SUPPLEMENTAL CHAPTER S1

Regulating Unemployment

LEARNING OBJECTIVES

After reading this chapter, students will be able to:

- Describe the history and development of unemployment insurance legislation in Canada.
- Describe how the legal model of unemployment insurance has been influenced by political perspectives on and attitudes toward subsidizing the jobless.
- Explain the basic elements of the current employment insurance model.
- Describe the conditions that unemployed workers must satisfy to be eligible for benefits and how those benefits are calculated.
- Describe the legal rules governing disentitlement from benefits for self-imposed unemployment.
- Explain the difference between "regular benefits" and "special benefits" under the *Employment Insurance Act*.
- Describe the types of special benefits available in Canada.
- Describe the Canada Emergency Response Benefit introduced in response to COVID-19.

CHAPTER OUTLINE

I. Introduction

The loss of employment can be among the most stressful events in people's lives. Unemployment often causes financial and personal strain. Studies demonstrate a higher incidence of alcohol and substance abuse, depression, and family breakups among the unemployed.[1] There are real social and economic costs associated with unemployment. First enacted in 1940 in the wake of the Great Depression, unemployment insurance was intended to provide a financial cushion to workers who find themselves without work through no fault of their own. Unemployment insurance, and the laws that maintain it, comprises an important part of Canada's income security safety net.

Few areas of work law demonstrate more vividly than unemployment insurance law how shifting political perspectives (recall Chapter 3) influence the development of our legal models. During periods in which the prevailing political orthodoxy aligns closely with the neoclassical perspective, unemployment insurance is perceived as a troubling interference in the free operation of labour markets, as promoting idleness, and as creating dependence on "government handouts." At other times, when governments believe more strongly in the need for state intervention to protect citizens against the harshness of labour markets, unemployment insurance is extended and treated as an important element of the Canadian welfare state and a useful policy tool to help alleviate poverty and protect the dignity of the jobless. This chapter surveys the evolution of unemployment insurance law, and some of the controversies associated with it, from 1940 to today.

II. A Brief History of Unemployment Insurance Legislation

Until the early 20th century, the prevailing political attitude was that unemployment, and the financial destitution it often wrought, was a matter of personal responsibility that did not require government intervention.[2] It took devastating, enduring economic recessions producing mass unemployment and growing public disillusionment with the capitalist model for the political climate to change. The end of the First World War brought concern that demobilization (the end of war-related production) and the return of soldiers to the labour market would produce high unemployment. This led to federal legislation in 1918 that funded public employment offices designed to assist workers in finding employment.[3] However, it was the onset of the Great Depression of the 1930s that would prove to be the catalyst for the creation of unemployment insurance legislation.

In 1933, over 25 percent of Canadians were unemployed, and more than 15 percent relied on some form of direct public relief to survive.[4] Yet Canadian governments still resisted any form of benefits for the unemployed. In 1931 Conservative Prime Minister R.B. Bennett responded to calls for unemployment insurance legislation by insisting that the government would "not put a premium on idleness."[5] This sentiment reflected a belief that financial support for the unemployed removes the incentive to work; that is, if given the choice, people would choose idleness over work. Bennett supported the creation of "relief camps" to put unemployed men to work, and in 1932 such camps were created. This development led to the "On-to-Ottawa Trek," an important event in Canadian work law history, which is described in Box S1.1.

By the mid-1930s, as the Great Depression lingered on, Canadian politicians began to accept the need for greater state oversight of the economy. The political orthodoxy was shifting away from the notion that individuals are responsible for all hardships that befall them and toward a belief in the need for state intervention in the economy to ensure that capitalism works to the benefit of the citizenry. That sentiment had influenced the US government, led by President Franklin D. Roosevelt, who introduced the "New Deal" programs of the early 1930s that formed the foundation of the American welfare state.

Even Prime Minister Bennett was singing a new tune by 1935. That year, in a speech to Parliament, Bennett spoke of the need for the state to intervene in order to protect people from the failures of capitalism:

> In the anxious years through which you have passed, you have been the witnesses of grave defects and abuses in the capitalist system. Unemployment and want are the proof of these. Great changes are taking place. New conditions prevail. These require modifications in the capitalist system to enable that system more effectively to serve the people. Reform measures will therefore be submitted to you as part of a comprehensive plan designed to remedy the social and economic injustices now prevailing and to ensure to all classes and to all parts of the country a greater degree of equality in the distribution of the benefits of the capitalist system.[6]

Bennett's Conservatives introduced the first unemployment insurance legislation in 1935, known as the *Employment and Social Insurance Act*. However, in 1936 the Supreme Court of Canada struck down that legislation as unconstitutional, ruling that the power to regulate an insurance scheme for the unemployed fell within provincial governments' authority to regulate "property and civil rights" in the *British North America Act* (the predecessor to the *Constitution Act*).[7] This ruling led to an amendment in 1940 of the *British North America Act* to grant expressed jurisdiction over unemployment insurance to the federal government.[8]

By that time, the Liberals had replaced the Conservatives as the federal government, and in 1940 Prime Minister William Lyon Mackenzie King introduced the federal *Unemployment Insurance Act* (UIA).[9] The UIA created an insurance program funded by employees, employers, and the government that was to be administered by the government through a new Unemployment Insurance Commission.[10] Only "employees" who had paid premiums into the unemployment insurance fund were eligible (although some non-employees could opt into the insurance scheme

by paying premiums). A jobless worker could file an application and, if eligible, would receive modest payments for a limited period of time from the unemployment insurance fund. The UIA included a vast array of qualifications, restrictions, and exemptions that effectively excluded large swaths of unemployed workers. In 1941, only about 42 percent of Canadian workers were covered by the new unemployment insurance model.[11]

BOX S1.1 » TALKING WORK LAW

Unemployment Relief Camps and the 1935 "On-to-Ottawa Trek"

The Great Depression of the early 1930s brought great hardship to many working Canadians. In 1932, the Conservative federal government led by Prime Minister R.B. Bennett, and some provincial governments, opened labour camps (called *relief camps*) where young unemployed men would go to work in harsh conditions in exchange for room and board and a mere 20 cents per day. As this temporary measure dragged on for years, the camp workers' resentment, desperation, and anger grew. Canadian Communists organized a Relief Camp Workers' Union to resist the oppressive conditions in the camps and demanded, among other things, a new unemployment insurance system.* When their demands were ignored, workers from the camps and their Communist leaders organized a protest that came to be known as the "On-to-Ottawa Trek" in 1935. Professor Desmond Morton (University of Toronto) described the event:

> More than a thousand men left Vancouver on eastbound freights. … The trek leader, "Slim" Evans, was a former mine union leader from Alberta. Faced with a snowballing movement from the West, the [R.B.] Bennett government decided to summon Evans and his lieutenants to Ottawa to negotiate. While Evans and Bennett traded sneers and insults, the trekkers were halted in Regina, conveniently close to the big RCMP training depot and far away from the next centre of left-wing agitation and unemployment, Winnipeg. On Dominion Day, police and workers clashed on Regina's Market Square. A police officer was killed, scores were injured, and more than a hundred trekkers, including Evans, were arrested. The next day, most of the men returned to their [relief] camps.†

Strikers from unemployment relief camps board an Ottawa-bound freight train in Kamloops, British Columbia, in June 1935.

Although the "trek" never reached Ottawa, it succeeded in drawing public attention to the plight of workers in the relief camps and helped solidify support for a system of unemployment insurance to assist workers who are unemployed due to no fault of their own. R.B. Bennett was voted out of office later in 1935 and replaced by a Liberal government led by Prime Minister Mackenzie King. King was a very important figure in the history of Canadian work law in relation not only to the *collective bargaining regime* that will be examined in Part IV but also to unemployment insurance, as we will see.

* G. Campeau, *From UI to EI: Waging War on the Welfare State* (Vancouver: University of British Columbia Press, 2004), at 45.

† D. Morton, *Working People: An Illustrated History of the Canadian Labour Movement*, 5th ed. (Montreal: McGill-Queen's University Press, 2007), at 147.

In the decades that followed, the federal government amended the UIA on numerous occasions to expand its reach, consistent with an emerging political belief that the unemployment insurance model comprised an important part of the welfare system intended to address poverty and protect the vulnerable. Amendments in 1971 removed many exemptions, made it easier for some workers to qualify, and increased the benefits.[12] The 1971 legislation also introduced sickness benefits for qualifying workers who become unemployed due to illness as well as maternity benefits, an entitlement to unemployment insurance benefits for women who become unemployed due to pregnancy or childbirth.[13] The 1971 amendments brought coverage under unemployment insurance to 96 percent of the workforce.

The 1971 legislation marked the high watermark of benefits coverage for the unemployed under Canada's unemployment insurance model. From 1975 onward, consistent with the emerging

political turn against state-based welfare systems, legislative reforms enacted by successive Liberal and Conservative governments tightened the qualifying conditions in order to reduce the number of unemployed workers who would receive unemployment insurance benefits.[14] In 1990, the Conservative government introduced parental benefits as a new form of special benefit, but cancelled the government's contribution to the unemployment insurance fund, instantly cutting about one-quarter of the insurance fund's revenues, which was approximately $2.5 billion.[15]

In 1996, the Liberals further reformed the legal model, changing the name of the legislation to the *Employment Insurance Act* (EIA) and the name of the insurance to *employment insurance*. The EIA decreased the length of time employment insurance benefits were available; lowered the maximum available benefits; and expanded the range of situations in which the unemployed would be disqualified from receiving benefits.[16] The EIA also changed the formula for calculating eligibility for benefits from a system based on number of weeks employed prior to unemployment to a system based on hours worked in the year preceding the claim. In theory, this change could have improved access to benefits for part-time workers and non-standard employees who work fewer, more sporadic hours than those employed under the standard employment model. However, the government fixed the qualifying number of hours at a very high level—between 420 and 700 hours, depending on where the claimant lives. The effect was to make it more rather than less difficult for non-standard workers to qualify for EI.[17]

Due to the legislative tightening of eligibility requirements and changes to the Canadian economy, the percentage of unemployed workers who qualified for benefits in Canada (a measure known as the beneficiaries to unemployed, or B/U, ratio) has fallen steadily: it was about 85 percent in 1989, but now sits at about 40 percent.[18] Moreover, the tightening of eligibility rules made since the late 1990s has disproportionately impacted women workers, as discussed in Box S1.2. Surpluses in the employment insurance fund flowing from the reduction of eligible claimants have proven to be a windfall for federal Liberal and Conservative governments, which have used the fund to subsidize other political objectives, including tax cuts. This strategy of diverting premiums paid by unemployed workers and employers has proven to be highly controversial.[19]

BOX S1.2 » TALKING WORK LAW

Unemployment Insurance Policy and Women Workers

The impact of work laws is often not gender neutral. This important theme, emphasized in feminist legal scholarship, can be demonstrated by reference to the effects of changes to Canada's unemployment insurance laws over time. From its beginnings in 1940, the unemployment insurance model was designed with the **standard employment relationship** in mind. To qualify for benefits, unemployed workers must have been employed and paid into the insurance fund for a period of time. Since men were far more likely to be employed in regular full-time jobs, they were also more likely to meet the eligibility requirements in the event of job loss.* Women were presumed to be dependent on their husbands, and the UI system included "dependent's allowances" to account for this social presumption.

During the Second World War, women entered the labour force in record numbers, many in high-paying skilled jobs left vacant by men who had joined the military. When the war ended, government policy emphasized re-employment of men returning from service and the deployment of women back to domestic duties, or to the low-paid jobs dominated by women prior to the war. The unemployment insurance system supported this transition in two ways.†

First, adjudicators applied the requirement to accept "suitable employment" (discussed later in the chapter) to deny unemployment insurance benefits to women who declined job opportunities at substantially lower pay rates than they had been earning in positions held during the war. This interpretation was consistent with the assumption that the high-paying jobs held by women in wartime were a temporary deviation from the norm of low-paying jobs for women.

standard employment relationship: A model of employment characterized by stable, long-term job security, full-time hours, decent benefits, and wage rates that rise steadily over time.

Second, the "married women" regulation enacted in 1950 introduced a presumption that married women were either unavailable or uninterested in working.‡ Under that regulation, a married woman was disqualified from receiving unemployment insurance benefits for a two-year period following the date of her marriage, unless she was employed for at least 90 days after her marriage. The theory behind the regulation was that once married, women were not seriously interested in working any longer. Therefore, the law required a newly married woman to prove her commitment to the labour market by first finding a job, and then sticking with it for at least 90 days. The regulation was repealed in 1957, but while in force, it disqualified between 12,000 and 14,000 women per year from unemployment insurance benefits.§

Blatant gender discrimination such as the "married women" regulation no longer exists. However, the unemployment insurance scheme in Canada still disadvantages women workers in a systemic manner. Despite huge growth in female labour market participation in the past few decades, women continue to be overrepresented in part-time, casual, and precarious jobs. Women also continue to shoulder a greater share of domestic work than men, including child and elder care, which leads women to experience more gaps in employment. These factors leave women less likely to qualify for unemployment insurance benefits.

The number of hours of employment needed to qualify today leaves most part-time and casual workers disqualified from EI benefits. The current EI model requires workers who have been out of the labour market for two years or more (re-entrants) to accumulate substantially more hours of employment than most other workers in order to qualify. Women are likely to be overrepresented in this class due to their responsibility for child care. A 2007 study by the Canadian Centre for Policy Alternatives found that only 32 percent of unemployed women received EI benefits in Canada, compared with 40 percent of unemployed males.# Similarly, Professor Leah Vosko (York University) found that when the threshold to qualify for benefits is 700 hours of employment, 21 percent of women fail to qualify for benefits, compared with 13.3 percent of men.**

* See R. Pierson, "Gender and the Unemployment Insurance Debates in Canada, 1934–1940" (1990) 25 *Labour/Le Travail* 102.

† See A. Porter, "Women and Income Security in the Post-War Period: The Case of Unemployment Insurance, 1945–1962" (1993) 31 *Labour/Le Travail* 111.

‡ Regulation 5A, Order in Council PC 5090.

§ G. Campeau, *From UI to EI: Waging War on the Welfare State* (Vancouver: University of British Columbia Press, 2004), at 76-77.

See M. Townson and K. Hayes, *Women and the Employment Insurance Program* (Toronto: Canadian Centre for Policy Alternatives, 2007), at 11, http://www.policyalternatives.ca/sites/default/files/uploads/publications/National_Office_Pubs/2007/Women_and_the_EI_Program.pdf.

** L. Vosko, *The Challenge of Expanding EI Coverage* (Toronto: Mowat Centre EI Task Force, 2011), at 8.

III. Basic Features of the Current Employment Insurance Model

It is a gross understatement to call the EIA complicated legislation. It spans almost 200 sections and is spattered with jargon and obscure special rules, formulas, schedules, and exemptions. Regulations add over 100 additional sections of legal rules.[20] If you want to learn how the law would apply to specific fact scenarios, you will need to study the law in detail.[21] Our intent here is to introduce the basic features of the legal model.

In terms of process, a worker who loses his or her job can apply for employment insurance benefits by completing an online form.[22] Service Canada assesses the claim and makes a decision about eligibility, benefits amount, and claim duration. An appeal of that decision can be made to a tribunal (created in 2013) known as the Social Security Tribunal (SST). Previously, appeals were heard by a tribunal known as the Board of Referees, whose decisions could be reviewed by an umpire, who was usually a Federal Court judge.[23] Applications to review the decision of the SST can be taken to the Federal Court of Appeal.

The EIA makes two types of benefits available to eligible workers: **regular benefits** and **special benefits**. These types of benefits are described below.

regular benefits (employment insurance): Benefits payable under the federal *Employment Insurance Act* to jobless workers who meet the qualifying conditions in the statute and who are available and willing to work.

special benefits (employment insurance): Benefits payable under the federal *Employment Insurance Act* to workers who meet the qualifying conditions in the statute and who are unable to work due to pregnancy, childbirth, sickness, parental responsibilities, or the need to care for a gravely ill relative.

A. Regular Benefits

Regular benefits provide temporary payments to eligible workers who become unemployed through no fault of their own. In order to qualify, an unemployed worker must have accumulated the defined number of "insurable hours of employment" during the "qualifying period," which in most cases is the 52-week period prior to the claim date.[24]

1. Entitlement and Calculation of Regular Benefits

a. Insurable Hours of Employment During the Qualifying Period

"Insurable hours" are hours worked in a type of employment that is covered by the EIA, which is most but not all employment.[25] The number of "insurable hours" required to qualify depends on the unemployment rate in the region of Canada where the claimant works. The higher the unemployment rate in the claimant's region, the fewer the number of insurable hours of employment needed to qualify, as depicted in Table S1.1, which appears in section 7(2) of the EIA:

TABLE S1.1 Qualifying for Benefits Under the Employment Insurance Act

Regional Rate of Unemployment	Required Number of Hours of Insurable Employment in Qualifying Period
6% and under	700
more than 6% but not more than 7%	665
more than 7% but not more than 8%	630
more than 8% but not more than 9%	595
more than 9% but not more than 10%	560
more than 10% but not more than 11%	525
more than 11% but not more than 12%	490
more than 12% but not more than 13%	455
more than 13%	420

Source: *Employment Insurance Act*, SC 1996, c. 23, s. 7(2).

So, for example, if the unemployment rate in your region is 6 percent or less, you need to have worked at least 700 hours in insurable employment in the 52 weeks prior to your claim, compared with only 420 hours if the unemployment rate is 13.1 percent or more where you live. The government maintains a website that explains the unemployment rates by region and the resulting number of insurable hours required to qualify for benefits.[26] The number of hours needed to qualify is increased if an applicant has been found in violation of various rules relating to honest reporting of information to the government.[27]

b. Calculation of Regular Benefits

The amount of regular benefits is determined by applying a complex formula that calculates a basic rate of 55 percent of total earnings during the highest-paid weeks of employment during the qualifying period.[28] The number of highest-paid weeks considered in the calculation depends on the unemployment rate where the claimant lives. The lower the unemployment rate, the more weeks the formula uses. Service Canada explains this labyrinth of rules through the following example:

- Julie applies for EI benefits after working full-time for a full year (52 weeks).
- She lives in a region where the unemployment rate is 13.1%, so we will calculate her benefits using her best 14 weeks during the qualifying period.
- The divisor is therefore 14.

- Julie's total earnings over that 14-week period are $10,400.
- To calculate Julie's weekly average insurable earnings, we divide her earnings by the divisor as follows: $10,400 ÷ 14 = $743.
- To calculate the amount of her weekly benefits, we calculate 55% of $743, which equals $409.[29]

As of January 1, 2015, the maximum amount of weekly benefits is fixed at $573 (based on 55 percent of the "maximum insurable earnings" of $54,200).

c. Duration of Regular Benefits

The length of time benefits are payable is also calculated with reference to the unemployment rate in the claimant's region and the number of hours the employee accumulated during the qualifying period.[30] The range is 14 to 45 weeks.

2. Disentitlement from Benefits

An unemployed person who has worked the requisite number of insurable hours within the qualifying period may nevertheless still be disentitled from receiving employment insurance benefits by any number of disqualifying factors described in the EIA. The Supreme Court of Canada noted in the 1983 case of *Abrahams v. Attorney General of Canada* that since the purpose of the legislation is to provide benefits to a vulnerable class of worker, disqualifying provisions should be read narrowly.[31] However, when the disqualifying provisions clearly apply, the claimant will not be entitled to benefits, regardless of the hardship this disentitlement causes.

The EIA is designed to insure workers against the risk of involuntary unemployment. If the unemployment is considered to be voluntary or caused by the worker's own actions, then employment insurance benefits will usually be denied. The most obvious scenario in which unemployment would be voluntary involves the decision of an employee to quit a job. Section 30 of the EIA provides that if the claimant lost employment because he or she "voluntarily left any employment without just cause," then that individual is disqualified from receiving employment insurance benefits (just as the employee will probably forfeit the statutory entitlement to termination and severance pay, as we learned in Chapter 20).[32]

However, the EIA recognizes that sometimes an employee has sound reasons—what the statute calls "just cause"—and little choice but to quit, and in those circumstances it carves out an exception to allow the employee to receive employment insurance benefits. A worker has "just cause" to leave or refuse employment if he or she "had no reasonable alternative to leaving … having regard to all the circumstances," including any of the following:

> (i) sexual or other harassment,
>
> (ii) obligation to accompany a spouse, common-law partner or dependent child to another residence,
>
> (iii) discrimination on a prohibited ground of discrimination within the meaning of the *Canadian Human Rights Act*,
>
> (iv) working conditions that constitute a danger to health or safety,
>
> (v) obligation to care for a child or a member of the immediate family,
>
> (vi) reasonable assurance of another employment in the immediate future,
>
> (vii) significant modification of terms and conditions respecting wages or salary,
>
> (viii) excessive overtime work or refusal to pay for overtime work,
>
> (ix) significant changes in work duties,
>
> (x) antagonism with a supervisor if the claimant is not primarily responsible for the antagonism,
>
> (xi) practices of an employer that are contrary to law,
>
> (xii) discrimination with regard to employment because of membership in an association, organization or union of workers,
>
> (xiii) undue pressure by an employer on the claimant to leave their employment, and
>
> (xiv) any other reasonable circumstances that are prescribed.[33]

Note that many of the grounds that give rise to "just cause" to quit under the EIA would likely also constitute a **constructive dismissal** in the common law (see Chapter 13). Thus, an employee who can successfully claim constructive dismissal should usually also be successful in a claim for benefits under the EIA, although that result is not guaranteed since the common law courts and the tribunal interpreting the EIA are not bound by the decisions of one another. Having "just cause" to quit under the EIA is not the same thing as having a good reason to quit. So, for example, workers who quit low-paying jobs to upgrade their skills in a training program would be disqualified from EI benefits.[34]

An employee who engages in misconduct that leads to dismissal may also be disentitled from employment insurance benefits.[35] The case law interpreting the "misconduct" disqualification has clarified that "wilful misconduct" is required to disqualify a claimant from benefits, similar to the test that disqualifies an employee from the statutory notice of termination we discussed in Chapter 20.[36] The Federal Court of Appeal explained the test in the 2007 case of *Mishibinijima v. Canada (Attorney General)*:

> [T]here will be misconduct where the conduct of a claimant was wilful, i.e. in the sense that the acts which led to the dismissal were conscious, deliberate or intentional. Put another way, there will be misconduct where the claimant knew or ought to have known that his conduct was such as to impair the performance of the duties owed to his employer and that, as a result, dismissal was a real possibility.[37]

Consider how that test was applied in the decision summarized in Box S1.3.

BOX S1.3 » CASE LAW HIGHLIGHT

Disentitlement to Employment Insurance Benefits Due to Employee Misconduct

Canada (Attorney General) v. Lemire
2010 FCA 314

Key Facts: Lemire had worked for the restaurant St-Hubert for 17 years as a delivery driver. One day, after his shift, but in the employer's parking lot and while wearing the employer's uniform, Lemire sold some contraband cigarettes. This activity was both illegal and a violation of a company policy. The employer learned of the sale and dismissed Lemire. Lemire claimed employment insurance benefits but was denied on the basis that he had engaged in misconduct causing his unemployment. Lemire sought a review of that decision and won before both the Board of Referees and the umpire. The Canada Employment Insurance Commission appealed to the Court of Appeal.

Issue: Did Lemire's off-duty sale of illegal cigarettes on the employer's property constitute "misconduct" that led to his unemployment?

Decision: Yes. The Federal Court of Appeal ruled that Lemire lost his job due to misconduct, which disentitled him from employment insurance benefits. The court explained that the "misconduct" language in section 30 of the EIA has been interpreted as requiring "wilful misconduct," which means that the conduct must have been deliberate or intentional. Lemire knew he was breaking the law by selling illegal cigarettes, but did it anyhow.

There must also be a link between the misconduct and the dismissal. That means that "the misconduct must … constitute a breach of an express or implied duty resulting from the contract of employment." However, the EIA does not require an assessment of whether the employer would have had cause for summary dismissal applying the common law tests we considered in Chapter 12. Rather, the test is whether "the misconduct was such that its author could normally foresee that it would be likely to result in his or her dismissal." Lemire ought to have realized that committing illegal acts that also violated an explicit company policy, on the employer's property and while wearing the employer's uniform, could lead to his dismissal. Therefore, the court ruled that Lemire lost his employment due to his own misconduct and was disqualified from benefits.

Finally, unemployment is considered to be voluntary when the employee either fails to actively search for a new job or declines to accept "suitable employment" offered to him or her. A key requirement imposed on claimants is the duty to demonstrate that they are "capable of

constructive dismissal: A type of wrongful dismissal; it is caused by an employer who commits a fundamental or repudiatory breach of an employment contract that the employee treats as having terminated the contract.

and available for work and unable to obtain suitable employment."[38] If a claimant would not be in a position to work even if a job opportunity arose, then the individual is not in fact suffering a loss due to unemployment. For example, if an unemployed claimant travels outside the country, goes on vacation, or enrols in courses that are held during times when jobs are most likely to be available, he or she will likely be found to be "unavailable" for work and disentitled from benefits.[39] Claimants cannot arrange their lives in ways that prevent them from looking for work or accepting a job.[40]

Claimants are disentitled if they refuse, or fail to actively search for, "suitable employment."[41] Until recently, "suitable" was not defined. The tribunals and courts interpreted the term in a manner that gave claimants some discretion to reject job offers that paid less than what they previously earned, required considerable travel or commute times, and were below the claimant's skill, experience, and education levels. This interpretation permitted claimants to hold out, for a reasonable time at least, in the hope of finding a comparable job to the one they lost.[42] However, regulations introduced under the EIA now list criteria to be considered in assessing what constitutes "suitable employment," which include: the claimant's physical capacity to commute to and perform the job and whether the hours of work and nature of the work are compatible with family obligations and religious beliefs.[43] Workers who have claimed EI benefits frequently are given little discretion to refuse any job offers.[44]

B. Special Benefits

The special benefits provisions in the EIA create an exception to the general rule that employment insurance benefits are only available to workers who are unemployed and otherwise available and willing to work. A person who qualifies for special benefits is not required to demonstrate the ability and willingness to work. There are several types of special benefits (and various special rules and requirements for each of these benefits):

- *Maternity benefits*. Introduced in 1971, these benefits are for women who are new mothers or who are unable to work due to pregnancy. A maximum of 15 weeks of maternity benefits is available.[45]
- *Parental benefits*. Introduced in 1990, these benefits are for biological, adoptive, or legally recognized parents of a newborn or newly adopted child. A maximum of 35 weeks of parental benefits can be shared between both parents.[46] Extended parental benefits of up to 61 weeks are also available at a lower rate of payment.
- *Sickness benefits*. Introduced in 1971, these benefits are for workers unable to work due to illness, injury, or quarantine. A maximum of 15 weeks of sickness benefits is available.[47]
- *Compassionate care benefits*. Introduced in 2004, these benefits are for people unable to work because they need to care for a gravely ill relative. A maximum of 26 weeks of compassionate care benefits is available.[48] Benefits are also available to care for a critically ill or injured child (up to 35 weeks) or adult (up to 15 weeks).

As we noted in Chapter 19, entitlement to certain special benefits under the EIA is sometimes coordinated with employment standards laws, permitting unpaid leaves of absence from employment. The employment standards laws require employers to provide time off work, and the EIA provides a means of financial support during the leave. This model disburses the cost of leaves away from individual employers and to the labour market as a whole.

When COVID-19 hit Canada in March 2020, employment standards statutes across Canada were amended to protect employees from termination of employment if they took COVID-19 related leaves of absence.[49] Meanwhile, the federal government introduced the Canadian Emergency Response Benefit (CERB) to provide emergency funding to people who lost their work due to COVID-19 related reasons, as explained in Box S1.4.

BOX S1.4 TALKING WORK LAW

Employment Insurance, the Canada Emergency Response Benefit, and COVID-19

The COVID-19 pandemic that hit Canada beginning in March 2020 suddenly thrust millions of Canadians into unemployment. Many workers lost their jobs or were placed on layoff because their employer went out of business or shut down temporarily due to a lack of customers or a mandatory order by governments to close for safety reasons. Some workers needed to stop working because they became sick or had to care for sick relatives or because they had to care for children whose schools were closed. About 30 percent of the Canadian labour force either lost their jobs or suffered a significant reduction in hours.*

Many workers who lost their jobs due to COVID-19 would have qualified for either regular or sickness benefits under the *Employment Insurance Act*, but many would not—either because they were not "employees" at the time they lost their job (they were independent contractors, as discussed in Chapter 4 and not eligible for EI benefits) or they had not worked sufficient qualifying hours. Still others who were already receiving EI benefits or whose benefits had run out would no longer have any prospect of finding new employment until the pandemic subsided.

In March 2020, the federal government introduced the Canada Emergency Response Benefit (CERB) to provide emergency funding to workers who lost work due to COVID-19 related reasons.† CERB benefits were made available to any person who lost work due to COVID-19 or whose EI benefits had expired between December 2019 and October 2020, who had income from work (employment or self-employment) of at least $5,000 in the 12 months prior to their CERB application, and who had not voluntarily quit their last job. Qualified CERB applicants received $500 per week for up to 24 weeks. As of June 2020, the government had paid out over $53 billion in CERB payments and received over 18 million CERB applications.

* Canadian Department of Finance, "Historic COVID-19 Plan Provides Canadians With the Support They Need to Get Through the Economic Crisis" (July 8 2020): https://www.canada.ca/en/department-finance/news/2020/07/historic-covid-19-plan-provides-canadians-with-the-support-they-need-to-get-through-the-economic-crisis.html

† See https://www.canada.ca/en/services/benefits/ei/cerb-application.html

IV. Chapter Summary

Canada's employment insurance law governs access by employed workers to the employment insurance fund. The purpose of this fund is to provide a temporary cushion to help involuntarily unemployed workers transition from job to job. Divergent political perspectives on the role the state should play in regulating labour markets have shaped the ebbs and flows of the employment insurance model since the introduction of the first *Unemployment Insurance Act* in 1940. Most litigation relating to employment insurance relates to the many rules governing disentitlements and disqualifications from benefits. The legislation is extremely complicated, and we attempted to introduce some of its main elements in this chapter.

QUESTIONS AND ISSUES FOR DISCUSSION

1. Does the regulation of employment insurance fall within provincial or federal jurisdiction in Canada?
2. Describe an argument for and against employment insurance.
3. What events precipitated the introduction of the *Unemployment Insurance Act* in Canada?
4. Discuss why the percentage of unemployed workers in Canada who are eligible for employment insurance benefits decreased so dramatically between the late 1990s and today.
5. How is the region in which a person seeking employment insurance benefits lives relevant in assessing benefits under the *Employment Insurance Act*?
6. Is a person who quits his or her last job always disqualified from receiving employment insurance benefits? Explain your answer with reference to the *Employment Insurance Act*.
7. Is a person who is fired from his or her last job also disqualified from receiving employment insurance benefits? Explain your answer with reference to the *Employment Insurance Act* and case law.

8. What is the difference between regular benefits and special benefits under the *Employment Insurance Act*? Identify and briefly explain the types of special benefits recognized in the legislation.

UPDATES

Go to www.emond.ca/lawofwork2 for links to news, author's blog posts, content updates, and other information related to the chapters in this text.

NOTES AND REFERENCES

1. See the discussion in R. Winkelmann, *Unemployment, Social Capital, and Subjective Well-Being* (Discussion Paper No. 2346) (Bonn, Germany: Institute for the Study of Labor [IZA], 2006), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=937887.
2. See the excellent discussion of Canada's history of unemployment insurance legislation in G. Campeau, *From UI to EI: Waging War on the Welfare State* (Vancouver: University of British Columbia Press, 2004). See also J. Struthers, *No Fault of Their Own: Unemployment and the Canadian Welfare State, 1914–1941* (Toronto: University of Toronto Press, 1983).
3. *Employment Offices Co-ordination Act*, SC 1918, c. 21.
4. D. Morton, *Working People: An Illustrated History of the Canadian Labour Movement*, 5th ed. (Montreal: McGill-Queen's University Press, 2007), at 139.
5. Ibid., at 147.
6. Excerpt from the Speech from the Throne, January 17, 1935, cited in Campeau, supra note 2, at 43.
7. *Reference re legislative jurisdiction of Parliament of Canada to enact the Employment and Social Insurance Act (1935, c. 48)*, [1936] 3 DLR 644 (SCC), [1936] SCR 427, upheld by the British Privy Council in *Attorney General for Canada v. Attorney General for Ontario*, [1937] AC 355.
8. This power today is found in s. 91(2A) of the *Constitution Act, 1867* (UK), 30 & 31 Vict., c. 3.
9. *Unemployment Insurance Act, 1940*, SC 1940, c. 44.
10. For a discussion of the early development of the unemployment insurance model, see Notes in "Unemployment Insurance in Canada" (1963) 87:5 *International Labour Review* 456; and G. Brown, "Unemployment Insurance Adopted by Canada" (1940) 30 *American Labor Legislation Review* 101.
11. Campeau, supra note 2, at 62.
12. *Unemployment Insurance Act, 1971*, 1970-71-72 (Can.), c. 48. See also Campeau, supra note 2, at 85.
13. The restrictive qualifying conditions in the original maternity benefits provisions were challenged in *Bliss v. Attorney-General of Canada* (1978), 92 DLR (3d) 417, [1979] 1 SCR 183 as violating the protection against discrimination on the basis of sex in the *Canadian Bill of Rights*. That action was dismissed on the basis that discrimination on the basis of pregnancy is not sex discrimination. A decade later, in *Brooks v. Canada Safeway Ltd.* (1989), 26 CCEL 1, [1989] 1 SCR 1219, the Supreme Court of Canada ruled that *Bliss* was wrongly decided.
14. See the discussion in Campeau, supra note 2, at chapter 6. On the political turn against the welfare state, see G. Calder, "Recent Changes to Maternity and Parental Leave Benefits Regime as a Case Study: The Impact of Globalization on the Delivery of Social Programs in Canada" (2003) 15:2 *Canadian Journal of Women and the Law* 342.
15. Campeau, supra note 2, at 131-33.
16. *Employment Insurance Act*, SC 1996, c. 23. See the discussion in Campeau, supra note 2, at chapter 9; and L. Vosko, *The Challenge of Expanding EI Coverage* (Toronto: Mowat Centre EI Task Force, 2011), http://www.mowateitaskforce.ca/sites/default/files/Vosko_1.pdf.
17. Vosko, supra note 16, at 7.
18. Gray, David M. and Busby, Colin, Unequal Access: Making Sense of EI Eligibility Rules and How to Improve Them (May 18, 2016). C.D. Howe Institute Commentary 450. Available at SSRN: https://ssrn.com/abstract=2782419 at 4. See Campeau, supra note 2, at 165; Public Service Alliance of Canada, "Employment Insurance in Canada: Hitting Rock Bottom," http://notothecuts.ca/employment-insurance-downward.html; and M. Townson and K. Hayes, *Women and the Employment Insurance Program* (Toronto: Canadian Centre for Policy Alternatives, 2007), at 11, http://www.policyalternatives.ca/sites/default/files/uploads/publications/National_Office_Pubs/2007/Women_and_the_EI_Program.pdf.

19. See the comments in S. Freeman, "Use of EI Funds by Tories to Help Balance Budget Draws Criticism," *Huffington Post*, April 21, 2015, http://www.huffingtonpost.ca/2015/04/21/ei-fund-budget-surplus-canada-2015_n_7113322.html.
20. *Employment Insurance Regulations*, SOR/96-332.
21. Service Canada explains many features of the legislation online. See Service Canada, "Employment Insurance Regular Benefits," http://www.servicecanada.gc.ca/eng/ei/types/regular.shtml.
22. The application form is available at Service Canada, "Applying for Employment Insurance Benefits Online," http://www.servicecanada.gc.ca/eng/ei/application/employmentinsurance.shtml.
23. The SST has proven controversial. It has been criticized by legal academics and worker advocates for being secretive—while all Boards of Referees and umpire decisions are published, most SST decisions are not. See "Opinion: Social Security Tribunal Must Embrace Openness," *Gazette* (Montreal), June 14, 2015, http://montrealgazette.com/news/national/opinion-social-security-tribunal-must-embrace-openness. Critics have also chastised the Conservative government for staffing the high-paying SST jobs with patronage appointments: T. Walkom, "New EI Tribunal Promises Good Pay for Conservatives, Bad Wages for the Rest of Us," *Toronto Star*, May 29, 2013, http://www.thestar.com/news/canada/2013/05/29/new_ei_tribunal_promises_good_pay_for_conservatives_bad_wages_for_the_rest_of_us_walkom.html.
24. *Employment Insurance Act*, supra note 16, s. 8. There are some special rules for calculating the qualifying period in some circumstances, as described in s. 8.
25. Ibid., s. 5.
26. The website is here: Employment and Social Development Canada, "Canada's Employment Insurance (EI) Economic Regions," http://srv129.services.gc.ca/ei_regions/eng/canada.aspx.
27. *Employment Insurance Act*, supra note 16, s. 7.1.
28. Ibid., s. 14.
29. See Service Canada, "How Do You Calculate the Amount of My Benefits?" https://www.canada.ca/en/employment-social-development/programs/ei/ei-list/reports/regular-benefits/duration.html#h2.3.
30. *Employment Insurance Act*, supra note 16, s. 12(2). See Schedule A for the calculation table.
31. *Abrahams v. Attorney General of Canada*, [1983] 1 SCR 2.
32. See, e.g., *Canada (Attorney General) v. White*, 2011 FCA 190; and *Canada (Attorney General) v. Langevin*, 2011 FCA 163.
33. *Employment Insurance Act*, supra note 16, s. 29(c).
34. *Canada v. Locke*, [1996] 3 FCR 171 (FCA).
35. *Employment Insurance Act*, supra note 16, s. 30.
36. See *Canada (A.G.) v. Tucker*, [1986] 2 FC 329 (CA), at para. 15; *Canada (A.G.) v. Brissette*, [1993] FCJ No. 1371 (FCA); *Canada (A.G.) v. Richard*, [2005] FCJ No. 1750 (QL); *Canada (Attorney General) v. Marion*, 2002 FCA 185; *Canada (Attorney General) v. Jolin*, 2009 FCA 303; and *Canada (Attorney-General) v. Lemire*, 2010 FCA 314.
37. *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36, 279 DLR (4th) 121, at para. 14 (repeated alcohol-related absences constituted wilful misconduct).
38. *Employment Insurance Act*, supra note 16, s. 18. If claimants are unable to work due to illness, they must prove that but for the illness they would have been available for work.
39. See, e.g., *Canada (Attorney General) v. Boland*, 2004 FCA 251; and *M.R. v. Canada Employment Insurance Commission*, 2014 SSTGDEI 74.
40. *Canada (Attorney General) v. Gagnon*, 2005 FCA 321.
41. *Employment Insurance Act*, supra note 16, s. 27.
42. See the discussion of the meaning of "suitable employment" in the old case law in C. Choates, *Unemployment Insurance*, 2nd ed. (Toronto: Carswell, 1985), at 103-6.
43. *Employment Insurance Regulations*, supra note 20, s. 9.002.
44. The law assigns different "types" of suitable employment based on the frequency in which a worker claims EI benefits: *Employment Insurance Regulations*, supra note 20, s. 9.003.
45. Service Canada, "Employment Insurance Maternity and Parental Benefits," http://www.servicecanada.gc.ca/eng/ei/types/maternity_parental.shtml#eligible.
46. Ibid.
47. Service Canada, "Employment Insurance Sickness Benefits," 2015, http://www.servicecanada.gc.ca/eng/ei/types/sickness.shtml#criteria.
48. *Employment Insurance Act*, supra note 16, s. 23.1. See also Service Canada, "Employment Insurance Compassionate Care Benefits," http://www.servicecanada.gc.ca/eng/ei/types/compassionate_care.shtml. The government has announced that it will extend the maximum length of this benefit to six months, commencing in 2016.
49. See D. Doorey, "A Plain Language Chart Describing Worker Entitlements in Ontario During COVID-19" Canadian Law of Work Forum (March 26, 2020): http://lawofwork.ca/a-plain-language-chart-describing-worker-entitlements-in-ontario-during-covid19/. See also, Ontario Bill 186, An Act to amend the Employment Standards Act, 2000: https://www.ola.org/sites/default/files/node-files/bill/document/pdf/2020/2020-03/b186ra_e.pdf