

The Human Rights of Older People in the United States and Canada

Tom Osborne and Dan Furlong*

December 2008

*Tom Osborne is a Senior Attorney who practices employment discrimination law at AARP Foundation Litigation in Washington, DC. Dan Furlong, a graduate of The George Washington University Law School, is a Law Clerk at AARP Foundation Litigation in Washington, DC and is preparing for the California Bar Examination.

1. Executive Summary

The rapidly aging populations of the United States and Canada will challenge the governments of both countries to insure that the human rights of older persons are adequately protected. Although both countries have laws that protect to some degree the human rights of older persons, the ailing world economy and the ongoing U.S. and Canadian recessions have undermined that legal framework to a degree unanticipated and unaddressed by those laws. The enactment of new federal laws addressing the gaps in protection revealed by the present economic downturn as well as other human rights abuses reinforced by a new UN directive defining the human rights of older persons and requiring States to enforce them and provide redress for their violation would materially assist older persons to age with dignity.

Methodology

Since there is no U.S. federal human rights commission or any other federal agency that systematically gathers, maintains, and analyzes statistics about human rights violations in the United States, conclusions regarding the scope and number of such violations, including patterns and trends must be inferred from information available from other sources. The United States Equal Employment Opportunity Commission (EEOC), for example, maintains enforcement statistics regarding work place discrimination based on age and other grounds prohibited by federal civil rights laws. Additionally, although the United States Commission on Civil Rights (USCCR) is broadly charged with investigating and reporting on denial of voting rights and equal protection of the law as well as discrimination arising from all the grounds prohibited by federal law (race, color, religion, sex, age, disability, and national origin), unlike the EEOC it has no advocacy or enforcement powers regarding discrimination complaints and does not collect and maintain statistical data regarding civil rights violations. Thus, since there is no centralized U.S. human rights database, the findings of this paper are based on information from the EEOC, research by advocacy organizations, such as AARP, that are concerned with the enforcement of older peoples' civil and human rights, such as AARP, and on-line queries. Canada does have a Human Rights Commission, but enforcement statistics are unavailable.

2. Key Findings

Although both the United States and Canada have federal and state or provincial laws conferring various rights on older persons in certain contexts, such as employment and custodial care, for example, and providing remedies for their violation, neither country has statutes that broadly address directly the human rights of older persons. Some of the laws that purport to protect the rights of older persons are not as comprehensive as they could be while others, even when they are vigorously enforced, do not provide remedies adequate to redress the injury and deter future violations. The current economic crisis has exposed gaps in the "safety net" for older persons that will need to be addressed by new laws and, perhaps, a new UN directive on the human rights of older persons that signatory nations will enforce.

3. Introduction and Overview

The population of the United States, like that of nearly every other country in the world, is aging rapidly. The 2000 census found that more than 35 million people in the U.S., approximately 12.4% of the total population, were over 65 years old.¹

Between 1981 and 2002, it is estimated that the U.S. population increased by 59 million, a 26% increase, while during that same period the number of people age 65 and older increased by 9.4 million, a 36% increase.² The senior population will begin to increase even more rapidly when the “Baby Boom” generation – people born between 1946 and 1964 – begins to turn 65 in 2011.³ In 2030, when all of the baby boomers will be 65 and older, nearly one in five U.S. residents is expected to be in that age group,⁴ which is projected to increase to 88.5 million in 2050, more than doubling the number in 2008 (38.7 million).⁵ At the same time, the percentage of the population in the “working ages” of 18 to 64 is projected to decline from 63 percent in 2008 to 57 percent in 2050.⁶ Such a dramatic demographic shift toward an increasingly older population will severely test the ability of the United States to provide the resources necessary to satisfy the basic human rights of its people – especially older persons - as they age.

As is the case in the United States, an increasing portion of Canada’s population is growing older. The 2006 Canadian census showed there to be 4,335,255 adults over the age of 65 in Canada.⁷ This number accounts for a record high 13.7 percent of the country’s population,⁸ up from 13.0 percent in 2001.⁹ Two major forces drive this demographic shift: an increase in life-expectancy and a decrease in fertility rate. In the late 1970’s Canada was barely sustaining its population level with a fertility rate of about 2.1 children per woman, now that rate has fallen to approximately 1.5 children per woman.¹⁰ Additionally, Canadians live longer than almost any other population in the world, with a life expectancy of 82.5 years for women and 77.7 years for men.¹¹

Senior citizens will outnumber children in approximately a decade as the trend of a Canada’s growing elderly population continues.¹² It is estimated that by 2031, the number of people aged 65 and over will range between 8.9 million and 9.4 million.¹³ A rapid increase in the ageing population is predicted to begin in 2011, the year the first baby boomers reach 65.¹⁴ This trend is projected to continue until 2031, when seniors are estimated to account for between 23% and 25% of the total population.¹⁵

The challenges this demographic shift poses to Canada mirror those in the United States. Ageism, poor treatment, neglect, discrimination in society and employment, as well as financial and physical abuse already plague Canada’s elderly. If action is not taken, the impact of these problems will increase along with Canada’s growing senior population.

None of the several human rights conventions, including the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Racial Discrimination, and the Convention on the Elimination of All Forms of Discrimination Against Women, all of which the United States has signed, refers to the rights of older people. While the U.S. is a signatory to the 1948 American Declaration of the Rights and Duties of Man and has signed, but not ratified the 1969 American Convention on Human Rights,¹⁶ it has not ratified any of the other regional human rights treaties of the Organization of American States, which include:

- Protocol to the American Convention on Human Rights to Abolish the Death Penalty (1990)
- Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights
- Inter-American Convention to Prevent and Punish Torture (1985)
- Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (1994)
- Inter-American Convention on Forced Disappearance of Persons (1994)

- Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities

Like the United States, Canada has ratified neither the 1969 American Convention on Human Rights nor any of the OAS treaties listed above.¹⁷ Further, of the eight arctic States, only the United States and Canada voted against the UN Declaration on the Rights of Indigenous Peoples, which was, nevertheless, passed overwhelmingly.¹⁸ The two countries along with New Zealand continue to oppose its implementation.¹⁹

Additionally, of all the U.S. federal civil rights laws, the only one that expressly protects the rights of older persons is the Age Discrimination in Employment Act;²⁰ however, as its title implies, its coverage is limited to the employment relationship. Further, although the United States long ago established a Civil Rights Commission, it has neither a national human rights law nor a federal human rights commission. On the other hand, many of the individual states and the District of Columbia have enacted a broadly applicable human rights law and established a human rights commission with responsibility for monitoring enforcement of the law. For example, the District of Columbia Human Rights Act, in addition to establishing the DC Human Rights Commission, provides:

Every individual shall have an equal opportunity to participate fully in the economic, cultural and intellectual life of the District and to have an equal opportunity to participate in all aspects of life, including, but not limited to, in employment, in places of public accommodation, resort or amusement, in educational institutions, in public service, and in housing and commercial space accommodations.²¹

Unlike the United States, Canada *does* have a federal statute, the Canadian Human Rights Act²² that prohibits discrimination on a number of grounds, including age, and that applies broadly to employment as well as to the provision of goods, services, and the provision of facilities or accommodations available to the public.²³ Additionally, the Canadian Charter of Rights and Freedoms²⁴ defines and guarantees many human rights and Canadian law consistently provides more extensive statutory protections for employees than does U.S. law.²⁵

Against this background this paper will focus on violations of the economic and social rights of older people in the United States and Canada that currently present the most serious threats to the goal of aging with dignity and freedom. Those threats include elder abuse in all its forms and age discrimination, especially in employment, which, of course, has implications for retirement security, including adequacy of Social Security, pensions, and healthcare, and adequate housing. The paper will focus primarily on the situation in the United States with which the authors are most familiar and will include information about Canada where it is available.

4. Detailed Analysis

Ageism is a broad term used to describe the general attitudes held by many in society that manifest in stereotyping and prejudice against individuals or groups due to their age. The term “ageism” was coined in 1969 by Robert N. Butler, the former director of the National Institute on Aging in the United States.²⁶ According to Butler, Ageism is composed of three distinct, but interconnected elements: (1) prejudicial attitudes toward older persons, old age and the aging process, which includes attitudes toward older persons themselves; (2) discriminatory practices against older people; and (3) institutional practices and policies that perpetuate stereotypes about

older adults, reduce their opportunity for life satisfaction, and undermine their personal dignity.²⁷

Like racism, ageism is a product of ignorance. Misperceptions regarding the ability, motivation, and cognitive state of older persons abound among the younger population.²⁸ Ignorance and stereotyping are at the root of many of the problems facing the older population. Both elder abuse and age discrimination, two significant categories of human rights violations suffered by U.S. and Canadian seniors, stem from misperception.

4.1 Elder Abuse in the United States

Elder abuse is the infliction of physical, emotional, or psychological harm on an older adult. Elder abuse also can take the form of financial exploitation or intentional or unintentional neglect of an older adult by the caregiver or self-neglect. The American Psychological Association estimates that every year 2.1 million older Americans are victims of physical, psychological, or other forms of abuse and neglect.²⁹ Experts estimate, however, that for every reported case of elder abuse or neglect there may be as many as five cases that are not reported.³⁰ Although most people associate elder abuse with older people living in nursing homes or with older relatives living alone who have few visitors, in fact most elder abuse takes place at home, since the vast majority of older people live with their spouses, adult children, siblings, or other relatives in non-institutional settings.³¹ Only about four percent of older adults live in nursing homes and the vast majority of nursing home residents have their needs met without experiencing abuse or neglect.³² Thus, when elder abuse occurs, family members or adult caregivers are usually the abusers.³³ Nevertheless, nursing home abuse and neglect is a serious problem in the U.S. Elderly residents, who make up over half of the nursing home resident population of approximately 1.5 million people in 17,000 nursing homes throughout the U.S.,³⁴ and who tend to be physically weak and emotionally vulnerable – particularly those who are very frail and unable to articulate that they are being abused - are especially susceptible to the various forms of abuse and neglect.

In response to alarming numbers of reports of nursing home abuse and neglect in the 1980s, Congress passed the Nursing Home Reform Act of 1987, which requires nursing homes that receive federal funds to promote and protect the rights of each resident and places a strong emphasis on individual dignity and self-determination. The NHRA prescribes standards for the care rendered to residents and also sets forth a “bill of rights” for nursing home residents. Among those rights are the right to be fully informed, the right to participate in their own care, and the right to privacy and confidentiality.³⁵

Although there is no federal law that specifically addresses elder abuse, each state has adopted adult protective services legislation whose primary purpose is to provide emergency services to adults who are abused, neglected, exploited, or otherwise mistreated by their families or caretakers. The protections offered by these statutes vary widely from state to state. Several different types of statutes may authorize emergency intervention to prevent abuse. Some authorize emergency detention of the alleged abuser, injunctions, guardianships or other arrangements as well as intervention for medical treatment. State domestic violence statutes that provide for civil protective orders may be applicable in certain abuse situations. Most adult protective services statutes generally authorize long-term services, ranging from social casework and referrals, to the imposition of guardianship or conservatorship proceedings and residential placements. State statutes that make abuse, neglect, or exploitation of elderly persons a crime are also considered adult protective services legislation. The major shortcoming of adult protective services statutes, in addition to

gaps in substantive protections inadvertently created by legislative oversight during the amendment process and/or restrictive judicial interpretations, is that they do not normally provide for a private right of action to enforce the statutory provisions, *i.e.*, the victim does not have the ability to sue the abuser for money damages or other relief.³⁶

For example, Minnesota prosecutors recently filed criminal complaints against six young caregivers at a Minnesota nursing home charging them with abusing and sexually humiliating elderly residents suffering from Alzheimer's disease and dementia by spitting upon, spanking, improperly touching, and tormenting them.³⁷ If they are found guilty, the teenagers could be sentenced to at least a year in jail.³⁸ In another recent incident, it was reported that police in Michigan who responded to a 911 (emergency) telephone call came to a home and found an 85-year-old woman living in disgustingly filthy conditions along with her 50-year-old son who was her live-in caretaker.³⁹ The house has been condemned, the woman is in bad shape but expected to survive, and her son has been arrested and charged with elder abuse.⁴⁰ In another incident, a 52-year-old Bradenton, Florida woman employed as a resident attendant at an assisted living facility was arrested on December 10, 2008 for allegedly neglecting a disabled adult. Assigned to work the night shift on July 21, 2008, the woman allegedly left the facility and did not return. In her absence, a 47-year-old disabled woman suffered a heat stroke and seizures. The disabled woman was hospitalized for a short time and has returned to the assisted living facility. The resident attendant, who was fired the day she left the facility, faces up to five years in prison if convicted.⁴¹ While incidents such as these are thankfully rare, they serve to remind us of the need for vigilance in the area of the human rights of older persons, especially older women who make up the bulk of the nursing home population in the United States.⁴²

In addition to the problem of abuse and neglect by caretakers, many older persons in both the United States and Canada suffer from self-neglect, which presents a unique situation as a human rights violation. In self-neglect cases there is no perpetrator, only a victim. Solutions to the problem of self-neglect can be difficult to achieve because the victim of the abuse is the same person causing it. Furthermore, there may not be a way to remove the individual from the environment where they have created a harmful situation. To combat the problem, a balance must be struck where the older adult is given the freedom to be as independent as possible, while still ensuring he or she lives in a safe and healthy environment.

The term "self-neglect" is somewhat of a misnomer because it implies that the acts of degradation and destruction are willful. This is hardly ever the case. The definition adopted by the U.S. National Association of Adult Protective Service Administrators reflects the passive nature of self-neglect:

Self neglect is the result of an adult's inability, due to physical and/or mental impairments or diminished capacity, to perform essential self-care tasks including: providing essential food, clothing, shelter, and medical care; obtaining goods and services necessary to maintain physical health, mental health, emotional well-being, and general safety; and/or managing financial affairs.⁴³

The consequences of self-neglect are no less dangerous for the older person than those suffered due to maltreatment by others. In both cases the results may be exceptionally harmful or even deadly; however, the two types of neglect represent clearly different categories.⁴⁴ Consequently, the causes and potential solutions to the problem of self-neglect differ in many ways from those of maltreatment by others.

Older persons are more likely to be victims of self-neglect if one or more of the following are present: lack of social support, lack of access to assistive services, history of mental illness, history of drug and/or alcohol abuse, advanced age (over 85), and living alone or isolated from others.⁴⁵ In extreme cases, self-neglect can be explained by the individual's affliction with Diogenes syndrome. This behavioral disorder is characterized by extreme self-neglect, domestic squalor, and a tendency to hoard excessively (sylllogomania).⁴⁶

Addressing the problem of self-neglect requires striking a balance. The elderly person must be given the freedom to be as independent as possible while still ensuring he or she lives in a safe and healthy environment. This can be difficult, however, because of the U.S. and Canadian constitutions. For example, the *Canadian Charter of Rights and Freedoms* grants all persons the right to life, liberty and the security of the person.⁴⁷ The U.S. Bill of Rights provides similar protections. Additionally, in Canada provincial/territorial laws often recognize certain rights and specify a course of action in cases of self neglect.⁴⁸ Thus, help can be offered, but it may be difficult to force on the individual unless the he or she is found to be incompetent⁴⁹ or poses a risk to others.⁵⁰ Declaring the individual incompetent is usually a last-resort, because it dramatically changes their rights and hinders their autonomy.

4.2 Elder Abuse in Canada

Elder abuse is the most distressing violation of human rights experienced by the senior population in Canada. In some cases the type of abuse, such as the infliction of physical harm or stealing from the victim, falls into a category where the abuser may be prosecuted under the Criminal Code of Canada⁵¹ or is prohibited by National or Provincial human rights law or elderly protection law; however, legal recourse may not be available for other types of abuse.

In Canada, just as in the United States and other countries, older persons suffer physical abuse most often at the hands of those trusted to care for them. In the context of institutions, the most common types of abuse are physical, psychological, and sexual. Physical abuse, the infliction of physical discomfort, pain or injury,⁵² is administered through such behaviors such as slapping, hitting, punching, beating, burning, sexual assault and rough handling.⁵³ Psychological abuse is defined as behavior which diminishes the identity, dignity and self-worth of the elderly person.⁵⁴ This form of abuse can be inflicted by name calling, yelling, insulting, threatening, sarcastically imitating, swearing, ignoring, isolating, and excluding the senior from important events and activities.⁵⁵ Chronic verbal aggression, one form of psychological abuse, is ranked as the second most pervasive form of abuse in Canada.⁵⁶ This type of abuse is usually inflicted by the victim's spouse.⁵⁷ Financial abuse involves the misuse of the senior's money or property and is reportedly the most prevalent form of abuse in Canada.⁵⁸ Most victims of financial abuse are widowed and living alone; the abuse is usually perpetrated by a distant relative or non-relative rather than a close family member.⁵⁹

There are four main categories of laws which are used in Canada to protect older adults from abuse and neglect: family violence laws, criminal laws, adult protection laws, and adult guardianship laws. Family violence or domestic violence laws are a novel approach to solving the problem in Canada. These laws are generally responsive to abuse that has already been alleged to have occurred. The remedy is usually a protective order requiring the abuser to stay away from the victim.⁶⁰ So far, Nova Scotia, Prince Edward Island, Alberta, Saskatchewan, Manitoba, the Northwest Territories and the Yukon have passed such laws.⁶¹ The Criminal Code of Canada

can be used in cases involving physical or sexual assaults, intimidation, harassment, or crimes of property, fraud or theft by power of attorney.⁶² This avenue for enforcement has many drawbacks, including the senior's lack of willingness to report a family member or caregiver, and general unfamiliarity with the issue in the criminal justice system. Adult protection laws allow a specific provincial health or social service department to take responsibility to respond to abuse and neglect cases which are brought to its attention.⁶³ So far, Nova Scotia, New Brunswick, Prince Edward Island, Newfoundland, and British Columbia have some form of adult protection laws.⁶⁴ These laws may also provide for health care, financial management, and restitution for victims of abuse.

A Human Rights Directive made enforceable by a national implementing law could have a salutary effect by providing uniform adult protective services standards as well as conferring upon the victim of abuse or neglect the power to seek relief directly from the abuser. Empowering the victim to sue the abuser directly rather than having to rely on the state to intervene and remedy the situation would also likely have the further salutary effect of deterring abuse and neglect on the part of caregivers who would face the prospect of having to pay substantial monetary damages for violating their care obligations.

4.3 Age Discrimination in the United States

Unfortunately, there is no general prohibition on age discrimination in either the United States, Canada, or Europe. While Council Directive 2000/43/EC, the EU-wide prohibition on discrimination based on racial or ethnic origin, applies to employment as well as to social protection, social advantages, education, and access to goods and services, including housing,⁶⁵ Council Directive 2000/78/EC (known as the "Framework Directive"), the EU-wide prohibition on age discrimination (as well as discrimination based on religion or belief, sexual orientation, and disability), is limited only to "employment and occupation."⁶⁶ Unlike the EU, the United States has no law generally prohibiting discrimination on race or ethnicity - or any other basis; however, the United States does have a law, the Age Discrimination in Employment Act of 1967, which prohibits job-related age discrimination against people who are at least 40 years of age.⁶⁷ And, in contrast with the human rights situation in the United States where there is no national human rights law and, consequently, no national human rights enforcement agency, there is a federal agency, the United States Equal Employment Opportunity Commission (EEOC), which is charged with enforcing the ADEA and the other federal anti-discrimination laws relating to employment.

As part of its enforcement responsibilities, the EEOC maintains a database that shows the number of charges – administrative claims that are a prerequisite to filing a lawsuit alleging employment discrimination – filed with the agency each year by workers who believe their employment civil rights have been violated. In addition to showing the absolute numbers of charges, these statistics are a rough indicator of the overall trends in the prevalence of discriminatory practices. The latest EEOC age discrimination statistics reflect that in fiscal year 2007 (October 1, 2007 – September 30, 2008), 19,103 charges were filed alleging violations of the ADEA, up from 16,548 in FY 2006 and 16,585 in FY 2005.⁶⁸ The figure for FY 2007 is an increase of more than 15% over each of the two previous fiscal years. Over the past ten years, the EEOC statistics show that from a low of 14,141 charges filed in FY 1999, the numbers gradually increased to a peak of 19,921 charges filed in FY 2002 and then gradually dropped until the dramatic jump FY 2007.⁶⁹ The trends in the number of age discrimination charges filed generally tracks the ups and downs of the U.S. economy, increasing in periods of slow or negative job growth and decreasing in economic expansions.

To put these numbers in perspective, out of a total U.S. population of 232 million people age 16 and older in 2007 slightly more than 153 million were employed. The number of employed people included about 80.5 million people age 40 and older.⁷⁰ Out of a population of slightly over 36 million people age 65 and older, over 5.8 million were employed in 2007. The number of employed people in 2008 is estimated to have increased to slightly over 154 million people,⁷¹ with a concomitant increase in the number of older workers – at least until the recent large jump in the numbers of people laid off due to the deteriorating U.S. – and world - economy.

In the Older Workers' Benefit Protection Act of 1990,⁷² Congress decreed that the ADEA applies not only to hiring, firing, promotions, wages, *etc.*, but also to so-called "fringe benefits," such as employer-provided healthcare benefits and pensions, overturning a Supreme Court decision holding that the Act did not cover benefits discrimination.⁷³ Nevertheless, acting on complaints from employers about the high cost of providing the same level of healthcare benefits to older as well as younger retirees, the EEOC takes the position that the ADEA permits employers to provide a reduced level of healthcare benefits or, indeed, to even terminate such benefits for retirees who are age 65 and older.⁷⁴ Of course, since the U.S. does not have a national healthcare program, older retirees whose benefits are reduced or cancelled pursuant to this policy face substantially increased costs for substitute healthcare benefits *if* – and it is a big if - they can even find a private insurer willing to take the risk of providing such benefits.⁷⁵

Even though the United States has had a federal law against work place age discrimination for over 40 years that was enacted with the specific aim of eliminating on-the-job age bias, the number of charges filed with the EEOC each year indicates that although age discrimination may not be as blatant as it once was, the ADEA has not resulted in a discrimination-free work place. One reason is that age discrimination cases are very hard to prove, in part because employers, consciously or unconsciously, rely on ageist stereotypes⁷⁶ and judges and juries accept that it is simply natural that younger workers inevitably replace older workers and so are skeptical of age discrimination claims. So while employers can and do "draw on ageist stereotypes and act in discriminatory ways to justify what they claim to be cost savings for the business,"⁷⁷ many courts have routinely rejected age discrimination claims on the basis of such economic arguments.

Additionally, litigation in the United States is so expensive that for the majority of workers and retirees, an individual lawsuit is simply unaffordable and so it is probable that many meritorious claims never see the light of day. Moreover, while a class action is sometimes a viable and affordable alternative for the worker or retiree, particularly in mass termination (layoff) cases, the class mechanism may be unsuitable for other kinds of claims. The bottom line is that while the ADEA has been effective at eliminating the most blatant ageist employment practices in the U.S., such as mandatory age-based retirement, after over 40 years of ADEA enforcement actions, the more subtle forms of age discrimination continue to plague America's older workers. Therefore, a new UN directive declaring that as a matter of international law among the human rights of older persons is the right to freedom from age discrimination – in employment as well as in other aspects of modern life – is likely to be only marginally successful until older persons can be effectively freed from ageist stereotypes.

Another law that benefits older persons in the United States is the Americans with Disabilities Act (ADA).⁷⁸ The Census Bureau reports that in 2008 there are 41.3 million Americans with some type of disability. Not surprisingly, since we know that the incidence of disability increases with age,⁷⁹ the same 2008 Census Bureau data

show that 41 percent of adults age 65 and older have disabilities.⁸⁰ The ADA's coverage is much broader than that of the ADEA because the ADA applies not only to employment (Title I), but also to state and local government programs and activities (Title II), and places of public accommodation – restaurants, hotels, public transportation, *etc.* – and services operated by private entities (Title III), although it does not apply across the board to such issues as housing or healthcare. The ADA was amended recently to overturn several court decisions that had narrowed its scope and application.

Additionally, the federal Fair Housing Act,⁸¹ which applies to almost every “dwelling,” including the housing of older persons, such as assisted living facilities and nursing homes, and which prohibits discrimination on the basis of race, color, national origin, religion, sex, and handicap, ironically does not specifically protect older persons because it does *not* bar age discrimination.⁸² Nevertheless, the FHA does provide important protections for the rights of older persons, including, under the “housing for older persons” exemption,⁸³ the right to maintain minimum age restrictions in a community designed for older persons. Thus, the FHA allows senior citizens to live in communities of fellow seniors that exclude younger adults as well as children.

Finally, the Employee Retirement Income Security Act of 1974 (ERISA),⁸⁴ was enacted to prevent abuses in private pensions as well as welfare benefit plans, such as employer-provided employee and retiree healthcare benefits, to insure that employees have access to detailed information about their plans, and to ensure the stability of the plans so that they are able to deliver the benefits promised to plan participants. ERISA does not require employers to provide an employee benefit plan or any particular level of benefits; however, when employer establishes such plans, the plans must comply with ERISA's provisions.

In addition to setting forth rules to insure the proper management of pension and welfare benefit plans, ERISA also established the Pension Benefit Guaranty Corporation, a federal corporation that currently protects the pensions, but not the welfare benefits, of almost 44 million workers and retirees.⁸⁵ The PBGC is not funded by general tax revenues. Instead it is financed by insurance premiums from employers that sponsor insured pension plans. It also earns money from investments and receives funds from pension plans that it takes over.⁸⁶ So while a retiree's pension is protected even if his former employer terminates its pension plan, there is no such guarantee for employer-provided retiree health benefits if the employer cancels the plan or goes out of business.

On November 17, 2008, the PBGC released the following statement:

Although the current turbulence in our economy will mean a challenging environment in 2009, the PBGC has the resources to meet its commitments to America's retirees for many years to come.⁸⁷

This statement should perhaps be taken with a grain of salt given that according to an estimate by Standard and Poors, the defined benefit pension plans – the type of pension plan insured by the PBGC – of the companies in the S&P 500 are underfunded by a total in excess of \$200 billion and could surpass their 2002 record underfunding of over \$219 billion.⁸⁸ Another bailout may be on the horizon.

These and other federal laws provide some protections for the rights and entitlements of older persons, but there are gaps, such as ERISA's protection of pensions, but not welfare benefits, as well as others that obviously need to be addressed, either by federal law or perhaps by a comprehensive human rights declaration that the U.S. agrees to enforce.

4.4 Age Discrimination in Canada

Like the United States, Canadian law at both the federal and state (provincial) levels provides protection against age discrimination in employment; however, while in the United States the protections against age discrimination are limited to employment, the Canadian laws extend such protection to the areas of services, goods, facilities, housing accommodation, contracts, and membership in trade and vocational associations.⁸⁹ The Canadian Charter of Rights and Freedoms⁹⁰ is part of the constitution of Canada, like the U.S. Bill of Rights, but does not apply to private sector employers.⁹¹ The Charter provides at Article 15 Section (1):

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

The Canadian Human Rights Act⁹² goes even farther by providing that [A]ll individuals should have an opportunity equal with other individuals ... without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted.⁹³

Even though there are no age limits in these laws, several of the provinces with the blessing of the Canadian courts have until recently permitted mandatory age-based retirement, typically at age 65.⁹⁴ As of January 1, 2008, however, Nova Scotia is the only province that still allows the practice, which will end throughout Canada (subject to certain narrow exceptions) when new Nova Scotia legislation becomes effective in July 2009.⁹⁵ Even though mandatory retirement is being phased out in Canada, only six percent of workers continue to work full-time after age 65 and the average retirement age in Canada is 62.⁹⁶

Canada has chosen to enforce the statutory protections afforded employees primarily through efficient (and generally free) administrative bodies⁹⁷ rather than via the cumbersome and expensive litigation process, which is the primary enforcement vehicle in the United States. In Canada, the statutory complaint procedure is generally an employee's exclusive remedy; discrimination does not give rise to a private cause of action.⁹⁸

4.5 The Affordability of Retirement – Social Security, Pensions, and Healthcare.

In light of recent economic developments and the continuing unresolved crisis in the financial and credit markets, many Americans (43% according to a recent survey) believe that they will have to work longer than they anticipated a year ago.⁹⁹ When - or more to the point these days - whether a person in the United States can retire and look forward to a secure future depends directly on employment because the retiree's pension, monthly Social Security benefit, and healthcare benefits – at least until the retiree qualifies for Medicare - all are related to earnings while employed. The rate of employment of older workers aged 55 and older is influenced by general economic conditions, eligibility for Social Security benefits, the availability of health insurance, and the prevalence and design of employer-sponsored pension plans.¹⁰⁰

As the baby boomers approach retirement, these factors will affect whether they can afford to retire.

The Canadian statistics reflect a similar pattern. In 2006, over two million people aged 55 to 64, over 12 percent of the total Canadian labor force, were employed or looking for work, up from 10 percent in 1976 and the overall labor force participation rate for this group increased from 53 percent to 59 percent.¹⁰¹ Given the recent economic downturn, these numbers are likely to increase for the same reason they are likely to increase in the United States – people are worried about whether they can afford to retire.

Women make less than men during their working lives, and, therefore, have much less than men when they are too old to work.¹⁰² Additionally, in the past women tended temporarily to leave the work force to raise children, to undertake other care giving duties, or for other reasons and also tended to leave the work force permanently sooner than men, thus reducing their earnings and, therefore, the pension amount, which is directly related to earnings. The experience of Canadian women is similar and as in the United States, is worsened by the fact that women's life expectancy is several years longer than that of men.¹⁰³

In 2006 in the United States, for example, 44.6 percent of men age 65 and older received annuity and/or pension income with a mean amount of \$17,200 per year.¹⁰⁴ By contrast, only 28.4 percent of women age 65 and older received annuity and/or pension income in 2006, with mean pension income of \$11,142 annually.¹⁰⁵ Therefore, a woman age 65 or older was only about two-thirds as likely (63.7%) to receive an annuity and/or pension payment in 2006, compared to her male counterpart.¹⁰⁶ If she did receive one, her mean benefit was likely to be about 65% of that received by a man in the same age group.

Older women living alone are the poorest adult group in the nation.¹⁰⁷ Widowed and divorced homemakers are particularly vulnerable to unfair pension policies, since without a pension to supplement their Social Security payments, they are likely to retire in poverty.¹⁰⁸ Pension policies, practices, and laws that do not recognize and compensate for the differences between the earning potential of men and women perpetuate not only discrimination, but the reality of poverty for older women for generations to come.¹⁰⁹

In an October 2008 poll of 2,000 adults conducted by the Consumer Reports National Research Center, 88 percent of the respondents stated that their top concern was the financial health of the Social Security program.¹¹⁰ While Social Security is safe for the present, unless Congress takes action, such as raising the eligibility age, cutting benefits for future retirees, raising taxes on high wage workers, or a combination of all three, by 2041 payroll taxes will cover only 78 percent of the benefits paid.¹¹¹

Also among top ten concerns named in the Consumer Reports survey were the protection of pensions and other retirement accounts when companies or financial institutions go under and affordable universal health care.¹¹² While the Pension Benefit Guaranty Corporation protects some private pensions, that protection is limited in amount¹¹³ and may not in many cases fully replace the monthly benefit payment specified by the now-terminated plan. Additionally, some companies have reduced or suspended their contributions to 401(k) plans, as General Motors did for its salaried workers in October.¹¹⁴ Many state and local government entities that provide employee pensions are also struggling. The nation's largest provider of public pensions, the California Public Employees' Retirement System, has lost \$63 billion, or 25 percent of its asset value, since the beginning of 2008.¹¹⁵ If such losses can't be recovered, retirees already strapped by higher healthcare costs and severely

reduced personal assets can look forward to paying higher taxes along with those who are still working to make up the shortfall.

Turmoil in the stock markets has wiped out over \$2 trillion of Americans' retirement savings in the past fifteen months, while the value of pension funds and retirement accounts dropped roughly \$1 trillion, or almost 10 percent, in the year ending June 30.¹¹⁶ Additionally, although the poverty rate for people 65 and older in the United States remained statistically unchanged from 2006 at 9.7 percent, the number in poverty increased to 3.6 million in 2007 from 3.4 million in 2006.¹¹⁷ Unless the anticipated economic recovery is much more rapid than expected, these numbers could increase substantially in the coming months.

The current global financial crisis and the ongoing U.S. recession¹¹⁸ with its concomitant job losses, which have totaled 1.9 million so far this year,¹¹⁹ have jeopardized the affordability of retirement for most Americans. Older persons on fixed incomes and people nearing retirement age are affected the most by these circumstances, since they have little or no chance recover their financial losses. The Canadian economy, which government officials a few months ago were predicting was well-positioned to weather the worldwide economic meltdown, has finally suffered a severe downturn that will directly affect the well-being of all Canadians, including the older population.¹²⁰ Thus, the ability of the United States and Canada to ensure the rights of older persons to appropriate healthcare, housing, and sufficient income to maintain an adequate standard of living, *etc.*, is in considerable doubt.

5. Conclusion

The laws discussed in this article, many of which were designed and enacted to protect against the very conditions in which older persons now find themselves, have proven woefully ineffective. New laws and regulations in both the United States and Canada likely will be one result of the current crisis. Some of those new laws may even be directed specifically at protecting the human rights of older persons. A directive defining the human rights of older persons and specifying the measures required of States to secure and ensure the enforceability of those rights could provide critical direction to the efforts of lawmakers in the United States, Canada, and around the world.

References

- ¹ Julie Meyer, U.S. DEP'T OF COMMERCE, AGE: 2000, at 1 (Oct. 2000), *available at* http://www.census.gov/prod/2001_pubs/c2kbr01-12.pdf, cited in Robert G. Schwemm and Michael Allen, *For the Rest of Their Lives: Seniors and the Fair Housing Act*, 90 Iowa Law Review (2004) at 121.
- ² U.S. Population Structure, (Draft) The Teaching Modules on Aging, *available at* <http://asaging.org/NCHS/module> 4.pdf.
- ³ Lisa Hetzel & Annetta Smith, U.S. DEP'T OF COMMERCE, THE 65 YEARS AND OLDER POPULATION 3 (Oct. 2001) *available at* <http://www.census.gov/prod/1/pop/p23-190/p23-190.pdf>, cited in Schwemm and Allen at 126.
- ⁴ *An Older And More Diverse Nation By Midcentury*, U.S. Census Bureau press release August 14, 2008 *available at* <http://www.census.gov/Press-Release/www/releases/archives/population/012496.html>.
- ⁵ *Id.*
- ⁶ *Id.*
- ⁷ *2006 Census: Age and Sex*, *available at* <http://www.statcan.gc.ca/daily-quotidien/070717/dq070717a-eng.htm> (July 17, 2007)
- ⁸ *Id.*
- ⁹ *Id.*
- ¹⁰ *Id.*
- ¹¹ *Id.*
- ¹² *Population Projections*, *available at* <http://www.statcan.gc.ca/daily-quotidien/051215/dq051215b-eng.htm> (December, 15, 2005)
- ¹³ *Id.*
- ¹⁴ *Id.*
- ¹⁵ *Id.*
- ¹⁶ Human Rights in the United States, *available at* http://en.wikipedia.org/wiki/Human_rights_in_the_United_States#The_U.S._and_the_American_human_rights_system.
- ¹⁷ Department of International Law, Organization of American States, Washington, DC, Multilateral Treaties, *available at* <http://www.oas.org/juridico/English/sigs/a-53.html>; <http://www.oas.org/juridico/English/sigs/a-52.html>; <http://www.oas.org/juridico/English/sigs/a-51.html>; <http://www.oas.org/juridico/english/sigs/a-61.html>; <http://www.oas.org/juridico/English/sigs/a-60.html>.
- ¹⁸ Arctic Peoples, Indigenous Peoples at the Arctic Council, *available at* <http://www.arcticpeoples.org/category/themes/human-rights/>.
- ¹⁹ Call to Support Declaration on Indigenous Rights, Catholic Communications, Press Release Monday 8 December 2008, *available at* <http://www.scoop.co.nz/stories/PO0812/S00101.htm>.
- ²⁰ 29 U.S.C. § 621 *et seq.*
- ²¹ DC ST § 2-1402.01
- ²² *Canadian Human Rights Act* 1976-77, c. 33, s. 1.
- ²³ *Id.*, Article 5, 1976-77, c. 33, s. 5.
- ²⁴ Enacted as Schedule B to the *Canada Act 1982* (U.K.) 1982, c. 11, which came into force on April 17, 1982.

-
- ²⁵ Society for Human Resource Management, International Focus, Canada's Labor and Employment Laws by Douglas G. Gilbert and Brian Burkett, June 2001, *available at* <http://www.shrm.org/nahrma/canada.asp>.
- ²⁶ Jody Wilkinson and Kenneth Ferraro, *Thirty years of Ageism Research*. In Todd Nelson (ed). *Ageism: Stereotyping and Prejudice against Older Persons*. MIT (2002) at 339
- ²⁷ *Id.*
- ²⁸ Michael Stones and Lee Stones, *Canadian Journal of Public Health; Editorial Ageism: The Quiet Epidemic*, Dept. of Health Studies and Gerontology, University of Waterloo, (1998) at 5
- ²⁹ *Elder Abuse And Neglect: In Search Of Solutions*, American Psychological Association Office On Aging, *available at* <http://www.apa.org/pi/aging/eldabuse/html> at 1.
- ³⁰ *Id.*
- ³¹ *Id.*
- ³² *Id.*
- ³³ *Id.*
- ³⁴ Florida Nursing Home Resident Admitted to Deland Hospital Had Maggots in His Eye and Bedsores, *available at* http://www.floridainjuryattorneyblog.com/florida_nursing_home_patient_s.html, posted on November 19, 2007.
- ³⁵ Nursing Home Abuse – Laws Protecting Nursing Home Residents *available at* http://www.elderly-abuse.com/nursing_home_laws/.
- ³⁶ A highly informative, but somewhat dated discussion of adult protective services can be found in *Decision-Making, Incapacity, and the Elderly – A Protective Services Practice Manual, Chapter Seven*, Legal Counsel for the Elderly (1987), sponsored by The American Association of Retired Persons (now known as AARP).
- ³⁷ Teens Charged In Nursing Home Abuse, *available at* <http://www.thesmokinggun.com/archive/years/2008/1202081minn1.html>.
- ³⁸ *Id.*
- ³⁹ Police say case of elder abuse one of the worst they have ever seen, *available at* http://www.wvmt.com/articles/_1356197___article.html/_html
- ⁴⁰ *Id.*
- ⁴¹ Bradenton Herald, Local caregiver arrested, *available at* <http://enews/viewarticle.asp?folderID=55&AN=BRDH000020081211e4ca00001>.
- ⁴² Robert G. Schwemm and Michael Allen, *For the Rest of Their Lives: Seniors and the Fair Housing Act*, 90 Iowa Law Review (2004), at 128, citing U.S. Census Bureau, U.S. Dep't of Commerce, *Aging in the United States: Past, Present, and Future* 3 (1997).
- ⁴³ John F. Longress, *Self Neglect Among the Elderly*, *Journal of elder Abuse and Neglect*, Vol7(1) (1995) at 71.
- ⁴⁴ 'The quantitative data suggest that cases of self-neglect are clearly distinguishable from cases involving maltreatment by others. Of the over 5000 referrals made during the three years studied, only 5.5% involved some overlap between self-neglect and maltreatment by others. The remainder were clearly one or the other. *Id.* at 75.
- ⁴⁵ *Id.* at 83.
- ⁴⁶ Amel Badr, Md, Asghar Hossain MD, Javed Iqbal, MD, *Diogenes Syndrome: When Self-Neglect is Nearly Life Threatening*

⁴⁷ Canada. *Canadian Charter of Rights and Freedoms* § 7, available at <http://laws.justice.gc.ca/en/charter/>

⁴⁸ Self-Neglect by Older Adults, NCFV, Public Health Agency of Canada, available at http://www.phac-aspc.gc.ca/ncfv-cnivf/familyviolence/html/age_snegl_e.html at 3

⁴⁹ Canada has no general test for competency; the definition varies across legislation, institutions, agencies, and provinces/territories. Competency can generally be defined as a person's ability to understand the situation he or she is in and the decisions that have to be made about the situation. .*Id.* at 3.

⁵⁰ An individual posing a risk to others may be subject to the *Criminal Code of Canada*. *Id.*

⁵¹ *Criminal Code of Canada*, available at <http://www.efc.ca/pages/law/cc/cc.html>.

⁵² Susan M. Swanson, *Abuse and Neglect of Older Adults*, available at: http://www.phac-aspc.gc.ca/ncfv-cnivf/familyviolence/age_e.html, at 1.

⁵³ *Id.*

⁵⁴ *Id.* at 2.

⁵⁵ *Id.*

⁵⁶ *Id.* at 2-3

⁵⁷ *Id.* at 3

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Canadian Laws on Abuse and Neglect, available at www.cnpea.ca/canadian_laws_on_abuse_and_negle.htm at 2-3.

⁶¹ *Id.*

⁶² *Id.* at 4

⁶³ *Id.* at 6

⁶⁴ *Id.*

⁶⁵ Council Directive 2000/43/EC of 29 June 2000, Chapter I, Article 3.

⁶⁶ Council Directive 2000/78/EC of 27 November 2000, Chapter 1, Article 1.

⁶⁷ 29 U.S.C. § 631.

⁶⁸ Age Discrimination in Employment Act (ADEA) Charges FY 1997 – FY 2007 available at <http://www.eeoc.gov/stats/adea.html>.

⁶⁹ *Id.*

⁷⁰ See U.S. Department of Labor, Bureau of Labor Statistics, Household Data Annual Averages 3. Employment status of the civilian noninstitutional population by age, sex, and race, available at <ftp://ftp.bls.gov/pub/special.requests/lf/aat3.txt>.

⁷¹ The Employment Situation October 2008, U.S. Department of Labor, Bureau of Labor Statistics News available at <http://www.bls.gov/news.release/pdf/empsit.pdf>.

⁷² Codified as part of the ADEA at 29 U.S.C. §§ 623 and 626.

⁷³ *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158 (1989).

⁷⁴ AARP's court challenge to this position was finally rejected after several years of litigation in *AARP v. EEOC*, 489 F.3d 558 (3d Cir. 2007), cert. denied 128 S.Ct. 1733 (2008).

⁷⁵ The United States is the only industrialized country that does not have a generally applicable government-sponsored national healthcare program. It does have Medicare, which provides certain medical benefits to its older population, but there are gaps in the coverage that the individual can choose to insure against if he/she can afford to do so.

⁷⁶ See, e.g., Roscigno, *et al.*, *Age Discrimination, Social Closure and Employment*, Social Forces, Vol. 86, No.1, September 2007 at 323 (“Ageist attitudes within society at large frequently permeate the walls of workplaces, and quite often in an explicit manner. This may be especially problematic for older employees because employers’ evaluations and decisions are subject to stereotypical filtering.”).

⁷⁷ *Id.* at 315.

⁷⁸ 42 U.S.C. §12101 *et seq.*

⁷⁹ See *Schwemm and Allen*, note 39 above, at 130.

⁸⁰ U.S. Census Bureau News May 27, 2008, *available at* [http://www.census.gov/Press-Release/www/releases/archives/cb\)8ff-11.pdf](http://www.census.gov/Press-Release/www/releases/archives/cb)8ff-11.pdf).

⁸¹ The federal Fair Housing Act (Title VIII of the Civil Rights Act of 1968). Pub. L. No. 90-284, 82 Stat. 73 (1968) (codified as amended at 42 U.S.C. §§ 3601-3619 (2000)).

⁸² See 42 U.S.C. §§3604-3606, 3617 (2000).

⁸³ 42 U.S.C. § 3607(b) (1) provides that the FHA’s prohibitions against familial status discrimination (*i.e.*, discrimination against households with children under the age of 18) do not apply to housing for older persons.

⁸⁴ 29 U.S.C. § 1001 *et seq.*

⁸⁵ Welcome to PBGC, *available at* www.pbgc.gov.

⁸⁶ Pension Benefit Guaranty Corporation, Mission Statement, *available at* www.pbgc.gov/about/about.html#1.

⁸⁷ PBGC Releases Annual Management Report for 2008, *available at* www.pbgc.gov/media/news-archive/news-releases/2008/pr09-05.html.

⁸⁸ In brief: Pension shortfall, *available at* <http://kansascity.com/business/moneywise/story/880373.html>.

⁸⁹ Learn more about CARP and the OHRC Age Discrimination Campaign, *available at* http://www.carp.ca/article_display.cfm?documentID=1249&CabinetID=256&LibraryID=70&cityID=0.

⁹⁰ See note 28, above.

⁹¹ Gilbert and Burkett, Note 29, above.

⁹² *Canadian Human Rights Act* 1976-77, c. 33, s. 1.

⁹³ R.S., 1985, c. H-6, s. 2; 1996, c. 14, s. 1; 1998, c. 9, s. 9.

⁹⁴ The Treatment of Age and Age Discrimination in Employment in the United States, Canada, and South Africa, [2004] *ElderLRev* 9, *available at* <http://www.austlii.edu.au/au/journals/ElderLRev/2004/9.html#Heading94>.

⁹⁵ CBC News In Depth: Retirement, Retiring mandatory retirement, Last Updated February 21, 2008 *available at* www.cbc.ca/news/background/retirement/mandatory_retirement.html.

⁹⁶ *Id.*

⁹⁷ Gilbert and Burkett, note 75 above.

⁹⁸ *Id.*

⁹⁹ Bank of America Survey Finds Despite Tightening Their Wallets, Americans Are Further from Achieving Their Retirement Goals Amidst Weakening Economy, *available at* <http://enews/viewarticle.ssp?folderID=21&AN=PRN0000020081204e4c4c400465>.

¹⁰⁰ Older Workers: Employment and Retirement Trends, September 15, 2008, opencrs Congressional Research Reports for the People, *available at* <http://opencrs.com/document/RL30629/2008-09-15%2000:00:00>.

¹⁰¹ Statistics Canada, Perspectives on Labor and Income, August 2007, Vol. 8, No. 8, at 5-6.

¹⁰² Lorraine A. Schmall, Women and Pension Reform: Economic Insecurity and Old Age, *The John Marshall Law Review*, Vol. 35, No. 4, pp. 673-708 (200).

¹⁰³ CBC News In Depth: Retirement, Retiring mandatory retirement, note 79 above.

¹⁰⁴ Employee Benefit News, Women receive smaller pension payments than men, *available at* <http://ebn.benefitnews.com/asset/article/557651/women-receive-smaller-pension-payments-than.html?pg>.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ Pension Rights Center, Pension Policy, Women's Pension Project *available at* <http://www.pensionrights.org/policy/women.html>.

¹⁰⁸ *Id.*

¹⁰⁹ See Schmall, note 71 above.

¹¹⁰ *A Rescue Plan for the Rest of Us*, Consumer Reports, January 2009 at 24.

¹¹¹ *Id.* at 25.

¹¹² *Id.* at 24.

¹¹³ For example, the maximum monthly guarantee for a person who retires in 2008 at age 65 is the lesser of the amount his now-terminated pension plan would have paid or \$4,312.50. See Pension Benefit Guarantee Corporation, Maximum Monthly Guarantee Tables, *available at* <http://www.pbgc.gov/workers-retirees/benefits-information/content/page789.html#2008>.

¹¹⁴ *A Rescue Plan for the Rest of Us*, Consumer Reports, January 2009 at 25.

¹¹⁵ *Id.*

¹¹⁶ Planning to Retire by Emily Brandon, U.S. News & World Report, Wednesday, December 3, 2008 *available at* <http://www.usnews.com/blogs/planning-to-retire/2008/10/08/retirement-savers-lost-2-trillion-in-the-stock-market.html>.

¹¹⁷ DeNavas-Walt, Carmen, Bernadette D. Proctor, and Jessica C. Smith, U.S. Census Bureau, Current Population Reports, P60-235, Income, Poverty, and Health Insurance Coverage in the United States: 2007, U.S. Government Printing Office, Washington, DC, 2008 at 12.

¹¹⁸ It's Official: Recession Since Dec '07, *available at* <http://money.cnn.com/2008/12/01/news/economy/recession/?postversion=2008120115>.

¹¹⁹ November: Most Jobs Lost in 34 Years, *available at* http://money.cnn.com/2008/12/05/news/economy/jobs_november/index.htm.

¹²⁰ Reuters, Dec. 16, 2008, Once-confident Canada now awash in economic gloom, *available at* <http://www.reuters.com/article/marketsNews/idUSN1618629520081216>.