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In Context

Bright Lines: Status, Recognition and the Elusive Nature

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The labels young and old only make sense relative to one other. Indeed, what we understand by these terms is determined as much by what they do not represent as by what they do for example, we may define old age as the opposite of youth, and vice versa. Oppositional and hierarchical relationships dominate language, in part because comparison and categorization are analytical tools central to human understanding. Without the tools to distinguish between apparently different groups, qualities, or circumstances, we would be less able to make sense of our world.

The fundamental problem with such a compartmentalized way of thinking, however, is that our lived experiences do not normally accommodate us with tidy natural categories. Distinctions that make sense based on one set of criteria seem indefensible or even absurd when the same data is sliced along different analytical or temporal lines. Our world is simply too complex to be packaged and labelled with any authority; thus, the distinctions we make are informed by, for example, our own limited perceptions, the context of the decision, and the purposes we are hoping to serve. More often than not, the bright lines we draw exist largely in our minds and are not the product of any real distinction or objective difference. In each context, of course, some ways of dividing up our world make more intuitive sense to us than others. But it bears remembering that we always operate with some degree of uncertainty. By drawing these lines we are engaging in a creative, culturally specific and world-defining process.

In the context of youth and ageing, the slippery and socially constructed nature of our categories becomes especially clear. The human life span is a continuum. Yet for many purposes, society describes the ageing process in terms of a series of near-watertight compartments: federally-defined childhood ends and adulthood begins at exactly 18 years of age, and adulthood gives way to old age at 65. There may be defensible physical, psychological or developmental reasons for setting these general boundaries. More importantly, they are socially, legally and politically meaningful. As a society we cannot take these boundaries for granted, given the bundles of rights, roles and responsibilities that we have attached to each status. But there is an element of arbitrariness

# of Ageing

in our line-drawing. Not all 18-year-olds are willing or able to assume the social responsibilities attached to adult status, for example, while others seem ready to do so at that age, or even earlier. Similarly, the ageing process is both an individual and a gradual one: we will not all be equally situated physically, mentally, or even financially when we reach 65. Nor will we wake up old one morning, simply because we have received our first pension cheque.

Indeed, it does not seem possible to pin down with certainty even the beginnings and endings of our lives. The abortion debate has highlighted the extent to which the very moment that one first comes to exist as a person is socially defined. It is society, not nature, that determines whether life begins at the moment of conception, at birth, or at any precise point in between. And it is not a value-neutral choice.

Another striking example of a socially created life cycle, and an important manifestation of the way in which age relates to status and legal recognition, has emerged in British Columbia s new *Representation Agreement Act*.[1] This statute, which is likely to come into force later this year, will change significantly the options available to ageing individuals seeking to order their affairs: it repeals the province s current enduring power of attorney provisions and replaces them with vastly expanded avenues for pre-planned personal, property and health care representation. The Act will allow adults, while they are legally capable, to make advance directives and appoint their own substitute decision-makers to carry out their wishes and make decisions for them should they become incapable in the future.

This is the other end of the ageing spectrum: in creating a vehicle for substitute decision-making, the legislation defines a death of sorts the death of an autonomous political and legal self. The *Representation Agreement Act* is progressive in its emphasis on maximizing the self-determination of the individual. In a sense, it is an attempt to push the endpoints of autonomous political and legal life beyond those events that would otherwise limit it. But the actual activation of a representation agreement marks the point at which, for reasons of perceived incapacity, a previously autonomous person can no longer exercise his or her rights independently. From that moment onwards, rights are carried forth by proxy only. As a fully autonomous political actor, the rights holder ceases to exist.

In defining this crucial moment of activation, the statute is faced with the difficulties common to all attempts to partition the human life cycle. Specifically, substitute decision-making powers under the Act may become effective immediately on the occurrence of a so-called triggering event, which is undefined in the legislation but may be described in advance by the parties to the agreement.[2] The legislation clearly contemplates a discrete point in time when the individual sudden-

1 SBC 1993, chapter 67. The Act is one component of an extensive new legislative scheme that also includes the *Adult Guardianship Act*, SBC 1993, chapter 35; the *Health Care (Consent) and Care Facility (Admission) Act*, SBC 1993, chapter 48; and the *Public Guardian and Trustee Act*, SBC 1993, chapter 64. Taken together, these statutes represent a significant revision and consolidation of the laws of informed consent and adult guardianship in British Columbia.

2 *Representation Agreement Act*, see note 1 at section 15 (1) (b).

ly becomes incapable: an abrupt and traumatic loss of capacity arising from, for example, head injury, irreversible coma or stroke. After that point, the substitute decision-maker s choices override the individual s own present wishes (though not the individual s past wishes, as set out in the agreement) in the case of conflict between them.

But how do these provisions affect those elderly individuals who slowly and incrementally lose the ability to look after their own needs? Potentially, the Act will fail to accommodate the majority of elders, who are more likely to move along a continuum of capacity than to experience its sudden loss while they are alive. At what precise moment is their legal death triggered?

Ultimately, because a precise line between capacity and incapacity cannot be drawn in advance with any certainty, this decision will have to be made by people other than the individual in question. In seeking to maximize individual autonomy and self-determination, the *Representation Agreement Act* has employed a device, the triggering event, that cannot accomplish this goal because it fails to reflect the complex, evolutionary nature of capacity in the ageing context. The problem is not that the goal of the Act is unattainable, but that the mechanism it provides for attaining that goal is inflexible and overly simplistic. As a result, actors other than the individual are left to impose their own socially constructed and potentially illegitimate definitions of incapacity upon the individual in a way that may not accord with that person s own experience.

Youth and ageing and perhaps even life and death are as much about legal, political and social recognition as they are about biology. The lines we draw are necessarily arbitrary and limited in their ability to describe the complex human experience. Thus, the act of drawing these bright lines is a creative one, and very much informed by the cultural and political narratives within which we operate. We do not so much find meaningful categories as we assign them. The young and the old are differently situated in our society, largely because of the choices that those of us in the middle have made in attaching distinct and dissimilar packages of status, recognition and rights to those labels. Meaningful discussions of youth and ageing cannot take place in a legal, social or political vacuum; we must contemplate not only the human life cycle, but our own discourse as well.

The Youth and Ageing Edition

The articles that follow in the Youth and Ageing Edition of Appeal demonstrate the ways in which the human life cycle intersects with and is informed by social status and recognition. In Maps, Knowledge and Territory: Intergenerational Gaps, author Kelly Gallagher-Mackay, the recipient of this year s Guild, Yule & Company essay prize, discusses how, in the process of drafting a native land claim, knowledge gaps

between young and old correspond to the potential shortfalls in the extent of their territory. The ways in which the colonial context can change fundamentally the forms of knowledge that are transmitted and valued between generations, resulting in a displacement of traditional knowledge, are evaluated as they affect the highly political map-making process. In User Fees and the Elderly: Medicare Solution or Dissolution? Blair Curtis conducts a legal and economic analysis of the options available in addressing the disproportionate toll that elders place on our health care system. The applicability of Japanese-style user fees to the Canadian context is discussed in light of the federal/provincial division of powers, the Charter s equality provisions, and the position of the elderly in Canadian society. Similar statistics are employed to a markedly different end in Pensions, Policy and Power. Here, in the context of increasing pension privatization, Francesca Marzari analyses the influence of societal power structures in constraining the choices available to different populations in planning for their seniority.

Filial responsibility, entitlement and obligation between generations are discussed by Wendy Bernt in Lines of Dependence: The Rebirth of Parental Support Legislation in Canada. Her discussion of the recent judgement in *Godwin v. Bolcso* highlights the legal position of children *vis vis* their elders. Finally, author Tanya Scharbach discusses the shifting balance between ideals of free expression and the need to restrict hateful and pornographic material within the new context of cyberspace. In Child Pornography in Cyberspace, she evaluates the possible impact of new legislative and common law attempts to strike a balance between these conflicting interests, particularly as they affect the availability and distribution of child pornography on the internet.

The social implications of ageing are myriad and complex, and the topic is an increasingly timely and important one. It is our hope that this edition of Appeal will be an exciting addition to the general and critical discourse on rights, recognition, status, and the law. ■

Maps, Kn and Terr Intergeneratio

Kelly Gallagher-Mackay is a recent graduate of the University of Victoria Faculty of Law. Originally from Toronto, she received her Bachelor of Arts in History and Political Science, with a minor in Women's Studies, from McGill University. Kelly worked in Bolivia in 1995 for a legal non-governmental organization, Centro de Estudios Jurídicos y Investigacíon Social (CEJIS), as part of an internship with the Canadian Lawyers Association for International Human Rights.
She would like to thank Ana Garnica, without whom this essay would not have been possible.

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An important aspect of colonialism is the way in which forms and classes of knowledge, important to members of the subordinated group, are devalued and may be displaced. This process occurs over time, but by looking at different generations in a community that is midway through an intense process of colonization you can get a snapshot view of the process. The information base of an older person is different from that of her or his children, reflecting changing activities and differing ways of life. Looking at territorial knowledge, crucial to defining land rights, I am trying in this article to understand and convey the potential significance of one such snapshot. Working as an intern on a land claim in a specific South American community positioned me as an outside viewer of such a process of inter-generational change as it became manifest in the making of maps.

Background

The Ayoreos are an indigenous group in Eastern Bolivia and Northern Paraguay that is making a *demanda territorial* : basically, a land claim on a very limited scale. Until forty years ago they were nomadic gatherers, hunters and warriors. However, since the 1950s they have been settled into

11 far flung communities by Catholic, Protestant and Baptist missionaries.[1] Today, the basis of their economy is a combination of subsistence farming and wage labour by males, only occasionally supplemented by hunting and gathering activities. The communities range in size from 150 to almost 500 people. Although there are important differences between them, there are certain basic commonalities between the communities: all are very poor and few have any significant economic resources. In particular, despite the widespread redistribution of land under Bolivian land reform since the 1950s, almost none of the communities own land in their own name.[2] The land that was formerly theirs is scattered throughout what is now prized agricultural land. The majority of their former territory is now privately owned or subject to timber concessions.[3]

Two basic rationales exist for recognizing the territorial claims of the Ayoreos or other native groups in a similar situation.[4] The first is historical: recognition would mean a long overdue legalization of a claim that use and occupation of the land have made legitimate over generations. This legalization should protect against the kinds of dispossession that have been a historical norm. The second is future looking: Bolivias indigenous people are among the countrys poorest and, in the absence of other forms of social safety, a more just distribution of land is meant to provide an economic base for healthy subsistence and growth.[5] The demand for territory rather than just land is a demand to be given cultural space, and a demand for control over natural resources and political decision-making as an important part of culture.

Like Canadian land claims, a *demanda territorial* is relatively complicated from a legal point of view. There is no established process for making this kind of demand. However, typically the claims include four components: a sociological survey (including demographics and community histories); a survey of natural resources with some kind of plan for their use; a legal analysis of the ownership and rights in the land being considered; and a detailed, accurate map of the area being claimed. There has to be cooperation between members of the affected communities and professionals from sociology, resource management, and cartography as well as law. Lawyers who participate must be aware of every step in the process since they

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1 J. Reister and B. Suaznabar, *Pueblos Ayoreodes, Chiquitanos, Guarayos* (Santa Cruz: unpublished, 1990) no page numbers.

2 Miguel Aragón, *Informe sobre la propriedad de tierras en comunidades Ayoreodes* (Santa Cruz: unpublished, 1995). See also, A. Zarzyncki Orlow, Estudio de delimitación de areas especiales de comunidades indígenas en el departmento de Santa Cruz (Santa Cruz: Corporacion Regional de Desarrollo de Santa Cruz, 1992).

3 World Bank, Proyecto de Tierras Bajas de Bolivia, *Informe Preliminar Sobre Los Ayoreos* (Santa Cruz: unpublished, 1993).

4 See for example, Confederacion Indígena del Oriente Chaco y Amazonia de Bolivia, *Propuesta de Ley Indígena* (Santa Cruz: CIDOB, 1992); Central de Pueblos Indígenas de Bení, *Hacia una Propuesta Indígena de Decentralización del Estado* (Trinidad: Central de Pueblos Indígenas del Bené / Centro de Investigacíon y Documentacíon por el Desarollo del Bené, 1995).

5 See W.C. Theisenhusen, "Introduction" in *Searching for Agrarian Reform in Latin America* (Routledge Chapman & Hall, 1988); see also *Ley de Reforma Agraria* (02-08-53 / 29-10-56).

generally draft the final demand.

I worked with the Ayoreos in a community called Rinc n del Tigre (Tiger s Lair) in Eastern Bolivia, near the border with Brazil. This remote community is the site of the Ayoreos largest claim: they are trying to establish a claim to some 96,000 hectares of land outside the main agricultural zone in the region. The land they are claiming takes almost half an hour to fly over in a small plane; to drive there takes five days in a land cruiser across the rocky, iron rich pampa. There are few communities anywhere nearby, and you can drive for hours seeing only red earth, waist high scrubby trees and occasionally, fabulous wildlife condors, armadillos, and road runners as well as endless varieties of parrot. Because of its isolation, there is relatively little geographic information about the area, and no established markers to use in determining precise coordinates of the boundaries of such a claim.

The demand for territory, rather than just land, is a demand to be given cultural space, and a demand for control over natural resources and political decision-making as an important part of culture.

For indigenous people claiming land in South America, one of the biggest advances in the last five to ten years has been the development and widespread use of a technology called Global Positioning System (GPS).[6] A type of geographic information system, GPS is a network of 24 satellites circling the earth that allows someone on the ground to identify their precise location on the globe with only an inexpensive hand-held receiver. The receiver gets signals from three satellites from which it can calculate its position, which it displays as a set of coordinates.[7] This technology can be used to make maps that are accurate to a distance of less than 30 metres.[8] In the context of land claims, the great advance of GPS is that it allows for a very participatory method of recording the extent of indigenous territory and patterns of land use in terms that external authorities, like governments and local land title offices, recognize as legitimate. Native people s

6 See P.E. Zorogastua Cruz, "La Percepción Remota en la Evaluación de los Recursos y La Demarcación de Territorios," in *Reconocimiento y Demarcación de Territorios Indígenas en la Amazonia - Las Experienceias de los Paises en la Región* (Bogota: CEREC & Fundacion Gaia, 1993).

7 P. Poole, *Indigenous Peoples, Mapping & Biodiversity Conservation: An Analysis of Current Activities and Opportunities for Applying Geomatics Technologies* (Washington: Biodiversity Support Program Discussion Paper Series, 1995).

8 Poole, see note 7 at 10. Higher accuracy — to as low as one meter — is possible through a process called "differential GPS," where images from four satellites are used. See also, D. Sprague and A. Woo, *Global Positioning System Fundamentals* (Austin: Trimble Navigation Ltd., 1993).

knowledge of their own land is applied by having indigenous guides (or cartographers) identify the limits of their territory, based on their actual on-the-ground patterns of use.[9]

On balance, the technology was very impressive: highly portable, it allowed our cartographers to record information generated by our guides and produce the maps that will be essential to the claim. But unfortunately, I was left with some severe doubts about the way we applied the technology and our original use of it to delineate territorial boundaries. The ostensibly technical tool of a map, transformed through legal processes, actually defines the rights and ownership of a whole community. It is crucial to ensure that the whole people s knowledge is involved.

Snapshot

The guides who went with our topographers had been chosen by the communities as particularly responsible people who were to be trusted in the important matter of defining their territory. Each man is a fluent Spanish speaker who reads and writes, and for that reason, has taken a leadership role in community affairs. Such a role more and more often requires contact with outside organizations to seek funds, market crafts, or get legal recognition for different community structures. None of them were older than 25; all of them had been educated in their community at the Spanish unilingual school run by the Baptist mission.

Unfortunately, in the course of learning those skills, the traditional education of Ayoreo youths has fallen behind. These men have spent much more time farming than their fathers, and they only hunt for something closer to sport than subsistence. They are simply unfamiliar with the hunting and collecting routes which were used extensively right through the early years of settlement by the missions. Although the Ayoreos are living within the area they once used, unlike many native groups they do not identify it as an ancestral homeland. Further, the missionary presence has significantly affected not only where they live, but the relationship between land use and the livelihood of the Ayoreos as well (that is, cultivation versus nomadic gathering and hunting, concentrated communities rather than scattered extended family groups, distant cropland versus nearby gardens,

9 For an excellent book on the significance of Native-controlled cartography, see H. Brody, *Maps & Dreams* (Vancouver: Douglas & McIntyre, 1981), based on his experiences in the Canadian arctic.

increasing wage labour for the mission itself). As a result of all these factors, our guides misidentified the outer limits of their traditional territory. They effectively short-changed themselves of up to 12,000 hectares of land, the area between the perimeter identified by our guides and the set boundaries of their nearest neighbour. Because of the extent of the mistake, it was noticed before we left the community and the outside border of the territory became a subject of discussion in a community meeting.[10]

The neighbouring proprietor, an engineer with a mining concession, had proposed to the missionaries that he and the Ayoreos should split the difference and divide in half the 12,000 hectare parcel of land that was not, until we arrived, considered anybody s property not his, not the missions, nor the Ayoreos . His proposal became the accepted basis for a slightly surreal discussion in the meeting. Rather than attempting to define what they considered their territory, the communities discussed whether it was worthwhile to include in the claim the 6,000 odd hectares that had been offered, and whether it would be necessary to go out again to use the GPS system to mark the boundary suggested by the engineer.

The apparent arbitrariness of the decision was quite shocking and left me disoriented. I had assumed that the strength of GPS was that it would allow native groups to define what was theirs, rather than accepting whatever offer traditionally powerful interests chose to make them. It seemed the system had failed and I was at a loss as to why, and depressed over the apparent absence of a knowledge that I had assumed was vested in the community.

In the end, the engineer s proposal was accepted. It was determined that sufficient information to delineate the community s territory could be gathered if the topographers flew over the two geographic points that marked the straight line proposed by the engineer.

Though the Ayoreos agreed on the boundary, for me, that was not the main event in the meeting. At one particular moment, a speaker stood up, went to the outline map we had been using, and made a speech in Ayoreo explaining the exact entitlement of their community to the land being discussed. He is just under sixty years of age, and had been considered an adult in the time before the communities were settled. Well into the 1970s,

10 Notes by author, Rincón del Tigre, Bolivia, 23 July 1995.

he had provided the family's protein by bringing home game. He explained that the area being discussed also has amethysts in their rock formations. He stood before us, in a very worn suit of scotch plaid and a baseball cap, and with his finger traced an irregular loop on the map representing his old collecting trail. The path extended significantly beyond the boundary that was accepted in the meeting. His loop stretched into the territory the engineer considers unequivocally his. The surface area he delimited — although not on the same places on the map — was approximately the same area as that accepted in the community meeting.

This incident proved to me that the knowledge I had assumed would be applied in the use of the GPS was indeed within the community; but, logically enough, it is not evenly distributed across the generations. On one hand, the very structure of Ayoreo communities — like many others with an oral tradition — is premised on elders' accumulation of a special wisdom throughout their years of experience. However, the methods of transmitting that knowledge must remain relatively intact. Settlement, the involvement of churches, and interaction with national society means that there is a fundamental interference with the way knowledge is both transmitted and valued in communities.

At the level of knowledge transmission, education in Ayoreo communities was mostly informal and relied on the simple mechanism of always having the children near their parents.[11] The supposedly beneficial advent of schooling in their communities ruptured this pattern of knowledge transmission by separating kids from their families for most of the day. Perhaps more insidiously, the type of knowledge that is being deemed useful and valuable is also changing. Clearly, there are excellent reasons why young people might want to learn more about the world outside their formerly isolated communities. Such knowledge is eminently practical, as so-called modernization seems inevitable and the presence of colonial institutions like the church and unilingual education is a fact. Logically, it is the young people who are learning more of this new kind of knowledge. But unfortunately, this pattern can present a serious disjunction between the roles of older and younger people as representatives in their communities,[12] and a displacement of traditional knowledge. Because it is not recorded, some

The trinity of accuracy, cert participation – meaningful if is not used in allows relative realization of geographical

11 Reister and Suaznabar, see note 1.

12 See for example, W. Molina, *Informe preliminar sobre los nuevos lideres jovenes en el TIPNIS* (Trinidad: unpublished, 1995); A. Triana Antorveza, "El Estado y El Derecho En Frente a los Indigenas," in *Entre la Ley y Costumbre* (Mexico City: Instituto Indigenista Interamericano / Instituto Interamericano de Derechos Humanos, 1993).

communities like Rinc n del Tigre are facing a permanent loss of knowledge that, in this case very literally, is their birthright.

Obviously, this discovery has some significant implications in terms of the manner in which territory is claimed.

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Implications

First, there are clear implications at the level of practice. Teams who are working together to develop land claims should be very careful when they are selecting their guides. At the very least, they should attempt to ensure that different generations are represented so as to capture the differing areas of knowledge between young and old. The trinity of GPS virtues in this context accuracy, certainty and participation are not meaningful if the technology is not used in a way that allows relatively full realization of the community's geographical knowledge.

The trinity of GPS virtues – accuracy, certainty, and participation – are not meaningful if the technology is not used in a way that allows relatively full realization of the community's geographical knowledge.

When the *James Bay and Northern Quebec Agreement* was signed in 1975, it was one of the first comprehensive bilateral land claim settlements between government and a native group, the Inuit of Nunavik, and it set a precedent world-wide. Since that time, Canadian native groups have played a leading role in using geographic information in both land claims and the resource management activities that follow the resolution of such claims. Mapping has played a crucial role in the development of information self-sufficiency by the Inuit, who have been described as information-rich as a culture but data poor as a political group. [13] Generating their own maps has been a key project for indigenous people in trying to control their knowledge base and ensure that such information is not treated merely as a historical relic but as a vital part of present day culture to be respected and revitalized.

One important difference between the Canadian and Amazonian projects is the scale of the resources invested in such projects. It is self-evident

13 W.B. Kemp and L.F. Brooke, "Towards Information Self-Sufficiency: The Nunavik Inuit gather information on ecology and land use" (1995) 18:4 Cultural Survival Quarterly 26.

that there is more money available in Canada. However, other factors may be relevant. In Canada, it is notable that projects undertaken by the aboriginal peoples themselves, over an extended period of time, had a tendency to emphasize the preliminary step of identifying elders or harvesters or knowledgeable people as the key aspect of transforming knowledge into data. Interestingly, in documented Canadian community-run mapping projects there is a clear acknowledgement that focusing on the information held by community *elders* specifically is an important part of the political struggle to maintain culture and land base.[14]

Outside lawyers, involved in preparing land claims here or in the South, must recognize that native participation in all aspects of the claim must amount to more than the provision of information. Specifically, it has to include a definition of what data will be relevant and how such data can effectively be collected using the differing skills of different members of the community.

Projects undertaken by the aboriginal peoples themselves emphasize the preliminary step of identifying elders or harvesters or "knowledgeable people" as the key aspect of transforming knowledge into data.

A second consequence following from the snapshot is a reminder of the potential economic value of indigenous knowledge. Seeing disrupted knowledge transmission result in a loss of land for the Ayoreos provides a literal and relatively dramatic way to value in economic terms some indirect effects of colonization that usually are considered too diffuse to measure. In the context of a *demanda territorial*, the application of territorial knowledge corresponds directly to the potential extent of the land that is to form the communities future economic and cultural base. The debate over the economic value of indigenous knowledge is not limited to the land claims context, but is raised most often in the context of intellectual property.[15] In that framework, the value of local knowledge is often marginalized due to the technical nature and

Projects under the aboriginal themselves em the preliminar identifying harv "knowledgeable as the key transforming kn i

14 Poole, see note 7 at 37-46; also "Geomatics: Who needs it?" (1995) 18:4 Cultural Survival Quarterly (special issue on geographic information systems); and D. Denniston, "Defending the Land with Maps" in *World Watch* (Washington: Worldwatch Institute, 1994).

15 See, *People, Plants and Patents: The Impact of Intellectual Property on Diversity, Conservation, Trade and Rural Society* (Ottawa: International Development Resource Centre, 1994); or, T. Greaves, ed., *Intellectual Property Rights for Indigenous Peoples, A Source Book* (Oklahoma City: Society for Applied Anthropology, 1994).

ideological limits of the discipline.[16] In the area of land rights, there are fewer ideological barriers to recognizing the value of indigenous knowledge. Territorial information, gathered with the participation of native people and codified into maps, is used as evidence of occupation and use, which gives rise to a claim to land title that has widespread theoretical acceptance.

Third, the emphasis on the accuracy of map-making in this context often is a demand for primarily historical accuracy. It can lead to an emphasis on traditional boundaries rather than on the adequacy of the proposed land as an economic base.[17] In this case, a successful process would result in ten of the eleven Ayoreo communities (excluding Rinc n) not owning sufficient land to maintain a nomadic lifestyle without degrading their natural resources. Yet, they have not moved fully into the patterns of settled agriculture of other native groups in the area.[18] I do not deny that the historical claim is crucially important, especially given potentially conflicting claims of native groups and later settlers, and the historicist bias of the court system.[19] But as this snapshot should suggest, given that both young and old will be affected by the outcome of such a process, and that inevitably, needs of individuals and groups within the communities will differ, any historical claim should be considered as well from the point of view of the present, and should represent a claim for a future that is culturally, economically, and ecologically sustainable.

Afterword

The future of the Ayoreos land claims in Rinc n del Tigre is not entirely certain. There is funding for two non-governmental organizations and a government department to see through the process of preparing a land claim for them. However, the biggest stumbling blocks are not related so much to the knowledge within the community like mapping or reconstructing a community history as they are to the bureaucratic processes outside it, through which every claim must pass. Even though no one is opposing the claim in this case, the Ayoreos know it has been five years since any community title has been recognized by the responsible body, the Agrarian Reform Office. They will be joining a long line of indigenous peoples across the Americas who are waiting until the governments under which they live are ready to recognize and affirm their rights. ■

16 For example, under existing intellectual property law, what can be patented (and therefore remunerated) is determined on the basis of the so-called value added to a natural resource by individual innovation. Collective knowledge (usually held by elders) about, say, a plant's usefulness for healing does not change the plant in any way, and results in non-compensation for native groups even where they have identified a use generally capitalized upon by western scientists.

17 This problem is by no means universal. In many cases, this map-making technology is just used to define broadly drawn territorial limits with *certainty*. An example is the application of GPS to delimit the indigenous territories in the east-central Bolivian departments of Beni and Cochabamba. See: C. Navia Ribera in *Reconocimiento y Demarcación de Territorios Territorios Indígenas en la Amazonia - Las Experienceias de los Paises en la Región*, see note 6; or K.A.Jarvis and A.M. Stearman "Geomatics and Political Empowerment: The Yuqui: '...that master tool, geography's perfection, the map'" (1995) 18:4 Cultural Survival Quarterly 58.

18 Based on figures contained in: Coordinación Ayoreode Nacional del Oriente de Bolivia, *Demanda Territorial Preliminar* (Santa Cruz: CIDOB, 1993).

19 A particularly egregious example of this bias would be the test in Canadian land claims jurisprudence, which only recognized native proprietorship if it has been established "since time immemorial". See comments of Justice Lambert in *Delgamuukw v. R.* (1993), 104 Dominion Law Reports (4th) 470 (British Columbia Court of Appeal) at 630-631.

User Fees for Medicare Solution

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Introduction The populations of countries in the Organization for Economic Cooperation and Development (OECD) are ageing. More to the point, the number of people over the age of 65 (who are presumed to be dependent for their support on the rest of the population) will increase more rapidly than the number of people of working age... who are presumed to be the chief source of support for the young and the elderly. [1] In preparation for the inevitable strain this demographic phenomenon will place on social programs, many countries have re-evaluated the feasibility of continuing to provide existing health care programmes.[2] Japan, faced with the most acute ageing problem of all OECD nations, has implemented user fees for the elderly, in an attempt to mitigate the economic and social problems caused by its ageing population.[3] (See Japanese Lessons, page 22). This paper addresses the questions of whether Canada can follow Japan s lead in charging health care user fees to its elderly citizens, and whether we should do so if it proves to be possible.

the Elderly: or Dissolution?

Can A Canadian Government Follow Japan's Lead?

A. The Canada Health Act, 1984

Although jurisdiction over health care is allocated to the provinces,[4] the administration of health care is a costly undertaking. The federal government, which wanted to have some control over the administration and provision of health care in the provinces, essentially bought its way into controlling a designated provincial power by offering substantial transfer payments to the provinces. These payments are conditional upon the provinces compliance with federal health care guidelines, especially as outlined in the *Canada Health Act, 1984*.[5] Therefore, a province can legislate nominally on any health care issue, but if such legislation is not in accordance with the federal stance the province is likely to lose some or all of the federal transfer payment amount. Specifically, the 1984 legislation explicitly withdrew the previously held right of the provinces to collect a full federal cash contribution if they charged user fees.[6]

How, then, could user fees for the elderly arise? Three possible scenarios exist. First, the provinces may want to charge or allow user fees while the federal government wants to prevent them from doing so. If this were the case, the implementation of user charges for the elderly by a

1 Organization for Economic Cooperation and Development, *Health and Pension Reform in Japan* (Paris: OECD, 1990) at ix.

2 Organization for Economic Cooperation and Development, *Aging Populations* (Paris: OECD, 1988) at 64. For a discussion of recent US concerns, see H. Fineman, "Mediscare" (18 September 1995) 126:12 Newsweek 38.

3 OECD Japan, see note 1 at xi. User fees are patient charges which vary with utilization of the system. These should not be confused with premiums, which are monthly amounts payable that do not vary with use of the system and are not set to reflect risk of illness. Two of Canada's ten provinces charge premiums.

province would violate at least two of the five criteria of the Canada Health Act: universality[7] and accessibility.[8] Furthermore, if some but not all provinces implemented a user fee system for the elderly there would be a problem with portability.[9] Most importantly, user fees would directly contravene the Act's prohibition of such charges.[10] The penalty for contravention is a dollar-for-dollar deduction from the federal contribution for all revenue earned by a province through user fees.[11] Economically, therefore, marginal benefit from imposing user fees begins to accrue only when the net profit from user fees exceeds the maximum entitlement to contributions from the federal government.

Until the late 1970s it seemed that net profit from user fees would never exceed the federal contribution. Under the former 50:50 cost sharing formula, the federal contribution was a considerable enticement to the provinces to follow the Act to the letter. In 1977, however, the form of federal health care financing changed[12] Recently, payments to the provinces have been declining.[13] This decrease in funding has federal politicians speculating that provinces may soon ignore the repercussions of losing the federal amounts. For example, after announcing an extended freeze on funding, former Progressive Conservative Finance Minister Michael Wilson recognized publicly that:

> ...limiting the growth of transfers...raises concerns about the ability of the federal government to continue enforcing national medicare principles under the *Canada Health Act, 1984*. Legislation will be introduced to ensure that the federal government continues to have the means to enforce those national medicare principles. The principles of the *Canada Health Act, 1984* will not be compromised.[14]

The implication in this statement is that a federal government that supported the 1984 Act could find a way to undermine the actions of provinces that wished to depart unilaterally from the Act's requirements. That is, even if one form of payment is declining, there are still other means to punish dissident provinces. Recent developments (see below), however, might lead one to believe that both the federal government and the provinces realize that greater power is indeed shifting to the provinces.

A second possibility is that the federal government would want the

4 Sections 91 and 92 of the *Constitution Act, 1867* delineate the level of government that is to hold certain powers: these are commonly referred to as the "division of powers" sections. Sections 92(7),(13), and (16) have been interpreted by the courts and academics to give power over health care to the provinces. See: *Carruthers v. Therapeutic Abortion Committees of Lions Gate Hospital* (1983), 6 Dominion Law Reports (4th) 57 at 63 (Federal Court of Appeal) [regulation and control of hospitals]; P.W. Hogg, *Constitutional Law of Canada*, 3rd ed. (Toronto: Carswell, 1992) at 546 [regulation of physicians as professionals]; *Schneider v. The Queen* (1982), 139 Dominion Law Reports (3d) 417 (Supreme Court of Canada) [medical treatment and health matters as local or private matters].

5 RSC 1985, chapter C-6. The Act reiterated the four fundamental criteria of the medicare program as established in the *Medical Care Act, 1966* (RSC 1970, chapter M-8), namely, comprehensiveness, universality, portability, and public administration. In addition, the new statute included a fifth principle — accessibility.

6 *Canada Health Act*, see note 5 at section 19(1). There is an exception, in section 19(2), for fees charged to inpatients who were considered "more or less permanently resident in a hospital or other institution."

7 *Canada Health Act*, see note 5 at section 10 [the requirement that all insured services be offered on the same terms to all provincial residents].

8 *Canada Health Act*, see note 5 at section 12 [the requirement that access to insured services cannot be impeded by means of a charge or otherwise].

9 *Canada Health Act*, see note 5 at section 11(1)(b)(i) [and particularly, with reimbursement between provinces].

provinces to implement user fees, and the provinces themselves would not. While the federal government has no constitutional mandate to legislate directly on health care, it can exert intense pressure on the provinces by modifying the terms of the Act. The federal government could amend the Act to create an exception to the prohibition of user fees; that is, any user fees *for the elderly* would no longer be prohibited. This modification would only create an enabling provision the provinces would not be obliged to charge fees. If the federal government wanted to force the provinces to collect user fees, the Act would have to be amended to impose a penalty on those provinces that did not charge such fees to users of the system. Admittedly, such a change would represent a marked departure from the purpose of the Act. But as will be discussed below, there have been major changes in Canadas social climate over the last ten years, which could create an impetus for such reform at the federal level.

Finally, it is possible that both the federal government and the provinces would want user fees to be instituted. This scenario would be the least complicated to implement: the federal government could simply amend the Act so as to allow provinces to charge user fees to the elderly. The only possible issues of contention might then concern amounts to charge and how to deal with users from outside the province of treatment.

B. The Canadian Charter of Rights and Freedoms

The preceding discussion on jurisdiction must be tempered by an understanding that the courts can strike down legislative provisions that are found to be unconstitutional. If a government decided to implement a user fee structure for the elderly, its actions would be subject to judicial review. Two complex questions need to be answered to determine the constitutionality of an age-specific user fee. First, would a medicare user fee for the elderly constitute discrimination based on age, contrary to the equality provisions in section 15(1) of the Charter?[15] And if such a law is discriminatory, could the limitation on the rights be considered reasonable and demonstrably justified in a free and democratic society?[16] If the answer to the latter question is yes, then section 1 of the Charter can operate to save offending legislation from being struck down as unconstitutional. There are two leading

10 *Canada Health Act*, see note 5 at section 19(2).

11 *Canada Health Act*, see note 5 at section 20(2).

12 A. Thomson, *Federal Support for Health Care* (Ottawa: The Health Action Lobby, 1991) at 11.

13 D. Fagan, "Health Costs Not Spiraling, But They Still Eat Up GDP" *The [Toronto] Globe and Mail* (25 August 1993) A5.

14 Thomson, see note 12 at 1.

15 Section 15(1) of the Canadian Charter of Rights and Freedoms reads as follows: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, *age* or mental or physical disability." (emphasis added)

16 According to section 1 of the Charter all guaranteed rights are "subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." For the original statement of the Supreme Court of Canada's test for this section, see the leading case of *R. v. Oakes*, [1986] 1 Supreme Court Reports 103.

Supreme Court of Canada cases on the issue of government legislation which discriminates against the elderly. In evaluating the scope and application of sections 15 and 1 of the Charter to the issue of user fees for the elderly, it is instructive to examine the reasoning of the court in each case, to determine the factors on which the court s decisions turned.

In *McKinney v. University of Guelph*,[17] the Supreme Court of Canada was given the opportunity to consider a section 15 Charter challenge to mandatory retirement provisions. The *Ontario Human Rights Code*, the legislation under examination in that case, only prohibited discrimination on the basis of age in employment up to the age of 65. The court found this

17 *McKinney v. University of Guelph*, [1990] 3 Supreme Court Reports 229.

Japanese Lessons

In 1973, as a result of a grassroots socialist movement among municipalities, the Japanese government implemented a system of public grants to lighten the health care cost burden borne by the aged.[1] Despite its initial popularity, this free medical care for the elderly lasted only ten years. By 1983 the numerous problems with the amendment had become painfully clear to the government. When the 1973 amendment came into force, [t]he number of the elderly in physicians waiting rooms immediately doubled and health costs shot up 300% in the [following] four years. [2] Health care costs soared from 1973 to 1983, as increased wages, the ageing of the population, the development of advanced medical care technology and changing disease patterns caused a rapid increase in costs.[3] More precisely, national medical costs for the aged rose 600% between 1973 and 1982, doubling from 10 to 20% of total health care costs.[4] As a result, the Japanese government passed a new bill in 1983,[5] in which one of the main features was the introduction of user fees for services to the aged.[6] A further motivation for the implementation of the user fees may have been to control indiscriminate use of services by...elderly patients. [7]

The user fees imposed by the 1983 law were a payment of 400 yen (about $3 US) for the first outpatient visit in a given month, and a charge of 300 yen ($2.25 US) per day for the first two months of inpatient care.[8] The inpatient charge was to apply to those over the age of 70 and those aged 65 to 69 years who were covered under another insurance plan.[9]

In 1985 the Council for the Health of the Aged submitted a report stating that the elderly could afford to pay more of their medical costs than required under the 1983 law. In response to this and other proposals from the Ministry of Health and Welfare, the law was amended in 1987[10] to reflect greater charges for both out-patients [800 yen ($6 US) per month] and in-patients [400 yen ($3 US) per day throughout hospitalization].[11]

A key question is whether these user fees have worked in Japan. As with any complex social calculus, the impact of a

1 *Amendment to the Law for the Welfare of the Aged* (1973).

2 C.W. Kiefer, "Care of the Aged" in E. Norbeck and M. Lock, eds., *Health, Illness, and Medical Care in Japan* (Honolulu: University of Hawaii Press, 1987) at 92.

3 Organization for Economic Cooperation and Development, *Health and Pension Reform in Japan* (Paris: OECD, 1990) at 14.

4 Kiefer, see note 2 at 90.

5 *Law of the Health and Medical Services for the Aged* (1983).

6 OECD Japan, see note 3.

7 Kiefer, see note 2 at 93.

8 Kiefer, see note 2 at 93.

9 OECD Japan, see note 3.

10 *Amendment to the Law of the Health and Medical Services for the Aged* (1987).

11 K. Sonoda, *Health and Illness in Changing Japanese Society* (Tokyo: University of Tokyo Press, 1988) at 55.

legislated age limit to be a breach of section 15. Likewise, in *Tetreault-Gadoury v. Canada*,[18] the Supreme Court of Canada held that a provision of the *Unemployment Insurance Act* that disallowed receipt of normal unemployment benefits by persons 65 years of age or older violated section 15 of the Charter.

It seems likely, therefore, that any government legislation that imposed health care user fees on the elderly would be ruled discriminatory. Where the effect of a governmental action is to impose a burden or remove a benefit from a group enumerated in section 15(1) of the Charter, then that action will be found to be discriminatory regardless of whether it was

18 *Tetreault-Gadoury v. Canada (Canada Employment and Immigration Commission),* [1991] 2 Supreme Court Reports 22.

single factor on health care costs in a country is nearly impossible to isolate. For example, possible deterrent effects of user fees may not have been at work in Japan. It has been noted that ...these cost-sharing requirements...have done little to diminish the average citizens proclivity to visit the physician often. [12] Low health care costs may have less to do with user fees than with the realization of other efficiencies. On the other hand, Japan is one of the few industrialized countries that appears to have its health care expenditures under control.[13] In 1990 Japan spent only 6.5% of its GDP on the provision of health care; Canada expended 9.1% of its GDP on health care that year.[14] Despite Japans relatively lower medical expenditures, the Japanese live longer than Canadians... and their infant mortality rate is lower. [15]

When Japan passed health care reform legislation in 1983 and amendments in 1987, it did so at a time when an extremely conservative ideology prevailed in Japan, and thus the law may not have been unpopular. Evidence to this effect comes from polls, conducted after 1987, which reflected public discontent with sales tax and defence, but did not cite any problems with the health-care system.[16] It has been observed that:

> [a]ll the evidence suggests that the public is satisfied with cost-sharing and is not averse to making some payment at point of service; in a society which has traditionally stressed the need for personal responsibility the governments approach to payment of services is not a contentious issue.[17]

Because of the very different context into which this Japanese law was thrust, Japanese lessons must be taken with a proverbial grain of salt. Currently, it would not be an easy task for a Canadian government to superimpose a Japanese system onto our markedly different society. However, similar conservative trends in Canada, coupled with similar demographic shifts, make it more and more likely that some time soon we may follow the lead of Japanese health care legislative reforms. ■

12 J.K. Iglehart, "Japan's Medical Care System" in M.M. Rosenthal and M. Frenkel, eds., *Health Care Systems and Their Patients* (Oxford: Westview Press, 1992) at 154.

13 R.G. Evans, "The Canadian Health-Care Financing and Delivery System: Its Experience and Lessons for Other Nations" (1992) 10 Yale Law and Policy Review 362 at 384.

14 D. Fagan, "Health Costs Not Spiraling, But They Still Eat Up GDP" *The [Toronto] Globe and Mail* (25 August 1993) A5.

15 M. Janigan, "A Prescription for Medicare" (31 July 1995) 108:31 Maclean's Magazine 10 at 10.

16 H. Fukui, "Japan in 1987: An Eventful Year" (1988) 28 Asian Survey 23 at 31.

17 M. Powell and M. Anesaki, *Health Care in Japan* (New York: Routledge, 1990) at 99.

motivated by a discriminatory purpose. The more complex question is whether the legislation could be saved by section 1 of the Charter. The answer to this question may be influenced by the final outcomes in *McKinney* and *Tetreault-Gadoury* for although the legislation in both cases was held to be discriminatory, in one it was upheld under section 1 while the other one was struck down.

Despite the finding in *McKinney* that the impugned section of the *Ontario Human Rights Code* contravened the Charter, the Supreme Court upheld the section as having been justified under section 1. The court reasoned that the specific provision sought to protect a certain group (that is, those aged 45-65) and that there was an acceptable rationale for the exclusion of those over 65 years of age:

> The truth is that...there are often solid grounds for imparting benefits on one age group over another in the development of broad social schemes and in allocating benefits.[19]

The court found that the legislature was attempting to strike a balance between the need to extend human rights protection to those over 65, and the possible congestion that would result in the workplace if older employees deferred retirement and younger ones were held back as a consequence. The court held that if legislation were to interfere with mandatory retirement, it would create personnel and human resource management problems in both the private and public sectors. Furthermore, the court determined that:

> [a] legislature should not be obliged to deal with all aspects of a problem at once. It should be permitted...to take account of the difficulties, whether social, economic or budgetary, that would arise if it attempted to deal globally with them.[20]

Therefore, the Code was permitted to stand unaltered, as it constituted a reasonable limit on section 15 Charter rights.

In contrast, the Supreme Court struck down the discriminatory provision of the *Unemployment Insurance Act* in *Tetreault-Gadoury.* The government contended that the main objective of the provision was to prevent abuse of the system by those who could also receive government pension money; in addition, the provision served to maintain coherence and rationality within the government s legislative scheme. While the court found

19 *McKinney*, see note 17 at 297.

20 *McKinney*, see note 17 at 237.

that these objectives were reasonable, it did not support the means used to accomplish them. The court noted that there was:

> ...no evidence...that those over age 65 abuse the Act any more than those in other age groups...The burden, of course, rests upon the government to adduce such evidence.[21]

The court also stated that avoiding double benefit payments, could have been achieved by simply deducting pension receipts from unemployment benefits. [22]

Finally, the court considered whether the objectives of the *Unemployment Insurance Act* would be furthered by the continued inclusion of the section in question, and, whether...denying benefits to individuals over 65...is compensated for by the provisions of other Acts. [23] It was noted that:

> ...there was no evidence put forth to show that the government could not afford to extend benefits to those over 65. More significantly, there is also no evidence to show that any of the other Acts attempt to fill the gap by addressing the problem of 65-year-olds who...do not receive a pension at all.[24]

The Supreme Court held that the government objectives could easily have been attained by less intrusive means, and the discriminatory section was struck down.[25]

Overall then, if health care user fees were imposed on the elderly, and such legislation was ruled discriminatory under the Charter s equality provisions, would that legislation be saved by section 1? The most valuable tools available to a government to justify legislation of this type under Charter scrutiny are empirical evidence, and reasonable consideration of alternatives. The onus is on the government to show that the mischief it sought to avoid is real, and preferably that it is quantifiable in economic terms. It would have to show that it could no longer afford to finance free medical care for the aged. Furthermore, it would have to demonstrate that it was the aged in particular who were straining the system. Such a contention would require evidence of increasing usage rates that correlate directly to ageing.[26] The government would have to establish that it had considered other alternatives, but reasonably felt that the legislation represented the smallest intrusion on the Charter rights of the elderly. If the court could

21 *Tetreault-Gadoury*, see note 18 at 45.

22 *Tetreault-Gadoury*, see note 18 at 45.

23 *Tetreault-Gadoury*, see note 18 at 46.

24 *Tetreault-Gadoury*, see note 18 at 46.

25 *Tetreault-Gadoury*, see note 18 at 47.

26 Such evidence would not be difficult to produce. See Marzouk, note 36; see also note 53 and accompanying text.

envision a less intrusive way for the government to meet its objectives, the user fees would not pass the minimum impairment test. Most likely, the court would also search for some guarantee that a person discriminated against, who could not afford the user fee, still could receive medical services without prejudice.

While an examination such as the one above may not take into account all of the considerations that might be pertinent to the Supreme Court, it is clear that it would not be impossible for a government to adduce the evidence required to uphold a discriminatory user fee law under section 1 of the Charter. As the *McKinney* decision demonstrates, legislation which has been shown to discriminate on the basis of age has been upheld by the Supreme Court in the past. This result suggests that discriminatory user fee legislation could be similarly upheld in the future.

Should A Canadian Government Follow Japan's Lead?

A. Potential Benefits

Three arguments, set out below, are traditionally raised in support of user fees. Additionally, this paper examines a fourth possible rationalization of user fees not found in other literature. The first argument is that user fees will generate net revenues. The theory is that actual revenue collected from patients will help to offset the costs of medical care. This theory is based on the premise that revenues from user fees will exceed the additional costs of administering such a system. In other words, the implementation of user fees must be a profitable endeavour for it to contribute any amount to the health care budget. Some critics have intimated that revenues from user fees would not outstrip additional administrative costs.[27]

The second argument in favour of user fees is that user fees will deter frivolous visits. This argument is based on supply and demand economic theory, which hypothesizes that, imposing prices on users of health services automatically reduces quantity demanded (and thus utilization) and thereby limits cost. [28] Empirical support for this theory comes from the RAND health insurance experiment, conducted in the United States from 1974 through the 1980s, which was one of the largest and most comprehensive studies ever undertaken in the health insurance field.[29] Although no

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27 *Preserving Universal Medicare* (Ottawa: Supply and Services Canada, 1983) at 23.

28 M.L. Barer et al., *Controlling Health Care Costs by Direct Charges to Patients: Snare or Delusion?* (Toronto: Ontario Economic Council, 1979) at 12.

29 J.P. Newhouse, *Free for All? Lessons from the RAND Health Insurance Experiment* (Cambridge: Harvard University Press, 1993) at 4.

elderly individuals or families were used as subjects, the experiment still provides some significant insights into the behaviour of a population faced with varying medical user fees. The study found that, [u]se of medical services responds unequivocally to changes in the amount paid out of pocket. [30] Furthermore, it was not necessary to implement extraordinary fees to have a significant deterrent effect since the largest drop in outpatient service usage occurred after the first level of payment, when services were simply no longer free.[31] While the RAND study may demonstrate that user fees cause reductions in system usage, it has been pointed out that the study, ...did not, and by design could not, show that this led to an overall system-wide reduction in utilization and costs. [32]

People use Canada's medical system imprudently because they do not appreciate the public expense inherent in medical services. Because we are accustomed to receiving free care, we consequently waste it as one might waste tap-water.

Some direct Canadian evidence on the deterrent effect of user fees comes from records kept in Saskatchewan during a brief period when that province implemented a user fee structure. In the late 1960s, Saskatchewan had a fee structure of $1.50 per office visit, and $2.00 per emergency, home, or hospital outpatient visit. The result of these fees appeared to be a reduction of hospital days by 2.5% for two years. After that, days of care and office visits returned to previous levels while admission rates increased by 10%.[33] Thus, Canadian indicators of the effectiveness of user fees as a deterrent to health care system use are not as clear cut as those of the RAND experiment.

A third argument suggests that user fees promote so-called cost association by linking value to medical services. This theory suggests that people use Canadas medical system imprudently because they do not appreciate the public expense inherent in medical services. Because we are accustomed to receiving free care, we attach no real value to it and consequently waste it as one might waste tap-water. User fees would make people link

30 Newhouse, see note 29 at 40.

31 Newhouse, see note 29 at 42.

32 R.G. Evans et al., "The Truth About User Fees" (October 1993) 14:8 Policy Options 4 at 7.

33 K.R. Grant, "The Inverse Care Law in Canada: Differential Access Under Universal Free Health Insurance" in B. Singh Bolaria and H.D. Dickinson, eds., *Sociology of Health Care in Canada* (Toronto: Harcourt Brace Jovaovich, 1988) at 118.

value and real cost to medical services. Dubbed the visible-link argument by prominent writers in the field,[34] the assumption is that people will be disinclined to waste a valuable commodity. This argument, however, could be flawed. Part payments, by attaching a nominal value to a costly service, might confuse the public even further. The end result could still be a vast undervaluation of medical treatment, causing the inherent side-effect of overuse to continue unabated.

Finally, user fees could provide individuals with an incentive to maintain desirable, health-conscious behaviour. The converse of a penalty for being sick is a reward for staying healthy (not a reward in actual monetary terms, but a reward in terms of user fee costs not incurred). On this basis, user fees would encourage individuals to look after their own health through diet and lifestyle improvement to save money in the short run. Dual benefits would result from this emphasis on prevention. First, presumably the medical system would be used less by a healthier population. Consequently, the overall public costs of running the system should decrease. Second, the population would actually get healthier surely the goal of health care systems generally. User fees may play a role in shifting the emphasis from treatment and reactive procedures to healthy choices that prevent later health problems. But the benefits of behaviour modification and systemic change go even deeper. Long-term benefits would accrue to individuals as future generations of Canadians are indoctrinated by their families to care for their own health. Monumental benefits would be reaped by a nation with a healthier population.

B. Potential Costs

There has been concern that deterrent measures like user fees could result in an actual decline in the overall health of the elderly, as people will be reluctant to see physicians when they ought to. The RAND study statistics tend to demonstrate that people are not willing to sacrifice needed or recommended medical procedures because a user fee exists.[35] Rather, they will rationalize their use of the system by evaluating more carefully whether their ailments require medical attention. Additionally, Canadian research implies that decreased use may not mean decreased health:

34 Barer, see note 28 at 12.

35 Newhouse, see note 29 at 42.

> Recent Canadian evidence suggests that increased hospitalization among the elderly is not curing morbidity...and that increased servicing to the elderly is associated with use of salvage activities and therapies of questionable effectiveness.[36]

By this account, concerns that user fees could result in a less healthy elderly population may be unwarranted.

The prevailing belief that elderly is synonymous with poor also requires re-evaluation. The idea that the elderly represent a poor group in society likely stems from their historically lower rates of income as a demographic group. The most recent Canadian census reports, however, indicate that the gap is closing rapidly. In addition, the situation is more complex than it first appears: it must be recognized that ability to pay can not be judged by a gross income comparison alone.

The first step, nevertheless, is to compare actual gross incomes. In 1981, the average gross income of all individuals up to 65 years of age was $15,275. The corresponding figure for a person aged 65 and over was $8927, approximately 58.4% of the income received by a younger person.[37] By 1990, however, an average male over 65 was reporting $24,500 in annual gross income 69% of that of his male counterpart aged 25-64, who earned $35,500.[38] The disparity for women was much less. An average woman over 65 reported $15,300 in gross income almost 76% of the $20,200 earned by an average woman aged 25-64.[39] These statistics demonstrate that women over 65 years of age have, on average, the lowest incomes. However, they also demonstrate that the elderly *as a class* are no longer as disadvantaged as they were 15 years ago, in comparison to the rest of the population, on the basis of their gross incomes.

A closer analysis of the statistics reveals numbers that are even more striking. If one compares the average income of seniors with that of persons 25 to 64, ...then after cross classifying by sex, by work activity (whether or not a person worked in 1990), and by education, in each case the average income of seniors was considerably *higher*. [40] From this finding one could extrapolate that ...the current trend towards higher educational levels of seniors will likely tend to reduce the future gap between the average income of seniors and that of the total population. [41]

36 M.S. Marzouk, "Aging, Age-Specific Health Care Costs and the Future Health Care Burden in Canada" (1991) 17 Canadian Public Policy 490 at 503.

37 *The Elderly in Canada* (Ottawa: Supply and Services Canada, 1984).

38 J.A. Norland, *Focus on Canada: Profile of Canada's Seniors* (Ottawa: Statistics Canada and Prentice Hall, 1994) at 46.

39 Norland, see note 38.

40 Norland, see note 38 (emphasis added).

41 Norland, see note 38 at 48.

Moreover, using gross income alone as a measure of ability to pay ignores real household spending power, which must factor in the costs of supporting dependants with no income. Thus, while younger individuals may earn more gross income, thereby appearing better off, younger households are also more likely to be supporting dependent members like children. In fact, average *per capita* income for senior families and households was higher than for Canadian families and households generally in 1990.[42]

A further problem with using gross income as a measure of wealth is that it does not account for debts payable, such as mortgages. In 1990, [m]ore senior households owned their own dwelling than did non-senior households. [43] Of these homeowners, 84% of senior-owned dwellings were completely mortgage-free as opposed to only 38% of non-senior owned dwellings.[44] Clearly, if two people have similar incomes, the one with fewer debt obligations will be better able to pay for health care and other costs.

Finally, gross income does not consider accumulated wealth. Of total income for seniors, 23% comes from investment.[45] This statistic demonstrates that many elderly hold substantial amounts of amassed capital. This fact has led one commentator to note that:

> [i]t is distributionally unjust for the heirs of an elderly person to profit by institutionalizing that person at public expense and then banking the public pension or earnings from the elderly persons capital (if there is any)...until, in due course, the cumulated pension and other earnings become part of the estate.[46]

This reasoning can be extended to health and medical care generally. The heirs of the wealthy elderly should not be allowed to benefit while the testator receives costly medical treatment at the expense of the tax-paying public.

Simply put, someone has to pay for health care, therefore wealth is a relative concept. The question becomes: will the next generation of wage earners and tax payers be better off, thus better able to pay than the next generation of elderly? This seems unlikely. According to a 1993 G7 draft report on ageing and health care,

> [i]f present policies are not changed, medical costs and pension payments will go up while the workforce shrinks and member states growth rates possibly slide.[47]

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42 Norland, see note 38 at 50.

43 Norland, see note 38 at 55.

44 Norland, see note 38 at 55.

45 Norland, see note 38 at 49.

46 Barer, see note 28 at 57.

47 T. Heneghan, "Japan: G7 Draft Report Focuses on Aging and Health Care" *Reuter News Service - Far East (LEXIS)* (6 July 1993).

The OECD projects that the dependency ratio in most countries will exceed 3:1 by the early 21st century,[48] and that the percentage of the Canadian population 65 years of age or older is expected to nearly double in the 50 years between 1990 and 2040.[49] It has been calculated that the Canadian health care-to-GDP ratio is likely to double over the next 40-45 years. [50]

Furthermore, as a result of improved medical technology and better lifestyles among the elderly, [51] Canada is experiencing ageing-within-ageing whereby there are now proportionately more of the older-old (meaning those 75 years of age and above).[52] Since it is well documented that the elderly use proportionately more health resources, and that the older elderly use more again, Canada's health care system may require even more than double its present resources solely because of changing demographics.[53] An overburdened base of taxpayers will have to look to those using the system disproportionately for some help in funding this use.

Simply put, someone has to pay for health care. The question becomes: will the next generation of wage earners and tax payers be better off, thus better able to pay than the next generation of elderly?

Canada In The 1990s

Attempts to tamper with medicare probably would be unpopular in Canada, as medicare is by a considerable margin the nation's most...popular public program. [54] However, many provinces and the federal government have imposed unpopular restraints and cutbacks on public spending and services, rationalizing these cuts to voters as necessary actions or means to control the deficit. Further, an increasingly dynamic political landscape makes it uncertain whether medicare will receive the same protection in the future.

Canada is presently governed by the federal Liberals, who have traditionally supported a number of Canadian public welfare programs, including medicare. In fact, it was a Liberal government that first implemented the program in the 1960s. In the 1990s, however, there appears to be a growing

48 OECD Japan, see note 1 at ix.

49 OECD Aging, see note 2 at 22.

50 Marzouk, see note 36 at 501.

51 Marzouk, see note 36 at 491.

52 Marzouk, see note 36 at 491.

53 Marzouk, see note 36 at 492.

54 R.G. Evans, "The Canadian Health-Care Financing and Delivery System: It's Experience and Lessons for Other Nations" (1992) 10 Yale Law and Policy Review 362 at 362.

conservative movement in Canada, as witnessed by the rapid rise in popularity of a new, right-wing party the Reform Party. In the most recent Canadian federal election, the Reform Party took 52 seats in the House of Commons, one seat less than the Bloc Quebecois (who became the official opposition). The leader of the Reform Party, Preston Manning, has stated that

> ...a Reform Party government would repeal much of the Canada Health Act and allow individual provinces to reform the medicare system under much looser guidelines.[55]

Great benefit could come from information gained by experimenting with user fees. But the Canada Health Act does not allow for such experimentation.

Mr. Manning is quick to point out, however, that he is not calling for user fees. Rather, he believes the decisions on health care issues should be made by the provinces and provincial electorates.[56]

Surprisingly, the Prime Minister has also made statements recently that bode poorly for the unaltered continuation of medicare in Canada. Jean ChrØtien has stated that medicare needs to be rethought if Canada is to control its health care to GDP ratio; indeed, that:

> ...$10 billion should be cut out of health care spending to get it down to European levels of 8 to 9% of GDP.[57]

During the same interview, Mr. ChrØtien indicated that federal involvement in medicare was originally intended to be temporary in nature and that the provinces might be ready now to reassume full responsibility for its administration.[58]

As mentioned earlier, the federal government is also losing power over the provinces as a result of decreased health care funding. There have been recent signs of discontent from some provinces. For example, Alberta began to charge patients for certain costly procedures by offering them only through private clinics. At first, federal Health Minister Diane Marleau threatened to cut Albertas payments. Now, a compromise seems imminent as Ottawa and the provinces have agreed to define together what constitutes a medically nec-

55 "Medicare reform, but not Reform's" *The [Toronto] Globe and Mail* (30 September 1993) A26.

56 See note 55.

57 M. Barlow and B. Campbell "Straight Through the Heart" (November 1995) 74:844 Canadian Forum 22 at 22.

58 Barlow, see note 57.

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essary service. The list is expected to exclude many services, and Canadians may soon face more charges for care.[59] From this result, it seems both the provinces and the federal government recognize that the predicted shift in power over medicare has begun. It may not be long before financially burdened provinces begin implementing fees for health services with impunity.

Conclusion

This paper has sought to address two main questions: can Canada copy Japans lead by instituting health care user fees for the elderly; and should Canada take such action? The debate as to whether it would be economically, politically, or socially astute to create a user fee structure is a contentious one. On the one hand, Canada spends an inordinate percentage of its GDP on health care.[60] To rely on present growth rates to subsume future escalation of health care costs may be a mistake. If the economy were to falter in the future, the health care cost to GDP ratio might become unbearably large.[61] Politicians from all parties, supported by a strong conservative movement in Canada, have begun to face the challenges posed by the expense of social programs. Recent statements and actions of key political players intimate that medicare as Canadians know it may not exist for much longer.

Yet one wonders if the proposed user fees would significantly reduce the governments burden of health care provision. It seems likely that user fees would contribute towards health care budgets, have a deterrent effect on frivolous visits, and create an economic incentive to pursue more health-conscious behaviour, which in turn could result in systemic change and a healthier society. It also appears that user fees would produce no appreciable decline in the health of the elderly population, and that it is the elderly themselves who will be in the best position to pay their own medical costs in the near future. Great benefit could come from information gained by experimenting with user fees. But the *Canada Health Act, 1984* does not allow for such experimentation,[62] thus the present debate is largely theoretical.

It has been said that medicare is the last truly Canadian thing left; that it epitomizes the Canadian spirit of protecting those who can not protect themselves. But the time seems near when the young can no longer afford to protect the old, and the old may no longer need protecting. ■

59 M. Janigan, "A Prescription for Medicare" (31 July 1995) 108:31 Maclean's Magazine 10 at 10.

60 In 1993, Canada spent $72 billion or 10.1 percent of its GDP on health care. This ratio is the second highest in the world behind only the United States: see Janigan, note 59 at 11.

61 See Heneghan, note 47, and accompanying text.

62 W. Watson, Report of the Policy Forum on Medicare in an Age of Restraint (Kingston: Queen's University, 1984) at 12.

Pension and Power

There are four main ways that the state has provided for income security in old age. **Old Age Security** (OAS) provides a universal indexed grant to all seniors over 65 and may be supplemented by the **Guaranteed Income Supplement** (GIS). First developed as a stop gap measure for the worst cases of elderly poverty in the 1930s, full OAS and GIS benefits are capable of putting married seniors within striking distance of the poverty line, but not of getting them out of poverty. Benefits for unattached seniors are well below the poverty line. The second option, the **Canada Pension Plan** (CPP), is publicly administered and mandatory for everyone in the paid work force. Unlike the OAS and GIS, benefits are tied to contributions made by workers and their employers throughout their working life. Payments are made of 25% of a worker's average earnings between the ages of 18 and 65, and the maximum insurable earnings for each year cannot exceed the average industrial wage. Like the OAS and GIS, the CPP is indexed to the cost of living. Third, the government provides tax deductions for private employer sponsored pension plans, **Registered Pension Plans** (RPPs) which often are negotiated by unionized and professional employees. Finally, individual savings incentives are offered in the form of tax deferrals for **Registered Retirement Savings Plans** (RRSPs).

Policy

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Pensions are big news. The ageing of Canadas population and the persistence of poverty among Canadas elderly, especially women outside of marriage, means that the laws that shape our economic well being in old age are of significant concern to people of all ages. Pensions are required because the poverty of the elderly is structural: it is the result of a market economy that is based on wage labour, but that denies access to wages to the old. These market forces make it necessary for the government to enlist society as a whole to support seniors through public income security plans at retirement age. However, increasingly the government is returning this role to the market.

Lately we cannot turn on the news or read the paper without a story about how the baby-boomers are going to break the Canada Pensions Plan, and how we need to invest in RRSPs. Less visible are the competing interests and power struggles that ultimately have determined the purpose

and structure of income security in old age and that have shaped pension law in Canada. The governments endorsement of the RRSP, an individual savings model encouraged by massive tax expenditures, has been the most significant change to government pension policy in the last 30 years. The development of the RRSP as the primary retirement income vehicle is much more problematic than the lack of critical attention in the media might indicate: as a pool of capital for investment, RRSPs serve their purpose well; but in their role as a government sponsored and subsidized means of addressing the problem of elderly poverty, they call for deeper analysis. Like poverty itself, pension law is an important location for the construction of social power. The increasing privatization of retirement savings vehicles cannot be understood in isolation from the social context that engendered it.

In the last ten years, federal legislation has made RRSPs increasingly accessible. Ottawas 1988 budget provided for an annual $1,000 increase in the allowable tax exemption for retirement savings, from $7, 500 in 1987 to $15,500 in 1995.[1] As the *Globe and Mail* remarked in a special section on financial planning in 1993, rising RRSP contribution limits contain a clear message from the government [that] personal savings, the [fourth] component of retirement savings, is fast becoming the crucial one.... They re saying: here are the tools you need to fund your retirement dont expect us to do it. [2] What this article does not say, however, is that the virtual abandonment of direct public solutions to the inadequacies of the current pension system has left most Canadians with no alternative.

The public pension system the CPP, OAS and GIS has been weakened significantly in the last fifteen years. Forward progress was halted in the late 1970s, when Ontario vetoed a drop-out clause in the CPP that would have excluded up to six years time, put into raising children, from the calculation of average contributions. In 1985, the Mulroney government moved to de-index public pensions from the cost of living but was blocked by senior citizens in an effective show of strength.[3] In 1987, the same government limited the universality of the OAS by including it in calculations of taxable income. With the 1995 budget, the federal government began to tax OAS benefits on the basis of family income rather than individual income, and now is promising to move towards a means tested rather than universal grant. The social

1 Currently, Finance Minister Paul Martin has frozen the exemption at $13,500. While this represents a decline from 1995 levels, it should be noted that the maximum allowable tax exemption has been entrenched, for the time being, at almost double the 1987 limit: see *Budget 1996: Budget Plan tabled in the House of Commons by the Honourable Paul Martin, PC, MP, Minister of Finance* (Canada: Department of Finance, 6 March 1996) at 50.

2 Gail El Baroudi, "For fifty-somethings, a new sense of urgency" *The [Toronto] Globe and Mail* (21 September 1993) C1 at C7.

3 The OAS and CPP have been indexed to the cost of living since changes to their Acts in 1971, so that benefits increase as inflation increases.

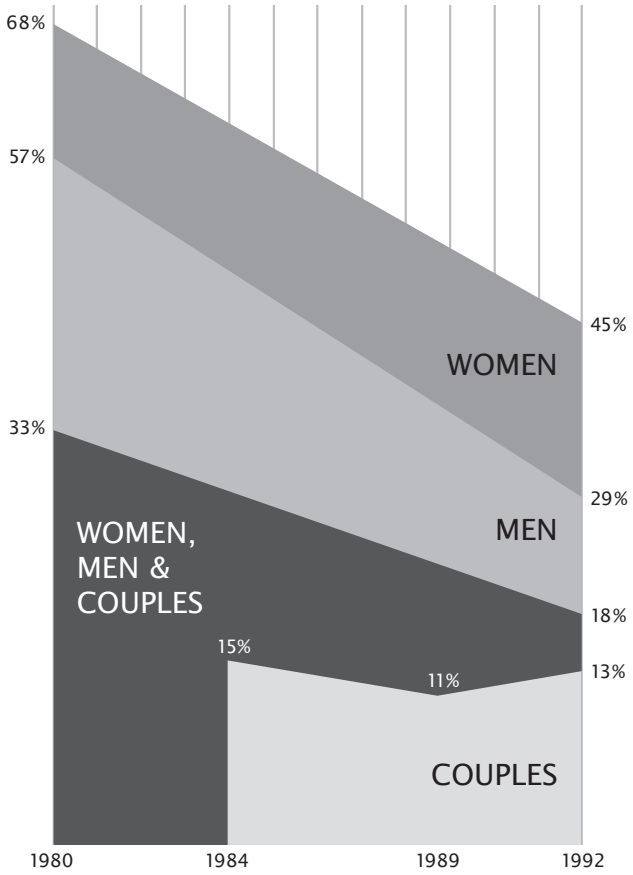
transfer legislation introduced with the 1995 budget has thrown the enforcement of national standards back to the provinces, and the provincial finance ministers already are discussing a lowering or dismantling of those standards. The effect has been to create a great deal of insecurity about OAS and the CPP, and to drive Canadians who can afford it toward private pension solutions.

Powerful Players in Pension Law Reform

Fifteen years ago, the traditional players in making pension policy business, labour and government were fighting over how retirement income should be structured to meet the shortcomings of company sponsored pension plans. Other groups with a large stake in the final outcome also entered the debate on the basis of a different set of priorities. Womens advocates were most visible, but also were joined by senior citizens groups and social welfare organizations. In many ways, however, the parameters of the debate had already been defined. The four tiers of the pension system establish a state enforced hierarchy between the interests of private profit and public benefit; between earners and non-earners; and between universal programs designed to promote equality, and individualized programs designed to promote initiative.

Graph A: POPULATION DISTRIBUTION BY AGE

Ratio of persons 65 or more years of age to persons under 65 years of age, grouped by year. From the National Council of Welfare, "Fighting Poverty: The Effect of Government Policy," in D. Drache & D. Cameron, eds., *The Other McDonald Report* (Toronto: James Lorimer & Co., 1985).



Poverty Rate among unattached women, unattached men and couples over 65 years old. From the National Council of Welfare, *Poverty Profile 1992* (Ottawa: Minister of Supplies and Services, 1994).

Graph B: POVERTY RATES

War metaphors were rampant as organized labour geared up for battle on the pensions issue in the early 1980s. Its agenda was to reform private employer pension plans, including providing for improved vesting mechanisms, portability and survivor benefits, joint union and company administration, and full disclosure to unions of company plans.[4] Labour s priorities, of course, were different from and even contradictory to the priorities of business. Even more at odds with the agenda of corporations was labour s endorsement of a primarily public pension scheme in preference to the private plans. The Canadian Labour Congress in 1980 called for the doubling of CPP benefits to 50% of the average wage so that workers not covered by private plans would not be left without a secure income after retirement. They also supported, in principle, an expansion of the GIS and OAS. The state, they argued, had a vital role to play in providing for all workers and in regulating the power of the corporate sector and pension industry.[5]

4 See, for example, Bob Baldwin (National Representative of the Canadian Labour Congress), "CLC Policy and the Politics of Pensions Reform" in *Pensions: Public Solutions vs. Private Interests: Conference Proceedings Series No. 1* (Ottawa: Canadian Centre for Policy Alternatives, 1981) at 199.

5 Louis Erlichman, "An Expanded Public Pension Plan and Collective Bargaining" in *Pensions*, see note 4 at 169.

For the most part, however, labour remained focused on a wage-replacement model of retirement income that favoured earners over non-earners. The CPP was central to its platform in that it incorporated the equalizing effects of direct state involvement in a near-universal program, while continuing to reward paid labour above unpaid work. CPP also keeps profits from the pension plan out of the hands of industry, investing them instead in universal and indexed benefits after retirement.

Organized labour's emphasis on the earnings-based CPP did not answer the concerns of women, poverty advocates or the elderly; nevertheless, for these groups any public system that provided for income after retirement was preferable to private pension schemes. Submissions to the Ontario Royal Commission on Pension Reform of that era make it clear that the focus of private pension schemes — individual self-maximization over universality and equality, for the benefit of high earners over low earners — was not going to meet the needs of women or the poor. Even when representatives of private plans did consider the specific needs of women, they considered women only as dependents or survivors of plan members, and never as members in their own right. The Royal Commission thus remarked that:

> it is evident from many briefs to this Commission by organizations involved in the pension industry, such as Canadian Institute of Actuaries, Canadian Life Insurance Association, Canadian Manufacturers Association, and Trust Companies Association, that the position of women is not seen as an issue in future pension planning. When the matter is addressed, it is in terms of the dependent stereotype - that is, women are not considered as pension plan members, but only as *survivors* of plan members.... A common recommendation from the industry might urge an automatic joint-life provision in plans, but no discussion is found which relates the provisions of pension plans to womens need, desire and ability to provide for their own financial security.[6]

Clearly, womens need to provide for their own security was not a priority for the private pension industry. But it should be noted that this industry is, almost by definition, ill-equipped to address the issue of poverty among older women. Many women do not even have the option to choose private pensions because they do not work for pay. Of those women who do have access to

6 Monica Townson, "Women and Pensions" in *Pensions*, see note 4 at 133.

private employer plans in their own right, many are still at a disadvantage within the wage earning model because of womens lower wages and their decreased and interrupted participation in the paid work force. For these reasons, many womens groups rejected private systems altogether and focused on changes to the two tiers of public retirement income: the CPP and OAS/GIS.

The Canadian Advisory Council on the Status of Women was one of the organizations working for change to the CPP. This group fought to make CPP credits recognized as marital property, thereby giving women some access to their spouses accumulated benefits in case of marriage breakdown. They also fought to incorporate a drop-out clause in the CPP, similar to the one in the Quebec Pension Plan, that would exclude up to six years spent in unpaid child care work from the calculation of average wage. More radically, the council lobbied hard for a provision in the CPP to value womens unpaid work in the home in the form of homemakers pensions.[7] Homemaker pensions, it was argued, would acknowledge the merit of womens work, and recognize that women are deserving of retirement income in the same way that mens pensions are considered a right and not a gift.[8] Surprisingly, this plan was even fleetingly discussed, though not pursued, during the 1984 federal election campaign.[9]

Others, however, were convinced that the wage-replacement model upon which the CPP was based was intrinsically incapable of meeting older womens needs for financial security and independence. Economist Diane Bellemare, in a brief to a pension policy conference in 1981, argued that:

> ...any restructuring of the retirement income security strategy must transcend the notion of individual self-reliance which predicates the adoption of contributor pension plans associated with remunerated employment. In other words, to be effective, any review of our present income security strategy must dissociate the right to a decent retirement pension from participation in the labour force and the amount of contributions paid. This dissociation is imperative if we really want to deal with the problems faced by those already retired, by women and by those whose participation in the labour force is irregular.[10]

From this perspective the entire basis of the CPP pension scheme the preference for the waged over the unwaged, and the unquestioned correlation

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7 *Homemaker Pension; For work that deserves concrete recognition* (Canada: Advisory Council on the Status of Women, 1985).

8 Louise Dulude, "Pension Reform with Women in Mind" in *Pensions*, see note 4 at 159.

9 "Pensions for homemakers recommended" (18 April 1983) 16:16 Ottawa Letter 120 at 120.

10 Diane Bellemare, "Collective Strategies for Retirement and their Underlying Values" in *Pensions*, see note 4 at 46.

between waged work and the right to a decent retirement income needed to be fundamentally challenged in a way that, from a theoretical point of view, not even homemaker s pensions would do. Both Bellemare and the Council s homemaker pension proposal, however, share a common understanding of the role of the state in pension law. In fighting for the expansion of universal state benefits, these advocates were once more looking for ways to break the structural dependence of women on a male wage that is implicit in the wage and work force structure, and mirrored in earnings based pension plans.

Women s advocates were joined by anti-poverty advocates and senior citizens groups in calling for a de-emphasis on the wage replacement model in favour of an expansion of the OAS and GIS. The National Welfare Council argued that an expansion of the public system was the only means to address the needs of the unpaid and underpaid specifically women, the unemployed, and the disabled. The *Association quØbØcoise pour la dØfence des droits retraitØs et des prØ-retraitØs* (AQDR) advocated a universal and public system for everyone, with fixed benefits for everyone men and women, administered by the State. It would be indexed and managed publicly and in part by the elderly themselves, without involving the private pension industry. The scheme would provide benefits of 15% above the poverty line, a flexible age of retirement, and better home care services.[11]

The entire basis of the CPP pension scheme, the preference for the waged over the unwaged, and the unquestioned correlation between waged work and the right to a decent retirement income needs to be fundamentally challenged in a way that not even homemaker's pensions would do.

Thus, despite different views as to how it should be accomplished, women, seniors, anti-poverty groups, and labour all argued that supporting the elderly was the responsibility of society as a whole and not only of the individual. This philosophy was in marked contrast to the agendas of

11 Claude de Mestral, "Recommendations and Priorities of the Elderly" in *Pensions*, see note 4 at 237-238.

private suppliers of pension funds and the industries that relied on their services. In 1981, senior corporate officials in the pension industry took the position that they would fight to the last breath in this country against any further expansion of the Canada Pension Plan or the Quebec Pension Plan because they would consider that a declaration of war against the private enterprise system. [12] The assortment of interests loosely referred to as the Pension Industry would ultimately demonstrate that they had the power to make it a very good fight.

The Pension Industry actually comprises a range of different institutions and actors, united by their diverse interests in large accumulations of capital available for investment. It includes as its allies Canadas business leaders, and even international powers such as the Organization for Economic Cooperation and Development.[13] Lobby groups like the Committee on Pension Policy include the Canadian Chamber of Commerce, the Financial Executives Institute, and the Canadian Manufacturers Association. Institutional investors like trust companies, banks, and investment companies are the primary carriers of private pension moneys. In return, the industry profits from the stock investments, and even venture capital, that derives from these moneys.

The introduction of the RRSP appears to address some of the specific demands of labour and women's groups for greater portability and flexibility. However, the move toward an individual savings model is a distinct setback for those seeking to modify the inequitable distribution of benefits provided by the private market system.

The Toronto Stock Exchange stated that pension funds and other institutional investors have vitally influenced macro-economic performance. [14] In 1979 institutional investors held nearly 56% of all stocks and roughly 80% of all bonds.[15] Their potential was already being recognized as a source of venture capital by merchant bankers, and as the key supply of investment in industry.[16] As pension funds became ever larger and more

12 Mike Rygus, "The Realities of the Problem: A Labour View" in *Pensions*, see note 4 at 9.

13 In 1992, the OECD was urging governments to adopt RRSP models for retirement income: see Elizabeth Duskin, "Private Pensions and Public Policy," OECD Social Policy Studies No. 9 (Paris: Organization for Economic Co-operation and Development, 1992).

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aggressive in their investments, a massive influx of capital was expected for the oil and hydroelectric sectors, young industrial companies, and foreign securities markets.[17] By 1982 the role of pension funds in supplying the capital resources of the economy was substantial.

At that point, the pension industry was not reconciled completely to a public pension plan that redistributed payments as fast as it received them. It endorsed, instead, the development and expansion of the Registered Retirement Savings Plan. Tax breaks for individual savings were comparatively limited in 1982, but the pension industry saw great potential in them. RRSPs, like private employee pension plans, would continue to feed the need for vast concentrations of capital for investment. At the same time they are more portable, flexible, and profitable than are company sponsored plans. Industry also supported an individual approach because it lifted the contribution burden imposed on employers in work-related pension schemes.

The entrenchment of an individual savings approach, facilitated through tax breaks and private plans, thus had significant benefits for many in the financial and business sector. And it is this corporate agenda that has been taken up by finance ministers, from Michael Wilson to Paul Martin, in the significant reallocation of government funds away from universal OAS toward massive tax expenditures to support private savings in the form of RRSPs.

The Privatization Agenda

Amendments to employment pension plans, and the introduction of the RRSP, appear to address some of the specific demands of labour and women s groups for greater portability and flexibility. However, the move toward an individual savings model is a distinct setback for those seeking to modify the inequitable distribution of benefits provided by the private market system. The shift to privatization is an entrenchment of the interests of the pension industry in Canada and internationally, at the expense of equity concerns.

By itself, state identification with the interests of industry does not explain the radical new direction that pension law has taken in the last fifteen years. The government s move to a highly privatized, individual-based pension scheme has been embraced not only by industry but by a range of

14 Toronto Stock Exchange, "Submission to the Royal Commission on the Status of Pensions in Ontario" (Toronto: TSE, 1978) at 40 as cited in Richard Lee Deaton, "The Political Economy of Pensions: The Political and Economic Framework of the Canadian Pension System" in *Pensions*, see note 4 at 76.

15 Deaton, see note 14 at 83.

16 A recent article in *Maclean's* demonstrates that this potential has been realized. Ironically entitled "Looking Forward to Retirement," the article barely mentions the role of pension plans in providing retirement income but instead focuses on the increasing use of private pension funds to back corporate takeovers: see Andrew Willis, (27 March 1995) 108:13 *Maclean's* 36-37.

17 Allan Robinson, "Innovation in Investment" (22 December 1979) 73 The Financial Post S9.

high-powered groups. It is a move that has been facilitated by the decentralization of power over welfare issues, the concentration of federal power over finance and tax issues, the shift within the media's treatment of pensions from a social to an economic model, and finally by the strong social tradition of liberal individualism that government and industry have played upon in their characterization of pension issues.

This last factor, a liberal tradition that places responsibility for economic well-being for all members of our society on the individual or nuclear family, has been particularly significant. Diane Bellemare has argued that an individualistic economic philosophy always has informed the structure of the state pension system.[18] This philosophy fits neatly with arguments that maintaining one's standard of living at retirement is an individual or family responsibility best left to private market forces.

The liberal tradition is institutionalized in our wage-based system of retirement income and, as such, is in sharp contrast to the view, held by social advocates, that elderly poverty is structural and the responsibility of society as a whole. Today's pension paradigm maintains an individualistic component that de-emphasizes the potential role of society as a whole, through the state, in supporting our seniors and protecting vulnerable groups from systemic inequities in the economy. As a result, OAS and GIS are seen increasingly as charity rather than as a fulfillment of Canada's social responsibility to those seniors who are excluded from access to a self-sufficient wage. What is interesting, and harder to explain, is precisely why the private savings model has eclipsed the competing concept of universality so effectively in pension policy.

The structure of Canadian federalism encourages federal funding through regressive tax expenditures rather than through publicly funded programs. While changes to the pension system by way of tax reform can be made unilaterally by the federal Minister of Finance, reform of the health and social welfare aspects of pension policy depends on the cooperation of every province, and can be blocked by just one. A unique consensus among most provinces was achieved in the late 1960s and early 1970s, when many of Canada's national health and welfare programs were established. This consensus would later prove to be a delicate one, however, as seen in

Today's pension maintains an in component that the potential rol as a whole, thro in supporting ou and protecting groups from sys inequities in the As a result, OAS are seen increas as charity rathe a fulfillment of social responsib

18 Bellemare, see note 10 at 21

Ontario's single-handed rejection of the drop-out clause for mothers in the CPP. Factors such as constitutional conflict have made that consensus even weaker.

Already, the Canada Health and Social Transfer (CHST), to take effect on 1 April 1997, has dismantled national standards in both health and welfare, two of the hardest fought compromises between the provinces and the federal government.[19] This change will begin a new era of interprovincial rivalry and competition for federal funding. The effect of this devolution of power to the provinces already threatens to affect income security for seniors, as provincial finance ministers meet and argue about age of retirement and cutbacks in funding.[20] It is arguably the power vacuum created by the federal government's withdrawal from the business of creating national standards that has opened the door so significantly to advocates of pension privatization.

Today's pension paradigm maintains an individualistic component that de-emphasizes the potential role of society as a whole, through the state, in supporting our seniors and protecting vulnerable groups from systemic inequities in the economy. As a result, OAS and GIS are seen increasingly as charity rather than as a fulfillment of Canada's social responsibility.

The private pension industry in particular is well-placed to make its views known: it is an influential lobby group, and its influence seems to have increased with its wealth over the last 15 years. Particularly since 1988, when personal tax exemptions for RRSP contributions began to increase by $1,000 per year, the providers of RRSPs and mutual funds have become increasingly powerful. In 1994 the *Globe and Mail* reported that mutual fund companies have a vested interest in the current system. Of the $130 billion invested in mutual funds, an estimated $26 billion to $39 billion is held in RRSPs. [21] This amounts to a great deal of economic power on which the government itself

19 The CHST was introduced on 27 February 1995 in *Budget 1995: Budget Plan tabled in the House of Commons by the Honourable Paul Martin, PC, MP, Minister of Finance* (Canada: Department of Finance). The standards appear in the preambles to the *Canada Assistance Plan*, RSC 1985, chapter C-1 and the *Canada Health Act*, RSC 1985, chapter 6, section 1.

20 See, for example, "Latest Budget — A 'Humane' Approach to Solving Deficit Woes" (28 February 1995) 23:5 Ottawa Letter 49 at 49.

21 Ellen Roseman, "Mutual fund firms strongly oppose moves on RRSPs" *The [Toronto] Globe and Mail* (8 December 1994) B7.

has become dependent. In a lead-up to the 1996 budget, *Macleans* reported that despite pressure to lower the amount of tax exemptions given to the wealthy in the form of RRSPs, the finance minister [was] unwilling to lower the ceiling because RRSPs provide a desperately needed pool of domestic savings that Ottawa itself draws upon. [22] Both the pension industry s increase in wealth and the increased dependence of the government on that wealth have solidified the position and power of RRSP advocates. In turn, discourse about pensions is shaped by that power, and effectively disempowers advocates of a public plan: organized labour, the poor, seniors groups and women s organizations.[23]

The shift in pension discourse from a health and welfare issue to a financial one is reflected in media treatment of the subject. Discussions of pensions appear increasingly and disproportionately in business publications, which naturally tend to address pensions from the perspective of their primary readers the business community.[24] As this perspective carries over to the mainstream media, the interests of Canadians as citizens facing eventual retirement is almost completely absent from the dominant discourse and evaluation of pension performance. The problems that women face in meeting their needs in retirement, for example, takes on a very interesting light in the business section of the *Globe and Mail*. In a story entitled Wage Gap Adds Urgency for Women, the subtitle is Bleak pension prospects dictate maximum RRSP contributions. While recognizing that many women feel they cannot afford to contribute to an RRSP, and that women today still earn significantly less than men, the article concludes that women will just have to learn to save more. The article does not argue in favour of a more equitable system; nor does it explain how women who make less can save more and still support themselves and their families.[25]

The language and framework of these articles is in itself alienating and intimidating to those who would like to understand the new terms of the pension debate. For this reason the former Director of the National Council of Welfare in 1982 saw one of his organizations primary roles to be to translate the issue into lay terms and concerns. In his view, [t]here are few areas of public policy so given to misinformation, misunderstanding and just plain ignorance as pensions. [26] Thus, when the Canadian public is told

22 E. Kaye Fulton and Mary Janigan, "Previewing the Budget" (26 February 1996) 109:9 *Maclean's* 18 at 19.

23 Richard Lee Deaton, *The Political Economy of Pensions: Power, Politics and Social Change in Canada, Britain and the United States* (Vancouver: University of British Columbia Press, 1989) at 232-260.

24 Last year, the author conducted an informal survey of articles in the *Globe and Mail* with the word "pension" in their titles. In 1995, 28 of 41 stories (excluding celebrity pension issues such as MPs' pensions) were in the Business section of that paper, and dealt primarily with pensions as investment vehicles. Of the 13 articles on government policy in Section A, seven were specifically concerned with the unreliability and cost of public pensions and retirement income.

25 Ann Kerr, *The [Toronto] Globe and Mail* (21 September 1993) C7.

26 Ken Battle, "They also Serve who Stand and Complain: Social Welfare Groups and the Politics of Pension reform" in *Pensions*, see note 4 at 213.

that the government just can t afford universality any longer, as it was by a financial expert in a *Globe and Mail* story,[27] the argument is taken as unbiased fact by more and more citizens who have now been taught not to expect even a basic government pension when they retire.

Moving pensions from the social welfare arena to the realm of business and economic development does more than merely downplay the important social issues connected to pensions. It actually presents a misleading impression of economic efficiency. Again the experience of the National Welfare Council is relevant: the group points out that [t]ax expenditures are expensive, largely hidden from public view, and are increasing faster than direct spending on visible government programs. [28] Nevertheless, these indirect expenditures are nearly impervious to the scrutiny of a public that is increasingly concerned about more visible government spending.

The shift in pension discourse from a health and welfare issue to a financial one is reflected in media treatment of the subject. Discussions of pensions appear increasingly and disproportionately in business publications, which naturally tend to address pensions from the perspective of their primary readers – the business community.

Implications

With increased reliance on the RRSP comes new priorities. Pensions now are evaluated not simply in terms of their effectiveness in ameliorating poverty among the elderly, or maintaining the standard of living of retirees, but increasingly in terms of their effectiveness as investment vehicles for industry. This view applauds the concentration of increasing amounts of RRSP contributions in the hands of banks and pension vehicles. Industrial profitability becomes as important as the standard of living of retirees.

27 El Baroudi, see note 2.

28 National Council of Welfare, "Fighting Poverty: The Effect of Government Policy" in Daniel Drache and Duncan Cameron, eds., *The Other McDonald Report: The Consensus on Canada's Future That The Macdonald Commission Left Out* (Toronto: James Lorimer & Co., 1985) 63 at 78.

For some it is no doubt a win-win solution. For individuals with income to invest, who are looking at a number of career changes throughout their working lives, the current regime provides some flexibility. RRSPs are controlled by the investor, and the interest accrued goes directly to that investor. Banks, as well, will continue to show record profits, and significant amounts of tax dollars in the form of exemptions will flow to those with the highest incomes. But the private and individual pension model does little, if anything, to solve the problem of poverty among seniors generally. Moreover, RRSP deductions drain tax dollars from general government revenue, thereby reducing the ability of the state to fund more equitably-distributed public pensions.

The RRSP cannot serve as a straightforward replacement for the public pension system precisely because it is based on the availability of a surplus individual income for savings, and therefore is not available to all Canadians. In 1993, Statistics Canada registered that only about 26% of tax filers put money into RRSPs this is a lower coverage rate than even that of employer sponsored plans a decade earlier. While newspaper reports indicate that more and more people are taking advantage of RRSPs, it is not at all clear that RRSPs will benefit even a bare majority of the population.[29] Nor are the benefits of the private savings model equitably distributed among taxpayers. The RRSP tax structure is regressive: it benefits the wealthiest the most because it provides for a tax deduction commensurate with ones tax bracket.[30] RRSPs offer little in tax savings or income security to people in the lowest income brackets.[31]

Ultimately, RRSPs are of least benefit to those who need income security the most: the single, widowed and lesbian women who suffer the worst poverty after age 65.[32] (See Graph B) RRSPs are more flexible than private employer sponsored pensions in terms of accommodating womens work force patterns; given the absolute failure of company sponsored plans to meet womens needs for support in old age, however, the comparison is a bleak one. Further, the RRSP does not address or even acknowledge the structural poverty of women that can result from years of unpaid or low-paid work.

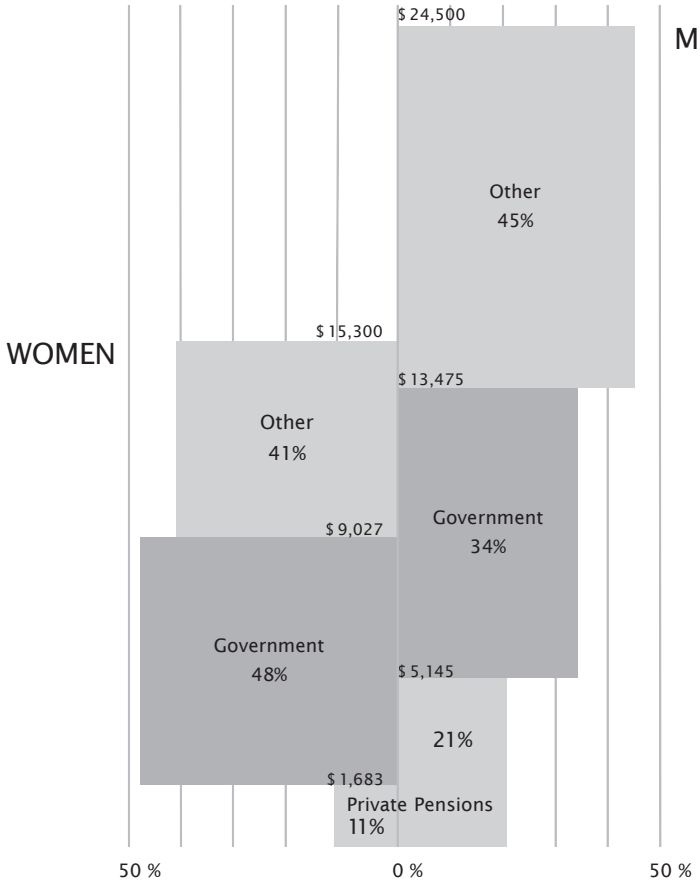
Because of this structural inequity, women are disproportionately reliant on the public pension system. The RRSP system by itself is not

29 Margot Gibb-Clark, "More Canadians Plan RRSP Contributions" *The [Toronto] Globe and Mail* (8 December 1994) B7.

30 Drache, see note 28.

31 Proposals to decrease the inequities of access to RRSPs have been entertained briefly by the present government, but quickly shut down by the financial community. A tax credit system that would provide equal deductibility of RRSP contributions to everyone (likely at 25%) regardless of their tax bracket may well make it easier for lower income people to save using RRSPs. Certainly such a move would have the beneficial effect of subsidizing the wealthy less through gross tax expenditures. However, this plan appears to have been effectively shut down by those who benefit from the high tax breaks for RRSPs — high income earners, and the pension industry. According to the *Globe and Mail*, pension industry players like the Investment Funds Institute recently sent a brief to Paul Martin, lobbying to keep a high RRSP limit and full deductibility: see Roseman, note 21.

32 The poverty rate of the unattached elderly (single, widowed and divorced), while it has decreased, is staggering. In 1980, 57.8% of men and 68.7% of women over 65 were living below the poverty line. By 1993, that rate had decreased to almost one third of unattached men (32.1%) and close to half (47.3%) of unattached women. See *Poverty Profile 1993: A Report* (Ottawa: National Council of Welfare, Spring 1995) at 31.



1990 sources of income for persons aged 65 and over, based on sex. From Tables 6.3 & 6.4, *Profile of Canada's Seniors* (Statistics Canada, 1994) at 45.

Graph C: SOURCES OF RETIREMENT INCOME

likely to decrease womens reliance on the public system, or to increase their access to private pensions. Better access to private pensions and better rewards within them, as offered by the RRSP, are far more likely to serve those who already have access to the private pension system. As a result, an increase in the benefits of private pensions is likely to benefit men much more than women. (See Graph C)

In an article assessing the impact of pension reform on women, Maureen Donnelly argues that even though individual women and members of other systemically disadvantaged groups do manage to use the current tax structure to secure a better old age, the system itself is stacked against them. Donnelly concludes that [t]he disparate impact of Canadian taxing statutes on women is, like the pension system, rooted in a bias toward the patriarchal family in which women are economically dependent upon men. [33]

Thus the new focus on the individual, rather than on society

33 Maureen Donnelly, "The Disparate Impact of Pension Reform on Women" (1993) 6 Canadian Journal of Women and the Law 419 at 424.

generally, as the primary locus of pension policy does not significantly alter the lines of power and dependence within the paradigmatic male headed nuclear family. For the most part, the economy continues to impose this model, and government pension policy through inaction does little to curtail it. Lines of dependence are reinforced by their invisibility. Unattached women, lesbian couples (who are counted statistically as a household of two unattached women), and gay men continue to be excluded from private benefits just as they are from publicly funded ones. The government has drawn a line in the sand between those who receive tax deductions to save for old age and those who do not, and it has drawn that line at the heterosexual nuclear family.[34]

Lines of Dependence and Power

With the shift toward private pension instruments, the goals of government pension policy have changed. The power relationships created by pension law must surely change as well. Pension policy shapes and directs the lines of power and dependence between old and young, men and women, employers and employees, the married and unmarried, heterosexuals and gays and lesbians, and the rich and poor.

The poverty of the elderly is structural. In this century it is the result of a market economy that provides the means of subsistence through wage labour, and then denies access to wages as people grow older. Poverty among the elderly is reinforced by government policy that presumes that these same market forces will provide a decent living for the very people it excludes. Far from meeting the income needs of the elderly and liberating them from the structural poverty of the private market, state policy is designed increasingly around the needs of capital.

The privatization of pensions is premised on a construction of the individual as unconstrained by deprivation of resources and power; yet this privatization reinforces the structures and institutions that constrain individuals. Where this structure benefits a particular group, the liberal, individual analysis makes it appear that members of that group have earned their rewards. Likewise, where the structure punishes members of a group, they too will appear to deserve the result in those cases, poverty.

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34 The Spouse's Allowance institutionalizes married heterosexuals as the normative family pattern for the elderly, and the only family recognized and supported by the state. Same sex couples, and women who do not marry or are divorced, are excluded from these benefits. This distinction has been upheld in two recent court cases. In *Egan v. Canada*, [1995] 2 Supreme Court Reports 513, the Supreme Court of Canada saved, under section 1 of the Canadian Charter of Rights and Freedoms, a provision of the *Old Age Security Act*, RSC 1985, chapter O-9, that denies equivalent spousal benefits to same sex couples. Four members of the court did not even find a violation of the Charter's section 15 equality provisions as the exclusion of homosexual couples was rooted in our Canadian law and values, as well as biology. This judgment in the context of public pension plans has been extended to the private pension system as well: in *Rosenberg v. Canada (Attorney General)* (1995), 127 Dominion Law Reports (4th) 738 (Ontario General Division), the heterosexist definition of "spouse" found in the *Income Tax Act*, RSC 1985, chapter 1 (5th Supp.) was upheld under the Charter for the purposes of pension benefits.

The individual savings model that now is entrenched in pension policy has not served those who face systematic discrimination because it is blind to systems and structures, and sees only merit and individual agency. The privatization of pensions in the form of RRSPs only makes the lines of dependence more invisible. By ignoring these dependencies and inequities, the individual savings pension model ultimately reinforces them.

Poverty among the elderly is reinforced by government policy that presumes that these same market forces will provide a decent living for the very people it excludes. Far from meeting the income needs of the elderly, state policy is designed increasingly around the needs of capital.

A public retirement income system could liberate many from the constraints of private power. Ideally, such a system would recognize the need to counteract the inequities of the waged economy for the elderly, for women, for the poor, and for all those who fall outside the male headed nuclear family. What is required is a broader understanding of social responsibility that recognizes the ways in which young, employed, male, married, and wealthy people receive structural benefits at the expense of the elderly. The existing public pension system acknowledges some limited responsibility for the welfare of seniors on the part of society as a whole, but even this role is being dismantled. The final irony, however, is that that private individual savings model drains unprecedented amounts of money from government coffers while doing nothing to address the inequities that lead to poverty in old age. On the contrary, the private savings model institutionalizes the inequities by hiding them behind an ethos of individual merit. The governments increased reliance on private pensions does not mean that fewer elderly people will be poor, or that the inequities between the elderly will be reduced; it simply means that inequity and poverty are accepted, invisible, and secondary to the needs of industry. ■

4 Adult Lines of Depend

The Rebirth of Pa

Children ordered to Legislati aid mom!

in Canada

Vancouver Sun

ence: rental support

Wendy Bernt, from Kitimat, British Columbia, is a third year law student at the University of Victoria. She received her Bachelor of Arts in History and Political Science from the University of Victoria.

Adult Children ordered to aid mom! proclaimed a 1993 *Vancouver Sun* headline.[1] The story referred to a decision of the Ontario Provincial Division in which the adult children of Veronica Godwin were ordered to pay financial support to their mother.[2] The article quoted Mrs. Godwins lawyer as saying that the decision meant that children had a legal responsibility to support their parents, and that the judgement could open the door to similar cases. What the article failed to mention is that statutory provisions requiring children to support their parents have existed for hundreds of years.

Background

The historical foundations of a legal duty on children to support their parents reach back to the Roman Empire.[3] Current Canadian parental support laws have their roots in the Elizabethan Poor Laws. Among other things, the Poor Laws stated that children of the indigent elderly were required to support their parents if they had the capacity to do so.[4] Modern parental support laws have not changed substantially since Elizabethan times.

In Canada, legislated provisions for parental support exist in all ten provinces.[5] Although there are variations between the provincial statutes, all of these laws recognize that in certain circumstances it will be necessary for adult children to support their parents, and that adult children have an obligation to do so. In order for this obligation to be enforced, the statutory provisions and case law provide that a parent must have a history

1 *Vancouver Sun* (9 February 1993) A4.

2 *Godwin v. Bolcso* (1993), 45 Reports of Family Law (3d) 310 (Ontario Court of Justice, Provincial Division).

3 Jean Van Houtte and Jef Breda, "Maintenance of the Aged by Their Adult Children" (1978) 12 Law and Society 645 at 649.

4 49 Elizabeth 1, chapter 2., section VI (1601).

5 CCQ 1980, chapter 39 Book Two, Title Four sections 633-644; *Family Law Act*, RSN 1990, chapter F-2, section 38; *Family Law Act*, RSO 1990, chapter F-3, section 32; *Family Law Reform Act*, RSPEI 1988, chapter F-3, section 17; *Family Maintenance Act*, RSNS 1989, chapter 160, section 15; *Family Relations Act*, RSBC 1979, chapter 121, section 58; *Family Services Act*, SNB 1980, chapter F.2.2, section 114; *Maintenance Order Act*, RSA 1980, chapter M-1, section 2(1); *Parents' Maintenance Act*, RSM 1987, chapter P10; *Parents Maintenance Act*, SS 1923, chapter 53.

of supporting the child, and that the parent must establish some form of need or dependency. In addition, the extent of the support required of an adult child will depend on that child's financial capacity.[6]

While provisions for parental support have a long history in Canadian law, the decision in *Godwin v. Bolcso* is remarkable. Prior to *Godwin*, the few Canadian cases that dealt with parental support provided relatively little insight into the extent and applicability of the relevant statutory provisions. As one of the first cases to interpret and apply the statutory provisions in any depth,[7] *Godwin* marks the first comprehensive analysis of the role and scope of this type of legislation in Canadian law.

In *Godwin*, a 58 year old mother sued her adult children for support. The Bolcso children were born and raised in the 1950s and 1960s. Their father, a butcher, abused alcohol. Their mother, Veronica Bolcso Godwin, was a housewife and the primary caregiver in the family. Physical demonstrations of affection were rare in the Bolcso household, and responsibility and duty were stressed over praise or emotional comfort.[8] All four children graduated from high school and left home to pursue careers or post-secondary education. As adults, the children did not visit their mother often, but kept in contact with her through letters and notes.[9] In 1990, at the time that Mrs. Godwin began her court action, the children had had no prior notice of their mother's intentions.

The Test

Mrs. Godwin used section 32 of the Ontario *Family Law Act*[10] to apply to the court for support from her children. That section provides that to the extent that she or he is capable, an adult child is obligated to support a parent who cared for or supported that child. The court stated that in order for Mrs. Godwin's application to be successful three questions had to be answered: did Mrs. Godwin provide support to her children; did Mrs. Godwin provide care; and, was Mrs. Godwin in financial need? All three of these elements had to be satisfied before Mrs. Godwin could be successful against her children.

Did Mrs. Godwin support her children? The court defined support to include the basic necessities of life such as food, shelter and clothing.[11] It held that the proper standard was that level of support that ...would reasonably have been expected from a parent in the circumstances in which the family found itself. [12] The court rejected the children's argument that a relationship of interdependency (that is, additional support beyond the standard normally required of a parent) was necessary in order for Mrs. Godwin to be successful in her claim.[13] The court stated that a claim for parental support would not be defeated by the fact that a parent provided only the minimum level of support required by law.[14] As a result, the minimal financial and moral support Mrs. Godwin had provided her children was found sufficient to meet the burden of the first test for parental support.

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6 *Re Blum and Blum* (1982), 132 Dominion Law Reports (3d) 69 at 72 (Ontario Provincial Court); *Newson v. Newson* (1994), 99 British Columbia Law Reports (2d) 197 at 200 (Supreme Court).

7 *Godwin*, see note 2 at 312.

8 *Godwin*, see note 2 at 315.

9 *Godwin*, see note 2 at 315.

10 See note 5.

11 *Godwin*, see note 2 at 321.

12 *Godwin*, see note 2 at 321.

13 *Godwin*, see note 2 at 323.

14 *Godwin*, see note 2 at 323. In this respect, the decision represents a significant departure from decisions of the past. See for example *Berendt v. Berendt* (1987), 11 Reports of Family Law (3d) 69 at 74 (Ontario Unified Family Court), where the court had held that section 32 of the Ontario *Family Law Act* addressed "...a mutual support obligation between parents and children based on direct interdependency."

Did Mrs. Godwin care for her children? Care was defined as the amount of care that could be reasonably expected within the family's circumstances at the time.[15] During the course of the trial, the children complained about the level of care they had received from their mother. They testified that she had failed to protect them from their father's violent tendencies and from sexual assault by people close to them. Several of the children also claimed that they were prone to depression and feelings of abandonment as a result of their upbringing.[16] The court declared that the parenting conditions existing at the time of the children's upbringing were critical in assessing the standard of care. While admitting that the level of care provided by Mrs. Godwin might not meet current standards for child rearing, the court nonetheless found that Mrs. Godwin had met the standard of care required of parents in the 1950s and 1960s.[17] Consequently, it was held that Veronica Godwin had provided levels of both care and support sufficient to satisfy the statutory provisions.

With respect to financial need, the court found that Mrs. Godwin's age and lack of work experience would make it difficult for her to find employment in the future. It was noted in particular that Mrs. Godwin's financial needs were caused in part by the fact that, because she had been at home raising her children, she had been unable to accumulate work experience.[18] In the result, the court found that the children owed their mother support, and ordered them to pay her a cumulative monthly support allowance of $1000.[19]

The Godwin decision is a significant landmark in Canadian law because it sets out the test that a parent is required to meet in order to be successful in an action for support. It also may indicate an increasing appreciation for the role of parental support laws in Canadian society.

The *Godwin* decision is a significant landmark in Canadian law because it sets out the test that a parent is required to meet in order to be successful in an action for support. It also may indicate an increasing appreciation for the role of parental support laws in Canadian society. Although statutes providing for parental support long have been a part of Canadian legal history, their use has been infrequent. In fact, parents maintenance acts existed for over half a century without having

15 *Godwin*, see note 2 at 323.

16 *Godwin*, see note 2 at 316.

17 *Godwin*, see note 2 at 323-324. It seems either that the court did not accept the children's allegations, or that it did not find sufficient evidence to support them.

18 *Godwin*, see note 2 at 321.

19 A recent judgement the Ontario Court of Appeal overturned a lower court decision to stay the interim support award of $1000 pending an appeal: see *Godwin v. Bolcso* (10 August 1995) No. 621262 (Ontario Court of Appeal). The Court of Appeal found the interim award to be reasonable given the circumstances of the case. The trial judgement discussed in this article was upheld by the Ontario Court of Appeal: see *Godwin v. Bolcso*, [1996] Ontario Judgements No. 145 (Quicklaw) (Court of Appeal).

an impact on family law, [20] and over the last 10 years the current Ontario legislation has yielded less than a dozen cases.[21] What is notable is that the majority of these cases have occurred in the last decade. The increasing frequency of parental support cases seems to indicate that past ideas about support for ageing parents are being challenged.

Society has an interest in ensuring that its elderly population receives adequate care. Where moral and societal pressures are not enough to enforce family responsibility, and a breakdown has occurred in the parent -child relationship, it may be necessary and proper for the courts to interfere.

Observations

It could be argued that legislating for parental support turns a private issue into a public responsibility. Traditionally, despite laws providing for support, a child s obligation to his or her parents has been viewed primarily as a moral responsibility. By shifting the emphasis to the legal aspects of support, the courts could be viewed as intruding on an area of private concern. Parental support should not be viewed as a moral issue alone, however. To do so would be to ignore the fact that society has an interest in ensuring that its elderly population receives adequate care. Where moral and societal pressures are not enough to enforce family responsibility, and a breakdown has occurred in the parent-child relationship, it may be necessary and proper for the courts to interfere.[22]

Critics of parental support legislation also argue that such laws are unfair to adult children.[23] That is, parents choose to have children and should assume the responsibility for them; by contrast, children do not choose their parents. In addition, the increased longevity of our ageing population means that adult children may have to support their parents longer than their parents ever supported them.[24] While it is true that children do not have control over the circumstances of their birth, this lack of individual choice is not determinative. The very existence of parental support legislation indicates that society has accepted that the parent-child relationship involves obligations on children as well as on parents. By passing and enforcing this type of legislation, society has chosen to favour the collective interest of providing support to destitute parents, over the individualistic interest of children in such circumstances.

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20 The *Parents Maintenance Act*, 1921, SO 1921, chapter 52, has not been judicially considered. The subsequent legislation — the *Parents' Maintenance Act*, 1954, SO 1954, chapter 68 and the *Parents Maintenance Act*, RSO 1970, chapter 336 — was considered in only three cases.

21 *Godwin*, see note 2 at 311-312.

22 Terrance A. Kline, "A Rational Role for Filial Responsibility Laws in Modern Society?" (Fall 1992) 26 Family Law Quarterly 195 at 207.

23 For example, see Kline, note 22 at 206-7; see also Lee E. Teitelbaum, "Family Obligation" (1992) Utah Law Review 765 at 780.

24 Kline, see note 22 at 206.

While there are principled arguments both for and against parental support legislation, practical reasons most likely underlie both the infrequent use of these provisions in the past, and their growing importance in recent years. Historically, several factors have ensured that parents either did not, or did not need to take advantage of parental support laws. Traditional family roles that defined parents as providers and caregivers reinforced the notion that parents should support themselves.[25] In many cases, parents may have been ashamed or embarrassed to take their children to court for support. At the same time, the sheer force of moral persuasion often encouraged children to support their parents.[26] In many cases legal action was not necessary to ensure that children met the support obligations they owed their parents.

Probably the most effective deterrent to the use of these provisions in the past, however, was the growth of the welfare state. In the twentieth century, the burden of supporting aged or dependent parents was transferred from adult children to the state. Universal old age pensions and medical benefits generally ensured that parents had the ability to support themselves as they aged. As a result, it was not necessary for parents to use either moral or legal force to obtain support from their children.

The changing nature of the welfare state may also provide the best explanation of why parental support cases have increased in frequency in recent years. Canadian governments have responded to concerns over the levels of debt and deficit by cutting social spending, with a resulting downsizing of the social welfare system. Unfortunately, these changes are occurring at the same time that Canadas population is ageing rapidly.[27] It is not difficult to foresee a time when Canadas increasing elderly population will be forced to balance decreasing financial resources with increased living and health care costs. If the state is unwilling or unable to help the elderly meet these costs, it is likely that the burden of parental support will shift once again to adult children. Parents may have no choice but to use the existing family responsibility legislation if moral and societal pressures are insufficient to force adult children to provide support.

The *Godwin* decision did not establish a bold new frontier of Canadian law. Nor did it create new support obligations on the part of children toward their parents. Instead, the court in *Godwin* breathed new life into statutory provisions that have existed for hundreds of years. By providing a comprehensive, detailed analysis of an adult child s obligation toward a parent, the *Godwin* decision established that parental support has an important role to play in modern Canadian society. Where societal, family and moral pressures are not enough to persuade children to support their parents, devastating consequences may result to aged persons. Family responsibility legislation ensures that parents have a means of enforcing this important and necessary support obligation. ■

25 Freda Steel, "Financial Obligations Toward the Elderly: Filial Responsibility Laws" in Margaret E. Hughes and E. Diane Pask, eds., *National Themes in Family Law* (Carswell: Toronto, 1988) at 111-112.

26 See Teitelbaum, note 23.

27 By the year 2030, the population over the age of 65 is expected to triple in size: see Statistics Canada, *The Seniors Boom: Dramatic Increases in Longevity and Prospects For Better Health* (Ottawa: Ministry of Supply and Services Canada, 1986) at 1.1.

Child Pornography

Cyber

It is unclear how much child pornography there is on the internet, but there are a number of factors that make cyberspace a uniquely suitable place for child pornographers to deal in their wares. It might be expected that the challenges posed by modern information distribution would inspire law makers to develop a coherent, planned approach to it.

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phy in space

Unfortunately, a clear policy direction has not emerged. Despite this lack of leadership, the law enforcement community is beginning to respond by using existing laws to address the problem. Particular difficulties associated with policing the internet may account for the limited success of these enforcement efforts. However, undue emphasis placed on the uniqueness of the internet as a medium for child pornography distracts from the classic problems of policing child pornography: a denial of the harm inherent in the practice, and the conflicting goal of protecting some kinds of speech.

Availability of child pornography

If you want to break the law and get your hands on child pornography, a quick trip around the internet is all it takes. Due to the illicit nature of child pornography, it is difficult to get statistics on its prevalence. However, if you assume that a certain percentage of the pornography on the internet involves children, statistics on pornography generally can be revealing.

A *Time* magazine article, based on a study by Martin Rimm,[1] asserted that [t]heres an awful lot of porn

online. [2] According to the article, [o]n those [u]senet news groups where digitized images are stored, 83.5% of the pictures were pornographic. The article also points out, however, that pornographic image files, despite their popularity, represent only about three percent of all usenet groups, which represent only 11.5% of traffic on the internet. These figures indicate that pornography is only found on one half of one percent of the internet, in sharp contrast to the figure of 83.5% used sensationally at the beginning of the article. Overall these numbers are controversial, and the methodology used in the Rimm Study has been criticized.[3] Mike Godwin, a lawyer and journalist, accused the study of generalizing from adult bulletin board servers and usenet news groups to the information superhighway as a whole, drawing the analogy of, generalizing from a Times Square adult bookstore to the print medium . [4]

These critics do acknowledge, however, that there is pornography on the internet. What they question is the characterization of the internet as seething with obscenity, rather than as generally free of obscene material. The statistics may be controversial, but the fact remains that there is child pornography available to the public on the internet everyday. Even if the majority of cyberspace is free of pornography, the areas that contain illegal and dangerous materials cannot simply be ignored, and neither can they be justified by the relative cleanliness of the rest of the internet. The US Federal Bureau of Investigations has observed that, [t]he utilization of online services or bulletin board systems is rapidly becoming one of the most prevalent techniques for individuals to share pornographic pictures of minors, as well as to identify and recruit children into sexually illicit relationships. [5]

The Internet: A uniquely suitable place for child pornographers

1. Access

More and more people own the tools necessary to access the internet, and even those who do not can gain access through many schools, universities, offices, and even coffee houses and bars. This access means that child pornography is now easily available to a much larger number of people than ever before. The wide availability of access to the internet is the first of several factors that have implications for child pornography.

2. Ease of use and distribution

The second factor that contributes to the unique quality of child pornography on the internet is ease of use and distribution. Nothing is lost by sending pornography via the internet rather than by regular mail. Messages may include or be composed of pictures that appear on a computer screen with comparable clarity and colour to a magazine. No direct contact is required between a source/distributor and the consumer,

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1 Martin Rimm was an undergraduate in engineering at Carnegie Mellon University when he published his study, entitled "Marketing Pornography on the Information Superhighway: A Survey of 917, 410 Images, Descriptions, Short Stories and Animations Downloaded 8.5 million times by Consumers in over 2000 cities, in 40 countries, provinces, and territories": see http://TRFN.pgh.pa.us./quest/mrstudy.html.

2 Philip Elmer-Dewitt, "On a Screen Near You: Cyberporn" (3 July 1995) 146:1 *Time* 32 at 34. Also located at http://pathfinder.com/@@i2EgWIFEdgEAQMp4/time/magazine/domestic/1995/950703/950703.cover.html on 8 January 1996.

3 See Donna Hoffman and Thomas Novak, "A Detailed Critique of the Time Article 'On a screen near you: Cyberporn' " (1 July 1995), located at http://www2000.ogsm.vanderbilt.edu/dewitt.cgi on 8 January 1996; and David Post, "A Preliminary Discussion of Methodological Peculiarities in the Rimm Study of Pornography on the 'Information Superhighway' " (28 June 1995), located at http://www.interlog.com/~bxi/post.html on 8 January 1996.

4 Mike Godwin, "JournoPorn - Dissection of the Time Scandal," located at http://www.hotwired.com/special/pornscare/godwin.html on 8 January 1996.

5 "Use of Computer Networks for child sex sets off raids" (13 September 1995) (c) 1995 New York Times News Service, located at http://www2.nando.net/newsroom/ntn/nation/nation331_4.html on 8 January 1996.

so a person is spared the trip to the provider of illegal child pornography. And once a pornographic photo is downloaded, it can be stored indefinitely on a computer hard-drive, available for viewing at any time.

Additionally, many advantages over regular mail are gained by using the internet. For example, a person can easily remain anonymous in cyberspace. There is less hassle involved in sending the actual message, as a person does not even have to leave the house. With the computer equipment widely available these days, speed is increased: sending or receiving a message may take only a matter of minutes. Difficulties with storage are also reduced, as files on a hard drive take up less space and are less conspicuous than paper copies of the same material.

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More and more people own the tools necessary to access the internet, and even those who do not can gain access through many schools, universities, offices, and even coffee houses and bars.

3. Legitimizing function

Usenet groups and bulletin boards allow people to discuss child pornography in an environment that normalizes it. Related to discussions of child pornography are discussions about child sexual abuse. Such acts, however, are not often characterized as abuse. On the contrary, sexual relationships with children often are portrayed as positive interactions for everyone involved. For example, a writer of a usenet newsgroup message indicated that while he had previously had some doubts and hesitation about initiating sexual relations with his very young niece, he had been convinced by many messages in the newsgroup that sexual contact with her was perfectly natural, and would even be *beneficial* to her development.[6]

The internet offers new arenas for these discussions where before, either none existed, or at least they existed in fewer numbers and were available to fewer people. The general tenor of these discussions can have the effect of legitimizing child pornography and child sexual abuse. Some may argue that these discussions should not be regulated or monitored because to do so would restrict freedom of expression. However, as the above example shows, the value of free expression is not the only one at play. The potential for harm to children that results from normalizing child pornography and sexual abuse must not automatically become an issue secondary to freedom of expression.

4. Difficulty of monitoring and tracking

It is extremely difficult to monitor and to track internet communications and transactions. Millions of

6 This message appeared in one of the alt.sex usenet newsgroup in January 1996. While the writer of the message may not have meant what he said, he also may have been deadly serious. It is unlikely that he is alone in having been convinced by a barrage of this type of material that it is appropriate to consider children as sexual objects.

people around the world use the internet; communications often occur across national boundaries; and the number of messages are so numerous as to make regulation of all the individual messages impractical. It has been estimated that 20 million words are posted to usenet newsgroups every day, and that the equivalent of 300 paperback pages pass across the network per second.[7] The ability to send messages over phone lines at amazing speeds removes the risks associated with large shipments of illegal goods, which often must pass through customs.

Any attempt to exercise control over the internet is complicated by its cross-jurisdictional nature. There is no central organization which controls or monitors the internet. As such, policing occurs on an ad hoc basis between countries and is subject to myriad legal regimes representing disparate philosophies on the problems of pornography. These difficulties in policing the internet translate into an advantage for those who use it for illegal purposes, because of the decreased likelihood they will be detected, apprehended, or prosecuted.

This problem of policing is complicated further by the greater incedence of the point of sale being in a separate jurisdiction from the point of purchase. If certain pornographic images are legal in the source country, law enforcement officers in a receiving country where they are illegal may be forced into focusing on individual consumers, rather than the producers. This inability to stop material at its source presents a major obstacle to law enforcement officers. Cases that may at first appear to be successes in the fight against child pornography actually may be of limited importance.

For example, in January of this year, a national precedent was set when Newfoundland police charged a man with the importation and possession of child pornography that had been downloaded from the internet.[8] However, his arrest did not affect the distribution ring. Locating and charging only one recipient with possession is unlikely to make even a dent in the actual volume of material being exchanged. This deficiency in enforcement is aggravated by the fact that the police have indicated they will act only after receiving a complaint.[9] If there is to be at least some enforcement of child pornography laws in cyberspace, police must not passively wait for complaints to be brought to them; they must aggressively conduct their own investigations.

5. Incentive to make, sell and trade

It is likely that the internet will encourage greater production of child pornography. Because nothing more is required to put a pornographic image online than to scan a photograph into a computer and send it with the click of a button, the production requirements of earlier times no longer exist. Gone is the need to bind the material into magazines, or to arrange for the distribution of bulky materials. The securi-

Amateur can flour and its p encoura to offer a Payment form of barter of between individua locate on via the in

7 Warren Caragata, "Crime in Cybercity" (22 May 1995) *Maclean's* 50 at 52; and Joe Chidley, "Red Light District" (22 May 1995) *Maclean's* 54 at 58.

8 Tom McDougall, "Possessing Internet porn illegal, but random computer raids unlikely" (18 January 1996) National General News (Quicklaw - Canadian Press); and "Internet child porn case scheduled for April" (13 February 1996) Atlantic Regional News (Quicklaw - Canadian Press).

9 McDougall, see note 8.

ty risks and expenses associated with that type of undertaking become negligible.

Amateur child pornography can flourish on the internet, and its production is encouraged by its potential to offer a new way to profit. Payment may come in the form of money, or in barter of pornography between interested individuals who often locate one another via the internet. With the spread of amateur child pornographers, it may be that an even greater number of children are at risk of becoming exploited as models.

What is being done?

Given the wide range of issues raised by the internet as a new medium for child pornography, one would expect serious efforts to be taken to develop an appropriate response. In Canada, however, such comprehensive efforts have not materialized. Despite this vacuum of policy direction, a range of initiatives are being undertaken by law enforcement agencies. Regular law enforcement options do not, however, seem entirely adequate to address the problem. This failure may be due to a lack of guidance from government, and the difficulties (discussed above) of regulating the internet. It also may be due to a general lack of commitment to taking the harms of child pornography seriously.

The only official Canadian organization assigned to study the internet is the Information Highway Advisory Council, which is responsible to Industry Canada. None of the main policy objectives identified in their Final Report, which was released in September 1995, related directly to use of the internet for illegal purposes.[10] Of the 15 issues addressed, only one touches on pornography and what controls, if any, should be put on information. Overall, the report dedicated only about ten paragraphs to a discussion of illegal or obscene material. Given this lack of attention, it was unlikely that creative solutions would be suggested, and in fact, the recommendations support the status quo.

The Final Report, while making several specific recommendations, generally advocated three approaches

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10 Located at http://www.ic.gc.ca/info-highway/final.report/eng/ on 8 January 1995.

to deal with obscene or illegal material. First, it recommended that existing laws should be fine-tuned to make them more applicable and enforceable in the changing world of global networks. Second, it promoted self-censorship and suggested that internet service providers be encouraged to adopt voluntary codes of ethics to govern their behaviour. Finally, it stressed that the public should be educated about the fact that the rule of law does not stop at the door of cyberspace.

When internet users can post messages, transmit pictures and send mail to one another with just a few keystrokes, child pornography slips easily across borders. To apply existing laws more effectively, there is a need for bilateral and multilateral arrangements at the international level.

Global Regulation

No concrete suggestions were offered by the Council as to how laws could be restructured to make them more applicable and enforceable in the cross-jurisdictional morass that is internet regulation. When internet users can post messages, transmit pictures and send mail to one another with just a few keystrokes, child pornography slips easily across borders.[11] To apply existing laws more effectively, the Final Report identified a need for bilateral and multilateral arrangements at the international level. However, nothing more specific was offered.

Law enforcement agencies appear to be trying to develop such agreements. To that end, the Royal Canadian Mounted Police have sent a representative to the United Nations to take part in a task force examining crime on the global network of computer systems.[12] According to Commissioner Philip Murray, the RCMP are concerned about the increase in hate literature and child pornography on the internet. In an interview with the press, he admitted that developing a coordinated response may take some time. The challenge of dealing with such material is exacerbated because many countries with substantially different values are involved.[13] Since the extent of our jurisdiction is unclear with respect to messages originating outside this country, or with respect to messages sent from here to abroad, Canadians may have to wait for results from this slow process.

The best example of the complexity that can arise when one country tries to block access to pornography is the December 1995 confrontation between CompuServe and German

11 Jim Bronskill, "RCMP working with UN to halt Internet crime" (4 April 1995) National General News (Quicklaw - Canadian Press).

12 Bronskill, see note 11.

13 For example, in the US a "community standards" test is used to judge whether material is "obscene." But when sexually explicit material available on a computer bulletin board in one state is accessed and viewed by someone in another state, which state's "community standards" should be used? For a discussion of this question, see Paul R. Joseph, "As Our World Connects, Issues Arise" (Spring 1996) 23:2 human rights 17 at 17. For a further discussion of these issues, see Dennis Chiu, "Obscenity on the Internet: Local Community Standards for Obscenity are Unworkable on the Information Superhighway" (1995) 36 Santa Clara Law Review 185; Pamela Huelster, "Cybersex and Community Standards" (May 1995) 75 Boston University Law Review 865; and John Zanghi, 'Community Standards' in "Cyberspace" (Fall 1995) 21 University of Dayton Law Review 95. Similar conflicts of laws will also occur between countries.

14 "Internet subscriber shut off for spreading child pornography" (30 December 1995) Foreign General News (Quicklaw - Canadian Press); and "Prosecutors consider incitement charges against internet-access providers" (24 January 1996) Foreign General News (Quicklaw - Canadian Press).

15 John McKay, "Canadians unfazed by latest Internet chill" (3 January 1996) National General News (Quicklaw - Canadian Press).

16 Located at http://www.eff.org/pub/EFF/about.eff on 1 March 1996. Begun in the United States, there are now EFF organizations in Canada, Ireland, Norway, and Australia.

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authorities. The Ohio-based network server agreed to block access to sex-oriented areas of the internet because of pressure from German prosecutors.[14] However, due to technical problems, CompuServe could only accomplish this task by blocking access to all of its four million subscribers worldwide, not just to those in Germany.[15]

These actions sparked fierce protest from civil liberties groups like the Electronic Frontier Foundation, founded in the United States in 1990 to ensure that civil liberties such as privacy and freedom of expression were protected as new communications technologies emerge.[16] The EFF accused Germany of trying to control what the rest of the world could see and read on the internet.[17]

Despite the complexity of these problems, regular law enforcement and international cooperation have produced some results. There are examples of coordinated international efforts in cross-jurisdictional cases. A man accused of distributing pornography from Mexico was successfully extradited to the United States for prosecution.[18] British police, after a tip from the FBI, seized child pornography stored in a London university computer that could be linked to 160 countries.[19] And the previously mentioned case in which a Newfoundland man was arrested and charged with possession of child pornography occurred after the Newfoundland police received a tip from the RCMP, who in turn had been given information by US customs.[20]

However, it appears that the majority of crime control activity is carried out by national law enforcement agencies working alone. Undercover operations, busts, arrests and prosecutions are occurring within the framework of regular obscenity and pornography laws.[21]

Voluntary Codes and Self-Censorship

The second general recommendation in the Information Highway Advisory Council Final Report relates to information providers and network servers. It was suggested that the development and adoption of voluntary codes of ethics and practices be encouraged. Nowhere was it suggested, however, that network servers be held responsible for the content of the messages they carry.[22] The decision not to make servers responsible for monitoring messages effectively leaves such censorship in the hands of individuals, and possibly corporations. Parents and guardians can use technology to program their computers and screen out material to which they do not want their children to have access. This approach differs from more interventionist or regulatory approaches in its assessment of the amount of pornography available on the internet. It takes the view that cyberspace is generally a safe place, and that pockets of obscenity can be side-stepped when necessary.

It must be recognized that this approach is extremely problematic in that it characterizes the issue as one of children being exposed to pornog-

17 "Germany probes online services to nab cyber-Nazi" (25 January 1996) Foreign General News (Quicklaw - Canadian Press). Five days after the signing of the US Communications Decency Act, (see note 39 and accompanying text), CompuServe reinstated access to all but five of the suspended internet newsgroups. It also said that it would offer a parental control program to allow users both at home and abroad to restrict access to questionable newsgroups: see "CompuServe reinstates newsgroup access" (13 February 1996) Business (Quicklaw - Canadian Press).

18 Dewitt, see note 2 at 39.

19 "Child pornography library found" (15 April 1994) Foreign General News (Quicklaw - Canadian Press).

20 McDougall, see note 8.

21 This approach will be discussed further below; see the section entitled "Rule of Law in Cyberspace."

22 The New York state court decision of *Stratton Oakmount Inc. & Porush v. Prodigy*, 23 Media Law Reporter 1794 (New York Supreme Court 1995) held that any carrier that held itself out as attempting to exercise some editorial or censorial function would become responsible for matter that was available through its server, but that was described as unacceptable in its guidelines. Essentially, this approach characterizes network servers as distributors. The decision has been appealed, and it is unclear what effect the new US Communication Decency Act may have on it. This is not the law in Canada, and the Final Report indicates that it should not become the law. The main arguments raised against imposing liability on network servers are: first, that they more closely resemble common carriers (such as telephone companies, which have no liability for the content of telephone conversations) than distributors (such as book stores); and second, that network servers would not be able to afford such liability, and so would severely restrict use, which would result in undue restrictions on freedom of expression.

raphy. Proponents of this approach, therefore, suggest that leaving it to parents to censor is solution enough. They advocate child-proofing the internet. Unfortunately, putting an end to children's access to such material does nothing to address the problem of adults who satisfy their own demands for pornography through the internet. Most importantly, it does nothing to address *adult* consumption of child pornography. The self-censorship solution, supported by appealing to the principle of freedom of expression by confusing the issue of child pornography with that of children viewing pornography superficially appears reasonable and effective, while allowing adults continued ease in the location, viewing and possession of clearly illegal materials.

Rule of Law in Cyberspace

Does criminal prosecution offer a better strategy to address these harms? The last proposal of the Information Highway Advisory Council was that the public should be educated that the rule of law has application in cyberspace. There is a difference, however, between a law having application in a given situation, and that same law being enforced. While local and national law enforcement agencies do appear to be making some attempt to enforce child pornography laws on the internet, the ultimate results are disappointing.

The RCMP state that they can deal with pornography on a computer in the same way they deal with it on paper, that the laws have been around for years, and that the electronic medium doesn't really present [their] investigators with much difficulty. [23] Neither the US Department of Justice nor the RCMP have asked for new legislation to deal with pornography on the internet.[24] However, the fact that child pornography remains constantly available suggests that the electronic medium does present investigators with difficulties. Even if a new law is not needed, something clearly has to change. The RCMP recognize this need, and have established trained computer investigators and a section for dealing with crimes on the internet, including pornography.[25] They have also sent a representative to the UN task force on crime on the global computer network.[26]

The Criminal Code provision governing child pornography[27] has been put to use in cases involving the internet, most recently in the Newfoundland case mentioned earlier. The accused in that case was charged only with the least serious offence of possession of child pornography; interestingly, this might have been the case even if the police had suspected that he was involved in distribution activities. Possession is far easier to prove than is distribution when the internet is involved, because of the problems inherent in monitoring and tracking internet communications. Therefore, the offence of mere possession may be essential to those prosecutions in which it is too difficult to prove distribution.

23 McDougall, see note 8.

24 In the US, for example, the distribution of obscene material across state lines is already illegal. Several years ago, 40 people from 14 states were arrested for exchanging child pornography online: see Dewitt, note 2 at 39. As well, recently a three year sentence was handed down to a man for transmitting obscene messages by computer: see Wendy Cole, "The Marquis de Cyberspace" (3 July 1995) 146:1 *Time* 37 at 37, also located at http://pathfinder.com/@@i2EgWIFEdgEAQMp4/time/magazine/domestic/1995/950703/950703.cover.marquis.html on 8 January 1996. And in the same year, the US Justice Department made a dozen arrests following a two year FBI investigation into the use of America On-line, the country's largest computer network, to distribute child pornography and lure minors into sex: see "Use of Computer Networks for child sex sets off raids," note 5.

25 "Porn flows freely along information highway" (6 November 1994) National General News (Quicklaw - Canadian Press).

26 Bronskill, see note 11.

27 Section 163.1 creates three offences in relation to child pornography: production, distribution, and possession. Unlike section 163, which governs obscenity generally, section 163.1 includes the additional offence of possession, which carries a maximum penalty of 5 years.

For example, in April 1995, after searching his home and finding videotapes and computer disks depicting child pornography, police in Calgary charged a man with 51 counts of possession of child pornography. The police believe that the evidence indicates a national and international child pornography ring that operates by computer, but again, charges of distribution were not brought against anyone.[28]

The Criminal Code provision prohibiting distribution of child pornography has also been applied directly to the internet. In *R. v. Pecciarich*[29] it was found that the accused, using an alias, uploaded child pornography onto a bulletin board server and acted as the systems operator of that server. In that case, the court decided that evidence of uploading files onto bulletin board servers, which the public can access through an application process, is clear evidence of distribution. This case leaves no doubt that the rule of law applies to computer-mediated communications, as stressed by the Information Highway Advisory Council.

From the sentencing in *Pecciarich*, it is clear that the court was concerned about the harm that could arise from the consumption of child pornography. The fact that the material was capable of inciting other pedophiles to act-out was considered an aggravating factor.[30] This concern reflects the assertion in *R. v. Butler*, the leading Canadian case on pornography and the Charter, that pornography can cause harm, which includes predisposing a person to act in an anti-social manner. [31] An appreciation of this type of harm is evident in the child pornography law itself. For example, the Criminal Code defines some material as child pornography even when the subject of the visual representations is not actually under eighteen years of age,[32] indicating that the law is concerned not only with the children who are harmed in the production of child pornography.

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28 Chidley, see note 7 at 58.

29 *R. v. Pecciarich* (1995), 22 Ontario Reports (3rd) 748 (Provincial Division).

30 *R. v. Pecciarich*, [1995] Ontario Judgements No. 2238 (Quicklaw) (Provincial Division).

31 *R. v. Butler*, [1992] 1 Supreme Court Reports 452 at 478-480.

Similarly, Mr. Pecciarich was found guilty despite the fact that the images involved were computer generated and did not require the explotation of children for their production.[33]

In the end, however, the accused in *Pecciarich* received only a suspended sentence, due to the mitigating fact that he was a youthful first offender. [34] This decision followed on two previous cases,[35] both of which involved the distribution of obscene adult materials as well as child pornography on bulletin board servers. In each case, the accused was given a conditional discharge due to the mitigating factor of youth. These results seem at odds with the strong penalty of up to ten years imprisonment that is found in the Criminal Code.[36] It is to be hoped that such lenient sentences will not become indicative of the treatment of child pornographers youthful or otherwise who operate in cyberspace.

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Unfortunately, there are other signs that leniency will become commonplace when judges deal with child pornography. In British Columbia, a man who was charged with possession of child pornography, and who had pled guilty, is reported to have received a letter from the judge on the case. Provincial Court Judge Saunderson wrote a letter to Vernon Logans lawyer saying that he should not plead guilty, and that the law banning child pornography ought to be constitutionally challenged. In the letter, the judge apparently said that Logan should enlist the BC Civil Liberties Association or a large legal firm to argue the case. The defendant maintained his plea of guilty, and the judge discharged him absolutely. The newspaper account of the absolute discharge indicated that Judge Saunderson said Logan was of good character and without previous conviction, and that the law was an infringement of ones freedom of

32 Section 163.1 (1) defines "child pornography" to include visual representations "that show a person who is *or is depicted as being* under the age of eighteen years and is engaged in or is depicted as engaged in explicit sexual activity." (emphasis added)

33 The children depicted had originally appeared in photographs in clothing catalogues. These photographs had been scanned into a computer, and the computer image had then been enhanced, for example, by removing clothes and adding genitalia. The judgement simply assumed that computer-generated images were covered under Canadian child pornography laws.

34 *Pecciarich*, see note 30.

35 *Pecciarich*, see note 30.

36 For example, these penalties can be contrasted with the general provision on obscenity in section 163 of the Criminal Code, where the maximum penalty for both production and distribution is only 2 years.

thought, belief, or opinion...on the theory that unfettered access to reading material is necessary to the exercise of those freedoms.[37]

In the written decision of *R. v. Logan*,[38] the court emphasized that there was no suggestion that the defendant had been sexually involved with children, and further stated that there was no evidence or argument of a causal relationship between reading child pornography and committing sexual offences against children: [t]here has been, and continues to be, considerable debate about whether viewing pornography causes individuals to commit sexual offences.

The court found that a conviction would not be necessary to deter or rehabilitate the accused who had already been forced to resign a position with an international organization, and had lost the company of his female companion of seventeen years. In granting the discharge, the court noted that, ...the defendant is not accused of committing any *overt act* detrimental to the public. *His crime is entirely passive.* He had prohibited material in his possession and, *presumably, read it. That is the extent of his culpability. (*emphasis added)

Therefore, the main obstacle to preventing child pornography on the internet may be not the internet itself, but rather attitudes to child pornography that fail either to take the offence seriously, or to punish it with adequate severity. In neither *Pecciarich* nor *Logan* did the convicted accused serve time for his offence. In *Pecciarich*, any rhetorical concern for the harm involved in child pornography was not evident in the ultimate outcome of the case. And in *Logan*, the harm itself was denied, while freedom of expression was valued more highly.

Where to go from here?

A new US law has been passed recently that, on the surface, seems to take these issues more seriously. It is useful to examine this law to determine if it could offer any solutions for Canada. On 8 February 1996, President Bill Clinton signed the *Communications Decency Act* into law as part of a landmark legislative package that threw the US market open for cable television and telephone services.[39] Importantly, the new law makes it a crime, punishable by up to $250,000 and two years imprisonment, to send indecent material that could be viewed by a minor over a computer network.[40] Proponents of the law, including its chief sponsor, Senator James Exon of Nebraska, say that the law is intended to protect children from hard-core pornography on the internet.[41]

For two days following the signing of the bill, much of the World Wide Web was blacked out and decorated with symbolic blue ribbons as part of a civil liberties protest.[42] Civil liberty advocates argue that these provisions amount to unconstitutional censorship. The American Civil Liberties Union immediately filed suit against the US government challenging the constitutionality of

37 "Accused says judge was right to grant discharge" (4 February 1996) National General News (Quicklaw - Canadian Press).

38 *R. v. Logan*, [1996] British Columbia Judgements No. 352 (Provincial Court).

39 *Telecommunications Act of 1996*, 110 Stat. 56.

40 "Clinton signs land mark telecommunications bill" (8 February 1996) Foreign General News (Quicklaw - Canadian Press); and "US telecommunications bill at a glance" (8 February 1996) Foreign General News (Quicklaw - Canadian Press).

41 "Internet blacked out in protest over censorship" (10 February 1996) Foreign General News (Quicklaw - Canadian Press).

42 "Internet blacked out in protest," see note 41.

these provisions.[43] In response to this lawsuit, a US District Court judge issued a temporary restraining order preventing the government from enforcing its new law. The order will remain in effect at least until the judge hears the arguments.[44]

Civil liberties groups argue that the law will violate privacy rights and strangle free speech, and they have a point. The *Communications Decency Act* defines indecency as any comment, request, suggestion, proposal, image or other communication that, in context, depicts or describes in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs.[45] This extremely broad definition of indecency could encompass any number of legitimate and important subjects. For example, when CompuServe forbade its customers access to roughly 200 sites, two of the restricted sites were gay-net.coming-out , and alt.sex. weight-gain.[46] Also, because of the way the CompuServe network was set up, the company could not selectively shut out only its German clients.[47] Such overly-broad restrictions on communication raise legitimate concerns about interference with freedom of expression.[48]

Many opponents of the new US law object to it on libertarian grounds: they believe that parents, not government, should control what their children see and hear, and that the value of freedom of expression should be paramount. It seems that Canadas Information Highway Advisory Council would agree. The Final Report recognizes that pornographic /obscene /hate materials were widely accessible and easy to obtain, and that the internet is difficult to police and monitor. However, it states that in approaching this difficult issue, Canadians must strike a balance between maintaining freedom of expression and promoting tolerance, and imposing controls to deter harm to society and to individuals. With no new laws suggested to remedy the inadequacies of existing options, the balance ultimately struck is in effect one that leans heavily in favour of freedom of expression.

Conclusion

The new US law contains an extremely broad definition of indecency that is too restrictive on freedom of expression. In addition, it does not focus specifically on child pornography. The irony is that, because of its breadth, it does go some way to accomplishing the goal of enforcing child pornography laws. By including in its scope a ban on indecent material in all cyberplaces to which any member of the public might have access (essentially, anywhere a child can go), it directly restricts childrens access to pornography. And, since the laws definition of indecent material would include child pornography, the law also indirectly restricts adults access to child pornography, at least in public cyber-places. It could be argued that having similar provisions in Canada would help bring home the point, made in

43 "Clinton signs," see note 40.

44 "US judge blocks computer decency law" (15 February 1996) Foreign General News (Quicklaw - Canadian Press).

45 "US judge blocks," see note 44.

46 See also Ann Beeson in "Top Ten Threats To Civil Liberties in Cyberspace" (Spring 1996) 23:2 human rights 10 at 13, where she notes that America Online banned the word "breast" until several days of online protests by irate breast cancer patients caused them to reverse their policy. She also notes (at 10) that many of the groups represented by the American Civil Liberties Union in *ACLU v. Reno* (E.D.Pa. No. 96-0963), the case challenging the Communication Decency Act, (see note 42 and related text) are challenging the CDA because it "bans a wide range of socially valuable and constitutionally protected speech about sexuality, reproduction, human rights, and civil liberties." Groups represented by the ACLU include Critical Path AIDS Project, AIDS Education Global Information Service, Planned Parenthood, and the Safer Sex Web Page.

47 McKay, see note 15.

48 Also, the restrictions may tend to impact most harshly on vulnerable or isolated groups. This effect must be kept in mind when suggesting that regulations be increased; see especially *Little Sisters Book & Art Emporium v. Canada*, [1996] British Columbia Judgements No. 71 (Quicklaw) (Supreme Court). However, increased regulation of child pornography leaves less room for discretion — and therefore less room for bias — than does regulation of adult pornography (since all child pornography is illegal by virtue of s.163.1 of the Criminal Code, and it was decided in *R. v. Butler* that no child pornography would receive constitutional protection under the right to freedom of expression).

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both the Information Highway Advisory Committee's Final Report and *Pecciarich*, that current child pornography laws apply equally in cyberspace.

However, a replication of the new US law would be too extreme and unnecessarily broad, and is not advisable. It would be enough to amend the Criminal Code to include an offence regarding child pornography on the internet specifically, carrying with it even stricter penalties than exist under the current provisions. But stricter penalties alone will not solve the problem. Despite the relatively strong penalties that exist already in relation to child pornography, offenders are being granted suspended sentences and discharges. The harm that results from child pornography is being ignored or denied. Stricter penalties must be combined with a renewed conviction on the part of the police, the courts, and the public, that child pornography offences are indeed harmful and must be dealt with as such.

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Most importantly, the harms associated with child pornography must not be obscured by the rhetoric of freedom of expression. This danger arises in particular when child pornography is found on the internet. Claims that civil liberties will always be trampled when the government attempts to regulate the internet are simply not true. Careful regulations crafted to address specific problems need not be overly broad or oppressive. While cyberspace may be a unique and novel place, this distinctiveness is no reason in itself that it should not be regulated in the same manner as is non-cyberspace. Further, claims that cyberspace is the last bastion of free communication must not convince us to forego enforcement of our laws there. With a calm and reasoned approach, socially valuable and constitutionally protected speech need not be sacrificed in the struggle against child pornography. ■

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