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# Welfare Fraud: The Constitution of Social Assistance as Crime

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**Welfare Fraud:  
The Constitution of Social Assistance as Crime**

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This paper was prepared for the Law Commission of Canada. The views expressed are those of the authors and do not necessarily reflect the views of the Commission.

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## **Table of Abbreviations**

C.A.P.A.	– <i>Canada Assistance Plan Act</i>
C.R.A.	–Canada Revenue Agency
C.R.I.L.F.	–Canadian Research Institute for Law and the Family
C.V.P.	–Consolidated Verification Procedures
E.R.O.	–Eligibility Review Officer
E.S.A.	– <i>Employment Standards Act</i>
E.S.O.	–Employment Standards Officer
F.B.A.	– <i>Family Benefits Act</i>
G.W.A.A.	– <i>General Welfare Assistance Act</i>
I.T.A.	– <i>Income Tax Act</i>
K.P.M.G.	–Klynveld, Peat Marwick, Goerdeler
M.P.P.	–Member of Provincial Parliament
O.D.S.P.	–Ontario Disability Support Program
O.D.S.P.A.	– <i>Ontario Disability Support Program Act</i>
O.S.A.P.	–Ontario Student Assistance Program
O.W.	–Ontario Works
O.W.A.	– <i>Ontario Works Act</i>
P.O.A.	– <i>Provincial Offences Act</i>
S.A.R.A.	– <i>Social Assistance Reform Act</i>
S.A.R.C.	–Social Assistance Review Committee
S.T.E.P.	–Supports Toward Employment Program

## Executive Summary

In the past decade 'welfare fraud' has attracted substantial political and public attention. In undertaking the most significant reforms to Ontario's social assistance regime in decades, fighting welfare fraud was expressly identified as a central objective, and a vast array of new measures were introduced to assist the government to win this battle. 'Welfare fraud' is now policed in such a way as to evoke a major crime against the public, one that is deserving of widespread moral condemnation and intensive policing and punishment. The impression that there is widespread defrauding of benefits by recipients has been so successfully installed in public discourse and government policy that social assistance is now primarily viewed not as a necessary form of support for those in need, but rather negatively, as a burdensome problem of regulation, policing and crime control. Those on social assistance, the far majority of them women and children, are widely viewed as morally suspect persons, criminals in waiting poised to abuse a public expenditure and trust. But in fact, much of the conduct so frequently characterized as 'fraud' falls far outside the boundaries of formal criminal law to include virtually all situations where a rule is breached. Moreover, because the welfare system is rife with literally hundreds of complex rules, errors on the part of both recipients and bureaucrats are not only common, but unavoidable. Yet, it is often these unintended rule violations that are portrayed as the 'fraud' within the system.

In order to fully understand how 'welfare fraud' is presently constituted, we argue that it is imperative to locate it within a much wider shift that has occurred in how poor people and poverty are positioned within the character of the 'reformed' welfare state. Our review of welfare reform in Ontario reveals that the ideal of the poor having an entitlement to assistance based on need has now been widely diminished, and replaced with a construction of poor people as a public burden who should themselves be held responsible, and even personally blamed, for their circumstances. The principle of entitlement has been replaced with a narrow view of the entrepreneurial citizen, who, as defined by the *Ontario Works Act, 1997* is self-reliant, responsible and accountable to the taxpayers of Ontario. A significant reduction in benefits, the introduction of workfare, and a revised definition of spouse are each concrete instances reflective of this shift, and each has significant implications for 'welfare fraud'.

Welfare fraud is frequently characterized as pervasive, although if one considers actual instances of criminal convictions for fraud, the incidence is exceptionally low: convictions represented roughly 0.1% of the social assistance caseload in 2001-02, notwithstanding more than 38,000 investigations being undertaken. The notion that fraud is rampant has been used to support a wide array of mechanisms to detect and deter fraud. These include broad consents to the release of personal information, information-sharing agreements with a host of state and non-state entities, expanded powers for eligibility review officers, consolidated verification procedures (requiring the extensive and on-going production and verification of documentation), provincial and local fraud control units, protocols negotiated with local police and crown attorneys, a toll-free welfare hotline, and for a period of time in Ontario, a lifetime ban on receipt of welfare if convicted of welfare fraud. Significantly, notwithstanding that an earlier government-commissioned review of social assistance in Ontario concluded that adequate welfare benefits were the single most important measure to reduce fraud, the Conservative government of Mike Harris rejected this as an anti-fraud strategy, instead opting to reduce benefits by 21.6%.

Those who are in receipt of welfare benefits live within the web of surveillance created by these various measures to detect and deter fraud. They commonly report feeling distrusted and under suspicion not only in their interactions with the welfare system, but more broadly with neighbours, landlords, teachers, etc.—that is, with anyone who might take up the invitation of the government to aid in the fight against welfare fraud by calling the welfare fraud hotline. The two areas where fraud investigations are most commonly targeted are the failure to report income, and the failure to disclose that one is living with a spouse. Several important observations can be made regarding the policing of both income and intimate relationships. The rules regarding each are complex and often counter-intuitive and it is frequently difficult to discern when the reporting obligation arises. Secondly, behaviour which in any other context would never attract criminal investigation—in fact, behaviour which is frequently lauded—becomes the object of suspicion, interest, interrogation and potentially sanction: a regular meal at a friend's house; an evening out on a date or a visit to your home; or the payment of your hydro bill by your parents. Thirdly, both areas, but especially that of 'spouses', impact most harshly upon women.

Notwithstanding a Fraud Control directive issued by the Ministry of Community and Social Services that is to provide the framework for local Ontario Works administrators, one finds tremendous variation in the processing of welfare fraud cases across the province. For example, while the directive clearly indicates that the only consideration in deciding whether the matter should be referred to the police is whether there is sufficient evidence to suspect intent to commit fraud, many local offices have established a dollar value threshold, most commonly set at \$5, 000. Cases below this amount (the break point for indictable fraud under the *Criminal Code*) will not be referred. Some local offices will consider a host of personal factors—was need the motivation, was there domestic violence, what will be the consequences of conviction—before referring, while others refuse to do so.

There are, however, common concerns that emerge across local offices. Perhaps the most significant of these is the pervasive misapprehension that rule violations of any sort constitute criminal fraud. As noted above, there are substantial and on-going reporting requirements, including, for example, the obligation to report a change in circumstances or the receipt of income. If a recipient has failed to report as required, this is commonly characterized as fraud. Yet, in a great many of these instances, the conduct falls far short of what is actually necessary to satisfy the *Criminal Code* test for fraud. A related error that is commonly made where a recipient says she didn't know or didn't understand the rule in issue (for example, that she didn't understand that most loans are considered income and are thus reportable), is to respond with the invocation that "ignorance of the law" is no excuse. But this is an incorrect application of the doctrine; her lack of knowledge of the rules is not being invoked to argue that she did not know the law of fraud and hence cannot be guilty of fraud, but rather to negate the *mens rea* of the offence. Yet, over and over, we heard of instances where recipients were threatened with fraud charges (and often agreed to terminations and over-payments as a result) or were charged with fraud and plead guilty in precisely these kinds of circumstances. The misapprehensions as to what conduct actually constitutes criminal fraud are rife throughout the social assistance system. And perhaps more distressingly, can also be found within the criminal justice system itself.

If convicted of welfare fraud, the sentence will be a particularly harsh one. The courts have long held that general deterrence is the paramount principle and that absent

exceptional mitigating circumstances, a sentence of incarceration is warranted. It is not at all uncommon to find periods of incarceration being ordered for even relatively small amounts of fraud (less than \$5,000) for a first offender. While the availability of conditional sentences may appear to ease the harshness of incarceration, this is often not the case for low income accused, as was made distressingly clear by the death of Kimberley Rogers, who died while serving a period of house arrest for welfare fraud, eight months pregnant, permitted to leave her home (a small apartment without air conditioning) for only three hours per week. Her crime had been to attend college and receive OSAP, without disclosing it, while in receipt of Ontario Works. The sentencing judge ordered her to serve her sentence not in jail, but under house arrest, because she had, in his view, already taken too much from her community. In other words, she was to fund her own incarceration. At the time the sentence was imposed, she was also subject to a three-month ban on the receipt of welfare benefits.

In their sentencing decisions, judges commonly characterize welfare fraud as a breach of trust and as a crime against every member of the community (both are counted as aggravating factors). Judges are inclined to describe those accused of welfare fraud as taking from those "genuinely in need", implying that the accused persons before them were not genuinely in need, and ignoring the reality that in the vast majority of cases where fraud charges are laid, need was the motivating factor. Judges frequently describe the accused's poverty as being of her own making, and will rarely find any of her compelling personal circumstances (the depth of her poverty, her struggle to provide for her children on an inadequate income, the abuse she may have experienced from an intimate partner) as mitigating considerations.

The normative character of the 'crime' of welfare fraud is also revealed by the disparities that exist between welfare fraud regulation and other forms of economic misconduct. In almost every respect 'tax evasion' and 'employee standards violations' (in particular the failure of employers to pay wages owing) are viewed in a much less punitive and severe light in terms of the moral culpability attached to the conduct, the range of detection and enforcement tools utilized and the penalties that follow upon conviction. This disparity suggests a clear normative distinction at work, one that is aligned with neo-liberal values that views poor people as not deserving of support, but rather of intense scrutiny and

inequitable treatment.

We are drawn to the conclusion that the receipt of social assistance itself has become criminalized through the category of welfare fraud. Simply being on social assistance results in one being positioned as a penal object in a climate of moral condemnation, surveillance, suspicion and penalty. This criminalization is particularly gendered in that the majority of people on social assistance are women, and the majority of them are single parents. And it is not only the intimate aspect of women's lives that is utilized as an area of control in social assistance regulation, but also the social sphere of everyday life as well. And despite a rhetoric of 'community responsibility' in government discourse, it is the very people that might constitute a support network in the community—neighbours, family, boyfriends, landlords, school officials—that are either re-responsibilized as agents to snitch on any perceived 'fraud', or are possibly complicit in rule breaking by being supportive, by for example, buying food for a mother and her child who have exhausted what is a completely inadequate benefit for that month. And the insidious character of this criminalization completely devalues women as mothers—that, for example, being a single parent surviving in poverty constitutes simply 'sitting around' and 'doing nothing'. It is no wonder that being on social assistance has been characterized by an experience of fear, retribution and isolation—qualities that 'cracking down' on welfare fraud intentionally generate.

## **Welfare Fraud: The Constitution of Social Assistance as Crime**

### **1 Introduction**

In the past decade 'welfare fraud' has attracted substantial political and public attention. In undertaking the most significant reforms to Ontario's social assistance regime in decades, fighting welfare fraud was expressly identified as a central objective, and a vast array of new measures were introduced to assist the government to win this battle. 'Welfare fraud' is now policed in such a way as to evoke a major crime against the public, one that is deserving of widespread moral condemnation and intensive policing and punishment. The impression that there is widespread defrauding of benefits by recipients has been so successfully installed in public discourse and government policy that social assistance is now primarily viewed not as a necessary form of support for those in need, but rather negatively, as a burdensome problem of regulation, policing and crime control. Those on social assistance, the far majority of them women and children, are widely viewed as morally suspect persons, criminals in waiting poised to abuse a public expenditure and trust. But in fact, much of the conduct so frequently characterized as 'fraud' falls far outside the boundaries of formal criminal law to include virtually all situations where a rule is breached. Moreover, because the welfare system is rife with literally hundreds of complex rules, errors on the part of both recipients and bureaucrats are not only common, but unavoidable. Yet, it is often these unintended rule violations that are portrayed as the 'fraud' within the system.

In order to fully understand how 'welfare fraud' is presently constituted, we argue that it is imperative to locate it within a much wider shift that has occurred in how poor people and poverty are positioned within the character of the 'reformed' welfare state. Our review of welfare reform in Ontario reveals that the ideal of the poor having an entitlement to assistance based on need has now been widely diminished, and replaced with a construction of poor people as a public burden who should themselves be held responsible, and even personally blamed, for their circumstances. While the provision of social assistance has always been a contested role of the state, there has been a significant hardening of the view that receiving social assistance amounts to getting 'something for nothing' by people who are lazy and simply do not want to be responsible for themselves and their families.

In the place of need-based entitlement, or any principle stating the importance of providing an adequate level of support to the disadvantaged, is a narrow view of the entrepreneurial citizen, who, as defined by the *Ontario Works Act, 1997* is self-reliant, responsible and accountable to the taxpayers of Ontario.<sup>1</sup> With the principle of entitlement removed, these reforms construct a form of contractualism between those on social assistance and the 'honest taxpayer', one that is enforced through the logic of a narrow economic rationalism. The introduction of 'workfare' (a term that tellingly signals *neither* employment nor social assistance) is the most dramatic tool that enforces this contractualism between the taxpayer and those on social assistance, one that ensures that no one will get 'something for nothing'.

This shift towards individual responsibility also encompasses a notion of responsibility for 'family'. In the context of the reforms to welfare, this has been enacted through the introduction of an expansive definition of 'spouse', wherein co-residency creates a *de facto* presumption of spousal status, and disqualifies one from state support as a 'single person'. The impact of these reforms has been to disqualify very significant numbers of women, largely single mothers, from eligibility for state economic support, and has forced them into relationships of economic dependence upon men who frequently have, at law, no corresponding obligation to support them. Our study reveals that the surveillance and policing of women's intimate relationships constitutes one of the most significant pre-occupations of the welfare fraud regime. The policing of welfare fraud systematically targets the bodies, social relations, and self-identities of women, and women are far more likely than men to be accused of welfare fraud.

The repositioning of those on social assistance has not just resulted in a diminished location within a political economy of obligation, but has at the same time resulted in the poor being made more visible as central targets of what has been characterized as the entrenchment of the politics of a 'crime-control' movement. These circumstances can be productively contrasted with what David Garland has characterized as a 'penal-welfare era'.<sup>2</sup> The penal-welfare era, that peaked in the early 1970's, was characterized by a climate wherein the state itself was viewed to have a monopoly on crime fighting, and generally enjoyed widespread public trust that it could in fact keep crime under control.

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<sup>1</sup> *Ontario Works Act, 1997*, S.O. 1997, c.25 Schedule A, section 1.

This 'top down' administration of order constructed the citizen as a passive and trusting subject, happy to leave crime and punishment in the hands of the professional, that is, state agents and experts. Spending on social programs (guided, for example, by liberal notions such as rehabilitation) was viewed as necessary, and as politically feasible at a time of robust economic performance.

In the last thirty years, there has been a shift that is radical and sweeping. Facilitated by neo-liberal values that have dominated how the welfare state should be reformed, this movement has been characterized as a 'crime control complex'<sup>3</sup> that has (quite paradoxically in an era of 'less government') vastly expanded the field of social order which the state can now claim as a legitimate regulatory interest. The encompassing of vague notions of safety, security and victimization anchored in symbolic appeals to emotion and sentiment, the targeting of small forms of disorder that are dubiously linked with serious crime, the mobilization of agents, institutions and mechanisms that are only tenuously connected to the state and formal legal processes: these are central aspects of the features of a regulatory network that extend far beyond the traditional targets of the criminal justice system. One over-arching effect of this shift is that areas of state interest that were traditionally conceived of as spheres of 'public policy' (such as education, social welfare and immigration) have been translated into problems of crime, social disorder and regulatory control.

Our study reveals that the network of social assistance regulation now in place to combat welfare fraud exemplifies the shift that has occurred to a 'crime-control' society in two central ways: first, the major techniques of social assistance regulation are only tenuously connected to the formal exercise of law and criminal justice institutions; and second, and closely tied to this, a dispersed network of agents, actors and techniques, many of which exist outside offices of formal social control, are mobilized to participate in this regulation. The result, as our study documents, is that those on social assistance are being policed by an extensive network of regulations made up of a mesh of both legal and normative forms of control.

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<sup>2</sup> David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Chicago: The University of Chicago Press, 2001).

<sup>3</sup> *Ibid.*

It should be no surprise that, given the replacement of entitlement with a contractual notion of exchange in social assistance administration, the primary actors who administer these goals focus on 'eligibility review'. Eligibility Review Officers (who investigate social assistance eligibility) have been vested with extensive powers that go beyond what we associate with police power. Under the Regulations they can, for example, compel neighbours to provide information about someone suspected of 'welfare fraud', are authorized to conduct searches without a warrant in non-dwelling houses in the course of an investigation, and with or without notice can conduct 'home visits'. And these powers are made even more penetrating and extensive when one considers the mass of vague prescriptions and prohibitions that are now in place which govern social assistance recipients. Characterized as "kafkaesque" and "fiendishly difficult", there are some 800 rules and regulations that apply to determine eligibility for social assistance, many of which are vague and applied at the discretion of local officials. Our study reveals two areas of regulation that create major spaces for capricious and extremely intrusive investigations: the resuscitated 'man-in-the-house' rule (through the definition of 'spouse') and the definition of 'income'. The Regulations governing both 'spouses' and 'income' place the recipient (the majority of them single women, many of whom are single parents) under a climate of almost total surveillance, where conduct that one would assume to have nothing to do with 'fraud', such as a boyfriend visiting for dinner, or bringing leftovers home from supper at a relative's place, can become grounds for an accusation of fraud and the withholding or terminating of benefits.

This form of regulation is made even more penetrating when one considers that 'the community' is responsabilized to play a civic role in fighting the menace of welfare fraud, and is given a specific opportunity to do so in the use of the 'welfare fraud hotline'. Neighbours, landlords, disgruntled boyfriends, or anyone with a mere suspicion of fraud, can call the hotline anonymously and accuse someone of being ineligible to be on assistance. And because the hotline enables one to simply gossip about someone (and do so anonymously) anyone with a grudge or dislike of a person on assistance can bring her into the arms of an investigation.

In addition to this mobilization of welfare eligibility agents who rely, in part, on the participation of the community, is a set of new administrative and bureaucratic features

that allow for another layer of surveillance and accusation. Social assistance recipients are subject to an extensive information-sharing network across a wide spectrum of state and non-state entities, and more specifically are targeted by consolidated verification procedures (C.V.P.). Introduced as part of the larger reform of government called the “business transformation project” this mechanism flags files for fraud investigation based on pre-determined risk factors (such as how long one has been in receipt of social assistance) that assume widespread fraud is present. Given the intense and aggressive character of this regulation, and the view that ‘welfare fraud’ is a serious and extensive crime against the public, one would expect that thousands of criminal convictions are registered every year (or at least offences under the provincial statute). Perhaps not surprisingly though, what is viewed as the successful catching of welfare fraudsters almost never involves either criminal or provincial charges; instead people are often administratively disentitled from assistance by local officers within this extensive maze of regulation and surveillance. And while few may be formally charged, virtually everyone on welfare struggles to survive and comply within this intense and unrelenting web of surveillance, experiencing on-going and profound violations of privacy and living in fear of a ‘fraud’ allegation. Moreover, very substantial numbers of recipients are subjected to fraud accusations and resulting investigations in which they are frequently put in the humiliating position of having to explain how they are managing to survive on benefits which are acknowledged to be wholly inadequate.

This report documents in detail how ‘welfare fraud’ is now constituted as a crime against the public, and more broadly, how the receipt of social assistance is being re-constituted as itself a crime. We begin by outlining the major reforms to social assistance undertaken in the past decade, including the reduction of benefits, the introduction of workfare, and the revised definition of ‘spouse’. We note the shifts described above, and analyze the importance of these shifts in the constitution not merely of welfare fraud, but of the receipt of social assistance as crime. In Part 3, we examine the lack of definitional clarity encompassed by the term ‘welfare fraud’ as it is policed as a category of crime. Of particular interest is the conflation of ‘error’ and ‘misuse’ with a criminal notion of fraud, a slippage that provokes questions about how the culpability and intent of those accused are configured within the current regime. The broad array of conduct that is commonly swept within the rubric of ‘welfare fraud’ is examined further in Part 3.b & c where we review what is known about the extent of fraud in social assistance regulation, and

summarize the measures that have been mobilized to respond to what is problematically presented as a major crime problem. We then move on, in Part 4, to outline the circumstances of those on social assistance, an existence marked by fear, scrutiny and moral apprehension at the choices that are faced by those in desperate need of economic and social support. With a sense of what it is like being a recipient of welfare sketched out, we then turn, in Part 5, to the circumstances that most commonly give rise to welfare investigations: undeclared 'income'; and living with undeclared 'spouses'. The processing of welfare fraud cases that stem from these suspicious circumstances is examined in Part 6, where we focus on the discretionary and often vague administration of policy that is carried out in local fraud control offices. The tone of moral condemnation and recrimination which characterizes the aggressive pursuit of social assistance recipients suspected of fraud is most effectively dramatized in themes that emerge in the sentences that are given to those relatively few who are actually convicted of criminal fraud, an area we explore in Part 7. Judges who convict individuals of criminal fraud in social assistance cases often talk in terms of a violation of public trust and the deprivation of the truly needy, and frequently misapprehend both the realities of living on welfare, and the level of benefits provided by our existing welfare system. In Parts 8 & 9 we draw a comparison with two other areas of economic misconduct: income tax evasion and the failure to respect employment standards and in particular the obligation to pay wages. The disparities that exist between these two regimes and 'welfare fraud' are striking, not only in terms of the formal mechanisms of regulation and punishment, but also in relation to the normative distinctions that appear to operate in terms of moral worthiness and ideas of legitimacy in the current political climate. We conclude by briefly summarizing the points of our discussion, which leads us to the conclusion that receiving social assistance itself has become criminalized through the regulation of what is constituted as welfare fraud.

## **2 An Overview of Social Assistance Reforms in Ontario**

Fundamental reforms to the social assistance system in Ontario were ushered into existence with the passage of the *Social Assistance Reform Act (S.A.R.A.)*.<sup>4</sup> The S.A.R.A. contains two schedules, the *Ontario Works Act, 1997*<sup>5</sup> (into effect May 1,

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<sup>4</sup> *Social Assistance Reform Act*, S.O. 1997, c.25.

<sup>5</sup> *Ontario Works Act*, *supra* note 1.

1998) and the *Ontario Disability Support Program Act, 1997*<sup>6</sup>(into effect June 1, 1998). In her closing comments on the third reading of Bill 142 (the S.A.R.A.), then Minister of Community and Social Services, the Honourable Janet Ecker, highlighted three objectives of the reforms embodied in the Bill: to meet the unique needs of persons with disabilities; to make self sufficiency the overriding goal of social assistance; and to fight welfare fraud.<sup>7</sup> Similarly and more recently, Debbie Moretta, the Director of the Ontario Disability Support Program (O.D.S.P.), described the Ontario Works (O.W.) regime as "a labour adjustment program, which provides short-term financial and employment assistance to persons in financial need while they participate in mandatory activities that help them take the shortest route to paid employment and financial independence" and noted that "one of the objectives of the new legislative framework was to address abuse of the social assistance system."<sup>8</sup> With the passage of the S.A.R.A., fighting welfare fraud had come to occupy a central place in the new social assistance regime.

In many important respects the reforms embodied in the new legislation reflect a marked departure from the principles and concrete recommendations arising from what was perhaps the most comprehensive review of social assistance ever undertaken in Ontario, *Transitions*, the report of the Social Assistance Review Committee (S.A.R.C.).<sup>9</sup> Rather, the historical antecedents for the embodied reforms are more dated, reaching back to the Poor Laws of the seventeenth century and the radical liberalism of the late 19<sup>th</sup> and early 20<sup>th</sup> centuries.<sup>10</sup>

In our review of the reforms we focus primarily on the O.W. regime. While the *Ontario Works Act (O.W.A.)* and the *Ontario Disability Support Program Act (O.D.S.P.A.)* share many common features, there is also much to distinguish them. Unlike the former social assistance framework in which single parents and those with disabilities were distinguished from the able-bodied 'employable', it is the existence of a recognized

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<sup>6</sup> *Ontario Disability Support Program Act, 1997*, S.O. 1997, c.25 Schedule B.

<sup>7</sup> Ontario Legislative Assembly, *Official Reports of Debates (Hansard)* 1<sup>st</sup> Session, 36<sup>th</sup> Leg., Nov 25, 1997.

<sup>8</sup> Affidavit of Debbie Moretta, sworn August 29, 2003 submitted in *Broomer et al. v. Ontario (A.G.)*, Toronto 02-CV-229203CM3 (Ontario Superior Court of Justice) at para.8 and 42.

<sup>9</sup> The Social Assistance Review Committee, Chaired by George Thomson, was established in 1986 by the Ontario Government. The Committee's final report, *Transitions*, was released in September, 1988. *Report of the Social Assistance Review Committee, Transitions* (Toronto: Queen's Printer, 1988).

disability alone that determines whether one falls under the O.W. or O.D.S.P. regimes.<sup>11</sup> Benefits for the able-bodied are significantly less than for those with statutorily recognized disabilities; and the able-bodied are subjected to a range of rules regarding employment and employment preparedness that do not apply to those found to be 'disabled'.

We have identified five significant reforms, each of which contributes to the constitution of social assistance as crime: a re-conceptualization of the purpose of social assistance; a significant reduction in benefit levels; the introduction of 'workfare'; the return of the 'man in the house' rules through a new definition of 'spouse'; and the creation of an expansive and extremely punitive fraud control regime. While these reforms were initiated through provincial legislation, it is crucial to note that many of the most significant reforms were made possible by the federal government's retreat from the social policy field, most notably through the revocation of the *Canada Assistance Plan Act (C.A.P.A.)*.<sup>12</sup> The *C.A.P.A.*, and the various federal-provincial agreements negotiated thereto, provided for federal funding of provincial social assistance programs upon certain conditions being maintained. Among these conditions was the requirement that benefit levels be set in a manner that would "take into account" the basic requirements (defined to include food, shelter, clothing, fuel, utilities, household supplies and personal requirements) of a person in need.<sup>13</sup> Significantly, in the case of *Finlay v. Canada (Minister of Finance)*, the Supreme Court of Canada found that this required provinces to establish benefit levels that were "compatible" with an individual's basic requirements. This, the Court held, did not require provinces to set benefit levels to "fulfil" or "equal" basic requirements, but it did require more than a mere "consideration" of these requirements. While the decision of the court granted provinces considerable leeway in determining benefit levels, importantly, it did require provinces to set levels that

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<sup>10</sup> See Martha T. McCluskey, "Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State" (2003), 73 *Indiana Law Journal* 783.

<sup>11</sup> Of course, not all disabilities qualify one for assistance under the more generous O.D.S.P. regime. One must satisfy the statutory definition of 'disability'. The vast majority of applicants do not qualify at first instance, but for those who access legal representation and pursue an appeal, the success rates on appeal are extraordinarily high. See Income Security Advocacy Clinic, *Denial By Design* (2003), [www.incomesecurity.org](http://www.incomesecurity.org) (last accessed, March 29, 2005).

<sup>12</sup> *Canada Assistance Plan Act 1966-67*, R.S.C. 1985, C-1 revoked April 1, 1996 and replaced by the *Canada Health and Social Transfer*.

<sup>13</sup> *Ibid*, subs. 2 (a) and 6(2) (a).

approximated (were compatible with) basic requirements.<sup>14</sup> Moreover, the Court's interpretation created a *right* to benefit levels compatible with basic requirements that could be asserted by social assistance recipients. *C.A.P.A.*'s revocation left the door wide open to provinces to set benefits as and how they pleased, without any necessary regard for basic needs/requirements. And of course, its revocation signaled the demise of the right established by *Finlay*. The revocation of *C.A.P.A.* also facilitated the introduction of workfare, another crucial provincial reform. *C.A.P.A.* had stipulated that every agreement shall provide that "no person shall be denied assistance because he refuses or has refused to take part in a work activity project".<sup>15</sup> The *C.A.P.A.* was replaced with the Canadian Health and Social Transfer, a block grant for welfare, education and health combined, and provinces are free to apportion the grant between these areas as they choose. Moreover, the conditions of funding that accompanied federal transfers pursuant to *C.A.P.A.* no longer exist under the Canada Health and Social Transfer.

## 2.a Re-Conceptualization of Purpose

Section one of the *O.W.A.* provides that the purpose of the Act is to establish a program that,

- (a) recognizes individual responsibility and promotes self reliance through employment;
- (b) provides temporary financial assistance to those most in need while they satisfy obligations to become and stay employed;
- (c) effectively serves people needing assistance; and
- (d) is accountable to the taxpayers of Ontario.<sup>16</sup>

This statement of purpose, and the reforms enacted to further that purpose (e.g. workfare, lifetime bans), reflects a profound departure from the principle of entitlement that, while never fully realized in practice, nevertheless formed an articulated basis for both provincial and federal legislation.<sup>17</sup> Indeed, the S.A.R.C., in its review of Social Assistance in Ontario, identified a rights or entitlement-based approach as a central, guiding principle of the social assistance regime. The first of its operating principles provides that, "all members of the community have a presumptive right to social

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<sup>14</sup> *Finlay v. Canada (Minister of Finance)*, [1993] 1 S.C.R. 1080.

<sup>15</sup> *C.A.P.A.* *supra* note 12, in particular subs. 15(3) (a). For a discussion of the gendered impact of *C.A.P.A.*'s revocation see, Shelagh Day and Gwen Brodsky, "Women and the Equality Deficit: The Impact of Restructuring Canada's Social Programs", Status of Women Canada, March 1998.

<sup>16</sup> *O.W.A.*, *supra* note 1, section 1.

<sup>17</sup> *C.A.P.A.*, *supra* note 12, preamble.

assistance based on need" and the S.A.R.C. further observes that, "the support that society provides is not to be understood as a gift or privilege, nor as charity to the disadvantage. Rather, it represents a right to which all members of society are entitled."<sup>18</sup>

The statement of purpose in Section 1 of the *O.W.A.* suggests that the government of the day had been persuaded by a competing line of thinking that maintained that it was "critical that this standard [of need in the *C.A.P.A.*] be removed, and replaced with a more general standard which makes explicit that the receipt of income security benefits in Canada is a privilege, not a right, and that appropriate behaviour and certain responsibilities are expected of recipients in return, both in terms of honesty and movement towards independence as rapidly as possible."<sup>19</sup>

In the view of many, the statement of purpose of the Act reflected a momentous redrawing of the social contract, from an understanding of that contract in which the unemployment endemic to a capitalist economy created an obligation on the part of the state to provide for those whom the market would not or could not employ, to one where the unemployed and the unemployable are obliged as a condition of benefits, "to become and stay employed". For others, cast slightly differently, the historical compromise between capital and labour that had resulted in at least limited forms of social rights after the Second World War was coming unraveled.<sup>20</sup>

## **2.b Benefit Reduction**

Shortly after being elected in 1995 on its promise of a 'common sense revolution', the Conservative government introduced a 21.6 percent cut in benefit levels, effective October 2, 1995. There had been no increase in benefits until the spring of 2004, when a 3 percent increase was announced by a recently elected Liberal government. With a rate of inflation of 12.8 percent in the intervening years, the total decline in purchasing power

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<sup>18</sup> S.A.R.C. *supra*, note 9 at pp 10 & 11.

<sup>19</sup> C.A. MacDonald & Associates, *Reducing Fraud and Waste in Income Security Programs in Canada* (Edmonton: C.A. MacDonald & Associates, 1995) at pp. 16-17.

<sup>20</sup> Edward Broadbent, "Citizenship Today: Is There a Crisis?", in Dave Broad & Wayne Antony, eds., *Citizens or Consumers? Social Policy in a Market Society* (Halifax: Fernwood Publishing, 1999).

between 1995 and 2002 was a staggering 34 percent.<sup>21</sup> Prior to the 3 percent increase, a single person in Ontario received \$520/month (comprised of a shelter allowance of \$325 and a basic needs allowance of \$195); a single parent with one child, a total of \$997/month. Single persons in Ontario received benefits in 2003 that equaled only 35 percent of the poverty line; a single parent with one child, 56 percent.<sup>22</sup> The diminishment of welfare rates to a level which places recipients (many of them single mothers with children) into the conditions of abject poverty has been justified by a political discourse that in an era of the goals of a 'debt free' government, those on social assistance are getting a 'free ride' and getting 'something for nothing'. Growing social assistance caseloads and corresponding costs were clearly understood to play a significant role in creating government debt and thus reducing caseload numbers and the costs for those remaining on the rolls was of central importance.<sup>23</sup> Here too, one sees a marked departure from the findings of the S.A.R.C. that rates were wholly inadequate. In the analysis of the S.A.R.C., inadequate rates hindered the transition to employment and self-sufficiency; in the view of the Conservative government, 'generous' rates [its characterization] create dependency and operate as a disincentive to work.<sup>24</sup>

## **2.c Workfare**

The *O.W.A.* conditions the receipt of benefits upon participation in paid work or in activities to increase the likelihood of becoming and staying employed, and as such, introduced the practice of what is commonly called 'workfare'.<sup>25</sup> Adult beneficiaries are required to enter into a 'participation agreement' with the Ministry, spelling out the 'employment assistance' activities that they will undertake. Employment assistance activities include 'community participation' and any of the following 'employment measures': job searches; literacy screening, testing, assessment, or programs; basic education and job-specific skills training; employment placement; screening for

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<sup>21</sup> Income Security Advocacy Centre, *Ontario Works Basic Needs Allowance*, <http://incomesecurity.org> (accessed October 6, 2003).

<sup>22</sup> National Council of Welfare, *Welfare Incomes 2003* (Ottawa: National Council of Welfare, spring 2003) at p.28. Note as well that until December 2004, sponsored immigrants whose sponsorship had broken down were subjected to an automatic \$100/mn deduction unless they could prove the breakdown was a result of family violence.

<sup>23</sup> See for example, MacDonald *supra* note 19, Hansard, *supra*, note 7.

<sup>24</sup> Disturbingly, in defending the rate cuts the Minister of Community and Social Services at the time, the Honourable David Tsubouchi, indicated that people could get by through measures such as negotiating for discounts on things like dented tins of tuna or buying food in bulk. He also maintained that because those on welfare had been given three months notice of the rate cuts, they had adequate time to prepare for the cuts. Hansard, *supra*, note 7, Oct. 2 & 3, 1995.

substance addiction; or participation in a program to complete high school or to develop parenting skills. In addition, every participant has an obligation to make reasonable efforts to accept and maintain employment "for which he or she is physically capable"; and if employed part-time, to find full-time employment; if employed and still eligible for assistance, to find employment to increase his or her income. The failure to comply or to make reasonable efforts will result in the cancellation of benefits for a three or six month period (depending upon the circumstances).<sup>26</sup>

State discourse regarding workfare represents to the public that the poor lack a proper work ethic and, for their own good, work must be mandated as a condition of benefit receipt. Implicit is the assumption that withholding benefits from what is, after all, a residual, end-of-the line program—in other words the threat of absolute destitution—is the only method by which those on welfare will take up paid employment and leave the welfare rolls. Implicit as well, and on occasion explicitly vocalized, is the assertion that those on welfare are, in fact, "doing nothing". Rather they are, as noted above, getting "something for nothing". Indeed Premier Harris, in defending the rate cuts and the announced plans to introduce workfare, maintained that "we're paying a significant number of people, over a million, by the way, of families, 300,000 to 400,000 to sit home and do nothing. ... This [the Conservative's approach] is breaking new ground. This is not easy. This is something that is a different philosophy. There is a philosophy, create a cycle of dependency, pay people more money to stay home and do nothing versus give people an opportunity, give them training, give them work experience, give them jobs".<sup>27</sup> Or as the then Minister of Community and Social Services put it, "[p]eople have got to learn again to take responsibility for themselves and their families and not leave it to everyone else to do."<sup>28</sup>

The explanation for poverty in this conceptualization is purely individualistic; individuals are poor because they are lazy, dependent, undisciplined and lack an ethic of work. From a neo-liberal vantage point, welfare benefits undermine economic performance by blunting incentives to work; people choose welfare over work, or are so embedded in a culture of dependency that they cannot even appreciate that paid employment is an

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<sup>25</sup> O.W.A., *supra* note 1, s.4.

<sup>26</sup> O. Reg. 134/98, sections 26-33.

<sup>27</sup> Hansard, *supra* note 7, September 28, 1995.

<sup>28</sup> Hansard, *supra* note 7, September 28, 1995.

option.<sup>29</sup> Because in the neo-liberal view welfare benefits undermine work incentives, they represent a threat to the public. One can also anticipate how readily the stereotype of welfare recipients as lazy, undisciplined and wanting "something for nothing" can incorporate as well, a characterization of recipients as potential criminals.

The border that separates the virtuous and the deviant, the full citizen and the second-class citizen, has particularly profound implications for women. As feminists have argued for decades, much of women's labour is done in the home, uncompensated, unacknowledged and devalued. Much feminist theorizing and activism has attempted to make this labour visible and to accord it value, including through the provision of adequate state benefits to single mothers.<sup>30</sup> Significantly, as noted above, welfare reform in Ontario erased the prior distinction between family benefits (paid to single parents (overwhelmingly mothers) and those with disabilities) and general welfare assistance (paid to the able-bodied unemployed). The *O.W.A.* redefines most single mothers as workers; women are only exempted from workfare until their children reach school age (age three or four).<sup>31</sup> The very substantial numbers of single parents rearing children on social assistance (in 2003, 59 percent of *O.W.* recipients were women, and women constitute 94 percent of single parents on *O.W.*) are in the words of the former Premier of Ontario, "doing nothing". The message is very clear; a job, any job, is a more important contribution than rearing children and raising children with an income substantially below the poverty line is a cakewalk.

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<sup>29</sup> Andrew Jackson argues that the neo-liberal view here is factually ungrounded. He notes that there was no link between relative economic growth in the 1990s and levels of public provision. Andrew Jackson, "Social Citizenship, Social Justice and Economic Efficiency" [www.misc-iecm.mcgill.ca/socdem/kacjso.htm](http://www.misc-iecm.mcgill.ca/socdem/kacjso.htm), accessed December 4, 2003.

<sup>30</sup> Linda Gordon, *Pitied But Not Entitled: Single Mothers and the History of Welfare, 1890-1935* (New York: The Free Press, 1994); Margaret Little, *No Car, No Radio, No Liquor Permit: The Moral Regulation of Single Mothers in Ontario 1920-1996* (Toronto, Oxford University Press, 1998); Pat Evans and G. Wekerle, editors, *Women and the Canadian Welfare State: Challenges and Change*, (Toronto: University of Toronto Press, 1997); Carole Pateman, "The Patriarchal Welfare State", in *The Disorder of Women: Democracy, Feminism and Political Theory* (Cambridge: Polity Press, 1989).

<sup>31</sup> For an interesting discussion of how workfare in the United States is enforcing a masculine worker-citizen subject through the deployment of various discursive strategies see Anna C. Korteweg, "Welfare reform and the subject of the working mother: "Get a job, a better job, then a career", (2003) 32 *Theory and Society* 445.

Study after study has concluded that the overwhelming majority of welfare recipients are anxious to find work and get off welfare.<sup>32</sup> And contrary to the assumptions of workfare, substantial numbers of welfare recipients are employed, part-time and full-time and above-the-board.

Workfare also operates from the pretence—a pretence essential to the neo-liberal construction of poverty as an individual failing—that there exists not only employment for all, but also employment that would enable one to escape poverty. Given an unemployment rate as of February 2005 of seven percent<sup>33</sup>, a lack of access to decent childcare, and in Ontario, a minimum wage that represents only a fraction of the poverty line even for a single person employed full-time, all cannot rely upon labour market participation to meet their needs. While workfare was sold to the public as a hand up, much of the evidence to date suggests that few are in fact offered that hand up and that in many cases workfare has been counter-productive.<sup>34</sup>

## **2.d New Definition of Spouse**

The gendered character of workfare which marginalizes the social lives of women while at the same time harnessing historically prejudicial stereotypes of them as 'bad mothers' is made even more insidious with the re-introduction of the 'spouse in the house' rules. Based upon the patriarchal character of poor relief which elevated the male 'bread-winner' as the primary hinge upon which welfare assistance should be administered, the use of the presence of a 'spouse' acts as a powerful point of control to order the social and intimate lives of women.

The 'man-in-the-house' rules have a lengthy history in Ontario, and certainly historically women's entitlement to benefits was strongly tied to judgements about their moral

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<sup>32</sup> Hartley Dean, "Undermining Social Citizenship" a paper presented to the ISSA Second International Research Conference on Social Security, Jerusalem, 25-28 January, 1998. In Dean's research three-quarters were anxious to work and valued work primarily as a means to self-esteem. See also Mosher et al, *Walking on Eggshells; Abused Women's Experiences of Ontario's Welfare System* (Woman Abuse and Welfare Research Project, 2004) available at [www.dawn.thot.net/walking-on-eggshells.htm](http://www.dawn.thot.net/walking-on-eggshells.htm).

<sup>33</sup> Statistics Canada, [www.statcan.ca](http://www.statcan.ca) (last accessed March 29, 2005).

<sup>34</sup> See Dean Herd and Andrew Mitchell, *Discouraged, diverted and disentitled: Ontario Works New Service Delivery Model* (Toronto: Community Social Planning Council of Toronto and the Ontario Social Safety Network, 2002); Deb Matthews M.P.P., *Review of Employment Assistance Programs in Ontario Works & Ontario Disability Support Program*, Ministry of Community and Social Services, December 2004; and *Walking on Eggshells*, *supra* note 32.

character and in particular, their sexual chastity.<sup>35</sup> In the period preceding 1987, a single recipient risked having her (the regime impacted almost exclusively upon women) benefits terminated if a conclusion was made that she was living in a "marriage-like" relationship. Needless to say, the concept of a marriage-like relationship was vague and ambiguous. Frequently, determinations of the nature of the relationship in issue turned on evidence of sexual intimacy.<sup>36</sup> The practices of welfare officials in enforcing the man-in-the-house rules were vigorously and thoroughly critiqued by feminists and equality activists, because such practices not only ignored women's privacy interests, but forced women into relationships of economic dependence with men who had, at law, no obligation to support them. In 1987, the definition of 'spouse' for welfare purposes was dramatically altered, so that it would largely track the *Family Law Act* definition. Importantly, this meant that couples could live together for three years before they would be deemed to be spouses for social assistance purposes, and when in fact, legal obligations of support would arise. This was incredibly important for women, because it meant that they could continue to receive welfare benefits in their own right as 'singles' or as 'sole support mothers'.

Even prior to the introduction of the *Social Assistance Reform Act*, the Conservative government acted in October of 1995 to amend the regulatory definition of 'spouse' for social assistance purposes. This definition (a definition that has been modified somewhat on a handful of occasions subsequently) treated persons of the opposite sex presumptively as spouses if they shared a common residence. As such the definition tracked much more closely the pre-1987 definition. The new definition resulted in 10,013 people being cut off social assistance; of these, 89 percent were women and 76 percent were single mothers.<sup>37</sup>

At present, a 'spouse' is defined as:

(a) a person of the opposite sex to the applicant or recipient, if the person and the applicant or recipient have together declared to the administrator or to the Director under the *Ontario Disability Support Program Act, 1997* that they are spouses,

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<sup>35</sup> Little, *supra* note 30. Often the phrase 'spouse in the house' is used; we prefer to use the phrase, 'man in the house' as the impact of the rules continues to be decidedly gendered.

<sup>36</sup> Little, *ibid.*

<sup>37</sup> *Falkiner et al v. Ontario (Ministry of Community and Social Services)*, 2002 CanLII 44902 (On.C.A.); Court Docket C35052, C34983, Date 20020513.

- (b) a person of the opposite sex to the applicant or recipient who is required under a court order or domestic contract to support the applicant or recipient or any of his or her dependants,
  - (c) a person of the opposite sex to the applicant or recipient who has an obligation to support the applicant or recipient or any of his or her dependants under section 30 or 31 of the *Family Law Act*, whether or not there is a domestic contract or other agreement between the person and the applicant or recipient whereby they purport to waive or release such obligation to support, or
  - (d) a person of the opposite sex to the applicant or recipient who has been residing in the same dwelling place as the applicant or recipient for a period of at least three months, if,
    - (i) the extent of the social and familial aspects of the relationship between the two persons is consistent with cohabitation, and
    - (ii) the extent of the financial support provided by one person to the other or the degree of financial interdependence between the two persons is consistent with cohabitation.
- (2) for the purpose of the definitions of "spouse" and "same-sex partner", sexual factors shall not be investigated or considered in determining whether or not a person is a spouse or same-sex partner.<sup>38</sup>

The definition of 'spouse' introduced in 1995 was constitutionally challenged in the case of *Falkiner et al v. Director, Income Maintenance Branch, Ministry of Community and Social Services and Attorney General of Ontario*.<sup>39</sup> Significantly for our discussion of welfare fraud, the Court of Appeal of Ontario found the definition to be overly broad—capturing relationships which do not resemble marriage-like relationships—and deeply ambiguous (since adjudicative Boards had come to different findings regarding whether the degree of financial inter-dependence had to be more than trivial). The government of Ontario abandoned its appeal to the Supreme Court of Canada (leave had been granted) in October 2004 and introduced a new definition (above) which in most respects, mirrors its predecessor and which arguably fails to comport with the ruling of the Court of Appeal.

The definition of 'spouse' and the operationalization of the concept of 'living with' (itself deeply ambiguous) play significant roles in the deployment of the welfare fraud regime. It is telling to observe that in 1981-82, 84 percent of welfare fraud charges were based upon an allegation of an undeclared spouse, resulting in 200 charges, 161 convictions,

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<sup>38</sup> O.Reg. 134/98, section 1, as amended. The category of "same-sex partner" was introduced as a result of the Supreme Court of Canada's decision in *M. v. H.*, [1995] 2 S.C.R. 3. The Ontario government responded to the Supreme Court's ruling by introducing an omnibus piece of legislation to add the category of "same-sex partner" to several pieces of legislation, including the *O.W.A.* and the *O.D.S.P.A.*

<sup>39</sup> *Falkiner*, *supra* note 37.

and jail in 42 percent of those cases. Both Gutierrez and the Canadian Research Institute for Law and the Family (C.R.I.L.F.), in their background reports for the S.A.R.C., observed that the definition of 'spouse' introduced in 1987 (tracking the *Family Law Act*) resulted in dramatic reductions to these very high rates.<sup>40</sup> The creation of a presumption of spousal status in 1995 signaled a renewed state interest in surveilling women's relationships with men.

### **3 Welfare Fraud**

'Welfare fraud' occupied a central position in the social assistance reforms of the mid-1990s. In political discourse and in the public imagination, abuse of the social assistance system was understood to be widespread. The government pointed to "strong public concern that the problem of welfare fraud was not being adequately addressed"<sup>41</sup> in introducing a host of new measures to prevent, detect and punish welfare fraud. Yet this claim might well position the cart before the horse, since the political discourse of parties of all stripes was unified in its portrayal of welfare fraud as a problem of grave concern and that more, and tougher, measures were needed to address it; a discourse which no doubt helped to shape the predominant public view.

#### **3.a Defining Fraud**

Problematically, an enduring feature of discussions about welfare fraud is the lack of definitional clarity and precision as to just what one means by the term 'welfare fraud'.<sup>42</sup> Some commentators include, for example, not only instances of what might properly be characterized as 'fraud' as defined by the *Criminal Code*, but all instances of rule violations, irrespective of the presence of *mens rea*. Others go further still to include all over-payments, including those arising from bureaucratic error. Some seek to differentiate 'fraud' and 'abuse' / 'misuse'; including in the former situations where *mens rea* exists, and in the latter, situations where actions of the recipient may not "go the full

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<sup>40</sup> Anne Marie Gutierrez, *The Interaction of Criminal Law and the Income Maintenance System in Ontario*, research report for the Social Assistance Review Committee, May 1987 at pp. 17 and 28; the Canadian Research Institute for Law and the Family (Jean E. Wallace, M.L. McCall & Joseph H. Hornick), "A Literature Review of Welfare Fraud: Nature, Extent and Control", report for the Social Assistance Review Committee, July 1987 at p.17.

<sup>41</sup> Moretta, *supra* note 8 at para. 27.

<sup>42</sup> The S.A.R.C. observed that many lump together administrative error, overpayments and mistakes together in the category 'fraud'; *supra* note 9.

distance" in making out the necessary intent.<sup>43</sup> While the defining characteristics of the category of 'abuse' or 'misuse' are far from clear, the terms do infer some degree of wrongdoing and moral culpability on the part of the recipient.

Our research suggests that a view of welfare fraud that includes all breaches of any of the mass of complex, often contradictory and frequently counter-intuitive rules that constitute the social assistance system is pervasive. This tendency to label all rule infractions as 'fraud' is disturbingly present throughout the O.W. system (impacting on whether referrals are made to an Eligibility Review Officer (E.R.O.), whether an E.R.O. recommends referral to police, etc). More disturbingly, while one would expect the characterization of conduct as 'fraudulent' to be applied narrowly and in accordance with relevant jurisprudence within the criminal justice context, this is all too often not the case.

The *O.W.A.* creates an offence within section 79, which itself includes a subjective element; thus even the Act itself does not contemplate a strict liability regime:

79. (1) No person shall knowingly obtain or receive assistance to which he or she is not entitled under this Act and the regulations.

(2) No person shall knowingly aid or abet another person to obtain or receive assistance to which the other person is not entitled under this Act and the regulations.

(3) No person shall obstruct or knowingly give false information to a person engaged in investigations for the purposes of section 57 or 58.

(4) A person who contravenes subsection (1), (2) or (3) is guilty of an offence and on conviction is liable to a fine of not more than \$5,000 or to imprisonment for a term of not more than six months or to both.<sup>44</sup>

The *Criminal Code*, by contrast provides,

380. (1) Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, defrauds the public or any person, whether ascertained or not, of any property, money or valuable security or any service,

(a) is guilty of an indictable offence and liable to a term of imprisonment not exceeding fourteen years, where the subject-matter of the offence is a testamentary instrument or the value of the subject-matter of the offence exceeds five thousand dollars; or

(b) is guilty

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<sup>43</sup> This is how Debbie Moretta explained the difference, Interview with Debbie Moretta, Dec. 22, 2004.

<sup>44</sup> *Ontario Works Act*, *supra* note 1, section 79.

- (i) of an indictable offence and is liable to imprisonment for a term not exceeding two years, or
- (ii) of an offence punishable on summary conviction, where the value of the subject matter of the offence does not exceed five thousand dollars.<sup>45</sup>

In practice the offence provisions contained in section 79 of the O.W.A. are virtually never resorted to. Only one of the respondents we interviewed had heard of a prosecution under the *Provincial Offences Act (P.O.A.)* for a violation of section 79; the one respondent who had observed that several years ago, prosecutions under the *P.O.A.* were sometimes agreed upon as part of a plea bargain to a *Criminal Code* charge. Another respondent noted that advocacy efforts with a local welfare office to try to persuade it to use section 79 rather than proceed by way of *Criminal Code* prosecutions were completely futile. Indeed the Ministry's *Controlling Fraud Policy Directive* provides that where there is "sufficient evidence to suspect an intent to commit fraud the case **must** [bolded in the original] be referred to the police for investigation under the *Criminal Code*."<sup>46</sup> Thus, infractions of the administrative regime created through the *O.W.A.* are invariably treated as *Criminal Code* matters.<sup>47</sup>

What then must one establish in order to make out the *Criminal Code* offence of fraud? The Supreme Court of Canada's jurisprudence on fraud has identified the *actus reus* of fraud as containing two elements: the prohibited act (of "deceit, falsehood or other fraudulent means"); and deprivation caused by the prohibited act (deprivation need not entail actual loss, putting pecuniary interests at risk may be sufficient). With respect to the first of these, the Supreme Court has identified deceit, falsehood and fraudulent means as three separate heads, but has also noted that the real core or nub of the offence of fraud is dishonesty.<sup>48</sup> Whether an act is appropriately characterized as

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<sup>45</sup> *Criminal Code of Canada*, R.S.C. 1985, c. C-46, s. 380 as amended by Bill C-13. Until the provisions of C-13 came into effect in September 2004, the maximum penalty was ten years. Bill C-13 addresses, in a variety of ways, criminal conduct in relation to insider trading.

<sup>46</sup> Controlling Fraud Policy Directive #45, Ministry of Community and Social Services, January 2004.

<sup>47</sup> Often the reason given for this is the six-month limitation period under the *Provincial Offences Act* (R.S.O. 1990, c.P.33). But more consistent with other government rhetoric on welfare fraud is the view that cases are prosecuted criminally as part of a "get-tough" approach to welfare and welfare recipients. For a critique of the claim that the six-month limitation period is the reason for this approach see Dianne Martin, "Passing the Buck: Prosecution of Welfare Fraud: Preservation of Stereotypes" (1992), 12 *Windsor Y.B. Access Just.* 52. Also note that the S.A.R.C. recommended increased use of the *Provincial Offences Act*.

<sup>48</sup> J. Douglas Ewart, *Criminal Fraud* (Toronto: Carswell Legal Publications, 1986).

dishonest is to be determined not by reference to the accused's subjective mental state (whether the accused subjectively believed the act in question to be dishonest) but whether the reasonable person would stigmatize the act in question as such. The Court, in *R. v. Olan*, noted that while 'dishonesty' was difficult to define with precision, it does connote an underhanded design, is discreditable, and perhaps unscrupulous. The Court also noted that mere negligence would not suffice.<sup>49</sup>

In 1993 the Supreme Court released two significant decisions on the *mens rea* of fraud, *R. v. Theroux* and *R. v. Zlatic*.<sup>50</sup> Madame Justice McLachlin, as she then was, noted in *Theroux* that the *mens rea* of criminal offences refers to the 'guilty mind', to a wrongful intention. Its role in the criminal setting is, as she notes, to prevent the conviction of the morally innocent, whose moral innocence may lie in the fact that she did not understand or did not intend the consequences of her action. With respect to the *mens rea* required for a conviction of fraud, the Supreme Court has identified two elements: subjective knowledge of the prohibited act (the act which, based upon a reasonableness standard, is appropriately stigmatized as dishonest); and subjective knowledge that the prohibited act could have as a consequence the deprivation of another. "Did the accused subjectively appreciate that certain consequences would possibly follow from her acts?" There must be a subjective awareness that undertaking the prohibited act (of deceit, falsehood or other dishonest means) could cause deprivation. In their dissenting judgement in *Theroux*, Mr. Justice Sopinka and Chief Justice Lamer (as he then was), while agreeing with the majority, took care to point out that it is important to distinguish between the conclusion that an accused's belief that his act is honest will not avail, if objectively the act in question is dishonest, from the situation where the accused's belief in facts, which if true, would deprive the act of its dishonest character. This distinction is, we argue, a crucial one in the context of welfare fraud.

Perhaps the most thorough treatment of fraud in the social assistance context is that found in the decision of Mr. Justice Weagant in the case of *R. v. Maldonado*.<sup>51</sup> Mr. Maldonado was in receipt of General Welfare Assistance (the precursor to Ontario

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<sup>49</sup> *R. v. Olan*, [1978] 2 S.C.R. 1175.

<sup>50</sup> *R. v. Theroux*, [1993] 2 S.C.R. 5; *R. v. Zlatic*, [1993] 2 S.C.R. 29.

<sup>51</sup> *R. v. Maldonado*, [1998] O.J. NO. 3209 (Prov. Div.) (QL); see also an important Supreme Court of Canada decision, *R. v. Parise*, [1996] 3 S.C.R. 408 and from the Ontario Court of Appeal, *R. v. Wakil* (2001), 150 O.A.C. 194.

Works benefits). He had been told that he must report any change in income. When his wife obtained part-time employment, it was dutifully reported. But when he began attending school and obtained a student loan he did not report it. When subsequently the Ministry learned that Mr. Maldonado was in receipt of a loan, he was charged with fraud. His evidence was that he did not think a loan was income, because it had to be repaid, so he had never contemplated that it need be reported. He did not know that the regulations treated student loans as income and that therefore, the loan ought to have been reported. Nor did he know that had it been so reported, a reduction in his benefits would have followed. Based on Supreme Court jurisprudence, it will not matter if Mr. Maldonado subjectively believed his actions to be honest. The question is, can his actions be appropriately stigmatized as 'dishonest', not merely negligent, but as an underhanded design, or as unscrupulous? To invoke Mr. Justice Sopinka's query, is there here a belief by the accused in a set of facts (a loan is not income and need not be reported), which if true, would deprive the act of its dishonest character? The answer given by Mr. Justice Weagant is affirmative; indeed he is loath to characterize Mr. Maldonado's actions as even negligent. When one considers Mr. Maldonado's state of mind, while he had knowledge of the prohibited act (the non-disclosure of the loan); his belief that a loan was not income and hence not reportable deprived the act of its dishonest character. Moreover, given his belief in this set of facts, he lacked the subjective knowledge that the non-reporting could have as a consequence the deprivation of another. Mr. Justice Weagant concludes:

Not only do I have a doubt that Mr. Maldonado did not have the subjective knowledge of the possibility of deprivation, I am quite sure he did not...I would not be surprised if Mr. Maldonado, even if given a copy of the Regulations to read for himself, were unable to glean the true meaning of "income" or "change of circumstances". The Regulations are extremely complicated and difficult to read. ... my own experience of wading through the Regulations leads me to believe their inaccessibility plays a major role in the scenario under consideration. The Regulations governing the question of entitlement are fiendishly difficult to understand... the sense or structure of the policy which might help a person on welfare to determine when he or she is breaking the law, is not apparent on the face of the Regulation. Why would a student loan be income, but a grant not? At first blush, one would think the opposite would be true...if during a one month period a welfare recipient took a loan from a friend on a grocery shopping trip and repaid the loan to the friend when they reach the recipient's place of residence the very same day, the welfare benefit for that month should be proportionately less to reflect the amount of the loan. Yet no person with an ounce of sense would think that he or she would be obligated to report the amount of the loan. What is Kafkaesque about this scheme, to use

Justice Campbell's word, is that the person who does not report the short-term loan from a friend might very well be prosecuted for fraud in the Province of Ontario... Surely this is an example of something that Madame Justice McLachlin would put in the category of behaviour that does not warrant criminalization.<sup>52</sup>

Consider also the case of *R. v. Bond*, a case we would argue was wrongfully decided in relation to the *mens rea* of the accused.<sup>53</sup> Ms. Bond was a single mother with two children who scrupulously saved every penny she could—baby bonus, child tax credits, etc. —and put this money in trust for her children, both of whom experienced health problems and who would, she wisely discerned, require financial support in the future. She disclosed all of this as 'income' when she received it. The savings account held in trust for her children accumulated and she purchased bonds. Ultimately she held an asset (the bonds) that substantially exceeded her asset level (present asset levels are the equivalent of one month's benefits). She did not disclose the bonds held in trust. Mr. Justice Kurisko observed that Ms Bond never bought anything unless on sale, she never ate out or took a holiday, she purchased her food in bulk, had no car, didn't drink and didn't smoke. Her evidence was that she honestly believed that she did not have to report these savings because they were for the kids (and note as well that all of the money invested had been disclosed when it was received). Mr. Justice Kurisko goes on to note that, "I reserved my decision as to guilt because I was very impressed by the sincerity and achievement of the accused and troubled by the paradox of criminalizing the actions of this woman who scrimped as a hedge against the future financial and health needs of her children... If she had spent this money on drinking or, drugs, or in any other irresponsible way, there would be no basis for any criminal charge. The conviction seems to send the message it was wrong to be conscientious about the welfare of her children and foolish to be frugal." He reviews the relevant Supreme Court of Canada jurisprudence and continues, "I have struggled to circumvent the Catch 22 circumstances of this case. But the law does not permit me to do so. The issue is whether her statement that she honestly believed she did not have to tell authorities about the savings account, can, in law raise a reasonable doubt as to the commission of the offence. This must be determined on an objective basis. Deceit is the concealment of the truth in order to mislead. A reasonable person in the circumstances of the accused

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<sup>52</sup> Maldonado, *supra* note 51, para. 40, 41 & 43. Mr. Justice Weagant's reference to Madame Justice McLachlin arises from her caution that because the Supreme Court had cast the net of 'fraud' rather widely, it was important to ensure that fraud was not interpreted so widely as to capture behaviour that does not warrant criminalization.

would know there was a duty to disclose the savings account and that failure to do so was misleading and therefore deceitful. Judged on this objective standard, the accused is guilty of offence as charged."<sup>54</sup>

Mr. Justice Kurisko makes several errors here. That a 'reasonable person' would know that a savings account had to be disclosed is not a relevant consideration; rather that the accused did not know (and this belief the trial judge found to be an honest one) suggests that it would be inappropriate to taint her conduct with the label of 'dishonesty'.

Moreover, given the trial judge's acceptance of the honesty in her belief that she did not have to disclose the accumulated savings, it is hard to know how then the trial judge could conclude that she engaged in the act for the purpose of deceiving the government. As the Supreme Court of Canada observed in *R. v. Parise*, the trial judge's acceptance of the accused's evidence that she honestly believed that her circumstances had not changed to affect her eligibility negated an essential element of the *mens rea* of fraud; she honestly did not believe that she was defrauding the Department.<sup>55</sup>

The decision in *Bond* is representative of a misapprehension that pervades both the social assistance and criminal justice systems. As in *Bond*, frequently the accused's lack of knowledge of the "fiendishly difficult" requirements of welfare law and regulations is wrongly assumed to be irrelevant to the question of whether a 'fraud' has been committed. In addition to the manner of reasoning one sees in *Bond*, another way in which this misapprehension manifests is in the frequent invocation of the principle, now enshrined in section 19 of the *Criminal Code*, that "ignorance of the law is no defence" to a criminal charge. The line of reasoning that is employed is that one is assumed to know the law and ignorance of the law is no excuse, hence lack of knowledge of the detailed requirements of the social assistance regime is irrelevant to the determination of criminal liability.<sup>56</sup> One respondent described to us how O.W. caseworkers in his district always rely on this line of reasoning: "you're required to disclose everything and if you don't you're guilty of fraud; ignorance of the law is no excuse—everyone is deemed to know the law, therefore you are guilty". This respondent went on to observe that, "[i]f anyone was

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<sup>53</sup> *R. v. Bond*, [1994] O.J. No. 2185 (Gen. Div.) (QL)

<sup>54</sup> *Ibid.*

<sup>55</sup> *R v. Parise*, *supra*, note 51.

<sup>56</sup> Note that Mr. Justice Weagant, in *Maldonado*, *supra* note 51, effectively deconstructs this argument.

genuinely trying to assess if this person intended to defraud the government that would be a very different case than the ones we see presented.” Or as another respondent put it, "the fact that the accused couldn't understand the tome [the complex regulations] doesn't get you to first base."

In their background reports for the S.A.R.C., the C.R.I.L.F., K.P.M.G. and Gutierrez all make this error.<sup>57</sup> The C.R.I.L.F., for example, maintains that "it is not necessary to find deceit... even in light of the complexity of welfare regulations, recipients are not exempt from the legal principle that states that ignorance of the law is not a defence to criminal charges... nothing prevents charges from being laid even in the face of an obvious misunderstanding, since there is a general rule of criminal law which provides that ignorance of the law is not an excuse for breaking it."<sup>58</sup>

The confusion and resulting error stem from the failure to appreciate that the lack of knowledge or understanding of the underlying rules of the administrative regime negates *mens rea* (one didn't intend deprivation as a consequence of one's actions) and/or renders the quality of the act in issue one which is **not** appropriately stigmatized as dishonest. One is making an argument based on 'mistake of fact', not an argument that because the accused did not know that his act constituted fraud he is therefore innocent.

### **3.b The Extent of Welfare Fraud**

Not surprisingly, given the lack of definitional clarity regarding 'fraud', reports on its incidence vary dramatically. The only hard evidence that exists is the number of convictions for fraud. The first year for which province-wide statistics are available for fraud convictions is 1997-98 (as a result of the implementation of a new welfare fraud control database); prior to that time, statistics, if gathered at all, were gathered at the municipal level only.<sup>59</sup> The most recent year available is 2001-02. All of the statistics

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<sup>57</sup> As we discuss *infra*, we did not come across a single example of this error in the context of prosecutions for tax evasions. To the contrary, resources for lawyers such as Carwell's looseleaf *Tax Evasion*, by William I. Innes (Toronto: Carswell, 2003), explain how ignorance of the relevant tax law may negate *mens rea*.

<sup>58</sup> C.R.I.L.F., *supra* note 40 at p. ix and at p.26; Peat Marwick and Partners (K.P.M.G.), *Welfare Fraud and Overpayment: Final Report*, September, 1987, research report for the Social Assistance Review Committee at p.37; and Gutierrez, *supra* note 40 at p.34 & p.37.

<sup>59</sup> Moretta, *supra* note 43.

below show the cumulative data from the O.W. and O.D.S.P. systems.<sup>60</sup> In addition to the number of convictions, it is important to observe the very substantial numbers of fraud investigations.

**Table 1: O.W. and O.D.S.P. Welfare Fraud Convictions, by year**

Year	Convictions	Total Fraud Investigations	S.A. Reduced or Terminated	No Eligibility Problems Found
2001-02	393	38,452	12,816	25,636
2000-01	430	52,582	17,734	34,848
1999-00	557	43,900	15,680	28,220
1998-99	747	49,987	16,946	33,041
1997-98	1123	53,452	14,771	38,681

The number of convictions for 2001-02 (393 convictions) is roughly equivalent to 0.1 percent of the combined social assistance caseload and one percent of the total number of allegations. Statistics from the Municipality of Toronto for 2001 provide a similar picture: 80 percent of 11,800 allegations made against recipients were found to be untrue, in 19 percent of the remaining allegations there was no intent to defraud, 117 cases were referred to the Fraud Review unit, of these 116 were reviewed by a special review committee, 95 were referred on to the police and charges were laid or pending in 91 (less than one percent of the total allegations).

The K.P.M.G. report on welfare fraud prepared for the S.A.R.C. concluded that accurate information about the extent of fraud is not available and noted that reliable data are not routinely collected and definitions of fraud vary widely.<sup>61</sup> The K.P.M.G. report extrapolated from an Alberta study in offering an estimate that funds lost to fraud constituted at least 2.59 percent to 3.66 percent of total payments.<sup>62</sup> Both K.P.M.G. and the C.R.I.L.F. concluded that there existed little reliable and objective research measuring the extent of welfare fraud, noting that the few reliable studies turned up estimates ranging from 1 percent to 10 percent.<sup>63</sup>

<sup>60</sup> Ministry of Community, Family and Children's Services, *Welfare Fraud Control Report 2001-2002*.

<sup>61</sup> K.P.M.G., *supra* note 58 at p.3.

<sup>62</sup> *Ibid*, at p.17.

<sup>63</sup> *Ibid*, at pp. 14 & 19.

The *Welfare Fraud Control Reports*, issued in Ontario annually from 1997 to 2002, portray quite a different picture. The Welfare Fraud Control Report 2001-2002 is pervaded with the language of 'fraud'; reference is made to the Welfare Fraud Hotline, to the fraud control database to track fraud investigations, to "anti-fraud measures [that] help catch welfare cheats and deter others from thinking about cheating" and to welfare fraud as a crime that the government is cracking down on through the introduction of a zero tolerance policy. And while the Report refers occasionally to "fraud and misuse", as they appear in the report they seem to represent interchangeable terms rather than carefully delineated categories. The report claims "over \$49 million was identified in social assistance payments that people were not entitled to receive and an estimated \$12 million in avoided future costs."<sup>64</sup> Given the general thrust of the report, one might be forgiven for concluding that these dollars are directly attributable to welfare fraud. But a closer examination reveals a different picture; in 2001-02 there were 393 convictions for welfare fraud and there were 12,816 cases where assistance was reduced or terminated as a result of eligibility assessments. It is not entirely clear whether the 393 convictions (where benefits are likely to have been reduced or terminated) are included among these 12,816 cases, but in either event, in more than 12,000 cases welfare 'fraud' has not been established; no crime has been proven. Some of the 12,000 may represent a modest number of instances where prosecution was not recommended even though there existed a strong case; but the vast majority are likely to be instances where a 'rule' was broken, but without the requisite *mens rea* to constitute criminal fraud—in other words as a result of client misunderstanding, error, or oversight. Indeed given the complexity of the rules, as Mr. Justice Weagant noted, one could readily anticipate very large numbers of inadvertent rule breaches. M.P.P. Deb Matthews, in her recent report, captures well the complexity of the system, concluding that there is a need to move from a system "so mired in a labyrinth of rules around financial eligibility, to a system where the rules are simple, clear, well-communicated and focused on helping people improve their circumstances and opportunities for success."<sup>65</sup> She further observed that,

there was probably nothing I heard about more than the need to simplify the rules... There are now approximately 800 rules and regulations within the system that must be applied before a client's eligibility and the amount of their monthly cheque can be determined. Many of those rules are punitive and designed not to support people, but rather to keep them out of the system. Because there are so

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<sup>64</sup> *Welfare Fraud Control Report 2001-2001*, *supra* note 60.

<sup>65</sup> Matthews, *supra* note 34 at p.4.

many rules, they are expensive to administer and often applied inconsistently from one caseworker to another, even within the same office. Further, the rules are so complicated that they are virtually impossible to communicate to clients, and it takes years to train a caseworker.<sup>66</sup>

There is, however, a school of thought that maintains the distinction between 'fraud' and 'error' has little relevance. In their report for the Fraser Institute, CA MacDonald and Associates argue, for instance, that,

[t]here is no clear-cut delineations [sic] of fraud and error in the sense that the dividing line, where error crosses into fraud, is based on the psychological construct of *intent* [emphasis in original]. And fraud is a legal term which applies when *intent* [emphasis in the original] can be proven in a court of law. There are many cases investigated in which the investigator is sure that fraud occurred, however the strict rules of evidence may prevent the case from being proven in court. This category could be referred to as 'program abuse'... All of the categories of error and fraud overlap, and it is often a matter of convenience or legal requirements which determine how a particular case is labeled... 'client error' is often the administrator's way of saying that intent to defraud could not be easily proven in court.<sup>67</sup>

The analysis of CA MacDonald and Associates is deeply flawed; it presupposes that client error is inevitably 'fraud'—the rules of evidence just get in the way of proving it. This view is, however, completely incompatible with what is known about how the system and its 'clients' interface. As noted above, the complexity of the system and the difficulties of adequately communicating the rules make client error—and we hasten to add, significant system error—unavoidable. Moreover, the analysis simply disregards the importance of the construct that lies at the heart of criminal liability; the 'guilty mind'. If all rule breaches, irrespective of intent, are characterized as 'fraud', every recipient who, through inadvertence, lack of knowledge/information, mental or cognitive disability, or misunderstanding breaches a rule is tainted with the moral brush of criminality. The language of the Welfare Fraud Control reports does precisely this: all are cheats and criminals. In turn, this conflation of rule violation with welfare fraud is significant for how we think about issues of system 'integrity' and public confidence in the social assistance system. 'Crack-downs' on welfare fraud, and harsh sentences meted out by judges (described *infra*), are frequently justified by the need to preserve public confidence in, and thus support for, the social assistance system. If the public is given to understand that 'fraud' is pervasive (e.g. we're dealing with 12,000 instances, rather than 393), it

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<sup>66</sup> *Ibid* at p.25.

<sup>67</sup> MacDonald, *supra* note 19 at p.7 & p.8.

might well lose confidence and support such measures. But if the public is given to understand that in fact, huge numbers of both client error and bureaucratic error occur because the rules are complex, voluminous and as we note below, frequently counter-intuitive and often in flux, the public may lose confidence and question the integrity of the system; but for profoundly different reasons and with different consequences. It would be the system that would be the subject of critical interrogation and reform, rather than its recipients. As K.P.M.G. notes in its report to the S.A.R.C., it is the **total** [emphasis added] dollar amount of welfare fraud, unintentional overpayment and underpayment that is significant and which undermines the overall integrity of the social assistance system. But, as its authors also importantly observed, the stigma of welfare recipients diverts attention from administrative error and underpayments; low benefit levels; lack of inflation proofing; lack of attention to tax evasion; and the abuse of welfare claimants and their rights.<sup>68</sup>

The deployment of the language of 'fraud' to cover a wide range of non-criminal conduct builds upon and further entrenches the stereotype of social assistance recipients as criminals, who prefer to exploit the system rather than work for a living.<sup>69</sup> As both K.P.M.G. and the C.R.I.L.F. noted in their reports for the S.A.R.C., this stereotype serves as a "convenient political scapegoat which results in ... keeping pay rates below the poverty line; enabling cut-backs; and supporting intrusive practices towards welfare recipients."<sup>70</sup> More recently, M.P.P. Deb Matthews observed in her report on O.W., "[a]t the foundation of all the changes recommended in this report is the fundamental need to change internal and external attitudes about who social assistance recipients are, why they are on social assistance and what they have to offer society. For the past several years, government leaders have made deriding social assistance recipients a core component of their political strategy. Their ideology has driven the entire system—the rules, the attitudes, and the administration."<sup>71</sup> Minister Papatello, in a press release of December 15, 2004, similarly noted that it's time to "break down the old stereotypes."<sup>72</sup>

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<sup>68</sup> K.P.M.G., *supra* note 58 at p15.

<sup>69</sup> This stereotype was noted in several of the background reports commissioned by the S.A.R.C. and by the S.A.R.C. in its final report.

<sup>70</sup> C.I.R.L.F., *supra* note 40 at p.36.

<sup>71</sup> Matthews, *supra* note 34 at p.29.

<sup>72</sup> Ministry of Community and Social Services, Backgrounder, December 15, 2004, "Improving Ontario's Social Assistance Programs", <http://www.cfcs.gov.on.ca/CFCS/en/newsRoom/backgrounders/041215A.htm> (last accessed January 24, 2005).

And it is this broad sweep of 'fraud', to capture over-payments and rule violations made without criminal intent, that supports the characterization of welfare fraud as rampant and which no doubt fuels the widespread misconception held by the general public about its incidence.<sup>73</sup> While we may not know the exact prevalence of fraud in the social assistance system, it is rather striking to note that of 38,452 cases investigated in 2001-02 only 393 resulted in convictions. Below we detail the many measures in place to prevent and detect welfare fraud. As we note, the surveillance of those in receipt of assistance is extensive; and substantially more extensive and intrusive than a decade ago. Of course even the most extensive, intrusive and finely honed systems for detecting fraud will never uncover every case. But given the large number of measures now being deployed and the very substantial number of investigations, one might reasonably surmise that much of the fraud within the system is, in fact, being detected.

### **3.c Measures to Respond**

To respond to the 'serious' problem that welfare fraud was portrayed to be, a broad array of measures was introduced by the Conservative government as part of its social assistance reforms. Before turning to these it is important to return first to the recommendations of the S.A.R.C. The Committee, citing the work of Gutierrez, endorsed the view that in this area, "perception may be more important than reality", referring to the widely held public perception that 'fraud' or 'abuse' was widespread.<sup>74</sup> It went on to note that while there was no evidence that fraud was more widespread than in systems such as income tax or unemployment insurance, nevertheless, because of the importance of maintaining public confidence, it was prepared to accept that measures to control fraud may need to be more extensive than in other systems. The Committee also explicitly acknowledged that measures to reduce fraud would come at a cost—the violation of the Committee's own statement of principles. The Committee noted that,

[o]ne of the first questions the committee had to answer in deciding upon appropriate measures to reduce fraud was the extent to which we were prepared

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<sup>73</sup> In a 1982 poll, 34 percent of those polled reported that the 'abuse' of the social assistance system was widespread; Table 2, S.A.R.C., *supra* note 9 at 381. K.P.M.G., in its report, noted that "public perceptions of the extent of welfare fraud are usually overestimated, especially when downshifts in the economy have resulted in a notable increase in the number of "employables" receiving social assistance", K.P.M.G., *supra* note 58 at p.52.

<sup>74</sup> S.A.R.C., *supra* note 9 at p.380.

to violate our other stated principles. Measures that are highly intrusive and stigmatizing or that constitute major violations of individual rights are never justifiable. However, lesser interferences with our principles might be justifiable if it is clear that the technique adopted is effective in reducing the amount of fraud.<sup>75</sup>

As Dianne Martin noted several years ago in her work on welfare fraud, this was an "unfortunate" direction, based on "fallacious reasoning", that continued the perpetuation of harmful and degrading stereotypes of welfare recipients.<sup>76</sup> Although the Committee identified the public perception of fraud's prevalence to be distorted, and fueled by inaccurate media reporting and government statements, and notwithstanding its own articulated analysis of the importance of eradicating the deeply negative stereotypes that informed both public opinion and public policy, it nevertheless was prepared to build its recommendations upon this deeply flawed (in its own assessment) foundation. And while the Committee acknowledged that current attempts to detect fraud were already quite "intrusive" (undermining recipients' dignity, privacy and autonomy—interests that its guiding principles sought to preserve and protect), additional measures were deemed in order.

The S.A.R.C. believed that many of its other recommendations would reduce the incidence of fraud. Significantly, it identified the "move towards adequacy [as] the single most important weapon in the fight against fraud in the system".<sup>77</sup> Also important was its identification of the definition of 'spouse' (it endorsed defining 'spouse' to track the *Family Law Act*) and the amount one could retain from earnings, as key fraud prevention reforms. But in addition, it recommended the creation of a fraud control unit to determine the extent of fraud and to establish consistent policies and procedures for investigations, an expanded role for *Provincial Offences Act* prosecutions, and the use of information sharing agreements. The Committee noted that in pursuing these reforms it must be borne in mind "that the intent is not to build the whole social assistance system around an assumption of widespread abuse."<sup>78</sup>

While some of the reforms to address fraud introduced by the Conservative government in the mid-1990s align with those recommended by the S.A.R.C., several others depart

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<sup>75</sup> *Ibid* at pp. 382-83.

<sup>76</sup> Martin, *supra* note 47 at p.54.

<sup>77</sup> S.A.R.C., *supra* note 9 at p.384.

in significant measure. As noted earlier, benefits were not increased, but radically decreased; and the definition of spouse returned to its pre-1987 model. In addition, the government introduced a wide array of measures to crack-down on welfare fraud, frequently deploying derogatory stereotypes of welfare recipients and misrepresenting the extent of fraud in the system in order to justify these measures. Below we describe these measures and then turn to consider their impact on those in receipt of social assistance.

### 3.c.i Fraud Control Policy Directive

The *O.W.A.* provides legislative authority for the Director to establish a social assistance fraud control unit and for each delivery agent to establish a local fraud control unit to investigate the eligibility of present and past applicants and recipients regarding possible violations of the *O.W.A.*, *O.D.S.P.A.*, *F.B.A.*, *G.W.A.* and *V.R.S.A. (Vocational Rehabilitation Services Act)*.<sup>79</sup> Both central and local fraud control units have been created. The central "Income Support, Compliance and Fraud Control Unit" is "mandated to provide leadership to the fraud control function. The Unit serves as a provincial resource and central point of contact for policy issues. It is responsible for providing policy analysis and advice, and for liaising with other programs and jurisdictions regarding fraud control matters."<sup>80</sup>

Directive 45, "Controlling Fraud", provides the policy framework in which delivery agents of O.W. (most of whom are municipalities) are to develop their local fraud control protocols and practices.<sup>81</sup> Every administrator is required, under the directive, to "consult with the local police services and the Crown Attorney's Office to develop a written protocol for the effective investigation and prosecution of cases of suspected social assistance fraud." The local protocols are to spell out respective responsibilities for various stages of the investigation including the collection of information, the securing of evidence and the preparation of a Crown brief.<sup>82</sup>

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<sup>78</sup> *Ibid* at p.384.

<sup>79</sup> *O.W.A.*, *supra* note 1, subs. 57(1) and (2)

<sup>80</sup> Controlling Fraud Directive 45, *supra* note 46.

<sup>81</sup> O.W. is delivered by "Delivery Agents" most of whom are municipalities, some are First Nations. There are 47 consolidated municipal service managers and First Nations delivery agents. O.D.S.P. by contrast is not delivered by municipalities, but by the Province.

<sup>82</sup> While we understand from the Ministry that all delivery agents have negotiated such local agreements we were unable to secure copies of any; the Ministry does not have copies of these

The directive requires that all allegations of fraud, from both internal and external sources, be assessed in a timely manner. The directive provides that in cases where it is suspected that an individual is receiving assistance that they are not entitled to, a referral to an Eligibility Review Officer (E.R.O.) should be made. An E.R.O. is to conduct a "comprehensive investigation" and prepare a written report for an E.R.O. supervisor, including a recommendation regarding on-going eligibility, any over-payment and whether to refer to the police. The Directive was revised in January 2004, at the same time as the life-time ban on eligibility was revoked (see below), to provide that "[w]here sufficient evidence exists to suspect intent to commit fraud, the case **must** (bolded in original) be referred to police for possible criminal prosecution."<sup>83</sup>

### 3.c.ii Information Sharing Agreements

In keeping with the recommendations of S.A.R.C., the *O.W.A.* creates legislative authority for the pursuit and use of information sharing agreements with other provinces, federal and Ontario ministries and agencies. As of 2002, agreements had been negotiated with the Ministries of Training, Colleges and Universities, Public Safety and Security, the Attorney General, and Transportation, as well as with social service departments in other provinces and territories and with the federal department of Human Resources Development Canada (Employment Insurance) and Citizenship and Immigration. Agreements were expected to be finalized with the Canada Pension Plan and the Old Age Security Program in 2003-04.<sup>84</sup>

### 3.c.iii Expanded Powers for Eligibility Review Officers

The *O.W.A.* expanded the powers available to E.R.O.s in their investigations of welfare fraud. Pursuant to section 58 of the *O.W.A.* the Director or an administrator may designate a person as an Eligibility Review Officer to investigate a person's past or present eligibility, and for that purpose has the prescribed powers, including the authority to apply for and act under a search warrant.<sup>85</sup> In 1987, according to the K.P.M.G. report for the S.A.R.C., there were 35 E.R.O.s in the social assistance system. In 2002-03,

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agreements; none of the legal advocates we spoke with had ever seen a local agreement; and time did not permit us to try to track these down through the various municipalities.

<sup>83</sup> Controlling Fraud Directive 45, *supra* note 46.

<sup>84</sup> *O.W.A.*, *supra* note 1, section 71; Moretta, *supra* note 8 at para. 58.

there were approximately 280 (50 for O.D.S.P. and 230 for O.W.).<sup>86</sup> Pursuant to section of 65 Regulation 134/98 an E.R.O. may,

(a) subject to subsection (2), enter any place that the officer believes on reasonable grounds contains evidence relevant to determining a person's eligibility for payments under an Act set out in subsection 58(2) of the *O.W.A.* 1997;

(b) inquire into all financial transactions, records and other matters that are relevant to the investigation; and

(c) demand the production for inspection of anything described in clause (b).

(2) An officer shall not, without the consent of the occupier, exercise a power to enter a place that is being used as a dwelling except under the authority of a search warrant.

(5) If an officer makes a demand, the person having custody of the things shall produce them to the officer.

(11) An officer may require information or material from a person who is the subject of an investigation under this section or from any person who the officer has reason to believe can provide information or material relevant to the investigation.

Subsection 79(3) of the *O.W.A.* makes it an offence to obstruct or knowingly give false information to a person engaged in an investigation under section 57 or 58. Thus, if an E.R.O. wishes to question a neighbour or relative about someone suspected of breaking the regulations, the person being questioned risks being charged with an offence if she or he does not co-operate. Significantly, as well, the regulations provide that an E.R.O. may **require** [emphasis added] information or material from the person who is the subject of an investigation, a point to which we return in our discussion of the *Charter* issues that may arise in relation to E.R.O. investigations.

In the course of their investigations, E.R.O.s will often seek information from landlords, neighbours, teachers and others who may know something of the circumstances of the recipient under investigation. A copy of a routine form letter, in the particular instance mailed out to make inquiries about a neighbour, was provided to us. The letter explains, "We are conducting inquiries relating to an Ontario Works recipient and require information with respect to the above address. If you have any information regarding the tenants of the above address i.e.: number of occupants, sexes, names, employment,

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<sup>85</sup> *O.W.A.*, *ibid*, s.58; although the power to apply for a search warrant exists we have been told by the Ministry that this power has, to date, never been utilized; Moretta, *supra* note 43.

<sup>86</sup> K.P.M.G., *supra* note 58 at p.31; Moretta, *supra* note 8 at para. 64.

length of residency, any other relevant information please do not hesitate to contact me. Your anonymity can be assured in responding to this inquiry.” The letter then goes on, in fine print, to note the statutory authority for collecting personal information. As one can see, the breadth of the information requested is quite sweeping. The person who provided the letter to us also explained that in his/her experience, persons who receive these letters feel obliged to respond and to provide what information they can.

### 3.c.iv Verification Procedures

A significant development in the arsenal of measures to combat welfare fraud was the introduction of first ‘enhanced verification’, and then ‘consolidated verification procedures’ (C.V.P.). The starting point here is to consider the initial application for assistance. At the time of applying one is required to sign a "Consent to Disclose and Verify Information" form. Clause one of the form grants a sweeping and generic consent to the collection and release of information by an O.W. delivery agent (for O.W.) or the Ministry (for O.D.S.P.) for the purpose of determining or verifying eligibility and administering social assistance. More specific consents follow: to the release of all information held by financial institutions; to the disclosure of personal information about oneself and one's children; and to the exchange of information among government agencies within and beyond Ontario.

Enhanced verification was introduced in 1994 with an increased emphasis on documentation/verification and accuracy of information recorded on update reports. The consolidated verification procedure followed in 1997.<sup>87</sup> C.V.P. has, note Herd and Mitchell, changed both the frequency and nature of file reviews. Previously reviews were time based, with a review occurring usually every 12 months. In the C.V.P. environment, priority-ranking factors, based upon an assumed 'risk' of fraud, are used to determine when a review will occur. High risk factors include: high accommodation costs (equal to or greater than 80 percent of the participant's net revenue); receipt of social assistance more than 36 months; or it has been eleven months or more since the last C.V.P. review. Medium risk factors include: another person resides at the participant's address; the S.I.N. begins with a 9 or is blank (a '9' indicates a person without permanent residence status who is permitted to work in Canada); accommodation costs equal 75-

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<sup>87</sup> Moretta, *supra*, note 8 at para. 34 & 40.

79 percent; or in receipt of social assistance 24-35 months.<sup>88</sup> C.V.P. is part of a broader project undertaken by the Ontario government, called the 'Business Transformation Project', a project intended to "modernize technology and business practices in the welfare delivery system to reduce fraud, improve the efficiency of its operations and save taxpayers money."<sup>89</sup> In other words, the operating system for the delivery of benefits is centrally concerned not with meeting needs and providing support to autonomy (as the S.A.R.C. envisioned) but reducing fraud, and 'protecting' the money of taxpayers.

The amount of information required to be provided at the time of applying and during regular or risk-determined reviews can be overwhelming and 'mind-boggling'; among other things one need provide documentation to verify: birth; marital status; support; immigration status; income; property; debts; S.I.N.; health card; sponsorship; bank accounts; receivables; funds in trust; boarder; accommodation; school attendance for dependent children; employment; and education status.<sup>90</sup> As Debbie Moretta outlines, checks with Employment Insurance, Equifax Credit, and Canada Customs and Revenue Agency are mandatory and checks are made with the Ontario Student Assistance Program, the Ministry of Transportation, and M.E.C.C.A. (enforcement of support orders) as appropriate, depending upon the circumstances.<sup>91</sup> The sweeping consent signed as a pre-condition to receipt of benefits, together with the extensive and on-going reporting requirements, permit the Ministry to gather and share vast amounts of information about those in receipt of social assistance.

The regulations also authorize random 'home visits', with or without notice, to verify eligibility.<sup>92</sup> Although in theory consent is required before entering the home, the

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<sup>88</sup> Herd and Mitchell, *supra* note 34 at pp. 34 - 37.

<sup>89</sup> Moretta, *supra* note 8, at para. 38. The Office of the Auditor General of Ontario noted in its 2002 Report that most of the expected benefits of the Business Transformation Project were yet to be realized, and notwithstanding a payment cap of \$180M recommended by the Standing Committee, was millions of dollars over budget at \$400M, (Office of the Auditor General of Ontario, Annual Report, 2002, chapter 3.01). For a Ministry concerned about over-payments, errors and reducing costs, the Auditor-General's conclusion that the Ministry "had not demonstrated due regard for economy and efficiency in the contract terms agreed to or in the administration of the work" surely suggested that it was not leading by example.

<sup>90</sup> Herd and Mitchell, *supra* note 34 at pp 38-39.

<sup>91</sup> Moretta, *supra* note 8 at para. 41.

<sup>92</sup> O.Reg. 134/98, section 12. The respondents in our interviews reported that home visits were being conducted far less frequently in recent years, and they surmised that this was due in large measure to the costs of undertaking such visits. Also, on occasion, home visits are arranged at

withholding of consent may result in termination of benefits or denial of eligibility unless the state is satisfied that there was a reasonable basis to withhold the consent. Given the coercive power of the state, backed by the threat of the denial of benefits, it is hard to imagine that consent is being volitionally given. Home visits are restricted to observing what is in 'plain view' and are, according to the policy directive on home visits, not to be used for the purpose of investigating a specific participant because of a fraud suspicion.<sup>93</sup> The directive does provide, however, that C.V.P. criteria may be "helpful in determining where random home visits are required" and goes on to note that a home visit can be made with a participant because s/he randomly falls within a specific group. This suggests that the risk factors for fraud used within the C.V.P. system can then be used to identify 'groups' to be targeted for home visits; surely not disconnected from the broadly articulated goal of 'cracking down' on fraud.

### 3.c.v Welfare Fraud Hotlines

In addition to E.R.O.s, the 'public' too is charged with a responsibility—a civic duty—to engage in the project of surveilling and scrutinizing welfare recipients. As noted above, the public is told that welfare fraud is rampant, that people not genuinely in need are taking money from the pockets of the hard-working taxpayer. One way to discharge this civic duty is to call a toll free welfare fraud hotline (6,527 people did in 2001-02, down from 9,348 in 2000-01).<sup>94</sup> Introducing the welfare fraud hotline on October 2, 1995 then Minister of Community and Social Services David Tsubouchi proclaimed in the House that, "[w]elfare fraud is a problem that hurts the most vulnerable people in our society. Every cent that is paid to the wrong person through fraud is help taken from the needy." He noted that experience had shown hotlines to be an effective device to ensure that does not happen, projected savings of \$25 million per year and invited the people of Ontario to call 1-800-394-STOP to help "stop fraud and to protect the system for people who really need help."<sup>95</sup> With respect to virtually no other 'crime' that we can identify, has there been such a vigorous effort to bring the public so actively into the task of surveillance and denunciation.

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the request of the applicant/recipient where, due to exceptional circumstances, s/he is unable to attend at an O.W. or O.D.S.P. office.

<sup>93</sup> O. Reg. 134/98 section 12(3); Ministry of Community and Social Services, Policy Directive # 12 Home Visits.

<sup>94</sup> *Welfare Fraud Control Report, 2001-2002, supra*, note 60.

### 3.c.vi Bans on Receipt of Benefits - Zero Tolerance Policies

A very significant development in the welfare fraud control regime was the introduction of additional penalties upon conviction: the government first introduced a three-month ban on receipt of welfare for a first conviction, six months for subsequent convictions; and later introduced a lifetime ban (for crimes committed after April 1, 2000).<sup>96</sup> Thus, upon conviction for welfare fraud, one was automatically banned for life from receipt of social assistance. The constitutionality of the lifetime ban was under challenge when the Liberal government announced the repeal of the lifetime ban in December 2003.<sup>97</sup>

In the course of the litigation regarding the constitutionality of the lifetime ban, the government argued that despite its many initiatives to combat welfare fraud, it nevertheless continued to be a serious problem. In our interview with Debbie Moretta, Director of the O.D.S.P., and one of the deponents for the government in the litigation, she noted that the government's claim was not that fraud was a widespread problem, but rather was a serious problem; serious because the existence of fraud undermines public confidence. In her affidavit for the litigation, Moretta details several initiatives undertaken by government and offers the conclusion that "despite initiatives to combat welfare fraud, it has remained a serious problem and was seen by the public to be insufficiently addressed by government. The zero tolerance policy is intended to deter welfare fraud, to ensure effective management of public funds and to restore public confidence in the welfare system." She noted as well that "the new zero tolerance policy was a key step in Ontario's welfare reforms. It was one of the key measures introduced by the Ontario government in an effort to eliminate misuse and abuse of the social assistance system."<sup>98</sup>

Certainly, reading Moretta's affidavit without the explanation of 'seriousness' she provided to us, one could walk away from having read her affidavit with a picture of fraud within the welfare system as widespread. It is also interesting to observe that it is asserted both that other measures have failed to address the problem and that a lifetime ban on eligibility will. Given what we know generally about deterrence theory, there

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<sup>95</sup> Hansard, *supra* note 7, 2 October 1995.

<sup>96</sup> O.Reg.134/98, section 36 as amended by O.Reg. 227/98; O.Reg.48/00; O.Reg. 314/01; and O.Reg. 456/03.

<sup>97</sup> *Broomer et al v. A.G. Ontario*, *supra* note 8; O.Reg. 456/03.

<sup>98</sup> Moretta, *supra* note 8 at para 6 & 46.

certainly seems not to be a strong footing for the assertion that a zero tolerance policy will ensure compliance and provide deterrence.<sup>99</sup> But then, given Moretta's explanation that 'serious' refers not to the extent of fraud, but rather to loss of public confidence, one wonders what the whole exercise is really all about.

Several municipalities (delivery agents for O.W.) opposed the lifetime ban and in addition to formally voting to express their disapproval, adopted a variety of strategies to avoid it where possible. Some municipalities stopped referring to police any case where less than \$5,000 was involved, others changed their referral practices opting to refer few, if any, cases to the police and at least one municipality created a diversion project of its own. The controversy over the lifetime ban was certainly evident when the newly elected leader of Ontario's Conservative Party, John Tory, vowed to reinstate the lifetime ban if his government were elected to power. The Honourable Sandra Pupatello, Minister of Community and Social Services, responded with a stinging rebuff, in the form of an open letter in which she rhetorically queried, "How dare you use the most vulnerable members of our community as a sop to your party's right-wing extremists."<sup>100</sup>

It is interesting to note that in her affidavit Moretta echoes a concern expressed by the S.A.R.C.; that is, that the social assistance system cannot be built around an assumption of widespread fraud. Moretta observes that,

while fraud detection and prevention mechanisms are in place, the entire system cannot be built around the assumption that applicants/recipients are out to defraud the system. It would not be feasible for a welfare system to be managed on such an assumption. Such a system would be overly cumbersome, costly and intrusive. A fair, efficient, and responsive system must balance various interests.... Finally, it cannot be over-emphasized that an increased focus on fraud detection would likely come at a significant cost to the interests of honest recipients. More intrusive questioning, increased home visits, searches, or surveillance would not only be expensive, but also would be seen by recipients as an invasions [sic] of their privacy and likely be perceived with hostility by the recipients and public. If more reliance is placed on detection, then the privacy interests of honest claimants/recipients could be detrimentally affected. Deterrence by the zero tolerance policy avoids inflicting these consequences on honest recipients."<sup>101</sup>

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<sup>99</sup> See for example Kimberly N. Varma and Anthony N. Doob, "Deterring Economic Crimes: The Case of Tax Evasion" (April 1998) 40:2 *Can. J. Crim.* 165.

<sup>100</sup> Open letter to John Tory from Sandra Pupatello, September 14, 2004.

<sup>101</sup> Moretta, *supra* note 8 at para 63 & 69.

But as our review of life on O.W. below reveals, the system that Moretta says is to be avoided is, in fact, the system as experienced by many, if not most, O.W. recipients today. The present system is highly intrusive, surveillance and suspicion are structured into its very core. It is a system that is experienced as fundamentally disrespectful of privacy, dignity and autonomy; a system that is demeaning and humiliating. The small incursions upon the dignity and privacy interests that the S.A.R.C. was prepared to accept have grown exponentially, fuelled by derogatory stereotypes of those in receipt of social assistance. Sweeping informational demands and broad, generic consent forms authorizing disclosure of information about oneself and lifetime bans on benefits are practices reminiscent of the 1834 Poor Law pursuant to which the needs of the poor would be met only if the claimant forfeited his civil and political liberties; if he ceased to be a citizen. As T.H. Marshall himself noted, the Poor Law “treated the claims of the poor, not as an integral part of the rights of the citizen, but as an alternative to them—as claims which could be met only if the claimants ceased to be citizens in any true sense of the word.”<sup>102</sup>

Lastly, these measures come not only at a cost to personal dignity and well-being, but to the 'taxpayer'—whom defenders of zero tolerance and get tough policies are so eager to protect. For the year 2002, based upon Moretta's "conservative" estimate, fraud detection initiatives cost \$18.7 million: \$18.03 million on E.R.O.s; \$0.54 million on Corporate Support (Hotline Support, Analyst, Manager); and \$.13 million on the welfare fraud hotline.<sup>103</sup>

#### **4 Life on O.W.**

In our interviews with advocates on the frontlines providing legal services to persons in receipt of social assistance, we were interested to hear about how persons experienced living on O.W. on a day-in, day-out basis. While we were curious to learn about situations where persons had been investigated and/or charged with fraud, we were also interested to learn how the various measures described above—measures which we describe collectively as constituting the 'welfare fraud regime'—impacted on recipients. Across the interviews several key themes emerged; themes that resonate strongly with

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<sup>102</sup> As cited and discussed in Martha McCluskey, *supra* 10.

<sup>103</sup> Moretta, *supra* note 8 at para 25.

other research documenting experiences on O.W.<sup>104</sup> Recipients are struggling to make ends meet, often going without adequate food, shelter and/or clothing. The challenge of meeting basic needs for themselves and their children often places recipients in the grips of difficult moral binds, where none of the choices are 'good' choices. Recipients feel under constant scrutiny and that they are never trusted; the feeling that one is being treated like a 'criminal' is commonly voiced. Fear is pervasive: fear of violating a rule and being cut off and/or charged with fraud; fear of someone snitching; fear that a relationship might be deemed to be 'spousal'; and fear of not being able to adequately provide for one's children (and risk losing custody to the state).

Several of those we interviewed described the C.V.P. environment as analogous to "living under a microscope"; to having "one's life gone through with a fine tooth comb"; and to having one's "life micro-managed". Everything in one's life is open to question; there is no privacy. For many, compliance with all of the demands of C.V.P. is time-consuming and very stressful. We were told that not uncommonly, the O.W. office is in a position where it could quickly access the information (because of the consent form or an information sharing agreement), yet nevertheless requires recipients to obtain the documentation. For recipients, accessing the required documentation can be anything but quick: they may have to deal with an unyielding bureaucracy; or make repeated visits; and/or incur transportation, childcare and other costs.

Often recipients are required to provide the same documentation on multiple occasions, an experience described as demeaning and degrading. Also, because C.V.P. flags recipients for fraud 'risk' factors, persons who are summoned for a meeting are often put in the position of explaining how they are managing to survive on so little money without breaching the rules, again something that is experienced as profoundly demoralizing. One respondent described how recipients sometimes feel ambushed, having to months after the fact and without warning, account for every single entry in their bankbooks. As one respondent explained, "it is made clear to people that you're in our scopes because we know you're doing something... this leaves people on tender hooks all the time".

One respondent described a client who was receiving \$520/month. His rent was \$500. Paying more than 80 percent of his income on rent, he was identified as a 'high priority'

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<sup>104</sup> Herd and Mitchell, *supra* note 34, Matthews, *supra* note 34, Mosher et al, *supra* note 32.

for risk of fraud through the C.V.P. He was called in and asked to explain how he survived on \$20/month. He explained that he received some food from his grandmother, and other friends and family members. He was required to itemize exactly what he received. The items were assigned a cost based on local grocery flyers and assessed a total value of \$70. He was then deemed to be in receipt of \$70 income/month and this was deducted from his benefits, and as a result, he was no longer able to pay his rent.

Herd and Mitchell report a similar incident occurring to 'K', a recipient interviewed for their study. 'K' asks, "Do you know what my worker told me? She is not giving me enough money to make it on a monthly basis so she knows that I'm defrauding them, but just hasn't figured out how yet. I get \$1106 a month and between my rent, heat and hydro which is all in one, it's \$950. So she knows I'm defrauding them, she just hasn't figured out how and because of that, and because of the new government standards, they can actually call me in every month for an update."<sup>105</sup>

Recipients fear the consequences that may befall them if they are unable to provide the requested documentation. As Herd and Mitchell have observed, recipients are under the constant threat and fear of cheques being suspended or cancelled.<sup>106</sup> This fear derives from a material reality; subsection 7(3) of the *O.W.A.* provides that no person is eligible unless s/he provides the information and verification of the information required to determine eligibility. Similarly, and more expansively, section 14 of the *O.W. General Regulation* provides that the administrator "**shall** [emphasis added] determine that a person is not eligible for income assistance if the person fails to provide the information the administrator requires to determine initial or ongoing eligibility for income assistance." This information includes such things as new or changed circumstances, participation in employment assistance activities, and the receipt of income or "some other financial resource."<sup>107</sup>

Respondents explained that in their experience, cheques were often held until information was provided. Some noted that they have seen cases where the recipient was simply notified by letter that his/her cheque was being held until the required

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<sup>105</sup> Herd and Mitchell, *supra* note 34 at p.48; note that subs. 14 (2) of O. Reg. 134/98 permits the Administrator to require a member of the benefit unit to provide monthly reports.

<sup>106</sup> Herd and Mitchell, *supra* note 34.

<sup>107</sup> Section 14, O.Reg. 134/98.

information was provided, without the letter specifying what information was, in fact, required. Many would characterize the practice of holding cheques in such circumstances as a form of bureaucratic disempowerment; a case management tool to cut people off assistance and reduce caseloads. Some suggested to us that the withholding of a cheque is sometimes employed for a further purpose: as a 'scare tactic' to extract admissions (of over-payments in particular).<sup>108</sup> They described instances where their clients, desperate for their monthly cheques, simply signed documents—including statutory declarations—without understanding the content of the document or the implications of signing.

Herd and Mitchell's finding that the climate is permeated with suspicion and hostility is consistent with what respondents reported to us. As Herd and Mitchell describe, "[t]he new system is more concerned with surveillance and deterrence, than it is with assisting people to find employment. What is new is the intensity of surveillance and the technologies employed, the importation of private sector methods and standardized business practices...[o]verall the mood of the focus groups was that the new system was inspiring a greater degree of suspicion and hostility... more concerned with constant surveillance and treating 'everybody like they're cheating the system'".<sup>109</sup> One of our respondents summed it up very effectively with the observation that hardly any of her clients now refer to their welfare workers as their 'social workers' as they did formerly; rather welfare workers have become much more closely associated with police officers. Fraud is now **the** focus of the system, explained another of our respondents.

Respondents also described how intensely scrutinized their clients' lives are by non-state agents: present or current abusive boyfriends or spouses, landlords and neighbours appear to have all taken up the government's invitation to participate in the surveillance project. In many instances, calls are made to the welfare fraud hotline; in others, calls are made directly to a local O.W. office. Respondents pointed out to us that when these calls form the basis of the allegation it is usually difficult to respond because the subject of the allegation is not told who made the allegation and often not told precisely what the allegation is. The allegation is 'in the wind' so to speak, and thus is

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<sup>108</sup> One respondent questioned whether there is any statutory authority for the withholding of cheques. Sections 7 and 14 suggest that one is eligible or ineligible; not that one can occupy some middle territory where one is 'on hold'.

<sup>109</sup> Herd and Mitchell, *supra* note 34 at pp. 8, 9 & 33.

difficult to pin down and answer. We also heard of many instances where allegations were reported to welfare for purposes completely extraneous to preventing or detecting fraud. Abusive men make false reports to O.W. to further their power and control over women; landlords make false reports to facilitate the eviction of a tenant; and vindictive neighbours or other acquaintances make false or misleading reports simply out of spite.<sup>110</sup> Two of our respondents also noted how the snitch lines in particular encourage gossip which is very destructive in smaller rural communities and on First Nations reserves. Yet, it seems, none of these abuses of, and harms created by, the welfare system enter political discourse as matters of public concern, let alone are raised to the level of charges for mischief.

Several respondents also observed how stereotyping plays into calls made. So, for example, class and race stereotypes of racialized women portray them as bad and potentially dangerous; as likely criminals. Dominant stereotypes also caricature aboriginal people as "living off the system", too lazy to get a job; and single mothers—especially those with children by more than one father—as promiscuous, having children to increase welfare dollars, and likely to be hiding men in their homes. Under the gaze of surveillance by 'concerned citizens' who harbour these stereotypes, virtually any racialized woman, any single mother, or any aboriginal person is a person suspected of fraud, who ought to be investigated. Thus, not surprisingly, many respondents expressed the view that the sweep and impact of surveillance by non-state actors impacts differentially on particular groups of recipients: racialized peoples generally, women, and most pervasively, upon racialized women.

It is important to emphasize how pervasively fear permeates the lives of those in receipt of O.W. The fear has multiple sources: fear of not being able to meet the basic needs of one's children; fear of losing custody; fear of declining health; fear of social exclusion and discrimination; and fear "that no matter what choice you make, it will be the wrong choice and the axe will fall".<sup>111</sup> The constant surveillance by not only the state, but neighbours, landlords, shopkeepers, etc. generates fear as well—fear that virtually whatever one does might lead to an allegation that one has broken a rule or is guilty of 'fraud'. Fear is also connected to the reality that recipients are often in a position where

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<sup>110</sup> We heard this over and over in the interviews.

<sup>111</sup> Interview Respondent.

there is simply no one that they feel they can trust with information; they have no control over who will use it and for what purpose. One respondent noted that some recipients respond by withholding information, even harmless information, because they simply don't know what will happen as a consequence of sharing the information. Yet this can land recipients in difficulty, for if the information is subsequently discovered, the failure to provide it may result in termination of benefits, an assessment of an overpayment, and/or a fraud charge.

The uncertainty that recipients experience is often created by the O.W. system itself; virtually everyone with whom we spoke observed that because of the complexity of the rules, it is very hard to get a straight-forward answer to any question quickly, or in some instances, at all. Moreover, many reported experiences of being given inconsistent answers by different workers (even within the same office) and of workers simply not knowing the answers to questions posed. An additional feature of the system that contributes to the uncertainty is the amount of discretion that exists; one cannot know in advance how that discretion will be exercised and contemplating disclosure can feel like a game of Russian roulette.

The poverty, insecurity, degradation and fear exact a toll upon the mental and physical health of recipients.<sup>112</sup> Respondents variously described the experience of being on welfare as soul destroying, dehumanizing, emotionally taxing, destructive of self-confidence and as reaching into someone's core and ripping out her/his self-respect. Several respondents noted that within the O.W. caseload, significant numbers of recipients experience cognitive and/or mental health disabilities. The very high correlation of poverty and depression means that for many on O.W., pre-existing mental illness may be exacerbated and for others, the experience of poverty may itself be the trigger for depression or other mental health issues.

Another feature of life on welfare is the lag time in the system's response to information that is, in fact, provided. Various respondents noted that when changes in circumstances regarding income or living arrangements are reported, there is often a lag time of several weeks before the system responds. So, for example, if employment income is reported,

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<sup>112</sup> See Dennis Raphael (ed.) *Social Determinants of Health: Canadian Perspectives* (Toronto: Canadian Scholars Press, 2004).

it will be deducted and benefits reduced accordingly. If the employment is temporary, and in a subsequent month, one has no employment income, it may take weeks before the adjustment is made to benefits.<sup>113</sup> A similar situation can occur with respect to the variable payments of support orders, or with changes in the *de facto* custody of children. One respondent noted that once child dependents are removed from the cheque, "it can be hellish to get them back on". Wilkie, commenting on the Australian social security system, notes how time lags of this sort create built-in "disincentives to scrupulous honesty for people dependent on the regularity, both as to [the] amount and date of payment, of subsistence income support."<sup>114</sup>

## **5 Circumstances giving rise to rule violations or fraud**

It is within this larger context of struggling to get through the month, under constant surveillance, often experiencing ill health, and with pervasive fear that both volitional and inadvertent rule violations occur. In this section, we focus on the sorts of circumstances that most commonly give rise to allegations of 'fraud': the non-disclosure of 'income'; and the non-disclosure that one is living with a 'spouse'. But before we turn to these specific circumstances, we identify three characteristics common not only to the rules regarding 'income' and 'spouses', but to the rules of the system more generally. These three characteristics—complexity, counter-intuitiveness, and instability—are crucially important to any analysis of 'fraud'.

### **5.a Features**

#### **5.a.i Complexity**

As we noted earlier in our report, the social assistance regime is hugely complex. Mr. Justice Weagant's characterization of the regulations as fiendishly difficult to comprehend, Mr. Justice Campbell's descriptor of "Kafkaesque", or M.P.P. Deb Matthews' as "mired in a labyrinth of rules" are indeed apt. The C.R.I.L.F. in its report to the S.A.R.C. noted that it is "extremely difficult for the clients and the workers to

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<sup>113</sup> Matthews, *supra* note 34 at p.14 observes that "the 6 week delay between the time earnings are reported and the time funds are deducted from social assistance payments, [create] large fluctuations in monthly income. The delay is confusing, makes it difficult for people to budget, creates hardship, and thus acts as another disincentive to work."

<sup>114</sup> Meredith Wilkie, *Women Social Security Offenders: Experiences of the Criminal Justice System in Western Australia* (Nedlands, Australia: University of Western Australia Crime Research Centre, 1993) at p88.

understand the implementation of the regulations", adding that "[o]ften regulations governing the provision of social assistance are almost impossible to interpret".<sup>115</sup> K.P.M.G. in its report speculated that complexity and lack of information were significant causes of fraud and overpayment.<sup>116</sup> All of the respondents in our interviews noted not merely the complexity of the rules, but also the enormous volume of them. One respondent observed that even experts in the system are unable to answer many of the questions presented to community legal clinics by clients. Others noted that so too, many O.W. workers have no idea of the correct answers to questions posed by recipients and frequently provide inaccurate information. All respondents felt the complexity of the rules get recipients into trouble.

Respondents also noted the general difficulty recipients have in accessing information. While often a package of information is given at the outset, many described this as "information overload" and totally ineffective in communicating rules, obligations and importantly, entitlements, clearly. Many noted the disparity between the hue and cry over recipients not sharing information and the withholding of information from recipients—about entitlements in particular—by O.W.

Importantly as well, recipients stressed the prevalence of mental health issues and cognitive disabilities among the O.W. caseload and expressed concern that in many cases, there simply was no ability to comply with the rules. One respondent observed that workers often are not even aware of mental health issues and cognitive impairments, let alone of how these might impact upon the recipient's ability to comply with the rules.

#### 5.a.ii Counter-Intuitiveness

In addition to their complexity, many of the rules are counter-intuitive. So, for example, as we review in more detail below, the rules regarding 'income' (which must be disclosed) define 'income' to include loans and credit card advances. And while student loans are considered 'income', grants by the Ministry of Education and Training to a student in post-secondary education are not. Additionally, there are situations in which one is deemed to be in receipt of 'income', irrespective of whether an actual payment is

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<sup>115</sup> C.R.I.L.F., *supra* note 40 at p.13 and p.40.

<sup>116</sup> K.P.M.G., *supra* note 58, at p.69.

received by the social assistance recipient. For example, if one has a boarder, the boarder is deemed to be contributing \$100/month.<sup>117</sup> Similarly, until very recently, a sponsored immigrant in situations of sponsorship breakdown was deemed to be receiving \$100/month and her monthly benefit cheque would automatically be reduced by \$100.<sup>118</sup>

#### 5.a.iii Instability

The third feature of the rules is that they are frequently subject to change, so that what might be permissible one day, becomes impermissible the next. Changing definitions of 'spouse', and of 'income', as we review below, provide two examples of this. Another—which has attracted several fraud charges—are the changes in the rules regarding the simultaneous receipt of student loans and social assistance. As recently as December 2004 these rules changed yet again with the government's announcement that "it will no longer treat grants, bursaries or R.E.S.P. funds obtained to cover costs of education as income and or assets."<sup>119</sup>

### 5.b Undeclared Income

As noted earlier, subsection 14(1) provides that "the administrator shall determine that a person is not eligible for income assistance if the person fails to provide the information the administrator requires to determine initial and ongoing eligibility for income assistance including information with respect to ... d) the receipt or expected receipt of income or some other financial assistance." Policy Directive #16, *Income*, instructs workers that they must advise applicants or participants that all income received must be reported. And in the "Rights and Responsibilities" form, signed at the time of applying, among the 14 listed responsibilities is the responsibility to "report all available income; each month you will receive an income reporting form that is used to report all changes to your income". But what is 'income' and when might the failure to report it give rise to an allegation of fraud?

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<sup>117</sup> O.Reg. 134/98, section 50.

<sup>118</sup> The government announced in December 2004 that sponsored immigrants will no longer face an automatic \$100 deduction; Ministry of Community and Social Services, Background, December 15, 2004, "Improving Ontario's Social Assistance Programs", <http://www.cfcs.gov.on.ca/CFCS/en/newsRoom/backgrounders/041215A.htm> (last accessed January 24, 2005).

<sup>119</sup> *Ibid.*

The definition of 'income' for social assistance purposes is detailed, lengthy and in many respects, so counter-intuitive that one would never advert to the need to report. Pursuant to the regulations 'income' is determined by adding, "all payments of any nature paid to or on behalf of or for the benefit of every member of the benefit unit." This calculation is to include the "monetary value of items and services", as well as "amounts deemed available" (such as income from boarders and from sponsorship agreements).<sup>120</sup> The regulations then provide a list of payments that are to be exempted, for example, donations from religious or charitable organizations, portions of loans approved by the administrator for very specific purposes, certain provincial and federal payments, and casual gifts or casual payments of small value. Thus loans—except those exempted for limited purposes—and cash advances from a credit card or line of credit are considered income and as such result in a dollar for dollar deduction in the amount of benefits payable.<sup>121</sup>

The complex, by times counter-intuitive, and changing nature of the rules regarding what constitutes income creates certain common problems for recipients. Not surprisingly, situations will arise where some 'payment' (in cash or in kind) has not been reported because the recipient had no inkling that the obligation to disclose had been triggered. In an analysis of fraud, these are cases where, accepting the testimony of the recipient, there exists either no act that might appropriately be described as dishonest and/or no intent to deprive. Yet, we heard over and over from respondents that the mere failure to disclose information that a welfare worker says ought to have been provided, gives rise to allegations, investigations and sometimes, fraud prosecutions and convictions. Several respondents noted that once accused of 'fraud', and acknowledging that they had not reported something, many recipients simply accept that they are guilty of fraud.

Even those cases which appear to be relatively straightforward in terms of their fraud analysis often are not. Consider for example the person working 'under the table' and being paid wages for his work who knows that he is obliged to report this as income. While he may have the requisite *mens rea*, one component of the *actus reus* may be absent; there may be no deprivation. This is because, while income is usually deducted dollar for dollar, within O.W. there exists a program known as S.T.E.P. (Supports Toward

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<sup>120</sup> O.Reg. 134/98, section 48.

<sup>121</sup> Income, Policy Directive #16, Ministry of Community and Social Services, Sept. 2001.

Employment Program), pursuant to which one is entitled to retain money from employment and to deduct employment related expenses, such that a possibility arises that had the disclosure been made, benefits would not have been reduced.<sup>122</sup> Thus, there would have been no deprivation.

An additional observation about the S.T.E.P. rules is in order. The rules are, in Matthews' words, "complicated, punitive and counter-productive. They take a long time to explain and are very difficult to understand". As Matthews found, "[c]onfusion about the rules and the administration of earnings exemptions creates fear for clients of inadvertently breaking the rules and losing their benefits."<sup>123</sup> One consequence of this fear of an inadvertent rule violation may be silence. But there will also be situations where the obligation to report income is known, understood and intentionally violated and there may well be sufficient evidence to support a fraud conviction. This may occur, as noted earlier, because of the lag time in benefit adjustments to reflect earnings that fluctuate. And it may occur because one may simultaneously recognize the importance of obtaining employment and indeed, is desirous of work, yet experiences how the O.W. rules regarding the treatment of earnings and expenses related to earnings may actually put one in a worse financial position than had one not taken up work at all.<sup>124</sup> The system, in fact, creates conflicting obligations for some: make all reasonable efforts to obtain employment; and comply with all the rules (rules which themselves impede obtaining employment).

Another very problematic dimension of the 'income' rules relates to "casual gifts or casual payments of small value". Directive 16 provides that,

[a]pplicants or participants may receive occasional financial help from relatives and friends while in receipt of assistance. Casual gifts and payments of small value are normally exempt from income. However, any income from a person who has an obligation to support the applicant or participant will be deducted at 100 percent unless the gift or payment is tied to a special occasion such as Christmas or a birthday.

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<sup>122</sup> O. Reg. 134/98, section 49.

<sup>123</sup> Matthews, *supra* note 34 at p.13.

<sup>124</sup> Although ostensibly designed to facilitate the transition to paid employment, many have observed how the rules can operate in fact to create obstacles and disincentives to work. In some circumstances one is no further ahead, and may well be worse off, if paid work is obtained.

Delivery agents may exercise their discretion when determining whether or not gifts or casual payments are chargeable as income. There are occasions where an applicant or participant may be faced with an immediate financial crisis. Help may be obtained from family, friends, or another third party. When making a determination, the delivery agent must consider the source, amount and frequency of the gift or casual payment and the opportunity to resolve the crisis. Exercising discretion should be in favour of applicants or participants to assist them to manage their financial circumstances...

Examples of casual gifts and payments of small value may include items such as clothing, meals at family members' homes and the occasional purchase of items such as food. Gifts tied to a special occasion are generally exempt. Casual payments are considered infrequent payments. Continuous payments of small value are non-chargeable up to six months. After six months they are no longer considered casual and therefore are considered income to be charged at 100 percent.<sup>125</sup>

The discretionary and complex nature of the rules makes it exceedingly difficult for anyone in receipt of welfare to know if and when gifts or casual payments will be deducted. If reported, and discretion is not exercised in your favour, your benefits will be reduced dollar for dollar. On the other hand, if you fail to disclose, you risk being cut off and charged with fraud, and the reality is, sometimes even in situations where if you had disclosed, the 'income' would not have been deducted. These are the kinds of situations that create difficult moral binds for recipients. Take, for example, \$100 given to you by your boyfriend to help you get by. Even with this \$100 you don't have enough to adequately feed and clothe your children. If you disclose the \$100 it may or may not be deducted dollar for dollar from your welfare cheque; if it is, you're obviously no further ahead. If you don't disclose and it is later discovered (perhaps because he, in fact, reports it to welfare) what will follow? Section 14 indicates that you shall be found to be ineligible for financial assistance, as you have failed to disclose income. You may well be cut off and while you can re-apply, there will likely be a period of time when you are without assistance. You will probably be assessed with an over-payment of \$100.00, and there is always the possibility of being charged with fraud.

Of course, another common situation is that one simply doesn't know anything at all about the rules regarding casual gifts or payments of small value. One respondent described a client, struggling to survive, who undertakes odd jobs in exchange for meals or a small supply of groceries. This respondent questioned whether it would ever cross

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<sup>125</sup> *Income*, Policy Directive #16, *supra* note 121.

this client's mind that this may be characterized as a "casual gift or payment of small value" that is reportable and which could potentially be deducted from his cheque and lead to termination, or even a fraud charge.

In our interviews we heard that generally casual gifts or payments of small value do not give rise to fraud charges, but rather to over-payments and terminations. However, one respondent reported that since the change to the Controlling Fraud Directive in January 2004—which now requires that where sufficient evidence exists to suspect intent to commit fraud, the case **must** (bolded in original) be referred to the police for possible criminal prosecution—casual gifts or small payments are being referred to the police.<sup>126</sup> Others observed that such cases may be referred, in particular where the payments or gifts continue beyond the six month time period and become automatically deductible.

But even in circumstances where no referral is made to police, the giving of assistance (often but not always compassionately motivated) is often overlaid with a discourse of fraud and abuse. One respondent described the case of a client on O.W. who, during a home visit, opened her refrigerator to show her O.W. worker that her son had given her food. Her worker (kindly) advised her not to "show me your fridge again". (Note that a 'home visit' is limited to what is in plain view so there is no legislative authority for a worker to open a refrigerator). The respondent who shared this story noted that this was a compassionate worker and that other workers in the region would pounce on this—the pounce could include assigning a dollar value and assessing an over-payment (so that its value would be deducted dollar for dollar from her welfare cheque), termination for failure to disclose and/or a fraud charge. But note that even the compassionate response of, "don't show me your fridge again" carries with it a message that someone is up to something s/he shouldn't be.

M.P.P. Deb Matthews reports a case described to her where the value of leftovers from Sunday dinner at a parent's house was deducted from the social assistance cheque.<sup>127</sup> And one of the persons interviewed by Herd and Mitchell described her situation as follows,

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<sup>126</sup> Controlling Fraud Directive, *supra* note 46.

<sup>127</sup> Matthews, *supra* note 34 at p.28 fn 30.

[I had] a form of what was considered a gift that had to be reported. Shoes, and various items like that, you were supposed to report at dollar value. You were allowed a birthday gift and a gift at Christmas. One of the things that I always remembered on that list was that if you were invited to somebody's house on a regular basis for a meal, that meal is a reportable item. Like if every Sunday you went to your Moms for dinner, you were supposed to say to them, "I had dinner at my Mother's 3 Sundays this month and the value of the meal was \$8.95 or whatever." If you got taken to a restaurant on a regular basis, that was a reportable item... One of the few things that was excluded was gifts from the church, like from the food bank, but you were allowed one visit a month and no more than a certain dollar value. (J, Scarborough) <sup>128</sup>

Another of our respondents described a situation where parents of a social assistance recipient, after reading about some welfare fraud cases in the newspaper, came into the office to inquire as to whether they had committed fraud because they had been giving their daughter money each month to help her get by.

### **5.c Man-in-the-house**

As noted earlier, a new definition of 'spouse' was introduced in 1995 that treated persons of the opposite sex presumptively as spouses upon taking up co-residency. While the definition of 'spouse' (and now also 'same sex partner') has been modified subsequently, most recently in the fall of 2004, it remains vague and ambiguous, falling to be determined in many instances upon an assessment of whether the 'social and familial aspects of the relationship' and the 'degree of financial interdependence' are consistent with cohabitation and whether, if 'spouses', they are 'residing in the same dwelling'. The *Co-residency Policy Directive #19* lists a variety of factors to consider when determining whether co-residency exists: a statement from a landlord that the recipient lives with another person, or that another person is listed on the lease; driver's license history; employment records; and credit checks are among the factors to be considered. There is no formula that weighs these various factors to determine whether the applicant/recipient is 'co-residing'.<sup>129</sup> Not surprisingly then, there is little consistency—even at the appeal level before the Social Benefits Tribunal—as to what combination of factors will lead to a determination of co-residency. Respondents pointed out to us that in some cases a determination of co-residency is made on very little evidence. One respondent told us of a case in which a finding of co-residency was made—and upheld at the Tribunal—on the basis of a common address on their respective drivers' licenses. Respondents also

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<sup>128</sup> Herd and Mitchell, *supra* note 34 at p.48.

<sup>129</sup> *Co-Residency Policy Directive #19*, Ministry of Community and Social Services.

observed that many of the factors often considered as indicative of co-residency need to be re-evaluated in the context of the lives of persons who are living in poverty. For example, frequently co-signatures are required on a lease, or to secure credit, if one does not have the financial means to qualify on one's own. So too, low income people without a fixed address may use the address of a friend or acquaintance when applying for employment, a license, or any number of other things for which an address is requested or required. These, and a range of other circumstances, represent forms of survival strategies that low-income people must engage in to get by. But such arrangements will often be viewed out of context and assumed to be evidence of co-residency.

In addition to the consideration of co-residency, a determination also must be made as to whether the persons in issue are 'spouses'. In some instances, this is answered readily if, for example, there is an existing obligation of support under the *Family Law Act*. But in other cases the determination will turn on a consideration of financial, social and familial factors. While here too the policy lists a host of factors to be considered, again there is no formula that permits any predictability as to the circumstances in which a 'spousal' determination will be made. And, as with determinations of co-residency, decisions regarding spousal status are "all over the map." Indeed, as noted earlier, the vagueness and ambiguity of the definition was based on which the Ontario Court of Appeal struck the definition down as unconstitutional.<sup>130</sup>

Although the Co-Residency Policy Directive provides that during the intake verification interview, during an annual financial assessment review, or at any time an applicant or participant declares a co-resident, the worker must: explain the spousal/same-sex partner criteria; provide the co-resident information sheet (which is to be signed indicating that its contents have been explained and a copy provided); and complete the co-resident questionnaire, recipients are frequently (and understandably) uncertain as to just what might get them into trouble.

Several themes emerged from our interviews about the manner in which the definition of 'spouse' was being deployed in practice; many of these themes can be tied to problems that arise through the imposition of a static nuclear family model onto relationships that

are anything but static and nuclear. Several respondents noted that many of the relationships of their clients are 'fluid', not static. They may move in and out of relationship with a single partner, or with other partners. This fluidity of relationships may be tied to economic needs, to ebbs and flows in emotive relationships, or any number of other factors. Frequently women do not benefit financially from such relationships (or even from more static relationships for that matter). The assumption made within the nuclear family model of a male breadwinner who provides materially for his dependent wife is profoundly out-of-step with the realities of the lives of many. We also note here that many respondents indicated that a similar problem arises in relation to the custody of children. In First Nations communities, for example, traditional child-rearing practices differ from those of the dominant North American culture. Children are not reared exclusively within a nuclear family, but rather will spend extended lengths of time with others, including Aunties and Uncles. When children who are reflected as dependents in the benefit calculation of a recipient spend relatively extended periods of time with other extended family members, if these absences are not reported, problems—including fraud charges—can arise.

Intimate relationships give rise to a wide range of situations in which 'fraud' is alleged to have occurred. If a woman is claiming benefits as a single person or sole support parent and it is determined that she is residing with a spouse, then she is ineligible for benefits. She and her 'spouse' may, however, apply as a couple. This option, as the Court of Appeal in *Falkiner* noted, can be deeply problematic for women, but the important point to observe here, is how such an option ties into the analysis of fraud.<sup>131</sup> Assume for a moment a situation where the man with whom she is 'residing' and who has been found to be a 'spouse' has no income and no assets. Were they to apply as a couple, their combined income and assets would be assessed to determine the total benefits. In this hypothetical, as a couple they would in fact receive more benefits than she would have been receiving as a single person. There is then a strong argument that the state has not been deprived; there is, on the facts, no *actus reus*. Situations also exist, not surprisingly, where a woman either does not know or does not understand the rules re 'spouses' or does not believe that her relationship is 'spousal, so does not report a 'change in circumstances' to her welfare worker. In these situations, there will be a

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<sup>130</sup> *Falkiner*, *supra* note 37.

<sup>131</sup> *Ibid.*

sound argument that even if there has been deprivation (because the state would define the relationship as spousal and he has income or assets), there may be no objectively dishonest or deceitful act, and/or no *mens rea* (since she had no subjective knowledge of potential deprivation).<sup>132</sup> As with the income cases however, there seems to be a tendency to label the failure to disclose an intimate relationship, and nothing more, as 'fraud'.

Wilkie also appropriately argues that it is highly problematic to "label conduct criminal when not only is the categorization of that conduct highly subjective and discretionary but when...different legally-qualified tribunals come to opposing views on the same facts."<sup>133</sup> She goes on to describe a case where the benefits tribunal had concluded on a balance of probabilities that there was not a spouse; while a criminal court on the same facts found that there was proof beyond a reasonable doubt there was a spouse. Wilkie questions the competence of courts to determine whether a 'spousal' relationship existed at all. But it also raises the question of the very nature of the criminal act that is in issue. In these cases, how ought we to think about the 'prohibited act' of "deceit, falsehood or other fraudulent means"? Take an easy case where there is no factual contestation whatsoever regarding spousal status nor co-residency. A couple is married and cohabiting; she has applied for O.W. as a single person and has not disclosed that she is married, nor that she is cohabiting with her spouse. Her husband is employed and earning enough income that they would not qualify as couple were they to apply to O.W. as such. The prohibited act on these facts is the failure to disclose that she is cohabiting with her spouse; her behaviour may well also be appropriately characterized as deceitful or as a falsehood, and there seems little doubt that viewed objectively, her behaviour would be appropriately characterized as dishonest.

But try moving away from this kind of clear-cut factual situation. A single mother on O.W. meets a man and they begin to date. Over the next several months he begins to spend a great deal of time at her home, and shares in a lot of the household tasks. They regularly go out together, so many people in their neighbourhood will see them together. He may move some of his clothing into her place and he spends a few nights each week there. What she (or anyone for that matter) is unable to predict is at what point the relationship

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<sup>132</sup> *R. v. Parise*, *supra* note 51.

<sup>133</sup> Wilkie, *supra* note 114 at p.44.

would be considered 'spousal'. When then, does she engage in the prohibited act of deceiving O.W. about the 'true' nature of the relationship—that she is co-residing with a spouse? As Gutierrez observes, given that the determination of 'spouse' is a mixed question of law and fact, it is often exceedingly difficult to know whether one is a 'spouse'.<sup>134</sup>

One common response to this is to say that she does not have to make this determination, O.W. will. Her only obligation is to report any change in circumstances; O.W. will then decide if the change in circumstance renders her a spouse. During our interview with Debbie Moretta, she suggested to us that while the rules may be complex, what is asked of recipients is really quite simple; report changes in their circumstances. Similarly, in her affidavit in the *Broomer* case Ms Moretta observes that "the system is designed so that recipients make full disclosure of any changes in their circumstances to the program; individuals are not required to make any self-assessment of eligibility".<sup>135</sup> Indeed, this approach seems to underlie many cases where fraud charges are laid; again based on the fundamental mistake that the failure to report any information that O.W. now says it ought to have constitutes fraud. Moreover, O.W. legislation itself does not require the reporting of all changes in circumstances; but rather changes in circumstances relevant to eligibility. The Rights and Responsibilities Form, for example, states "you are responsible for following the rules of the O.W. program, including honest reporting of all circumstances that **affect eligibility**" [emphasis added]. Similarly, in the application form, the applicant acknowledges that "I/we will notify the Administrator, the Director, or his/her representative as the case may be, of any change of **relevant circumstances** [emphasis added] of any beneficiary of the allowance/assistance to be provided, including any change in circumstances pertaining to assets, income, living arrangements and my/our participation in Ontario Works activity as set out in the participation agreement. So we're back at square one; what is relevant to eligibility?

Moreover, consider the implications for women's privacy, dignity and autonomy were the requirement such that one had to report every change in circumstance. Is a woman required to report each time her boyfriend visits? Each time they go out together? Each

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<sup>134</sup> Gutierrez, *supra* note 40 at p.39.

<sup>135</sup> Moretta, *supra* note 8 at para. 54.

time he cares for her children? Each time they have sex? Each time he buys her coffee? Each time he helps out around the house?

It is also very significant to appreciate how the forming of an intimate relationship—something which society encourages, particularly if a heterosexual relationship that leads to marriage—quickly becomes an object of surveillance for potential criminal charges.<sup>136</sup> The inquisitiveness of front line workers, the policing powers of E.R.O.s and the wide net of intrusive surveillance cast by measures like the snitch lines are deployed to scrutinize and regulate the intimate lives of women (women constituted 59 percent of the O.W. caseload and 94 percent of single parents on O.W. were women in December 2003).<sup>137</sup> As noted earlier, stereotyping of poor, single, and especially racialized women make them particularly vulnerable to this kind of scrutiny. As Cook argues, single mothers on benefits are seen to have transgressed borders of acceptable behaviour; they are neither good mothers, good wives, good workers nor good consumers.<sup>138</sup> Their intimate relationships are regarded with acute interest, suspicion and often open hostility; they are, in fact, everybody's business.

Most of our respondents also observed that there are many situations they see where women have little control over whether and when an intimate partner (past or present) comes and goes. This is especially true where a partner is abusive. The difficulty abused women have of getting their abusers out of their lives is extremely well documented; abusers are threatened by the loss of power and control her departure signals and will go to great lengths in order to maintain their power and control. The misassumption is all too commonly made that women can simply leave an abusive relationship. Not only are there frequently no viable options for women, but often when a woman does leave, her abuser follows, stalks, and continuously re-asserts his presence and his control. Leaving can be extremely difficult, and is the time when women are at the greatest risk of violence, including lethal violence.<sup>139</sup>

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<sup>136</sup> In the United States, including in context of welfare benefits, a large number of measures have been introduced recently to encourage marriage. Even the S.A.R.C. took explicit care to avoid creating disincentives to marriage within welfare policy.

<sup>137</sup> Ministry of Community and Social Services, 2003.

<sup>138</sup> Dee Cook, "Women on Welfare: In Crime or Injustice?" in Pat Carlen & Anne Worrall (eds.) *Gender, Crime and Justice* (Milton Keynes: Open University Press Press, 1987).

<sup>139</sup> See for example, Maria Crawford & Rosemary Gartner, *Woman Killing: Intimate Femicide in Ontario 1974-1990* (Toronto: Women We Honour Action Committee, 1992); Ellen Pence and M.

Here too, these kinds of circumstances are importantly relevant to both the determination of eligibility and to an analysis of fraud. If a man comes and goes of his own accord, despite a woman's efforts to rid of him, surely there is an argument that a) she is not his spouse; b) she is not residing with him; c) she harbours no intention of depriving the Ministry; and/or d) there has been no deprivation.

In the reported decisions, the outcome of the fraud analysis seems to turn very much upon whether, and to what extent, the trier of fact actually understands the realities of the lives of abused women. Consider for example the case of *R. v. Lalonde*.<sup>140</sup> While the legal analysis here is not as careful as it might be, Mr. Justice Trainor seems to clearly have understood that 'leaving' for Lise Lalonde was no simple matter. Her abusive partner, Peter Van Deyl, was described as a possessive and jealous man who stalked her and threatened her with death. Mr. Justice Trainor concludes that often Van Deyl was only there because Lise Lalonde did not know how to extricate herself from him. Indeed, it may well have been that there simply was no safe option. Importantly as well, he observes that Van Deyl made no economic contribution and was, in fact, a burden. He astutely observed that they could have applied as a couple—and received greater benefits—but that was not a viable option for Lise Lalonde, as the cheque would have gone to Van Deyl as the head of the household. On these facts, there was a good argument that there was no deprivation of the state. Mr. Justice Trainor invokes the defence of necessity, concluding that Lise Lalonde had no other viable or reasonable choice in the circumstances. He also concludes (problematically, without much, if any, evidence on this point) that Lise Lalonde suffered from battered woman syndrome and that this negated *mens rea* (also a problematic legal conclusion). Though his legal analysis calls out for improvement, what is significant is his appreciation of the incredibly constricted world of 'choice' in which Lalonde had to exercise judgement. He understood that VanDeyl asserted his presence and that there was little, if anything, Lalonde could do to control his comings and goings. He understood that VanDeyl (though welfare would have assumed him to be the head of the household, and the male breadwinner) was a burden, a financial drag, and not a contributor.

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Paymar *Power and Control: Tactics of Men Who Batter* (Duluth: Duluth Minnesota Program Development Inc. 1986).

In sharp contrast to Mr. Justice Trainor's decision in *Lalonde* is the decision of Mr. Justice Daniel in *R. v. McGillivray*.<sup>141</sup> McGillivray was charged for failing to disclose a common law relationship; her 'common law' partner was in receipt of a student loan. The judge notes that by all accounts, she was "an emotionally abused, battered wife who is very much manipulated by her boyfriend" and that she had been "unsuccessful" in ending the relationship because he threatened her into returning. He observes that "[t]his offence apparently resulted from her feeling that she had no other available choices to her in order to support herself and her children." His use of "apparently" reveals his deeper skepticism regarding how little control and choice McGillivray had. While acknowledging that she may have been manipulated "to some extent", he notes that her boyfriend was "certainly not standing over her shoulder when she made false applications at the Welfare Office," as if he had to be physically present in order to exercise his power and control.<sup>142</sup> In the course of sentencing Ms McGillivray to six months' incarceration and one year of probation for a fraud of \$23,000 Mr. Justice Trainor quoted favourably from another case in which the court had observed that "...many would consider this the most despicable form of theft."<sup>143</sup>

Respondents consistently reported to us that in the vast majority of cases where findings that one is co-residing with a spouse are made and an over-payment assessed, or fraud charge laid, men simply walk away—with no over-payment, no criminal charges, and no threat of a criminal record. In the overwhelming majority of cases, it is only women who are charged with fraud and/or assessed with overpayments and not the men who are allegedly their spouses with whom they are residing. Across all of our interviews, less than a handful of cases were identified where men had been charged with fraud in man-in-the-house cases. As one respondent described it: "she's barely surviving, the debt is hers, she has a criminal record, and he's just moved on". And in a zero tolerance regime, she is also banned from the receipt of benefits for life. Another respondent described frustrating and ultimately futile efforts to convince a local welfare office to recommend to police the laying of charges against men as well. In our interview with

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<sup>140</sup> *R. v. Lalonde* (1995), 22 O.R. (ed) 275 (Gen. Div.).

<sup>141</sup> *R. v. McGillivray*, [1992] A.J. No. 886 (Prov. Ct. Crim. Div. ) (QL)

<sup>142</sup> One woman interviewed for the *Walking on Eggshells Report* described how her husband severely beat her and then told her to apply for welfare, tell them her husband had kicked her out and not to come back until she had received it. She did as her husband said and lived in constant fear that she would be charged with fraud and he would walk away. Mosher et al, *supra* note 32.

<sup>143</sup> *R. v. McGillivray*, *supra* note 141.

Debbie Moretta she indicated that this issue has been discussed within the Ministry and that the advice the Ministry has received is that a fraud conviction cannot be sustained against the person who is not the applicant (usually the man). Our view is that this advice may be misguided; while it may well be more difficult to secure a conviction against him, the fact that he is not the applicant for benefits does not render him immune from a prosecution for fraud. In particular, there seems to be a good argument that in many circumstances, he may aptly be characterized as a 'party' to the offence, having either aided or abetted in its commission.<sup>144</sup> Section 79(2) of the *O.W.A.* expressly provides that, "no person shall knowingly aid or abet another person to obtain or receive assistance to which the other person is not entitled under the Act and the regulations. In addition, the Ministry has a civil remedy under the *O.W.A.* which it undoubtedly could pursue, but which it seems not to. Pursuant to subsection 21(4), "if a recipient had a dependent spouse or same-sex partner when an overpayment was incurred, the administrator may give notice in writing to the spouse or same-sex partner respecting the overpayment". Once notice has been given the overpayment becomes enforceable as if it were an order of the Ontario Court (General Division).<sup>145</sup> In short, legal mechanisms clearly exist through which 'spouses' not in receipt of assistance may be prosecuted provincially or under the *Code* for fraud. Rather, what appears to be lacking is the will to do so.

## **6 Processing of Welfare Fraud Cases**

As noted earlier, a substantial number of allegations of welfare fraud are communicated to the Ministry each year, and these allegations come from a variety of sources. Table 2 below, prepared by the Ministry, notes these various sources and the numbers of complaints each source generates.<sup>146</sup>

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<sup>144</sup> *Criminal Code*, *supra* note 45, section 21, in particular b) and c).

<sup>145</sup> *O.W.A.* *supra*, note 1, section 21.

<sup>146</sup> *Welfare Fraud Control Report 2001-2001*, *supra* note 60. One might query whether the precipitous decline in allegations in 2001-2001 might be attributable to the introduction of the lifetime ban.

**Table 2: Source of Welfare Fraud Complaints**

	<u>2001/02</u>	<u>2000/01</u>	<u>99/00</u>	<u>98/99</u>	<u>97/98</u>
<b>Welfare Fraud Hotline</b>	6527	9348	8825	8327	7910
<b>Information – Sharing Agreements</b>	9988	10447	12502	11577	12514
<b>Local provincial/municipal Offices</b>	19078	33028	33714	39158	41229
<b>Total</b>	35593	53823	55041	59062	61,653

In many instances the matter can be resolved by a front line caseworker. But if a concern exists regarding eligibility the allegation will be referred to an E.R.O. for a comprehensive eligibility investigation (respondents noted that the comprehensiveness of investigations varies considerably). Directive #45, "Controlling Fraud" requires the E.R.O. to prepare a written report for an E.R.O. supervisor, including recommendations regarding on-going eligibility, assessment of any overpayment and whether a referral to the police is warranted. In some municipalities an additional layer of decision-making occurs; a special review committee will review cases before a decision is made regarding referral to police.

### **6.a Variation**

In our interviews with respondents the picture which emerged was one of tremendous variation in the nature of cases which would give rise to referrals to the police, and variation among police departments and Crown Attorneys as to whether referred cases would go forward.<sup>147</sup> One of the clearest variations exists around dollar value: in some parts of the province a threshold of \$5,000 is employed for referral to the police; one respondent indicated that the threshold in her/his region seemed to be \$10,000; and others indicated that no dollar thresholds were applied at all and cases—even those for a few hundred dollars—would be referred. No one with whom we spoke had seen these various income thresholds in writing; rather the thresholds were observed as a matter of practice. From a review of the record in the Kimberley Rogers inquest it would appear that as a result of the lifetime ban, more municipalities moved to the adoption of a

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<sup>147</sup> Dianne Martin found similar variations in her work on welfare fraud in the late 1980s, see Martin, *supra* note 47.

\$5,000 income threshold. A police officer testifying at the inquest also noted that in Sudbury, the police department had been overwhelmed with the number of welfare fraud referrals. The department decided not to take cases below \$5000 and this reduced the number of cases significantly.<sup>148</sup>

As described earlier, Directive #45 was revised in January of 2004, at the same time as the lifetime ban on eligibility was revoked. The prior directive stated that, "the administrator must determine if there are reasonable grounds to suspect that fraud may have occurred. Where this is the case, the matter must be referred to the police for a possible criminal investigation."<sup>149</sup> The emphasis, more so than the content, has changed in the revised directive: "where sufficient evidence exists to suspect intent to commit fraud, the case **must** (bolded in original) be referred to police for possible criminal prosecution."<sup>150</sup> Both versions employ the mandatory language of 'must', but the mandatory nature of the requirement is clearly emphasized in the revised version of the Directive. In our interview with Debbie Moretta she explained to us that the Directive creates a framework within which municipalities are expected to operate, but within that framework there is scope for regional variation. But given the mandatory nature of the requirement to refer to police which is, itself, part of the framework provided, one would have thought that the amount of money alleged to have been fraudulently received could not be employed by local O.W. offices in decision-making regarding referrals. The revision to the Directive emphasizes this requirement through the use of bold typeface. Yet, at least from the respondents that we have interviewed, it would appear that practices regarding referrals have, in the main, continued as before.<sup>151</sup>

Variations also exist regarding the types of circumstances that may give rise to a referral to police. Student loans, casual gifts of small value beyond six months and spouses are treated differently in various parts of the province; in some parts of the province they do give rise to over-payments but virtually never to fraud charges. Respondents reported that variations also depend upon who the recipient is. Whether they like you; whether you're contrite, whether you're able to explain what's happening in a way they can

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<sup>148</sup> Transcript of evidence of Constable Sheldon Roberts, Oct. 28, 2002, Inquest into the Death of Kimberly Rogers.

<sup>149</sup> *Controlling Fraud*, Policy Directive #45, September, 2001.

<sup>150</sup> *Controlling Fraud*, Policy Directive #45, *supra* note 46.

understand; your family's reputation; how you look; how you talk; and what stereotypes inform how you are judged are all factors that were identified as influencing the decision as to whether the matter would be referred to police.

## **6.b Criminal Investigations and Charter Implications**

There is also an important question regarding the inter-relationship of the E.R.O. investigation and criminal liability. E.R.O. investigations will often include an interview with the person who is the subject of the investigation, and recall that an E.R.O. has the power to "require information or material from a person who is the subject of an investigation" and that it is an offence under the O.W.A. to obstruct an E.R.O. in his/her investigation.<sup>152</sup> Two important questions arise: when, if at all, does an obligation to advise of *Charter* rights arise during the course of the E.R.O. investigation; and when, if at all, can information and documents that are statutorily compelled be used in evidence against the accused? While these questions have attracted little attention in the welfare context, they have been extensively litigated in the income tax context.<sup>153</sup>

The recent decisions of the Supreme Court of Canada in *R. v. Jarvis* and *R. v. Ling*, (both income tax evasion cases) provide useful guidance for an evaluation of the processing of welfare fraud cases.<sup>154</sup> In *Jarvis*, Revenue Canada received a tip that the

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<sup>151</sup> The directive does not impinge upon the decision-making authority exercised by the police and by Crowns regarding what cases they are prepared to take on.

<sup>152</sup> *O.W.A.*, *supra* note 1, subs. 79(3) and O.Reg. 134/98, section 65.

<sup>153</sup> We did locate however two welfare fraud cases that bear on these questions. In *R. v. Coulter* the Accused failed to report income from employment; when this was discovered he signed an agreement to repay with the understanding that a clause in the agreement to the effect that the Ministry would not pursue full legal remedies meant that there would be no criminal proceedings. A year later charges were laid against him and Mr. Coulter argued that it would be an abuse of process to proceed. The court agreed, noted that in signing the agreement and making acknowledgements, he was conscripting evidence against himself to someone in authority for any subsequent criminal proceeding and that this had been done without concern for his *Charter* protections. In *R. v. D'Amour* the court was asked to consider whether all of the documentation gathered by social assistance authorities could be available for a criminal prosecution. Some of the documents had been provided by the accused at the time of applying for benefits, and others after a concern regarding undisclosed income resulted in welfare officials requesting that she provide additional documentation of past income. Madame Justice Epstein concluded that all of the documents were in hand well before there was any prospect of a criminal investigation and moreover, that in applying for benefits she relinquished her right to having the information protected from use by the state. The decision predates *Jarvis* and fails to address the question of whether the inquiry had at some point de facto become a criminal investigation. Also, in our view, Madame Justice Epstein misconstrues the role of E.R.O.s when describing their function as solely to determine eligibility. *R. v. Coulter*, [1995] O.J. No. 645 (Prov. Div.) (QL) and *R. v. D'Amour*. [2000] O.J. No 5122 (Sup.Ct.) (QL)

<sup>154</sup> *R. v. Jarvis*, [2002] 3 S.C.R. 757, *R. v. Lee*, [2002] 3 S.C.R. 814.

accused had not reported sales of his late wife's art in his tax returns. Revenue Canada sent a letter to Mr. Jarvis advising him that his file had been selected for an audit and requested certified books and records. Subsequently the auditor phoned Mr. Jarvis, and a few weeks later met with him. On both these occasions the auditor obtained additional information and documents and on neither of these occasions was Mr. Jarvis cautioned. Shortly thereafter the auditor referred the file to the Special Investigations Unit to determine whether a charge of tax evasion was warranted. A search warrant was subsequently obtained and executed and a charge of tax evasion was laid under s.239 of the Act.

Not at all unlike the *O.W.A.* scheme, section 231.1(1) of the *ITA* empowers 'authorized persons', for the purposes of the administration and enforcement of the Act, to enter any premises or place of business except a dwelling house to examine any books and records and may require persons (including the taxpayer) to give all reasonable assistance and to answer all proper questions relating to the administration or enforcement of the Act.<sup>155</sup> Section 232.1(1) provides, again for the purpose of the administration and enforcement of the Act, that the Minister may require any person to provide, upon proper notice, any information or document.

In *Jarvis* the Court considered two questions: at what point in the audit/investigation process does the obligation to caution the taxpayer arise; and whether documents or information compelled pursuant to the powers granted by sections 231.1(1) and 231.2(1) could be used as evidence against the accused at his criminal trial. The Court rejected the characterization of the *ITA* as a purely regulatory statute, noting that while much of its content could be appropriately characterized as regulatory, it simultaneously contains provisions (such as the offences and penalties found in s.239) which bear the hallmarks of criminal legislation. As such, the legislation attracted a higher degree of *Charter* scrutiny than would a statute that was solely regulatory in nature.

The Court found that section 7 of the *Charter*—the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice—to be engaged by the introduction at trial of information statutorily compelled pursuant to sections 231.1(1) or 231.2(1). The Court observed, however, that

section 7 does not preclude the use in all contexts of information that has been statutorily compelled. Rather the principle against self-incrimination (the principle of fundamental justice at play here) is to be balanced against the principle that all relevant evidence should be available to the trier of fact. In finding that balance, the Court distinguished the auditing and investigative functions exercised by Revenue Canada. Where 'auditing' is undertaken to ensure compliance with the Act—including the meting out of penalties under the Act—the taxpayer's *Charter* rights are not engaged. However, once an adversarial relationship develops between the state and taxpayer—a relationship the Court says arises where the predominant purpose of the inquiry is to determine penal liability—*Charter* rights are triggered. The Court held that the predominant purpose is determined contextually, having regard to a variety of factors, including: did authorities have reasonable grounds to lay charges; was the general conduct of the authorities consistent with a criminal investigation; did the auditor transfer the file to the investigator; and did investigators intend to use the auditor as their agent?

The balance to be struck between the principle against self-incrimination and the principle that the trier of fact should have all relevant evidence before it, lies in permitting the introduction of evidence gathered under 231.1(1) and 232.1(1) prior to the point in time when an inquiry's dominant purpose becomes that of determining penal liability. Sections 231.1(1) and 232.1(1), the Court reasoned, are available for the administration and enforcement of the Act, and not for the prosecution of section 239 offences. Thus sections 231.1(1) and 232.1(1) cannot be used to aid an investigation into penal liability. But where information has been properly gathered under these provisions for the administration and enforcement of the Act, such information can be passed on to investigators (in other words, where the evidence was generated before the adversarial relationship between the individual and state arose). There must be, the Court ruled, some separation between auditing and investigative functions to protect the accused's section 7 interests.

What are the implications then of the decision in *Jarvis* for the role of E.R.O.s and the processing of welfare fraud cases? Given *Jarvis*' attention to context-specific factors it may not be possible to fully discern its application in the abstract, yet several general observations about its application to welfare fraud investigations can be discerned. One

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<sup>155</sup> *Income Tax Act*, R.S.C. 1985, c.1 (5<sup>th</sup> Supp.), section 231.1.

might argue that the O.W. regime is purely regulatory; that it does not contain provisions akin to the s.239 offences of the *I.T.A.* And indeed, the E.R.O. training materials that we have reviewed characterize the E.R.O. function in this manner, as purely regulatory.<sup>156</sup> But in our view the claim that their role, and the Act, are only regulatory in nature, must fail. First, matters are referred to E.R.O.s once there is an allegation of fraud and an E.R.O. report must contain a recommendation regarding possible referral to police for criminal charges, as well as a recommendation regarding eligibility and any possible over-payment. Pursuant to the Controlling Fraud Policy Directive, the E.R.O. is to turn his/her mind to whether there is sufficient evidence to suspect the intent to commit fraud. An E.R.O. also completes a Form 1005, "Alleged Fraud Case Outline" before a referral is made to the police. Moreover, each delivery agent must develop a local fraud control protocol with local police services and Crown Attorney's office for the "effective investigation and prosecution of cases of suspected social assistance fraud."<sup>157</sup>

Second, both Ministry policy and practice show not merely the favouring of resort to the *Criminal Code* offence of fraud over the offence provisions contained in the *O.W.A.*, but in fact, virtually exclusive use of the former.<sup>158</sup> Thirdly, it is important to appreciate that in many instances the only investigation conducted is the investigation undertaken by an E.R.O. Consistent with what we heard from the respondents in our interviews was evidence on this point from Constable Sheldon Roberts, a police officer who testified at the Rogers Inquest; police departments, particularly in non-complex cases, often rely on the E.R.O.'s investigative report. Roberts' evidence on this point was that he and a partner had instructed E.R.O.s in different parts of the province on how to put together files for police so that there would be a minimal amount of police work required after the point of referral.<sup>159</sup> One respondent in our interviews noted that in his district the Crown Attorney's office has recently refused to accept any welfare fraud cases unless there is a thorough and independent investigation conducted by the police. The practice had been for the police department to simply forward to the Crown files in which the investigative work had been conducted exclusively by E.R.O.s. In the Crown's view, the E.R.O. investigations proceeded on an assumption of guilt, with inadequate attention paid to the

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<sup>156</sup> Ministry of Community and Social Services, Provincial Training Unit, Management Support Branch, *Draft ERO Core Training: PDSPB Revisions – June 27, 2001*.

<sup>157</sup> *Controlling Fraud Policy Directive #45*, *supra* note 46.

<sup>158</sup> We do not mean to imply by this that the *Charter* would not apply to offences under the *O.W.A.*

elements of a criminal fraud charge, and for this reason, insisted upon an independent police investigation.

Finally, given the absolute pervasiveness of the language of 'fraud' that shapes the entire investigative process, an argument that E.R.O.s are merely engaged in the administration and enforcement of the *O.W.A.*, a purely regulatory Act, and are not engaged in the investigation of penal liability, simply cannot be maintained.

There is not, as far as we are able to discern, any clear separation of the auditing (enforcement of the Act) and investigative (assessing penal liability) functions within O.W. It would seem that evidence that is statutorily compelled, even after an inquiry's dominant focus is penal liability, is used against the accused in her criminal trial. And our research to date suggests that E.R.O.s do not provide a *Charter* caution when they meet with subjects of the inquiry. It will be a mixed question of law and fact as to whether, at the time of the meeting, the predominant purpose is to determine penal liability such that the obligation would arise. But in our view, there will be situations where that is, indeed, the predominant purpose of the interview.

We also note with interest Wilkie's description of the explicit attention paid to the separation of the review/overpayment processes from investigation and prosecution processes within Australia's welfare system. As with the O.W. regime, Department of Social Security officials have the statutory power to compel answers. It seems, however, to be commonly accepted that these compelled answers cannot be used in subsequent criminal prosecutions (note this is not precisely on all fours with the Supreme Court's ruling in *Jarvis*). Rather, the Prosecution/Control section conducts a separate, cautioned interview.<sup>160</sup> While Wilkie's research is somewhat dated (1993), and we do not have information as to whether her description of the separation of functions reflects current practices, we raise it here because it does offer an alternative approach to welfare administration compatible with the Supreme Court's ruling in *Jarvis*.

Wilkie also raises concerns we heard reflected in our interviews regarding the investigative interviews that are conducted. As with our respondents, Wilkie queries

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<sup>159</sup> Roberts, *supra* note 148.

<sup>160</sup> Wilkie, *supra* note 114 at p. 64-66.

whether people appreciate the full import of these interviews and whether confessions are made as a result of intimidation or duress, and in particular, a fear of being cut off benefits. She also suggests that given the human dynamics at play, any confession given is likely to be unchecked and untested—even, possibly, by defence counsel.<sup>161</sup>

An additional and related concern is that fearing a possible criminal charge, and within a broad context where 'fraud' language is pervasive and recipients are constantly dehumanized, those accused (even inferentially) of fraud agree all too readily to administrative sanctions such as terminations or over-payments.<sup>162</sup> McKeever, in her analysis of British reforms advanced in the late 1990s to make detection, prosecution and punishment of benefit fraud more effective, raises concerns about the proposed provisions for financial penalties as an alternative to prosecution for less serious fraud.<sup>163</sup> Suspicions of fraud, she reasoned, would be played off against a fear of court proceedings, and recipients would 'agree' to penalties where there were insufficient grounds for a prosecution. Interestingly, she also worries that the new offence provisions to tackle minor fraud would "blur the line between dishonesty and oversight or ignorance so that every overpayment comes to equal fraud", precisely the problem that exists in Ontario.

### **6.c Consideration of Personal Circumstances**

A controversial issue in the processing of welfare fraud cases is whether, and if so, when and by whom, 'personal circumstances' should be considered. This issue was very much at play in the inquest into the death of Kimberly Rogers, who died while serving a period of house arrest upon a conviction of welfare fraud, eight months pregnant, a history of depression, subject to a three month ban on eligibility (an injunction was subsequently obtained to lift the ban), during a heat wave in August of 2001. From a review of the transcripts of evidence at the Inquest, it appears that virtually everyone involved in the decision-making process—from the E.R.O., to police, to the Crown—passed the buck of considering

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<sup>161</sup> *Ibid* at pp. 72-76.

<sup>162</sup> The Canadian Institute for Research on Law and Family raised this concern in their work for the S.A.R.C. They expressed concern that terminations were happening in instances where there was nothing more than a 'suspicion' of abuse. C.R.I.L.F., *supra* note 40 at p.19.

<sup>163</sup> It is significant to note that less serious fraud is understood in this debate as things such as undisclosed income, or undisclosed spouses. Grainne McKeever, "Detecting, Prosecuting and

her personal circumstances along; until it stopped with defence counsel and his submissions to the Judge on sentencing. In essence the testimony of each was that a consideration of extenuating circumstances, the mental health of the accused, or the impact of a ban on eligibility was not part of their respective jobs. While Mary Nethery, Director at the time of Criminal Law Policy for the Attorney General of Ontario, noted that a general Crown charge screening policy that existed required a consideration of the public interest and that this included a consideration of the accused's personal circumstances such as age and health, the Crowns involved in the actual case testified that they had very little information about Kimberly Rogers' personal circumstances and were not in a position to assess the impact of the ban. Investigation of her personal circumstances and arguments about its impact, they suggested, were appropriately tasks for defence counsel.<sup>164</sup> Implicit in the recommendations of the Coroner's jury is the conclusion that consideration of personal circumstances need occur much earlier in the process, and in particular before a referral is made to the police. The jury recommended the establishment of a committee to develop a model to be used throughout the province for the assessment of whether cases involving allegations of welfare fraud should be referred for prosecution. In the jury's view, the model would allow for the "full appreciation of the person's life circumstances and the impact of the consequences of a fraud conviction".

Further to this recommendation the Ontario Municipal Social Services Association (OMSSA) struck a Fraud Referral Task Force. The Task Force released its recommendations in November 2003 articulating as one of its guiding principles that decisions regarding referral take into account the impacts of a conviction for the individual, the family and the community. The Task Force identified a range of case specific factors (e.g. how the payment in excess of O.W. entitlement occurred, the amount of the excess payment, and the complexity of legislation or recent policy changes), and factors relevant to personal circumstances (e.g. health, comprehension of

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Punishing Benefit Fraud: The Social Security Administration (Fraud) Act 1997" (1999) 62:2 Mod. L. Rev. 261.

<sup>164</sup> Transcripts of the evidence of Philip Zylberberg and Alex Kurke, Inquest into the Death of Kimberley Rogers.

responsibilities, domestic violence, adequacy of benefits versus need, and impact of conviction) that ought to be considered in making a referral to police.<sup>165</sup>

While we do not have system-wide information about each Delivery Agent, from our interviews it appears that the recommendations of the Task Force have not been widely implemented, if at all. The Ministry did not participate in the O.M.S.S.A. Task Force process, and has neither endorsed its recommendations, nor revised its Policy Directive to enshrine it.<sup>166</sup> In fact, the recommendations of the Task Force stand in stark contrast to the revision of the Policy Directive that in fact occurred: all cases where there is reason to suspect intent to commit fraud **must** be referred. The only consideration permissible within the framework of the Policy is suspicion of intent to commit fraud.

#### **6.d Legal Representation**

Once a fraud charge has in fact been laid, a further issue in the processing of welfare fraud cases arises in relation to legal representation. Most of our respondents expressed grave concern about access to legal representation and about the uneven quality of criminal defence representation that is, in fact, provided. While clearly there are instances of defence counsel who are knowledgeable about the welfare system and its myriad of complex rules and who are thus able to provide effective representation, many defence counsel have little, if any, knowledge of welfare law. As noted earlier, welfare law is tremendously complex and it is difficult and time-consuming to learn the statute, regulations and policies, let alone have an up-to-date familiarity with the current jurisprudence of the Social Benefits Tribunal (whose decisions are unpublished) and local practices.

Almost all of our respondents expressed concern that guilty pleas were being encouraged in some cases where a strong defence existed because defence lawyers did not have sufficient knowledge of welfare law to advance these defences. All too often, many felt, cases were just not being subjected to the necessary rigour of analysis, especially in relation to the *mens rea* component of fraud. One respondent summed up the quality of defence representation as "tragic".

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<sup>165</sup> Ontario Municipal Social Services, *Fraud Referral Task Force Report*, November 2003.

<sup>166</sup> Moretta, *supra* note 43.

Cases were described to us where all players in the criminal justice system—Crowns, defence lawyers and judges—failed to challenge the position taken by social assistance authorities that the failure to disclose information is, alone, sufficient to ground a conviction for fraud. Others gave examples of lawyers who, during the period of the lifetime ban, were providing representation on guilty pleas without knowing that the lifetime ban was even in place (the ban being a mandatory consequence of criminal conviction).<sup>167</sup> A further example of concern provided by one of our respondents related to the calculation of the amount of fraud in issue. In at least some parts of the province, the position is taken that the amount of 'fraud' in issue is the total of all benefits received during the period in which the fraud was being perpetrated. So, for example, if one failed to report employment income for an eight-month period and on the facts, criminal fraud was established, the amount of the fraud would be the total benefits received over the eight months. But assume this is a person, who had he disclosed, would have been eligible in accordance with S.T.E.P., to continue to receive benefits (although a reduced amount). The competing argument is that the amount of 'deprivation'—thus the amount of the fraud in issue—is the difference between what he did receive and what he would have received had he made the disclosure. As one respondent pointed out to us, in cases where the fraud has occurred over a lengthy period of time, these two methods of determining the amount of fraud in issue generate dramatically different answers.<sup>168</sup> It is therefore crucially important that defence counsel advance the latter argument. In the experience of one of our respondents, defence counsel simply never make this argument and at least one Community Legal Clinic has tried to work with the local criminal defence bar so that this analysis will be advanced in the defence of those accused of welfare fraud.

Several of the respondents we interviewed faulted Legal Aid Ontario and the funding structure for certificates, as in many of these cases, accused persons are not able to access legal aid funding. But even when they do, lawyers are not paid enough to cover the hours they need to master welfare law. Those who cannot access legal aid are rarely, if ever, in a position to be able to pay for counsel.

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<sup>167</sup> See also the affidavits of the applicants in *Broomer v. Ontario (A.G.)*, *supra* note 8; two of the applicants report that their defence lawyers had not told them of the lifetime ban.

<sup>168</sup> It also seems entirely plausible to conclude that the amount of an assessed over-payment may differ from the amount of fraud in issue, because the former does not turn on the notion of deprivation.

## **6.e Expert Evidence**

Respondents observed that in many cases, it is not only defence counsel, but judges and Crown prosecutors as well, who do not understand social assistance law. Again, we do not know how widespread the practice is, but in some parts of the province, in order to address this knowledge gap, judges permit front line welfare workers to be qualified as expert witnesses to offer opinion evidence as to the governing law. One respondent who has observed this practice noted that often in their testimony, welfare workers give incorrect evidence regarding the legislation. So, for example, they will often say that the legislation requires that the recipient must report virtually everything and welfare authorities will decide whether or not it is relevant. As noted earlier, this is a common misapprehension regarding what the legislation requires of recipients. The respondent who described this to us also reported that in his experience, he has never seen a defence lawyer object to the expert qualifications of the worker put forward by the Crown, nor an objection to the content of the evidence proffered. Of course it is deeply problematic if incorrect evidence is being tendered regarding the requirements of the social assistance legislative regime, but it is also problematic—indeed remarkable—that front line workers should be accepted as experts and permitted to offer opinion evidence on the requirements of the substantive law. Not only is it difficult to discern how a front line welfare caseworker might meet the criteria laid down by the Supreme Court of Canada in *Mohan* to be a "properly qualified expert" in an area/field of recognized expertise widely accepted by the relevant scientific community, but that the 'field' she should be permitted to offer an opinion on is substantive law is more remarkable still.<sup>169</sup>

## **7 Sentencing**

The harsh treatment of those accused of welfare fraud have been noted by many, including the respondents in our interviews. Our review of the reported cases and our interviews confirm this assessment. Dianne Martin noted in her work on welfare fraud in the early 1990s that the sentencing principle dominating welfare fraud cases for the prior 20 years had been that of general deterrence. Little has changed since that time; general deterrence continues to be the paramount principle in sentencing in welfare

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<sup>169</sup> *R. v. Mohan*, [1994] 2 S.C.R. 9.

fraud cases and in many cases, the sole principle considered.<sup>170</sup> Often citing the decision of the British Columbia Court of Appeal in *R. v. Frieson*, it is widely accepted that welfare fraud is a “form of crime in respect of which there is a real chance that substantial penal consequences will deter.”<sup>171</sup>

### 7.a Sentences Imposed

The paramountcy of general deterrence and the characterization of welfare fraud as a serious crime involving a breach of trust have supported a *de facto* presumption of imprisonment as the appropriate sentence. *R. v. Thurotte*, a 1971 decision of the Ontario Court of Appeal, has long been regarded as a leading case on this matter. In *Thurotte* the court observed that, “although this case is pitiful in many respects, this court is unanimously of the opinion that the paramount consideration in determining the sentence is the element of deterrence. Welfare authorities have enough difficulties without having to put up with persons who set out to defraud them. This is one such instance, and others who are similarly minded must be warned that these offences will not be treated lightly.” The trial court had ordered five months imprisonment for a fraud of \$1,700 and the Court of Appeal affirmed that a period of incarceration of anywhere up to five months would be an appropriate sentence. A series of cases thereafter in several provincial jurisdictions confirmed (and continue to confirm) that absent unusual or exceptional mitigating circumstances, a period of incarceration was (is) warranted.<sup>172</sup>

Of the fifty cases reviewed by Martin in the early 1990’s, a jail sentence was ordered in 80 percent.<sup>173</sup> Mary Nethery, then Director of Criminal Law Policy, Ministry of the Attorney General, in her evidence at the Rogers Inquest, noted that prior to the 1996 sentencing reforms, “it was not unusual to see jail terms.”<sup>174</sup> Perhaps more accurately, it was unusual not to see jail terms. In the 1995 case of *R. v. Bunde*, the court observed that counsel for the accused was not able to refer to a single case of welfare fraud where

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<sup>170</sup> See for example *R. v Bunde*, [1995] O.J. No. 213 (Gen. Div.) (QL); *R. v. Cameron* (1999), 241 A.R. 87 (Q.B.); *R. v. Durocher* (1992), 100 Sask. R. 108 (C.A.); *R. v. Friesen*, [1994] B.C.J. No. 374 (C.A.) (QL); *R. v. Gallagher*, [1996] O.J. No. 4761 (Prov. Div.) (QL); *R. v. Mclsaac*, [1998] B.C.J. NO. 1946 (S.C.) (QL); *R. v. Sedra*, [1996] O.J. No. 1482 (Prov. Div.) (QL).

<sup>171</sup> *R. v. Friesen*, *supra* note 170.

<sup>172</sup> *R. v. Cameron*, *supra* note 170; *R. v. Hunt* [2000] S.K. No. 161 (Q.B.) (QL); *R. v. Bunde*, *supra* note 170.

<sup>173</sup> Martin, *supra* note 47. By contrast, in Wilkie reports that 18.8 percent of social security offenders nationally, in Australia, resulted in imprisonment. Wilkie, *supra* note 114.

<sup>174</sup> Mary Nethery, transcript of evidence, Inquest into the Death of Kimberly Rogers.

a jail term was not imposed.<sup>175</sup> Counsel may not have done an exhaustive search, because clearly such cases did exist, but from the materials that we have reviewed, certainly non-custodial sentences were much more the exception than the rule.

Of the 58 welfare fraud sentencing decisions that we reviewed for this report, covering the period 1989-2002, jail was ordered in 33 cases (57 percent); of these 6 occurred after conditional sentences were introduced in 1996. In our sample, there were 15 conditional sentences (a form of incarceration, which when combined with the jail terms, gives a rate of 83 percent for sentences entailing incarceration), 8 suspended sentences, 1 conditional discharge, and 1 case where a fine was ordered. In 30 of the cases restitution or a compensation order was ordered and in 13, community service, ranging from 100-300 hours, was ordered in addition to other components of the sentence. The severity of the sentences imposed in welfare fraud cases is dramatically out of step with infractions that occur in other administrative regimes and out of step with other *Criminal Code* offences. As one respondent put it to us, for a first offence of theft under \$5,000 (the break point for summary and indictable theft) an accused without a criminal record is several steps away from a custodial sentence. Yet a first offender accused of welfare fraud (even fraud under \$5,000) is at serious risk of incarceration. The decision in *R. v. Cameron*, in noting that absent unusual mitigating or aggravating factors, welfare fraud over \$5,000 warranted a sentence of 12 months' incarceration, is reflective of common sentencing approaches.<sup>176</sup>

## **7.b Justificatory Framework**

Several common tropes invoked by Crown counsel and judges provide the justificatory framework to support imprisonment as the 'appropriate' sentence in cases of welfare fraud. These tropes are certainly not unique to the criminal justice system, but mirror tropes pervasive in both political and public discourse. One of the most common of these is for the court to personalize the state; judges are at pains to point out that a crime has been committed not against some faceless, amorphous entity but against every citizen of the community. Commonly, welfare fraud is described as, "depriving all citizens of the province" or as a "crime against every member of the community".<sup>177</sup> It is rendered a

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<sup>175</sup> *R. v. Bunde*, *supra* note 170 at para. 27.

<sup>176</sup> *R. v. Cameron*, *supra* note 170.

<sup>177</sup> See for example *R. v. McIsaac*, *supra* note 170; *R. v. Gallagher*, *supra* note 170; *R. v. Reid* (1995), 137 N.S.R. (2d) 293 (C.A.).

crime of colossal proportions; unlike a simple theft from a single individual, the pocketbooks of every citizen are alleged to have been robbed. While the Nova Scotia Court of Appeal rejected the trial court's characterization of the crime of Ms Reid (failing to disclose \$5,545 in motor vehicle accident benefits), absent the gun metaphor invoked in the quote below from the trial judge, the view therein appears commonly in sentencing decisions. Noting that welfare fraud is becoming more prevalent the trial judge added that it,

is a rather serious offence, because what the offender is doing is stealing from the pockets of his fellow citizens, he's stealing from his fellow taxpayers of the Province of Nova Scotia in this case, just the same as if he took a gun and held them up and stole \$5,000. by that means, it's the same difference, it comes out of the pockets of all of his fellow community members. [The original sentence of 9 months incarceration was reduced to time served (50 days) on appeal.]<sup>178</sup>

Commonly judges also scold the accused for having taken from those genuinely in need, inferring that the accused is herself not genuinely in need and obscuring the reality that in the overwhelming majority of these cases, need and desperation motivated the actions in issue.<sup>179</sup> This trope also commonly attributes to those recipients who 'abuse' the welfare system responsibility for the difficult circumstances of others on welfare in both direct and indirect ways. Directly, they are responsible for any inadequacy of benefit levels for 'legitimate' recipients because for every extra penny in their pockets, a penny is stolen from the pockets of those 'genuinely in need'; it's an absolute zero-sum game in this portrayal. Indirectly, they alone are held responsible for the erosion of public support for welfare programs. In this characterization, the system's 'abuse' by 'undeserving' people, stealing from those 'genuinely in need', erodes the public's willingness to have their tax dollars used to fund the system. Consider for example, the judicial discourse in the cases of *R. v. Leaming* and *R. v. McGillivray*. In *R. v. Leaming*, the accused, a mother of four, was sentenced to 18 months' incarceration for failing to disclose a spouse. The \$70,000 received from welfare authorities was undisputedly used for basic household expenses.<sup>180</sup> Mr. Justice Fradsham had this to say,

Ms Leaming used the fraudulently obtained funds for household expenses... In a very general sense, that is to her credit but one must stop short of giving the accused credit for being in difficult financial circumstances. While all right thinking

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<sup>178</sup> *R. v. Reid*, *supra* note 177.

<sup>179</sup> See for example *R. v. Durocher*, *supra* 170; *R. v. Hunt*, *supra* note 172; and *R. v. Jantunen*, [1994] O.J. No. 933 (Gen.Div.) (QL) and [1997] O.J. No. 1369 (C.A.) (QL)

<sup>180</sup> *R. v. Leaming*, [1992] A.J. No. 1033 (Prov. Ct.) (QL).

persons would have great sympathy for her financial position, one must be careful to distinguish between that which is worthy of sympathy and that which goes to the credit the accused in matters of sentence. By definition, all persons who find themselves requiring social assistance are in very difficult financial situations. When Ms Leaming defrauds the system, she defrauds all other people in like situations. There is only so much money that may be made available for social programmes such as welfare. It is illogical to assume that those who depend upon such programmes will not bear some burden because of the actions of Ms Leaming and those who follow her footsteps.

Accordingly, while one naturally feels compassion for the plight in which Ms Leaming found herself, that plight is not a matter of mitigation. If she had not been in the difficult position to begin with, she would not have been able to practice the fraud. ....what must not be forgotten in the quite proper sympathy for the accused, is that welfare fraud is a very serious crime... in some respects welfare fraud is more serious than other forms of fraudulent activity. I have already noted the effects that it has upon others who depend upon the social assistance safety net. Those are persons least able to absorb further shocks. There is yet another reason that welfare fraud is particularly serious. It weakens the public's faith in the benefit system itself... there is concern expressed in some quarters of the general public about the benefits paid to those on social assistance...examples of flagrant abuse of the system only serve to exacerbate the tensions that sometimes exist between some members of the general public and those receiving benefits.

In *R. v. McGillivray*, briefly discussed earlier, Mr. Justice Daniel sentenced the accused to six months' incarceration and one year of probation for a fraud of \$23,263. She had not disclosed her common law relationship with a man whose only income was a student loan. The court found that by all accounts, "she was an emotionally abused, battered wife who is very much manipulated by her boyfriend", yet quoted favourably from another case in which welfare fraud was described as,

... the most despicable form of theft. There is only a certain amount of money available for people in need. And as the fund is abused by people who are not entitled to it, there is less money to go around, and others who possibly need more help simply don't receive it... So theft of this nature is, when you analyze it, really a theft from the poorest people of the community. And that is one of the major reasons that this type of offence must be treated very, very seriously by the Courts.

Mr. Justice Daniel added that,

... it is commonly the case that offenders of this type present themselves as quite sympathetic figures. They have usually had a difficult life and their circumstances are often pitiful. But, they are not unlike the thousands of others who find themselves driven to depend on the largesse of the Welfare System. Given the absolute necessity for honesty on the part of welfare applicants it is evident the

Courts have time and time again stressed deterrence both for the individual and the public at large must be the paramount consideration in these types of sentencings.<sup>181</sup>

Judges are also given to characterizing welfare fraud as a violation of trust, and thus a serious matter (and an aggravating factor relevant to sentencing).<sup>182</sup> It is important to interrogate this idea of a violation of trust. One way of understanding the nature of the 'trust' in issue is that the welfare system, judges are prone to point out, depends upon self-reporting (while this is true in one sense it obscures the enormous amount of active surveillance that happens as detailed earlier). The system's functioning and integrity are portrayed as being dependent upon recipients' candour and honesty; it turns upon just how trustworthy recipients are. But one also has a sense that the nature of the 'trust' and of the 'violation' in issue may well be something quite different. These cases are frequently characterized by a tone of abundant self-righteousness in which the contributions of the generous taxpayer must be dutifully respected and gratefully appreciated. Reading some of these cases brings to mind Oliver Twist and his request for more, "how dare you ask for more"—and more plaintively still, "how dare you take more!". This sentiment is most vociferously expressed in cases involving an accused who has immigrated to Canada.

Both explicitly in their remarks, and more commonly implicit in their failure to acknowledge the circumstances of these 'crimes', judges project a particular view about the welfare state. In this view, the welfare state provides a finely woven web of protection, ensuring that no one goes without adequate shelter or food. One of the respondents in our interviews also noted that judges are inclined to assume that the state does not make mistakes, and that the welfare system is both functional and adequate. In *R. v. Kems*, a case involving an accused who had come to Canada from Nigeria in 1988 as a refugee claimant and who had embarked on a sophisticated scheme using thirteen fictitious names, the court had the following to say about our welfare system.

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<sup>181</sup> *R. v. McGillivray*, *supra* note 141.

<sup>182</sup> *R. v. Anderson* [2000] O.J.No. 1485 (Ct. Jus.) (QL); *R. v. Friesen*, *supra* note 170; *R. v. Hughes*, [1998] S.J. No. 420 (Prov. Ct.) (QL).; *R. v. Leaming*, *supra* note 180; *R. McGillivray*, *supra* 141; *R. v. Obazee*, [1995] O.J. No. 4113 (Gen.Div.) (QL); *R. v. Sedra*, *supra* note 170; *R. v. Sewilam*, [2000] O.J. No. 5489 (Ct. Jus.) (QL).

Our current welfare system is the envy of many in the world and acts as a safety net of last resort for people in need. The vast majority of people on welfare are legitimate recipients of public funds. The monies they receive are not largesse but needed resources to allow them to survive until they are in a position to become self-sufficient. With today's desperate economy, our welfare system is over-burdened with applicants in need. Those who manage the claims are taxed with administering and monitoring an ever increasing caseload. It is not surprising that taxpayers voice concern about the growing demands on welfare. However, in a caring society, the welfare system is recognized as a means to help those less fortunate. When incidents such as we have before the court surface, the legitimate recipients of welfare are unfairly subjected to the suspicion of the general public.<sup>183</sup>

Similarly, in *R .v. Obazee*, also a case involving an accused who had come to Canada as a refugee claimant, but who was at the time of sentencing a Canadian citizen, the court commented thus,

That is \$24,000 paid out to the accused for the benefit of him and his family to assist them in their economic difficulties, not by the government because the government doesn't make money, but by the people of Ontario, the people of Canada. This is roughly the equivalent of the full-time earnings of two average people when, after taxes, they take home this amount of money to pay for the needs of their wives and their children, who have to be fed and clothed, educated and entertained. That is where the money comes from. It does not grow on a tree. It does not grow up from the ground. It is not made by selling off portions of the country. It comes from the work of productive people.... There is a great deal of publicity about welfare fraud and the burden of welfare on the community. As far as I am concerned the average citizen appreciates how fortunate we all are that when someone is in difficulty – economic difficulty, he does or she does not have to go out with a tin cup begging, that this is a rich enough country, productive enough country, that people can afford to assist their fellows through difficult times ... The average citizen does so willingly and is proud to be able to do so, and not to have to see other fellows degraded by begging, or impoverished to the extent they cannot have a roof over their head or have food on the table.<sup>184</sup>

In *R. v. Bunde (aka Rabarison)* the accused was a refugee claimant from Uganda with six children. He had been severely tortured in Uganda. He had no right to work upon

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<sup>183</sup> *R. v. Kems* [1992] O.J. No. 1724 (Prov. Div.) (QL); see also *R. v. Aigbokhae* (1992), 54 O.A.C. 72 where a joint submission for a suspended sentence and probation was rejected; the accused was sentenced to 6 months imprisonment, 2.5 years of probation and restitution of \$100/month, and the judge made a strong recommendation for deportation for a fraud of \$2,472. While the Court of Appeal reduced the sentence of incarceration to 60 days, it agreed that welfare fraud is a serious property offence which in the circumstances was aggravated by the fact that having been in Canada a "mere three months... he knowingly took advantage of the generosity and goodwill of the country he wished to make his home."

<sup>184</sup> *R. v. Obazee*, *supra* note 182.

arrival in Canada and there was a five-year delay, that was not of his making, before he received a work permit. He secured employment within two days of receiving his work permit. During the time he was unable to work, he used two names to collect welfare. The court characterized his crime as,

...a breach of trust against the citizens of Canada, those to whom Mr. Rabarison had turned for help, for refuge, for a better future for him and his family... He devised and implemented a plan to steal from the Canadian taxpayers, who work hard to fund a system that, while perhaps imperfect, at least provided him and his family with a level of economic support during his term as a refugee claimant.<sup>185</sup>

### **7.c Conditional Sentences**

A significant development in the sentencing of welfare fraud cases was the introduction of the conditional sentence in 1996. Pursuant to section 742.1 of the *Criminal Code*, where convicted, except where the offence is one punishable by a minimum term of imprisonment, and the court a) imposes a sentence of imprisonment of less than two years and b) is satisfied that serving the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718-718.2, the court may order that the offender serve the sentence in the community subject to complying with the conditions under section 742.3.<sup>186</sup>

An early line of welfare fraud cases ruled that conditional sentences were simply unavailable as a disposition; that presumptively welfare fraud warranted a jail sentence. However, in *R. v Francis*, the Ontario Court of Appeal found the trial judge to have erred in concluding that a conditional sentence was not available in cases of welfare fraud, and that the "presumption of custody" approach constituted an error in principle. Yet the *de facto* presumption of custody in a penal institution appears to continue to operate in some parts of the province. One respondent reported to us that in the region of the province where he practices, judges routinely sentence those accused of welfare fraud to jail time of at least 30 days and refuse to even consider a conditional sentence.

In other cases, courts have concluded that conditional sentences are inadequate to accomplish the general deterrent effect that jail sentences are assumed to possess. For

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<sup>185</sup> *R. v Bunde (aka Rabarison)*, *supra* note 170.

<sup>186</sup> *Criminal Code*, *supra* note 45, section 741.2.

example, in *R. v Stapley*, Mr. Justice Byers concluded that it would be no punishment at all to say well, "go home and continue to collect your benefits."<sup>187</sup> Other courts have found conditional sentences to be inappropriate where local police resources are not in place to meaningfully enforce them.<sup>188</sup> For example, in *R. v. Anderson* the accused was found guilty of fraud for having failed to disclose \$5,679 in unemployment insurance benefits. The Court, while noting that the funds were used for normal living expenses and to assist his ill wife, reasoned that, "[b]ecause this is a fraud of public funds and a breach of trust, there must, in my view, be a custodial sentence to reflect deterrence and denunciation". Holding that because no effective system of monitoring was in place for conditional sentences, a conditional sentence would be a mere token and would bring the administration of justice into disrepute. The accused was sentenced to 90 days in jail to be served intermittently, 2 years probation, 100 hours of community service and a compensation order for \$5,463.93 was issued.

While the availability of conditional sentences may at first blush appear to have eased the harshness of sentencing in welfare fraud cases, upon further examination it is not clear that this has been the effect. Are judges now more inclined to find that a sentence of imprisonment would be warranted because they know that actual jail time can be avoided through a conditional sentence? While the Supreme Court of Canada in *R. v. Proulx* made it clear that courts must first determine that the sentence of imprisonment is appropriate given the gravity of the offence and the degree of responsibility of the accused, there nevertheless remains the worry that conditional sentences may be imposed because they are frequently viewed as less severe than incarceration.<sup>189</sup> While a comparison of the outcomes of the cases we reviewed with those reviewed by Martin would suggest that this has not been the case, more data are needed to draw a firm conclusion one way or the other. However, one respondent did note that in the area where s/he practiced, prior to 1996 welfare fraud cases were routinely screened for suspended sentences (a practice that would have been out-of-step with other areas in the province). Post-1996 this no longer occurs and the Crown now seeks conditional

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<sup>187</sup> *R. v. Stapley* [1997] O.J. No. 3235 (Gen. Div.) (QL); see also *R. v. Olyynk* (2002) Sask. R. 270 where the Court of Appeal found that a conditional sentence failed to emphasize denunciation and deterrence.

<sup>188</sup> *R. v. Anderson*, *supra* note 182.

<sup>189</sup> *R. v. Proulx*, [2000] 1 S.C.R. 61.

sentences in cases that previously would have been considered for suspended sentences.

Without doubting the gravity of the deprivation of liberty imposed by a period of incarceration in a custodial facility, it is imperative to consider the impact of a conditional sentence upon a low income person. As ably illustrated by the intervenor factum of the Charter Committee on Poverty Issues, and supporting affidavit of Bruce Porter in the case of *R. v. Wu*, and by the troubling circumstances in which Kimberley Rogers died, a conditional sentence will often have a disproportionately negative effect upon low income people. Confinement to one's home, if that home is over-heated (as in the case of Kimberley Rogers), under-heated, infested with cockroaches or rodents, over-crowded, covered in mildew or shares any of the characteristic features of much low-income housing, will have significant and deleterious effects on both physical and mental health that will not exist for a person adequately housed. So too, trying to acquire the other material necessities of life often requires much more time for the low-income person than for the person with adequate financial means. For many, trying to access food means visiting multiple food banks and/or other charities and/or buying products at several stores (where one can get the best buy), rather than a single stop at a supermarket. Similarly acquiring clothing and other necessities is often time-consuming and complicated. Trying to find these necessities will often require long absences from the home; the three-hour window provided in, for example, the case of Kimberley Rogers, would be manifestly inadequate.

Another problematic feature of conditional sentences is compliance with the terms attached, and the risk of breach thereof (where breach will land one in prison). So, for example, reporting obligations will create problems for persons without access to phones or adequate transportation. So too, community service orders that commonly accompany conditional sentences can create enormous compliance problems. It is not at all unusual to see 150-250 hours of community service ordered. Performing this service will often require access to transportation (and this will cost money that the recipient may simply not have) and for single mothers in particular, access to childcare (again something that may be extremely difficult to arrange, and will often cost more than a recipient can afford). A case in point is that of Paulette Duke, one of the applicants in

*Broomer et al. v. Attorney-General of Ontario*.<sup>190</sup> She was 22 with three children, one an infant. Her landlord served her with notice to vacate, she had trouble finding housing, and her father had arranged with her grandmother for her to move in with her grandmother. Ms Duke prepared a rent receipt showing how much she would pay her grandmother and signed her grandmother's name. At the last moment, her grandmother changed her mind, and Ms Duke moved in with her father. She did not disclose this to welfare. She was charged with fraud under \$5,000 (a summary conviction offence), was convicted and sentenced to two years probation, \$1,022 restitution (the total amount of the fraud) and 100 hours of community service. She was also subject to the lifetime ban. Not surprisingly her expenses exceeded her income. In her affidavit she described her difficulty in feeding her children, in obtaining the medical prescriptions she required, in getting her daughter's asthma medication, which was not covered, in getting her daughter to Toronto to see a specialist, and in fixing her own broken teeth. With three young children and desperately short of money, it is not the least bit surprising that she was unable to complete the 100 hours of community service because she could neither obtain nor pay for childcare. She was charged with breach of probation.

As many of our respondents pointed out, community service orders can be very difficult for low-income people to comply with. Both the time and money required to participate are in very short supply. Problematically, it seems that often many judges share the view espoused by former Premier Mike Harris, that those on social assistance are at home doing nothing. They fail to understand how time-consuming living in poverty is in fact, and the tremendous work entailed in trying to meet basic needs from day to day.<sup>191</sup>

Also implicit is the view that low-income people do not give to their communities, but only take from them; community service—giving to their communities—must be mandated. But again, this is a mischaracterization of the lives of the vast majority of low-income people. Many are actively involved in their communities as volunteers, and many make a contribution to their communities through their work in rearing and caring for children. The view of welfare recipients as 'takers', not 'givers' pervades many of the sentencing

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<sup>190</sup> *Broomer supra*, note 8.

<sup>191</sup> See Karen Swift and Michael Birmingham (2000), "Location, Location, Location: Restructuring and the Everyday Lives of 'Welfare Moms'" in *Restructuring Caring Labour: Discourse, State Practice and Everyday Life*, ed. S. Neysmith (Toronto: Oxford,) 93; also Mosher et al, *supra* note 30.

cases. Disturbingly, in *R. v Rogers* the characterization of Kimberley Rogers as a 'taker' was used by the sentencing judge to justify a conditional sentence rather than a jail term. Mr. Justice Rodgers, in sentencing Kimberley Rogers, admonished her in the following terms; "[t]his is how serious the matter is, Ms. Rogers. There is a jail term that is going to be involved, it just happens to be a jail term that will be served in your home, and not at the expense of the community. You have taken enough from the community." Jail would have provided adequate food and shelter for Kimberley Rogers; house arrest did not. In Mr. Justice Rodgers' view, Kimberley Rogers was so dehumanized that even jail was too good for her.

Restitution orders also create incredible burdens for low-income people. Many of those convicted of welfare fraud are in receipt of social assistance at the time of sentencing. Their benefits will be reduced by 5-10 percent to collect the monies owing. Given that existing benefit levels are already below what is required for subsistence, taking more money away means further reducing the ability to meet basic needs. This will have deleterious health consequences. Moreover, because in many instances it was 'need' that led to the 'crime' in the first place, deepening the need without providing more choice in how one could provide for those needs, tightens the knot of the moral double bind. As observed in *R. v Johnson* on a motion for interim relief pending a constitutional challenge to the lifetime ban, "[f]rom a realistic point of view it appears that we are back in the conditions of England of the 1840s... it appears that jail will once again provide the service which Scrooge contemplated when he asked those soliciting funds for the poor "What, are there no jails?" Mr. Johnson had been granted a suspended sentence on the condition that he pay \$175/month.<sup>192</sup> But Mr. Johnson was in no position to comply with this condition. At best he would have been in receipt of benefits of \$520. Given his accommodation costs of \$400/month, he certainly was in no position to pay \$175/month. And of course, in light of the application of the lifetime ban he was without any income at all.

#### **7.d The Relevance of Context**

A common feature of many of the reported cases and an observation made by several respondents in our interviews is the failure of decision-makers to in any meaningful way engage with the realities of life on welfare; rather they construct, demean, and devalue

the 'other' who is all that they are not. While some aspects of the context of the life of the accused may be described in the decision, as in the quote from *Leaming* above, that context is quickly discarded as irrelevant, rather than mitigating. So too, that context—though often described as 'pitiful'—is taken to be of the accused's own making. The appeal court said of Ms Durocher,

There is a great deal to be said for the personal circumstances of the appellant, a divorced mother of six, struggling to get by. With perseverance and despite enormous hardship, she has managed over time to better her conditions, enrich her education, and improve her ability to provide for herself and her children... were one to approach the matter compassionately, with her and her family's interests solely in mind, or were one to have regard alone for her rehabilitation, one would not incarcerate her. But considerations personal to her must be balanced against others, impersonal, in finding a fit sentence. This is our duty. [The court continues with a discussion of the importance of general deterrence.] ...ensuring that scarce financial resources find their way to those genuinely in need of them, and in preserving the community's willingness to continue to support those in their midst who, through no real fault of their own, must have the help of the community. [The Court of Appeal then cites several cases where 5-6 months' imprisonment was ordered, in each case in the face of compelling personal circumstances. Her 8-month sentence was reduced to 5 months.]<sup>193</sup>

In sentencing Kimberley Rogers—whose crime was attending a post-secondary institution without permission of Ontario Works, and failing to disclose \$13,000 in student loans received over a three year period—Mr. Justice Rodgers reprimanded her with the following words:

Ms Rogers, I am really concerned about the amount and the manner in which it was taken. You are obviously intelligent. You are involved in post-secondary education, and you knew that you were receiving some assistance from the OSAP program, and you did not disclose that to the welfare office, and you received their benefits when you were not entitled to it. I am also concerned about the amount and how long this went on. I see almost four years of deception and dishonesty. I am satisfied you were not living an opulent lifestyle, even with these two sources of income, but welfare is there for people who need it, not for people who want it; who want things and who want money. It is there for people who are at their lowest and who cannot survive without it. You were bright enough to be able to go to school, and you were fortunate enough to get a loan or a grant to do that. You got yours. You got that lawfully. But, it was not enough. You wanted more, and you were prepared to lie, and cheat, and essentially steal from your own community, people who work hard to pay taxes to make those funds available to people who need it. Along you come and you take it through deception. What you did was wrong, and you are doing it while you are

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<sup>192</sup> *Johnson v. Ontario (A.G.)* (2003), 110 C.R.R. (2d) 155 (Sup. Ct.).

<sup>193</sup> *R. v. Durocher*, *supra* note 170.

purporting to become a social worker. You are there with a goal, with a dream to help people, and in order to realize that dream you are stealing. One takes away from the other...I hope you raise your child in a way that will instil [sic] the values that you appear to be missing, at least during this period of time...There will be a conditional sentence. This is how serious the matter is, Ms. Rogers. There is a jail term that is going to be involved, it just happens to be a jail term that will be served in your home, and not at the expense of the community. You have taken enough from the community. There will be six months jail to be served conditionally, followed by 19 months probation. ...you will be required to remain at your place of residence at all times, except for medical purposes; except for religious purposes; except for the shopping for the necessities of life, groceries, clothes for you and for your child; and, except to report to your supervisor... [At the request of the Crown this was amended to restrict shopping for life necessities to Wednesdays between the hours of 9:00am and noon]. There will be a restitution order made in the amount of \$13, 372.67.<sup>194</sup>

In *R. v. Jantunen* there was no dispute that the accused had been abused by her common law partner, who had manipulated and exploited her for his own personal gain and that she derived little or no financial gain from the relationship. Mr. Justice Kurisko concluded, however, that jail must be imposed (while acknowledging some unfairness in the fact that her abuser was walking away as a free man without any financial or legal liability). She is clearly blamed for having ‘chosen’ the wrong partner, and for *her* failure to end the relationship when the judge observes that, she "entered into the relationship of her own free will fully aware of the advantages and risks involved."<sup>195</sup> Noting that she is a “good mother to her children ... who will be deprived of her love and guidance” and “with the children foremost in my mind”, Mr. Justice Kurisko sentenced her to four months in jail. While noting the “exemplary” pre-sentence report—in addition to being a good mother, she worked part-time, volunteered, and had no record—Mr. Justice Kurisko added that this must be considered alongside what he described as her “propensity to place her personal interests ahead of truth when it suits her advantage.”<sup>196</sup> She was ordered imprisoned for four months (on appeal, conditional sentences having been introduced in the interim, the remainder of her term of imprisonment was to be served under a conditional sentence, together with an order for restitution, six months' probation and 200 hours of community service).

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<sup>194</sup> *R. v. Rogers*, [2001] O.J. No. 5203 (Ct. of Jus.) (QL).

<sup>195</sup> *Jantunen*, *supra* note 179.

<sup>196</sup> *Ibid.*

These cases stand in stark contrast to the decision of the Prince Edward Island Superior Court, Appeal Division, in *R. v. Laybolt and Laybolt*.<sup>197</sup> Noting that the accused had six children, experienced many family difficulties, engaged in no elaborate plan (the male accused sometimes drove a garbage truck—openly in the community—and this income was not disclosed), and used the money to get by, the trial judge refused to incarcerate the accused. "Considering the information from the pre-sentence report, I think with these two particular accused their whole life of misery, ignorance, poverty and under-privilege, has, in itself, amounted to worse prison than any court can impose and it is one which unfortunately there seems little prospect of their escape." The Appeal Court affirmed this view, adding that a sentence of short duration would be of no deterrence to anyone. Unlike other jurisdictions where incarceration has been the presumptive outcome, the question which arose in Prince Edward Island, in *Dunn et al*, was whether the Court of Appeal, in *Laybolt* and other decisions, had indicated that those convicted of welfare fraud should only receive suspended sentences and probation. The Appeal Court answered that this was an incorrect interpretation; rather a fit sentence must be one that considers all aggravating and mitigating factors.<sup>198</sup> But clearly what stands out in the approach in Prince Edward Island—in addition to the rejection of the claimed deterrent effect of custodial sentences—is how an engaged consideration of personal circumstances of low income persons on welfare results in far less punitive sentences.

But in the vast majority of decisions we have seen, personal circumstances rarely have a mitigating effect, and are often characterized as of the recipient's own making. There are, in our view, several strands in the judicial analyses that lead to this result. One of these proceeds from the assumption that the circumstances of the accused, while 'pitiful', are circumstances widely shared among those on welfare. Material discomfort, ill health, forced relationships, etc. are endemic and therefore can never constitute exceptional circumstances that would justify a departure from the presumption of incarceration as the appropriate result. What is left unquestioned is the general presumption of incarceration itself, and the underlying assumption of the validity of general deterrence theory in this context. A related analytical thread is the notion that because many others apparently manage on the system, the accused could have, but

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<sup>197</sup> *R. v. Laybolt & Laybolt* (1985), 20 C.C.C. (3d) 263 (P.E.I.C.A.); note that two of the judges on appeal found the entire proceeding to be a nullity, reasoning that the Crown was required to proceed under the offence provisions of the provincial social assistance legislation.

<sup>198</sup> *R. v. Dunn et al* (1993), 105 Nfld. & P.E.I.R. 18 (P.E.I.C.A.).

chose not to. The accused's actions then become associated with 'greed' rather than 'need'. A third feature is the tendency to blame the recipient for her own predicament, ignoring the ways in which social structures, institutions and ideologies construct and limit the choices available to her. The 'self' in these decisions is a starkly liberal self: atomistic; self-interested; and self-made.<sup>199</sup> In all, these features combine to create an 'other', someone who is by all measures, unlike the decision-maker; or as is commonly articulated in the cases, unlike the honest, hard-working taxpayer.

What emerges quite strikingly in many of the welfare fraud cases, as in much of the government discourse on welfare fraud, are simplistic, uni-dimensional stories of villains (welfare recipients) and heroes (taxpayers); of outsiders and insiders; of 'them' and 'us'. In these stories 'the welfare recipient' is cast as a liar and cheater, as a lazy, ungrateful parasite. She is a non-citizen, whose greed and self-interest deprive genuine citizens of their due. She is cast as a threatening outsider; she is not a good consumer, not a good worker, and if a single mother, not a good mother or wife. She is invariably compared to her foil, the honest, generous, hard-working, trustworthy, employed taxpayer.<sup>200</sup> The welfare recipient is cast as the 'other'; all that the taxpayer (the judge, the politician) is not. Perhaps her negation is critical to his claim to a normatively positive identity. For were he to genuinely acknowledge the realities of her life, many assumptions critical to his own identity would be shaken: the assumption that he is generous, caring and compassionate; that welfare recipients abuse the system, not that the system abuses them; that hard work, determination and a strong work ethic are guarantors against poverty and destitution; and that poverty is the result of personal failing.

As many of our respondents observed, most judges do not identify with people on social assistance. People on social assistance are cast so negatively that indeed, most of those in receipt of social assistance are reluctant to claim that identity and often go to some length to distinguish themselves from 'other' recipients. Judges, like each of us, face the challenge of trying to move beyond the boundaries of their own social existence

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<sup>199</sup> Susan Sherwin, "A Relational Approach to Autonomy in Health Care", in The Feminist Health Care Ethics Research Network, *The Politics of Women's Health: Exploring Agency and Autonomy* (Philadelphia, Temple University Press, 1998) 19-47.

<sup>200</sup> These constructions of the welfare recipient and the taxpayer are also very much at play in the differential approaches to dealing with welfare fraud and tax 'evasion' cases—a theme we pick up later.

in order to grapple with the reality of the lives of others who occupy profoundly different social locations. Without genuine interest and engagement, the vast majority of judges will exercise judgement without an inkling as to the daily grind of life on welfare. They will not understand the pervasive fear, the struggle to provide for oneself and one's children, the need to lie on occasion in order to survive, the structures and attitudes that constrain choice and produce horrendous moral double binds. Imagine, for a moment, a different judgement that could have been rendered in the case of Kimberley Rogers, by a judge who had made a genuine effort to understand her reality. Perhaps this is what such a judge might have said,

Ms Rogers, we have failed you. We have placed you in an untenable position where you were to be damned whatever you did. You are an astute woman. You rightly observed that in order to adequately provide for yourself and the child you are expecting you needed to upgrade your education. Without that education your chances of finding non-poverty wage employment were exceedingly limited. With an infant and later a young child, you will need to pay for childcare in order to work. We appreciate that poverty wage work will certainly not permit you do this. The Ontario Works system clearly creates an obligation for you to seek and maintain employment—employment at a wage where you will no longer qualify for O.W. benefits. So important is this, that this obligation appears in the statement of principles guiding the Act. You took this seriously; you had a plan, and that plan appropriately required post-secondary education. Not so long ago, in fact, the social assistance system encouraged recipients to do precisely this, with a long-term view to maintaining recipients' self-sufficiency. The legislation now asks you to become self-sufficient, but denies you the means to do so. I suspect that you are also acutely aware of the stigmatization that attaches not only to those on welfare, but those who are unemployed. I can only begin to imagine how deeply you wished to avoid this for yourself and for your child. Moreover, paid employment, for many, is essential to a sense of dignity and self-esteem, and this may well have been something that you were seeking as well.

Some may say that you have been greedy, taking more than your fair share. You have lived on \$520/month from Ontario Works; your rent has been \$450 (an amount which I shall judicially notice is a very reasonable market rent). The math is not complicated—you had \$70/month to live on. I make two observations about the money that you have received in the form of a student loan: first, it is a loan—a liability that you have an obligation to repay; secondly, this money went largely to pay for your tuition and your school-related expenses. The money has all been spent on your basic sustenance and in pursuing a solid plan for your future economic well-being. While many of my brethren have found spending on necessities not to mitigate sentence—while spending on 'luxuries' will be considered an aggravating factor—this is not my view. While on the facts before me you are guilty of fraud, you are to be granted an absolute discharge.

The role of 'need' in welfare fraud cases is a matter of some controversy. Often because others are assumed to be managing on benefits and because it is further assumed that the welfare state provides enough for adequate food and shelter, the deduction follows that those accused of fraud are motivated by 'greed', wanting more than their fair share. Earlier in the report we outlined how very inadequate rates are to meet basic needs. Additionally, it is important to appreciate that the ability to get by on benefits will turn on a huge variety of factors: shelter costs (which vary considerably); access to food banks and other charities; supportive friends and family; discretion exercised around gifts and payments of small cash value; and a myriad of other life details. That Jane can get by really is not very telling about whether Veronica can do so as well. One of the significant variables is simply that of how long one has been on welfare. As time unfolds, debts accumulate, the six-month window for casual gifts or payments of small value passes, and it becomes harder and harder to meet basic needs without 'fiddling'. It is perhaps telling that the C.V.P. identification for fraud priority includes length of time on benefits (the more time on benefits, the higher the risk). So too are the stories shared by many recipients who have been accused by their workers of being "up to something", since it is increasingly difficult with the passage of time to survive on existing benefit levels.

Virtually all of the respondents in our interviews reported that where fraud (intentional deprivation) occurred it was almost always motivated by 'need' rather than 'greed'. All respondents acknowledged cases of more complex 'scams' that were elaborately and consciously planned, but they suggested these constituted only a tiny fraction of the cases where fraud is investigated and/or charged.<sup>201</sup> Rather, in most instances, people were struggling to simply get by, and make do. As a few of our respondents pointed out, often the 'fraud' is incremental in nature. So, for example, a mother might not disclose a wee bit of money she made cleaning someone's house, and she realizes, "My God, I was able to pay for my kid's pizza day at school." And over time, additional small amounts of money are not disclosed.

Others too have observed that the profound inadequacy of benefit levels means that surviving sometimes requires not telling everything. 'Fiddling' may be, as Dee Cook suggests, one of very few 'choices' for getting by. Do your children go without adequate

food or do you not disclose the \$50 you made last week babysitting? Another choice for women is to find a man, any man—including an abusive man—in order to get off welfare. As the *Walking on Eggshells* report notes, women are sometimes told explicitly that they should find a man; other times, realizing how constrained their choices are, finding any man looks like a better bet than staying on welfare. And several of the women interviewed for that study returned to, were contemplating returning to, or had stayed in abusive relationships because all in all, for them the abusive relationship was better than life on welfare.<sup>202</sup> In theory, another option would be to find a job, but in many cases this is not a realistic option. Moreover, the job is often any job, no matter how exploited are those who undertake it. One is pressured (by welfare rules, employment insurance rules, changes to employment standards, etc.) to 'get a job, any job, no matter how bad' in much the same manner that women are encouraged to 'get a man, any man, no matter how abusive'. As Lauren Snider has argued, a new consensus has emerged about permissible standards of exploitation.<sup>203</sup> While Snider makes this argument in the context of the retrenchment of minimum standards of protection in employment, changes to welfare policy invite a similar critique.

The findings from studies in other jurisdictions, as well as those commissioned by the Social Assistance Review Committee, mirror what we heard from respondents during the interviews; inadequate rates and desperation force some recipients to take steps that they know violate the rules (not reporting small amounts of income in particular) but which are essential for their own preservation and for the preservation of their children.<sup>204</sup> As we noted much earlier in the report, the Social Assistance Review Committee (S.A.R.C.) identified a correlation between benefit rates and fraud, and offered the view that the provision of adequate benefit rates is the single most important means to prevent fraud in the system.

The C.R.I.L.F., in its report to S.A.R.C., argued that the combination of very low rates and very low earnings exemptions tempts recipients to conceal casual earnings or gifts.

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<sup>201</sup> In the *Broomer* litigation, the circumstances of the applicants that gave rise to fraud charges differ dramatically from the cases contained in the affidavit of Debbie Moretta, *supra* note 8 at para. 26

<sup>202</sup> Mosher et al, *supra* note 32.

<sup>203</sup> Lauren Snider, "Relocating Law: Making Corporate Crime Disappear" in E.Comack (ed), *Locating Law: Race/Class/Gender Connections* (Halifax: Fernwood Press, 1999).

Similarly K.P.M.G. reported that all of the submissions to the Committee emphasized the inadequacy of rates; they "fail to meet basic human needs and tempt people to 'cheat' by not reporting income, for example, in order to survive."<sup>205</sup> Gutierrez noted that some recipients feel forced to engage in theft, shoplifting and prostitution because of the inadequacy of benefits and that others engage in 'legal behaviour' (e.g. babysitting) but do not report it.<sup>206</sup> Gutierrez concludes that the motivation for fraudulent activity arises for persons where the need for additional funds outweighs their commitment to accountability and morality. We would suggest, somewhat differently than Gutierrez, that fraud often arises not where the need for money to meet basic needs outweighs one's commitment to morality, but rather arises through the resolution of a profound moral dilemma, where one's moral commitments are in conflict. When ought one's moral commitment to the truth outweigh one's moral commitment to care for a child, to preserve one's health and life or the health and life of another?

Some argue that there is no evidence that raising rates will rid the welfare system of fraud.<sup>207</sup> While it may well be the case that there are no empirical studies that establish this, there is a substantial body of evidence that fundamentally questions the proposition that harsh penalties have a deterrent effect.<sup>208</sup> Moreover, there is research which reveals that those convicted of welfare fraud, and those on the system who acknowledge fraudulent activity but have not been caught, consistently report that their actions were motivated by need—and most often, by the needs of their children. They do **not** report that they engaged in the 'fraudulent' conduct because they thought that they could do so without being caught or because the penalties were insignificant.<sup>209</sup> As Wilkie astutely observes, the vast majority of those engaged in welfare fraud have not "leapt a chasm into criminality". They are people who properly qualify for benefits, who when they cannot make ends meet because of the inadequacy of benefits, must find ways to provide for themselves and their children. In a social context of constrained options, sometimes the only way to get by is to 'fiddle'.

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<sup>204</sup> John Gilliom, *Overseers Of the Poor: Surveillance, Resistance and the Limits of Privacy* [Chicago: University of Chicago Press]; and Cook, *supra* note 138.

<sup>205</sup> K.P.M.G., *supra* note 58.

<sup>206</sup> Gutierrez, *supra* note 40 at pp.4 & 5.

<sup>207</sup> Debbie Moretta made this point during our interview, Moretta, *supra* note 43.

<sup>208</sup> Varma & Doob, *supra* note 99.

<sup>209</sup> Cook, *supra* note 138; Wilkie, *supra* note 114; and Gilliom, *supra* note 204.

## 8 *Income Tax Evasion*

While we do not purport to offer here a full-blown description and analysis of the income tax system and of income tax evasion more specifically, we do want to highlight the parallels and contrasts between tax evasion and welfare fraud. While the similarities they share—a reliance upon self-disclosure and the depletion of a collective/public asset—might invite correspondingly similar responses, what this comparison reveals is marked differences in public attitudes, in the scope of surveillance in place to detect wrongdoing, in the processing of suspected cases, and in the sentencing of offenders.

Income tax evasion is defined by subs.239(1)(d) of the *Income Tax Act (I.T.A.)* as the willful evasion or attempt to evade compliance with the Act or payment of taxes imposed by the Act.<sup>210</sup> Prosecution may be either by summary or indictment, and virtually always proceeds pursuant to the *I.T.A.*, rather than the 'fraud' provision of the *Criminal Code*. Upon summary conviction, the accused is liable to a mandatory fine of not less than 50 percent and not greater than 200 percent of the amount of the tax that was sought to be evaded, or to both such a fine and imprisonment for a term not exceeding two years. At the election of the Attorney General of Canada (with advice from the Canada Revenue Agency (C.R.A.)), subs. 239(1) offences may be prosecuted by indictment. If convicted of an indictable offence, the accused is liable to a mandatory fine of not less than 100 percent and not more than 200 percent of the amount of tax that was sought to be evaded and imprisonment for a term not exceeding five years. Subsection 239(1)(d) and other 239(1) offences have been found by the Supreme Court of Canada to be criminal in nature and as such, have been construed as full *mens rea* offences.<sup>211</sup> The *I.T.A.* also contains several regulatory offences, as well as provisions for civil consequences for non-compliance with various of its requirements.

The income tax system is largely based upon the candour of taxpayers in the full and honest disclosure of income. While for many taxpayers taxes are deducted at source—thus leaving little room for hiding income—it is often those with larger incomes, where taxes are not deducted at source, wherein the greatest opportunities exist to evade

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<sup>210</sup> *Income Tax Act*, R.S.C. *supra* note 155, subs. 239(1)(d). Note that subs. 239(1) contains various other offences, including making a false statement in a return and altering books or records.

<sup>211</sup> *Knox Contracting Ltd. v. Canada*, [1990] 2 S.C.R. 338.

taxes. In 1989/90, an estimated four million people were not subject to deduction of tax at source, and given the growth in self-employment through the 1990s, this number is likely to have increased significantly.<sup>212</sup>

The precise amount of income not disclosed to the C.R.A., either as a result of taxpayer error (similar to welfare law, tax law is extremely complex, and errors are likely to be common) or due to willful evasion, is unknown.<sup>213</sup> Reporting on the lack luster performance of the C.R.A. in addressing the underground economy (a significant source of willful evasion) the Auditor General's office estimated that the underground economy constituted 4.2 to 4.5 percent of G.D.P. Assuming a rate of 4.5 percent, in 1997 this amounted to \$38 billion, and a loss of tax revenues of \$12 billion.<sup>214</sup> Lorne Sossin, in his work on tax evasion, reports a significant increase in the quantity and frequency of tax evasion during the 1990s. He cites survey data for 1994-95 that show 50-60 percent of respondents had avoided taxes either a lot or a fair amount.<sup>215</sup> In a telephone survey undertaken by Varma and Doob, 18.4 percent of respondents admitted evading tax on one or more measures.<sup>216</sup> Data from the 2002-03 C.R.A. tax compliance survey of 2,732 Canadians, suggests that roughly 25-30% percent engage in, and rationalize, various forms of tax evasion.<sup>217</sup>

The Auditor General has noted that because the costs of enforcement are borne by taxpayers, voluntary compliance would be in the public interest; "[y]et academic studies have shown that many people view even willful non-compliance with income tax laws as a victimless and not particularly serious crime. To some extent, this public attitude has shaped the way tax administration operates in Canada, as evidenced by low rates of

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<sup>212</sup> 1990 *Report of the Auditor General of Canada* (Ottawa: Office of the Auditor General of Canada, 1990) at 24.30; on the rise of self-employment see Judy Fudge, Eric Tucker and Leah Vosko, *The Legal Concept of Employment: Marginalizing Workers*", prepared for the Law Commission of Canada, October 25, 2002, <http://lcc.gc.ca/en/themes/er/tvw/fudge/fudge/pdf> (last accessed January 24, 2005).

<sup>213</sup> *Ibid*, 1990 *Report of the Auditor General* at section 24.6.

<sup>214</sup> 1999 *Report of the Auditor General of Canada* (Ottawa: Office of the Auditor General of Canada, 1999) at 2.14 and the Opening Statement to the Committee on Public Accounts: Revenue Canada - Underground Economy Initiative (Chapter 2, April 1999 Report), May 11, 1999, [http://www.oag-bvg.gc.ca/domino/other.nsf/html/99pa08\\_e.html](http://www.oag-bvg.gc.ca/domino/other.nsf/html/99pa08_e.html) (last accessed January 24, 2005).

<sup>215</sup> Lorne Sossin, "Welfare State Crime in Canada Revisited: The Politics of Tax Evasion in the 1980s and 1990s" (Autumn 1999) *The Tax Forum* 1 at p1.

<sup>216</sup> Varma and Doob, *supra* note 99 at p.186.

enforcement coverage and the relatively lenient treatment of tax evaders."<sup>218</sup> The low rates of enforcement are reflected in prosecution and conviction statistics. In 1984-85 there were a total of 163 completed prosecutions and in 1989-90, only 123.<sup>219</sup> In 1999-2000 there were 240 charges of income tax evasion. The C.R.A. currently posts on its web site convictions obtained. For Ontario, in the period of August '04 to January '05, there were a total of 18 convictions obtained for income tax evasion and of these, only one jail sentence imposed.<sup>220</sup>

The widespread evasion of taxes is rationalized by reference to a range of claims: the system is too complex; tax administration is unreasonable; no real harm comes of it/there is no victim; the tax burden is too heavy; government mismanages its spending of tax dollars; others are doing it; there is little risk of being caught; and penalties are minimal.<sup>221</sup> In addition, the line between tax 'avoidance'—which is not merely condoned but celebrated and heavily resourced through the professional assistance of lawyers, accountants and other experts—and tax 'evasion' is often a blurry one, making it easy to regard tax evasion not as criminal conduct and the tax evader not as a 'criminal', but as a minor technical breach by a hard-working, contributing citizen. Sossin concludes that tax evasion, while a species of fraud, may be "better understood as a product, rather than a violation, of the income tax system."<sup>222</sup>

Indeed one can readily find not only rationalized non-compliance, but active encouragement, to disregard tax obligations. The C.R.A., on its website, warns Canadians against tax myths, cautioning that "[t]here are groups and individuals in Canada who claim that people can lawfully refuse to pay taxes or file a tax return" and that "a number of individuals and groups are actively promoting claims that there are

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<sup>217</sup> Canada Customs and Revenue Agency, *Compliance, Tax Cheating and Social Change in Canada in 2002-03*.

<sup>218</sup> Auditor General's Report, *supra* note 212, at section 24.17.

<sup>219</sup> *Ibid* at section 24.26.

<sup>220</sup> Canada Revenue Agency, "Ontario Prosecutions", <http://www.cra-arc.gc.ca/newroom/prosecutions/on/menu-e.html> (last accessed January 15, 2005).

<sup>221</sup> *Report of the Auditor General of Canada*, *supra* note 214; see also Lorne Sossin, *supra* note 215; Neil Brooks, "The Challenge of Tax Compliance" in Chris Evans & Abe Greenbaum (eds) *Tax Administration: Facing the Challenges of the Future* (New South Wales: Prospect Media, 1998); Cook, *supra* note 138; Varma & Doob, *supra* note 99, Compliance Survey, *supra* note 217.

<sup>222</sup> Sossin, *supra* note 215 at p12.

lawful ways to declare oneself exempt from tax."<sup>223</sup> Moreover there are those who seek not only to justify tax evasion, but to laud it. Consider, for example, Pierre Lemieux's editorial in the *Globe and Mail*, arguing that tax evasion is a response to tax invasion. In his characterization, the underground economy represents a "peaceful tax revolt... a useful restraint on Leviathan, and a benefit to all taxpayers."<sup>224</sup>

The wide public acceptance of tax evasion stands in sharp contrast to public sentiments regarding welfare fraud and welfare recipients. Note too how the rationalizations that are regularly invoked to justify tax evasion are not used to justify welfare fraud. For welfare fraud, the amorphous state is transformed into millions of innocent victims; all are expected to know, understand and comply with the admittedly complex rules; and the inadequacy of benefit levels in no way mitigates the crime. As Uglow has observed, the tax evader is looked "upon indulgently, as a person "entitled" to retain what is his own." By contrast, the welfare claimant is demonized, "informed upon by neighbors, all the circumstances of his life are under public scrutiny. The claimant may also carry a "moral taint" as a person unable to earn a living."<sup>225</sup>

One also observes dramatic differences in the web of surveillance, and the range of detection tools employed to catch tax 'evaders', by contrast to welfare 'fraudsters'. Under the *I.T.A.* the audit is used to detect instances of the failure to comply with the provisions of the Act.<sup>226</sup> In 1989/90 your chances of being audited were less than 2 in 1,000 individual returns.<sup>227</sup> In a very significant sense, virtually every social assistance recipient is under the equivalent of a constant audit. The S.A.R.C.'s conclusion that the *Income Tax Act* operates in a different and less intrusive way than the social assistance system is even more apt today, given the dramatic increase in surveillance and scrutiny under the social assistance system and no corresponding development on the income tax

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<sup>223</sup> Canada Revenue Agency, "The CRA warns Canadians against tax 'myths'", <http://www.cra.arc.gc.ca/newroom/myths/menu-e.html> (last accessed January 24, 2005).

<sup>224</sup> Pierre Lemieux, "A Few Words in Support of Tax Evasion", *Globe and Mail*, January 31, 1994.

<sup>225</sup> Steve Uglow, "Defrauding the Public Purse: Prosecuting in Social Security, Revenue and Excise Cases" (1984) Crim. L.R. 128 at p128; and also by the C.R.I.L.F *supra* note 40 at pp.10 & 28.

<sup>226</sup> See Van Der Hout et al for a fuller description of the powers under section 231.1, "Taxpayer Information: Administration and Enforcement Procedures Under the Income Tax Act (Canada)" (2000) 23 *Advocates Q.* 84. See also IC73 - 10R3 Tax Evasion, February 13, 1987.

<sup>227</sup> Auditor General's Report, *supra* note 212 at section 24.30.

side.<sup>228</sup> Similarly the K.P.M.G. report for the S.A.R.C. contrasted the high degree of self-reporting and privacy in income tax returns with the personal and continuing scrutiny for clients applying for social assistance.<sup>229</sup> Importantly, within both the social assistance and tax systems, various investigative and monitoring tools are justified by reference to the need to maintain public confidence in the integrity of the respective systems, both of which depend (though to varying degrees) upon self-reporting. However, substantially more extensive scrutiny and accompanying incursions upon the privacy of welfare recipients are assumed to be necessary to maintain public confidence.

One will also find an army of expert resources that those with money can draw upon, to protect and guard the privacy interests of the taxpayer (interests that are less threatened in the tax context than in the welfare context). As discussed earlier, there has been a significant amount of litigation challenging the powers of Revenue Canada to investigate the taxpayer, and some of that litigation has resulted in a diminution of those powers. Van Der Haut's argument that "even in a self-assessing system, where fair disclosure is critical, there must be clear limits to and tangible protections for taxpayers, their advisors and other third parties in the course of the audit or investigation, even where that exercise is not criminal in nature" is widely accepted.<sup>230</sup> Taxpayers, and those advising them, are encouraged to know the permissible limits of the C.R.A.'s powers; to invoke solicitor-client privilege to protect information against disclosure; to realize the potential to sue if an audit is conducted with malice; and to understand the *Charter* remedies available to protect the 'target' of an audit.<sup>231</sup> The point here is not to say that the advice is ill-founded but rather to note just how very different the context is from that of welfare fraud. On the income tax side, the arguments proceed on the assumption that the taxpayer is a full citizen, worthy of respect, whose interests (privacy, liberty, autonomy) ought to be zealously guarded from incursions by the state. In addition, the well-resourced taxpayer is able to pay for the development of a battery of legal argumentation by lawyers and other experts and over time, a substantial body of expert resources contained in treatises and elsewhere has been generated. By contrast, the starting assumption for the welfare recipient is that she is undeserving and unworthy of

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<sup>228</sup> S.A.R.C. *supra* note 9 at p.383.

<sup>229</sup> K.P.M.G., *supra* note 58 at p.60.

<sup>230</sup> Van Der Haut, *supra* note 226 at p.89.

<sup>231</sup> *Ibid.*

respect; her privacy interests are scarcely acknowledged, let alone respected.<sup>232</sup> Welfare recipients, with little or no access to the best legal talent in the country, do not have access to an accumulated body of expert legal argumentation. One can readily find several published resources to facilitate the provision of sound legal advice and representation of the person accused of tax evasion; but not for the person accused of welfare fraud.

In addition, advice and guidance is available from the C.R.A. itself, as a form of immunity from prosecution. The C.R.A. offers a 'voluntary disclosure program'.<sup>233</sup> Four conditions determine whether a 'voluntary disclosure' exists: it was made before the client had knowledge of an audit, investigation or other enforcement action; the client provides a complete disclosure; the disclosure involves a penalty; and it includes information that is more than one year past due. Clients, representatives and agents who are unsure about whether they should make a voluntary disclosure can discuss their situation on a no-name basis with an officer responsible for handling voluntary disclosures. If a voluntary disclosure is made and outstanding taxes (together with interest) are paid, civil and criminal liabilities under the *I.T.A.* will be avoided. Nothing of this sort exists with the welfare system.

Also of potential benefit to the taxpayer are the "fairness provisions", which provide for the cancellation or waiver of penalties and interest if, for example, they arise from, among other circumstances, those wherein the client experienced serious emotional or mental distress. Interest may also be forgiven if a client has been unable to pay because of circumstances beyond her/his control, including the loss of employment.<sup>234</sup>

The C.R.A. has what may be described as a very low-key 'snitching' program; but it is certainly not advertised and trumpeted in the manner that Ontario's welfare snitch line has been. On its website, under 'investigations' there is a sub-file, entitled, "What to tell

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<sup>232</sup> Janet Mosher, "The Shrinking of the Public and Private Spaces of the Poor" in J. Hermer and J. Mosher, *Disorderly People: Law and the Politics of Exclusion in Ontario* (Halifax: Fernwood Press, 2002) and Elizabeth MacFarlane, "No Lock on the Door: Privacy and Social Assistance Recipients" (1995), 1 Appeal 1-9.

<sup>233</sup> C.R.A. policy IC00 - 1R; a similar program of voluntary disclosure also exists with respect to Ontario provincial taxes.

<sup>234</sup> Canada Revenue Agency, "Fairness Provisions", <http://www.cra-arc.gc.ca/agency/fairness/fair-prov-e.html> (last accessed January 24, 2005).

us", which instructs those with "information about a suspected violation of any tax law" to contact the nearest CRA tax investigations unit.<sup>235</sup>

If, in the course of an audit, evasion is suspected the matter can be referred to 'special investigations'. The 1994 Report of the Auditor General noted with concern that since 1990 the number of referrals to Special Investigations had decreased by 50 percent; from 1000 to 500/year. Contrast this with the number of referrals to Eligibility Review Officers where an allegation of fraud has been made; which in 1997-98 was over 53,000. There are, no doubt, differences in the thresholds used for referral to Special Investigations and E.R.O.s, but even bearing this in mind, the difference is striking. Indeed the number of fraud investigations by E.R.O.s more closely tracks the total number of audits undertaken by C.R.A. for the entire country in a given year.<sup>236</sup>

The decision of whether to proceed by way of summary or indictment, as noted earlier, rests with the Attorney-General of Canada (the Department of Justice in practice), on the recommendation of the C.R.A. The policy, noted by the Auditor General, was not to recommend prosecution by indictment unless the case involved evasion of at least \$100,000 or other aggravating factors.<sup>237</sup> As the Auditor General observed at the time, the break point for indictment for fraud under the *Criminal Code* was \$1,000 (now \$5,000), exposing the accused to jail time of up to ten years. "Setting a \$100,000 threshold for prosecutions by indictment in tax evasion cases means that most tax evaders face a much lower chance of being incarcerated than those convicted of other types of frauds."<sup>238</sup>

Upon conviction, as noted earlier, the *I.T.A.* imposes a mandatory minimum and maximum fine. In addition, both for summary conviction and conviction by way of indictment, jail may also be imposed. Our review of the literature and of the reported cases suggests, however, that a jail term is rarely imposed. Jail appears to be reserved for those cases where the accused is, for example, a person who prepares tax returns

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<sup>235</sup> Canada Revenue Agency, "Investigations: What to tell us", [http: www.cra-arc.gc.ca/agency/investigations/tell\\_us-e.html](http://www.cra-arc.gc.ca/agency/investigations/tell_us-e.html) (last accessed January 24, 2005).

<sup>236</sup> While a bit dated, the S.A.R.C. noted that for 1986, 16 million people filed returns, there were 40,000 audits, 1,000 were referred to special investigations, 500 were considered for prosecution and 130 were prosecuted for tax evasion; *supra* note 9 at p.383.

<sup>237</sup> Similarly, Innes notes that proceedings by indictment are relatively uncommon, reserved for very serious offences or second offenders, *supra* note 53 at pp.1-16.

for others and has facilitated the evasion of taxes by multiple taxpayers (several hundred); or where, in addition to the charge of tax evasion, the accused has also been charged with fraud upon a public benefits program.<sup>239</sup> In *R. v Silvestri*, a 2001 decision, the court observed that neither the Crown nor defence counsel were able to point to a similar case—an uncomplicated case of tax evasion involving a first offender who had evaded tax in the range of \$50,000—where incarceration was found to be appropriate in addition to the fine as required by the Act.<sup>240</sup>

Several authors, and the Auditor General (on multiple occasions) have commented on the relatively insignificant penalties imposed for tax evasion. Sossin has argued that tax evasion is treated as a "minor regulatory infraction rather than as a violation of any esteemed social values."<sup>241</sup> While the Auditor General's office has explicitly refrained from suggesting that the penalties for tax evasion are inadequate, successive Auditor Generals have certainly invited the government to consider the value judgement reflected by weak enforcement and light penalties<sup>242</sup> and to consider sending a message to Canadians that tax cheating is unacceptable (a message not presently being conveyed).<sup>243</sup> Indeed, the repeated message in successive Auditor Generals' reports has been that tax evasion ought to be considered a serious crime, and to articulate reasons why it ought to be regarded as such. The 1994 Report of the Auditor General, for example, observed that, "[t]ax evasion is a serious criminal offence. It results in a loss of revenue; it shifts the tax burden from dishonest taxpayers to honest taxpayers; and it creates unfair competition between businesses that abide by the law and those that don't."<sup>244</sup> Similarly, the 1998 Report of the Technical Committee on Business Taxation characterized tax evasion as a persistent phenomenon, now being impacted by the globalization of business activities and new electronic technologies, and urged a

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<sup>238</sup> Report of the Auditor General, *supra* note 212, at section 24.23.

<sup>239</sup> See for example, *R. v Sparks* [1995] O.J. No. 3041 (Prov. Div.) (QL); *R. v DiPalma*, [2002] O.J. No. 2684 (C.A.) (QL); *R. v Lacroix*, [1999] O.J. No. 5704 (Sup. Ct.) (QL); *R. v Lang & Stance* (1989), 90 D.T.C. 6151 (B.C. Prov. Ct.).

<sup>240</sup> *R v. Silvestri*, [2001] O.J. No. 3694 (Ont. Sup. Ct.) (QL).

<sup>241</sup> Sossin, *supra* note 215 at p.1.

<sup>242</sup> Report of the Auditor General, *supra* note 212, at section 24.24.

<sup>243</sup> Opening Statement, *supra* note 214.

<sup>244</sup> *1994 Report of the Auditor General Canada* (Ottawa: Office of the Auditor General of Canada, 1990).

more rigorous approach to tax evasion, including more resources for enforcement and greater use of prison terms.<sup>245</sup>

Problematically the political, social and personal morality arguments that support the paying of taxes are often absent from the debate—although clearly some segment of the population, as reflected by the tax compliance surveys, is guided by these considerations. These arguments are well-articulated by Neil Brooks in his work: the political argument is grounded in the principle of democratic representation—one is obliged to pay taxes since it is, on this basis, self-assumed; the social argument is that each of us must pay in order to create the most basic conditions necessary for social life; and the individual morality argument rests upon a fiduciary obligation that we expect from others and should willingly discharge ourselves. "Those who evade taxes have broken one of the most basic elements of trust reposed in them as a member of a democratic society."<sup>246</sup>

In comparing the welfare fraud judicial decisions to those rendered in relation to income tax two striking differences appear: the attention given to *mens rea*; and the discourse invoked to support sentencing outcomes. On the first of these, it appears that in the processing of tax evasion cases—both within the Canada Revenue Agency and throughout the criminal prosecution—the slippage from rule violation to guilt, that is so pervasive in the welfare system, does not occur. Resources available to counsel detail the many defence arguments that will successfully negate *mens rea*; including mistake of law. We located not a single example of the error that so commonly appears in the welfare context in the invocation of the doctrine, "ignorance of the law is no excuse." Indeed it is assumed that mistake of law is particularly significant in fiscal prosecutions, especially where the conduct "lies on the boundary between evasion and aggressive tax planning" or needs to be assessed by reference to complex provisions or applications of the Act.<sup>247</sup> Lack of knowledge of the admittedly complex tax regime is regularly invoked to negate *mens rea*. Indeed, even sophisticated businessmen with an advanced grasp of tax law and able to access expert assistance have successfully invoked lack of

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<sup>245</sup> Technical Committee on Business Taxation, *Report of the Technical Committee on Business Taxation*, Chapter 10, 1998.

<sup>246</sup> Brooks, *supra* note 221 at p.25.

<sup>247</sup> Innes, *supra* note 55 at pp.6-11.

knowledge of the *I.T.A.* to negate *mens rea*. Consider, for example, the following two cases.

In *R. v. Chusid*, the accused was charged with willful evasion and the making of false or deceptive statements.<sup>248</sup> Mr. Chusid had failed to disclose a \$1 million commission in the year it was received (when it ought to have been disclosed); but did disclose it later (when he knew he was under investigation). The court stressed that mere carelessness or inattention is not enough; but rather there must be proof beyond a reasonable doubt that his actions were undertaken for the express purpose of evading taxes. That the accused was an experienced businessman, with an advanced grasp of taxation, who should have known of his obligation to report the commission was not enough, the court pointed out. The court noted that he was careless in his bookkeeping and his failure to disclose could have resulted from simple carelessness, thus raising, in the judge's mind, the benefit of a doubt and Mr. Chusid was acquitted.

In *R. v. McGuigan*, the accused was similarly charged with willfully evading taxes and making a false or deceptive statement.<sup>249</sup> The case turned on whether Mr. McGuigan honestly believed that the stock options which were in fact taxable in 1996 and not disclosed by him, were not taxable in 1996 but rather in 1997 and that it was his intent to disclose them in 1997. The court noted that the law is complex, the treatment of stock options in this regard perhaps counter-intuitive, and that the law had changed. And while Mr. McGuigan had been the president of a company with sales of \$500 million and vice-president of a company with sales of \$5 billion, there was, to quote the trial judge, "no evidence of any financial sophistication or knowledge outside his sphere." He had recently been terminated from work, and no doubt experienced shock and disorientation; apart from the act itself there was no evidence to infer *mens rea* (debts, gambling problems, living beyond his means), and his character evidence from witnesses (including a former Assistant Deputy Minister of National Defence) was strong. The trial judge concluded, "there was a genuineness in his testimony", "something that made me believe him". He too, was acquitted.

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<sup>248</sup> *R. v Chusid*, [2002] O.J. No. 4644 (Ont. Sup. Ct.) (QL).

<sup>249</sup> *R. v McGuigan*, [2002] O.J. No. 3989 (Ont. Sup. Ct.) (QL).

We raise these cases not to suggest that the results were incorrect, but again to highlight some of the contrasts with the treatment of *mens rea* in the welfare fraud context. While there are clearly exceptions, as we noted earlier, welfare recipients—those with very limited, if any, access to expert advice and assistance—are very commonly imputed with knowledge of the complexity of the rules and regulations surrounding Ontario Works. The complexity of the regulatory regime has shown little purchase power in defending against an allegation of fraud. The opposite seems to hold true regarding the regulation of the income tax regime; notwithstanding that persons under suspicion in this context are very often those who have—and who can continue to access—expert advice and guidance. It may also be the case that a reasonable doubt is created in the mind of the judge much more readily in the income tax context than in the welfare context. There may well be—and this would not be surprising in the least given the correlation of their respective social positions—an ability on the part of judges to much more readily imagine how a million dollar commission might be 'carelessly' missed in reporting taxes, or to believe that termination from prestigious employment could be devastating and distracting than it is to imagine that one cannot escape from an abusive partner, the destitution of poverty, or that one could sign a document without understanding its import.

The discourse supporting sentence outcomes, as noted above, also differs significantly from that found in the welfare context. Again, while there are certainly exceptions, one generally does not see the same tropes invoked by the judiciary in order to justify significant sentences. So, for example, in the cases we reviewed, while judges observe from time-to-time that the income tax system is dependent upon taxpayer candour and honesty, income tax evasion is not commonly labeled a breach of trust. Recall that this characterization is extremely common in welfare fraud cases, and is employed—together with the characterization of the crime as one against the public purse—to not only warrant, but to indeed require, incarceration. The income tax system is, in fact, more dependent upon the candour and honesty of taxpayers than is the welfare system (in large measure because the former are assumed to be honest and the latter not; a troublesome assumption in light of the data regarding acknowledged evasion). Moreover, the evasion of taxes is also a fraud upon the public purse. But what one absolutely does not see in the tax cases is the conclusion that because of the breach of trust and the crime against the public purse, incarceration is the appropriate sentence.

Indeed, we found not a single case where this logic was employed to support a presumption of incarceration.

Also, we did not often see tax evasion characterized as a crime against every member of the community used to support a custodial sentence. One important exception, however, is the case of *R. v. Ayling*, a case much more compatible with decisions commonly found in the welfare fraud context.<sup>250</sup> This was a case where the accused was in the business of preparing false tax returns for others, and one wherein the only financial benefit to her was an increased volume of business. Here the court stressed the importance of general deterrence, adding that "this is a crime that makes everyone in society a victim as a result of those who don't pay their fair share of taxes; the burden is left on the other taxpayers to make up that amount. So, in effect, the crime that you commit is a crime against every Canadian and it is necessary to deter others who would endeavour to do what you did." She was sentenced to a fine of \$143,000 and 2 years less a day incarceration.

Finally, one also observes in the income tax cases how the fall from a position of elevated social status is used to justify lighter sentences. Again, while there are exceptions, the accused's high status in the community and his good character and reputation—all somewhat tarnished by the prosecution—are considered relevant to sentencing. The stigma, sometimes personal financial bankruptcy, and more generally the loss of status, are regarded as dimensions of punishment already inflicted upon the accused. The welfare recipient, by contrast, is unable to invoke these badges of social esteem that are soiled by the criminal prosecution.

Sentencing patterns indicate much harsher sentencing outcomes for those convicted of welfare fraud than those convicted of tax evasion. Those convicted of having evaded tens of thousands of dollars in taxes are likely to receive only a fine; those convicted of defrauding welfare of even a few thousand dollars are likely to face a sentence of incarceration (served either in jail or under house arrest). Clearly, welfare recipients are not in a position to pay substantial fines, and one might query whether it is the inability to do so which results in what is acknowledged to be a more punitive sentence—that of incarceration. As such, might this constitute a form of systemic discrimination against

low income people in relation to criminal sentencing, as was the finding in *R. v. Wu* where, because the accused was impecunious and unable to pay a mandatory fine, the trial judge ordered the fine, gave on time to pay, and upon default, imposed a conditional sentence of 75 days.<sup>251</sup>

## **9 Employment Standards Violations**

Another area of regulation which provides interesting points of comparison with social assistance is that of employment standards.<sup>252</sup> Within the employment standards regime in Ontario, many shifts in the statutory regime and in enforcement practices over the past decade mirror those in the social assistance regime. One sees, for example, a shift away from public/social responsibility to maintain and enforce minimum standards within the workplace, towards increased scope for individual contracts of employment that may permissibly derogate from the ostensibly 'minimum' statutory standards. The shift from public/social responsibility for maintaining minimum conditions of employment is also reflected by the current enforcement regime, a regime that is both under-resourced and almost entirely reactive, placing responsibility for enforcing standards onto individual employees. The cumulative impact of many of the changes (together with the increase in contingent work) has been to worsen the conditions of work for many employees: many are working longer hours; not being compensated for over-time; and for some, not being paid at all for work done.

The deterioration in the conditions of work developed at roughly the same time as the introduction of workfare, wherein welfare recipients were being required to find a job, any job, that would get them off welfare (or would reduce their welfare benefits). Given the changes within the social assistance regime, more and more employees were/are forced to accept jobs where the conditions of work fall below—often far below—statutory minimum standards. This is both because of the new scope for contracting out of those minimum standards, and more importantly, because of the lack of enforcement of the statutory standards. Not only is the system almost entirely reactive, but even where an employee lodges a complaint and is successful, the record of the Ministry in enforcing

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<sup>250</sup> *R. v. Ayling*, [1998] O.J. No. 6428 (Gen. Div.) (QL).

<sup>251</sup> *R. v. Wu*, [2003] 3 S.C.R. 530.

<sup>252</sup> Certainly yet another area is that of medicare fraud; as revealed by the work by Professor Joan Brockman there are striking contrasts in the regulation of welfare fraud and medicare fraud.

Orders to Pay made against employers is abysmal. Additionally, notwithstanding that the conduct of many employers could be characterized as criminal fraud, not only does one never see fraud charges laid against employers in these circumstances, but almost without exception, the Ministry does not use its powers under the *Employment Standards Act* to prosecute employers who are in violation of the Act. The situation is such that an employer can flagrantly disregard the Act, with little possibility that she will be ordered to pay; with a fair measure of confidence that even if an Order to Pay is made it will not be successfully enforced; and with an abundance of confidence that s/he will not be prosecuted criminally or provincially.

Employment standards evolved historically in an effort by workers to establish a social floor of standards required of all employment. While in the late 19<sup>th</sup> and early 20<sup>th</sup> centuries, the ideology of 'freedom of contract' governed employment relationships, gradually the state was persuaded by workers to introduce legislated minimum requirements. Constraints on freedom of contract in employment were first introduced to protect women and children, primarily because they were viewed as less than fully autonomous, rational actors and who thus required the paternalism of the state. State intervention to regulate conditions of employment for men, on the other hand, was understood to constitute an indefensible infringement of liberty. The actual conditions of grave inequalities of bargaining power and the exploitation of working class labour this permitted were simply ignored.<sup>253</sup> But gradually, workers were successful in securing legislated minimum standards of protection. In an important sense, legislated minimum standards—if enforced—limit the exploitation of workers, and help to offset the inequalities of bargaining power between employees and employers.<sup>254</sup> Minimum standards include such important terms of work as the minimum wage, the maximum hours of work, entitlement to leave, vacation pay, and termination pay. Judith Fudge has observed that in Ontario, these minimum standards—contained in the *Employment Standards Act, 2000*—have never been particularly generous, yet they do, in theory, create a common floor.<sup>255</sup>

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<sup>253</sup> See Martha T. McCluskey, *supra* note 10.

<sup>254</sup> United Steelworkers of America, *Time for Change: Ontario's Employment Standards Legislation: Consultation Paper* (Toronto: United Steelworkers of America, September 2000).

<sup>255</sup> Judy Fudge, "The Real Story: An Analysis of the Impact of Bill 49, the *Employment Standards Act*, upon Unorganized Workers", July 1996 (paper on file with the authors) at p.3.

The Conservative government of Mike Harris introduced a series of reforms to the employment standards regime, culminating with a new Act, the *Employment Standards Act, 2000*, proclaimed September 2001.<sup>256</sup> Without reviewing the reforms and the existing regulatory regime in detail, three areas invite interesting comparisons with that of the social assistance regulation: the diminution of the public/social responsibility for minimum standards of employment in favour of individual contracts and individual responsibility; the approach to enforcement; and the specific practices around the failure of employers to pay their employees.

The language of 'self-reliance', much like in the social assistance context, permeates government rhetoric surrounding the reforms. More concretely, several of the reforms introduced through the *Employment Standards Act, 2000*, under the rubric of increased 'flexibility', enable workers to contract out of the minimum standards of work. For instance, while section 17 of the Act limits hours of work to 8 hours/day and 48 hours/week, an employee may agree to work beyond both these levels (if greater than 60 hours/week, approval of the Director is required).<sup>257</sup> An employee may also agree, for the purposes of determining overtime entitlement (ordinarily payable beyond 44 hours/week) to average hours over a two-week period (and hours can be averaged over additional weeks, with approval of the Director).<sup>258</sup> Of course, in many instances, employees simply have no real choice as to whether to agree to these agreements, and the language of freedom of contract is once again used to obscure the actual (and increasing) inequalities of bargaining power in the workplace.

On the enforcement front, it has long been observed that the employment standards regime suffers from inadequate enforcement; it is primarily reactive (responding to individual complaints) and does a poor job of recovering money found to be owing to individuals whose complaints have been successful. The more recent reforms—while on the one hand holding out the promise of more meaningful enforcement through the introduction of increased fines and jail terms, as well as new protections against reprisal—create additional hurdles to pursue money owing.

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<sup>256</sup> Bill 49 *Employment Standards Improvement Act, 1997*; *Employment Standards Act 2000*, S.O. 2000, c.41.

<sup>257</sup> *E.S.A. 2000*, section 17.

<sup>258</sup> *Ibid*, section 22.

Employees are encouraged to reach an agreement with their respective employers, and if unsuccessful to pursue a formal claim. But even if fully pursued and successful, with an “Order to Pay” issued against one’s employer, recovery of money owing is still very tenuous. Orders to pay go to private collection agencies, and as discussed below, Orders are often simply ignored by employers. An Employee Wage Protection Program, formerly in place to provide a safety net for employees to recover unpaid wages, was first capped and then eliminated by the Conservative government. In Judy Fudge’s assessment, the overall import of the changes has been to make it easier for employers to avoid their legal obligations.<sup>259</sup> The shift of responsibility for enforcement onto individual employees and private collection agencies, as well as the elimination of the Employee Wage Protection Program represent additional instances of the decline of the social in the regulation of work.

While the legislation contains several enforcement tools including provision for pro-active investigations or audits, as well as a range of investigative powers and penalties, the system is, as noted, primarily reactive (responding to an individual’s complaint) and many of the powers and penalties available seem to hardly be utilized at all. The basic complaint process works as follows: an employee who is aggrieved completes a written claim form, s/he is encouraged to reach a resolution with the employer, but where no resolution is possible, the matter is referred to an Employment Standards Officer (E.S.O.) for an investigation. An E.S.O. enjoys many of the same powers as E.R.O.s and those conducting tax audits: the power to enter and inspect any place other than a dwelling; the power to require production of a record; and the power to question any person on matters relevant to the investigation.<sup>260</sup> Often the investigation will include a ‘fact-finding’ where the employee and employer will be required to attend a meeting with an E.S.O.<sup>261</sup> Unlike an E.R.O, an E.S.O. has the power to issue a decision, and if in the employee’s favour, to issue an “Order to Pay” against an employer, an order which becomes final and binding after 30 days.<sup>262</sup> The E.R.O. can decide to expand the scope of the inquiry beyond the individual complaint before him or her to examine the employer’s practices more broadly through an audit. Data from the Ministry suggests, however, that this is rarely done (See Table 3).

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<sup>259</sup> Fudge, *supra* note 255.

<sup>260</sup> E.S.O. 2000, *supra* note 256, sections 91 & 92.

<sup>261</sup> *Ibid*, Section 102.

<sup>262</sup> *Ibid*, section 103.

**Table 3: Number and Percentage of E.R.O. Investigations, by year**

Year	# of proactive inspections	% proactive inspections that include audit	% complaints where audit conducted	% ESO time doing proactive inspections
<b>2002-03</b>	357	38%	4%	1.4%
<b>2001-02</b>	1156	64%	5%	2.4%
<b>2000-01</b>	1543	70%	6%	1.9%
<b>1999-00</b>	1426	66%	6%	1.7%
<b>1998-99</b>	1279	54%	8%	1.5%

In addition to the ability to issue an “Order to Pay”, an E.S.O. may also issue a compliance order (an order to comply with a particular standard, and which has no monetary consequence), or a notice of contravention, which includes a penalty.<sup>263</sup> Anecdotal evidence suggests that compliance orders and notices of contraventions are not commonly issued. Finally, there also exists the possibility of a prosecution.<sup>264</sup> Penalties were increased under the new legislation: a maximum penalty for an individual on first conviction of a fine of up to \$50,000 and/or twelve months jail and for a corporation on first conviction, up to \$100,000.<sup>265</sup>

The Ministry’s prosecutions policy indicates the purpose of prosecution is to promote compliance through the general and specific deterrent effects of prosecution. The policy directs that consideration be given to the employer’s failure to comply with orders or notices of contravention and repeat violations. Additionally, the policy lists a of variety of factors to consider in the process of deciding whether to prosecute: the gravity of the offence; any mitigating or aggravating factors; the availability of effective alternatives; public confidence in the legislation; history of compliance; and the strength of the evidence and of defences. By contrast to the processing of welfare fraud cases, note the consideration in particular of mitigating factors prior to prosecution. The policy also clearly provides that where an E.S.O. has reasonable and probable grounds to believe an offence has been committed; is considering proceeding by way of prosecution, is considering laying charges; or wishes to speak to the individual being considered for prosecution, s/he must read a *Charter* caution to the individual employer, and follow

<sup>263</sup> *Ibid* sections 108, 113 & 141.

<sup>264</sup> *Ibid*, see generally sections 131-139.

<sup>265</sup> *Ibid*, section 132.

other procedures, such as continuity requirements for seized evidence. Here too, note the contrast with E.R.O. investigations wherein a *Charter* caution seems generally not to be given.<sup>266</sup>

Notwithstanding the availability of prosecutions and substantial penalties upon conviction, prosecutions are extremely rare.<sup>267</sup> In 2001 the Ministry of Labour reports a total of 37 convictions but none of these were for *E.S.A.* violations; in 2002, 49 convictions only one of which was for an *E.S.A.* violation; in 2003, 38 convictions of which two were for *E.S.A.* violations. In sum, there were only three convictions for *E.S.A.* violations over a three-year period. Adams, reviewing much earlier data, notes that in the period 1978-79 there were some 60 active prosecutions, but that since 1982/83 there have been no more than four per year.<sup>268</sup> The Minister of Labour at the time of writing, the Honourable Chris Bentley, in a press announcement of April 26, 2004, stated, “[l]ast year, there were more than 15,000 claims against employers and only one prosecution was started. Starting today, enforcement is back in style.”<sup>269</sup> But unless there are substantial changes, it is clear that employers can violate the Act with a tremendous sense of security against prosecution; they are given expansive scope for even flagrant violations of workers’ rights.

On the collections side, once an Order to Pay has been issued, as briefly noted above, it will go to a private collection agency contracted by the Ministry of Labour to collect both the amount owing to the employee, as well as a reasonable fee.<sup>270</sup> The legislation also authorizes the collector to agree to a settlement with the person from whom he or she seeks to collect money. If the agreement is for less than 75 percent of the Order, but only then, written approval of the Director is required. In other words, the private collection agency is authorized to agree to settle what is an Order of the state; an Order that ostensibly reflects a social consensus about the statutory minimum standards of

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<sup>266</sup> Ontario Ministry of Labour, Employment Standards, *Procedures Manual*, Chapter 7, "Enforcement and Collections", section 7.7.2.1.

<sup>267</sup> Requests to the Minister made by various community legal clinics to prosecute repeat offenders constantly fell on deaf ears. See Scott Bergman, "A New Strategic Vision for the Workers Rights Division at Parkdale Community Legal Services: Putting the Money in the Hands of our Clients" (Toronto, April 2003) (paper on file with the authors).

<sup>268</sup> Roy J. Adams, "Employment Standards in Ontario: An Industrial Relations Systems Analysis" (1987) 42:1 *Relations Industrielles* 46 at p.54.

<sup>269</sup> Ministry of Labour, News Release April 26, 2004.

<sup>270</sup> *E.S.O.*, *supra* note 256, sections 127-130.

employment. Thus, private agreements can be made—without the employee’s approval—to move the protections of the employee below the statutory floor.

Equally disturbing are the numbers of outstanding Orders to Pay and the enormous amount of monies owing to employees – more than \$16 million in 2002/03. The Ministry’s Annual Fiscal Reports (Table 4) reveal the following composite:

**Table 4: Ministry of Labour—Annual Fiscal Report**

Year	# of claim file completions	% in violation	% of assessments collected on (Partially & fully)	% of assessed amounts uncollected	Uncollected amounts
2002-03	15, 078	75%	76%	59%	\$16,648,800
2001-02	12,457	74%	78%	68%	\$19,978,000
2000-01	13,975	73%	77%	68%	\$22,498,000
1999-00	12,880	72%	75%	61%	\$16,119,000
1998-99	11,982	72%	73%	58%	\$13,505,063

These numbers only reflect the situation for those employees who have filed a formal complaint, thus the total amount of unpaid wages is likely to be many times the amounts reflected in these statistics. While the data that Adams draws upon is dated, it does help give us some sense of how that total picture might look; the overall compliance rate with respect to the payment of minimum wage in 1979 was 55 percent, reflecting some 55,000 workers. From 1981-85 collections were made for 900 employees through the Employment Standards branch procedures, thus correcting the situation for less than 2 percent of those affected.<sup>271</sup> This general lax state of enforcement stands in marked contrast to the enforcement of the social assistance regulatory regime.

Adams divides delinquent employers into three groups: the sulkers, the shysters, and the bankrupted. The shysters in his topology are those who deliberately set out to defraud employees. A common pattern, Adams explains, for this kind of employer is to set up a summer business and then, towards the end of the summer stop wage payments and simply disappear. He notes as well, that the present system is one in which the potential criminal has little reason not to commit the crime.<sup>272</sup> Which leads us to the final comparison we wish to make. A substantial number of employers regularly

<sup>271</sup> Adams, *supra* note 268 at p.58.

<sup>272</sup> *Ibid*, at p.54.

violate not only the *E.S.A.* but the *Criminal Code* as well. There is an extremely low probability of prosecution under either—really virtually unheard of under the latter, notwithstanding that the behaviour of some employers (particularly of ‘shysters’) does satisfy the *Criminal Code* definition of fraud.<sup>273</sup> State Orders to Pay are routinely ignored without consequence. There is a virtual vacuum of state enforcement of its own laws. Moreover, the political discourse surrounding employment standards violations is void of the language of ‘fraud’ or criminality. Employers, even those who hire intending not to pay their employees, are not labeled as criminals. There is no outrage expressed about the theft of the labour of employees by unscrupulous employers; none of the kind of moral outrage expressed about welfare ‘fraudsters’. Adams' use of the terms ‘crime’ and ‘criminal’ in relation to employment standards violations is utterly exceptional. Snider suggests that the “ideological processes that shape society's distribution of blame have exonerated these kinds of harmful acts and actors responsible for them.”<sup>274</sup> At the same time, these same ideological processes have not exonerated, but inculpated and demonized low-income people in receipt of social assistance.

## **10 Conclusion**

Our analysis of welfare fraud reveals a disconcerting picture. The discourses and practices regulating welfare fraud operates in tandem with other features of Ontario's reformed social assistance system (e.g. benefit reductions, workfare, the definition of spouse) to re-constitute the receipt of welfare benefits as a morally suspect activity. Those in receipt of benefits are viewed as at worst criminals, and at best, deviants deemed to be lacking the virtues essential to the good neo-liberal citizen: a strong work ethic; a sense of responsibility for self and family; and sustained employment. Those in receipt of O.W., as they struggle to get by on benefit levels that fail to “take into account their basic requirements” (as the *C.A.P.A.* formerly stipulated), are expected to know and comply with an enormous number of complex rules. They are acutely aware that they are being constantly monitored and snitched upon by a vast array of both public and

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<sup>273</sup> See Shannon Slattery, “The Criminal Law and the Employment Relationship: A New Perspective on Enforcing the Employment Standards Act” (Toronto, 2004) (Paper on file with the authors). Slattery identifies a wide array of not uncommon employer practices that might satisfy the test for criminal ‘fraud’, including lying to an employee about the terms or quantum of payment; hiring new employees when previous employees are still owed wages; hiring new employees when the business is about to go bankrupt; hiring a new employee with no intention to pay wages.

<sup>274</sup> Snider, *supra* note 203 at p.201.

private actors. They experience not only material destitution, but fear, shame, humiliation and a profound sense that they are 'others'; not full citizens, but outsiders who are perceived as threatening and who are not to be trusted.

For many observers, the post-War period reflected the evolution of pan-Canadian social rights of citizenship, including, importantly, access to social assistance benefits. In this view, citizenship in Canada had evolved such that the collective provision of social security (education, health, minimum standards for work, fulfillment of basic needs) was regarded as one of its core elements—people expected this from the state by virtue of their status as citizens.<sup>275</sup> Others are skeptical of this claim, preferring instead to characterize these social policies as reflective of historic compromises necessary to preserve the interests of capital.<sup>276</sup> But whether viewed as the recognition of social rights or expedient historical compromise, what is clearly evident in the past decade is a retraction from any notion of entitlement to social assistance. Rather than being regarded as a route to full citizenship, or as an indicia of one's citizenship or member status, it is clear that increasingly welfare recipients are being re-positioned as partial or failed citizens; as outsiders; as 'them' not 'us'.

As discussed earlier, entitlement to social assistance has been replaced by a contractual notion of exchange. One consequence of this is that the receipt of social assistance, framed within the rationalism of the free market, is now frequently viewed as 'taking' from the public by those who have chosen to get a 'free ride' by 'doing nothing' with their lives. Philosopher Alan Schrift has noted how these neo-liberal reforms have allowed a narrow self-interested form of reciprocal return to dominate current discourses on how the state collectively organizes our obligations to each other. "One must wonder," Schrift writes,

what sorts of assumptions regarding gift giving and generosity are operating in a society that views public assistance to its least advantaged members as an illegitimate gift that results in an unjustifiable social burden that can no longer be tolerated while at the same time viewing corporate bailouts and tax breaks for its wealthiest citizens as legitimate investments in a nation's future.<sup>277</sup>

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<sup>275</sup> See the collection by Dave Broad and Wayne Antony, *Citizens or Consumers? Social Policy in a Market Society* (Halifax: Fernwood Publishing, 1999).

<sup>276</sup> Broadbent, *supra* note 20.

<sup>277</sup> A.D. Schrift, "Introduction: Why Gift?" in A.D. Schrift (ed.), *The Logic of the Gift: Towards an Ethic of Generosity* (New York: Routledge, 1997) at p.19.

Portrayed and understood to be threatening outsiders, as persons lacking neo-liberal virtues who desire something for nothing, who 'take' rather than 'give', who 'misuse' and 'abuse' the welfare system, claims voiced by welfare applicants for state assistance are regarded with intense suspicion; as potentially fraudulent and certainly not to be trusted. As a consequence, as our study has revealed, benefits are administered within an environment of intense and unrelenting scrutiny and frequently, hostility. Extensive reporting and disclosure requirements, exceptionally broad consents to the disclosure of personal information, home visits, snitch lines, invasive interrogations, and demeaning interactions constitute the lived reality of those in receipt of O.W. Abuse, misuse and fraud of the system are assumed to be flagrant, and thus, those in receipt of benefits are constantly assumed to be "up to something."

As our report has documented, much of what is frequently called 'welfare fraud'—and policed as such—is far removed from activity that is the object of criminal law. Criminal convictions for fraud involving social assistance are, as we have discussed, exceedingly rare, representing in 2001- 02 a mere 0.1 percent of the social assistance caseload. Our analysis suggests that 'welfare fraud' as it is now constituted involves all breaches of any of a mass of complex, often contradictory, and frequently counter-intuitive rules that govern social assistance administration. And as we have detailed, many of these rules and regulations are so vague and confusing that they seem intentionally designed to make receiving social assistance an ungovernable activity that inherently involves rule breaking, and thus the committing of 'welfare fraud'. As should be clear from our discussion, regulation that revolves around 'undeclared income' and 'man in the house' in particular is so capricious and vague that no reasonable person could conduct herself in a way that would not put her in jeopardy of an accusation of 'fraud' in receiving social assistance. This is particularly so when one considers the extensive and often arbitrary powers of Eligibility Review Officers, the ambiguity of how officials apply rules and regulations in local settings, and the use of the 'welfare fraud' hotline which translates what can often be malicious gossip into official action. It is the highly informal policing of this network, fueled by prejudicial stereotypes of those on social assistance, which results in termination of benefits, assessments of over-payments, accusations of fraud, and formal fraud charges.

The normative character of the 'crime' of welfare fraud is generated not just by the complexity and vagueness of the rules and regulations that govern social assistance, but also by the disparities that exist between welfare fraud regulation and other forms of economic misconduct. As we have noted, in almost every respect 'tax evasion' and 'employee standards violations' are viewed in a much less punitive and severe light in terms of the moral culpability attached to the conduct, the range of detection and enforcement tools utilized and the penalties that follow upon conviction. This disparity suggests a clear normative distinction at work, one that is aligned with neo-liberal values that views poor people as not deserving of support, but rather of intense scrutiny and inequitable treatment. This brings us to a troubling paradox that the constitution of welfare fraud as a crime provokes: despite being depicted as a serious threat to the public, and despite being the subject of significant changes in law and legal processes, this mode of regulation appears extra-legal, not only in the highly informal ways in which regulation is carried out, but also in how it frequently positions those on social assistance as outside the usual safeguards and principles of criminal justice administration. For example, a basic aspect of culpability in law, that of *mens rea*, is often not adequately interrogated in the determination of guilt. Similarly, well-established legal distinctions between 'error' and 'fraud' that are present in income tax evasion jurisprudence are often not even made in the cases where recipients are informally disentitled under the auspices of committing welfare fraud.

We are drawn then to the conclusion that the receipt of social assistance itself has become criminalized through the category of welfare fraud. Simply being on social assistance results in one being positioned as a penal object in a climate of moral condemnation, surveillance, suspicion and penalty. This criminalization is particularly gendered in that the majority of people on social assistance are women, and the majority of them are single parents. Prejudicial, historically embedded views of single women and single mothers—that they are irresponsible, sexually loose, lazy and 'need a man' to support them—pervade stereotypes about those on social assistance, and are implicitly re-enforced in the regulation of the 'man in the house rule' in particular. And it is not only the intimate aspect of women's lives that is utilized as an area of control in social assistance regulation, but also the social sphere of everyday life as well. Despite a rhetoric of 'community responsibility' in government discourse, it is the very people that might constitute a support network in the community—neighbours, family, boyfriends,

landlords, school officials—that are either re-responsibilized as agents to snitch on any perceived ‘fraud’, or are possibly complicit in rule breaking by being supportive, by for example, buying food for a mother and her child who have exhausted what is a completely inadequate benefit for that month. The insidious character of this criminalization completely devalues women as mothers—that for example being a single parent surviving in poverty constitutes simply ‘sitting around’ and ‘doing nothing’. It is no wonder that being on social assistance has been characterized by an experience of fear, retribution and isolation—qualities that ‘cracking down’ on welfare fraud intentionally generate.

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