POSITION PAPER ON THE EMPLOYMENT INSURANCE APPEAL PROCESS

By the Income Security Advocacy Centre & the Inter-Clinic EI Working Group

Submitted to KPMG on July 7, 2017

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Introduction

A. What brought us here: Background on the Social Security Tribunal Review

When a worker loses their job, it is essential that applying for income replacement through the Employment Insurance program be fast, easy and fair. If that application is denied, there must also be a fast, easy and fair process for appealing that decision.

Such a process was in place prior to 2013. Those who wanted to appeal the denial of an EI claim appealed to a Board of Referees. Their case was heard very quickly by a three-member panel that included a representative for workers and a representative for employers. If the claimant was still dissatisfied with the result, they could appeal from there to an Umpire, who was a judge of the Federal Court.

It was a fast and easy process. It was optional to request a reconsideration prior to appealing to the Board of Referees, and when a reconsideration was sought, it took place in 14 days. The Board of Referees had a performance target of hearing 90% of cases within 30 days. While this target was not always met, the process generally came close to it, and even exceeded it in some regions of Canada.[1] A full hearing at the Board of Referees took an average of 44 days.[2]

Workers representatives felt it was a fair process. The system wasn't broken.

In 2013, the Canadian government made profound changes to the appeal process for Employment Insurance claims. These changes were made with no consultation or notice to stakeholders, apart from a 30 day timeline to comment on the proposed regulatory changes (a good portion of which ran during the December holidays).

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[1] 2003 November Report of the Auditor General of Canada. Available at http://www.oag-bvg.gc.ca/internet/English/att_20031107xe07_e_12816.html, accessed July 6, 2017.

[2] Employment and Social Development Canada (2017), *Employment Insurance Service Quality Review Report: Making Citizens Central*, available at https://www.canada.ca/en/employment-social-development/programs/ei/ei-list/reports/service-quality-review-report.html#h2.4-h3.1, accessed July 6, 2017.

The Social Security Tribunal replaced the Board of Referees and the Umpires as well as two other Tribunals that heard cases relating to the Canada Pension Plan and Old Age Security. The purpose of creating the new Tribunal was to cut costs, not to improve access to justice. But even that goal has not been met. The hopes for cut costs have not been realized. The new appeal process has undermined basic principles of fairness and stacked the odds against unemployed workers.

Some of the early administrative problems with the Tribunal have been fixed. The Chair of the Social Security Tribunal has reached out to stakeholders to seek feedback and committed to ongoing communication. Representatives from Ontario legal clinics have been consulted on new forms and have met personally with the Chair several times. The Chair has been very responsive to concerns and taken action to resolve a number of problems, including addressing deficiencies with the call centre, publishing more decisions, creating a process of public interest interventions and putting in place a process to deal fairly with the huge backlog of disability appeals.

The issues with the Social Security Tribunal are in the way that it is structured, not in the way it is currently run. The repercussions can be disastrous for claimants who are left stranded and waiting: insecurity, mounting debt and poverty. Such outcomes are unacceptable in the context of a social insurance program. Workers pay into the EI fund expecting it to be there to support them when they lose their job.

B. Our Perspective

The Income Security Advocacy Centre (ISAC) is a specialty legal clinic funded by Legal Aid Ontario to advance the rights, interests and systemic concerns of low-income Ontarians with respect to income security and employment. Founded in 2001, we are the only legal clinic in Ontario wholly devoted to systemic advocacy on income security issues. We carry out our law reform mandate through test case litigation, policy advocacy, community organizing and public education.

We are governed by a community Board of Directors with representation from all regions of Ontario and composed of individuals, academics and advocates with expertise in issues of income security and poverty. Our Board members include legal clinic caseworkers and people who identify as low-income, with representation from Indigenous communities, racialized communities, people with disabilities and recipients of income support benefit programs.

We work closely with the more than 60 community legal clinics, both local and those with a provincial mandate, who work every day with the challenges faced by low-income people in Ontario. We also work in coalition with other advocacy groups and organizations. Our analysis and recommendations are informed by ongoing consultation with and information provided by our partners and others in the anti-poverty and labour sector.

The Inter-Clinic Employment Insurance Working Group brings together legal workers from Ontario's community legal clinics. Working Group members advocate for improvements to the EI program and represent many of the appellants who appear before the Social Security Tribunal in the Ontario region. The EI Working Group meets regularly to discuss practice issues, including the challenges of appearing before the Social Security Tribunal.

These submissions are made jointly by the Income Security Advocacy Centre and the EI Working Group, following consultations and a survey of Working Group members. We will address the following key structural problems that will require legislative responses to fix:

- The "reconsideration" process creates an additional hurdle
- Workers don't know what they are appealing until after they have appealed
- The community perspective has been lost with the change to one "professional" adjudicator
- It takes too long to resolve an appeal
- Too many hearings happen by telephone
- Some workers don't get a hearing at all
- The Appeal Division requires a high level of literacy and legal expertise
- The Tribunal does not publish all of its decisions

- The appeal process is needlessly complex and creates barriers for people with language barriers and persons with disabilities

We argue that the appeal process should be restructured based on the following four key principles:

> **Principle One: Representatives for workers, employers and the community should be part of the decision-making process.**
>
> **Principle Two: Because the process serves people who have lost their jobs, the time it takes to get to a decision should be short.**
>
> **Principle Three: The process must be accessible.**
>
> **Principle Four: The process must be fair.**

Part One: The Process for Appealing EI Decisions Denies Workers Access to Justice

A. An additional hurdle: Introduction of a "Reconsideration" process

The new process created a new legal hoop that claimants have to jump through before they can even bring an appeal: they have to ask the EI Commission to "reconsider" the decision. The average time for Service Canada to complete reconsideration application is 38 days.[3] Thus, the reconsideration process adds over a month to the time required to get to a hearing before an independent decision-maker.

Further, around 46% of reconsideration decisions are reversed, which suggests significant errors are being made at the initial application stage.[4] There needs to be improved quality of initial decision-making so that unemployed workers are not thrust into the appeal process unnecessarily.

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[3] Canada, "Government of Canada launches consultation to improve Employment Insurance services" (May 12, 2016) (Accessed May 12, 2016 at: http://news.gc.ca/web/article-en.do?nid=1064209&tp=1).

[4] Canada, "Government of Canada launches consultation to improve Employment Insurance services" (May 12, 2016) (Accessed May 12, 2016 at: http://news.gc.ca/web/article-en.do?nid=1064209&tp=1).

Finally, the EI Commission introduced a mandatory policy that requires Service Canada benefit officers to directly communicate with the worker as part of the reconsideration process.[5] Members of the EI Working Group have reported that some officers have discouraged their clients from appealing a negative decision by suggesting that their appeal has little chance of success. There has been a significant drop in the number of appeals being brought as compared to the old system: in its recent study of changes to the EI system, HUMA reports that the total number of appeals dropped by 85% after the introduction of the SST.[6] We are concerned that some workers are not appealing based on advice given by officers during the reconsideration that may well be incorrect.

B. Workers don't know what they are appealing until after they have appealed

The structure of the appeal process itself is extremely unusual and is inconsistent with from accepted legal norms about what is required for a fair procedure.

When a worker is denied employment insurance benefits, they often first hear that decision in a phone call from an officer. Working Group members have found that officers are not informing claimants that their limitation period to appeal begins at that time, rather than when they receive a written decision in the mail (which could be considerably later). This oversight can mean that some claimants start their appeal to late and have to seek an extension of time.

Once claimants do receive a written decision, it consists of a computer-generated letter with often confusing or erroneous statements – issues that were specifically mentioned in the recent EI Service Quality Review.[7] These letters also do not inform individuals

[5] Canada, "Government of Canada launches consultation to improve Employment Insurance services" (May 12, 2016) (Accessed May 12, 2016 at: http://news.gc.ca/web/article-en.do?nid=1064209&tp=1).

[6] The House of Commons Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities (2016), *Exploring the Impact of Recent Changes to Employment Insurance and Ways to Improve Access to the Program*, at pp. 33-35

[7] Employment and Social Development Canada (2017), *Employment Insurance Service Quality Review Report: Making Citizens Central*, available at https://www.canada.ca/en/employment-social-development/programs/ei/ei-list/reports/service-quality-review-report.html#h2.4-h3.1, accessed July 6, 2017.

that if they start an appeal, they should be sure to keep records of their job searches – failing to do so may mean that even a successful appellant can be denied EI a second time on the basis that they cannot prove that they were ready and available for work.

Perhaps most importantly, these letters do not set out the reasons for the Commission's decision (for example why EI concluded that they were fired for misconduct) or the evidence underlying that decision. Rather, the reasons for the decision are only provided to the worker after they have started an appeal.[8] This means that workers are required to submit all of their evidence and legal submissions at the very first stage of the process, before they have even been informed of the case against them or given full disclosure of their file.

As a result, workers who challenge an EI decision often do not know what their case is actually about until they are well into the appeal process. One caseworker in our Working Group reports that, in one of his appeals, the very reason for denial of EI benefits was disputed even into the Appeal Division stage of the case – all because the decision itself was never clearly articulated at the outset.

At any other administrative Tribunal, the claimant has a chance to see the evidence against them so that they can respond in an informed way. The current process undermines workers' ability to properly assess their chances on appeal and of properly holding those who initially decided their claim accountable. It also leads to confusing and inefficient proceedings.

Furthermore, workers rarely have any means to contact the EI Commission's representative until they show up (or not) at their appeal hearing. As a result, they have no way to clarify issues in advance or to discuss potential settlements. Hearings are protracted and unnecessarily complex as a result.

[8] This procedure is set out in s. 24(1) of the *Social Security Tribunal Regulations*, SOR/2013-60. Unlike with most quasi-judicial tribunals, the SST does not have the power to change its own procedural regulations. Pursuant to s. 69 of the *Department of Employment and Social Development Act*, S.C. 2005, c. 34, these can only be changed by the Governor in Council.

C. The "community" perspective has been lost with the change to one "professional" adjudicator

Under the prior system, workers had the benefit of a three-member decision-making panel that included people from their own community and representatives of workers and employers. With three decision makers, the members were able to assess the case with their knowledge of the local labour market and social services. Having representation from the key EI stakeholders on the panel also added to the system's reputation for impartiality from the EI Commission.

The change to a panel of one is an enormous loss.

D. It takes far too long to resolve an appeal

The Social Security Tribunal was rushed into existence and was not prepared to handle the backlog of cases that it faced when it opened its doors. It has taken years for the Tribunal to reach what it is calling a "steady state."

The Tribunal's service standard is to have final decisions in 85% of cases within 90 days of the appeal being filed. Three months is an extremely long time for any unemployed worker, and particularly for ones with low-income and/or less assets to rely on during their period of unemployment.

But even this standard is not being met. The average time to complete an appeal is 158 days, or over five months.[9] It takes considerably longer to complete an appeal than it did under the former system, which often had matters resolved in just over 40 days.[10]

[9] Canada, "Government of Canada launches consultation to improve Employment Insurance services" (May 12, 2016) (Accessed May 12, 2016 at: http://news.gc.ca/web/article-en.do?nid=1064209&tp=1).

[10] Employment and Social Development Canada (2017), *Employment Insurance Service Quality Review Report: Making Citizens Central*, available at https://www.canada.ca/en/employment-social-development/programs/ei/ei-list/reports/service-quality-review-report.html#h2.4-h3.1, accessed July 6, 2017.

In the meantime, unemployed workers are forced to go into debt and/or rely on inadequate provincial social assistance programs.

E. Too many hearings happen by telephone

The majority of EI hearings (63%) are conducted by telephone.[11] Indeed, the caseworkers in our Working Group report that nearly all of their cases are heard this way even when the claimant asks for the hearing to be done in person. This is a serious problem for cases in which credibility is in issue and poses a problem for low income people who may not have access to a phone or a private room to conduct the call. It also presents challenges to those who require interpretation.

F. Some workers don't get a hearing at all

The Social Security Tribunal has the power to summarily dismiss an appeal without a hearing. While this new power was allegedly intended to be used only in those clear cases where the Social Security Tribunal did not have the jurisdiction to do anything (for example, if the worker did not work enough hours to qualify), the reality has proven otherwise.

For example, in one published case, the General Division summarily dismissed an appeal from a refusal by EI to "antedate" (backdate) an EI application. Appeals concerning antedates are common and – unlike disputes about whether someone has worked enough hours to qualify – are clearly within the jurisdiction of the Tribunal. Ultimately this appellant had to get leave to appeal to the Appeal Division. The Appeal Division sent the case back to the General Division, stating:

> As Parliament does not speak in vain, I must conclude from this that it was Parliament's intention to ensure that appellants in employment insurance cases before the General Division be given an opportunity to be

[11] Canada, "Government of Canada launches consultation to improve Employment Insurance services" (May 12, 2016) (Accessed May 12, 2016 at: http://news.gc.ca/web/article-en.do?nid=1064209&tp=1).

> heard. The summary dismissal provisions should not be stretched in order to bypass this intention.[12]

This case is a clear example of an abuse of the summary dismissal power, and the unrepresented claimant was forced into a protracted battle to even have her appeal heard.

Between 2013 and 2015, over 400 EI appeals were summarily dismissed. Very few workers appealed these decisions to the Appeal Division – but of those that did, half were successful in overturning the summary dismissal.[13]

The summary dismissal power undermines the right to be heard and creates an unnecessary barrier to justice.

G. The Appeal Division process requires a high level of literacy and legal expertise

The Social Security Tribunal appeal process includes two steps: an initial appeal heard by the General Division, with the right to appeal from there to the Appeal Division. However, there is a requirement that workers get permission (called "leave") from the Tribunal itself before their appeal can proceed at the Appeal Division. The only grounds of appeal that are permitted are that the General Division: failed to observe a principle of natural justice or acted beyond or refused to exercise its jurisdiction; erred in law; or made an erroneous finding of fact.[14]

The "leave to appeal" process is conducted entirely in writing, and therefore requires the worker to explain specific legal errors made by the General Division. If leave is granted, 32% of hearings are conducted in writing.[15]

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[12] M. C. v Canada Employment Insurance Commission, 2015 SSTAD 237 (CanLII) at para. 27.

[13] Mouvement Autonome et Solidaire des Sans-Emploi (2016), « Le Tribunal de l'insécurité sociale: une atteinte aux droits et à l'accès à la justice » at p. 12.

[14] *Department of Employment and Social Development Act*, S.C. 2005, c. 34, at ss. 56 - 58

[15] Canada, "Government of Canada launches consultation to improve Employment Insurance services" (May 12, 2016) (Accessed May 12, 2016 at: http://news.gc.ca/web/article-en.do?nid=1064209&tp=1).

This process requires a high degree of literacy and familiarity with legal concepts, both of which create difficult barriers particularly for those vulnerable workers who need Employment Insurance the most.

In addition, this "leave" requirement is one more hurdle that adds to the length of time it takes for a worker to negotiate the system. It can take six months to get a leave decision.[16]

H. Lack of transparency: Only 3% of General Division decisions are publicly available

The Social Security Tribunal, after being pushed by advocates, agreed to publish all Appeal Division decisions. However, it has not made a similar commitment to publish General Division decisions, instead publishing only a selection of cases the Tribunal considers significant. This selection amounts to 3% of all General Division decisions.

General Division decisions are not secret for everyone. The EI Commission receives a copy of all decisions. Their lawyers and expert staff can thus determine precisely where current Tribunal interpretations of the law stand, while unemployed workers and their representatives are denied access to the current state of the law. This raises important procedural fairness issues within the appeals process. It is tantamount to establishing a secret body of law, undisclosed to those most affected by these decisions.

I. Needless complexity undermines accessibility

As a result of all of the above factors, the Employment Insurance appeal system is needlessly complex. It creates unnecessary procedural hurdles for those who do not speak or read English or French fluently and for some persons with mental health

[16] Employment and Social Development Canada (2017), *Employment Insurance Service Quality Review Report: Making Citizens Central*, available at https://www.canada.ca/en/employment-social-development/programs/ei/ei-list/reports/service-quality-review-report.html#h2.4-h3.1, accessed July 6, 2017.

disabilities. The system should be created with the needs of the most vulnerable in mind.

For example, there are several different appeal forms, which can be confusing for appellants, leading to delays if they send in the wrong one. Some of the complexity stems from the employment insurance system itself. Indeed, the employment insurance regime is at the heart of the problem, with its many rules that deny workers access to the program they have paid into throughout their working lives. Ultimately there must be reform of this program.

The repercussions for claimants can be extremely serious. Many go into debt, lose their homes or are forced to rely on inadequate social assistance supports while they go through the appeal process. Those without access to social assistance are left without any income whatsoever during this time.

Part Two: Principles for an Effective EI Appeal System

It is essential that an appeal process for employment insurance matters be designed in accordance with the basic purposes and structure of the EI program itself.

We have identified four key principles that must be the basis of Canada's EI appeal system. The concrete recommendations outlined below stem from and support these fundamental underlying principles.

Principle 1 – Tripartite Decision-Making

The EI system in Canada has a history that is unlike many other federal programs. Developed following the Great Depression, the EI system was established, from its inception, as a no-fault, tripartite insurance system: it is not funded from the general tax base, but through contributions from workers and employers; and it is governed by commissioners representing those same key stakeholders[17]. That tripartite structure exists to this day.

This unique history and structure should be reflected in the EI appeal system. Doing so supports the credibility and impartiality of the process, as it directly engages the program's key stakeholders directly in the system of adjudication. It also helps to create an appeals process that is more informed of local economic concerns, as well as one that is more informal and accessible to workers.

Recommendations:

- A prominent decision-making role for labour and business should be restored, with a return to a three-person decision making panel with representative from labour, business and the community.

[17] See the excellent overview of this structure in Donna Wood (2017), "The Seventy-Five Year Decline: How government expropriated Employment Insurance from Canadian workers and employers and why this matters", at: https://mowatcentre.ca/wp-content/uploads/publications/151_the_seventy_five_year_decline.pdf, at pp. 20-22, accessed June 15, 2017.

Principle 2 - Speed

Canada's EI system was first established in 1940 in order provide an income-support safety net for individuals who find themselves out of work. This is still the fundamental purpose underlying regular benefits under the Act.[18]

Speed is of particular importance in this context. When an EI system makes frequent incorrect decisions or takes too long in determining whether an individual qualifies for benefits, it fails to act as a safety net. Even when decisions are rectified after the fact, this means that workers have been left without support during their period of greatest uncertainty. In other words, a slow EI system fails in meeting its most fundamental purpose.

This same principle applies to any appeal process governing access to an EI system. In this context, justice delayed is quite literally justice denied.

Recommendations:

- The current long delays at all levels in the process must stop, and the commission / Tribunal must be funded adequately to end these delays.
- Given that the maximum length of EI regular benefits in any region in Canada is 45 weeks, the SST must have shorter service standards, and must be given the resources to comply with them.
- The leave-to-appeal provisions are unnecessary and should be eliminated.
- A formal reconsideration request should be optional and not required in order to appeal a decision.

Principle 3 – Accessibility

The nature of the EI system also mandates that any appeal process be accessible, and easy to move through without the aid of legal representation.

[18] *Bourassa*, 2002 ABCA 205, at para. 25

Workers who apply for EI are, by definition, in a period of economic uncertainty. They very often do not have the resources to retain counsel or to engage in a protracted legal procedure.

It follows that such a system must be accessible and friendly to workers, so that they can move through it without the necessity of retaining counsel or engaging in the lengthy delays associated with a more legalistic system. Accordingly, more informal administrative proceedings are strongly preferable to a formal, legalistic approach, and supports workers to navigate the system independently.

Recommendations:

- Resources for challenging decisions should be expanded.

Principle 4 – Fairness

Taking all of these principles into account, the EI appeal system is also an adjudicative system, and must accord with established standards of procedural fairness. Applicants must know the legal requirements required to qualify for income supports, and must have access to the evidence that formed the basis for their denial of benefits.

The form of hearing must be one that allows workers to present their whole case fairly and completely, including the choice to have an in-person hearing.

Recommendations:

- In-person hearings should be the default, with Appellants having the right to choose a different form of hearing.
- The summary dismissal provisions should be eliminated.
- Appellants must have a copy of their full file early in the appeal process and before they are required to submit their own evidence/arguments.
- All Tribunal decisions should be published.
- Appellants must have a means of communicating with a representative from the Commission before an appeal, to allow for the possibility of settlement, to clarify factual or procedural issues and simplify the process.

Part 3: Summary of Recommendations

Principle 1 – Tripartite Decision-Making

- A prominent decision-making role for labour and business should be restored, with a return to a three-person decision making panel with representative from labour, business and the community.

Principle 2 - Speed

- The current long delays at all levels in the process must stop, and the commission / Tribunal must be funded adequately to end these delays.
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