

Unemployment Protection for Older Workers: A Case Study of Systemic Bias in a Statutory Regime

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CONTENTS

PART ONE: INTRODUCTION

- I. Background to the Project 1-2
 - A. Defining the Problem 1-2
 - B. Choosing a Vehicle 1-8
 - 1. The Factual Background 1-12
 - 2. Core Documents 1-12
 - 3. Judicial Interpretation 1-12
 - 4. Administration and Implementation 1-13
 - C. A Note on Methods 1-13
- II. Background to the Topic 1-17
 - A. The National Economic Picture 1-17
 - 1. The Transformation of Work 1-17
 - a) Sectoral Shifts 1-18
 - b) The Leaner, Meaner Workplace 1-19
 - c) The Growth of Non-Standard Work 1-19
 - 2. Technological Change 1-21
 - 3. Unemployment in the Last Decade 1-23
 - B. Positioning of Older Workers 1-25
 - 1. Declining Participation 1-29
 - 2. Intracohort Variation 1-32
 - a) Demographic Differences 1-33
 - b) Life Course Differences 1-35
 - 3. The Big Picture 1-37
 - a) Likelihood of Unemployment 1-37
 - b) Likelihood of Re-employment 1-38
 - c) Duration of Joblessness 1-39
 - d) Characteristics of Replacement Jobs 1-39
 - e) Effect on Earnings 1-40
- Notes 1-41

PART TWO: THE LEGAL FRAMEWORK

- III. The Legislation 2-2
 - A. From UI to EI 2-2
 - B. Alternative Takes on the Changes 2-8
 - C. Potential for Adverse Impact 2-15
 - 1. Calculating Eligibility and Benefits 2-16
 - 2. Job Search and Availability-for-Work Requirements 2-18
 - 3. Disadvantages for Non-Standard and Irregular Workers 2-21
 - a) Hours-Based Eligibility Formula 2-21
 - b) The Domino Effect of Job Instability 2-22
 - c) Penalties for Low Earners 2-23
 - 4. The Self-Employment Trap 2-24
 - 5. Health-Related Issues 2-27
 - a) Sickness Benefits 2-27
 - b) Non-Recognition of Caregiving Obligations 2-28
 - 6. Definition and Allocation of Income 2-29

- IV. The Case Law 2-32
 - A. Overview 2-321.
 - 1. The Process 2-32
 - 2. The Results 2-36
 - a) Age Discrimination Cases 2-36
 - b) Systemic Problems Generally 2-38
 - B. Anti-Evolutionary Features of the System 2-47
 - 1. Legislative Constraints 2-49
 - a) Discretion to Make Regulations 2-49
 - b) Discretion to Vary Requirements 2-50
 - c) Discretion re Penalties 2-51
 - d) Discretion re Overpayments 2-51
 - 2. Judicial Interpretation 2-52
 - 3. Administrative Control 2-54
 - a) Control of the Process 2-54
 - b) Influencing the Adjudicators 2-55
 - c) Influencing the Adjudication 2-60
 - 4. Claimant Disadvantage 2-64
 - C. A Glimpse at Implications: Selected Issues 2-67
 - 1. Availability for Work 2-67
 - a) Job Search 2-68
 - b) Obligation to Take Suitable Employment 2-70
 - c) Relocation 2-72
 - d) Caregiving 2-74
 - e) Disability 2-74
 - f) Self-Employment 2-77
 - 2. Comments and Observations 2-80
- Notes 2-82

PART THREE: THE IMPLEMENTATION REGIME

- V. The Administrators 3-2
 - A. Evolution of the System 3-2
 - 1. The Early Years 3-2
 - 2. A Peek Behind the Scenes 3-3
 - 3. From the Eighties into the Nineties 3-6
 - a) Reducing Federal Funding 3-7
 - b) Reducing Federal Influence 3-8
 - B. Principles of the New Approach 3-9
 - 1. Active Employment Measures 3-10
 - 2. Program Objectives 3-11
 - a) Equity 3-12
 - b) Self-Sufficiency 3-12
 - c) Flexibility 3-13
 - d) Efficiency 3-13
 - C. Potential Hot Spots 3-14
 - D. What's in It for the Older Claimant? 3-17
 - 1. Less Access to Training 3-20
 - 2. Fragmentation of Services 3-20
 - 3. Just-in-Time Thinking 3-22
 - 4. Pushing "Connectivity" 3-24
- VI. The Service Providers 3-25
 - A. Devolution to the Provinces 3-25

- B. Toronto Region as a Case in Point 3-29
 - 1. Employment Assistance Delivery 3-29
 - a) In Theory 3-29
 - b) In Reality 3-31
 - 2. Skills Development Benefits 3-42
 - a) In Theory 3-42
 - b) In Reality 3-43
- C. The 45+ Network 3-53
 - 1. The Background to the Initiative 3-54
 - 2. A Snapshot of the Participants 3-56
 - a) Identities 3-56
 - b) Facilities 3-57
 - c) Clientele 3-57
 - d) Programming 3-58
 - 3. Assessing the Results 3-60
- D. Is Toronto Typical or Anomalous? 3-61

- VII. The Clients 3-63
 - A. Voices from the Front Lines 3-65
 - B. Older Workers and Technology 3-77

Notes 3-83

PART FOUR: CONCLUSIONS AND RECOMMENDATIONS

- VIII. Public Remedies 4-2
 - A. Why the System Should be Fixed 4-2
 - 1. Legal Considerations 4-3
 - 2. Social Considerations 4-3
 - 3. Practical Considerations 4-5
 - a) Getting People Back to Work 4-5
 - b) Getting More Bang for the Buck 4-6
 - c) Getting Away from Bandaid Thinking 4-6
 - 4. National Interest 4-7
 - B. What Needs to Be Done 4-10
 - 1. Policy Changes 4-11
 - a) Fiscal Responsibility 4-12
 - b) Restoring Top-Down Oversight 4-12
 - c) Qualitative Assessment 4-13
 - 2. Legislative Changes 4-13
 - a) From VERs to DEWs 4-13
 - b) Lifetime Accounts 4-14
 - c) Unused Entitlement Protection 4-14
 - d) Indexed Replacement Rates 4-15
 - e) Flexible Job-Search Requirements 4-15
 - f) Levelling the Field for Non-Standard Workers 4-15
 - g) Removing the Prohibition on Preventative Programming 4-16
 - 3. Changes to the Appeals Process 4-16
 - a) Levelling the Playing Field 4-17
 - b) Removing the Ban on Part II Appeals 4-17
 - c) Outsourcing of Referee Training and Informational Resources 4-18
 - d) Legal Assistance for Claimants 4-18
 - 4. Changes to the Implementation Regime 4-18
 - a) Adding Older Workers to the Pan-Canadian Target Groups 4-19
 - b) Realistic Budgets and Quotas 4-19

- c) Better/Alternative Information Packaging 4-20
- d) Integrated Programming 4-20
- e) Developing Pedagogical Alternatives 4-21
- f) Needs-Based Training Duration 4-22
- g) Making Career Change Viable 4-22
- h) Different Contribution Rules for Older Workers 4-22
- i) Bridge Funding Options 4-22
- j) Public Education 4-23

IX Private Remedies 4-24

- A. Complaints under the *Canadian Human Rights Act* 4-26
 - 1. The Special Nature of Human Rights Law 4-27
 - 2. Remedial Powers of Tribunals 4-28
 - 3. Methodological Pitfalls 4-29
 - 4. Throwing Out Blanket Rules 4-33
- B. Judicial Review under the *Federal Courts Act* 4-34
 - 1. Breaches of Natural Justice 4-35
 - a) Independence of Adjudicators 4-36
 - b) Institutional Impartiality 4-38
 - 2. Standard of Review 4-41
- C. Charter Challenges 4-47
 - 1. Internal Track Record 4-49
 - a) Appeals to the Umpire 4-49
 - b) Federal Court of Appeal 4-56
 - 2. Signs of Change (Or Not): *Lesiuk* 4-58
 - a) The Case 4-58
 - b) The Prospects 4-63
 - 3. Recent Developments in Constitutional Law 4-65
 - a) *Law v. Canada* 4-67
 - b) *Eldridge v. British Columbia* 4-73
 - c) *Vriend v. Alberta* 4-76
 - c) *BCGSEU v. British Columbia (Meiorin)* 4-76
- D. The Bottom Line 4-80

Notes 4-82

APPENDIX: FACT SHEET ON THE ECONOMICS OF AGING IN CANADA

BIBLIOGRAPHY

EXECUTIVE SUMMARY

Unemployment Protection for Older Workers: A Case Study of Systemic Bias in a Statutory Regime

In June 2001, the Ontario Human Rights Commission released a report on age discrimination entitled *Time for Action: Advancing the Rights of Older Persons in Ontario*, which proposed, as its second major recommendation, “THAT all levels of government [should] evaluate laws, policies and programs to ensure that they do not contain age-based assumptions and stereotypes and that they reflect the needs of older persons.” Although conceived before this report appeared, the present project, as the title implies, could be seen as developing a model for exactly this kind of analysis. Using a range of methods drawn from both law and the social sciences, it provides, in the words of the prospectus, “a detailed analysis of the substance, legal interpretation, and real-world effects of a statutory regime impacting on the wellbeing of older workers”, specifically the (un)employment insurance regime. The results of this exercise pointed up an unfortunate convergence of *overgeneralizations* (older workers are less productive; older workers are sitting pretty with their seniority and fat retirement packages) and *failures* to discriminate. Most notable in the latter category is the use of blanket rules which do not make allowances for the “real” concomitants of age.

Chapter I sets the scene by reviewing the general background to the project, with particular emphasis on the extent and invisibility of age discrimination in the country. As an impetus for the particular choice of topic, it cites two inter-complicating phenomena: on the one hand, the disadvantage experienced by older workers in finding and keeping employment, and on the other, the demographic trends that make it imperative that governments find ways to keep more older people in the labour market. Exacerbating these background problems, it says, is the fact that there are signs that mandatory retirement will soon be eliminated. Once this happens, it will be more important than ever that older workers have access, not only to adequate unemployment protection

but, even more, to effective retraining and employment assistance services. The chapter ends with a discussion of the research agenda, the sources consulted, and the methodology employed.

Chapter II puts the subject matter in context by examining relevant aspects of the economic picture in the country. The first section looks at the way work has been transformed over the last decade, singling out as key factors three particular developments: (a) sectoral shifts in labour market share, first from manufacturing to the service sector, and more recently from high-labour to high-information jobs; (b) downsizing, accompanied by a marked flattening of hierarchy; and (c) the growth of non-standard or contingent forms of work, particularly part-time and self-employment. It considers a fourth, recently much touted factor, technological change, but concludes that the role played by this element in either the GNP or the labour market is much less significant than is commonly supposed. The section ends by reviewing some of the major features of unemployment during the period, including the concentration of job loss among particular groups and regions, the volatile participation patterns and reduced prospects of youth, the gains of women relative to men, the high rate of displacement (i.e., where the jobs lost actually cease to exist), and the increase in duration relative to incidence of joblessness.

The second part of Chapter II focusses on the specific positioning of older workers within this picture. It begins by noting the unreliability of available data due to the fact that the system does not track those who are involuntarily underemployed or who give up searching from sheer discouragement. This unreliability obscures the implications of what is clearly the most prominent trend of the decade, that is, the decline in retirement age and the radical decrease in older worker participation rates. Contra popular images of happy escapees, there is evidence that a significant proportion of these early departures are involuntary and financially devastating. The picture is further muddied by the extreme intracohort variation in older age groups, with the experience of significantly disadvantaged subsets camouflaged by the relative affluence of, particularly, white middle-class men. A section is devoted to the role played by ageism in this polarization, pointing

out that any factor that is subject to negative stereotyping earlier in life will trigger even greater and more blatant stigmatization with age. The chapter ends by considering what all these various tendencies imply for the overall prospects of older workers. In virtually every category – likelihood of unemployment, likelihood of re-employment, duration of joblessness, characteristics of replacement jobs, the effect on earnings – it finds that the group as a whole is *somewhat* disadvantaged, and that quite sizable subsets *within* the cohort – especially women, the disabled, displaced workers, and the less educated – are extremely so.

Part Two of the study turns its attention to the legislative regime where, if anywhere, we should find a remedy for these problems. Chapter III traces the historical evolution of the unemployment insurance system from its inception in the early 1940s to its radical revamp during the nineties. Providing an informative backdrop to the development of the new *EI Act* of 1996, it reviews public, partisan, and scholarly opinion on the causes of unemployment and the effects of various past, present, and proposed changes to the insurance system. Among the most controversial of the insights that emerge from this material are: (a) that the government ignored both public opinion and the recommendations of its own Parliamentary Standing Committee on Human Resources Development in crafting the new legislation; (b) that the “disincentives theory” (i.e., the theory that overly generous unemployment insurance encourages people not to work and produces dependency) that provided the central rationale for tightening up eligibility requirements and reducing benefits was substantially undermined by the work of the government’s own analysts; and (c) that the statistical evidence coming out of the late nineties supported the critics’ worst predictions about the radically reduced coverage of the new Act and the disproportionate effect it would have on poor and marginalized segments of the population.

Balancing the section on the economic position of older workers, the last section of Chapter III looks at the specific implications of UI reform for this constituency. Focussing particularly on the provisions in Part I of the Act, it finds at least five potential problem areas, as follows:

- Making regional unemployment rates the only basis for determining eligibility requirements and benefit level/duration ignores the fact that employability varies more radically according to demographic factors, including age, than geographic ones.
- The department's rather bizarrely specific interpretation of "availability" and "active job search" are disproportionately hard on groups that have higher than average rates of discouragement and lower than average employability potential; the penalizing of disability and other age-related limitations may also violate Section 15 of the Charter.
- Non-standard workers, of whom older individuals make up an increasingly large percentage, are disadvantaged by the hours-based eligibility formula; the calculation of earnings on the basis of a flat period, regardless of fluctuating activity; and by the domino effect of job instability which results in protection disappearing at the same moment as job quality and duration are declining
- The Self-Employment Assistance Program is luring increasing numbers of desperate older workers into ventures with little chance of success, while the provisions in the Act exclude such workers from EI coverage.
- The cap on sickness benefits and the use of finite qualification and benefit periods erodes the value of entitlements for those groups, like older workers, with a higher than average rate of health-related problems.

Having looked at the legislation, Chapter IV turns to a consideration of case law in the area.

The key finding of this investigation is that the internal appeals process of the EI regime provides little relief in respect of systemic problems. Adjudicators at both levels have tended to take a narrow, formalistic, non-purposive approach to interpreting the provisions of the Act, relying heavily on the Commission's own published guidelines, and courts have been inexplicably deferential in reviewing these interpretations. It is notable, on the other hand, that the Supreme Court has not made any substantive pronouncements on these issues since the eighties. It is also notable that human rights tribunals have been significantly readier to find discrimination in the system. The approach generally taken by such bodies was echoed in an anomalous recent Umpire's decision that found the hours-based eligibility formula discriminatory towards women. This case is currently under appeal. After reviewing relevant recent developments in Charter law, the chapter concludes

by suggesting that, should *Lesiuk* get as far as the Supreme Court, the outcome may radically change the prospects for older workers by requiring adjudicators to decide complaints on a more individualized basis.

Part Three of the report shifts attention from the legal framework of the EI system to the implementation regime, which it discusses from three different perspectives, that of the administrators (Human Resources Development Canada), that of the non-governmental front-line service providers, and that of the clients. The particular focus is on the provisions for and delivery of training.

Chapter V begins by tracing the evolution of the system from the early years to the present. Central to this story are two apparently contrary trends: (a) a gradual decrease in the federal contribution to funding, up to 1990, when it was eliminated entirely (the system is now totally financed from employer and employee premiums); accompanied by (b) a gradual *increase* in federal *control* of the system, up to the nineties, when, as a byproduct of constitutional struggles of the period, Ottawa suddenly offered to give up the responsibility for training to the provinces. It moves on from this historical review to look in some detail at the mid-nineties reform initiative. Features discussed include both its articulated goals (getting people back to work through increased use of “active employment measures”) and its *unarticulated* but easily inferrable secondary objectives (reducing expenditures on unemployment so the surplus can be put to other uses). The chapter concludes by considering some of the more detrimental consequences for older workers, including the loss of national standards, the fragmentation of services, the abandonment of preventative measures, and the decreased access to training (without which high-needs workers tend to be either ghettoized into McJobs or forced into early retirement) concomitant on the emphasis on quick fixes.

Shifting focus from policy to program delivery, Chapter VI begins by reviewing the background to and results of the aforementioned devolution process. It then turns to a

consideration of Toronto Region as a case in point. While the example is arguably non-representative in that Ontario is the only province which has not signed a Labour Market Development Agreement with Ottawa, because HRDC is still nominally “in charge” of the system at this site, it also offers the best opportunity possible to see how the federal priorities translate into concrete programs. The picture that emerges does not inspire confidence. Downsizing, decentralization, the contracting out of almost all front-line services, and an emphasis on cost cutting at the expense of quality control has resulted in decreased benefits for all users. How does this affect older workers in particular? Most obviously, the truncation of support duration, according to front-line workers, has made it impossible to do any significant skills upgrading. Aggravating matters, the depersonalization of the system, the switch to electronic information disbursement, and the stress on self-reliance (theoretically at least, counsellors just provide information; clients are expected to set their own goals, carry out their own research, make their own decisions, and purchase their own training) make it difficult for the less-educated and less sophisticated faction of the cohort to make effective use of the services that *are* offered. The capping problem is that quota-based assessment methods mean that service providers, in order to survive, must focus their efforts on the most likely prospects to the detriment of the needier ones, a process known as “creaming”.

The result of these various trends can be seen clearly in the fact that most of the few agencies that provide specialized services for older workers cater to a largely middle-class clientele and emphasize job-getting strategies (labour market research, networking, resume writing, interview techniques, and general psychological preparedness) rather than any sort of skills development programming. Although, thanks to the peculiarities of HRDC’s data-gathering methods, it is impossible to get hard figures on this, there is considerable anecdotal evidence that a large percentage of high-needs older individuals are simply being driven out of the system. The effect that this has on personal lives can be seen in Chapter VII, the centrepiece of which is a compilation

of quotations from clients and the counselling professionals who work with them.

Faced with all this evidence that older workers, as the group hardest hit by the combination of underbudgeting and minimalist programming, *are* facing disadvantage in the EI arena, the concluding portion of the report poses two questions: Should the system be changed, and if so, what should be done to it? Chapter VIII considers these questions from the standpoint of state action. It begins by noting reasons – ranging from legal necessity through social wellbeing to economic stability – why it would benefit, not only the subjects themselves, but the country as a whole if the government were to undertake to “fix” those aspects of the EI regime that currently work to the disadvantage of older workers. It then offers a list of specific suggestions as to how this could be achieved, highlights of which are listed below. Underwriting the whole chapter is the ironical observation that the “reforms” called for would actually have the result of bringing the system more in line with the vision originally articulated by the government in the period leading up to and concomitant with passage of the 1996 Act, and repeated faithfully in HRDC reports and policy statements ever since. What it boils down to, in other words, is a call for the government to put its money where its mouth is. Balancing this wishful prescription, and recognizing the political impediments which are likely to block its realization, Chapter IX shifts focus from public to private remedies, with an examination of various available litigation strategies, from human rights complaints through judicial review to Charter challenges. The chapter and the report conclude with a discussion of several recent Supreme Court Charter decisions which – besides adding force to the author’s claims about the pernicious nature of one-size-fits-all statutory schemes – provide important new tools for combating institutionalized discrimination.

RECOMMENDATIONS

Policy changes

1. Expenditures should be determined by the reasonable costs of actually delivering the services required to bring about a satisfactory result, not by quotas or by cost-cutting targets.

2. The federal government should take steps to restore top-down control by modifying the Labour Market Development Agreements to include more specific guidelines and standards and by exerting more direct oversight.

3. Assessment methods, which are currently almost entirely quantitative (clients served, dollars saved, interventions averted, etc.), should be broadened to incorporate qualitative evaluations of both services and programs.

Legislative Changes

4. Eligibility and benefit levels should not be based solely on regional variations in unemployment, but should take into account any additional grounds of disadvantage for which reliable employment statistics are available, including gender, age, race, education, disability, and immigrant status.

5. Entitlements should not be based solely on activity in the recent past, but should take into account the individual's labour market attachment over his/her entire career. Individuals should be able to use their accrued credits to take education leaves in mid-career or bank them against the risk of extended or repeated joblessness later on.

6. The idea of a finite benefit duration should be discarded; unused entitlements relating to claims interrupted by sickness or other justifiable reasons for unavailability (like caregiving obligations) should be payable in full when the person is able to return to the labour force.

7. The Minimum Insurable Earnings (MIE) should be raised so that low earners will bear a less disproportionate share of the premium burden, and replacement levels should be indexed such that individuals at the bottom of the scale would get a higher percentage of MIE than those further up.

8. Availability and job-search requirements should be interpreted with regard to the personal circumstances of the individual, particularly where barriers either to activity or to employment are related to prohibited grounds of discrimination, including age.

9. Means should be sought to eliminate the disadvantage for non-standard workers, including doing away with the hours-based eligibility formula, changing to a "best weeks" system of calculating earnings, and introducing some form of coverage for Own-Account Self-Employed persons.

10. The prohibition on preventative programming should be removed from the Act.

Changes to the Appeals Process

11. Provisions in the legislation limiting the discretion of boards and umpires to review decisions

and actions of the Commission, or giving the Commission, in its role as an interested party, an advantage over a claimant in the appeals process, should be modified or removed.

12. The prohibition on appeals in respect of Part II employment benefits should be eliminated.

13. The training of, and the preparation of reference materials and guidelines for, referees should be done by an independent body, not by the Commission.

14. Assistance should be provided for appellants at the very beginning of the process, including information about the legal tests they will be expected to meet under particular heads, the onus of proof, and the kind of evidence that is generally necessary to make a case.

Changes to the Implementation Regime

15. Older workers should be added to the Pan-Canadian target groups.

16. Quotas and budgets for employment assistance service delivery should be based on realistic re-employment prospects for the client mix actually handled by given agencies.

17. New entrants into the system should be given more personalized guidance, and information about services should be better packaged, better mediated, and provided in print as well as in electronic form.

18. High-needs older workers should be provided with specialized integrated programming such that they will receive more intense and more continuous counselling and guidance than is available in the current “supermarket” service model.

19. Efforts should be made to identify and/or develop training regimens better suited to individualized learning than the fast-track, classroom-style delivery which is currently the norm. Since older people learn better in a practical setting, more effective use should be made of wage subsidies to encourage employers to provide significant training on, or in conjunction with, real jobs.

20. Training durations should be based on particular needs rather than standardized formulae, with the criterion being what is required to bring a person’s skills up to the level necessary, not just to get him/her into *any* employment, but to get him/her into employment comparable in quality to his/her prime-years occupation and with a reasonable chance of lasting.

21. Career change, which is rarely approved under the present system unless the claimant’s occupation has disappeared or s/he is no longer able to function in this occupation due to medical problems, should be promoted as a means of combating underemployment.

22. In means-testing to assess the required level of personal contribution to training, an older individual should not be forced to exhaust assets and savings required to subsidize retirement.

23. Bridge funding should be made available for individuals less than pension age who are no longer capable of working full-time or at all. This should include a range of options from partial pensions for those capable of maintaining a reduced attachment to the labour market to full income replacement for those who are unemployable

24. The government should undertake a public education campaign to promote awareness of ageism.

