Discipline and Punishment in the Law of Unemployment Insurance: A Critical View of Disqualifications and Disentitlement

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DISCIPLINE AND PUNISHMENT IN 
THE LAW OF UNEMPLOYMENT 
INSURANCE – A CRITICAL VIEW OF 
DISQUALIFICATIONS AND 
DISENTITLEMENT

BY REUBEN HASSON**

I. INTRODUCTION

Disqualifications in the law of unemployment insurance should be abolished and the law relating to disentitlement should be reformed. The current system of disqualification lacks rationality and humanity; the current legal principles relating to disentitlement are confused, arbitrary, and largely inaccessible to the many people who rely on the unemployment insurance system to maintain a basic standard of living.

As things stand, a disqualification may be imposed for a maximum of six weeks as a result of an employee's dismissal because of misconduct, an employee's refusal of suitable employment, or because an employee quit his or her employment "without just cause." A disentitlement is potentially a more serious form of


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1 See s. 43 of the Unemployment Insurance Act, 1971, S.C. 1970-71-72, c. 48, as amended.
sanction than the disqualification penalty as it may cover the whole period of the employee's claim.\(^2\)

Because there is some overlap between disqualification and disentitlement, the two penalties may, in some cases, be imposed concurrently. For example, a disqualification for failure to accept suitable employment may also be regarded as a failure to be available for work and this will disentitle the employee.

II. DISQUALIFICATIONS

Before examining all the variants of disqualifications in detail, it would be desirable to set out why disqualifications should be abolished.

First, the difficulty of determining what is good cause as opposed to a bad cause is very often an impossible task.

Second, even when everyone would agree that the employee’s case clearly has no merits — for example, the case of an employee who assaults fellow workers without cause — there are adequate sanctions in the law without the need to resort to disqualifications.

Third, the cost of determining whether a disqualification should be imposed frequently exceeds the amount at stake. This is particularly likely to be true if the claimant appeals a disqualification. Further, an employee who has been disqualified will generally claim welfare benefits that may be higher than the unemployment insurance benefits the employee would have been entitled to but for the disqualification.

A. Misconduct\(^3\)

When the U.K. Unemployment Insurance Act of 1911 was being drawn up there was a very keen debate on whether a worker who had been guilty of misconduct should be disqualified from

\(^2\) I do not propose in this paper to deal with the labour dispute disentitlement. That disentitlement raises different issues from the ordinary disentitlement.

\(^3\) In this section, I have drawn heavily on David Lewis' excellent article, "Losing Benefit Through Misconduct: Time to Stop Punishing the Unemployed?" (1985) J. Soc. Wel. L. 145.
receiving unemployment insurance benefits. Beveridge argued that workers who were guilty of misconduct should be disqualified because existing union rules provided for disqualification from benefits for members who had been guilty of misconduct. This was a strange argument: it cannot sensibly be argued that a disqualification is justified in a state scheme simply because disqualifications are imposed by schemes operated by unions. It must first be shown that the disqualifications imposed by unions are legitimate. Also, because a union has a fraction of the resources available to the state, the union cannot be expected to pay benefits to ex-members.

Beveridge was opposed by Winston Churchill who insisted that the state had no right to refuse benefits to those who paid for them, whatever the cause of their unemployment. Churchill argued:

A disposition to over-indulge in alcohol, a hot temper, a bad manner, a capricious employer, a new process in manufacture, a contraction in trade are all alike factors in the risk. Our concern is with the evil, not with the causes, with the fact of unemployment not with the character of the unemployed. In my judgment if a man has paid to the fund for six months he should have his benefit in all circumstances, including dismissal for personal fault even of the gravest character: two securities being the low scale of benefits and the solid rigid disqualifying period.

Although benefits are higher today and the qualifying periods have been relaxed since Churchill's day, a worker in Canada today receives only 60 percent of his or her income to a maximum of $613.60 a week with a qualifying period ranging from ten to twenty weeks. These conditions provide substantial safeguards against abuse. In addition to these safeguards, there would be others in an unemployment insurance system that functioned without disqualifications:

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4 For details of this argument, see J. Fulbrook, Administrative Justice and the Unemployed (London: Mansell, 1978) at 134-38, and J. Harris, William Beveridge: A Biography (Oxford: Clarendon Press, 1977) at 176. A disqualification of six weeks was imposed by s. 87 of the 1911 National Insurance Act. This period has now been increased to thirteen weeks by s. 43 of the Social Security Act, 1986.


6 The 1911 British Act provided for a benefit of seven shillings a week in any twelve-month period; see Fulbrook, supra, note 4.
(i) a worker who is dismissed after committing a criminal
offence runs the risk of a criminal conviction;
(ii) a worker who is dismissed for misconduct will not get a
reference from his or her previous employer. (This denial is a
particularly severe sanction during periods of very high
unemployment.);
(iii) even if disqualifications were to be abolished, a worker
who is dismissed with cause will suffer a loss of income;
(iv) the final safeguard is the very high rate of
unemployment. Even if unemployment could be significantly
reduced, a claimant might find him or herself seeking an occupation
that has a low demand.
These penalties for being dismissed for misconduct seem to be more
than adequate sanctions to prevent workers from abusing the
unemployment insurance system.

There are two further points to be made about the system
of disqualifications for misconduct. First, a worker who is
disqualified for misconduct does not have the right to a hearing.
This frequently has led the Unemployment Insurance Commission to
accept the employer's reason for dismissal — often without any
evidence — to impose a disqualification. Thus, in CUB 1079 the
umpire had to remind the board of referees that they could not
simply accept the employer's statement that the claimant's "oft-
repeated absences" justified dismissal and the resulting
disqualification. The umpire pointed out, after an investigation of
the facts, that no offence had been committed, or that the offence
was trifling and did not justify a dismissal; this is similar to other
cases.8 Note that in CUB 1079 the claimant was fortunate enough
to have the knowledge and resources to challenge a disqualification.

In theory, one could require that everyone who is disqualified
be entitled to a hearing and that every claimant who wishes to
appeal an adverse decision should be provided with free legal
representation. This, however, would make an expensive process

7 10 September 1954.

8 See also the decision in CUB 1044 (22 June 1954) in which the insurance officer
disqualified the claimant for a period of six weeks, even though the claimant was grieving his
dismissal before an arbitrator.
even more expensive. It is doubtful that any government could contemplate adopting these measures.

Second, the system of disqualifications for misconduct works capriciously. This was argued by Katherine Kempfer over forty years ago: "[s]tatutes imposing or permitting long periods of disqualification penalize a worker who misjudges labor conditions...." Kempfer's conclusion is supported by the research of Paul Fenn who, after studying the operation of the misconduct rule in the United Kingdom between 1960 and 1976, concluded that "... dismissals for misconduct depend not on some exogenous standard of employee behaviour but rather on the employer's tolerance of such behaviour which will tend to vary with the state of trade both seasonally and cyclically..." and that "...if product demand is high and alternative labour is scarce, it may be optimal for the employer to accept a lower standard of conduct...." On the other hand, if product demand is low employers may wish to dismiss for relatively trivial breaches of discipline which might not count as misconduct as the law has defined it.

Therefore, an important determinant of whether a worker suffers a disqualification for misconduct depends on the state of the labour market rather than on a rule of law. This suggests that these sanctions do not operate fairly; instead they work exclusively in favour of employers. No one has been able to provide a satisfactory justification for this arbitrary and unjust rule for seventy-five years: it is high time to excise it from the statute book.

9 See K. Kempfer, "Disqualifications for Voluntary Leaving and Misconduct" (1945) 55 Yale L.J. 147.

10 Ibid. at 152.


12 Ibid. at 314.

13 Ogus and Barendt comment that: "the exact policy considerations on which it (the disqualification) is based have never been made entirely explicit." A. Ogus & E. Barendt, Law of Social Security (London: Butterworths, 1978) at 109.
B. Refusal of Suitable Employment

Sections 40 and 41 of the Unemployment Insurance Act disqualify a claimant for refusing to apply for a position after becoming aware that such a position is vacant or is becoming vacant, or for failing to accept such employment when it has been offered.

Some of the decisions under this section are grotesque and inhumane. In CUB 3567\footnote{27 August 1974.} a logger was found not to have proved good cause when he refused employment at a lumber mill because he had no car to travel to the mill and could not afford a chain saw. In CUB 5323,\footnote{28 September 1979.} a woman who refused a job as an animator in another community on the basis that she had no car was disqualified for six weeks. The decision in CUB 5070\footnote{26 October 1978.} held that a waitress who refused a position at a take-out restaurant because she could not afford transportation and babysitter costs would be disqualified. It is impossible to see these decisions as anything more than exercises in arbitrary cost-cutting.

The Commission usually disqualifies claimants who want full-time employment but who turn down part-time employment.\footnote{See, for example, CUB 7239 (27 January 1983). But see CUB 4907 (27 July 1978) where a claimant was held to be justified in refusing part-time employment because of "family responsibilities."} In many cases, however, a claimant who is forced to take a part-time job will not be able to support his or herself and family.\footnote{This is particularly true if the part-time job pays a low wage. There is considerable evidence that one worker in six who works less than 30 hours a week falls into this category. See O. Ward, "Part Time Work Force Growing" The [Toronto] Star (3 August 1986) 1. The article points out that "a substantial number of workers must do more than one job to earn a basic income."} It would make more sense to allow a claimant to search longer for a full-time position. Although it is true that such claimants are using public money to aid in their job search, the social costs could be
considerably reduced if the claimants were to find full-time employment.

Section 40(3) of the Act requires that claimants, after a "reasonable interval," lower their sights in terms of the jobs that they are willing to accept. The problem, however, is that claimants do not know what constitutes a reasonable interval and by how much their expectations must be lowered. A study prepared for the Law Reform Commission of Canada\(^\text{19}\) found that claimants in the first three weeks of unemployment are entitled to regard as suitable only such jobs as are in their own occupation and which pay their normal rate of earnings. Skilled workers with more than one year's experience in their occupation receive an extension of one week for every year of experience up to a maximum of thirteen weeks. At the end of this time, claimants must expand the scope of their search at a progressively lower rate of earnings (5 percent less per week).

It is shocking that this rule is unpublished. Even more shocking is the fact that the Commission instructs its agents to give evasive answers to claimants who ask about the meaning of reasonable interval.\(^\text{20}\) The claimant is told simply that it depends on the type of employment, the experience of the claimant in his or her occupation, and the length of time on unemployment. No specific time limit is mentioned. The fact that claimants run the risk of a disqualification and/or disentitlement in this immoral game is nothing short of outrageous. If such practices occurred in the field of tax law, squads of lawyers, politicians, accountants and journalists would be up in arms. In the area of social security, however, such practices seem to be regarded with equanimity.\(^\text{21}\)

This disqualification should be removed from the Act. The prospect of saying to a claimant "either you accept this job or we will cut off unemployment insurance benefits for six weeks" is extremely distasteful. This smacks too much of forced labour. One's distaste is increased by the fact that often the disqualification will be

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\(^{20}\) Ibid. at 54-55.

imposed for failure to take a part-time or temporary job. Even in the case of full-time jobs, it is undesirable to force people into jobs for which they have no aptitude or liking. There are ample safeguards against abuse.

C. Voluntarily Quitting Employment

The disqualification imposed for voluntarily quitting one’s employment excites the greatest passion. According to Ron Atkey, former Minister for Employment, "voluntary quitters stay on unemployment insurance claims substantially longer than others and show the least inclination to seriously look for alternative employment or training," and are thus the "biggest abusers of all." 22

There is no evidence that voluntary quitters stay on unemployment insurance substantially longer than others and show little inclination to seriously look for alternative employment or training. Indeed, few voluntary quitters claim benefits at all. According to Mr. Atkey, one in four voluntary quitters files a claim. However, Mr. Basil Hargrove of the U.A.W. has maintained that one out of ten voluntary quitters claimed unemployment insurance. 23

Moreover, if one examines the causes of job quitting, it is impossible to regard the reasons given as frivolous. A Statistics Canada Study showed that in 1977 24,000 workers had left their jobs because of illness or disability, 20,000 workers because of changed residence, and 57,000 workers because of job dissatisfaction.

The purpose behind the disqualification of voluntary quitters is to ensure that people in low paying jobs remain there. Some fear that already too many workers abandon low paying jobs. Thus, the

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22 In this section of my paper, I have drawn substantially on a portion of my earlier paper, "The Cruel War," ibid. at 122-23.


Canadian Manufacturers Association, in its brief to the Forget Commission on Unemployment Insurance recommended that a longer disqualification period should be imposed for those individuals who quit their jobs.  

This disqualification is enforced with the greatest severity because it causes the most anxiety among politicians and administrators. The decisions on voluntary quitting lend support to Schwartzman's claim that in the Commission's Toronto office "U.I. staff work under orders to impose virtually automatic penalties on claimants who quit their jobs whether they deserve a penalty or not."  

It is virtually impossible to prove that a claimant quit with just cause. Consider, for example, CUB 3163 and CUB 3383 where the umpires held that quitting due to a seriously strained working relationship is not quitting with just cause, even if termination was prudent and necessary in the circumstances. This is indeed Hobson's choice! If the employee does the sensible thing and quits, he or she will be disqualified for six weeks for a voluntary quitting. If, however, the employee stays and the relationship deteriorates further, he or she stands an excellent chance of being dismissed and disqualified for misconduct. Similarly, claimants who are underpaid, having regard to their professional qualifications and experience, will incur a penalty for leaving their job. Again, claimants who are placed in a job that entails the use of heavy machinery and who leave because they are afraid of the machinery will incur a disqualification. As a final example, workers who take

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26 Canadian Manufacturers' Association, Submission on Unemployment Insurance Review (13 December 1985) at 8, recommendation (e) suggests that voluntary quitters should be disqualified for twelve weeks.


28 6 July 1972.


30 See CUB 3247 (22 January 1973).

31 See CUB 2538 (30 September 1965).
early retirement, even if encouraged to do so by their employers, will be held to have quit voluntarily without good cause.32

In those very rare cases where a disqualification for a voluntary quitting is removed, it frequently requires two appeals to set aside disqualification. Thus, it is common for the Commission to disqualify a claimant who has quit a job to join his or her spouse who has found employment in another city or province. For example, in CUB 329832 a disqualification that was imposed in these circumstances was set aside by the umpire on appeal. In the course of his judgment, however, the umpire reaffirmed the principle "that domestic circumstances do not normally constitute 'just cause' within the meaning of the Act for voluntarily leaving employment."34

The limited scope of the umpire's decision in this case is demonstrated by two lines of cases. First, in CUB 557835 an umpire held that a spouse was disqualified from receiving benefits because she did not join her partner until after an interval of time. This decision displays a shocking lack of common sense. For example, one spouse may be offered employment in a different city beginning on a particular date, while the other spouse may be contractually bound to his or her employment until some time after that date. It would be foolish for the spouse who is offered an attractive job not to take it. Theoretically, the spouse who has a contract until a later date could break his or her contract, but this might jeopardize any chance of employment in the city they were moving to because he or she would almost certainly not get a letter of reference. In addition, many decent people feel obliged to honour their contracts, particularly if this is going to cause disruption to an employer, fellow employees, and clients.

Second, disqualifications have generally been imposed on a common-law partner who voluntarily terminated employment to

32 See, for example, CUB 3332 (25 June 1973); see also the decision of the English Court of Appeal in Crewe & Another v. Anderson, [1972] 1 W.L.R. 1209.


34 Ibid.

35 29 May 1979.
follow his or her partner. At a time when common-law relationships are recognized throughout the field of social security and even in the area of private law, it is impossible to justify why unemployment insurance should have its own rules. If the disqualification for voluntary quitting were to be abolished, there would be sufficient safeguards against abuse: one who quit a job would, even without disqualification, suffer a loss in income; would jeopardize pension and social security rights; would not get a letter of reference; and, may experience great difficulty in finding a suitable job.

It is sometimes argued that it is inconsistent with insurance principles to give unemployment insurance to someone who has quit a job. There are two responses to this. First, if one applied private insurance principles to a case of voluntary quitting (or any other disqualification), the result would not be a disqualification but a complete denial of benefits. This is because there is no analogue in private insurance to a disqualification. Again, and more important, the people who rely on insurance principles are not using insurance in its private law context; rather, they are using insurance as a metaphor. Unemployment insurance is simply a way of stating that an employee is assured of benefits after loss of his or her employment.

III. DISENTITLEMENT

A worker who is unavailable for work will be disentitled from claiming unemployment insurance benefits. Neither the Unemployment Insurance Act nor the umpires have defined

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36 See CUB 4652 (2 September 1977), CUB 6334 (10 April 1981). An exception to this principle is made if the couple have children.


38 The principal sections dealing with disentitlement are ss. 25 and 36 of the Act. Section 25 provides that a claimant is not entitled to be paid initial benefit for any working day in a benefit period of which he fails to prove that he was capable and available for work and unable to find suitable employment on that day. Section 36 provides that "a claimant is not entitled to be paid extended benefit for any working day for which he fails to prove that he was capable of and available for work and unable to find suitable employment."
Table 1
Disentitlements and Disqualifications in Unemployment Insurance
*1979-1983

<table>
<thead>
<tr>
<th>YEAR</th>
<th>NUMBER OF CLAIMS</th>
<th>NOT AVAILABLE FOR WORK</th>
<th>REFUSAL OF SUITABLE WORK</th>
<th>DISQUALIFICATION BECAUSE OF MISCONDUCT</th>
<th>VOLUNTARY QUIT</th>
<th>NO SEARCH FOR EMPLOYMENT</th>
<th>NUMBER OF DISQUALIFICATIONS AND DISENTITLEMENTS</th>
<th>PERCENTAGE OF DISQUALIFICATIONS AND DISENTITLEMENTS AS PERCENTAGE OF CLAIMS</th>
</tr>
</thead>
<tbody>
<tr>
<td>1979</td>
<td>1,516,411</td>
<td>308,314</td>
<td>14,468</td>
<td>32,931</td>
<td>216,334</td>
<td>21,036</td>
<td>592,263</td>
<td>39.1%</td>
</tr>
<tr>
<td>1980</td>
<td>1,570,992</td>
<td>291,797</td>
<td>10,695</td>
<td>34,618</td>
<td>231,755</td>
<td>10,604</td>
<td>579,469</td>
<td>36.9%</td>
</tr>
<tr>
<td>1981</td>
<td>1,697,043</td>
<td>273,170</td>
<td>10,001</td>
<td>32,075</td>
<td>238,018</td>
<td>6,552</td>
<td>559,816</td>
<td>33.0%</td>
</tr>
<tr>
<td>1982</td>
<td>2,494,903</td>
<td>280,495</td>
<td>6,655</td>
<td>34,866</td>
<td>211,558</td>
<td>2,799</td>
<td>536,373</td>
<td>21.5%</td>
</tr>
<tr>
<td>1983</td>
<td>2,143,604</td>
<td>274,514</td>
<td>5,641</td>
<td>30,968</td>
<td>215,236</td>
<td>1,616</td>
<td>527,975</td>
<td>24.6%</td>
</tr>
<tr>
<td>5-Year Average</td>
<td>1,884,590</td>
<td>285,658</td>
<td>9,528</td>
<td>33,091</td>
<td>222,580</td>
<td>8,521</td>
<td>559,379</td>
<td>29.6%</td>
</tr>
</tbody>
</table>

unavailability for work. Those definitions that have been given by
the Commission are excessively broad. Claimants may show their
unavailability for work by not being prepared to work for a
"reasonable" wage. This is despite the fact that when they ask what
a reasonable wage would be, they are given no guidance and are left
to guess.  

A fraudulent twist will sometimes be added to this procedure.
In its November 1973 report, the Unemployment Insurance
Advisory Committee stated that, in certain circumstances, the Benefit
Control Officers made use of leading questions and subsequently
twisted the meaning of replies by making them much more
categorical than they had actually been. The most frequent shifts in
meaning seem to have occurred with regard to the salary desired by
the claimant. On the basis of observations made by members of
Boards of Referees, the Advisory Committee therefore disapproved
of Benefit Control Officers asking: "I suppose a minimum wage of
$3.25 an hour would suit you?" and after getting the reply: "Yes,
I would like to get that," noting in their report that the claimant
demanded a minimum wage of $3.25 an hour. This sleight of hand
can produce an immediate disentitlement. Unfortunately, the
Advisory Committee did not recommend that Benefit Control
Officers who engaged in such practices be fired.

Failure to get the correct answer on how far one is prepared
to travel to and from work can also result in disentitlement.
Similarly, the failure to have a babysitter can result in disentitlement.
Incredibly, even jury service can result in a claimant being
disentitled. The Forget Commission has recommended that this
practice be changed.

As a final example of disentitlement, a claimant will be
disentitled if he or she moves from an area of low unemployment to
an area of high unemployment. This is illustrated by the decision in

39 See text accompanying notes 19-21.
40 See Issalys & Watkins, supra, note 19 at 88.
41 Ibid.
42 Canada, Report of the Commission of Inquiry on Unemployment Insurance (Ottawa: Supply
and Services, 1986) at 321.
CUB 3262.\textsuperscript{43} In that case a twenty-year-old Newfoundlander moved to Toronto where he was employed as a labourer from September 1, 1971, until March 24, 1972, when he lost his employment as a result of his misconduct. At that point he returned to Newfoundland "to a sparsely populated area where there are no known employers of any consequence." The claimant registered for work but no employment was offered to him. The umpire disentitled the claimant quoting from the decision in CUB 1327.\textsuperscript{44}

As it has often been pointed out by the umpire, unemployment insurance is essentially designed to cover cases of involuntary and short-term unemployment and not cases who deliberately leave their employment in large centres and move to isolated and sparsely populated areas, thereby exposing themselves to lengthy periods of unemployment.

The view that residing in a large centre means that the claimant will only have to endure a short period of unemployment is false. Additionally, it is undesirable to force a claimant to remain in a large centre even if this means the claimant is lonely and miserable in unfamiliar surroundings. Allowing such a claimant to return home may not only be more humane but also, in the long run, cheaper for the state.

A worker who is committing fraud\textsuperscript{45} on the unemployment insurance scheme should be deemed to be unavailable for work. Some examples of the kind of behaviour that should disentitle a worker are going on a holiday in a different province or country while continuing to collect unemployment cheques, starting a personal business while continuing to collect unemployment insurance, collecting both unemployment insurance and welfare, and refusing to speak to Canada Manpower about possible job opportunities.

These abuses do not occur frequently,\textsuperscript{46} but they have occurred, and obviously claimants in these situations should be

\textsuperscript{43} 10 March 1973.
\textsuperscript{44} 24 January 1957.
\textsuperscript{45} I am using fraud here in the popular as opposed to its legal meaning.
\textsuperscript{46} Not one enquiry, whether official or unofficial, has stated that fraud is a serious problem in the unemployment insurance system.
denied unemployment insurance. The concept of unavailability should not be extended beyond this point because this would involve disentitling people for the same arbitrary reasons for which we are presently denying them benefits.

A. The Impact of Disqualifications and Disentitlements

The number of disqualifications and disentitlements imposed between the years 1979 and 1983 is alarmingly high (see Table 1). In each one of these years, more than half a million claimants were either disqualified or disentitled. The percentage of those claimants disqualified or disentitled ranged from 21.5 percent in 1982 to 39.1 percent in 1979. This meant that in the five-year period the lowest disqualification disentitlement rate was one in five workers whereas the highest disqualification disentitlement cut-off rate was two in five workers. Over the five-year period, the average number of disentitlements and disqualifications came to 29.6 percent. This is close to a disqualification disentitlement rate of one worker for every three claimants.

It is submitted that these figures are intolerably high in the light of the fact that there are already abundant safeguards against abuse. The administration of the law is lacking in both common sense and humanity. This situation constitutes a national disgrace.

B. The Road to Reform

It is not enough to suggest that disqualifications should be abolished and disentitlements should be redefined. It is crucial to see the administration of disentitlements and disqualifications as a response to prevailing rates of high unemployment. High unemployment generates excessive social costs; the harsh administration of disqualifications and disentitlements represents an attempt to control those costs.

I propose to show how the administration of unemployment insurance has become harsher as unemployment has increased. If the cause of our harsh administration of unemployment insurance is excessive unemployment, then the cure for the problem lies in moving toward full employment.
In 1971 dramatic changes were made to the unemployment insurance scheme. First, coverage was made virtually universal, being extended from approximately 80 percent of the work force to 96 percent. Second, for those without a previous claim, it was provided that they could get unemployment insurance if they had eight insurable weeks in the last fifty-two. For those with a previous claim, eight insurable weeks were needed from the beginning of the benefit week. This contrasts with the 1955 requirement of thirty insurable weeks in the last two years. Third, benefits were increased from an average of 43 percent of earnings to 66.6 percent of earnings. A dependent's rate of 75 percent was paid to all in extended benefit phases and to low-income earners. Finally, sickness, maternity, and retirement benefits were payable to claimants with twenty weeks of insurable employment in the qualifying period.

It is clear that from the inception of these reforms the government had exaggerated fears of fraud. Governments in Canada (and elsewhere) have, after expanding the coverage of a scheme, been very sensitive to allegations of abuse. It must be remembered that opposition to these changes came not only from extreme conservatives. The [Toronto] Globe & Mail, for example, called the reforms "immoral and stupid." Moreover, throughout the 1970s there were numerous commissions (official and unofficial) to look for abuse. To detect fraud the government drew on the ranks of former policemen, private detectives, and collection agency investigators, who comprised a large number of the benefit control officers it employed. The authors of the Law Reform Commission study on the administration of unemployment insurance pointed out, however, that "... these hiring practices may create a risk that benefit

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control operations be occasionally tainted with the ethics and the (sometimes strongly criticized) methods of private agencies.\textsuperscript{50}

The second step in the fight in the mid-1970s against abusers of the system was the interviewing of groups of workers who were thought to be prone to work shyness.\textsuperscript{51} The fact that there was no evidence that these claimants were prone to malingering made no difference. Additionally, workers who had been fired for misconduct or had voluntarily quit their jobs were summoned for regular interviews.\textsuperscript{52}

The Commission sponsored a survey in 1977 which found that "71 percent of Canadians felt that the Unemployment Insurance programme should be tightened up."\textsuperscript{53} Although claimants were not asked for their view of the system, they would have described a Kafkaesque regime under which they had to guess what was "suitable employment" without any guidance from a Commission that was all too often arbitrary and inefficient. At the same time these surveys were being commissioned, the government was spending more than a million dollars a year telling Canadians that abuse of the unemployment insurance system was a serious problem.\textsuperscript{54} Those monies would have been better spent informing citizens of the benefits to which they were entitled under the \textit{Act}. The case law reveals that there were many claimants who did not know of the new benefits.\textsuperscript{55}

\begin{quote}
\textsuperscript{50} See Issalys & Watkins, \textit{supra}, note 19 at 75.

\textsuperscript{51} For details of this scheme, see Schwartzman, "How Dark Is it in the Bowels of the Beast?" (May-June 1981) \textit{This Magazine} 4 at 6.


\textsuperscript{54} See the statement by the Hon. Bud Cullen, then Minister of Employment and Immigration in Canada, \textit{House of Commons Debates} (23 January 1978) 2301.

\textsuperscript{55} Generally, ante-dated benefits are denied to claimants who do not claim them because they did not know of their existence, but see \textit{CUB} 3294 (25 April 1973) where the claimant, a West Indian, was given ante-dated benefits because she was new to Canada and came from the West Indies "where unemployment benefit does not exist."
\end{quote}
As a further step against fraud, the government began to prosecute claimants more aggressively under sections 47 and 121 of the Act for wrongfully making claims or for making false statements. Section 47 imposes administrative penalties; section 121 imposes criminal penalties. A section 47 penalty was imposed by the Commission when there were felt to be "mitigating or extenuating circumstances," whereas a section 121 penalty was imposed when it was felt that there were no mitigating circumstances.\

The increase in the number of administrative penalties and prosecutions under the Act between 1974 and 1978 is shown below.

<table>
<thead>
<tr>
<th>Act</th>
<th>No. of Claims</th>
<th>No. of s. 47 Penalties</th>
<th>No. of s. 121 Penalties</th>
</tr>
</thead>
<tbody>
<tr>
<td>1974</td>
<td>1,974,000</td>
<td>22,474</td>
<td>924</td>
</tr>
<tr>
<td>1975</td>
<td>2,438,000</td>
<td>26,853</td>
<td>1,800</td>
</tr>
<tr>
<td>1976</td>
<td>2,429,000</td>
<td>38,151</td>
<td>4,600</td>
</tr>
<tr>
<td>1977</td>
<td>2,500,000</td>
<td>60,000</td>
<td>6,500</td>
</tr>
<tr>
<td>1978</td>
<td>2,809,000</td>
<td>50,000</td>
<td>6,700</td>
</tr>
</tbody>
</table>


The percentage of claimants subject to either penalty or prosecution rose from 1.19 percent of claims in 1974 to 2.66 percent in 1977. In 1978 this figure dropped to 2.01 percent but it is clear that a deliberate attempt was made to exercise stricter control over claimants.\

In short, since 1971 the government has waged an increasingly aggressive campaign against fraud. This campaign has

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56 For a list of mitigating circumstances see Issalys & Watkins, supra, note 19 at 114-16.
57 The reports of the Unemployment Insurance Commission do not publish figures for these penalties after 1979.
been very harmful. Not only have claimants often been regarded as potential criminals, but the public has been misled, both as regards the generosity of unemployment insurance and the extent of its abuse. In fact, unemployment benefits are not generous, and the administration of the system is extremely arbitrary.

C. The Retreat from Full Employment

Canada's unemployment rate did not exceed 5.5 percent during the 1960s, except from 1960 to 1962 (see Table 3). In the 1970s it never fell below that figure. In the 1980s, unemployment in excess of 10 percent seems to have become the norm.

The government's response to the rising unemployment rate has been to introduce a series of cut-backs in unemployment benefits. The cut-backs seem to track very closely the increase in unemployment rates. The first measure came in 1975 when the government eliminated the 75 percent rate in favour of 66.6 percent and the maximum disqualification period was increased from three weeks to six weeks.

A second measure was introduced in 1976 and passed in 1977: the variable entrance requirements were increased from ten to fourteen weeks. Further, the Unemployment Insurance Account was to be used for work-sharing and job creation expenditures. A third measure in 1978 changed the minimum insurability to an hours basis rather than an income basis — thus reducing claims from people working few hours but at high rates. Higher entrance rates (twenty weeks) were introduced for repeaters, new entrants, and re-entrants. Benefit rates were cut from 66.6 percent to 60 percent. A portion of extended benefit costs would now be borne by employer and employee contributions. Finally, there was a provision whereby high-income earners would pay back a portion of unemployment insurance benefits received in the previous year.

One reason the government gave for the cut-backs in unemployment insurance was the improvements in other social service benefits. Thus, Robert Andras argued that the 1973 increase
in family allowances made the 75 percent benefit rate unnecessary.\textsuperscript{58}

Table 3

Unemployment Rates in Canada
1961-1985*

<table>
<thead>
<tr>
<th>Year</th>
<th>Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>1961</td>
<td>7.2</td>
</tr>
<tr>
<td>1962</td>
<td>5.9</td>
</tr>
<tr>
<td>1963</td>
<td>5.5</td>
</tr>
<tr>
<td>1964</td>
<td>4.7</td>
</tr>
<tr>
<td>1965</td>
<td>3.9</td>
</tr>
<tr>
<td>1966</td>
<td>3.6</td>
</tr>
<tr>
<td>1967</td>
<td>4.1</td>
</tr>
<tr>
<td>1968</td>
<td>4.8</td>
</tr>
<tr>
<td>1969</td>
<td>4.7</td>
</tr>
<tr>
<td>1970</td>
<td>5.9</td>
</tr>
<tr>
<td>1971</td>
<td>6.4</td>
</tr>
<tr>
<td>1972</td>
<td>6.3</td>
</tr>
<tr>
<td>1973</td>
<td>5.6</td>
</tr>
<tr>
<td>1974</td>
<td>5.4</td>
</tr>
<tr>
<td>1975</td>
<td>7.0</td>
</tr>
<tr>
<td>1976</td>
<td>7.2</td>
</tr>
<tr>
<td>1977</td>
<td>8.2</td>
</tr>
<tr>
<td>1978</td>
<td>8.5</td>
</tr>
<tr>
<td>1979</td>
<td>7.6</td>
</tr>
<tr>
<td>1980</td>
<td>7.1</td>
</tr>
<tr>
<td>1981</td>
<td>8.5</td>
</tr>
<tr>
<td>1982</td>
<td>12.7</td>
</tr>
<tr>
<td>1983</td>
<td>11.1</td>
</tr>
<tr>
<td>1984</td>
<td>10.7</td>
</tr>
<tr>
<td>1985</td>
<td>10.1</td>
</tr>
</tbody>
</table>


\textsuperscript{58} Ibid. at 81.
However, this increase in social benefits never took place. The 1975, 1977, and 1978 cuts that took place were, as Leslie Pal points out’ "...made within the context of general expenditure reductions." According to Pal, "[p]rogram changes ... were motivated by a visceral sense that Unemployment Insurance expenditures were too high." It is true that no new legislation was introduced between 1979 and 1984, but the administration of the Act was made much more severe. It is instructive to compare the disqualification and disentitlement rates between 1972 and 1976 and between 1979 and 1983:

Table 4

<table>
<thead>
<tr>
<th>Year</th>
<th>Disqualifications and Disentitlements as a Percentage of Claims</th>
</tr>
</thead>
<tbody>
<tr>
<td>1972</td>
<td>9.1</td>
</tr>
<tr>
<td>1973</td>
<td>12.2</td>
</tr>
<tr>
<td>1974</td>
<td>14.5</td>
</tr>
<tr>
<td>1975</td>
<td>12.4</td>
</tr>
<tr>
<td>1976</td>
<td>14.5&lt;sup&gt;62&lt;/sup&gt;</td>
</tr>
<tr>
<td>1979</td>
<td>39.1</td>
</tr>
<tr>
<td>1980</td>
<td>36.9</td>
</tr>
<tr>
<td>1981</td>
<td>33.0</td>
</tr>
<tr>
<td>1982</td>
<td>21.5</td>
</tr>
<tr>
<td>1983</td>
<td>24.6&lt;sup&gt;63&lt;/sup&gt;</td>
</tr>
</tbody>
</table>

<sup>59</sup> Ibid. at 89.

<sup>60</sup> Ibid.

<sup>61</sup> Ibid. at 85, Table 2.

<sup>62</sup> See post, Table I.
The next set of cut-backs was introduced in 1985 and 1986. In 1985 severance pay became a criterion to be taken into account in determining a claimant's right to unemployment benefits. In 1986 retirement benefits received by early retirees also joined the list of considerations.

Despite all the talk about natural rates of unemployment, it seems that we cannot afford the cost of this beast. Or, to put it another way, we can only live with a natural rate of unemployment by emasculating our social security system. The most recent proposals for reform have been to cut benefits to 50 percent and their duration to sixteen weeks and to annualize the unemployment insurance system and to eliminate regionally extended benefit periods. If implemented these would leave us with a shell of an unemployment insurance system.

IV. CONCLUSION

There are two priorities in redesigning our unemployment insurance scheme. First, the administration of unemployment insurance has to be taken out of the hands of specialists in the detection of fraud. Second, there must be a commitment to achieving full employment. However, full employment is not to be achieved by the massive tax handouts that are currently used to

63 Royal Commission on the Economic Union and Development Prospects for Canada (Ottawa: Supply and Services, 1984), (Commissioner: The Hon. Donald S. MacDonald). The Commission recommended inter alia: (1) reducing the benefit from 60 percent to 50 percent; (2) raising the entrance requirement to fifteen to twenty weeks from ten to fourteen; (3) the elimination of extended benefit periods in areas of high unemployment; (4) to reduce the maximum period of benefits to sixteen weeks; see vol. 2 at 116. For a brief critique of these proposals see J.P. Grayson, "The Ignored Costs of the MacDonald Commission" (Spring 1985) 3 Atk. Rev. of Can. Stud. 29.

64 The Forget Commission proposes: (1) the adoption of the concept of annualization of benefits and (2) the abolition of regionally extended benefits. The adoption of these measures would reduce benefits from 1985 levels by 50 percent in Prince Edward Island, 49 percent in New Brunswick, 47 percent in Newfoundland, 35 percent in Nova Scotia, 36 percent in Quebec, 34 percent in British Columbia, 29 percent in Saskatchewan, 24 percent in Manitoba, 17 percent in Alberta and 16 percent in Ontario. See Ministry report, supra, note 42 at 457.

65 See text accompanying note 50.
encourage business to develop industries. Business must practise the self-reliance that it so readily proclaims others should practise.

Next, there must be a reorganization of priorities. More insurance agents or more people employed in advertising are not needed. Rather, our needs are in the public sector; more people are needed to inspect factories and to construct low- and middle-income housing.

There must also be a redefinition of full employment. There is a need to phase out overtime in order to provide a thirty-five hour week to allow workers more recreation.

Finally, and perhaps most important, there must be a considerable increase in the benefits of welfare recipients, of unemployment insurance benefits and the low paid workers. One of the causes for the increase in unemployment in the 1970s and 1980s is the fact that millions of low paid people have seen their standard of living drop. For many welfare recipients the task of providing adequate food has become an impossibility. In many centres, food banks now seek to provide that aid. People in this situation cannot think of buying clothes or beds, let alone more expensive items. For these groups, the payment of rent, food, and fuel costs will absorb nearly all their resources. There will be precious little left to buy anything else.

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66 See, for example, N. Brooks, "Tax Expenditures" (1987) 26 Osgoode Hall L.J.

67 See E. Tucker, "The Persistence of Market Regulation of Occupational Health and Safety: The Stillbirth of Voluntarism" in Essays in Labour Relations (Don Mills, Ont.: CCH Canadian Ltd, 1984) at 219. Professor Tucker writes: "The Ministry (of Labour) makes no secret of its enforcement philosophy. It sees primary responsibility for health and safety resting with employers and workers acting co-operatively through the internal responsibility system. The primary role of inspectors is to facilitate the functioning of the internal responsibility system, not to directly enforce the regulations themselves"; ibid. at 238-39. Tucker effectively demonstrates the failure of this revival of laissez-faire. In this connection, note the complaints by trade unionists in Manitoba to the effect that whereas there are 250 officers employed to enforce fish and game laws, there are only thirty-six factory and mine inspectors; "Manitoba Fish Safer Than Workers" see The [Toronto] Star (10 August 1986) A15.

68 For a recent discussion of proposals to shorten the working week, see F. Reid, "More Jobs Through Shorter Hours" (June 1986) 12 Can. Pub. Pol. 275.
Once we move in the direction of full employment, it will be possible to get rid of disqualifications and to limit disentitlement to a few egregious cases. It will also be possible to use the savings through having to pay less in unemployment insurance and to spend more on developing proper training schemes.

To some, my proposals may seem unrealistic, even visionary. However, the implementation of these proposed measures is necessary if we are to prevent further disintegration of the welfare state — a disintegration that would have disastrous consequences for many.

69 Obviously, I can do no more than sketch my plans for a society with full employment. There is a full discussion of the measures needed in R. Bellan, *Unnecessary Evil: An Answer to Canada's High Unemployment* (Toronto: McClelland and Stewart, 1986).