, let alone the capacity to achieve good legal literacy to understand and enforce their rights. At present, general purpose legal aid clinics, where they exist, are not set up to address the types of issues or to meet the often complex set of needs of older adults in a multidisciplinary and holistic manner. As a result, there is a pressing need for specialized government-subsidized legal aid clinics in each province to provide formal legal advice and representation for older adults on individual matters, as well as advocacy on systemic issues, drawing on proven models such as that of the Advocacy Centre for the Elderly.

There is strong need for critical legal analysis in the areas of law affecting older adults, whether that is a feminist analysis that looks beyond middle age or other critical approaches. Among other things, this analysis will need to examine the intersection of aging, gender, ability, race and other statuses in the context of social policy and law. The law is seldom neutral or objective in its application to the lives of older adults, and aging is a highly gendered issue.

The practice of elder law in Canada is likely to continue, in large part, in conjunction with other fields of law. Although it is an approach which has not yet been widely adopted in the country, future elder law practice may need to draw on multiple disciplines. There are several different models to consider, including case management approaches to addressing client files that present a combination of legal, accounting, tax, health and social issues. For example, a lawyer may act as the primary "point person" for the coordination of service delivery by a

¹⁴² E.g. guides produced by the Canadian Palliative Care Association, <http://www.chpca.net/home.htm> (accessed June 2, 2007); Caregivers Coalition, <http://www.ccc-can.ca/> (accessed June 2, 2007).

variety of professionals whose services are independently engaged by the client. Some practitioners may consider opening professional multidisciplinary practices comprised of lawyers, accountants and others such as social workers. Future practice might include the sale of ancillary products such as long-term care insurance and financial investments for the delivery of a one-stop, full service to older clients. However, all of these options will need to be carefully considered for their practicality and adherence to provincial codes of conduct, the ethical implications, and potential liability for representations made by other professionals to one's clients.

Canada has begun to see important legal and practice research unfold in recent years. This research will affect older adults and practitioners. For a decade, the country has been implementing promising practices for addressing abuse and neglect of older adults in the community and institutional settings, and may be starting to consider some national strategies in the area. Capacity assessment guides for lawyers, judges, physicians and social workers that are adaptable to the laws of each jurisdiction are likely to become more commonplace. The Western provinces have been considering the development of uniform power of attorney legislation for the common law provinces of Canada.¹⁴³ There are slowly developing efforts to raise understanding about advance care planning, along with its underlying laws and ethical principles, among lawyers, doctors and social workers. Over time, the country will likely see the development of best professional practices in the advising and drafting of legal instruments in the planning for incapability.

Several new issues are being explored and identified, including: the legal needs and matters affecting special populations of older adults, including older women, older sponsored immigrants and ethnic seniors; older adults in the penal system; older Inuit and First Nations persons; older adults with developmental disabilities; and older adults who are gay, lesbian, bisexual or transsexual. Increasingly, older adults and others are seeking information and advice from a variety of professionals on the wide range of supportive housing and long-term care facility matters, and a specialized practice in long-term care law is likely to develop over time. Many traditional areas of contract and administrative law well may be reviewed, using an aging lens in the future.

¹⁴³ Western Canada Law Reform Agencies, *Enduring Powers of Attorney: Areas for Reform, Consultation Paper #1* (June 2004), <http://www.law.ualberta.ca/alri/docs/wclraCP1.pdf> (accessed May 29, 2007).

There are some existing and potential areas of conflict among professions when it comes to legal issues and the respective scope of practice will need to be clarified over time. For example, practitioners find that real estate agents, social workers and other housing and care professionals, as well as gerontological consultants, sometimes offer what may appear to be legal advice to clients, or practice illegally within the fields of other professions, but without the requisite education, licensing or recognition of potential liability.

Various Canadian stakeholders such as the Canadian Bar Association, Canadian Centre for Elder Law Studies, and the National Institute on Law, Policy and Aging have a variety of comparative law studies in various stages of planning or development. They are also beginning to examine matters on a cross-jurisdictional or an inter-provincial level. In addition, they have begun working internationally with bodies such as the Commission of Law and Aging in Washington D.C. and the faculties of law at Wake Forest University and Stetson University's Centre for Excellence in Elder Law.

V. CONCLUSION

Canada has witnessed a number of significant changes in social policy and law during the past four decades. One of the important bright notes is the reality that life is more financially secure for many older adults, as a result of the maturation of the Canada Pension Plan and enhancements to the public pension system. Yet, inequities remain for subgroups of older adults, including many older women and minorities. Retrenchment in the area of public pensions continues to loom, creating the prospect of a much less secure future for many.

There has been progress made in recent years to better recognize the diversity of relationships among adults, with expansion of policy definitions of 'spouse' and 'family'. However, these policy changes have often been reactive -- reflecting of the efforts of interested individuals pushing for change, rather than proactive direction in social policy planning. Further, many of these changes maintain the *status quo*, leaving the bulk of social responsibility for caregiving resting on individuals and family, and not treated as a collective (state) responsibility. While there have been significant advancements in individual rights in areas of substitute decision making and alternatives to guardianship, collective rights to affordable and appropriate housing and adequate health care have lagged across the lifespan.

Other areas such as protection of older adults' human rights in key areas of employment, accommodation, health care and other services

have also lagged significantly, and with very little discourse in these areas as to how to balance interests. Ageism is still manifest in the country, although hidden from view. Mechanisms to engage the public discourse on what the future of aging and intergenerational relationships *might look like* and *should look like* are at continued risk. It is in this mixed environment that the capacity of the country to recognize and respond appropriately to the social as well as legal needs and interests of older adults will continue to evolve.

While law and aging policy in Canada may face many challenges and more transitions in the future, the future of elder law in Canada looks very encouraging as the country softly greys.