

**“Putting it All Together:
Bringing Coherence to the Law Affecting Older Adults”**

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I. INTRODUCTION

The Law Commission of Ontario has undertaken a project to develop a coherent approach to the law as it affects older adults. The purpose is not to address substantive areas of the law, except as illustrations, but to create a framework or set of principles and guidelines to serve as a reference point in developing the law as it affects older adults.

In this paper, I discuss the project and provide examples of the issues we may address as illustrations of the framework that we develop. The paper is not exhaustive about the project, but is intended to show how it operates on both the theoretical and practical or pragmatic levels or, in other words, how it is intended to integrate theory and practice. To that end, I have included statistical data to provide a grounding, not only for the decision to undertake the project, but also to show the *kinds* of factors and considerations that we will take into account as we develop the framework and provide examples of its application.

We have released two consultation papers¹ and are currently at the stage of completing research and an extensive consultation with respect to preparing an interim report in the older adults project. Accordingly, any examples I provide in this paper are intended to be hypothetical examples to illustrate the interaction of theory and practice. Although we have tentatively proposed principles that might apply, we are far from developing our recommendations in this project.

¹ Law Commission of Ontario, “The Law as It Affects Older Adults Consultation Paper: Shaping the Project (May 2008) (“Shaping the Project”): <http://www.lco-cdo.org/en/documents/OlderAdultsMay08/documents/ConsultationPaper-OlderAdultsFINAL.pdf>. Law Commission of Ontario, “The Law as it Affects Older Adults: Moving the Project Forward. Report on the Preliminary Consultation (December 2008) (“Moving the Project Forward”): <http://www.lco-cdo.org/en/documents/OlderAdultPreStudyConsultationRpt-FINAL.pdf>.

Generally speaking, the law applies to older adults as it applies to younger adults, but it may have quite different effects; however, there are laws that apply only to older adults. Although we talk about “elder law” as if it is a separate area of law, it is also correct to say that one way or another, nearly all areas of law affect older adults, as this conference with its sessions on family law, criminal law, dispute resolution and powers of attorney shows. The notion of “elder law” as a distinct body of law is a convenient way to refer to the relationship between demands of aging and the law; it also emphasizes the *importance* of understanding how law affects older adults and how older adults interact with the law; finally, it is a way of saying that the law should be developed, implemented and interpreted through an “anti-ageist” lens. Nevertheless, it may be more appropriate to talk about a coherent approach to the law as it affects older adults, whether the effect is indirect or specific, than to speak about “elder law” as a coherent body of *substantive* law.

The Law Commission of Ontario’s project is designed to develop a coherent framework against which law can be developed. In some cases, the framework could be used to assess the impact general laws might have on the elderly; in other cases, it could be used to design laws directed at the elderly. This framework must involve not only principles that should govern any law affecting the elderly, but also reflect or permit to be addressed the reality of being elderly and the interaction of older adults’ interests and the interests of other members of society. It needs, in other words, to combine theory and practice.

I consider “theory” in two ways: the first refers to the theoretical premises that underlie the LCO’s work (its research, analysis and recommendations), and the second refers to the principles that we expect will underlie the framework the LCO recommends that should be able to provide guidance in developing law as it affects older adults. With respect to “practice”, I will provide examples of the kind of data that will underlie the theoretical analysis, discuss our consultation process and outline some of the issues that will illustrate the application of the theory, all of which ground the theoretical framework.

You will find the two discussion or consultation papers (produced by Lauren Bates, the head of the older adults project), on the LCO’s website at <http://www.lco-cdo.org/>. Our first paper, “Shaping the Project”, was released a year ago and was designed to help us

shape what was an admittedly somewhat amorphous project. Based on responses to that paper and other consultations and research, we released the next discussion paper, “Moving the Project Forward”, in January of this year. The next stage of the project will include further research and consultations and an interim report.

II. WHY THE LCO HAS UNDERTAKEN THIS PROJECT

There is no dispute about the growing numbers in the “elder” cohort. This is a recent phenomenon. Older persons comprised only about 5% of the population in Canada in the first third of the 20th century and even by the 1960s, they constituted less than 8%. In the 1920s and 1930s, seniors accounted for about 5% of the population, while in the 1950s and 1960s they accounted for less than 8%. In part, this is explained by the higher proportion of children in the population relatively speaking, as well as lower life expectancy.² According to Portrait of Seniors in Canada, in the approximately 25 years between 1981 and 2005, the proportion of seniors in the population increased from 9.6% to 13.1%; in absolute numbers, this was an increase from 2.4 to 4.2 million people. Portrait of Seniors in Canada predicts that the number of seniors will more than double by 2036 to 9.8 million people or to nearly a quarter of the population (24.5%). By 2056, it is expected that seniors will comprise 27.2% of the population or 11.5 million people.³

It is not only the “gross” seniors cohort that is increasing, however. Equally importantly, the number of “senior seniors” will also increase. Thus the sub-cohort between 75 and 84 constituted 4.6% of the population in 2005 (1.5 million people), having risen from 2.8% to 695,000 between 1981 and 2005. Although it is expected that the number will “remain fairly stable” for the first twenty years or so of this century, the aging of the baby boomer generation will result in a considerable increase in the size of this group, with the number of persons between 75 and 84 increasing to almost 4 million or nearly 10% of the population. Increases for the group 85 and older will also be considerable: between 2021 and 2056, the number will increase to 2.5 million or 5.8% of the population. (This

² Martin Turcotte and Grant Schellenberg, A Portrait of Seniors in Canada 2006 (Statistics Canada 2007) 11 (“Portrait of Seniors in Canada”): <http://www.statcan.gc.ca/pub/89-519-x/2006001/4122092-eng.htm> [accessed April 30, 2009].

³ Portrait of Seniors in Canada, 12.

group currently accounts for about 1.5% of the population or nearly half a million people, a figure that will increase further to 800,000 by 2021.)⁴

Seniors make up nearly 13% of Ontario's population.⁵ Although this is a smaller proportion than is the case in most provinces, since Ontario has one of the largest populations, it also has one of the biggest cohorts of seniors. In 2005, the senior population in Ontario constituted about 38% of the seniors in Canada (with the non-senior Ontario population constituting 39% of the total Canadian population). It is expected that by 2026, just over 38% of Canada's seniors will live in Ontario (while 41.5% of the non-senior population will live in this province). The 2006 Census revealed that the population aged 65 and over had increased 12% since 2001; the group 80 and over had increased almost 30%.⁶

These dry statistics veil the far more challenging reality of the seniors cohort today and in the future. The aging of baby boomers, the impact of improved health and medical care and greater disposable income in the working and middle class or greater financial security through pensions (at least over the past 30 years or so until very recently) have meant that the current and future older adult population must be viewed as a different cohort from a generation ago. This is a cohort of whom some or even many members are more independent than were many seniors in the past. At the same time, however, a portion of that cohort remains vulnerable, physically, mentally and/or financially. We cannot make assumptions about "getting old" or "older" or about what being a senior citizen means and we have to recognize that the status of being "elderly" (whatever that means) is fraught with ambiguity, ambivalence and change. The "design" of the cohort shifts and the experience and physical reality of those within it may change within a very short period. Our project will attempt to reflect these evolving individual and systemic developments.

⁴ Portrait of Seniors in Canada, 14.

⁵ Portrait of Seniors in Canada indicates at 13 that this is among the smallest proportionate cohort in Canada, although it appears large next to Nunavut which has a seniors population of only 2.6%. The largest proportion of a provincial population is in Saskatchewan where seniors make up nearly 15% of the population.

⁶ Statistics Canada, 2006 Census, "Age and Sex, percentage change (2001 to 2006) for both sexes, for Canada, provinces and territories - 100% data": <http://www12.statcan.ca/english/census06/data/highlights/agesex/pages/Page.cfm?Lang=E&Geo=PR&Code=01&Table=1&Data=Change&Sex=1&StartRec=1&Sort=2&Display=Page>.

There is therefore good reason to address the issue of a coherent framework for the law as it affects older adults and the broader question of access to justice for older adults. It is not sufficient to know that seniors will comprise a greater proportion of the population than is now the case. The term “seniors” carries a great diversity: not only should developing, implementing, enforcing and interpreting law and policy not be carried out as if seniors were in all respects the same as younger cohorts of Canadians, they should not be carried out as if all seniors were the same, defined solely by age. We understand that the law cannot be developed in the abstract, but must respond to the actual circumstances of seniors’ lives and that it do so systematically. It is equally important that the implementation of what may be “good” law not run afoul of the principles by which the law should be governed, that it not, for example, be applied on the basis of stereotypical assumptions.⁷

I note four other projects the LCO is currently undertaking that have an affinity for the older adults project (or *vice versa*): the development of a coherent approach to the law as it affects persons with disabilities, in particular, the family law and vulnerable employees projects and the project on electronic medical records that an Osgoode School in Residence is carrying out in association with the LCO.⁸ One of the decisions we will have to make is where we predominantly address an issue that overlaps these projects, perhaps merely alluding to it in one of the other projects. For example, our family law project seeks to develop more effective and responsive practices at the entry points to the family law system. It may be appropriate to develop specific processes that can address complaints and law suits by seniors more quickly than might normally (even when “normal” is a reasonable length of time) be the case, given seniors’ concerns that they will die before the legal matter is settled, sometimes with the result that the legal case dies with them.⁹ Without duplicating the work, both projects may have something to say about this. The focus of the electronic medical records project is on the interplay of

⁷ “Moving the Project Forward” refers at 21 to submissions by stakeholders with a focus on older adults that “good” laws may result in “bad practice”: Law Commission of Ontario, “The Law as it Affects Older Adults: Moving the Project Forward. Report on the Preliminary Consultation (December 2008). The phrase “Good Law, Bad Practice” is derived from the submission of the Advocacy Centre for the Elderly in response to “Shaping the Project”.

⁸ See the Law Commission of Ontario website at <http://www.lco-cdo.org/en/currentprojects.html> for descriptions of these projects which are at different stages of development.

⁹ “Moving the Project Forward” considers the issue of access to the legal system for seniors in Part V.

intellectual property, ethical and privacy concerns with medical records; again, therefore, both projects might have something to say about older adults, but in this case, to the extent the issue of electronic medical records in relation to older adults is addressed, it would perhaps fit most appropriately in the older adults project, taking into account what is learned in the medical records project where possible.

Apart from the reality that seniors might be “vulnerable workers”, the employment project concerns seniors in another way. Vulnerable employees are unlikely to belong to private pension plans, have extended health care benefits or enjoy discretionary income that allows for planning for the future. Vulnerable employees today who remain in that category are likely to enter older adulthood in poverty or at least in uneasy financial circumstances. It might be said, therefore, that the impact of precarious work on older adults might be an aspect of the vulnerable employees project. From a different perspective, the concept of “living in place” promotes the independence of seniors in a way that does not sacrifice security; at times, this requires the assistance of family members and others. In this regard, the Senate Report on Aging has suggested that workplace policies and labour standards might be changed to “help caregivers balance their paid work and caregiving needs”.¹⁰ Any consideration of this issue would most likely be considered as part of the older adults project, rather than the vulnerable employees project.

The parallel development of the two projects on the law and older adults and on the law and persons with disabilities is not coincidence. Aging often brings new physical and mental challenges or exacerbates those affecting people throughout their lives or for a good part of their lives. Seniors and younger people with disabilities may face some of the same challenges, such as treatment in a long-term care facility or the need to prepare a Power of Attorney. Two of the issues that cross the boundary of these projects are those of elderly caregivers to children or spouses who have disabilities and persons with disabilities who have aged without having made “an essential transition to adulthood – moving from one’s parental home to establish one’s own home in the community”.¹¹ By

¹⁰ Special Senate Committee on Aging Final Report, *Canada’s Aging Population: Seizing the Opportunity* (April 2009) 124 (“the Senate Report on Aging”): <http://www.parl.gc.ca/40/2/parlbus/commbus/senate/com-e/agei-e/rep-e/AgingFinalReport-e.pdf> [accessed April 30.09].

¹¹ “Moving the Project Forward”, 29, referring to a submission from the Canadian Association for Community Living.

indicating that there may be an overlap, however, we are not saying that the issues are always experienced in the same way or that they should be addressed in the same way. Some of the nuances for both cohorts are lost if we conflate the circumstances of persons with disabilities who are aging with those of older adults who have developed disabilities.

III. DEFINING THE TERM “OLDER ADULTS”

The LCO has not yet defined the term “older adults”. We are not satisfied that a single definition works for all purposes; however, we are also aware that using different ages might be confusing. We have left this quandary to grapple with later.

The most common age used to mark entry into the cohort of “older adults” or seniors is 65. As retirement is less associated with the age of 65, the use of this age more generally seems less suitable. Certainly, “seniors” means different things in different contexts, whether it is a discount at the local nursery which might apply to persons 55 and up or receipt of Canada pension, generally at age 65 (although as early as 60). Seniors may be as young as 50. “Portrait of Seniors in Canada” on which I rely heavily for many of the statistics in this paper, uses age 65 as the entry point for “senior”, although it also divides the cohort into sub-cohorts (such as seniors 85 and over).¹² To avoid “ageism”, the recently released Senate Report, “Canada’s Aging Population: Seizing the Opportunity”, does not define “senior”, leaving it to the reader to do so.¹³ The Report does, however, use ways of describing particular groups of seniors through relevant experiences for particular aspects of the Report, such as “persons eligible for retirement”, “residents of long-term facilities” or, reluctantly, “frail elderly”.¹⁴

As we said in our initial Consultation Paper in this project, “Shaping the Project”, regardless of how we define “senior” or “older adult”, “it is essential to recognize that there is great diversity among older adults. The experience of aging will differ significantly depending on one’s health, gender, income and education level, ethnicity or place of origin, place of residence and multiple other factors”.¹⁵

¹² Portrait of Seniors in Canada, 8.

¹³ The Senate Report on Aging, 3.

¹⁴ The Senate Report on Aging, 4. The reluctance stems from not wishing to define a group predominantly by their frailty.

¹⁵ “Shaping the Project”, 2.

IV. THE LCO'S APPROACH

In this section of the paper I explain the LCO's processes. While we apply them in our shorter, more focused projects as much as possible, they are particularly applicable to the larger projects such as the older adults project. We engage in extensive consultation at different stages of the project, apply substantive equality and multidisciplinary assumptions and processes at the research and analysis stages and direct our recommendations at both government and private actors.

A. Consultation Process

The LCO engages in substantial outreach generally and in consultation in relation to specific projects. Sometimes the two overlap. For example, I was fortunate in an early "outreach" visit to Kingston to meet with a number of people who worked with or otherwise had an interest in older adults. The visit did not begin that way; it was a "get acquainted" meeting with the Frontenac-Kingston Council on Aging, as I have had many similar meetings with a wide variety of organizations, but when the energetic Acting Executive Director of the Council, Christine McMillan, organized about 20 people for a conversation, it turned into one of our first "consultations" in our older adult project in which we had not long before released our first consultation paper.

The consultations for specific projects occur at different stages and take several forms. In the older adults project, we prepared the initial consultation paper, posted it on the website and sent it electronically (in hard copy when needed) to a large group of "stakeholders". Consultation at that stage took the form of written submissions, in person meetings and telephone conversations. What we learned through that process informed the second consultation paper. We then instituted a "comment box" on our website to encourage feedback from people who were not interested in or used to preparing longer submissions. When we have prepared the interim report, we will organize focus groups and be open to other ways of finding out from people themselves whether they think the framework and application of the principles will be effective. We have now something in the neighbourhood of 400 stakeholders, professional, community-based, academics and others, on our list for this project and are always pleased to add more. We do not assume that the only organizations or groups who would be interested in the project are

those who work directly with or represent older adults; those with a different mandate that would encompass seniors along with others also have something important to say about the experience of seniors in particular communities, for example. Our consultation will include feedback from older adults themselves through focus groups and other means.

B. Substantive Equality Analysis and Overlapping Characteristics

The LCO's mandate can be briefly and concisely stated as to make recommendations that will increase access to justice. More specifically, this means making recommendations that would make the law more relevant, accessible and effective or that would clarify and simplify the law; we are also to consider technology as a way to increase access to justice. Access to justice invokes equality considerations: in short, individuals should not be disadvantaged in gaining access to justice because of factors such as class, ethnicity, language, sex, aboriginal status or disability, among others. This relates to access to the legal system and means of dispute resolution; but it also relates to the substantive law and a broader conception of access to justice. The LCO undertakes projects that encompass all these aspects of access to justice. Our project on older adults takes perhaps the widest view of access to justice, taking into account not only the legal system, but also social conditions that have an effect on how well seniors can access and benefit from the law.

It is important to clarify the meaning of the term "difference" in the context of substantive equality analysis. We tend to think difference refers to difference from a norm: that the way a particular ("majority") group does things is the "normal" way of doing something, while others deviate from the norm or require accommodation. This is not an appropriate way of viewing the concept of "difference". Rather, we need either to avoid thinking of a norm or we have to think about the norm as including recognition of difference. The thinking in this area began in feminist analysis, based on the insight that society was structured around the male as the norm, while attempts to recognize women's experience and needs were treated as a claim for accommodation, rather than a redefining as the norm, as looking through the lens of both men's and women's experiences might require.

Sometimes, it is true, we have a “regular” way of doing things and make “special” provision for those who cannot conform to the regular way for one reason or another. In some cases, this mix of “regular” and “accommodation” transmutes into a new way of doing things. Religious accommodation for employees is an example. Over time, employees’ religious observances are a factor in how employees’ schedules are arranged, particularly as the shape of the work week has changed (in the retail industry, for example), although in some workplaces, such as the education field, recognition of difference still requires so-called “accommodation”.

Substantive equality means that differences are taken into account as part of the organizing of society and that results can be a measure of equality or at least a signal that treatment has been equal or unequal. Sometimes standards that have been treated as legitimate might require revising, rather than merely making accommodations to respond to the needs of those who cannot satisfy them. In the *Meiorin* decision, the Supreme Court of Canada said,

Under the conventional analysis, if a standard is classified as being “neutral” at the threshold stage of the inquiry, its legitimacy is never questioned. The focus shifts to whether the individual claimant can be accommodated, and the formal standard itself always remains intact. The conventional analysis thus shifts attention away from the substantive norms underlying the standard, to how “different” individuals can fit into the “mainstream”, represented by the standard.¹⁶

In its research, analysis and recommendations, the LCO recognizes that no cohort, group or community is homogeneous. Accordingly, it attempts to assess the experiences, circumstances and needs of various sub-cohorts within the identified comprehensive cohort.¹⁷ In the case of older persons, for example, one would identify female seniors as one of these sub-cohorts, among others. Portrait of Seniors in Canada shows that in 2005, women constituted over half of “younger” seniors, those 65 to 69, and the proportion of women increased as age increased: they constituted almost 75% of seniors 90 or older. It is important to note, however, that it is expected that the life

¹⁶ *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Services Employees’ Union (B.C.G.S.E.U.) (“Meiorin”)*, [1999] 3 S.C.R. 3, at para. 40. The LCO’s analysis and recommendations must, of course, take into account constitutional standards and international law that affects Canadian domestic law; they do not have to be limited by them, however.

¹⁷ In our second consultation document in the older adults project, we identified a number of diversity factors: age, gender, sexual orientation, income, education, geographic residence, family and marital status, language, immigration and citizenship status, racialization and ethnic origin, Aboriginal status and whether the person has a psychiatric, physical, intellectual, cognitive or sensory disability: “Moving the Project Forward”, 7-8.

expectancies of men and women will draw closer, as, in fact, has been the case over the past several years. Thus Portrait of Seniors in Canada reports that “between 1981 and 2005, the share of persons aged 80 to 84 who were men increased from 37% to 39%” and that by 2021, men will comprise 43% of that age group, and by 2056, they will comprise 46%.¹⁸

We also expect to hear about different experiences and needs expressed from different ethnic communities. One might ask, for example, are there seniors who have lived primarily in their own communities compared to others who have moved across communities or between their own and the mainstream community? Or are women in some communities more likely to have been dependent on their husbands and to live more within their family than is the case with other groups?. In this regard, Portrait of Seniors in Canada notes that “[s]enior women were slightly more likely than men to be unable to speak at least one official language. For example, about 5% of women aged 65 to 74 could not speak an official language, compared to 3.2% of men”.¹⁹ The demographic data suggest that awareness of this factor is an important one, but that we should be wary of overstating its significance without more information. Most seniors who emigrated from other countries did so when they were younger.²⁰ Of seniors in 2001, only 9% had arrived in Canada in the previous decade. There are few seniors among immigrants in any year, comprising between 2% and 4% of immigrants and refugees between 1995 and 2004. Portrait of Seniors in Canada explains that 80% of immigrants in 2004, for example, “were sponsored by a family member and admitted to Canada in the family class category”.²¹

While 54% of “immigrant seniors” come from Western Europe, this will change in the coming years, as the impact in the changes in source countries for immigration is manifested among the senior population. There was a dramatic decrease in the proportion of immigrants from Western and Northern Europe and the United States between 1981 and 2001 from 45.5% to 24.6%, while the proportion from Asia increased from 13.9% to 36.5%.²² More than half of immigrant seniors are from Western Europe,

¹⁸ Portrait of Seniors in Canada, 13.

¹⁹ Portrait of Seniors in Canada, 24.

²⁰ Portrait of Seniors in Canada, 22.

²¹ Portrait of Seniors in Canada, 23.

²² Portrait of Seniors in Canada, 23.

but this proportion will decrease in the future consistent with the changing immigration patterns; for example, “the share from Asia increased from 5.6% to 19.1% between 1981 and 2001”. By 2001, 7.2% of Canadian seniors belonged to a visible minority group, up from 2.3% in 1981; 39% were Chinese.²³

In light of varying provincial (and territorial) populations and the geographic destinations of immigrants, the proportion of seniors in the provinces (and territories) who are immigrants varies considerably in different areas of Canada. Thus 41% of seniors in Ontario are immigrants and 54.6% of all immigrants seniors live in Ontario. A slightly higher proportion of immigrant seniors arriving between 1991 and 2001 live in Ontario (nearly 56%).²⁴

While seniors who immigrated to Canada as children are most likely to speak English or French fluently, even if they did not when they emigrated and those who entered the workforce at the time of immigration may speak sufficient English or French to satisfy immigration requirements, those who entered as family members may speak no or little English or French. Portrait of Seniors in Canada states, “in 2001 4.5% of individuals aged 75 to 84 and 6.1% of those aged 85 and over could not speak either English or French” (compared to only 0.9% of persons aged 25 to 54). Notably, “[s]ince 1981, the proportion of seniors unable to speak an official language has been on the rise. For example in 1981, 3.1% of senior men aged 85 and over could not speak English or French, compared to 5.2% in 2001.”²⁵ Even if they speak French, however, seniors in Ontario may receive poorer quality services, such as legal services, because of “the poor availability of services in French of a similar quality to those offered in English”.²⁶

The comparison of the senior Aboriginal population with the non-Aboriginal senior population reflects the lower life expectancy of Aboriginal people. Portrait of Seniors in Canada reports that “[i]n 2001, only 4% of Aboriginal people [and specifically only 3% of

²³ Portrait of Seniors in Canada, 23.

²⁴ Portrait of Seniors in Canada, 23. These figures contrast with the second highest province, British Columbia where 39% of seniors living in British Columbia are immigrants, a figure similar to Ontario’s, but only 19.3% of immigrant seniors overall live in British Columbia, although about 25% of immigrant seniors arriving more recently live in that province.

²⁵ Portrait of Seniors in Canada, 24.

²⁶ “Moving the Project Forward”, 25, quoting the submission of the Fédération des aînés et des retraités de l’Ontario.

Inuit] were 65 years and over compared to 13% of the non-Aboriginal population.”²⁷ Even more striking, “about 3% of the Aboriginal population were between the ages of 65 and 74, and 1% were 75 years and over. On the other hand, 7% of the total Canadian population fell between the ages of 65 and 74 years, and 5% were 75 years and over.”²⁸ Similarly, compared to the 3% of the total population comprised of Aboriginal people, of the total senior population, only 1% is Aboriginal. Of Aboriginal seniors, more than 20% live in Ontario. There are more female Aboriginal seniors than male (54% were women), except for Inuit where there are more men (55%) than women.²⁹

These detailed data illustrate how sub-cohorts differ and why blanket recommendations would not necessarily respond to their needs. Just as we say that the comprehensive cohort is not homogenous, we recognize that the so-called “sub-cohorts” are not homogenous. Thus all women who are “older” are not in the same circumstances or have the same needs or would respond in the same way to suggestions about how they might behave or what the law should say about them. People do belong to more than one “community” at a time and are influenced by the circumstances facing all those communities. These overlapping identities are sometimes labelled “intersectionality”. This analysis requires us to ask the extent to which, for example, the experience and needs of senior women in visible minority communities or minority religious communities are informed by their “status” as an older person, as a woman and as a member of a minority community. It might be that the experiences of older women in one ethnic community are considerably different from the experiences of older women in another ethnic community; and their experiences may be different from those of older men in their own community. In other words, in this example, it would be a mistake to assume that a senior woman who is a member of a visible minority community has the same needs as a senior white woman or a younger female member of the same minority community. This might or might not be significant for determining the appropriate recommendations the LCO should make, but unless we ask the question, “is it significant?”, we obviously cannot answer it or even begin to make appropriate

²⁷ Portrait of Seniors in Canada, 25.

²⁸ Portrait of Seniors in Canada, 27.

²⁹ Portrait of Seniors in Canada, 27.

recommendations for law or policy or how law or policy might be applied in certain cases.

It is easy to see that this approach can become complicated and it is certainly possible that one can divide the cohort into so many different sub-cohorts and sub-sub-cohorts that the exercise becomes meaningless. The recognition of difference requires that we exercise judgment in each case about whether there is enough information and whether differences are significant enough to take into account to warrant the recognition. We should also be aware that this recognition may be meaningful for some purposes and not for others. We need, as well, to be pragmatic in responding to cohort differences with respect to the administration of law and policy and cost; at the same time, even if it is not realistic to refine law and policy (or their implementation) as much as we might like, it is important to know how far away from the “ideal” we are.

We also have to consider the law’s impact on particular cohorts, even though it is meant to apply to everyone. Does it have a disproportionate impact on a particular group? For the older adults project, we are concerned not only with the law as it is specifically directed at older adults, but also at law as it might have a disproportionately negative impact on older adults, that is, an indirect impact or adverse effect. This long-established anti-discrimination doctrine³⁰ was incorporated into the interpretation of section 15 of the *Canadian Charter of Rights and Freedoms* in *Andrews*, the first case addressing that section.³¹ A decade later, in *Meiorin*, the Supreme Court of Canada said that the distinction between direct and adverse effect discrimination is “artificial”, since both relate to the concept of substantive equality. The distinction, the Court said, is also undesirably malleable, since it allows an assessment that could result either in striking down a standard or in accommodating the claimant who does not conform to the

³⁰ *Ont. Human Rights Comm. v. Simpsons-Sears*, [1985] 2 S.C.R. 536 (“*O’Malley*”) in which a requirement to work on Saturdays was discriminatory because it had an adverse impact on an employee whose religion marked the Sabbath on a Saturday. The Supreme Court traced the advent of adverse impact, or the lack of a requirement of intention, to nearly fifteen years earlier in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) in which “the employer required as a condition of employment or advancement in employment the production of a high school diploma or the passing of an intelligence test. The requirement applied equally to all employees but had the effect of excluding from employment a much higher proportion of black applicants than white. It was found that the requirements were not related to performance on the job, and the Supreme Court of the United States held them to be discriminatory because of their disproportionate effect upon the black population.” (*O’Malley*, at para. 16).

³¹ *The Law Society of British Columbia v. Andrews*, [1989] 1 S.C.R. 143, at 166-168.

standard, as might be convenient, rather than on the basis of principle.³² Focusing on individuals may also veil the systematic discrimination that a standard or law might reflect.³³ For practical purposes, however, the distinction remains and, indeed, adverse effect or disparate impact discrimination is far more likely to occur today than is direct discrimination.

The result of this evolving understanding of equality is that we now accept that the government may have an obligation to take pro-active measures to overcome inequality and that a failure to do so may be viewed as contributing to continued disadvantage.³⁴ Remedial measures may be an integral part of achieving substantial equality. In *R. v. Kapp*, the Chief Justice and Abella J., for the majority (and it appears for Bastarache J., who wrote his own reasons), explained how subsections 15(1) and (2) of the Charter work together in furtherance of the objective of substantive equality:

s. 15(1) and s. 15(2) should be read as working together to promote substantive equality. The focus of s. 15(1) is on *preventing* governments from making distinctions based on enumerated or analogous grounds that have the effect of perpetuating disadvantage or prejudice or imposing disadvantage on the basis of stereotyping. The focus of s. 15(2) is on *enabling* governments to pro-actively combat discrimination. Read thus, the two sections are confirmatory of each other. Section 15(2) supports a full expression of equality, rather than derogating from it.³⁵

Along with “personal” characteristics such as sex or ethnicity, demographic factors are crucial to understanding how to deliver services effectively in fulfillment of legal obligations or government programs, whether health care or access to legal services.³⁶ Urban or rural place of residence is an example. The increase in the proportion of seniors living in large urban centres is consistent with the increase in the general population who are living in these centres. Between 1981 and 2001, the proportion of

³² *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 (“*Meiorin*”), at para. 28.

³³ *Meiorin*, at para. 41.

³⁴ This has to some extent been recognized in the Supreme Court of Canada’s jurisprudence: see, for example, *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016, 2001 SCC 94.

³⁵ *R. v. Kapp* 2008 SCC 41, at para. 37 (emphasis in original). Therefore, if a program satisfies the requirements of being an affirmative action program under section 15(2), it cannot violate section 15(1): at para. 41.

³⁶ I use the term “personal” to distinguish these factors from such factors as place of residence. I do not mean to suggest, however, that any disadvantage individuals with these characteristics experiences arises from them; rather, the disadvantage more likely arises from how others respond to these characteristics or because the organization of society fails to acknowledge them.

seniors living in large urban areas increased from nearly 54% to nearly 61% and “about seven of every ten seniors in Canada lived in an urban centre with at least 50,000 residents”.³⁷ Nearly 3% live in communities with populations of fewer than 25,000. More than 22% of seniors live in rural areas, although as Portrait of Seniors in Canada points out, “these rural areas vary in terms of their proximity and integration with urban centres” and “[a]cross Canada, 8.4% of all seniors live in rural areas with weak or no metropolitan influence, and another 9.2% live in rural areas with moderate metropolitan influence”.³⁸ Ontario has the smallest proportion of seniors living in these areas (9%).³⁹ In Ontario, the large urban areas of St. Catherines-Niagara, Thunder Bay and Toronto have the largest number of seniors: 17%, 15% and 11%, respectively.⁴⁰ The 2006 Census confirms that these populations will likely increase dramatically. These proportions had increased by 5.4%, 7.2% and 14.8%, respectively, for persons aged 65 and over; for the sub-cohort 80 and over, the increases were over 27%, nearly 27% and 34.5%, respectively.⁴¹

As with other cohorts, class or economic status is a major factor in assessing seniors’ autonomy and vulnerability. Although the proportion of seniors in Canada with a low income is one of the lowest in the industrialized world (6.8% of older adults fall below the Low Income Cutoff after taxes), the degree to which different sub-cohorts live in poverty varies.⁴² While it may be that seniors are more likely than in the past to have greater financial resources, it must be noted that these are not necessarily stable. Many middle

³⁷ Portrait of Seniors in Canada, 16. The report states that the proportion of Canada’s population living in large urban centres increased from nearly 58% to over 64% between 1981 and 2005.

³⁸ Portrait of Seniors in Canada, 17.

³⁹ One might compare the much higher proportions in some other provinces and territories: Northwest Territories (77%), Newfoundland (55%), Saskatchewan (47%), New Brunswick (43%) and Nova Scotia (40%). As Portrait of Seniors in Canada points out at 27, these different proportions of seniors reflects the proportions of the general population living in these areas without a great deal of regular contact with metropolitan areas and, of course, the number of large urban areas in these provinces and territories.

⁴⁰ Portrait of Seniors in Canada, 17.

⁴¹ Statistics Canada, 2006 Census, “Age and Sex percentage change (2001 to 2006) for both sexes for Canada and census metropolitan areas and census agglomerations - 100% data”: <http://www12.statcan.ca/english/census06/data/highlights/agesex/pages/Page.cfm?Lang=E&Geo=CMA&Code=01&Table=1&Data=Change&Sex=1&StartRec=126&Sort=2&Display=Page&CSDFilter=5000>.

⁴² Portrait of Seniors in Canada, 68. Senior women living alone have the highest rates of low income. The report indicates that there were significant decreases in the proportion of low income seniors between 1980 and 2003 (from 34% to 15% using Low Income Cut-Off before taxes and from 21.3% to 6.8% using Low Income Cuff-Off after taxes).

class and wealthy seniors rely on investments. Many working and middle class employees expect to see the benefit of private employment pension plans when they reach their later years: in 2003, almost 70% of men and 53% of women received benefits from private plans.⁴³ The current recession is evidence of the way in which carefully laid plans and expectations can be derailed, even though in the case of investments, this may not be permanent or even long-term. Fewer workers are members of employment pension plans, however, than in the past.⁴⁴ Furthermore, employers are changing plans from defined benefit to defined contribution plans that are dependent on the vagaries of the market. On the other hand, many seniors are reliant on government pensions and government assistance (the majority of income for two-thirds of seniors);⁴⁵ these may be more stable, but they do not provide an extensive income.⁴⁶

For recent immigrant seniors, the economic situation may be more serious, since there is a ten year residency requirement for the old age security and guaranteed income supplement programs and they may not have access to private pension plans that are a major source of income for many seniors; while those who emigrate as seniors are likely to be with families, they nevertheless require a separate source of income to permit independence and dignity. It has been estimated, however, that between 25% and 40% of seniors who immigrated to Canada after the age of 60 are completely dependent financially on their sponsors.⁴⁷

Thus while the current emphasis is on the emerging financially secure senior cohort who can live in well-appointed surroundings, can travel and do not have to be exceptionally concerned with the cost of health care, any recommendations about older adults must be concerned with ensuring that more vulnerable seniors financially have sufficient

⁴³ Portrait of Seniors in Canada, 66.

⁴⁴ "Shaping the Project" 3, citing Richard Shillington, *Research Paper: Occupational Pension Plan Coverage in Ontario* (Toronto: Expert Commission on Pensions, 2007).

⁴⁵ "Shaping the Project" 3, citing Cara Williams, "Finances in the Golden Years", *Perspectives* (Ottawa: Statistics Canada, November 2003). Richard Shillington, *Research Paper: Occupational Pension Plan Coverage in Ontario* (Toronto: Expert Commission on Pensions, 2007). A Portrait of Seniors in Canada reports that 20% of seniors' income in 2003 came from the Canada Pension Plan (or Quebec Pension Plan) and that 95% of men and 85% of women receive benefits from these plans: Portrait of Seniors in Canada, 94.

⁴⁶ As the Senate Report on Aging states, "the basic income levels provided by the Old Age Security and the Guaranteed Income Supplement do not even meet the poverty line", 7.

⁴⁷ The Senate Report on Aging, 29, citing Sharon Koehn, *Brief to the Special Senate Committee on Aging: Second Interim Report* (June 2008) 1.

means to live in dignity and independence and that security does not rely significantly on the vagaries of the market.

The LCO's mandate includes considering how technology might be employed to increase access to justice. Although more and more people have access to and are conversant with computers and the internet, and while many older adults use email to communicate with their grandchildren who live in other cities or countries, as well as more generally,⁴⁸ there is still a difference among different age cohorts in the use of computers. This may be especially the case in rural and remote areas where there may not be the same access that there is in other centres. The gaps that exist will gradually disappear, but it is still important that recommendations about technology be made judiciously. In some instances the technology may not occur in the home, but elsewhere with access to electronic records and training for healthcare workers.⁴⁹ Other uses may require greater connectivity of rural and remote communities.⁵⁰

C. Multidisciplinary Analysis

The LCO operates on the premise that the law is affected by other aspects of society (such as economic, sociological, psychology and other forms of knowledge); law also affects those other areas. Although the LCO does undertake projects that are directed only at the law (the project on division of pensions on marital breakdown is an example⁵¹), the project on older adults is typical of a project that seeks to bring an understanding of the relationship between law and other forms of knowledge or societal systems. Gerontology is an obvious example of another discipline that is relevant to this project, but it only the most obvious perhaps. We also need to consider medicine, physiology, economics and others. If law and policy are to be effective, we need to know whether it is realistic, what barriers there might be to its application and whether, indeed, it takes into account such intangibles as compassion. While it may not be possible to

⁴⁸ Portrait of Seniors in Canada states that between 1990 and 2003, "[t]he share of senior-led households with home Internet access increased from 3.4% to 22.7% and access among households headed by someone aged 55 to 64 increased more than four-fold": 212. More men than women used the internet and email and people with higher education were also more likely to use them: 213.

⁴⁹ The Senate Report on Aging, 158.

⁵⁰ The Senate Report on Aging, 160.

⁵¹ The Final Report is available at <http://www.lco-cdo.org/en/documents/Currentprojects/documents/PensionsReport.pdf>.

take into account all relevant variables, it is nevertheless important to identify as many as possible and to assess which can realistically be recognized in the law that is developed. If the government creates policy for different senior cohorts, it need to know how people age, how to measure the impact of “aging” physically and psychologically. We need to appreciate the sociological implications of various demographic and personal factors. We might benefit from what urban planners have to say about the organization of cities to meet the needs of seniors. Law must be informed by the expertise and insights those in other disciplines can bring, but law also has an impact in how people with expertise in various areas, such as health, are to interact with older adults.

D. Some Thoughts on How We Make Recommendations

Although the LCO most often directs its recommendations to governments, it follows from the way in which law is affected by other societal systems, that its effectiveness is also affected by how it is implemented by non-legal actors and whether conditions are appropriate for its implementation. While government makes laws, private and semi-private actors often are influential in whether the laws achieve their objectives. It is also the case that the objectives to be met through law are only part of a larger objective that can be accomplished only by the non-governmental sector. Access to justice in the fullest sense is, therefore, not all about law, although law plays an important function in codifying the values to which most members of Canadian society are committed and in enforcing the observance of those values, in maintaining order and in reconciling various interests that may appear to be in conflict. The older adults project will, of course, address the need for recommendations about law that accomplish these goals as appropriate. It will also, however, make recommendations to non-governmental actors that are intended to bolster the effectiveness of the law.

Our recommendations should not be “either-or” propositions. Not only will they take into account the factors discussed above, but also context. Competency provides an example: as the Senate Report on Aging points out, a senior may be “competent” for some purposes and not for others.⁵² An approach consistent with principles of independence and autonomy and dignity (among those principles we have followed

⁵² The Senate Report on Aging, 17.

others in suggesting should underlie the law affecting older adults) would allow a senior to make decisions in areas in which he or she is competent and, if possible, to identify areas in which a senior can make decisions with assistance rather than being declared incompetent. Sometimes structural changes that are made with seniors in mind will have a beneficial effect for everyone, as the Senate Report on Aging discusses in the context of driving.⁵³

The LCO is a provincial law reform commission. In our sometimes messy confederation, however, the capacity of the province to act is affected by federal law and policy. In these areas, it would not be appropriate for us to make recommendations directed at the federal government, but we can point out how our recommendations to the provincial government may be affected by federal law or policy. We might also from time to time have some thoughts about how the two levels of government might work together. Health care is one example. There are some significant health cost consequences to the growth of the senior cohort. Although seniors may be healthier as a group than they were in the past, as we age we will require more health care. The Senate Report on Aging points out that “health care use is typically most intensive in the first and last years of life” and there is a significant jump in costs for the group 85 and over.⁵⁴ Overall the 13% of the population in 2003 comprised of seniors “accounted ... for 44% of health care expenditures overall”.⁵⁵ The provinces’ capacity to address this matter is in part limited by the funding process for health care. The Senate Report on Aging recommends a “supplementary program to compensate for uneven aging” in different parts of Canada.⁵⁶ Were we to discuss this recommendation, we might consider how it would assist in seniors’ obtaining adequate health care in Ontario. The Senate Report also points to the “jurisdictional arguments [that] have resulted in fragmentation of services to First Nations and Inuit seniors”⁵⁷ and this may be a factor in recommendations in the older adults project.

⁵³ The Senate Report on Aging, 19-22.

⁵⁴ Special Senate Committee on Aging Final Report, *Canada’s Aging Population: Seizing the Opportunity* (April 2009) 64 (“the Senate Report on Aging”): <http://www.parl.gc.ca/40/2/parlbus/commbus/senate/com-e/agei-e/rep-e/AgingFinalReport-e.pdf> [accessed April 30.09].

⁵⁵ The Senate Report on Aging, 139.

⁵⁶ The Senate Report on Aging, 69.

⁵⁷ The Senate Report on Aging, 171.

V. PRINCIPLES FORMING THE FRAMEWORK

In our second consultation paper, “Moving the Project Forward”, based on the feedback to “Shaping the Project” and our own research, the LCO has identified principles that we expect to form the basis of the framework: independence, participation, security, dignity and respect for diversity.⁵⁸ These principles were derived from international and domestic documents and were generally supported by those who made submissions to the LCO.⁵⁹ These principles, we noted, are interdependent. We also recognized that these principles often come into tension, or appear to do so, not only with respect to seniors themselves, but also as between seniors and other members of society. Thus independence or autonomy might risk serious harm to the security of seniors, but restraints on seniors to minimize the harm may impair seniors’ sense of dignity; seniors’ desire to be as independent as possible might also come into conflict with the need for public safety. The very difficult task of developing ways of addressing these apparent conflicts and different interests will be part of the framework we develop. Here is an example of theory and practice acting together: although these ways will have to be “abstract”, they will have to be capable of application in concrete situations.

Possibly the most important aspect of developing a framework for the law as it affects older adults is that it must be capable of taking into account the diversity of seniors’ experiences, negative and positive, challenges and opportunities. We identified in our initial discussion paper a number of stereotypes that the framework we develop – and its implementation – must avoid:

- Older persons are inflexible, resistant to change, and have difficulty learning new things;
- Older persons are chronically ill, dependent, and no longer make a contribution to society;
- Older persons are a burden on their families and loved ones, as well as on society at large;
- Older persons are depressed, isolated and waiting to die;
- Older persons have declining capacity, are incapable of making responsible decisions, and must be protected from themselves.⁶⁰

Avoiding these stereotypical assumptions requires that in applying the principles means that we do not overemphasize the principle of “security” because we assume that

⁵⁸ “Moving the Project Forward”, 2, where the principles are described as “preliminary”.

⁵⁹ See “Moving the Project Forward”, 4-5, for an elaboration of these principles.

⁶⁰ “Shaping the Project”, 6.

making decisions for seniors is “for their own good”. It requires that we minimize the situations in which security overrides autonomy or independence to those in which there is actual need.

Confirming the most significant principles and developing a coherent and flexible way in which they can be applied, including how they interrelate, in different contexts, is the challenging purpose of the LCO’s project. We intend to use some specific examples to illustrate how the framework we develop might be applied.

VI. SPECIFIC ISSUES

In “Shaping the Project”, we signalled some of the areas we thought might well be addressed in any report on older adults: the use of age as a criterion in legislation and policy, recognizing that it is often, particularly when capacity might be an issue, used as a proxy for other criteria, such as actually determining capacity; the importance of continued participation in public life and access to public services such as the legal system and various other services; the relationships in which seniors are involved, raising issues such as elder care and elder abuse, older adults as caregivers, acknowledging that seniors will be involved in a range of intimate, familial, other personal and public relationships and interactions; and secured and dignified living arrangements.⁶¹ All these areas are the subject of legislation and government policy, but they are all informed by older adults’ actual experiences and hopes, as well as the challenges they might raise, and the experiences are very much filtered through the social and other circumstances that characterize different groups of seniors’ lives.

Based on these issues, in “Moving the Project Forward” the LCO identified some specific areas that have potential for illustrating the application of the framework developed to guide the law as it affects older adults and in which it has commissioned background studies. These areas are: the use of age as a decision-making criterion (and stereotyping, negative assumptions and paternalism); access to the law; promoting choice in relationships; and living environments. The point is not to make substantive recommendations in relation to these areas of the law necessarily, nor to limit our analysis to these areas, but to provide examples of situations that help to develop the

⁶¹ “Shaping the Project”, 7-13.

framework and to implement it. These areas cover a great deal of ground. The LCO has contracted research studies relevant to these areas. The Advocacy Centre for the Elderly will conduct research on the design of effective mechanisms for enforcing the rights of residents in institutional settings. A consultant in elder law is completing another background study that will evaluate legal responses to elder abuse and legal decision-making frameworks with the aim of developing an anti-ageist approach to the law in these two areas. An academic with an expertise in gerontology will focus on the concepts of ageism and age discrimination in housing law and health law.

I provide greater detail in three of the areas “Moving the Project Forward” identified: living environments; elder abuse; and access to the law, again merely to illustrate the work completed on this project to date and to show how the theory and practice interrelate.

A. Living Environments

“Moving the Project Forward” discusses some of the issues that arise in this context. These include how regulation for particular forms of institutionalized living or collective dwellings need to promote dignity, independence, participation and diversity in institutional living, even while ensuring that residents are secure, all informed by the principle of “aging in place” in Part VII of “Moving the Project Forward”.

Relevant to this issue is the changing nature of seniors’ family arrangements. As the 2001 Census revealed, “35% of women aged 65 and over and 61% of senior men lived with a spouse or partner”, compared to 33% and 59% twenty years earlier.⁶² Of course, this is less true as seniors grow older; thus nearly half of 65 to 74 year old women lived with a partner; by age 85, this was the case for only about 7% of women.⁶³ This compares to 64% of men in the 64 to 74 age category and 39% of men 85 and over. In at least some of these cases, seniors are caring for their spouse who requires long-term care.⁶⁴ Thirteen per cent of men lived with at least one of their adult children; 12% of

⁶² 2001 Census, Statistics Canada:
<http://www12.statcan.ca/english/census01/products/analytic/companion/fam/canada.cfm#seniors>
[accessed April 30.09]

⁶³ Portrait of Seniors in Canada, 138.

⁶⁴ More broadly, the Senate Report on Aging cites the 2007 General Social Survey that reported that “1 in 4 of those providing care were over age 65 themselves”, 117. At the same time, “marriage and divorce trends may imply that, in the future, fewer disabled seniors will have a spouse who could care for them”: The Senate Report on Aging, 118.

women did, an increase from almost 9% twenty years before. Among seniors in private households, 6.5% lived with grandchildren and of them, 12% lived only with their grandchildren.

More seniors are able to live in their own homes (houses, apartments or condominiums) for longer when they have the option. For example, the proportion of women 85 and over living alone increased from 25% in 1981 to 38% in 2001; 16% of men in this age category lived alone in 1981, while 23% did in 2001.⁶⁵ The physical and mental capacities to live in one's own home may not be matched with financial capacity, however. The Senate Report on Aging observed that "this can lead to the anomaly of seniors having considerable wealth that does not provide income". Some provinces and cities offer tax deferral programs to respond to this situation.⁶⁶ This is an example of government policy, as much or perhaps more than the law as we generally understand it.

By the same token, fewer seniors live in health care facilities. Long-term care facilities are only one form of "collective dwelling" in which seniors may reside. The Portrait of Seniors in Canada indicates that "the proportion of seniors living in institutions has decline[d] significantly since 1981", with approximately a third of seniors 85 or older living in a collective dwelling in 2001.⁶⁷ About 9% of senior women and 5% of senior men lived in health care institutions in 2001, while twenty years earlier 10.5% of senior women and nearly 7% of senior men did so. Not surprisingly, more older seniors (85 and over) lived in health care institutions; however, the proportions in this age group also dropped between 1981 and 2001: from 41% of older women to 35% and 29% of older men to 23%. The decrease is attributable to home-care programs and community support. Of course, as people live longer, the *number* of seniors, particularly older seniors, in health care institutions will also increase, even if it is a smaller proportion of the total senior population.

⁶⁵ Portrait of Seniors in Canada, . Because more seniors lived with a partner, there were fewer younger senior (aged 65 to 84) women and men living alone in 2001: 35% of women and 16% of the men.

⁶⁶ The Senate Report on Aging, 115.

⁶⁷ Portrait of Seniors in Canada, 42 n.5. This compares to 2% of seniors aged 65 to 74: Portrait of Seniors in Canada, 138.

Living environments have an impact regardless of what they are. For example, seniors who live alone may be less likely to apply for benefits to which they are entitled.⁶⁸ Putting aside the issue of the amount of benefits, this is a case where the problem may lie in the implementation of law, rather than in the law itself. Seniors who live in long-term care facilities may be unattended; this is an example of failure in compliance with the law. These two situations have one thing in common: the lack of support or advocacy systems, in the one case to ensure effective independence and in the second to ensure security.

Although some “minority” communities have established their own residences for seniors, this is not always the case and is more difficult to do for long-term care facilities than it is for “seniors residences” where seniors are living independently. Immigrant seniors or seniors who have lived in a particular community may find it difficult to find what the Senate Report on Aging called “culturally-appropriate long-term care services”. Seniors who had learned English or French may lose the capacity to speak in those languages and will require an environment in which they can speak their original language.⁶⁹ Aboriginal seniors, too, may find that they live in long-term care facilities away from their home and their original language.⁷⁰ In this regard, the Senate Report on Aging noted that “only Ontario has long-term care services available to some Métis seniors”.⁷¹

“Living in place” requires that seniors have the support necessary. Seniors living in rural areas often have difficulty in meeting all their needs if they do not drive or can no longer drive. With the migration of young people from rural and remote areas to cities, seniors in these areas may not have children in the area on whom to rely, “leaving seniors looking after seniors”.⁷² Consideration also has to be given to how seniors can participate fully in the cities. The Senate Report on Aging refers to Age-Friendly Cities and Communities Guidelines that have been developed.⁷³ While within the purview of municipalities, both the provinces and the federal government can promote the

⁶⁸ The Senate Report on Aging, 105.

⁶⁹ The Senate Report on Aging, 52.

⁷⁰ The Senate Report on Aging, 176.

⁷¹ The Senate Report on Aging, 188.

⁷² The Senate Report on Aging, 117.

⁷³ The Senate Report on Aging, 84-86.

implementation of the guidelines. This is an example how the LCO might make a recommendation about government policy rather than the law.

B. Elder Abuse

The issue of elder abuse has become much more public than in the past and it has been estimated that 10% of seniors may suffer some form of abuse.⁷⁴ Elder abuse may occur in institutions and in the family and, like wife abuse, may be physical, psychological, emotional and/or financial; it may also take the form of neglect. To the extent that an abused spouse may have difficulty revealing that she has been abused, it may be even more difficult for seniors who may have even less interaction with the “outside world” and who may be even more dependant on their family or other so-called “caregiver”.⁷⁵ This abuse is gradually receiving more attention. For example, recently an Ontario-wide hot line system was established for seniors to receive advice about what to do if they are being abused.⁷⁶ There may be “barriers” to older adults calling the hot-line or otherwise reporting abuse, however:⁷⁷ they may not recognize their treatment as abuse; they might be isolated and have little contact with anyone outside their immediate family or caregiver and therefore not realize there is somewhere they may go for help; or they may be fearful, with or without objective reason, of telling someone about the abuse.

The more specific spousal abuse appears to decline with age: among seniors, less than 1% reported experiencing any type of violence by a partner in the preceding ten months,

⁷⁴ Launch of New Province Wide Help Line Provides Safety Resource for Seniors <http://www.onpea.org/english/seniorsafetyline.html> [accessed May 3.09]. It has been suggested that the recognition of elder abuse is “20 years behind where we were when we were trying to raise awareness about violence against women and, before that, how to prevent and respond to abuse of children”: Alison Leaney, Canadian Network for the Prevention of Elder Abuse, quoted in the Senate Report on Aging, 27.

⁷⁵ The isolation of some seniors, particularly older immigrants, is a point made by the Ontario Network for the Prevention of Elder Abuse in response to the LCO’s first consultation paper: “Moving the Project Forward”, 23.

⁷⁶ See the Ontario Network for the Prevention of Elder Abuse at <http://www.onpea.org/#> and Launch of New Province Wide Help Line Provides Safety Resource for Seniors <http://www.onpea.org/english/seniorsafetyline.html> [accessed May 3.09]. The 24 hour hotline provides assistance in 150 languages.

⁷⁷ The Senate Report on Aging notes that “[f]ewer than one in five situations of abuse actually come to the attention of any public agency, and fewer still come to the attention of a public agency operating in the criminal justice system”: 26, citing evidence from Alison Leaney, Canadian Network for the Prevention of Elder Abuse.

compared to 2% of people under 65.⁷⁸ This was true of emotional or financial abuse within the past five years; while 8% of seniors reported experiencing these forms of abuse, 13% of persons 55 to 64 and 31% of persons 15 to 24 did so.⁷⁹ The Senate Report on Aging, however, states that “[o]lder women are at greater risk of abuse due to increased social isolation, cultural norms, familial status, disadvantage or disability”.⁸⁰

Nor are seniors apparently more likely to be victims of other forms of crime; indeed, they may be less likely than non-seniors, with one study showing that about 10% of seniors (65 years and over) had experienced “at least one victimization” in the preceding year”, compared to over 30% for those under 65.⁸¹ This was true for violent crimes and common assault.⁸² Senior men are more likely to experience violent crime than are women (188 compared to 121 per 100,000 persons), except for sexual assault which remains for senior women the crime they suffer more often than do men (5 per 100,000 senior women compared to fewer than 1 per 100,000 senior men).

Seniors are more likely to report crimes to the police than are younger victims, in fact twice as likely than the youngest age group (51% to 25% of victims); this may be in part a function of the context in which the crime occurs, particularly between these two extreme age groups. Contrary to the stereotype that seniors are all frail, the Seniors as Victims of Crime report maintains that “[a]lthough seniors may be perceived as being more frail and vulnerable than their younger counterparts, senior victims of violent crime are no more likely to sustain injuries” and that “over two-thirds (68%) of violent incidents involving seniors did not result in any physical injuries”, as was also the case with victims under 65.

⁷⁸ “Seniors as Victims of Crime in Canada” (Government of Canada): <http://www.victimsworld.gc.ca/res/r54.html>. The report referred to the 2004 General Social Survey on victimization.

⁷⁹ “Seniors as Victims of Crime in Canada”.

⁸⁰ The Senate Report on Aging, 26, citing M. Etkin, the Ontario Network for the Prevention of Elder Abuse: *Stop Abuse, Restore Respect*, Appendix A.

⁸¹ “Seniors as Victims of Crime in Canada”.

⁸² “Seniors as Victims of Crime in Canada” reported that in 2004, there were 12 violent events for every 1,000 [sic] seniors, compared to 45 per 1,000 for persons 55 to 64 and 226 per 1,000 [sic] for persons aged 15 to 24 and 51 incidents of common assault per 100,000 seniors compared to 476 per 100,000 non-seniors. The rates for robbery were 28 per 100,000 seniors and 97 per 100,000 non-seniors.

The figures of actual experience with crime are reflected in levels of fear which are similar between seniors and non-seniors: over 90% of seniors feel “satisfied with their overall level of safety from crime”, compared to 94% of non-seniors.⁸³

One type of crime for which seniors may be specially targeted is telemarketing fraud, with “84% of the total dollar loss through telemarketing prize and lottery occurrences was accounted for by victims over 60 years of age between 1996 and 2003”.⁸⁴

Accordingly, efforts to address the victimization of seniors may need to focus on particular kinds of crimes and on particular contexts, including the home, whether a private home or a collective dwelling. It may be appropriate, too, to recognize the different impact that certain forms of violence have on different sub-cohorts. In particular, the security of older adults may in too many cases require a focus on how to assist those who experience abuse at the hands of a family member, in ways that respect the independence and dignity of the older adult.

C. Access to the Law

While the older adults project is concerned with a broad conception of “access to justice”, it does include the narrower question of the extent to which age constitutes a barrier to the legal system. In some instances, the barriers seniors face are little different from those faced by other groups in particular cohorts, such as those with a low level of education or with language barriers. In other cases, while the issues of access are similar, they may grow worse as we grow older. Another group of issues are specifically related to age. “Moving the Project Forward” sets out some of the considerations that arise in relation to seniors’ access to the legal system.⁸⁵ For example, it is necessary to make the system more accessible for persons with disabilities, necessary for the population as a whole, but perhaps exacerbated when coupled with age. Complaint-based enforcement mechanisms may constitute a barrier to seniors, particularly when age and language and other characteristics intersect. The issue of elder abuse is of

⁸³ “Seniors as Victims of Crime in Canada”. In fact, this 92% was an increase from 89% in 1999. More specifically, however, “21% of seniors felt somewhat or very worried walking alone in their neighbourhoods after dark compared to 15% of non-seniors”.

⁸⁴ “Seniors as Victims of Crime” cites PhoneBusters, the anti-fraud call centre, for this figure. The report suggests that the reasons include seniors’ “substantial savings or assets”, the assumption that seniors will be trusting and polite and lack of contact with family members.

⁸⁵ “Moving the Project Forward”, 25.

particular concern in this regard. Seniors may be reluctant to make complaints about family members, even though the latter may be abusing them financially or otherwise; it may be necessary to develop or extend dispute resolution systems that will protect seniors while respecting their desire for relationships, where it is possible to do both. Technology is often considered a tool to make the legal system more accessible; we need to be aware that seniors still may not have as ready access to the internet or the skills to access it as do younger cohorts.

VII. CONCLUSION

The Law Commission of Ontario project on older adults is intended to provide a road map or blueprint for the future development of law and policy with respect to a cohort that is not only increasing in numbers and proportion of the population, but also whose characteristics as a cohort and as individuals are increasing in complexity. At the very least, we are increasingly recognizing that the existence of older adults is more complex than assuming that they are defined solely by age would suggest; the LCO project is about acting on that recognition in a coherent way.

The older adults project seeks to combine theory and practice. The theory consists of developing a framework or coherent approach to the development of law, informed by the experiential knowledge provided by older adults and those who have formed other kinds of expertise on aging, and based on principles that can be applied flexibly in actual situations. The principles have been defined for preliminary purposes as independence or autonomy, full participation in society, security, dignity and respect for diversity. From what may be considered a theoretical model, the LCO will use concrete examples, illuminated by the kind of demographic data I have discussed above, to illustrate the practice of applying the model and to make pragmatic recommendations about how to employ the framework. The model will allow a “balancing” or weighing of the principles when the values they represent come into tension, either within the cohort or sub-cohorts of older adults or between the cohort and sub-cohorts of older adults and other members of society. The framework and its application must be capable of evolution, as the data referred to above show that changes can occur quickly with respect to this cohort.