CHAPTER EIGHT: EMPLOYMENT INSURANCE

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I. INTRODUCTION

A. Keeping Up to Date on Changes to Employment Insurance

When working with an EI claim, always ensure that you are working with the most updated information. Consult Service Canada's Employment Insurance website before proceeding.

1. Electronic Developments and EI

The internet can now be used at many different stages of the EI process. An applicant can apply for EI benefits online. In addition, using the "My EI information on-line" an applicant is able to make changes to their personal information, view claim information, and review previous EI claims. The "Internet Reporting Service" allows a claimant to submit their EI reports online; these records are required to demonstrate entitlement.

An employer can submit Records of Employment online.

The "Epass" system creates an easier way to communicate with government services via the internet.

B. General Information

Employment Insurance (EI) is a contributory federal social insurance scheme that pays benefits to eligible workers who lose their jobs or who cannot work due to illness, pregnancy or due to responsibilities for a newborn or newly-adopted child, an ill family member, or person who considers the claimant to be like a family member. Service Canada and the Canada Employment Insurance Commission (the Commission) administer and act as the registry for the system.

Under the *Employment Insurance Act*, RSC 1996, c. 23 [*EI Act*], both employees and employers are required to contribute to the payment of premiums. A claimant is not automatically entitled to benefits for loss of employment because he or she paid premiums. Certain criteria (see **Section IV: Qualifying for EI**) must be met before benefits are payable.

The EI regime is a multi-tiered system. The list immediately below shows the progression of decisions and appeals under the regime:

a) decision made by an agent of the Commission affecting the Appellant, Claimant, employer, and the Commission itself;

b) party applies to the Commission for Reconsideration of the Commission's decision;

c) party appeals to the General Division of the Employment Insurance section of the SST (Social Security Tribunal);

d) party appeals decision of the General Division to the Appeal Division of Employment Insurance section of the SST;

e) claimant applies to Federal Court of Appeal to reverse decision of SST;

f) claimant appeals court's decision to the Supreme Court of Canada. (Cases will usually only proceed to the Supreme Court of Canada if the disputed issue is of national significance).

A separate appeal structure exists for cases concerning the insurability of employment. This structure is set out in **section XII. A. 3 Insurability Decisions**.

C. What LSLAP Can Do

The following is a summary of what LSLAP students can help with:

- Assist a client with an initial application;
- Assist a client with an application for training benefits or write-off of debt;
- Appeal any unfavourable decision by the Commission:
    a) write a Notice of Appeal;
    b) prepare for an appeal to the General Division;
    c) appear at hearing before the General Division;
- Assist a client with an appeal to the Minister of National Revenue;
- Appeal unfavourable decisions by the General Division to the Appeal Division; and
- Help clients cut off from EI benefits write a letter of complaint to their MP.

D. What LSLAP Cannot Do

LSLAP cannot represent clients seeking judicial review of decisions made by Umpires, because these are argued in the Federal Court of Appeal (and then, in the event of a further appeal, the Supreme Court of Canada). LSLAP students cannot appear before these courts. Clients can be referred to the Community Legal Assistance Society (CLAS), as qualified legal counsel will be required.

E. Deadlines for Appeals

- For Requests for Reconsideration: **30 days**
- For appeals to the General Division: **30 days** from the date the Reconsideration decision was communicated to the applicant
- For appeals to the Appeal Division: **30 days** from the time the decision was communicated to the applicant or within such further time as granted.
- For judicial review to the Federal Court of Appeal: **30 days** from the date of the ruling.

For rulings that must be decided by the CRA:

- For requests for rulings to the Canada Revenue Agency (CRA): Before **June 30th** in the year following the year to which the question relates. Note that the CRA rules on insurability issues.
- For appeals to the Minister of National Revenue from a CRA decision: **90 days** from the date of the ruling.

II. GOVERNING LEGISLATION, REGULATIONS, POLICY GUIDELINES, AND RESOURCES

A. Employment Insurance Act, ***1996, c 23 and Regulations***

Ensure that you are working with the most recent version of the Act. The legislation is published in the *CCH Labour Law Reporter* and the *Employment Insurance Regulations*, SOR/96-332 P.C. 1996-1056 28 June, 1996 (*EI Regulations*) are updated by publications in the Canada Gazette. The legislation can also be found online at: http://laws-lois.justice.gc.ca/eng/index.html

The SST website also provides a list of common issues and their reference to relevant legislation:

1. Earnings and allocation of earnings (*Employment Insurance Regulations* - sections 35 and 36)
2. Hours of insurable employment (*Employment Insurance Act* - section 7)
3. Interruption of earnings (*Employment Insurance Act* - section 7; *Employment Insurance Regulations* - section 14)
4. Late initial claims/antedate (*Employment Insurance Act* - subsection 10(4))
5. Maximum number of weeks of benefits (*Employment Insurance Act* - section 12)
6. Misconduct (*Employment Insurance Act* - sections 29 and 30)
7. Outside of Canada (*Employment Insurance Act* - section 37; *Employment Insurance Regulations* - section 55)
8. Penalties (*Employment Insurance Act* - sections 38 and 39)
9. Rate of weekly benefits (*Employment Insurance Act* - section 14; *Employment Insurance Regulations* - section 23)
10. Violations (*Employment Insurance Act* - section 7.1)
11. Voluntarily leaving (*Employment Insurance Act* - sections 29 and 30)
12. Week of unemployment (*Employment Insurance Act* - section 11; *Employment Insurance Regulations* - sections 29 to 31)
13. Availability for work (*Employment Insurance Act* - section 18; *Employment Insurance Regulations* - sections 9.001-9.004)

B. ***Carswell's Annotated Employment Insurance Statutes***

Lavender, T.S., Carswell (20010-). A copy is on reserve at the UBC Law Library.

Updated every year, Carswell's Annotated Employment Insurance Statutes is an excellent tool for detailed legal research. It contains the entire *EI Act* and Regulations, with extensive annotations after each provision describing the history of the section, and the decisions interpreting and applying it.

C. ***EI Jurisprudence Online***

The EI homepage at http://www.ae-ei.gc.ca/eng/home.shtml has links to legislation, a jurisprudence library, and to the SST and Umpires sections. The breadth and organization of this site makes it a good place for students to start, though students should be aware that that certain sections may be dated or not have the information most useful to building a good case for a claimant. The Jurisprudence Library has decisions by the Umpires, the Federal Court of Appeal and the Supreme Court of Canada. These decisions can be searched via a search engine located at: www.ei-ae.gc.ca/en/library/search.shtml.

The site also has sections for the Umpires and the SST. The Umpires section has a Judicial Interpretations section. These lead respectively to useful summaries of the law on key issues and to a synopsis of the leading decisions by the Federal Court. These summaries don't always state the law in the most favourable way for the claimants and students should also be aware that some very claimant friendly decisions, such as the very recent Burke decision on antedating, are not listed.

A very useful resource can be found in the "Employment Insurance Appeal Decisions Favourable to Workers" decisions database. The database makes available a collection of Employment Insurance jurisprudence where decisions were favourable to workers. Students should be aware, however, that this section has not been updated to reflect some recent rulings favourable to workers. At the time of writing, this section was last updated in September 2012. More information and a link to the database can be found at:

http://www.ae-ei.gc.ca/eng/board/favourable_jurisprudence/favourable_decisions_toc.shtml

NOTE:

According to the SST website, the SST is not legally bound to follow its own decisions or those of the "legacy tribunals" (Board of Referees, Umpires). A prior decision may be at most persuasive, especially where the facts are similar. The tribunal must however follow rulings of the Federal Court, Court of Appeal, and the Supreme Court of Canada.

D. Tax Court Decisions

There is a separate site for Tax Court decisions (on insurability issues, etc.). The search page is located at: http://decision.tcc-cci.gc.ca/en/index.html. Searches can be limited to UI and EI decisions.

E. Digest of Benefit Entitlement Principles

This two-volume policy manual is published by the Commission and is amended periodically. It is a useful research tool and reference. It contains a summary of general law and policy for each subject matter, with references to the relevant sections of the *EI Act* and Regulations and refers to many decisions of the Umpires and Federal Court. However, it is written by the Commission, and many chapters do not accurately describe the cases. It must therefore be used with caution, and **not** as the sole reference. However, the online version is the most reliable source; few printed versions are fully up to date. The manual can be found online at:

www.servicecanada.gc.ca/eng/ei/digest/table_of_contents.shtml.

F. Human Resources and Development Canada

Human Resources and Development Canada maintains an extensive web site with many tools, which is located at www.hrsdc.gc.ca/eng/employment/ei/index.shtml.

For general information regarding EI claims contact:

Vancouver Service Canada Centre
1263 West Broadway
Vancouver, BC
Telephone: (604) 682-7885 (Job Order Hotline)
Toll-free: 1-800-O Canada or 1-800-206-7218

Also see Employment Centres listed in the Government of Canada blue pages in the phone book.

III. QUALIFYING FOR EI

A. Insurable Employment

Sections 5(1) and (2) of the *EI Act* set out what is and what is not insurable employment. Please note that s 5(2) outlines specific instances of employment that are not insurable (i.e. employment in Canada by an international organization, by a foreign government, or by Her Majesty in right of a province). When in doubt, the reader should consult s 5 of the *EI Act*, and s 3 of the *EI Regulations*.

Generally, if the employer has deducted EI premiums, then the employment is insurable. However, it is the nature of the employment, and not the premiums paid, that is determinative. At the time of writing, this is being challenged before an umpire.

Disputes concerning s 90(1) of the *EI Act* including:

a) whether employment is insurable;

b) how long employment lasts, including the dates on which it begins or ends;

c) the amount of any insurable earnings;

d) how many hours an insured person has had insurable employment;

e) whether a premium is payable;

f) the amount of a premium payable;

g) who is the employer of an insured person;

h) whether employers are associated employers; or

i) what amount shall be refunded under s 96(4) - (10);

are determined **solely** by the Canada Revenue Agency (CRA). Appeals of decisions by the CRA are made first to the Minister of National Revenue (within 90 days of being informed of the decision), and then to the Tax Court of Canada (*EI Act*, s 103). Tax Court decisions can be appealed to the Federal Court of Appeal under s 27 of the *Federal Court Act*, RSC 1985, c. F-7.

Workers with insurable earnings below $2,000 will have their premiums refunded.

B. Qualifying Period

1. General

To qualify for EI benefits, a claimant must have paid premiums for a specific period of time. This period is determined by several factors that are explained below. The premium period is calculated based on **hours** of insurable employment. The required number of hours of insurable employment must be accumulated during the claimant's "qualifying period". The definition of qualifying period is set out in s 8(1) of the *EI Act*. This is usually the shorter of either:

a) the 52 weeks immediately before the benefit period commences under s 10(1); or

b) the period between the beginning of a prior claim and the beginning of the present one.

2. Extensions of the Qualifying Period

The qualifying period may be extended (i.e. the Commission will look further back in time) up to a maximum of 104 weeks, as set out in ss 8(2)(a)-(d). It may be extended if the claimant can prove that he or she was unable to work during any of the weeks of the qualifying period because of:

a) illness, injury, quarantine, or pregnancy;

b) attendance in a course which he or she was referred to by HRDC; or

c) the claimant has left the job due to hazardous work or working conditions. This covers situations where the claimant has ceased to work because to continue would have entailed danger to the worker, the worker's unborn child, or a child whom the worker is breast-feeding.

NOTE: The extension under (c) is limited to situations where a worker would receive payments under provincial law. Many provinces, including BC, do not yet provide for such payments. Consequently, BC workers cannot use (c) as a ground to extend the qualifying period.

Also, since June 30th 2013, individuals who are incarcerated and found guilty of an offence for which they are being detained will no longer be able to have their Employment Insurance qualifying and/or benefit periods extended beyond the usual 52 weeks for each week they are confined in a jail, penitentiary or similar institution.

Section 8(3) allows the Commission to extend the qualifying period for persons who were receiving compensation arising from the "complete severance" of a previous employment relationship during the benefit period (e.g. severance pay paid following dismissal).

The absolute **maximum extension** of a qualifying period is **104 weeks** (two years). After 104 weeks, no extensions can be made to the claimant's qualifying period.

NOTE: The qualifying period can never be extended to include a period of time prior to the filing of a previous claim. In other words, the same insurable hours can never be used for two separate claims.

C. Minimum Hours of Employment Required

1. Types of Claimants (As Defined By the *EI Act*)

Claimants are classified differently depending on their prior "attachment" to the labour market. Major attachment claimants will be able to receive special benefits (See **Section VI: Types of Benefits**). The government also classifies claimants as longer tenured workers, occasional claimants, and frequent claimants, each of whom have different rights to regarding what jobs they must accept. See section VII(B) of this chapter for details.

a) Major Attachment Claimants

A major attachment claimant is defined in s 6(1) as a claimant who qualifies to receive benefits and who has 600 or more hours of insurable employment in their qualifying period. The required Insurable Employment hours is a flat rate and not determined by any tables.

Major attachment claimants are eligible for all types of "special" benefits (e.g. pregnancy, parental, and sickness).

b) Minor Attachment Claimants

A minor attachment claimant is defined in s 6(1) as a claimant who qualifies to receive benefits and has fewer than 600 hours of insurable employment in their qualifying period. The required hours of insurable employment are set out in the ***s. 7 Table***, below.

Minor attachment claimants receive fewer weeks of benefits and cannot receive most special benefits.

c) New Entrants or Re-entrants

A new entrant, or re-entrant, is defined in s 7 as a person who, in the last 52 weeks before the qualifying period, had less than 490 hours of the following:

a) hours of insurable employment;

b) hours for which benefits have been paid or were payable to the person calculated on the basis of 35 hours for each week of benefits;

c) prescribed hours that relate to employment in the labour force; or

d) hours comprised of any combination of those hours.

A new entrant, or re-entrant requires 910 hours of insurable employment in their qualifying period, regardless of the rate of unemployment in their region, which qualifies them to be major attachment claimants.

NOTE: Under subsection 4.1 of s 7 of the *EI Act*, parents just returning to the workforce who received one or more weeks of special benefits (see **Section VI: Types of Benefits**) in the previous five years are not classified as new entrants or re-entrants. They can qualify for benefits with the same number of hours as regular attached workers.

2. Youth and EI

As long as a minor is employed in insurable employment and is paying into the plan, a minor is eligible in the same manner as an adult.

3. Hours Required

All new entrant or re-entrant claimants must accumulate **910 hours** of insurable employment during their qualifying period, which entitles them to be major attachment claimants. Regional tables of unemployment are not relevant to the 910 hour requirement.

For (non re-entrant) major, or minor attachment claimants to receive the regular benefits, they must meet their ***s. 7 Table*** requirements during the qualifying period.

The number of hours required to qualify for benefits is based on the unemployment rate of the region in which the claimant lives. HRDC relies on Statistics Canada's Labour Force Survey and its "seasonally adjusted average unemployment rate". Note that several features of the Labour Force survey make the official unemployment rate appear much lower than it

actually is. The current rate of unemployment for each region can be found at: www.hrsdc.gc.ca/eng/employment/ei/economic_regions/index.shtml.

EI Act, s. 7 Table

Regional Rate Of Unemployment	Required Number of Hours of Insurable Employment in the Qualifying Period
6.0% and under	700
over 6.0% to 7.0%	665
over 7.0% to 8.0%	630
over 8.0% to 9.0%	595
over 9.0% to 10.0%	560
over 10.0% to 11.0%	525
over 11.0% to 12.0%	490
over 12.0% to 13.0%	455
over 13.0%	420

For EI purposes, British Columbia is divided into six regions:

a) Southern Interior consisting of Thompson-Nicola, Columbia-Shuswap, Okanagan and Kootenays Regional Districts;

b) Southern Coastal British Columbia, consisting of Comox-Strathcona, Powell River, Squamish-Lillooet, Fraser Valley, Sunshine Coast, Nanaimo, Alberni-Clayoquot, Cowichan Valley and Capital Regional Districts;

c) Abbotsford, consisting of Mission and Abbotsford;

d) Vancouver, consisting of Greater Vancouver, West Vancouver, North Vancouver, Richmond, Surrey, Delta, Burnaby, Langley, Maple Ridge, Coquitlam, Pitt Meadows and New Westminster;

e) Victoria, including Saanich, Metchosin, Oak Bay, Sooke and Esquimalt; and

f) Northern British Columbia.

For more details on the regions, refer to the *EI Regulations*, Schedule I, s 7. The monthly seasonally adjusted regional rate is available from Statistics Canada online at www.statcan.gc.ca/pub/71-001-x/2009005/t018-eng.htm.

NOTE: A claimant who does not qualify at the time of his or her application may subsequently qualify if the regional unemployment rate should rise into a higher category. However, the converse does not apply. That is, once a claimant meets the requirements, he or she will not be cut off if the rate subsequently goes down.

NOTE: The number of hours that an insured person (other than a new or re-entrant to the labour force) needs under s 7 to qualify for benefits is increased to the number shown under s 7.1(1) if one or more violations has occurred in the 260 week period prior to the initial claim (see **Section IX: Keeping Out of Trouble**).

D. Interruption of Earnings

To establish a claim, the worker must have an "interruption of earnings." An interruption of earnings is defined as:

Seven or more consecutive days during which the employee performs no work and for which the employee will **receive no earnings.** (*EI Regulations,* s.14)

Layoff, the end of a contract, dismissal, voluntary departure, maternity, illness, adoption, and retirement can all be causes of an interruption of earnings. It must have occurred in the past 52 weeks for the claimant to be eligible for benefits.

A substantial reduction in the hours of work (for example, from full time to one day a week or less) does **not** meet this definition. Consequently, a worker whose hours are drastically reduced cannot establish a claim unless he or she has a full week of unemployment. The only exception is for special benefits: sickness, quarantine, pregnancy, and parental leave (see s 14(2) of the *EI Regulations*). However, if there is an interruption of earnings from one of two part-time jobs with the same employer, then the claimant could qualify.

1. Weeks of Unemployment

"Week of unemployment" is defined in s 11(1) of the *EI Act*. This definition is important for the purposes of claiming benefits. The following subsections of s 11 describe situations which do *not* amount to an interruption of earnings as defined in s 14.

- Subsection (2): a week during which a claimant's contract of service continues and in respect of which he or she receives, or will receive, usual remuneration for a full working week, does not constitute a week of unemployment, even if the claimant actually performs no work during that time.

- Subsection (3): where an employee agrees with the employer to take a period of leave from employment, but continues to be an employee during that period, and receives remuneration that was set aside during a period of work (i.e. vacation pay), any week or part of a week during such a period of leave is not a week of unemployment, regardless of when the remuneration was paid.

- Subsection (4): where an insured person regularly works a greater number of hours, days, or shifts than are normally worked by persons in full time employment, and pursuant to an agreement to which the employer is therefore entitled to a period of leave, the weeks falling in the period of leave are not considered to be weeks of unemployment.

E. Record of Employment

An employer must provide an employee with a Record of Employment (a ROE) within five days of lay-off or other termination; many employers do not follow the rules and take longer. The ROE contains information important to the EI claim. It sets out the first and last dates of work, the total hours worked and the total earnings, which are used to determine the amount of benefits payable and it also sets out the reason for separation. If it says that the claimant quit or was fired, the Commission must investigate the reasons. Depending on the conclusions of the Commission, the claimant may be disqualified from all regular benefits (see **Section V.D: Effect of Earnings**).

NOTE: It is important that claimants who have worked more than one job during the qualifying period retain the ROEs from each employer.

The employer can now file an ROE online; however, they still must give the worker a copy. If the ROE has not been filed online, the worker should file it with the Commission as soon as possible after applying for benefits. The "ROE Web" program enables employers to complete Records of Employment online. See www.servicecanada.gc.ca/eng/ei/employers/roe_web.shtml.

If the claimant disagrees with statements in the ROE, he or she can ask the employer to correct them. The claimant should also bring the errors to the Commission's attention at the time of application.

F. Filing an Application

Applications should be filed during the first full week of unemployment (see **Appendix A: Checklist for Initial Application for EI Applications**). However, as a matter of policy, applications will be automatically "antedated" (see **Section IV.B: Antedating**) for up to four weeks. If the claimant delays longer than this, he or she will lose benefits unless he or she is able to show "good cause" for the delay. Because of this, if a claimant cannot get a ROE immediately, he or she should go to the nearest Canada Employment Insurance Commission office and complete an application. It is not necessary to wait for a ROE if the employer fails to provide one. The Commission will contact the employer if the record is not completed on time. If necessary, a claimant may prove his or her employment history and insurable earnings by filing an application supported by pay slips and cheque stubs, etc.

NOTE: Applications may be filed online through the HRDC web site. Applicants filing online must still submit their ROE(s) by mail or in person. If the claimant's ROE has a "W" or "S" serial number, his or her employer has provided ROE electronically to the local office and the claimant is not required to submit the paper copy. Claimants may review and edit their claim information online by using the "My EI Information on-line" service provided by HRDC.

For general information about filing an application and about the EI system visit: www.hrsdc.gc.ca/en/ei/menu/eihome.shtml.

IV. THE BENEFIT PERIOD

A. Introduction

When a claim is established, the claimant's "benefit period" will begin. Under s 10(1) of the *EI Act*, the benefit period begins on the Sunday at the beginning of the week in which the interruption of earnings occurs, or on the Sunday of the week in which the initial claim for benefit is made, whichever is later, though this is subject to antedating. Benefits will only be paid during the benefit period.

B. Antedating

If an application for EI benefits was not filed within the first four weeks after the claimant's last day of work, under s 10(4) he or she can ask that the claim be antedated back to the first date when it could have been filed. The claimant must establish that good cause existed for the delay in filing. "Good cause" must be demonstrated for each day until the date of application was actually made. If the claim is filed within the first four weeks, it is automatically antedated to the first date of eligibility.

What is "Good Cause"? Good cause has typically been interpreted narrowly. In one case, the applicant was in the hospital and the Commission denied his application for antedating on the grounds that his wife should have made the claim on his behalf. Simple ignorance of the requirements of the *EI Act* has not been considered good cause either, though reasonable reliance on bad advice from the employer, union, a legal advisor or the Commission itself usually meets the requirements.

Recently some Boards of Referees have started to use a looser definition of good cause. In Attorney General v. Burke, a man asked for his application to be back dated because he had expected to be rehired and hence did not apply for EI until after the regular deadline. The Board of Referees decided that the standard for good cause was whether any reasonable person would have done the same, and found the man's case met this standard. This ruling survived appeals to both an umpire and the Federal Court of Appeal, as the umpire refused to interfere with the board's decision on the basis that

it was reasonable and the Federal Court of Appeal found the umpire's refusal to interfere was itself reasonable. This case may open the door to similar rulings by other Boards.

C. *Income That is Treated as Earnings*

Section 35(2) of the *EI Regulations* defines earnings for the purpose of determining whether an interruption of earnings has occurred and all other purposes related to payment of benefits.

Income that counts as "earnings" and may delay the start of a claim includes, but is not limited to:

a) severance pay;

b) retirement payments and retirement leave credits or payments in lieu;

c) most bonuses and gratuities;

d) wages in lieu of notice; and

e) vacation pay.

Except for (c) – bonuses and gratuities – the earnings above do not prevent interruptions. The claimant must apply before the monies stop being allocated.

Income regarded as earnings is "allocated" pursuant to s 36 of the *EI Regulations*. This is usually done at the claimant's regular weekly rate of pay. Such allocation will delay the start of benefits by the number of weeks the earnings can be allocated to. For example, if a person normally earns $500 per week, and receives $1000 severance pay, their claim will be delayed for 2 weeks after they stop work. This is because it will notionally take two weeks to "use up" the $1000, as the claimant usually makes this amount in two weeks.

Though the claimant will need to wait until the money is used up before being eligible to receive benefits, he or she **must still apply for EI immediately**. The benefit period will be extended to make up for the weeks it takes to use up these earnings.

D. *Income That Is Not Treated As Earnings*

Section 35(7) exempts certain sources of income from being regarded as earnings.

Recent cases suggest that in certain circumstances some earnings **may not** delay the start of an EI claim. In *Attorney General of Canada v Doreen Myers*, 2006 FCA 57 the court found that the claimant's vacation pay did not delay the start of a claim because it was not a payment made by reason of a separation, thus allowing benefits to be received earlier, and possibly at a higher rate.

The case of *Attorney General of Canada v Alexander Hamilton*, 2007 FCA 104 suggests that a money payment that is made in order to compensate an employee for not pursing remedies for wrongful dismissal is not earnings and will therefore not delay the start of benefits.

See also the case of *Attorney General of Canada v Bielich*, 2005 FCA 363. In this case the court allowed a $24,000 payment to be exempted from the claimant's allocation of earnings because the purpose of the payment was to compensate the claimant for giving up his right to seek reinstatement, not to compensate for lost pay.

Income that **does not** count as earnings and will **not** delay the start of the claim includes:

a) disability pensions; and

b) permanent settlement Workers' Compensation payments.

NOTE: A retirement pension will not delay the start of a claim. However, it does constitute earnings, and will reduce the benefits payable until the pensioner has worked long enough to re-qualify for EI **after** the pension commences. From that point on, it is not regarded as income.

E. The Waiting Period

Before receiving any EI benefits, a claimant must serve a two-week "waiting period" during which he or she is unemployed and otherwise eligible for benefits. These two weeks constitute the first two weeks of the benefit period.

This waiting period also applies to pregnancy, parental, and sickness claims. If a claimant works during the waiting period, 100 percent of his or her earnings will be deducted from the first three (and no more than three) weekly benefit cheques.

F. Length of Benefit Period

The benefit period for regular EI benefits is 52 weeks. However, this period can sometimes be extended to more than 52 weeks, like with special benefits. The criteria for this is set out in s 10(10) of the *EI Act*. The benefit period can be extended when a claimant proves that for any week during that benefit period the claimant was not entitled to benefit by reason of:

a) receiving earnings paid by reason of the complete severance of the relationship between the claimant and the claimant's former employer (i.e. "using up" severance pay, vacation pay, etc.);

b) receiving Workers' Compensation payments for a total disability; or

c) receiving payments under a provincial law on the basis of having ceased to work because continuing to work would have entailed danger to the claimant, the claimant's unborn child, or a child the claimant is breast-feeding.

The benefit period can be further extended under s 10(11) where a claimant can prove that for any week during the extension period, he or she was not entitled to benefit, again for any reason stated in s 10(10).

The length of any benefit period extended for these reasons cannot exceed two years or 104 weeks (*EI Act*, s 10(12)).

A benefit period can also be extended if the **Commission** refers the claimant to a training course under s 25. In that case, the benefit period can be extended to six weeks after the course is over, to a maximum of three years or 156 weeks.

G. Termination of Benefit Period

While a benefit period is normally 52 weeks long, the maximum number of weeks for which benefits may be payable will vary in each case depending upon the individual claimant's entitlement (see **Section VI: Types of Benefits**). Once a benefit period is established, it continues to run notwithstanding that the claimant may have returned to work (though full benefits will not actually be paid in this case), unless the benefit period is terminated.

Section 10(8) states that a benefit period terminates when:

1. no further benefits are payable to the claimant in his or her benefit period;

2. the benefit period would otherwise end under this section; and

3. the claimant:

   a) asks that the benefit period end;

   b) makes a new initial claim for benefit; and

   c) qualifies to receive benefit under this part of the *EI Act*.

NOTE: The way benefit rates are calculated under the *EI Act* can make the timing of the decision to end one claim and start a new one crucial. Therefore, it may be better for a claimant to terminate an existing benefit period prior to its expiration and establish a new one, in order to use working periods during the benefit period that may improve his or her benefit rate or attachment.

V. QUANTIFYING BENEFITS

A. Benefit Rate

The benefit rate is set out in s 14 of the *EI Act*. It is:

- 55% of the worker's average weekly insurable earnings, including the weeks of only part-time employment; and

- If (1) the claimant or the spouse of the claimant has dependants and (2) the benefit rate of 55 percent amounts to less than $225 a week or the family income is less than $25,921, then the claimant may also be entitled to a family supplement.

In 2014, the current ceiling for the maximum weekly benefits is $514 per week Always check Service Canada's "Employment Insurance Regular Benefits" webpage to ensure this information is up-to-date at http://www.servicecanada.gc.ca/eng/sc/ei/sew/weekly_benefits.shtml. The maximum yearly insurable amount is currently 39,000, according to s4 of the *EI Act*.

B. Weekly Insurable Earnings

A claimant's weekly insurable earnings are their insurable earnings in the calculation period divided by the number of weeks in the calculation period.

1. The Calculation Period

The calculation period is the number of weeks, consecutive or not, determined based on the applicable regional rate of unemployment as below, in which the claimant received the highest insurable earnings.

Regional Rate of Unemployment	Number of Weeks
not more than 6%	22
more than 6% but not more than 7%	21
more than 7% but not more than 8%	20
more than 8% but not more than 9%	19
more than 9% but not more than 10%	18
more than 10% but not more than 11%	17
more than 11% but not more than 12%	16

Regional Rate of Unemployment	Number of Weeks
more than 12% but not more than 13%	15
more than 13%	14

2. Insurable Earnings

Insurable earnings include:

- Insurable earnings from insurable employment including employment that has not ended
- Insurable earnings paid or payable to the claimant during the qualifying period by reason of lay-off or separation from employment, unless the lay-off or separation from employment occurred during the qualifying period

C. Effect of Earnings

The benefit payable to a claimant may be reduced if the claimant has "earnings" during the benefit period. It may be possible both to work part-time and receive EI benefits at the same time, but all income must be reported on the report cards.

The Employment Insurance (EI) Working While on Claim pilot project is a way to help claimants stay connected with the labour market. The three-year pilot project began August 5, 2012 and runs until August 1, 2015. It applies to claimants earning money while collecting any of the following types of EI benefits:

- regular benefits
- fishing benefits
- parental benefits
- compassionate care benefits

As soon as a claimant completes the two-week EI waiting period, the pilot project will automatically apply to any money the claimant earns while the claimant is collecting EI benefits.

How it works
Claimants keep 50 cents of their EI benefits for every dollar earned, up to 90% of the weekly insurable earnings used to calculate the claimant's EI benefit amount. This 90% amount is called the earnings threshold. If the claimant earns any money above this threshold, it is deducted dollar for dollar from the claimant's benefits.

Example from Service Canada Website:
Christine's weekly insurable earnings are $800. Her earnings threshold would therefore be $720 ($800 x .90 = $720). If Christine is collecting EI benefits based on weekly insurable earnings of $800, the equivalent of 50% would be deduced from her earnings and EI benefits, until those earnings reach $720 (the earnings threshold). Any money Christine earns in addition to the $720 (the earnings threshold) will be deducted from her EI benefits dollar for dollar.

Important reminders
If a claimant is receiving EI sickness benefits or EI maternity benefits, this pilot project does not apply. Any earnings the claimant has will continue to be deducted dollar for dollar from benefits.

If the claimant works a full work week, the rules do not change – the claimant will not receive any EI benefits, regardless of the amount the claimant earns.

The table below compares the previous method (ended on August 4, 2012) of calculating EI payments with the pilot-project method:

Comparison table of the previous pilot project and the new pilot project

Previous method		New method	
Weekly insurable earnings	$600	Weekly insurable earnings	$600
EI weekly benefit amount (55% of $600)	$330	EI weekly benefit amount (55% of $600)	$330
Gross earnings declared during a week while on EI benefits	$450	Gross earnings declared during a week while on EI benefits	$450
Earnings amount (40% of the benefit amount: $330 x .40 = $132)	$132	**Earnings amount (50% of gross earnings: $450 x .50 = $225)**	$225
Net EI benefit payment for that week ($330 + $132 – $450 = $12)	$12	Net EI benefit payment for that week ($330 + $225 – $450 = $105)	$105
Combined earnings and EI benefits ($450 + $12 = $462)	**$462**	Combined earnings and EI benefits ($450 + $105 = $555)	**$555**

What if the claimant works or lives outside Canada?
If the claimant is living in the United States and works in Canada, or if the claimant crossed the Canada–United States border between the claimant's residence and workplace and the claimant is receiving EI benefits, this pilot project will apply. Visit the Employment Insurance and Workers and/or Residents outside Canada Web page for more information.

Choice between old and new formula
According to the Parliament of Canada website, it is possible for a claimant to choose between either the previous or current formula (40% vs 50%) for calculating benefits, in case one is more advantageous to the claimant than the other. This cannot be done once the benefit period has commenced:

http://www.parl.gc.ca/Content/LOP/ResearchPublications/2013-03-e.htm#a5

1. Earnings During the Waiting Period

All earnings during the waiting period are deducted dollar for dollar from the benefits payable in respect of the first three weeks for which benefits are otherwise payable. There is thus little incentive to work during the waiting period.

2. Earning of Sick Claimants

In contrast to regular claimants, all "earnings" are deducted, dollar for dollar, for claimants receiving sickness benefits – whether they are earned during the waiting period or afterward. (s 21(3)).

3. Earnings of Parental Claimants

Claimants receiving parental benefits are entitled to claim an exemption of earnings (See **Section V.C: Effect of Earnings**)

4. Earnings of Sick or Pregnant Claimants under Supplemental Employment Benefit Plans

Amounts paid to the claimant during periods of illness or pregnancy under an approved Supplemental Employment Benefit plan will not be deducted from EI benefits. These plans allow the employer to "top up" the regular EI benefits without reductions.

Supplemental Employment Benefit plans are designed to help employers retain and provide for employees in seasonal industries, or industries that experience hiring and layoff "surges". These plans are authorized under s 37 of the EI Regulations. Individual Supplemental Employment Benefit plans must be approved by the Commission, which ensures that they meet the requirements of s 37(2).

An employee normally benefits from these plans while drawing EI benefits. If the worker is ineligible for EI, he or she may still qualify for Supplemental Employment Benefits that do not count as earnings for the purpose of determining waiting periods.

VI. TYPES OF BENEFITS

A. Regular Benefits

Starting April 7, 2013, EI benefits are calculated using your highest weeks of earnings over the qualifying period (generally 52 weeks): http://www.servicecanada.gc.ca/eng/ei/vbw/index.shtml. (Applies to both Regular (A) and Special Benefits (B)).

Regular EI benefits are payable during the benefit period to a claimant who:

- has had the requisite number of hours of insurable earnings during the qualifying period;
- has had an interruption of earnings from employment;
- is capable of and available for work, has made "reasonable and customary efforts" ; and
- is unable to find suitable employment.

The maximum number of weeks of regular benefits available to a claimant varies according to the claimant's hours of insurable employment in the qualifying period, and the regional rate of unemployment. See Schedule I, s 12(2) of the *EI Act*.

B. Special Benefits

This category includes sickness, compassionate care, pregnancy, and parental benefits (s 12(3)). More than one type of special benefit can be claimed within one benefit period. Similarly, special and regular benefits claims can be combined. However, s 12(6) sets out the maximum for such a combination. If the combination of regular and special benefits adds up to 50 or more weeks of benefits, the total number of weeks that a claimant is entitled to shall not exceed the number of weeks of regular benefits that he or she is entitled to, or the maximum benefit entitlement, whichever is greater. If the combination adds up to 50 or fewer weeks, the claimant may receive more than the number of weeks he or she is entitled to under special benefits, but not more than 50 weeks in total.

A claimant can receive up to a maximum of 71 weeks of combined sickness, maternity, parental, and compassionate care benefits, to extend the benefit period beyond the usual 52 weeks while these benefits are being received. The amendments that set out the conditions for these extensions require that claimants have:

- not been paid regular benefits;
- been paid some combination of sickness, maternity, parental, and compassionate care benefits; and
- been paid less than the maximum number of weeks for each type of special benefit (15 weeks for sickness benefits, and 35 weeks for parental benefits).

C. Sickness Benefits

1. Entitlement

To qualify for sickness benefits, the claimant must be able to prove that he or she is unable to work due to illness, injury, or quarantine, which normally requires that the claimant obtain a medical certificate. The illness, injury, or quarantine must be that of the claimant personally, not a child or other family member.

a) Major Attachment Claimant

Up to 15 weeks of sickness benefits are payable to a claimant who is incapable of work due to a prescribed illness, injury, or quarantine (s 12(3)). Major attachment claimants can receive sickness benefits even if the illness is the reason for ceasing work.

b) Minor Attachment Claimant

A minor attachment claimant may qualify for up to 15 weeks of sickness benefits where the illness arose **after the termination of employment**. This is where the minor attachment claimant did not suffer an interruption of earnings due to illness, but whose illness arose after the interruption (s 21(1)). If, due to the illness, the claimant cannot accept work, the claimant may be entitled to receive sickness benefits.

If a minor attachment claimant loses his or her job because of the illness or injury, the claimant will be eligible for regular benefits once recovered and capable of accepting suitable employment, notwithstanding that he or she was ineligible for sickness benefits. In some cases, a claimant who loses previous employment – due to injury for example – may not immediately qualify for regular benefits if he or she is capable of performing other jobs and is actively seeking such employment.

2. Sickness Benefit Rate

The sickness benefit rate is the same as the regular benefit rate and is subject to reduction due to "earnings", which are allocated to weeks of sickness. In contrast to regular claimants, **all** "earnings" are deducted (s 21(3)). See **Section V.D: Effect of Earnings**, above.

Since paid sick leave benefits are regarded as earnings, they are deducted from EI benefits payable. An employee who receives paid sick leave has not suffered an interruption of earnings and therefore is not eligible to establish a claim.

3. Prescribed Illness, Injury or Quarantine

Sickness benefits are only available for a "prescribed illness, injury or quarantine that renders a claimant incapable of performing the functions of his or her regular or usual employment or other suitable employment" (s 40(4)). The onus is on the claimant to prove entitlement. A medical certificate is usually required, and the Commission may also require a claimant to undergo a medical examination at their direction pursuant to s 40(2) of the *EI Regulations*. In those situations the Commission must pay travel and other expenses for the examination.

For the purpose s 40 of the *EI Regulations*, there are some instances in which mental illness will be treated as a valid sickness.

D. Compassionate Care Benefits

Compassionate Care Benefits may be paid up to a maximum of six weeks to a claimant who has to be absent from work to provide care or support to a gravely ill family member or a person who considers the claimant to be like a family member and is at risk of dying within 26 weeks. Unemployed persons on EI can also apply for this type of benefit.

To be eligible for Compassionate Care Benefits a claimant must apply and show that:

- his or her regular weekly earnings from work have decreased by more than 40 percent; and
- he or she has accumulated 600 insured hours in the last 52 weeks or since the start of his or her last claim.

The *EI Act*'s expanded definition of "family member" includes a claimant's:

- own child or the child of the spouse or common-law partner;
- wife/husband or common-law partner;
- father/mother or father's wife/mother's husband, if parent is remarried;
- common-law partner of father/mother, if there has been no remarriage;
- other relatives; and
- anyone that the gravely ill person considers to be like a family member .

NOTE: Please refer to the HRSDC web site for a comprehensive list of persons included under the term "family member":
http://www.servicecanada.gc.ca/eng/ei/types/compassionate_care.shtml#Definition

To establish a claim for compassionate care benefits in order to care for a gravely ill person who considers you to be like a family member, a signed "Compassionate Care Benefits Attestation" form must be obtained from the gravely ill person or their representative.

A claimant will need to provide a medical certificate that indicates that the family member or friend is gravely ill with a significant risk of death within 26 weeks. The benefits will be given regardless of where the family member lives but a claimant will need to meet the same conditions that would apply

if that ill person was in Canada.

E. Benefits for Parents of Critically Ill Children

Eligible parents who take leave from work to provide care or support to a child with a life-threatening illness or injury can receive up to 35 weeks of benefits. The benefits must be collected in the 52-week window beginning on the day a medical certificate is issued showing that the child is critically ill or, if the claim is made before the certificate is issued, from the date a specialist medical doctor certifies that the child is critically ill or injured.

As with other special benefits, the claimant must have an interruption of earnings (for special benefits, a 40% reduction in earnings) and have 600 hours in their qualifying period.

These benefits are not available to parents of a child with a chronic illness or condition that is their normal state of health. There must be a significant change from the child's normal or baseline state of health at the time they are assessed by a specialist medical doctor.

F. Pregnancy Benefits

Like sickness benefits, pregnancy and parental benefits can be distinguished from regular EI benefits, because they are paid even though the applicant is not available for work. Pregnancy benefits are paid to an expectant or newly delivered mother. A mother can be entitled to both pregnancy benefits and parental benefits.

1. Entitlement

A claimant for pregnancy benefits must:

a) be a major attachment claimant;

b) prove her pregnancy. This entails furnishing a certificate completed by a physician that sets out the expected date of birth, or providing such other evidence as the Commission may require (s 18(1));

c) claim pregnancy benefits at any time during the 10 weeks before the expected delivery date, or at the latest, during the week the baby is born, if the claimant wants to qualify for the full 15 weeks of benefits. If the claimant is already on EI, the claim must be made during the eight weeks before the delivery;

d) report the date of birth of the child on the report card for that week; and

e) have an interruption of earnings.

NOTE: A pregnancy that is terminated within the first 19 weeks is an illness defined in s 40(5) of the *EI Regulations*, and not a confinement.

2. Benefit Period and Duration

Benefits can only be paid for a maximum of 15 consecutive weeks during the period that starts no more than eight weeks before the week when the claimant's "confinement" (the period the mother is giving birth and is in the hospital for this reason) is expected or before the week when her confinement actually occurs, whichever is earliest.

Benefit ends 17 weeks after the week that her confinement is expected (or the week that her confinement occurs, whichever is earlier). As with claims for regular benefits, there is a two-week waiting period after the claim is made before benefits become payable.

3. Pregnancy Benefit Rate

The pregnancy benefit rate is the same as the regular benefit rate. All earnings received from other sources reduce benefits. However, no proof of availability is necessary. Money received under an employer's sickness or maternity plan, other than a SUB plan, is regarded as earnings, and will be deducted. For a comprehensive list of what is and is not, regarded as earnings, see s 35 of the *EI Regulations*. See also **Section V.C: Effect of Earnings**, above.

4. When to File a Claim for Pregnancy Benefits

Since pregnancy benefits are not payable earlier than eight weeks before the expected date of delivery, a woman who wishes to receive benefits from this early date should, due to the waiting period, go on leave, or terminate her employment (if that is her choice) and make her claim 10 weeks before the expected date of delivery. The two-week waiting period would then be served, and benefits would be payable for 15 consecutive weeks commencing on the eighth week before the expected week of delivery.

Alternatively, a woman may wish to work up until the week of birth, and then make her claim. The two-week waiting period would then be served and benefits would be payable for 15 consecutive weeks beginning with the third week after the date of birth. If a pregnant worker becomes too ill to work prior to the birth, she should make a "sickness" claim, until she becomes eligible for pregnancy benefits.

NOTE: Whenever a client wishes to make her claim, she should know that pregnancy benefits are payable for a maximum of 15 consecutive weeks, and the latest week during which pregnancy benefits are payable is the 17th week after the week in which her delivery occurs (s 22(2)(b)(ii)). Thus, if the claim is made later than the week in which delivery occurs, the claimant may not receive the full 15 weeks benefits to which she would otherwise be entitled.

The *EI Act* limits the number of weeks of sickness, pregnancy, parental, and compassionate care benefits that can be paid in any one claim to 50 weeks. Thus, if the claimant has an existing claim and has already received sickness benefits, she may not be eligible for the maximum number of weeks of pregnancy and parental benefits. Voluntary termination of the old benefit period and establishment of a new claim, if possible, may help in this situation.

5. Availability of Regular Benefits on Termination of Maternity Benefits

A maternity pregnancy claimant may be entitled to regular benefits when her maternity benefits terminate, but she must be "capable of and available for work and unable to find suitable employment" in the same way as any other regular claimant. For example, she must prove that she has set up childcare arrangements so that she will be able to work immediately if a job is offered to her.

The claimant would also need to show that she is unable to return to her previous job because of a lack of positions, or that her previous job was unsuitable for her in her current conditions (i.e. a nursing mother being exposed to toxic fumes or other similar health hazards).

G. Parental Benefits

Under s 23, a new adoptive or natural parent (male or female) can remain at home to care for a new child and receive parental benefits for a maximum of 35 weeks. This benefit can be received in addition to the pregnancy benefit. The parents can share the weeks they receive these benefits, as long as the total does not exceed the maximum of 35, and so long as they are both major attachment claimants (*EI Act*, s 12).

Each parent is entitled to 55 percent of his or her average insurable earnings based on the rate calculation period and the divisor. To qualify, an adoptive parent must be a major attachment claimant, have an interruption of earnings, and have custody of the adopted child.

Parental benefits must be claimed during the period between the week the child arrives home and the 52 weeks following this date. In contrast to pregnancy benefits, parental benefits do not need to be claimed for consecutive weeks. Indeed, a new parent may find it desirable to "save" some weeks of parental benefits for the later months of the claim, in case the baby (or the parent) develops health problems. Bill C-32 repealed s 23(3), and allows parents to claim an earnings exemption.

For a case dealing with the constitutional jurisdiction over parental benefits see *Reference re Employment Insurance Act (Can.) s*s 2*2 and 23*, 2005 SCC 56. It considered whether the federal government has the authority to provide pregnancy and parental benefits as part of its jurisdiction over "unemployment insurance". The SCC reversed the Quebec Court of Appeals' ruling, holding that the federal government does have jurisdiction to create such benefits as they are tied to unemployment.

H. Provisions for Low Income Families

For claimants with children and low family incomes, there is a family supplement that could raise their benefit rate to a maximum of 80 percent. Low-income families are defined as those with a combined annual income of less than $25,921. Under s 16, if the claimants meet the criteria, one parent may be entitled to receive the family supplement. To determine eligibility, s 16(2) states that eligibility for the Child Tax Credit will be used. This links eligibility to fluctuations in the rate of inflation. Section 34 of the *EI Regulations* provides a more detailed breakdown of eligibility and benefits.

I. Training Benefits

The EI budget includes discretionary funding for retraining. A claimant can apply to the Commission for an extension of benefits to improve his or her employability. The claimant's benefits can be extended, at the Commission's discretion, for the duration of the course plus three weeks, for a maximum total of three years. The Commission has discretion to approve funding for benefits during training, and decisions on this matter cannot be appealed (*EI Act*, s 25(2)). The course must actually begin during the benefit period, however, so it is important to apply early in the benefit period.

VII. BENEFIT ENTITLEMENT

Once a claim is established, the basic requirement for receiving weekly benefits is that the claimant be "capable of and available for work and unable to obtain suitable employment". To prove this in the event of a dispute, the claimant should keep a "job search record" (see **Section IX.A: Job Search Record**, below).

A. Capable and Available

A claimant will be disentitled if the Commission has evidence (often supplied inadvertently by the claimant) to show that the claimant was not capable and available for work during a given period. For example, if a claimant volunteers the fact that he or she is only applying for jobs paying $20 per hour or more, the Commission could disentitle the claimant if there are few if any such jobs for which the

claimant would be suitable. For an example of how unforeseen events can affect availability, see *Canada (Attorney General) v Leblanc,* 2010 FCA 60. In this case, a desire to work was insufficient to establish availability because the claimant lacked proper clothing and a means to get to work as the result of a house fire.

1. Vacation and Travel

A claimant cannot collect benefits for times he or she is on vacation, as he or she must be ready for work to collect benefits. However, he or she can collect up to the day he or she leaves, and from the day he or she returns, if he or she becomes immediately available again. To avoid potentially onerous penalties, vacations – including short ones – **must** be properly recorded and reported.

The Customs Match program allows Human Resources Development Canada (HRDC) to match data from Canada Customs and Revenue Agency's Customs Declaration form to determine whether an EI claimant has been out of Canada without notifying HRDC. Under the *EI Act*, a claimant is **not entitled to receive EI benefits while not in Canada**, except under certain circumstances.

2. Sickness

A claimant may receive up to 15 weeks of sickness benefits where he or she can prove that he or she was "incapable of work by reason of prescribed illness, injury or quarantine on that day, and that they would otherwise be available for work" (s 12(3)(c)). In theory, if the claimant is already receiving regular benefits from EI and is ill for even one day, that day must be recorded as a day on which he or she is not capable of or available for work, if that is indeed the case.

3. Attending Courses

A person attending a course full-time is usually considered only "available for work" as defined in s 18 if he or she was referred to take that course by an authority designated by the Commission (s 25(1)). Even if the course is part-time and improves the claimant's chances of finding employment, the claimant may still be disentitled because he or she is considered unavailable for work. In these circumstances a claimant may attempt to prove availability, if the course does not interfere with the job search and he or she would immediately be able to accept an offer of employment.

An appeal can and should be made against a disentitlement due to taking an unauthorized course, although according to s 25(2), the Commission's decision to refer a claimant to a course is not appealable under s 114.

Persons attending full-time courses not approved by the Commission may still be entitled to EI benefits if they have established their eligibility by working part-time while attending classes and if they are still available for their previous hours of work on virtually no notice.

4. Starting a Business

Claimants who are trying to start a business are generally considered to be working full-time, regardless of whether they are receiving any income from the business. They are therefore not eligible for any benefits. The only escape for such claimants is to convince the Commission, or the Referees in an appeal, that the self-employment was so minor in extent that a person would not normally rely upon it as a principal means of livelihood.

5. Working Part-time

A claimant who worked part-time may be able to claim an exemption from earnings exemption. If the claimant receives any benefits at all, the week counts toward the maximum number of weeks that can be paid under that claim. Thus, it may be in a claimant's interest not to claim benefits for a week in which only a small amount would be paid.

B. Suitable Employment

A claimant must accept suitable work but is not required to take work considered not suitable. Bill C - 38 defines not suitable employment to include employment that arises in consequence of a stoppage of work attributable to a labour dispute. Employment Insurance Regulations (SOR/96-332) s9.002 sets out the criteria considered in determining what constitutes "suitable employment". For example, under 9.002(d), in searching of employment, a suitable commuting time to or from work should be less than an hour, but if it is greater, it should not exceed the claimant's daily commuting time to or from work during the qualifying period.

Most of the criteria that define suitable work are controlled by Cabinet. Claimants are broken into three categories for the purpose of determining what constitutes suitable work. Cabinet is able to implement these new categories very quickly. Employment Insurance Regulations (SOR/96-332) s 9.004 categorizes as follows:

1. Long-Tenured Workers

A claimant who has paid into EI seven of the past ten years and who has claimed 35 weeks or less of benefits in the past five years is considered a long-tenured worker. During the first 18 weeks of their EI claim, they need only accept jobs in their previous occupation that pay 90% of their previous wages. Following that, they must accept any similar jobs that pay 80% of their previous earnings.

2. Frequent Claimants

Claimants who have had three or more claims totalling 60 weeks or more in the past five years are considered frequent claimants and have far fewer rights under the definition of suitable work. For the first six weeks of their claim they must accept jobs in similar occupations with 80% of their previous earnings. Following that, they must accept any job paying 70% of their previous wages.

3. Occasional Claimants

Claimants who do not fit into either category above are considered occasional claimants. In the first six weeks, they must accept jobs in the same occupation that pay 90% of their previous earnings. For the twelve weeks following that, they must accept similar employment paying 80% of their previous earnings. Following that, they must accept any job paying 70% of their previous wages.

1. Proof of Search for Suitable Employment

Section 50(8) of the EI Act requires that a claimant prove he or she is making "reasonable and customary" efforts to obtain suitable employment. Again, this emphasizes the importance of keeping a job search record, which the claimant should update daily. The criteria are further elaborated in Employment Insurance Regulations (SOR/96-332) s9.001:

(*a*) the claimant's efforts are sustained;
(*b*) the claimant's efforts consist of
- (i) assessing employment opportunities,
- (ii) preparing a resumé or cover letter,
- (iii) registering for job search tools or with electronic job banks or employment agencies,
- (iv) attending job search workshops or job fairs,

(v) networking,
(vi) contacting prospective employers,
(vii) submitting job applications,
(viii) attending interviews, and
(ix) undergoing evaluations of competencies; and

(*c*) the claimant's efforts are directed toward obtaining suitable employment.

C. Disqualification

There are two categories of disqualification: s 27(1) and s 30(1). The effects of disqualification differ depending on what category the disqualification falls into:

1. Section 27(1) states that a claimant is disqualified from 7 to 12 weeks of benefits when, without good cause, he or she:

- refuses a suitable employment offer;
- refuses to apply for suitable employment when aware that a position is vacant or is becoming vacant;
- neglected to avail himself or herself of an opportunity for suitable employment;
- failed to attend an interview recommended by the Commission; or
- under s 27(1.1), has failed to attend a course of instruction or training referred to by the Commission.

NOTE: In these cases the length of disqualification is appealable.

2. Section 30(1) states that a claimant is disqualified when he or she is fired due to his or her own misconduct or when he or she quits without just cause. However, s 35 states that s 30(1) does not operate when loss of employment is due to membership in a union, organization, or association.

The effect of a s 30 disqualification is a cut-off of all regular benefits in a benefit period. Such a disqualification is imposed if the claimant has lost any job in the qualifying period for the reasons set out in s 30, even if the claimant had other work before applying for EI (ss 30(5) and (6)). Only if the claimant has worked enough hours since the disqualifying loss of employment to meet the hourly requirements to establish a claim will the disqualification not be imposed. For example, if a worker is employed in a job for five years, and gets fired for misconduct, the worker would be totally disqualified under s 30 from all regular benefits. If the worker subsequently finds a second job, and gets laid off from that second job after 10 weeks, the total insurable employment would be calculated as the number of hours worked during those 10 weeks **after** the earlier s 30 disqualification. The worker's previous five years of insurable employment would not count unless the worker had enough hours in the 10-week period to qualify under the s.7 table. In that case, the previous hours would count toward the number of weeks of payable benefits.

1. Just Cause for Voluntarily Leaving Employment

"Just cause" is defined under s 29(c) as follows: "having regard to all the circumstances, the individual had no reasonable alternative to leaving the employment." Where an employee had "just cause", for leaving his or her employment, he or she will not be disqualified. The onus is on the worker to show "just cause". The Commission must show that leaving was voluntary and that the claimant took the initiative in severing the employer-employee relationship; the worker must then prove just cause.

The Decisions of the Umpires provide examples of what is and is not considered voluntary. Once the facts have been established to show voluntary leaving, the onus then shifts to the claimant to show that he or she had just cause. When the evidence of the employee and the employer contradict one another, and the evidence is evenly balanced, s 49(2) of the *EI Act* provides that the claimant shall receive the benefit of the doubt.

a) Statute & Case Law

Whether the employees had "just cause" for leaving his or her employment is decided with statutes and case law.

Sections 29(c)(i) – (xiv) of the EI Act provide a list of the circumstances that can constitute "just cause". This list is **neither exhaustive nor conclusive**. In other words, circumstances not described in s 29(c) can also be just cause if they satisfy the main definition in s 29(c). On the other hand, circumstances listed in s 29(c)(i) – (xiv) will not be considered "just cause" if the conditions in s 29(c) are not met (if, for example, the claimant had a reasonable alternative).

Under s 29(c), just cause includes:

i) sexual or other harassment;

ii) obligations 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*, RSC; 1985, c. H-6;

iv) working conditions that constitute a danger to health and safety;

v) obligations to care for a child or member of the immediate family;

vi) reasonable assurance of other 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 change in work duties;

x) antagonism with supervisor if the claimant is not primarily responsible for the antagonism;

xi) employer's practices 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 employees to leave employment; and

xiv) such other reasonable circumstances as are prescribed.

Bill C-23 amended s 29(c)(ii) by adding "common law partner". The definition of "common law partner" has also been added to s 2(1) and defined as a person who could be of the same sex "with whom the claimant has lived in a conjugal relationship for at least one year".

To date, the only prescribed circumstance under s 29(c)(xiv) is *EI Regulations* s 51. This states that leaving employment when the employer is downsizing the business and the claimant's decision preserves the employment of another worker does constitute just cause. This regulation reverses the decision of the Federal Court of Appeal in *Tanguay et al. v Unemployment Insurance Commission* (1985), 10 C.C.E.L. 239 (F.C.A.), which is still quoted as the leading authority on the general meaning of just cause.

According to cases decided before Bill C-21 (1990) was introduced, and under the old *Unemployment Insurance Act*, for a claimant to prove just cause, he or she must show:

a) a genuine grievance, or other acceptable reason for leaving the employment;

b) proof of taking all reasonable steps to alleviate the grievance; and

c) proof of a search for alternate employment before the termination, unless circumstances are so immediate that a proper search is impossible.

In *Canada v Hernandez*, 2007 FCA 320 the claimant was disqualified for quitting his job after a public health nurse advised him that the silica dust which was a main material in the factory was carcinogen. The court decided he did not exhaust his alternatives because he should have asked the employer to change its business or find him a new job somewhere else. While this case is an aberration, it shows the importance of being able to prove that the worker did everything possible to avoid quitting.

There are thousands of decisions by the Umpires and Federal Court of Appeal addressing "just cause" issues that may help determine whether just cause existed (see **Section XIII.D: Umpire's Decision is Final**). CUB 21681 (23 Sept. 1992) confirms that just cause may result from all of the circumstances together, although no single factor would be sufficient: "When the statute says 'having regard to all the circumstances', it imposes a consideration of the totality of the evidence." Thus, if the claimant's reason for leaving is not one of the enumerated factors under s 29 but the claimant feels that they had no reasonable alternative to quitting or that they were fired without committing intentional misconduct, a case could still be made that the totality of the claimant's circumstances gives rise to just cause.

b) Importance of Evidence

Students should stress to LSLAP clients that detailed evidence like records or diaries is exceptionally important in the determination of their claim. The employee should try to remember as many specific incidents, dates and times as he or she can. Though the older CUBs (Umpire decisions) may provide an indication of what "just cause" means, they are not determinative.

c) Returning to School

The Federal Court of Appeal continues to find that voluntarily leaving one's employment to return to school, except for programs authorized by the EI Commission, does not constitute "just cause" and is a ground for disqualification from benefits under ss 29 and 30 of the *EI Act*.

In the case of *Attorney General of Canada v Mattieu Lamonde*, 2006 FCA 44, the court held that the claimant should be disqualified from benefits because he took a year's

leave from his full time job to attend school in another community, although he immediately found part time work when he arrived there.

Refer also to *Attorney General of Canada v Melanie Gauthier*, 2006 FCA 40 and *Canada v Cloutier*, 2007 FCA 161 and CUB 66126.

NOTE: While nothing in the legislation indicates that improving one's qualifications can never be just cause, the Court of Appeal continues to set aside decisions on this basis.

2. Misconduct

Section 30(1) states that a claimant is **disqualified** when he or she is fired due to his or her own misconduct.

a) Determining Misconduct

"Misconduct" is not defined in the *EI Act*, but previous decisions have stated that the word must be given its dictionary meaning. According to *Black's Law Dictionary*:

> Misconduct occurs when conduct of employee evinces wilful or wanton disregard of [the] employer's interest, as in deliberate violations or disregard of standards of behaviour which employer has right to expect of his or her employees, or in carelessness or negligence of such degree or recurrence as to manifest wrongful intent or evil design.

The alleged misconduct must be the real or the actual and direct cause for the dismissal, not merely an excuse for it. An employer cannot invoke previously forgotten or forgiven incidents to justify a dismissal.

The onus of establishing a misconduct allegation rests on the party alleging it. So, the Commission or employer must prove positively the existence of misconduct and must prove the misconduct caused the loss of employment. Again, refer to the CUBs for examples of what constitutes misconduct justifying lawful dismissal.

b) Dishonesty

In its decision in *McKinley v* BC *Tel*, [2001] S.C.R. 38, the Supreme Court of Canada held that an employee's dishonesty does not automatically constitute a blanket grounds for dismissal. Dishonesty is only grounds for dismissal "where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer". This decision places a duty on the trial judge to determine whether the dismissal was warranted by the nature and degree of the dishonesty, or alternatively, whether lesser sanctions were appropriate. It is likely that the same principle could be applied to EI appeals. For an example of a situation where dishonesty did not amount to just cause see *Fakhari v Canada (Attorney General),* A-732-95.

c) Theft

In the case of *Attorney General of Canada v Linda Caul*, 2006 FCA 251, the court decided that theft is always misconduct, regardless of the claimant's state of mind.

d) Addiction

In *Mishibinijima v Attorney General of Canada*, 2007 FCA 36, the court examined whether an addiction has the element of wilfulness necessary for a finding of misconduct. The court found that the applicant's evidence was too weak to support the claim that he was not acting wilfully. The court left open the possibility that with stronger evidence of compulsion due to addiction a claimant might succeed in rebutting misconduct.

See also *Attorney General of Canada v Brent Pearson*, 2006 FCA 199, where despite his addiction the claimant was disqualified for misconduct. In that case, the employee knew that his absences were unacceptable and notwithstanding his employer's offers to help with the addiction the employee refused to take any such measures.

In *Canada v McNamara,* 2007 FCA 107, the claimant was fired from his job because he failed a random drug test due to trace amounts of marijuana. The court declined to overturn the disqualification, despite the argument that such illegal, but decriminalized conduct as smoking a joint on the previous weekend could not amount to misconduct for EI purposes.

NOTE: **Determinations of "just cause" and "misconduct" by the Commission can be appealed** and where disqualification is imposed, a client should be advised to appeal. Many claimants mistakenly believe that they are automatically disqualified from EI if they have been fired, however unfairly. Unfortunately, many such claimants do not apply for EI benefits at all, or if disqualified do not realize that they can challenge the employer's decision until their **30-day period to appeal** expires.

D. Disentitlement

Disentitlement means that the claimant is not eligible to receive benefits. This may be due to any of a number of reasons including:

- illness of a minor attachment claimant (s 21(1));
- the claimant is an inmate of a prison or similar institution, except when on parole (s 37(a));
- the claimant is absent from Canada, unless he or she falls within the category set out in s 55 of the *EI Regulations* (s 37(b));
- the claimant does not have child care in place; or
- loss of employment due to a labour dispute (i.e. either a strike or lockout (s 36)).

However, the most common basis for disentitlement is that the claimant failed to prove that he or she is "capable of and available for work and unable to find suitable employment" (s 18(a)). Students should ensure the claimant understands that he or she **must keep a job search record**.

Disentitlements can last indefinitely until the situation is remedied. Further, a disentitlement can be retroactive, which can lead to decisions of overpayment (see below). The *EI Act* places the onus on the claimant to prove entitlement on the balance of probabilities (s 49). In cases where the evidence as a whole indicates that the claimant's availability was doubtful, it might be held that the claimant had failed to prove that he or she was available for suitable employment. For example, if a woman is disentitled because she has no child care arrangements, she may need to give the Commission the name of a relative or friend who will care for the child until permanent arrangement can be made.

As discussed above, the longer the period of unemployment, the less "picky" the claimant can be in his or her employment search. Under the changes to EI proposed by the government at the time of writing, this will become particularly true for frequent claimants: see section VII(B) for details. When claimants fill out EI application forms, they should not be too restrictive, especially about the wages they are willing to accept, or the distances they are willing to commute. Further, the Commission is likely to disentitle a claimant who is searching for a job that is virtually non-existent in the area the claimant is searching. Also, a former employee searching for a job in a field where the wages were atypically high can be disentitled if he or she restricts the search to jobs with similar wage levels. This can often be the case with formerly unionized workers.

What it comes down to in the end is that the Commission will make a judgment call about whether the claimant genuinely wants to find work and whether his or her current strategy maximizes the chances of success.

VIII. PENALTIES, VIOLATIONS AND OFFENCES

A. Imposing Penalties

Sections 38 and 40 of the *EI Act* allow the Commission to impose a penalty of up to three times the weekly rate of benefit on a claimant who **knowingly** makes a false or misleading representation to the Commission in relation to his or her claim for benefits. The claimant must actually know that the statement is false or misleading, and the onus of proving this is on the Commission.

The court applies a subjective knowledge test to decide whether the claimant intended to commit fraud or intended to make false statements to the commission. Following the leading case, *Canada v Gates* (1995), 125 D.L.R. (4th) 348, the Court in *David Moretto v AG Canada,* [1998] F.C.J. No. 438, confirmed that even if a claimant's statement is found to be false, no penalty should be levied unless the finder of fact is satisfied that the claimant "subjectively knew" the statement was false. It is not enough to say that he or she should have known, or should have asked someone, or that a reasonable person would have known.

B. Types of Penalties

A penalty can be levied under s 38(2)(b) on grounds provided in s 38(1)(c), which concerns **failing to declare earnings** while claiming benefits. The amount can be up to three times the amount of the deduction from the claimant's benefits or up to three times the benefits that would have been paid to the claimant for the period if the deduction had not been made or the claimant had not been disentitled or disqualified from receiving benefits (see s.19(3)). Aside from the penalty itself, a claimant found to have knowingly made false representations to the Commission loses the right to claim an earnings exemption.

Alternatively, a claimant could be prosecuted criminally (summarily). Section 135(3) of the *EI Act* sets the minimum fine at $200 for fraud relating to a person's employment and Record of Employment. The maximum fine is $5,000 and where appropriate, twice the amount of benefits falsely obtained, or the fine plus imprisonment for a term of up to six months (s 135(3)). In practice, criminal court cases are very rare, even when a claimant asks to be prosecuted. This is because the courts require proof beyond a reasonable doubt, while for penalties the Commission only requires proof on a balance of probabilities. Also, the Commission need only write a decision letter to the claimant to impose a very large penalty, which is much simpler than proceeding with a court case.

1. Appealing a Decision to Impose a Penalty

If the Commission imposes a **penalty under s 38** (or s 39 in the case of employers), **a client should be advised to appeal** in all but the clearest of circumstances. Regardless of what the

Commission says, it has the burden of proving that the claimant knew that the statement was false or misleading at the time it was made. If the claimant has a reasonable explanation (e.g. confusion regarding the intent of the question), the appeal should be allowed.

NOTE: The Commission cannot impose a penalty under ss 38 or 39 if 36 months have elapsed since the act or omission. For a case that discusses when time limits start to run see *Attorney General of Canada v Kos*, 2005 FCA 319. The key issue here was whether file notes by an insurance officer constituted a "decision" that triggered the time limit. The court ruled that it did not, in part because the notes were not communicated to the claimant.

2. Appealing the Amount of a Penalty

The SST has jurisdiction over the amount of the penalty assigned. While the amount of the penalty can also be appealed, a penalty cannot be reduced simply because the referees consider it a bit too high. However, they can reduce a penalty if the decision is unreasonable, e.g. where Commission has erred by ignoring relevant circumstances such as the claimant's ability to pay, or health problems, or where it took irrelevant circumstances into account. It is not necessary to prove that the Commission was unfair, just that it was not made aware of all the relevant circumstances.

C. The Violation System

Section 7.1 of the *EI Act* outlines the increased qualifying requirements for claimants who are found to have committed fraud after June 30, 1996. These requirements increase depending on how the violation is classified (minor, serious, or very serious). If the Commission chooses to simply issue a warning letter (possibly accompanied by a fine), then as per s 7.1(5), no such classification is made.

1. Increased Number of Hours Required to Qualify

Section 7.1(1) provides that an insured claimant (other than a new or re-entrant) must have a greater number of hours to qualify if that person has accumulated one or more violations in the 260 weeks before making their claim. This adds a significant barrier for receiving benefits. The increased hours required to qualify after a violation are outlined in the ***s 7.1(1) Table***, on the following page:

Section 7.1(1) Table

Regional Rate Of Unemployment	**Violation Severity**			
	Minor	**Serious**	**Very Serious**	**Subsequent**
6.0% and under	875	1050	1225	1400
over 6.0% to 7.0%	831	998	1164	1330
over 7.0% to 8.0%	788	945	1103	1260
over 8.0% to 9.0%	744	893	1041	1190
over 9.0% to 10.0%	700	840	980	1120
over 10.0% to 11.0%	656	788	919	1050
over 11.0% to 12.0%	613	735	858	980
over 12.0% to 13.0%	569	683	796	910
over 13.0%	525	630	735	840

In the case of new entrants or re-entrants that have committed a violation in the 260 weeks prior to making their initial claim, the number of hours required to qualify is even higher:

a) **minor violation**: the number of required hours is increased to 1,138 hours;

b) **serious violation**: the number of required hours is increased to 1,365 hours;

c) **very serious violation**: the number required is increased to 1,400 hours.

In each of the above scenarios, and in the case of persons who are not new or re-entrants, the Commission may now apply the increased hours rule to a claimant's next **two** claims, (if made over the course of the next 260 weeks). This makes it critical to appeal any penalty or violation decision.

NOTE: Violations should always be appealed.

2. Issuing Violations

Pursuant to s 7.1(4), the Commission may issue a violation notice for:

a) one or more penalties imposed under ss 38, 39, 41.1 or 65.1 as a result of acts or omissions mentioned in ss 38, 39 or 65.1;

b) a finding of guilt for an offence under ss 135 or 136; or

c) a finding of guilt of one or more offences under the *Criminal Code* as a result of acts or omissions relating to the application of the *EI Act*.

3. Classifying Violations

If a violation is found to have occurred, as determined by the above criteria, it must be classified for purposes of the ***s 7.1(1) Table***, and also for new and re-entrants. The *EI Act* classifies violations in the following manner under s 7.1(5)(a):

a) Minor violation: if the value of the violation is less than $1,000;

b) Serious violation: if the value of the violation is less than $5,000 (but more than $1,000), it is a serious violation;

c) Very serious violation: if the value of the violation is over $5,000, it is a very serious violation.

Under s 7.1(6), the value of a violation for purposes of classification is the amount of overpayment of benefits resulting from acts on which the violation is based. If the claimant is disqualified or disentitled, the value is the total amount of benefits he or she would have collected, divided by two.

4. Relevant Jurisprudence

In *Attorney General of Canada v Charles Savard*, 2006 FCA 327, the court considered s 7.1 of the Act. The court found that the Commission has discretion, which is appealable, as to whether a notice of violation is necessary as an additional punishment or deterrent for a claimant who has been penalized for providing false information. Specifically, the court decided that decisions to impose penal or administrative sanctions and monetary or non-monetary sanctions are discretionary in nature. The court also found that the increased hours of work required as penalty for a violation become effective from the time the notice was issued, not when the claimant learns of it.

This case may provide grounds to argue that several aspects of previous interpretations should be reconsidered, including: whether a violation can be overturned (an unreasonable exercise of discretion is generally subject to appeal), and whether the increased hours apply when an appeal against the violation is pending.

NOTE: If the claimant has received a notice of violation, the recent (2010) Federal Court decision in *Gill v AG Canada* holds that such decisions are appealable.

IX. KEEPING OUT OF TROUBLE

A. Job Search Record

Once a claim is established, the basic eligibility requirement to receive regular EI benefits is that claimants be able to prove that they are "capable of, and available for work and unable to find suitable employment". To help prove this, the claimant should keep a job search record. This may make disentitlement less likely, and improve the chances of success should an appeal be necessary. In fact, the Commission may send to the claimant a form that is essentially a job search record. This is called an "active job search statement". The statement will require the claimant to provide:

- names of the businesses applied to and the names of the persons who interviewed the claimant;
- type of employment applied for;
- date of the application or contact; and
- results.

Potential employers need not sign the statement or record. They, however, may be contacted by the Commission to confirm the facts reported. If the form is not returned, disentitlement may follow.

Even though an "active job search statement" may not be required, the claimant should keep a job search record with this same information. The job search record should include everything done to look for work. It should be made clear that every attempt or type of attempt counts (including such things as contacting family members about employment opportunities, "cold calling," etc.). The difficulty is that many claimants do not keep such records even though they have been warned to do so. In such cases, the claimant's representative can only do the following:

a) advise the claimant to keep such lists in the future; and

b) (if true) argue that the claimant did not know that he or she had to keep such a list, and that any list now composed from memory is not a complete one, as the claimant cannot remember the details of all the employment opportunities he or she pursued.

Every regular benefit claimant must also register with the Commission. Claimants should visit the job board at least once a week and record these visits. Many EI offices now maintain electronic job boards that can be accessed from computer kiosks in the offices, or from home, like the Canada Job Bank.

Claimants should also keep a record of all telephone calls and any other kind of contact for further evidence of job searching. An example "job search record":

June 12 – 15: Checked *The Sun* and *The Province* want ads every day.

June 12: Phoned Ajax Plumbing: George Brown, Manager, said not to send in a written application, but to call back in a month.

June 13: Checked bulletin board at the Canada Employment Centre and copied down one possible job: phoned XYZ Deliveries, but position already taken.

June 14: Wrote letter to Acme Amigos: no response.

June 15: Searched Internet job sites from Frank's house. Printed out some likely prospects.

Tell the claimant to make the job search record as detailed and complete as possible. Include friends contacted regarding job openings, and **all efforts** made to look for a job. The claimant must at all times try to convince the Commission that he or she is making a great effort to find a job.

B. Interviews with an Investigation and Control Officer

At some point, the claimant may be summoned to the local EI office for an interview regarding his or her job search. Typically the Investigation and Control Officer asks the claimant questions and makes a "Report of Interview," which is later reviewed by an Insurance Officer who will, on the basis of the Report, decide whether or not benefits are to continue. The claimant does not need to sign or affirm the report, though it is supposed to be read to him or her, and a copy should be provided for the claimant's records.

The Commission can disqualify a claimant for 7-12 weeks if the claimant fails to attend, without good cause, an interview the Commission asks him or her to attend (*EI Act*, s 27(1)(d)). The claimant must either attend the interview or phone to make a new appointment and confirm the new appointment in writing.

1. Keeping the Record Straight

A client may complain that the Report of Interview is misleading or a distortion of the truth. To protect against a potentially misleading report, the claimant should try to be as general as possible in his or her report. However, telling the truth during the interview is imperative. For example, the client should state, if true, that he or she would accept the going rate rather than stating his or her desired wage.

If the claimant decides, after the Report is read to him or her, that it is incorrect or misleading, the claimant should tell the Officer immediately because the Officer may correct the report immediately. If the Officer refuses or if the claimant later decides that he or she disagrees, the claimant should write a letter stating their position. This is important since an appeal may be necessary and such an immediate reaction by the claimant may convince the Board of his or her honesty and integrity. It may also lead to the earlier reinstatement of a claimant who is disentitled for unreasonably restricting his or her job search.

2. Disputing the Report at an Appeal

If there is a disentitlement based on the Report of Interview and an appeal follows, the SST may be willing to accept explanations and modifications of the report. There must be evidence to support these modifications. Further, their usual position will be that since the statement was read to the claimant, it must be true. There is an established principle supported by several court decisions to the effect that "statements made before disentitlement are to be believed more than statements made after disentitlement," the latter suspected of being self-serving. One effective way for a claimant to demonstrate willingness to accept wages lower than the figure stated on the application form or in an interview report is to prove that he or she actively pursued a job possibility paying a lower amount after learning what the salary was.

C. Reporting

In order to receive continued benefits, individuals must send in reports on a regular basis. They are usually due and cover every two calendar weeks (from Sunday to Saturday). There are three ways to send in these reports:

1. the Telephone Reporting Service;

2. the Reporting Service By Internet at http://www.servicecanada.gc.ca/eng/ei/service/interdec_report.shtml#How; and

3. the paper "Report Card" system.

The timing and due dates of these reports depends on each individual claim. This information will be available to each claimant shortly after applying to EI when the Benefit statement and Access Code is received in the mail.

1. What to Include in Reports

Be careful to include the following in each report:

- gross income;

- earnings for the week they are earned, **not** the week they are received; and

- money received from a group maternity or sickness plan paid for by the employer and wages, less benefits, received by way of Workers' Compensation. All money received and declared should include some reference to the source and reason for the payment since it may or may not count as earnings (*EI Regulations*, s 35). However, money received from a private or individual insurance plan paid for by the claimant should not be included.

The information given must be accurate, otherwise the claimant could be accused of a false or misleading statement. If the claimant needs to update a report, for example to change the amount of earnings reported, they should call the Telephone Reporting Service immediately. The Commission has a policy that they will not charge or prosecute a claimant for giving false or misleading information if the claimant volunteers the correct information before an investigation begins.

X. TIMING FOR REPORTING

Individuals should pay special attention to report due dates. Each claim has its own due dates, and the specific timing for meeting these due dates can differ between the telephone, internet and paper systems. For example, all Telephone Reporting Service reports made on the weekend are processed at 3:00 p.m. Sunday.

Claimants must complete their reports throughout the claim period whether or not they are receiving benefits (for example, during the waiting period or a period of disqualification). When an appeal is pending, reports must continue to be made because if the appeal is successful, the claimant may find that there will be no payment for any week for which no report has been made (*EI Regulations*, s 26).

Individuals on pregnancy, parental, and sickness benefits should continue to make reports, noting that they are incapable of work and explaining the reason, whether pregnancy, parental, or illness. However, the Commission may exempt people claiming pregnancy and parental benefits from making reports provided that they promise to report to the Commission any relevant changes.

NOTE: Workers whose weekly income amounts tend to fluctuate (e.g. trade workers) should try to estimate as carefully as possible when providing an income figure. Those claimants who either err on the side of caution by declaring an amount that is too high or those who under-declare their actual income may be deemed by the Commission as providing "false or misleading information" and may incur penalties. The best way to avoid penalties is to always inform the Commission of the exact amount as soon as it is known to be correct. Also, an appeal should be filed immediately if a claimant is penalized for an inaccurate estimate of weekly earnings. The test for a penalty is that the claimant **knew** that the information he or she was giving was false. Honest attempts to predict actual earnings should not lead to penalties, even when it results in an overpayment of benefits.

A. Documents

It is generally a good idea to fill in all the documents the Commission requires and to return them immediately, since failure to do so may involve delay, if not disentitlement. **Also, keep copies of all documents in chronological order.**

B. Delays

One of the greatest difficulties with EI is delay. The computer is very sensitive to errors and sometimes delays occur as a result. Often the delays are related to report cards, and in certain cases it is possible to get the insurance officer to use his or her "back-up manual pay system" rather than waiting for the computer. If this is done, the claimant may get his or her money quickly.

Another solution to delay may often be to hassle the Commission. In extreme cases, you may wish to consider writing to the Minister (Employment and Immigration) with copies, to the claimant's Member of Parliament, or to opposition critics. See **Chapter 20: Public Complaints Procedure**.

C. Self-Employment While Claiming EI

Self-employment and employment as an independent contractor are **not** insurable employment. Those who fall under this category are not eligible for employment insurance benefits (see s 5 of the *EI Act*), and are not even considered part of the workforce for attachment purposes. This means that a person returning to insurable employment after one or more years of self-employment will be treated as a re-entrant to the workforce, and will need 910 hours of work to qualify for benefits.

Many people get into trouble for trying to start their own business while receiving benefits. Failure to report such activity will usually lead to overpayments and penalties or charges for misrepresentation. Contrary to many claimants' belief, self-employment amounts to "working" within the meaning of the question on the weekly reports even if the person has no expectation of receiving any income from it. Section 30 of the *EI Regulations* provides that, in most cases, a claimant engaged in self-employment is deemed to have worked a full week, unless the self-employment is "so minor in extent that a person would not normally follow it as a principal means of livelihood". Decisions by the Commission on overpayment and/or the imposition of penalties should always be appealed.

If a claimant wishes to start a business while on EI, he or she should contact the Commission **before** doing anything to pursue self-employment. Special benefits may be available if the claimant enters an approved self-employment agreement for the development and implementation of a business plan.

XI. OVERPAYMENT AND COLLECTIONS

A. Overpayments

If the Commission pays a claimant more than that claimant is entitled to, whether through the claimant's fault or the Commission's, the Commission is entitled to recover the overpayment (*EI Act*, s 43). The Commission may deduct the overpayment from any benefit payable to the claimant, or

Commission's Collections Branch may contact the claimant to recover the overpayment (s 47). The Commission must send written notice, stating the existence of the overpayment and why it occurred, as well as explaining the right to appeal within 30 days.

If the overpayment results from a reconsideration of a decision involving an element of judgment or discretion by the Commission (often as part of a random "audit"), an appeal should be filed. Umpires have ruled that the Commission does not have the right to second-guess its previous determination of such questions (such as just cause, misconduct, and availability) unless there are significant new facts it could not have learned about when the initial decision was made.

1. Interest Regulation

EI claimants are required to pay interest on outstanding overpayments and penalties arising from what the Commission considers fraud or misrepresentation.

No interest will be charged on debt that arises from the Commission's and/or the claimant's errors in benefit payments. Where the claimant has appealed the decision that establishes the overpayment or penalty, no interest will be charged during the appeal process, and claimants will be reimbursed interest payments made before the appeal if the Referees or Umpire decide that there was no fraud or misrepresentation.

B. Time Limits

The statutory limitation on collection of overpayments is six years after declaring the overpayments, excepting the periods during which an appeal is pending. The Commission has three years to discover the debt. Periods of appeal do count in this assessment. If an overpayment is due to fraud, the Commission has six years to discover and six years to recover the amount. However, the Commission is not allowed to impose a penalty more than 36 months after the offence.

C. Write-off of Overpayment or Other Amounts Owed

Section 56 of the *EI Regulations* specifies various circumstances in which a benefit wrongly paid may be written off. The most useful provision allows a write off when in all circumstances:

- the sum is not collectable; or
- repayment would result in undue hardship to the claimant (s 56(1)(f)(ii)).

Regulation 56(2) provides for almost automatic write-off of amounts paid more than a year before notification of the claimant and resulting from the Commission or employer's error. It may even be argued that decisions under this provision should be appealable.

If a claimant seeks information about their repayment debt, the claimant can contact the CRA:

CRA Collections: Employment Insurance
1-800-206-7218

As a rule, a claimant cannot appeal a decision refusing the cancellation of a debt. However, in Steel v. Canada (Attorney-General) 2011 FCA 153, Stratas J.A. argued that claimants should be able to appeal such rulings. Stratas' opinion is not binding as the other two judges on the case decided the case on other grounds, but may have persuasive value if one wishes to challenge a refusal to allow such an appeal.

D. Benefit Repayment

Under s 145(1) of the *EI Act*, a claimant whose income for the taxation year exceeds one and one-half times the maximum yearly insurable earnings is liable for the repayment of the lesser of:

- 30 percent of the total benefits paid to the claimant in the year; or
- 30 percent of the amount by which the claimant's income exceeds one and one-half times the maximum yearly insurable earnings.

The benefit repayment scheme is administered and enforced by the Minister of National Revenue (s 148). A claimant will estimate on his or her tax form the amount of benefit repayment payable by him or her (s 147).

XII. APPEALS

As of April 1, 2013, the Board of Referee and Umpire system was replaced by the General and Appeal divisions of the SST (SST). The system has transitioned and the Board of Referees no longer continues to hear appeals. Any appeals not decided by a Board of Referees by October 31, 2013 were forwarded to the General Division of the SST. The Umpires continued to decide on appeals it heard up until March 31, 2013 and issued decisions on these appeals by March 31, 2014. Any appeals filed with the Office of the Umpire that were not heard by March 31, 2013 were transferred to the Appeal division of the SST. Any new appeals are presently be made through the SST.

XIII. RECONSIDERATION

Under this new system, before appealing to the SST, a claimant must first submit a Request for Reconsideration to the EI Commission within 30 days. Upon receipt of a Request for Reconsideration, a Service Canada employee, other than the one who made the original decision, will review your case, including any new information provided in the Request. The Service Canada employee will also conduct any additional investigation that may be required, including clarifying the circumstances, and obtaining relevant documents related to the employment. The Service Canada employee will use this information to make the EI Commission's final decision on the claimant's claim.

The Request for Reconsideration form can be found at the following link:

http://www.servicecanada.gc.ca/eforms/forms/sc-ins5210%282014-04-007%29e.pdf

This request must be submitted to Service Canada within **30 days** after the date the decision was communicated to the claimant. If the 30-day period has passed, a claimant may still submit a request for reconsideration with an explanation for the delay. The EI Commission will consider the reasons for the delay and decide whether to allow the request. This process is **free**.

The claimant will be informed in writing of the decision following the Reconsideration. If the decision is unfavourable to the claimant, a Service Canada employee will provide a verbal explanation.

A. What can be Reconsidered (and later appealed)

Most decisions of the Commission may be Reconsidered. For example, claimants are eligible to request a Reconsideration if the original decision:

- Refused EI benefits;
- Ordered that EI benefits received be repaid;
- Issued a warning letter; and/or

- Imposed a penalty.

1. Exceptions

The following issues cannot be Reconsidered:

- certain discretionary benefits, such as training courses, special employment benefits and work-sharing, see above and the *EI Act* ss 24, 25, and 64; and

- insurability issues, which are subject to a separate decision-making and appeal process that must be appealed to the Minister of National Revenue, the Tax Court. (see **Section III.A: Insurable Employment**, and ss 90 – 105 of the *EI Act*).

There is presently some uncertainty regarding whether a claimant can Reconsider or appeal a decision about writing-off an overpayment or penalty. The Commission maintains that these decisions cannot be appealed, however, the Federal Court of Appeal has recently suggested that the Commission may be incorrect (See the concurring reasons of Justice Stratus in *Steel v Canada* (Attorney General) 2011 FCA 153)).

2. Discretionary Decisions

Discretionary decisions such as the Commission's refusal to extend time, its decision regarding the length of reduced benefits, or its decision regarding the length of disqualification, can only be reversed if it is decided that the original decision:

a) ignored or failed to consider a relevant factor, including something the Commission was unaware of, such as health problems or other mitigation;

b) acted on an irrelevant factor;

c) committed a jurisdictional error; or

d) acted against the principles of natural justice, such as acting with bias or bad faith.

The issue is whether or not the Commission's exercise of discretion in the original decision was reasonable. However, where the Commission has failed to consider relevant evidence, or where there is new evidence presented for the first time by the claimant, the reviewer can exercise remedial authority by making the decision that should have been made. It is rarely difficult in a deserving case to show that the Commission has disregarded some relevant fact.

3. Amount of Penalty

Courts have also determined that the amount of a penalty for making false statements may also be appealed only to the extent that in coming up with the amount of penalty, the Commission committed an error, such that the decision or the decision making process was unreasonable. That said, as above, one can often find some relevant "fact" that the Commission failed to consider.

4. Insurability Decisions

Certain decisions concerning "insurable employment" must be appealed to the CRA or the Minister of National Revenue. These appeals under s 90(1) include:

a) whether an employment is insurable;

b) how long an employment lasts, including the dates on which it begins and ends;

c) the amount of any insurable earnings;

d) how many hours an insured person has had in insurable employment;

e) whether a premium is payable;

f) the amount of a premium payable;

g) who is the employer of an insured person;

h) whether employers are associated employers; and

i) what amount shall be refunded under ss 96(4) to (10).

For an example of the appeal process, consult *McPhee v Minister of National Revenue*, 2005 TCC 502. In deciding whether the claimant was an employee or an independent contractor, the court allowed a consideration of the parties' intentions.

It is crucial to analyze the dispute and file the correct type of appeal. In doubtful cases, it can be wise to do both – file an appeal and ask the CRA for a ruling.

XIV. THE SOCIAL SECURITY TRIBUNAL (SST)

If the claimant is unhappy with the decision following the Reconsideration, the claimant may file an appeal to the SST. General information about the Tribunal appeal process can be found at: http://www.canada.ca/en/sst/index.html

A. General Division (former Board of Referees)

The SST must receive a claimant's appeal **within 30 days** of the claimant's receipt of the Reconsideration decision. There are two ways to file an appeal:

1. Fill out the Notice of Appeal to the SST General Division – EI form and mail or fax it to the SST. The form can be filled out on the computer and then printed or printed and filled out by hand. This form is accessible at the following link: http://www.servicecanada.gc.ca/eng/common/sst-tss/forms-formulaires/SST-NOA-GD-EI-E.pdf

   If the claimant is unable to print the form, the claimant may contact the SST and the Tribunal will send the form to the claimant.

2. Write the SST a letter of appeal containing all the information required in the form.

The Tribunal will notify Service Canada of your appeal.

If a claimant submits an appeal form after the 30 days, the claimant can request an extension in the form. However, the decision is ultimately the Tribunal's as to whether or not to grant the extension.

When a Notice of Appeal is received, a Tribunal member will be assigned to the claimant's file. The Member will review the file and will **dismiss any file which the Member decides has no reasonable chance of success**. A claimant will be informed in writing if their appeal is dismissed. There is an opportunity to respond to the dismissal and continue with the appeal. The application to appeal a dismissal can be found here: http://www.servicecanada.gc.ca/eng/common/sst-tss/forms-formulaires/SST-ATATTAD.pdf.

If the appeal is proceeded with, there are several types of hearings available:

- Written: The Member will ask the claimant questions and request a written response by a certain date

- Telephone
- Videoconference
- In-Person

The Member will choose the type of hearing to be used. The Tribunal will telephone or write to the claimant to arrange the hearing.

Following the hearing, the Member will send the claimant a copy of the decision.

B. Appeal Division (former Office of the Umpire)

The Appeal Division of the SST must receive a claimant's appeal **within 30 days** of the claimant's receipt of the General Division's decision. There are two ways to file an appeal:

1. Fill out the Notice of Appeal to the SST General Division – EI form and mail or fax it to the SST. The form can be filled out on the computer and then printed or printed and filled out by hand. This form is accessible at the following link:

   http://www.servicecanada.gc.ca/eng/common/sst-tss/forms-formulaires/SST-ATATTAD.pdf

   If the claimant is unable to print the form, the claimant may contact the SST and the Tribunal will send the form to the claimant.

2. Write the SST a letter of appeal containing all the information required in the form.

Note that the claimant does not need to have all the information for the appeal at this time. These documents can be either faxed or mailed to the SST. The SST will confirm receipt of these documents

If a claimant submits an appeal form after the 30 days, the claimant can request an extension in the form. However, the decision is ultimately the Tribunal's as to whether or not to grant the extension.

When a Notice of Appeal is received, a Tribunal member will be assigned to the claimant's file to decide whether or not to grant permission to allow the appeal to proceed. The grounds for appeal to the Appeal Division are:

- The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction
- The General Division erred in law in making its decision
- The General Division based its decision on an erroneous finding of fact that was made in a perverse or capricious manner or without regard for the evidence before it

A claimant will be informed in writing if their application for permission to appeal is dismissed. Permission is not required when appealing a General Division decision to summarily dismiss the appeal.

If permission is granted for the appeal, the parties have 45 days to provide submissions. If no submissions are received, the Member will decide whether or not to allow the appeal to proceed based on the documents or submissions on file. The Member will decide if a hearing is necessary. There are several forms of hearings:

- Written: The Member will ask the claimant questions and request a written response by a certain date
- Telephone

- Videoconference
- In-Person

The Member will choose the type of hearing to be used.

Following the hearing, the Member will send the claimant a copy of the decision. The decisions of the Appeal Division are subject to review under the *Federal Courts Act*.

C. Re-opening a Decision

A claimant can apply to the Commission or the SST to rescind or amend a decision if there are new facts or the decision was made without knowledge of, or was based on a mistake as to, some material fact. This application can only be made once and must be submitted within one year of the decision. The form to re-open a decision is accessible at the following link:

http://www.servicecanada.gc.ca/eng/common/sst-tss/forms-formulaires/SST-ATROA.pdf

XV. PAYMENT OF BENEFIT PENDING APPEAL: NOT RECOVERABLE

Benefits are not payable in accordance with a decision of the Employment Insurance Section of the SST if, within 21 days after the day on which a decision is given, the Commission makes an application for leave to appeal to the Appeal division on the ground that the Employment Insurance Section has erred in law, according to s 80 of the *EI Regulations*.

If benefits are paid to the claimant and the Appeal Division allows the Commission's appeal, the benefits cannot be recovered. In practice, however, when the Commission appeals it always alleges an error of law, and files within 21 days. This avoids the need to pay benefits while the appeal is pending.

XVI. APPEALS TO THE SST GENERAL DIVISION

Appeal Docket

The Commission receives and reviews the appeal letter and, unless convinced to reverse its decision by the information contained in it, will set the place and date of appeal and send the claimant and the employer an "Appeal Docket". The docket contains all documents from the Commission's file regarding the claim that it considers relevant to the issue. The docket is given to the claimant, the General Division, and to the employer if the employer asks to participate.

The docket should be carefully reviewed, as the appeal must meet the Commission's argument and evidence. The docket includes the "Representations of the Commission to the General Division", which is basically the Commission's written argument supporting its decision. Otherwise, the Commission usually does not appear at the hearing.

NOTE: All adverse decisions should be listed under item no. 2 of the appeal form. There have been cases where claimants who claimed they were appealing a letter of overpayment without mentioning the penalty imposed in a different letter were told at the hearing that the Referees have no jurisdiction over the penalty by reason of this omission.

Preparation for Appeal to the General Division

When reviewing the docket and preparing for the appeal, the claimant and his or her representative should consider the:

1. "Representations of the Commission to the General Division" (this is the Commission's justification for its decision);

2. evidence relied upon by the Commission; and

3. CUBs (Umpire decisions or now SST Appeal Division decisions) cited by the Commission.

The docket contains most of the relevant documents and also summarizes all statements made by the claimant to the Commission, as well as the Insurance Officer's decision and comments. Read the docket carefully and be prepared to comment on it.

In many cases, the claimant may have to explain that the statement does not accurately reflect what he or she really intended to say. For example, the claimant did not mean to say that he or she would only work for $12.50 per hour and no less. Rather, the claimant meant that he or she would prefer $12.50 per hour, but would work for the going rate. The claimant will have to overcome the Board's inclination to believe what the claimant said in his or her statement as opposed to what is being said now, after disentitlement. The claimant must convince the Board of his or her honesty.

Under the *Privacy Act*, R.S, 1985, c. P-21 a claimant has a right to access the entire claim file, whether there is an appeal pending or not. This may include the documents that are not part of the docket because the Commission did not consider them relevant. If details of the Commission's record may be important to the outcome, the advocate should ask for full disclosure of all relevant files.

The jurisprudence on EI includes more than 80,000 decisions of the Umpire, along with perhaps a thousand or so decisions of the Federal Court of Appeal and the Supreme Court of Canada. Most of these decisions can be found (and searched by key words) on the Commission's jurisprudence web site at: www.ei-ae.gc.ca/en/library/search.shtml. A claimant or representative should always read the cases upon which the Commission is relying. Often the quoted excerpt is taken out of context, and the facts are so different that the case can be easily distinguished, or even used to support the appeal.

Any exhibits, cases, or written arguments should be submitted to the General Division ahead of the hearing date, if possible. This will give the Tribunal a chance to familiarize themselves with the materials, and make more efficient use of the hearing. The Tribunal will accept new evidence at the hearing, but may adjourn it if the material is lengthy.

Service Canada's EI website accessible at: www.ei-ae.gc.ca/en/home.shtml contains links to the legislation, the jurisprudence library, and to the Board of Referees and Umpires' sections, as well as general and appeal division decisions. The Referee's site has a "Quick Reference Tool", "View From the Courts" and "Judicial Interpretations" section. These lead to useful summaries of the law on key issues and to summaries of leading decisions by the Federal Court.

Hearings Before the General Division

Claimant's Preparation

The claimant should be neat in appearance, be prepared to submit a job search if relevant, and be prepared to present the facts of his or her situation. The claimant should also be prepared to answer questions directly and clearly.

The General Division cannot administer an oath (although in rare cases a chair may insist on doing so, citing the *Canada Evidence Act*, **RSC 1985, c C-5,** s.13). In cases where credibility is crucial, claimants may consider preparing a sworn affidavit or statutory declaration of the evidence if the facts are in dispute, since sworn evidence carries greater weight. The affidavit or declaration can also form a useful "record" of the claimant's case and is especially useful in cases where there are contradictory statements.

Representative's Preparation

The representative should also be neatly dressed, which in the case of LSLAP clinicians means courtroom clothing. The representative should:

a) prepare a legal basis to allow the appeal, using the *EI Act*, *EI Regulations*, Digest, and jurisprudence;

b) spend some time before the hearing with the claimant reviewing facts, explaining legal arguments and anticipating questions;

c) prepare a written list of points to be made in the claimant's favour. This is to ensure that if and when "side-tracked" by the General Division, none of the points will be forgotten. It will also be helpful in "making a record" to give to the General Division, ; and

d) prepare a written submission summarizing the main points of evidence and arguments. This fills in the gaps in the oral arguments, and becomes part of the "record" for later appeals to the Appeal Division or the Federal Court.

Procedure at the Hearing

The General Division generally takes a "common sense" rather than a highly legal approach to the proceedings, and is usually interested primarily in the evidence. The claimant's appearance, attitude, and presentation of facts are all important. An hour spent familiarizing the claimant with procedure and preparing him or her for the types of questions the General Division will ask is usually more valuable than an hour spent mulling over the nuances of the *EI Act*. That said, the Tribunal will not allow an appeal if they do not believe they have the authority to do so, whatever sympathy they may have for the worker.

Rules of evidence generally do not apply to General Division hearings. An objection on a "technicality" may upset the General Division and jeopardize the claimant's success. However, the General Division will agree that the hearing is only to decide the questions placed before it and may accept an objection that a question is irrelevant to the issue before the Tribunal. Umpires (Now appeal Division members) have often emphasized that the evidence of a claimant who appears before the Referees (General Division) is entitled to more weight than the hearsay statement of the employer to an EI agent in a telephone conversation.

The claimant can ask to have the hearing taped. In the absence of such a request, the General Division will use its discretion as to whether to record the hearing or not. It is **strongly advised** that every claimant request that the hearing be taped, as this provides a record of the evidence, and also shows whether the General Division gave a fair hearing.

Evidence at the Hearing

Claimant's Evidence

The claimant should then be asked to tell the General Division his or her version of the relevant facts. The advocate should ask leading questions (requiring a simple "yes" or "no" answer) for all matters not really in dispute, or relate the non-controversial facts directly to the General Division members. However, it is important to let claimants tell crucial facts in their own words. At any point, the General Division itself may ask questions of the claimant or witnesses, or may

query parts of the legal argument that it does not understand. A well-prepared claimant can make a good impression if answers are given in a clear, straightforward manner. The claimant should be sure to make eye contact with the General Division members when addressing them.

Most boards take a non-adversarial approach and do not allow cross-examination except by the General Division itself.

Ryan v Attorney General of Canada, 2005 FCA 320 is a useful case because the court reconsidered the weight of some claimant evidence. The court contradicted the general line of reasoning that evidence given by a claimant in response to the Commission's accusations is inherently less believable.

Submissions: Disputing the Commission's Case

Following the presentation of documents, the claimant's evidence, and any other witnesses, the representative should summarise the facts and evidence in the client's favour and make legal arguments if applicable. The representative should point out fallacies in the Commission's argument and distinguish the cases relied upon by the Commission.

XVII. JUDICIAL REVIEW IN THE FEDERAL COURT OF APPEAL

If a claimant disagrees with the decision of the Appeal Division of the Social Security Tribunal, the claimant can file an originating Notice of Motion in the local Federal Court Registry for judicial review by the Federal Court of Appeal, on grounds set out in ss 28 and 18.1(4) of the current Federal Court Act. These are very similar to the grounds for appeal to the Umpire and Appeal Division of the Social Security Tribunal.

The application must be made within **30 days** of the time that the decision was communicated to the applicant, or within such further time as the Court of Appeal may allow. At this stage, qualified counsel is almost essential. Contact the Community Legal Assistance Society if this situation arises. See **Chapter 20: Public Complaint Procedure** for more information regarding judicial review.

XVIII. AUTHORIZATION FOR REPRESENTATIVES

If a student plans to act for a claimant, or obtain information from the Commission on his or her behalf, the student should have the claimant sign an authorization form:

EMPLOYMENT INSURANCE COMMISSION:

I, _____, SIN# ____ ____ ____, hereby authorize you to release any and all information required by _____, or the (University of British Columbia) Law Students' Legal Advice Program, which they may request of you.

DATE:

In addition, the claimant should complete a Personal Information Request Form (available from LSLAP's office) to obtain all documents, memos, notes, e-mail messages, and other records pertaining to the EI claim. An electronic copy of the form is also available online at: infosource.gc.ca.

APPENDIX A: CHECKLIST FOR INITIAL APPLICATION TO EI

I. ADVICE IF CLIENT HAS NOT YET APPLIED FOR EI:

A. APPLY IMMEDIATELY

- Apply during the first full week of unemployment.
- DO NOT wait for the Record of Employment to apply.
- If the application was not filed in the first week, then the claimant should ask for the claim to be "antedated" to the date it should have been filed. "Good cause" must exist to justify each day it was delayed prior to applying (see **Section V: The Benefit Period**).

B. WARNING

- Statements made unwittingly over the phone can be used to disqualify the claimant. To protect him or herself, the claimant can ask for a written summons to be mailed to them. Get advice before replying.

C. HOW LONG DOES IT TAKE TO PROCESS THE APPLICATION?

- From six to eight weeks depending on administrative delay. Benefits can be retroactive if there is an administrative delay.
- **Emergency financial support** can be obtained from income assistance: this is a **loan** and it must be **repaid** when the client receives EI

D. REASON FOR LEAVING

1. DID YOU LEAVE VOLUNTARILY?

   - Why did the claimant leave?
   - Was there "just cause" (see **Section VIII.E.1: Just Cause for Voluntarily Leaving Employment**)?
   - The Commission's determination of "just cause" can be appealed to the General Division.

2. WERE YOU FIRED?

   - Why was the claimant fired?
   - Was there "misconduct" by the claimant (see **Section VIII.E.2: Misconduct**).
   - The determination of "misconduct" can be appealed to the Board of Referees.

E. QUALIFYING FOR EI

1. AVAILABILITY

   a) Are you available for work?

      - Caring for others may mean you are **not** available for work. What arrangements for childcare, for instance, have you made when you obtain work?
      - Studying full time means you are not available for work.

- Studying part time may also mean you are not considered available for work. You will have to prove availability, i.e. that a course does not interfere with the job search (see **Section VIII: Benefit Entitlement**).
- You cannot be on vacation.
- Narrowly restricting your salary expectations, the type of work sought, the work location, or your work schedule can result in a determination that you are **not** available for work.

2. CAPABILITY

a) Are you capable of working?

- You cannot be ill or injured or otherwise incapable of working to qualify (see **Section VII.C: Sickness Benefits** and **VII.E: Pregnancy Benefits**).

3. UNABLE TO FIND SUITABLE EMPLOYMENT

a) Were you offered employment that was unsuitable?

- Were you offered employment in the same occupation for **lower pay**, in **poorer working conditions**?
- Were you offered employment in a different occupation, but at **lower pay** in **poorer working conditions**?

b) Keep a Job Search Record (see **Section X.A: Job Search Record**)

- Where have you sent resumes? Write down the date, and the names, addresses, and phone numbers of companies contacted**.**
- Names of people who you spoke with.
- What dates did you check the job postings board?
- Have you participated in any job search clubs?

F. APPEAL ANY UNFAVOURABLE DECISION