

Ageism in the Justice System  
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Canada's population is aging. Statistics Canada recently released figures showing that the number of people aged 100 or older increased 50 percent between 1996 and 2006, and is set to triple to more than 14 000 by 2031.<sup>1</sup> The growth in Canada's aging population has led to an increase in the number of studies evaluating the impact of the law on older-adults.

Related work in the legal arena has focused on the law's intersection with the social science concept of ageism.<sup>2</sup> Ageism has been defined as "discrimination against people on the grounds of age; specifically, discrimination against the elderly (n ageist agist adj)."<sup>3</sup> Social science definitions of ageism associate ageism with older age and social conflict and draw parallels with racism. Most strikingly, social science definitions incorporate the perception of older people as a category that is distinct from other human beings.<sup>4</sup>

The purpose of this paper is to consider whether the justice system is ageist. The first part of the paper explores the concept of ageism. A justice system is ageist if stereotypes or beliefs about older individuals as a group are

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1 Canada, Special Senate Committee on Aging, *Canada's Aging Population, Seizing the Opportunity: Final Report* (Ottawa: Special Senate Committee on Aging, 2009) at p. 2 (Chair: Sharon Carstairs)

2 For example, Charmaine Spencer, "Ageism and the law: Emerging concepts and practices in housing and health" (2009) Law Commission of Ontario, online: <<http://www.lco-cdo.org/en/older-adults-lco-funded-papers-charmaine-spencer>> and Margaret Hall, "Developing an Anti-Ageist Approach to the Law" (2009) Law Commission of Ontario, online: <<http://www.lco-cdo.org/en/older-adults-lco-funded-papers-margaret-hall-section1>>

3 *Collins English Dictionary s.v "Ageism"*

4 Bill Bytheway, *Ageism and Age Categorization* (2005) 61: 2 *Journal of Social Issues* 361 at 362

manifest or if it is structured in a way that assumes all participants are young, thereby failing to respond to the needs of older adults.

The next part of the paper provides examples of the social construction of age in law-based aspects of the justice system, including age distinctions in law, age discrimination, the uneven application or effects of a law, and in the language used in judgments. In recent years, an increased awareness of ageism is reflected in these law based aspects of the justice system. Continued subjection of the law to an age-based lens will ensure that the justice system will serve the diverse needs of older adults in the future.

The third part of the paper looks at three institutional aspects of the justice system through an age based lens (legal education, resource based access issues, and community services) to determine whether they may manifest assumptions about older adults or impede access to justice. Improvements could be made to legal education to make knowledge more accessible to all levels of literacy. The financial drain of participating in the legal process makes it difficult for middle class individuals to participate in litigation, and cuts to public legal aid over the past decade make the future provision of existing services uncertain.

While this paper does not look at every aspect of the justice system, taking an age based analysis of a couple aspects of it serves as a 'jumping off' point for future discussion and policy. Viewing the justice system through the eyes of the older litigant uncovers that there are areas of further research and potential improvements that could be made. As Chief Justice McLachlin observed, "The most advanced justice system in the world is a failure if it does not provide justice

to the people it is meant to serve.”<sup>5</sup> As more and more of our population advances to old age it is important to focus on ageism and access issues to ensure that this growing segment of society can participate in the legal process.

### 1. Ageism and the Justice System

Ageism is a social science term used to describe stereotyped beliefs about older adults. In her report, “Aging and the Law: Emerging Concepts and Practices in Housing and Health”, Charmaine Spencer defines ageism as follows:

“Ageism” as used in social sciences refers to the set of attitudes that stereotype older adults, while “age discrimination” refers to the negative behaviours within law or society generally towards groups of persons at various ages. Ageism is more than discrimination that centres on a particular chronological age. Ageism reflects power relations within groups. The behaviours are often premised on (or the consequences of) the ageist attitudes or beliefs, many of which are implicit in society and the way it is structured.

Ageism consists of stereotypes about older adults that can be overtly expressed or implicit in society and the way it is structured. Ageism is so implicit and prevalent in society that one psychologist described the phenomenon as “one of the most socially-condoned and institutionalized forms of prejudice, such that researchers may tend to overlook it as a phenomenon to be studied.”<sup>6</sup>

In “Time for Action: Advancing Human Rights for Older Ontarians”, the Ontario Human Rights Commission sets out that ageism involves two types of behaviours that have a negative effect on older persons. The first type of ageist behaviour involves the social construction of age, including incorrect

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5 The Right Honourable Beverley McLachlin, Address, Paper presented to the Empire Club of Canada Toronto, March 8, 2007, published on the Supreme Court of Canada website, online: <<http://www.scc-csc.gc.ca/court-cour/ju/spe-dis/bm07-03-08-eng.asp>>

6 Todd D. Nelson, “Ageism: Prejudice Against Our Feared Future Self” (2005) 61:2 J. of Social Sciences 207 at 207.

assumptions and stereotypes about older persons. The other form of ageism is the tendency to structure society based on an assumption that everyone is young, thereby failing to respond appropriately to the real needs of older persons.<sup>7</sup>

The “justice system” is comprised of all of the various components of the law-related institutions, including courts, lawyers, police, parole, prisons and other corrections facilities. The terms “justice system” and “legal system” are used synonymously. Accordingly, when attempting to determine whether the justice system as a whole is ageist, it is necessary to consider the existence of stereotypes or assumptions that may exist in the various components of law related institutions.

While considering all aspects of the justice system is beyond the scope of this work, this paper will consider two general aspects of the justice system: the law based aspects of the justice system and the institutional aspects of the justice system. The law based aspects of the justice system that are reviewed in this paper include age distinction in the law, age discrimination in the law, the uneven application of the law, and the language of judgments themselves. The institutional aspects of the justice system that are considered in this paper include public legal education, the costs of litigation, and community services. Of course, casting an age based lens on every aspect of the justice system is beyond the scope of this paper, however, looking at some aspects of it critically could inform future decision making.

## 2. Law based aspects of the justice system

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<sup>7</sup> Ontario Human Rights Commission, “Time for Action: Advancing Human Rights for Older Ontarians” (2001) Ontario Human Rights Commission at p. 15.

a. Age distinctions in the law

Equality rights are guaranteed by section 15 of the *Charter of Rights and Freedoms*, which provides for equal protection and benefit of the law without discrimination:<sup>8</sup>

15. (1) 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.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Age distinctions are permitted, indeed in some cases encouraged, by the law. Section 15(2) of the *Charter* provides that a law, program or activity that ameliorates the disadvantages facing members of an enumerated or analogous group will not be found to be discriminatory.<sup>9</sup>

For example, in *Gosselin v. Quebec (Attorney General)*<sup>10</sup>, the Supreme Court of Canada found that the age distinction in Quebec's welfare legislation<sup>11</sup> that provided fewer benefits to those under age 30 unless they were enrolled in an education or job training program was not discriminatory. The majority held that since younger individuals did not suffer from pre-existing disadvantage and

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8 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982, ch. 11 (U.K.), s. 15(2) [the "*Charter*"].

9 *Ibid.* s. 15(2).

10 *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84 [*Gosselin*].

11 The legislation was repealed by the time the matter was heard by the Supreme Court.

the legislation had an ameliorative purpose, the age distinction was justifiable.

Writing for the majority, McLachlin C.J. noted:<sup>12</sup>

[T]his not a case where members of the complainant group suffered from pre-existing disadvantage and stigmatization on the basis of their age. Age-based distinctions are a common and necessary way of ordering our society, and do not automatically evoke a context of pre-existing disadvantage suggesting discrimination and marginalization. Unlike people of very advanced age who may be presumed to lack abilities that they in fact possess, young people do not have a similar history of being undervalued.

The Court held that the age based distinction had the ameliorative purpose of “enhancing the position of young people in society by placing them in a better position to find employment and live fuller, more independent lives.”<sup>13</sup> One may disagree that this legislation truly ameliorates the position of poor young people, but non-the-less *Gosselin* shows that certain age distinctions are legally permissible.

Another second example on the other half of the age spectrum is where landlords restrict rentals in a building to individuals over age 55.<sup>14</sup> The ameliorative purpose is to ensure access to housing options for older adults.

#### b. Age discrimination and the law

While not all age distinctions in the law are discriminatory, in the absence of an ameliorative purpose, a distinction that reinforces pre-existing stereotypes and is inconsistent with the actual capacities of older adults will be considered age discrimination. The issue of age discrimination was recently considered by the Ontario Superior Court in *Association of Justices of the Peace in Ontario v.*

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12 *Gosselin, supra* note 10 at para. 68.

13 *Ibid.* at para. 70.

14 British Columbia Ministry of the Attorney General, “Human Rights in British Columbia: Age Discrimination” (January 2008) online: < <http://www.ag.gov.bc.ca/human-rights-protection/pdfs/AgeDiscrimination.pdf>>

*Ontario (Attorney General)*<sup>15</sup>. At issue in that case was the mandatory retirement provision requiring justices of the peace to retire at age 70. Strathy J. distinguished the case from the mandatory retirement cases heard by the Supreme Court of Canada in the early 1990's noting that the social context, the consciousness of ageism and its effects had changed dramatically since the earlier cases had been decided:<sup>16</sup>

[I]n the sixteen years since the Supreme Court of Canada's decision in *McKinney*, there has been a sea change in the attitude to mandatory retirement in Ontario, led by the efforts of the [Ontario Human Rights] Commission. The Legislature has confirmed that mandatory retirement is a serious form of age discrimination and has abolished it in the public and private sectors. The rights of the individual Applicants, and of their colleagues in the Association, must be considered in this context.

In light of the current recognition of the pervasive effects of ageism, the Court concluded that mandatory age based retirement was discrimination because it (a) reinforced pre-existing ageist stereotypes; (b) was inconsistent with the actual needs, capabilities and circumstances of the applicants; (c) the ameliorative purpose did not make it any less discriminatory; and (d) the fundamental dignity of the applicants was at stake. The *Association of the Justices of the Peace* case provides a cogent precedent for determining whether future distinctions based on age will be considered discriminatory.

Indeed, legislation requiring mandatory retirement at a given age has been eliminated in Canadian human rights codes. The *Ending Mandatory Retirement Statute Law Amendment Act*<sup>17</sup> was enacted, amending the Ontario

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15 *Association of Justices of the Peace in Ontario v. Ontario (Attorney General)* (2008), 292 D.L.R. (4th) 623, 92 O.R. (3d) 16 [*Justices of the Peace*]

16 *Ibid.* at para. 45.

17 *Ending Mandatory Retirement Statute Law Amendment Act*, 2005, S.O. 2005, c. 29

*Human Rights Code* and prohibiting age discrimination in employment after age 65. Similar amendments have since been made in all of the provinces.<sup>18</sup>

c. Uneven application of a law

Ageism will exist wherever a law, policy, or program that is 'age-neutral' on its face disproportionately impacts older adults.<sup>19</sup> Advocacy groups like the Canadian Centre for Elder Law, Advocacy Centre for the Elderly, the Ontario Human Rights Commission, and the Law Commission of Ontario, have examined the impact of legislation governing areas as diverse as coroner's proceedings, predatory lending, guardianship, housing, capacity, substitute decision making, and elder abuse (to name only a few) on older adults. What their work has uncovered is that in many cases the laws that appear neutral on their face are in practice ageist.

New literature suggests adopting the process first articulated by the Supreme Court of Canada in *Granovsky v. Canada*<sup>20</sup> to determine if age-neutral legislation is in practice ageist:<sup>21</sup>

Developing an anti-ageist approach within the law requires developing and applying an "age based lens" to evaluate the impact of the law on older adults, and whether negative differential impact is intentional or not. An age-based lens includes the following questions:

- Does the legislation include or refer to, explicitly or implicitly, ageist stereotypes and/or paternalistic attitudes?
- Are there sufficient mechanisms provided for by the legislation to prevent or protect against the legislation being implemented in an ageist manner (including the acting-out of individual ageism, given the prevalence of ageist attitudes?)

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18 CBC News, "Mandatory Retirement Fades in Canada", *CBC News*, (20 August 2009) online: CBC News <<http://www.cbc.ca/canada/story/2009/08/20/mandatory-retirement-explainer523.html>> accessed September 28, 2010.

19 Hall, *supra* note 2 at p. 4.

20 *Granovsky v. Canada (Minister of Employment and Immigration)*, 2000 SCC 28

21 Hall, *supra* note 2 at p. 5.



- Does the legislation respond appropriately to the real needs of older persons as a group (understanding that older adults are extremely diverse), recognizing that older adults generally are situated differently from younger people and have different needs?

In order to determine if a law that is neutral on its face is, in practice, ageist, the law must be subjected to a three part inquiry: (1) whether the legislation explicitly refers to ageist or paternalistic attitudes; (2) whether it provides a mechanism to prevent itself from being applied in an ageist manner; and (3) whether it responds appropriately to the real needs of older persons as a group. Some recent cases concerning the law of evidence<sup>22</sup> or the application of sentencing principles with regards to older victims and older offenders may be ripe for scrutiny under this lens.<sup>23</sup> Submitting future legislation to the rigors of this age based lens will help to inform and improve future policy and regulation.

However, legislation is only one aspect of the law. Judge made principles of the common law should also be subjected to this type of age-based lens to determine if common law principles are in practice ageist and need to be revised.<sup>24</sup> Applying an age-based lens to any aspect of the law will help the law grow and adapt to the needs of Canada's aging society.

#### d. Judgments

The common law is communicated to the public through the decisions of judges. The language of any judgment must be carefully chosen because its

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<sup>22</sup> *R. v. Khelawon*, [2006] 2 S.C.R. 787

<sup>23</sup> *Criminal Code of Canada*, R.S.C. 1985, c. C-46, ss. 718 – 718.2 . Cases considering aggravating and mitigating sentences for older adults consider the age of the victim (with older victims constituting an aggravating factor) or age of the offender (old age is considered mitigating factor).

<sup>24</sup> One example is the presumption of undue influence when a parent transfers property to a child *Geffen v. Geffen Estate*, [1991] S.C.J. No. 53 (SCC) (Q.L.).

interpretation of the law may be applied in future cases. Furthermore, judgments are the basis of casebooks that educate future generations of lawyers in law school. Any given judgment has the chance of being repeated dozens of times, read hundreds of times, and reproduced thousands of times. The Senate Committee on Aging was very careful with defining older adults and cautioned against over generalization or the use of stereotypes for older adults as a group or paternalistic language. After hearing a significant amount of evidence from experts and analyzing statistics, they found:<sup>25</sup>

People over 65 are not a homogenous group. The experiences of people in their senior years vary with available resources, quality of health, and degree of integration into social and family networks. The senior years are experienced differently by different segments of the population, based on age category, urban/rural residence, and gender, as well as culture and race.

The senior years are experienced differently by different segments of the population, depending on a host of factors including geography, gender, culture, race, quality of health, resources, and social and family connections. It is impossible to attribute uniform characteristics to older adults.

To see if judgments were as careful as the Senate Special Committee about the language or stereotypes applied to older adults, I did a quick search on the Canadian Encyclopedic digest for the term 'elderly'. Ageism is a serious charge, so I had to assume that a judge was making a statement that reflected the evidence of that case relating to the older adult appearing in that particular

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<sup>25</sup> Special Senate Committee on Aging, Sharon Carstairs, chair ; Wilbert Joseph Keon, deputy chair "Embracing the Challenges of Aging" (Ottawa: : Special Senate Committee on Aging, 2007 ) at p. 15.

court. Nonetheless, I did find some examples where perhaps the language of the Court suggested generalizations related to older adults:<sup>26</sup>

- “He is an elderly man but prior to these events was able to enjoy life to a large degree.” This quote implies that enjoying life as an elderly person is exceptional.
- “Thus the gravity of the offence is neither increased nor lessened according to whether the victim was young, full of promise and vitality, and left behind loving family and many friends, as is obviously the case here, or whether the victim was elderly with no one to mourn his or her passing.” While on its face the comment seems age-neutral as it says that no distinction should be drawn, I suggest that even mentioning the dichotomy between “young, full of promise and vitality” with “a loving family and many friends” and “elderly with no one” propagates a stereotype of sad, lonely, older adults.
- “One reasonably may conclude that the telemarketing approach to this undertaking is at least somewhat more likely to victimize the elderly and the gullible and the non-assertive than are the lawful gaming activities of government.” This statement lumps the age-based notion of older age as analogous to the undesirable characteristics of “gullible” and “non-assertive”.

While I am sure that the individual judges themselves did not intend to apply any age-based assumptions, the examples above suggest that careful language is needed in judgments. With the advent of awareness of ageism and the aging

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26 Footnotes deliberately omitted.

population, the language used in judgments is likely to evolve much as policy and other law based aspects of the justice system have in recent years.

### 3. Institutional aspects of the justice system

#### a. Public legal education

The law is complex. The areas of the law that directly affect seniors including, capacity,<sup>27</sup> housing,<sup>28</sup> health care,<sup>29</sup> social assistance,<sup>30</sup> and privacy<sup>31</sup> are mired in complicated legal and regulatory processes. Most people (of any age or education level) who have justiciable problems do not obtain professional assistance.<sup>32</sup>

Those who do not seek professional legal assistance can turn to public legal information to inform themselves of their legal rights. Because many older Canadians have not obtained high school or higher level education,<sup>33</sup> in order to allow these individuals to avail themselves of this public legal information, it should be written in to the high school (or lower) literacy level. Spencer points out that there is a problem educating older adults about their legal rights where a disconnect exists in communication and literacy:<sup>34</sup>

Although public legal information has made important strides to make the law more understandable and accessible to many, it is still geared to the functionally literate person. That leaves many older adults, including older and more recent immigrants, at a significant disadvantage. Written information is helpful to some,

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27 Hall *supra* note 2.

28 Spencer *supra* note 2.

29 *Ibid.*

30 See Senate Committee *supra* note 1 at p. 21.

31 See Spencer *supra* note 2.

32 Ab Currie, "Justiciable Problems and Access to Justice in Canada" (Paper presented to the Osgoode Roundtable on Legal Aid, Toronto, November 2007) at p. 9.

33 A 2003 Statistics Canada report found that in 2001, 57 percent of seniors did not have a high-school diploma from Canada Office of Consumer Affairs, "Consumer Trends Report" online: < <http://www.ic.gc.ca/eic/site/oca-bc.nsf/eng/ca02102.html>>.

34 Spencer *supra* note 2 at p. 68.

but does not meet the needs of older adults whose cultural background has traditionally used oral communication to share information.

Public information about the justice system assumes a functionally literate audience, which many older adults are not, especially those cultures where oral communication was used to share information. The inability to access or understand public information about the law leaves some older adults without knowledge of their legal rights. While statistics suggest future generations of older adults will be more literate, the law is unlikely to get any less complex.<sup>35</sup> Continued efforts to translate legal concepts and educate older adults through a variety of methods should consider the literacy levels of the audience and oral methods of delivery where possible.

#### b. Financial Barriers to Access to Justice

Litigation is expensive. The Chief Justice described the cost of litigation as the most common barrier facing Canadians trying to access the justice system:<sup>36</sup>

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35 A Statistics Canada report states "The next generation of seniors, that is those aged between 55 and 64, has significantly different characteristics than the current generation in terms of educational attainment. Between 1990 and 2005, the share of 55- to 64-years-old with a postsecondary certificate or degree increased from 7% to 19%." (Statistics Canada, *A Portrait of Seniors in Canada* by Martin Turcotte and Grant Schellengberg (Ottawa: Statistics Canada, 2007) at p. 46).

36 McLachlin, *supra* note , the Supreme Court of Canada found that the age distinction in Quebec's welfare legislation that provided fewer benefits to those under age 30 unless they were enrolled in an education or job training program was not discriminatory. The majority held that since younger individuals did not suffer from pre-existing disadvantage and the legislation had an ameliorative purpose, the age distinction was justifiable. Writing for the majority, McLachlin C.J. noted:

[T]his not a case where members of the complainant group suffered from pre-existing disadvantage and stigmatization on the basis of their age. Age-based distinctions are a common and necessary way of ordering our society, and do not automatically evoke a context of pre-existing disadvantage suggesting discrimination and marginalization. Unlike

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people of very advanced age who may be presumed to lack abilities that they in fact possess, young people do not have a similar history of being undervalued.

The Court held that the age based distinction had the ameliorative purpose of “enhancing the position of young people in society by placing them in a better position to find employment and live fuller, more independent lives.” One may disagree that this legislation truly ameliorates the position of poor young people, but non-the-less *Gosselin* shows that certain age distinctions are legally permissible.

Another second example on the other half of the age spectrum is where landlords restrict rentals in a building to individuals over age 55. The ameliorative purpose is to ensure access to housing options for older adults.

a. Age discrimination and the law

While not all age distinctions in the law are discriminatory, in the absence of an ameliorative purpose, a distinction that reinforces pre-existing stereotypes and is inconsistent with the actual capacities of older adults will be considered age discrimination. The issue of age discrimination was recently considered by the Ontario Superior Court in *Association of Justices of the Peace in Ontario v. Ontario (Attorney General)*. At issue in that case was the mandatory retirement provision requiring justices of the peace to retire at age 70. Strathy J. distinguished the case from the mandatory retirement cases heard by the Supreme Court of Canada in the early 1990’s noting that the social context, the consciousness of ageism and its effects had changed dramatically since the earlier cases had been decided:

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[I]n the sixteen years since the Supreme Court of Canada's decision in *McKinney*, there has been a sea change in the attitude to mandatory retirement in Ontario, led by the efforts of the [Ontario Human Rights] Commission. The Legislature has confirmed that mandatory retirement is a serious form of age discrimination and has abolished it in the public and private sectors. The rights of the individual Applicants, and of their colleagues in the Association, must be considered in this context.

In light of the current recognition of the pervasive effects of ageism, the Court concluded that mandatory age based retirement was discrimination because it (a) reinforced pre-existing ageist stereotypes; (b) was inconsistent with the actual needs, capabilities and circumstances of the applicants; (c) the ameliorative purpose did not make it any less discriminatory; and (d) the fundamental dignity of the applicants was at stake. The *Association of the Justices of the Peace* case provides a cogent precedent for determining whether future distinctions based on age will be considered discriminatory.

Indeed, legislation requiring mandatory retirement at a given age has been eliminated in Canadian human rights codes. The *Ending Mandatory Retirement Statute Law Amendment Act* was enacted, amending the Ontario *Human Rights Code* and prohibiting age discrimination in employment after age 65. Similar amendments have since been made in all of the provinces.

b. Uneven application of a law

Ageism will exist wherever a law, policy, or program that is 'age-neutral' on its face disproportionately impacts older adults. Advocacy groups like the Canadian Centre for Elder Law, Advocacy Centre for the Elderly, the Ontario Human Rights Commission and the Law Commission of Ontario, have examined the impact of legislation governing areas as diverse as coroner's proceedings, predatory lending, guardianship, housing, capacity, substitute decision making,

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and elder abuse (to name only a few) on older adults. What their work has uncovered is that in many cases the laws that appear neutral on their face are in practice ageist.

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An age-based lens includes the following questions:

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- Does the legislation respond appropriately to the real needs of older persons as a group (understanding that older adults are extremely diverse), recognizing that older adults generally are situated differently from younger people and have different needs?

In order to determine if a law that is neutral on its face is, in practice, ageist, the law must be subjected to a three part inquiry: (1) whether the legislation explicitly refers to ageist or paternalistic attitudes; (2) whether it provides a mechanism to prevent itself from being applied in an ageist manner; and (3) whether it responds appropriately to the real needs of older persons as a group. Some recent cases concerning the law of evidence or the application of sentencing principles with regards to older victims and older offenders may be ripe for scrutiny under this lens. Submitting future legislation to the rigors of this age based lens will help to inform and improve future policy and regulation.



Unfortunately, many Canadian men and women find themselves unable, mainly for financial reasons, to access the Canadian justice system...

The Canadian legal system is sometimes said to be open to two groups – the wealthy and corporations at one end of the spectrum, and those charged with serious crimes at the other. The first have access to the courts and justice because they have deep pockets and can afford them. The second have access because, by and large, and with some notable deficiencies, legal aid is available to the poor who face serious charges that may lead to imprisonment...

It is obvious that these two groups leave out many Canadians. Hard hit are average middle-class Canadians. They have some income. They may have a few assets, perhaps a modest home. This makes them ineligible for legal aid. But at the same time, they quite reasonably may be unwilling to put a second mortgage on the house or gamble with their child's college education or their retirement savings to pursue justice in the courts. Their options are grim: use up the family assets in litigation; become their own lawyers; or give up.

The result may be injustice.

The costs of litigation are onerous on middle-class households who neither qualify for legal assistance nor have the funds to pay for legal services outright. The

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### c. Judgments

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average after-tax income received by senior couples in 2003 was \$42,800. For single males, the median after tax income was \$20,200 and for women it was \$18,200.<sup>37</sup> Accordingly, when deciding to pursue their rights, older adults

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*Human Rights Code* and prohibiting age discrimination in employment after age 65. Similar amendments have since been made in all of the provinces.

e. Uneven application of a law

Ageism will exist wherever a law, policy, or program that is 'age-neutral' on its face disproportionately impacts older adults. Advocacy groups like the Canadian Centre for Elder Law, Advocacy Centre for the Elderly, the Ontario Human Rights Commission and the Law Commission of Ontario, have examined the impact of legislation governing areas as diverse as coroner's proceedings, predatory lending, guardianship, housing, capacity, substitute decision making, and elder abuse (to name only a few) on older adults. What their work has uncovered is that in many cases the laws that appear neutral on their face are in practice ageist.

New literature suggests adopting the process first articulated by the Supreme Court of Canada in *Granovsky v. Canada* to determine if age-neutral legislation is in practice ageist:

Developing an anti-ageist approach within the law requires developing and applying an "age based lens" to evaluate the impact of the law on older adults, and whether negative differential impact is intentional or not. An age-based lens includes the following questions:

- Does the legislation include or refer to, explicitly or implicitly, ageist stereotypes and/or paternalistic attitudes?
- Are there sufficient mechanisms provided for by the legislation to prevent or protect against the legislation being implemented in an ageist manner (including the acting-out of individual ageism, given the prevalence of ageist attitudes?)
- Does the legislation respond appropriately to the real needs of older persons as a group (understanding that older adults are extremely diverse), recognizing that older adults generally are situated differently from younger people and have different needs?

will have to choose between giving up their rights or their assets, which would undoubtedly interfere with their ability to hire a lawyer and obtain professional legal services.

#### c. Community services

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In order to determine if a law that is neutral on its face is, in practice, ageist, the law must be subjected to a three part inquiry: (1) whether the legislation explicitly refers to ageist or paternalistic attitudes; (2) whether it provides a mechanism to prevent itself from being applied in an ageist manner; and (3) whether it responds appropriately to the real needs of older persons as a group. Some recent cases concerning the law of evidence or the application of sentencing principles with regards to older victims and older offenders may be ripe for scrutiny under this lens. Submitting future legislation to the rigors of this age based lens will help to inform and improve future policy and regulation.

However, legislation is only one aspect of the law. Judge made principles of the common law should also be subjected to this type of age-based lens to determine if common law principles are in practice ageist and need to be revised. Applying an age-based lens to any aspect of the law will help the law grow and adapt to the needs of Canada's aging society.

#### f. Judgments

The common law is communicated to the public through the decisions of judges. The language of any judgment must be carefully chosen because its interpretation of the law may be applied in future cases. Furthermore, judgments are the basis of casebooks that educate future generations of lawyers in law school. Any given judgment has the chance of being repeated dozens of times, read hundreds of times, and reproduced thousands of times. The Senate Committee on Aging was very careful with defining older adults and cautioned against over generalization or the use of stereotypes for older adults as a group or paternalistic language. After hearing a significant amount of evidence from experts and analyzing statistics, they found: at p. 64.

Community service aspects of the justice system are those aspects that facilitate the participation of older adults in exercising their legal rights. Community service ranges from advocacy or support groups that provide information and research or clinical assistance to older adults to programs that help older adults physically access the justice system.

Each level of government shares the responsibility to provide community services to older adults. The Senate Committee on Aging emphasized the importance of taking a proactive approach in developing social services for seniors, stating:<sup>38</sup>

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38 Senate Committee on Aging, footnote , the Supreme Court of Canada found that the age distinction in Quebec's welfare legislation that provided fewer benefits to those under age 30 unless they were enrolled in an education or job training program was not discriminatory. The majority held that since younger individuals did not suffer from pre-existing disadvantage and the legislation had an ameliorative purpose, the age distinction was justifiable. Writing for the majority, McLachlin C.J. noted:

[T]his not a case where members of the complainant group suffered from pre-existing disadvantage and stigmatization on the basis of their age. Age-based distinctions are a common and necessary way of ordering our society, and do not automatically evoke a context of pre-existing disadvantage suggesting discrimination and marginalization. Unlike people of very advanced age who may be presumed to lack abilities that they in fact possess, young people do not have a similar history of being undervalued.

The Court held that the age based distinction had the ameliorative purpose of “enhancing the position of young people in society by placing them in a better position to find employment and live fuller, more independent lives.” One may disagree that this legislation truly ameliorates the position of poor young people, but non-the-less *Gosselin* shows that certain age distinctions are legally permissible.

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Another second example on the other half of the age spectrum is where landlords restrict rentals in a building to individuals over age 55. The ameliorative purpose is to ensure access to housing options for older adults.

g. Age discrimination and the law

While not all age distinctions in the law are discriminatory, in the absence of an ameliorative purpose, a distinction that reinforces pre-existing stereotypes and is inconsistent with the actual capacities of older adults will be considered age discrimination. The issue of age discrimination was recently considered by the Ontario Superior Court in *Association of Justices of the Peace in Ontario v. Ontario (Attorney General)*. At issue in that case was the mandatory retirement provision requiring justices of the peace to retire at age 70. Strathy J. distinguished the case from the mandatory retirement cases heard by the Supreme Court of Canada in the early 1990's noting that the social context, the consciousness of ageism and its effects had changed dramatically since the earlier cases had been decided:

[I]n the sixteen years since the Supreme Court of Canada's decision in *McKinney*, there has been a sea change in the attitude to mandatory retirement in Ontario, led by the efforts of the [Ontario Human Rights] Commission. The Legislature has confirmed that mandatory retirement is a serious form of age discrimination and has abolished it in the public and private sectors. The rights of the individual Applicants, and of their colleagues in the Association, must be considered in this context.

In light of the current recognition of the pervasive effects of ageism, the Court concluded that mandatory age based retirement was discrimination because it (a) reinforced pre-existing ageist stereotypes; (b) was inconsistent with the actual needs, capabilities and circumstances of the applicants; (c) the ameliorative purpose did not make it any less discriminatory; and (d) the fundamental dignity

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of the applicants was at stake. The *Association of the Justices of the Peace* case provides a cogent precedent for determining whether future distinctions based on age will be considered discriminatory.

Indeed, legislation requiring mandatory retirement at a given age has been eliminated in Canadian human rights codes. The *Ending Mandatory Retirement Statute Law Amendment Act* was enacted, amending the Ontario *Human Rights Code* and prohibiting age discrimination in employment after age 65. Similar amendments have since been made in all of the provinces.

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In order to determine if a law that is neutral on its face is, in practice, ageist, the law must be subjected to a three part inquiry: (1) whether the legislation explicitly refers to ageist or paternalistic attitudes; (2) whether it provides a mechanism to prevent itself from being applied in an ageist manner; and (3) whether it responds appropriately to the real needs of older persons as a group. Some recent cases concerning the law of evidence or the application of sentencing principles with regards to older victims and older offenders may be ripe for scrutiny under this lens. Submitting future legislation to the rigors of this age based lens will help to inform and improve future policy and regulation.

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#### i. Judgments

The common law is communicated to the public through the decisions of judges. The language of any judgment must be carefully chosen because its interpretation of the law may be applied in future cases. Furthermore, judgments are the basis of casebooks that educate future generations of lawyers in law school. Any given judgment has the chance of being repeated

The aging population will change the way we do things. We can allow this change to happen by passively reacting to change. Or we can anticipate it and meet the challenge by design. We believe that in order to realize a society free of ageism, where seniors can access appropriate supports and services when they need them, where no senior is living in poverty, and adequate supports are in place for people to age in their place of choice, governments at all levels will need to work in cooperation with the private and voluntary sector to initiate change.

The Senate Committee of the Federal Government endorsed a proactive approach to providing supports and services for older adults. To be effective, each levels of government and volunteer service providers will need to coordinate efforts to ensure our justice system meets the needs of older adults.

At the municipal level , in Vancouver, there are a variety of organizations that promote healthy living, education, and community involvement.<sup>39</sup> If they get their day in court, seniors have discounted public transit fares (\$45/year), and those with disabilities can use the public “handi-dart” service which picks up individuals at their homes and drops them off at the desired location for the same price as a bus ticket (advance booking required).

At the provincial level, there is coordination between the government and non- profit organizations (such as the Law Foundation, an organization that was created by legislation that redistributes the interest on clients' funds held in lawyers' pooled trust accounts maintained in financial institutions) to provide public legal aid and education. To navigate the legal system there are

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dozens of times, read hundreds of times, and reproduced thousands of times. The Senate Committee on Aging was very careful with defining older adults and cautioned against over generalization or the use of stereotypes for older adults as a group or paternalistic language. After hearing a significant amount of evidence from experts and analyzing statistics, they found: at p. 9.

<sup>39</sup> Online: City of Vancouver Community Services for Seniors  
<<http://vancouver.ca/commsvcs/socialplanning/newtovancouver/part3/seniors.htm>  
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organizations such as the BC Centre for Elder Advocacy and Support, which is specifically designated for older clients. BCCEAS provides legal research and education, victim support, operates a legal clinic, and generally assists over 200 older adults per month.<sup>40</sup>

Other legal services in Vancouver include the Pivot Legal Society (which focuses on housing, discrimination, and health based advocacy), Legal Services Society, Community Legal Assistance Society (who advocate in the areas of mental health, disability law, and human rights law), Access Pro Bono, as well as the Law Students Legal Advice (LSLAP) program, which operates out of the UBC Faculty of Law.

While these services offer support for older adults to access the justice system at the present time, legal aid in British Columbia has faced significant cuts over the past decade.<sup>41</sup> Services available now may not be available in the future. It is easy to see that B.C.'s low income seniors will be disproportionately affected by the cuts to public legal services. There needs to be coordination between municipal, provincial, and federal efforts to ensure that older adults can participate in the justice system equally.

#### 4. Conclusion

In "A Time for Action: Advancing Human Rights for Older Ontarians", the Ontario Human Rights Commission warned:<sup>42</sup>

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<sup>40</sup> BC Centre for Elder Advocacy and Support, online: <<http://site.bcceas.ca/>>.

<sup>41</sup> See, CBC News, "Legal Aid funding cuts leads to service cuts", (13 January 2009) online: CBC News <http://www.cbc.ca/canada/british-columbia/story/2009/11/03/bc-legal-aid-cuts.html>; and CBC News, "B.C. Legal Aid Closes 5 Offices" (3 November 2009) online: CBC News < <http://www.cbc.ca/canada/british-columbia/story/2009/01/13/bc-legal-aid-funding-crunch.html>>.

<sup>42</sup> *Supra*, footnote 7 at p. 5.

There is an urgent need for action to eliminate ageism and age discrimination so that older persons can fully participate in our communities, enjoy the same rights afforded to others and can live their later years with dignity. A new approach to aging is needed, one that promotes the dignity and worth of older persons and ensures their independence, security, full-participation and self-fulfillment.

A justice system is ageist if it manifests incorrect assumptions and stereotypes about older persons or was structured in such a way that failed to respond to the real needs of older persons. Taking a look at a couple of aspects of the justice system through the age based lens in this paper is a point of departure for future discussion and policy.

The first part of this paper considered the law-based elements of the justice system with a view to determining whether they were ageist. Age distinctions in the law in favour of older adults will not be ageist where the purpose of the distinction is to improve disadvantages facing older adults. There have been positive developments in the law in the context of age-based discrimination. Since mandatory retirement case law was first decided in the 90's, Courts have adopted the concept of ageism as a discriminatory practice, and held that behaviour will be ageist where it (a) reinforces pre-existing ageist stereotypes; (b) is inconsistent with the actual needs, capabilities and circumstances of older persons; (c) does not have an ameliorative purpose; and (d) the fundamental dignity of older adults is at stake. Applying an age-based lens to what appears to be age-neutral statutes may uncover stereotypes or uneven application to older adults. There is a need to be sensitive to ageist language in judgments, to ensure that negative stereotypes about older adults are not carried on through the text of the law. When the law-based elements are subjected to an age-based lens, there are positive trends demonstrating an awareness and

responsiveness to issues facing older adults. As advocacy groups subject more aspects of the law to this lens, the law will be able to adapt to the changing needs of society.

The second part of the paper explores the institutional aspects of the justice system, including public legal education, the financial cost of litigation, and the availability of community legal services to see whether there are access issues for older adults. Public legal education will have to take into consideration the varied levels of literacy and means of communication in order to effectively inform older adults of their legal rights. The costs of litigation are likely to be prohibitively expensive for the many adults. All levels of government and volunteers need to coordinate their efforts to make the justice system more accessible. With recent cuts in legal services over the past decade, accessing legal aid may be more difficult for low income adults in the future. Taken together, all of these institutional aspects of the justice system have a disproportionately adverse effect on low education and low income older adults.

In conclusion, while there are ageist aspects of the justice system, there is also hope for change with the growing awareness of the issue of ageism in society. Continued research and activism are necessary to ensure that all barriers to older adults in participating our justice system are removed, so that it can provide justice to those that it is meant to serve.