

Introduction

The unemployment insurance (UI) scheme of 1940 came as a key component of Canada's social security net. Conceived against the social, economic, and political background of the Great Depression, the Canadian UI system began by recognizing rights to the jobless as it proceeded to define entrance requirements, a range of benefits that carried specific responsibilities, and an appeal process.

The Canadian plan drew on the existing British model, and its legal framework exhibited more or less the same basic features. In line with the social insurance approach, benefit payments were not discretionary but dictated by specific eligibility criteria. And the jurisprudence would confirm this acknowledgment of rights by holding that the purpose of the legislation was to pay benefits to the unemployed.

In the postwar period, the system evolved with Ottawa's new Keynesian bent. The federal government, wanting the scheme to play an economic multiplier role, favoured its expansion, and unemployment insurance thereby became one of the building blocks of the Canadian welfare state then under construction. This Keynesian strategy came with a social message that depicted unemployment as a collective responsibility and the government as an instrument of solidarity. By degrees, an increasing proportion of the workforce would be covered by unemployment insurance. The unemployed were the first beneficiaries of an interventionist strategy that reached its peak with the reform of 1971, when qualifying conditions were relaxed and the length and rate of benefits made more generous.

The mid-1970s saw the first stirrings of a counterattack as the Keynesian strategy came under siege. With other areas of government activity, social commitments were denounced by supporters of the neoliberal school as inflationary and unproductive. Employment was essentially a private sector responsibility, and the handling of the unemployed should reflect a free-market approach. This regressive movement culminated in the 1990s counterreforms that heralded a major policy shift. The term "counterreform"

actually seems to be more appropriate than “reform” to describe a sweeping change that basically undermined the function of social protection that had typified UI up to that time. Thereafter the government reduced its direct involvement with the jobless to refocus on managing unemployment, primarily to serve the marketplace.

The rights that the system recognized to the jobless were radically challenged: qualifying conditions were tightened up, the length and rate of benefits were revised downward, and penalties for voluntary leaving and misconduct were toughened. The numbers of unemployed with access to benefits would drop by half during the 1990s.

The current status of the UI/EI (employment insurance) system, after the cutbacks and shrinkages in jobless rights of recent years, raises some basic questions about the scheme itself and the rights that it is supposed to stand for. Does the system still recognize genuine rights to the jobless? What are the nature and basis of the rights thus protected? Should not unemployment insurance, with its contributory principle, still guarantee the insured reasonable protection against the risk of unemployment?

How do we explain the government actually reducing the protection that the system affords to victims of a persistently high rate of unemployment just as the market is being restructured from top to bottom? Does the purpose originally enshrined in this legislation, to “provide benefits to the unemployed,” still have valid meaning?

My working assumption is that the recognition of genuine jobless rights reflects the role taken by the government in dealing with the problems of employment and unemployment. I will attempt to validate this assumption by reviewing the historical development of unemployment insurance in Canada. I believe that the history of a law helps to reveal both its origins and its current focus.

This historical dimension helps us to see how industrialization produced mass unemployment over which the individual had almost no control. As a consequence of this, liberalism and its idea of unemployment as essentially an individual responsibility became less reputable. Bit by bit, unemployment came to be seen as a social problem and the jobless not as primarily responsible for their situation but as victims. The responsibilities of both the economic system and the government as our collective embodiment were called to account. Gradually, Canadians saw the need for ongoing state involvement.

Employment and unemployment then became social concerns that the government had to make its own. It was up to the government to create the right conditions for full employment or at least to compensate people whom the market could not keep at work. These new government responsibilities involved recognizing rights to the jobless: failing a genuine right to work, workers were granted a right to protection from unemployment.

Only insofar as the government accepted a direct responsibility for the social issue of employment, independent of dominant market interests, could the jobless hope for reasonable protection against unemployment accompanied by an array of genuine rights.

Although the need for an unemployment compensation plan gradually won minds, however, it was not easily carried into effect. Like any state intervention, the government's role in employment and unemployment was defined against the play of forces, political as well as economic, that quickened society. The extent of state involvement in the labour market was one of the main issues in this power play. Employers initially opposed the government initiative and then, when the UI principle won out, tried to limit its reach. Employer lobbies conjured up the costs of a future system that they would have to bear in part and the system's potential interference with the workings of a labour market in which, or so they claimed, unemployment insurance was a disincentive to work. At the same time, unions and grassroots movements were calling for vigorous government action to ensure reasonable social protection for the jobless and recognition of rights for victims of unemployment.

The extent of government involvement in the unemployment problem also reflected the influence of existing ideologies. On the one hand, liberalism, though weakened by the economic crisis of the 1930s, still proclaimed employment and unemployment as primarily personal responsibilities and challenged the state's role in economic life generally and in the labour market particularly. Once the unemployment insurance plan was up and running, the same liberals would try to curtail its coverage. On the other hand, the supporters of a more interventionist state maintained that government must not only play an active role in the economy but also deal with social issues stemming from the economic process, including jobs and joblessness. This interventionist movement spearheaded the introduction and development of a UI system with better protection for the jobless and acceptance of subjective rights to compensation.

Just as in Britain thirty years before, the Canadian unemployment compensation scheme of 1940 embodied a compromise on the type of state involvement reached by employers' associations, unions, and the ruling political class. Accordingly, elements of the UI system were borrowed from one or the other of these opposing ideologies.

This compromise would appear in the insurance feature of the scheme. Admittedly, the government assumed some responsibility for employment and unemployment by setting up and funding an arrangement based on the public right. The workers, however, through their own and, indirectly, their employers' contributions, had to pay the lion's share of the cost. Indeed, even though employers had to contribute financially, they sloughed off most of the cost on their employees.

Similarly, although the act's stated objective was always to compensate victims of unemployment, the system also pursued another and equally important economic goal from the outset. The establishment of an employment network to accompany the system, along with the various obligations that the law imposed on claimants to curb voluntary leaving, actually made UI an effective tool for controlling the workforce. Disregard for these obligations could result in penalties that went as far as forfeiture of entitlement. Since the message sent by these provisions was primarily for the employed, UI operated as a powerful workforce regulator.

If the social security aspect of the system reflected a social objective involving direct government action on behalf of the jobless, the workforce regulation aspect was intended to satisfy market imperatives. And the use of social insurance techniques helped to preserve the individual aspect of unemployment, which rationalized the regulatory notion of "voluntary unemployment": the unemployed, becoming insured, must not cause the risk of unemployment to occur.

Behind these two dimensions of unemployment insurance, the compensatory and the regulatory, loomed two concepts of social insurance as a method of indemnifying the unemployed. On the one hand, a social vision of unemployment insurance called for more government involvement to guarantee the jobless easier access to the system, better protection, and entrenchment of their rights. On the other hand, an actuarial concept of social insurance drew on the commercial insurance model that limited government involvement and, in the name of financial integrity, tried to limit the coverage provided by the system. Naturally, this second concept underscored individual responsibility for the occurrence of unemployment and controlling its effects.

The same protagonists for and against the unemployment insurance project would support one concept of UI or the other when the system was in place. This debate between the social and actuarial visions of unemployment insurance would haunt its entire development.

Finally, the system's legal structure also reflected the compromise that lay at its origin. Although the recognition of rights was a substantial advance compared to earlier systems based on handouts, it came with a retinue of obligations, especially regarding voluntary unemployment and labour disputes. Here again the delicate balance between claimants' rights and responsibilities would reflect the role taken by the government: as soon as the government extricated itself from its responsibilities for employment and unemployment and began treating them as essentially the products of market forces, claimants' obligations were strengthened and their rights undermined.

Some have seen the contributory model as a more secure basis for asserting the rights of the unemployed than a noncontributory scheme funded

completely out of taxes. With premiums, was the worker not “buying” entitlement to benefit just as he or she bought private insurance? Would this model not be a better guarantee of his or her rights? Although the analogy with commercial insurance could have a positive psychological effect by lending benefits the colour of entitlements purchased through premiums, the contributory formula cannot be used as the ground for a right to unemployment insurance. Unlike a contract that is binding on both parties, a law can always be amended by the lawmaker alone. The real basis of the right to benefit was the law, which set out the procedures and reflected the responsibility that the government willingly assumed for employment and unemployment, not an alleged contractual relationship between the insured and the state that would generate the payment of premiums.

The system evolved in two phases that reflected differing government roles in the economy as well as differing ideologies and, above all, differing government involvements in unemployment and its casualties. Initially, the Keynesian approach that argued for direct and ongoing state involvement in running the system would positively affect the development and recognition of jobless rights. However, the neoliberal approach steered by free-market principles taken up by the government in the mid-1970s would spell a decline in these rights.

These two phases are also seen, though in mitigated form, in the relevant jurisprudence. The umpires, as the chief arbiters of the act in its early days, would increasingly favour a liberal approach and thereby, bit by bit, a jurisdictional recognition of claimants’ rights. A more restrictive interpretation was still placed on certain provisions in the act, however, especially those for disentitlement due to labour disputes.

The Supreme Court confirmed in 1983 that the act should be given a liberal reading that favoured recognition of the rights of the unemployed. In 1988, the court went on to stipulate that this liberal interpretation was based mainly on the contributory nature of the system. These decisions announced a period of liberalized jurisprudence that affected a number of provisions in the act, including the ones for voluntary unemployment. This trend, asserting the primacy of the act’s social purpose of paying benefits to the unemployed, would clearly be favourable to the jobless and, for the most part, continue until the 1990s.

Like the legislation itself, the jurisprudence saw a wave of conservatism after 1990 that took the form of a restrictive reading of certain provisions affecting voluntary unemployment. Although not generalized, this trend marked a setback compared with the type of interpretation favoured by Supreme Court decisions in the 1980s.

Although this study of the Canadian UI system deals more specifically with jobless rights, I thought it essential as well to look at the system’s history and the Canadian government’s record of managing unemployment.

As often happens in social law, consideration of these broader aspects is essential for a detailed understanding of the legislative story.

My viewpoint has been clearly stated. This book follows from a number of years of legal practice defending the rights of the unemployed in the company of jobless defence movements and union organizations. Obviously, this professional experience has influenced the book and been a major source of much of the thinking embodied in it. So this work is an extension of a professional commitment. My thinking highlights the jobless perspective by assuming that the primary aim of any UI scheme is to compensate workers affected by the occurrence of the risk of unemployment. I weigh the various aspects of the system's history from the standpoint most favourable to the rights of the unemployed. I take a critical look at the system, and more specifically at its legal aspects, to determine whether the Canadian version of UI is the one most likely to afford workers effective protection against unemployment.

This book also includes a number of references to works in disciplines other than law. I have not attempted to write in the guise of a historian, political scientist, or economist but simply to use these materials for the light that they can shed on my review of the legal rules. This approach strikes me as essential in terms of the right to social security, which is so closely tied to political struggles, economic doctrines, and the evolution of societies.

This book has ten chapters. The first two deal with UI's conceptual aspects and their application when the first government system emerged in Britain. The British reference is especially useful in that the Canadian act of 1940 was basically copied from its British precursor.

Chapters 3 to 7 focus on the process of creating the Canadian system and outline its development to 1988. The period after the system was introduced, generally favourable to the interests of the jobless, was marked by recognition of their rights. My review here deals mainly with the scope and meaning of legislative amendments, but the trend in the jurisprudence, also generally favourable to jobless rights, is also noted.

Chapters 8 to 10 offer a review of the system's evolution from 1989 to 2000. This period was typified by successive waves of counterreforms that profoundly altered the philosophy of the system. My review attempts to highlight the legislative substance of the various amendments to the system as well as the motives of the lawmaker. Jurisprudential developments in this period were not impervious to these motives: on certain significant issues, I find a tendency to break with the interpretation established at the close of the preceding period. The signs of this break are put back into their conjunctural context. Finally, I thought it appropriate to include a brief epilogue reviewing Bill C-2, which was tabled in the House of Commons in February 2001. Following from the counterreforms of the 1990s, this bill passed without much change.

We need to be mindful of a few comments about legislation and jurisprudence. First, I have given more space to the legislative than the jurisprudential process in appraising the rights of the jobless. In fact, the various legislative changes have had much more decisive impacts on the actual status of jobless rights than interpretations given to the act in appeal instances or the courts. I have therefore elected to review the jurisprudence in two separate periods that basically correspond to the episodes of growth and shrinkage in the system. This approach helps to convey a clearer idea of certain legislative amendments that started occurring in 1990 and were closely related to earlier jurisprudence.

Second, in view of the breadth and wealth of detail in the legislative and regulatory texts on UI, I have elected to make the provisions on voluntary unemployment and labour disputes my primary target. I made this choice because of the large number of appeals that these rules have always generated and because they reflect the power relationships and ideological movements in society and, ultimately, the question of responsibility for unemployment in a free-market system. I also devote a lot of attention to evolving ideas and legal texts on vocational training seen as a component of unemployment insurance, especially because of the importance that this component has assumed in the system's development from the 1990s on.

And third, I stress that the book reflects the state of unemployment insurance legislation as of 30 September 2002.

I could not conclude this introduction without thanking Professor Pierre Issalys from the Faculty of Law, Laval University, a recognized expert in social security law. Our many discussions on the subject's legal aspects and, more generally, the role of social security in our society have greatly enriched this book. Also, my colleague in the law, Jean-Guy Ouellet. His advice on various legal and political aspects of the work has been very useful, especially as it was grounded in more than fifteen years of experience in defending the rights of the jobless.

But above all, thanks to my companion, Brigitte Lahellec, who has given me her unceasing support and encouragement during this lengthy project.