The Cruel War: Social Security Abuse in Canada

Reuben A. Hasson
Osgoode Hall Law School of York University

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The Cruel War: Social Security Abuse in Canada

Reuben Hasson *

The Persistent and Universal Search for Social Security Abuse

Allegations of abuse in the social security field have become a permanent feature of debates about social policy in Canada, as well as in the United States1, the United Kingdom2 and Australia.3

There are certain features about the allegations of widespread abuse that are striking. In the first place, they are totally unsupported by evidence. Thus, when in 1976 in British Columbia Mr. William Vander Zalm instituted the Ministry Inspectors Program (known generally as the 'fraud squad'), he estimated that there were more than $40-$50 million lost through welfare fraud each year. The figures were, in fact, nowhere near that magnitude and the most that can be said is that the programme eventually came close to paying for itself.

Complaints about welfare abuse serve to conceal vast areas of welfare law and administration from critical scrutiny since these areas are never mentioned by those who allege rampant welfare abuse.

Through recoveries agreed to, as well as moneys saved by terminating existing benefits.4 To be sure, Mr. Vander Zalm's is the most egregious example of an overestimate but the important point is that no single allegation of widespread social security abuse has been documented in Canada.

The second feature of the social security abuse allegations is that they give no indication of the fact that the number of people who do not claim benefits may be greater than the number of claimants who are defrauding the welfare system. Thus, in the United Kingdom Mr. David Donnison, then chairman of the Supplementary Benefits Commission, estimated in 1976 that twenty-five per cent of people entitled to welfare benefits were not claiming them.5 In 1975, the Federal Provincial Working Party on Income Maintenance noted that many Canadians were not obtaining the social security benefits to which they were entitled.6 The authors of the review attributed this failure to claim benefits to "the stigma attached to social assistance (associated on the one hand with the discretionary powers held by local welfare authorities, and on the other, with the public perception of persons 'living off welfare.'"7 Although stigma may be the main factor inhibiting people from claiming their welfare benefits, ignorance of benefits available cannot be ignored as a factor in a country in which it has been estimated that there are "80 separate and separately administered programs to provide income to those in need."8 Apart from those who do not get benefits at all, there are a large number

* Reuben Hasson is a professor of law at Osgoode Hall Law School.

4. See Leman, supra note 1, p. 209.
7. Id., p. 7.

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of welfare claimants who receive wrongly calculated benefits. In the United States, twenty five per cent of all Aid to Families with Dependent Children cases involve mistaken payments\(^9\) and, while Canadian figures are not available, it would not be surprising — given the complexity of Canadian Welfare programmes — if the same margin of error prevailed here. Even if most of the mistaken payments were in favour of claimants, this is of little consequence since, as will be seen, Canadian social security law offers very little protection against mistaken payments.

The third feature of much of the ‘anti-scrounger’ allegations is that it often uses ‘abuse’ in a highly idiosyncratic manner. Thus, to receive a social security overpayment is regarded as an abuse despite the fact that the general law of the land provides that someone who receives a mistaken payment in good faith and spends it is not obliged to make restitution.\(^1\)\(^2\) Again, it is regarded as an abuse by many that injured workers should get overlapping benefits under workers’ compensation schemes,\(^3\) whereas in the general law of tort overlapping payments are regarded by the legal system with equanimity.

Finally, a disturbing feature of the behaviour of politicians and propagandists who allege that social security abuse is endemic is that they fail to generate the same or indeed any concern about tax evasion.\(^4\) This is so despite the fact that the sums estimated lost through tax evasion — $3 billion\(^5\) per annum — are far in excess of even the most extravagant estimates of all moneys lost through all social security schemes as a result of fraud. Yet, at a time when all levels of government were appointing more people to control social security abuse,\(^6\) the percentage of income tax returns audited decreased from 0.93 per cent in 1971 to 0.62 per cent in 1976.\(^7\) In the field of corporate audits, the number went down between 1974 and 1979 from 6.5 per cent to 4.6 per cent.\(^8\) This occurred despite the fact that corporate schemes for the evasion of tax became more sophisticated and despite the fact that Mr. Bruce McDonald, Deputy Minister, Taxation, Department of National Revenue, stated, “Our expected minimum intake from spending a dollar on auditing tax returns is to get $3 back.”\(^9\)

How Much Welfare Abuse?

While allegations of widespread welfare abuse are unsupported, it must be conceded that some welfare abuse does take place. The difficulties in measuring its extent are fraught with formidable difficulties.

First, there is no consensus as to what constitutes abuse. For example, as pointed out above, there is no agreement as to how to view overlapping benefits in accident compensation schemes. Similarly, there is no consensus as to how much unemployed people and people on welfare ought to be allowed to earn by way of part-time earnings. Indeed, it would be correct to say that most of the rules in the social security system have been (and still are) the subject of vigorous controversy.\(^10\)

Second, assuming that definitions of abuse could be agreed upon, another difficulty in this field is simply that of measuring the extent of abuse. This difficulty frustrated even the British Royal Committee on the Abuse of Social Security Benefits (Fisher Committee).\(^11\)

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9. M. Bendick et al., The Anatomy of A.F.D.C. Errors (Washington, D.C.: Urban Institute, 1978), p. 55; Richardson, “Fraud”, in Department of the U.S. House Committee on Government Operations, Administration of the A.F.D.C. Program, 95th Congress, 1st Session (April 1977), part 8, pp. 255-258, quoted in C. Leman, supra note 1, p. 208. Professor David Donnison has pointed out, supra note 5, at 11, that “…every study of errors shows that claimants are more likely to get less than they are entitled to than more.” The reason for this is that while virtually every social insurance scheme will have a mechanism to monitor overpayments, very few indeed will have mechanisms to safeguard against underpayment.


13. Even a small municipality the size of Durham in Ontario has thought it necessary to appoint a full-time welfare fraud official. According to a story in the Toronto Star, July 17, 1981 this individual has saved Durham region taxpayers $248,000.00 in his first year, a sum equal to 11 times his salary. This kind of return might persuade other municipalities to adopt similar courses of action.

14. The figures are as follows:

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of Audits</th>
<th>Tax Collected</th>
</tr>
</thead>
<tbody>
<tr>
<td>1971</td>
<td>88,743</td>
<td>$155,879,000</td>
</tr>
<tr>
<td>1972</td>
<td>90,025</td>
<td>$253,240,000</td>
</tr>
<tr>
<td>1973</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>1974</td>
<td>81,119</td>
<td>$240,867,689</td>
</tr>
<tr>
<td>1975</td>
<td>66,604</td>
<td>$229,444,387</td>
</tr>
<tr>
<td>1976</td>
<td>78,700</td>
<td>$327,901,000</td>
</tr>
</tbody>
</table>


15. Id., p. 37.


17. In this connection, the comments of Professor David Donnison, supra note 5, are particularly relevant: “When I hear people talking about abuses, I usually find when I dig into the abuse that they are talking about a payment to which someone is fully entitled by law — but they do not think he ought to get it.”

18. Supra note 2.
After hearing evidence from government departments, social work agencies, Members of Parliament and anyone who had an interest in the subject the Committee concluded:

It would be very desirable, if it were possible, to know exactly how much abuse of the social security system by wrongful claims actually goes on. So long as knowledge of the full extent of abuse is incomplete and fragmentary, any judgment as to how serious a problem it is and what resources it is justifiable to devote to alternative means of suppressing it must be based on impression and guesswork.20

The difficulty in estimating the extent and cost of welfare abuse is greater in a federal country such as Canada than in a unitary country as the United Kingdom. Whereas social security is centrally administered in the United Kingdom, the administration of social welfare in Canada is divided between federal, provincial and municipal governments in a 'scheme' of frightening complexity.21

[A] disturbing feature of the behaviour of politicians and propagandists who allege that social security abuse is endemic is that they fail to generate the same or indeed any concern about tax evasion.

Third, difficulty arises in not knowing what use to make of figures relating to criminal prosecutions in the field of security abuse. On one extreme, criminal convictions may indicate the full extent of the social security agency's efforts in combating abuse. At the other extreme, criminal prosecutions may tell us next to nothing about an agency's efforts in attempting to combat abuse, since although very few prosecutions may be brought the agency may penalize social security recipients either by wrongly denying their claims in the first place or else by terminating their benefits wrongfully.22 It is extremely important to note that the denial of benefits to a claimant may be more financially severe than a fine or a prison sentence and that this method of controlling abuse is attractive to many administrators since it is cheaper and easier to administer. Even if social security decisions were published — and for the most part they are not23 — there would still be no way of telling how many people who rightfully claim welfare benefits are denied them.

Even though there are these uncertainties about the basic facts and the fundamental question of what constitutes abuse, it is my contention that there is very little opportunity for social security recipients to commit social security abuse.

Indeed, the major problem in the social security system is that the social security recipient is all too often abused by harsh and atavistic rules or is abused by receiving inadequate benefits.

In order to illustrate these points, I shall examine three areas of social security: Workers' Compensation, Unemployment Insurance and Welfare.

## PART I

**WORKERS' COMPENSATION**

It is doubtful if any subject of Canadian public policy has been more exhaustively examined than workers' compensation. In Ontario alone, there have been three Royal Commission reports,24 one task force inquiry,25 a review by a group of pension consultants,26 and an inquiry by a noted academic.27 In no single review of the provincial Acts that I am aware of has the problem of false claims been regarded as being of any great significance. The Ontario figures for cases referred to the prosecuting authorities in respect of fraudulent claims during the past five years indicate that the problem is an extremely modest one.

20. *Id.*, p. 209, para. 446. The Committee did recommend that the Department of Social Security carry out a random survey of those receiving benefits. The Minister of the day objected that a random survey of this sort would cause offence to the many innocent people who would inevitably be selected.


22. Thus, in the United Kingdom in 1974, 2,335 cases were investigated for fictitious desertion and 9,993 cases for undisclosed cohabitation. The investigations resulted in 45 per cent and 41 per cent respectively of allowances being reduced or withdrawn for each group of claimants investigated, see figures cited in Field et al., *supra* note 12, p. 153. Clearly the cut-off of benefits is the more dominate method of dealing with suspected fraud, as opposed to, say, criminal prosecutions.

23. Even those decisions which are reported are so inadequate that the claimant cannot make any kind of intelligent decision as to whether he or she wants to appeal. The point has been well put by Professor Ison when commenting on decisions of the Ontario Workmen's Compensation Board. Ison says of these decisions, "They are simply a brief recital of some of the evidence followed by a decree. They do not state what principles are being applied, or how these principles are derived nor do they portray in any other way any movement of the mind from premise to conclusion" Ison, "Contemporary Developments and Reform in Personal Injury Compensation in New Developments in the Law of Torts," in *Law Society of Canada Special Lectures* (Toronto: Richard De Boo, 1973), pp. 521, 547. The decisions of the Ontario Social Assistance Review Board are at least as incomprehensible as those of the Ontario Workmen's Compensation Board.


27. See the Weiler Report, *supra* note 11.

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I think that the reason why there is so little abuse is that it is very difficult to pass off an injury that occurred, say, at home, as being one that occurred at work. Occasionally, perhaps, a claimant is able to persuade a board that a non-work-caused injury occurred at work, but — and this illustrates my point about the difficulty of defining at least serious abuse — in the very rare case where a claimant is able to obtain workers' compensation benefits for an accident that occurred outside the factory gate, I am afraid that I am unable to feel any great sense of outrage. For the purpose of a rational compensation scheme it is impossible to justify, either on policy grounds or in terms of ethics, discrimination between those persons who suffer injuries at the work place and those who suffer them elsewhere.

On a number of occasions, business groups have asserted that the provisions of the workers' compensation Acts have been construed too liberally in favour of injured victims. Thus, some employers told the Weiler Committee on workers' compensation that "there was a systemic bias in favor of granting claims, even unjustified ones." Such allegations are unsupported by even a single example. The scanty evidence we have — scanty because only one province has a developed reporting service — indicates that the Boards are not overly generous in compensating for traumatic injuries. Consider, for example, the four following Ontario cases. In the first case, a wood lathe operator injured his hand while turning a piece of wood for his personal use. In the second case, an employee injured his eye while lighting a cigarette while on his way to the washroom. In both these cases, the Board felt that under the terms of the Workmen's Compensation Act the claimant was not entitled to receive protection for acts done on their own behalf while at work.

These cases should be contrasted with the case of an employee who suffered a lumbar strain when picking up a can of cola from a dispensing machine located in the canteen. In another case, an employee was injured as she was re-entering the factory gates after returning from a dental appointment. In both these latter cases, the employees were held to be entitled to compensation because they were acting within the scope of their employment.

It seems to me that the theory which allowed the claimants in the last two cases to recover, that is, that an accident which occurs on the employer's premises is one that arises out of employment, should have been applied to allow recovery in the first two cases.

However, the fate of the traumatically injured victim is more favourable than someone disabled by disease in the work place. "Accidents, poisonings and violence" accounted for only 24.4 per cent of the deaths of persons aged between 20 - 60 in 1974. Disease accounted for 75.6 per cent of the deaths. However, when workers' compensation figures for the Alberta, British Columbia and Manitoba Boards are examined, only between 2 and 17 per cent of awards were made in respect of death from disease. Of the total number of permanent disability awards only 3.4 to 11.3 per cent were awarded in respect of disease, and of these, the majority were for hearing loss. If claims for hearing loss are excluded, only 0.8 to 1.7 per cent of the total number of permanent disability awards were for disease. Workers might be excused for thinking that the Workmen's Compensation Act should be renamed the Workmen's Compensation (Trauma) Act.

There are three additional problems that work accident and disease victims face. First, the Boards have generally accorded a more generous recognition to visible anatomical loss in awarding partial and permanent disability benefits than to the degree of impairment or economic loss. As Professor Ison has pointed out, "it is common to find permanent disability awards ranging from 40 to 70% for the loss of a limb, even though the actual wage loss may be negligible. But for a herniated disc treated by laminectomy and fusion, awards have commonly been about 5 to 10% of total disability, notwithstanding that actual wage loss may be 50% or higher." The physical impairment method of compen-

The physical impairment method of compen-

28. Even the most liberal workers' compensation board in the country has set out fairly stringent criteria for determining whether accidents are work-related or not. See, for example, decision No. 145 of the British Columbia Workers' Compensation Board dated October 3, 1975.

29. See the Weiler Report, supra note 11, p. 95.

30. British Columbia.


33. This should not be taken to mean that the fact that a worker is injured off the work premises determines a priori that the injury did not arise in the course of the employment. See, e.g., Decision No. 2 of the British Columbia Workers' Compensation Board dated June 4, 1973 where the worker was granted compensation when he was hit by a passing motor vehicle after he had cashed his pay cheque.


36. Id.

sating for permanent disabilities certainly leaves a large proportion, if not the majority, of claimants who do actually receive awards under-compensated.  

Second, even if the awards were originally adequate or generous, in three provinces the awards will soon become inadequate because of the failure of the provincial governments to inflation-proof these benefits.  

Third, because the workers' compensation Acts are limited to work-related accidents and diseases, there are numerous contested cases. For example, is the worker's asthma caused by poor ventilating conditions at work or is the illness the result of non-work-related causes?  

Or, is the claimant's back injury the result of a traumatic event or is it the result of the process of aging? Disputes such as these, combined with the facts that boards either do not make interim payments or limit them to very exceptional circumstances, cause delays in payment which create nightmarish difficulties for thousands of claimants.  

In short, there is "no systemic bias" in favour of claimants. The workers' compensation system has too many affinities with the justly discredited negligence system for it to be regarded as a just and effective system of compensation.  

[O]ver-compensation of accident victims in tort actions is generally regarded with equanimity and, sometimes, with positive enthusiasm.  

In recent years, some commentators have focussed their attention on what they perceive to be an abuse in the system of workers' compensation. That abuse may be described as the problem of overlapping benefits or over-compensation of workers. Thus, in December 1979, the Ontario Workmen's Compensation Board pointed out in its Grey Paper that as a result of some workers obtaining Canada Pension Plan benefits, disability insurance and wage loss plans, in addition to their workers' compensation benefits, some workers might be financially better off while injured than while working. There is a great failure to understand that over-compensation is extremely unlikely to occur in other than a very small minority of cases. In the first place, many workers are adversely affected by ceilings which are entirely anachronistic and which penalize higher-paid workers. Second, as has been pointed out earlier, there is little attempt to match the degree of disability with the amount of economic loss sustained. Third, in three provinces benefits are not made inflation-proof.

If ceilings were removed, realistic pensions were paid and benefits indexed to inflation, it is difficult to envisage workers purchasing expensive disability insurance and wage loss plans. It is even difficult to imagine that very many workers would pursue their Canadian Pension Plan benefits since the criteria for obtaining these benefits are extremely difficult to meet. In short, an attack on the problem of over-compensation is a thoroughly ill-advised one at the present time since many people who appear to be over-compensated are, in fact, under-compensated.  

It is impossible to leave the subject of over-compensation without mentioning that, in the field of personal injury litigation, over-compensation of accident victims in tort actions is generally regarded with equanimity and, sometimes, with positive enthusiasm. Not only are accident victims awarded substantial sums for pain and suffering and for loss of amenities, but tort accident victims are not required to deduct from their awards either private insurance benefits, unemploying insurance benefits, Canada Pension Plan Benefits, wage payments by the employer or any

38. There is a recognition of this fact in the existence of sections such as subsection 42(5) of the Ontario Workmen's Compensation Act which allows supplements to be paid to workers who would be seriously under-compensated if the physical impairment method were used. Unfortunately, this section has been hedged around by numerous restrictions.  

39. The provinces are Alberta, New Brunswick and Ontario.  

40. See the celebrated decision in the case of Mrs. Murdeena Johnson where the claimant was successful in arguing that her asthma was caused by poor ventilating conditions. The decision was hailed as a breakthrough in the Toronto Globe and Mail, February 3, 1979, pp. 1-2, but the Board said the case "is a unique case with unusual circumstances and will probably never crop up again," Globe and Mail, February 6, 1979, p. 6.  

41. The Weiler Report, supra note 11, does not appear to have grasped the importance of delays in the workers' compensation system. Had it done so, it is possible that the Report would have recommended a system of interim payments.  

42. See the authorities cited supra note 11.  


44. The ceilings are as follows: Alberta $18,250  

British Columbia 22,200  

Manitoba 18,000  

New Brunswick 18,000  

Newfoundland 18,000  

Nova Scotia 15,000  

Ontario 18,500  

Prince Edward Island 12,000  

Quebec 23,500  

Saskatchewan 22,000  

45. See text at supra note 37.  

46. See supra note 39.  

47. See, e.g., Minister of Health and Welfare v. Cauchi, 2 Canadian Employment Benefits and Pension Guide Reports (1978), para. 8546, pp. 20.12, where the claimant was not entitled to compensation despite suffering from asbestosis.  

48. See the award of $100,000 for pain and suffering and loss of amenities awarded by the Supreme Court of Canada in Andrews v. Grand & Toy (Alberta) Ltd. (1978), 83 D.L.R. (3d) 452, 491. It would be fair to say that this sum is regarded as being extremely (or excessively) moderate by commentators and practitioners.  


52. See, e.g., Harris v. Manchester (1975), 50 D.L.R. (3d) 90 (Man. Q.B.).
other collateral benefit. Any attempt to change the collateral benefits principle in this area would provoke the wrath of most lawyers. Ironically, most of these lawyers would applaud the principle that there should be no overlapping benefits in workers' compensation cases.

Another example of the double standard that operates in this area of the law is to be found in the activities of occupational health consultants who advise employers on how to resist workers' compensation claims. Thus, recently, a Dr. Richman who advises for British Petroleum, Canadian General Electric and St. Lawrence Cement, was speaking at a conference seminar on employee-employer-doctor problems in communications. Among the advice that Dr. Richman gave employers was that if they wanted to defeat an employee's compensation claim which they felt was "not valid," they should not fill in the WCB form properly. "Leave out the social insurance number; then it won't go into the computer," he said. Alternatively, Dr.

[S]ome employers seem prepared to receive instruction in how to use unethical tactics to resist workers' claims.

Richman also advised the conference that if employers believed an injury did not really occur at work, they should give the employee a letter with that information to take to his family doctor. The advantage to the employer of doing this is that this might discourage the doctor from putting through a compensation claim with the compensation board. Finally, the speaker advised company officials to leave the WCB form deliberately vague if they felt the claim being applied for was not valid. They should answer "yes" or "no" questions with question marks. The presence of question marks might well lead to an investigation. In short, in disputed cases the object should be "to make the form as hard for them to follow as possible." Amazingly, this sort of advice seems to be regarded as a legitimate exercise of a professional calling. It is impossible to believe that if a trade union official or a community legal worker told claimants to exaggerate their injuries because the benefits paid were too low or else told them to fudge facts which might show that the accident was not work-related this would be regarded as being ethically acceptable.

Conclusion

There seems to be very little fraud in the workers' compensation system. Further, to assert as many business groups have done that the injured victim is the darling of the provincial workers' compensation schemes is equally without any support. What evidence there is indicates that a very large number of workers' compensation claims become nightmares for the people who bring them because the boards all too often interpret the acts in the narrowest possible fashion.

The problem of overlapping compensation turns out, on examination, to be a problem of insignificant proportions. Finally, some employers seem prepared to receive instruction in how to use unethical tactics to resist workers' claims.

[T]o the extent that payment of benefits would help strikers, the denial of benefits helps the employer. Since there can be no neutral position, the real question is why the government should choose to be neutral on the side of the employer.

It seems impossible to resist the conclusion that the debate over abuse is really a fight over the adequacy of benefits. Increased benefits are seen by employers and by pension consultants as likely to promote fraudulent claims and malingering on the part of claimants. Thus, after the Weiler Report recommended marginal changes in workers' compensation, the benefit consulting firm William M. Mercer of Toronto, stated, "We feel all Ontario citizens should be alarmed by the omission of safeguards to prevent unjustified claims and undue duration of benefits." Then, as if aware that improved benefits might not cause increase fraud or malingering, the company stated that further research was needed and such research might show "that as a society we cannot afford the luxury of one of the world's most generous compensation systems." Thus, a generous workers' compensation scheme would be undesirable — an abuse from the Company's point of view. On the other hand, a workers' compensation system of the present kind is unacceptable — perhaps one might use the word 'abusive' — for the workforce subject to the system.

At the end of the day, the charges of abuse seem to evaporate, and the question becomes one of how comprehensive and generous we believe our workers' compensation schemes to be.

53. The one exception to this principle is to be found in the various provincial no-fault road accident benefits; see, for example, The Insurance Act, R.S.O. 1980, c. 218, s. 232.
54. See the report in the Hamilton Spectator, September 29, 1979.
55. Id.
56. Id.
57. Id. Note also the comments of Lloyd Sataryn who observes: "Industry doctors and scientists often act as hired guns shooting down evidence that a product or process is potentially dangerous to human health." L. Sataryn, Dying For a Living (Toronto: Deneau and Greenberg, 1979), p. 182.
58. See supra note 11. It is an open question whether these marginal changes will benefit or disadvantage workers.
60. Id., p. 4.

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PART II
UNEMPLOYMENT INSURANCE

There is some evidence that many Canadians believe that the Unemployment Insurance Act is being abused by claimants. A review sponsored by the Unemployment Insurance Commission in 1977 found that “71 per cent of Canadians felt that the U.I. programme should be tightened up.” In February 1978, the Toronto Globe and Mail reported that 84 per cent of Canadians thought that the Act needed to be tightened up to prevent abuse. These results are not surprising considering that at the time these surveys were taken the Federal Government was spending more than a million dollars a year telling Canadians that abuse of the unemployment insurance system was a serious problem.

In my view the Act does not need tightening up because it is being administered in a very unsympathetic manner. It is necessary to divide the areas of alleged abuse into separate categories.

Fraud

Penalties may be imposed either under section 47 or section 121 of the Unemployment Insurance Act, 1971 upon someone who wrongfully claims benefits and upon people who make false statements. Section 47 imposes administrative penalties whereas section 121 imposes quasi-criminal penalties. The figures for the number of penalties imposed in recent years are as follows.

<table>
<thead>
<tr>
<th>Year</th>
<th>No. of Claims</th>
<th>No. of 47 Penalties</th>
<th>No. of 121 Penalties</th>
</tr>
</thead>
<tbody>
<tr>
<td>1974</td>
<td>1,974,000</td>
<td>22,474</td>
<td>924</td>
</tr>
<tr>
<td>1975</td>
<td>2,438,000</td>
<td>26,853</td>
<td>1,800</td>
</tr>
<tr>
<td>1976</td>
<td>2,429,000</td>
<td>38,151</td>
<td>4,600</td>
</tr>
<tr>
<td>1977</td>
<td>2,500,000</td>
<td>60,000</td>
<td>6,500</td>
</tr>
<tr>
<td>1978</td>
<td>2,809,000</td>
<td>50,000</td>
<td>6,700</td>
</tr>
</tbody>
</table>


The total number of claimants subject to either penalty or prosecution rose from 1.19 to 2.66 per cent in 1977. In 1978 this figure dropped to 2.01 per cent, but it is clear that the last five years for which we have figures have seen stricter control over claimants. In particular, the number of people convicted has continued to grow steadily.

The annual reports of the Unemployment Insurance Commission do not give any breakdown of how many of these convictions and penalties are imposed for failure to disclose earnings as opposed to say, incorrectly stating the number of jobs searched for, or merely making false statements. The British Royal Committee on the Abuse of Social Security Benefits found that 86 per cent of the prosecutions were for the failure to report the receipt of earnings above the level permitted. I am prepared to assume that most prosecutions in Canada are, similarly, for failure to report outside earnings.

In assessing the moral culpability and therefore the seriousness of the abuse committed by claimants who fail to report outside earnings, I would like to make a plea in mitigation and urge that the law be changed. As the law stands at present, a claimant is entitled to earn a sum equal to 25 per cent of his or her weekly benefits. However, for every $1 earned above that amount, his or her benefits are reduced by $1. This means that earnings in excess of 25 per cent are taxed at a rate of 100 per cent. If, as has been argued for so long, penal rates of taxation encourage tax evasion, then surely we ought to be concerned about a system that imposes a rate of taxation that is without parallel in the field of income taxation. This is particularly true when it is appreciated that many people receiving full employment benefits plus another twenty-five per cent thereof would still be living below any of the recognized poverty lines.

The Problem of the Workshy

The problem of the workshy unemployment insurance claimant is one that has received extensive attention from politicians, the mass media and academics. The difficulty, however, is that, like...
abuse, 'workshyness' is a very subjective concept. Thus, individuals who refuse a lower-paid and less prestigious job would not regard themselves as being workshy, but the Commission might take precisely that view and disqualify (and/or disentitle) them. The Unemployment Insurance Act, 1971, subsection 40(3) requires a claimant, after a "reasonable interval", to lower her or his sights in terms of the job that she or he is willing to accept. The problem, however, is that the claimants do not know what constitutes a "reasonable interval" and by how much their expectations must be lowered. According to the authors of a study prepared for the Law Reform Commission, Unemployment Insurance Benefits, claimants in the first three weeks of unemployment are entitled to regard as suitable only such jobs as are in their own occupation and which pay their normal rate of earnings. After this period, skilled workers with more than one year's experience in their occupation receive an extension of one week for every year of experience up to a maximum of thirteen weeks. At the end of this time, claimants must expand the scope of their search to include other occupations at a progressively lower rate of earnings (five per cent less per week). An employee is not, however, required to accept a job if the rate of pay is lower than the prevailing wage for the particular occupation or if the conditions of employment are less favourable than those observed by collective agreements or recognized by good employers.

It is scandalous that this rule is unpublished, but even more shocking is the fact that the Commission has instructed its agents not to inform claimants to be particularly demanding in terms of a new job until the lapse of the "reasonable interval". If the claimant questions the agent regarding the length of the interval he is told simply that it depends on the type of employment, the experience of the claimant in his occupation and the length of time on unemployment. No specific time limit is mentioned. As a result of this bizarre procedure, it is possible that a claimant will be disentitled from receiving unemployment insurance benefits even though the claimant is actively seeking work. The difficulty is that the claimant will have been seeking the 'wrong' kind of work because there was no one to point that fact out to the claimant. If such a practice existed in the field of say, taxation law, there would, rightly, be outcries in response to the claimant.

What appears to be taking place is the cynical use of alleged abuse to justify cutting unemployment insurance costs.

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Beginning in the mid-70s, the government decided that certain groups of workers were prone to workshyness. These workers were to be subjected to regular interviews. There was (and is) no statistical evidence that these groups of workers were more likely to abuse the unemployment insurance system than other groups of workers. It was decided that the following claimants be subjected to regular interviews:

1. All claimants in "demand" occupations, were to be interviewed every three weeks.
2. All single males, between 14-24 years of age and not in "demand" occupations were to be interviewed every four weeks.
3. All married females not in "demand" occupations were to be interviewed every four weeks.

In April 1976, the list of target groups was revised. After that date, the following groups of claimants were to be exposed to one-on-one interviews wherever resources permitted with the order of priority being listed as follows:

1. Occupations with "High Opportunities". These are defined as occupations where ten or more contacts are considered to be a minimum.
2. All males aged 14-24 who fall within "Low Opportunity" occupations. These are defined as occupations where less than ten contacts per week are considered to be a minimum.
3. All females, aged 18-20 who are in "Low Opportunity" occupations. These are defined as occupations where less than ten contacts per week are considered a minimum.
4. All "ethnic" claimants who do not fall within any of the above criteria. They should be interviewed on a one-to-one basis wherever resources allow.

The interviewing of these 'target' groups is performed by benefit control officers who are drawn from the ranks of former policemen, private detectives and investigators for commercial collection agencies. As the authors of the report for the Law Reform Commission of Canada point out "...these interviewing practices may create a risk that benefit control operations be occasionally tainted with the ethics and the (sometimes strongly criticized) methods of private agencies." In another passage, they demonstrated that there was more than a risk of these methods being used. In their words, "Some of the ...interviewing techniques used by BCOs have, however, come in for severe criticism. In its November 1973 report, the Unemployment Insurance Advisory Committee stated that in certain instances, the BCOs made use of leading questions and subsequently twisted the meaning of the replies by making them much more categorical than they had actually been. The most frequent shifts in meaning seemed to have occurred with regard to the salary desired by the claimant, a point about which it is quite possible that a claimant may entertain more or less exaggerated hopes, but it is highly

70. See the Unemployment Insurance Act, 1971, c. 48 subsection 40(2).
71. See P. Issalys and S. Watkins, supra note 65, pp. 54-55.
73. Id.
74. See P. Issalys and S. Watkins, supra note 65, p. 75.

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improbable that his demands will be absolutely uncompromising and immutable. On the basis of observations made by members of the Boards of referees the Advisory Committee therefore disapproved of BCOs asking, ‘I suppose a minimum wage of $3.25 an hour would suit you?’ and after getting the reply ‘yes, I’d like to get that,’ noting in their report that the claimant demanded a minimum wage of $3.25 an hour. From the point of view of the benefit control officer concerned, an undeserving and possibly workshy claimant has been denied benefit. To many observers, the claimant has been declared ineligible for unemployment insurance benefits because of an immoral trick.

The [UIC] training guide does nothing to encourage sympathetic or ethical attitudes towards claimants.

The training guide does nothing to encourage sympathetic or ethical attitudes towards claimants. This guide includes the following statements:

5. Tell the truth. A bluff may occasionally be justified; deliberate falsehoods, never.
6. Do not underestimate the mental capacity and ability of your subject.
11. Be dominant without being domineering.

In my view, such instructions would not be justified in a police training manual. They are even more inappropriate in a scheme where the emphasis should be on giving assistance to disadvantaged people.

The Problem of Overpayments

Periodically, public attention is focussed on the problem of overpayments in unemployment insurance. For example, in 1979, as a result of computer error overpayments amounting to $4.3 million were made to claimants in Nova Scotia, Quebec and British Columbia. But in no case of overpayment that I know of has it been shown that the recipients were acting other than in good faith. Despite this fact, the reporting of these cases by the press often suggests that the acting were not received in good faith. The Commission also seems to take the view that these receipts of benefit constitute a serious form of abuse, judging from the aggressive measures it has often taken to recover these overpayments.

What is truly remarkable is the contrast between the law of mistaken payments in social security law and the general law relating to mistaken payments. Under the general law of mistaken payments, the Supreme Court of Canada has held that individuals who receive and spend mistaken payment in good faith may successfully plead the defence of change of position, i.e. that they have spent the money. As with the law relating to ‘collateral benefits’, conduct which is thought to be perfectly legitimate suddenly becomes either immoral and/or illegal when performed by a social security recipient.

The Problem of the Voluntary Quit

From time to time the complaint is made that the Commission is not taking a sufficiently hard line against the people Mr. Atkey, formerly Minister for Employment, described as “the biggest abusers of all — those who voluntarily quit jobs without just cause.” According to Mr. Atkey, voluntary quitters “stay on unemployment insurance claims substantially longer than others and show the least inclination to seriously look for alternative employment or training.”

In the first place, there is no evidence that voluntary quitters stay on unemployment insurance claims substantially longer than others and show little inclination in looking for alternative employment or training. Indeed, few voluntary quitters claim benefits at all. According to Mr. Atkey, one in four voluntary quitters files a claim, while another protagonist in the recent debate claims that only one out of ten voluntary quitters actually becomes an unemployment insurance claimant.

In the second place, if one examines the causes of job quits, it is impossible to regard the reasons given as frivolous. A Statistics Canada study showed that in 1977 24,000 workers had left their jobs because of illness or disability, 20,000 because of changed residence and 57,000 because of job dissatisfaction due to low wages and poor working conditions as well as the desire to move from part-time to full-time work. With regard to the first two classes of claimants, the disabled and those who change their residence, there should be little difficulty in deciding the merits of these cases. The difficult problems concern the 57,000 workers who quit their work because of job dissatisfaction. If penalties for voluntary quitters were increased, this might have

78. Id., p. 88.
76. Id., p. 83.
77. Id., p. 88.
78. If such instructions were included in a police training manual, one would hope that bodies such as the Canadian Civil Liberties Association would express outrage.
79. The Commission has the right to demand the repayment of monies up to three years after they were collected if fraud was involved, it has up to six years to demand repayment. The Commission has the power to forgive repayments if the "money is uncollectable" or if repayment would cause "undue hardship".
79. Low Income Law (No. 2) 16 (1979).
80. The Commission has the power to garnish wages and/or issue demand for payment to third parties (e.g., banks). If it chooses the latter route, it does not need any court order.
81. See supra note 10.
82. Compare text at supra notes 43-48 to text at supra notes 49-54.
85. Id.
the effect of keeping workers in jobs where they should not be, e.g., in jobs where the safety conditions are abysmal. The effect of increasing the disqualification may also be to discourage employees from moving from low-paying jobs where their talents might not be fully employed to better paying jobs.

But perhaps the most disturbing aspect of the voluntary quit disqualification is the extremely rigid view taken by the Commission towards what constitutes a voluntary quit. On reading the decisions of the Board of Referees, it sometimes appears that the Commission will treat every quit as a voluntary quit.

Thus, in a number of decisions it has been held that developing a great fear of dismemberment by machinery does not relieve a claimant from disqualification for voluntary quit. Again, workers who take advantage of early retirement schemes will be deemed to have left their employment without 'just cause'. Further, employees who leave their jobs because of low-pay or because they wish to improve their qualifications do not do so with 'just cause' although their motives may be praised. The Commission has also disqualified a male teacher who quit his job in Alberta and moved with his wife who had obtained a job in Ontario. Fortunately, the Commission's decision was reversed by the Board of Referees but there would be nothing to prevent the Commission from imposing a disqualification in a subsequent case and letting the claimant appeal against the decision. Reading these decisions gives weight to the claim of a former information officer for the Commission's Toronto office that "UI staff work under orders to impose virtually automatic penalties on claimants who quit their jobs — whether they deserve a penalty or not".

Once the allegation of abuse and fraud are swept away as they should be in the light of the evidence, the whole argument over the voluntary quit issue centres around the extent to which one wishes to encourage labour mobility. The present unemployment insurance system acting together with forces such as private pension schemes have the intention and effect of restricting labour mobility. There are arguments for restricting labour mobility, although they seem to me to rest on feudalistic assumptions of the employment relationship. On the other hand, there are very powerful reasons for encouraging labour mobility. It would be helpful if the 'just quit' provision in the Unemployment Insurance Act were to be discussed in those terms rather than by obscuring these issues and turning the matter into a question of 'abuse'.

Some Undiscussed Aspects of the Unemployment Insurance System

There are at least three aspects of the unemployment insurance scheme which do not seem to figure in public discussion on 'abuse' in the unemployment insurance system although they are regarded with great disfavour by a very large number of claimants. It is necessary to examine these neglected areas if we are to view the unemployment insurance system in some kind of context.

1. The Financing of Unemployment Insurance

The regressive manner in which the unemployment insurance system is financed is well described in The National Council of Welfare's publication, Bearing The Burden: Sharing The Benefits. Unemployment insurance is financed, in part, through a payroll tax. The tax rate is 1.5% of earnings with an insurable limit of $240 a week. As the National Council of Welfare points out:

The maximum on insurable earnings and the deductibility of premiums result in another regressive tax. Everyone earning above the maximum insurable level pays the same amount of tax but once again, this decreases as a proportion of earnings as income rises, while the deduction goes up in value as a person moves into higher tax brackets. The 1.5 per cent tax rate charged to a minimum-wage worker earning $6,300 a year decreases to a .75 per cent rate for a $25,000-a-year earner.

Incredibly, what low-income workers get for paying at the highest rate is the lowest coverage. An $8,000-a-year earner pays $120 in net unemployment insurance premiums to buy coverage which guarantees him $103 a week, if he loses his job. A $25,000-a-year earner pays $112 in net premiums to buy coverage worth $160 a week.

It is scandalous that the armies of politicians and journalists who write about 'abuse' in the unemployment insurance system do not make any mention of the iniquitous manner in which the scheme is financed.

2. The Labour Dispute Disentitlement

In 1976 29,525 claimants were disentitled from claiming unemployment insurance benefits and in 1977 12,245 persons were disentitled from claiming unemployment insurance benefits. This occurred as a result

92. There will be very few appeals under the Unemployment Insurance Act first, because there are few more complex statutes in existence, and second, because the number of people who have any knowledge of its intricacies is pitifully small.
93. See the letter by Mr. Victor Schwartzman to the Globe and Mail, July 24, 1980.
94. See the article by Professor H.J. Glasbeek, "A Proposal for a Non-Earnings Related Retirement Income Scheme," 2 Canadian Taxation 186 (1980).
96. I have used the same figures used by the National Council of Welfare since the change in insurable earnings does not affect the argument.
98. Statistics Canada, supra note 87.
of the operation of section 44 of the Unemployment Insurance Act, 1971, which provides that a worker who is unable to work because of a strike or lockout is not entitled to unemployment insurance benefits. Despite the fact that large numbers of people are affected, the labour dispute disqualification stirs neither the interest of politicians nor the press.

This must be so because the justice for the disentitlement is thought to be self-evident. In fact, the justice for the disentitlement is highly problematic. The chief reason for the rule is that the denial of benefits furthers the position of state neutrality. But as commentators have pointed out, 99 to the extent that payment of benefits would help strikers, the denial of benefits helps the employer. Since there can be no neutral position, the real question is why the government should choose to be neutral on the side of the employer. Any proposal that the government should achieve neutrality by withdrawing forms of government assistance such as DREE grants, tariffs, tax credits and other advantages to employers when a strike or lock-out occurs would be fiercely opposed by those who adhere to the 'neutrality on the side of the employer' point of view.

Another reason frequently given for the disentitlement is that it is wrong to give unemployment insurance to people who have voluntarily terminated their employment. But, as the law stands, it is possible for a striker to claim unemployment insurance benefits in some cases because section 44 only requires "a stoppage of work". Thus, in one case, a claimant who was on strike and active on the picket line was held entitled to claim benefits because there was "no stoppage of work" at her place of employment. The employer's business (telephone answering service) was such that he was able to continue operations in spite of the strike. 100 This voluntary/involuntary rationale for terminating benefits is inconsistent with the present law in another respect. If workers are being denied unemployment benefits because of their voluntary action, then it would seem to follow that workers who have lost their employment involuntarily by virtue of being locked out should be able to receive benefits. Yet employees who are locked out are also denied unemployment benefits.101

A third argument in support of the neutrality stance is that the payment of unemployment insurance to strikers would drain the unemployment insurance fund. But very few people have proposed that claimants should be entitled to unemployment insurance benefits as of right. What is proposed is that the only means of achieving neutrality is to off-set the present section 44 with rules that deny private firms subsidies.

A final argument is that any change in section 44 would have a serious effect on collective bargaining. But the fact that legal machinery is capable of having an influence on collective bargaining has not meant that that legal machinery has been rejected. If this were so, we would never have had labour boards with their power, inter alia, to fix the size of bargaining units. Besides, New York and Rhode Island pay claimants unemployment insurance benefits six weeks after the commencement of a dispute 102 and collective bargaining flourishes in those states.

Even if the labour dispute disentitlement is not totally recast, some of its excesses might, with great profit, be removed from the law.

At the present time claimants are denied benefits whether the employer is acting illegally or not. For example, in one case radio station workers were locked out by their employer during the course of negotiations, a direct violation of the Canada Labour Code. 103 In spite of the fact that the claimants wanted to continue to work (and in fact were legally obliged to do so under labour relations legislation) but were prevented from doing so by the employer's illegal act, their claims for unemployment benefits were denied. 104 Results such as these seem defensible only if unions are perceived as illegal organizations.

A worker will be disentitled from receiving unemployment insurance benefits if he or she has been financing the dispute. Many workers have reason to complain of the absurdly broad meaning given to financing a labour dispute. A vivid example of the kind of absurdity is afforded by the decision in McKinnon and Canadian Food and Allied Workers v. U.I.C. 105 Mrs. McKinnon was employed by a company where the employees, although represented by the same union, were divided into several bargaining units. She belonged to the union and like all members, paid union dues part of which were used, as provided by the union's constitution, for a strike fund. In May 1975, Mrs. McKinnon lost her job as the result of a strike of employees of the same company who belonged to another bargaining unit but were represented by the same union. During the strike this union paid the strikers money from its strike fund which had been set up using dues paid by all members of the union. Incredibly, Mrs. McKinnon was denied benefits because it was held that she was "financing" the strike by paying union dues, some of which went into the strike fund!

Workers will also be disentitled if they belong to the same "grade or class" of workers as the workers in dispute. How this is capable of working in practice is illustrated by a dispute in the B.C. logging industry. Production was delayed after a strike had been settled. Negotiations were underway between employers and the various unions for a master agreement to cover all occupational groups in the labour force. Before the time for a legal strike had arrived, the fallers staged a wildcat strike with the result that members of other occupational groups were laid off because of a shortage of work. The official strike did not take place for another month and was settled within a few weeks, but the wildcatters stayed out for another month in protest over the agreement. As a result, normal production was delayed. Despite the fact that the claimants were members of the trades who had signed the agreement, and were ready to return to work but were unable to do so because of the wildcat, their claims for benefits were denied by the Umpire. It was held, that since the "work stoppage" arising from the labour dispute began on the day of the wildcat, their claim for benefits should be denied. Although the claimants had not participated in the illegal strike nor had any control over its course they were deemed to be the same "grade or class" of worker as the wildcatters and were disqualified on that ground. It seems impossible to attempt any kind of justification for this result.

Finally, a very broad interpretation is given to "directly interested". In perhaps the leading case on the subject a claimant who was not a member of the union, nor even of the bargaining unit, was laid off by his employer because of a shortage of work due to a strike. Benefits were denied by the Umpire on the ground that because his wages and working conditions were likely to be "affected" by the outcome of the dispute, he had a "direct interest" in it. Although he was not covered by the collective agreement, the fact that his employer might adjust the wages of his non-union staff in accordance with any new agreement was a close enough connection to the dispute to disentitle him under section 44. Again, it seems impossible to provide any kind of rationale for decisions of this kind.

3. The Problem of Late Claims and Ante-dating

Theoretically, the Unemployment Act, 1971 allows a claimant who has filed a late claim to ante-date the claim. This is so provided the claimant has had "good cause for his delay" under subsection 20(4) of the Act. The interpretation of this phrase is an extremely serious issue in practice as employees make late claims because of ignorance, sickness or through getting wrong advice from union officials, employers, lawyers and other persons who give advice. The difficulty is that the Commission takes the view that "ante-dating is an exceptional measure to which may resort only claimants who have been prevented from filing their claim earlier by conditions beyond their control". Thus, an employee who delays making a claim because he expects a recall to a former job does not have "good cause for delay". Similarly, employees who delay making claims because they are waiting for employment or medical records will not, save in exceptional circumstances, have "good cause for delay".

The Commission takes a very stringent line about denying claimants benefits because of their ignorance of the law. The harshness of the present law is illustrated by the decision of the Federal Court of Appeal in Re Pirotte v. Unemployment Insurance Commission. In that case, the claimant knew that she had a right to claim unemployment insurance benefits but she did not know the procedure for making a claim. She sought information from an employee in the Quebec Department of Education in which she had been employed. She was advised by this employee that she must report her termination of employment to the offices of the Unemployment Insurance Commission in Ottawa and await a reply from them which might take some considerable time. As a result of receiving this information, the applicant delayed in submitting her application.

The Federal Court of Appeal held that there was "no good cause for delay" since, if the present claim were allowed, it would undermine "the principle that ignorance of the law does not excuse failure to comply with a statutory provision." The court noted that the principle had "sometimes been criticized as implying an unreasonable imputation of knowledge but it has long been recognized as essential to the maintenance and operation of the legal order." The difficulty with this argument is that it proves too much. If knowledge of the law is truly a bedrock of our civilization, then it should make no difference that the claimant was misled by an employee of the Commission or by his or her own employer. Yet, in the former case, the claimant will be able to plead that there was "good cause for delay". The court states, namely, in justification of this distinction, "In such a case we would be dealing not so much with ignorance of the law as with mistake induced by representations on behalf of the Commission." This semantic nonsense explains nothing and does nothing to give authority to a very weak and mischievous opinion.

110. See C.U.B. 6146, January 9, 1981, where it was stated that relief was denied but that it might be granted in 'special' circumstances.
111. See C.U.B. 6512, January 7, 1981 where again relief was denied but it was stated that it might be granted in 'special' circumstances.
113. Id., p. 444.
114. Id.
115. Id., p. 445.
The opinion fails to take into account how natural it is for many, if not most, employees to turn to their employers for advice on how to make a claim—particularly in a case such as the present where the employer is a government department. After all, it is the employer who pays the premiums and who has control over the employee’s employment record. The employer has contact with the Commission during the currency of the employment, whereas the employee has none. It is natural, therefore, that on termination of employment the employee should ask the employer where she or he should go to file a claim.

The effect of the *Pirotte* case can be seen in an unfortunate subsequent decision. In this later case the applicant retired on pension from her teaching position on June 30, 1978 and subsequently took up residence in Saskatoon. After having studied the form used by the Commission, the claimant thought that since she was in receipt of a pension, she was not entitled to unemployment insurance benefits. The Commission knew of her situation but did not advise her of a right to benefits.116

Finally, the claimant applied for benefits on May 25, 1979 after looking for work for a considerable period of time. On learning on that date that she had a inadequate number of weeks to qualify for benefits, she applied to have her claim ante-dated to September 15, 1978. The Umpire held that the claimant’s conduct had been exemplary. He said, “One can readily sympathize with the applicant and others placed in the same situation. An attempt to obtain and keep employment, must be admired.”117 Despite this fact, the Umpire felt that in the light of the *Pirotte* decision he had to reject the claim. There is something seriously wrong with a rule that commends claimants for having acted in an exemplary manner and yet denies them benefits.

Professor Partington has shown in his valuable study, *Claim in Time*118 that the British have found it possible to have a much more flexible law with regard to late claims. In particular, relief has been given to claimants who have relied on mistaken advice from paralegals119 and from lawyers.120 It would be beneficial if those responsible for amending and administering the *Unemployment Insurance Act* would study the United Kingdom experience. After all, if the point at issue were some minor problem in say, contract law, our lawmakers would be familiar with developments in the United Kingdom. In the vastly more important field of social security law, blindness is the order of the day.121

**Conclusion**

It is true that a great majority of Canadians feel that the unemployment system is being abused. But there are very good reasons to be skeptical of what figures purport to show. In the first place, the polls were taken after the government had spent a large amount of money telling people that unemployment insurance fraud was a significant problem. Second, citizens are given very little education in even the fundamentals of the unemployment insurance system. Even law students are not required to know anything about the system either by their universities or by their law societies. In such an atmosphere of ignorance it is possible for the government to make unsubstantiated charges of abuse. These charges of abuse go largely unchallenged and they prepare the way for cutbacks in levels of benefit and in qualifying periods. These cutbacks are not addressed to any ‘abuse’, but the fact that the government has alleged abuse makes it easier for it to tighten up the unemployment insurance rules. In short, what appears to be taking place is the cynical use of alleged abuse to justify cutting unemployment insurance costs. These cuts are being made at a time when there is a great need to revamp the whole unemployment insurance system and change it from a regressive tax system to a system of clear and easily discovered rules applied with consistency and compassion by men and women whose principal skill is not the ability to detect fraud.

**PART III WELFARE**

**Welfare Fraud**

Although Canadian initiatives to detect welfare fraud are not as flamboyant as those in the United States,122 feelings about welfare fraud have run very high. For example, in Manitoba the NDP premier began an investigation into welfare fraud sensing the “profound, seething resentment” of voters towards welfare.123 Even Quebec, which had a reputation for a liberal welfare policy, took steps to cut out ineligibles. In March 1972 the government announced that an audit had allowed the exclusion of seven per cent of the caseload. In 1973 the province computerized its welfare rolls, reducing the number of recipients by a further four per cent.124 In recent years, even small municipalities have appointed officials to prosecute for fraud.125 There is some evidence that there is “profound, seething resentment” on the part of the general population towards welfare abuse. A 1972 government

117. Id. p. 2.
119. R.(U) 9/74.
120. See C.S.I. 10/50 and C.S. 50/50. The first case dealt with a claim under the industrial injuries scheme and the second claim was for sickness benefit. However it is difficult to see any difference between these benefits and unemployment benefit.
121. In *Pirotte*, supra note 112, the Federal Court of Appeal cited two cases—one dealing with immigration law and the other dealing with the statute of limitations in an accident case. No authority involving a social security issue was cited.
122. See Leman, supra note 1.
123. Quoted in Leman, supra note 1, p. 209.
124. *Id*.
125. See supra note 14. Other municipalities are contemplating following Durham’s example.
study in Alberta showed that most Albertans polled said thirty per cent of those on assistance did not deserve help. A third of the respondents said welfare abuse exceeded forty per cent of the total case-load.126

1. The range of welfare criminality

Before turning to examine the number of welfare prosecutions, it is instructive to look at the range of the 'welfare' criminal law. It will be seen that its range is remarkably broad.

A number of provinces make it an offence for a welfare recipient to fail to report any income or resources received while in receipt of welfare payments. In New Brunswick, for example, it is an offence not to comply with an obligation to notify the Director in writing of any additional income or resources "within 15 days of receiving it."127 Similar provisions exist in Manitoba,128 British Columbia,129 Saskatchewan130 and Alberta.131

These provisions are difficult to defend. First, the claimant may be entitled to keep the resources, whether they take the form of part-time earnings,132 payment from the criminal injuries compensation board133 or the receipt of a gift from a friend or relative.134

Second, a welfare recipient may believe in good faith, acting perhaps on the advice of a friend, a social worker or an employer, that she or he is entitled to keep the benefit. In this connection it is useful to examine Jean James's figures in respect of the knowledge of family benefits as to their basic earnings exemption, the tax-back rate and the number of hours that could be worked per month without losing entitlement to benefits.

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<td>Knowledge of Mothers Receiving Family Benefits as to Their Basic Exemptions, Tax-Back Rates and Number of Hours that can be Worked per Month</td>
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With ignorance on this scale, it seems cruel and senseless to impose criminal penalties for failing to report this kind of information. After all, a taxpayer is not required, under threat from the criminal law, to report on his or her initiative information to Revenue Canada. The taxpayer is asked, in effect, a great number of specific questions so that his or her tax bill can be calculated. Similarly, a welfare recipient should be asked every, say, six months as to changes in his or her financial status so that appropriate adjustments can be made. If the welfare claimant wilfully and knowingly makes a false statement with intent to defraud, that should be treated as an offence.

Another area where the welfare criminal law seems to operate in a bizarre fashion is in the area of cohabitation. In Ontario in 1977-78, 63.5 per cent of cases "actively reviewed" for prosecution involved claimants not living as single persons.135 The difficulty here is that there are two definitions of cohabitation. The first is the definition given in the critically important decision of the Ontario Divisional Court in Re Proc.136 In that case, the court held that the crucial test in determining whether there was cohabitation was the economic unit test, that is, had the parties entered into what looked like a permanent economic union. However, there is a second view of cohabitation that is set out in the Ontario General Welfare Assistance137 and the Ontario Family Benefits manuals.138

127. See subsection 9(2) of the Social Welfare Act, R.S. N.B. 1973, c. 5-11.
128. See paragraph 22(b) of the Social Allowances Act, R.S.M. 1970, c. S-160.
129. See paragraph 19(1)(b) of the Guaranteed Available Income for Need Act, R.S. B.C. 1979, c. 158.
130. See subsection 28(3) of the Saskatchewan Assistance Act, R.S.S., 1978, c.5-8.
131. See section 13 of the Social Development Act, R.S.A. 1980, c. 5-16.
132. For a discussion of the rules on outside earnings see text at infra notes 243-51.
133. Re Elliott and Attorney General of Ontario, [1973] 2 O.R. 534 (C.A.). The Court of Appeal held that the claimant was entitled to keep a sum awarded by the Criminal Injuries Compensation Board without this affecting her right to welfare payments. That decision has now been reversed by regulation but at the time of receiving the compensation, the Court of Appeal does not seem to have thought the claimant was obliged to report the sum she had received.
134. Many provincial welfare statutes distinguish between "regular gifts" which are treated as income and casual gifts which are not to be treated as an addition to the claimant's liquid assets. Thus, a gift to Mrs. Clara Wuziuk of $400 from a friend to enable her to take her first holiday in ten years was held to be a "casual" gift by the Manitoba Court of Appeal. See Riley, Manitoba Casual Gifts, 1 Law Income Law (No. 3) 1 (1980).
135. Information supplied by Mr. D. Aliferi, Director Income Maintenance Branch, Ministry of Community and Social Services of Ontario, on February 26, 1980.
137. Published by Ministry of Community and Social Services, Ontario, July 21, 1980.
138. Published by Ministry of Community and Social Services, January 1, 1980.
These manuals do not mention the Proc decision; instead they set out criteria for determining cohabitation which the Proc court went to considerable pains to reject. The criteria listed are, first, "familial," examples of which are: (a) the couple occupy the same premises; (b) documents, such as leases, are titled or signed as Mr. and Mrs. (c) the couple are known or recognized in the neighbourhood or community at large, as husband and wife; (d) birth records or other records record the couple as husband ans wife.\textsuperscript{139}

The next criterion is "sexual" which on a reading of the manuals appears to be both relevant and irrelevant. The manuals state, "This relationship is difficult to prove, and for all intents and purposes is not relevant to the eligibility process. A possible exception, however, would be where, in an alleged common law relationship, the man with whom the woman is supposed to be living is the father of her child(ren). In these circumstances, the fact the man is declared father might, in conjunction with other indicators, be supportive of a finding that the mother is not living as a single person. Self-admission of an ongoing sexual relationship is also acceptable."\textsuperscript{140}

The third factor is "social," examples of which are: (a) acknowledgement on the part of either party to a husband/wife relationship; (b) the couple are invited and accept invitations as Mr. and Mrs. and are recognized at gatherings as husband and wife; (c) they vacation as husband and wife; (d) they sign as Mr. and Mrs.\textsuperscript{141}

The manuals also give a number of examples of the economic criterion, examples of which include: (a) whether in tendering credit one party can purchase goods and services in the name of the other; (b) there are joint bank accounts and pooling of other financial resources; (c) the male claims the recipient and/or child(ren) for income tax purposes, unemployment insurance or other similar benefits.\textsuperscript{142}

Not surprisingly, the Ontario Social Assistance Review Board adopts the same approach in defining cohabitation. In his extremely valuable examination of forty-two decisions by the Board on the cohabitation rule, Professor R.W. Kerr of the University of Windsor Law School found that there was no reference to the principles set out in Re Proc.\textsuperscript{143} Instead, the Board relied on the numerous factors set out in the manuals.

If, as seems most likely, the welfare fraud squad adopts the same approach towards cohabitation as do the manuals and the Social Assistance Review Board, then the scope of the criminal law is being widened beyond the legislatively designed and judicially defined rules. Even if most of the cases which are 'actively investigated' or referred to prosecution result in the claimant being cut off rather than being convicted of a criminal offence, very great harm is being done as a result of illegal acts of welfare administrators.

2. The Prosecutions

I tried to obtain figures for the number of prosecutions and convictions for all the provinces for the previous three years. One province (Manitoba) failed to supply statistics on the grounds of confidentiality.\textsuperscript{144} The other provinces gave no information as to what kind of offences claimants were guilty of and how many received prison sentences. The statistics follow:

<table>
<thead>
<tr>
<th>Table 4</th>
<th>Criminal Convictions for Welfare Fraud</th>
<th>Province by Province</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Alberta</td>
<td>1978</td>
</tr>
<tr>
<td>Nature of cases</td>
<td></td>
<td>1978</td>
</tr>
<tr>
<td>Income</td>
<td>214</td>
<td>196</td>
</tr>
<tr>
<td>Assets</td>
<td>30</td>
<td>26</td>
</tr>
<tr>
<td>Common Law (Cohabitation)</td>
<td>97</td>
<td>96</td>
</tr>
<tr>
<td>Forgeries</td>
<td>87</td>
<td>96</td>
</tr>
<tr>
<td>Others</td>
<td>157</td>
<td>179</td>
</tr>
<tr>
<td>Disposition</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Unfounded</td>
<td>22</td>
<td>29</td>
</tr>
<tr>
<td>Closed</td>
<td>53</td>
<td>57</td>
</tr>
<tr>
<td>Refund Agreement</td>
<td>179</td>
<td>164</td>
</tr>
<tr>
<td>Convictions</td>
<td>11</td>
<td>25</td>
</tr>
<tr>
<td>Others</td>
<td>195</td>
<td>312</td>
</tr>
<tr>
<td>Sentences Imposed</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Jail</td>
<td>5</td>
<td>39</td>
</tr>
<tr>
<td>Suspended Sentence</td>
<td>10</td>
<td>39</td>
</tr>
<tr>
<td>Probation</td>
<td>61</td>
<td>108</td>
</tr>
<tr>
<td>Community Work</td>
<td>15</td>
<td></td>
</tr>
<tr>
<td>Fine</td>
<td>6</td>
<td>8</td>
</tr>
<tr>
<td>Conditional Discharge</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Restitution</td>
<td>34</td>
<td></td>
</tr>
</tbody>
</table>


a. In 1980, 117 cases were still under investigation.

<table>
<thead>
<tr>
<th></th>
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</thead>
<tbody>
<tr>
<td>Cases Actively taken under Review</td>
<td>349</td>
<td>288</td>
<td></td>
</tr>
<tr>
<td>Cases Not pursued for Investigation and/or Prosecution</td>
<td>233</td>
<td>170</td>
<td></td>
</tr>
<tr>
<td>Passed to Police for Investigation</td>
<td>186</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Persons Charged</td>
<td></td>
<td>154</td>
<td></td>
</tr>
<tr>
<td>Sentences Imposed</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Jail</td>
<td>5</td>
<td>39</td>
<td>50</td>
</tr>
<tr>
<td>Suspended Sentence</td>
<td>10</td>
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<td>Probation</td>
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<td>108</td>
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<tr>
<td>Community Work</td>
<td>15</td>
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<tr>
<td>Restitution</td>
<td>34</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Source: Information supplied by Mr. D. Alfieri, Director, Income Maintenance, in a letter dated March 17, 1981.

139. See the General Welfare Assistance manual 0303-08, p. 3; see the Family Benefits manual guideline No. 11, p. 2.
140. G.W.A. manual 0303-08, p. 4; F.B.A. manual, guideline No. 11, p. 2.
141. G.W.A. manual 0303-08, p. 4; F.B.A. manual No. 11, p. 3.
142. G.W.A. manual 0303-08, p. 4; F.B.A. manual No. 11, p. 3.
143. See Kerr, "Living Together as Husband and Wife: The Current Approach to the 'Man in the House' Rule under Ontario's Welfare Law," 1 Low Income Law (No. 1) 29 (1979). Professor Kerr concludes that the "decisions of the Ontario Social Assistance Review Board evidence little appreciation of the Court's direction in Proc's case to apply an economic test, and leave room to suspect a continued application of moral standards" (p. 34).
144. Letter from Ms. Roxy Freedman, Executive Director Social Security Services, June 2, 1981.
### British Columbia

<table>
<thead>
<tr>
<th></th>
<th>1978-79</th>
<th>1979-80</th>
<th>1980-81</th>
</tr>
</thead>
<tbody>
<tr>
<td>Charged</td>
<td>235</td>
<td>212</td>
<td>208</td>
</tr>
<tr>
<td>Convicted</td>
<td>133</td>
<td>135</td>
<td>128</td>
</tr>
</tbody>
</table>

Source: Information supplied by Mr. Roy Johnson, Ministry Inspector in a letter dated April 13, 1981.

### Manitoba

No figures made available because of policy of confidentiality.

### New Brunswick

Complete data is not available but three or four cases are prosecuted every year. These usually result in a few months’ imprisonment.

Source: Information supplied by Mr. Georgio Gaudet, Deputy Minister, Department of Social Services, in a letter dated April 13, 1981.

### Newfoundland

<table>
<thead>
<tr>
<th></th>
<th>1978</th>
<th>1979</th>
<th>1980</th>
</tr>
</thead>
<tbody>
<tr>
<td>Charged</td>
<td>136</td>
<td>114</td>
<td>87</td>
</tr>
<tr>
<td>Convicted</td>
<td>109</td>
<td>91</td>
<td>37</td>
</tr>
</tbody>
</table>

Source: Information supplied by Mr. M.J. Vincent, Director of Social Assistance, in a letter dated April 21, 1981.

### Nova Scotia

Since 1978 there have been 29 prosecutions, of which 16 have resulted in convictions and 10 in acquittals. Three cases are still being tried. There is no year-by-year breakdown available.

Source: Information supplied by Department of Social Services by telephone, August 4, 1981.

### Prince Edward Island

Five people have been convicted of welfare fraud in the last three years.

Source: Information supplied by Mr. J.D. Seaman, Director of Prosecutions, in a letter dated April 10, 1981.

### Quebec

<table>
<thead>
<tr>
<th></th>
<th>1976</th>
<th>1977</th>
<th>1978</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cases Investigated</td>
<td>24</td>
<td>52</td>
<td>37</td>
</tr>
<tr>
<td>Convictions</td>
<td>13</td>
<td>28</td>
<td>4</td>
</tr>
<tr>
<td>Prison Sentences</td>
<td>7</td>
<td>10</td>
<td>2</td>
</tr>
</tbody>
</table>


### Saskatchewan

<p>| | | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>No. of Cases Referred to Police</td>
<td>57</td>
<td>15</td>
<td>15</td>
</tr>
<tr>
<td>No. of New Charges Laid</td>
<td>64</td>
<td>17</td>
<td>11</td>
</tr>
<tr>
<td>No. of Convictions</td>
<td>30</td>
<td>17</td>
<td>10</td>
</tr>
</tbody>
</table>

Source: Information supplied by Mr. A.W. Uhren, Assistant Executive Director, Income Support Division in a letter dated May 12, 1981.

It seems, therefore, that less than 400 welfare claimants are convicted every year in Canada. This is a remarkably low figure considering that the number of people relying on social assistance at any point in time a year has been estimated at between 1.8 million and 2.3 million.145

It might be argued that the estimate of 400 persons...

...cut-offs are very dangerous indicia to use in any argument about criminality. The only inference that can be drawn from them is that the claimant is suspected of having infringed the welfare regulations. It is erroneous to draw any inferences of criminality from cut-offs.

convicted of welfare fraud is unrealistic since a figure of, say, ten times that magnitude is cut off without a trial being brought. There is no doubt that cut-offs are widely used. The Alberta pilot study on welfare fraud in 1979 showed that termination of benefits was frequently resorted to.146 Also, as has been noted above, Quebec has resorted to cut-offs.147

But cut-offs are very dangerous indicia to use in any argument about criminality. The only inference that can be drawn from them is that the claimant is suspected

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147. See text at *supra* note 124.
of having infringed the welfare regulations. It is erroneous to draw any inferences of criminality from cut-offs.

Indeed, the problem with cut-offs is that Canadian welfare law provides inadequate safeguards against the possibility of arbitrary cut-offs. In the United States, as a result of the landmark decision in Goldberg v. Kelly,148 a recipient of welfare must be given a hearing before she or he is cut off welfare benefits. No Canadian province gives this degree of protection. Prince Edward Island provides that when a claimant appeals against a termination or reduction of benefits, assistance shall be paid at emergency level until the decision of the Appeal Board.149 Ontario has a similar provision in its Family Benefits Act.150 The Ontario General Welfare Assistance Act contains language that comes closest to the principle in Goldberg v. Kelly. The relevant provision states that "where practicable, a welfare administrator shall afford an applicant for or recipient of assistance...an opportunity to make submissions before suspension, cancellation or refusal of the assistance to show why such action should not be taken."151

Provisions such as the ones to be found in the Prince Edward Island legislation and in the Ontario Family Benefits Act require that the claimant know that he or she has a right of appeal to a welfare appeal board but the Canadian Civil Liberties Education Trust estimated in 1975 that about fifty per cent of Canadian welfare recipients did not know that they had a right to appeal an unfavourable welfare decision.

Most welfare statutes are silent on the question of procedural protections for the welfare recipient who has been cut off, and the legislation in Newfoundland152 and Nova Scotia153 give very broad powers to administrators to suspend, lower or withhold social assistance payments without any hearing being given to the claimant.

3. The Range of Sentences Imposed

There is a remarkable disparity in the penalties imposed on delinquent welfare claimants. Newfoundland has a conscious policy of not prosecuting welfare claimants under the Criminal Code.154 Moreover, this province usually does not ask for jail sentences but asks for fines and probation orders.155 Ontario, on the other hand does use the Criminal Code,156 and, in the last two years 39 persons out of 86 convicted and 50 out of 128 convicted have received prison sentences.157

These are the only two provinces that seem to have relatively clear prosecution policies. In the other provinces, there is an enormous discrepancy in sentencing. This can be seen by looking at three Manitoba cases. First, in Simm,158 decided by the Manitoba Court of Appeal in September 1975, a mother claimed benefits in respect of two children when she only had one. She was ordered to make full restitution but a three month prison sentence was reduced to a suspended sentence. In Said,159 a case decided by Manitoba Provincial Court in 1979, the accused failed to report a common law spouse and one year's employment. As a result, she had received $14,000 she ought not to have received over 4 1/2 years. Upon conviction, she was placed on one year's probation and was not required to make any restitution. These two cases should be contrasted with the decision in Ashdown.160 In the latter case, the accused had obtained $2,400 fraudulently. Despite the fact that she was a first offender, and had two children and was six months pregnant, she was sentenced to a six month jail sentence and ordered to make full restitution.

The decision in Ashdown and similar cases,161 raises the question of whether imprisonment is a suitable sentence for welfare recipients. It is extremely doubtful if the threat of imprisonment deters for the reason that was advanced by the Edinburgh Council on Social Service before the Fisher Committee on the Abuse of Social Security Benefits.

The Council told the Committee, "In general, we feel that the majority of people who resort to such devices to defraud the [Supplementary Benefits] Commission do so out of the necessity to obtain an income at subsistence level rather than from irresponsible choice".162

The second argument against imprisonment as an appropriate sanction is that it is expensive. The cost per diem of incarcerating a prisoner in an Ontario jail in 1977-78 came to about $47.163 Four years later, that figure can safely be said to exceed $60 a day. If there are children who have to be relocated, that cost will exceed...
the cost of incarcerating the claimant.

The third reason why imprisonment is not a satisfactory sentence is because it is likely to impose enormous psychic costs on the claimant and his or her children. Some of the consequences of a prison sentence on a mother and her child can be seen from a British Columbia case. In February 1981, Florence Kemp was sentenced to ninety days in jail by a New Westminster County Court judge for failing to report $2,674 which she earned as a homemaker. As a result of the conviction, Ms Kemp cannot be bonded to work as a homemaker. Further, Ms Kemp's ten-year old daughter is seeing a psychologist paid for by the provincial government. The daughter is in the care of the Ministry of Human Resources because she could not stand the stress of the court case and because she blamed herself for her mother's problems. Ms Kemp is serving her sentence on Saturdays at the Oakalla Women's unit in Burnaby. She needs $15 to take a taxi to get there, because there is no bus service to the prison from her home. This money comes from her food allowance. A system of degradation for the claimant and suffering for dependents seem to be virtually certain features of the consequence of using imprisonment for offences of this type.

Most welfare statutes are silent on the question of procedural protection for the welfare recipient who has been cut off.

It would be a beneficial step if prison sentences were to be abolished for welfare offences. Such a measure would not be a radical step even by Canadian standards since this is close to the position in Newfoundland at the present time. The high conviction rate in that province must be seen, in part, as a reflection of an extremely large welfare population. Further, the conviction rate in Newfoundland has dropped from 109 in 1978 to 91 in 1979 and from 91 to 37 in 1980. These figures seem to indicate that it is possible to deter without using jail sentences.

4. The Defence of Necessity?

In R. v. Bourne an eminent gynaecologist aborted a girl of 14 who was pregnant as a result of a rape. He justified his action on the grounds of the health of the mother and was acquitted after a favourable direction by MacNaghten J. The judge rested his direction on the presence in the statute of the word "unlawfully" which he took to mean that some terminations of pregnancy were lawful. But the judge also referred to the choice of values or choice of evils that is generally known as the doctrine of necessity. The gynaecologist was acquitted because he was acting to save the mother's mental and physical health. If a prolonged period of existence on welfare rates can also cause grievous harm to a claimant's health and that of his or her children, it is difficult to see why the defence of necessity should not be available to a claimant who has, say, obtained earnings in excess of the amount permitted by the welfare legislation.

A powerful picture of the typical welfare offender was put to the British Committee on the Abuse of Social Security Benefits by the Family Service Units:

All the cases of abuse described by such workers occurred in families living for long periods on extremely low incomes, one third in single parent families with the additional stresses experienced. The vast majority were, in the opinion of the workers not 'rogues' wilfully abusing social security but ordinary claimants either unknowingly or in desperation making wrongful claims in order to ease unbearable situations, created in the main by the vicious circle of long term poverty and in some instances by personal problems including psychiatric ill health.

Similarly, the Edinburgh Council on Social Service told the same Committee, "In general, we feel that the majority of people who resort to such devices to defraud the [Supplementary Benefits] Commission do so out of the necessity to obtain an income at subsistence level rather than from irresponsible choice."

The plight of the welfare claimant as described by the Family Service Units and the Edinburgh Council on social service seems to be as desperate as that of the 14 year old girl in the Bourne case. The difference in the two cases seems to be that the poor are not allowed to take the law into their own hands because it does not recognize the necessity to eat. It seems bizarre, to say the least, to allow preservation of mental health as a defence, as was done in Bourne, but to say that the preservation of mental health is not a defence if the threat to one's mental health arises through hunger.

165. Leave to appeal to the British Columbia Court of Appeal was denied.
166. Note, in this connection, the remarks of Lord Kilbrandon who said, "We know quite well that conviction and sentence and imprisonment are liable to result in severe personal deterioration. That is why the task of rehabilitation in a prison is so difficult. The two things are mutually destructive on one another," in Detention: The Report of a Conference Chichester: British Institute of Human Rights, (1975) quoted by Judge MacKenna in Glazebrook, ed., Plea for Shorter Prison Sentences in Reshaping the Criminal Law (London: Stevens, 1978), pp. 422, 425, fn. 7.
167. See text at supra note 164.
168. According to Mr. George Pope, Assistant Deputy Minister for Social Services in the Province cheques are sent out to 30,000 individuals and families every year. Information provided by telephone, August 14, 1981.
169. See supra Table 4.
172. See the Fisher Report, supra note 2, p. 158, para. 367.
173. Id., emphasis not in the original.
174. For a discussion of how narrowly the defence has been applied see G. Williams, Textbook of Criminal Law (London: Stevens, 1978), ch. 24.
There is no reason why Canadian courts should feel bound by ancient English authorities which make nonsense of the defence.

The adoption of a defence of necessity would not be a radical departure in the light of a decision such as Said75 where the claimant was put on probation despite the failure to report a common law husband and a year of employment, or Perry76 decided by the Prince Edward Island Supreme Court, where the accused received a two year suspended sentence despite having obtained $9,200 over a period of sixteen months. It is true that exceptional circumstances were found to exist in both cases but 'exceptional circumstances' will be found in many (if not most) cases of welfare fraud prosecution.

The unavailability of child care facilities in many parts of Canada makes it practically impossible for female heads of families to find jobs.

I am not suggesting that the defence of necessity is the answer to the problems of the 'delinquent' welfare client. It is too uncertain in its application to be considered an altogether satisfactory weapon. But until welfare rates are raised, at least, to poverty lines and made inflation-proof, the defence of necessity can save some individuals from the vagaries of the criminal process. These people are already incurring sufficient punishment by living at unacceptable levels of deprivation.

Interim Conclusion

The number of convictions for welfare fraud is extremely low. It is possible that the reason for this extremely low conviction rate is to be found in an extremely generous exercise of prosecutorial discretion but this seems unlikely in view of the fact that, say for example, jail sentences have been asked for (and secured) in the case of pregnant women.77 A more likely explanation is that most welfare recipients are disabled, elderly or female — heads of one-parent families. In 1977-78 these three groups accounted for 80 percent (36 per cent, 8 per cent and 35 per cent respectively) of the welfare case load.78 Because these groups find it extremely difficult to find work in the paid labour force, they are not able to commit the most common type of welfare offence, the failure to report outside earnings. In addition, it is difficult for the disabled and the elderly to run foul of the cohabitation rules. It might also be surmised that these handicapped groups are particularly afraid of breaking the law.

What is disturbing about the convictions is the lack of any uniform treatment of offenders. In particular, it seems impossible to justify the use of imprisonment which degrades but does not deter, is expensive to ad-

minister, and which may do severe damage to relationships between claimants and their children.

Workshyness

For most believers in widespread welfare abuse, workshyness would perhaps be thought of as being the most common form of abuse. Workshyness is not a problem among welfare claimants for the same reason that welfare fraud is not a serious problem among welfare claimants.

If we accept the fact that 80 per cent of welfare claimants are disabled (36 per cent), elderly (8 per cent) or female heads of one-parent families (35 per cent),79 then employment opportunities will be extremely hard to come by for these groups, particularly in a society which has abandoned full employment as a goal. It is true that women with children could be declared employable and Alberta has done this with women who have children older than four months,80 but the unavailability of child care facilities in many parts of Canada makes it practically impossible for female heads of families to find jobs.

So far as employables on welfare are concerned, The Report of the Task Force on Employment Opportunities for Welfare Recipients (Swadron Report)81 found that employables were under a duty to seek any employment which they were capable of performing. It is irrelevant that the employment in question requires lesser skills and lower remuneration than the person might usually expect.82 Indeed, a claimant could not refuse a job because union rules forbade him or her from taking the job.83 The one concession to a claimant is that she or he is not required to accept a job in any plant where there is a strike or a lockout.

A claimant who leaves a job shortly after accepting it runs the risk of being cut off welfare for not making reasonable efforts to secure employment.84 The claimant also runs the risk of being declared ineligible for refusing an offer of employment.85 Because it felt that

175. See text at supra note 168.
176. See 1 Low Income Law (No. 3) 6 (1980).
177. See, e.g., Ashdown, supra note 160 and cases such as Thurroll, supra note 161 where a custodial sentence was imposed on a mother with four children.
178. See the National Council of Welfare, supra note 145, p. 82.
179. Id.
181. See The Report of the Task Force on Employment Opportunities for Welfare Recipients (Swadron Report) (Toronto, 1972). In his letter to Mr. Rene Brundle, then Minister of Social and Family Services, Mr. Swadron wrote: "Our Terms of Reference embrace some of the most vital and controversial issues of our times."
182. Id., p. 51.
183. Id.
184. Id., pp. 51-52.
185. Id., p. 52.
their powers are capable of being abused by the Welfare Administrator, the Swadron Report recommended that every refusal and termination of General Assistance should be accompanied by a written notice explaining the existence of the Social Assistance Review Board with an explanation of how to appeal to the Board.\textsuperscript{186}

The report commented on a kind of workshyness which it described as rational. This kind of workshyness occurred after a welfare claimant had incurred a substantial amount of debt and then found a job; such a claimant might find that she or he could then have 30 per cent of her or his wages garnisheed. An attempt to escape to a different job brought no relief as garnishee followed garnishee. In the end, welfare offers relief since welfare payments cannot be garnisheed.\textsuperscript{187}

The report was not as sympathetic to the workers who found that certain kinds of work were demeaning or exploitative. The report merely noted that it was difficult to obtain agricultural workers, fruit pickers and field hands and said no more.\textsuperscript{188} The report failed to inquire into what ways claimants found these jobs unsatisfactory. Had it done so, it might have been able to suggest ways of making these jobs more attractive. It might be that a considerable improvement in pay together with improved living conditions might improve employment stability.

The lesson of the Swadron Report, and others of its kind,\textsuperscript{189} is that they demonstrate that the problem of the workshy employable welfare claimant is best seen as one of employment barriers. The first barrier is lack of education. The Canadian Council on Social Development report entitled Men on Relief found that 74 per cent of their respondents in Ottawa had attained less than grade 8 education and the figures for men from Winnipeg and Edmonton were 68 per cent and 55 per cent respectively.\textsuperscript{190} Further, most of these men were unskilled and many of them did not speak English as a mother tongue.\textsuperscript{191}

Most employable welfare claimants find themselves facing numerous hurdles in the search for even low-paying jobs.

The second barrier to these workers finding employment is, as the CCSO report points out, the absence of any government commitment to a full employment policy. The report advocated training and financial assistance be given to “hard to place” unemployed persons. But the report concluded that even substantial assistance was unlikely to produce lasting benefits in the absence of full-employment policies.\textsuperscript{192}

The third barrier is imposed by employers who do not think of employees who are on welfare as suitable employees. For example, the task force received a letter from a large northern forest enterprise advising that it required equipment operators but it did not think anyone on welfare would be interested.\textsuperscript{193} A letter from a large service industry expressed considerable reluctance about offering employment to persons presently on social welfare “because the hotel field is not a high paying industry!”\textsuperscript{194}

A fourth barrier to employment for welfare recipients is that unions are not prepared to waive their membership fees. The Swadron Report recommended that trade union requirements regarding the payment of fees should be made more flexible so that an individual could be given the opportunity to pay his fees over a period of time.\textsuperscript{195} In my view, such an arrangement does not do justice to the interests of the union; it may, legitimately, fear that the cost of debt-collecting may be too high, both in terms of time and in terms of dues lost. A much more satisfactory solution would be for the welfare officer to furnish the claimants with money to pay union dues. Even if this money were paid to the claimant as a loan, this would be preferable to saddling the union with the costs of collection.

A similar approach should be taken to the fifth barrier to the employment of welfare claimants—the problem of bonding.\textsuperscript{196} Employers are increasingly requiring that their employees be bondable, i.e., acceptable to a surety company. The only realistic way of overcoming this barrier is for the welfare department to act as bondsman for welfare claimants.

The final barrier to claimants getting jobs is the poor state of job counselling and job-training facilities.\textsuperscript{197}

A third problem with the present maintenance system is that it makes criminals of those spouses who cannot or will not pay.

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186. Id., p. 55.  
187. Id., p. 63.  
188. Id., p. 64.  
189. See Canadian Council on Social Development, Men on Relief (Ottawa, 1972); and Barber, Welfare Policy in Manitoba: A Report To the Planning and Priorities Committee of the Co-Joint Secretariat, Province of Manitoba (Winnipeg, 1972).  
190. See Men in Relief, id., p. 21.  
191. Id., p. 52.  
192. Id., p. 55.  
193. See the Swadron Report, supra note 181, p. 80. Some of the other paper and pulp firms were more aggressive. Thus, one company told the task force, “It seems too that people on welfare rolls lack the drive to go out after a job and hence they lack the competence to fill them,” p. 79.  
194. Id.  
195. Id.  
196. Id., p. 82; the report recommended that the provincial government make special provision for bonding.  
197. Id., p. 90.
The stereotype of the teenager living off comfortable welfare benefits while avoiding work is, for practical purposes, irrelevant to the reality which most employable welfare claimants face. Most employable welfare claimants find themselves facing numerous hurdles in the search for even low-paying jobs. I have tried to describe some of these hurdles above. The significant fact is that all levels of government, federal, provincial and municipal, are doing very little to remove these obstacles. But until determined action is taken in this field, the best that welfare claimant employables can hope for is a series of unsatisfactory jobs of very short duration. To call this ‘workshyness’, is a classic example of ‘blaming the victim’.

**Overpayments**

Another alleged abuse of the welfare system is that of overpayments. The assumption that is made here is that welfare recipients know exactly how much they are entitled to. What evidence we have suggests that this assumption is false.198

Quebec is the only province which provides the claimant with relief from an administrative error. Section 8.03 of the Regulation on Social Aid provides that, “No repayment shall be exacted from a person...to whom aid was paid due to an error for which he is not responsible.”199 The Ontario Family Benefits manual also excuses claimants from having to repay overpayments that result from administrative error200 but a statement in this form has no legal effect.

Two provinces have extremely severe provisions for overpayments. Nova Scotia, provides in subsection 33(3) of the Social Assistance Appeal Regulations that once the Social Assistance Appeal Board has determined the existence of an overpayment, the Board may not order that the overpayment be forgiven or waived.201 Even more remarkably, British Columbia, under subsection 34(11) of the Guaranteed Available Income for Need Regulations202 prevents a claimant from obtaining as a matter of right “a retroactive adjustment to benefits for any time prior to the date of the tribunal’s decision.”203 This provision makes no attempt to achieve fairness; its only rationale is that it cuts costs.

In Redding v. Burlington County Welfare Board,204 the New Jersey Supreme Court refused to allow county welfare boards to recover overpayments because, in the Courts words, “We are dealing with the poor and disadvantaged who, for the most part, eke out a marginal existence on their meager earnings supplemented by AFDC assistance. Invariably, nothing is left over at the end of the month. They should not be held responsible for an administrative error unless the legislature says that this should be done.”205

The Redding decision, rightly, recognizes that a policy of making welfare recipients repay overpayments defeats the state policy of providing welfare recipients with minimum benefits at monthly (or other) intervals. Since it is totally unrealistic for welfare families living considerably below any of the recognized poverty lines to save any money, a policy of recovering overpayments must mean that individuals and families will be living at a level below that fixed by the province. When it is realized that living at that level may seriously harm individuals and children, it is clear that our law relating to overpayments in welfare cases is in need of radical change.

**PART IV**

**ABUSE OF THE WELFARE CLAIMANT**

Allegations of widespread fraud and workshyness on the part of welfare claimants help conceal areas where the law abuses welfare claimants. In the remaining part of this paper I will outline some of these abuses.

1. The Wide Range of Civil Penalties

In an earlier section, I made mention of the very wide scope of the criminal law in this area. The very wide scope of the criminal law has its parallel in the extraordinary powers given to the welfare departments. The first example of these powers is the power found in the statutes of six provinces206 to penalize welfare claimants who make, or who have made, improvident dispositions of property up to three (or five) years before they went on welfare. An example of this kind of provision is to be found in section 7 of the regulations under the Ontario Family Benefits Act which provides:

Where, within three years preceding the date of application, or at any date subsequent thereto, an applicant or recipient or the spouse of an applicant or recipient has made an assignment or transfer of liquid assets or real property and, in the opinion of the Director, the consideration for the

198. See, e.g., Kuyek, Noonan and Martha, “The Right to Welfare in Ontario,” 1 Queen's IntraMural Law Journal 99 (1969). After observing how assistance rates were calculated, the authors observed: “There was not evidence of a welfare officer explaining how that assistance was calculated,” (p. 120).

199. Reg. 75-670. This still leaves open the possibility that a claimant may have to make a repayment when he or she has made an innocent error.

200. See manual, supra note 137, No. 64, p. 1.


202. B.C. Reg. 479/76.

203. Someone who had been denied a retroactive adjustment to benefits, would appear to have no option but to appeal to the Minister, who would make a decision based on no known criteria.

204. 65 N.J. 439, 323 A. 2d 477 (N.J. S.C., 1974). This case and the issues it raises are discussed in the excellent article by Howard, “Recoupment of Overpayments in A.F.D.C.: Misguided Policy and Misread Statute,” 75 Northwestern University Law Review 635 (1980), to which I am greatly indebted.


206. The provinces of British Columbia, Manitoba, Ontario, Quebec, Prince Edward Island and Saskatchewan have such legislation.
Such a provision could be justified to prevent fraudulent transfers of property but, as a commentator has shown, the section has been used to punish honest transferors. In one case, Mr. S was found to be permanently unemployable by the Medical Advisory Board but an allowance was refused because of a transfer of the property, in which he resided, to his daughter and son-in-law. The stated reason for the transfer was that, because of financial difficulties, he was threatened with the property, assumed the mortgage and paid off the debts. The Board held that he did not transfer the property to qualify for assistance. In a second case, the appellant was refused an allowance as a permanently unemployable person under the Family Benefits Act because of the transfer of a $2000 debenture to his sister. The Board allowed the appeal, holding that there was adequate consideration as the sister had provided for his needs for over three years. These decisions leave a great deal to be desired although their outcomes are satisfactory. In the first place, success in such cases depends on the claimant's knowledge of the right of appeal; only fifty per cent of welfare claimants in Canada know that they have a right to appeal an adverse decision. Further, among the fifty per cent who do know of a right of appeal, many will not exercise that right either because they fear they will not be able to secure an effective advocate or because they fear that the welfare office's decision will be rubber-stamped on appeal. Finally, both decisions make it clear that they turn on their own special facts. For example, it is by no means clear that the results would have been the same if the assets in question had been worth, say, $5000 instead of $1,200-$1,500 in the first case and $2000 in the second case. It is intolerable that legal rights, and, in particular, the legal right to a subsistence income, should depend on such fine distinctions to be drawn by unaccountable bureaucrats.

A second example of the extraordinary powers given to welfare departments is in British Columbia and Nova Scotia. Powers are given to the Minister and the Director, respectively, to deny or reduce benefits in specified instances. In British Columbia any claimant who "(b) by his misconduct loses his employment or (c) terminates his employment for other than medical reasons" can have his or her benefits denied or reduced.

The Nova Scotia provision states that the Director of Welfare may deny benefits where a claimant (or his spouse) has quit his or her job without just cause within a four months period prior to the claimant applying for welfare benefits. The effect of these provisions may well be to leave claimants without either unemployment insurance or welfare benefits. These provisions can be understood in the light of these provinces' belief that the law does not deal as severely as it should with voluntary quitters. As I have tried to show above, the law relating to voluntary quits is more severe than it should be.

A third example is Nova Scotia's additional discretionary powers which are frightening in their scope. In the first place, the Director may refuse to grant or may reduce benefits to someone who "in the opinion of the Director dissipates, spends, invests or deals with his assets in an unreasonable manner." Presumably, the aim here is to prevent alcoholics or drug addicts from diverting assets from their dependents but it is easier to devise more narrowly worded legislation that can achieve the same result. Next the Director may require a person who is refused benefits to wait for a period between one month and a year before re-applying for benefits under the Act. Presumably, this provision is meant to deal with the vexatious claimant but, again, the legislation is dangerously wide. It may be a nuisance if someone appears weekly (or even daily) at the welfare office claiming welfare benefits to which she or he is not entitled but to impose, for example say, a six-month ban on such a person from claiming welfare benefits is a cruel and dangerous punishment. Someone who does not need welfare assistance today may be in dire need of it next week. It is ironic that when one of the problems in welfare is the failure of welfare claimants to claim benefits because of feelings of stigma, a provincial government should have seen fit to erect a legal barrier to inhibit claimants from submitting their claims. Finally, the Director may, if he or she thinks that a husband and wife have separated for the purpose of enabling one or both of them to qualify for benefits, refuse to grant

209. Id., p. 25.
210. Id.
211. Civil Liberties Education Trust, Welfare Practises and Civil Liberties: A Canadian Survey (Toronto: Civil Liberties Education Trust, 1975), p. 81. The United Kingdom Committee on Welfare Abuse, supra note 2, also found that most welfare recipients did not know of their right to appeal an unfavourable welfare decision, see p. 173, para. 381.
213. Subsections 12(3) and (4) of the Family Benefits Schedule "B" Regulations, N.S. Reg. 80/80.
214. The Director also has power to declare ineligible any one who refuses to accept available employment or fails to demonstrate that he is making reasonable efforts to secure employment. Whether the Director has to give the claimant a hearing before disentitling him/her is not clear.
215. The Director also has power to disqualify anyone who refuses suitable employment or else, refuses to look for it. As in the case of British Columbia, it is not clear whether the Director has to provide the claimant with a hearing.
216. See text at supra notes 84-95.
218. Id., subsection 39(2).
benefits to either of them.\textsuperscript{219} A provision of this kind is extremely dangerous. It is not uncommon for marriage partners to break up, become reconciled and then break up again. This behaviour might lead one to think that a fictitious desertion had taken place but unless one heard the parties and knew a great deal about the relationship, one could not make any kind of determination as to whether a fictitious desertion had taken place. Incredibly, the Nova Scotia legislation empowers the Director to disqualify one (or both) of the spouses from receiving welfare benefits without hearing the parties!\textsuperscript{220}

These powers are awesome in their scope: they would be impossible to justify in regard to the use of land or livestock, let alone human beings who are living at subsistence level. The failure of lawyers, politicians and the press to make any statement about these kinds of powers is a sad commentary on the way that poor people are viewed in our society.

2. Levels of Benefits and Inflation Proofing

The most oppressive feature of Canadian welfare policy is the extremely low level of benefits. In no province are the benefits tied to any of the poverty lines in existence. An example of the gulf that exists between welfare rates and various poverty lines is illustrated by the amounts received by welfare recipients in the greater Vancouver area (see Table 5).

The situation depicted by those figures is being made worse by the fact that in seven of the provinces, welfare benefits are not made inflation-proof.

The results of not inflation-proofing welfare benefits are to be seen from what has happened in Ontario to welfare recipients between 1975-1980 (see Table 6).

Table 6

<table>
<thead>
<tr>
<th></th>
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<th></th>
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</thead>
<tbody>
<tr>
<td>Single Person under 65</td>
<td>$3,479</td>
<td>2,842</td>
<td>-637</td>
<td>-22%</td>
</tr>
<tr>
<td>Mother with one child</td>
<td>$5,811</td>
<td>4,970</td>
<td>-841</td>
<td>-16.9%</td>
</tr>
<tr>
<td>Mother with 3 children</td>
<td>$8,057</td>
<td>7,110</td>
<td>-947</td>
<td>-13.3%</td>
</tr>
<tr>
<td>Mother, Father with 2 children</td>
<td>$8,248</td>
<td>7,098</td>
<td>-1,150</td>
<td>-16.2%</td>
</tr>
<tr>
<td>Mother with one child</td>
<td>$6,335</td>
<td>5,461</td>
<td>-874</td>
<td>-16%</td>
</tr>
<tr>
<td>Mother with 3 children</td>
<td>$8,716</td>
<td>7,718</td>
<td>-998</td>
<td>-12.9%</td>
</tr>
<tr>
<td>Mother, Father with 2 children</td>
<td>$9,020</td>
<td>7,820</td>
<td>-1,200</td>
<td>-15.3%</td>
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</tbody>
</table>


Similarly, Brad McKenzie of the University of Manitoba School of Social Work writing in the summer of 1981 estimated that welfare recipients in Manitoba were receiving 12 per cent less for basic necessities than they received in November 1977 when inflation was taken into account. This difference is projected to escalate to 25 per cent before the next scheduled adjustment in January 1982.\textsuperscript{221}

Another factor that has to be taken into account here is that the number of field workers is not keeping up with the growth in the welfare population. In Ontario, at the present time, field workers have to carry

\textsuperscript{219} Section 16 of the Family Benefits Regulations, Reg. 50/78.
\textsuperscript{220} It is possible that a bold Court would require a hearing under this section, but it would take an even bolder Court to hold that the Director had reached a perverse result.
work loads of 280 - 400 cases each. As if this were not bad enough, field workers now are forced to perform administrative duties once performed by office personnel. It has been estimated that field workers are forced to spend 60 per cent of their time in the office. As a result of these heavy case-loads and the fact that field workers are now mainly office workers, it seems likely that claimants are not being directed to services and forms of discretionary assistance which might be available. In this way, too, the claimant is worse off than before.

Three provinces (New Brunswick, Nova Scotia and Alberta) inflation-proof their welfare benefits, but it is important to realize the limitations of inflation-proofing. In the first place, with a rate of inflation in excess of 10 per cent each year, "annual reviews that make up for past increases in the price index rather than anticipating prospective needs serve only to keep welfare recipients a year behind the current cost of living." A more equitable method would be to adjust benefits quarterly.

Second, as the National Council of Welfare report Prices and the Poor pointed out, "Looking to the general CPI to tell us about the effect of inflation on low-income consumers is like relying on the assurance that the river's average depth is only 18 inches and deciding to wade across."

Since 1972 food prices have gone up more quickly than general prices and in 1980 food prices rose by 15.2 per cent, a sum in excess of the general increase in the CPI. But even the figure of 15.2 per cent may understate the rise in food prices for the poor because studies in Vancouver, Edmonton and Montreal showed that food prices charged by chain stores were higher in the poorer areas than anywhere else in the city. There is, therefore, a need to work out a modified Consumer Price Index that more accurately reflects price increases for welfare claimants than does the present index.

But the most serious drawback to the system of inflation-proofing benefits is that automatic increases mean very little if the base rates are unreasonably low. What is needed is to first adopt a welfare level that is based on one of the recognised poverty levels. Second, it is important to make sure that welfare rates do not fall too far below average income rates. This can be accomplished by the use of a formula that ties welfare rates to whichever is the higher of a modified Consumer Price Index or an increase in the average net earnings. The adoption of this formula in the United Kingdom meant that in November 1976 the ordinary welfare rate for a married couple came to 49.8 per cent of average net earnings for manual workers, compared with 36.1 per cent in 1948.

The continuing decline in welfare benefits must be viewed as a matter of great concern. There may be a small increase in welfare fraud but even this is problematic. It is more likely that the increased pressures generated by having to live on increasingly depressed budgets will be reflected in anti-social behaviour and in deteriorating standards of mental and physical health.

3. The Means Test

In 1971 the Federal-Provincial Task Force on Public Assistance said, the multiplicity of budgetary requirements and income and assets that have to be considered in determining need and the complexities that enter into their assessment contribute to a lack of understanding, confusion and feelings of helplessness on the part of recipients. The negative feelings created in the client by the eligibility process are likely to extend to other services of the agency as well as to the financial assistance program. It is true, as Professors Handler and Hollingsworth have reminded us, the means test is not as offensive to welfare claimants as the levels of benefit, but even Handler and Hollingsworth show that a substantial number of claimants felt outrage at the means testing process.

In Toronto, Jean James's study showed that although most welfare recipients were not bothered by questions about money and assets, a substantial number were, and more claimants were upset by questions about

223. Id.
225. Section 34 of the Family Benefits Schedule "B" Regulations, N.S. Reg. 80/80.
226. Indexing in Alberta is not statutory. However, during the past few years welfare benefits have been raised in line with changes in the Consumer Price Index. Information supplied by Ms. Patricia Millar, Chief, Income Security Unit, Social Services Planning Secretariat, Alberta, by telephone July 9, 1981.
229. See statement by Mr. James McGrath in Can., H. of C. Debates, Dec. 18, 1980, p. 5881. The significance of this figure is underscored by the fact that the lower a family's income is, the more it will spend on food. Thus, in 1969 a Statistics Canada study showed that families with incomes of less than $3,000 spent 27.9% of their income on food, whereas families with incomes over $15,000 spent only 13.4% of their budgets on food. (See Report, supra note 27, p. 4).
234. The authors, id. at 128, posit the plausible conclusion that the "social and psychological events requiring people to apply for assistance so humble them and produce such anxiety that welfare applicants lose or repress feelings of privacy and outrage."
235. Id. p. 129, Table 2.
income and assets than were bothered by questions about their children. The figures are as follows:

Table 7
Perceptions of Questions Relating to Assets
by Toronto Women in Receipt of Family Benefits

<table>
<thead>
<tr>
<th></th>
<th>Were you bothered by questions about</th>
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<tbody>
<tr>
<td></td>
<td>money/assets</td>
</tr>
<tr>
<td>very much</td>
<td>12%</td>
</tr>
<tr>
<td>somewhat</td>
<td>18.9%</td>
</tr>
<tr>
<td>not at all</td>
<td>69.1%</td>
</tr>
</tbody>
</table>


The argument in favour of the means test was set out in the Federal-Provincial Working Party on Income Maintenance, *Background Paper on Income Support and Supplementation*. The argument advanced there is that it would be unfair to give identical treatment to two families — Family A, which has $8,000 earned income, and Family B, which has no earned income but has $100,000 worth of land whose value is increasing at a rate of 8 per cent a year. If there were to be no means test, it is argued, Family B would be entitled to claim welfare benefits, whereas Family A would not be able to do so and this would create "an equity problem at least in social policy terms".

The difficulty with this example is that it could be duplicated under present welfare legislation. Again, we have family A with $8,000 of earned income and not entitled to any welfare benefits. Next door, we have family B, which has no earned income but which owns their house for $150,000 and has $100,000 being the cash surrender value of a life insurance policy. Family B would (if other conditions were met) be entitled to welfare benefits since the assets it possesses are not "liquid assets" under Canadian welfare legislation.

But we should not focus too much on hypothetical families since it is dangerous to build social policy on situations which are close to being fanciful.

In practice, the means test makes it more difficult for people to carry on their livelihood after a set-back. Thus, in an Ontario case, the applicant had at the time of his application livestock worth about $2,000 and other farm animals and equipment that were over the asset limit allowed by the *Family Benefits Act*. Although he was in need at the time, the Social Assistance Review Board held that he would be disentitled from welfare assistance unless those assets were converted to cash and used for his maintenance. It would, of course, be far more sensible to disregard the assets and simply deduct the income received from them from the applicant's entitlement. This would enable the applicant to get off welfare in time. The application of the means test makes it more likely that the applicant will be on welfare for an indefinite period of time. Needless to say, this seems to be very short-sighted social policy.

Another function of the means test is to perpetuate the 'cycle of poverty'. The classic example of this effect is the decision of the Ontario Court of Appeal in *Re Fawcett and Board of Review*. In that case Mrs. Fawcett recovered $13,500 in a *Fatal Accidents Act* claim. Mrs. Fawcett received $3,500 personally and $5,000 for each of her two children. One of the children was made a ward of the Children's Aid Society. The issue in the case centered around whether the $5,000 Mrs. Fawcett had placed in trust for her son until he reached maturity could be retained for that purpose, or whether such assets had to be considered as "liquid assets" in which case the monies had to be used to maintain Mrs. Fawcett. The Ontario Court of Appeal, affirming the decision of the Social Assistance Review Board, decided that the monies had to be used to maintain Mrs. Fawcett. The effect of such a decision is "to exhaust a capital sum, usually of modest amount, that might have been available to the infant when he reached eighteen years to help give him a start on the difficult path out of the family welfare cycle."

Finally, the means test provisions make it virtually certain that recipients of welfare will be able to live at one of the recognized poverty lines for only a limited period of time. After that, they will have to live on welfare rates which are scandalously low at the present time and which continue to decline annually in seven provinces.

Unfortunately, the means test gets less examination and coverage than does, say, welfare fraud or alleged workshyness. Like so many fundamental parts of our welfare law, it is in need of radical reform.

4. Outside Earnings

Another abuse faced by welfare claimants is the fact that the welfare programmes discourage work and foster dependency. Welfare recipients are allowed only very small outside earnings. The situation is well described by David Ross:

Generally, after a recipient's earnings reach a certain level (usually $75 - $100 monthly), welfare benefits are drastically reduced or completely cut off. Given the low-paying and insecure nature of most job opportunities facing welfare recipients, this cold turkey treatment is likely to encourage people to hang on to the security of the social assistance...


238. See Mantini, supra note 208, p. 22.


242. This will be true unless they have assets which by some quirk in the legislation are not described as 'liquid assets'. These would include the proceeds derived as the result of the sale of a home and the cash surrender value of a life insurance policy; see text at supra note 238.
payments especially as they know they may encounter difficulties and delays in requalifying for welfare benefits. 243

It is true that there are differences between the severity of provincial cut-off rates for outside earnings. Thus, Prince Edward Island allows a single person to earn $25 a month and a couple to earn $50 a month but this dispensation only lasts for six months unless the claimant is employed to pick berries, sell newspapers or acts as a part-time baby sitter. 244 British Columbia, 245 Saskatchewan 246 and Manitoba 247 all allow recipients to earn $50 a month. New Brunswick 248 allows a recipient to earn $100 a month and Newfoundland 249 allows a recipient to keep some of his or her income. Alberta 250 has a sliding scale whereby the first $75 earned every month may be retained by the claimant, between $75 and $150 earned thereafter is a tax-back rate of 50 per cent and between $150 and $250 earned, a tax-back rate of 75 per cent is applied and finally, on the excess of earnings over $250 a month a tax-back rate of 90 per cent is applied. Ontario 251 has a scheme similar to Alberta's except that a tax-back rate of 75 per cent is applied after the applicant has earned $100 a month. Quebec 252 applies a 50 per cent tax-back rate for the first month of work, a 66 2/3 per cent tax-back rate for the second month and 100 per cent thereafter, where the claimant has been in receipt of welfare benefits for three consecutive months. In some provinces, attempts have been made to introduce work incentive programmes but these are available to only a very small number of claimants. Further, in Ontario the benefits will last only two years. Indeed, the Family Benefits Work Group has argued that after the mother has borne the cost of child care and the cost of work-related expenses, she will be little better off than on Family Benefits. 253

In any event, these statutory provisions, whatever their differences, bear out the correctness of Ross's statement. The results of applying penal rates of taxation are illustrated in a case study described by the Canadian Council on Social Development, in their report entitled The One Parent Family:

With three children in public school and an income of $180 a month this person said that she had been finding it impossible to manage and has borrowed, getting deeper and deeper in debt. Therefore, she took a job in a factory where she was paid $1.25 an hour. She had to pay a baby sitter $15 a week so that she was clearing $72 every two weeks. Her rent in subsidized housing went up from $33 to $50 because she was working. She could not deduct anything for a baby sitter. Obviously this plan was not working. She then tried working on night shift from 4 to 11 p.m., clearing $10 a week. Her babysitter was clearing more. She gave up the work at the end of a couple of weeks. She thinks that when a woman in her position takes a job people like the welfare department and the housing authority should allow six months or so to work without having the allowance reduced and the rent raised. This would give the person a chance to replenish clothing and pay off debts. She says she also went to a Canada Manpower training program to upgrade her schooling and also to business college. Canada Manpower paid $62 a week. Her rent was raised and her provincial allowance cut. She concluded that life as a stenographer would be expensive, with respect to clothes, baby sitting etc., and yet she seems to feel a great need to get a feeling that she is improving her situation even slightly. 254

It should not be necessary to create such an obstacle course for those people who wish to make the extremely difficult transition from dependence to independence.

5. The Maintenance Quagmire 255

For over one third of the welfare population, female headed one parent families and deserted spouses, 256 the provincial welfare departments have abdicated their functions by requiring the claimant to first attempt to claim maintenance from the delinquent spouse.

The statutes on maintenance may be divided into two groups. In the first group there are statutes such as those in Newfoundland, 257 Nova Scotia, 258 Quebec 259 and British Columbia 260 which require that the spouse

246. Paragraph 28 (3)(d) of the Saskatchewan Assistance Regulations, Sask. Reg. 160/75. A single person can earn the greater of $50 per month or 25 per cent of his/her allowance. In the case of a family unit (2 or more persons), the unit is entitled to $100 per month or 25 per cent of their allowance, if that is greater.
247. See Section 4(1) (B) (C) of the Manitoba Social Allowances Act Regulations, Man. Reg. 202/77; 77/78 which allows a recipient to earn the greater of up to $50 per month or 70 cents for each dollar worked or 30 per cent of gross monthly earnings.
248. Section 7(2)(g) of the Social Welfare Regulation N.B. Reg. 74-34, as amended by N.B. Reg. 79-40, paragraph 3(6).
250. 1(1) (a) Social Allowance Regulations Alta. Reg. 92/75. These amounts came into force on April 1, 1981.
253. See Family Benefits Work Group, WIN Program, mimeo (Toronto, Nov. 1979); see also Ontario Welfare Council, Settling for Less (Toronto, October, 1979).
255. I have borrowed the phrase from the title of Mr. S.M. Cretney's article in 33 Modern L. Rev. 662 (1970).
256. See text at supra note 178.
258. Section 15(3) of the Family Benefits "Schedule A" Regulations, N.S. Reg. 50/78.
initiate an action against a deserting partner. In the second group, in provinces such as Alberta,261 New Brunswick,262 Prince Edward Island,263 and Ontario,264 the Director of Welfare (or other official) is empowered to bring an action in the name of the deserted spouse to recover maintenance payments. But there is very good reason to believe that the difference between the two kinds of statutes is not great. This is illustrated by the experiences of Ontario and Alberta. On October 30, 1979, Mr. Keith Norton told the Ontario Standing Committee on Social Development that his Ministry did not have sufficient resources to bring subrogated actions.265 Further, although the Ontario Family Law Reform Act266 of 1978 empowered the Ministry of Community and Social Services to bring subrogated actions for deserted spouses, by August 1979, 16 months after the passage of the statute, not a single action had been brought by the Ministry.267 It is significant that the Annual Reports of the Ministry of Community and Social Services advertise the existence of skip-tracing services which may be used by a deserted spouse.268 In Alberta, the Institute of Law Research and Reform Research Project on Matrimonial Support Failures shows that women are having to pursue maintenance actions because, as over two-thirds of the women who were interviewed said, they had not received social assistance during marriage.269

The present system has very serious defects. In the first place, even when payment is forthcoming, the average amounts paid will be considerably below the welfare rates. This point was made vividly by the Finer Committee on Single Parent Families in the United Kingdom,270 Taking figures awarded by Magistrates' Courts in the United Kingdom between April and June 1971, the committee demonstrated the remarkable gap between what could be covered on maintenance and welfare rates. The figures are truly startling (see Table 8).

What these figures mean is that the mother has to make frequent visits to court, perhaps travelling a considerable distance with several small children and perhaps having taken time off from work. After she has been through all these obstacles, she finds that she has to make a further journey to seek a social security payment. It is difficult to believe that results would be any different in Canada. Thus, in Manitoba, Barber reports in his Welfare Policy in Manitoba that "the majority of women reported not knowing their husband's income before losing support. Those who were able to give this information reported an average income of $5,000, only slightly above the Economic Council of Canada Poverty level."271

The next problem is that most orders are not regularly complied with. The Finer Committee estimated that 55 per cent of orders were irregularly complied with as compared to 45 per cent of orders that were regularly complied with.272 The Law Reform Commission of Canada in its paper entitled Maintenance on Divorce reported that the records for the City of Calgary Family Court showed that 85 per cent of all maintenance orders were in default to some degree and 50 per cent of the cases were in default by a very substantial degree.273 It is true that British Columbia,274 Nova Scotia275 and Ontario276 relieve a spouse from having to seek maintenance for a defined number of reasons but one of those reasons is not irregular payment of maintenance. Thus, a spouse may be relieved of having to bring a maintenance action if he or she can prove serious health or emotional problems. This is an extremely uncertain criterion especially when it is realized that virtually all spouses who are seeking money that is not likely to

<table>
<thead>
<tr>
<th>Type of Order</th>
<th>No. of Children</th>
<th>Weekly Welfare Rates</th>
<th>Weekly Maintenance Amounts Awarded by Magistrate/Courts</th>
</tr>
</thead>
<tbody>
<tr>
<td>Wife only</td>
<td>Nil</td>
<td>£ 8.20</td>
<td>£ 3.89</td>
</tr>
<tr>
<td>Wife</td>
<td>&amp; 1 child</td>
<td>9.70</td>
<td>6.06</td>
</tr>
<tr>
<td>Wife</td>
<td>&amp; 2 children</td>
<td>11.20</td>
<td>9.33</td>
</tr>
<tr>
<td>Wife</td>
<td>&amp; 3 children</td>
<td>12.70</td>
<td>10.72</td>
</tr>
<tr>
<td>Wife</td>
<td>&amp; 4 children</td>
<td>15.70</td>
<td>12.75</td>
</tr>
<tr>
<td></td>
<td>or more</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Children only</td>
<td>1</td>
<td>9.70</td>
<td>3.05</td>
</tr>
<tr>
<td>Children only</td>
<td>2</td>
<td>11.20</td>
<td>5.45</td>
</tr>
<tr>
<td>Children only</td>
<td>3</td>
<td>12.70</td>
<td>7.87</td>
</tr>
<tr>
<td>Children only</td>
<td>4</td>
<td>15.70</td>
<td>8.98</td>
</tr>
</tbody>
</table>


261. Section 12 of the Social Development Act, R.S.A. 1980, c. 5-16.
262. Section 8 of the New Brunswick Social Welfare Act, R.S.N.B., 1973, c. 5-11.
264. See paragraph 18(3)(a) of the Family Law Reform Act, R.S.O. 1980, c. 152.
266. R.S.O. 1980, c. 152.
267. Information supplied by Ministry of community and Social Services by telephone August 6, 1979.
271. Barber, supra note 270, vol. 1, p. 100, para. 4.87.

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materialize will be under considerable strain. Requiring persons to meet this requirement may force them to disclose intimate private details about themselves. A second case in which a wife will be relieved from taking proceedings is if she can show that she has been the victim of violence or there is a likelihood of violence ensuing after she has taken proceedings. Again, there is considerable uncertainty here. Does the wife get relief if she can show that her husband has used violence against her in the past, although the violence related to a matter that had nothing to do with maintenance or financial matters? Or, suppose that the wife gets a call or a letter from her husband informing her that (the husband) would prefer imprisonment rather than paying her maintenance? Is this a threat which indicates that violence may result? Alternatively, can the wife obtain relief, on these facts, by arguing that her action is likely to be futile? The only thing that is certain is that the answer to these questions is hopelessly uncertain and that different officials will give different answers to the same question. To take one final example, the wife is relieved from having to take action for support where she can show that she would incur unreasonable expense, "particularly in areas where distances are great."277 This escape hatch also raises numerous questions. First, is the wife obliged to seek legal aid? Second, what are "great distances"? If a woman lives in Toronto and her husband is working in Windsor, is that "too great a distance"? How about Sudbury, Winnipeg or Calgary? Is it relevant to the question, that although the distance is great, it is reported that her husband is earning a very substantial salary in, say, Calgary? One cannot envy those people who have to make such enquiries or the officials who have to answer them.

A third problem with the present maintenance system is that it makes criminals of those spouses who cannot or will not pay. Thus, in Newfoundland over the past three years, almost as many people have been convicted of failing to maintain dependents as have been convicted of obtaining money fraudulently. The figures are as follows:

<table>
<thead>
<tr>
<th>Year</th>
<th>Convicted of Failure to Provide</th>
<th>Convicted of Obtaining Benefits Fraudulently</th>
</tr>
</thead>
<tbody>
<tr>
<td>1978</td>
<td>87</td>
<td>109</td>
</tr>
<tr>
<td>1979</td>
<td>60</td>
<td>91</td>
</tr>
<tr>
<td>1980</td>
<td>40</td>
<td>37</td>
</tr>
<tr>
<td>Total</td>
<td>187</td>
<td>228</td>
</tr>
</tbody>
</table>

Source: Information supplied by Mr. M.J. Vincent, Director of Social Assistance in a letter dated April 21, 1981.

The Finer Committee noted that in 1972 criminal proceedings were taken against 604 men for failure to maintain persons for whom they were liable under the Ministry of Social Security Act.278 585 convictions were obtained and 114 men received prison sentences.279 The imposition of criminal penalties does not seem to accomplish much for the wife and her children. In the first place, some (if not many) of the men being exposed to criminal sanctions are not realistically able to pay maintenance. Second, even in the case of men who are able to pay, it is difficult to see any moral basis for imposing an obligation of support for a spouse (or ex-spouse) which may run for twenty or thirty years.280 If substantial property has been acquired during the marriage, that property should be divided equally since this division, almost invariably, will come close to recognizing the contributions the parties have made to the marriage.

The obligation on the part of the father to pay maintenance in respect of children stands on a different footing since making the father pay is to enforce his obligation, whereas the mother on welfare makes her contribution through unpaid labour on behalf of the child. It is important, however, as Professor Chambers has argued in his book Making Fathers Pay281 that this obligation be imposed only on those fathers who earn more than enough for their own subsistence.

A special word needs to be said about the position of the unmarried (or divorced) mother who refuses to make a declaration of paternity. In a series of cases, welfare departments have refused to grant an allowance to the newborn child when the mother refuses to name the father. In an Ontario case, the Social Assistance Review Board held that this practice is illegal.282 Despite this decision, the Family Benefits Manual states that a worker must first determine whether the reason for failing to name the father is "valid". This requirement formed no part of the Social Assistance Review Board's decision and is hopelessly vague. Presumably, it is a 'valid' reason to fail to name the father if the mother fears violence. But is it a valid reason to fail to name a married man with a family? If the answer to this question is 'yes', does it make any difference if he is separated from his wife? Is it 'valid' to protect the father

In the end, the cessation of the war is not only an ethical imperative; it is also practical politics.

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277. Id., p. 4.
278. Ministry of Social Security Act, 1966 c.20, s.30 (U.K.).
279. See the Finer Report, supra note 270, vol. 1, p. 146, Table 4.13.
who is still at high school? How about the university student? In the latter case, will it make a difference if the university student is wealthy or is earning a salary? Discretion of this kind would be regarded as unacceptable in any branch of the law; in the area of welfare law the exercise of this kind of power does not seem to raise any comment despite the fact that what is being done is immoral and illegal.

If the mother does not give a 'valid' reason she may be declared ineligible for benefits or she may have her benefits reduced. If, however, the mother gives a 'valid' reason, welfare benefits may be granted without any reduction or the mother may, if her reason is "extremely valid" be given a waiver which exempts her from ever having to name the father. The nice balancing of equities involved in this attempt to find true justice might make some sense to those persons who are familiar with the criteria to be used in determining what is a "valid" reason for failing to name the father, but to outsiders, the exercise appears to be capricious in the extreme.

In one province, the social service form asks the mother to name the father, his address and physical description, the date of her last menstrual period and dates of sexual intercourse. The Edmonton Journal described the procedures used as requiring a "sexual diary" from the mother.

In my view, it is improper to deny welfare benefits to a mother who refuses to name the father of her child. She is at least as likely to be able to recognize a 'valid' reason as a social worker. But even in the extreme case, where a mother fails to name a father for no particular reason, a policy of denying her benefits does great harm to the child and this seems to me to be an intolerable cost, particularly when it is realized that even if the father is apprehended he may not be able to support the child in any event. It is possible to argue that a mother who fails to name the child's father should have the child taken away from her but this is a cruel and senseless solution. Mothers are deprived of the care of their children if they are shown to be unfit parents and this solution would take away children from many mothers who would qualify as extraordinarily dedicated and affectionate parents.

6. Strikers and Welfare

At the time of the enactment of the Canada Assistance Plan Act, the view of the federal government was that persons on strike should be entitled to welfare payments since the cause of need was to be treated as irrelevant. The paper had carried an earlier story on July 19, 1980.

At the present time, no province seems to have adopted this position. Some provinces have no statutory provisions dealing with the subject and the welfare manuals are likewise silent on the subject. Other provinces have no statutory provisions on the subject but the welfare manuals provide very limited assistance for strikers and their dependents. Finally, there are some provinces which simply state that they do not provide welfare assistance to strikers.

Two provinces, Quebec and Prince Edward Island, deny welfare benefits to strikers. The Quebec provision is linked in with the provisions of section 44 of the Unemployment Insurance Act, 1971 so that a claimant may not claim welfare benefits when there is a "stoppage of work". Thus, claimants would not be able to get welfare benefits in the event of a lockout. Furthermore, the bizarre jurisprudence that relates to the disqualification of those who "finance", belong to the same "grade or class" of workers as those in dispute, and, finally, anyone "interested" will be applied to deny claimants welfare.

Prince Edward Island has an incredibly punitive and dangerous provision. The regulations made under the Welfare Assistance Act provide that any person who participates in, or who supports a strike "is ineligible for deny claimants welfare. Finally, anyone "interested" will be applied to deny claimants welfare.

Ontario has no statutory provisions governing the payment of welfare benefits, but the General Welfare Assistance manual provides that a striker will be eligible for welfare benefits provided she or he first terminates employment. Second, the claimant will be able to get welfare benefits if she or he can show the welfare administrator that she or he is available for work and is making reasonable efforts to secure employment. This policy can best be described as "neutrality after capitulation." For those workers who do not capitulate, no regular benefits are payable during a strike or a lockout. Since the rationale for the disqualification begins by asserting that it would be wrong to give benefits to strikers, i.e., people not involuntarily unemployed, it is a little difficult to understand why workers cannot get welfare during a lockout. The provi-
sion of lockouts is added without any explanation. Finally, the manual provides that if a person is in "dire need", assistance may be issued for a maximum of two weeks. After two weeks, presumably the expectation is that the striker will have capitulated and will be searching for another job.

There can be no winners in this war. People who are abused are likely to lose respect for themselves, and for the society in which they live.

British Columbia has a seemingly generous provision in its welfare statute which allows the Director to give assistance to claimants whose usual source of income is suspended by reason of a legal strike or legal lockout. However, this assistance will only be forthcoming "provided that there are no other sources of income, funds or assets available." The meaning of the words quoted becomes clear when one reads in the manual that no assistance is to be given to strikers "until all credit, income or liquid assets have been exhausted." The final shock comes in reading that when welfare is granted, it is only limited emergency assistance consisting of a few days' food and medical services which may be rendered. It is difficult to envisage any striker exhausting his or her credit, income and liquid assets to obtain a few days' food and medical attention. The British Columbia provisions appear to be in the nature of a cruel hoax.

The Alberta provisions may be stated quite briefly. Strikers are not entitled to welfare benefits but strikers who were receiving a social allowance supplement to earnings may continue to receive the supplement while on strike. Next, a person on strike who is unable to provide for his or her dependent children may apply for social allowance. Temporary assistance available "will be for food only, and will only be issued in exceptional and emergency situations as an alternative to child protection services. As a measure of control, any issue for food shall not exceed the entitlement for a one week period." It is difficult to believe that strikers would do worse by resorting to plain charity rather than using the provincial welfare services.

A limitation on the availability of unemployment insurance benefits for strikers, although not as wide as the one in Canada, can be justified provided that the Federal and Provincial governments attempt to redress the balance by withholding subsidies and other benefits from employers in dispute. But what has been appreciated in most Western industrialized countries is that it is intolerable to deny welfare payments to strikers and their families. To be sure, the details of any scheme are complex — the British scheme at the present time is a particularly good example of the compromises politicians feel they have to make — but the notion that at least strikers' families should receive welfare payments seems unchallenged. The thesis advanced by Thieblot and Cowin in their book *Welfare and Strikes* that the payment of welfare to strikers would destroy both collective bargaining as well as deplete the funds available for social welfare is disproved by the evidence assembled in the book itself.

On the other hand, there are very substantial costs involved in denying trade unionists welfare benefits. First, the denial of welfare benefits to unionists sets the tone of the strike as an act of war against the social order. If unionists see themselves as outlaws, then their tactics in a strike may be less 'reasonable' than would otherwise have been the case. It is important to remember that there has been more violence in Canadian labour history than has generally been imagined. Secondly, the policy of denying welfare benefits to strikers shows that the provinces are prepared to gamble dangerously with the health and lives of strikers and their families, even though there is not the slightest suspicion of illegality on their part. Such a policy might have been appropriate in Zola's France or Dickens' England, but it appears to be horribly atavistic a century later.

7. Residency Requirement

Paragraph 6 (2)(d) of the *Canada Assistance Plan Act* states that a province "will not require a period of residence in the province as a condition of eligibility for assistance or for the receipt or continued receipt thereof." The spirit, if not the letter, of the section has been violated by those provinces which have set up municipalities to administer welfare functions. There have

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295. See the Income Assistance Section of the Services Policy and Procedures Manual, October 1977, S. 14, para. 4.
296. Id., S. 14, para. 7.
298. Id., p. 12.
299. See text at supra notes 98-107.
301. See the extremely complicated provisions on the subject in the United Kingdom at the present time. See Professor Partington's helpful article, "Unemployment Industrial Conflict and Social Security," 9 Industrial Law J. 243 (1980).
305. The provinces which have municipalities administering welfare functions are Alberta (one municipality only), Manitoba, Nova Scotia and Ontario.
been allegations that these municipalities have insisted on a period of residence of up to twelve months as a precondition of giving welfare.

But even in situations where the municipality does not insist on a particular period of residence as a condition for granting welfare, conflicts may arise because, as David Donnison pointed out in his excellent book *Welfare Services in a Canadian Community*, it sometimes becomes very difficult to determine which municipality is responsible for which family. Donnison writes, "...when families move frequently it becomes very difficult to decide which municipality is responsible for them, particularly if they have crossed provincial as well as municipal boundaries. The families themselves may be quite unaware that they have moved from one municipality to another — the area described by most people as "Brockville" extends well beyond the town limits and they often cannot remember the exact dates at which they moved." Even a municipality that accepts responsibility for a claimant may insist on a period of residence before granting an item of discretionary or supplementary aid.

The problem of residence in welfare may well be exacerbated as a result of the operation of the Charter of Rights. The troublesome section is section 6 which contains the seemingly innocuous "mobility rights" which enables Canadians to take up residence in any province and to pursue a livelihood in any province. The difficulty is that these rights are subject to:

"(b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services." What an explosive section that could turn out to be! Will provinces be able to insist on a six or a twelve month residency requirement? Or will a six month requirement be unconstitutional for disabled people but valid for deserted spouses or employables on welfare? Unfortunately, no one knows. Allowing provinces to set up boundaries to the receipt of welfare is unconscionable. As Donnison has pointed out, welfare claimants already have enough problems with municipal boundaries. To add to their difficulties by setting up provincial boundaries to their obtaining welfare benefits is intolerable. The dimensions of the problem are suggested by Barber's study entitled *Welfare Policy in Manitoba*. Barber found that 40 per cent of welfare recipients had been born outside Manitoba; in Winnipeg more than half the welfare recipients were born outside Winnipeg. Barber concluded that the poor are highly mobile. If the 'mobility' clause of the Charter of Rights comes into effect, the poor will have to learn that 'mobility' is another good that is being rationed for them.

8. Home Visits

There has been considerable disquiet expressed during the past few years on the question of home visits (or welfare searches). Only one statute appears to deal with the problem. Subsection 8(2) of the regulations under the Ontario *General Welfare Assistance Act* provides that: "In determining the eligibility of an applicant...a welfare administrator shall make or cause to be made a visit to the home of the applicant for the purpose of enquiring into the living conditions and financial and other circumstances of the applicant." The section leaves all kinds of questions unanswered. Clearly a visit to the claimant's home is permitted to establish eligibility but are subsequent visits allowed after the claimant has established eligibility? It is doubtful if a case challenging these post-eligibility searches would be brought. If one were, it would probably suffer the same fate as the challenge to warrantless home-searches did in *Wyman v. James*. In that case, the United States Supreme Court held that warrantless searches were constitutional because they were 'rehabilitative' rather than 'punitive'. It seems likely that a similar result would be reached in Canada.

In any event, the practice of not making appointments before visits (or searches) are made continues. The figures found by the Canadian Civil Liberties Association in this regard are revealing:

<table>
<thead>
<tr>
<th>Table 10</th>
<th>Home Visits Without Notice in Selected Canadian Cities</th>
</tr>
</thead>
<tbody>
<tr>
<td>City</td>
<td>No Notice Given of Visit</td>
</tr>
<tr>
<td>Toronto</td>
<td>164 or 49% out of a sample of 330</td>
</tr>
<tr>
<td>Hamilton</td>
<td>30 or 36% out of a sample of 82</td>
</tr>
<tr>
<td>Halifax</td>
<td>54 or 55% out of a sample of 102</td>
</tr>
<tr>
<td>Winnipeg</td>
<td>23 or 23% out of a sample of 102</td>
</tr>
<tr>
<td>Fredericton</td>
<td>42 or 69% out of a sample of 61</td>
</tr>
</tbody>
</table>


Welfare workers are prepared to concede that there

308. Thus, Niagara Municipality provides a large number of benefits to claimants who satisfy six-month residency requirements: information provided by Mr. M.G. Fraser, Director of Social Services, August 11, 1980.
309. Compare with the decision of the U.S. Supreme Court in *Shapiro v. Thompson*, 394 U.S. 618 (1969) which held that states cannot impose residency requirements as a condition for granting welfare.
310. See text at supra note 307.
311. Barber, supra note 189.
312. Id., p. 33.
313. Id.
315. Regulation 441, R.S.O. 1980.
are times when recipients expressly objected to their visits. One welfare worker, for example, recalls a situation when his visit coincided with the visit of the recipient's friends. The recipient took exception to the worker's being there because he did not wish his friends to know he was on welfare.317

A large amount of the dissatisfaction that arises in this arises because of the attempt to make one individual— the social worker—play two roles—that of social officer providing rehabilitative benefits, as well as the role of the fraud investigator. Inevitably, the social worker becomes confused about his or her role and quite soon the social worker will be perceived by welfare claimants as a part of the fraud squad. The provincial governments also have strong pressures to downplay the rehabilitative functions the social workers play and to view them increasingly as welfare fraud squad officers. In the first place, once provinces feel they should curtail spending on social services, there is a tendency to accentuate the role of fraud squad officer. In the second place, some governments, particularly British Columbia and Manitoba, have made a considerable political commitment to detecting and punishing welfare fraud. The decline of the rehabilitative ideal is best seen in a remarkable document issued by the Co-ordinator for Income Assistance Procedures in British Columbia on June 3, 1980.318 This document is clearly a manual for the detection of fraud. It states inter alia:

...Home visits are too often a haphazard thing, done by appointment and thereby offering a chance to set up fictitious residency.

Home visits should not be patterned to exact hours except in isolated cases.

Be alert to several clients in one building exchanging (rent) receipts.319

It is suspected in many cases that unreasonably low (rental) rates (are) charged to divert our attention from a common-law situation or so the client will not be diverted for that income.

...staff (are) to ensure that rates being charged are in line with local rates.320

Most of the circular is concerned with ways of detecting fraud. There is very little on rehabilitative services. One sentence on the rehabilitation sections stands out: "Rotate the caseload periodically to avoid too frequent rotation of case officers providing rehabilitative benefits, as well as the role of the fraud investigator." This sort of language says nothing intelligent about rehabilitation; it does, however, have a lot to do, say, with regard to the desire of the province to save money.

It seems clear that just as a single individual cannot be both a probation officer and a policeman, so a social worker cannot be a welfare counsellor and a policeman at the same time. The only solution is to have two classes of social worker; the first would provide rehabilitation and counselling services and would not be concerned with the detection of possible violations of the law. No warrant would be necessary but if a home visit were to take place, a postcard should be sent notifying the claimant of the social worker's time of arrival. If the claimant preferred a meeting at the welfare office,323 she or he should be sent a postcard setting up a time for an appointment.

The second type of social worker would be entrusted with the detection and prosecution of fraud. In his or her case a warrant showing "probable cause" should be required. Until these changes are effected, social workers are going to continue to perform impossible tasks. At the same time the scope of rehabilitation services will shrink and the welfare claimant will view the social worker as an unfriendly policeman.324 The architects of our social policy do not seem to be aware of these problems.

9. The Welfare Claimant's Right of Appeal

Businessmen, landowners, taxpayers and other people are frequently notified of their right to appeal an adverse decision. Such a courtesy is not extended to welfare claimants, despite the fact that this step was recommended by the Canadian Council on Social Development in their review of appeal procedures.325

In 1975, the Canadian Civil Liberties Education Trust found that close to 50 per cent of Canadians on welfare did not know of their right to appeal an unfavourable welfare decision326 (see Table 11).

319. Id., p. 3, para 4.
320. Id., p. 6, para 4.
321. Id., p. 6, under "Further Recommendations"
322. Id.
323. In her survey of welfare recipients in Montreal, Barbara Heppner found that some of the welfare recipients preferred to meet their social workers at the welfare office, because they were ashamed of the apartments in which they lived; see her book, The Recipient and The Welfare System Living on Welfare in Montreal (Montreal: McGill School of Social Work, 1974).
324. Commentators are already beginning to raise the issue of whether social workers are bound to give claimants the same procedural safeguards as the police afford criminal suspects; see, e.g., Smith, "Social Workers and the Judges Rules," [1978] J. of Social Welfare Law 155 (1978).
325. Canadian Council on Social Development, Appeal Procedures under the Canada Assistance Plan Act (Ottawa, 1972). The report gave high marks only to Quebec for their attempts to explain how the system of reviews and appeals worked and their efforts in trying to explain how benefits were calculated: id. p. 15.
326. The Royal Committee on the Abuse of Social Security Benefits found that the same percentage of welfare recipients did not know of their right to appeal an unfavourable decision: see the Report, supra note 2, p. 173, para. 381.
The importance of notifying claimants of their right of appeal is particularly great since letters turning down claims tend to be written in authoritative and frightening technical language. Thus, a letter denying disability benefits under the Ontario Family Benefit Act may read as follows:327

1981
Re: FBA File
Dear Mr. 

Your request for additional assistance as a disabled person has been carefully considered. I regret to inform you that we are unable to approve your request at this time as in the opinion of our Medical Advisory Board you continue to be considered permanently unemployed but are not considered disabled under Family Benefits Legislation.

While we are unable to provide the additional assistance at present, you may be assured of every consideration if your situation changes.

Please see the reverse side of this letter for further information pertaining to your allowance.

Yours very truly,
Director
Family Benefits

The calibre of Boards of Review is extremely low. The decision has been made to have non-lawyers interpret a highly technical statute. The result has been disastrous.328 The decisions of the Boards of Review that I have seen have often failed to identify which section of which statute is being dealt with. No reference is made to principles and none to case law. Thus, we are informed that a person has been found to be "cohabitating" or has been found not to be "disabled" but we are not told how the Board of Review reached this conclusion.

In one case, an Ontario Court had to remand a case back to the Social Assistance Review Board,329 because the Board of Review had not stated how it reached its conclusion; hence, judicial review was futile.

The boards often do not observe the rules of natural justice. In Ontario, the Director receives a report from the Medical Advisory Board and the Director will simply state that he has received a negative report from the Medical Advisory Board and the applicant is ineligible for the particular benefit. The contents of the Medical Advisory Board's report are not given in evidence and the appellant has no right to see it. Some of the documents on which the Director relies are not even produced on appeal. No transcript is kept of the appeal unless there is legal representation on both sides.330 In Manitoba, the Social Services Advisory Committee (the welfare review tribunal) had been routinely represented in appeals before the courts. The practice ended in the case of Beattie v. Director of Social Services (Winnipeg South/West),331 where the appellant successfully objected to the committee's representation. The Manitoba Court of Appeal held that all the arguments which the committee wished to make were contained in the factum submitted by the respondent director and would be argued by his counsel. In the words of the court, "it is our view that it would be preferable for the committee not to appear in this court to defend its decision on the merits where the committee has given a decision as an impartial tribunal."332 Although the formal links between the director and the committee have been formally severed, welfare claimants might well feel that the link between the director and the committee is still unhealthily close.

Legal representation might change some of the results of excessive amateurism and informality but this seems doubtful. In the first place, of 3,907 appeals heard during the fiscal year ending March 31, 1980, in Ontario, only 247 claimants were legally represented.333 Second, even universal legal representation will make little difference if the tribunal refuses, or is unable, to make principled decisions. Legal representation will also have very little effect if tribunals see themselves as allies of the Director of Welfare, rather than impartial adjudicators.

10. The Welfare Claimant and Abusive Behaviour

There are disturbing reports of abusive behaviour directed against welfare claimants from all parts of Canada. The problem of abusive behaviour is a very serious matter because the abusive language also often serves to deny the claimant a right.

Consider these examples given by the Canadian Civil Liberties Education Trust:334

(a) A 46 year old divorced woman suffering from arthritis and varicose veins, reported that upon refusing her choice

327. This is a copy of a letter which came to my attention in August 1981.
328. Most of the Board decisions that I have seen have been from Ontario but the non-Ontario decisions I have seen are equally cursory and unsatisfactory.
329. See the decision in Re McLeod (April 13, 1977), unreported, Ontario Divisional Court (reviewing S.A.R.B. decision No. 259895).
332. Id., p. 158.
of a main floor apartment, the welfare worker said, "We can carry you on our backs, ha-ha."

(b) In Regina, when a crib was requested for a newly born child, the welfare official is reported to have advised the family to use a cardboard box.

(c) Finally, in Toronto, a 25 year old separated woman said that her worker gave her the following advice, "You've got an arse, go out and hustle, other women do."

In the first case, the welfare worker may, in addition to using abusive language, be depriving the claimant of her legal rights to a main floor apartment. In the second case, the mother may have been entitled to the crib, either under provincial welfare regulations, or else as an item of discretionary aid. In the third case, the welfare worker is almost certainly acting illegally. For one thing, the mother may be unemployed because she has young children. Second, even if she is employable she is still entitled to welfare unless it can be shown that she has not been making efforts at finding work.

Even where the abusive remark or behaviour does not immediately deny the claimant a welfare benefit, the effect of the abusive behaviour may be to discourage a claimant from claiming a particular benefit in future. Kuyek, Noonan and Mantha in their article on the Right to Welfare in Ontario give examples of this kind of insulting behaviour. In one case, a claimant had had difficulty in securing welfare. Eventually he was declared eligible but the welfare administrator demanded that he report at the welfare office three times a week at 9:00 a.m. The claimant was given no explanation for the requirement; the authors speculate that one possible explanation for this strange requirement was to punish the claimant for having sought the assistance of third parties. In another case described by the authors, Mr. X was only paid $140 out of the $320 to which he was entitled. Mr. X was informed of his rights and he was told to go and see the administrator. The administrator promised to pay him the difference provided he (the claimant) told no one because: "The government would be angry if I started giving people everything they are entitled to." Despite this promise, Mr. X never received the benefit. People who do not get what they are promised after having exhausted all the procedures could very well refrain from claiming a benefit in the future — at least if she or he can possibly live without it.

A final example of a degrading practice which could affect people asserting their rights is the practice used by the welfare department in British Columbia of administering lie-detector tests on welfare recipients who claim that their welfare cheque has been stolen. A Mr. Robert Joyce seems to have been the first person to complain of the treatment. After his experience, Mr. Joyce said, "I'm sure many welfare clients in a similar bind would be scared off by it and decide not to apply for crisis relief."

Mr. Joyce's prediction seems to be coming true. In the first six months of 1980, only one out of eight welfare recipients asked to take the test did so. Sadly, the welfare department regard the operation as a great success since they claim that the number of money loss and theft claims had gone down from 335 a month to 50 a month. But if this is so, then, even on the welfare department's evidence there is cause for concern because in the pre-lie-detector days, the welfare department estimated that half of the 335 reports were fraudulent. If this is so, then 160 claims were valid so that the present figure of 50 claims a month means that at least 110 valid claims are not being recognized. It would be, of course, considered intolerable if people who suffered, say, insurance losses, were to be subjected to lie-detector tests. However, this degrading behaviour passes with only sporadic criticism when used against welfare claimants.

Conclusion

The war against welfare abuse is a particularly cynical and cruel one. In the first place, by grossly exaggerating the extent of fraud and abuse that occurs, politicians help build up a climate of opinion which enables cut-backs to be made and which also tolerates abusive practices towards those receiving social security benefits. After all, if social security recipients are committing fraud and abuse on a massive scale, it is difficult to feel compassion for them. Second, the effect of allegations of widespread fraud may well serve to discourage claimants from claiming benefits since they do not wish to see themselves as belonging to a group which has a reputation for committing fraud and scrounging. Third, complaints about welfare abuse serve to conceal vast areas of welfare law and administration from critical scrutiny since these areas are never mentioned by those who allege rampant welfare abuse.

There can be no winners in this war. People who are abused are likely to lose respect for themselves, and for the society in which they live. The violence that is done to the social fabric by those who have been abused exceeds the loss of a few million dollars taken from the state. In the end, the cessation of the war is not only an ethical imperative; it is also practical politics.

335. See Kuyek, Noonan and Mantha, supra note 198.
336. Id., p. 110, n. 20.
337. Id., p. 119.
339. Id.
340. Id.
341. Id.
342. NDP M.L.A.'s Rosemary Brown and Gary Lauk expressed criticism of the practice as did Mr. Kit Rigg, President of the B.C. Civil Liberties Association; see The Vancouver Sun, May 29, 1980.
343. The costs of this war include for those who are disabled and unemployed, a higher rate of mental illness and suicide, a higher incidence of marital breakdown and worsening standards of physical health.