Family Law and Social Welfare Legislation in Canada

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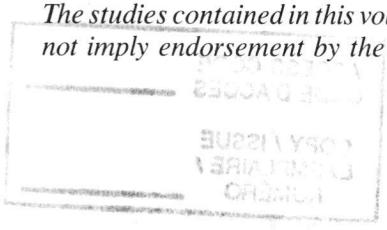

IVAN BERNIER and ANDRÉE LAJOIE
Research Coordinators

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FOREWORD

When the members of the Rowell-Sirois Commission began their collective task in 1937, very little was known about the evolution of the Canadian economy. What was known, moreover, had not been extensively analyzed by the slender cadre of social scientists of the day.

When we set out upon our task nearly 50 years later, we enjoyed a substantial advantage over our predecessors; we had a wealth of information. We inherited the work of scholars at universities across Canada and we had the benefit of the work of experts from private research institutes and publicly sponsored organizations such as the Ontario Economic Council and the Economic Council of Canada. Although there were still important gaps, our problem was not a shortage of information; it was to interrelate and integrate — to synthesize — the results of much of the information we already had.

The mandate of this Commission is unusually broad. It encompasses many of the fundamental policy issues expected to confront the people of Canada and their governments for the next several decades. The nature of the mandate also identified, in advance, the subject matter for much of the research and suggested the scope of enquiry and the need for vigorous efforts to interrelate and integrate the research disciplines. The resulting research program, therefore, is particularly noteworthy in three respects: along with original research studies, it includes survey papers which synthesize work already done in specialized fields; it avoids duplication of work which, in the judgment of the Canadian research community, has already been well done; and, considered as a whole, it is the most thorough examination of the Canadian economic, political and legal systems ever undertaken by an independent agency.

The Commission's research program was carried out under the joint

direction of three prominent and highly respected Canadian scholars: Dr. Ivan Bernier (*Law and Constitutional Issues*), Dr. Alan Cairns (*Politics and Institutions of Government*) and Dr. David C. Smith (*Economics*).

Dr. Ivan Bernier is Dean of the Faculty of Law at Laval University. Dr. Alan Cairns is former Head of the Department of Political Science at the University of British Columbia and, prior to joining the Commission, was William Lyon Mackenzie King Visiting Professor of Canadian Studies at Harvard University. Dr. David C. Smith, former Head of the Department of Economics at Queen's University in Kingston, is now Principal of that University. When Dr. Smith assumed his new responsibilities at Queen's in September 1984, he was succeeded by Dr. Kenneth Norrie of the University of Alberta and John Sargent of the federal Department of Finance, who together acted as Co-directors of Research for the concluding phase of the Economics research program.

I am confident that the efforts of the Research Directors, research coordinators and authors whose work appears in this and other volumes, have provided the community of Canadian scholars and policy makers with a series of publications that will continue to be of value for many years to come. And I hope that the value of the research program to Canadian scholarship will be enhanced by the fact that Commission research is being made available to interested readers in both English and French.

I extend my personal thanks, and that of my fellow Commissioners, to the Research Directors and those immediately associated with them in the Commission's research program. I also want to thank the members of the many research advisory groups whose counsel contributed so substantially to this undertaking.

DONALD S. MACDONALD

INTRODUCTION

At its most general level, the Royal Commission's research program has examined how the Canadian political economy can better adapt to change. As a basis of enquiry, this question reflects our belief that the future will always take us partly by surprise. Our political, legal and economic institutions should therefore be flexible enough to accommodate surprises and yet solid enough to ensure that they help us meet our future goals. This theme of an adaptive political economy led us to explore the interdependencies between political, legal and economic systems and drew our research efforts in an interdisciplinary direction.

The sheer magnitude of the research output (more than 280 separate studies in 70+ volumes) as well as its disciplinary and ideological diversity have, however, made complete integration impossible and, we have concluded, undesirable. The research output as a whole brings varying perspectives and methodologies to the study of common problems and we therefore urge readers to look beyond their particular field of interest and to explore topics across disciplines.

The three research areas, — *Law and Constitutional Issues*, under Ivan Bernier; *Politics and Institutions of Government*, under Alan Cairns; and *Economics*, under David C. Smith (co-directed with Kenneth Norrie and John Sargent for the concluding phase of the research program) — were further divided into 19 sections headed by research coordinators.

The area *Law and Constitutional Issues* has been organized into five major sections headed by the research coordinators identified below.

- Law, Society and the Economy — *Ivan Bernier and Andrée Lajoie*
- The International Legal Environment — *John J. Quinn*
- The Canadian Economic Union — *Mark Krasnick*

- Harmonization of Laws in Canada — *Ronald C.C. Cuming*
- Institutional and Constitutional Arrangements — *Clare F. Beckton and A. Wayne MacKay*

Since law in its numerous manifestations is the most fundamental means of implementing state policy, it was necessary to investigate how and when law could be mobilized most effectively to address the problems raised by the Commission's mandate. Adopting a broad perspective, researchers examined Canada's legal system from the standpoint of how law evolves as a result of social, economic and political changes and how, in turn, law brings about changes in our social, economic and political conduct.

Within *Politics and Institutions of Government*, research has been organized into seven major sections.

- Canada and the International Political Economy — *Denis Stairs and Gilbert Winham*
- State and Society in the Modern Era — *Keith Banting*
- Constitutionalism, Citizenship and Society — *Alan Cairns and Cynthia Williams*
- The Politics of Canadian Federalism — *Richard Simeon*
- Representative Institutions — *Peter Aucoin*
- The Politics of Economic Policy — *G. Bruce Doern*
- Industrial Policy — *André Blais*

This area examines a number of developments which have led Canadians to question their ability to govern themselves wisely and effectively. Many of these developments are not unique to Canada and a number of comparative studies canvass and assess how others have coped with similar problems. Within the context of the Canadian heritage of parliamentary government, federalism, a mixed economy, and a bilingual and multicultural society, the research also explores ways of rearranging the relationships of power and influence among institutions to restore and enhance the fundamental democratic principles of representativeness, responsiveness and accountability.

Economics research was organized into seven major sections.

- Macroeconomics — *John Sargent*
- Federalism and the Economic Union — *Kenneth Norrie*
- Industrial Structure — *Donald G. McFetridge*
- International Trade — *John Whalley*
- Income Distribution and Economic Security — *François Vaillancourt*
- Labour Markets and Labour Relations — *Craig Riddell*
- Economic Ideas and Social Issues — *David Laidler*

Economics research examines the allocation of Canada's human and other resources, the ways in which institutions and policies affect this

allocation, and the distribution of the gains from their use. It also considers the nature of economic development, the forces that shape our regional and industrial structure, and our economic interdependence with other countries. The thrust of the research in economics is to increase our comprehension of what determines our economic potential and how instruments of economic policy may move us closer to our future goals.

One section from each of the three research areas — The Canadian Economic Union, The Politics of Canadian Federalism, and Federalism and the Economic Union — have been blended into one unified research effort. Consequently, the volumes on Federalism and the Economic Union as well as the volume on The North are the results of an interdisciplinary research effort.

We owe a special debt to the research coordinators. Not only did they organize, assemble and analyze the many research studies and combine their major findings in overviews, but they also made substantial contributions to the Final Report. We wish to thank them for their performance, often under heavy pressure.

Unfortunately, space does not permit us to thank all members of the Commission staff individually. However, we are particularly grateful to the Chairman, The Hon. Donald S. Macdonald; the Commission's Executive Director, J. Gerald Godsoe; and the Director of Policy, Alan Nymark, all of whom were closely involved with the Research Program and played key roles in the contribution of Research to the Final Report. We wish to express our appreciation to the Commission's Administrative Advisor, Harry Stewart, for his guidance and advice, and to the Director of Publishing, Ed Matheson, who managed the research publication process. A special thanks to Jamie Benidickson, Policy Coordinator and Special Assistant to the Chairman, who played a valuable liaison role between Research and the Chairman and Commissioners. We are also grateful to our office administrator, Donna Stebbing, and to our secretarial staff, Monique Carpentier, Barbara Cowtan, Tina DeLuca, Françoise Guilbault and Marilyn Sheldon.

Finally, a well deserved thank you to our closest assistants: Jacques J.M. Shore, *Law and Constitutional Issues*; Cynthia Williams and her successor Karen Jackson, *Politics and Institutions of Government*; and I. Lilla Connidis, *Economics*. We appreciate not only their individual contribution to each research area, but also their cooperative contribution to the research program and the Commission.

IVAN BERNIER
ALAN CAIRNS
DAVID C. SMITH

PREFACE

This volume of research is part of the output of the Royal Commission's research program on Law and Constitutional Issues, and falls within the section entitled Law, Society and the Economy. This section serves as both an introduction and background to all the Commission's research on law. It analyzes how law has evolved under the pressure of social and economic changes and how it in turn has changed our social and economic conduct. Our objective was to highlight the relationship of law to the state, society and the economy. Our ultimate aim was to show how law affects Canadian society and to reveal its potential and limitations as an instrument for implementing government polity. In particular, we have addressed criticisms that focus on the multiplication of laws, regulations and tribunals as instruments of state intervention; on the complexity of our legal system and its essentially conflictual nature; and on the confusing character of the law and its apparent incapacity to respond to the needs of all Canadians.

We trust that, with the inventory taken and the conclusions drawn in this section, we have provided the Commission with insight into one of the most fundamental issues confronting it — the role of the state in Canadian society. For to ask what is the role of the state is to also question the role of the law.

The three studies included in this volume provide an overview of the development of law in two closely related fields, those of family law and social welfare. Indeed it is only in the 20th century that social welfare schemes have gradually replaced the family as the basic means of providing economic security.

The first study, by Payne, examines how changing perceptions of the role of family members, coupled with the freedom to divorce, have

brought about radical changes in the family law system. The growing realization that the private family law system cannot satisfactorily cope with the financial crises resulting from marriage breakdown, Payne points out, has stimulated demands for more state intervention. The latter point is picked up in the second study, by Mossman, who cites as evidence the sometimes conflicting attitude of the social welfare system, with its focus on the individual family unit, and the family law system, with its increasing focus on the individual.

The third study, by Bureau, Lippel and Lamarche, offers an historical account of the development of our social welfare system, focussing particularly on the period 1940–84. In their view, the progress made during that time, important as it is, has served as much to preserve the existing economic system as to bring relief to those lost in that system, with the result that the disparity between richest and poorest has increased rather than decreased. Worried that the current predominance of neo-liberal ideas might lead to a deterioration of the existing system, they conclude their paper with a strong plea in favour of a minimum guaranteed income to provide for basic human needs. Taken together, these studies offer a stimulating perspective on the relationship between law and social change.

IVAN BERNIER
ANDRÉE LAJOIE

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I also take this opportunity to acknowledge and thank my research assistant, Nicolas Roy, for his untiring efforts and valuable help.

I.B.

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Family Law in Canada and the Financial Consequences of Marriage Breakdown and Divorce

JULIEN D. PAYNE

Introduction

This paper examines contemporary private family law in Canada and its present and prospective role with respect to the well-being of families following marriage breakdown and divorce. Private family law may be defined as the system of laws regulating the rights and responsibilities of family members with respect to one another, as opposed to public law which regulates relationships between individuals and the state. Radical changes have taken place in recent years in the federal and provincial laws governing the rights and obligations of spouses to one another on marriage breakdown or divorce. No-fault divorce, no-fault maintenance orders, bilateral spousal maintenance obligations, rehabilitative maintenance awards and equitable disposition of property between spouses on marriage breakdown are concepts that were largely unknown in Canada prior to the late 1960s. These reforms have been accompanied by relatively modest changes in the processes for resolving legal disputes arising from marriage breakdown.

Marriage breakdown is an increasingly common occurrence in Canada. Despite this, our view of what marriage should be has changed little. People still tend to think of marriage and the family as synonymous, a family meaning father and mother, married for life, and their children. Despite the weakening of religious influences, most Canadians still subscribe to the legal definition of marriage as "a voluntary union for life of one man and one woman to the exclusion of all others." In reality, however, the hopes and expectations of a lifelong marital union are frequently dashed. Current statistical surveys project that 40 percent of all marriages in existence today in Canada will be terminated by divorce

and not by death. Faced with a fivefold increase in the divorce rate since the enactment of the federal *Divorce Act* in Canada in 1968,[1] there are those who assert that the Canadian family is in a state of crisis and that the "decline of the family" is symptomatic of a serious malaise in society at large. Others take the view that the family is now, as it always has been, in a state of transition and that it adapts to accommodate the changing values and needs of its individual members. Viewed historically, there is no doubt that the functions of the Canadian family have radically changed during the past century. Many of the responsibilities previously discharged by the family have been delegated to other agencies, including the education of the children and the welfare of elderly members of the extended family. Changing perceptions of individual freedom make it unlikely that the following views of Lord Stowell supporting the indissolubility of marriage would be shared by most Canadians today:

> It must be carefully remembered that the general happiness of the married life is secured by its indissolubility. When people understand that they must live together, except for a very few reasons known to the law, they learn to soften by mutual accommodation that yoke which they know they cannot shake off; they become good husbands and good wives from the necessity of remaining husbands and wives, for necessity is a powerful master in teaching the duties which it imposes. If it were once understood that upon mutual disgust married persons might be legally separated, many couples, who now pass through the world with mutual comfort, with attention to their offspring and to the moral order of civil society, might have been at this moment living in a state of mutual unkindness, in a state of estrangement from their common offspring, and in a state of the most licentious and unreserved immorality. In this case, as in many others, the happiness of some individuals must be sacrificed to the greater and more general good.[2]

Although few would contest that the family should retain its primary responsibility for the nurturing and socialization of children, this responsibility is no longer assumed to lie inevitably with both biological parents, or indeed, in exceptional cases, with either biological parent. The identification of domestic households with biological families has become increasingly blurred in the past 16 years with the growing incidence of common-law relationships and with remarriage after divorce, both of which have resulted in the emergence of reconstituted or blended families on a large scale. Consequently, the stereotype of the closely knit nuclear family with a breadwinning husband, a homemaking wife, and their two or more children no longer reflects the diverse structures of the Canadian family today. Canadian families of all types and ethnic backgrounds have undergone radical changes.

The substantial decrease in the birth rate over the past 20 years reflects not only the impact of the pill but also changing attitudes and values toward marriage and the family. Marriage is now perceived by many

spouses in terms of the happiness quotient. If a marital relationship is unduly stressful, there is an inclination to terminate it through the formal legal process of divorce. Some allege that the liberalization of divorce laws in Canada has fostered divorce-mindedness and that the law thus contributes to the breakdown of marriages in times of crisis. Others assert that divorce laws are constructive in that they enable spouses to end a marriage when it has irretrievably broken down and to enter into new positive and fulfilling relationships. Opinions also differ widely on the effect of separation and divorce on the children of the marriage. While some take the view that divorce is bad for the children, others assert that hostility between parents is far more detrimental than dissolution of the marital bond. In fact, we have no means of knowing the long-term effects of a high incidence of separation or divorce on Canadian families or Canadian society at large. It is significant, however, that three out of four divorced Canadians remarry. Divorce is thus perceived by its participants as the negation of a particular marital relationship rather than a negation of the institution of marriage.

The actual or prospective role of the law in regulating, moulding and sustaining family relationships has been a neglected field of research in Canada and elsewhere. Federal and provincial legislation regulating the rights and obligations of family members has been largely piecemeal in evolution and no coherent family policy has been articulated. In essence, however, the predominant trend in federal and provincial legislation has been toward the assertion of individual rights and liberties rather than the assertion of any family right. For the most part, private family law has been premised on the notion that any form of state intervention is an intrusion upon family privacy that can only be justified in the event of a breakdown in the family relationship.

Since 1968, revolutionary changes have been introduced in federal and provincial statutes regulating the substantive rights and obligations of family members. It can safely be said that no other field of law, with the possible but by no means obvious exception of the law of income taxation, has undergone such radical change. The major changes are the extension of the grounds for divorce and the establishment of new principles for determining spousal support after marriage breakdown.

The federal *Divorce Act* of 1968 established uniform grounds for divorce throughout Canada. It also introduced "no fault" grounds and extended the "offence" grounds on which divorce could be granted. Prior to 1968, divorce was available only by private act of Parliament in Quebec and Newfoundland. In the rest of Canada judicial divorce was available solely on the ground of adultery, with the exception of Nova Scotia where matrimonial cruelty also constituted a ground for divorce.

The *Divorce Act* also instituted fundamental changes in the statutory criteria regulating the granting of spousal support following a divorce. Prior to 1968, spousal maintenance in all cases of marriage breakdown

was regulated by provincial statute. The provinces imposed a unilateral obligation on a guilty husband to maintain his innocent wife in the event of a marriage breakdown. The *Divorce Act* altered the basis for maintenance rights and obligations following divorce from the traditional fault-oriented approach to one focussing on financial need and established "legal" equality of rights and obligations for men and women. Many provinces have since enacted similar legislation governing spousal support independent of divorce. Although these federal and provincial laws eliminated the matrimonial offence as the foundation of spousal support rights and obligations, spousal misconduct is not invariably excluded from judicial consideration in determining the right to or amount of support. The governing consideration, however, now turns upon the financial need of the claimant and the ability of the other spouse to pay. The right to support applies equally to wives and husbands. The claimant is nevertheless expected to strive for financial self-sufficiency, because marriage is no longer perceived as creating a right to lifelong support for the dependent spouse in the event of marriage breakdown.

These fundamental changes in the right to divorce and the right to spousal maintenance on divorce or marriage breakdown have been accompanied by equally fundamental changes in the provincial laws governing the division of property on divorce or marriage breakdown. The decision of the Supreme Court of Canada in *Murdoch v. Murdoch* in 1975,[3] which denied the wife's claim to a share in the assets acquired in her husband's name during their marriage, notwithstanding her work contribution to the acquisition of those assets, has largely been consigned to the realm of an historical anachronism. Changing judicial attitudes as reflected in the decisions of the Supreme Court of Canada in *Rathwell v. Rathwell* (1978)[4] and in *Pettkus v. Becker* (1980)[5] now recognize the economic contributions of the wife or "common law" wife who actively assists in the husband's or "common law" husband's business activities as entitling her to an interest in the property acquired by him as a result of those business activities. The 1982 decision of the Supreme Court of Canada in *Leatherdale v. Leatherdale*[6] denies any corresponding recognition of the wife's contribution where her role has been that of a homemaker who is not directly involved in the husband's business activities. In most provinces and territories, however, the homemaking spouse is now entitled to a share, but not necessarily an equal share, in such property pursuant to the provisions of recently enacted provincial statutes.

Statutory reforms in the field of children's rights have been modest in comparison with the changes affecting husbands and wives. The concept of "children's rights" is relatively new, although certain legislative trends are emerging. In the Province of Ontario, for example, the status of illegitimacy was substantially abolished by statute in 1977[7] and the

child's right to independent legal representation in wardship proceedings, albeit in the discretion of the court, was legislatively recognized in 1978.[8] The *Divorce Act* introduced dominion-wide statutory criteria to regulate child support and custody decisions in divorce proceedings, and the proposed 1984 amendments to the act[9] would have expressly empowered the court to order the appointment of a lawyer to represent the interests of any children of the marriage, where divorce proceedings have been instituted and the proper protection of the interests of the children requires such an appointment.

The past decade has also witnessed the development of new procedures and practices in the resolution of spousal disputes where litigation is pending. Mandatory financial and property statements are now filed by litigating spouses to provide data that will expedite the settlement or adjudication of maintenance and property disputes. Pre-trial processes have been devised to reduce or eliminate contentious issues. The discretionary jurisdiction of the court over costs has been exercised so as to promote the consensual resolution of disputed issues. The consolidation of disputed issues in a single court proceeding has been facilitated by statutory changes and by amendments to the provincial rules of court.

These and other procedural changes have proved advantageous but do not eliminate the overall negative impact of the traditional adversary system on the resolution of family disputes. Some progress has, nevertheless, been made. For example, the use of mediation or conciliation as an alternative or supplement to litigation is encouraged under current legislation in several provinces. In a few urban centres, unified family courts have been established with comprehensive jurisdiction over family law matters and access to support services that can deflect the need for protracted and costly litigation. There remains, however, considerable room for improvement in the development of alternative processes to litigation that will aid in the constructive resolution of family conflict.

Briefly stated, the ensuing analysis will focus on present weaknesses in the family law system. The continued fragmentation of legislative and judicial jurisdictions will be addressed in the context of providing alternative processes for the resolution of family disputes. The financial consequences of marriage breakdown and divorce will be examined in terms of the law and social and economic realities. Where appropriate, recommendations for change will be proposed. Particular attention will be directed toward the policy objectives that should be sought in applications for spousal support on marriage breakdown or divorce. The chronic problem of enforcing orders for spousal and child support will also be addressed. The analysis will conclude with an overview of the present and prospective role of the state in providing economic security for the financial victims of marriage breakdown and divorce.

Fragmentation of Legislative and Judicial Jurisdictions

Distribution of Legislative Powers

Exclusive legislative jurisdiction over "marriage and divorce" was conferred on the Parliament of Canada by section 91(26) of the *Constitution Act, 1867*. By way of qualification of the above jurisdiction, section 92(12) of the act granted an exclusive power to the provincial legislatures to enact laws relating to the "solemnization of marriage." Section 92(13) of the act also conferred exclusive authority on the provincial legislatures to make laws in relation to "property and civil rights in the province." Subject to the overriding provisions of section 96 of the act, section 92(14) gave the provinces authority over the "administration of justice in the province, including the constitution, maintenance and organization of provincial courts, both of civil and criminal jurisdiction, and including procedure in civil matters in those courts." This distribution of legislative powers remained unchanged with the patriation of the Constitution in 1982.[10]

It is significant that the Parliament of Canada has never seen fit to exercise its potentially broad legislative authority over "marriage." Furthermore, its "divorce" power lay dormant for the most part until the enactment of the *Divorce Act* in 1968. This statute created a dual system of spousal and child support and custody. Where a claim for support or custody arises in the context of divorce, the dispute is governed by the federal *Divorce Act*. Where, however, these claims arise during the subsistence of a marriage and independently of divorce, they are governed by provincial statute.

In the federal-provincial consultations on constitutional reform in the late 1970s and early 1980s, the federal government initially proposed that legislative jurisdiction over "marriage and divorce" be transferred to the provinces. This proposal reflected the opinions expressed in the report of the special joint committee of the Senate and House of Commons on the Constitution of Canada.[11] This committee concluded that such a transfer of legislative jurisdiction would permit "the laws [to] conform more closely to the social and ethical values of the Canadians living in that Province" and "would allow for a more integrated approach to Family Law within Provincial jurisdiction."

It remains to be seen whether the federal government still adheres to its former opinion that the legislative jurisdiction over "marriage and divorce" should be transferred to the provinces. In all probability, any such future proposal would be premised on the notion that such a transfer constitutes an item for negotiation in the broad context of a redefinition of federal and provincial legislative powers.

The transfer of legislative jurisdiction over "marriage and divorce" from the Parliament of Canada to the provincial legislatures would facilitate the development of a unified family law regime within each

province. However, a number of disadvantages would flow from a proliferation of diverse provincial regimes. Because Canadians frequently move from one province to another, a transfer of legislative jurisdiction over "marriage and divorce" to the provinces would undoubtedly exacerbate the problems currently encountered with respect to the recognition and enforcement of extra-provincial maintenance and custody orders. Furthermore, there is some risk that a province might opt to establish a divorce mecca, as has been done in the past in Nevada and Mexico and more recently in Haiti and the Dominican Republic.[12]

The Fragmentation of Judicial Jurisdiction

The distribution of legislative powers under the present Constitution contributes to but is not the sole reason for substantial fragmentation in the jurisdiction of Canadian courts that adjudicate family disputes.

The adjudication of family disputes in Canada today lacks any coherent philosophical basis. In many Canadian provinces, several levels of court share the responsibility for such adjudication. Overlapping and fragmented jurisdictions are rife, especially with respect to spousal and child support and the custody, care and upbringing of children. Thus, lawyers can play the game of "forum shopping," which can materially affect the cost and outcome of legal proceedings. Confusion, frustration and despair may ensue as family members are shunted from court to court in their search for elusive legal remedies. The problems are aggravated by the differing approaches to family conflict resolution adopted by the superior courts and by the juvenile and family courts.

Proceedings in the superior courts follow the traditional adversarial approach adopted in civil proceedings. Technical and formal procedures are adhered to and involve substantial costs to the litigating spouses at a time when there is often insufficient money to meet their basic needs. Superior courts are typically presided over by judges who have never specialized in the field of family law and whose contact with the adjudication of family disputes is sporadic. The superior courts rarely look to facilities in the community that might promote the conciliation of differences between family members. Any out-of-court settlement of disputes is left to the lawyers and their clients. Although the vast majority of disputes are in fact settled by the lawyers, one of the most significant factors contributing to settlement is the prohibitive cost of protracted litigation, in both dollars and cents and psychological wear and tear.

The juvenile and family courts established in Canada during the 20th century owe their origin to the notion that therapeutic intervention in the resolution of family disputes may be institutionalized within a judicial framework. Juvenile and family courts provide judicial expertise in the resolution of family law disputes. The judges are specifically appointed

to these courts and exercise a specialized jurisdiction in juvenile and family law matters. In theory, their legal expertise is reinforced by access to non-legal specialists who can assist litigants through counselling or assist the court by undertaking investigative or assessment functions. Pleadings and procedures in the juvenile and family courts are typically less formal than those in the superior courts. The proceedings are summary in character and relatively inexpensive.

There is, however, a substantial gulf between theory and practice. Few juvenile and family courts have the staff necessary to provide comprehensive investigations or assessments and few have access to alternative resources in the community. The lack of adequate non-legal personnel and the excessive workloads of the judges often result in delay and ineffectual judgments. More often than not, these courts merely provide "conveyor-belt justice" for the poor. Judgments that are issued are frequently unenforced, notwithstanding supposed "automatic enforcement" systems that have been implemented from time to time in some jurisdictions.

Although public expectations with respect to the constructive resolution of family disputes may far exceed the realistic potential of any court of law, public concern with the existing maze of jurisdictions is legitimate. The present fragmentation of jurisdiction, coupled with the absence of any coherent legal philosophy toward the resolution of family conflicts, cannot be justified.

In an effort to redress some of the problems arising out of the present fragmentation of judicial jurisdiction, federal and provincial law reform agencies have advocated the establishment of unified family courts. There are two outstanding features of a unified family court.

- The court must exercise an exclusive and comprehensive jurisdiction over legal issues directly arising from the formation or dissolution of the family.
- Auxiliary services must be available to the court in the exercise of its judicial functions and also to litigants having recourse to the judicial process. These auxiliary services include information and intake services; counselling and conciliation or mediation services; investigative or assessment services; and enforcement services.

Following the recommendations of federal and provincial law reform commissions, unified family court projects were established on a pilot or experimental basis in various urban centres across Canada, including the Richmond, Surrey, Delta districts in British Columbia; Fredericton, New Brunswick; St. John's, Newfoundland; Hamilton, Ontario; and Saskatoon, Saskatchewan. Some of these projects have now been given permanent status, but unified family courts have been established on a permanent and province-wide basis only in Prince Edward Island and New Brunswick. In the province of Manitoba, legislation was enacted as

recently as 1983 to establish the Family Division of the Court of Queen's Bench, which will assume a comprehensive jurisdiction over family law matters.[13] Internal and external evaluations of several of the aforementioned projects attest to their success in promoting the resolution of spousal and family disputes.[14]

Notwithstanding these favourable assessments, governments seem averse to establishing a province-wide or national network of unified family courts. There appears to be a tacit assumption that the costs of establishing such a network would be prohibitive. Regrettably, no concerted effort has been made to ascertain the cost-effectiveness of unified family courts as compared with that of existing courts that exercise a fragmentary jurisdiction over family law matters within the framework of the traditional adversarial process. Unless and until a comparative cost analysis is undertaken, it is unlikely that governments will take active steps to promote the establishment of a province-wide or national network of unified family courts.

Conciliation/Mediation and Arbitration as Adjuncts or Alternatives to the Adversarial Legal Process

Conciliation/Mediation

Marriage Breakdown: A Multi-Faceted Process

The termination of a marital or family relationship is a complex process. Paul Bohannan[15] has characterized "six stations of divorce": (i) the emotional divorce; (ii) the legal divorce; (iii) the economic divorce; (iv) the co-parental divorce; (v) the community divorce; and (vi) the psychic divorce. Each of these stations of divorce is an evolutionary process and there is substantial interaction between them.

Family law and the judicial process thus represent only one facet of the severance of matrimonial or familial ties. In the vast majority of cases, matrimonial disputes do not involve protracted litigation. Matrimonial proceedings in the provincial family courts are summary in character and occupy a modest amount of time in terms of judicial disposition. In addition, at least 85 percent of all divorce cases are uncontested and are judicially disposed of in a matter of minutes. Issues relating to spousal and child support, property division and the care and upbringing of dependent children are usually resolved by pre-trial negotiations between the respective spouses, with their lawyers. Protracted contentious litigation is the exception rather than the rule. Although lawyers may attribute the negotiation of settlements to their professional skills, a more obvious explanation lies in the emotional and financial costs to both clients and their children that flow from protracted litigation.

All too often, the legal divorce and the emotional divorce do not coincide in point of time for one or both spouses. Lawyers frequently

encounter situations where one spouse regards the marriage as over but the other spouse is unable or unwilling to accept that reality. In these circumstances, contested litigation over spousal and child support, property division, or custody and access often reflect the unresolved emotional divorce. Spouses who have not weathered the storm of the emotional divorce "displace" what is essentially a non-litigable issue relating to the preservation or dissolution of the marriage by fighting over one or more of these justiciable issues.[16]

The failure of the traditional legal and judicial process to respond to the human dynamics of marriage breakdown or divorce is confirmed by the findings of the Canadian Institute for Research on why husbands fail to pay court-ordered spousal or child support. In its *Matrimonial Support Failures: Reasons, Profiles and Perceptions of Individuals Involved* (1981), the institute found that husbands and fathers who failed to discharge their maintenance obligations to family dependants harboured strong feelings of bitterness toward their wives or former wives, expressed dissatisfaction over parenting arrangements, and considered that they had been treated harshly by the legal system. The institute concluded that these reactions reflected a failure on the part of the defaulters to come to terms with the change from a familial relationship to a debtor-creditor relationship and with their inability to adjust to the new role of an absentee provider. It was accordingly suggested that "better efforts to enable couples involved in divorce to come to an understanding concerning their future relationship, may lead to better payment and less acrimony."[17]

This research indicates that legal proceedings often fail to terminate spousal hostilities that commonly arise from the emotional trauma of marriage breakdown. Indeed, it suggests that the traditional adversarial legal process may be counter-productive by aggravating spousal tensions and hostilities, thus negating the prospect of reasonable consensual compromise and promoting non-compliance with court-ordered solutions.

The past 20 years have witnessed increasing criticism of the adversarial legal and judicial approach to the resolution of family conflicts. It is much easier, however, to identify the problem than to devise constructive solutions.

Following the enactment of the *Divorce Act* in 1968, fundamental changes in substantive family law were also implemented by the provincial legislatures by the late 1970s. Spousal property rights on marriage breakdown have been revolutionized by statutory reforms in every Canadian province. In many provinces, spousal support rights and obligations have been statutorily reformulated to reflect the changing role of married women in contemporary society. These reforms in substantive family law have not been accompanied by any fundamental change in the traditional adversarial legal and judicial process. Some

modest steps have, nevertheless, been taken to promote the consensual resolution of spousal disputes by way of conciliation services. It is appropriate, therefore, to review the present status of conciliation and mediation as alternative techniques for promoting the settlement of spousal and familial disputes.

Court-Based Conciliation Services: The Edmonton Experience

In 1972, a court-based Family Conciliation Service was established in the City of Edmonton on an experimental basis.[18] This pilot project received federal funding from September 1972 until August 1975 and was thereafter funded exclusively by the Province of Alberta. The Family Conciliation Service is now a permanent agency that acts under the authority of the provincial Department of Social Services and Community Health. The defined objective of the Family Conciliation Service is "to help parties make decisions about the marriage and/or related issues of custody, access and sometimes maintenance." In the past, the Family Conciliation Service has focussed on problems of support only when they are connected with custody or access disputes.

The counselling services are accessible to families through referral by lawyers, judges, family court counsellors or other paralegal workers. Between 1972 and 1979, 3,015 referrals were made. Internal and external evaluations indicate that the Family Conciliation Service offers a practical alternative to the adversarial resolution of disputes through litigation. The essence of the conciliation process is that the parties jointly resolve the issues with the aid of a neutral third party — the counsellor.

Although the Family Conciliation Service has concentrated its attention on spousal decisions respecting the preservation or termination of their relationship and on parenting after separation, the conciliation process can also serve a useful function in the resolution of financial disputes. In the words of Vincent T. Dwyer, senior counsellor of the service:

> From my experience . . . a conciliation service can play an important role in promoting compliance with statutorily imposed support obligations . . . pretrial conciliation often does reduce hostility and help couples arrive at voluntary agreements. At times conciliation helps couples solve problems which contribute to default under existing court orders.[19]

Budgetary considerations have precluded the Family Conciliation Service from increasing its caseload to permit a more extensive involvement in the resolution of issues relating to spousal or child support. It is submitted that this is false economy. Conciliation is not only advantageous to the emotional well-being of the members of a divided family; it is also financially preferable to the adversarial legal and judicial process and the costs of social assistance. A report submitted by the

Family Conciliation Service to the Department of Social Services and Community Health in 1979 makes the following statements:

> The Edmonton . . . Conciliation Service has demonstrated consistently that it is a useful and effective supplement to the legal and judicial systems. It is so in these ways:
>
> 1. The Conciliation Service is *preventative*. That aspect is clear in:
>   (a) the numbers of couples who reconciled and so avoided the pain of a disrupted marriage;
>   (b) the numbers of children whose distress was lessened and shortened when parents themselves decided access/custody issues in relatively short time;
>   (c) the more beneficial use of legal and judicial measures.
> 2. The service is *crisis-oriented*. The energy generated by the crisis situation is channeled toward productive decisions.
> 3. The service is economical when compared with
>   (a) the costs of social assistance to disrupted families;
>   (b) the costs of legal and court services. Those costs presumably are lessened when people make their own decisions.
>
> A minimal estimate of the cost of one hour in Family Court is $196.00. The same amount of time in the Court of Queen's Bench costs about $260.00. By comparison, the cost of one counselling hour in the Conciliation service is around $30.00.
>
> Such comparisons ought not be pushed too far. However, the comparison in this instance does show that custody/access matters can be settled at much lower cost when the parents decide the issues in Conciliation.

In an updated analysis of the comparable costs of the conciliation and judicial processes, Vincent T. Dwyer states:

> With respect to the cogency of citing comparisons of court costs and conciliation costs, we have kept no explicit cost figures. . . .
>
> The figures cited on page 6 of the [1979] report [*supra*] were obtained from the Clerk of the Edmonton Family Court. At the time they were conservative. If the figures were inflated by 12 percent per year they could serve as startling indicators of the differences in current costs between the court process and the conciliation process. Thus a conservative updated estimate for Family Court costs would be $267.00 per hour, for the Court of Queen's Bench $354.00 per hour and for Conciliation $41.00 per hour.
>
> Applying these figures, it takes an average of three conciliation hours to work out a viable agreement around custody and/or access and/or support. The cost of $123.00 is still considerably less expensive than one hour of court time.[20]

The positive benefits of the Family Conciliation Service, whether measured in terms of the creation of emotional stability for spouses and their children or in purely monetary terms, are confirmed in an independent evaluation that was completed in 1975.[21] The beneficial effects of court-based conciliation services have also been demonstrated in other Cana-

dian cities, some of which have incorporated a conciliation process within a unified family court structure, while others have used conciliation services within the framework of the more traditional family court.[22]

Independent evaluations of conciliation services in Edmonton and elsewhere suggest that there is a strong case for extending these services to pre-litigation and post-litigation counselling with respect to spousal and family disputes generally. This would undoubtedly necessitate increased public expenditures to permit the appointment of additional counsellors. It is submitted, however, that the investment could yield substantial returns both in financial and social terms.

It must be conceded that conciliation services cannot provide a panacea for family dysfunction. Counselling facilities can foster spousal and parental communication and understanding, and thus promote the consensual resolution of family disputes. They cannot effect fundamental changes in the cultural ethos that each individual should have freedom of choice and an opportunity to achieve personal happiness. Nor can counselling eliminate extrinsic pressures, such as poverty, unemployment and sickness, that may adversely affect the stability of marriage and the family unit. Conciliation services provide a partial, not total, solution to family dysfunction. This realization does not, however, excuse continued inaction. Social welfare programs that reflect a rational family policy and promote family cohesion must be buttressed by conciliation services that permit dysfunctional families to seek solutions to their problems other than by way of an adversarial, and often acrimonious, legal and judicial process.

Other Counselling Resources

The preceding analysis has been confined to court-based counselling and conciliation services. These short-term and crisis-oriented services represent only a small fraction of the total counselling resources available in the community. Clergymen, psychiatrists, psychologists, general medical practitioners, social workers, debt counsellors and lawyers are all actively engaged in counselling members of dysfunctional families. Established community resources include family service agencies and children's aid societies, as well as a growing number of self-help organizations. Universities and community colleges are increasingly providing educational programs for lay people and professionals that seek to promote the constructive resolution of family disputes.

In the last five years, mediation as a private practice has become a major growth industry in the United States. In all probability, this experience will be reflected in Canada within a relatively short period of time. Several private organizations in the United States are at present vying for the right to train and certify mediators. Ultimately, the state

may perceive a need to regulate private mediators to ensure adequate training and professional competence. Be that as it may, the growth of private mediation, as distinct from its quality, cannot be denied as the expression of a perceived public need for an alternative to the adversarial legal and judicial process.

Many questions remain unanswered respecting the optimal use of counselling resources as a means of resolving family disputes. Whether a province should give priority to the funding of court-based conciliation services or implement a fee-for-services approach with the cooperation of existing community-based agencies cannot be divorced from local conditions. Policies and programs also presuppose a clear definition of the functions and relationship of court-based and community-based counselling services. It is accordingly submitted that the provinces should examine their counselling needs and resources with a view to establishing cohesive province-wide counselling networks that will encourage family members to resolve their problems by negotiation rather than litigation. In the words of the Law Commission of England:

> The availability and scope of conciliation and similar services should be systematically investigated; everything possible should be done to encourage recourse to conciliation rather than litigation.[23]

Provincial Statutory Endorsement of Conciliation and Mediation

Several provinces have legislatively endorsed the use of conciliation or mediation processes in the resolution of custody disputes.[24] The prospective impact of these recent statutory provisions on the resolution of family disputes is speculative at the present time. It remains to be seen how often and in what circumstances lawyers and the courts will promote the use of conciliation or mediation. The frequency and efficacy of court-ordered conciliation or mediation will depend in part upon the reactions of practising lawyers. Whether conciliation or mediation will be viewed by lawyers as a practical and beneficial complementary or alternative process in family conflict resolution or as an invasion of the exclusive domain of the legal profession will be answered in the years ahead. Just as successful conciliation or mediation processes require the cooperation of the parties, so too an inter-disciplinary professional approach to the resolution of family conflicts requires the cooperation of the involved professionals.

Whatever the future may hold with respect to these innovative processes, these statutory provisions represent a major breakthrough in introducing through the law new perspectives to the resolution of family disputes. They openly acknowledge what has long been known — that legal processes are insufficient, of themselves, to promote the constructive resolution of family disputes.

Arbitration as an Alternative to the Judicial Process

The Evolution of the Arbitration Process

The conciliation or mediation of family disputes reserves the decision-making power to the parties themselves. The essence of a mediated settlement is the right of family members to self-determination of their disputes. When they cannot agree, an independent arbiter must determine their respective rights and obligations. Traditionally, this function has been discharged by the courts.

Arbitration has largely displaced litigation as a primary means of resolving labour disputes. To a much lesser extent, arbitration has also been recognized as an effective means of resolving commercial disputes. The use of binding arbitration instead of litigation to resolve spousal disputes respecting property division, support and child custody and access on marriage breakdown or divorce is relatively rare in Canada. It was, nevertheless, strongly endorsed by O.J. Coogler, former president and founder of the Family Mediation Association (U.S.A.), who pioneered the structured mediation and arbitration of family disputes.[25] During the last ten years, Canadian lawyers have made increasing use of arbitration clauses in drafting separation agreements and minutes of settlement. Arbitration clauses are now frequently incorporated in spousal agreements to provide a means of resolving whether a change in circumstances has occurred that justifies the variation or discharge of those terms of the agreement that provide for periodic spousal or child support. Arbitration has also emerged as an alternative to contested litigation of child custody disputes.[26] Although there have been individual instances where arbitration has been used to resolve all of the legal issues arising in consequence of marriage breakdown or divorce, it remains to be seen whether this will become a common practice.

Judicial Responses to Arbitration

Judicial decisions respecting the validity and enforceability of arbitration clauses in spousal agreements or settlements are rare in Canada. It is generally conceded, however, that spousal disputes can be referred to arbitration.[27] It does not follow, however, that a reference to arbitration ousts the statutory jurisdiction of the courts to adjudicate financial and parenting disputes arising on marriage breakdown or divorce.[28]

Advantages of Arbitration

Arbitration has the following advantages over litigation as a dispute-resolution process.

1. Selection of arbitrator In arbitration, the parties are directly involved in the appointment of the arbitrator and can make their selec-

tion according to the nature of the dispute and the arbitrator's qualifications and expertise. A lawyer or accountant might be appointed to resolve a complex financial dispute, or a psychiatrist or psychologist when the dispute focusses on the custody, care and upbringing of children. More than one arbitrator can be appointed if the parties wish to take advantage of several fields of expertise.

In litigation, the parties have little or no choice. Once proceedings have been instituted in a particular court, the issues will be adjudicated by one of the judges assigned to that court. The parties are not free to select a particular judge. Furthermore, if proceedings are instituted in a court of superior jurisdiction, the judge is not usually a specialist in the field of family law and may have no interest in, or even a positive aversion to, adjudicating spousal or parental disputes.

2. Type of hearing Litigants are often intimidated by the formality and adversarial atmosphere of the court. An arbitration hearing can be as formal or informal as the parties desire. They may favour an adversarial type of proceeding in which pleadings and affidavits are filed, witnesses are examined and cross-examined and the rules of evidence are strictly observed. Alternatively, they may prefer an informal approach such as a round-table conference. The role of the arbitrator can be specifically defined by the parties. In custody and access disputes, the arbitrator, often a psychiatrist or psychologist, may be given authority to act as a fact-finder as well as the decision maker. The fact-finding may include authorized access to school records and personnel and to doctors and medical records. It may also involve interviewing members of the immediate or extended family and other persons who may be involved in future arrangements for the care and upbringing of the children. Psychological tests may constitute part of the assessment. The arbitration process can thus be tailored to the needs of the parties and the circumstances of the particular case.

3. Flexibility and speed Litigation, at least in courts of superior jurisdiction, necessitates formal pleadings, productions and discoveries. Interlocutory motions are often brought pending a trial of the issues. The parties, their counsel and any witnesses must accommodate the demands or convenience of the court. The date of the hearing cannot be guaranteed and time is often wasted in waiting to be reached on the court list. Procedural requirements imposed by Rules of Court must be observed and the judge must have regard to previous decisions in matters of substantive law. It is not difficult for experienced counsel to invoke established procedures to delay a final resolution of the issues. Contested litigation invariably takes several months and may take several years, particularly if appeals are taken.

In contrast, arbitration does not normally require formal pleadings,

productions and discoveries. Interlocutory motions are unnecessary and the issues can be resolved without delay. An arbitrator can resolve the issues on the facts of the particular case and is not fettered by the doctrine of precedent. The extent to which formal procedural rules shall govern is a matter to be resolved by the parties themselves. The parties and the arbitrator can negotiate a suitable time and location for any hearing. Statutory holidays, weekends and evenings are not precluded, as they would be in the judicial process. The arbitrator has only one case to resolve and can give it his or her undivided attention. Hearings and adjournments can be scheduled to accommodate the parties. Even complex issues can usually be resolved by arbitration within a few weeks.

4. Definition of issues Parties may specifically define the ambit of the arbitrator's decision-making power. It can be as broad or as narrow as the parties wish. The arbitrator may be required to make decisions not only about the present but also the future. For example, an arbitrator may determine what spousal or child support shall be payable before and after a spouse's (parent's) retirement.

In contrast, litigants cannot fetter the statute-based discretionary jurisdiction of a court respecting spousal or child support, custody and access. In addition, courts look to the present and not the future; they cannot, or will not, decide issues that depend on future contingencies.

A. Burke Doran has expressed the following opinion:

> It is likely that the narrower the issue the more amenable it is to arbitration. You might be unwise to go into arbitration where the whole spectrum of matrimonial rights is in issue: custody, maintenance, access, property rights and so on, as the time-tested machinery of pleadings, particulars, etc., may be vital. Examples where arbitration could easily be used would include:
>
> 1. to decide the quantum of maintenance a husband shall pay after retirement;
> 2. whether the children can attend private school, public school or university;
> 3. what education the father must pay for after the child attains eighteen years;
> 4. terms of access;
> 5. custody when there are no major facts in dispute.[29]

This opinion was not shared, however, by O.J. Coogler, who advocated the use of arbitration to resolve disputes respecting property division, spousal and child support, custody and access, and legal and other costs.[30]

5. Privacy Even when the arbitration process selected by the parties has a formal and adversarial character, the hearing is conducted in private. Only the parties, their counsel and witnesses attend the hearing

before the arbitrator. Courts of law are generally open to the public and the press, with the consequent risk of embarrassing publicity.

6. Expense Although the fees and expenses of the arbitrator are paid by the parties in almost every case, these additional costs may be more than offset by the time and expense saved as a result of the simpler process. In the words of A. Burke Doran:

> Although arbitrators must be paid and judges come free along with capacious court rooms and court attendants . . . arbitration will be much cheaper (probably a small fraction) to all concerned, especially if commenced early in the proceedings.[31]

In *Carson v. Browman, Browman and Green River Stock Farms Limited*, however, an arbitrator's fees in the resolution of a spousal property dispute were taxed in the amount of $58,000 and the Taxing Office concluded that the use of the traditional legal process would probably have been more expeditious and less expensive.[32]

The costs of arbitration are usually more predictable than those arising from contested litigation. Parties to the arbitration process frequently predetermine who shall pay the costs. It is not uncommon for each spouse to pay his or her own lawyer and for the costs of the arbitrator to be shared equally between the spouses.

In contested litigation, it is often difficult to predict the costs that will be involved in proceeding to an adjudication. The time likely to be expended and the results of the dispute are frequently unpredictable. In addition, after contested litigation, it is the responsibility of the court to determine who shall pay the legal costs. The jurisdiction to order costs falls within the unfettered discretion of the court, and judicial practices vary widely. In some cases, the court will make no order for costs; in others, costs will be ordered on a party/party basis, which entitles the recipient to recover a portion of his or her own lawyer's fees; in still others, the court will order costs on a solicitor/client basis, which indemnifies the recipient for all costs reasonably incurred.[33]

Disadvantages of Arbitration

Opponents of arbitration argue that the extrajudicial character of the arbitration process denies the protection that is guaranteed by "due process of law." Any failure to adhere to substantive and procedural laws, including the rules of evidence, creates a vacuum within which the arbitrator's discretion is unfettered. This may produce unpredictable results and arbitrary judgments. Difficulties may also be encountered in the enforcement or subsequent variation of arbitration awards. Judge Rosalie Silberman Abella[34] asserts that "a refined adversarial process of judicial decision making is necessary to avoid the erosion and dilution of the integrity of the law of the family" and that this can be achieved by

refinements of the existing process, including the use of expert evidence, pre-trials, mediation, and the legal representation of children, but concludes that arbitration is essentially "the adversary process without the judicial atmosphere, and therefore not generally considered a real alternative to it."

In addition, the use of arbitration as an alternative to litigation can create tax problems. Relevant sections of the *Income Tax Act* respecting spousal and child support and property dispositions are conditioned on the existence of a written agreement or court order. Rights and liabilities flowing from an arbitration award do not, without more, fall within either of these categories.

Arbitration as a Viable Alternative

On balance, binding arbitration appears to constitute a rational alternative to litigation. It should be available at the option of the parties. Experiments with the mandatory arbitration of non-familial civil disputes in the United States have yielded mixed results.[35] It would be inappropriate, therefore, to recommend any universal system of compulsory arbitration for the resolution of family disputes. Spouses should, nevertheless, be legally empowered to submit any dispute arising on marriage breakdown to binding arbitration. A residual jurisdiction should be vested in the courts, however, to direct a trial of the issues when the arbitration process contravenes principles of "natural justice" or when the interests of a child necessitate judicial intervention.

Some form of court-annexed arbitration might also be considered as an alternative process for the resolution of family disputes. Court-annexed arbitration has recently emerged in several jurisdictions in the United States as a viable alternative to the traditional litigation process. The nature of court-annexed arbitration has been described by Dr. A. Leo Levin, director of the U.S. Federal Judicial Center in the following words:

> Arbitration, as an alternative to litigation, is voluntary in its most common form. Its use depends on the consent of the parties and, once agreed to, is binding. In order to cope with an ever-increasing flood of litigation, some courts have used arbitration in a different form — a court-annexed procedure — to resolve civil litigation already commenced. Court-annexed arbitration is unlike traditional arbitration in several ways: it is mandatory rather than voluntary; the arbitrators are typically assigned by a third party rather than chosen by the parties; and the award is not binding. Typically, the procedure is imposed upon litigants by statute and by rule. Moreover, court-annexed arbitration is a method of dealing with civil litigation subsequent to the filing of the case while traditional arbitration occurs prior to the institution of the lawsuit.[36]

In addressing the potential of this innovative process, Dr. Levin concludes:

From the perspective of the litigants, there are three important variables that must be considered in evaluating the operation of compulsory arbitration: speed of disposition, expense of litigation, and quality of justice. Properly administered, an arbitration program that reduces the number of trials will speed disposition and reduce the expense of litigation. The evidence also points toward litigant satisfaction with the quality of justice dispensed. From the perspective of the courts and of litigants whose controversies are susceptible to resolution other than by a court, there is much to be gained. Programs do not, however, run themselves. Effective administration is essential. Variations in administrative detail can dictate the difference between success and failure.

Court-annexed arbitration may not be the optimal approach for every jurisdiction, but it has been a dramatic success in some places, and has produced significant, albeit modest, results in others. Given the enormity of the twin problems of delay and expense in court litigation, it is reasonable to suggest that court-annexed arbitration be given the chance to reach its full potential as an alternative mechanism for dispute resolution.

The need for alternative mechanisms of dispute resolution is so great in our litigious society, and contemporary demands on the courts so heavy, that any procedure that can contribute to more efficient, more effective justice deserves to be tried.[37]

Spousal Support and Property Division

Policy Objectives

The basic principles underlying spousal maintenance prior to the reforms that began in 1968 were relatively clear. Because divorce was permitted only by petition of a person whose spouse was guilty of a matrimonial offense, the basis for spousal support was to minimize the financial suffering of the innocent party. Coupled with this was the view that a wife was financially dependent on her husband and his responsibility for supporting her was a potentially lifelong obligation even in the event of marriage breakdown. Consequently, the provincial statutes that formerly governed support rights and obligations on marriage breakdown and divorce authorized spousal maintenance only for the wife and only if she was the innocent party. The objective of the court in assessing the degree of support was that the wife's standard of living should be lowered as little as possible. If practicable, the husband would be ordered to pay sufficient maintenance to enable her to enjoy the same standard of living as existed during the marriage. In most cases this was not possible and the courts invoked the alternative principle that she should not be relegated to a position substantially lower than that enjoyed by the husband.

The introduction of no-fault divorce grounds, changes in the roles of husband and wife — particularly the increased labour market participa-

tion of married women — and demands for equality of men and women all contributed to the need for reformulation of the principles and objectives of spousal support legislation. The federal *Divorce Act* of 1968, governing support following divorce, and the more recent provincial and territorial statutes governing support following marriage breakdown independent of divorce instituted some fundamental changes. Maintenance rights and obligations are no longer sex based and either spouse may apply for financial relief. Federal law and most provincial laws have abandoned the fault system for determining support rights and obligations in favour of an approach based on need and capacity to pay.

Every province and territory has also enacted legislation to promote a more equitable division of property between spouses. These changes followed the public outcry over the decision of the Supreme Court of Canada in *Murdoch v. Murdoch* in 1975. Provincial statutes, most of them enacted between 1978 and 1980, provide for some form of division of property between spouses on their marriage breakdown or divorce. Stated generally, provincial legislation currently provides for an equal division of the former matrimonial home and its contents. There are, however, fundamental differences in approach with respect to the division of business assets and pension benefits.

Although this legislation has mitigated the rigours of the *Murdoch* decision and provided some relief for homemaking spouses, the benefits are, in fact, significant only when there are substantial assets available for distribution. A court-ordered division or negotiated property settlement rarely provides sufficient capital to give a "displaced homemaking spouse" any degree of financial security for the future.

It has been suggested that the "future income" of a spouse should be included within the category of divisible property. Given the findings below respecting maintenance rights and obligations, it is submitted that the inclusion of future income in divisible property would confer no real benefit in the vast majority of cases.

The freedom to remarry that has resulted from the new divorce regime has carried in its wake increasing problems for the courts as they seek to balance the competing demands of the divorced wife and the children of the dissolved marriage against the demands of the divorced husband's subsequently acquired family dependants. In the absence of specific statutory guidelines or directives, courts have differed widely in resolving the priorities between past and present families. Some courts have endorsed the view that the primary responsibility is owed to the first family and that this responsibility is unaffected by the obligor's voluntary assumption of new family responsibilities. Other courts have asserted that the new family takes precedence, at least where the obligor is unable to maintain two families, because the public interest is best served by promoting the success of the present relationship. Between these two

extremes, a middle ground has been adopted by many courts whereby no preference is automatically extended to either family unit and each case is determined on its own facts.

The search for a redefinition of the policies or objectives that should be pursued by the courts in determining the right to spousal maintenance and the amount of support on marriage breakdown or divorce has proved elusive, largely because of changing family structures and the changing roles of family members in contemporary society. The traditional image of the nuclear family comprising a husband "breadwinner," a wife "homemaker" and their dependent children is an outmoded stereotype that no longer reflects the diverse forms of family structures in Canada. Contemporary demands for equality between the sexes and the increasing number of married women in the labour force also necessitate a reformulation of the objectives of spousal maintenance on marriage breakdown. Indeed, the impact of these factors has induced new provincial legislative approaches to spousal maintenance that place emphasis — perhaps undue emphasis — on the notion that a financially dependent spouse is required, in law, to achieve self-sufficiency. The traditional notion that marriage entitles a dependent spouse to lifelong support has been trenchantly criticized in recent years and has been largely displaced by the concept of rehabilitative maintenance awards and the "clean break" doctrine.

Both provincial statutes and the federal *Divorce Act* confer extremely broad discretion on the courts in the adjudication of spousal maintenance claims. This is true whether the court is applying the general language of the *Divorce Act* or the more detailed criteria set out in some provincial statutes. In the author's view the flexibility of an unfettered judicial discretion is purchased at too high a price in terms of uncertainty, inconsistency and unpredictability and both provincial and federal legislation should include a definition of the policies or objectives of spousal maintenance laws. The present legal position was aptly summarized by the Supreme Court of Canada in its judgment in *Messier v. Delage* in 1983,[38] wherein the judges disagreed on the central issue of whether the wife's inability to secure employment, notwithstanding her qualifications, should result in the imposition of a legal obligation on the ex-husband or the state to subsidize her financial needs. In the majority judgment, the following extra-judicial observations of Judge Rosalie Silberman Abella were cited:

> To try to find a comprehensive philosophy in the avalanche of jurisprudence which is triggered by the Divorce Act [RSC 1970 cD-8] and the various provincial statutes is to recognize that the law in its present state is a Rubik's cube for which no one yet has written the Solution Book. The result is a patchwork of often conflicting theories and approaches.[39]

Differing judicial and legislative attitudes have also been evinced with respect to the continued relevance, if any, of spousal misconduct to the

determination of the right to and quantum of spousal maintenance on marriage breakdown or divorce. In this respect, provincial statute laws are passing through a transitional phase. At the present time, Alberta, Saskatchewan, the Yukon and Northwest Territories still adhere to the traditional offence concept. The applicant in these jurisdictions must prove that the defendant has committed a designated matrimonial offence (e.g., adultery, cruelty or desertion) and the misconduct of the applicant can constitute a bar to relief. Other provinces have generally rejected the offence concept as the basis of spousal support in favour of a "needs" and "capacity to pay" orientation, although in Ontario and Prince Edward Island "conduct that is so unconscionable as to constitute an obvious and gross repudiation of the [marital] relationship" remains a relevant factor in the court's determination of the amount of support.[40] In British Columbia, the misconduct of the spouses appears to be irrelevant to any judicial determination of the right to and quantum of maintenance on an application made pursuant to the *Family Relations Act* of 1979.[41] The same is true with respect to applications for spousal maintenance made pursuant to the Civil Code of Quebec. In Manitoba, the 1983 amendments to the *Family Maintenance Act* of 1978[42] expressly exclude spousal conduct from consideration in maintenance proceedings. And in New Brunswick, conduct is declared to be relevant only insofar as it affects the applicant's need for support or the respondent's ability to pay.[43]

Section 11 of the *Divorce Act* stipulates that the "conduct" as well as the "condition, means and other circumstances" of each of the parties is a relevant consideration in the judicial determination of the right to and quantum of support. Reported judicial decisions over the 16 years since the *Divorce Act* was enacted indicate that many judges now concentrate on the economic consequences of the marriage breakdown rather than on misconduct during the subsistence of the marriage. There are, however, wide variations in the approach of individual judges to the significance of matrimonial misconduct irrespective of whether the governing legislation is the *Divorce Act* or a provincial statute.[44] Differing judicial opinions on the effect of spousal misconduct where maintenance is sought in divorce proceedings will be eliminated when Bill C-47, Divorce and Corollary Relief Act, is enacted by the Parliament of Canada. Subsection 15(5) of the bill expressly provides that in determining the right to and quantum of maintenance on the dissolution of marriage, "the court. . . shall not take into consideration any misconduct of a spouse in relation to the marriage."

Unless and until federal and provincial statutes specifically define the policy objectives of spousal maintenance rights and obligations on marriage breakdown and divorce, the present uncertainty, unpredictability, confusion and conflicting judicial approaches will prevail. Some judges will continue to place emphasis on the "clean break doctrine" and

"rehabilitative support," while others will adhere more closely to notions of culpability and preservation of the standard of living enjoyed during the cohabitation of the spouses.

Any statutory definition of new policy objectives for spousal maintenance rights and obligations must, of course, take account of the diverse characteristics of families in contemporary society. The economic variables of marriage breakdown and divorce do not lend themselves to the formulation of any single objective. Long-term marriages that ultimately break down often result in a condition of financial dependence if the wife was a full-time homemaker. The legitimate objectives of spousal support in such a case will rarely coincide with the objectives that should be pursued with respect to short-term marriages. Childless marriages give rise to different considerations from those arising in marriages that have produced dependent children. Two-income families cannot be equated with one-income families. The impact of remarriage and second families cannot be ignored. In an attempt to redress the problems arising from the exercise of an unfettered judicial discretion, subsection 15(6) of Bill C-47, 1985, formulates the following four policy objectives of spousal maintenance on the dissolution of marriage:

- recognition of the economic advantages and disadvantages to the spouses arising from the marriage or its breakdown;
- sharing the economic consequences of child care;
- relief of any economic hardship arising from the breakdown of the marriage;
- adjustment to economic self-sufficiency within a reasonable time.

These objectives are analyzed in detail in a 1982 study by the author.[45] A comparison of the average duration of dissolved marriages (10.5 years) with the average post-dissolution lifespan of the former spouses (38–43 years) underlines the advantages of implementing a clean financial break between divorcing spouses where this is practicable. In appropriate circumstances, a clean break may be facilitated by a division of property pursuant to provincial statutory authority and/or by the granting of a lump sum maintenance order in the divorce proceedings. Where a clean break is not feasible, the financial rehabilitation of a dependent spouse should be encouraged by periodic payments for a fixed term. Spousal support by way of periodic payments for an indefinite term should be avoided on the dissolution of marriage except where there is no reasonable and practical alternative, as, for example, where a "displaced homemaker" cannot reasonably be expected to achieve an acceptable level of financial independence. Legislative implementation of the above policies should structure the judicial decision-making process within a framework of more clearly defined standards and objectives. In the absence of fixed arithmetical formulae, however, there will always be considerable freedom of choice in the judicial application of statutory

provisions, however specific they may appear to be. Although the ultimate evaluation and application of statutory criteria are inevitably a matter for the adjudicator, undue subjectivity may be avoidable by the formulation of well-conceived policy objectives.

The Enforcement of Maintenance Rights and Obligations

Empirical research undertaken in Alberta and Ontario indicates an extremely high rate of default in the payment of court-ordered maintenance. The Canadian Institute for Research conducted an extensive study of family court and Supreme Court files in Alberta, accompanied by an opinion survey of men and women affected by maintenance orders, and found that almost 50 percent of the persons ordered to pay spousal and/or child maintenance fail to fully discharge their obligations.[46] In a more limited study of an urban family court in Ontario, 62.7 percent of the orders involved some degree of default within four months of the issue of the order, and the incidence of default increased to 77 percent within six months and to 87 per cent within twelve months of the granting of the order.[47]

In assessing the factors relevant to the payment or non-payment of court-ordered maintenance, these studies concluded that compliance with court orders was attributable to "a sense of responsibility" and that non-compliance was not explained by an inability to pay. Using social assistance rates as the base line for calculating the obligor's disposable income, the Canadian Institute for Research found that lack of income seemed related to irregular payment but not to complete disregard of the court order. Applying the aforementioned base line, the institute observed that 80 percent of husbands had sufficient income to meet their legal obligations. The failure to pay was, therefore, not attributable to "affordability," notwithstanding the husbands' protest to the contrary. Rather, it was attributable to continued resentment toward their wives or ex-wives, dissatisfaction with parenting arrangements and the belief that they had been treated badly by the legal system. In short, default frequently reflected the failure of the husbands to adjust to the role of an absent breadwinner.[48] Accordingly, the institute concluded that more positive attitudes toward the discharge of continuing support obligations necessitate a better understanding by spouses and ex-spouses of their future relationship and commitments.

This conclusion opens up fundamental questions concerning the present character of the legal system and of the judicial process. There is reason to believe that the adversarial nature of the legal process exacerbates the bitterness and resentment that inevitably accompany the "emotional divorce" of the spouses. It remains open to question how far these problems can be resolved within the context of existing legal and judicial structures. Assuming for the present that the private law system

presupposes continued reliance on the judicial process, the findings of the Canadian Institute for Research suggest that some form of counselling, mediation or conciliation service would prove beneficial in balancing the emotional and economic needs of all affected parties and thus promoting fairness both in fact and in appearance.

The aformentioned studies, together with the comprehensive study undertaken by Professor David L. Chambers in the State of Michigan,[49] support the following conclusions.

1. Economic hardship Economic deprivation is an inevitable consequence of marriage breakdown, at least where there are dependent children. Empirical evidence demonstrates quite clearly that the vast majority of marriage breakdowns involving children create severe financial pressures for the custodial parent. Separated and divorced women become the primary custodial parent in approximately 85 percent of all marriage breakdowns. Even if a negotiated settlement or court order provides for modest financial support from their husbands or former husbands, most women with dependent children cannot maintain the same standard of living as that enjoyed during the subsistence of the marriage. If the maintenance to which they are entitled is paid, and often it is not, those with no other source of income live at near a bare subsistence level. Even employed mothers cannot preserve the same standard of living as that enjoyed during matrimonial cohabitation. For the most part, their standard of living will range from something below the poverty line to a level modestly above it.

Professor Chambers concluded that a higher standard of living cannot be achieved by reform of spousal or child support laws or by the implementation of more effective enforcement processes. The solution must be found elsewhere, perhaps through state-guaranteed income policies or by state-initiated policies aimed at expanding opportunities for women in the labour force.[50] A second and perhaps equally important finding of Professor Chambers relates to the "gap in psychological perception between many divorced persons about the value of the payments."[51] Although many men regarded $50 per week as extremely high, the women regarded it as far too little. Professor Chambers opined that this "gap in psychological perception surely operates to widen the gaps in the postdivorce relations between parents — gaps in perceptions about 'fault' in the marriage, the appropriate care of children, and so forth."[52] This finding tends to support the previously asserted need for a better understanding of the divorce process and of the economic realities of marriage breakdown. Such an understanding might be promoted through the provision of counselling services as an integral part of the legal resolution of family disputes.

The economic plight of separated and divorced women is not necessarily improved where there are no dependent children at the time of the

breakdown or dissolution of the marriage. In the Alberta study undertaken in 1981 by the Canadian Institute for Research, it is reported that "wives were rarely granted periodic awards when no dependent children were involved" and "even when there were dependent children, only 18 percent of the wives received periodic [spousal] awards."[53] These statistics confirm that judicial practice under the fault-oriented regime in the Province of Alberta accords with the legislative trend found in other provinces, whereby the "doctrine of the assumed dependence of a wife" has been displaced by a legal obligation to strive for financial self-sufficiency. This approach offers little solace to the displaced homemaker of many years standing who has few, if any, marketable skills that will promote her advancement in the labour force.

It is unlikely that any fundamental shift of legal responsibility from the spouse to the state would radically improve the lot of separated and divorced women. Given the present approach to the social welfare system, any form of guaranteed income is likely to be set at a subsistence level, regardless of any reservation of the state's right of recourse against the husband or ex-husband.

2. Prevention of default Empirical studies have demonstrated that many people who are ordered to pay spousal or child maintenance will not discharge their legal obligations in the absence of effective enforcement procedures. If the payment status of court orders for spousal and child maintenance are to be improved, the responsibility for enforcement cannot be left exclusively to the initiative of the family dependants entitled to support. "Self-starting" or "automatic" enforcement systems result in significantly higher collections than systems that rely on the initiative of the family dependants themselves. In Manitoba, lawyers in the Department of the Attorney-General assume the responsibility for instituting appropriate legal proceedings to enforce the payment of court-ordered spousal and child support. In Michigan, this responsibility is assumed by the Friend of the Court.

A successful "automatic" enforcement process requires the systematic and frequent monitoring of all accounts. In cases of default, follow-up procedures must be invoked as soon as possible — within a matter of days, not weeks or months after the initial detection. The longer arrears accrue, the less likelihood of ultimate collection. The process of enforcement must be simple, inexpensive and expeditious. If courts are to retain this responsibility, personnel and facilities must be available to implement the necessary procedures. Effective administrative procedures must be buttressed by a judicial process that ensures the timely imposition of appropriate sanctions. Certainty and severity of sanction are significant indicators of compliance with court orders for spousal and child support. Although the real threat of imprisonment for default is an effective deterrent to non-compliance with court orders for

spousal and child support, at least where the sanction of imprisonment is linked to an efficient self-starting enforcement system, opinions differ on the desirability of retaining this sanction. Legislative changes that increase the variety of sanctions available by way of judicial disposition of enforcement proceedings are not sufficient. They must be accompanied by expeditious administrative intervention and judicial implementation of the most appropriate sanction.

Many defaulters, consciously or unconsciously, test the efficacy of the enforcement process at an early stage. Where it is found ineffective, the pattern of default tends to become habitual. In that event, subsequent enforcement efforts do not meet with a high degree of success. An integrated collection and enforcement system is a critical factor in promoting compliance with court orders for spousal and child support. The objective of the enforcement process must be to promote a regular payment pattern and this requires that early action be taken on delinquent accounts.

Enforcement processes should, wherever possible, be centralized in a single agency. If a judicially based system of enforcement is to be retained, the most appropriate agency for the enforcement of court orders appears to be the family court. Enforcement procedures in the superior courts are far too slow and cumbersome. For these and other reasons, they are inappropriate for the enforcement of the vast majority of court orders for spousal and child support, which involve relatively modest periodic sums.

The vigorous pursuit of obligors has been found to be less effective when their family dependants are receiving social assistance. However, there is some evidence that a system of "automatic" enforcement results in significantly higher collection rates even in welfare cases. In defining the ambit of any system of automatic enforcement, it is necessary to determine whether the system should be mandatory and universal. Should the system apply to all support orders irrespective of the court of origin and the amount involved? Should it be confined to orders for periodic support or should it extend to other orders, for example, lump sum orders or property dispositions? Should it be possible to invoke the system to enforce contractual as well as court-ordered support rights and obligations?

Current practices in the Province of Manitoba offer some guidance in answering these questions. It is submitted that the establishment of any automatic enforcement system should, at the outset, be confined to the enforcement of court orders for periodic spousal and child support. Maintenance orders granted in divorce proceedings should continue to be registrable and enforceable in the family court and should be subject to the same processes as those applying to support orders that originate in the family court. If social assistance is being provided to family dependants, the enforcement process should be self-starting and require

neither the consent nor the intervention of the family dependants themselves. Opinions differ, however, on whether the enforcement process should be self-starting with respect to family dependants who are not receiving social assistance. The Province of Manitoba favours an "opt-in" procedure rather than a mandatory and universal process. If, however, a primary objective of the collection process is perceived as ensuring due compliance with court orders for spousal and child support, the experience in Michigan indicates that this objective may be significantly impaired by any requirement that family dependants be directly involved in initiating the enforcement process.

It is conceded that the establishment of a province-wide or nationwide integrated system of automatic enforcement would involve substantial government expenditure at the outset. It would be necessary to appoint additional clerical and administrative staff to ensure the systematic monitoring and processing of all files incorporated in the system. Additional expenditures would be incurred in the provision of enforcement personnel to undertake the carriage of appropriate legal proceedings. A computerized system would involve not only the cost of purchasing or renting the hardware but also the cost of placing all relevant data on the computer. The experience in Michigan strongly suggests that start-up costs as well as continuing operational costs would be modest compared to the significant long-term increase in the collection rates that would result from implementation of a computerized system of automatic enforcement.

3. Information and counselling needs The present high rate of default in the payment of court-ordered spousal and child support is not generally attributable to incapacity to pay. Rather, the reason lies in the psychological responses of both parties to the marriage breakdown. Good payment records are generated by an understanding of the processes of the "emotional divorce" and a realization of the economic needs of all members of the broken family. Accordingly, the strengthening and streamlining of enforcement processes should not be divorced from a perceived need for information and counselling services in the resolution of family disputes. Given this bilateral approach to the resolution of the current problem of non-compliance with court orders for spousal and child support, there is reason to believe that the enforcement of support obligations may more readily achieve the objectives of efficiency and fairness.

4. Limitations No private law or public law system can hope to eliminate, as distinct from alleviate, the economic crises flowing from marriage breakdown. These crises are endemic to a society that continues to discriminate between men and women in the labour force and that provides inadequate daycare services to aid custodial parents who

seek to establish financial security for themselves and their children after marriage breakdown. It is an imperfect world and reconstituted family law systems cannot expect to achieve perfection. The most that can be expected of the private law system of spousal and child support is some improvement in what will always be an inadequate system of financial support for non-income-earning spouses and parents with dependent children. Even this limited goal will not be easy to achieve.

Public Law Alternatives to the Private Law System

The private law system of spousal and child support plays a central role in the adjustment of the economic consequences of marriage breakdown and divorce. Apart from its impact in terms of court-ordered support, it provides a foundation on which most spouses, with the aid of their lawyers, negotiate a settlement without recourse to litigation. Whether the private law system should continue to occupy the predominant position in the regulation of the financial consequences of marriage breakdown and divorce is, however, a debatable issue. Accordingly, it is appropriate to consider the present and prospective role of the state in providing for the needs of the financially disadvantaged. Before doing so, however, the inherent limitations of any private law system of spousal and child support should be identified.

Limitations of the Private Law System

Constructive reforms can, no doubt, alleviate some of the adverse effects of the present private law system of spousal and child support. The policy objectives or goals of the private law system can be ascertained and statutorily defined to promote more rational and consistent judicial dispositions. Improvements can be made in the procedures for assessing spousal and child support. Mandatory financial statements and pre-trial procedures can reduce the contentious issues to be referred to the court and provide a reliable foundation for determining the amount of spousal or child support. The enforcement process can be streamlined and strengthened to promote due compliance with court-ordered spousal and child support obligations. The injurious effects of the fault-oriented and adversarial system can be mitigated by changes in substantive law and by access to conciliation or mediation resources. But such changes, though important, will not redress the real problem of many Canadian families who encounter poverty in consequence of the breakdown of the marital relationship. A statute-based judicial system that provides for the equitable distribution of property on marriage breakdown and for the payment of reasonable spousal and child support is of no consequence to those who have no property and whose income is insufficient to support two households.

The Role of the State

In determining the future of the private law system respecting spousal and child support, it is impossible to ignore the present and prospective role of the state in subsidizing the needs of the financially disadvantaged. Social assistance, guaranteed income and pension schemes, family allowances, old age pensions, vocational training and affirmative action programs, state-subsidized child-care facilities, and taxation laws all contribute to family policy and have a potentially significant impact on the private law system of income support for family dependants.

In reality, there is a dual system of income support for family dependants in Canada: the "family law system" regulates the obligations of the family members to one another; the "welfare system" regulates the financial responsibilities of the state. These two systems differ in origin, substantive provisions, administration and orientation. The relationship between them has not been adequately explored in Canada. In the words of Madame Justice Bertha Wilson, a 1982 appointee to the Supreme Court of Canada:

> It is fair to say, I think, on the basis of very sparse Canadian authority that we are beginning to think about the relationship between family law as administered by the courts and welfare as administered by the state. We are groping for the right principles and the right policies. We are, however, a long way from the level of sophistication in England and other common law jurisdictions where the welfare implications of various levels of awards are put before the court in the same way as the tax implications are now being put to the court here. Perhaps what we need is our own Finer Committee![54]

It is appropriate, therefore, to address the findings and recommendations of the Finer Committee in England with a view to determining whether similar problems and solutions can be associated with the Canadian position.

The Finer Report

The Finer Committee, in its 1974 report on one-parent families in England,[55] identified three different systems of financial support for family dependants and concluded that fundamental changes were necessary to eliminate the anachronisms, inconsistencies, inefficiencies and injustices that result from this tripartite jurisdiction. The three systems identified in the Finer Report were the predominantly no-fault family law regime administered by the divorce courts, the fault-oriented summary jurisdiction of the magistrates' courts, and the social welfare system administered by the Supplementary Benefits Commission. In an attempt to rationalize these diverse systems and provide a coherent policy that would provide some degree of financial security for single-parent families, the Finer Committee focussed on these three central issues:

- Unification — the need for a single system of substantive family law to be administered by a Unified Family Court.
- A major shift from judicial to administrative procedures in the assessment, payment and reimbursement of financial support for family dependants.
- The provision of a state-guaranteed maintenance allowance for all one-parent families at a level exceeding that provided by the "supplementary benefit" system.

1. Unification The Finer Committee concluded that the tripartite system of family law in England, involving the High Court and county courts, the magistrates' courts and the Supplementary Benefits Commission, constituted a "tangled web of law and administration" that required a fundamental restructuring to banish anachronisms, undue complexity, confusion, inconsistencies and injustices. In substitution for the fragmented and often incompatible systems administered by the aforementioned courts, the Finer Committee recommended "the establishment of a unified institution, the family court, which will apply a single and uniform system of family law."[56]

2. Shift from judicial to administrative procedures Radical changes from judicial to administrative procedures were proposed for cases where social assistance was being provided by the state to one-parent families,[57] and the committee recommended that one-parent families seeking social assistance ("supplementary benefit") should be relieved of the necessity of instituting legal proceedings for spousal and child support. Any supplementary benefit paid, however, would be directly recoverable by the Supplementary Benefits Commission from the "liable relative." The Supplementary Benefits Commission would assess the means of the liable relative and determine what payments should be made to the commission in or toward satisfaction of the money paid to the family dependants. The commission would be entitled to issue an "administrative order" directing the liable relative to pay the assessed amount. Subject to rights of review and appeal, the administrative order would be legally binding on the liable relative and enforceable by the commission through normal judicial processes. The amount of the order would not exceed the amount of the supplementary benefit payable to the family dependants but would otherwise fall within the discretion of the Supplementary Benefits Commission. Except under unusual circumstances arising in individual cases, this discretion would be exercised in accordance with predetermined published criteria. The commission would be required to review its administrative orders at fixed intervals. In addition, the liable relative would be entitled to a review of the administrative order by the commission in the event of a material

change of circumstances. The commission would have the general power to remit any arrears that accrued under an administrative order.

It was envisaged that the administrative order system would apply to separated and divorced spouses with children, to separated spouses without children and to unmarried mothers. The Finer Committee suggested that consideration should be given to the possibility of extending the administrative order system to divorced spouses without children. It also suggested that the Supplementary Benefits Commission might be empowered "to recover the whole of a divorced woman's maintenance from her former husband, even when this exceeded the benefit in payment, and to account to her for the balance" and that "one might envisage the commission being empowered to make an administrative order for an amount in excess of benefit in payment even in cases where there was no court order in existence, but where the process of assessment showed a plain case for making an order at that level."[58] Pending any such extensions of the proposed system of administrative orders, the Finer Committee recommended that claims for support payments in amounts exceeding those provided by the Supplementary Benefits Commission should continue to be governed by the private law system of spousal and child support and be subject to adjudication by the proposed Unified Family Court.

3. State-guaranteed maintenance allowance The Finer Committee expressed dissatisfaction with the present supplementary benefit scheme. It concluded that the supplementary benefit provides an inadequate income for the one-parent family. In addition, the deductibility of income earned by recipients from part-time employment discourages attempts to strive for ultimate financial self-sufficiency. Recipients of the supplementary benefit have no incentive to take part-time employment that might eventually lead to full-time employment and financial independence as their family circumstances change. The Finer Committee accordingly recommended that a new non-contributory social security benefit, to be known as the "guaranteed maintenance allowance," should be payable by the state to one-parent families.[59] The objectives sought by this recommendation were to provide one-parent families with a guaranteed income above the supplementary benefit levels and to provide single parents with a real choice of engaging in full-time or part-time employment or remaining in the home, according to family circumstances.

To accommodate these objectives, it was proposed that a designated percentage of any income received from employment would be exempted from the assessment of the guaranteed maintenance allowance. Beyond the exempted income, the guaranteed maintenance allowance would be reduced by 50 percent of net earnings until they reached the level of average male earnings, at which point the right to the

guaranteed maintenance allowance would be extinguished. It was also proposed that the guaranteed maintenance allowance would constitute a qualifying source of income for tax credits. Applying these criteria, the guaranteed maintenance allowance would provide a higher income level for most one-parent families than that available under the supplementary benefit scheme. Entitlement to the guaranteed maintenance allowance would be assessed without regard to the liability of the absent parent to support the family dependants, but any support payments directly received from the absent parent would be set off against the guaranteed maintenance allowance.

The administering authority of the guaranteed maintenance allowance would be responsible for assessing the liability of the absent parent. Any action taken to establish and enforce this liability would fall on the administering authority and not on the family dependants. The amount assessed by the administering authority against the absent parent might be the same, more, or less than the guaranteed maintenance allowance. Irrespective of any judicial proceedings for divorce, separation, or custody of children, the administering authority would have the responsibility for assessing the absent parent's liability, except where judicial issues such as conduct were involved. If the administering authority fixed this liability in an amount exceeding the guaranteed maintenance allowance, any surplus received by the administering authority would be remitted to the family dependants. A standard formula would be devised to guide the administering authority in its assessment of the absent parent's liability. This formula would take due account of the absent parent's ability to pay and also any subsisting obligations owed by the absent parent to a second family. An administrative order fixing the liability of the absent parent would be enforceable in the courts as a civil debt.

Government Reactions to the Finer Report

The recommendations of the Finer Committee have failed to win government support in England. Some resistance to the proposed guaranteed maintenance allowance may be attributed to the reluctance of governments to place one-parent families "in a superior financial position to other groups such as the physically handicapped and the aged."[60] Officers of the government have tended, however, to focus more directly on the assumed costs of implementing the proposed guaranteed maintenance allowance. For example, on the second reading of the Affiliation Orders and Aliment Bill in the United Kingdom, Mrs. Chalker, the undersecretary of state for health and social security, stated:

> My hon. Friend is very much on top of all the Finer arguments which he can possibly display to the House. He knows that many of us who have worked with the problem of one-parent families and all their difficulties for many

> years are sympathetic. However, I must remind my hon. Friend that in the present economic circumstances there is no way in which we, as with the previous Government, could accept the proposal for a guaranteed maintenance allowance at present. Whilst there are many things which we would happily wish to do when we have controlled inflation and improved the economy, I think that my hon. Friend realises that his suggestion, however necessary and however much it would answer the points I have just made on behalf of the Home Office, is not a possibility at present.[61]

It seems not unlikely that the *supposed* prohibitive costs of implementing the Finer Committee's proposal for a guaranteed maintenance allowance will continue to plague successive governments in the foreseeable future. Whether the *actual* costs of implementing the proposed guaranteed maintenance allowance, or indeed all the recommendations of the Finer Committee, would exceed the costs of the present fragmentary tripartite system of income support for family dependants remains, in reality, a matter for conjecture. The relative costs of administrative and judicial processes are unknown; the present indirect costs to the state of supporting separated and divorced spouses and dependent children by way of tax relief are unknown; and the comparative costs of present and future social assistance or guaranteed income schemes are unknown. It is not surprising, therefore, that successive governments have been reluctant to implement proposals for fundamental changes in the private and public law systems of family support. A major re-allocation of human and financial resources, the dismantling of established structures and the substitution of new and untried processes necessitate highly predictable present and future costs and prospective efficacy of the new systems.

Judicial and Administrative Processes for Income Support

Several law reform agencies in Canada have addressed proposals corresponding to those formulated by the Finer Committee in England. In British Columbia, the Royal Commission on Family and Children's Law (1975) substantially endorsed the proposals of the Finer Committee respecting a fundamental shift from judicial to administrative processes.[62] Subject to this exception, the provincial law reform agencies have expressed opposition to any such shift in the regulation and administration of spousal and child support rights and obligations on marriage breakdown or divorce. There appears to be support, however, for the following conclusions.

- The state should not assume the exclusive responsibility for providing financial assistance to families in need. The legal obligations of the private individual to his or her family dependants must be preserved.
- There is a need for greater coordination and consistency in the policies

and operation of the public law system of social assistance and the private law system of spousal and child support.

- The state should provide immediate financial support to families in need, with a right to reimbursement from any individual who is in breach of his or her support obligations.
- There should be uniform levels of financial support directly available to family dependants by way of social assistance. There is no justification for adjusting these levels by reference to the former standard of living enjoyed during matrimonial cohabitation.

A Universal Guaranteed Income

In 1973, the Government of Canada proposed a joint federal-provincial review of the social security system in Canada. As a basis for future discussions, the Government of Canada issued a *Working Paper on Social Security in Canada*. This working paper sought to define broad directions of policy that would facilitate the development of a more effective and coordinated system of social security for all Canadians.

One of the basic propositions in the working paper was a universal guaranteed income for all Canadians who cannot reasonably be expected to achieve financial self-sufficiency through employment:

> Proposition #7:
> That a guaranteed income should be available to people whose incomes are insufficient because they are unable or are not expected to work, namely the retired or disabled, single parent families, and people who are not presently employable by reason of a combination of factors such as age, lack of skills, or length of time out of the labour market. The guaranteed income would be paid in the form of an additional income supplement over and above the general income supplementation available — thus taking account of the fact that these people either do not have or are relatively unable to earn their own incomes — with the guaranteed income being set at levels appropriate to the different groups of people involved. The additional income supplementation should provide some advantage to the single parent families and the aged and the disabled who have income from savings or who choose and are able to earn income from work, and a positive incentive to those who are not presently employable to take advantage of the training, rehabilitation, and counselling which would make them employable.[63]

The working paper envisaged that the federal and provincial governments would develop a new comprehensive approach to social security in Canada by 1975 and that the implementation of the new approach would be phased in over a period of three to five years. These expectations have not been realized.

It is submitted that any proposal for a guaranteed income scheme for family dependants must be examined in the context of the total social

security system and the competing financial demands of other legitimate claimants. There is no obvious reason why a universal guaranteed income should be confined to the financial victims of marriage breakdown or divorce. What appears to be needed is not the further fragmentation of the existing mosaic of social security by the addition of another class of beneficiaries, but rather a comprehensive review of the present systems with the objective of producing more effective and cohesive policies of social security for all financially disadvantaged groups. If the working paper is now regarded as a dead letter, new initiatives must be taken to re-examine the overall policy objectives of social security systems in Canada.

Concluding Observations

The preceding analysis has focussed on the impact of family law on families involved in marriage breakdown and divorce, and on opportunities to improve the substantive law and the processes involved in the resolution of family disputes arising on marriage breakdown. What it does not address is the overall role of the state in the legal regulation of family relationships. Any attempt to evaluate the past and prospective role of the state in the management of family relationships must avoid the misconception that the law, standing alone, can effectively control human relationships by fettering the individual's right to self-determination. Restrictive divorce laws do not enrich the quality of married life or promote stable and positive family relationships. Fault-oriented maintenance laws provoke hostility and non-compliance, rather than responsibility and acquiescence.

Recognition of the inherent limitations of the law and its processes has led to the evolution of a system of family law that has become increasingly reactive in nature during the 20th century. Modern family law tends to respond to actual or perceived changes in society and in the roles and attitudes of family members; it has substantially abandoned its former role of promoting particular value judgments through the definition of a prescribed set of norms that elevates the traditional two-parent family to a preferred status. Family law has largely rejected its former normative approach by assuming a position of legal neutrality toward the diverse forms of family relationships. This is amply demonstrated by the increasing legal recognition accorded to "de facto" marriages or "common law relationships" and by the legal shift toward an assimilation of the rights of legitimate and illegitimate children. In the former context, maintenance rights and obligations are no longer confined to "de jure" marital relationships. In most Canadian provinces, a financially dependent "common law spouse" is entitled to look to his or her cohabitant for monetary support on the breakdown of their relationship, provided that the relationship has survived for a designated period of time or a child

was born of the relationship. In addition, *Pettkus v. Becker* (1980) established that a "common law spouse" who has contributed to the acquisition of property by his or her cohabitant is entitled to share in that property pursuant to the doctrine of constructive trust.[64]

Viewed from a legal and social perspective, the relationship between marriage and the family has become obscured. The concept of marriage as a lifelong union has been eroded. With a divorce rate that has increased some 500 percent since the enactment of the *Divorce Act* in 1968, and the prognosis that 40 percent of all current marriages in Canada will terminate in divorce, the traditional family with a breadwinning husband, a homemaking wife, and their dependent children is no longer representative of the Canadian family. It has been displaced by other forms of family relationships — the two-income family, the single-parent family, the reconstituted or blended family, and the common law relationship. Both in law and society, the former distinctions between marital and non-marital cohabitational relationships are now becoming increasingly difficult to discern. Permanent common law relationships are not uncommon and are an accepted family form in Canada today, although it is impossible to produce hard statistics to define the incidence of such relationships. In the United States, it has been estimated that the number of unmarried cohabitants increased by more than 700 percent between 1960 and 1975.[65] It is not surprising, therefore, that family law no longer seeks to buttress the traditional nuclear family to the exclusion of other family relationships.

The shift of family law to a stance of legal neutrality has been accompanied and perhaps fostered by a new focus on the rights and responsibilities of individuals. The battles for equality between the sexes and for children's rights have been reflected in laws that emphasize the individual's rights and responsibilities rather than family rights. This is exemplified by the evolution of non-fault maintenance laws that require each spouse to achieve financial self-sufficiency on the breakdown or dissolution of marriage and by the qualified right of the child to independent legal representation. In many respects, "Family Law" is a misnomer. Because the private law system concentrates on the definition and balancing of the competing interests of the individual members of the broken family, this branch of law might more properly be called "The Law of Persons."

Changing perceptions of the role of family members, coupled with the freedom to divorce, have evoked substantial demands for more state intervention, both during the subsistence of marriage and on its dissolution. As more and more married women have entered the labour force, the 1970s and 1980s have witnessed persistent demands for extended child-care facilities, for equal pay for work of equal value, and for affirmative action programs that would enable women to upgrade their status and income-earning capacity in the labour force. The growing

realization that marriage cannot guarantee lifelong economic security for a financially dependent spouse has led to demands for salaries for homemaking spouses and for improved pension benefits not only for members of the labour force but also for "career homemaking spouses." The failure of the private family law system to cope with the financial crises resulting from marriage breakdown in an age of sequential marital and non-marital cohabitational relationships has reinforced demands that the state guarantee a reasonable standard of living to all Canadians, including the economic victims of marriage breakdown and divorce.

It appears clear, therefore, that the private family law system, standing alone, cannot buttress any particular family form. At best, it can only seek to provide a pragmatic and reasoned response to the competing demands arising from sequential family relationships. Whether the public law system can devise clearly defined policies that will improve the quality of life for Canadian families is a debatable issue. Quite apart from the limited availability of public funding, opinions will differ widely as to the aims and priorities that should be assigned to the allocation of public funds and how these aims and priorities can best be achieved. It is doubtful, for example, whether improved child-care facilities or affirmative action programs can effectively counterbalance the economic vulnerability of separated or divorced mothers. When 85 percent of all divorces result in the mother's assumption of the day-to-day responsibility for rearing the dependent children of the marriage, compromises have to be made by custodial parents between their paid employment and their child-care responsibilities, and these compromises by their nature tend to impact adversely on career advancement. Concepts of shared parenting and job sharing are in their infancy and are unlikely to produce any immediate positive impact on the status of women in the labour force, although their potential offers some promise for the future.

In summation, the economic crises provoked by the breakdown of marriage are unlikely to be resolved by the private family law system or the public law system. Although the concept that marriage constitutes a basis for economic security for a dependent spouse is no longer tenable, the answer does not lie in the legal system but in the development of coordinated policies that will facilitate economic viability through job security and equal opportunities for career advancement for all Canadians, whether male or female.

Notes

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The author acknowledges his indebtedness to Vincent T. Dwyer, Senior Counsellor, Family Conciliation Service, Edmonton, for furnishing information respecting the past and present operation of the service.

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3. *Murdoch v. Murdoch* (1975), 1 S.C.R. 423, (1974) 1 W.W.R. 101, 1 R.F.L. (2d) 1, 83 D.L.R. (3d) 289.
4. *Rathwell v. Rathwell* (1978), 2 S.C.R. 436, (1982) 2 W.W.R. 101, 1 R.F.L. (2d) 1, 83 D.L.R. (3d) 289.
5. *Pettkus v. Becker* (1980), 2 S.C.R. 834, 34 N.R. 384, 19 R.F.L. (2d) 165, 8 E.T.R. 143, 117 D.L.R. (3d) 257.
6. *Leatherdale v. Leatherdale* (1982), 30 R.F.L. (2d) 255, 142 D.L.R. (3d) 193.
7. See *Children's Law Reform Act*, S.O. 1977, c. 41, sections 1 and 2, now R.S.O. 1980, c. 68, sections 1 and 2.
8. *Child Welfare Act*, S.O. 1978, c. 85, section 20, now R.S.O. 1980, c. 66, section 20.
9. Section 10 of Bill C-10 (Canada, 1984), *An Act to Amend the Divorce Act*. Bill C-10 died on the order paper and its successor, Bill C-47, 1985, includes no similar provision.
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19. Letter to the author, March 9, 1982.
20. *Ibid.*
21. See John G. Paterson and James C. Hackler, *To Have or Let Go: The Challenge of Conciliation — An Evaluation Report on the Edmonton Family Court Conciliation Project* (Department of National Health and Welfare, Welfare Grants Directorate, 1974); see also *Final Report on Edmonton Family Court Conciliation Project* (Department of National Health and Welfare, Welfare Grants Directorate, Volumes I and II, September 1975), especially Volume II, pp. 59–61 and 75–76.
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28. See *Crawford v. Crawford* (1973), 3 W.W.R. 211, 10 R.F.L. 1, 35 D.L.R. (3d) 155 (B.C.S.C.).
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39. Rosalie Silberman Abella, "Economic Adjustment on Marriage Breakdown: Support" (1981), 4 *Family Law Review* 1.
40. *Family Law Reform Act*, S.O. 1978, c. 2, now R.S.O. 1980, c. 152, subsection 18(6); *Family Law Reform Act*, S.P.E.I. 1978, c. 6 subsection 19(6).
41. *Family Relations Act*, S.B.C. 1978, c. 20, now R.S.B.C. 1979, c. 121.
42. Effective October 1, 1983, subsection 2(2) of the *Family Maintenance Act*, S.M. 1978, c. 25, as amended by S.M. 1982–83, c. 54.
43. See paragraphs 115(6) (t) and 118(c) of the *Child and Family Services and Family Relations Act*, S.N.B. 1980, c. C-2.1.
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59. *Ibid.*, pp. 276–34, paras. 5.79–5.249 and pp. 500–507, paras. 9.12–9.16, including Recommendations 64 - 117.
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2

Family Law and Social Welfare in Canada

MARY JANE MOSSMAN

Introduction

The purpose of this paper is to explore the relationship between family law and the social welfare system, particularly in the context of divorce or marriage breakdown, which often entail financial hardship for the families involved.[1] In general, the principles and procedures of family law regulate the economic consequences for individual family members after divorce or marriage breakdown through arrangements for custody of children, division of property, and ongoing financial support or maintenance. Because of the significant increase in the rate of divorce since the enactment of the *Divorce Act* in 1968, many more married partners and their children have been substantially affected by these family law principles in recent years.[2]

The economic hardship experienced by families on divorce or marriage breakdown will in some cases lead to dependence on the social welfare system for financial support. In these cases, there is a functional link between the principles and procedures of family law and those which operate in the social welfare system. However, policy makers in the provincial legislatures and decision makers in the judiciary have shown little awareness of the need to integrate the two. Indeed, the rationale underlying the development of family law principles — to encourage equality and self-sufficiency of both spouses — seems often to be negated or thwarted by the principles adopted in social welfare policies.

The lack of integration of family law and social welfare in this area affects families who have few assets and little income more severely than those who are well-to-do. The principles of family law may be adequate

where there is property to divide between spouses, and where one or both spouses have an income sufficient to maintain a reasonable level of ongoing financial support for a custodial spouse. For poor families, however, these principles cannot operate because the property and income required are almost non-existent; the economic consequences of divorce and marriage breakdown will, in fact, often result in dependence on social welfare.

Yet not all members of poor families in these circumstances will become dependent on social welfare. In practice husbands, even in less well-to-do families, will often escape poverty and welfare dependence, while their former wives (and their children) will not.[3] Thus, the lack of integration of family law and social welfare principles must be explored with special regard to the relatively more disadvantaged position of women. Moreover, any reforms that encourage a better integration of these principles should be consistent with the principle of equality for men and women.

This paper is a review of some aspects of family law and social welfare in Canada with a focus on their impact on women in families that experience divorce or marriage breakdown. A general overview of the development of some of the relevant principles is followed by a more detailed examination of these principles in some reported cases. There is also an assessment of some of the policy options available with emphasis on the need to encourage greater economic security for women in Canada.

The Evolution of Basic Principles: Toward Independence

At the present time in Canada, the principles of family law generally espouse a neutral rather than a normative approach to marriage and the family,[4] and they generally encourage the equality and independence of spouses on divorce or marriage breakdown. At the same time, the social welfare system actively encourages ongoing dependence of divorced wives on their former husbands, and sometimes on men to whom they are not and never have been married.[5] Although the welfare state of the 20th century seems to have supplanted the family as the means of ensuring financial security for some purposes, it seems that, on divorce and marriage breakdown, the spouses must look to family members for support. The benefits of the welfare state are available only as a last resort. The evolution of the principles of family law and social welfare have been quite separate and distinct, despite the functional relationship between them on marriage breakdown or divorce. For this reason, an examination of their evolution is important to an assessment of their future relevance, particularly to the need of ensuring economic security for women.

Although the family as a societal institution has existed throughout

history, its form and functions have changed markedly over the centuries. According to Glendon,[6] the family in early centuries "included a wide circle of people from different households related by blood ties and by a feeling that they belonged to a neighbourhood, a community or larger political entity."[7] The family was part of the social structure and was linked closely to the feudal tenure system, a type of land ownership which ensured that the wealth and status derived from land remained intact within the family, passing from one generation to the next by way of the eldest son. Because land was the basis for wealth and status, the social position of individuals was dependent on their position within a family structure. According to Olsen:

> Just as the feudal state was not perceived to be clearly separate from civil society, the feudal family was not perceived to be separate from the rest of economic life; there was no dichotomy between the market and the family. The hierarchical family was an integral part of hierarchical society.[8]

Glendon has asserted, however, that the pattern of the family changed as capital increased in importance and displaced land as a form of wealth. Increasingly, the family became defined more in terms of a husband-wife marriage bond with dependent children — the modern nuclear family.[9] Glendon has also suggested that the pattern of the family in the 20th century has altered once again, with more fluidity in its bonds as the nature of wealth has once again altered. In the modern welfare state, wealth and status in society are more dependent on income and employment than on the family. The "new property" seems to create its own status for the individual, with a corresponding reduction in the family's role in defining status for its members.[10]

In Glendon's view, the transformation of wealth from land to capital to income and employment contributed to the increasing independence of the modern nuclear family. However, until the 20th century, this independence was effectively independence primarily for the husband/father and not for the wife/mother or children. According to the common law principles enunciated in the feudal period, the husband and wife became one on marriage, and the one was the husband.[11] On marriage a husband acquired the sole right to manage and control land owned by his wife, the right to all rents and profits from the land, and the right to grant or withhold consent to its disposition.[12] For all practical purposes, he became the owner of all his wife's property on marriage.

Until the enactment of the *Married Women's Property Acts* in England in the 1880s this principle of unity of legal personality survived, notwithstanding changes in family patterns; the impact of the principle could be avoided only by the adoption of a trust settlement enforceable in a court of equity. This settlement had certain limitations, however. It was useful only where there was sufficient wealth to warrant the creation and ongoing management of such an arrangement. In addition, it did not

actually make the wife the owner, but merely the beneficiary of a trust arrangement in which her husband or other male relative acted as trustee.[13] The enactment of the *Married Women's Property Acts* represented the culmination of a concerted struggle to achieve property rights for women. Yet, although the 1882 Act in England:

> is often held out as a milestone in the march of women to equality . . . in reality it did little more than save wealthy women from the irksome restraints of holding property through trustees. In fact, men continued to control the property of women, even if only in the capacity of advisors rather than husbands or trustees, since women were precluded from acquiring the skills thought to be needed for the proper administration of their property, such skills being locked within the male professions.[14]

Thus, the formal principles of the common law, and the practical reality after the later 19th-century statutory reforms, emphasize the pre-eminent position of the husband/father as legal head of the household within the family. Further, the wife/mother's role as homemaker and provider of child care generally prevented her from acquiring income or property, notwithstanding the formal equality accorded in the statutory right to hold separate property. At the same time, however, the law also obligated the husband/father to provide lifelong financial support to his wife, and for his children during their infancy.[15] Even when judicial divorce became possible after 1867 in England, the husband's obligation to support his wife during marriage extended to ensure continued support after divorce.[16] Thus, the principle of a wife's entitlement to lifelong financial support seems to have developed as a corollary to her lack of entitlement to property, and to her inability to earn a living because of her sex-defined role as homemaker and child-care provider within the family.

The re-examination of sex roles which has occurred in the postwar years in Canada and elsewhere has contributed to changes in the family and family law as well as in society at large.[17] For the family, the most dramatic change is evident in the law concerning divorce and marriage breakdown. The *Divorce Act* of 1968 made marriage breakdown, together with specified matrimonial offences, a legal ground for divorce. The phenomenal increase in the divorce rate after the act was passed,[18] coupled with the need to redefine post-marriage relationships in light of changes in the expectations of men and women, led to dramatic legal reforms in many provinces in the 1970s. Since 1978, all of the common law provinces of Canada have enacted reform legislation with significant effects on entitlement to property and support for spouses.[19]

Under most of these new schemes, certain types of property may be equally divided between the spouses on marriage breakdown, regardless of which partner holds legal title, and often subject to judicial discretion as set out in the relevant statutes. At the same time, however, the

concept of marriage creating a lifelong entitlement to support seems to have declined in importance, or disappeared. In its place, the new legislation frequently provides that each spouse has responsibility for his or her own financial support, although one spouse may become entitled to financial support from the other where there is proof of need by one and resources available to the other. It is the need of the individual rather than the status of spouse that generally provides entitlement under most of the reform legislation.[20] In theory, the new principles concerning property and support create equality and independence for married partners on divorce; certain property of the family is divided, and each spouse becomes once more an autonomous individual responsible for self-support.

Yet the effect of these legal principles in practice is quite often disastrous for women. The legislation that creates equality of treatment for husbands and wives on marriage breakdown effectively ignores the economic reality of women's lives.[21] For both husband and wife, legislation that requires a division of all assets owned jointly or separately by the spouses on marriage breakdown will result in little equity for either of them where there are few or no assets. Moreover, for a wife who often will become the custodial parent for dependent children, such a legislatively equal division may require that the matrimonial home be sold, thereby causing additional dislocation and insecurity for the family. In addition, a wife who has worked only in the home for a number of years, as homemaker and child-care provider, may have few skills readily marketable in the paid labour force. If she is able to undergo retraining, she may be entitled to "rehabilitative" spousal support during a retraining period, but may have to compete in a labour market already overcrowded with the unemployed.[22] Even after she has acquired labour market skills, the wife will be able to earn a salary which is statistically likely to be only two-thirds of the salary her husband can command.[23] Thus, the dependence generated by a traditional division of sex roles during the marriage may substantially impede any real equality between the spouses on marriage breakdown.

In addition to dependence generated by the traditional sex role division during marriage, the wife's dependence may be increased after marriage breakdown if she becomes the custodial parent of young children.[24] In this case also, her ability to earn income will be substantially impeded, if not altogether prevented, by her responsibilities as child-care provider. Even where a divorce occurs after children have grown up, she faces greater obstacles to becoming self-sufficient, having lived a lifetime of economic dependence with an expectation that her full-time homemaking would lead to economic security in old age. The obligation of self-support appears especially harsh for such women because their failure to participate in the paid labour force often results in a denial of access to pension entitlement. This situation further contributes to the

problem of poverty among elderly women in Canada who rely for financial security on the basic federal pension.[25]

Thus, the principles of independence and equal treatment of spouses on marriage breakdown may result in real economic hardship for women because the principles do not match the reality of their lives.[26] Moreover, even within an existing marriage, it is not appropriate to assume that equality exists between the spouses, and to use equality and independence as the basis for social and legal policies. Especially in a family where there is a traditional breadwinner/homemaker division of labour between husband and wife, the wife will seldom have access to either property or income. In such a family also, it cannot be assumed that the husband's income necessarily becomes the family's income, and the dependent wife has few legal remedies available to enforce entitlement beyond the provision of a minimum standard of living.[27]

These family law principles that emphasize the independence and equality between spouses on marriage breakdown must be examined in the broader context of the 20th-century welfare state. Numerous government programs providing financial and other assistance in Canada have been established in the last century:[28] workers' compensation as early as the 1880s, unemployment insurance in 1940, the federal and Quebec pension plans in 1965, universal hospital insurance in the provinces between 1947 and 1961, and universal medical care insurance between 1962 and 1971. In addition, the federal Canada Assistance Plan of 1966 provides for a federal contribution of 50 percent of provincial social welfare schemes. There are also federal old age pensions and numerous income tax deductions, credits, and subsidies.

According to the federal *Working Paper on Social Security in Canada*, the existence of programs such as these reflects a shared community support for the values of independence, interdependence, and fairness in the distribution of resources. The values of independence are described essentially by focussing on individuals, not families. In relation to independence, Canadians

> expect to meet their own needs through their own efforts, and they expect others to do their best to do the same. This sturdiness of outlook is not a matter, it should be said, of sheer selfishness: rather it is a matter of believing that each should contribute, to the extent *he* is able, to *his* own and *his* family's well-being. . . .[29] (emphasis added)

The value of interdependence means "that man has a responsibility to his fellow men."[30] Moreover, the *Working Paper* asserts that there is no contradiction between the values of independence and interdependence. "It is simply a matter of working, if you are able, to meet your family's daily needs, and of saving, to the extent you are able, to meet the contingencies of life."[31]

It is evident that the explanation of values of independence and

interdependence obscures the role of the family, and the obligations of family members, in relation to these values. Although social welfare schemes in the 20th century have replaced the family, at least to some extent, as the means of providing economic security, it is apparent from the *Working Paper*'s definitions that the relationships between individuals and the family in terms of economic security remains unclear. On one hand, some social welfare programs have been established on the basis that in certain circumstances, an individual may be unable to provide for his or her own economic well-being, and the individual's family cannot help, or, more significantly, should not be expected to do so.[32] In such cases, the legislation establishing the social welfare scheme will define eligibility by focussing on the individual, without regard to the possibility or extent of familial resources available.[33] In other cases, the individual's eligibility will be determined having regard to the circumstances and resources of the family unit overall.[34]

Eichler has noted this paradox:

> As far as the support function of families is concerned, there is widespread consensus that families not only do support their own, but *should* do so. What is often overlooked is that there tends to be a direct opposition between the notion of the family as a support system and social security programmes: to the degree that the proper locus of support for an individual is seen to lie within that individual's family, the individual becomes *disentitled* from public support.[35]

In this context, the intersection of general principles of family law with those relating to eligibility for social welfare benefits may not be congruent. To the extent that family law principles have increasingly recognized the equality of family members and the independence of spouses on divorce or marriage breakdown, they seem to be at odds with some of the principles of social welfare which focus on the family unit to determine individual's entitlement. Eichler has described this situation as the "familism-individualism flip-flop."

> To the degree that we make social security programmes available to individuals we guarantee, as a society, some income security to individuals. Conversely, to the degree that we let eligibility to social security programmes be determined by family status, we disentitle individuals from access to social support on the basis of their family status. This disentitlement is usually justified by reference to the function of "the family" -- and with the pious wish that the state (or government) must not usurp the functions of the family. This encapsules nicely the basic paradox which underlies any social security policy that is geared towards families rather than individuals: in the name of protecting "the family" people are disentitled from public support on the basis of their family status.[36]

In many cases, the social welfare system seems to "presume" the availability of family support based simply on married (or formerly

married) status, thus denying eligibility to welfare benefits; at the same time, family law statutes seem to "presume" an obligation for self-support, subject to proof to the contrary. What this means is a significant difference of philosophy between the two statutory schemes, with social welfare law focussing on the individual's family unit and family law increasingly focussing on the individual. It is true in most cases that a dependent wife (or former wife) will be regarded as entitled to welfare after she has been unsuccessful in a suit for support against her husband (or former husband). However, the fact that the family law system starts with presumptions of equality and independence means that the woman will likely experience some delay, frustration and hardship before the systems "mesh."

If the increasing focus in family law on the individual represents Glendon's "attenuation of family ties,"[37] it is arguable that there should be a more general transfer of responsibility for the financial welfare of individual family members from the family unit to society at large and that this philosophical shift should be recognized in social welfare legislation in particular. Yet, while any such transfer would affect the independence of individuals from the family unit, it would also result in financial dependence on social welfare programs of government. Clearly, the "independence" thereby achieved is more theoretical than real.

This conclusion is especially significant for women. Formerly dependent on their husbands, their independence and equality on marriage breakdown may lead to dependence on social welfare programs. Because the reality of women's lives is economic inequality and dependence, either because of their traditional role in the family or their second-class status in the workplace, the declared legislative principles of equality and independence in family law are not realized in practice in the daily lives of women. The lack of support orders, or the difficulties of enforcing orders which are granted,[38] creates dependence on social welfare. Moreover, they will be regarded as "independent" for purposes of social welfare programs only so long as they live as a single person, i.e., without cohabiting with a man.[39] When a female welfare recipient cohabits with a man, the social welfare system may well conclude that she has a male breadwinner and lives in a family unit, thereby negating her eligibility for welfare. It is ironic, perhaps, that the social welfare system may recognize a family unit and thereby create familial financial dependency for a woman where she is not married and in circumstances where family law principles may result in no order (or no enforceable order) for support to be paid by the same woman's deserting husband. Only by ceasing to cohabit in such a "family" unit can the women re-establish her eligibility for welfare based on her "independence."

The lack of congruence between the principles of family law and social welfare is partly explained by the differences in their historical develop-

ment. Evolution of family patterns and changes in the legal relationships of family members has occurred over a number of centuries, while social welfare principles have been established almost entirely in this century. Further, the development of each set of principles has occurred separately, based on somewhat different policy objectives and without overall coordination. As well, the principles have been directed to the provision of economic security in two different kinds of circumstances. Family law principles have been designed for the division of the property of a marriage, and on the basis that at least some marriages will have substantial assets for distribution; the creation of independence for purposes of support is at least theoretically sound in this context. Social welfare principles, on the other hand, are more clearly designed for those who are economically disadvantaged, including those whose families experience divorce or marriage breakdown. Yet, the relatively high rates of divorce and remarriage in Canada have resulted in many situations where family resources are inadequate to provide for the needs of all dependent "family" members. Clear and coordinated policy directives are now needed as to the principles to be used to accommodate the objectives of both family law and social welfare in order to reflect more equitably the real circumstances of many wives.

The Intersection of Principles: Problems in Practice

Both the *Divorce Act* of 1968 and the more recent provincial legislative reforms in family law generally adopt criteria that recognize the principle of self-support for spouses on marriage breakdown; in the provincial legislation, this principle is often linked to the division of some of the family property. The reforms thus reverse the earlier situation, pursuant to which a wife had little or no entitlement to property but a guarantee of lifelong support, so long as she was not guilty of improper conduct. The reforms are intended to provide independent financial security through the division of property and a "clean break" from the relationship with no ongoing spousal support. In the words of the Law Reform Commission of Canada:

> the financial expectations created by the divorce law should not, even inferentially, allow marriage to be seen as a substitute for individual achievement or as an alternative to seeking training and education for the station in life to which an individual aspires. By the same token, the legal aspects of marriage should no longer give support to the practice of withholding educational and employment opportunities from women on the ground that they are expected to be dependents, are guaranteed the lifestyle that accompanies economic success in any event by marrying and that it is therefore acceptable for educational institutions and the job market to give priority to men.[40]

The commission also recognized that the creation of two households after marriage breakdown would almost always be more expensive that maintaining one matrimonial home, and that it would likely be impossible therefore "for the lifestyle of the former spouses to remain unaffected."[41] In support cases decided under both the *Divorce Act* and the provincial legislation, the principles suggested by the commission are often reflected, although there are also some exceptions.[42]

In the well-known case in Ontario, *Bregman v. Bregman*,[43] the homemaker-wife of a wealthy husband received an equal division of "family assets" worth in excess of $300,000 and a share of non-family assets as well. In addition, Henry J. stated that:

> It is not my opinion that *Mrs. Bregman*, after having been supported in comfort by her husband all her married life and now having reached the age of 56 years, should be forced by the disposition of this matter by the Court now to go to work to supplement her income; that would be most injust.[44]

However, in considering the circumstances, the judge concluded that Mrs. Bregman's available assets were "entirely adequate to provide sufficient income for the present 'and maintain' an appropriate standard of living."[45] It seems that the "need" of the wife was assessed in *Bregman*, having regard to her style of life during marriage, and that the substantial wealth of her husband affected the judge's decision as to the availability of resources.

Similarly, in *Silverstein v. Silverstein*,[46] another well-to-do husband was ordered to pay spousal support to his homemaker-wife, aged 62; the result of the support order was to permit both spouses to enjoy approximately equal incomes, although for both it represented a reduction in the standard of living. In *Leatherdale v. Leatherdale*[47] also, the trial judge ordered the husband to make support payments to the wife even though she was employed and had received an equal division of family assets as well as a share in some non-family assets. On appeal to the Supreme Court of Canada, the support order was not in issue, and the court confirmed the wife's entitlement to a share (unequal) in the non-family assets.

It is probably significant that in all three of these cases, the husbands held jobs which were reasonably or even very well paid, and that one or both spouses had acquired relatively or even very valuable assets during the marriage.[48] In addition, all of these marriages were relatively long-term relationships.[49] In such cases, the principles enunciated in *Silverstein* seem to be generally applicable:

> (1) If it can be afforded, the wife, being the non-income-producing spouse, should be permitted to enjoy the same standard of living as she enjoyed during the marriage;
> (2) If that cannot be afforded, then the two spouses should be left with something close to equality in their standards of living in a marriage which existed for more than 15 years.[50]

In contrast to these cases, there are others such as *Page v. Page*[51] where the court has expressly invoked the idea of independence after marriage breakdown and emphasized the wife's obligation to contribute to her own support, taking into account the wife's job qualifications. This concept of independence on divorce or marriage breakdown has also resulted in the adoption of a "clean break"[52] theory for support orders, evidenced in cases like *Kan Hai v. Kan Hai*[53] where the court declined to make a support order in the wife's favour which would have effectively equalized their incomes:

> In my view, the second principle (in *Silverstein*) requires only that an attempt be made to provide that each spouse be left with "something close to equality in their standards of living". . . . It does not require that the total income be ladled out portion by portion to ensure absolute equality of standard for each. Such an approach tends to perpetuate the "common fund" arrangement previously entered into voluntarily by the parties. Lacking are the voluntary nature of the arrangement and the advantages of sharing common expenses. Furthermore, it would appear to continue the partnership concept where the clear intention of the parties is to dissolve the partnership.[54]

Since the wife was employed and able to maintain herself, she was required to do so, even though her standard of living was necessarily lower than that enjoyed by her husband because her employment was not as well paid as his. And, in *Korosec v. Korosec*,[55] the theory seems to have been applied regardless of the hardship it created; in that case, a homemaker-wife was required to work although she was in poor health, over 50 and had not worked during the marriage, because her husband's resources were too meagre to provide spousal support.

In cases like *Korosec*, where there are few or no substantial assets, and only modest income, it seems that the principle of independence on marriage breakdown may be adopted because it is the only real option. Alternatively, there may be a compromise with spousal support being awarded, for example, as limited "rehabilitative" support to enable a dependent wife to continue as the primary care-provider for dependent children. In the latter case, support may also be limited to the period before the children attain majority. In such cases, however, the impact of inflation will usually erode the value of the support, even where it is limited to a short period of time. Increasingly, instances of legal recognition of such claims for support are seen, in cases of ordinary financial circumstances at least, as exceptions to the general principle that husband and wife are independent after marriage breakdown, thereby negating the need for ongoing spousal support.

The result is that some "independent" former wives may require welfare assistance. Clearly, this result is more likely to occur where there are dependent children and where there are few assets and only a modest income in a marriage, and less likely where there are more substantial

assets and income. Moreover, some research[56] supports the conclusion that the impact of divorce and marriage breakdown is likely to be greater for wives than their husbands. About 19 percent of separated wives and 17 percent of divorced wives in the 1971 census reported an income derived mainly from government sources, while only 7 percent of separated and divorced husbands did so. The same study reported a 1970 mean income (including both persons in and not in the labour force) as $3,186 for separated wives and $3,800 for divorced wives; the corresponding figures for husbands were $5,863 for those separated and $5,940 for those divorced.[57] Based on this data, it seems that even prior to the new provincial legislation, the problems of spousal support orders resulted in many former wives living on income derived from social assistance and at a level considerably below that of former husbands. More recent statistics suggest that this trend has not altered.[58] Thus, it seems likely that the increasing reliance on the concept of independence and the "clean break" will necessarily result in more women seeking social welfare assistance as income support.

In this context, it is essential to determine whether the availability of social welfare assistance will affect, and to what extent, a judicial determination as to support payable by one former spouse to the other. This problem has been identified as one which requires further investigation in Canada. By comparison with the Canadian jurisprudence, it has been stated that:

> The approach taken now in the English Courts seems to me to be much more sensible and in accordance with the realities. Where the parties were living close to the poverty line prior to the breakdown of the marriage so that there simply is not enough money to support them both in different establishments, then the court must look beyond the parties' own resources and make an award which is fair, having regard to any welfare entitlement either may have. . . . We are, however, a long way from the level of sophistication in England and other common law jurisdictions where the welfare implications of various levels of awards are put before the courts in the same way as the tax implications are now being put before the courts here.[59]

Notwithstanding this plea for a closer connection between family law principles and those of the social welfare system, particularly for those living at or near the poverty line, Canadian courts seem loath to recognize "independence" from the family unit which results in welfare entitlement, especially where the potential welfare claimant is a wife.

For example, in *Lamming v. McIntyre*,[60] the judge excluded the fact of entitlement to welfare as a relevant factor in determining a wife's income, and thus her needs and resources, in an application for spousal support. In that case, the court expressly declared that husbands have a "primary obligation for support" of wives and children, which could not be shifted to the state. By contrast, in *Harrington v. Harrington*,[61] the Ontario Court of Appeal relieved a father of any obligation for support of his

disabled adult daughter who was eligible for government benefits by reason of her disability. The court stated that the daughter's entitlement to such welfare benefits was a relevant factor in determining her father's liability for support; at the same time, however, the court noted that a husband has a primary obligation to support his wife. In a similar case, *McLeod v. McLeod*,[62] a husband who had applied for spousal maintenance as a paraplegic was denied support because of his entitlement to welfare. It is interesting that both the adult daughter in *Harrington* and the paraplegic husband in *McLeod* were entitled to welfare and "independence" from family support; by contrast, both *Lamming* (expressly) and *Harrington* (by way of obiter) reiterated that wives are primarily dependent on their husbands for support, thus perpetuating familial dependence for them even after divorce or marriage breakdown. It is possible that the physical disabilities of the applicants in *Harrington* and *McLeod* allowed the courts to make their decisions having regard to the well-recognized principle that such persons are entitled to state support and no longer dependent on family charity. The existence of physical disabilities in these cases may offer a reason for distinguishing them from *Lamming*; however, the issue remains as to why wives have not yet been regarded as entitled to similar treatment. Although the precise circumstances differ, the policy choice in both cases should be based on objective assessments as to need and dependency, and not on subjective values.

The principle that there is a primary obligation of familial support, especially where a wife may become eligible for welfare, creates special problems in the context of competing needs on the part of a husband's "old" and "new" families. In both *Blowes v. Blowes*[63] and in *Hunter v. Hunter*,[64] the court refused to consider the potentially adverse effect of an order for spousal support to the "old" family on the wife's entitlement to (or to a particular level of) welfare. In *Blowes*, Galligan J. decided that it was not appropriate to consider any effect on welfare payments in determining the appropriate amount to be paid by the husband. In *Hunter*, the Manitoba Queen's Bench reiterated that the husband has the primary responsibility for family support, not the state; on this basis, it was appropriate to assess the husband's liability according to the usual principles, recognizing that the welfare system would provide support if the amount so determined were insufficient and the wife qualified for welfare. This segregation of the principles is also evident in the reasoning in *Gospavitch v. Gospavitch*[65] where the court refused to allow the municipal welfare authority any standing (as *amicus curiae* or in subrogation) in a wife's action for support against her husband. Unfortunately, it is not clear whether either or both parties were receiving welfare benefits in any of the above cases. If there is a problem of insufficient integration of principles of family law and social welfare, it is even more dramatically apparent where both partners are eligible for such benefits. In the

United Kingdom, courts have expressly recognized that it is not appropriate to apply traditional family law principles in determining support where both spouses are receiving welfare.[66]

The principle that the primary source of support is familial was reinforced as well in the Supreme Court of Canada's recent decision of *Messier v. Delage*.[67] In that case, the husband applied approximately four years after the decree nisi had been granted to vary the corollary relief orders granted in connection with the divorce. Among other requests, the husband sought a reduction of his obligation for support of his former wife because she had completed a master's degree in translation, was 38 years old and in good health, was working part-time as a freelance translator, and was fully able to support herself. The husband's income was quite substantial; the evidence also showed that the wife had earned $5,000 from her part-time work in the latter part of the year in which she completed her degree.

In a split decision, the Supreme Court of Canada decided that the husband should continue to pay support to his former wife because he could well afford to pay the amount required, and because the wife could not yet be regarded as self-supporting. In effect, the majority found that no change of circumstances had occurred sufficient to set aside the original order of support, noting that: "If other changes occur, it will be for [the husband] to apply to the Court again."[68] Three members of the court dissented. On behalf of them, Lamer J. examined the wife's position. Conceding that she had made an effort to obtain employment following completion of her degree, he decided that the "ability to work" should be the test of independence rather than "actual employment." As he stated:

> In my view the evolution of society requires that one more step be taken in favour of the final emancipation of former spouses. To me, aside from rare exceptions, the ability to work leads to the "end of divorce" and the beginning of truly single status for each of the former spouses. I also consider that the "ability" to work should be determined intrinsically, and should not in any way be determined in light of factors extrinsic to the individual, such as the labour market and the economic situation.
>
> As maintenance is only granted for as long as it takes to acquire sufficient independence, once that independence has been acquired it follows that maintenance ceases to be necessary. A divorced spouse who is "employable" but unemployed is in the same position as other citizens, men or women, who are unemployed. The problem is a social one and it is therefore the responsibility of the government rather than the former husband. Once the spouse has been retrained, I do not see why the fact of having been married should give the now single individual any special status by comparison with any other unemployed single person. . . .[69]

The fact that the husband in this case enjoyed a good income, and that the wife might have been unable to obtain employment suggests that, for

the three dissenting members of the court, the primary obligation for support has shifted from the family to the social welfare system, even where family resources are adequate.

This case may therefore represent a transition in the attitude of courts toward the familial obligation of support for former wives. In this context the court's express consideration in *Re Feehan v. Attwells*[70] of the relation between a spousal support order and social welfare entitlement is also noteworthy. In that case, the "wife" concerned was not legally married, but qualified for support on the basis of the required period of cohabitation pursuant to the Ontario statute.[71] She petitioned for support after separation, and was found to be eligible. However, because her husband had remarried his former wife, the judge noted that there was . . . little purpose in jeopardizing what now appears to be a stable relationship between the [married couple] when the effect thereof would, it seems to me, be to supplement [welfare] payments [to the applicant].[72] It may be that the absence of a legal marriage between the applicant "wife" and the husband eliminated the court's need to enforce a primary financial obligation on the part of the husband where welfare assistance would otherwise be required.

The law's continued emphasis on spousal support for former wives, rather than a recognition of the need for social welfare assistance, places many former wives (particularly those with few assets and little income) in an impossible predicament on divorce or marriage breakdown. A wife is usually required to seek spousal support as a condition of qualifying for welfare assistance,[73] and the granting of an order for spousal support may prevent her from receiving regular welfare assistance, even though her support payments may be intermittent or for less than the full amount. Thus, the emphasis on spousal support may mean that an order may prevent a wife from receiving social welfare, at least as a regular recipient; at the same time, the support order may not be honoured by her former husband, either intentionally or because of other claims on his limited resources. This situation makes a mockery of the theory of independence on marriage breakdown. A wife who is unable to support herself may continue to be dependent on spousal support which may be inadequate or irregular or both, after the marriage has ended.

Moreover, even if she qualifies for social welfare assistance, it will very often be insufficient to meet her actual needs. Some research has very clearly demonstrated that levels of welfare benefits are often below the poverty lines[74] and that the effect of inflation has eroded much of their real purchasing power.[75] Yet, particularly where a former husband forms a new relationship and undertakes responsibility for a new family, his first family will often become dependent on welfare assistance because the husband's resources are simply inadequate to support two families effectively. This means that the practical result of the rising divorce rate and serial monogamy in Canada is an increasing number of

women dependent on welfare assistance. Notwithstanding the family law principles of independence and equality, women are in fact dependent because they are custodial parents of infant children and because, without competitive labour market skills, they cannot attain economic independence. In reality, therefore, there are two sets of family law principles: equality and independence for the well-to-do and inequality and dependence on welfare assistance for all others. In other words, the equality legislated in the family law reform statutes has not in fact significantly altered the unequal and dependent position of women. As Olsen has noted:

> Recent reforms . . . tend to impose mutual obligations of support upon both spouses and to prevent either spouse from disinheriting the other. Such a cosmetic change, however, fails to eliminate the ideology of sexual inequality, because merely formal gender neutrality does not address actual conditions of economic dependency.[76]

By contrast, if the family courts generally ignore welfare entitlement, the social welfare system often recognizes the "family" in the process of determining entitlement. In most provinces, a wife must bring a support action against her husband as a condition of entitlement to welfare. Even in provinces like Ontario where the legislation permits the government department to bring such actions on behalf of claimants[77] it seems that, in practice, the claimants themselves are usually required to bring the actions.[78] The effect of such a condition of entitlement is to deny, in practice, any "independence" for former wives from their husbands, even where support may not be forthcoming at all.

Similarly, the social welfare system may recognize that a "family" exists even where there is no formal marriage, thereby creating a "spousal" dependency and disentitling a woman to welfare assistance. For example, in *Re Proc*[79] the Ontario High Court reviewed a decision of a welfare tribunal which had concluded that a "marriage" existed, thereby disentitling the claimant "wife" to an allowance as an unemployable person, because she was not living as a single person. Even though a former sexual relationship with her male cohabitee had terminated some years earlier, and notwithstanding that the man recognized no legal obligation to provide support for her, the tribunal had determined that the "wife" was not eligible for the appropriate welfare allowance. On appeal to the court, the tribunal's decision was reversed. The court declared that disentitlement was appropriate only where there was a shared economic relationship between the man and woman. The court stated:

> We consider that, as a matter of law, the expression "lives with that person as if they were husband and wife" must be construed in the light of the overall purpose of the statute, which is to prescribe the rules whereby persons are to be entitled to an allowance by reason of need. That expres-

> sion ought therefore to be applied by reference to the economic relationship of persons who are living together. . . . The approach by which the Board [the welfare tribunal] reached the view that these two persons were "married in fact if not in law" reflects, in the context of their reasons, undue emphasis upon the sexual relationship and insufficient analysis of the economic relationship.[80]

In a later decision *Warwick v. Minister of Community and Social Services*,[81] two single parents (male and female) shared a house and complemented one another's resources, but without really "pooling" them. The welfare tribunal again found that a "marriage" existed, thereby disentitling the "wife" to welfare. In this case, the appeal court reversed the decision of the welfare tribunal (which had been upheld by the Divisional Court) and reiterated that the phrase "living with another person as husband or wife" was to be construed in its ordinary interpretation. The court stated:

> I commenced my analysis by stating that if the appellant had not been the recipient of an allowance under the Act she would have been regarded as Mr. Galea's housekeeper. The fact that she is entitled to benefits under that Act does not change her status. She remains his housekeeper and cannot be considered as if she were his wife for the purpose of the Act and the regulation.[82]

What is evident in the tribunal decisions is the same principle that husbands have a primary responsibility for support of their wives which may be supplemented, if proved absolutely necessary, by social welfare assistance. In its enthusiasm to promote this principle, the tribunal seems willing to assign this responsibility for spousal support even to "husbands" who are not married to the "wives" receiving welfare assistance. As one commentator has stated:

> The implications [of this policy] for women are clear. The cohabitation regulation is based on the assumption that a man has to pay for the sexual and housekeeping services he receives from a woman. The regulation is a clear expression of the deeply entrenched gender stereotyping of women as dependents of men.[83]

By contrast, the appeal courts departed from the principle of spousal support in such cases and refused to assign responsibility where no marriage existed and where there were clear suggestions that the parties did not live "as husband and wife."

It seems that the courts have opted for independence from "family" support in favour of dependence on welfare benefits, at least where the evidence is less than clear as to the existence of a "marriage" relationship. In this respect, the result is similar to that in *Re Feehan v. Attwells*,[84] cited above, again where no legal "marriage" had existed. Yet, where spouses have been legally married, the required action for support as a condition of entitlement reinforces the primary obligation of

familial support in the social welfare system as in the family law system. The result for women is a denial of real equality or independence in either system.

Options for Policy Making

This analysis of the economic hardships resulting from divorce and marriage breakdown in Canada focusses on two problems: one is the poverty that seems to be a frequent result of the high rate of divorce and serial monogamy; the second is the disproportionate number of women, relative to men, who suffer economic hardship in these circumstances.

The first problem has received considerable attention from policy makers. Efforts have been made to improve the divorce system and to establish more satisfactory procedures for obtaining support orders; in addition, better arrangements have been adopted for the enforcement of existing orders. Increasingly, however, it has been recognized that the system of familial support after marriage breakdown has inherent limitations, particularly where an income earner is required to support both a former and an existing family.

> One may argue that men have a moral obligation to support their ex-wives and children, and that this responsibility should not be placed on the state. But in reality it is quite impractical to expect men to be able to support more than one family. Wages and salaries in Canada are simply not large enough to make this happen.[85]

Thus even with effective enforcement measures, there will still be situations in which the state must provide support.

At present the state may provide welfare assistance on divorce or marriage breakdown, but generally only on condition that a woman sue her former husband for support and, second, that she refrain from establishing cohabitation with any other man. In addition to these conditions of state support, the social system provides a level of support which is only marginal at best. Thus, to the extent that social welfare is available to those experiencing divorce or marriage breakdown, it seems apparent that the system intends to provide assistance only grudgingly, after all avenues of familial support have been exhausted, and at a level which is singularly unattractive. Social welfare assistance on divorce or marriage breakdown can be regarded only as a last resort; the expectation of familial support is still the norm.

The situation in Canada is similar to that in other common law countries at the present time. As was suggested by one commentator, however, it is likely that the existing expectation of private familial support will eventually be replaced by the provision of state support.

> The private law of maintenance will tend to wither away and its place be assumed by social security legislation. In other words, by the year 2000 the

> law will have abandoned as socially undesirable, frequently ineffectual and wholly uneconomic the hounding of spouses through the courts for non-support of their families. Non-support by spouse or parent will be ranged alongside those other vicissitudes of life — unemployment, sickness, industrial injury, child-birth, death itself — for which social insurance should make provision.[86]

The author, also suggests, however, an "intermediate stage" in which familial relief will be available from the state, but state agencies will be used to recoup payments from defaulting spouses.[87]

There is some evidence of movement toward this intermediate stage. In Great Britain, the *Report of the Committee on One-Parent Families*[88] recommended the establishment of a guaranteed maintenance allowance.

> Maintenance payments would be assessed and collected by the authority administering the allowance; they would be offset against the allowance paid and any excess paid to the mother; the need for some mothers to go to court to sue for maintenance awards would be largely eliminated.[89]

According to the committee's recommendations, the level of benefit would be fixed in relation to supplementary benefit payments and would normally remove lone wives and their dependent children from the welfare system. It would also be tapered to encourage some employment and be available to both men and women. In addition, it would have been administered by mail, and its level fixed for three months at a time, regardless of changed circumstances, including the beginning of a cohabitation.[90] The committee considered a number of alternatives[91] before recommending a guaranteed maintenance allowance. However, this recommendation was not implemented, with the result that such families in the United Kingdom must rely on social welfare assistance (supplementary benefit) just "as any other persons within the official poverty limits would do."[92] This means that there is no special treatment by the social welfare system for dependent spouses and children on divorce or marriage breakdown. However, there is a special child benefit payable to all families with children regardless of means, and one-parent families receive "marginally favourable treatment" in benefit rates.[93] In recent years, there have been very extensive efforts to increase the level of child benefit as a means of increasing the resources available to poor families.[94]

An alternative option, which has been implemented in some European countries, is the "maintenance advance," payable by the state if a maintenance debtor fails to pay to pay or pays insufficiently.[95] In Sweden, for example, the amount of the advance is calculated by reference to the level of the national old age pension, and the advance is 40 percent of that amount per child. With this option, of course, some inequity may result between one-parent families and low-income two parent families.

For this reason, it has been suggested that "the best approach is to fix the community obligation to children of one-parent families by reference to one or more other classes of claimant on the social security system."[96]

In practice, however, there has been very little progress even toward the "intermediate stage"[97] discussed above in policies on maintenance because of the limited use of statutory changes that permit such agencies to sue for maintenance payments on behalf of wives.

Perhaps because of the difficulties in designing appropriate policies for state support of broken families, some consideration has been given to an alternative private measure. The concept of insurance against marriage breakdown was considered by the Committee on One-Parent Families, but rejected as both impracticable (because poor families most in need of financial support would be least likely to be able to afford contributions) and inequitable (because it would not be available to unmarried "families" with children born out of wedlock).[98] The significance of the insurance concept probably lies in the fact that it resurrects the idea of private responsibility for financial support of dependents on divorce or marriage breakdown. Since support orders are ineffective, the insurance concept seems to be a viable means of increasing effectiveness, while retaining the essence of familial responsibility for support. By contrast, the idea of state support to replace the primary obligation of the family requires a choice between general and special treatment for dependents in the divorce and marriage breakdown context: a choice between including them in the social welfare system and creating a separate benefit to which only dependents would be entitled.

A choice between these two policy options — general social welfare measures for low-income individuals or special benefits designed for dependents on divorce or marriage breakdown — raises the issue of income support for the poor, including those who experience family breakups. What is left unexplored is the fact that there are disproportionate numbers of women, relative to men, who suffer economic hardship in such circumstances. In the larger picture, it is necessary to recognize that the rising divorce rate and the financial repercussions of marriage breakdown have contributed to a significant change in the profile of families in Canada; moreover, there is no reason to expect that the growth in numbers of one-parent families, and in the formation of serial family units by individuals, will decrease.[99]

This means that policy makers must take account of the differences in family patterns and the changing roles of individuals within family units, as well as the need for a reasonable standard of financial security. More particularly, they must take account of the position of women in family life and on divorce or marriage breakdown, and must design policies that encourage economic independence and equality for women as well as for men.

This objective requires that policy makers regard women as function-

ing individuals in the economy and not just as wives/mothers in the family context. It means that policies must take account of the paid labour market as well as the unpaid labour of women as family members because it is "the conditions and structures of the labour market in conjunction with the nuclear family model" which "conspire to keep women sexually and economically dependent on men."[100] Thus, a policy option that provides a minimum standard of income security to a woman, on the basis that she is a dependent wife/mother, exacerbates her dependence; she is seen as a wife/mother, rather than an individual who is in need. The existing social welfare legislation in Canada, as well as the proposal for a guaranteed maintenance allowance in the United Kingdom, reinforce the view of women as wives/mothers dependent on men, rather than as independent individuals. By contrast, the 1973 federal proposal for a guaranteed annual income in Canada offered a potential guarantee of income based on individual need, although even this proposal did not clearly state whether every individual would be entitled to the income regardless of familial supports.

Although a guaranteed annual income, especially one based on need, seems desirable, it is essential to recognize that ensuring independence and equality for women requires additional measures. A guaranteed annual income alone results in women being locked into dependence on the state, just as they were dependent on their husbands in the family. Only if a guarantee of a minimum standard of living is coupled with affirmative proposals that ensure economic equality for women can they be regarded as independent individuals. An important issue, for example, is adequate and adequately funded child-care facilities for women who want to work. As Eekelaar has noted, there is an "integral relationship between the organization of family life and the economic organization of society."[101] This view is also reflected in the view of the Committee on One-Parent Families, which concluded that adequate day care was

> vital to the needs of all one-parent families . . . as a practical means of supporting parents and children in their everyday existence, as enhancing the quality of their lives and as lessening or overcoming the social disadvantages from which many of them suffer.[102]

This need for adequate child-care facilities as a means of overcoming disadvantages for women is similar to proposals that encourage some part-time employment for women on welfare.[103]

Yet the objective of economic independence and equality for women also requires broader policy measures: equality of access to jobs, equal pay for work of equal value, and a recognition of women's economic contribution in the family. An appropriate policy with respect to financial security on divorce or marriage breakdown which also recognizes the relationship between the family and the economy must take account

of the variation in the structures of modern families and it must ensure equal treatment in its effects on men and women.[104]

In terms of family policies, Eichler has suggested five principles as the basis for a family policy, which include individual equality, shared societal responsibility for dependents, and universality and progressivity. The first principle represents a significant reform in the family law/social welfare context:

> The principle of individual equality implies that everybody should be administratively treated as an individual, rather than as a family member. This is one of the major ways in which to avoid the familism-individualism flip-flop, since it means that there could be no discrimination on the basis of sex, marital status, or family status in general. This would imply that eligibility to all social benefits be determined on the basis of individual status and individual income only, and, correspondingly, that nobody could be disentitled from any social benefit on the basis of family status.[105]

The second and third principles are designed to prevent inequity resulting from a literal application of the first. In addition, however, Eichler recognizes that effective equality is not achieved by policies or legislation alone, and she has two additional principles designed to take account of the existing unequal position of women: elimination of structural disadvantages for women, and preservation and extension of benefits that presently assist those in need.

These principles, taken together with the others, are designed to recognize the need for independence and equality for all family members, women as well as men, and to ensure effective equality in existing circumstances. The significance of principles such as these for social policy in Canada is that they address both of the problems identified by the analysis of this paper, that is, economic hardship in divorce or marriage breakdown and the poverty and dependence that become the fate of women much more often than men. As Eichler has said:

> Ironically, in order to serve families as *social* units best, and to avoid discrimination against certain types of families, it is necessary to treat people *administratively* as individuals so that they can live together *socially* in families.[106]

In the long run, it is only policies that reflect and encourage individualism that will result in economic equality for women.

Conclusion

This paper has attempted to provide an overview of the development of principles in family law and social welfare, and to identify, in theoretical terms and in the practical decision making of courts and tribunals, the lack of a consistent policy that deals with the family and with the responsibility for financial support of family members on divorce or

marriage breakdown. The paper has also explored some of the policy options available to provide for economic security of dependents in family breakups. It has suggested that policies in such cases should be designed so as to meet the objective of providing financial security, but should also ensure the equality and independence of men and women. Such policy objectives require an emphasis on women as individuals rather than merely as wives or mothers. In implementing them, it is important to recognize that "the family is indeed a relatively flexible unit which has been susceptible to the transmission of broader societal goals."[107] For this reason, policies about families and their economic security can become useful vehicles for the broader societal objectives of effective equality for both men and women.[108]

Notes

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1. M. Boyd, "The Social Demography of Divorce in Canada," in K. Ishwaran, ed., *Marriage and Divorce in Canada* (Toronto: Methuen, 1983), at 248 and Table 11.1.
2. The divorce rate was 124.2 per 100,000 population in 1968; it "subsequently soared to 148.4 in 1972, 200.6 in 1974, 235.8 in 1976, and 243.4 in 1978." Statistics Canada, *Divorce: Law and the Family in Canada* (Ottawa: Minister of Supply and Services Canada, 1983), at 59.
3. M. Boyd, "Social Demography," Table 11.1. Recent Statistics Canada figures also demonstrate that the proportion of female-headed poor families within the total pool of poor families increased by 75 percent — from 21.6 percent to 37.6 percent in the ten year period 1969–79. "And the poor get poorer . . .," *Toronto Star*, September 24, 1983, at 1.
4. J. Payne, "Family Law in Canada and the Financial Consequences of Marriage Breakdown and Divorce," in this volume. The phrase "neutral rather than normative" means that the law and legal principles are without values of a sort that require particular responses from individuals; i.e., they do not prescribe norms.
5. See B. Kitchen, "Women's Dependence" (1984 No. 2), 1 *Atkinson Review* 11. See also E. Wilson, *Women and the Welfare State* (London: Tavistock Publications, 1977).
6. M.A. Glendon, *The New Family and the New Property* (Toronto: Butterworth, 1981).
7. *Ibid.*, at 13–14.
8. F. Olsen "The Family and the Market: A Study of Ideology and Legal Reform" (1983), 96 *Harv. L.R.* 1497 at 1516.
9. Glendon, *supra*, note 6, at 14. The timing of the nuclear family and the reasons for its development are explored in C. Degler, "Women and the Family" in M. Kammen, ed., *The Past Before Us* (Ithaca: Cornell University Press, 1980), 308 at 316–17.
10. Glendon, *supra*, note 6, at 138ff.
11. The unity principle, usually quoted from Blackstone's *Commentaries* appears in the oldest English law book, the *Dialogus de Saccario*. See M. McCaughan, *The Legal Status of Married Women in Canada* (Toronto: Carswell, 1977), at 2ff.
12. McCaughan, *supra*, note 11, at 5ff.
13. *Ibid.*, pp. 17–19. See also L. Holcombe, *Wives and Property* (Toronto: University of Toronto Press, 1983), at 37ff.
14. A. Sachs and J.H. Wilson, *Sexism and the Law* (Oxford: Martin Robertson, 1978), at 137.

15. Under the common law a husband must provide for this wife the necessities of life. See McCaughan, *supra*, note 11, at 166.
16. See B. Hovius, *Family Law* (Toronto: Carswell, 1982), at 379, note 5. See also Ontario Law Reform Commission, *Report on Family Law, Part VI: Support Obligations* (Toronto: Ministry of the Attorney General, 1975), 5–9. The support obligation of husbands was limited to "innocent" wives; that is, a wife who had committed adultery thereby forfeited her right to support on divorce.
17. There are different views of the relationship between law and social change. For two interesting examples, see J. Eekelaar, *Family Law and Social Policy* (London: Weidenfeld and Nicolson, 1978), at 27–34; and A. Watson, "Legal Change: Sources of Law and Legal Culture" (1983), 131 *University of Pennsylvania Law Review* 1121.
18. *Supra*, note 2.
19. See *Matrimonial Property Act*, R.S.A. 1980, c.M-9
    Family Relations Act, R.S.B.C. 1979, c.121
    Marital Property Act, 1978 (Man.), c.24 (also C.C.S.M., c.M.-45)
    Marital Property Act, 1980 (N.B.), c.M.-1.1
    Matrimonial Property Act, 1979 (Nfld.), c.32
    Matrimonial Property Act, 1980 (N.S.), c.9
    Family Law Reform Act, R.S.O. 1980, c.152
    Family Law Reform Act, 1978 (P.E.I.), c.6
    Matrimonial Property Act, 1979 (Sask.), c.M.-6.1
    In Quebec, Bill 89 also marks the beginning of a reform process in family law for the civil law tradition in Canada. See generally, A. Bissett-Johnson and W. Hollan, *Matrimonial Property Law in Canada* (Toronto: Carswell, 1980).
20. For example, see Ontario's *Family Law Reform Act*, sections 4, 15 and 18.
21. See N. Hunter, "Child Support Law and Policy: The Systematic Imposition of Costs on Women" (1983), 6 *Harvard Women's Law Journal* 1; Kitchen, *supra*, note 5; Boyd, *supra*, note 1; and Olsen, *supra*, note 8 at 1530–35.
22. See Canada, Law Reform Commission, *Maintenance on Divorce*, Working Paper 12 (Ottawa: Information Canada, 1975), at 30. The extent of the rehabilitative allowance was reviewed by the SCC in *Messier v. Delage* (1984), 50 N.R. 16.
23. Ontario, Ministry of Labour, Women's Bureau, "Women in the Labour Force: 'Basic Facts' Update" (Toronto, 1982).
24. According to Statistics Canada, 85.6 percent of custody awards are made to mothers (this figure applies only to circumstances where one or the other parent gets all the children). See Statistics Canada, *supra*, note 2, at 203 and Table 2.
25. Social Planning Council of Metropolitan Toronto, "Poverty Among Ontario's Older Women," *Social Infopac* (1982, No. 4), at 2 and Table 2. See also L. Cohen, *Small Expectations: Society's Betrayal of Older Women* (Toronto: McClelland and Stewart, 1984), at 125ff.
26. See M. Fineman, "Implementing Equality: Ideology, Contradiction and Social Change", [1983] *Wisconsin Law Review* 789.
27. M. Eichler, *Families in Canada Today* (Toronto: Gage, 1983), at 109–10.
28. See Government of Canada, *Income Security and Social Services* (1969) and *Working Paper on Social Security in Canada* (1973).
29. *Working Paper on Social Security in Canada*, at 4–5.
30. *Ibid.*, at 5.
31. *Ibid.* The quotation implicitly assumes that "independence" means that an individual works to support family dependents; it also seems to imply that familial support is to be provided, in times of contingencies, from accumulated savings. Presumably, those deserving persons who conform to this pattern are then entitled to state support (interdependence).
32. For example, eligibility for unemployment insurance and workers' compensation focusses primarily on the individual rather than the family unit. It is relevant, of course, that unemployment insurance and workers' compensation benefits are provided for out of contributions by workers and employers, unlike welfare. As "insur-

ance," the former benefits can be paid regardless of income level. Yet this apparent distinction obscures both the fact that the work of housewives and childcare providers does not qualify for either unemployment insurance or workers' compensation, and that the eligibility for welfare does not ensure that a family has an income which meets the poverty line as set by Statistics Canada.

33. The family unit may be taken into account in some cases in determining level of benefit even though it is not used to determine eligibility.
34. Provincial welfare programs often determine eligibility by reference to the family unit as a whole; because this program is available to persons who have not participated in the paid labour force, it is a program to which wives must often turn on divorce or marriage breakdown. The fact that it utilizes family resources in determining eligibility therefore often undermines a wife's independence from her former husband.
35. Eichler, *supra*, note 27, at 110.
36. *Ibid.*
37. Glendon's thesis is that the status formerly derived from family is now derived more often from employment and income; for those who do not work in the paid labour force, it seems to follow logically that their status and independence should be derived from social welfare. She has stated: "The changing law has been a sensitive indicator of the fact that, for the majority of Americans, the most important relationship in their lives, so far as economic security is concerned, is their own actual or potential employment relationship, with government and the family serving as back-up systems." Glendon, *supra*, note 6, at 191.
38. "The Alberta Family Court at Calgary reported that 85 percent of support payments were in default, half of these 'substantially in arrears' and research in the Ontario Provincial Courts (Family Division) showed that only 55 percent of support arrangements had been fully discharged. More recent figures suggest that 70 percent of men ordered to pay support in Ontario default at some point." B. Burch et al., "Issues in the Determination and Enforcement of Child Support Orders" (1980), 3 *Canadian Journal of Family Law* 5. See also Canadian Institute for Research, *Matrimonial Support Failures: Reasons, Profiles and Perceptions of Individuals Involved* (Edmonton: University of Alberta Institute of Law Research and Reform, 1981).
39. The cohabitation rule is examined in the next section in more detail.
40. Law Reform Commission, *supra*, note 22, at 35. These principles are clearly reflected in the draft bill amending the *Divorce Act*, proposed by the government in 1984. See *An Act to Amend the Divorce Act* (Bill C–10), especially s. 10, which provides for a new s. 12.1(1) and legislatively defined "objectives of maintenance orders."
41. *Ibid.*
42. The application of principles is not entirely consistent in the reported cases; this situation led one commentator to the conclusion that:

    > To try to find a comprehensive philosophy in the avalanche of jurisprudence which is triggered by the Divorce Act and the various provincial statutes is to recognize that the law in its present state is a Rubik's cube for which no one has yet written the Solution Book. The result is a patchwork of often conflicting theories and approaches.

    See Judge Rosalie Silberman Abella, "Economic Adjustment on Marriage Breakdown: Support" (1981), 4 *Family Law Review* 1 at 1, quoted by Chouinard, J. in *Messier v. Delage* (1984), 50 N.R. 16.
43. (1978) 21 O.R.(2d) 722; 7 R.F.L.(2d) 201 (Ont. H.C.), per Henry, J. To ensure consistency in the statutory framework, the cases referred to in this section are primarily drawn from one provincial jurisdiction: Ontario. However, the general principles are evident as well in cases from other provinces, because of the general statutory reform which has occurred in recent years. See, *supra*, note 19.
44. *Ibid.*, at 743.
45. *Ibid.* To ensure the possibility of variation in the future, Henry, J. made a nominal order for support of $1 annually.
46. (1978), 20 O.R.(2d) 185; 1 R.F.L.(2d) 239 (Ont. H.C.), per Galligan J.

47. (1982) 45 N.R. 40; 30 R.F.L.(2d) 225 (S.C.C.) per Laskin, C.J. (Estey, J., dissenting in part).
48. The result in the *Silverstein* case, after a division of assets, was to leave Mr. and Mrs. Silverstein each with approximately $24,000 annual income; some of this income was to be derived from capital investments. In the *Bregman* case, Mr. Bregman's net assets were $2.8 million, of which Mrs. Bregman received approximately $600,000. In *Leatherdale*, both the husband and wife held jobs, both had inherited some money (Mrs. Leatherdale's was worth $14,000), and they divided the matrimonial home; their dispute concerned some Bell Canada shares and an RRSP owned by the husband, worth about $40,000 in total, of which the wife eventually received a share worth $10,000.
49. The Silversteins were married for over 35 years, the Bregmans for over 25 years, and the Leatherdales for 19 years.
50. As quoted by Southey, J. in *Weir v. Weir* (1978), 23 O.R.(2d) 765; 6 R.F.L.(2d) 189 (Ont. H.C.), at 196.
51. (1979), 1 F.L.R.A.C. 467 (Ont. H.C.), per Lerner J.
52. See W. Atkin, "Spousal Maintenance: A New Philosophy" (1980–81), 9 N.Z.U.L.R. 336, especially at 336–37, quoting Lord Scarman in *Minton v. Minton*, [1979] A.C.593.
53. (1982), 35 O.R.(2d) 55 (Co. Ct.), per Keeman Co.Ct.J.
54. *Ibid.*, at 61.
55. (1980), 21 R.F.L.(2d) 199 (Ont. Div. Ct.).
56. Boyd, *supra*, note 1, at Table 11.1
57. *Ibid.*
58. Statistics Canada figures for 1979 indicate that although there were fewer female-headed than male-headed families among poor families, the likelihood of a female-headed family being poor was 36 percent, more than five times that of a male-headed family in Canada. See David P. Ross, *The Canadian Fact Book on Poverty — 1983* (CCSD Series, Toronto: James Lorimer, 1983), at 13 and Table 4.
59. Madame Justice B. Wilson, "The Variation of Support Orders" in R. Abella and C. L'Heureux-Dubé, eds., *Family Law: Dimensions of Justice* (Toronto: Butterworth, 1983), at 63 and 67.
60. 1982, 36 O.R.(2d) 365, 134 O.L.R.(3d) 128 (Ont. H.C.) per Hollingworth, J.
61. (1981), 22 R.F.L.(2d) 40 (Ont. C.A.) per Morden J.A.
62. (1970), 2 R.F.L. 386 (Man. Q.B.).
63. (1974), 15 R.F.L. 261 (Ont. H.C.), per Galligan J.
64. (1972), 9 R.F.L. 312 (Man. Q.B.), per Matas J.
65. (1970), 5 R.F.L. 368 (Ont. Prov. Ct.) per Van Duzer Prov. Ct. J.
66. See *Reiterbund v. Reiterbund*, [1974] 2 All E.R. 455, per Finer J. and *Barnes v. Barnes*, [1972] 1 W.L.R. 1381 (C.A.).
67. *Supra*, note 22.
68. *Ibid.*, at 36.
69. *Ibid.*, at 48–49.
70. (1979), 24 O.R.(2d) 248 (Co. Ct.) per Honey Co. Ct. J.
71. *Family Law Reform Act*, *supra*, note 19, s. 14.
72. *Supra*, note 70, at 254.
73. R. Hasson, "The Cruel War: Social Security Abuse in Canada" (1981), 3 *Canadian Taxation* 114, at 32 - 33.
74. *Ibid.*, at 136, Table 5.
75. *Ibid.*, Table 6.
76. Olsen, *supra*, note 8, at 1541. This conclusion explicitly identifies the gender basis of the existence of two systems of family law: one for the well-to-do and one for the poor.

See also J. ten Broek, "California's Dual System of Family Law: Its Origin, Development, and Present Status" (1964), 16 *Stanford Law Review* 257.

77. *Family Law Reform Act*, *supra*, note 19, s. 18(3).
78. In 1979, the minister advised the legislative committee that the ministry did not have sufficient resources to bring subrogated actions. Statement of Mr. Keith Norton to the Standing Committee on Social Development, *Proceedings* (Oct. 30, 1979), at 16; as quoted in Hasson, "The Cruel War," at 139–40. See also Institute of Law Research and Reform (Alberta), *Matrimonial Support*, Report No. 27 (Edmonton, 1978), at 161–167.
79. (1974), 6 O.R.(2d) 624; 19 R.F.L. 82 (Ont. H.C.) per Henry J. The decision was affirmed without written reasons by the Court of Appeal: (1974) 6 O.R.(2d) 624.
80. *Ibid.*, at 630.
81. (1978), 21 O.R.(2d) 528; 5 R.F.L.(2d) 325 (Ont. C.A.), per Blair J.A.
82. *Ibid.*, at 538.
83. Kitchen, *supra*, note 5, at 13.
84. *Supra*, note 70.
85. Kitchen, *supra*, note 5, at 15.
86. L. Neville Brown, "Maintenance and Esoterism" (1968), 31 *Modern Law Review* 121 at 137.
87. *Ibid.*
88. Great Britain, Department of Health and Social Security, *Report of the Committee on One-Parent Families* (1974), Cmnd. 5629.
89. *Ibid.*, at 285.
90. *Ibid.*
91. For example, the committee considered and rejected proposals for a child and childcare allowance (CHAID) and for a fatherless family allowance (FFA). See *ibid.*, at 276–284.
92. Eekelaar, *supra*, note 17, at 125.
93. *Ibid.*
94. See, for example, R. Lister, "A Budget for the Poor — or a Poor Budget?: A Pre-Budget Memorandum to the Chancellor of the Exchequer" (Child Poverty Section Group, 1984), at 6:

    > Since the abolition of child tax allowances, child benefit is the major way of transferring income to families with children. It is therefore a crucial instrument for furthering a policy of helping the family. (Quoting the Treasury and Civil Service Select Committee, 1983, para. 11.16)

    See also J. McClelland, ed., "A Little Pride and Dignity" (Child Poverty Action Group, Poverty Pamphlet 54, 1982).
95. See Eekelaar, *supra*, note 17, at 125.
96. *Ibid.*
97. Neville Brown, *supra*, note 86. There is, however, a recent proposal in Australia, which may qualify as an "intermediate stage," for a national agency to enforce and negotiate maintenance orders. [1984] Reform 76.
98. Committee on One-Parent Families, *supra*, note 87, at 279–280. See also Eekelaar, *supra*, note 17, at 124. The concept has received limited support in Canada: see V. Bhardwaj, "An Outline of the Matrimonial and Child Support Insurance Plan: A New Law of Maintenance" (1977), 28 R.F.L. 295.
99. Eichler, *supra*, note 27, at 25–26.
100. Kitchen, *supra*, note 5, at 15.
101. Eekelaar, *supra*, note 17, at 211.
102. Committee on One-Parent Families, *supra*, note 87, at 454. See also J. Popay, L. Rimmer, and C. Rossiter, *One-Parent Families* (Study Commission on the Family, Occasional Paper 12, London, 1983), at 71–78; and YWCA of Metropolitan Toronto, "Women and Employment: A Background Paper" (Toronto, 1982), at 2.

103. In the U.K., such proposals include the "tapered earnings disregard"; similar proposals have been initiated from time to time in Canada.
104. See Eichler, *supra*, note 27, at 129.
105. *Ibid.*, at 130–131.
106. *Ibid.*, at 135.
107. Eekelaar, *supra*, note 17, at 189.
108. Judge R. Abella, "The Critical Century: The Rights of Women and Children from 1881–1982" (1984), 18 Gazette 40 at 50.

3

Development and Trends in Canadian Social Law, 1940 to 1984

ROBERT D. BUREAU
KATHERINE LIPPEL
LUCIE LAMARCHE

Introduction

Social legislation is a characteristic feature of the development of law in the 20th century. Social law is subtle, enlightening and dynamic; it lies at the heart of the contradictions facing our industrialized societies. For 50 years it has been the subject of political conflict and fundamental economic choices. Its development is intimately linked to deep-seated changes in the state and to the structural transformation of our social institutions. Because of its objectives and the stakes involved, social law meets with both resistance and controversy. Its critical analysis is as necessary as it is fascinating.

As a specific legal form, social law both reflects and challenges established social values, sometimes concealing reality while fulfilling several roles that should be analyzed. Concrete and quantifiable, social law is a phenomenon that touches the lives of every Canadian at one point or another. It can be measured financially and enables the quality of life of the society to be evaluated according to the degree to which the basic needs of its members are met.

The study of social legislation is not without its difficulties. From the beginning, it is hard to define the field and the insufficient theoretical framework makes analysis more complicated. Historically, more than any other field of law, social law has led to debates and problems on the constitutional level that could justify a chapter in themselves. For this reason we have chosen to confine our study to legislation of general application dealing principally with income security, and to approach our analysis from the standpoint of the beneficiaries, who are subject to the law, in their relations with the state at whatever level.

Though these choices have been dictated by material constraints, they are not without ideological and political motivation in that they are initially linked to values and opinions which result from many years of research.

The study is divided into three parts. The first part, which provides in effect a substantial introduction, reviews the evolution of social law as both a dialectical and historical product of the relationship between property, labour, and power within the context of industrialization and urbanization and of the transformation of the state during the Great Depression and of its consequences. The second part addresses the development and content of the legislation itself from 1940 to the present taking into account the multiple roles of social law. Finally, in the third part we attempt to elucidate current trends in social law and to outline prospects for the future.

The Origins of Canadian Social Law, 1880–1940

In previous centuries the social security of those unable to look after themselves was mainly provided through private initiatives. The first social legislation adopted at the turn of the 20th century appears as a collection of measures heralding a break with and a re-orientation of traditional juridical thought.

The context which produced the legislation was certainly a determining factor: massive industrialization, urbanization, and proletarianization gave birth to new social problems and radical changes in living conditions. This period, which marked the shift from liberal, competitive capitalism to state monopoly capitalism, was characterized by economic and social contradictions that came to a head in the Great Depression and that threatened the political equilibrium and balance of power within society. In this context, it appears that neither the classic legal structure, which had developed during the initial phase of the capitalist mode of production, nor the civil and political rights, which had emerged from the bourgeois revolution, could respond to the new social relationships, either ideologically or technically.

On the one hand, the working masses and the urban proletariat were demanding concrete rights related to the problems they faced: work accidents, unemployment, sickness, retirement. On the other hand, to resolve contradictions and guarantee social order, the capitalists and politicians had to conceive of new orientations, a new approach and new juridical forms. This led to the emergence of new rights, described in legal jargon as economic and social rights, which make up social law.

On this backdrop we will trace the creation of Canadian social law, starting with the first piecemeal enactments early in the century and proceeding to the more structured social security plans of the 1940s. But first the traditional forms of social security shall be briefly considered.

Traditional Social Security

Most studies[1] dealing with social security in the 19th century state that individuals who were unable to see to their own needs, for whatever reasons, were looked after by their families, by charitable institutions or organizations, or, in some cases, by local or municipal authorities. Relief for the poor, the destitute and those unable to work, as well as assistance to the sick, the disabled, the elderly and needy families, was generally granted within the context of what might be called the long tradition of assistance inspired by principles of charity and private initiative. A schematic analysis will enable us to identify three distinct levels of assistance at the time of Confederation. It was above all up to the extended family to provide for the care and security of members who were not self-sufficient. This responsibility generally took the form of assistance in kind and was dictated by the obligation of support provided for at common law and by the Civil Code. Both lay and religious charitable institutions offered help to needy individuals and families in the form of material support or general and specialized institutional services in hospitals, asylums, and homes. Finally, in some provinces, municipalities provided financial assistance to certain categories of individuals when the financial resources of the family had been exhausted.[2]

It is generally understood that these forms of social security suited the type of rural society that existed at the time, and the lifestyle and values inherited from the Elizabethan period and the *ancien régime* in France. Consequently, the values of charity, individual responsibility, and family solidarity explain the private nature of assistance and the limited liability of public authorities prior to the early 20th century.

The *Constitution Act, 1867* provided that the administration of "persons" was within the jurisdiction of the provinces, who had overall responsibility for civil rights (92.13), matters of purely local and private nature (92.10), municipal institutions (92.8), prisons and reformatory institutions (92.6), hospitals, asylums, charities and charitable institutions (92.7).

This description of a society, which leaves within the private sector the core of social relationships, including self-help and assistance arrangements that arise when individuals are unable to participate in production and the labour market, is certainly not incorrect, quite the contrary. But it is not adequate because it reflects only a portion of reality. It may suggest that the state did not get involved at the time, or that Quebec Premier Alexandre Taschereau's 1921 statement, "private charity does wonders,"[3] which was used to justify maintaining old structures of assistance, was the established truth. In fact, private charity did not do wonders, not in 1921, or in 1900, or in 1867, and even in the mid-19th century the state was intervening in the private sphere of production relations, property and labour.

A more critical examination of socio-economic conditions at the time of Confederation reveals that the formation of the modern Canadian state coincides with the period in which the Canadian bourgeoisie carried out its revolution, forced to free itself from the mother country and to set itself apart from its southern neighbour. Proceeding "full steam ahead" with industrial development after having accumulated capital in trading, agriculture, and on the backs of settlers and immigrants, it created a network of canals and linked the two oceans by the construction of a vast railway system to cement Canadian unity. During this period also, cities, large businesses, banks, and financial trusts developed, and private fortunes were created.

The Canadian bourgeoisie was in a period of expansion. To fulfill its conception of society, it needed a state that would not only serve as an instrument of political power but also finance its plans, unify the territory, facilitate communications, regulate industry and trade, and guarantee capitalists the labour they required for production. It also needed technical, economic, ideological and repressive tools to manage the relationships between power, property, and labour within this new Canadian social formation.

The legislative powers granted the Canadian Parliament by section 91 of the *Constitution Act, 1867*,[4] including the regulation of trade and commerce (91.2), taxation (91.3), borrowing of money on the public credit (91.4), navigation (91.10), ferries (91.13), militia (91.7) and criminal law (91.27), must be understood within this broader context, as must Sir John A. Macdonald's National Policy during the 1870s.[5] The creation of the public service and a complex bureaucracy,[6] and the establishment of a national police, the Royal Canadian Mounted Police,[7] must also be seen in this light.

In principle, private enterprise was the driving force of the economy. The law of the marketplace excluded state intervention. Liberal ideology allowed that an individual could become a capitalist by individual initiative and entrepreneurship. History has shown, however, that there were only a limited number of seats on boards of directors, and that the state intervened either when the interests of the capitalists required it or to put down the working class when it had recourse to strikes or demonstrations to improve living and working conditions.[8]

Therefore, the claim that the state did not intervene in social and economic matters during the 19th century reflects only a portion of reality. Though it is true that relations of production and the distribution of wealth were mainly confined to the private sector, the state had already set up some mechanisms to encourage industrial development and maximize the profitability of capital. As for the various social consequences that resulted, the bourgeoisie was quite comfortable with traditional values and a sharing of responsibility in the name of liberalism, individualism, and charity. Indeed the state had not repudiated its

power over the individual, but, in the interests of effectiveness, had simply delegated the exercise of it to private institutions, which it controlled, supervised, and subsidized as required. In extreme circumstances and when social order required it, the state took direct control — in prisons, industrial schools, and reform schools,[9] and of the impoverished, derelicts, and others who might have threatened society and the functioning of the economy.

From the end of the 19th century, the state was concerned with matters of health, cleanliness, and hygiene in the workplace[10] to the extent that these matters had a direct effect on workers' production and on profitability.

Social Risks and the First Social Legislation, 1900–30

In less than 50 years, the bourgeois revolution completely transformed Canadian society, as well as the way of life and living conditions of Canadians. The industrialization that began at the end of the 19th century underwent an expansion with a rate of development which brought the gross national product from $1,057 million in 1900 to $5,529 million in 1920.[11] By the turn of the century manufacturing was already more important than agriculture, and capitalist business made up the majority of the sectors of production. By the beginning of the 20th century the population, largely rural in 1880, found itself concentrated mainly in the cities. The change from an agriculture and rural to an industrial and urban society in such a short period of time was not without problems. One of the first consequences was increased wage labour and the transformation of the family as a unit of production and support for its members. Whereas the rural economy allowed for the subsistence of several generations within the same family, the salary of the urban worker was barely enough to meet his own needs The massive proletarianization and accelerated urbanization resulted in depriving farmers and artisans of their means of production, ruptured the family structure, and concentrated the majority of the population within poorly equipped urban areas.

If industry was the source of progress, productivity, and the growth of wealth, they did not come without a price. One of the costs, and not the least important, was to be paid by workers whose labour was their only source of income in the form of wages subject to the laws of the marketplace and whose working conditions were subject to constraints and risks.

This period was characterized by the material insecurity of the worker, who often could barely meet basic needs because wages were below the minimum budget of a family. It is not surprising that by the late 19th century, as the Royal Commission to Inquire into and Report on the Subject of Labour and its Relation to Capital revealed in 1888,[12] a large

number of women and children were forced to work to make ends meet, at even lower wages and under even more difficult conditions.

Added to the material insecurity of this new class of working poor, marked by hardship and misery, was a whole other range of social problems. Under such conditions it was impossible to save money for the periods in which earnings were interrupted. Industrialization made it impossible for workers to earn the money they needed: economic crises, recessions, mechanization and productivity were the dark side of the picture of "progress." Ironically the expression "social risks" was consecrated to designate unemployment, work accidents, industrial diseases and compulsory retirement — the main reasons for interruption in earnings affecting the working class since the end of the 19th century. The expression is certainly accurate to the extent that it cites the cause, which was social, and to the extent that the event itself was not dependent on the will of the victim. The capitalists well understood the concept of risk when they devised commercial insurance to compensate the victims of damage, fire or theft. But no social measures were provided to compensate the risk of loss of employment and the consequences of unemployment on workers' living standards. In reality, the risk was social, but the solution had to be found within the private sector. The contradiction was a major one, but it was in keeping with the conditions and social relations of the period.

As long as the bourgeoisie could impose its liberal values and the work ethic, and force workers to pay the social costs of industrialization, it had no interest in admitting the necessity of state intervention to resolve these problems. Meanwhile, however, it had to recognize the right of workers to organize themselves to defend their interests, in the same way as capitalists had for many years been able to organize themselves in companies or corporations to run their businesses and see to their class interests, without violating antitrust laws.

The organization of trade unions was the first breach in the bourgeois fortifications and permitted some of the rules of the game to be challenged. In their ceaseless struggle for recognition and better working conditions, workers had also organized mutual aid societies, alongside and sometimes within their unions, to assist those who had fallen victim to certain social risks. These organizations, which were financed and managed by the workers, found themselves just as overloaded as private aid institutions in coping with problems caused by unemployment, work accidents, retirement, death, low wages and inadequate income.

The involvement of the state in social matters at the beginning of the 20th century can be explained by a combination of factors: pressure from the labour movement, the interests of capitalists and the balance of power between the two. In some European countries, such as Germany, workers had achieved a social insurance plan by 1886. In Canada the first worker's compensation plan was not introduced until 1909, and it was

based not on the technique of social insurance but on the principle of no-fault liability.

Furthermore, it is quite revealing that the major social legislation in the 1900–30 period was linked to labour; the management and control of the productive forces required state intervention.

Ontario and Quebec, the two most industrialized provinces, took the initiative in workmen's compensation legislation.[13] At the time, workers were required to use new machinery under safety conditions that left much to be desired. The sole recourse of victims of accidents and their families was a civil suit for damages or an action in tort in the common law provinces. To receive any form of compensation the victim had to prove employer liability in a court of law: not an easy task. But, in those cases where liability was found, it was also costly for businessmen to have to compensate victims under the rules of civil or common law, which set no ceiling on damages.

The introduction of the presumed liability of the employer as a legal fiction appealed to workers who no longer had to prove employer fault. In exchange, they abandoned their right to sue for damages before the civil courts, and were forced to accept a limit on indemnities in the case of incapacity or death.

Work accidents were the only social risk for which a solution did exist within the civil law of torts. Surprised by the action of the workers and trapped by the rules of their own game, the capitalists found changes to such rules to be in their own interest.[14] This was not however the case for breach of contract for hire of services or for the determination of wages and working conditions, which were based on the law of property, obligations and management rights, and which sheltered employers from any legal action in the case of layoff.

The abuses of capitalism and the scandalized reaction of public opinion, as well as the pressure of organized labour, did enable other measures to be won. The main social legislation concerning labour was adopted provincially. It dealt with basic protection of women and children for whom the minimum age and the length of the working day were set,[15] the minimum wage for women in certain industries,[16] and the establishment in 1910 of provincial employment offices,[17] which became subsidized federally in 1918.[18]

In the first two cases, legislation was undoubtedly aimed at limiting abuses and providing women and children with a certain basic protection, but we should not overlook the fact that such legislation did recognize child labour and sanctioned the inferiority of women's labour, as well as the discrimination to which it was subject. As for the federally financed employment offices, which were set up at the end of World War I, they indicated the government's desire to control the supply and demand of manpower[19] to facilitate the transition from a war to a peace economy.

In the field of health, provincial statutes dealing with health and accident prevention within industry and business were designed more to assist production than protect the public. Hospitalization, medical care and income in case of illness remained in the domain of the private sector until 1946.

The risk of compulsory retirement and problems of old age gave rise in 1927, for the first time, to a right based on the concept of need. After World War I, the federal government had set up a pension plan for disabled officers and soldiers and for the widows and orphans of veterans.[20] Some private firms, including the banks and the railways, had created pension funds for their employees, and in 1919 the federal government had enacted the Civil Service Superannuation Act for its employees.[21]

These examples, as well as the favourable response of public opinion to the establishment of pension plans in England and New Zealand in 1892 and 1898, led the Trades and Labor Congress of Canada and several trade unions to pressure the federal government to extend protection to the elderly poor left without economic security in retirement:

> That this Congress considers that the time has come for the workers of the country to benefit from a pension for old age or in the case of serious illness. We hereby demand that the federal government establish a fund known as the "old age pension" in order to assist workers in retirement who are not self-sufficient.[22] (translation)

This 1907 resolution was transmitted to cabinet. But because of technical and constitutional objections, it was not until after the report of the Royal Commission of Inquiry into Labour Relations of 1919 and the favourable view of a Select Committee of the House of Commons in 1924 that Parliament decided to adopt in 1927 the *Old Age Pensions Act*.[23]

In effect, Ottawa attempted to use federal legislation to pressure the provincial governments to adopt measures of economic security for the elderly. It was not direct intervention but rather a general law providing for the conclusion of an agreement under certain conditions.[24] The act gave the provinces the administration of pensions while stipulating that the powers would be equally divided between both levels of government.[25]

The content of this legislation represented a clear evolution in the orientation of social security. Though strongly inspired by the English tradition, it broke with the traditional concept of private assistance, recognized the principle of direct financial aid, constituted a first step toward universal protection, and opened the way for a recognition of rights for an initial category of beneficiaries.

In practice, the 1927 statute was a form of assistance by category. It subjected the exercise of this right to certain conditions[26] and established the amount of the pension at $240 per year, an amount well below

real needs. In this sense, although it represented a break with the principle that individuals should meet their own needs by means of their own labour, its scope remained confined to a category considered no longer productive. Therefore, most of the employable whose earnings were insufficient or who were excluded from the labour market and most of the unemployable were either left on their own, covered by private insurance systems if they had the means (in the most fortunate cases), or, more often, left to traditional sources of aid and private charity.

This period, which to some extent marked the end of the golden age of capitalism and the apogee of liberal ideology, was also the period of increasing working-class organization. But as long as the private sector assumed the management of social problems and as long as civil law provided for the resolution of conflicts, the state could remain uninvolved, or could intervene on a strictly selective basis.

The Great Depression and the Questioning of Liberalism

The economic crisis of 1929 and the Great Depression which followed took Western societies by surprise. Canada had known a long period of prosperity and its leaders were expressing great optimism. Preoccupied with profit maximization and with their efforts at financial and industrial concentration, entrepreneurs and businessmen were only concerned with the short term and refused to consider that the impoverished worker, underpaid or unemployed, could no longer purchase the abundant goods being produced which, for a certain time, had accounted for their prosperity.

From the beginning of industrial capitalism, Western societies had faced shocks and periodic recessions. But business managed to survive relatively well because it was the workers who paid the price, suffering through periods of unemployment, reduced wages and an increased cost of living. In the 1930s the capitalist bourgeoisie found itself backed into its own corner. Started in the United States and rapidly spreading to Canada, the Depression was to some degree the culmination of contradictions that had been growing within the capitalist economy. The absence of planning, the free market, and the concentration and anarchy that characterized the organization of production had led to a complete imbalance in the supply and demand for goods. Unlike previous crises, the situation was aggravated by a climate of panic and a lack of investor confidence; the price of shares in the stock market nosedived within a few weeks.

Overproduction resulting from concentration and a lack of planning by business, on the one hand, and poor distribution of buying power, on the other, rapidly brought a fall in prices and a slowdown in production which led to wage cuts and unemployment. In turn, buying power was reduced by massive unemployment and wage cuts, which were not offset

by other earnings, and this reduction directly affected production levels. Within three years Canada saw a dramatic 50 percent decline in its gross national product and a decrease in industrial and agricultural production which affected all sectors of the economy.[27] The effects of the Depression were felt in all regions and throughout the population. Municipal and provincial governments found themselves near bankruptcy, swamped by applications for relief from the unemployed and the needy.

At the height of the Depression, in 1933, it has been estimated that 26 percent of the male work force was unemployed and that 20 percent of the population was receiving relief.[28] Of those who had managed to keep their jobs, 60 percent of men and 82 percent of women earned less than $1,000, at a time when the minimum living wage was fixed at $1,200 per year.[29]

But the Depression showed more than what these statistics indicate. First, it demonstrated the inability of the marketplace to balance the production and consumption of goods. It showed the inequalities and injustices which result from having wage labour as the principal mechanism for the distribution of wealth. It made clear that social risks and living conditions are linked to the economic structure and cannot be blamed on isolated factors or individuals. Finally, it showed the inefficiency of traditional mechanisms of protection as solutions to social problems.

There was enough in these revelations to shake even the most sceptical: the economy was operating at only half capacity, misery was widespread and social order was threatened. The nation's leaders had no choice but to rethink their strategies. They were forced to revamp the system in order to save it, and to take action on a variety of fronts. With the provinces suddenly crying for help, the federal government initiated public works programs and financed direct relief for the unemployed. These empirical measures, considered to be temporary, were aimed at halting the cycle of increased unemployment and relieving misery.

For the first time in the history of North American capitalism, the bourgeoisie found itself managing "non-work." It did so both out of its own class interests and those of the workers, whom it could no longer leave to fend for themselves or send to charitable institutions.

Using its experience from World War I, the state rapidly took on an entrepreneurial role in order to revive employment by organizing public works.[30] But it had to answer the immediate needs of those thousands who were employable but had no work. Direct relief[31] allowed for the transition from local and private assistance, often in the form of services, to a broader form of public and social financial assistance. This form had three advantages: it relieved misery at least partially, it injected funds into the economy, and it bought time.

This transfer of responsibility constituted to some extent recognition of social risk and a step toward a more systematic assumption of respon-

sibility vis-à-vis certain social problems by public authorities. In reality, however, these measures were partial and inadequate to meet what was required. It took economists and political strategists several years before they could come up with solutions to satisfy business leaders and financiers and at the same time pacify the working masses and farmers who were engaged in nation-wide protests.[32]

In its search for solutions to the crisis that had moved north from the United States, the government of Prime Minister R.B. Bennett drew inspiration in 1935 from that country, specifically Roosevelt's New Deal. The New Deal consisted of a range of economic measures and direct state intervention; its originality was in the introduction of corrective and regulatory mechanisms within the capitalist structure of the market economy, accompanied by some social measures to meet the pressing demands of the victims of the Depression. They took the form of financial aid to banks, assistance for agriculture, subsidies for public works, price, incomes and wage controls, restrictions on competition, and tax reform.[33] The short-term effect was to stimulate the overall demand for goods, increase buying power and revive production. In short, the Depression was made to work in reverse in order to restart the economy.

Roosevelt understood that he could not save the capitalist system without alleviating some of its abuses and making important concessions to workers and other disadvantaged sections of the population. As the representative of the most enlightened wing of the bourgeoisie, he enacted the *Social Security Act*,[34] which provided for unemployment insurance and a pension plan for elderly workers.[35] The positive effect of these measures, in combination with the war economy and the cooperative efforts of the capitalist countries, would later permit the refinement and integration of an entire range of prevention and stabilization mechanisms so that similar catastrophes would not occur again.

In Canada, Bennett, a Conservative, presented his own version of the New Deal. He appealed to the nation for major economic and social reforms:

> And in my mind, reform means government intervention. It means the end of laisser-faire. Reform heralds certain recovery. There can be no permanent recovery without reform. Reform or no reform! I raise that issue squarely. I nail the flag of progress to the masthead. I summon the power of the State to its support.[36]

His fifteen-point program was embodied in six statutes, of which the *Employment and Social Insurance Act*,[37] providing specifically for a national unemployment insurance plan, was the centrepiece. As we know, the courts declared it unconstitutional,[38] as they did the *Minimum Wage Act*,[39] the *Limitation of Hours of Work Act*,[40] and the *Weekly Rest in Industrial Undertakings Act*,[41] which were judged to be within provincial legislative jurisdictions.

Meanwhile, however, the pressure of trade unions,[42] the recommendations of the Rowell-Sirois Commission[43] and political negotiations managed to overcome some opposition within business circles and from the provinces, including Quebec, and a constitutional amendment allowed the federal government to enact unemployment insurance legislation.[44] It introduced a new principle of social security founded on the payment of a contribution entitling the worker to a specific right, pursuant to specific terms and conditions. The program financed jointly by employees, employers and the state provided for contributions and the payment of benefits to particular categories of workers according to scales based on past earnings, up to a maximum of $2,000 per year. The 1940 statute was slightly more generous than that of 1935 in that it provided for a small supplement to beneficiaries with dependants. On the administrative level, a three-member commission was to apply the plan. The system left much to the discretion of public servants, and the review and appeal procedures were not clearly defined.[45]

Although the unemployment insurance plan can be considered as a gain for the workers, everything suggests that it represented not only a tool of economic stabilization for the capitalists, but the supreme instrument for the regimentation and political control of those without work. The unemployed had to be maintained on "standby" at the lowest possible cost.

It is worth noting that during the same period, with a view to developing a legal framework to reflect these new social relationships, the provincial legislatures were regulating industrial relations and working conditions to contain labour's demands. The revision of the "ground rules" between capital and labour for the negotiation of collective agreements and the use of the strike by organized labour should be viewed from this perspective.

With respect to working conditions, under the influence of certain European countries and of the International Labor Organization, whose 1919 conference followed the signing of the Treaty of Versailles,[46] many provincial governments had been led to proclaim the eight-hour day, to extend the minimum wage to the majority of workers, and to recognize a weekly day of rest.[47]

The ten years of the Depression profoundly shook Canadian society, its structures and its way of thinking. The magnitude of economic problems and political tensions forced the ruling class to integrate on a state level the management of certain social problems that it had previously been used to settling in a heavy-handed way or that it had denied existed only a few years earlier.

It was not by chance that the transfer of responsibility from the private to the public sector and the strengthening of state authority, sanctioned and legitimized by the law, was primarily in the field of labour. Since the time of Adam Smith and Marx, capitalists have appreciated labour as the creator of value and wealth.

Thus the unemployable, the unproductive, the ill, the poor, the needy and their dependants were, with a few exceptions, forced to rely on the private sector to obtain any material help or services. In 1937, the benefits of the 1927 Pensions Act were extended to the blind.[48] But this right to a meagre $240 per year pension had to be "deserved," as was the case for old age pensions, accorded after 50 years of labour industrializing the country.

The programs to assist needy mothers, adopted by several provinces after 1916,[49] excluded more women than they helped, and they required good conduct certificates as evidence that the mothers were "deserving" of what was a pittance that varied between $40 and $60 monthly per family.

In general, society at the time was not prepared to recognize the needs of several categories of individuals, despite the revelations of the Depression. In 1933, the Montpetit Commission, assigned to inquire into social insurance in Quebec,[50] clearly stated the dominant ideology and the reservations that continued to be raised within certain circles about the old age pension formula of 1927.

> While recognizing the commendable wish of Parliament to help the elderly who are in need, your Commission must state the view that this system, which is not as good as contributory insurance, constitutes in many cases an award for lack of foresight, negligence and indolence, conditions the individual to count only on the state, hinders the spirit of saving and, in its application, may lead to abuses and fraud which are not always easy to detect. The system of mandatory contributory insurance, on the contrary, encourages the individual who will later benefit from it to begin saving in his youth and to provide for his later years. At that time, this beneficiary can only have a better opinion of himself and will say, in receiving his annuity, that this is a right that he enjoys and that he has acquired.[51] (translation)

For this reason the contributory unemployment insurance plan was better received; it corresponded to the work ethic and the principles of saving and insurance.[52]

Canada's entry into the war and its participation in the Allied war effort ended the long period of stagnation and depression and marked a return to a degree of prosperity. Within a few months, the economy turned around, war industry and troop mobilization stopped unemployment, and the growth in production allowed a substantial improvement in the living standards of the population.

As part of the war effort, governments continued the interventionist policies they had begun during the Depression and refined their orientation. Early in the conflict, power was centralized in Ottawa, tax revenues tapped and economic activity rigidly controlled. But state intervention was not confined to organizing and planning the business of war. Because the Depression was still fresh in the collective memory, even before the end of hostilities there was concern about the postwar period and the transition to a peace economy. This transition can be summarized in

general by the phrase "reconstruction and recovery." Its double goal was defined in the federal government white paper published in 1945:

> The central task of reconstruction, in the interest of the armed services and civilians alike, must be to accomplish a smooth, orderly transition from the economic conditions of war to those of peace and to maintain a high and stable level of employment and income. The Government adopts this as its primary object of policy.[53]

This policy statement provided the framework in which the concept of social security, as an integrated system of income security, social and health services, would develop in Canada.

Several factors, both internal and external, help to explain this rapid evolution and the consolidation of state intervention in economic and social development. The war economy had to some extent created an artificial and limited demand for goods (equipment, arms, aircraft, ships, vehicles, textiles) which allowed industrial production and manufacturing to be brought back to their 1929 level. The financial and industrial empires, which had used the Depression to concentrate their operations, now moved into a new phase in the accumulation of capital and extension of their monopoly to an international level.

The transition to a peace economy brought not only the need to meet a new demand for consumer goods but also created this demand "at all costs" so as to develop a popular consumerism corresponding to the goals and productive capacities of capitalism.

> During the war, we had to regulate consumer buying power as much as possible. But as scarce articles gradually reappeared on the market and as the demand for war materials diminished, it became necessary to encourage the consumer to buy more in order to compensate for the slowdown which otherwise would have taken place. It is from this standpoint — that is, maintaining the elevated buying power of the consumer — that social security measures on a large scale could, and in effect did, play an important role.
>
> A considerable amount of social security allowances remitted to consumers contributed to the economic stabilization of the country in general and prevented a decline in the national income. As a result, these allowances constituted, in the circumstances, a powerful weapon against general economic crisis.[54]

The influence of Keynesian theories, which were to play a paramount role in setting out new mechanisms of economic regulation and stabilization, appears clearly.[55]

The Allied leaders, who were maintaining the close ties developed through their military collaboration, had every reason to fear a postwar wave of communism, increased socialist mobilization, and workers' organizations, who had rallied to the support of their governments, on a temporary basis, to fight the Axis powers. The experience of the Soviet

revolution and of the popular fronts, the strength of leftist parties in Europe, and the surprising activities of protest movements in North America during the Depression had given governments in power food for thought. It was foreseeable that the truce and the sacrifices agreed to during the war would be followed by new demands for improved living conditions and by a struggle for power. Not only economic reconstruction but also political transition had to be guaranteed. In this respect, two important proclamations had a direct influence on the evolution of legislation in Canada. The Atlantic Charter[56] affirmed the principle of economic and social cooperation between countries and the Philadelphia Declaration[57] defined and listed the needs to be met by social security systems.[58]

As a result, a trend emerged which appeared to be an extension and generalization of the goal stated by Roosevelt in 1935, and which corresponded to a new public awareness of the necessity to free the individual from need. This trend was confirmed some years later by sections 22 and 23 of the *Universal Declaration of Human Rights*, which stated: "Everyone, as a member of a society, has the right to social security and to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity."[59]

Two new factors had therefore entered the political vocabulary: the concept of need and the social security system. The work of Lord Beveridge was one source of this change. He had denounced the problem of poverty and the existence of need as an inexcusable scandal, and he projected an integrated system of income security and social services.[60]

The Beveridge report, published in England in 1942, was influential in political circles and among Canadian technocrats involved in social security, who hastened to prepare a similar report within the context of the Advisory Committee on Reconstruction.[61] Chaired by L.C. Marsh, this report had been commissioned to examine the major issues which would lead to a "consideration of comprehensive social security legislation for Canada."[62] Given its impact on Canadian social policies, it is worth reviewing this report's major themes.

The report begins by stating that in principle "the only rational way to cope with the large and complicated problem of the insecurities of working and family life is by recognizing and legislating for particular categories or areas of risk or need."[63] This recognition of a state of need, placed on the same level as social risks linked to employment, represents the most important change in this period and corresponds to a trend, observed previously, toward a minimum of social security,[64] a form of claim owed to the individual by the community. A consequence of this position was the introduction of a new principle of distributive justice which would permit the adoption of permanent programs of services and economic security based on the absence or inadequacy of income. Qualified as a form of a "demoguarantee," programs such as health

insurance, family allowances and old age pensions were to become available to all Canadians or to certain categories of individuals.

But in practice and for very economic reasons,[65] the report returned to an old distinction which echoes long-standing preoccupations with respect to labour.

> An important distinction running through the whole scheme is that between universal risks, which are applicable to all persons, or to all persons of working age, and "employment" risks, which are applicable and insurance for wage earners only.[66]

This distinction heralded a critical choice because the scheme proposed by Marsh was to be based, technically and financially, on the system of mandatory social insurance previously recommended by the Montpetit and Rowell-Sirois commissions.[67]

> Social insurance is a direct and complete remedy for the most painful feature of assistance at low income levels because it obviates altogether the need for a means test in every specific case. The benefit under a social insurance scheme is available according to certain objective tests of eligibility which are clearly set down and known to all parties. The amount to be obtained is relatively certain, and subject to certain reasonable conditions; so is its duration. The insured person knows "what he is entitled to"; his benefit comes as of right, and not from charity.[68]

This time, however, less stress was placed on the disadvantages of assistance plans and more was placed on the advantages of insurance from the standpoint of the beneficiary and his right to benefits.[69] But this choice did not exclude maintaining a residual program of public assistance and the parallel establishment of certain complementary services.

> If social insurances exist to provide a basic minimum for the majority of the population, there is room for social assistance or public welfare measures which are supplementary or even preventive in form, as for example some of the best public health measures are to-day. Social assistance may be at any stage between two extremes: one, an anachronistic and unsatisfactory form of general relief for all kinds of destitution, dependent mainly on the proof of complete lack of means; the other, a modernized and specialized series of constructive welfare services. It is no accident that the latter when found in this form is usually developed in relationship to the practices and institutions set up by insurance methods.[70]

It did not take long for the recommendations of the Marsh report to have their effect, since they served as the basis for the federal government's proposals at the 1945 Dominion-Provincial Conference on Reconstruction, and were to provide the long-term inspiration for the Canadian welfare state.

In this long process, a combination of economic, political and social factors had within a few years enabled the creation of conditions neces-

sary for the emergence of a new law. The essential elements of social law (goals, functions and techniques) had been brought together.

Development and Evolution of Canadian Social Law, 1940–84

It should be apparent from the preceding section that what we refer to as "social" law has been, like other legal categories, the product of a society, its history, values, economic structure, and power struggles that have evolved over time. But more than any other branch, social law reflects the requirements and contradictions that have marked the development of capitalism, specifically by clarifying on the one hand the functions of the state in its monopolistic stage, and on the other the role of movements involved in the defence and improvement of living conditions of workers and the underprivileged.

We shall begin this second section of our study by presenting some elements of our analysis of social law as well as an overview of the period. Historically, as long as the "social problem" raised by the Industrial Revolution could find a solution within legal mechanisms inspired by liberalism and individualism, the individual could not hope "to have other rights than those he had acquired in exchange for what he offered."[71]

Within the context of capitalist relations of production, the worker has only his labour to offer and thus acquires no other right than to receive payment for his labour when he finds a buyer. His subsistence depends exclusively on his marketability.

The division of wealth is structurally determined when capital and labour meet: the expropriation of the product of the worker's labour accompanies its appropriation by the capitalist. This division is legitimized by the law,[72] and results necessarily in a contradiction that is expressed in economic terms by the concentration of wealth in the hands of a minority and the impoverishment of the majority, and in legal terms by the accumulation of rights for some and obligations for others.[73]

The evolution of social law and the recognition of new economic and social rights are intimately linked to the resolution of this contradiction inasmuch as it has proved intolerable for its principal victims and has compromised the very structure of the system that created it.

For this reason, we consider social law as the dialectical result of the relationship between "the protest strategy and the power strategy"[74] and as an important factor in the struggle to improve the quality and the conditions of life. Consequently, a number of factors have contributed to the emergence of new legal rules destined to solve new problems.

> All evolution of law derives from an attempt to correct inadequacies, real or apprehended, that appear when a hiatus exists between new needs and the existing legal rules; the establishment of a particular legal branch therefore

> answers the need for specific solutions to new problems, problems created by social evolution, that cannot be resolved satisfactorily by the simple application of pre-existing rules.[75] (translation)

Is it possible from this standpoint to propose a definition of social law without falling into an ideological trap, letting legalism take over and overshadow a part of reality?

Since the expression "social law" first appeared in legal language and popular imagery, few scholarly studies have attempted formally to delimit its content. The expression seems more suitable than "law of poverty" or "law of the underprivileged." It represents a tendency to bring together a number of areas of law which, beyond their traditional definition in private and public law, correspond to new forms of state intervention. Some examples are statutes dealing with income security, occupational health and safety, training and manpower, the minimum wage, social services, legal aid, etc. Common to these statutes is their presentation as measures of protection involving the establishment of institutions, structures and mechanisms to prevent injustice, correct situations and guarantee their beneficiaries a state of economic, social and cultural well-being. Thus the legislator would seem to be aware of "the actual conditions in which certain individuals find themselves owing to their economic status"[76] (translation).

This is the opinion of Andrée Lajoie and Claude Parizeau, who consider that "social law, which is defined by the clientele it is addressed to, brings together, within what is generally a vaguely paternalistic approach, protectionist or remedial provisions against the damage done by the economic system"[77] (translation).

We are therefore considering law defined as language, as a system representing inequalities and as an instrument of intervention destined to resolve them.

If it is fair to say that the expression "social law" defies logic[78] because "all law is social," an offhand remark by the great French jurist Ripert,[79] Lajoie and Parizeau are undoubtedly right in affirming that "the word *social* should be read with a more restrained meaning and it should be given the meaning it has in 'social policy' or 'social affairs,' expressions which to a certain extent suffer from the same ambiguity"[80] (translation). In effect, it is an expression or consecration in legal form of social policies that social law appeared "as the dialectical result of the relationship between the protest strategy and the power strategy."

From the point at which historical analysis permits the identification of this dialectical relationship, the question becomes less whether it is possible to reconcile social law with logic[81] than that one can avoid the trap of ideology, to the extent that this analysis shows that social laws in effect correspond to humanitarian objectives for the persons they affect, but also fulfill other functions which have often been obscured by their official justification.

It is thus possible to adopt the definition proposed above to the extent that we can distinguish between the roles and rights that are officially recognized, on the one hand, and the real functions and limits of social law, on the other. We are then able to make critical analyses and judge the effectiveness of social law from the standpoint of its beneficiaries.[82]

It is certainly clear that if social law and the policies it expresses had, if we may put it this way, kept their promises it would be unnecessary to carry out this exercise and we would have opted for a descriptive study proceeding chronologically from 1940 to the present. Of course, there is continuity and it would be wrong to lose sight of the protection that social law has provided over the past 40 years within the context of the modern welfare state.

This objective is found in a mosaic of statutes and rights which correspond to values shared by the vast majority of Canadians. The various governments in Ottawa and the provinces, from the time of the reforms of Bennett's New Deal to Prime Minister Pierre Trudeau's "Just Society," at the end of the 1960s, have proposed an entire range of goals, of which a mere list will make even the most radical individuals dream: social progress, equal opportunity for success, redistributive justice, respect for human dignity, social justice, solidarity, satisfaction of needs, improvement of the standard of living and full development of the individual.[83]

Using its general spending power and the concentration of powers which took place during the war, and aided by constitutional amendments, the federal government took the initiative in the area of income security despite provincial hesitancy. Enactment of the *Unemployment Insurance Act* was followed by the establishment of a universal program of family allowances and old age pensions, and cost sharing for a series of assistance programs administered by the provinces and aimed at specific target groups: the disabled, the blind and the unemployed. This federal initiative, which took place in a period of relatively stable prosperity and an increasing tax base, was slowed down in the early 1960s by the desire of the provinces to occupy the field of social programs and to seek a degree of decentralization. But though this movement somewhat divided efforts, it did not prevent the expansion of programs and the extension of certain rights, notably in the areas of pensions, health and public welfare. At the end of the 1960s, after a long period of prosperity and within a climate of protest that had initially developed in the United States, the government announced a vast war on poverty: generous reform of unemployment insurance, the proposals of the Croll Committee on poverty for a guaranteed annual income plan, and sweeping reform of all social security in Canada.[84] This plan of action was accompanied by a process of constitutional reform, dictated by the political situation and pressure from Quebec to repatriate all programs of income security.[85] However, this double operation, which could have meant the simplification and unification of programs and the adoption of an inte-

grated system of guaranteed minimum income as an effective instrument of maintenance and support for earnings, was never completed.

In effect, in the meantime,

> the economic and political environment facing governments had changed. The high rates of growth experienced by the Canadian economy during the post-war period had been disrupted by years of double-digit inflation, recession, high unemployment, and low and uncertain growth. It became increasingly evident that the country had entered a period of slower economic growth that would continue into the foreseeable future.[86]

Curiously, while an increase in program benefits or at least their maintenance ought to have been expected, to guarantee victims of the new recession a more than needed protection falling below the goals already stated, the period that began with the oil crisis in 1973 and the wage freeze in 1975 was characterized by a questioning of and a limitation on social rights.

> The result has been the retrenchment and sudden shifts in policy occurring today: the series of Unemployment Insurance reductions, the Family Allowance reductions and the introduction of the Refundable Child Tax Credit.[87]

This sudden shift may appear to be a paradox. In reality, it is no more nor less than the ongoing process of amendment and change that has marked the evolution of social law since the end of World War II. The most marked characteristic of social law is its flexibility; it can be adapted to various circumstances and needs. In fact, there are different kinds of needs; there are human needs, and there are economic, political and ideological considerations. There are even two types of justification:

> The problem of social security arises on two levels. First, there is the humanitarian or social side, and second, there is the economic or financial one. Traditionally, we have tended to view these two aspects as being incompatible.[88] (translation)

That was in 1945, in the midst of a period of economic reconstruction.

> Recently, however, we have begun to realize that a vast program of social security finds its justification not only from a humanitarian standpoint. It can also contribute to economic stability by maintaining production, income and hiring and by a fair distribution of buying power.[89] (translation)

Thirty years later:

> The challenge, then, is to arrive at a renewed affirmation of income security policy which will have the effect of assisting the people in greatest need, *without detracting from programs designed to stimulate the economic development which is the basis of national well-being*.[90]

Work incentives also have an important place: "The social security system as it applies to people who can work must contain incentives to

work and a greater emphasis on the need to get people who are on social aid back to work."[91] And finally, what would we not do in the name of political stability? "Searching for and applying appropriate solutions to the social problems of our era still remains, in my view, the best way to contend with social protest even if these solutions require, on our part, a profound revision of policies and programs established in light of new values"[92] (translation).

Rather than present a vision of reality that consists only of describing social law as it appears in the statute books, we have chosen a framework that enables us to explain and demonstrate its various functions. In doing so we are conscious of the fact that we are "decoding," but we believe this is in the best interests of the beneficiaries to whom social law is officially addressed.

The Quest for Stability: Promotion of Social Harmony

The legislator who seeks to promote social harmony tends to do so in a period of social transformation, when people have abandoned their usual silence. Legally speaking, these periods are often characterized by the creation of an entire range of new rights: the state takes on the role of benefactor toward those classes of citizens most likely to challenge it.[93] On a political level, these legislative periods correspond with real or apprehended social unrest. Between 1940 and 1984 there were three periods in which the search for social peace was crucial: the post-war period, 1940–46; the late 1960s and the war on poverty; and, finally, the 1970s and its preoccupation with a guaranteed annual income.

POSTWAR ORGANIZATION

The first concerted effort to use social legislation to meet the needs of the public occurred at the beginning of the 1940s.

> Knowledge that these programs are in operation would give a sense of security to all who are protected, a sense of security which is the most potent antidote to fears and worry over the uncertainty of the times. Viewed from the present, therefore, the post-war period would not be anticipated with fear and apprehension because of the readjustments that will be inevitable but as a period when the economic sacrifices made during the war will seem to have been worth while. . . .[94]

Two seminal statutes were adopted during this period: the *Unemployment Insurance Act*[95] in 1941 and the *Family Allowance Act*[96] in 1944. The latter's aim was primarily to promote buying power and will be studied later. However, some comments should be made about the unemployment insurance plan.

In the troubled decade of the 1930s, workers vigorously demanded a guarantee against unemployment, based on a non-contributory scheme.

However, the first constitutionally valid statute,[97] that of 1940, set up a plan based on tripartite contribution; it was put into operation in 1941 at a time of full employment due to the war economy, and thus met with little opposition. What effect was sought? Unemployment insurance arrived at a particularly opportune moment. Productivity was then at one of its highest levels, and, as long as this situation continued, workers would make few claims for benefits. In this way, the unemployment insurance fund could set up a reserve, and the amounts that built up were invested in government bonds and helped finance the war. The important reserves that were accumulated provided an element of stabilization, desirable in preparation for the postwar period.[98]

It is clear that the establishment of the plan was particularly onerous for the workers. In effect, the fund's profitability was largely underestimated during its first fifteen years.[99] Workers were over-assessed because they became elegible for maximum benefits only after five years' participation.[100] Was the plan supposed to pioneer forced savings for Canadians? The fund's total assets reached $886 million in 1956.[101]

Certainly from its beginnings the plan did much to meet the state's need to profit from the savings of the workers, as well as its long-term need to stimulate buying power and maintain a stable social climate. At the same time a national employment service[102] was created to try to organize full employment:

> Above all, we aim at the maintenance of a high level of employment and income. In no field are the interests of Dominion and provinces more thoroughly one than in the maintenance at all times of a high level of employment. . . . Finally, our proposals are designed to make possible a comprehensive system of social insurance, partially federal and partially provincial, through which the community will share with the individual in meeting the variations of income and expense to which the rise and fall of business activity . . . render us all liable.[103]

The War on Poverty

The evolution of social legislation took another leap at the end of the 1960s. In the United States, amid the opposition to the war in Vietnam and unprecedented general popular unrest, President Johnson initiated the "War on Poverty," setting up commissions of inquiry and public debate to focus attention on the fight against indigence. Everything suggests that he hoped to channel protesters' energies into an area less dangerous for his administration than that of the Vietnam War.

Protests in the United States were not without their echo in Canada. In the major Canadian cities, trade union organizations and community groups underwent a remarkable revival: the Company of Young Canadians, groups of welfare recipients, tenants, students and workers all let the state know that, unless something was done, those classified as the disadvantaged would take action.

Within this social and political context a new wave of social legislation emerged across the country. In retrospect, this legislation appears generous compared to what preceded and what followed. During this period several statutes were enacted aimed at providing the public with services previously performed by community groups. For example, a legal aid plan was introduced in Quebec in 1972[104] that endeavoured to ensure access to legal services while slowing down the development of community clinics and other centres of community organization.

> The creation of the legal aid plan [according to Minister Jérôme Choquette] has become necessary for several other reasons of which one is the search, beyond a simple tool in the fight against poverty, for an instrument of "social pacification." He who does not wish to assert his rights by normal means will do so by force. This [says Mr. Choquette] does not explain all protest, but the [government run] clinics may surely be one channel which can diminish some social tensions.[105] (translation)

In the field of income security, this period also saw the reorganization of some existing plans and the beginning of a unified assistance program.

Unemployment Insurance Plan

What were the costs the unemployment insurance fund had to support that led it to the brink of bankruptcy at the end of the 1950s? For the most part, fund reserves fell (from $886 million in 1956 to $66 million in 1961[106]) because of the payment of benefits to new beneficiaries in 1949,[107] and to seasonal workers in 1955.[108] The payments came from contributions by workers and employers and were used to assist the unemployed who had not previously been eligible for regular benefits. Thus, despite an increased government contribution to the fund,[109] the cost of introducing these new benefits was largely assumed by contributing workers and employers.

This new form of assistance so upset the existing approach of the unemployment insurance plan that the Gill Commission was established in 1961[110] to inquire into the problem. The plan that had been created to regulate the economy had failed; it had itself become the prey of the economic situation.

When the unemployment insurance plan was first set up,[111] the provinces were to share the cost initially for the employable, and from 1957 for the unemployable. This measure turned out to be unsatisfactory, since it did not relieve the pressure on the fund from fluctuations in unemployment. The Gill Report, in reference to a study of the practices of the Unemployment Insurance Commission, concluded that the plan had moved considerably away from the strict principle of insurance.[112] According to the commissioners, only short-term or "normal" unemployment should be insurable. The 1970s would not prove favourable to this thesis.

In 1966, there was nothing to suggest that the unemployment insurance system would be strengthened along the lines of its initial calling as

an insurance plan. The bill which led to the *Unemployment Insurance Act, 1971*[113] reflected the preoccupations of the Munro Report:[114] to enable access to a scheme of continued earnings without imposing the total cost on the state.

Given the need for immediate measures to ensure income to a dissatisfied population, the state chose to enlarge access to the unemployment insurance plan rather than create an independent system that would guarantee Canadians a minimum income.

This political choice allowed the state to take advantage of the popularity of the relatively generous unemployment insurance plan,[115] while avoiding genuine measures of guaranteed minimum income. Thus the statute's effect was to encourage those not part of the traditional pool of workers to work a minimum number of weeks,[116] often regardless of the conditions of employment, in order to have access to a minimum income. It goes without saying that the minimum income provided by unemployment insurance benefits was only a percentage of the minimum wage for these workers. We may therefore conclude that this minimum income "guaranteed" by unemployment insurance benefits was less onerous than a genuine program of guaranteed minimum income would have been. In addition, by integrating specific new groups of beneficiaries within the unemployment insurance plan rather than an independent guaranteed minimum income plan, the cost of financing these new benefits was borne principally by employers and workers who had already contributed, thereby sparing taxpayers with higher incomes.

Everything suggests that this operation served to disguise a general strategy of income security by means of the *Unemployment Insurance Act*. "Benefits will be higher, more related to earnings and given more on the basis of need than length of time in the work force."[117]

To respond to the demands of Canadians, it was necessary to "improve" a situation while taking over the control and orientation of manpower availability. Employers need an inexpensive workforce for casual employment. Is this not encouraged by a system that entitles people to benefits after only eight weeks' employment? In this way, the 1971 act favoured the continued employment of the largest possible number of Canadians.

The new unemployment insurance plan had the following effects:

- a massive real increase in the number of contributors for a potential increase in the number of beneficiaries;[118]
- an increase in costs of the plan without a corresponding proportional increase in benefits;[119]
- state financing for any period of unemployment during which the national rate was greater than 4 percent.[120]

Though its effect was generous, this plan required contributions from

thousands of new participants whose jobs bore no risk of unemployment.[121]

Canada Assistance Plan

Prior to the war on poverty, the provincial legislative approach toward the "poor" had been piecemeal or based on the merits of individual situations (the era of categorized assistance). For example, a number of statutes dealt with the blind, the disabled and needy mothers. There was, however, no right to assistance. Those in the above groups could only hope that their needs would be recognized. Those not falling in the specific categories had no recourse (except the existing old age pension plan). Quebec provides one example. There in 1968, social assistance expenditures represented 20 percent of a total budget of $1 billion distributed in social benefits;[122] but several categories of persons were not covered by these benefits, for example, immigrants, unemployed youth, farmers, and seasonal workers.

Social assistance legislation that came into force after 1966 in different provinces was the result of new rules of financing, set up by the *Canada Assistance Plan*.[123] This new plan provided for shared financing of social assistance by the federal and provincial governments, on the condition that provincial social aid legislation respect universal access, that is, the end of categorized aid,[124] and access to an appeal mechanism.[125] Legislation that followed the enactment of the *Canada Assistance Plan* recognized in principle that the primary goal of social aid measures was to compensate family units for insufficient income,[126] no matter what the cause of this insufficiency or the composition of the family unit.

Henceforth, the state could claim that all Canadians were assured a basic minimum. The legislative expression of this goal, however, revealed the gap between the promised income and the reality, although Canadians generally believed the war on poverty to be won.

Introduction of the Guaranteed Minimum Income Concept

Although the 1968–71 period was marked by "generous" measures (*Canada Assistance Plan*, *Unemployment Insurance Act, 1971*, etc.), the years immediately following led into an inflationary spiral and a new recession. It was within this context that the federal program of a guaranteed minimum income was conceived. The ineffectiveness of "demoguarantees," the unfairness of assistance programs based strictly on insufficient incomes, and the impossibility of full employment had all become evident. One might question the state's diagnosis in this respect, however, because with the *Unemployment Insurance Act* it undertook to assume the cost of national unemployment greater than 4 percent. At the same time, faced with a public that feared increased unemployment, the

state decided on a new tack with respect to minimum income, based on a new concept of maximum "employability" of Canadians. The state declared that henceforth all Canadian workers could count on a sufficient annual income that would not depend solely on the product of their labour.

> The ideal social security system is one which would reflect these values, or attitudes, of the Canadian community. It would go something like this.
>
> For people who are of working age, and are able to work, there would be employment at at least a living wage. To ensure that a living wage is paid, the state would legislate a minimum wage. If the minimum wage were sufficient to support small family units only, income supplements would be available to meet the costs of child-raising in larger families whose incomes fell at or near the minimum wage. . . .
>
> If someone somehow failed to receive an adequate "income through employment" (with supplementation of family income for low income earners), or "income from savings" (social insurance), additional income support measures would be available. These would be required when employment was not available for a person, or when he/she was not suited for the jobs which were available.[127]

The supplementary income program was designed for the casual worker and thus posed a challenge. Canada had to plan for such casual labour to be available based on the needs of industry:

> That, while income supplementation along the lines provided . . . would remove the great majority of people from social assistance as it now stands, a supplementary or "last resort" programme would be required to meet special situations as they arose. . . .[128]

This three-point program, which contemplated a national employment service, an income supplement for employable Canadians (and ideally all Canadians were employable and met the needs of industry) as well as the maintenance of social assistance programs based on savings and contributions by Canadians was put on hold by the advent of the recession.

It was at this time that federal measures to stimulate buying power by expanding the amount of currency in circulation were questioned. Because full employment was one of the results sought, it is not surprising that the economic goals of social measures were based on control of the workforce and the labour market. This was a two-fold challenge: encourage the unemployment insurance beneficiary to become or remain a worker (this raises the issue of incentive in the programs), and simultaneously meet the fundamental needs of the beneficiaries, with a view to maintaining social peace and promoting buying power without creating pressure that would increase wages.

The Canadian Council for Social Development, in its 1969 report entitled *Social Policies for Canada*, dealt with employment as follows:

> Under the hypothesis of the existence of an energetic manpower policy, especially with respect to job creation and improvement of the productive capacity of workers, the first preventive measure against insufficiency of income is the institution of a form of guaranteed annual income.[129]

In this respect, it should be noted that Minister Marc Lalonde's proposals to the Federal-Provincial Conference in February 1975 introduced distinctions between employable and unemployable individuals, despite the fact that these distinctions had been abandoned in the 1960s, at least in principle, by the *Canada Assistance Plan*. This raises the question of why nothing tangible was done with the 1969 proposals, which clearly raised the issue of a guaranteed minimum income.[130]

In 1981 the Canadian Council for Social Development was no longer sure if there was an effective employment policy. Assuming there was not, it felt that the emphasis should be placed on adopting one before contemplating the implementation of public measures of income support.[131]

Each era's legislation reflects the government's priorities. Sometimes, promoting buying power may take precedence over establishing regulatory mechanisms to control the labour market. Other times, the cost of programs that ensure social harmony may become prohibitive and cutbacks and limitations on various plans ensue. The content of social programs thus fluctuates with the needs of the time.

For these reasons, other priorities have interfered in recent years with the state's economic option in favour of a guaranteed minimum income.

Stimulation and Control of the Economy

This section will explore how social policies are primarily economic tools serving the interests of capital by balancing the two-fold function of promoting buying power and controlling manpower and the labour market.

Promotion of Buying Power

Under the influence of evolving British and American thinking (specifically the Beveridge report, published in England in 1942, Keynesian economic theories and the American New Deal), Canada's social legislation in the 1940s favoured the injection of money into the economy to reduce the danger of a mini-recession following the war. The Marsh Report — the Canadian equivalent of the Beveridge Report — introduced the idea of a Public Investment Program in the form of transfer payments and job creation schemes destined for the needy.

The principal goal of the Canada Investment Program was to stimulate the economy by increasing public buying power:

> The program must be activated not by mere reference to the number of unemployed men but by the role of public expenditure and total fiscal policy in the national, and indeed in the international economy. It is investment expenditure, not employment, which is the motive force.[132]

In the 1940s several programs had this goal. Unemployment insurance, introduced in 1941, was supported not only by workers[133] but also by manufacturers and retailers in eastern Canada, who saw it as a form of indirect investment.

> The manufacturers and retailers on the other hand were vigorous supporters of social insurance measures as a means of increasing purchasing power, while relieving *labour unrest*, and the increasing burden of municipal property taxation caused by relief. Their ability to pass on the costs of such schemes was, of course, considerably greater than those of resource-based industries since their markets were mainly domestic and protected by tariffs.[134]

On the other hand, western producers, who were eyeing international markets and who did not depend on the buying power of Canadian consumers, disliked the proposed social programs.[135]

Such cash injection programs have been particularly important in times of recession (real or apprehended). Shortly after World War II, family allowances became the first universal social program providing benefits independent of the needs of beneficiaries.[136] Introduced in 1945 as a universal plan to help Canadian families meet the costs of raising children, the family allowance plan no doubt fulfilled other goals: "The introduction of a universal Family Allowance program in 1945 [was] also motivated by this new fiscal philosophy of maintaining employment and purchasing power."[137]

By 1974 family allowance expenditures had grown by nearly 150 percent with the increased benefit allowed for each child.[138] But despite this increase, which resulted from 1971 federal-provincial negotiations, the creation of family allowances in Quebec,[139] the creation of a family allowance supplement in Prince Edward Island,[140] the indexation of federal family allowances starting in 1974,[141] and the creation of a child tax credit for dependent children to replace the old non-refundable $50 (a credit coinciding with a decrease in family allowances),[142] here is what the Economic Council of Canada concluded in 1980:

> Benefits to children represented 13 percent of total expenditures on income security in Canada during the period 1971-1978, but the Economic Council of Canada considers that only 22 percent of these payments were made to families whose income is in the lower 40 percent of Canadian families having the lowest family income in the country.[143] (translation)

It therefore appears that the family allowance plan in no way corrected inequalities of income during the 1970s. However, the plan did help to

promote buying power. In the same way, the introduction of universal old age pensions in 1952 also met this as well as other goals.[144]

Obviously the choice of injecting money into universal programs that would affect all social classes rather than investing in programs based on need in turn determines the aspect of the economy that it is hoped to stimulate. The decision to distribute transfer payments to Canadians, heads of families or the elderly, according to the principle of universality, does not restrict consumption created by investment in vital necessities such as housing, food, heating and clothing. Investment aimed at the most impoverished is more favourable to the local economies of the Atlantic provinces and Quebec, these areas having a larger proportion of unemployed and welfare recipients than the others. On the other hand, universal programs spread investment across Canada and among all types of consumers.

The credibility of Keynesian theories faded with the recession of the 1980s. Given an economy suffering from such a wide range of problems, such meagre injection of funds on a regional basis was not enough to stimulate local industry. Funds available for distribution were more and more limited, because the government had chosen to reduce industrial taxes as much as possible. The economy did not produce the profits expected, something which would have permitted a redistribution of the surplus. The goal of stimulating the economy therefore gave way to another economic objective, the regulation of the labour market.

As early as the 1970s, the Economic Council of Canada, faced with an imminent recession which had been forecast but whose magnitude was unknown, had recommended a re-evaluation of Keynesianism with a view to substituting a strategy of guaranteed income for that of social security.[145] The introduction of effective provisions for the workforce would improve the access of active workers, among others, to unemployment insurance and its benefits.

Control of Manpower and the Labour Market

Canadian social legislation has always reflected the fundamental legislative goal of maintaining at a maximum a number of workers of optimum productivity who are prepared to work for the lowest wage possible. Policy announcements indicate a concern to avoid encouraging people not to work by paying social benefits. For example, the first proposal of the Lalonde Report reads as follows:

> That the income security system should remove any disincentives which may exist to discourage people who are on social assistance from taking advantage of the training and employment opportunities available to them, and thus from becoming wholly self-dependent. It should also take care to eliminate any *incentive* which may now exist for people to shift from employment to social assistance, by reason of the higher benefits which might thus be obtained.[146]

Government strategy being based on the principle of supply and demand, minimal assistance payments which do not compete with the minimum wage were to be furnished and at the same time work incentive measures aimed at beneficiaries were to be provided.

A brief review of social legislation indicates three indirect goals: maximizing the number of available workers who may be called upon by priority sectors of the economy; minimizing the cost for capital, whether in hiring workers or in financing social programs; and, finally, maintaining an efficient labour force, by encouraging the elimination of less productive workers from the labour market (the elderly) or providing the necessary medical care to ensure workers remain in good health.

There is no doubt that, in addition to encouraging social harmony and the buying power of beneficiaries, these programs also had humanitarian aims. The most recent health programs (after those created by virtue of various statutes dealing with work accidents) do not solely contemplate beneficiaries who are wage earners or who are able to work: they also provide universal medical services. However, given that the political discourse accompanying the various social programs often emphasizes their humanitarian goals while obscuring other objectives, it is perhaps time to re-establish a balanced analysis and to explore other aspects of legislative motivation.

Ensuring Availability of Workers

The various social programs have a wide range of work incentives and it would be futile to attempt to enumerate them here. When one compares the various enactments of the provinces over the period 1940–84, however, some trends stand out. We shall look first at the positive incentives to work and then the negative ones. It should be understood that incentives are not only addressed to the beneficiaries of the various programs but often, above all in the case of negative incentives, to non-beneficiaries. Frequently the fear of going on social assistance encourages a worker to remain in the workforce despite unacceptable working conditions. Stimulating individuals to work should certainly not be condemned. In reality, however, work incentives result in the worker being determined to find and keep a job no matter what the conditions of employment. As a result, workers are deprived of their right to negotiate working conditions with their employers.

The most effective positive incentive, provided by the very existence of social assistance programs, is respect for work: if an individual works, he is not humiliated as a welfare recipient. In describing the functions of poverty, Herbert J. Gans has identified 15 ways in which the existence of poverty helps maintain the economic and social *status quo*. The eighth of these is the following:

> Poverty helps to guarantee the status of those who are not poor. In a stratified society, where social mobility is an especially important goal and

> class boundaries are fuzzy, people need quite urgently to know where they stand. As a result, the poor function as a reliable and relatively permanent measuring rod for status comparison, particularly for the working class, which must find and maintain status distinctions between itself and the poor, much as the aristocracy must find ways of distinguishing itself from the nouveaux riches.[147]

Respect for work is also accomplished through concrete positive work incentives. Several income security programs are directed only to individuals who have been employed for a period of time. The Quebec Pension Plan[148] requires that a worker contribute over several years before being able to claim benefits. The *Work Income Supplement Act*[149] provides a supplementary income for workers only, making a short period on the labour market more attractive than an equivalent period on welfare.

Even when a statute does not require previous participation in the labour market, often benefits are calculated on previously earned income. The *Automobile Insurance Act*[150] grants an allowance for temporary incapacity equal to a percentage of earnings prior to the accident.[151] For someone who does not work, the act provides for some discretion in establishing an allowance.[152] Similar provisions are found in the *Crime Victims Compensation Act*.[153] For the worker who is already in the labour market, these benefits are an incentive to remain employed. For the beneficiary who hopes to return to work, several statutes provide for a gradual reduction in benefits so that over a period of time beneficiaries may combine their income with a portion of the benefit payments.[154]

These are positive incentives for the worker to persevere in the workforce or to return to it. However, the majority of work incentives found in social legislation are negative ones.

At the beginning of the 1940s, there were no social aid programs in Canada which provided benefits for those who were employable. The period prior to 1966, when the *Canada Assistance Plan* was adopted,[155] was characterized by a series of programs aimed at specific categories of individuals, all of them unable to work, based on the social values of the period (the blind,[156] the disabled[157] and needy mothers[158]).

Described as the Canadian contribution to the war on poverty,[159] the *Canada Assistance Plan* began the period of non-categorized aid. Despite provincial pressure to continue aid programs based on inability to work, the federal government held to its position that any federal aid to the provinces would be conditional on the enactment of provincial assistance statutes based on need, whatever the cause. By and large the federal government's opinions carried the day[160] and the *Canada Assistance Plan* was followed by the enactment of social assistance legislation in every province.

Despite the federal conditions, several statutes distinguished between beneficiaries who were employable and those who were not. Because

society is much less accommodating toward employable welfare recipients,[161] these statutes frequently established far less advantageous aid programs for this group. The current distinction between employable and unemployable beneficiaries appears in a variety of forms.

In a situation where the right to decent living and working conditions is assured, it is conceivable that a second scale of benefits exists for the unemployable, by providing them with supplementary benefits. But discrimination that exists at present deprives the employable of a portion of the benefits of the unemployable. And this creates a hierarchy of misery. When the rate of benefits paid to the unemployable is below the poverty line, a scheme that accords even less to the employable is totally unacceptable.

If a decent minimum standard of living can be guaranteed for the employable as well as the unemployable, a supplementary allowance for those who are unable to work can be envisaged. The tacit desire to maintain a class of poor, which Gans refers to, by limiting all benefits to a level below the poverty line, can only be rationalized as a way of commending the "non-poor" and valorizing work. In Newfoundland, for example, access to assistance is itself discretionary if an individual is employable. Those who are "unemployable," for example, the physically or mentally handicapped or single parents, have an absolute right to social assistance.[162] But all others can only benefit from payments under the statute if the official in charge considers them necessary for the support or rehabilitation of the individual in question.[163]

Alberta makes the distinction not on the right to aid but rather on the maximum amount that a family is entitled to. Since 1976, Alberta's regulations have provided two scales of social aid, one for long-term aid and the other short-term.[164] In the past, Alberta's legislation was even more explicit, providing for two categories of beneficiaries, "destitute employable persons" and "indigent persons." "Destitute employable persons" are able to work and may be called upon to work for the municipality where they live which in any case must assume the cost of their benefits. "Indigent persons" also receive financial aid from the municipalities, but the latter are reimbursed by the province for 60 percent of the cost.[165] We shall see further on that municipal administrations frequently use these regulations as a means of controlling the behaviour of beneficiaries; often it is the municipalities that implement a form of forced labour.[166]

Ontario also distinguishes between employable and unemployable beneficiaries. The *Family Benefits Act*[167] deals with beneficiaries considered unemployable: individuals over 65 years of age who are not eligible for old age pensions, some women over 60 years of age, the handicapped, single mothers, and handicapped fathers with families. The *General Welfare Assistance Act*[168] is addressed not only to these categories, but also to those who are able to work but who have been shown to be unable to find work.[169] The incredibly complex regulations enacted under these

two statutes indicate that benefits payable under the *Family Benefits Act* are clearly greater than those payable under the *General Welfare Assistance Act*.[170]

Without listing all social assistance statutes, we can state that most of the provinces distinguish between employable and unemployable workers. These distinctions affect access to assistance,[171] on the level of both property exemptions[172] and calculations of benefits payable.[173] It is also worth noting that several provinces still distinguish between male and female beneficiaries, for example, by suggesting that it is unacceptable for a single father to stay home with young children for a period exceeding six months.[174]

Besides explicit distinctions over employability, these statutes provide generally for the exclusion of individuals who refuse employment or who do not actively try to find employment when they are employable.[175] These constraints are sometimes even greater; the fact of voluntarily quitting a job may make a family ineligible for benefits.[176] With the recession of the early 1980s, some provinces have increased their requirements. In 1970, beneficiaries in Ontario who were able to work had to prove not only a state of need but that they were making reasonable efforts to find work, that they were willing to work full time, and that their current state of unemployment was due to circumstances independent of their will.[177] By 1980 an addition had been made to the conditions. Beneficiaries were obliged to demonstrate that "any history of unemployment was due and any current unemployment is due to circumstances beyond the control of the applicant or recipient."[178]

Other legislation provides for administrative control of a recipient's efforts to find work. Using their discretionary power, some workers' compensation commissions suspend benefits if a worker refuses to participate in a rehabilitation program.[179]

As for that enormous regulator of manpower known as the *Unemployment Insurance Act*,[180] the government recently set up a task force to study the effectiveness of employment and retraining services with respect to the needs of industry.

The conclusions of the Task Force on Labour Market Development in the 1980s,[181] dealing with the needs of workers and industry, are worth examining. In looking at the relationship between workers and the Canada Manpower Centres, the Task Force observed that of those who had actually made use of employment centres in 1979, 52 percent said they were dissatisfied. They said that the centre had not found work for them (36 percent); that the personnel had not known how to advise them (16 percent); that they did not have enough information (6 percent); that they did not seem interested (10 percent); and that the orientation service offered was inadequate (10 percent).

What did the Task Force consider to be the needs of industry? Industry would like to see labour mobility so that one region does not suffer from a shortage of workers while another has too many. It also prefers to

see workers move to jobs in sectors where they are available; and this at the lowest wages.

The Task Force proposed that Canada Manpower provide a better preselection service to help employers find the workers that they need; consequently, not all workers should be registered with Canada Manpower.[182]

As for the goals of the employment structure, the Task Force concluded:

> Our data suggest that employment experiences should be separated into two categories — those that are permanent and those that are temporary (i.e., characterized by recurring periods of unemployment).[183]

The *Unemployment Insurance Act* contains mechanisms that allow for the control of the supply and mobility of the worker and the definition of suitable employment: the burden is on workers to make themselves available for "suitable" employment or face a stoppage of payments.[184]

While based on work incentives, the hiring and retraining programs in effect today have moved a long way from the forced labour of the first programs. Up to 1970, employable beneficiaries in Alberta had the choice of working without pay for the municipality ("unemployment relief work") or undertaking to reimburse the assistance they received.[185] Until 1960 in New Brunswick an enactment read as follows:

> Any two overseers for a parish with the consent of a magistrate, shall oblige any idle, disorderly person, rogue or vagabond who is likely to become chargeable on the parish where he resides, to labour for any person willing to employ him.[186]

An individual who refused to submit to this rule was subject to 40 days of "hard labour."[187]

Social legislation today is far more discrete: the word "pauper" has been replaced by "person in need."[188] Reference is made to "social assistance" rather than "welfare," although the message to recipients remains the same.

Everything would suggest that enactments which directly promote a return to work are not the most effective work incentives. The humiliation associated with being a welfare recipient is probably the strongest argument in favour of the search for employment. Whether in the context of the 1940s or that of the 1980s, welfare beneficiaries are still victims of bureaucratic red tape, mobility restrictions and administrative contempt.

Until 1966 in New Brunswick the relief that a single person could demand from the state (in fact, the municipality) was the right to stay in a "poorhouse" and do any work the commissioners of the house considered him capable of.[189] A welfare recipient in Alberta could not move to another municipality. A move, followed by a claim for benefits, would

bring removal to the original municipality. A second move would result in a maximum of three months' imprisonment (no fine was provided for).[190]

The humiliation and the loss of freedom these two examples demonstrate show why the "beneficiary" of such plans would do everything to avoid them. It may be argued that this legislation has now been repealed, but the contemporary equivalents, if more refined, are equally effective. Recall the tremendous advertising campaign against unemployment "fraud" that was undertaken in the press shortly after extensive cutbacks for the unemployed were introduced by Minister Cullen,[191] during a recessionary period. And whether we consider the investigations of the homes of welfare recipients, often made without warning, or the $1 per month laundry allowance for families in Alberta receiving social aid who have a child in diapers,[192] it is clear that the administrative attitude is one of contempt.

Sometimes government policies aimed at target clienteles reflect an aim of "human resources management" that amounts to manipulation. We have already cited a number of examples in our analysis of work incentives. The same techniques are used with groups other than workers. Several measures deal specifically with housewives. Their effect is to keep the woman dependent on her present or future husband, or in the final analysis, on the state. These measures require the cooperation of the husband responsible for support; he must supervise his wife and do everything possible to avoid the state being required to pay benefits to her. The state's disciplinary role is thus guaranteed by the husband of the woman recipient.

Most social laws require, as a condition of eligibility, that the beneficiary exhaust all recourses before appealing to the state.[193] It is often in the interests of a woman who is the victim of violence to limit contact with her husband, but she then has a difficult choice: live without state assistance, or bring her husband before the courts to get what are often nominal maintenance payments. What about the woman who seeks reconciliation with her husband and does not wish to further aggravate the relationship by initiating legal proceedings? Certainly this measure is not aimed at encouraging family harmony; at best its purpose is to save some money for the state by making access to benefits more difficult; at worst it will tend to keep the woman within the marriage. Rather than take responsibility for denying a right to assistance, the state hands the wife over to her husband who in turn attempts to show that she has no immediate material needs. Worse, the husband may attempt to use privileged information to denounce his wife's paltry undeclared income to the welfare service. Should women be forced into reconciliation or required to accept additional humiliation?

Virtually all Canadian provincial legislation provides for legal subrogation in favour of the appropriate ministers in collecting money due

as maintenance to welfare recipients.[194] British Columbia even allows the minister responsible to exercise the recourse himself.[195] Until 1960, in New Brunswick the minister could sell the husband's property in order to be reimbursed for assistance paid to the wife.[196]

The direct consequence of this legislation is that Canadian women who benefit from maintenance orders are squeezed between the obligation to institute proceedings for maintenance in order to respect the requirements of the law and the virtual certainty that they will never get the assistance they seek. In these conditions, what assurance do they have of receiving a minimum income, even one as paltry as social assistance?

The same legislation is barely concerned with the "employability" of women although for men inability to work is often a condition of eligibility for assistance plans.[197] The state prefers women to stay at home while it forces men to take any job. In some cases, an allowance may even be paid for dependents while the employable husband is forced to move away from home for retraining or to find work.

Social legislation has often affected even the composition of recipient families. Social laws were the first to admit the existence of de facto marriage.[198] In some cases once a new family of two adults has been formed, the state turns to the new spouse, if he or she is earning income, to support the needs of the partner who is a recipient.[199] The latter is then faced with a difficult choice: rely entirely on the new mate for subsistence or repudiate the union in order to return to state support.[200]

A family head who is self-sufficient can undertake a new union without having to consider the financial situation of his new partner, but that is not the case for a welfare recipient. He or she is confronted with the same choice as in the preceding case.

Except when both partners are recipients (the payment of a single allowance then represents a savings for the state), one may question whether Canadians are free to choose the union they desire according to their own interests.

Thus social legislation conveys prevailing social values. In other words, independent of conditions, workers must work, mothers must stay in the home, and fathers — even single fathers — must return to work.[201]

Other forms of control are more subtle. In the 1970s, administrative discretion was reintroduced in the application of social legislation. For example, regulations in several provinces often provide for entitlement to a minimum benefit which may be supplemented at the discretion of the welfare official.[202] Elsewhere, regulations provide for a maximum amount of assistance but give the official the discretion to reduce payments.

When the minimum payment is such that beneficiaries clearly cannot survive without the supplement, they find themselves at the mercy of the

state. Discretion is exercised according to the behaviour the official expects of the recipient. For example, when the base payment is $140 per month (Alberta, 1981), it is impossible to claim that the discretion to add the $15 supplement is one based on need. In fact, as soon as this becomes discretionary, beneficiaries are convinced that they must "please the director," meet real or supposed expectations, and be docile and cooperative. Is there a difference between this state of mind and the mentality that existed in the era of private charity? Whether directly, by denying assistance where employment is refused, or indirectly, in making the lives of recipients so difficult they prefer to work no matter the price, the mechanisms provided for within social assistance legislation have the effect of pushing the maximum number of employable beneficiaries to work as soon as possible.

Social security programs also influence employers' costs of production. Employers seek to have not only a pool of workers to draw on which enables them, according to supply and demand, to pay lower wages, but they also profit from social programs which grant benefits directly to workers that might otherwise be demanded from the employer. There is no question here of encouraging a kind of family wage, but rather of drawing attention to the fact that in partially meeting the needs of families, the state reduces potential pressure against employers.

Minimizing the Cost to Business

It is no surprise that one of the leitmotifs of most social programs is minimizing the costs that business must pay. This is accomplished in a variety of ways. Sometimes a social program indirectly subsidizes the production costs of the employer of recipients. Other programs will provide for a rate of benefits payable to non-workers that is below the poverty line, so as not to put pressure on the minimum wage. Finally, it goes without saying that social programs are the first to be cut back in a recession, despite the fact that the impoverished are the first to suffer from economic crises.[203]

During the period studied, these three trends appeared at different times. Indirect subsidy of the production costs of an employer may take a variety of forms. For example, employment income supplement programs have the effect of making the state pay amounts of money that the worker would otherwise demand of the employer. The Family Allowance Program, enacted in 1945[204] following the Marsh Report's recommendations,[205] had the goal of increasing the income of the head of the family with dependent children. If employment is a worker's only source of income, the wages paid must be enough to provide for basic family needs; otherwise, the worker will stop working or take steps that might cause social disruption.

A minimum wage sufficient to meet the needs of an average family

would be judged by employers to be too high for someone who lives alone. In providing family allowances to those with dependent children, the state can maintain the minimum wage at the subsistence level of a single person. In this way the wages of heads of families are subsidized by taxpayers.

Quebec's *Work Income Supplement Act*[206] is another example. This program provides for payment of benefits to the most impoverished workers, thereby allowing them to survive in unsatisfactory working conditions.

What is the program's real cost? In 1979, it cost Quebec $31 million. But the freeze on indexation of social aid benefits which was imposed in the first quarter of 1979 saved the government $25 million. The net cost to the government of the work income supplement program was therefore $6 million.[207] It was welfare recipients who paid the price.

The guaranteed minimum income is a perfect example of a program that indirectly reduces pressure on wages. Though never enacted, it was, in the words of then Prime Minister Pierre Elliott Trudeau, clearly aimed at permitting a reduction in the minimum wage:

> Clearly the minimum wage was a social purpose. However, in my opinion we should examine whether an indirect income supplement to those with the lowest wages would not achieve the same social goals as the minimum wage, but with less disruption to the economy.[208] (translation)

Without disputing the social utility of these programs, or forgetting that they were the result of workers' struggles, we must point out that the state steps in to respond to circumstances that should be met first by employers. In subsidizing low wages, the state indirectly subsidizes employers.

The state more directly subsidizes industry with other programs. During the economic crisis of the late 1970s, the federal government made substantial investments in job creation. It established a series of subsidies for employers, hoping to reduce the unemployment rate. In principle, the unemployed were to be able to find work more easily, and industry was to enjoy a reduction in production costs. This was clearly a political choice. Less was said about the other aspect of these new programs: a reduction in benefits payable to the unemployed. The same statute which created the Employment and Immigration Commission, charging the latter with job creation by means of subsidy programs, also reduced unemployment benefits to 60 percent of wages from 66 to 75 percent of wages.[209]

During the same period, Parliament amended the *Unemployment Insurance Act, 1971* three times. Each of these amendments was aimed at reducing costs by making access to benefits by so-called "marginal" workers (women, youth, seasonal workers) more difficult.[210] The number of insurable weeks necessary for benefits was increased.[211]

Other provisions tightened control of beneficiaries,[212] and a new system of benefit payments made entitlement to unemployment insurance more tenuous.[213] These amendments appeared at the very time when the unemployment rate was at its highest level since the Great Depression. In *Abrahams v. A-G. Canada*,[214] Madam Justice Wilson stated that the goal of the *Unemployment Insurance Act* was to provide benefits to the unemployed, and that it should be interpreted in a large and liberal manner. The political options which inspired these amendments force us to ask whether this was the real purpose of the act.

If in 1971 the *Unemployment Insurance Act* was an alternative to a guaranteed minimum income policy, history shows that this legislation quickly lost any claim of reaching such a goal as soon as the recession began. What had been generous legislation until then, from the standpoint of an unemployment insurance act rather than a guaranteed minimum income program, became typical of other social legislation. It encouraged workers to keep their jobs no matter what. The administration had tools to harass and humiliate beneficiaries. Above all, pressure was kept off the minimum wage by keeping the rate of benefits low and requiring beneficiaries who had received more than two or three months of benefits to accept employment at the minimum wage, even if their previous wage had been double that amount.

Government reports dealing with income security often convey their concern that social policy making not affect the minimum wage. An example is the Marois Report on guaranteed minimum income (Quebec): "It is true that what is sought is to find a threshold incentive that is near the minimum wage without putting pressure on it"[215] (translation). As the minimum wage is already at the poverty line, such preoccupations institutionalize a policy by which beneficiaries of income security programs must, by definition, live beneath the poverty line.

Legislative opinion seems to be that, when the beneficiary is a potential worker, he should be in a state of misery because in such an extreme situation he will be prepared to work in worse conditions. This attitude underlies the social aid regulations in New Brunswick, which provide that an employable beneficiary is entitled to benefits equal to 60 percent of the net minimum wage. An unemployable beneficiary is entitled to higher benefits.[216] In brief, this mosaic of social legislation provides a general picture of measures aimed at minimizing the cost for business, particularly in a recessionary period.

Between 1940 and 1984 social legislation evolved according to the changing needs of the Canadian economy and under pressure from various social groups. The postwar economy required measures which would promote buying power and minimize the cost of manpower while maximizing productivity. Initially, a smooth transition from a war to a peace economy was needed and the most pressing demands had to be

met. This resulted in a series of social enactments: the *Unemployment Insurance Act*, the *Family Allowance Act* and the *Old Age Security Act*. We know that a period of prosperity is usually accompanied by an extension of social and economic rights. These events promoted the recognition of a collective debt to the working class but without a fair price being paid.

At the time the state recognizes new rights, protest movements and unrest are neutralized. Protest movements have to start again from the beginning. Before reaching the stage where state intervention is again necessary, a period of relative calm can be expected, during which frustrated hopes build up until there is a new outburst. The end of the 1960s brought such an outburst and the state, which had not responded adequately to public needs, had to take action to calm things down. The *Canada Assistance Plan* and all the provincial social assistance statutes were enacted. A few years later the *Unemployment Insurance Act* was transformed from a compromise solution into a genuine policy of guaranteed minimum income.

A series of measures was also enacted to improve access to medical insurance,[217] legal aid and health and social services.[218] As a whole, these statutes represented important gains for the people, but we cannot ignore their effect in co-opting popular initiatives and organizations.

The 1980s brought another period of economic crisis. Community groups and workers' organizations, which had been so active during the war on poverty, were disorganized. Faced with social service cutbacks, the traditional spokesmen for beneficiaries of social legislation were demobilized and unable to protest.

The crises of the 1970s and 1980s were marked by the reversal of many vested rights in all areas of social law: unemployment insurance, social assistance, legal aid, and workers' compensation. The beneficiaries of these plans saw their rights eroded, by the reduction of benefits and services and the introduction of deterrent fees, and by changes to the legal conception by which access to programs has become a privilege, granted by the official administering the program, rather than a right to which the beneficiary is entitled.

In this way, during a period in which we seek to encourage investment the cost to business is minimized. Everything would suggest that the welfare of Canadians is not the pith and substance of current social programs.

Balance Sheet and Prospects for the Future

Observation of the efforts that have led to the Canadian social security system, and of legislation creating a certain number of rights, allows us to conclude that had governments really intended to eliminate "need" and guarantee all citizens a minimum standard of living supported by legal mechanisms as effective as those aimed at protecting property

rights, for example, they would indeed have accomplished it. It is not being utopian to believe as we do, based on such moderate views as those of the Economic Council of Canada and the Senate Committee on Poverty,[219] that our society, like other similar Western societies, produces enough wealth to ensure certain minimum social standards and can therefore at least reduce if not eliminate poverty in Canada. But this has not been done. Unlike those who blame the failure to amend the social security system on the constitutional problems of the 1970s that followed the Conference at Victoria,[220] we consider this failure and its aftermath are explained by more fundamental economic choices, made long ago, combined with lack of political will. One may answer that Canadian values have not evolved sufficiently,[221] and that Canadians are not ready to make the effort nor pay the price for the redistribution of wealth. Later we shall demonstrate that most Canadians, including the poorest, have already paid dearly and that additional efforts on their part cannot be envisaged without making the situation even worse.

The political factors surrounding the federal-provincial negotiations of the 1970s and 1980s, with respect to introduction of a guaranteed minimum income plan and integrated social services, must certainly be considered in their constitutional, fiscal and administrative dimensions. But how can we explain the fact that these same governments were able to agree on constitutional amendments[222] to settle differences on social insurance, in the case of unemployment insurance in 1940 and old age security and pensions in 1951 and 1966?[223] There is no doubt in our mind that the primary reason is that these statutes are based on the principle of commutative justice, itself based on the rule "to each according to his work," and not the principle of distributive justice, to the extent that these programs did not imply a redistribution of wealth from the rich to the poor, as Diane Bellemare has clearly shown, but rather, over a period of time, a redistribution of income from the good years to the bad years,[224] financed partially by those immediately concerned, earned by previous work, and fixed as to term and amount in proportion to income earned and time devoted to work. This explanation seems all the more plausible because the unemployment insurance plan of 1971, which introduced elements of the redistribution principle, was quickly called into question when the new recession and unemployment brought billion-dollar deficits. This said, there is no doubt that social security plans modelled on insurance methods have forestalled poverty for thousands of workers, stabilizing the economy in recessions and even allowing the accumulation of capital, as in the case of the *Quebec Pension Plan*.[225]

If we admit that the purpose of social insurance is not to correct inequalities that result from work, but at least to stop those inequalities from increasing in the event of a socially recognized risk such as unemployment, illness or retirement, we must agree that other income security measures in the form of universal payments, assistance or income

supplements, based on redistribution, have not enabled us to remove inequality or to guarantee an absolute right to minimum social standards. In fact, we must ask if governments have really sought to redistribute wealth and if social law does not actually tend to provide a structure and a legitimacy for inequality.

The Myth of the Redistribution of Wealth

Nobody would question the fact that the proportion of government budgets used for transfer payments in the field of income security has substantially increased since the 1940s.[226] On the contrary, some politicians and economists never miss a chance to denounce the costs of the welfare state and the risk of government bankruptcy in the immediate future. The poor, those who cannot meet their own needs, are described as a burden for other Canadians because they draw on a large part of every tax dollar paid.

Reports and studies from such respected bodies as the Canadian Senate, the Economic Council of Canada, the Canadian Council on Social Development and Statistics Canada and the analyses of various economists and organizations[227] indicate that there were 3 million poor in 1977 and 4.3 million by 1983.[228] It is not our intention to launch a debate on the exact amount of income insufficiency and of poverty in Canada;[229] we wish rather to establish that the problem exists and to show that despite transfer payments the gulf between rich and poor has not changed substantially between 1950 and 1980. Far from reducing poverty, so-called redistribution payments have at best "stopped the gulf between rich and poor from getting any wider"[230] (translation).

However it is measured, the distribution of income in Canada over the past 30 years has not changed; most economists agree that the 20 percent of the population with the lowest incomes received 4.4 percent of the total income in 1951 and no more than 4.1 percent in 1979, while the wealthiest 20 percent alone accounted for 42.8 percent of the total income in 1951 compared with 42.3 percent in 1979.[231]

> The most obvious conclusion to be drawn from the previous discussion is that, whichever way you choose to measure income, the multi-million dollar social security system has not significantly reduced income inequality. On the contrary, the distribution of income for family units, which seems to come close to measuring the real level of income inequality, indicates that the gap between rich and poor is increasing.[232]

In reality, income security measures have never allowed the promised redistribution:

> We refer to the myth that Canadian society has become increasingly more redistributive away from the rich to the poor during the postwar period. The claim that Canadian governments have been successful in increasing the

> degree of redistribution such that the share of command over resources of the poor has increased considerably at the expense of the rich has moved off the popular podium into the popular literature . . . The distribution of income became slightly less unequal during the 1950s and early 1960s, more unequal during the late 1960s through 1971, and slightly less unequal since 1971.[233]

It should be no surprise that such a large number of Canadians live below the poverty line when we consider that most of the poor in Canada are working people.

A full-time worker who is paid the highest minimum wage in Canada receives less annually than the amount fixed as the lowest poverty line by Statistics Canada.[234] We can imagine what the situation is like when the worker has dependants or is a recipient of social insurance or welfare payments, even taking family allowance payments into account.

> Unfortunately, while this may be true in a few instances, and more so as family size increases, the wrong conclusion is often reached that social assistance benefit levels are too high. In fact . . . there are few instances where social assistance plus family allowances, unemployment insurance plus family allowances, or even minimum wages plus family allowances come even close to the conservatively-estimated poverty lines of the Economic Council of Canada.[235]

It can always be argued that poverty is relative, that Canadians are better protected in 1980 than they were in 1930, and that even the most impoverished seem well off compared with those who live in the Third World. But we should also consider that the great majority of Canadians would be in agreement with poverty lines adopted by the Senate and the Economic Council of Canada to the extent that their application, indexed to the cost of living as the salaries of members of Parliament or managers are, would represent a substantial increase of real income and living standards, and thus greater equality of opportunity based on the following concept:

> involving a large measure of economic equality — not necessarily in the sense of an identical level of pecuniary incomes, but of equality of environment, of access to education and the means of civilization, of security and independence, and of the social consideration which equality in these matters usually carries with it.[236]

If not, what is the use of establishing poverty lines?

To examine the problem from a somewhat broader perspective, it is worth reviewing research which has shown that there are two types of income security in Canada: the type studied here, known as "welfare for the poor," and a second category that an economist has called "welfare for the non-poor,"[237] destined for the well-off. Not as well known as the first category, the "welfare for the non-poor" refers federally to the scheme of tax deductions found in the *Income Tax Act*. A study by Wei

Djao[238] has established that in 1974 the federal treasury had a loss of revenue through deductions and tax exemptions that was 12 times greater than the total amount of all transfer payments to the provinces under income security programs.[239] For the same year, from only 17 of these tax exemptions, the government lost an estimated $6.4 billion in revenue, or 20 percent of the federal budget.[240]

These losses of revenue benefit the well-off and have undoubtedly allowed them to maintain their position in the distribution of wealth. Our tax system is a regressive one that more often than not taxes social benefits at 100 percent.[241] As a result, the welfare recipient loses a dollar of benefits for each dollar earned.

As for sales taxes, they make no distinctions. The most impoverished give up a larger proportion of their income than the wealthy. Finally, tax exemption policies for children and dependents are more favourable to high income taxpayers and do not enable the welfare recipient to negotiate his grocery or telephone bill at the end of the month.[242]

The parallel existence of these welfare systems deserves to be explained and developed more fully. Here it shall suffice to note a single aspect which characterizes the difference in treatment of these two categories of beneficiaries. In general, transfer payments to beneficiaries are presented as a payment of money without labour in return, whereas tax exemptions are considered a normal procedure enabling money already earned by labour to be retained. Thus public opinion is led to believe that money paid as social assistance is part of the welfare system while a loss of revenue for the state due to a retirement savings plan tax exemption[243] or investment interest deduction is not. It has been demonstrated that a large part of the earnings of the best off, the 20 percent who receive 40 percent of the income[244] and not less than 42 per cent of the wealth of the country,[245] comes from investment income, that is, from investments and bonds that can hardly be considered income from labour.

Why should a dollar paid to a welfare recipient and a dollar that is not received from a taxpayer be treated any differently? At first glance, this defies logic. Is this not a form of unequal treatment that allows the government to transmit values that are then picked up by theorists and journalists and used to mould public opinion? Is it not commonplace to accord high standing to someone who is independently wealthy and who may never have worked in his life or who has become rich because of the labour of his employees, and to do the opposite for the unemployed worker or welfare beneficiary who is considered lazy but whose services we will gladly accept "under the table" for small domestic chores?

We were surprised to find that one of the only enactments that provides that investment income is not true "earned" income within the ordinary meaning of the term is a social assistance regulation: "unearned income: money . . . derived from money, annuities, stocks,

bonds, shares and interest bearing accounts or properties."[246] Is an Income Tax Act that would qualify such income as "unearned or undeserved" even conceivable?

Why the Right to a Minimum Standard of Living for All Is Never Secured

If the "economic" measurement of social law shows that the structure of inequality in Canada is unchanged despite the injection of billions of dollars and a relative improvement in the living standards of Canadians, we should question the discrepancy between the stated objectives and the methods used to accomplish them.

First, we cannot emphasize too strongly that most poor people or those with insufficient incomes in Canada[247] are workers, despite the family allowance plan and the few meagre programs of employment income supplement.

> A basic argument for the establishment of "no fault" poverty is provided by aggregate data on the poor which reveal that 50 percent of the poor population in Canada are "working poor" and that these people work wherever they can, and 60 percent of them work full-time, year round, but still earn poverty incomes. Can we, therefore, say that poverty is their own fault? And can we still maintain the myth that hard work alone brings success?[248]

It is the employable who somehow become poorer by working and who are encouraged to return to work if they become unemployed or welfare recipients once they have exhausted their "right to unemployment." If they cannot find work, they join the other group of poor made up of those who are unemployable, retired, ill or single parents, and who have to be satisfied with less.

> Statistics also reveal that of the other 50 percent of the poor population, those who are unable to work, 49 percent are disabled or ill, 26 percent are deserted women with families, 9 percent are debilitated by old age, so the 84 percent of the "unemployable poor" are in poverty for reasons almost totally beyond their control. Can we attribute personal fault?[249]

While recognizing that income security programs have helped to avoid having an even greater number of Canadian individuals and families fall below the poverty line,[250] we must point out that a minimum standard of living for all is no more guaranteed than the right to employment which supposedly provides the key to a decent standard of living.

This concept of a minimum standard of living must be understood on two levels. It is first of all a quantitative measure of income linked to meeting basic needs, as defined by the Senate or the Economic Council of Canada. To go back to a formula proposed 20 years ago by a social organization, income in question here is "the strict minimum income of

which no citizen should be deprived if our society is to have the slightest respect for human dignity"[251] (translation).

The concept also assumes that Canadians have access to services and living conditions that will allow them to exercise a certain number of options.

> This concept has been described by one Canadian scholar as the realization that in a civilized society, there is a certain minimum of conditions without which health, decency, happiness and a chance in life are impossible.[252]

Under the best scenario, in which a worker is entitled to benefits under a social insurance plan, it remains necessary that his previous earnings be sufficiently high (because he will receive only a part of his wages in benefits) or that he is able to combine other sources of income; otherwise he will fall below the poverty line, as is the case with most of the unemployed and retired.

As for those who rely directly on social assistance programs to survive, their right is never acquired, since their benefits are always lower than the lowest poverty line[253] and may be modified according to the needs of the state. Changes are facilitated because the conditions of applications are often decreed by regulation or internal guidelines over which the beneficiaries have no control and of whose existence they may even be unaware.

Curiously enough, and certainly not by accident, only one category of individual merits a somewhat different treatment. These are persons over 65 years of age who are entitled to the basic benefit of old age "security." On its own or even combined with the guaranteed income supplement[254] this benefit does not enable recipients to reach the poverty line unless they can add a retirement pension[255] or employment income to it, in which case the supplement is reduced by one dollar for every dollar of pension or employment income received. In no case however is the old age security benefit subject to cutbacks, taxes or administrative red tape. It is a right acquired simply by the recognition of a presumed need because of retirement; every Canadian citizen over 65 years of age may exercise this claim against the state which automatically pays the benefit every month.

This strict entitlement to income therefore, though well below the poverty line, is only granted individuals for whom it is no longer necessary to provide a work incentive.

> In effect, in a society where henceforth we guarantee a minimum income to those in need, the burden of transfers may become hard to bear for those who work if there is no means of incentive to the employable to work. However, the importance we give incentives to work, at a time when there are major shortages of employment because of the economic situation, is proof of an economic conception that basically does not accept the possibility of involuntary unemployment. It is a return to the period before Keynes.[256] (translation)

Under the worst scenario, where it is necessary to maintain such work incentives, how can we explain the fact that the state does not guarantee to old age pensioners a basic benefit that corresponds to needs as defined by the Senate or the Economic Council of Canada, since it is established that recipients will no longer work and are entitled to their retirement? And according to what principle should we treat those who are unemployable, ill or single parents any differently because they clearly have the same needs as those who are retired?

In effect, we end up returning to the problem we started with, we are back to a period where every individual should in principle see to his or her own needs by his or her own labour.

It is unlikely that we will return to a pre-Keynesian era, but it is indeed possible that as long as mechanisms for the distribution of wealth are governed by the laws of the marketplace, and as long as this is not seriously challenged, there will always be workers who become poorer by working. Any guarantee of a minimum standard of living is therefore illusory.

> Based in part on this kind of economic interpretation, where individuals are assumed to have virtual total control over the planning of their economic fortunes, an individual is entitled to get back out from the economic system what he puts in, and hence everyone is responsible for looking after one's own welfare. In this ultimate laisser-faire world, the processes of production and distribution are tightly associated and are merely two sides of the same coin.[257]

Prospects for the Future

During the Great Depression the state had to intervene to resolve contradictions that the private sector had been unable to manage, but the history of the past 40 years shows that this intervention has not solved the problem. It is not by returning to the past or leaving people to their own devices that the problem will be solved. As we are not heading, in the short term, toward a change in economic structures which will alter the rules of the game and the current mechanisms for the division of wealth, there are not many options left.

But once we declare war on poverty, accept that needs should be met and that a minimum standard of living should exist, is it not logical to define clearly the content of this minimum standard, and provide for mechanisms that will guarantee its application? Nobody chooses to work, to be unemployed or to grow old below the poverty line.

> For many, it is perhaps comfortable to assume that some people are born with a strong desire to inhabit the bottom income quintile, and who have consciously decided to make a career out of being poor. However, what a new interpretation of the distribution process should teach us is that a person ends up being where he is in life primarily through a complicated set

of circumstances playing on him. Certainly hard work is often necessary, but it is neither essential nor sufficient for purposes of being economically successful.[258]

Economists cannot agree on when and under what conditions the country will pull out of the most important recession since the 1930s. Marked by inflationary spirals and record unemployment, the economic crisis we are going through is not only economic and social.

> It is a very profound world-scale structural and cultural crisis; and the transformations it calls for will extend over a number of years. It is not only a question of analysing and defining the phenomena accompanying the crisis; it is especially important to understand the enrichment and opportunities it represents. We must identify these changes the crisis is demanding; the crisis can be appreciated insofar as it forces us to place things in perspective. The widespread awareness of the crisis is cause for hope, because it is an historic time for challenging the practices and institutions of the past, as well as a time for choosing our direction for the future.[259]

Recent years have also been characterized by a return to traditional values, such as private enterprise and volunteer work; this change coincides with the shift to the right that has brought conservative political parties to power in several Western countries. In addition a political and social demobilization has taken place since the end of the 1970s that has modified protest movements and made it less necessary to relieve social tensions.

These factors explain a certain withdrawal of government involvement, or at least a reduction in social investment as well as cutbacks, despite the increase in the collective wealth and the continued growth rates of the large industrial, commercial and financial corporations,[260] as revealed in their assets, equity, sales and profits.[261]

Under these conditions, and if the trend continues, there is no doubt that social law may be presented as the law of *inequality*.

> With the deepening of the crisis, however, for the first time in Canada we are seriously faced with overpopulation from the economic and social standpoints and new forms of economic and social hardship arising from unemployment. The appearance of overpopulation derives from profound causes that accompany structural changes, notably the extent of the transformation of businesses, where we see a massive substitution of labour with technological innovations. It is becoming increasingly evident that a large proportion of workers displaced by technological changes will be permanently excluded from the labour market unless there is some change in current policies.
>
> In such a situation, the programs of the Welfare State prove inadequate: they were not designed to serve such a large proportion of the population that is the victim of unemployment nor to act effectively to counter its causes and effects. Faced with such a phenomenon, we should be seeing an intensification of social policies and additional redistribution efforts, but the

> crisis seems rather to be having the opposite effect under the impulse of the ideology of the new right.[262]

It should be no surprise if the next few years are characterized by a struggle for acquired rights which are never in fact acquired.

> As Canada moves into the 1980's burdened by serious inflation, high rates of unemployment, a weakened dollar, and disappointing rates of growth, the climate for further major advances in social security is not propitious. Indeed, the most immediate task may well be the struggle to maintain the integrity of those programs already in place which confer rights to benefit and safeguard the dignity of Canadians.[263]

The parameters of this study do not permit us to be more explicit or convincing than those who, over the last 40 years, have set out the goals and principles upon which should be based the recognition of the right to a minimum standard of living for all Canadian citizens, whatever their situation.

It is not the role of jurists to define needs and to quantify thresholds of "poverty," which perhaps should be renamed to make the objective more evident.[264] Nor is it the role of jurists to set out mechanisms or formulae of guaranteed income which would make this goal a reality.[265] But if it were possible to provide a legal form for a collective undertaking that no law of the marketplace has been able to accomplish, our proposal would be to entrench in the *Constitution Act*[266] the right of every individual to a minimum standard in the form of guaranteed income, indexed to the cost of living,[267] accompanied by a full constitutional guarantees[268] and a clause providing that its legislative application take precedence over all other legislation.

In a context of uncertainty in which some social programs are being questioned, and in light of past experience, we consider that this proposal would protect Canadians against arbitrary exercise of power and governmental discretion. The proposal is not predicated on the abolition of existing income security plans which provide for, as do some social insurance and workers' compensation schemes, benefits that are above the current poverty line. In other words, our proposal includes the maintenance of acquired rights and excludes any reduction in income security plans. We are aware that reaching the goal of such a proposal will require a two-pronged operation of social security reform and constitutional amendment, something that was put aside at the beginning of the 1970s.

Beyond the principles and ideologies that we have cited, both those we have challenged and those we have favoured, beyond efforts to reflect the evolution of society, and beyond all conditions that we may put forward in seeking social development, lies a very straightforward point of view, a kind of fundamental truth, one that has been missed by critics and the new architects of systems, and that deals with the basic guaran-

tee of a right to social security. In our society, like most Western societies which have been marked and impregnated by humanism and the purest values of liberalism, the answer to the problem does not seem obvious; indeed we have worked to find justifications and then to replace them with others and in so doing have put off responding, for as long as possible, to reality. The evidence is that old ideas of justice, liberty and equality have been replaced by those of social justice, redistributive justice and national solidarity and that social injustice continues despite the efforts that have been made.

We feel that there is no justification, in the ideological sense, upon which to found the right to basic human necessities. It is an existential conviction, entrenched in the history of humanity and sufficient in and of itself. The need to survive, from the economic, social and cultural standpoints, considering the necessary relativity that this is based on, is in the words of André Gorz, "The reason for its own satisfaction . . . and needs no legitimization"[269] (translation).

To the extent that our society has the physical, technical and economic means to guarantee to every individual a minimum standard of living, social law would take on its most profound meaning, one that sets it apart from everything we have known previously, and which has been so well defined by the French jurist Georges Ripert: "Social law will be the law of a society in which the production and distribution of wealth are not left to the free initiative of men, but are scientifically organized"[270] (translation).

Notes

This study is a translation of the original French-Language text which was completed in November 1984.

1. See particularly E. Mainville, *Labour Legislation and Social Services in the Province of Quebec* (Ottawa: Royal Commission on Dominion-Provincial Relations, 1939); G. Poulin, *L'assistance sociale dans la Province de Québec* (Quebec: Royal Commission of Inquiry on Constitutional Problems, 1955), appendix W; M. Pelletier and Y. Vaillancourt, *Les politiques sociales et les travailleurs*, vols. 1 and 2 (Montreal: Centre de recherche en politiques sociales, 1974); Québec: Government of Quebec, 1963); Canada, Interprovincial Conference of Ministers Responsible for Social Services, *The Income Security System in Canada* (Ottawa: Canadian Intergovernmental Conference Secretariat, 1980); N.K. Strong, *Public Welfare Administration in Canada* (Chicago: University of Chicago Press, 1930).
2. *The Income Security System*, *supra*, note 1, p. 10.
3. Quoted by Poulin, *supra*, note 1, p. 71.
4. 30–31 Vict., c. 3 (U.K.).
5. See S.B. Ryerson, *Le capitalisme et la Confédération* (Montreal: Parti-Pris, 1972), and A. Dubuc, "Les fondements historiques de la crise des sociétés canadienne et québécoise," *Politique d'aujourd'hui* 7/8 (1978): 29–53.
6. *Civil Service Act*, 49–49 Vict., c. 46, *An Act respecting Public Officers*, R.S.C. 1986, c. 19.
7. Its predecessor, the North West Mounted Police, was created in 1873, S.C. 1873, c. 35.

8. The police and militia have intervened frequently in the history of the Canadian workers' movement: the printers' strike in Toronto in 1872, the Lachine Canal strike in 1877, the Quebec construction workers' strike in 1877, the Winnipeg general strike of 1919, repression of demonstrators during the march of the unemployed in 1935. See M. Horn, *The Dirty Thirties* (Toronto: Copp-Clark, 1972), pp. 360–80. See also R. Desrosiers and D. Héroux, *Le travailleur québécois et le syndicalisme* (Montreal: Presses de l'Université du Québec, 1973).
9. Referring to this type of intervention, common to all industrializing countries, Jean-Jacques Dupeyroux said in *Securité sociale* (Paris: Dalloz, 1965, p. 32): "In a society which claims to be the best of all worlds by virtue of the principle of free competition . . . the destitute basically appear to be potential trouble makers and it is more important to protect the bourgeois order from them than to protect the persons themselves. Thus it is sometimes hard to distinguish between the orphanage and the correctional institution, or between the shelter and the prison, that is to say between the measure of social protection and the penal sanction" (translation). G. Perrin, "Pour une théorie sociologique de la sécurité sociale dans les sociétés industrielles," *Revue française de sociologie* 8 (1967), p. 302.
10. At the time, the rare enactments adopted by most of the industrialized provinces such as Ontario and Quebec (e.g., *An Act to Protect the Life and Health of Persons Employed in Factories*, S.Q. 1885, c. 32) were difficult to enforce and there was a shortage of inspectors. See the comments of Desrosiers and Héroux, *supra*, note 8, p. 95, concerning the Royal Commission to Inquire into and Report on the Subject of Labour and Its Relation to Capital (1886–1891).
11. Statistics of M.C. Urquhart and K.A.H. Buckley, *Historical Statistics of Canada* (Toronto: Macmillan, 1965), quoted in *The Income Security System*, *supra*, note 1, p. 12.
12. The memorandum, tabled in the House of Commons in April 1889, followed by two reports dealing with the conclusions, paints a striking picture of the social and working conditions prevailing at the end of the nineteenth century. For fuller details, see, Desrosiers and Héroux, *supra*, note 8.
13. *The Workmens' Compensation for Inquiries Act*, S.O., 55 Vict., c. 30, and *An Act Respecting the Responsibility for Accidents Suffered by Workmen in the Course of Their Work, and the Compensation for Injuries Resulting Therefrom*, S.Q. 1909, c. 66.
14. See Katherine Lippel, "Les droits des accidentés du travail à une indemnité: analyse critique et historique," master's thesis (Montreal: Université de Montréal, 1982).
15. *An Act Respecting Working Hours for Women and Children in Certain Factories*, S.Q. 1910, c. 27.
16. *An Act to Provide for Fixing a Minimum Wage for Women*, S.Q. 1919, c. 11.
17. *An Act Respecting the Establishment of Employment Bureaus for Workmen*, S.Q. 1910, c. 19.
18. *The Employment Offices Co-ordination Act*, S.C. 1918, c. 21.
19. Pelletier and Vaillancourt, *supra*, note 1, vol. 1, p. 94.
20. Order in Council, April 29, 1915, and *The Pensions Act*, S.C. 1919, c. 43.
21. S.C. 1920, c. 8.
22. Resolution quoted in Québec, Le Comité interministériel d'étude sur le régime des rentes du Québéc, Rapport (Quebec, 1964), vol. 1, p. 5.
23. S.C. 1926–1927, c. 35.
24. *Ibid.*, s. 2.
25. The federal government's share was increased to 75 percent in 1931.
26. "If the residency conditions could be justified by some apparent necessity for belonging to the collectivity or because of a presumption of prior indirect contributions by the recipient through taxation, it is difficult to explain eligibility conditions relating to the resources of the applicant. The limit on annual income set at $325 per annum and the obligation of applicants to submit to an examination concerning their assets and needs must be viewed as a constraint on the exercise of their rights and, at the social level, as a procedure that leads to placing individuals in a humiliating situation

incompatible with human dignity. Once more, we see signs of the English concept of public assistance less marked by the mutualist traditions and sensitivity of continental Europe whose programs were best characterized by the original concept of presumption of the existence of needs and the concomitant obligation to ensure for the recipient an absolute right to benefits" (translation). Robert D. Bureau, "La sécurité sociale et le droit au Québec," doctoral dissertation (Lyon: Université de Lyon II, 1972), p. 83. On the concept of means test and needs test, see also E. Burns, *The American Social Security System* (Boston: Houghton Miffin, 1951), p. 31.

27. Percentage drawn from Statistics Canada figures for 1941 and evaluated by Pelletier and Vaillancourt, *supra*, note 1, vol. 2, p. 27; see also *The Income Security System*, *supra*, note 1, p. 15.
28. Canada, Royal Commission on Dominion-Provincial Relations, *Report*, vol. 2 (Ottawa, 1939), p. 18.
29. Pelletier and Vaillancourt, *supra*, note 1, vol. 2, p. 25. Furthermore, it is interesting in retrospect to read the point of view of the Economic Council of Canada: "And if a typical 1968 'poverty line,' defined in terms of real income, were extended back through time, most Canadians during the Depression of the 1930's and perhaps even most Canadiansof the 1920's would be found to have been living below that line." Economic Council of Canada, *The Challenge of Growth and Change: Fifth Annual Review* (Ottawa: Queen's Printer, 1968), p. 104.
30. A.E. Grauer, *Public Assistance and Social Insurance* (Ottawa: Royal Commission on Dominion-Provincial Relations, 1939), Appendix 6, pp. 17–18.
31. *Ibid.*, p. 17.
32. We refer mainly to the march of the unemployed on Ottawa after the strikes in the camps in British Columbia. See Horn, *supra*, note 8, p. 358 ff.
33. Principally the *Federal Emergencies Relief Act* (FERA), *National Industrial Recovery Act* (NIRA), *Civil Works Administrative Act*, *National Labour Relief Act* and the *Wagner Act*. For a detailed analysis of these programs, see Pelletier and Vaillancourt, *supra*, note 1, vol. 2, pp. 279–87. See also the excellent analysis from the viewpoint of the recipients in F.F. Piven and R.A. Cloward, *Regulating the Poor: The Functions of Public Welfare* (New York: Vintage Books, 1971).
34. Based by the U.S. Congress on August 14, 1935. See Burns, *supra*, note 26.
35. See E. Burns, *Social Security and Public Policy* (New York: McGraw Hill, 1956).
36. Quoted by Diane Bellemare, "La sécurité de revenue au Canada: une analyse économique de l'avènement de l'Etat-providence," doctoral dissertation (Montreal: McGill University, 1981).
37. S.C. 1935, c. 38.
38. *Attorney-General for Canada v. Attorney-General for Ontario* [1937], A.C. 355.
39. S.C. 1935, c. 44.
40. S.C. 1935, c. 63.
41. S.C. 1935, c. 14.
42. Pelletier and Vaillancourt, *supra*, note 1, vol. 2, p. 274.
43. Royal Commission on Dominion-Provincial Relations, *supra*, note 28, vol. 2, p. 133.
44. *Infra*, note 221.
45. *Unemployment Insurance Act, 1940*, S.C. 1940, c. 44, s. 39.
46. International Labor Conference, second session, Washington, D.C., 1919. The conference adopted the terms of articles 23 and 427 of the Treaty of Versailles signed in June 1919. On this issue, see Guy Perrin, "Réflexions sur cinquante ans de sécurité sociale," *Revue internationale du travail* 79(3) (1969), p. 623.
47. Canada had ratified the conventions on unemployment, fair salaries, and weekly rest adopted by the ILO.
48. *An Act to Amend the Old Age Pensions Act*, S.C. 1937, c. 13.
49. "The first province to enact such legislation was Manitoba in 1916. . . . A complete system of provincial mothers' allowances was not established in all provinces until 1950." *The Income Security System*, *supra*, note 1, p. 12.

50. Quebec, Commission des assurances sociales du Québec (Montpetit Commission), created by Order in Council, October 20, 1930. The commission published several reports and made numerous recommendations concerning unemployment insurance and old age security.
51. Quebec, Commission des assurances sociales du Québec, *Sixième rapport* (Quebec, 1933) p. 155.
52. Bellemare, *supra*, note 36, p. 110.
53. Canada, Department of Reconstruction, Employment and Income (Ottawa: King's Printer, 1945), p. 1.
54. Canada, Dominion-Provincial Conference on Reconstruction, *Report* (Ottawa: King's Printer, 1945), pp. 6 and 30.
55. J.M. Keynes, *The General Theory of Employment and Money*, 2d ed. (London: Macmillan, 1961); see also A. Murad, *What Keynes Means* (New York: Bookman Associates, 1962) and A. Finkel, "Origins of the Welfare State in Canada," in *The Canadian State, Political Economy and Political Power*, edited by Leo Panitch (Toronto: University of Toronto Press, 1977).
56. It is the fifth element of the Charter signed by Roosevelt and Churchill on August 12, 1941; see Dupeyroux, *supra*, note 9, p. 66.
57. Declaration of May 10, 1944, adopted at the 28th session of the International Labor Conference under the aegis of the ILO.
58. Recommendations no. 67 and 69; see Dupeyroux, *supra*, note 9, pp. 66 and 68.
59. *Universal Declaration of Human Rights*, adopted on December 10, 1948, by the General Assembly of the United Nations. On this subject, see J.J. Dupeyroux, "Quelques réflexions sur le droit à la sécurité sociale," *Droit social* (1960) p. 228.
60. Sir William Beveridge, *Social Insurance and Allied Services*, 2d ed. (New York: Agathen Press, 1969). See J.J. Dupeyroux, *Évolutions et tendances des systèmes de sécurité sociale des pays membres des Communautés européenes et de la Grande-Bretagne* (Luxembourg: European Community, 1966), p. 67.
61. Canada, Advisory Committee on Reconstruction, *Advisory Report on Reconstruction* (Ottawa: King's Printer, 1943).
62. L.C. Marsh, *Report on Social Security for Canada* (Ottawa: King's Printer, 1943), p. 4.
63. *Ibid.*, p. 10.
64. This trend which Dupeyroux qualified as "distributive" as opposed to the "commutative" trend based on rights acquired from work performed implies the "society's responsibility for each of its members . . . for each individual without reference to any particular socio-professional characteristic" (translation). See Dupeyroux, *supra*, note 60, pp. 160 and 166.
65. In principle, there was recognition of a state of need unrelated to any particular risk to the person, but in practice it was necessary to maintain the distinction between the employable and the unemployable and to keep in place the mechanisms serving to encourage the individual to find work.
66. Marsh, *supra*, note 62, p. 121.
67. *Supra*, notes 30 and 50.
68. Marsh, *supra*, note 62, p. 30.
69. This was the point of view of the Montpetit Commission which had favoured the mechanism of social insurance to ensure protection and rights related to a recipient's working activity.
70. Marsh, *supra*, note 62, pp. 15–16.
71. Dupeyroux, *supra*, note 60, p. 23.
72. D. Brunelle, *Le Code civil et les rapports de classes* (Montreal: Presses de l'Université du Québec, 1975), p. 8.
73. *Ibid.*, p. 9. See also J.B. Robichaud, "Peut-on éliminer la pauvreté au Canada?" *Le Devoir*, July 31, 1984.
74. This expression is borrowed from J. Duchantel in "Chômage, politiques sociales et crises," *Cahier du socialisme* (Spring 1979): 72–120.

75. Dupeyroux, *supra*, note 60, p. 17. In *Sécurité sociale*, *supra*, note 9, pp. 25 and 26, Dupeyroux wrote: "A direct relationship between the legal rules and social and economic infrastructures is apparent here and may be the expression of the following rule of legal sociology: the creation of systems to compensate for social risks is linked to a certain development of the working class; this development must be sufficient to resolve the contradiction between the actual needs for security of members of this class and the ideology of dominant classes" (translation).
76. Andrée Lajoie and Claude Parizeau, "La place du juriste dans la société québécoise," *Revue juridique Thémis* (1976), p. 460.
77. *Ibid.*, p. 491.
78. *Ibid.*
79. G. Ripert, *Les forces créatrices du droit* (Paris: Librairie générale de droit et de jurisprudence, 1955), p. 51.
80. Lajoie and Parizeau, *supra*, note 76, p. 491.
81. *Ibid.*
82. Concerning the functions of social law, see the point of view of Keith G. Banting in *The Welfare State and Canadian Federalism* (Montreal: McGill-Queen's University Press, 1982), p. 19.
83. However, this did not prevent the Special Senate Committee on Poverty from affirming: "The welfare system as it exists today is a chaotic accumulation of good intentions gone out of joint." Canada, Senate, Special Committee on Poverty, *Poverty in Canada* (Ottawa: Information Canada, 1971), p. viii.
84. This reform was initiated by a working paper on the Constitution published by the Government of Canada following the 1969 Constitutional Conference, see *Income Security and Social Services* (Ottawa: Queen's Printer, 1969), p. 7. It was followed by a federal government white paper, *Income Security for Canadians* (Ottawa: Department of National Health and Welfare, 1970), and the *Working Paper on Social Security in Canada*, signed by Marc Lalonde (Ottawa: Department of National Health and Welfare, 1973).
85. W.A.J. Armitage, "The Emerging Realignment of Social Policy — A Problem for Federalism," *Canadian Welfare* 47 (9) (1971), pp. 4, 5. Quebec's position as stated at the federal-provincial conference of 1965 could not be clearer: "Social service measures taken as a whole are in direct relation with the culture of a people and allow it to express itself collectively. Quebec society cannot be deprived of its social security system any more than it can do without its own legislation in education" (translation). (Declaration of the premier of Quebec at the 1969 federal-provincial conference, p. 8.)
86. *The Income Security System*, *supra*, note 1, p. 28.
87. *Ibid.*
88. *Supra*, note 54, p. 6.
89. *Ibid.*, p. 8.
90. *Income Security for Canadians*, *supra*, note 84, p. 1 (emphasis added).
91. *Working Paper on Social Security*, *supra*, note 84, p. 17.
92. Claude Castonguay, from a speech given at the Kiwanis Club, Ville Saint-Laurent, November 1970, p. 19.
93. Piven and Cloward, *supra*, note 33.
94. Marsh, *supra*, note 62, p. 13.
95. S.C. 1940, c. 44.
96. S.C. 1944–45, c. 40.
97. *Unemployment Insurance Act, 1940*, S.C. 1940, c. 44.
98. Canada, Unemployment Insurance Commission, *Thirty-sixth Annual Report* (Ottawa: Minister of Supply and Services Canada, 1977), p. 5.
99. Canada, Committee of Inquiry into the Unemployment Insurance Act, *Report* (Ottawa: Queen's Printer, 1962), p. 67.
100. *Unemployment Insurance Act, 1940*, S.C. 1940, c. 44, ss. 27 *et seq.*

101. Committee of Inquiry, *supra*, note 99, p. 104.
102. *Unemployment Insurance Act, 1940*, S.C. 1940, c. 44, ss. 88 *et seq.*
103. Dominion-Provincial Conference on Reconstruction, *supra*, note 54, p. 6, excerpt from a speech by Mackenzie King.
104. *Legal Aid Act*, S.Q. 1972, c. 14.
105. J. Hétu and H. Marx, *Droit et pauvreté au Québec* (Montreal: Les Éditions Thémis, 1974), p. 475.
106. Committee of Inquiry, *supra*, note 99, pp. 104, 105.
107. *An Act to Amend the Unemployment Insurance Act, 1940*, S.C. 1950, c. 1, ss. 87(a) and 87(b).
108. *Unemployment Insurance Act*, S.C. 1955, c. 50, ss. 49, 50.
109. *An Act to Amend the Unemployment Insurance Act, 1940*, S.C. 1950, c. 1, s. 87(a), and *Unemployment Insurance Act*, S.C. 1955, c. 50, s. 49.
110. Committee of Inquiry, *supra*, note 99.
111. *Unemployment Insurance Act*, S.C. 1956, c. 26.
112. Committee of Inquiry, *supra*, note 99.
113. S.C. 1970–1971–1972, c. 48, s. 17.
114. *Income Security for Canadians*, *supra*, note 84.
115. *Unemployment Insurance Act, 1971*, S.C. 1970–1971–1972, c. 48, s. 17.
116. *Ibid.*
117. Canada, Unemployment Insurance Commission, *Unemployment Insurance in the 70's* (Mackasey Report) (Ottawa: Queen's Printer, 1970), p. 8.
118. *Unemployment Insurance Act, 1971*, S.C. 1970–1971–1972, c. 48, s. 3.
119. *Ibid.*, s. 24.
120. *Ibid.*, s. 136.
121. *Ibid.*, s. 3.
122. *An Act to Provide Assistance for Needy Mothers*, S.Q. 1937, c. 81; *Blind Persons Act*, S.Q. 1937, c. 83; *An Act Respecting Assistance to Disabled Persons*, S.Q. 1954–1955, c. 9.
123. *Canada Assistance Plan*, S.C. 1966–1967, c. 45.
124. Québec, Commission d'enquête sur la santé et le bien-être social, *Rapport*, vol. 5: *La sécurité du revenu*, book 1 (Quebec, 1969), p. 22.
125. *Canada Assistance Plan*, S.C. 1966–1967, c. 45, ss. 2(g) and 2(i).
126. *Ibid.*, ss. 6(2) (a) and (i).
127. *Working Paper on Social Security*, *supra*, note 84, pp. 6–7.
128. *Ibid.*, p. 34, proposal no. 9.
129. Canadian Council on Social Development, *Social Policies for the Eighties* (Ottawa: The Council, 1981).
130. M. Pelletier, "Le revenu minimum garanti: une stratégie de bien-être social ou un instrument de politique économique," *Canadian Public Policy* (1975), pp. 503–505.
131. *Supra*, note 129.
132. Marsh, *supra*, note 62, pp. 81, 82.
133. The support can be explained by the need for the plan. However, on no occasion did workers accept the method of financing that was planned.
134. *The Income Security System*, *supra*, note 1, p. 16.
135. *Ibid.*
136. *An Act to Provide for Family Allowances*, S.C. 1944–1945, c. 40.
137. *The Income Security System*, *supra*, note 1, p. 16.
138. Y. Bergeron, *Social Spending in Canada* (Ottawa: Canadian Council on Social Development, 1979), p. 21.
139. *Quebec Family Allowances Plan*, S.Q. 1973, c. 36.

140. *Family Allowances Act*, R.S.P.E.I. 1974, c. F–2, s. 1.

141. *Family Allowances Act*, S.C. 1973–1974, c. 44. s. 13; *Government Expenditures Restraint Act*, S.C. 1976–77, c. 3, ss. 6 and 9; *An Act to Amend the Income Tax Act to Provide for a Child Tax Credit and to Amend the Family Allowances Act, 1973*, S.C. 1978–1979, c. 5, s. 10.

142. *An Act to Amend the Income Tax Act*, S.C. 1978–1979, c. 5; *An Act to Amend the Statute Law Relating to Income Tax*, S.C. 1983–1984, c. 1, s. 65(1).

143. Economic Council of Canada, *The Challenge of Growth and Change: Fifth Annual Review* (Ottawa: Queen's Printer, 1968).

144. *An Act to Provide for Old Age Security*, S.C. 1951, c. 18.

145. *Supra*, note 143.

146. *Working Paper on Social Security*, *supra*, note 84, p. 24, proposal no. 1 (emphasis added).

147. Herbert J. Gans, "The Positive Functions of Poverty and Inequality," in *Structured Inequality in Canada*, edited by J. Harp and R. Hofley (Scarborough: Prentice-Hall, 1980), pp. 140–83.

148. *Quebec Pension Plan*, R.S.Q. 1977, c. R-9, ss. 105 *et seq.*

149. R.S.Q., c. S-37.1, s. 2(b).

150. R.S.Q., c. A-25.

151. *Ibid.*, ss. 19 and 26.

152. *Ibid.*, s. 20.

153. R.S.Q., c. 1-6, ss. 5 and 18.

154. *General Welfare Assistance Regs.*, R.R.O. 1970, Reg. 383, ss. 12 *et seq.*; *Social Development Act Regs.*, *B.C. Gazette*, Part II, B.C. Reg. 4971–76, p. 616, Schedule B.

155. *Canada Assistance Plan*, S.C. 1966–1967, c. 45.

156. *Blind Persons Aid Act*, S.Q. 1937, c. 83.

157. *An Act Representing Assistance to Disabled Persons*, S.Q. 1954–1955, c. 9.

158. *An Act to Provide Assistance to Needy Mothers*, S.Q. 1937, c. 81.

159. R. Dick, "The Canada Assistance Plan: The Ultimate in Cooperative Federalism," *Canadian Public Administration* (1970), p. 587.

160. *Ibid.* Except the case of workers on strike for which the provincial position prevailed over the federal position that they should be eligible for aid.

161. A. Wei Djao, "Social Welfare in Canada: Ideology and Reality," *Social Praxis* (1979), p. 35ff. "A province-wide survey conducted in Alberta in 1972 revealed that although most respondents approved of government involvement in welfare programs, they thought that many undeserving poor were abusing the system. They felt that only the sick, the aged, and the single parents should get public assistance" (p. 45).

162. *The Social Assistance Act, 1977*, S.N. 1977, c. 102, ss. 6(a), (b), (c), (d) and (e).

163. " . . . if, in the opinion of the office of the Department, social assistance is necessary for the proper maintenance or rehabilitation of that person or his family (*ibid.*, s. 6(f)).

164. *Regs. to Amend the Social Allowance Regs.*, Alta Regs. 45/76, *Alberta Gazette*, Part II, February 28, 1976. In April 1982, a long-term recipient received aid of $176 per month while a short-term recipient received $136. In the latter case, costs for lodging and clothing are not taken into consideration; see Alta Regs. 91/82, *Alberta Gazette*, Part II, March 15, 1982.

165. *The Public Welfare Act*, R.S.A. 1955, c. 268, ss. 2(c), 37(a) and 38.

166. The distinction must be drawn between forced labour and incitement to return to work. The recipient subjected to forced labour is not being reintegrated into the working population because he is not being paid for his work. Doing the work is a condition for obtaining aid. See, for example, *The Public Welfare Act*, R.S.A. 1955, c. 268, s. 29.

167. R.S.O. 1980, c. 151, s. 7.

168. R.S.O. 1980, c. 188.

169. *General Welfare Assistance Regs.*, R.R.O. 1980, Reg. 441, s. 1(2).

170. Comparing the benefits under the regulations adopted pursuant to the *General Welfare Assistance Act of 1970*, R.R.O. 1970, Reg. 383) with those under the *Family Benefits Act* of 1970 (R.R.O. 1970, Reg. 287), it appears that the latter provides 20 percent more. The current regulation enacted pursuant to the *General Welfare Assistance Act* also provides for two scales for housing allowances: $163 for the unemployable and $141 for the employable. (R.R.O. 1980, Reg. 441).

171. *The Social Assistance Act, 1977*, S.N. 1977, c. 102; *The Social Allowance Act*, R.S.M. 1970, c. 160, s. 5(1)(a) which removes from the definition of those eligible for aid, persons unfit to work for a period of less than 90 days, irrespective of s. 2(g) (i) of the *Canada Assistance Plan*, S.C. 1966–1967, c. 45.

172. *Social Welfare Act Regs.*, N.B. 1974, Reg. 34/74 O.C. 74-263, s. 7(1), *New Brunswick Royal Gazette*, pursuant to the *Social Welfare Act of New Brunswick*, R.S.N.B. 1973, c. S-11; *Guaranteed Available Income for Need Act*, S.B.C. 1976, c. 19, s. 26(f): Unless a person's property is less than $160 in value or if the person is not a resident of the province, he will not be eligible for benefits in British Columbia if he is fit for work.

173. See above for Ontario and Alberta. *Social Welfare Act Regs.* N.B. 1974, Reg. 34/74 O.C. 74–263, ss. 15 and 15(a), *New Brunswick Royal Gazette*, pursuant to the *Social Welfare Act of New Brunswick*, R.S.N.B. 1973, c. S-11: This regulation provides for benefits equal to old age pension benefits (with the supplement) for those unfit for work while benefits for those able to work are set at 55 percent of the net minimum wage.

174. See *General Welfare Assistance Regs.*, R.R.O. 1980, Reg. 441, s. 3(1)(b).

175. See *Alberta Social Development Act*, R.S.A. 1970, c. 345, s. 13(2); *Guaranteed Available Income for Need Act*, S.B.C. 1976, c. 19, s. 19; *Social Aid Act*, R.S.Q. 1977, c. A-16, s. 12; *Social Aid Regulation*, R.R.Q., c. A-16, r. 1, s. 14.

176. *Guaranteed Available Income for Need Act*, S.B.C. 1976, c. 19.

177. *General Welfare Assistance Regs.*, R.R.O., 1970, Reg. 383, s. 3(b).

178. *General Welfare Assistance Regs.*, R.R.O. 1980, Reg. 441, s. 3(6).

179. For example, programs established pursuant to section 56 of the *Workmen's Compensation Act*, R.S.Q., c. A-3, allowing the Commission de santé et sécurité au travail to suspend rehabilitation benefits if the worker does not look for work or does not cooperate with his rehabilitation officer. Thus a woman worker in non-traditional employment will be required to become a secretary because of the needs of the labour market. Refusal will entail suspension of benefits. Another example is found in the new regulations providing for a supplement in social aid benefits for those under 30 completing high school (Cegeps and universities excluded); *Social Aid Regulations* (1984). 116 O.G. II, p. 1687. The idea of rehabilitation, whether it is applied to injured workers or to the "poor," allows the administration to recycle recipients into priority areas of the economy.

180. S.C. 1970–1971–1972, c. 48, s. 25.

181. Canada, Task Force on Labour Market Development, *Labour Market Development in the 1980s* (Ottawa: Department of Employment and Immigration), p. 83.

182. *Ibid.*, p. 96.

183. *Ibid.*, p. 43.

184. S.C. 1970–1971–1972, c. 48, ss. 24, 41 *et seq.*

185. *The Public Welfare Act*, R.S.A. 1955, c. 268, s. 29.

186. *Support of the Poor Act*, R.S.N.B. 1952, c. 221, s. 3(1).

187. *Ibid.*, s. 3(2).

188. *Social Assistance Act*, S.N.B. 1960, c. 9, s. 64.

189. *Municipal Homes Act*, R.S.N.B. 1952, c. 152; followed by *Social Assistance Act*, S.N.B. 1960, c. 9, s. 40; repealed by the *Social Welfare Act*, S.N.B. 1966, c. 27.

190. *Public Welfare Act*, R.S.O. 1955, c. 268 (in force until July 1, 1970).

191. *An Act to Amend the Unemployment Insurance Act, 1971*, S.C. 1978–1979, c. 7.

192. *The Social Development Act Regs.*, Alta Regs. 49/79, *Alberta Gazette*, Part II, February 28, 1977, O.C. 121/79, s. 9.
193. *Social Aid Act*, R.S.Q., c. A-16, s. 12; administratively, this measure has allowed the state to have more control over Quebec women in the exercise of their rights against their husbands for maintenance.
194. See *Social Aid Act*, R.S.Q., c. A-16, s. 13.1; *Social Development Act*, R.S.O. 1980, c. S-16, s. 14.1; *An Act Respecting Social Security for Residents of Manitoba*, R.S.M., c. S-160, s. 14.
195. *Guaranteed Available Income for Need Act*, S.B.C. 1976, c. 19, ss. 16(1) and 16(4).
196. *Legal Settlement Act*, R.S.N.B. 1952, c. 128, s. 8; repealed by *Social Assistance Act*, S.N.B. 1960, c. 9, s. 66.
197. *Family Benefits Act Regs.*, R.R.O. 1980, Reg. 151, s. 34(2).
198. *Social Aid Act*, R.S.Q., c. A-16, ss. 1(b) and 1(d): definition of "family" and "consort."
199. See, for example, 1978 C.A.S. 40; 1978 C.A.S. 458. Decisions concerning welfare cuts because of the presence of a consort in the home (living maritally).
200. P. Lefebvre, *Impact redistributif de la sécurité du revenu*, vol. 8206 (Montreal: Labrev, 1982), pp. 42, 43.
201. *Family Benefits Act Regs.*, R.R.O. 1980, Reg. 318, ss. 14 *et seq.*
202. See *Social Development Acts Regs.*, Alta Regs. 129/78, *Alberta Gazette*, Part II, April 25, 1978, O.C. 355/78, s. 4: discretion to grant a supplement of $15 to the basic monthly allowance of $100. *Guaranteed Available Income for Need Act*, B.C. Regs., *B.C. Gazette*, Part II, September 15, 1976, O.C. 2531, Schedule A, s. 12: Discretionary grants for special needs in 1976.
203. R.C. Baetz and K. Collins, "Equality Aspects of Income Security Programs," *Canadian Public Policy* (1975): 487–98.
204. *Family Allowance Act, 1944*, S.C. 1944–1945, c. 40.
205. Marsh, *supra*, note 62.
206. R.S.Q., 1977, c. S-37.
207. M. Pelletier, "Le supplément au revenu de travail: Une stratégie de bien-être social," *Les Cahiers du socialisme* (Autumn 1979).
208. J. Francoeur, "Jouer à qui perd gagne," *Le Devoir*, July 27, 1984, p. 6.
209. *An Act to Amend the Unemployment Insurance Act, 1971*, S.C. 1978–1979, c. 7 s. 5.
210. *Ibid.*, s. 4.
211. *Ibid.*
212. *An Act to Amend the Unemployment Insurance Act, 1971*, S.C. 1974–1975–1976, c. 80, s. 15.
213. *Employment and Immigration Reorganization Act*, S.C. 1976–1977, c. 54, ss. 26, 31 and 41.
214. (1983), 1 S.C.R. 2.
215. "Les diverses hypothèse d'implantation d'une première étape de revenu minimum garanti," (Quebec: Executive Council, October 1978), p. 21.
216. *Supra*, note 172.
217. *Health Insurance Act*, S.Q. 1970, c. 37.
218. *Health Services and Social Services Act*, S.Q. 1971, c. 48.
219. "The elimination of the scourge of poverty from the land is a vital national goal . . . . The test of national progress is surely not merely in providing more for those who have much — but also in providing enough for those who have too little." (Special Senate Committee on Poverty, *supra*, note 83, p. xiii). The point of view of the Economic Council of Canada in *The Challenge of Growth* (*supra*, note 143, p. 105), is no less explicit: "We believe that serious poverty should be eliminated in Canada, and that this should be designated as a major national goal. We believe this for two reasons. The first is that one of the wealthiest societies in world history, if it aspires to

be a just society, cannot avoid setting itself such a goal. Secondly, poverty is costly. Its most grievous costs are those felt directly by the poor themselves, but it also imposes very large costs on the rest of society."

220. *The Income Security System*, *supra*, note 1, p. 28.
221. The viewpoint of the economist Diane Bellemare in *La sécurité de revenu*, (*supra*, note 36) certainly was not the same as that of the Senate report (*supra*, note 183, p. xix), which stated that it was convinced "that the Canadian people whose lives are spent in a far different world are ready to face the challenge of poverty."
222. See F. Chevrette and H. Marx, *Droit constitutional* (Montreal: Presses de l'Université de Montréal, 1982), pp. 662, 663.
223. Amendments to the *British North America Act*, s. 91-2A, unemployment insurance, added by the *British North America Act, 1940*, 3-4 Geo. VI, c. 36 (U.K.) and s. 94-A, old age pensions, added by the *British North America Act, 1964*, 12-13, Eliz. II, c. 73 (U.K.) originally enacted by (1951), 14-15 Geo. VI, c. 32 (U.K.).
224. Bellemare, *supra*, note 36, p. 660.
225. S.Q. 1965, c. 24.
226. "A Canadian Press release in the Montreal Gazette (March 9, 1978) observed that in 1977, 9% of the GNP was channeled into social security, compared with 3% in the early 1950s and 5% in the mid-1960s." (J. St-Laurent, "Income Maintenance Programs and Their Effects on Income Distribution in Canada," in *Structured Inequality in Canada*, edited by J. Harp and J.R. Hofley (Scarborough: Prentice-Hall, 1980). See also Canadian Council on Social Development, *Social Responsibility . . . to Challenge the Future*, Canadian report to the 22nd International Conference on Welfare, Montreal, 1984 (Ottawa: The Council, 1984), and Bergeron, *supra*, note 138, p. 4.
227. St-Laurent, *supra*, note 226, p. 422.
228. Data compiled by the Organisation de lutte contre la pauvreté and published in *Le Devoir*, September 26, 1984. According to the organization, the increase in poverty "was a frightening 23 percent compared with 1981" (translation).
229. "Poverty in Canada is real. Its numbers are not in the thousands, but the millions. There is more of it than our society can tolerate, more than our economy can afford, and far more than existing measures and efforts can cope with. Its persistence, at a time when the bulk of Canadians enjoy one of the highest standards of living in the world is a disgrace." Economic Council, *supra*, note 143, p. 103.
230. Robichaud, *supra*, note 73. See also Beatz and Collins, *supra*, note 203.
231. Robichaud, *supra*, note 73, p. 7; see also David Ross, *Canadian Fact Book on Income Distribution* (Ottawa: Canadian Council on Social Development, 1975), p. 93.
232. St-Laurent, *supra*, note 226, p. 430; see also L. Osberg, *Economic Equality in Canada* (Toronto: Butterworth, 1980), p. 36, and Banting, *supra*, note 82, pp. 84, 85.
233. W. Irwin Gillespie, "On the Redistribution of Income in Canada," *Canadian Tax Journal* 24 (1976): pp. 419–20; see also Osberg, *supra*, note 232, p. 205.
234. Wei Djao, *supra*, note 161, p. 39.
235. David Ross, "Income Security," in *Canadian Social Policy*, edited by Shankar A. Yelaja (Waterloo: Wilfrid Laurier University Press, 1978), p. 57.
236. R.H. Tawney, "The Religion of Inequality," in *Wealth, Income and Inequality*, 2d ed., edited by A.B. Atkinson (Oxford: Oxford University Press, 1981).
237. Wei Djao, *supra*, note 161; see also Baetz and Collins, *supra*, note 203, p. 489.
238. Wei Djao, *supra*, note 161, p. 39.
239. *Ibid.*, p. 41.
240. *Ibid.*, p. 43.
241. Baetz and Collins, *supra*, note 203, p. 492; see also Bergeron, *supra*, note 138, p. 48.
242. Canadian Council on Social Development, *Le poids des impots, le partage des bénéfices* (Ottawa: The Council, 1978), and Baetz and Collins, *supra*, note 203, p. 494; see also, D. Ross, *supra*, note 231, p. 94.
243. Wei Djao, *supra*, note 161, p. 49.

244. St-Laurent, *supra*, note 226, p. 439.
245. Osberg, *supra*, note 232, p. 37.
246. *Guaranteed Available Income for Need Act*, B.C. Regs., *B.C. Gazette*, Part II, September 15, 1976, O.C. 2531, s. 2(20).
247. This was clearly recognized by the Economic Council of Canada, the Special Senate Committee on Poverty, and the Commission d'enquête sur la santé et le bien-être social (Castonguay-Neveu Commission) in its report, *La sécurité du revenu*, vol. 1 (Quebec, 1971).
248. D. Ross, *Canadian Fact Book on Income Distribution* (Ottawa: Canadian Council for Social Development, 1980), p. 63.
249. *Ibid.*, p. 63.
250. Given that approximately 30 percent of the financial transfers are to families with income well above the poverty line, the majority of studies reveal that between 15 and 20 percent of individuals and Canadian families avoid poverty thanks to the income security programs.
251. *Opération rénovation sociale* (Montreal: Conseil des oeuvres de Montréal, 1966), p. 17.
252. Dennis Guest, *The Emergence of Social Security in Canada* (Vancouver: University of British Columbia Press, 1980), pp. 3, 4.
253. J. Harp and J.R. Hofley (eds.), *Structured Inequality in Canada* (Scarborough: Prentice Hall, 1979), pp. 6, 7. It should be noted that material insecurity is compounded by psychological insecurity and at times by humiliation and scorn for the recipient who finds himself subject to arbitrary decisions and discretionary government policy which varies according to the economic and political atmosphere and the moods of civil servants.
254. The supplement guarantees for all elderly Canadians what has been called a "basic income" and which in 1980 was from 8 to 14 percent below the poverty line; see the Association québécoise pour la défense des retraités et préretraités, *La situation économique des retraités*, 3d ed. (Montreal, 1980), p. 30.
255. In 1980, less than 50 percent of retired persons in Quebec received pension income from the Quebec Pension Plan and 62 percent of these persons were living below the poverty line (*ibid.*, p. 30).
256. Bellemare, *supra*, note 36, p. 112.
257. D. Ross, *Fact Book*, p. 63; see also Osberg, *supra*, note 232, p. 63. How could it be otherwise? "Sixty percent of the poor are not on welfare. . . . The vast majority of the "working poor" continue to work at jobs that pay no more than they would receive on welfare." Special Senate Committee on Poverty, *supra*, note 83, pp. xi, xii.
258. D. Ross, *Fact Book*, p. 65; see also Claus Offe, "Advanced Capitalism and the Welfare State," *Politics and Society* (11) (1972), pp. 480, 481.
259. Canadian Council on Social Development, *supra*, note 226, p. 83.
260. *Ibid.*
261. *Ibid.*
262. *Ibid.*, p. 87; see also F.F. Piven and R.A. Cloward, *The New Class War* (New York: Pantheon Books, 1982).
263. Quest, *supra*, note 252. p. 205.
264. For example, an "insufficient income line" or a "minimum social income line" is conceivable. Of course, here it is a question of defining and creating an economic measure since it would be necessary to set a certain income below which it would be considered socially unacceptable for a Canadian to fall and which would be sufficient to provide the basic necessities of life. This measure would have the advantage of removing all ambiguity surrounding the concept of poverty which itself involves much more than the single aspect of economic deprivation. Thus, it would doubtless be more realistic to adopt the goal of eliminating insufficiency of income rather than poverty for which the relative nature will always provide a pretext to those who accept the unchanging income disparities existing in Canada over the past 30 years.

Finally, concerning the setting of the thresholds and definition of basic needs, in Canada there is no shortage of studies or data which could provide the basis for a consensus.

265. The last remark is equally applicable to the many proposals for guaranteed minimum income which have been made since the beginning of the 1970s. But, taking into consideration the complexity of the problem and the many effects on the economy which would result in any case from the adoption of the simplest and most effective system, it is of the greatest importance for us to see an affirmation of the goal and evidence of the political will to accomplish it. In this context, it would be better to return to the late 1960s and to the objectives of bodies as little known for radicalism as the Canadian Council on Social Development rather than fall back into the conservative thinking which has dominated the 1980s until now.

266. We are referring to the *Constitution Act, 1982*, enacted by the *Canada Act, 1982*, U.K. 1982, c. 11, Part I, Canadian Charter of Rights and Freedoms.

267. The Senate Special Committee on Poverty has already provided for such a procedure, Statistics Canada has developed indexation formulae, and reference could also be made to the different mechanisms applied to the Quebec Pension Plan.

268. *Constitution Act, 1982*. Its effect is to protect Canadians from arbitrary decisions and government discretion. Moreover, this proposal would not entail the abolition of existing systems of income security; certain social insurance programs such as workers' compensation often provide an income above today's poverty line. In other words, our proposal includes the preservation of vested rights and would exclude any type of standardization of social security programs tending to reduce benefits. Furthermore, we realize that in order to reach such a goal, it would be necessary to embark upon the two-pronged program of social security reform and constitutional change which was dropped at the beginning of the 1970s. See *supra*, notes 83 and 94.

269. André Gorz, *La morale de l'histoire* (Paris: Seuil, 1958), p. 234.

270. Ripert, *supra*, note 79, p. 56.

Robert D. Bureau is Professor in the Faculty of Law, Université du Québec à Montréal.

Lucie Lamarche is Professor in the Faculty of Law, Université du Québec à Montréal.

Katherine Lippel is Professor in the Faculty of Law, Université du Québec à Montréal.

Mary Jane Mossman is Associate Professor in the Osgoode Hall Law School, York University, Toronto.

Julien D. Payne is Professor in the Faculty of Law, University of Ottawa.

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Family Law and Social Welfare Legislation in Canada

IVAN BERNIER and ANDRÉE LAJOIE, Research Coordinators

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IVAN BERNIER is Dean of the Faculty of Law, Université Laval, Quebec.
ANDRÉE LAJOIE is Professor in the Faculty of Law, University of Montreal.

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