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Diminishing Returns: Age-Discriminatory Elements in the Employment Insurance Act

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DIMINISHING RETURNS:
Age-Discriminatory Elements in
the Employment Insurance Act

GAILE MCGREGOR*

RéSUMÉ
En 1996, Ottawa a dévoilé les résultats d'une initiative de réforme de sécurité sociale sur trois ans. La nouvelle Loi sur l'assurance-emploi réduit les taux de prestations, resserrer les conditions d'admissibilité et met en place une série de sanctions pour les utilisateurs fréquents. En l'espace d'un an, le nombre de requérants a diminué de plus de la moitié. Bien que le gouvernement affirme qu'il était nécessaire de se serrer la ceinture pour éliminer les facteurs non incitatifs au travail, il est vite devenu évident que les modifications ont touché de façon disproportionnée les groupes démographiques dont le non-emploi ne dépendait pas d'un choix délibéré. Cet article se penche sur les implications de ces changements pour l'un de ces groupes, les travailleurs âgés. La recherche se concentre d'abord sur les facteurs sociaux et économiques – depuis les lacunes au niveau des compétences jusqu'aux problèmes de santé, en passant par l'âgisme –, lesquels rendent sans conteste les personnes âgées extrêmement vulnérables. Elle offre ensuite une analyse systématique des aspects éventuellement discriminatoires de la législation. Le tout se termine par une recension du droit jurisprudentiel d'appels d'assurance-emploi afin d'établir si ces problèmes « théoriques » se sont produits dans la pratique et, si oui, de quelle manière. Il se dégage de ce triple exercice que les travailleurs âgés se trouvent généralement désavantagez par la dépendance envers des décisions générales et des solutions rapides. Certains sous-groupes parmi la cohorte – les femmes sous-éduquées, les minorités raciales, les immigrants et les handicapés – se comptent en grand nombre parmi les laissés-pour-compte.

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In 2000, the Canadian Human Rights Review Committee came out strongly in favour of doing away with mandatory retirement.\(^1\) A year later, the Ontario Human Rights Commission made the same recommendation.\(^2\) Granted, this is not the first time that we have heard such views from these sources. Every time another mandatory retirement case comes up, the Canadian Human Rights Commission (CHRC) takes the opportunity to register its invariably negative opinion. The comments in its 1997 Annual Report are typical. “No doubt there are various ways to adapt ourselves to an aging society,” the author says snappishly, after reviewing a long list of reasons why the present system is unfair and irrational, “but mandatory retirement hardly seems one of them…. It is high time this form of discrimination ceased to be protected by the Canadian Human Rights Act.”\(^3\) This time, though, there is evidence that politicians are ready to hear the message. After a decade of encouraging early retirement to make jobs available for younger workers, governments in almost all developed regions of the world have begun to realize the implications of an aging population, increasing dependency ratios, and a radically declining labour force participation rate for older cohorts.\(^4\) With crass economic motives weighing in to the debate, it seems only a matter of time before the retirement age is raised or eliminated altogether.

In the abstract, this development may be seen as a victory against ageism. Offsetting the triumph, unfortunately, is the fact that for many population subgroups, including – particularly – women, it is not mandatory retirement which is propelling them out of the workforce, nor is it the fact that governments and employers have been pushing people to retire. It is their radically diminished employability after the age of 55 (see Section I.B below), partly because of “real” problems like skills gaps, but even more because of ageism.\(^5\) Unless steps are taken to counter both the real and the attitudinal handicaps, for

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4. As an example of recent shifts of thought in at least some pockets within the federal superstructure, see Human Resources Development Canada (HRDC), Evaluation and Data Development, *Lessons Learned: Older Worker Adjustment Programs* (Ottawa, Ont.: HRDC, 1999); also the 1999 report of the Standing Committee on Human Resources Development on older workers, *Looking Ahead: An Interim Report on Older Workers*. For a taste of international perspectives on this subject, see Alexander Samorodov, *Ageing and Labour Markets for Older Workers*, Employment and Training Papers #33 (Geneva: International Labour Office, 1999).

5. Space precludes any substantial consideration of this issue. As a small indication of the extent of the problem, however, one might note that in a survey of federally run Human Resources Centres, 91% of respondents with an older client mix agreed, strongly or moderately, that employers discriminate against older applicants. Susan Underhill, Victor Marshall, Victor & Sylvie Deliencourt, *Options 45+ HRCC Survey: Final Report* (Ottawa, Ont.: One Voice, 1997) at 30. For a range of perspectives on ageist attitudes among employers, see Martin M. Greller & Linda K. Stroh, “Careers in Midlife
many of the individuals who share this kind of disadvantage a higher retirement age will just mean a longer period of frustration, humiliation, and economic deprivation.

Much of the legislation designed to protect the interests of workers either ignores or exacerbates the problems of older cohorts. In some cases the differential treatment is quite explicit. Most notable in this respect is the fact that the human rights statutes of four provinces – British Columbia, Saskatchewan, Ontario, and Newfoundland – prohibit discrimination in employment on the basis of age only between the ages of 18 or 19 and 65.6 This initial exception enables further distinctions such as the exclusion of those past the normal age of retirement from the notice and severance requirements in the Ontario Employment Standards Act (ESA).7 In other cases, such as the federal Employment Equity Act8 (EEA), the problem is one of omission. Despite the very general language in its preamble (“The purpose of this Act is to achieve equality in the workplace so that no person shall be denied employment opportunities or benefits for reasons unrelated to ability”), as it presently stands the EEA covers only women, aboriginal peoples, persons with disabilities, and members of visible minorities.9 More pernicious than any explicit exception, on the other hand – if only because of its invisibility – is the disadvantaging of older workers through the adverse impact of facially neutral rules and practices.

In a report on age discrimination released in the spring of 2001, the Ontario Human Rights Commission recommended “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.”10 The present article arises from just such an initiative – a study funded by the Law Commission of Canada on systemic age discrimination in what is arguably the most critical legal and practical resource for un- or under-employed older workers, the employment insurance regime.11

6. With similar implications, the Canadian Human Rights Act, R.S.C. 1985, c. H-6. contains an exception for termination of an individual who has reached the "normal age of retirement" for his or her profession (s. 15(1)(c)).
7. O.Reg. 327(2)(g), s. 57.
8. S.C. 1995, c. 44.
9. Considering the substantial evidence that older workers are collectively disadvantaged as much or more than the enumerated groups when it comes to hiring and promotion, it may well be possible to apply the principles enunciated in Vriend v. Alberta, [1998] 1 S.C.R. 493, 156 D.L.R. (4th) 385, in respect of the omission of sexual orientation from the province's human rights code to establish that their exclusion from the protection offered by this statute is not only discriminatory but unjustified.
10. Time for Action, supra note 2.
11. The findings of this study, which looked at administration and implementation issues in the EI system, not just its legal concomitants, may be found in Unemployment Protection for Older Workers: A Case
Age-Discriminatory Elements in the *Employment Insurance Act*

### I. BACKGROUND

#### A. The Legislation

For most people, the defining moment in the recent history of the Canadian unemployment insurance system was the coming into force in 1996 of the strategically renamed *Employment Insurance Act* (1996) (EIA), with its more rigorous eligibility criteria and radically diminished entitlements. (See Table 1 below.) In fact, the *EIA* only gave official recognition to a change of direction which had been in the wind for at least three years. Amendments made to the old Act in 1993 and 1994 in response to recessionary fiscal pressures had already quietly set in motion a campaign to reduce program costs. True, some technical elements in the new legislation—like the switch from a weeks-based to an hours-based formula for calculating threshold eligibility—were innovations. Also true, the extent of the reductions increased rather markedly. The general *trend* toward belt-tightening, however, was already well underway before mid-decade. What made the *EIA* seem like a departure was less what it contained than the way it was framed.

#### Table 1: A comparison of entitlement parameters before and after 1996

<table>
<thead>
<tr>
<th></th>
<th>Old UI</th>
<th>EI</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Entrance requirement</strong></td>
<td>12-20 weeks (min 15 hours or $163/week)</td>
<td>420-700 hrs (equiv. to 12-20 weeks of 35 hrs/week)</td>
</tr>
<tr>
<td></td>
<td>20 weeks</td>
<td>910 hours</td>
</tr>
<tr>
<td>Weekly insurable earnings</td>
<td>Maximum Insured Earnings (MIE) of $815/week; min $163 or 15 hours/week</td>
<td>No restriction; all hours, all earnings count up to an annual maximum of $39,000 ($750/week)</td>
</tr>
<tr>
<td><strong>Benefit level</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Measurement of insurable earnings</td>
<td>Average over most recent 12-20 weeks of work</td>
<td>Last 26 weeks earnings divided by number of weeks worked OR last 26 weeks earnings divided by minimum divisor (14-22)</td>
</tr>
<tr>
<td>Benefit rate for most claimants low income claimants with children</td>
<td>55% of earnings (see above) up to MIE Dependency Rate: 60% (if own earnings 50% of MIE)</td>
<td>55% of earnings (see above) up to MIE Family Supplement: top-up equal to CTB to maximum benefit rate or 65% (if household income $24,921)</td>
</tr>
<tr>
<td>Reduction based on past use</td>
<td>n/a</td>
<td>Intensity Rule: 1% decrease in benefit rate for every 20 weeks regular benefits collected in 5 years, to min of 50% of earnings (rule eliminated in 2001)</td>
</tr>
<tr>
<td><strong>Length of Claim</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Weeks of benefits</td>
<td>Schedule based on insurable weeks of work and regional unemployment rate</td>
<td></td>
</tr>
<tr>
<td>Range</td>
<td>14-50 weeks</td>
<td>14-45 weeks</td>
</tr>
</tbody>
</table>


In 1995, then-Minister of Human Resources Development, Lloyd Axworthy, released a Green Paper entitled *Jobs and Growth – Improving Social Security in Canada*. Nine supplementary papers provided more detailed information about the current system and about the options set out in the primary document. Much was made of the fact that this was not an agenda cast in concrete; it was a menu of widely varying possibilities to be adjudicated through public discussion. The illusion of consultation was fostered by the fact that changes—many of which were already in place—were packaged as two alternative approaches, one involving a radical restructuring of the system, the other modifying current arrangements. Underlying all the substantive proposals, however, was a set of axioms that formed a centrepiece to the initiative. Overly generous UI (it was claimed) acts as a disincentive to work. Because of this unintended psychological effect, people become trapped in cycles of dependency. The only way to help them permanently is through a kind of tough-love regime focussing on active employment measures rather than passive support. The priority for the government, therefore, should not be to make unemployment painless, but to promote self-sufficiency by improving employment development services such as counselling, training, wage subsidies, and job creation.

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### Clawback

<table>
<thead>
<tr>
<th>Payback of benefits above a total</th>
<th>Threshold of $63,570 (1.5 x MIE); 30% rate of payback; max of 30% of benefits collected</th>
<th>If weeks of regular benefits in last 5 years 20; threshold of $48,750 (1.25 x MIE); 30% rate of payback; max of 30% or benefits recovered</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>If weeks of regular benefits in last 5 years 20; threshold of $39,000 (MIE); 50-100% rate of payback (100% if 120 weeks); max of 50-100% of benefits recovered</td>
<td></td>
</tr>
</tbody>
</table>

*Adapted from Martha MacDonald, “Restructuring, Gender and Social Reform in Canada” (1999) 34 J Cdn Studies 57 at 64-65*
While this is not the place to embark on a full scale critique of either the scientific soundness of this thinking or the policy that drove it, it is perhaps worth mentioning that, whatever its viability in the U.S., where it was spawned, there has been little empirical support for the disincentives theory on this side of the border. Confuting the predictions of behaviour change implicit in the tough-love scenario, studies undertaken by the government's own researchers after the new system was launched have revealed that reducing benefits did not reduce durations of unemployment spells, did not noticeably affect the number of quits at the point that eligibility was established, and had only a minor impact on job search intensity. Notably, these

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required to meet this objective. Three out of the six have to do with training, and a fourth talks of better counselling about training. The fly in the ointment is the fact that, as will be discussed later in the paper, the objective of improving training opportunities is fundamentally irreconcilable with the uber-objective of cutting costs.

15. The fact is, the whole theoretical edifice is based on a premise about human psychology which is neither questioned nor proven, that is, that most people, given the chance, would prefer not to work. The most blatant -- and crassest -- version of this usage encountered by this writer was in Thomas Lemieux & W. Bentley MacLeod, *UI: State Dependence and Unemployment Insurance* (Ottawa, Ont.: HRDC, 1995). Although their only evidence is the statistical datum that "first time use of the [UI] system increased the probability of future use", these researchers use intentional language throughout their paper as if there were no other way to account for the phenomenon other than claimants deliberately taking advantage. "For people with lower incomes, UI provides another inducement to reduce their labour supply and to work on a part-year basis.... When a new government program is introduced, individuals adjust their behaviour.... [T]he speed of behavioural response to policy changes is likely to be very asymmetric, depending on whether a program is increasing or decreasing in size. When a program is made more generous, more people are expected to use it. As with any other 'profit' opportunity, it takes time for people to learn about a new policy and adjust to its parameters. In keeping with our finding that first-time use tends to increase future use, these people were unaware of the benefits of the system prior to their using it and used it less than they might have had they been better informed" (at 30-31). Further down they refer to "persons choosing to cycle in and out of the system" (at 31, emphasis added). Nowhere in this article do the authors consider obvious alternative explanations for the positive correlation between use and future use, that is, that there are no jobs, that a high proportion of the population in question lacks the kinds of skills that would get them into more permanent employment in the first place, and/or that losing employment damages one's employability quotient and makes it more likely that one will have to settle for the kind of unstable work that increases the odds of more unemployment in the future. Given the disparaging tenor of this line of analysis, it is hard to resist the suspicion that what we are seeing is just a recycling of common classist assumptions about the laziness and dishonesty of the poor.

16. These particular findings derive from Stephen R.G. Jones, *UI, Effects of Benefit Rate Reduction and Changes in Entitlement (Bill C-113) on Unemployment Job Search Behaviour and New Job Quality*, Unemployment Insurance Evaluation 14 (Ottawa, Ont.: HRDC, 1995); L.N. Christofides & C. McKenna, *UI, Employment Patterns and Unemployment Insurance*, Unemployment Insurance Evaluation 6 (Ottawa, Ont.: HRDC, 1995); and P.-Y. Crémiex et al., *UI, Unemployment Insurance and Job Search* (Ottawa, Ont.: HRDC, 1995). For a more comprehensive discussion of the topic, see Miles Corak, *Unemployment Insurance, Work Disincentives, and the Canadian Labour Market: An Overview*, Research Paper No. 62 (Ottawa, Ont.: Statistics Canada, Analytical Studies Branch, Business and Labour Market Analysis Group, 1994). After conducting a full review of the research, Corak, a Senior Research Economist with the Analytic Studies Branch who, ironically, had himself contributed significantly to the earlier disincentives literature, concluded, obviously somewhat to his own surprise, (a) that UI had probably not influenced unemployment in the country nearly as much
discoveries did not stimulate any major rethinking among policy makers. This is hardly surprising. Whatever its shortcomings in respect of its humanitarian pretensions, EI reform was eminently successful in respect of its "other" objective—the objective of saving money. Thanks to the much tightened eligibility requirements, coverage under the new Act was reduced by more than half, from 74% in 1989 to 36% in 1997. Thanks to the reduction in payouts, within five years of the leaner, meaner regime, the accumulated EI surplus had topped $28 billion.

This brings us to our present topic. As gratifying as it may be for the government, for people concerned with social justice issues, the EI surplus is a negative, not a positive indicator. And not just because it looks like a tax grab. The real problem is that the pain is not evenly shared. What emerged very quickly once the new system went into effect was that those hardest hit by the cuts were the very groups who, due to economic disadvantage and reduced employability, needed the assistance the most. Older workers have arguably been the hardest hit of all, especially where age comes on top of other grounds of discrimination. The purpose of this paper is to examine exactly what it is in the legislation that is disproportionately problematic for such individuals. Before turning to this task, however, it is useful to consider a few of the factors that make the cohort unusually vulnerable in the first place.

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17. Originally compiled by Statistics Canada from the monthly Employment Insurance System data file provided by HRDC, these figures were reported in a 1999 Canadian Labour Congress (CLC) booklet entitled Left Out in the Cold: The End of UI for Canadian Workers. A roughly contemporaneous Applied Research Branch working paper, An Analysis of Employment Insurance Benefit Coverage (Ottawa, Ont.: HRDC, 1998), using different methods of calculation, gives the coverage rates for the pertinent years as 83 and 42. Numbers aside, the more interesting contrast between these two publications is in their tone. The CLC paints the result as outrageous; the government publication, despite revealing that the decline was just as bad as critics claimed, is nonchalant and dismissive.

18. This figure is taken from the HRDC Performance Report for the period ending March 31, 2000.

19. Not surprisingly, the most persistent and strident critics were those whose constituencies had the most to lose from the changes. Labour and women's organizations were particularly outspoken. See, for instance, the National Association of Women and the Law's Submission to the Standing Committee on Human Resources Development, The Federal Social Security Reform: Taking Gender Into Account, (Ottawa, Ont.: NAWL, 1994), and the Canadian Labour Congress's Submission to the Standing Committee on Human Resources on Bill C-12: The Employment Insurance Act. (Ottawa, Ont.: CLC, 1996).

B. The Constituency

Not much has been written about the specific impact of EI reforms on older claimants. Most critics focus on the ramifications for (1) displaced workers, (2) the least educated, (3) women and/or (4) low earners. Fortunately (at least from the standpoint of this article) much of what they say is also applicable to the older cohort. As I have detailed elsewhere, displaced workers and the uneducated are significantly overrepresented among 45-64-year-olds. Because of their penchant to retire earlier than men, women are underrepresented numerically in the group, but offsetting this is the fact that the effects of gender disadvantage are magnified with age. The earnings picture is harder to get at. Though there is evidence that replacement jobs in later life typically provide only a fraction of prime-age earnings, the effects of this are muted by the increasing polarization we see in late career, especially (though not solely) among men. A study reported in a 1997 HRDC research paper shows men in the highest earnings quintile making twice as much – almost $40,000 more – as those in the next highest quintile, and almost ten times as much as those in the lowest. Obviously this split makes aggregate figures unreliable. If we subtract the well-off minority, though, it is clear that the older workers category again includes a disproportionate number of low earners. This means that negative impacts delineated for any of the other disadvantaged groups, from declines in coverage to higher premium burdens, may also be extrapolated to the older cohort.

Shared problems, on the other hand, are only the tip of the iceberg for this particular constituency. Even without additional sources of disadvantagement like gender or

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23. Just as an indication of this, according to a 1999 study of older worker adjustment, the average annual earnings from employment after layoff was $11-12K for those laid off in the 45-49 year old age group, $8-9K for those in the 50-54 year old age group, $3-4K for the 55-59 year old group, and $5-2K for those 60-64 years old. These figures represent drops ranging from about 50% for the youngest subgroup to over 90% for the oldest one. HRDC, Lessons Learned: Older Worker Adjustment Programs, supra note 4.

education deficits, there are structural features of older worker unemployment that make individuals in this category generally more vulnerable than younger claimants. While space constraints make it impossible to provide a full discussion of these features, the following capsule, synthesized from data compiled as part of the Law Commission study (see note 22), will give the reader at least a sense of the context against which the adequacy of the EI provisions must be assessed.

The position of older cohorts has worsened drastically in recent decades. This is not widely realized. Most people still think of older workers as being protected by their experience and seniority. In fact, Statistics Canada figures on comparative employment patterns show not only that older workers have faced escalating layoff rates during the past quarter century relative to younger cohorts, but that, once out, they have a far more difficult time reentering the labour force. While the highest level of unemployment is still among persons 15-24 years, the duration of unemployment increases significantly with age. Duration for men 45+ rose from 18 weeks in 1976 to 32 in 1985 to 35 in 1994, compared with 17 weeks for men 15-24. Duration for 45+ women has traditionally been lower than for men, but has been increasing at a faster rate. Duration rates for all older workers rose by 67% between 1976 and 1998, compared with a 47% increase for all ages. In 1993, approximately 25% of men and 17% of women 45+ who were unemployed had been so for more than a year, compared with 16% of unemployed men and 12% of unemployed women aged 15-24. In 1998, the incidence of long-term unemployment among older workers was twice that in the labour market as a whole.

Exacerbating the longer jobless spells is the aforementioned decline in the quality of replacement jobs. It is not just a question of lower earnings—a more important factor is the lower hours. It is notable that between 1976 and 1998 the number of older workers in part-time jobs increased by more than 70%, roughly one and one half times the rate of increase for all ages. Although some of this is a matter of choice, 15 to 20% of the change in mode of participation is estimated to be involuntary. In 1996, 41% of employed men and 27% of employed women 45-69 who were working part-time would have preferred otherwise. The rate of self-employment also rises with age. Again some of this is elective, especially among better educated males. For the swelling number of women and blue-collar workers in the category, however, the shift is more likely to reflect a lack of viable alternatives. For both voluntary and involuntary contingent workers, the financial and other penalties may be considerable, since the vast majority of jobs in this class, besides being low paying, are characterized by short tenure, irregular hours, no benefits, and a great deal of uncertainty.

Adding a final fillip to the picture, there is every reason to believe that these data, as bad as they are, actually underrepresent the problem. Much has been made of late, for instance, about declines in the participation of older workers. In 1996, employment rates for Canadian men 55-59 and 60-64 were only 67% and 41% respectively. Comparable figures for women were 45% and 22%. The average retirement age in Canada is now under 62. Generally this is seen as a positive phenomenon. Offsetting all those media images of happy seniors basking on beaches, however, is the fact that many people who retire before 65 do not do so voluntarily. Studies have reported that
an absolute majority of men 60+ who become unemployed are unable to return to active labour force participation. In the U.S. approximately one-third of all career jobs have ended by the time the incumbent is 55, and about one-half have ended by age 60. It is clear from such indications that many older persons move into retirement through the absence of alternatives. Displaced workers – workers who have lost jobs which cease to exist – are particularly vulnerable in this respect. According to a mid-nineties report excerpted on the HRDC website, among 55-64-year-olds, 52% of those losing jobs due to displacement were unable to find reemployment. It is also notable that older people are significantly overrepresented (almost 2:1) in the discouraged category of unemployed workers. Victor Marshall speculates that if these people were factored into unemployment statistics, the real unemployment rate for 55+ workers would be over 23%.25

Considering these special problems, it is clear that, even above and beyond the normal disadvantage for high-needs subgroups within the older cohort, an insurance scheme geared to the average is likely to have particular or at least increased shortcomings with age. The most noteworthy of the potential hot spots for older workers are reviewed in the next section.

II. POTENTIAL FOR ADVERSE EFFECTS

Sections III through IX of the EIA deal with technical, financial, and administrative aspects of the system, and with special applications. While these areas are not without their own hot spots – the appeals system, which I have discussed elsewhere, is particularly notorious in this respect – for the purposes of the present paper I have limited my examination to the core elements of the program, income support (unemployment benefits), and employment assistance services (employment benefits).

A. Part I Unemployment Benefits

1. Calculating Eligibility and Benefit Levels

There are three elements that have to be considered in calculating an individual’s entitlement under the EIA. The first is the entrance requirement, setting out the minimum length of time that an applicant must have been employed during a qualifying period (usually 52 weeks); the second is the measure of insurable earnings, which determines the benefit level; the third is the allowable length of claim, based on entry hours. As can be seen on Table 1, changes made in the EIA of 1996 raised the bar on all three of these axes. The entrance requirement was increased from 12-20 minimum-15-hour weeks to 420-700 hours (the equivalent of 12-20 35-hour weeks) for regular claimants, and from 20 weeks to 910 hours (the equivalent of 26 35-hour


weeks) for new entrants and re-entrants (i.e., claimants who have had less than 490 hours of insurable work during the 52 weeks preceding their qualifying period). The basis for calculating earnings was changed from 12-20 weeks of work to a flat period of 26 weeks. The maximum length of claim was reduced from 50 to 45 weeks. All of these changes adversely affect older workers. I will be talking about the first two areas later. For now, let me merely point out the obvious fact that any reduction in the length of time for which support can be provided is going to impact disproportionately on claimants who face particular barriers to unemployment (whether because of real detriments, like low education, or attitudinal ones like discrimination) such that their durations of joblessness are longer than average. As I have already noted, there is ample statistical evidence that significant subgroups of older workers fall into this category.

Having said this, I must add that focusing on specific developments like changes to eligibility requirements and claim lengths, as most recent commentators have tended to do, obscures what is probably the most profoundly discriminatory aspect of this legislation. Exacerbating the effect of changing any individual component in the equation is the formula that dictates the way these components will be combined. You may have noted that the foregoing summary of parameters was framed in terms, not of fixed figures, but of maximums and ranges. The variable determining where, within a stipulated range, a given claimant will fall is the employment rate in different regions of the county. In high unemployment areas, unemployed individuals require fewer hours to qualify, and get more weeks of support for any given number of hours, than unemployed individuals in low unemployment areas. As of August 10, 2001, for instance, an EI claimant in Ontario, where the unemployment rate was 5.7, would need a minimum of 700 hours to qualify, and with that minimum, would be eligible for only 14 weeks of support. In Quebec, right across the border, where the unemployment rate was 8.6, the same person would need only 595 hours and would be entitled to 18 weeks worth of benefits.

Now obviously there is nothing wrong with the principle behind this variance — if a person has a diminished chance of finding work quickly, it seems only fair that s/he should be given more time to do so. What is unfair, however, is using geography as the only basis for calculating chances.\(^27\) Regional unemployment is not the only or


\(^{28}\) To frame the discussion in terms of objective criteria, like fairness or rationality, as I have done here, is misleading in at least one respect. The impetus for selecting a regional scheme was political, not logical. One of the most perennial questions about UI/EI over the years has been whether it should be viewed primarily as an insurance scheme or as a means of income transfer. The income
even the most important determinant of re-employability. Just on the statistical probabilities, a white, Canadian-born, 35-year-old male with a college degree living in Quebec is significantly more readily employable than a high-school-educated 52-year-old female Jamaican immigrant from Ontario. The more axes of disadvantagement that are added to the mix, moreover, the lower the chances. In this last example, for instance, if the Jamaican woman were also disabled, her chances of re-employment would be just about nil. As a group from the Canadian Centre for Policy Alternatives pointed out as far back as 1989, a reasonable program would be one that treated all relevant variables equally.\textsuperscript{29} From the standpoint of the purposes and principles articulated for this regime by its own authors, it would clearly make more sense to base eligibility and entitlement calculations on a sliding scale of employability that took into account not only regional economic conditions but systemically disadvantaging demographic and experiential factors. Since older workers as a group suffer both more numerously and more substantially from such effects, one could argue that the omission of some such provision is in itself adverse effect discrimination.\textsuperscript{30}

...
2. **Job Search and Availability-for-Work Requirements**

The second potential locus of discrimination concerns what someone is required to do to retain his or her benefits. Section 18 of the Act stipulates that a claimant may not collect benefits for any working day for which s/he fails to prove that s/he was "capable of and available for work and unable to obtain suitable employment". On the surface, this qualification seems entirely reasonable. What is problematic is the way the El Commission has interpreted availability. The following passages are taken from sections 10.1.2 and 10.1.3 of the El Digest of Entitlement Principles, a reference tool available on the internet detailing the bases on which HRDC makes its claims decisions.

A person may not be considered available for work unless that person is physically capable of working. From this perspective, the ability to work is just one facet of the concept of availability. Similarly, not taking advantage of an opportunity of suitable employment may indicate that one's willingness to work is doubtful or that there are limitations on one's availability.

The requirement to personally make reasonable and customary efforts to find suitable employment is explicitly laid down in the legislation. Availability, therefore, refers to a *dynamic desire to work* and not just to an expression of a passive state towards accepting work. It would not be enough to accept the passive connotation of the word "available" as it appears in the dictionary. [emphasis added]

Availability for work depends on a willingness to accept any offer of employment to which one is suited by skill, training, aptitude or experience and on a willingness to accept working conditions *for which there is a demand* in the labour market. [emphasis added]

Availability for work is primarily a subjective matter which must be considered in the light of a claimant's intention. This can be done by examining statements, actions, restrictions as well as the concern shown by an individual towards finding employment. However, it must also be viewed objectively by examining *a person's prospects of employment in relation to the objective circumstances, whether created deliberately or not*, including any limitations caused by partial incapacity, transportation difficulties, and personal or family constraints. [emphasis added]

The problems relate, not to the letter of these texts, but to the meanings that have been given to the italicized passages.

"A dynamic desire to work" has been construed as a requirement for a high, continued level of job-search activity. The expectation is sensible in the early stages of unemployment. One creates a resume, researches the labour market, identifies and reaches out to prospective employers, signs up for job clubs, and takes appropriate

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Audenrode & Paul A. Storer, *Eligibility for UI Benefits, Take-up of Benefits and the Financial Liability of the UI Account*, Strategic Evaluation and Monitoring Evaluation and Data Development Evaluation Report 1 (Ottawa, Ont.: HRDC, 1998). Putting these facts together, it is hard to escape the conclusion that the government has *knowingly* chosen to impose a disproportionate share of the financial burden of the deficit on older Canadians, a constituency with little political clout.

steps to acquire necessary counselling and training. After a certain point, however, the avenues left to pursue necessarily become more limited. Beyond keeping watch for new job postings and applying for suitable vacancies, there is not much that one can do. Continuing to pester the companies and agencies one has already contacted is at least a waste of time and perhaps even counter-productive. Far from recognizing this fact of life, the EI regime actually increases its expectations of claimants as time goes on. Long-unemployed individuals must provide more and better evidence of search intensity than recent entrants. They must also show themselves willing to widen their job search both categorically and geographically. If there is any reluctance on either of these grounds, the mere fact that no job is forthcoming may be taken as proof that the person is not prepared “to accept working conditions for which there is a demand in the labour market”. This approach disadvantages older workers in at least four different ways.

First, some of the individual requirements under the search-broadening head are disproportionately arduous for older cohorts. Particularly problematic is the fact that a person may be deemed unavailable for work if s/he refuses to consider jobs outside the immediate geographic area. Much is often made of the fact that older people are less mobile than younger ones. There is good reason for this. The older one gets, the more likely one is to depend on support networks of family and friends, and to play an essential role in such networks for others. The older one gets, moreover, the less likely it is that one will have either the financial resources or the physical and psychological capacity to undertake a major relocation, especially when there is no guarantee of any better job prospects at the other end. The EI regulations specifically preclude giving any consideration whatsoever to “extenuating circumstances” of this sort.

Second, because of the higher than average duration rates for older people, the group as a whole faces a greater likelihood of having to make, and to make more, accommodations of this sort. It is not just a matter of multiplied inconvenience. Mailing out resumes is expensive. Attending extra job-search counselling sessions or spending more time at a resource centre will chalk up busfare. If, on top of these regular expenses, one has to job-hunt or attend interviews at a distance, the transportation may be more than a jobless individual can afford. The fact that more is required of long-term than short-term claimants in these areas means that groups containing a disproportionate number of long-term claimants – like older workers – face greater average costs, in both pecuniary and personal terms, than those who are more readily re-employable. Since the hurdles can keep being raised, moreover, it provides a legally defensible means of getting rid of claimants for whom, through no fault of their own, the labour market offers no reasonable prospects.

The third problem is less easy to pin down. It is not clear how the “capability” requirement interfaces with the activity requirement. If an older person were capable of working but not capable of extensive travel to find or get to such work, would that mean that s/he would be considered unavailable? The guidelines are extremely fuzzy on this point. Section 10.4.6 of the Digest says specifically that “[f]actors such as a handicap, advanced age, lack of education or training and very limited knowledge of the language spoken are not considered as restrictions and should not be held against claimants in assessing their availability.” Countering this, however, section 10.10.6,
on religious obligations, suggests that a person who is limited by a constitutionally protected personal characteristic may be expected to “extend availability or to accept different working conditions or terms of employment” in order to compensate for this limitation. One is also struck by the implication in section 10.10.3 that a distinction will be made between a partially disabling condition predating the separation, which will not be considered as affecting availability, and a recently incurred one which either postdated or caused the job loss, which apparently will. It is notable that “partial incapacity” was among the disqualifying factors listed in the passage quoted above, along with transportation difficulties and personal or family constraints. If these provisions imply what the Digest seems to suggest, it is almost certainly contrary to s. 15 of the Charter.

The last discriminatory aspect of the “active” job search requirement is its failure to address or allow for the effects of discouragement. Adding to the normal strains of a long spell of joblessness, older workers forced to expose themselves over and over to the stress and humiliation of rejection can face seriously increased psychological risk. Thus debilitated, older job seekers are even less likely to be re-employed. From this standpoint, the policy of escalating expectations may be seen as not only facilitating but exacerbating the residual effects of ageism.

3. Disadvantages for Non-Standard and Irregular Workers

I have mentioned the increasing number of older individuals involved in non-standard forms of work. A great deal has been written about the extent to which the EIA disadvantages such workers, mainly from the standpoint of women. Again because of the overlap in subgroup characteristics, much of this research is also applicable to older workers. Because there are a number of discrete problems involved, all of which are mutually exacerbating, it is impossible to deal comprehensively with this topic in the space available. For present purposes, I will just briefly touch on the major issues.

a) Hours-Based Eligibility Formula

The switch from a weeks-based to an hours-based entrance requirement does not affect full-time workers since the minimums add up to the same number of 35-hour

32. While no-one responds well to unemployment, older workers are more than usually susceptible to counter-productive psychological reactions. Describing the results of a survey of discouraged older workers carried out in Columbus, Ohio, John Rife and Richard Firth suggest that a sense of stigmatization leads to a withdrawal of affect. “Participants reported feeling mildly depressed ... socially isolated and embarrassed, and were experiencing low life satisfaction generally. They also tended to use a low number of social and employment-related community services” (“Discouraged Older Workers: An Exploratory Study” (1989) 29 Intnl J. Aging & Human Dev. 195 at 195). It is notable that such effects are not only not given any weight but generally not even acknowledged by EI appeals adjudicators. In CUB 51628 (Filas, 2000), for instance, the claimant appealed a disqualification for not sustaining an active enough job search on the grounds that he was suffering from stress related to discouragement. “With respect to availability, the claimant stated that it was virtually impossible to get work in other fields because of his age,” the Umpire summarized. “He stated that he could not attend the scheduled meeting because of stress and the conclusion that these group sessions could do nothing for him.” Although the case was returned to the Board for reconsideration on other grounds, the ageism argument was not even considered.

33. This formula was ruled unconstitutional by B.C. Umpire Roger Salhany in March, 2001, in CUB 51142 (Lesiuk) on the grounds of its statistically greater adverse impact on women. Predictably,
weeks as were previously required. For those who work more than 35 hours — primarily men — the change is beneficial. For those who work less than a full week, however, whether regularly or on the average, the difference is staggering. Under the UIA an individual in a high unemployment region with fifteen hours of work per week needed only 12 weeks of employment to qualify for UI benefits. Now the same individual needs to work for 28 weeks to reach the 420-hour threshold. In low unemployment regions the threshold is 700 hours, more than double the previous level. That this change has a disproportionate impact on groups overrepresented in non-standard forms of work is self-evident.

b) The Domino Effect of Job Instability

As Table I shows, when the EIA was first drafted, against both public and expert recommendations it contained a provision known as the intensity rule which explicitly penalized repeat users by reducing their benefits incrementally from 55% to 50% of earnings and by decreasing the ceiling above which benefits would have to be repaid through tax clawback. These penalties were repealed as of May, 2001. Despite this, at least some classes of repeat users still face structural disadvantages, including the tendency to keep repeating. Non-standard workers are very likely to fall into this category. The key characterizing detriments of non-standard work, in fact, are shorter tenure and greater instability. Statistically speaking, therefore, a non-standard worker given its record on EI Charter cases, this ruling was reversed by the Federal Court of Appeal in Canada (Attorney General) v. Lesiuk (2003), 299 N.R. 307, 100 C.R.R. (2d) 255. Leave to appeal to the Supreme Court of Canada was filed March 7, 2003, [2002] S.C.C.A. No. 94 (S.C.C.) (QL). For a discussion of this case and of its broader implications within EI jurisprudence, see Gaile McGregor, “Lesiuk versus the Employment Insurance Commission: Fighting for Charter Rights in an Anti-Charter Environment” (forthcoming, publisher to be confirmed).

34. For an impact analysis from a gender standpoint, see the Umpire’s summary in Lesiuk (ibid.) of an opinion report prepared by Professor Norene Pupo. Chair of Sociology at York University. Casting an ironic light on the systemic disadvantage illuminated in this case is the fact that the switch to an hours-based method of calculating eligibility was originally touted by the government as a means of bringing a significant number of previously ineligible workers into the system. Although some individuals were, indeed, newly covered under the new approach, their gains were so negligible that Jane Pulkingham calls it a “hollow victory”. “[T]hose working less than 15 hours per week under UI may now have their work insured for the first time, but for many, unless they alter their work schedule by increasing the number of hours worked per week, they will never actually qualify for EI. A significant proportion (18 percent) of newly insured workers now have to pay premiums but will never be able to qualify for benefits while working less than 15 hours per week (or 17.5 hours per week if they are a new/re-entrant). Only 6 percent of newly insured workers stand to benefit through coverage and ability to qualify in the event of unemployment.... In addition, it would appear that the premium refund also is being used as a way of removing insurance and coverage/entitlement from part-timers covered and entitled under the previous legislation. For example, 16% of claimants who worked part-time and were eligible for UI benefits will not qualify for EI income benefits with equivalent hours of work. Therefore, a significant portion of part-timers, whether they work less than fifteen hours per week (newly covered) or between fifteen and thirty-five hours per week (previously covered), are worse off as a result of the new legislation” (“Remaking the Social Divisions of Welfare”, supra note 21 at 24).

35. The research cited in notes 15 and 16 may have been discredited insofar as it supports the disincentives theory, but what remains indubitable is the demonstration that once an individual has used the EI system, s/he has a statistically greater chance of having to use it again.
has a significantly higher probability of repeated job loss than a full-time employee. The effects of such work interruptions are obviously exacerbated when there are problems of re-employability. And not just because short-timers get less support. If a person remains unemployed for long enough that s/he has less than 14 weeks of work in the year preceding her qualifying period — which many older workers do — when s/he does return to the labour force, according to the provisions of the new Act s/he will do so as a re-entrant. This means that if s/he falls out of employment again in less than two years — again, not an unlikely prospect in an unstable job sector – s/he will need 910 hours of work to qualify, compared to the 420-700 hours required of a regular claimant. The likely impact of such a change is underlined by the fact, as revealed in an HRDC evaluation report, that the recipient rates for NEREs (new and re-entrants) is only half that of non-NEREs. To put it more baldly, only 15% of NEREs reporting job loss get benefits.36 (This pattern of escalating disadvantage is undoubtedly at least part of the reason why so many older workers give up!)

c) Penalties for Low Earners
Low earners, which include many if not most non-standard workers, are penalized by the EI system both collectively and individually. As a group, low earners not only indirectly subsidize higher status workers because they are less likely to ever qualify to recoup what they have paid into the system; with the reduction of the Maximum Insurable Earnings, they also bear a relatively greater portion of the premium cost. “Lowering the annual MIE from $43,940 to $39,000 ... redistribute[s] the costs of [the] program from higher income to lower income workers, and from higher wage provinces to provinces with a greater portion of their labour force earning lower wages,” says a Canadian Labour Congress Fact Book released when the change was first proposed.37 It is on the individual level, however, that low earners really feel the impact of the recent reform. I said earlier that having fewer hours means a shorter period of support. It also means a relatively less adequate benefit level. The reduction of replacement rates – from 75% in 1971, to 67.5% in 1976, to 60% in 1979, to 57% in 1993, to 55% in 1994 – obviously has greater ramifications the less one earns. Fifty-five percent of the earnings from a half-time minimum wage job cuts a lot closer to the bone than 55% of the full MIE. This disadvantage has been aggravated for non-standard workers by the new formula for calculating insurable earnings.

Because of what it reflects about the arcane combination of politics and theory that went into the design of the current Act, it is worth catching at least a glimpse of the process by which this formula was derived. Martha MacDonald explains:

Under UI most claimants were entitled to a benefit equal to 55 percent of their insurable earning during the last 12-20 weeks worked. Working extra weeks for lower earnings would lower one's benefits, while moonlighting at an uninsured job


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(less than $163 or 15 hours per week) would leave benefits unchanged. EI attempted to remove these disincentives.

While the benefit rate remains at 55 percent ... the effective rate is lower for many people because of the way average earnings are calculated. The original EI bill averaged earnings over a fixed period of 16-20 weeks....

.... The use of a reference period in weeks contradicts the attempt to take account of non-standard work patterns – although eligibility is based on hours, the benefit level is calculated on weeks. Again non-standard workers, disproportionately female, are penalized.

Workers with gaps in employment (35 percent of claimants) would also be penalized by using a fixed number of weeks – an unintended consequence of the formula. After protest from Atlantic MPs and others the period used was increased to 26 weeks. Average weekly insurable earnings are calculated by dividing total earnings in that period by the higher of the number of weeks worked, or the minimum divisor (the regional EI entrance requirement plus two). The change in the divisor lowers the penalty on seasonal workers and makes the penalty equal across regions.

If a person has fewer weeks of work than the relevant minimum divisor, there is still an incentive to take more work, regardless of the wage level. But if a person has already worked more weeks than the minimum divisor but less than 26, extra work for less pay will lower the benefit level.\[38\]

From the non-standard worker’s perspective, it is the latter paragraph that is most critical – although, the way it is phrased, MacDonald’s explanation actually understates the problem. Because the weeks in the Rate Calculation Period have to be consecutive (s. 14(4)), the averaging can include weeks with reduced or even token earnings. Obviously this is going to disadvantage people with fluctuating hours.\[39\]

Adding insult to injury, as MacDonald notes in passing, the divisor used as an alternative to actual weeks is based on the same problematic geographic variable discussed earlier.

d) The Self-Employment Trap

I have already noted that there is a correlation between self-employment and age. According to a 1999 Statistics Canada working paper, in 1996 individuals “aged 55+ accounted for 19% of the self employed but only 8% of paid employees. The likelihood of being self-employed also increases sharply with age. In 1996, 7% of all workers under the age of 25 were self-employed, compared with 28% among those between

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39. This rule may already be on its way out. In a news release dated September 21, 2001, HRDC announced “that on September 22, 2001, it will pre-publish in the Canada Gazette, for consultation purposes. the possibility of implementing the successful ‘Small Weeks’ pilot project as a permanent and Canada-wide method of calculating Employment Insurance (EI) benefits.” The notice continued: “This proposed amendment would allow EI claimants to exclude low-earning weeks (less than $150) for benefit calculation purposes and, therefore, encourage people to accept all available work.” While the results must be applauded, it is interesting to note that this decision would seem to have been based, not on humanitarian or fairness considerations, but on the idea that penalizing “small weeks” might be a disincentive to employment.
the ages of 55 to 64."40 Whether this is a positive or negative development is obscured by inconsistencies in the literature on the subject. One much-debated question, for instance, has been whether the greater number of individuals involved in the sector are pulled by entrepreneurial enthusiasm or pushed by the inability to find jobs. Although the bigger picture remains murky,41 recent evidence does suggest that the pushed rate is higher among own-account self-employed (OASEs) relative to those who employ others (ESEs),42 among women relative to men,43 and among blue collar trades workers relative to managers.44 It is notable that the former category in each of these groups has mushroomed during the nineties, the same period during which older-worker self-employment has increased so markedly.45 While specific research in the area is lacking, when one considers these data in tandem it seems likely, given the re-employability problems that we have noted among significant sub-groups of older workers, that much of the rise in self-employment among individuals over 55, like the rise in part-time work, may be involuntary. It also seems likely that the pushed subgroup has a far lower chance of success than retired professionals who start up consulting businesses.

What does any of this have to do with EI? While no single provision seems discriminatory on its face, two features of the regime work in combination to produce a potentially disadvantaging result for the "pushed" fraction of older unemployed workers. First, HRDC actually promotes self-employment through its Self-Employment Assistance (SEA) program, which provides income support for EI-eligible individuals while they are getting a business up and running. Second, and counter to this, the EIA specifically excludes self-employed persons from coverage (S.O.R. 96-332, s. 30(1)). Looking at these ostensibly unrelated items in the context of the current preoccupation with savings, it is hard to avoid the conclusion that HRDC is luring people into a course of action with a limited chance of success expressly to get them off the EI rolls. This is at least ethically dubious. Compounding the problem, moreover, if an EI-eligible unemployed person devotes the kind of time to planning and research that is required in order to get accepted for SEA, and does not get


41. One of the problems is inconsistent evidence on whether and how self-employment is related to the business cycle. When one looks more closely at the literature, it seems likely, as Lin et al. point out (ibid.), that there are several mutually interfering factors at work.


44. This polarization of late-life self-employment was documented in a study carried out by Ekos Research Associates and reported in Lessons Learned: Own-Account Self Employment in Canada (Ottawa, Ont.: HRDC, Evaluation and Data Development, 2000).

45. Gauthier & Roy, supra note 42.
approval, s/he may find him/herself disentitled from benefits on the grounds that s/he is/was not available for work.46

4. Health-Related Issues
The fourth group of problems can be subdivided according to whether the health involved is the claimant’s own or someone else’s.

a) Sickness Benefits
It is well documented (see Fact Sheet, supra note 22) that older workers suffer more health risks than the rest of the working population. This means that any feature of the legislation that adversely affects sick people will disproportionately affect older ones. In addition to the uncertainty around disability noted in the section on job search, there are three sets of provisions that might be seen as falling into this category. The first – which is of particular concern given the domino effects noted earlier – is the fact that minor attachment claimants, meaning claimants who have less than 600 hours during their qualifying periods, are not eligible for sickness benefits at all. The second is that chronic, combined, recurring, or hard-to-diagnose conditions sufficient to keep a person from working, or even to get him/her dismissed, may be viewed as compromising availability yet not meet the rigorous standard of proof required to establish an eligible “illness, injury or quarantine” (s. 21(1)). Along the same lines, it is notable that absenteeism, even of the innocent, health-related variety, can be counted as misconduct in determining whether a dismissal was culpable or not.

The third problem area has to do with the limitations applying to various benefit types. Sickness benefits have a flat cap of 15 weeks. If a person who would otherwise be eligible to collect regular benefits is sick longer than this, s/he will be disentitled as not available. “Stacked” benefits are capped at the length of the overall entitlement. If a person entitled to 40 weeks of regular benefits is sick for, say, ten weeks of his/her benefit period, during which s/he collects sickness benefits, s/he is still only entitled to a maximum of 40 weeks of both kinds of benefits combined. This means that anyone who gets ill during a claim will have shorter job-searching time than s/he would otherwise be entitled to. This is obviously going to be a particular detriment for

46. It is notable that an HRDC web document entitled “Venturing Out: Starting a Successful Business” contains the following warning: “Individuals who may be entitled to receive Employment Insurance (EI) or Social Assistance (SA) benefits, and are not accepted in the Self Employment Assistance Program, may lose entitlement to those benefits once the decision to start a business is made.” The case law suggests that this is not just a pro forma caution. Although the topic was not included in the sampling of availability issues discussed in section III, the search turned up one case – CUB 50604 (Schmitt, 2001) – in which the claimant was disqualified because he mistakenly thought he had been accepted for SEA and proceeded to act accordingly, and a second – CUB 51187 (Buors, 2001) – where the claimant was expelled from the program because he misunderstood the reporting requirements. “It is apparent that the claimant was very detailed in the manner in which he wanted the reporting cards explained to him, and he apparently filled them out diligently on the understanding he had from the Commission,” said the Umpire in this latter case. “It seems ironical that the very plan which was set up to assist the claimant, because of some misinformation or incomplete information given to him, now turns out to be a plan which is defeating him.”
individuals and groups who/which face already face special barriers to re-employment. 47

b) Non-Recognition of Caregiving Obligations

Although caring for a sick spouse or family member is considered as just cause for leaving employment, as long as the emergency continues the otherwise eligible claimant will not be considered as available for work. Caring for a sick relative is also not grounds for extending either a qualifying period (the period during which the hours required to establish eligibility must be accrued, usually 52 weeks) or a benefit period (the length of time during which all benefits payable on a given claim must be collected, also usually 52 weeks). This means that a person who is forced to drop out of the labour force for any substantial period for reasons of caregiving may (a) lose the previously accrued hours that would otherwise have made him/her eligible for benefits, (b) lose benefits to which s/he has already established a claim, and/or (c) lack recent enough hours to establish a new claim once the caregiving stint is ended.

It may be argued, of course, that since these rules apply to everyone, there is no special disadvantage for older people. To accept this as a blanket answer is to ignore the fact that, especially in developed countries, the caregiving responsibilities normally associated with child-bearing can actually escalate later in life. 48 Not only are a significant number of older people, especially women, forced to leave employment to care for ailing spouses or parents but, because of the trend to later child-bearing on the one hand and longer life expectancy on the other, many middle-aged people find themselves having to cope with childcare and eldercare at the same time. 49 One could

47. Adding poignancy to this situation is the fact that there is evidence that unemployment itself negatively affects health. "The studies indicate that the unemployed usually suffer from more physical and mental health problems than the employed population," notes Marcel Bédard. "According to the [1985] D'Arcy and Siddique ... study ... Canadian unemployed subjects are inclined to be less satisfied (by almost 70%) than employed subjects with their general physical and mental well-being, and they report more short-term and long-term physical disabilities than workers do: they are sick almost twice as often, and visit the doctor more frequently. Physicians' diagnoses reported in D'Arcy's 1986 study indicate that Canadian unemployed workers are 20% to 25% more at risk for heart disease, chest pain, high blood pressure, and joint pain than the general working population." The Economic and Social Costs of Unemployment, Research Paper R-96-12E (Ottawa,Ont.: HRDC, Strategic Policy, Applied Research Branch, 1996) at 16-17.


49. Anne Martin-Matthews offers a variety of statistics hinting at the dimensions of this problem. "Between 1991 and 1995, the [CARNET] Research Group surveyed over 8,500 employees from across regions of the country in a series of studies designed to examine the prevalence of 'elder care' among Canadian workers.... [They] estimated that approximately 45% of the employees who were surveyed had some measure of involvement in assisting elderly relatives. For most employees, this involved modest to moderate levels of help.... However, for about 12% of the employees, assistance to elderly relatives included the potentially more demanding responsibilities associated with the provision of personal care. Approximately half the employees also had some responsibilities for dependent children.... Over a 3-year period, 33% of a group of employees with the 'structural potential' ... for elder care (in that they had elderly relatives) moved from nonactive into active caring roles.... It is estimated that approximately 9% of caregivers leave paid employment in order to provide care for an elderly person.... Almost 12% of current employees indicated that they have left
argue that caring for the elderly is just as much of a contribution to society as parenting, yet only one of these activities is compensated in the EI system. While it might run counter to the principles of employment insurance to provide direct benefits for active caregivers, it should be possible, and certainly would be more equitable, if the rules were changed to enable such people to at least preserve their eligibility in order to qualify once they are ready to re-enter the labour force.

6. Definition and Allocation of Income
The last problem to be considered in this section is the most purely technical. One of the few older worker issues to have garnered much public attention was the mid-eighties decision to begin treating pensions as “earnings” for the purposes of determining UI eligibility. The principle was given form in what is now S.O.R. 96-332, s. 35(2): “[T]he earnings to be ... deducted from benefits payable under ... the Act ... are the entire income of a claimant arising out of any employment, including ... (e) the moneys paid or payable to a claimant on a periodic basis or in a lump sum on account of or in lieu of a pension.” While it is easy to see why the targeting of pensions would have the greatest symbolic resonance for government-watchers, what was actually more problematic for our particular clientele was the related provision that severance pay and payments in lieu of notice would be treated in the same manner.

Like many of the other problems discussed in the foregoing pages, the threat posed by this scheme is not readily apparent. The reason for the new rule, according to the government of the day, was to improve the equitability of the UI system by eliminating “double dipping” – an aim with which it is hard to argue. If the purpose of unemployment insurance is to ensure that individuals whose earnings have been terminated will be provided with an alternative source of income for a reasonable period in order to job-hunt, then it is at least inconsistent and arguably unfair to use it to subsidize those who are still receiving pay from their employment. Whether the transition is funded by an employer or by the public or by a combination of both, the important thing is that everyone get a comparable adjustment period. Viewed in this light, the limitation seems unobjectionable. In combination with other sections of the Act, however, the provision has a negative side effect that has gone largely unnoticed.

Termination payouts are allocated as earnings for an appropriate number of weeks following the week in which the separation occurs, based on the individual’s “normal” past employment because of family obligations, and slightly over 14% reported that they have considered leaving their current employers for this reason.” “Canada and the Changing Profile of Health and Social Services: Implications for Employment and Caregiving” in Viola M. Lechner & Margaret B. Neal, eds., Work and Caring for the Elderly: International Perspectives (Philadelphia: Brunner/Mazel, 1999) at 2-15. See also Judith Phillips “Working Carers: Caring Workers” in Miriam Bernard, Judith Phillips, Linda Machin & Val Harding Davies, eds., Women Ageing: Changing Identities, Challenging Myths (London & N.Y.: Routledge, 2000).

50. It was in response to public pressure on this issue that the government incorporated an exception (now S.O.R. 96-332, s. 35(7)(e)) providing that pension income would not be counted as earnings if (1) the claimant had accumulated the necessary weeks of insurable employment to establish a claim, (2) these weeks had been accumulated after the pension became payable, and (3) the pension payments had continued during the entire period of accumulation.
rate of pay (S.O.R. 96-332, ss. 36(9) and (10)). The higher the payment, obviously, the longer this "deemed" extension of wages lasts. The longer it lasts, the longer it will be before the individual can establish the "interruption of earnings" which is a prerequisite to a claim. On the surface, this does seem problematic. Because the qualifying period is extended to cover the extra weeks, benefit entitlement is only delayed, not lost. If anything, a severance recipient seems better off, as a result of the increased coverage, than someone who has to begin collecting immediately. The problem is, until a claim is established, an individual is not only ineligible for income support, s/he is also ineligible for employment assistance benefits. This means that s/he will be unable to access special programs or training during the critical early stages of unemployment. The longer a jobless spell lasts, the more likelihood there is of stigmatization, psycho-social deficits, and discouragement, all of which decrease the statistical probability of re-employment. The implications for older workers are obvious. Of all unemployed individuals, older workers are the most likely to need retraining in order to achieve re-entry. They are also the most likely to have large enough severance packages to delay their claims for long periods.

B. Part II Employment Benefits

1. Guidelines for Administering Support Measures

At the centre of the mid-nineties reform initiative, as mentioned earlier, was the idea of not simply giving people handouts but providing them with the wherewithal to obtain employment. Section 57(1) sets out conditions for establishing and administering the programs and benefits by which this objective is to be met. On the surface, the principles articulated here look benign and even admirable. It is only when one looks at the end result that one begins to realize that the problem is not in what they say or prescribe, but in what they allow. Discretion as to obligations is especially dangerous in a climate of budgetary constraint. It may seem unduly cynical to assume that a cash-strapped government department is likely to provide as little in the way of services as it can get away with. The facts, however, suggest that this is exactly what has happened. To put my readings of this Part of the Act in context, the following

51. As another sop to public opinion, pensions are also not taken into account in determining whether an interruption of earnings has taken place.

52. Non-EI eligible unemployed persons are not left entirely out in the cold. Under S.O.R. 96-332, s. 59, the basics supplied under the umbrella of the National Employment Service are "available to all workers whether insured or not or whether they are claiming unemployment benefits or not". As spelled out in s. 58, these basics include access to labour market information, counselling, assessment, job referral, and referral to appropriate social service agencies. They do not, however, include more substantial kinds of help like wage subsidies, job creation programs, self-employment assistance, or skills enhancement courses — exactly what high-needs unemployed workers are likely to need to help them overcome their extra disadvantages.

53. Ironically, given the government's emphasis on educational measures in its mid-nineties discussion papers, the area which has suffered most from the budget-cutting of the nineties is training. "The emphasis [now] is on how quickly the individual can be 're-attached' to the labour force," says Randy Ellsworth. "Sometimes minimal skills and education upgrading is available. Only in the rarest of cases is comprehensive retraining or occupational rehabilitation offered." "Squandering our
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discussion draws on the findings of a 2001 field study of front-line agencies involved in the delivery of employment assistance services in the Toronto area.54

a) Pushing the Quick Fix

Subsection 57(1)(b) provides that programs will be aimed at “reduc[ing] ... dependency on unemployment benefits by helping individuals obtain or keep employment.” On its face this clause reads simply as a restatement of the objectives spelled out in the original Green Paper. With the pressure to cut costs, however, the highlighting of dependency reduction has been taken to justify a whole range of policies and practices detrimental to high-needs claimants. One problematic tendency, for instance, is the prioritization of short-term interventions aimed at employment-ready individuals over long-term interventions such as skills development and training courses.55 Another is interpreting availability requirements in such a way as to force people to accept bad jobs or face disqualification (see Section III.B.2 below). A third, which is obviously going to have disproportionate impact on groups with high duration rates, is setting unrealistic quotas for service deliverers that force them to concentrate on clients with the best prospects, leaving hard-to-place applicants to fend for themselves.56

Inheritance”, supra note 21 at 289. Supporting Ellsworth’s contentions are the statistics on spending levels. A research paper by Jennifer Stephen published in 2000 by Advocates for Community Based Training and Education for Women (ACTEW) under the title “Access Diminished” produced the following, rather sobering facts: 1) Since 1993, total expenditures for training have been reduced nationally by nearly 50%; 2) Federal general revenue spending on training in Ontario was reduced from $764 million in 1995-96 to $79 million in 1997/98; 3) Total federal expenditures on training declined as a proportion of the overall budget from 83% in 1995 to 28% in 1999; 4) Total federal and provincial training and employment program/service expenditures in the province went from $2,491,100 in 1995/96 to $1,768,800 in 1997/98.

54. The results of this study are reported in detail in McGregor, Unemployment Protection for Older Workers, supra note 11 at Part III.

55. According to HRDC’s Employment Insurance 2000 Monitoring and Assessment Report (Ottawa, Ont.: HRDC, 2000) at 27-29, in 1999-2000 only 32.8% of interventions fell into the long-term category. Even more tellingly, over the last half decade expenditures on long-term interventions shrank from 92.5% in 1995-96 (under UI), to 78.2% in 1997-98, to 67% in 1998-99, to 64% in 1999-2000.

56. The quotas reported by our informants in the Toronto study ranged from 70% to 90%, depending on the service and the clientele. A typical resource centre contract calls for x-number of starts, of whom 85% must complete the intervention and 70% must find employment in a four-month follow up. The job does not have to be a “good” or a full-time or a permanent one – it merely has to last for a minimum of ten weeks out of the next 26. Quite apart from the pressures this system imposes on the front-line workers, the implications for practice are clearly considerable. Faced with losing their funding if they fail to keep up their numbers, agencies have no choice but to focus their efforts on the most easily re-employable. While there are no hard data on the phenomenon there is both circumstantial and anecdotal evidence that at many outlets high-needs individuals are referred elsewhere, told that they do not meet the qualifications for the programming on site, or simply not encouraged to continue. This is one of the areas that was singled out by the Standing Committee on Human Resources Development as presenting particular problems for older workers. “The results-based focus established under the LMDAs encourages ... program delivery operators to focus attention on those who can reenter the labour market fastest and for the least amount of spending.... While the Committee does not object to the emphasis on active measures, it points out the importance of ensuring that this approach not be pursued at the expense of clients – such as
phenomenon, which is called "creaming", is not only known but apparently approved by department officials. The manager of a Toronto Human Resources Centre told me when I raised the problem in a telephone interview in the fall of 2001 that the emphasis in the Act on getting people back to work meant that they were required to concentrate resources on the people who were most capable of getting back to work.

b) Passing the Buck
Subsection 57(1)(c) calls for "co-operation and partnership with other governments, employers, community-based organizations and other interested organizations". Subsection 57(1)(d) calls for "flexibility to allow significant decisions about implementation to be made at a local level". Again none of this sounds particularly alarming. What it has done in practice, however, is to provide an excuse for HRDC to download as many of its obligations as possible to the provinces and the private sector, with only minimal top-down control to ensure either the manner or the extent to which these obligations are fulfilled.57 When this policy was first announced in the mid-nineties, the main focus of critics was on the government's failure to include any formal equity requirements in its agreements with the provinces. Judging by outcomes, an even bigger problem—especially given the aforementioned cost-cutting motive—was the omission of measures to ensure consistency and adequacy of programming across the country.58 Based on the language of the Act, there is nothing whatsoever to require either participating provinces or HRDC's own local offices to provide a particular type or level of service, to operate according to any particular standard of fairness or adequacy, or to account in any way for its practice beyond reporting numbers.

That such open-endedness is inimical to user interests may be gauged from the finding of our field study that the Toronto regional HRDC office, in order to keep expenditures down, systematically sets limits on employment benefits at levels significantly less

57. As of this writing, every province and territory with the exception of Ontario has signed a Labour Market Development Agreement with Ottawa giving it either full or partial responsibility for the administration of employment support measures. In Ontario, HRDC remains technically in charge, but the services themselves, from assessment to training, have been contracted out to community and private sector operators. The problems caused by this fractionation of the system range from poor communications to cross-regional discrepancies in access. For different perspectives on the background to and effects of the great nineties downloading event, see Herman Bakvis & Peter Aucoin, Negotiating Labour Market Development Agreements (Ottawa, Ont.: Canadian Centre for Management Development, 2000); Gordon DiGiacomo, Federalist Occupational Training Policy: A Neo-Institutionalist Analysis, Working Paper 2001(2) (Kingston, Ont.: IIGR, Queen's University, 2001); and Thomas Klassen, Precarious Values: Organizations, Politics and Labour Market Policy in Ontario (Montreal & Kingston: McGill-Queen's University Press, 2000).

58. When the reforms were first announced, the National Association of Women and the Law claimed that the changes not only "eliminate national standards for training problems, they also threaten the existence of training programs altogether for provinces who do not wish or cannot afford to participate". Bill C-12: An Act Respecting Employment Insurance in Canada: Its Impact on Women (Ottawa, Ont.: NAWL, 1996 ) at 12. As events have proven, the suspicion one may read into this caution was fully justified.
than what the rules allow. Officially, according to information published on the department's website, training may be approved for up to 52 weeks, with extensions in exceptional circumstances. Unofficially, a set of guidelines issued to local service providers in 1999 stipulated that the average training length “should be” 26 weeks.\(^5\) (Obviously this is going to work to the disadvantage of claimants whose outdated skills or education deficits require substantial remediation.\(^6\) Officially, individuals who have had an active claim within three years are entitled to the same benefits as individuals with a current claim. Unofficially, the same 1999 guidelines suggested that the “level of activity” appropriate to active and reachback clients should be 65% and 10% respectively. (Obviously this is going to work to the disadvantage of both long-duration clients who have exhausted their benefits without finding work and clients who find themselves jobless again before accruing enough hours to establish a new claim, an all-too-common occurrence for those who get propelled into non-standard forms of work.)

c) Promoting Self-Sufficiency
Subsection 57(1)(d.1) stipulates that persons participating in employment assistance programming must take “primary responsibility for identifying their employment needs and locating services”, and, “if appropriate”, share the cost of these services. What this says, in effect, is that the government is only going to help those who are prepared to help themselves.\(^6\) Theoretically, this does not seem unreasonable. In

\(^{59}\) The explicit cap was eliminated from replacement Guidelines issued in 2001, but since the reason given for the loosening up was a temporary budget surplus, it seems likely that constraints will reappear as soon as unemployment begins rising again. The point, in any case, is not that the Act requires stinginess, but that it allows local administrations to pursue their own agendas. In Toronto, the main priority seems to be cost-cutting. It is notable that, as of 1999, Ontario led the provinces in unpaid benefits “saved”, at $235 million. ACTEW, “Access Diminished”, supra note 53.

\(^{60}\) When we asked our informants about the “exceptional circumstances” clause in the policy, we were told that it was rarely invoked because HRDC thinks that everyone – regardless of special needs – should be treated equally. “They like to spread things around,” was the standard comment. Although the principle does not sound very sinister, what it means for particularly disadvantaged claimants can be seen in the following quotation from the director of an assessment centre. “They used to be eligible for four months of Basic English Skills upgrading, then 52 weeks of Skills Training. Some would qualify for ESL for an additional six months or so. Now, they are only eligible for a total of 26 weeks including English or Literacy training. Often upgrading literacy skills so they can qualify for skills training and then the actual skills training exceeds the 26-week limit. This also poses a problem ... because some of the training institutions and particularly the colleges have not adjusted their schedules to the new eligibility requirements. HRDC only pays for training in one continuous program, whereas the colleges deliver training through the semester system.” The implications of this last remark go beyond the obvious. Because college courses are generally too long to fit within the window, skills training provision has been increasingly taken over by commercial operators who can do continual input and provide condensed scheduling. Leaving aside the question of what the trend means for course quality, the speeded up format is particularly hard for older workers, whose best learning modes are performance-based and personalized (see Susan Underhill, Aging Workers in the Workplace, supra note 5 at 13-14) and whose classroom skills are likely to be rusty.

\(^{61}\) Self-sufficiency was a major theme in the mid-nineties reform initiative. As conveyed by the government rhetoric, the principle has two distinct faces. We catch a glimpse of this ambivalence in a section of the Green Paper entitled “From unemployment insurance to employment insurance”.

practice—again—it creates some real difficulties for high-needs claimants by licencing a minimalist approach to assistance. In Toronto, for instance, applicants are required to formulate their own goals, develop detailed back-to-work plans, and carry out extensive research to determine the cheapest and most effective means of acquiring the requisite skills and knowledge. It is true that they can get assistance in this endeavour through a network of resource and assessment centres. Given the tight budgets and high quotas for service agencies, however, the opportunities for individualized counselling are severely limited. For the most part, programs emphasize group how-to sessions and electronic information sources. Adding to the problem is the fact that the people least capable of "playing" the system are also generally the least capable of designing their own solutions.

The cost-sharing requirement is also problematic for older individuals. Asking someone in the last decade of his/her working life to exhaust his/her savings and assets in order to finance reeducation of unknown value is a very different matter than asking a thirtysomething-year-old to invest in his/her future. The result is that many older claimants simply fall out of the system, either because of ignorance and incapacity or because they are afraid of losing the little they have. (Given these problems, it is almost certainly not coincidental that most of the Toronto agencies specializing in older workers cater largely to a middle-class clientele.)

The lead items in a list of reasons why reform of the system is urgently needed are: "The program often discourages adjustment" and "The program is easily abused" Improving Social Security in Canada: Discussion Paper Summary (Ottawa, Ont.: HRDC, 1994) at 12-13, The first of these two formulations signals the line of thought, discussed in Section I.A, that forcing people out of dependency is doing them a favour. The second has the slightly nastier connotation of claimants ripping off the system. Usually the suggestion is made somewhat more subtly. ("Society definitely has a responsibility to provide support for people who are in need and who cannot work. But individuals also have a responsibility to help themselves" [ibid]) In all cases, though, the underlying implication is the same: dependency is not only a weakness but a character flaw. This reasoning shows strong traces of the American ideology that spurred the development of the aforementioned disincentive theory.

62. The word extensive in this sentence was used advisedly. The form on which clients are required to record their findings on potential training courses is a three-page legal sized document, divided into three columns labeled School #1, School #2, School #3, and containing 33 detailed questions about the cost, content, methodology, facilities, and support services offered in each of three alternative venues.

63. This phenomenon provides further evidence of what I said earlier about the creaming process being approved and even encouraged by the department. Of the eight Toronto resource centres funded as a result of a special 1999 initiative to develop services for older workers, the one that was most actively pursued by the manager in charge is a workshop for retired managers and professionals interested in starting consulting businesses. This upscale emphasis is particularly ironic given the stated rationale for developing these particular services. "We can expect the current pace of technological and market change to continue, if not increase," said a prospectus issued by the Toronto regional office in the late nineties. "[Our plan for the Millennium] needs to serve our social policies and promote an ethics of care to offset a purely fiscal approach to governing. Reliance on market forces and economic policies alone excludes individuals with needs not met in the marketplace. In Toronto, this means investing in initiatives for groups most at risk of being marginalized—persons with disabilities, youth, aboriginal peoples, newcomers and unemployed experienced workers over 45 years old" (Bridge to a New Millennium: Toronto HRDC Business
d) Reporting Requirements
Subsection 57(1)(f) stipulates that unemployment benefits must be dispensed "within a framework for evaluating their success in assisting persons to obtain or keep employment". Again the problem is not with the base requirement but with the way it can be – and, according to our research, has been – interpreted. Success could be geared to job quality or future prospects or client satisfaction. In practice, the department is interested only in getting people off the rolls as quickly as possible, even when it is apparent that the quick fix is likely to cause further problems down the line. Why the short-sightedness? Although there is no hard evidence for this, one cannot help suspecting that a key factor driving this policy is that most of the people pushed into bad jobs will never again qualify for benefits. The future will be their problem, consequently, not the government's. Whatever the reason, it is clear from HRDC's own documents that there is little concern with the quality or the equitability of programming – only with its cheapness. It is notable that the sole outcome measures listed in the department's 2000 Performance Report for assessing success in facilitating access to employment are "Number of clients ... employed or self-employed following ... interventions" and "Unpaid benefits ... resulting from ... claimants returning to work before the end of their benefit period". The bottom line, in other words, is the number of dollars not paid out to which clients might otherwise have been entitled.

2. Just-in-Time Thinking
At least some of the problems outlined in the preceding section could be alleviated if more efforts were made to remedy the educational deficits of older workers before they become a problem. Theoretically, the new thinking should make this easier. It is striking that one of HRDC's currently favourite buzz-phrases is "lifelong learning". In practice, unfortunately, very few of the opportunities suggested by the phrase come the way of older workers. In part this may be due to the ageist assumption (see note

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Plan 1999-2001 at 12). Even apart from the rather smirk-inducing reference to an "ethics of care" in this passage, the supposed concern for the most needy is more than a little undermined by the finding of a survey carried out as part of our 2001 field study (see McGregor, Unemployment Protection for Older Workers, supra note 11 at ch. VI) that, at least in the older worker category, the vast majority of the programming offered is aimed at the subgroups least at risk of being marginalized.

64. At 11. These provisions take on extra resonance when read in light of the pressure put on clients to take marginal employment discussed in section A.2 below.

65. Dale Yeatts, Edward Fols, and James Knapp suggest that maintaining training throughout a worker's career is a major factor, not just in preventing skills from becoming outmoded in the first place, but, even more important, in ensuring that individuals will be receptive to and capable of change in later life. "Older Worker's Adaptation to a Changing Workplace: Employment Issues for the 21st Century" (1999) 25 Ed. Geront. 331.

66. Although the situation has worsened as a result of recent budget cuts, there is nothing new about the exclusion of older workers from retraining opportunities. Contrasting starkly with what we can infer about their relatively greater needs in this area, research shows that older workers as a group have historically received far less in the way of educational upgrading, both from employers and, more critically for present purposes, from public sources, than other cohorts. According to a Statistics Canada report on adult education in Canada, participation in non-employer-sponsored job-related education and training Activities in 1993 (i.e., before the big cuts of the late nineties) was around 5%
5) that older people are unable or unwilling to learn new skills and technologies. (It is telling in this respect that the section entitled “Promoting Learning and Skills Development” in the 2000-2001 HRDC Report on Plans and Priorities is all about financing “students”.) In greater part, however, it is an artifact of the drive to prune services to the minimum. EI used to fund workplace training and adjustment preparation that would help lessen the impact of layoffs when they came. Now it is made explicit in s. 60(5) of the Act that there is no money for anything but cases of actual imminent unemployment: “Support measures ... shall not ... provide assistance for employed persons unless they are facing a loss of their employment.” Given the greater training needs and structural problems of older people – needs and problems that are not easily addressed in a system designed to favour cheap solutions – this may be too little, too late.

3. Ban on Appeals
The last problem area in Part II of the Act puts a capper on everything else. The EI regime offers a rather elaborate appeals system (complaints go from Boards of Referees to Umpires to the Federal Court of Appeal) for those seeking relief from what they see as unfair or unreasonable decisions in respect of income support. Section 64, however, specifically excludes “employment benefits” from challenge under this system. This would include everything from denials of applications for training to assessments of claimant contributions. Especially given the stress that HRDC puts on accountability in its performance reports, there is no moral or legal

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68. One of the most notable initiatives in this area was the early nineties Labour Market Adjustments Program. As described by Anne Crichton and Lyn Jongbloed, the purpose of this program was to service communities, not just individuals. “In 1991, a labour market adjustments program was ... introduced to help small- and medium-sized employers assume primary responsibility for meeting changing skill requirements.... The program was designed to negotiate partnership arrangements that would assist in the planning and implementation of human resource development plans, workplace training and other adjustment measures.... Strategies used would focus on human resource planning, workplace-based training, work sharing, industrial adjustment services and employment equity concepts.... Special programs were also introduced to assist communities facing severe labour market problems to: (1) organize their resources; (2) assess local labour market problems and opportunities; (3) establish realistic objectives, and (4) formulate, manage and implement appropriate strategies” (Disability and Social Policy in Canada (North York, Ont.: Captus Press, 1998) at 240-41).

Unfortunately, the LMAP disappeared as part of the big downloading event. Now adjustment is the responsibility of the provinces. Federal funding is theoretically available to help deal with the effects of larger layoffs, but at least from the perspective of the community, there is no clear policy as to when this assistance will be forthcoming. Whether HRDC gets involved now depends on each particular office, said a union official interviewed in the course of the Toronto field study. Some offices do not want to participate in broad-scale initiatives – their attitude is that they have outlets the unemployed can visit for assistance; they are not interested in doing anything else.

reason why these matters should be exempted from normal judicial oversight. They are not tangential to the purposes of the legislation, nor do they remotely resemble the kinds of policy issues that might attract parliamentary privilege. Most of the unfair and irrational results obtained from this system can be attributed to local practice, not official rules. Adding to the absurdity of the situation is the fact that, as mentioned, these services are now delivered largely by third parties. With the whole process protected from beginning to end, not only is the claimant deprived of recourse against the government; s/he is deprived of any avenue, short of expensive private legal action, by which to obtain a remedy against an incompetent or negligent or dishonest private operator. Of particular concern to the older cohort, s/he is also deprived of any means to battle the discriminatory effects of customary practice.

III. A GLIMPSE AT REAL-WORLD IMPACTS

Showing that a piece of legislation has the potential for discriminatory application is not the same as showing actual discrimination. In some cases—like the Part II provisions discussed in the last section—the ramifications are evident from field studies. In others, however, one can only speculate that a rule could disadvantage older applicants if it were applied in such and such a fashion. One way of gauging the likelihood of the worst case scenarios is to look at the kinds of problems that surface in the appeals process. It is beyond the scope of this study to review the entire body of jurisprudence for age-relevant decisions. (There are, after all, more than 50,000 cases in the corpus at this point.) Given that the whole appeals system is subject to the rule of stare decisis, however, it seems likely that any reasonably sized slice will provide a reasonably representative sense of general tendencies. After considering the alternatives, I decided that my purposes would be best served in the present instance by focussing on availability for work cases.

Why this topic in particular? Methodologically, the availability jurisprudence is in no way exceptional. Because eligibility and entitlement cases tend to be focussed on technicalities, the broader implications of the rulings are, if not less present, at least less striking. Almost identical principles, however, emerge from cases in the other major area requiring substantive interpretation, just cause for job leaving. Despite this, there are at least three reasons why the handling of availability issues is of particular concern to our target constituency. The first and most obvious is that older workers are statistically more likely to suffer from progressively degenerating employment. The second is that the kind of standardized assessment methods set out in the relevant section of the guidebook are disproportionately difficult for such individuals to meet. The third is the fact that so many of the concepts used in decision-making in this area—reasonable and customary efforts to find work, suitability of employment, good cause for refusal—are amorphous enough to allow for a good deal of subjective judgment. Why is this a problem? The more room there is for subjectivity in an implementation process, the greater the likelihood that any biases, whether of the system or of its administrators, will make themselves felt.70

70. The observations made in this section were based on a representative sample of CUBs (Umpires'
A. Selected Case Law

We looked at what the *Digest of Benefit Entitlement Principles* said about availability for work requirements in section II.A.2 above. The treatment given to the topic in the *Quick Reference Tool* compiled by the EI Commission for the use of Boards of Referees is considerably more simplistic. Under "Questions to Answer" it lists five items: 1) Is the claimant capable of work?, 2) Is the claimant willing to work?, 3) Has the claimant made efforts to find work?, 4) Does the claimant have employment restrictions?, and 5) Are restrictions "undue" according to labour market information? Complementing these, it suggests the following four "Legal Tests":

- availability is a question of fact, which should normally be disposed of on the basis of an assessment of the evidence;
- desire to return to the labour market as soon as possible;
- demonstrating this desire by making reasonable and customary efforts to find suitable employment;
- remaining free of personal requirements which would unduly limit the opportunities for work.

Taken on its face, this does not sound like a particularly arduous burden to meet. The first issue to recognize in approaching this topic, however, is that the court has typically favoured restrictive rather than liberal approaches in EI cases.\(^7\) (The most probable explanation for this is that most adjudicators tend to look at the *EJA*, not as social legislation, but as a species of fiscal legislation, parallel to tax law.) The second is that, despite the recurrent emphasis on ordinary language interpretation in the jurisprudence, the terminology around eligibility requirements has taken on a distinct – and in some respects rather bizarre – life of its own. The third is that, thanks to *Granger v. Canada (EIC)*, a seminal and much-cited case dating back to the 1980s, the letter of the law is generally held to prevail over any extrinsic consideration, from absurdity of results to evidence of official error.\(^7\) A key corollary of this ruling is that the Commission can never be required to do anything which is not prescribed by law decisions totalling around 80 items. This sample was obtained as part of a much broader investigation of EI jurisprudence, reported in McGregor, "Anti-Claimant Bias in the Employment Insurance Appeals System", *supra* note 26. Because of the large number of cases there are on the issue (a search in the EI jurisprudence library for "available" in proximity to "work" yielded 8,172 hits), unfortunately, it was not possible to carry out the kind of exhaustive review I was able to do on more specialized topics like deference and discrimination. Instead, I started with the citations provided in Karen Rudner, *The 2001 Annotated Employment Insurance Statutes* (Toronto: Carswell, 2001) under appropriate subject headings, and added to these cases that turned up in searches because they cited Rudner's selections, plus cases cited in related jurisprudence turned up by other means. I then culled out technical rulings, decisions with no substantive element, and items dealing with issues of limited relevance to older workers, like attendance at courses, absence from the country, and babysitting problems. Although the number seems small compared with the potential total, on the basis of the overview obtained in the course of this selection process I am confident that they represent a fairly typical range and distribution of issues and outcomes.\(^7\)

71. For a full discussion of these tendencies, see McGregor, "Anti-Client Bias in the Employment
or prevented from doing anything which is, even if it has raised expectations to the contrary.

1. Job Search
The most critical aspect of availability, from an older worker's perspective, is the job search requirement. Section 18 provides that "A claimant is not entitled to be paid benefits for a working day in a benefit period for which the claimant fails to prove that on that day the claimant was (a) capable of and available for work and unable to find suitable employment." As suggested by the phrase, "fails to prove", the onus is on the individual to establish that he or she meets these conditions. As Rudner's commentary in the Annotated Statute makes clear, adjudicators have interpreted the obligation both literally and stringently.

   The claimant's intention to work must be outwardly shown by action; that is, there must be evidence of the claimant's efforts to obtain work and it may be that the evidence must be presented....

   The claimant can prove availability by showing that he has made reasonable efforts in the circumstances to find employment. The best proof of a claimant's availability and concern to find employment is a "reasonable" or "serious and active", "active" or "serious, continual and intensive" job search. Availability is perhaps best demonstrated by a record of a systematic job search. An inadequate job search, or a failure to demonstrate an extensive job search, may lead to a conclusion that the claimant is not available for work.

Where do personal circumstances enter into this picture? The Digest, as noted earlier, takes the position that extenuating factors are irrelevant, but do the courts agree? The weight of evidence suggests that, for the most part, they do. Rudner ends her summary with the caveat that "[t]he requirement that a claimant is to be continuously seeking employment must be interpreted in a sensible fashion. Factors such as ... the age and health of the claimant should be considered in determining whether the search is sufficient or adequate." Looking at the case law itself, however, there is little sign that this is an accurate gloss. While a few cases do give some extra latitude to the physically handicapped, as long as they can show that their conditions have proven

72. [1986] 3 F.C. 70, 29 D.L.R. (4th) 501 (F.C.A.), aff'd, [1989] 1 S.C.R. 141, 91 N.R. 63. The specific question in contention in this case was the all too common one of whether the Commission was liable for misinformation provided by its employees which was accepted by a claimant to his detriment. When the issue came before the Federal Court of Appeal, the majority not only endorsed the Commission position but, in doing so, effectively gave the body blanket immunity from ever being held to account for its erroneous actions and representations. The rationale offered is a classic one. "It is beyond question that the Commission and its representatives have no power to amend the law, and that therefore the interpretations which they may give of that law do not themselves have the force of law. It is equally certain that any commitment which the Commission or its representatives may give, whether in good or bad faith, to act in a way other than that prescribed by law would be absolutely void and contrary to public order." The law is the law, in other words.

73. Supra note 70 at 98-99. Footnote numbers have been dropped from the passage. For more complete citations on these principles, see the original.

74. Ibid. at 99.
commensurate with employment in the past.\textsuperscript{75} I did not find one where consideration was given on the basis of age. In the sole example cited by Rudner in connection with the proposition, CUB 12606 (Chilton, 1986), the Umpire finds for the claimant on the technical grounds that the Board dealt improperly with the job search evidence. Age per se does not enter into it.\textsuperscript{76}

This is not to say that age is not recognized at all in this jurisprudence, or even that it is not recognized as a factor bearing on employability. The problem is what adjudicators do with such recognition. At best it gleans the appellant some vague sympathy. In CUB 37834A (Thomson, 1997), for instance, the Umpire goes so far as to comment that “age is an occupational hazard”. As far as “consideration” is concerned, however, it is notable that he raises the factor only with respect to the credibility of the appellant’s explanation for why her efforts have been fruitless. He does not suggest that it is a reason for varying the standard. Even this much is anomalous. More typically adjudicators treat age as an additional reason for doubting the genuineness of the claimant’s commitment. In CUB 19012 (Alexakis, 1990), there is no sign that either the Board or the Umpire gave a moment’s thought to the appellant’s claims that “she had followed the rules of the Commission to the best of her ability but due to her limited skills and age no one would hire her.” Rather, they simply concluded that she lacked a “genuine intention to find work”.

Cases where age is made an explicit issue are rare. This does not mean that the problems are infrequent; it just means that they are hard to see. Whatever the issue, the system is going to work against older claimants simply by virtue of its invariability. I speculated earlier that the escalation of expectations one infers from the Digest would discriminate against subgroups with longer average jobless durations. There is no sign in the case law that adjudicators are sensitive to this problem. Not only have they given general approval to the Commission’s policy of demanding a broader and less restricted job search the longer an individual is unemployed (see next section); the grace period they allow for an individual to impose geographical, economic, or job type restrictions, or to hold out for work commensurate with past experience, is the same – two to three months, usually – regardless of the particular circumstances of the claimant.\textsuperscript{77}

\textsuperscript{75} See, for instance, CUB 4584 (Richard, 1977) and CUB 8465 (Gulutzan, 1983). It is notable that these cases predated the mid-eighties anti-equity trend marked by Granger (supra note 72). It is possible that the same circumstances would not generate the same result were the cases heard today. In CUB 14866 (Lindner, 1991), where the claimant’s back problems necessitated “a job which did not entail sitting or standing for long periods of time, nor any lifting”, the Umpire, while sympathetic, declined to interfere with the Board’s finding of fact that he was unavailable.

\textsuperscript{76} The reason for Rudner’s inclusion of this reference, presumably, is that the Umpire himself makes the comment that “There is jurisprudence to the effect that special circumstances such as age and health should be taken into consideration in determining whether a claimant’s job search can be regarded as sufficient.” He does not provide any specific references, however, and I found little in my own review of the case law to support such a claim. Certainly it does not represent mainstream thinking.

\textsuperscript{77} This tenet adds an additional qualification to the earlier statement about umpires giving latitude on grounds of “health”. The treatment of time restrictions is typical. The general rule is that a claimant
2. **Obligation to Take Suitable Employment**

Related to job search requirements generally is the more specific requirement that a person prove that s/he is unable to find suitable employment. The most frequently adjudicated issue under this head arises where the Commission has referred a claimant to a job which he or she views as unacceptable for some reason — the pay is not enough to cover expenses; the hours or conditions are onerous; the claimant is under- or overqualified; the job is temporary or trivial, and will interfere with the claimant's availability for something better on which he or she has a line. If an individual on benefit refuses or fails to pursue such an opportunity, s/he stands a very good chance of being disqualified.

Adjudicators do not always find for the Commission in such circumstances, to be sure, but it seems telling that of the 13 cases of this type that turned up in the sample, only four were resolved in favour of the claimant. Increasing the risk, moreover, it is not always the seemingly most compelling reasons which prevail. In one case on the list, a woman was found not to be justified when she refused a part-time job that would net her only $16/week once she covered child care and transportation costs. In another, the employment ruled as suitable involved only 20-24 hours of work per week, "when and as needed in any of the three stores at different locations", and paid only half of what the claimant was receiving previously. The fly in the ointment in most of these examples is the fact that suitability has been defined by the courts as an objective standard, to be assessed on a comparison between the job offered and other jobs in its class, not on a consideration of the claimant's needs and circumstances. "The rate of pay was the same for all employees," said the Umpire in CUB 24403.

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78. CUB 6192A (Moura, 1982); CUB 24403 (Phung, 1992).
79. CUB 14135 (Popowich, 1987); CUB 17592 (Barbata, 1988).
81. CUB 10113 (Therrien, 1985); CUB 12104 (Koehler, 1986); CUB 15873 (Andrews, 1988); CUB 16748 (Leslie, 1989); CUB 18717 (Pakulak, 1991).
82. CUB 6192/6192A (Moura, 1981-82).
83. CUB 14135 (Popowich, 1987).
84. See, for instance, *Canada (A.G.) v. Moura*, [1982] 2 F.C. 93 (F.C.A.), which has been much cited for its assertion, in relation to reasons for refusing work, that "A claimant can act in good faith but still not have 'good cause' for his or her action".
(Phung, 1992), considering whether the 57-year-old appellant was justified in turning down a job involving only three or four hours a day, three or four days a week, and located a half hour's walk from public transit. "She was aware that the work was somewhat seasonal, and that hours of work might be irregular, but this was a condition inherent in the job and did not make it unsuitable from an objective point of view."85

If the claimant does take an uncertain job, s/he faces equally considerable risks. If s/he ends up having to quit because the situation is untenable, she may be disqualified for voluntarily leaving employment.86 If s/he sticks it out, she may end up getting caught in the downward spiral described in section II.A.3(b) ("The Domino Effect of Job Instability"), and losing her eligibility. Even if nothing catastrophic happens, it is clear from the case law that once one has been pushed into marginal employment, it is very difficult to extricate oneself. I was struck by the predicament of the claimant in one of the self-employment cases that turned up in the availability sample. Stanislaw Piedel was trained as a draftsperson in his home country. Unable to find work in his profession when he arrived in Canada, he took a job as a delivery man for a pizza restaurant. When the business went under, Piedel invested in a pizza franchise of his own. Since he was required to be on the premises only in the evenings, he went back to searching for a daytime job in his field. At this point, the EI Commission disentitled him on the grounds that he was not available during the normal hours for what was now considered to be his normal line of work, pizza delivery.87 The message one draws from this decision adds an ominous undercolouring to the now-common situation where a skilled worker is forced to take a job as a gas bar attendant or burger-flipper as a temporary stopgap. Once one is downgraded to a marginal job category, one's availability will be measured henceforth against the norms of the new field, not the old one, no matter how long or substantial one's experience, and one will never again be allowed to reject a job of the new type as unsuitable.

3. Caregiving
The courts have confirmed beyond cavil that the illness exception to the availability requirement in the Act applies only to the claimant's own illness, not to the illness of a third party.88 The only thing I might add under this head is that the case law bears

85. Although disallowing the appeal, the Umpire in this case, who professed considerable sympathy toward the claimant, reduced the period of disqualification from 12 to seven weeks. Providing yet another illustration of the capacity of the system to produce and countenance inhumane results, the Federal Court of Appeal in Canada (A.G.) v. Phung (1994), 178 N.R. 8, [1994] F.C.J. No. 1754 (C.A.) (QL), set aside this reduction on the grounds that neither Boards nor Umpires have the power to exercise discretionary powers specifically conferred on the Commission.

86. CUB 15680 (Sicoli, 1988); CUB 17907 (Shewpal, 1990). In both of these cases, the Umpire finds that the Board made an error of law. It is clear from the decisions, however, that, absent technical blunders, a decision like this could very easily be unchallengeable.

87. CUB 16051. We find a similar fact situation and a similar result in CUB 17592 (Barbato, 1989), where the claimant was narrowly categorized as a pizza cook on the basis of her last job and disqualified for undue restrictions when she said she did not want to work at night.

88. The most recent reaffirmation of this principle was in Canada (A.G.) v. Faltermeyer (1995), 128 D.L.R. (4th) 481, 187 N.R. 305 (F.C.A.), rev'd CUB 25001 (Faltermeyer). For a discussion of this
out what was said earlier about caregiving being disproportionately problematic for older workers. It is notable that of the caregiving-related cases turned up in the availability search, there were as many or more involving the care of spouses or parents as of children. A review of just cause cases involving caregiving, moreover, yielded an even more striking result. In a sample of 20 CUBs compiled from references in the Annotated Statute, there were six involving sick adults and not one involving sick children. Since all family members have the same status under s. 29(c)(v) – which lists the obligation to care for a relation as a circumstance justifying leaving an employment – this imbalance may indicate either that sick adults actually cause more work interruptions than sick children, or that adjudicators are likely to be less understanding about the former, or both. Whatever the answer to that question, the implication is the same: the exclusion of third parties from the illness exception may well have more negative ramifications for older workers than for younger ones.

4. Disability
Unsurprisingly, given the ambiguity and incoherence observed in the Commission’s policy around disability issues, as articulated in the Digest (see section A.2 above), some of the most troubling availability cases involve individuals who, due to health conditions, are unable to continue in their previous lines of work. Because of the particular salience of this issue for older workers, it is worth looking at some of these cases individually. From the standpoint of the prevalence of this problem, it should be noted that these are not the only cases of this nature in this sample, only the most striking ones.

CUB 5849 (Diamond, 1979) – The claimant, a park superintendent, left his job when he was diagnosed with angina pectoris. The prognosis at the time was that he was permanently disabled. Later, however, his condition improved, and he began looking for light work. When he applied for EI benefits, despite a letter from his doctor testifying to the change, and despite evidence of extensive job search activities, the majority of the Board held, on the basis of the initial diagnosis, that he was not available for work. Although acknowledging that he might have concluded differently himself, the Umpire finds nothing in the record that would justify interfering with the Board’s findings of fact. “[T]he chances of obtaining employment are external factors and are appreciated in the light of the labour market information supplied at times by the Commission itself and by the claimant’s unsuccessful ... [though] genuine search for work.”


90. Supra note 70.
CUB 11288 (Barrett, 1985) – At the time of his initial application, the claimant indicated that he was not available for work due to a medical disability. Two months later, he submitted a letter from his doctor stating that he was sufficiently recovered to permit partial work. His reporting cards for the next few months indicated that he was working part-time while looking for full-time employment of a light nature. At the end of this period the Commission retroactively disentitled him on the basis that the part-time job was as much as he was capable of handling, and he was therefore not available for anything more. In endorsing this decision, the Board placed more emphasis on the restrictions noted in the initial medical evidence than on the claimant’s testimony about his capabilities. On appeal, the Umpire found that it had not committed any error in law.

CUB 16559 (Graham, 1988) – The claimant, who had worked as a welder for a shipbuilder for 18 years, left his employment because of chronic pulmonary disease. When his medical benefits ran out, although warned by his doctor that he was unfit for work, he registered with his union hiring hall indicating that he was seeking a less arduous position as a storeman. Despite this, both the Commission and the Board determined that he was not available. The Umpire saw no reason to intervene. Because of its rather dire implications about judicial thinking around this issue, it is worth quoting the pertinent passage in his decision. “Labour Market information indicated that at his age and in his state of health his opportunities for employment ... were severely limited. He only wanted to work until he retired in any event even if he had the capability. It was up to [his former employer] to decide whether they would offer him this work and they did not. They were not obliged to do so, and his willingness to work is insufficient in law to prove availability and capability.”

CUB 18783 (McDougall, 1990) – The claimant, a 59-year-old registered nurse, left her employment because of declining health. A certificate from her doctor indicated that she was “no longer able to perform general nursing duties because of medical problems. She would be able to do light duty work only.” When interviewed by a Commission agent, the claimant clarified this opinion by stating that although she did not feel capable of returning to full-time shift work as a staff nurse in a hospital, she was available for other kinds of nursing, preferably day work on a part-time basis up to 24 hours weekly. Subsequent to this admission, she was disentitled for placing undue restrictions on her availability. Although the Umpire allowed the appeal on other grounds, he did not address the issue of whether her health-related limitations did, in fact, constitute a restriction. By ignoring this aspect, the decision leaves open the possibility that if she were offered a full-time job that she was unable to take, she would be disqualified.

CUB 23929 (Veinot, 1994) – The claimant was forced to leave her job as a cleaner because of arthritis in her back. The file contained two letters from her doctor. The first said that she was unable to work; the second that she was able to return to employment if it did not entail any heavy physical activity. Four months after the initial claim was established, the Commission imposed a retroactive disqualification and levied a $1600 overpayment. In issuing its decision on appeal, the Board accepted the respondent’s argument that the second letter should be treated as less credible than
the first since it was written after the claimant received notice of her disqualification. The fact that she offered evidence of a job search was not considered as significant. "Although I have considerable sympathy for Mrs. Veinot’s position," said the Umpire, "I do not find that the Board of Referees erred in its decision."

A disturbing pattern emerges when we look at these cases as a group. If a claimant limits his or her search to something appropriate to his or her reduced capabilities (like MacDougall), s/he may be penalized for undue restrictions. If s/he looks for work that the Commission does not believe he or she can handle (Diamond, Barrett, Graham, Veinot), s/he faces disqualification for non-availability. Exacerbating matters is the fact that capability is a slippery concept that tends to merge with de facto employability. The language in at least some of these decisions (Diamond, Graham) comes very close to saying that not being able to find a job is evidence that one is not available for work. That adjudicators should think like this has implications well beyond the special field of disability. If a person is unable to secure employment because of prejudice on the part of employers, despite being fully capable of doing jobs that are on the market, does that mean that he or she is unavailable?

This last point raises a more technical consideration. Since the problems in these particular cases were not pre-existing conditions but lately developed ones which precipitated the claimant’s job loss, they fall under the circumstances described in section 10.10.3 of the Digest as legitimate factors to consider in determining availability. As I suggested earlier, however, I do not believe that there is any legal justification for making this distinction. Regardless of the particular instrument, it is good law that, barring some bona fide justification (which will rarely be found absent either impossibility or undue hardship\(^{91}\)), discriminating in the provision of services to the public on the basis of disability, regardless of how or when the condition was contracted, is illegal. While the issue appears not to have been specifically considered by the courts (as I have discussed elsewhere, Charter questions are typically either ignored in EI cases\(^{92}\)), it seems only common sense that penalizing someone for seeking an alternative form of employment to accommodate a reduced capacity would fall within prohibited conduct.

B. Comments and Observations
What are we to make of these examples? At the very least, they demonstrate that the discriminatory impact I have imputed to the Act is not merely potential. Looking at the advantage that has been taken of client handicaps in these cases, in fact, one might

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91. The relevant clause in the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 for instance, is s. 15(2): "For any practice ... to be considered to have a bona fide justification, if must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost." In a few of these cases – like Graham, perhaps – it is conceivable that the Commission could argue that the claimant's health would be endangered if it encouraged him to continue with a job search. As far as cost is concerned, though, it seems unlikely, given the current size of the EI surplus, that the government could establish that accommodating these few individuals would be fiscally catastrophic.

reach the same conclusion suggested by our field study of the Toronto implementation regime – that if there is any possibility of interpreting a provision against a claimant, such that money is saved or obligations are minimized, administrators are likely to do so. More troubling, however, is what they suggest about the chances of remedying – or gaining individual recourse for – these discriminatory elements through the normal complaints process. Part of the problem, obviously, is the rather rigid insistence on the rule of law. An even bigger part, however, is the extent to which the appeals process reproduces rather than compensates for biases in the legislation. And not just because, as I have discussed elsewhere, the way the system is set up gives a practical advantage to the respondent. 93

There is considerable if somewhat subtle evidence in this body of case law that EI adjudicators’ views are coloured by the same ageist stereotypes that make it difficult for older workers to find employment in the first place. In many of the disability cases discussed in the last section, for instance, there was a clear disinclination to believe that the individuals were really looking for work. One finds a similar disinclination in other types of job search cases. In CUB 23426 (Armitage, 1994), where the job preference listed on an initial application form was used to prove that an unemployed long-time teacher was unduly restricting her availability, despite ample evidence to the contrary, part of the reason why the Board was suspicious of claims about the appellant’s readiness to take work outside her field was the extent of her education and experience. In CUB 22947 (Hegyi, 1993), similarly, a Board refused to believe that a 63-year-old former building superintendent had lowered his initial expectations vis-à-vis salary and job type, again despite evidence, because they were convinced that he was not prepared to take work outside of his chosen occupation. While there may be good reason to suspect, on common sense grounds, that a claimant who faces some kind of detriment in taking a job – whether in terms of lost status or of physical discomfort or of diminished returns for effort expended – is less likely to be wholehearted about the prospect, there is no legal justification for holding such individuals to a higher standard of proof than others. More to the point, there is no legal justification for providing such individuals with a lower standard of support than others, not just in absolute terms but calculated as a ratio of actual need.

That EI penalizes difference is not just an older worker issue, of course. Many of the problems elucidated in the foregoing pages apply to other constituencies besides this one. Indeed, based on the evidence, one might say that the EI regime is biased against any group that faces greater than average barriers to employment. I have talked elsewhere about public law remedies for this situation. 94 Granted that the internal appeals system does not offer much relief, this fact in itself may provide good grounds for judicial review. And certainly many of the effects I have talked about would be

93. Particularly troublesome is the fact that it is the Commission itself, a party to the appeals, which is empowered to make the ground rules, train the referees, and administer the procedures. For a full discussion of these problems, see McGregor, “Anti-Claimant Bias in the Employment Insurance System,” supra note 26.

94. Ibid.
vulnerable to human rights complaints, especially in the wake of *B.C.G.S.E.U. v. British Columbia (Meiorin)*, with its enshrinement of the concept of anticipatory accommodation and its insistence on individualized treatment. As far as older workers in particular are concerned, however, it should not be left to the victims to search out solutions. If the government really is interested in re-normalizing a longer work life – and self-interest dictates that it must be – then fixing the anti-age elements in the *ELA* is not altruism but necessity.

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96. Considering the defence of “reasonable necessity”, the Court in this case formulated the principle that accommodation is not just a post facto bandaid to be applied by an employer when confronted with evidence that its rules are discriminatory, as was the case previously; it is something that must actually be built into the rules. How would the EI regime measure up to this standard? One quibble that might be raised would concern the applicability of the precedent. It is notable that *Meiorin* involved employment testing – what we are dealing with in EI is a service to the public. Despite its facial plausibility, it is unlikely that such an argument would wash. In the context of human rights law, principles are not generally attached to specific subject matters. Most codes contain a concept of *bona fide justification* which is not only notionally parallel to *bona fide occupational requirement* in the employment arena, but is applied using a specifically parallel form of analysis (see i.e., *Floyd v. CEIC* (1993), 3/93 (F.C.T.D.)). Adding weight in this particular case, moreover, is the practical artificiality of the distinction. Employment insurance may technically be a service, but it also has a number of distinctly employment-like features. Benefit payments are viewed as replacing “earnings”. Beneficiaries are expected to “work” at finding a job. Most significantly, entitlement is determined on the ability of the applicant to meet certain tests. Some of these are purely factual – how long a person has worked, where s/he resides, what circumstances led to the loss of employment. Others, however – like attachment and availability – are clearly connected with the efforts, attitudes, and capabilities of the individual. Just like employment tests. With these similarities, it is not much of a stretch to conclude that legal principles applicable to one field should also be applicable to the other. A more serious counter would be the claim that the Commission’s modus is already based on individual assessment. “[A]vailability is a question of fact to be considered in reference to the particular circumstances of each case,” says the *Digest of Benefit Entitlement Principles* (supra note 31 at s. 10.4.0). One thing *Meiorin* makes clear, however, is that the mere fact that an assessment process is individualized does not make it acceptable. “The Court of Appeal ... suggested that the fact that Ms. Meiorin was tested individually immunized the Government from a finding of discrimination. However, individual testing, without more, does not negate discrimination. The individual must be tested against a realistic standard that reflects his or her capacities and potential contributions” (para 82; emphasis added). Viewed in this light, it seems unlikely that the Commission’s policy of disentitling people whose job prospects are limited due to health problems (discrimination on the ground of disability) or care giving obligations (discrimination on the ground of family status) or stereotypes about declining capacity (discrimination on the ground of age) could pass muster. At the very least, the government would be required to provide concrete reasons why it would be infeasible for it to vary its blanket policies – by giving more time, or by allowing the claimant to put appropriate restrictions on his/her job search, for instance, or even by providing special programs to help get applicants into suitably modified work situations – in order to accommodate these individual differences.