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FROM UNEMPLOYMENT INSURANCE TO EMPLOYMENT INSURANCE: A PRIMER FOR ADVOCATES

JAMES ARENBURG*

Résumé
Cet article résume les changements législatifs qui résultent de la Loi sur l'assurance-emploi et qui ont une importance dans la défense de personnes qui réclament des prestations tant en vertu de la nouvelle loi que de l'ancienne, soit la Loi sur l'assurance-chômage.

1. INTRODUCTION
This article will summarize the legislative changes resulting from the Employment Insurance Act\(^1\) that are of significance to advocates for individuals claiming benefits under both the EIA and its predecessor, the Unemployment Insurance Act.\(^2\)

Most sections of the EIA and the first version of the Employment Insurance Regulations\(^3\) (the EIR) came into force on June 30, 1996. Almost all of the remaining provisions took effect on either January 1, 1997 or January 5, 1997.\(^4\)

The EIA replaces both the UIA and the National Training Act.\(^5\) The familiar categories of Unemployment Insurance benefits from the old legislation are

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1. S.C. 1996, c.23 [hereinafter the EIA].
3. SOR/96-332, as recently amended by SOR/97-31 [hereinafter the EIR].
4. See EIA, s.190; EIR, ss.94, 95.
continued and are now simply called "unemployment benefits". Part II of the 
EI-free governing all remaining employment assistance programs administered by 
the Canada Employment and Immigration Commission (the "Commission"). 
These are now known as "employment benefits".

The transition to the EIA has brought many substantive reforms. Regrettably, 
most have an adverse effect on individual claimants. Because of the nature of 
the changes, including provisions linked to new measures to maintain records 
for each claimant over a 5 year period, the full impact will not be felt 
immediately.

Although the EIA has replaced the UIA, the general conceptual framework for 
benefits claims remains unchanged. In many important respects, jurisprudence 
relevant to UIA claims will continue to govern the interpretation of the new 
legislation.

2. IMPACT ASSESSMENT REPORTS
The legislation includes a process for monitoring and assessing its impact. From 
1997 to 2001, the Commission is to report to the government on at least an 
annual basis. These reports will assess the impact of the EIA, including consid-
eration of "how individuals, communities and the economy are adjusting to the 
changes" and whether the anticipated cost savings are being realized. The 
Commission reports are also supposed to assess the effectiveness of EIA benefits 
and other assistance, with specific emphasis on how these items are influencing 
the behaviour of employees and employers. The EIA does not require an 
assessment of the overall impact of legislative change on the unemployed, nor 
need there be an official report on how effective the new "employment benefits" 
regime is in helping these individuals get back to work.

6. EIA, s.7.
7. EIA, s.59.
8. For example, most of the substantive issues relating to disqualification for losing 
employment because of misconduct or leaving employment without just cause are unaf-
fected. These were the most heavily litigated UIA matters, a trend that will no doubt 
continue.
9. EIA, ss.3(1)(a), 3(1)(b).
10. EIA, s.3(1)(c). The reports will look at how EIA benefits and other assistance are being 
used, whether the EIA regime is encouraging claimants to actively seek work, and 
whether it is encouraging employers to maintain a stable workforce.
11. With these omissions, there may be no formal assessments of the impact on those citizens 
and taxpayers who are most affected by the legislation. It should be kept in mind that 
the overall purpose of the benefits program continued by the EIA is to provide benefits
3. **DELAYED IMPACT**

The year 2001, selected as the end of the *EIA* monitoring and assessment period, is also the first year that the full consequences of many significant changes will be apparent. Under the new “intensity rule”, applicants for regular employment benefits who have received more than 20 weeks of regular benefits within the previous five years will see their benefits incrementally reduced. All claimants with one or more “violations” during the past five years will need to work substantially more hours than other claimants to establish eligibility. A new provision for the clawback of benefits through the income tax system is also based in part on a five year claims history. In order to implement these changes, it was necessary for the Commission to establish a new method for tracking each claimant’s record of claims and violations. This information began to be collected on June 30, 1996. As the records accumulate during the first five years of the *EIA*, more claimants will be adversely affected every year.

4. **REDUCED BENEFITS AND RESTRICTED ELIGIBILITY**

The *EIA* is one of many recent steps in the erosion of income protection for our unemployed and their families. Cost savings have been the dominant theme of amendments to the previous legislation for a number of years. The new law reflects the commitment made by the Chretien government in the 1995 budget to reduce unemployment insurance program costs by 10%.

The maximum possible length of a benefits claim has been reduced to 45 weeks, from the 50 weeks that was allowed previously. With maximum weekly insurable earnings reduced from $815 to $750, the system also provides a diminished level of protection to high and middle income earners. With the

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12. *EIA*, s.15. See Part 6, below.

13. *EIA*, s.7.1. See Part 7, below. The most common “violation” is giving false or misleading information to the Commission.


16. *EIA*, s.12(2). The actual length of a particular claim continues to depend on length of time worked and the official regional rate of unemployment.

17. *EIA*, s.14. This translates to a maximum weekly benefit of $415, 8% less than before.
exception of those affected by the "intensity rule",\textsuperscript{18} the basic benefit rate of 55% of insurable earnings remains the norm.

New entrants and re-entrants to the labour force face significantly increased requirements to qualify for benefits.\textsuperscript{19} The UIA requirement of 20 weeks of insurable employment has been increased to the hourly equivalent of 26 weeks of full time work.\textsuperscript{20} The official reasoning in support of this change is a revealing example of prevailing current attitudes toward the issue of unemployment:

Studies show that people who become reliant on UI early in their working lives quickly begin to factor it into their annual work pattern. It can lead to a cycle of regular income supplementation. That's one reason why the number of people who regularly collect UI has gone from being a small fraction of claimants, 15 per cent in 1980, to about 40 per cent today.

The incentive to mix spells of work with UI has been powerful enough to encourage some young people to quit school before they have acquired the basic skills needed to achieve more stable employment in today's world of work.\textsuperscript{21}

Even if one accepts the stated cause, it is difficult to understand how the increased entry and re-entry requirements address the problem. There are many reasons why individuals stay out of the workforce for prolonged periods. These include child care responsibilities, sickness, taking education or retraining to obtain the skills needed for work, and, of course, the simple inability to find employment. In all of these situations, the individual returning to work must now meet the greater eligibility requirements.

The three classes of special benefits\textsuperscript{22} under the UIA are continued by the new legislation.\textsuperscript{23} There are no substantive changes to the eligibility provisions or the number of weeks of benefits that can be paid.

\textsuperscript{18} The intensity rule can result in a benefit rate as low as 50% of insurable earnings.
\textsuperscript{19} EIA, s.7.
\textsuperscript{20} The 26 week requirement is expressed in the legislation as 910 hours. Other aspects of the hours-based system are described at Part 5, below.
\textsuperscript{21} This reasoning is set out in the government's guidebook explaining the EIA changes: Canada, \textit{A 21st Century Employment System for Canada: Guide to the Employment Insurance Legislation} (Ottawa: Queen's Printer, December 1995) at 18. Are there not more plausible explanations for increased reliance on the U.I. program than this form of "career planning" on the part of the unemployed?
\textsuperscript{22} Maternity, sickness and parental benefits.
\textsuperscript{23} EIA, ss. 21, 22, 23.
5. THE MOVE TO COUNTING HOURS OF EMPLOYMENT

The most fundamental change in the EIA is the determination of eligibility based on hours of work. Previously, eligibility was ascertained by adding up the number of weeks of insurable employment within the statutorily defined qualifying period. Generally, only weeks in which a claimant worked 15 hours or more were counted. U.I. premiums were not collected until this 15 hour threshold was reached. The UIA therefore excluded some part-time workers from coverage. It also encouraged some businesses to avoid premiums and paperwork by employing large numbers of part-time workers and assigning them minimal hours. In addition, the counting of weeks was detrimental to some workers who worked exceptionally long hours. The eligibility determination system lacked the flexibility to recognize and reward all of their efforts.

The new regime is based on counting the total hours worked, with premiums paid on each dollar earned. However, the crucial element to understand is not the change to hours per se but the conversion ratio that has been selected. In place of each week of 15 hours or more that was needed, the EIA requires 35 hours of work. While some part-time workers are brought under the umbrella of coverage for the first time, the major result is to substantially increase the number of hours that all part-time employees must work in order to achieve eligibility. Many who would have qualified under the UIA will now find themselves with insufficient hours. Also, those part-time workers who do have enough hours to qualify are now entitled to fewer weeks of benefits. The change to counting hours also affects claims for special benefits.

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24. Normally 52 weeks, but extended to as much as 104 weeks in certain situations. The length of the qualifying period has not changed: EIA, s.8.


26. As one example, consider the hypothetical situation of Workers A and B, two unemployed workers living in the same town with a regional rate of unemployment of 9.5%. Under the UIA, each required 16 weeks of insurable employment to qualify for benefits. Worker A was laid off after working 15 hours per week for 16 weeks (240 hours). She would qualify for 20 weeks of benefits. Worker B had worked 50 hours per week for 15 weeks (750 hours). He would not qualify.

27. See the tables referred to in UIA, s.6(2) and EIA, s. 7(2). Under the EIA regime, all hours of work are counted regardless of the number of hours worked in a given week.

28. To use the same example from note 26, Worker B now qualifies under EIA, having achieved the threshold of 560 hours during his 12th week of employment. Worker A does not qualify. If Worker A continued to work part-time at 15 hours per week, then she would not reach the required 560 hours until her 38th week of employment.

29. Once Worker A achieves 38 weeks of work at 15 hours per week, she will be eligible.
The conversion to an hours-based system is accompanied by a new method for calculating the rate of benefits to be paid. Curiously, this method relies on the old UIA concept of "weeks of employment". One result is slightly reduced benefits for some claimants who have managed to work just enough hours to qualify. The new calculation method also reduces benefits for claimants who have recent gaps in their employment history.

The change to counting hours raises some difficult issues of interpretation and application. These include the situations of salaried and commission workers, and other circumstances where it is hard to prove the number of hours worked. Some sections of the EIR provide guidance but these provisions are not likely to cover every contingency. There are also transitional issues that arise from claims based in part on work performed before January, 1997.

6. **THE INTENSITY RULE**

As mentioned earlier, there is a new provision to lower the rate of regular benefits paid to repeat claimants. As the rate of benefits varies with the intensity of past usage of the unemployment benefits system, this move to rate the claims history of individuals has been called the intensity rule. Those who have drawn more than 20 weeks of regular benefits during the five years before a new claim are no longer able to receive payments at the usual rate of 55% of weekly insurable earnings. Their rate will be between 50 and 54%, depending for 20 weeks of unemployment benefits. Contrast this with the 31 weeks that would have resulted under the UIA.

30. Sickness, pregnancy and parental benefits continue to be available to "major attachment claimants" only, now defined as those with at least 700 hours of insurable employment in their qualifying period: EIA, s.6(1).

31. **EIA**, s.14. This result is accomplished by adding up total insurable earnings for the preceding 26 weeks and dividing by the actual number of weeks worked during those 26 weeks, or the minimum "divisor", whichever is highest. The "divisor" is calculated by adding two to the number of weeks that make up the regional E.I. entrance requirement. For our two friends, Workers A and B, here are the consequences: Worker A would receive benefits to reflect her actual earnings during the previous 26 weeks. Using the minimum divisor of 18, Worker B's E.I. benefit rate would be based on only 83.3% of actual weekly earnings for his 15 weeks of work.

32. **EIR**, ss. 9.1, 10, 10.1, 10.2, 11, 12. Many of these are recent amendments intended to clarify the new hourly system.

33. The recent EIR amendments include a provision specifying that for benefit periods starting on or after January 5, 1997, all weeks of insurable employment from 1996 or earlier shall be treated as the equivalent of 35 hours: EIR, s.94.1.

34. **EIA**, s.15.
on how many weeks of benefits they previously received. The record-keeping for this provision began on June 30, 1996. All weeks of regular benefits paid after that date are to be considered.

The effect of the intensity rule is lessened somewhat for a claimant who takes part-time work while drawing unemployment benefits. By so doing, the claimant earns "work credits". If there are sufficient earnings in a week to lower the unemployment benefits payment, that week does not count as a full week for the purpose of applying the intensity rule to future claims. It is counted as a percentage of a week, based on the percentage of unemployment benefits that is paid.

The intensity rule affects the rate of regular benefits only. The weeks counted against claimants for the purpose of the rule do not include weeks of special benefits, weeks when the claimant was disqualified, or weeks of benefits arising from work-sharing or a training course. However, any weeks for which benefits were overpaid due to a claimant's act or omission that falls within the expanded penalty provisions in the EIA are counted, even though these benefits must be repaid.

With the complexity of record-keeping now required to apply the intensity rule, it seems inevitable that errors will occur and appeals will be necessary.

7. **FAMILY SUPPLEMENT**

In 1994, a provision was added to the UIA to increase the usual benefit rate of 55% of average weekly insurable earnings to 60% for some low income

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35. Claimants entitled to the new family supplement are exempt from the intensity rule. See Part 7, below.

36. Unfortunately, the UIA created other disincentives to taking part-time work while on a claim. These have been continued and in some cases strengthened. See Part 10, below.

37. *EIR*, s.25.

38. Special benefits (sickness, maternity and parental benefits) are paid at the usual 55% rate, regardless of the claimant's record of EIA claims.


40. While notions of fairness would seem to suggest that all affected claimants receive detailed decision letters listing their previous weeks of benefits, work credits, and the resulting calculations, this may not happen. One hopes it will not be necessary to make a special request or invoke the appeal process to obtain this basic information.

41. As a general rule, a claimant may appeal all E.I. decisions to a Board of Referees: *EIA*, s.114. There is no specific provision that exempts benefit rate calculations from the appeal process.
claimants with dependants. The *EIA* provision is much more general, providing for unspecified increases to benefit rates for claimants with dependant children. The criteria to be met, maximum rate, and the formula used for calculation purposes are found exclusively in the *EIR*.

The family supplement applies to all types of benefits. Eligibility is established if in the month prior to filing a claim the claimant or a cohabiting spouse received a child tax benefit under the *Income Tax Act*. The calculation formula is based on the amount of the child tax benefit and the adjusted income, for tax purposes, of the child tax benefit recipient. Where both spouses are drawing unemployment benefits, only one of them may receive the family supplement.

For benefit claims starting in 1997, the maximum benefit rate for family supplement recipients is 65%. The current wording of the *Regulation* provides for yearly increases to this maximum rate, in annual increments of 5% and peaking at 80% in the year 2000. However, there may well be an important limit to the total amount that can be paid for each week. The legislation sets $413 as the maximum rate of weekly benefits, and the government has stated that family supplements cannot increase benefits beyond that amount.

Human Resources Development Canada has estimated that the family supplement will affect 15% of all claimants and that by 2000 these claimants will see an average 12% increase to their benefit levels. Significantly, a last minute

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42. *UIA*, s.13(1)(b).

43. *EIA*, s.16. The criteria “may include criteria that are the same as or similar to the criteria for receiving a child tax benefit”: s.16(2).

44. *EIR*, s.34.

45. The applicable definition of “co-habiting spouse” is that of s.122.6 of the *Income Tax Act*: “‘cohabiting spouse’ of an individual at any time means the person who at that time is the individual’s spouse and who is not at that time living separate and apart from the individual and, for the purpose of this definition, a person shall not be considered to be living separate and apart from an individual at any time unless they were living separate and apart at that time, because of a breakdown of their marriage, for a period of at least 90 days that includes that time.

46. The yearly maximum rates for the family supplement are set out in *EIR* s.34(6). For family supplement recipients, the usual 55% rate is increased by the following amounts: 1997, 10% (to a maximum benefit rate of 65%); 1998, 15% (70%); 1999, 20% (75%); 2000 or later, 25% (80%).

47. *EIA*, s.17. The “Regulatory Impact Analysis Statement”, appended to the *EIR*, states that the maximum weekly benefit is a limitation to family supplement increases. Neither the *Act* nor the *Regulations* say this directly, although it may well be a correct interpretation.

provision was added to the EIA during Committee deliberations which exempts family supplement recipients from having benefits rates lowered due to the intensity rule.\textsuperscript{49} As a practical matter, the family supplement should achieve the desirable goal of making it unnecessary for some unemployed individuals to apply for social assistance while on their claims.

8. **EARNINGS TOP-UP**
Under the UIA, claimants working part-time while drawing benefits were able to earn up to 25\% of their weekly benefit rate before any earnings would be deducted.\textsuperscript{50} This rule has been continued, but the EIA earnings top-up provides a small additional advantage for low income claimants. The maximum allowable earnings are now the greater of 25\% of the weekly benefit rate or $50 per week.\textsuperscript{51} This change increases the earnings exemption for all claimants who draw unemployment benefits of less than $200 per week. It has been marketed as an incentive to encourage these claimants to find part-time work. In keeping with the EIA's tough sanctions against abusers, claimants found to have knowingly failed to declare earnings are not able to take advantage of the earnings exemption.\textsuperscript{52}

9. **INCREASED CLAWBACKS**
The UIA provided for a clawback through the income tax system of up to 30\% of total unemployment insurance benefits received in a year. This provision applied to claimants with incomes greater than one and one-half times the maximum yearly insurable earnings.\textsuperscript{53} It has been replaced by two clawbacks in the EIA.

The first of these maintains the 30\% maximum for repayment. However, clawback now begins when income exceeds one and one-quarter times the maximum yearly insurable earnings.\textsuperscript{54} As a result, more high income earners

\textsuperscript{49}. EIA, s.15(1.1). Note that potential family supplement recipients with a record of "violations" in their claims history are not exempt from the increased entrance requirements resulting from the "violations". See Part 11, below.

\textsuperscript{50}. UIA, s.15(2).

\textsuperscript{51}. EIA, s.19(2).

\textsuperscript{52}. EIA, s.19(3). Thus a claimant who knowingly fails to declare a small amount of earnings, that do not exceed the earnings exemption, may receive a rude surprise later on. See Part 11, below.

\textsuperscript{53}. UIA, s.123.

\textsuperscript{54}. For this clawback, in relation to regular benefits, see EIA, s.145(1). Special benefits are
who draw benefits for part of the year must repay a portion of what they have collected.55

Many repeat claimants of regular benefits are subject to a second and more punitive clawback, based on their income and benefit claims history.56 Depending on the number of weeks collected within the previous five years, the tax system can take back as much as 100% of the current year's benefits.57 A formula that restricts the clawback to a maximum, based on annual income, serves to mute its effect in some situations.58 The records for this clawback, as with those for other new provisions, start from June 30, 1996. The clawback will, with the passage of time, begin to affect more people.

10. DISQUALIFICATIONS AND DISENITLEMENTS59

While the EIA has not brought significant changes to the rules for imposing disentitlements, there are some substantive changes to the disqualification sections.60 Disqualification decisions lead to the majority of appeal hearings. Changes to these provisions are, therefore, of particular interest to advocates for claimants. The amendments apply to all disqualifying events that took place after June 30, 1996. There are no meaningful changes to the appeals system.

55. The decrease in maximum weekly insurable earnings from $815 to $750 is another factor that makes more claimants subject to this first clawback. Under UIA, the clawback began at an income level of $63,570. The threshold is now $48,750.

56. EIA, s.145(3).

57. This second clawback begins at an income level of $39,000 per year, the equivalent of drawing maximum employment benefits for a full year: EIA, s.14(4). The potential percentage of benefits to be repaid starts at 50%, for those who received 21 to 40 weeks of regular benefits within the past 5 years. If over 120 weeks of benefits were received within the 5 year period, the potential clawback is 100%.

58. EIA, s.145(4). The maximum amount repayable is 30% of the amount by which the claimant’s income [less the s.145(5) clawback of special benefits] exceeds the maximum yearly insurable earnings.

59. Generally speaking, a disentitlement is imposed as of the date a claimant fails to meet a condition or requirement (eg. being available to work). A claimant may remove herself from the state of disentitlement if and when the condition or requirement is later met. A disqualification can be for either a fixed or indefinite period. The claimant is ineligible for unemployment benefits for the full disqualification period unless the decision imposing the disqualification is overturned.

60. EIA, s.6(1) lists all of the sections imposing disentitlements as well as the two disqualification provisions.
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In the rules providing for disqualification of claimants for a fixed number of weeks,\(^61\) wording has now been added to cover additional situations. A six week disqualification will result when the Commission terminates the referral of a claimant to a program, course or employment activity for which assistance is provided under "employment benefits",\(^62\) and the termination is due to the claimant's non-attendance, lack of participation, withdrawal, or expulsion. Unless the claimant was expelled, the claimant may avoid disqualification by showing good cause for his or her actions.\(^63\) These rules broaden the former UIA disqualification which covered failure to attend a course of instruction or training.\(^64\)

The EIA, like the previous legislation, provides for the indefinite disqualification of claimants who lose employment because of their own misconduct or who voluntarily leave employment without just cause.\(^65\) The concept of "misconduct" remains undefined. The test for "just cause" continues to rely on the same non-exhaustive list of circumstances that are specifically recognized.\(^66\) There are, however, two types of amendments that increase the range of situations for which indefinite disqualifications may be given.

The first of these is a statutory definition of "voluntarily leaving an employment" which includes three types of disqualifying circumstances that would probably not have resulted in disqualification under UIA jurisprudence. These are, (1) a refusal to accept employment offered as an alternative to an anticipated loss of employment, (2) a refusal to resume an employment, and (3) a refusal to continue in a position when a new employer takes over the operation.\(^67\)

Second, a number of amendments appear to strengthen the Commission's view that a disqualification should always result from the loss of employment due to misconduct or the leaving of employment without just cause — regardless of the length or nature of the employment.\(^68\) In the past, when dealing with issues

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\(^{61}\) These are set out in EIA, s.27. Depending on the cause, this type of disqualification may be for 1 to 6 weeks or for 7 to 12 weeks: EIA, s.28.

\(^{62}\) See Part 12, below.

\(^{63}\) EIA, ss.27(1.1), 28(1)(b).

\(^{64}\) UIA, s.27(1)(e).

\(^{65}\) EIA, s.30.

\(^{66}\) EIA, s.29(c).

\(^{67}\) EIA, s.29(b.1). The first Umpire and Federal Court of Appeal decisions interpreting these provisions and considering the concept of "just cause" in these new contexts will be of interest.

\(^{68}\) The new wording includes reference to "any employment" in s.30(1), and provisions
such as the loss of jobs held concurrently, the loss of two consecutive jobs for different reasons, and the loss of part-time work while receiving unemployment benefits, the Commission's view has not always won the day.69

11. PENALTIES AND VIOLATIONS
The EIA has significantly broadened the range of activities for which monetary penalties may be imposed and has also added some harsh new sanctions. The sole penalty ground under the UIA was the making of a false or misleading representation.70 There is now a list of eight possible transgressions.71 For the first time, these penalties may be applied to either the claimant, any person acting on the claimant's behalf, or both.72 Transgressors can include anyone who participates in, assents to or acquiesces in one of the listed acts or omissions.73 The penalties may be imposed even if a benefits claim is denied and no monies are ever received.

For most situations, the penalty for each act or omission cannot exceed three times the claimant's rate of weekly benefits, although there is a different formula to calculate a penalty arising from a failure to declare earnings. If the penalized

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69. With respect to the loss of two concurrent jobs, see Canada v. Larocque (1996), 195 N.R. 316 (F.C.A.), where the result was no disqualification. With regard to the issue of two consecutive employments lost for different reasons, see Canada v. Droege (17 April 1996), F.C.A. #A-576-95 [unreported]. The court upheld the disqualification, distinguishing the reasoning in Larocque. Two recent decisions have considered the plight of those disqualified due to loss of part-time work while on a claim. In Canada v. Jenkins (26 April 1995), F.C.A. #A-141-95 [unreported], the disqualification was found not to apply. The Federal Court of Appeal in Canada v. Locke (3 June 1996), F.C.A. #A-799-95 [unreported], reached an opposite result, based largely on amendments to the UIA and Regulations, while noting that the provisions may appear "draconian and ill-conceived". Currently, one further application to the Federal Court on this issue is pending: Estabrooks v. Canada, F.C.A. #A-787-96. The prospect of disqualification remains an obvious disincentive to taking part-time work while on a claim.

70. UIA, s.33.

71. EIA, s.38.

72. Under the UIA, a penalty could result from a false or misleading statement by a claimant or any person acting on the claimant's behalf, but only the claimant could be penalized.

73. EIA, s.38(1)(h). Wording that requires knowledge and intent is present for each of the other listed transgressions, but is conspicuously absent here. Caseworkers who advise or represent claimants may wish to contemplate their own potential liability.
claimant did not obtain benefits, the maximum penalty is three times the maximum weekly benefits rate provided by the Act.\textsuperscript{74}

Penalties may also be levied against recipients of financial assistance under the new “employment benefits” portion of the legislation.\textsuperscript{75} A penalty can result from making a false or misleading representation in relation to the application for assistance, including non-disclosure of facts. Of more concern, a penalty may be applied when the claimant without good cause fails to attend, carry out or complete a course, program or activity for which the assistance was provided or is expelled. The maximum penalty in this context is the amount of financial assistance that was provided.

Under the UIA, the Commission argued, with temporary success, in favour of limiting the jurisdiction of Boards of Referees and Umpires to hear appeals of monetary penalties. Ultimately, these arguments failed.\textsuperscript{76} This was primarily

\begin{itemize}
\item \textsuperscript{74} EA, s.38(2). Section 38(2)(c) shows the clear intention to penalize even if no benefits are paid.
\item \textsuperscript{75} EA, s.65.1.
\item \textsuperscript{76} Before \textit{Canada v. Smith} (1994), 167 N.R. 105 (F.C.A.), the prevailing view was that Umpires and Boards of Referees could overturn a Commission decision to impose a penalty. In \textit{Smith}, Justice Decary stated, in \textit{obiter}, that a decision establishing the amount of a penalty is an exercise of discretion by the Commission and an Umpire lacks jurisdiction to substitute his or her own point of view. In that proceeding, Mr. Smith was unrepresented.

In \textit{Canada v. Purcell} (October/December 1995), F.C.A. #A-694-94 [unreported], the Commission chose a case involving another unrepresented claimant to argue that this type of reasoning should be extended to completely insulate a Commission decision to impose a penalty from review by a Board of Referees or Umpire, so long as the Commission acted “judicially”. Faced with the potentially serious consequences of this apparently novel argument, the Court of Appeal adjourned the matter and directed the Attorney-General to help the claimant retain counsel. Ultimately, the Court rejected the argument that penalty decisions could not be reviewed, but allowed the application on other grounds.

For a time, the \textit{obiter} statement from \textit{Smith} was applied by the Court to preclude reductions to penalties, without analysis: see \textit{Canada v. Freisen} (September 1994), F.C.A. #A-694-93 [unreported] and \textit{Canada v. Simard} (March 1994), F.C.A. #A-1284-92 [unreported]. However, in \textit{Morin v. Canada} (April 1996), F.C.A. #A-453-95 [unreported], Justice Decary specifically repudiated the statement from \textit{Smith}, stating that the Court must correct the error. Based on an analysis of the appeal provisions and the powers of the Board of Referees and Umpire, the Court held that the Board and Umpire could substitute their decision as to the amount of a penalty.

For a summary and critique of \textit{Canada v. Smith} and some other elements of Federal Court of Appeal UIA jurisprudence, see P. Rapsey, “Contempt of Court — A New Definition: An Examination of Trends in Recent Federal Court of Appeal Jurisprudence Under the \textit{Unemployment Insurance Act}” (1994) 14 Windsor Yearbook of Access
due to the broadly worded UIA appeal and reconsideration provisions, both of which survive in the EIA. However, the EIA also has specific provisions referring to the power of the Commission, but not the Board of Referees or Umpire, to rescind or reduce penalties. A section allows for an appeal to the Board of Referees and Umpire from a decision to impose a penalty in the context of employment benefits, but there is no similar section to cover penalties resulting from unemployment benefits claims. Judicial consideration of the impact of these new provisions will determine the extent to which penalized claimants can access the appeals system.

The EIA introduces the new concept of "violations", which are a severe sanction against those who run afoul of the penalty provisions, and those found guilty of offenses under the EIA or the Criminal Code. Once again, the records kept for the purpose of applying the new provisions start from June 30, 1996. As of January 5, 1997, all claimants with one or more violations on record during the past five years face significantly higher entrance requirements. Violations are classified according to severity based on the total overpayment of benefits and, in some instances, are based on a portion of the benefits that would have been paid to the claimant in the future if the overpayment had not been discovered.

Claimants with one violation on record within the last five years will have their entrance requirement increased by either 25%, 50%, or 75%, depending on the classification of the violation as minor, serious, or very serious. The receipt of two notices of violation within five years results in a doubling of the entrance requirement for the five years after receipt of the second notice. Claimants who,

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77. UIA, ss.79, 86.
78. EIA, ss.114, 120.
79. EIA, ss.41, 65.1(4).
80. EIA, s.64.
81. If the Commission gives a warning only, without imposing a financial penalty, then it appears that a "violation" does not result. This seems to be the combined effect of sections 41.1, 7.1(4)(b), and 7.1(5).
82. EIA, s.7.1(4). The wording for offenses under the EIA has been expanded to include the same list of acts and omissions that can give rise to penalties: EIA, s.135. The general offence under the UIA of contravening the Act or Regulations or delaying or obstructing a Commission representative has been continued: EIA, s.136.
83. EIA, s.7.1(1). For a claimant who receives a decision imposing a penalty, this lingering sanction makes it that much more important to challenge the decision by appeal or otherwise, if there is a basis for so doing.
84. EIA, s.7.1(6); EIR, s.13.
despite a violation, work enough hours to meet their increased entrance requirements in two subsequent benefits claims, are rewarded by having the violation no longer counted against them.\textsuperscript{85}

One may comfortably predict that, over the next five years, we will witness a growing number of individuals who, because of past violations, are no longer able to access unemployment benefits.\textsuperscript{86}

12. **EMPLOYMENT BENEFITS**

The *EIA* repeals the *National Training Act*\textsuperscript{87} and replaces some 39 previous federal employment programs with five types of potential programs, known collectively as “employment benefits”. This reform is an expression of the government’s policy decision to withdraw from labour market training and recognize that area as one of sole provincial responsibility. The change will be gradual. While the government began to phase out the purchase of training on July 1, 1996, some training courses may be available to eligible claimants over the next three years.\textsuperscript{88}

The legislation sets out a number of general guidelines for the establishment of employment benefits and related support measures. These measures include harmonization with provincial employment initiatives; a reduction of dependency on benefits; partnerships with governments, employers, community-based organizations and others; as well as maintaining local flexibility.\textsuperscript{89} Conspicuously, one of the guidelines is that those receiving assistance must have a commitment to “taking primary responsibility for identifying their employment needs and locating services necessary to allow them to meet those needs”.\textsuperscript{90}

\textsuperscript{85} *EIA*, s.7.1(3).
\textsuperscript{86} Breadwinners in low income families, even though they would be potential family supplement recipients, are not exempt from the increased entrance requirements resulting from violations. The response of provincial social assistance regimes to increased numbers of Welfare applicants who are precluded from drawing unemployment benefits because of past violations is not yet known.
\textsuperscript{87} Supra, note 5.
\textsuperscript{88} Canada, *Employment Insurance: The New Employment Insurance System* (Ottawa: Queen’s Printer, July 1996). This publication also states that the federal government will no longer purchase training after June 30, 1999. By *EIA*, s.61(3), the Commission is prohibited from making direct payments for courses and training programs after that date.
\textsuperscript{89} *EIA*, s.57.
\textsuperscript{90} *EIA*, s.57(1)(e)(ii).
There are two categories of persons eligible for employment benefits.\(^9\) The first includes any unemployed person who has been on a benefits claim within the previous 36 months. Secondly, employment benefits can be provided to a parent who has drawn maternity or parental benefits in the last 60 months, and who is making a delayed return to the workforce after staying home to care for a child. However, the notion of "eligibility" for employment benefits must be strictly qualified. Eligibility cannot be formally enforced because decisions relating to entitlement to employment benefits are not subject to appeal.\(^9\) Clearly, there is now to be less reliance on expert counselling and more reliance on self-help through use of computer terminals to access information from the National Employment Service.\(^9\)

The EIA specifically recognizes that the negotiation of a separate inter-governmental agreement shall be a prerequisite for implementing employment benefits in each province and territory.\(^9\) Three of the five types of employment benefits programs have been theoretically available since July 1, 1996.\(^9\) A program of Targeted Earnings Supplements, to provide temporary supplements to encourage workers to take jobs that pay less than jobs they have lost, is now being tested. The final category of program, providing for Skills Loans and Grants to cover the costs of training or education, will only become available in provinces and territories where inter-governmental agreements are reached.

13. **SOME CONCLUSIONS**

For claimants as well as their advisers and advocates, the EIA presents significant new issues and challenges. Clearly, the provisions affecting claims entitlement have become more complex, and the consequences imposed on those

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91. *EIA*, s.58.

92. *EIA*, s.64. Judicial Review may be an option in some instances. There is little in the *EIA* or *EIR* to structure the Commission’s discretion. One government publication states that “[e]ven if you are eligible, you are not automatically entitled to Re-employment Benefits. These benefits are targeted for those who really need extra help and are prepared to make a personal commitment to a return-to-work Action Plan. They are available only when they can really lead to stable employment.” (*Supra*, note 88.)

93. *EIA*, s.60.

94. *EIA*, ss.57(2), 57(3). Clearly, availability of programs will vary greatly between provinces.

95. All five types of programs are referred to in *EIA*, s.59, although the Commission has given them more specific names. The three categories already in place are Targeted Wage Subsidies, Self-Employment Assistance, and Job Creation Partnerships (providing work experience through community projects); *Supra*, note 88.
found to have violated the rules of the benefits system are now much more severe.

Conceptually, it is difficult to reconcile many of the *EIA* reforms with the traditional notion of unemployment insurance as a type of insurance scheme. With the family supplement and other new elements, the benefits regime increasingly resembles a form of social welfare legislation, which specifically targets certain groups. In the long term, one must question how the lowering of protection for middle range earners and the preferred treatment of some lower income families will affect the level of political support for the benefits program.

By adopting a process of annual assessment of at least some results of the *EIA*, the government has signalled that there may well be further significant modifications within the next few years. One hopes that in some fashion this process of impact assessment will provide opportunities that can be used as rallying points for those who would encourage progressive improvements to the *EIA* program.

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96. These include the reduction of the amount of weekly earnings covered by the program, increased clawback of benefits at tax time, the more advantageous earnings top-up provision for low income claimants, and the collection of premiums from claimants who, due to "violations", have no reasonable prospect of qualifying for benefits.