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Making the Law Keep Down the Costs. Why Canada's public systems designed to support unemployed workers with a disability are making the decisions that they are.

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I. Introduction – Déjà vu Revisited[1]

There is ample evidence of continuing high levels of poverty and unemployment among people with disabilities in Canada despite the efforts of public systems and millions of dollars that exist to support them. According to a recent study, working-age people with disabilities were about twice as likely as other Canadians to live below the poverty line and practically two thirds of their total income was from government transfers, increasingly welfare.[2]

Some research suggests that the numbers of unemployed workers with a disability having to rely on welfare, instead of being protected by public disability systems such as workers' compensation, Canada Pension Plan Disability or Employment Insurance Sickness benefits, have increased.[3] This welfarization of disability has serious implications for workers as welfare does not protect income. Poverty is a prerequisite to welfare eligibility and welfare benefits provide only minimum income.

One approach to understand why this has happened would be to examine how the different public systems sought to achieve goals of income replacement and employment over time in order to identify any gaps, barriers or challenges that may have contributed to more prospective claimants being rejected or receiving such insufficient income support that they had to turn to welfare. This paper tracks legislation, policy and decision making in four public systems over the last 25 years with this agenda in mind.

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[1] With acknowledgements to Michael J. Prince, "Canadian Disability Policy: Still a Hit-and-Miss Affair" (2004) 29 Canadian Journal of Sociology 59 at 60.
[2] Cameron Crawford, "Looking Into Poverty: Income Sources of Poor People with Disabilities in Canada" in Michael J. Prince and Yvonne Peters, eds, *Disabling poverty, enabling citizenship* (Winnipeg: Council of Canadians with Disabilities, 2015) 30 at p 31. http://dpec.ccdonline.ca/links/pdf/dpec_book_v02.pdf
[3] John Stapleton, "The "Welfarization" of Disability Incomes in Ontario" (2013December). http://metcalffoundation.com/wp-content/uploads/2013/12/Welfareization-of-Disability-Incomes-in-Ontario.pdf .

The welfarization of disability was documented by John Stapleton and others through a study of changes to disability program expenditures in Canada from 2005-2010. Canada's disability system is made up of a number of different provincial and federal public programs.[4] "Nationally, social assistance [welfare][5] disability income expenditures are growing faster than other programs overall. Between 2005-06 and 2010-11 they grew from $23.2 billion to $28.6 billion, an increase of nearly 30%." [6] In Ontario and western provinces, welfare expenditures have increased disproportionately to all other programs. They have grown fastest in Ontario representing 30% of Ontario's total disability expenditures in 2010 making the Ontario Disability Support Program (ODSP) the single largest program and the one increasing fastest.[7]

While there were a number of reasons to explain why overall disability expenditures were increasing – an aging population, continuing difficulties for people with disabilities to find and retain work, increasing numbers of workers with mental illnesses – the disproportionate increase in welfare expenditures also suggested that there were increasing limitations on the employment based disability programs, predominantly workers' compensation (WC) and Canada Pension Plan disability benefits (CPPD). [8] Stapleton subsequently updated his figures to 2013. In Ontario, welfare (social) assistance as support for people with a disability grew

[4] There are also private disability insurance plans. This paper focuses on only the public systems.
[5] Throughout this paper, the terms welfare and social assistance are used interchangeably.
[6] John Stapleton, Anne Tweddle and Katie Gibson, "What is Happening to Disability Income Systems in Canada?" (2013, February) http://www.ccdonline.ca/en/socialpolicy/poverty-citizenship/income-security-reform/disability-income-systems#sec-executive
[7] Ibid., at 13.
[8] Stapleton used the expression "employment triggered programs," that is employment is a prerequisite for eligibility. This paper uses the expression "employment based" signifying that the entitlement arises out of the applicant's employment.

70.4% from 2005 to 2013 while the total income growth for people with a disability grew only 39%.[9]

This paper describes a series of changes that were made to public systems since 1990 that provide an explanation for a shift in coverage from the employment based systems to welfare. It argues that welfarization of disability was a consequence of legislated and policy reforms made by provincial and federal governments in the common pursuit of cutting costs. These reforms restricted entitlement and reduced benefits ultimately forcing more unemployed workers with a disability to apply for welfare in order to survive. In addition, changes made to decision making processes in all systems, including welfare, to align with cost cutting objectives created systemic barriers to access these systems, increasing the numbers of workers not protected. This paper identified evidence of negative health outcomes associated with being applicants in these systems, the role of stigma and the use of processes that were not in the best interests of workers.

It is argued that these reforms were accomplished through a market framework in which beneficiaries, that is to say people, were reduced to a cost. When governments imposed these reforms, the system responsible for delivering the legislation was also changed, often led by a review conducted by an external private management company. Administrative procedures were set up to facilitate obtaining of these objectives. Even though each system was significantly different from the other on multiple levels, that is to say they covered different circumstances, were administered by different institutions and directed by different levels of government, the practice of all of them was realigned through a combination of similar legislative reforms and by adopting business management strategies to design and implement policy in adjudication to reduce costs.

This process can also be seen in the larger global context of globalization, neo liberalism and new public management which has shifted government policy away from historic norms into

[9] John Stapleton, "Trends in Disability Incomes in Canada" (Presentation delivered at the CRWDP Roundtable, Nov 19, 2015) slide 5.
https://www.crwdp.ca/sites/default/files/nationalsymposium/2._john_stapleton_ptt_presentation_nov_19_2015.pdf

market based approaches. Beginning at different times initially in the Anglo Saxon jurisdictions – Britain, United States, Australia, New Zealand and Canada - new public management uses neo classical economics as a filter within which to view all government policy.[10] Lead by the OECD, there has been a major effort to transform public policy towards people with a disability away from income security, which is seen as a benefit trap, and into one which provides time limited rehabilitation and income support. This included transforming the rules of benefit entitlement and reducing the amounts received by unemployed people with a disability.[11]

In Canada, this realignment began in the 1990s. Prior to that, while costs were always an issue, the disability practice of governments was aligned to address very different objectives: to increase the numbers of workers covered by the employment based systems, to improve levels and effectiveness of benefits and services, and to provide assurances of fairness in decision making. This latter guarantee included improving access to justice for applicants and was supported by the creation of independent and specialized tribunals to hear appeals.[12] These reforms were not without struggle. They were driven by organizations of people with disabilities, injured workers, unions, community organizations and others. Resistance to the current transformation has come from these same activists and their successors in collaboration with researchers, public health and others.

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[10] See G. A. Larbi, "The new public management approach and crisis states." UNRISD Discussion Paper no. 112 (September,1999); http://www.unrisd.org/80256B3C005BCCF9/%28httpAuxPages%29/5F280B19C6125F4380256B6600448FDB/$file/dp112.pdf Andrew Nickson, "Managerial Reforms and Developmental State Capacity" commissioned by UNRISD Flagship Report on Poverty (May 2008) DRAFT. http://www.unrisd.org/80256B3C005BCCF9/%28httpAuxPages%29/953967BDEBADA049C1257A5D0056FA7B/$file/NicksonWeb.pdf

[11] See Organisation for Economic Co-operation and Development (OECD), Transforming Disability into Ability http://www.oecd.org/els/emp/transformingdisabilityintoability.htm

[12] See for examples Michael J. Prince, "Wrestling With The Poor Cousin: Canada Pension Plan Disability Policy and Practice, 1964-2001"Research Paper prepared for Office of the Commissioner of Review Tribunals (June 2002) https://web.archive.org/web/20030401080913/http://www.ocrt-bctr.gc.ca/pubs/index_e.html ; Andrew King, *Making Sense of Law Reform- A Case Study of Workers' Compensation Law Reform in Ontario 1980 to 2012*, (LLM thesis, UOttawa, 2014) [unpublished]; Ian Morrison, "Ontario Works: A Preliminary Assessment" (1998) 13:1 Journal of Law and Social Policy1.

This paper argues that the critical limitations, gaps and confusion that exist between the public disability systems today are a result of the primacy of cost cutting and corporate restructuring in reform over the past 25 years. This paper proposes that future policy must broaden its framework to make improving outcomes for all workers with a disability a priority, develop a worker based disability model to support interventions and improve implementation through collaborative research projects.

II. Methodology

This paper is a case study of Ontario, the province where welfarization was most advanced in Stapleton et al's research, to examine the realignment of the public systems and its impacts. It does so in two sections. The first section is a systems description. Each of the four major public systems examined in this paper – CPP disability, EI sickness benefits, workers' compensation and welfare - is briefly described with a short explanation of its history, what the system was set up to do and the changes made since 1990. The second section focuses on key changes made to who is covered and the services or financial support they receive, and describes the evidence of the impact of these changes on workers. This includes a review of how changes were made to decision making processes, standards of decision making and appeals.

The research methodology was constructed from four principle approaches.

As a starting point, this paper adopts the standpoint of unemployed workers with a disability. Eakin demonstrated that standpoint influences research and plays a significant role in how one sees and acts within the world.[13] By adopting the standpoint of workers, the objective is to see how the system works or does not work for them. Lippel built on this premise and described key issues that should be addressed in a system designed to meet the needs of workers while respecting their right to be treated with dignity.[14] In the context of economic evaluations of occupational health and safety prevention investments, Culyer et al have argued that full and transparent consideration of all possible stakeholders is necessary in order to determine

[13] Joan M. Eakin, "Towards a 'standpoint' perspective: health and safety in small workplaces from the perspective of the workers" (2010) 8:2 Policy and Practice in Health and Safety 113.
[14] Katherine Lippel, "Preserving Workers' Dignity in Workers' Compensation Systems: An International Perspective" (2012) 55:6 American Journal of Industrial Medicine 1.

whether an intervention should be adopted. As they summarized, workers should not be treated like "carthorses". [15]

Secondly, this paper's approach to evaluating legal systems as decision making bodies is drawn from the work of Marc Gallanter whose studies of the US judiciary in 1974[16] and again in 2006[17] demonstrated how the courts' decisions were influenced by persistent interested engagement on behalf of those with the financial and legal resources to exploit them. Gallanter demonstrated how corporations - Artificial Persons or APs – have used their resources to influence decision making on a broad scale throughout the legal system. In this paper, our focus is on the institutions set up to implement the systems and not the courts. These institutions function much like the courts in making legally binding decisions but have a much more active role than courts requiring them routinely to decide whether thousands, if not tens of thousands, of claims are legitimate and if people are entitled to payments and/or services. This functional requirement has been described as "mass adjudication" [18] and draws attention to the importance of policy and adjudication procedures designed to deliver consistent decision outcomes for large numbers of claimants. Appeals of these decisions typically proceed to a tribunal set up under the legislation and not to the courts. The role of the courts is restricted to judicial review which adopts a position of deference to the tribunal's expertise and intervenes only when the decision is unreasonable.

In this environment, policy and administrative practices are significant in directing decision outcomes.[19] For this reason, the paper examines significant changes to policy, adjudication

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[15] Anthony Culyer, Benjamin Amick III & Audrey Laporte, "What is a little more health and safety worth? " in Emile Tompa, Anthony Culyer & Roman Dolinski, eds., *Economic Evaluation of Interventions in Occupational Health and Safety: Developing Good Practice* (Oxford University Press, 2008) at 30-31.
[16] Marc Gallanter, "Why the "Haves" come out ahead: Speculations on the Limits of Legal Change" (1974) 9 Law and Society Review 95
[17] Marc Gallanter, "Planet of the APs: Reflections on the Scale of Law and its Users" (2006) 53:5 Buffalo Law Review 1369.
[18] John M. Evans, "Problems in Mass Adjudication: The Court's Contribution" (1990) 40:3 University of Toronto Law Journal 606.
[19] France Houle & Lorne Sossin, "Tribunals and guidelines: Exploring the relationship between fairness and

practices and appeals as well as legislation and case law. Following Gallanter, this paper contrasts these changes with the available empirical evidence of the effects of these policy and practices on workers.

Thirdly, building on the work of Dorothy Smith,[20] laws, regulations, programs and policies are understood as frames through which institutions organize front line decision makers to reconstruct the lives of applicants for adjudicative purposes. The resulting decisions turn the worker's experiences into a discrete number of acceptable (or unacceptable) actionable categories. The disjuncture between the experience lived by the worker and her or his treatment by the institution is made apparent in the contrast. An examination of the programs, policy and practices from the standpoint of workers provides an explanation of how the system works (or does not work) for them.

Fourthly, a social justice lens is utilized. The role of organizations of those most affected in the evolution of these social programs - injured workers, people with disabilities, unions- is well documented.[21] Some advocacy organizations and social justice movements have adopted formal research strategies in association with independent researchers in order to better make the case for reform and establish the parameters within which social programs should operate. Community aligned researchers have added substantially to the available evidence of the impacts of these changes, notably Disabling Poverty/Enabling Citizenship,[22] an alliance of the Council of Canadians with Disabilities and researchers, and the Research Action Alliance on the Consequences of Work Injury, an alliance of injured workers' organizations, community legal

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[20] Dorothy E. Smith, *Institutional Ethnography A Sociology for People* (U.K.: AltaMira Press, 2005).
[21] Michael McCann, "Law and Social Movements: Contemporary Perspectives" (2006) 2 Annual Review of Law and Social Science 17; Byron Sheldrick, "Law, Representation, and Political Activism: Community-based Practice and the Mobilization of Legal Resources" (1995) 10:2 Canadian Journal of Law and Society155; Robert Storey, ""Their only power was moral": The Injured Workers' Movement in Toronto, 1970-1985" (2008) 41:81 Social History 99; and Lisa Vanhala, "Disability Rights Activists in the Supreme Court of Canada: Legal Mobilization Theory and Accommodating Social Movements" (2009) 42:4 Canadian Journal of Political Science 981.
[22] *Supra* note 1, Prince, "Hit or Miss."

clinics and researchers. "Nothing about us without us" is a central tenet of the reform project. [23]

A review of the major public systems in Ontario with mandates to support unemployed workers with a disability - WC (WSIB[24]), CPPD, EI sickness and Welfare (ODSP) - was carried out with a focus on the period 1990 to 2015. Institutional web sites were examined for policy documents, annual reports and evaluative studies. Peer reviewed literature was searched for studies of the systems that examined impacts and consequences for workers. A review of changes to adjudication and appellate system for each system was conducted and key court decisions identified. Legal scholarship on human rights and leading court decisions addressing issues affecting entitlement to benefits for workers with an injury or disability were examined.

Databases searches included Google News, Google Scholar, CANLii, and Quicklaw.

Websites of key advocacy and social justice organizations were searched: the AODA Alliance (http://www.aodaalliance.org), Caledon Institute (http://www.caledoninst.org),,Canadian Labour Congress (http://canadianlabour.ca), Council of Canadians with Disabilities (http://www.ccdonline.ca), Institute for Work and Health (http://www.iwh.on.ca), Injured Workers Online (http://injuredworkersonline.org), Income Security Advocacy Centre (http://www.incomesecurity.org/), and ODSP Action Coalition (http://www.odspaction.ca/).

[23] See Council of Canadians with Disabilities at http://www.ccdonline.ca/en/socialpolicy/poverty-citizenship and Research Action Alliance on the Consequences of Work Injury (RAACWI) at http://www.consequencesofworkinjury.ca.

[24] Rebranded in 1997 as the Workplace Safety and Insurance Board or WSIB.

III. Systems Description

Canada's program of protection for unemployed workers with a disability is made up of a number of systems which operate separately from each other. This separation was in part a result of Canada's constitution which divides the legislative power to do certain things between the Federal government and provincial government. The separation is also due to systems having different mandates and being carried out by different institutions. Both Marchildon[25] and Beatty,[26] in attempting to describe prospects for reform of these systems, emphasized these separations as the challenge. While neither rejecting these arguments nor suggesting they are not important, this paper suggests that post 1990 changes made to the systems emphasized the separations. Prior to this, the approach at both levels of government was to expand coverage and improve benefits for workers.[27]

These changes are documented in two steps. This part, the Systems Description, provides a brief description of each of the four programs, their mandates and the major changes that were made. The next part, Key Coverage and Benefits Changes, will focus on specific changes which resulted in restricting, reducing and rejecting benefits for applicants. In both parts, the changes are described for each program separately and consecutively.

To provide some context, it is first important to highlight of some key substantive differences between the employment based systems and welfare from the perspective of workers.

WC, CPPD and EI are employment based systems in that the beneficiary – a worker –must have a prior work history in order to be eligible. In WC, the history is situational – the illness or

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[25] Gregory P Marchildon, "Health Security in Canada: Policy Complexity and Overlap" (2008) 6 Social Theory & Health 74.
[26] Harry Beatty, "Comprehensive Disability Compensation in Ontario: Towards an Agenda" (1991) 7Journal of Law and Social Policy 100
[27] *Supra* note 10, Prince, "Wrestling" and King, Thesis.

injury arises out of and in the course of employment. The length of history is relevant only to determine the level of income replacement. In CPPD and EI sickness, the history is contributory. CPPD and EI require contributions from employers and workers. A worker must make a minimum contribution to be eligible. This contrasts to welfare where eligibility is determined by proof of sufficient disability and sufficient poverty.

The employment based systems pay an income replacement benefit based on a proportion of/or other relationship to the worker's income. WC and EI both pay an income benefit based on a percentage of prior income. CPPD pays a fixed amount plus an additional amount derived from income so there is some variation but overall the benefit is less than provided by WC and EI. Welfare pays only a minimum amount set by government, the adequacy of which is widely questioned.[28]

Secondly, as is suggested from the brief descriptions below, the mandates of employment based systems do form a coherent pattern of protection – work injury, short term illness, permanent disability. The outcomes for workers are in the details of the legislation and policy, and in the administration of the adjudication of claims.

Employment Based Systems

Workers Compensation

Workers Compensation (WC) was established in Ontario in 1914 as a compromise of legal rights.[29] Prior to WC, an injured worker or his survivor could sue the employer in negligence for damages as a result of injury or death. However, success was difficult and costly for injured workers and their survivors. Ultimately public pressure and a public inquiry lead to

[28] See Action Coalition on AODSP, "Income Adequacy For People With Disabilities" http://www.odspaction.ca/resource/adequate-incomes-people-odsp
[29] See *supra* note 10, King thesis, for a detailed review.

recommendations that resulted in legislation that abandoned the right to sue and gave injured workers a claim to benefits from a public corporation that collected premiums from employers.

The mandate of this system is to pay income loss benefits and provide employment supports for workers who are injured or made ill by their work and unable to work as a result.

Originally worker's compensation paid temporary benefits based on 50% of income and permanent pensions based on a percentage of pre accident income based on a medical assessment of impairment. The authority to provide rehabilitation assistance was added after the Second World War. In 1914, only a few sectors of employers had mandated coverage but this was consistently expanded up until the 1960s when retail was added.

Beginning in 1990 successive governments implemented legislative reforms that changed WC permanent disability benefits from a disability pension into a wage loss payment. Rebates and surcharges on premiums through experience rating were introduced for employers. Employment supports were initially amplified and a modest incentive was placed on employers in individual cases to reemploy injured workers. An independent tribunal to hear appeals was established.

Legislative change beginning in 1995 and again in 1997 focused WC on employers interests, further reduced worker benefits, prioritized prevention and privatized employment supports. Just over a decade later, this privatization was a demonstrated failure. Prevention was removed from the WSIB mandate after a critical review by an expert panel.[30] For a brief period from 2004 to 2008, under the first Liberal government after the Conservatives, under a President who came from the public sector instead of the private, the WSIB was open to review of its practices and research the impacts that these changes produced. Since 2008, however,

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[30] Ontario, Expert Advisory Panel on Occupational Health and Safety, *Report and Recommendations to the Minister of Labour* (Ontario Ministry of Labour, 2010).

the influence of the Auditor General and the cost cutting agenda has been paramount.[31] Experience rating is still used despite little evidence that it improves prevention without the considerable evidence of negative impact on injured workers. [32]

Canada Pension Plan – Disability Benefit

This benefit was established in the 1960s as part of a much larger and ambitious plan to provide public pensions for working people in Canada. It was made possible by a unique constitutional amendment. The amendment gave the federal government the authority to make laws in relation to old age pensions provided that there was no provincial law on the same subject. [33] Disability and survivor benefits were accepted by the provinces and Ottawa as included within the scope of a national contributory pension plan.

This led to federal legislation creating the Canada Pension Plan in 1965 which contains a unique provision. Any changes to the Federal legislation requires support of at least two thirds of all the provinces, with not less than two thirds of the population of the included provinces.[34] Quebec has a separate plan but is included in the formula. If any other province, such as Ontario, wanted to have a separate plan, there is a notice provision in the legislation and a process by which this is accommodated.

One of the mandates of this system is to pay a pension to workers who are unable to maintain employment for a prolonged period because of a disability.

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[31] See Auditor General of Ontario, *Annual Report* (Toronto: AG, 2009) and Auditor General of Ontario, *Annual Report* (Toronto: AG, 2011).

[32] PRISM, Workplace Injury Supression Final Report, prepared for WSIB (April 2013) http://www.wsib.on.ca/cs/groups/public/documents/staticfile/c2h/mdex/~edisp/wsib011617.pdf; Harry Arthurs, *Funding Fairness: A Report On Ontario's Workplace Safety And Insurance System*, Report prepared for Workplace Safety and Insurance Board (Toronto: Queen's Printer, 2012); Katherine Lippel, "Therapeutic and Anti-Therapeutic Consequences of Workers' Compensation" (1999) 22:5-6 International Journal of Law and Psychiatry 521; E. Tompa E, Trevithick S & McLeod C., "Systematic review of the prevention incentives of insurance and regulatory mechanisms for occupational health and safety." (2007) 33:2 Scandinavian Journal of Work, Environment and Health; T. Ison, "Significance of Experience Rating" (1986) 24 Osgoode Hall Law Journal 723; Dave Bruser and Mora Welsh, "When companies get rewarded for mistakes. Flaw in worksite safety system allows big rebates even when a death occurs," Toronto Star (April 5, 2008).

[33] *The Constitution Act*, 1982, s 94A.

[34] *Canada Pension Plan Act*, RSC 1985, c C-8 s 114(4)

Similar to EI, the plan is funded by employer and worker contributions. A worker's eligibility requires a minimum contribution within a specified time frame. Unlike EI, CPP included self employed workers from its inception. Unlike EI, CPP funds are kept in a special account so Government cannot scoop any surplus into general revenues.

The disability benefit is payable to eligible contributors who have a severe and prolonged mental or physical disability. A disability is severe only if the person is incapable regularly of pursuing any substantially gainful occupation, and a disability is prolonged only if it is likely to be long continued and of indefinite duration or is likely to result in death.[35]

Unlike WC and EI, the CPPD income benefit is not calculated simply on a percentage of prior income. Instead, there is a fixed basic monthly allowance plus an amount based on contributions. [36] This lower benefit rate was because it is designed as a pension, a supplement to other sources of income.[37]

A number of Canadian scholars have written about CPP. Michael Prince, in 2004, wrote a comprehensive review of the evolution of the disability pension for the Office of the Commissioner of Review Tribunals.[38] He identified four periods of development roughly matching the changes in government from 1964 to 2001. The first three periods map the design, implementation and initial reforms to the disability program. What is consistent across the period up to 1993 is a common agenda to expand eligibility, entitlement and benefits for workers with a disability. Contribution requirements for eligibility were reduced. The narrow interpretation of the serious and prolonged requirement for CPPD was relaxed following a

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[35] *Canada Pension Plan Act* s 42(2)(a).
[36] Service Canada, Disability Benefit, http://www.servicecanada.gc.ca/eng/services/pensions/cpp/disability/benefit//index.shtml.
[37] See S. Torjman, "The Canada Pension Plan Disability Benefit" Prepared for the Office of the Commissioner of Review Tribunals (Canada), (Caledon: February, 2002) http://www.caledoninst.org/Publications/PDF/314ENG.pdf
[38] *Supra* note 10, Prince, "Poor Cousin".

court ruling in 1988 with a more flexible approach to determining the availability of gainful employment.[39] Vocational rehabilitation programs were implemented.

The liberalization of disability benefits, contributory requirements and time limits on claims introduced through the legislative reforms of 1987 and 1992 increased both the number of successfully claimants and CPP expenditures.[40] Provincial social assistance and workers' compensation systems became aggressive in requiring their claimants to also apply for CPPD in order to reduce the amount of benefits that they would be required to pay. Although anticipated by the nature of the reforms made, these increases made CPPD a target of fiscally conservative governments.[41]

Since 1994 with the major changes being made in 1997-8 the federal government has increased contribution eligibility requirements, reduced benefits and returned to a stricter interpretation of entitlement especially in relation to work. There was one small exception in 2007 which reduced eligibility requirements by one week for long term (25 years) contributors.[42] As Prince notes, the cuts to benefits were modest compared to those in the other three systems at least in part because of the requirement that provinces had to agree. A major revamp occurred on the funding side. CPP contributions by employers and employees were significantly increased to provide a stronger revenue base. The Canada Pension Plan Investment Board was established to invest those funds that were collected but not immediately required (for payout of benefits) in order to provide better financial security for the scheme.

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[39] Ibid., at p 42.
[40] Ibid., at p 51.
[41] See Sherri Torjman, "History/Hysteria" (Caledon Institute, December 1996) http://www.caledoninst.org/Publications/PDF/23ENG.pdf
[42] *An Act to amend the Canada Pension Plan and the Old Age Security Act*, SC 2007 c. 11

Employment Insurance Sickness Benefits

Unemployment insurance was introduced in 1940 after a constitutional amendment gave the federal government the authority to carry it out nationally. The general mandate of this system was to provide workers who lose their jobs with some income support while seeking new employment. The first major overhaul was in 1971 which expanded coverage and increased benefits. Then, beginning in 1990, there were a series of retrenchments culminating in 1996 with the rebranding of unemployment insurance as Employment Insurance. There was a restructuring of how premiums were calculated and a reduction in both the amount and number of benefits received. EI coverage has dropped from 80% to closer to 40% of workers.[43] There is also differential coverage across Canada because eligibility rules vary according to regional unemployment rates with broader coverage east of Ontario.

Sickness benefits are a type of special benefit first added to the unemployment insurance system in 1971. Sickness benefits have limited duration (maximum of 15 weeks) paid when a claimant is unable to work because of illness, injury or quarantine, and would otherwise be available for work. There is a minimum contribution requirement. An applicant must have worked a minimum 600 hours in the past 52 weeks to be eligible for sickness benefits. The other special benefits currently available are maternity leave, parental benefits, compassionate care benefits, and parents of critically ill children benefits.

Of particular interest in the face of these restrictions is the EI surplus. Since 1986, premiums have been paid directly into government revenue, albeit credited to the UI/EI account. Since

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[43] See Maple Leaf Web, "Employment Insurance in Canada: History, Structure and Issues," http://www.mapleleafweb.com/features/employment-insurance-canada-history-structure-and-issues#history ; Zhengxi Lin, "Employment Insurance in Canada; Policy Changes", Perspectives no 42 (Statistics Canada, 1998) Catalogue no. 75-001-XP; Lars Osberg, "Canada's Declining Social Safety Net - The Case for EI Reform," (Canadian Centre for Policy Alternatives, June 2009) http://www.policyalternatives.ca/sites/default/files/uploads/publications/National_Office_Pubs/2009/Canadas_Declining_Safety_Net.pdf

the retrenchment, the UI/EI account has generated huge surpluses which the government simply used as revenue. Unions challenged this action in the courts as unconstitutional and an unlawful use of the money which had been collected explicitly to cover the UI/EI system costs. The case was finally heard by the Supreme Court of Canada in 2008. As of March 2008, the cumulative EI surplus was $56.9 billion dollars. The courts ruled that, except for a three year period, the actions of the government were permitted by the constitution. [44]

In 2010, the Harper Conservative Federal government decided to close the EI account and transferred a further $57 billion surplus to general revenue. This was again challenged in the courts and failed.[45] The recently (2015) elected Liberal Federal government has proposed to make some changes to extend some benefits and shorten wait times[46] but rejected making the EI Fund independent. EI surpluses of $3.5 billion in 2014 and $2.2 billion in 2015 are helping balance federal books in 2016.[47]

Welfare

Provincial social assistance plans, welfare as they are generally known, were first introduced around the First World War[48] and then again largely in response to the Great Depression and the failure of municipal relief in the 1930s. Welfare provides a minimum level of income support to individuals.[49] In 1966 the federal government introduced the Canada Assistance Plan (CAP) which shared the costs of provincial social assistance on a dollar for dollar basis. In

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[44] *Confédération des syndicats nationaux (CSN) v. Canada (Attorney General)* 2008 SCC 68.
[45] Canada Press, "Supreme Court sides with Ottawa in $57B EI surplus case," CBC Jul 17, 2014 http://www.cbc.ca/news/canada/montreal/supreme-court-sides-with-ottawa-in-57b-ei-surplus-case-1.2709846
[46] Pete Evans, " EI overhaul will extend benefits, shorten wait times - Changes will make 50,000 more people eligible for employment insurance, Ottawa says." CBC Mar 22, 2016. http://www.cbc.ca/news/business/budget-ei-1.3502956
[47] Canadian Press, "Bill Morneau rejects making employment insurance fund independent - EI surpluses were $3.5 billion in 2014 and $2.2 billion in 2015 - helping balance federal books" CBC Mar 24, 2016 http://www.cbc.ca/news/politics/morneau-canadian-press-employment-insurance-budget-1.3506214
[48] Michael J. Prince, "Entrenched Residualism: Social Assistance and People with Disabilities" in Daniel Béland and Pierre-Marc Daigneault, eds, *Welfare Reform in Canada: Provincial Social Assistance in Comparative Perspective*, (Toronto: University of Toronto Press, 2015) chapter 16
[49] *Supra* note 22, Marchildon at 77.

the 1960s Ontario adopted two statutes to deliver the system, General Welfare Assistance Act which was municipally based and provided short term benefits to people in need and the Family Benefits Act which was administered provincially and provided longer term assistance.

In 1990 the Federal government put a limit on its contribution to CAP to the then "have" provinces of Alberta, British Columbia and Ontario. In 1995 it eliminated CAP altogether replacing it with block funding.[50] In the early 1990s Ontario faced a major economic recession and the highest welfare caseloads since the 1930s. The Harris Conservative election victory in 1995 included promises to slash welfare rates, to make recipients work for their welfare, and to root out "fraud and abuse".[51]

The changes made were dramatic. Welfare income benefit rates were reduced by 21.6% in October 1995 for everyone except persons with a disability. Workfare – the compulsory requirement to participate in work programs – was brought in and applied to all recipients except persons with a disability. The legislation reforms occurred in 1997 with the Social Assistance Reform Act that created two new systems – Ontario Disability Supports Program (ODSP) which applied only to persons with a disability (and some seniors) and Ontario Works (OW) which applied to everyone else. The transformation was not limited to the statutory framework. The Ontario government signed a five year agreement with then international business consulting firm Anderson Consulting to lead a Business Transformation program that ultimately lead to a new Service Delivery Model through which the programs are delivered.[52]

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[50] CAP was shared funding and required the provinces to meet certain standards in welfare programs. Block funding was a fixed amount of total federal transfer in which welfare competed with healthcare, education and other programs for funds. See Ken Battle and Sherri Torjman, "The Dangers of Block Funding", (Caledon Commentary, February 1995) for a fuller description of the problems presented by block funding. http://www.caledoninst.org/Publications/PDF/479ENG.pdf

[51] Ian Morrison, "Ontario Works: A Preliminary Assessment" (1998) 13 Journal of Law and Social Policy 1.

[52] Ibid., at 11.

The choice to create a separate system for persons with disabilities was described by Beatty as an attempt by the government to distinguish between those who were seen as "deserving poor" and those who were "undeserving poor."[53] Creation of a separate system for this "deserving poor" group was part of a larger strategy to enforce workfare, cutbacks and restrictive rules on other "less deserving" groups. People with disabilities (and a limited class of seniors) would be taken out of "welfare" so that welfare could be cut for the rest. On the other hand, as Beatty points out, the government ultimately enforced rigorous eligibility requirements under ODSP as well as OW although this was not mentioned in the government's public remarks. Despite several reviews,[54] there have been few substantive changes under subsequent governments.

[53] Harry Beatty, "Ontario Disability Support Program: Policy and Implementation" (1999) 14 Journal of Law and Social Policy 1.

[54] Deb Matthews, M.P.P. Parliamentary Assistant, "Review of Employment Assistance Programs in Ontario Works & Ontario Disability Support Program" (2004) http://www.mcss.gov.on.ca/documents/en/mcss/social/publications/EmploymentAssistanceProgram_Matthews_eng1.pdf ; Task Force on Modernizing Income Security for Working- Age Adults (2006) http://www.stchrishouse.org/get-involved/community-dev/modernizing-income-work-adults/ ; Report of the Ontario Social Assistance Review Advisory Council (2010); Commission for the Review of Social Assistance in Ontario, "Brighter Prospects: Transforming Social Assistance in Ontario: Realizing Our Potential" (2012) http://www.mcss.gov.on.ca/documents/en/mcss/publications/social/sarac%20report/SARAC%20Report%20-%20FINAL.pdf ; and "Realizing our Potential - Poverty Reduction Strategy" (2014-2019) https://www.ontario.ca/page/realizing-our-potential-ontarios-poverty-reduction-strategy-2014-2019-all.

IV. Key System Changes Since 1990

In this section the paper looks in detail at Ontario and how changes systematically reduced, restricted and/or denied benefits to workers since 1990. It is presented in two parts. The first part provides examples of key legislation and policy changes for each system that effected who was covered and the benefits they received. The second part addresses changes that were made to the ways in which decisions are made.

Key Legislation and Policy Changes

Each system makes two initial decisions. Is this person eligible to receive the benefits that this system provides? Does this person have the characteristics – illness, injury, disability – that entitles her or him to the benefits? As Beatty points out, determining this is not simply a matter of looking at written rules. [55] Understanding how the rules are applied in practice and how restrictive they are is critical to what an applicant does or does not receive. Rejection on either of these grounds puts the applicant worker outside the system without any support from it.

If a worker is accepted into the system, she or he then becomes eligible for benefits. This section also looks at changes to income replacement benefits and employment supports for unemployed workers with a disability.

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[55] *Supra* note 23, Beatty, "Comprehensive Disability Insurance" at 104.

Workers' Compensation

While the WC reforms in the 1990s made no change to the general eligibility criteria in workers' compensation, the failure to continue to extend the number of covered sectors has lead to an increasing proportion of Ontario workers who are not covered, 65-68% according to Smith et al in 2004.[56]

The 1997 reforms introduced restrictions on entitlement for the first time. WSIB, as WC was rebranded, would no longer provide compensation to workers for the impacts of chronic work stress. Secondly, workers who were victims of chronic pain as a result of their work injury would have their benefits restricted by regulation. Although both limitations remain in the legislation, the latter regarding chronic pain is void because of the decision of the Supreme Court of Canada that a similar attempt to limit benefits to injured worker victims of chronic pain by the government of Nova Scotia violated the Charter of Rights.[57] There is a growing consensus that the rationale of the SCC in *Martin & Laseur* applies to chronic stress as well. BC has recently passed legislation recognizing this and two WSIAT decisions applying the Charter (as *Martin & Laseur* requires them to do) have held that the restriction of chronic stress entitlement violate the Charter.[58] To date, however, there has been no change in the policy and practice of denial by the WSIB. This policy has been a major impediment to recognition of the growing number of workers with mental health problems associated with psychosocial hazards in the workplace.[59]

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[56] Smith, P. M., Mustard, C. A., & Payne, J. I. (2004). *Methods for estimating the labour force insured by the Ontario Workplace Safety & Insurance Board: 1990-2000*. Chronic Diseases and Injuries in Canada, 25(3/4), 127.
[57] *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, [2003] 2 S.C.R. 504. (Martin & Laseur)
[58] See WSIAT Decisions No. 2157/09 and Decision No. 665/10 I2.
[59] Katherine Lippel, "Law, public policy and mental health in the workplace" (2010)11 Healthcare Papers 20.

Many permanently disabled workers lost significant financial compensation because of the switch from a pension to wage loss system. Many workers who would have received a lifetime pension under the pre 1990 system received only a much smaller lump sum in the post 1990 system. Instead, a wage loss benefit was to provide income replacement benefits to unemployed workers with a permanent disability in both initial and subsequent unemployment. Once an injured worker received a payment for non economic loss (NEL) recognizing some permanent impairment, she or he then became eligible until age 65 for wage loss benefits if she or he lost their work because of the disability. This was particularly important for the growing numbers of workers with low back, shoulder, wrist and other musculoskeletal injures who found themselves in and out of work as their disabilities flared up or worsened. The price was that workers would be monitored for their co-operation in getting back to work. If a worker failed to co-operate, benefits could be reduced or eliminated.

Recently, however, using a Value for Money audit conducted by the management consulting firm KPMG[60] as its justification, the WSIB changed its approach to determining whether or not a worker is eligible for the NEL. Whereas before these assessments were done by independent doctors' and medical specialists' examination and reviewed by trained nurse case managers, going forward they were done administratively by adjudicators with a view to making sure that only those whose disability are acceptable to WSIB policy receive the NEL. This is done quite consciously as part of a strategy to reduce the number of people eligible to claim extended support from the system. COA John Slinger recently noted in a letter to a trade journal that recognition of permanent disability for back injuries had been reduced by 80%.[61]

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[60] KPMG, "WSIB Adjudication & Claims Administration (ACA) Program Value for Money Audit Report" (2011) 2010 - WSIBVFMAReportExecSummary-2.pdf

[61] John Slinger, "Letter to the Editor" Canadian Contractor (November 11, 2015). http://www.canadiancontractor.ca/canadian-contractor/wsib-ontario-deny-claims-transfer-285-million-investment-fund/1003274958/

A similar strategy arising from the same VFM report targeted the claims of workers whose disabling injury involved a recurrence or aggravation of previous injury.[62] Old WC policies reducing entitlement because of "pre-existing disabilities and conditions" had been rejected in the 1980s because they were contradicted by well established legal principles. [63] This approach resurfaced in WSIB policy as a basis for cutting benefits to workers with these conditions after the adoption of the VFM audit.[64]

The amount of income replacement for injured workers was reduced in two ways. Firstly, the percentage of income replaced was reduced from 75% of gross to first 90% and now 85% of net earnings. Secondly, WC developed a policy called deeming. Essentially, deeming involved reducing a worker's wage loss benefit by the wages the WSIB thought she or he could earn in a suitable job whether or not it was available. The application of this policy was accelerated by the policy changes made after 1995.[65]

Prior to 1995, the wage loss model was flexible enough to help permanently disabled workers with return to work, initially and over time. Deeming during this period was restricted by a requirement that a job had to be available and workers were supported with vocational rehabilitation. After 1997 and by 2005, both of these factors were removed. The numbers of workers returning to work decreased in an environment where even larger employers understood there was no penalty for refusing to employ injured workers.[66] It is to be noted

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[62] *Supra* note 58, KPMG, ACA.

[63] This is a rule in negligence law that the person legally responsible for the injury (in this case, the employer) must take their victim (the worker) as it finds him or her. What this means is that the employer's liability is not lessened because the effects on the worker are more serious than usual. Except in those cases where the victim had a prior disability, the employer is responsible for the full extent of the consequences. See CanLII Connects, "Thin Skull and Crumbling Skull" http://canliiconnects.org/en/summaries/28393.

[64] WSIB Operational Policy Document Number 15-02-03 Section: Work Relatedness Subject: Pre-existing Conditions.

[65] *Supra* note 10, King, Thesis at 74.

[66] This came as a result of a joint research project between the WSIB and the IWH referred to as the Locked in Claimants Study and referenced in *supra* note 58, KPMG ACA. See Shelagh Hogg-Johnson, Cynthia Chen, David

that this consequence came to light as a result of an collaboration between the Institute for Work and Health and senior WSIB managers. Two VFM audits commissioned to review the program failed to detect this consequence to workers.[67] The Labour Market Reintegration program was reversed by 2012.

Studies by Ellen MacEachen, Joan Eakin and others have identified ways in which workers were put into toxic situations where they had to 'play it smart' to survive return to work programs and practices.[68] Lippel references this research in her paper as evidence that, in order to protect workers' health and dignity, programs should legitimately support workers and not be primarily vehicles to cut them off benefits.[69]

This situation was exacerbated for workers by the integration of CPPD benefits. A major fear of some economists in the 1990s was that a worker could receive both CPPD and WC at the same time. This was identified as a concern by Campolieti and Lavis[70] and by Marchildon.[71] It was suggested though never proven that this would lead to some workers getting more money than they were earning while working. The result was that WC legislation was amended to require the deduction of CPP benefits from any loss of earnings that an unemployed permanently disabled worker would receive. In many cases, this would happen to unemployed permanently disabled workers who had been deemed to be capable of suitable work by WC even though CPPD had determined the same workers was unable to obtain any remunerative employment. The WC benefits were reduced thereby two fold, the first by deeming and the second by deducting CPPD.

Tolusso, Emile Tompa, Arold Davilmar & Benjamin Charles Amick III. "Did changes in workers' compensation policy and practice drive increasing long duration of claims? Findings from the Ontario Long Duration Claim Study" (2013) Submitted Manuscript.

[67] *Supra* note 10, King, Thesis at 93.

[68] Joan Eakin, Ellen MacEachen & Judy Clarke, "'Playing it smart' with return to work: small workplace experience under Ontario's policy of self-reliance and early return" (2003) 1:2 Policy and Practice in Health and Safety 19; Ellen MacEachen, Sue Ferrier, Agnieszka Kosny & Lori Chambers. "The "Toxic Dose" of System Problems: Why Some Injured Workers Don't Return to Work as Expected" (2010) 20:3 Journal of Occupational Rehabilitation 349.

[69] *Supra* note 12, Lippel, "Preserving Dignity" at 522.

[70] Michele Campolieti and John Lavis, "Disability Expenditures in Canada, 1970-1996: Trends, Reform Efforts and a Path for the Future" (2000) 26:2 Canadian Public Policy 241.

[71] *Supra* note 22, Marchildon at 85.

Canada Pension Plan Disability Benefits

Applicants for CPP disability benefits have always had to meet minimum contribution requirements. They had been modified by amendment three times prior to 1998 (1975, 1980, 1987). Up until 1998, however, the modifications had been to reduce requirements and improve eligibility for workers. In 1998 the contribution requirements were increased to four of the last six years to have the opposite effect. According to the Summative Evaluation in 2011, there was a decrease of qualifying contributors by 15.2% from 1997 to 1998 and a 35% decrease among eligible self employed contributors.[72] Compared to EI where annually approximately 88% of contributors are eligible for benefits, by 2005 only 68% of CPP contributors were eligible for disability benefits.

The principle issue in adjudicating entitlement in CPPD has always been the interpretation of "severe and prolonged" and what is "gainful employment". After 1998, policy returned to a more restrictive interpretation. The emphasis was placed on a medical adjudication of severe and prolonged and on a determination of 'work capacity' that considered whether or not the applicant could do any work, a process similar to deeming used in WC. The claimant might not have a job but they could do something. The measure for gainful employment was the ability to earning the equivalent of 12 months of the maximum CPPD pension. The principle justification for this restrictive interpretations was that rejected claimants would return to work because they could do gainful employment.

A Summative Evaluation of CPPD in 2011 provided two approaches by which to asses the impacts of this restrictive interpretation.[73] The first came from a survey in 2008 of 2,000

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[72] Evaluation Directorate, Strategic Policy and Research, Human Resources and Skills Development Canada , "Final Report - Summative Evaluation of the Canada Pension Plan Disability Program"(Ottawa: HRSDC, 2011) http://www.esdc.gc.ca/eng/publications/evaluations/income/2011/sp-983-02-11-eng.pdf.
[73] Ibid., at 30.

randomly selected CPPD applicants (approximately 1,000 denied and 1,000 granted) who applied in 2004 and 2005. Among the denied applicants, 3-5 years later, 60 percent had not worked since their application was denied, 17 percent had done some work since being denied, and 23 percent were working at the time of the survey. Of those who had worked since denial but who were not working at the time of survey, most (76 percent) had stopped working again because of a recurrence of disability or further illness. The second approach linked CPPD administrative data and Canada Revenue Agency income tax data for CPPD applicants to show that nearly half (49 percent) of the denied applicants had no earnings three years after being denied benefits and an additional 24 percent had average annual earnings of less than $10,000.

Workers with disabilities that are episodic are rejected as either not being severe or prolonged and for not having sufficient contributions. An important case that went to the Supreme Court of Canada involved a worker who had a disability that caused him to lose work intermittently for some years before he applied for CPPD resulting in his claim being denied for insufficient contributions. There is an exemption to the contribution requirement for workers whose permanent disability interfered in their employment prior to applying. This exemption was denied this claimant because his pre application disability was intermittent. Despite the Charter protection of equality which the court had used to protect injured workers with chronic pain in *Martin & Laseur*, in this case the SCC upheld a restrictive interpretation of disability.[74] As one commentator put it, "In Granovsky, we see the Court moving in the worrisome direction of excluding financial security for persons with disabilities from the concept of human dignity. Imported into the Court's human dignity analysis is the stereotype "only the severely disabled are the truly needy" implicit in the economic model of disability."[75]

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[74] *Granovsky v. Canada* [2000] 1 S.C.R. 703

[75] Ena Chadha and Laura Schatz, "Human Dignity and Economic Integrity for Persons with Disabilities: A Commentary on the Supreme Court's Decisions in Granovsky and Martin" (2004) 19:7 Journal of Law and Social Policy 94.

Employment supports in the form of voluntary vocational rehabilitation was introduced to CPPD beneficiaries in 1990s. Authority to provide these supports had been in the legislation since the 1970s but not previously used. Campolieti et al published an assessment of the program in 2014 and found modest impacts on employment for males and a stronger, sometimes statistically significant impact for women.[76]

The challenge of vocational rehabilitation for most successful CPPD claimants is the rigidity of the entitlement requirements in the first place. According to the Summative Evaluation, both the CPPD applicants and health care professionals questioned the incongruence of the "prolonged" criterion and the "return to work" initiative. Between 1997 and 2007, 7% of CPPD beneficiaries returned to work. Automatic reinstatement was added to the legislation so that those who did try to return to work could return to benefits on an expedited basis. The Summative Evaluation recommended that return to work supports be provided also to applicants who were denied benefits for not meeting the stringent eligibility criteria.[77]

Employment Insurance Sickness Benefits

The overall impact of EI changes was to reduce the eligibility of workers to receive any EI benefit. There was a significantly worse impact on unemployed workers in Ontario and west because of variations in regional eligibility.[78] The only improvement to the eligibility of sickness benefits has been the inclusion in 2013 of self employed workers through voluntary contribution and is discussed below.

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[76] Michele Campolieti , Morley KL Gunderson, and Jeffrey A. Smith, "The effect of vocational rehabilitation on the employment outcomes of disability insurance beneficiaries: new evidence from Canada" (2014) 3:1 IZA Journal of Labor Policy10.
[77] *Supra* note 69, Summative Evaluation at 29.
[78] Michael Mendelson, Ken Battle and Sherri Torjman, "Canada's Shrunken Safety Net: Employment Insurance in the Great Recession" (Caledon, April 2009) http://www.caledoninst.org/Publications/PDF/773ENG.pdf.

The report of a recent roundtable on worker sickness by the Institute for Research on Public Policy compared EI sickness benefits to private disability insurance in its discussions of the challenges facing sick workers.[79] It compared what workers can get on an employer funded private disability insurance with what a worker can get under EI sickness benefits. The report argues that private insurance provides better short term coverage because duration is usually longer than 15 weeks and the percentage of income protected is often higher. The report demonstrated that the Canadian EI duration of coverage is lower by international standards as well. In this regard, the principle limitation of EI sickness benefits is its short duration. [80]

According to the Roundtable, in 2013-14, approximately 337,000 Canadians received sickness benefits through EI, and slightly more than a third of these claimants fully exhausted their benefits after 15 weeks. What then happens to these workers? A 2007 study of EI clients who exhausted sickness benefits found that nearly three-quarters did not return to work within six months, or ever. Some may make the transfer to CPPD. Those who were not able to meet the stringent CPPD test for entitlement discussed above would have to apply for welfare.[81]

Voluntary coverage of special benefits for self employed workers was added in 2013. Self employed workers had been excluded from the unemployment system in Canada from inception. Arguments had been made that with the growing number of self employed in Canada, changes were necessary because these workers could not afford the cost of private disability insurance.[82] The uptake by self employed people since the amendment has been less

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[79] Tyler Meredith and Colin Chia, "Leaving Some Behind: What Happens When Workers Get Sick" (Institute for Research on Public Policy, Sept 2015) http://irpp.org/wp-content/uploads/2015/09/report-2015-09-03.pdf .
[80] Michael Prince, "Canadians Need a Medium-Term Sickness/Disability Income Benefit" (Caledon,2008) http://www.caledoninst.org/Publications/PDF/670ENG.pdf.
[81] *Supra* note 76, Meredith and Chia at 20.
[82] Katherine Marshall, "On Sick Leave" Perspectives 14 (Statistics Canada: April 2006) — Catalogue no. 75-001-XIE; Ernest B. Akyeampong and Deborah Sussman, "Health-related insurance for the self-employed" (2003) 4:5 Perspectives on Labour and Income.

than .5% according to the CBC.[83] The majority of registrants are women and majority of claims so far have been maternity benefits. Sickness benefits claims are very small with only 162 in 2013/14. There is a one year waiting period after registration before a worker can claim benefits, their time devoted to business must be reduced by more than 40%, and they must earn no more than a minimum amount. This amount was $6645 in 2014.

There are no employment supports available under EI sickness benefits. It is not clear how significant this is as claims are 15 weeks maximum and two thirds of the beneficiaries do not use the full period. The IRPP report suggests that employer private disability insurance provides good employment supports.[84] This is not a common experience and requires further investigation. Although some insurance plans do have a small rehabilitation rider, the funds available tend to be small and they are seldom used especially with short term benefits. Even with long term disability insurance, which is usually only a maximum of two years, there are few employment supports and what there is has little money attached.

Welfare (ODSP)

The definition of disability in the ODSP Act provides a broader coverage for workers with disabilities than that found in either of the two federal social insurance systems but there has been substantial litigation with the Ministry responsible for its implementation over its interpretation. The statute provides benefits when

> (a) the person has a substantial physical or mental impairment that is continuous or recurrent and expected to last one year or more;

[83] Sean Davidson," Self-employed slow to take up employment insurance" CBC News (Feb 25, 2013) www.cbc.ca/news/business/taxes/self-employed-slow-to-t Self-employed slow to take up employment insurance".
[84] *Supra* note 76, Meredith and Chia at 18-19.

> (b) the direct and cumulative effect of the impairment on the person's ability to attend to his or her personal care, function in the community and function in a workplace, results in a substantial restriction in one or more of these activities of daily living; and
>
> (c) the impairment and its likely duration and the restriction in the person's activities of daily living have been verified by a person with the prescribed qualifications.

The language is a mix of substantial, social and medical parameters. A range of interpretations are possible. Medical verification of a condition by a health professional is required. How serious substantial had to be and how significant the restrictions were matters of interpretation. Similar to CPPD, policy direction focused on the medical review, emphasizing the seriousness of the disability.

Court of Appeal decisions have provided guidance on these questions. For example, in 2002, in *Gray v. Ontario (Disability Support Program, Director)*[85] , the court required a broad and liberal interpretation of the act that would resolve any ambiguity in favour of the person with a disability. It then went on to say that definition of "person with disability" in Act was intended to encompass broader segments of society than its predecessor and to provide assistance to persons with significant and not just severe long-term functional barriers. In a subsequent case, *Ontario (Director, Disability Support Program) v. Crane*[86], the Court of Appeal ruled that while each subsection had to be considered separately in determining eligibility, the determination of whether an impairment is substantial will require consideration of the whole person,

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[85] (2002)59 O.R. (3d) 364
[86] (2006) 83 O.R. (3d) 321

including a person's ability to function in the domains of personal care, community and workplace.

Mental disorders (psychoses, neuroses, and developmental delays) represented about 52% of the primary conditions of applicants granted ODSP in 2009.[87]

In April 2015 the Ministry began to systematically send notices to many recipients of ODSP as there was a backlog of 60,000 claimants whose medical status had not been reviewed. The Act provides for medical reviews to confirm eligibility. The review initially required claimants to go through essentially the same process as they did originally when they applied. The consequences of failing to comply – i.e. taking required forms to appropriate medical personal, make sure they are completed and returned to the appropriate Ministry department within 90 days – would be termination of benefits. [88] This action by the Ministry was spurred on by a series of Auditor General reports beginning in 2002. The Auditor General took on the responsibility of insuring that the Ministry utilize the tools provided in the legislation to question the eligibility of claimants. It has also insisted on increased verification of a person's financial eligibility, regular monitoring of adjudicator's decisions, limiting appeal success at the tribunal and increased eligibility reassessments.[89] Consistent lobbying by anti poverty activists and representatives were ultimately able to stop the government from implementing these measures. The government announced that a new and fairer process would be developed with input from stakeholders and advocates.[90]

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[87] *Supra* note 3, Stapleton, "Welfarization" at 12.
[88] Income Security Advocacy Centre, "ODSP Medical Reviews" (2015) http://www.incomesecurity.org/medical_reviews_odsp.htm
[89] See Auditor General, Chapter 4, Section 4.09 "Ontario Disability Support Program Follow-up on VFM Section 3.09" Annual Report (2009) http://www.auditor.on.ca/en/content/annualreports/arreports/en09/2009AR_en_web_entire.pdf.
[90] Ministry of Community and Social Services, "Improving the Medical Review Process for ODSP clients" http://www.mcss.gov.on.ca/en/mcss/programs/social/medicalReviewODSP.aspx

The 2016 Ontario budget announced that the government will end the clawback of child support benefits from a single parents receiving welfare payments.[91]

Changes to How Decisions were Made Since 1990

This section looks at changes to how decisions were made about individual claims. Adjudication is the method used to decide whether or not a claim will be accepted. Historically these decisions were made by individuals employed by the organization mandated to deliver the system. The institution, whether Board or Ministry, produced policy to guide decision making. The principles for decision making were generally understood in terms of administrative law, i.e. decisions had to be made fairly, but were also expected to be pragmatic, and guided by the Interpretation Act that required social welfare legislation to be interpreted liberally and in favour of the beneficiary.[92]

Beginning in the 1970s, appeals took on an enhanced role in these systems. As institutions were required to make huge numbers of decisions efficiently and quickly, tribunals were given the role to ensure that the quality of decision making would respect legal standards. This was part of a much larger access to justice movement during the same time period.[93] In law, however, these tribunals are only extensions of the government's executive power and not considered part of the judiciary. While broad principles of natural justice apply, tribunal independence is not protected in the same way as the independence of the courts.

When systems were changed in the late 1990s, so did the approach to decision making. While the 1970-80s were characterized by an expansion of access to justice, after the 1990s,

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[91] Income Security Advocacy Centre, "Bold steps on social assistance reform in Ontario Budget 2016, but incomes still grossly inadequate" (February 26, 2016). http://incomesecurity.org/public-education/bold-steps-on-social-assistance-reform-in-ontario-budget-2016-but-incomes-still-grossly-inadequate.

[92] *Interpretation Act*, RSO 1990, c I.11 s. 10. See David Mullan, *Administrative Law* (Toronto: Irwin Law, 2001).

[93] see Government of Canada, "Proceedings of a National Symposium, Expanding Horizons Rethinking Access to Justice in Canada" (March 2000) http://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/op00_2-po00_2/op00_2.pdf.

implementation of cost cutting strategies lead to greater routinization and decreased access to decision makers.

Workers' Compensation

The most recent significant change to adjudication at the WSIB involved replacing the test of fairness with the test of correctness when evaluating decision making. [94] This strategy was first described by Ellis and Laird in their paper critiquing an auditor general's assessment of the performance of the Social Assistance Review Board, then the appellate tribunal for the welfare system. They describe how this is a very different standard than the one used by law. The standard legal test is the balance of probabilities, based on principles of fairness[95]. At the WSIB, in 2011, a value for money audit of adjudication in by KPMG identified correctness as the appropriate standard for decision making to achieve the WSIB corporate objectives. This is consistent with the goal of value for money audits which are designed to find ways to better implement management's objectives for the corporation.

Eakin et al's study of front line adjudicators captured how the cost cutting agenda permeated the discourse of adjudication and shaped differing attitudes towards employers and workers. Adjudicators learned to see employers as income and workers as costs.[96]

There is evidence that internal appeals have been similarly integrated. The vast majority of internal appeals are now handled solely in writing with very few opportunities for a hearing. An earlier KPMG value for money study of the appeal system recommended greater integration

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[94] *Supra* note 58, KPMG VFM Adjudication.
[95] Ron Ellis & Kathy Laird. "The Provincial Auditor and the Administrative Justice System" (2010) 23 Canadian Journal of Administrative Law and Practice 237.
[96] Joan Eakin, Ellen MacEachen, Elizabeth Mansfield & Judy Clarke, "The Logic of Practice: An Ethnographic Study of Front-line Service Work with Small Businesses in Ontario's Workplace Safety and Insurance Board" (Toronto: IWH, 2009) https://www.iwh.on.ca/working-paper/wp-346.

with the corporation's goals. A majority of worker appeals are denied especially when appeals decision is based solely on review of the file.[97]

Decisions of the external appeal tribunal WSIAT were fully subordinated to Board policies by legislation in 1997[98]. The tribunal retained the responsibility to adjudicate individual claims on the balance of probabilities. The tribunal has the ability to rule, as it has done twice regarding entitlement for chronic stress, that legislation violates the Charter. Problematic for workers who have to appeal denial of benefits is the persistent and large backlog of appeals to be heard by the Tribunal which has increased over time. In a message posted on the WSIAT website in April 2015, Tribunal chair advised that a system designed to handle approximately 4,000 cases per annum, had at 2014 year end almost 9,000 active cases. He furthered advised that recruiting new tribunal member has been frustrated by a 10 year limit put on appointments.[99]

Employment Insurance Sickness and Canada Pension Plan – Disability Benefit

The adjudication and appeals of EI claims were a regular subject in the news over the last few years due to massive reorganizations and job cuts. EI claims have been handled by Service Canada since 2005. However, as documented in the EI Insurance and Monitoring Assessment Reports, there has been on ongoing reorganization of how the service is delivered with increasing use of call centres and technology towards a more and more automated system of adjudication.[100] Beginning in 2012 Human Resources and Development Canada planned to cut the number of offices that process EI claims from 120 nationwide down to about 20 in three years.[101] At the same time there were growing delays in claimants getting their benefits and

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[97] *Supra* note 10, King, Thesis at 125.
[98] *Workplace Safety and Insurance Act* 1997, S.O. 1997, c. 16, Sched. A s. 126.
[99] Message of the Chair, Workplace Safety and Insurance Tribunal, (2004) http://www.wsiat.on.ca/english/news/Message%20of%20the%20Chair%202014%20-%20The%20Appeals%20Cup%20Overflow.htm
100 Canada Employment Insurance Commission, "Employment Insurance Monitoring and Assessment Report 2013/14" at c 4 III and IV. http://www.esdc.gc.ca/en/reports/ei/monitoring2014/index.page.
101 Louise Elliot, "Conservative ridings benefit from Service Canada closures" CBC News (Jan 13, 2012) http://www.cbc.ca/news/politics/conservative-ridings-benefit-from-service-canada-closures-1.1140555

increasing number of claims being rejected. The automated system that was supposed to streamline the process was rejecting applications over tiny inconsistencies - for example, a misplaced hyphen.[102] Inadequate staffing has been a constant complaint with ongoing promises by government to add additional staff. [103] In June 2015, the union representing Service Canada employees took the unusual step of tabling, as a bargaining proposal, a demand that there be a moratorium on job cuts at Service Canada's pay and processing centre until an independent probe determines whether it can deliver services with existing staff.

The appeal process for EI claimants was completely revamped in 2013. From its inception, there had been principally two levels of appeal for EI claimants. The first was to a tripartite representative Board of Referees made up of three persons – worker, employer and chair. The second appeal was to an umpire, usually a Federal court judge. This system was wiped out, and the appellate function transferred to a brand new tribunal with newly appointed tribunal members who would also handle Income Security and CPP appeals in 2013. Around the same time, the government implemented a series of changes to surveillance of EI claimants intensifying the job search requirements.

Reporters have pointed out that most of the new tribunal appointees were contributors to the governing Conservative party.[104] The new tribunal started with a huge backlog of appeals from the previous systems. Insufficient tribunal members were appointed and, again, although

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102 Louise Elliot, "Inside Canada's battered EI system" CBC News (Jan 14, 2012) http://www.cbc.ca/m/touch/world/story/1.1183568

103 Bill Curry, "Ottawa hiring 400 public servants to manage EI" Globe and Mail (Dec. 09, 2014) http://www.theglobeandmail.com/news/politics/ottawa-hiring-400-public-servants-to-manage-employment-insurance-files/article21996968/

104 Thomas Walkom, "New EI tribunal promises good pay for Conservatives, bad wages for the rest of us: Stephen Harper's latest reform of Employment Insurance makes the program even more of a cruel joke" Toronto Star (May 29 2013). https://www.thestar.com/news/canada/2013/05/29/new_ei_tribunal_promises_good_pay_for_conservatives_bad_wages_for_the_rest_of_us_walkom.html

government promised more, it did not happen.[105] Eighty percent of appeals by workers were denied and the majority of hearings on EI appeals are now held via teleconference or video conference, not in person.[106] As the backlog of cases swelled, it was revealed that the tribunal as indeed saving money but hearing 1000 less cases than the previous one. Apparently the merged tribunal was created without any study to justify the need for it.[107]

A report ordered by the Social Security Tribunal itself to help it address its growing backlog in 2015 found that the tribunal had been short-staffed from its inception, leading to a backlog of new cases and stressed-out, error-prone employees. The consultants predicted that one section of the tribunal could take more than three years to get through a backlog of old appeals before coming to a "steady state" — a manageable workload — without any new employees. [108] The tribunal would need 27 more employees to get to that "steady state" within one year.[109]

The Tribunal website claimed in October 2015 that the backlog of appeals launched under the old system was cleared.[110]

CPP appeals were moved into the same Social Security Tribunal as EI appeals in 2013. CPP disability appeals make up 95% of CPP appeals under the old system and continue to be the majority of claims under the new.

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[105] Lee-Anne Goodman, "Social Security Tribunal struggling with massive backlog: documents" Canadian Press (CTV: August 15, 2014) http://www.ctvnews.ca/politics/social-security-tribunal-struggling-with-massive-backlog-documents-1.1961824.

[106] Lee-Anne Goodman, "Most claimants lose EI appeals, dismissal rate remains high" Canadian Press (Maclean's: August 27, 2014) http://www.macleans.ca/news/canada/most-claimants-lose-ei-appeals-dismissal-rate-remains-high.

[107] Lee-Anne Goodman, "Social Security Tribunal saves money, but hears fewer appeals" Canadian Press (CTV News: September 22, 2014) http://www.ctvnews.ca/canada/social-security-tribunal-saves-money-but-hears-fewer-appeals-1.2018831.

[108] Kelly Sears Consulting Group, "Final Report, Baseline Study of Social Security Tribunal of Canada Appeal Processes" prepared for the Social Security Tribunal of Canada (March 18, 2015). See http://www.ctvnews.ca/canada/social-security-tribunal-short-staffed-error-prone-and-under-pressure-report-1.2611142.

[109] Jordan Press, "Social security tribunal short-staffed, under pressure from the start: report" Canadian Press (ipolitics, Oct 15, 2015). http://ipolitics.ca/2015/10/15/social-security-tribunal-short-staffed-under-pressure-from-the-start-report/

[110] Message from Chairperson, Social Security Tribunal of Canada (October 2015). http://www1.canada.ca/en/sst/

In 2011 the Summative Review found that most complaints about adjudication related to getting medical information in a timely fashion. Other challenges reported by respondents included inefficient electronic tools, constantly changing policies, as well as difficulties in recruiting and retaining medical adjudicators. About 40 percent of those ultimately denied and 27 percent of those ultimately granted have appealed a decision made by the CPPD Pension.[111]

The Canadian Labour Congress produced a review of the status of CPPD claims in April 2015. Their investigations found 60% of initial applications to Canada Pension Plan Disability (CPPD) are refused. Canada has one of the highest rejection rates for disability pension among the Organization for Economic Co-operation and Development (OECD) countries. As of February 2015, there was a backlog of 11,230 cases – a 24% increase since February 2014. In addition to delays as long as five years before the appeal is heard, the rate of successful appeals against initial CPPD rulings has been declining for the last decade to just 43% in 2013-14. About 90% of cases before the Social Security Tribunal are CPPD appeals.[112]

In the fall of 2015, the Auditor General released an audit assessing whether or not CPP disability benefits were being decided in a consistent and timely fashion. While the report found that the department met its own internal timeliness standards, there was significant variation. Furthermore, there were high percentages of decisions overturned on reconsideration and appeal. "For example, in the 2014–15 fiscal year, 35 percent of initial decisions were overturned at the reconsideration stage. In the same fiscal year, 67 percent of appeals were overturned by the Tribunal—or by the Department before the Tribunal decided—because it was determined that the applicant was eligible after all."[113] In about one third of

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[111] *Supra* note 69, Summative Review at 41.
[112] Canadian Labour Congress, "CPPD Factoids" (April 2015). http://dpsuoecta.ca/wp-content/uploads/2015/05/Injured-Workers-Day-CPPD-factoids-2015-06-01-EN.pdf
[113] Auditor General of Canada, "Fall Reports 2015 - Report 6 Canada Pension Plan Disability" http://www.oag-bvg.gc.ca/internet/English/parl_oag_201602_06_e_41063.html at p 14.

appeals reviewed by the Auditor, appellants were found eligible for the benefit despite being denied twice previously.[114] The lack of a quality assurance program was identified as a contributor. The report went on to document that the Department made unrealistic target dates and planning assumptions in the transfer of appeals to the Social Security Tribunal of Canada leading to a backlog and a failure to decide appeals in a timely fashion.[115]

Welfare (ODSP)

Adjudication of claims under the ODSP is a focus of major concern. Detailed descriptions of its failures were documented in a report, *Denial by Design*.[116] Processes especially with regards to medical reviews are complicated with multiple forms to be filled out. Getting these forms filled out correctly and delivered to the right place at the Ministry within time limits is the responsibility of the applicant. Errors on any one of these procedural requirements can lead to the claim being dismissed. As early as 2003, complaints were made about a system that used technicalities to deny applications.[117] These complaints continued into 2015.[118]

Sossin explored this phenomenon in detail and discussed the lack of legitimacy of what he called bureaucratic disentitlement strategies of welfare. Using the example of Ontario's system, he argued that how information was collected, whether face to face or at a telephone intake screening at a call centre, how onerous the questions are to answer, and all the other bureaucratic hurdles should be linked to the critical legal question whether they are reasonable

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[114] Ibid., p. 23.
[115] Ibid.
[116] Income Security Advocacy Centre, "Denial By Design - The Ontario Disability Support Program" (2003). http://www.odspaction.ca/sites/odspaction.ca/files/denialbydesign.pdf.
[117] Ibid. See also Dean Herd and Andrew Mitchell. "Cutting Caseloads by Design: The Impact of the New Service Delivery Model for Ontario Works" (2003) 51Canadian Review of Social Policy 114.
[118] Yamri Taddese, "Clinics bogged down by disability support applications" Law Times (April, 2015) http://www.lawtimesnews.com/201504064592/headline-news/tribunals.

and fair. These obligations arise from public law concerns that the exercise of public authority conforms to fundamental process values such as protecting human dignity. [119]

The Auditor General's review of ODSP adjudication and their concern about the percentage of successful appeals by applicants to the Social Benefits Tribunal put forward an alternate approach.[120] From the AG's perspective, correctness was central. The objective of the AG was to reduce the number of applicants getting benefits and reduce costs. This supervision of adjudication and appeals is very similar to the role asserted by the AG over the WSIB decision making. The approach of the AG is the same used by KPMG and Deloitte value for money audit to align decision making with the objectives of the system reforms.

Unlike the other tribunals, decisions of the Social Benefits Tribunal can be appealed to the courts on questions of law.[121] This allows the courts to evaluate the tribunal's interpretation of law as it applies to a given case. In this respect, the courts can play a more significant role in supervising tribunal decisions. Reforms in 2011 made the Social Benefits Tribunal one of a network of tribunals called the Social Justice Tribunals of Ontario.[122]

[120] *Supra* note 92, Ellis and Laird, "Provincial Auditor and Administrative Justice".
[119] Lorne Sossin, "Boldly going where no law has gone before: Call centres, intake scripts, database fields and discretionary justice in social welfare" (2004) 42 3Osgoode Hall Law Journal 363.
[121] ODSP Act,. s 31. "In WSIB, EI and CPP, final decisions of the tribunal cannot be appealed. They are only subject to judicial review, a less rigorous standard of supervision.
[122] Social Justice Tribunals of Ontario http://www.sjto.gov.on.ca/en.

V. Discussion

Since the 1990s there have been changes across the four systems reviewed in this paper to reduce benefits in order to cut costs. Some changes were legislated reductions in income replacement as seen in WSIB, CPPD and EI. Others were policy changes such as CPPD's restrictive interpretation of "severe and prolonged". WSIB adopted new administrative processes that had the effect of reducing the number of injured workers receiving a NEL award recognizing their permanent disability in order to reduce the number eligible for future benefits. ODSP singularly was expanded providing entitlement to people with a wider ranges of disabilities albeit at minimum levels of benefits.

WSIB stood out as the only system to try and prohibit coverage to eligible workers with mental injury due to chronic stress and to chronic pain. CPPD discriminated against workers with intermittent disabilities and used a highly restrictive interpretation of disability to deny benefits to many unemployed disabled workers. While EI and ODSP require medical documentation and impose severity requirements, at the same time they did not discriminate based on the nature of the disability.

Inside the employment based systems, income replacement and employment supports generally deteriorated, the availability of employment supports for CPP recipients being a modest exception. Employment protection declined. Widespread privatization of LMR employment supports in the late 1990s under the WSIB failed workers. Market approaches to return to work in ODSP have showed a focus on moving easier-to-place beneficiaries into low

wage jobs.[123] CPPD attempt at rehabilitation showed success for some of its beneficiaries but the restrictive approach to determining eligibility reduced its effectiveness.

This cost cutting agenda realignment drove changes to adjudication and appeals. All systems have been moved to more automated processes for determining initial entitlement with fewer human decision makers. New business models of decision making have been imposed and implemented through a correctness standard measuring whether decisions are following the policy direction of who is or is not worthy. The right to appeal to an independent tribunal has generally been preserved but delays in when appeals are heard and decided and by whom have become endemic. There were high levels of negative decisions being overturned when the appeal is finally heard.

The changes documented in this paper support Stapleton's findings of the welfarization of disability. The convergence of cost cutting strategies resulted in reduced benefits and eligibility. Without the support of WC or CPPD, those workers with a disability who could not work ultimately would have to qualify for welfare to get assistance. At the same time, the adjudication approaches adopted by ODSP increased the risk that applications for welfare would be delayed or denied due to bureaucratic disentitlement.

[123] Rebecca E. Gewurtz, Cheryl Cott, Brian Rush & Bonnie Kirsh, "How Does Outcome-Based Funding Affect Service Delivery? An Analysis of Consequences Within Employment Services for People Living With Serious Mental Illness" (2015) 42 Administration and Policy in Mental Health19.

VI. Recommendations for Framing Future Research

Labelling changes to the four public systems since 1990s as cost cutting is hardly controversial or surprising. This has been a major part of public discourse for the past thirty years or more. What was demonstrated here is that the practice of cost cutting reduced both the benefits and eligibility to benefits for many workers with a disability who were unemployed. The effect of these changes in the employment based public systems could facilitate the welfarization process that Stapleton et al identified. Coverage under the employment based systems was shrunk while coverage under welfare was broadened.

If the objective is to engage these systems to better support unemployed workers with a disability and to reduce their negative impacts, different approaches and values need to be added.

Broaden the Framework

Much of the public research on this topic has framed policy for workers with a disability as primarily about human rights or economic outcomes. WC has a separate history based in tort negligence law but after recent reforms it is also being re-examined within a human rights framework.[124] Human rights law has been essential to the development of disability rights, but so far has not protected benefits for workers with a disability or their entitlement.[125] Entitlement can be limited if the government is seeking to improve the conditions of some without discriminating against the dignity of others or until declared discriminatory by the courts.[126]

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[124] J. A. Hilgert, "Building a human rights framework for workers' compensation in the United States: opening the debate on first principles" (2012) 55:6 American Journal of Industrial Medicine 506.
[125] See *Gosselin v Quebec* (AG) [2002] 4 S.C.R. 429.
[126] *Supra* note 71, Granovsky.

The courts and tribunals have provided consistent support for accommodation and return to work requirements in individual cases under both the Charter and Human Rights legislation.[127] However, to succeed with a complaint, workers require representation in the workplace and before the courts. Unions are subject to a duty to participate through their collective agreements and to provide their members with grievance and arbitrations systems that support their rights.[128] Workers not represented by a union may have access to a public system and access legal aid but support and resources are not well distributed.

The requirement of a systemic approach to discrimination and accommodation is rare. An exception to this is the Accessibility for Ontarians with Disabilities Act.[129] Passed in 2005, the legislation requires employers to meet a series of accessibility standards set out in regulation. The standards apply to customer service, information and communication, employment, transportation and the built environment. The standards are developed by committees which include people with a disability and employers. The standards have been introduced gradually by sector (private/public) and size. While there is considerable disenchantment with levels of compliance so far,[130] implementation deadlines were recent. The current Liberal federal government included within its platform for election in November 2015 a commitment to design a similar law for the federal jurisdiction.[131]

While costs are undeniably relevant, economic research and policy regarding whose costs are considered and who pays is systematically biased in favour of business interests. Much

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[127] See Ravi Malhotra, "Has the Charter Made a Difference for People with Disabilities? Reflections and Strategies for the 21st Century" (2012) 58 Supreme Court Law Review(2d) 273 and Gwen Brodsky, Shelagh Day, Yvonne Peters, "Accommodation in the 21st Century" (Canadian Human Rights Commission, March 2012). http://www.chrc-ccdp.gc.ca/sites/default/files/accommodation_eng.pdf.
[128] *Central Okanagan School Dist. No. 23 v. Renaud* [1992] 2 SCR 970.
[129] Accessibility for Ontarians with Disabilities Act, 2005, S.O. 2005, c. 11.
[130] See AODA Alliance, http://www.aoda.ca/even-more-media-coverage-of-problems-with-accessible-customer-service-in-ontario/#mainmenu
[131] Liberal Election Platform 2015 http://www.liberal.ca/realchange/a-new-health-accord/

economic analysis emphasized potential moral hazards of workers receiving benefits while ignoring those of employers receiving experience rating rebates. Employers are expected and encouraged to act in their economic interests while workers are not. Dembe and Boden provided a detailed study of the evolution of moral hazard and its adoption by economists, documenting its systemic bias against workers. [132] Increasing benefits to address poverty is characterized as "benefit enrichment." This approach is often rationalized as balancing the interests of employers and workers as if they were equal ignoring the disproportionate ability of employers to generate income from multiple sources.

Lippel proposed an alternative framework for reform, derived from an analysis of workers compensation and considering the more universal forms of coverage in New Zealand and the Netherlands.[133] She drew attention to International Labour Organization principles that the institutions responsible for implementing the system must have respect for claimant dignity, fairness and justice, and avoid stigmatization. She critiqued many of the principles of economic analysis especially experience rating and the underlying adversarial approach that it promoted by examining the evidence of its impact on claimants. Empirical evidence that contradicted moral hazard assumptions was referenced and the stigma that it inflicted on workers was identified. Lippel's approach suggested that research should address how the system can provide adequate benefits and appropriate supports for employment while reducing adversarial relations and stigma. She suggested that this required an appropriate use of scientific evidence to provide, for example, effective measures to promote return to work while not encouraging employers to cheat or mismanage the process.[134] Clay et al, through a systematic review of studies on return to work, documented how little of the effects of the

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[132] Allard E Dembe and Leslie I. Boden. "Moral hazard: a question of morality?." (2000) 10:3 New Solutions: A Journal of Environmental and Occupational Health Policy 257.
[133] *Supra* note 12, Lippel, "Preserving Dignity".
[134] Ibid at 526.

system are taken into consideration by researchers when studying return to work programs. MacEachen et al documented the toxic impacts of some WSIB approaches to return to work.[135]

Health security was advanced by Marchildon as a framework to measure the degree and effectiveness of public policy in providing access to health care and income support during times of illness and injury.[136] Marchildon considered medicare, CPPD, EI, welfare and WC as Canada's system of health security. He acknowledged the existence of tax policy but did not include it primarily because of its limited impact. The focus of his study was a description of the many factors preventing greater integration, emphasizing the differences between the systems and their inability to co-ordinate programs between them. He did not consider the reform process described in this paper as a factor.

Limited by what he saw as silos, Marchildon examined only two small integration concerns, neither of which addressed the needs of beneficiaries: the use of WC resources to pay a premium to obtain medicare services for injured workers ahead of others; and the overlap between CPPD and WC benefits that could result in some workers getting both.

Marchildon's framework of income and health security, when concerns raised by Lippel, Dembe and Boden are considered, does shift our focus onto longer term implications for injured and disabled workers. These systems were originally designed with this in mind. Systems currently focus on the immediate cost cutting goals and not enough on consequences to workers, especially those with long term and recurrent problems . What happens to a worker after benefits are cut or denied is not currently a measure of the success or failure of the system. Approaches that focus on income security should consider adequacy and reliability as relevant indicators, potentially in ways that reduce costs for workers and improve their recovery.

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[135] *Supra* note 65, MacEachen, "Toxic Dose."
[136] *Supra* note 22, Marchildon.

Fairness and equity of decision making should be a central part of any framework, and not an add on or embellishment. In addition to "justice delayed is justice denied" demanding that there be sufficient resources for timely appeals, the accessibility and independence of appeals tribunals must be supported by more dedication to fairness at the initial adjudication and internal reviews. As documented here, adjudicators have been moved farther and farther away from the people they serve, administering often complicated policies through electronic programs to determine the outcome. Sossin raised important principles needed to legitimate this kind of decision making, fairness being only one.[137] Audi alteram partem implies a commitment and not just a formality.[138]

A future strategy to coordinate existing systems should explore approaches which reduce conflict and stigma for workers and promote health and income security through fair decision making.

Measuring Adequacy

There is some evidence that workers who were able to access WSIB or CPPD did have their income protected to varying degrees. An outstanding question is whether or not the protection was adequate and fair.

The Institute for Work and Health published two issue briefings examining the adequacy of workers compensation benefits in Ontario based on studies by a research team led by Emile Tompa. Tompa et al investigated the economic status of a sample of WC recipients with a permanent disability over three time periods of change in the WC system in Ontario: pre 1990,

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[137] *Supra* note 116,Sossin, "Boldly Going"
[138] Latin legal maxim which means there is an obligation of a just legal system to hear both sides of a case.

1990 - 1997[139] and 1998 – 2002.[140] They linked workers' compensation benefit data in Ontario to data on earnings for a sample of injured workers in Statistics Canada's Longitudinal Administrative Database (LAD). In each case, earnings information was available for at least four years prior to the injury and nine years following. This information was then categorized by the degree of impairment of the injured workers' disability and percentage of recovery and loss.

The briefings framed adequacy in three key ways. Firstly, adequacy was ultimately measured as an average. The first key message in both briefings was that, on average, benefits were adequate in each period because the majority of the workers received a combination of income and benefits equal to or greater than the statutory amount that the legislation protected. The ratios from which the average was derived were calculated initially at the level of the worker and then averaged over the sample. [141]

The second message, however, highlighted the variation that existed within each subsample based on the degree of impairment. In fact, the results were highly polarized with significant numbers at both ends of the impairment spectrum receiving far less than the law provided. In all three systems in Ontario that Tompa et al examined, of the sample studied, when income and benefits were summed, only 50% of the workers injured prior to 1990 and 54% of those injured post 1990 achieved the 90% net earnings replacement target.[142] For those injured post 1998 only 65% reached the 85% net earnings replacement target.[143] There has been very limited change in the variations under the different systems. If one compares the charts,[144] there has been only a small shift towards better recovery over time. Many permanently

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[139] Institute for Work and Health, "Examining the Adequacy of Workers' Compensation Benefits" Issue Briefing (January 2011) https://www.iwh.on.ca/system/files/documents/iwh_issue_briefing_benefit_adequacy_s2011.pdf

[140] Institute for Work and Health, "Measuring the adequacy of workers' compensation benefits in Ontario: An update" Issue Briefing (March 2016) https://www.iwh.on.ca/system/files/documents/iwh_issue_briefing_benefits_adequacy_2016.pdf.

[141] Tompa E, Scott-Marshall H, Fang M, Mustard C. "Comparative benefits adequacy and equity of three Canadian workers' compensation programs for long-term disability" Institute for Work & Health Working Paper 350 (2010). www.iwh.on.ca/working-paper/wp-350.

[142] 2011 Issue Briefing at 6.

[143] 2016 Issue Briefing at 8.

[144] *Supra* Issue Briefing 2011 chart 1 and 2 p 5 with Issue Briefing 2016 chart 1 p 3 for example.

disabled workers continued to be left behind and the polarization of experience has continued after changes to the system were made.

Adequacy measured as an average is a challenging concept. It has been said to apply to the pre 1990 system where income replacement was a permanent pension based on a medical per cent measure of impairment. Workers with similar disabilities got similar benefits whether or not employed. After 1990, the system was changed explicitly to deliver wage loss benefits to unemployed permanently injured workers with the promise of individualized decision making and individualized compensation. [145]

Secondly, adequacy of recovery was reframed by the briefings as a relationship to other non injured workers' earnings. While acknowledging that WC was designed to provide income replacement to claimants, the Issue Briefings proposed an alternative measure. A comparison to a group of similarly situated but non injured workers over the same time frame was proposed in order to take into account the vagaries of life that could affect a worker's income other than injury. It was argued that this approach is more consistent with theory and actual experiences of individuals.[146] Despite this, after comparison, in all three periods, injured workers experienced lower levels relative to the controls.

This approach is different than what the law prescribed. The law required the comparison of pre and post accident earnings as part of the compromise of legal rights on which the system is based. It could be argued that the legislated replacement targets of only 90 and 85% of net income rather than full recovery already take into account any vagaries. Similar to determining adequacy by average, the experiences of many injured workers are marginalized.

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[145] See Paul Weiler, "Reshaping Workers' Compensation for Ontario" (Toronto: Ministry of Labour,1980) at 25.
[146] *Supra* note , IWH 350

The third measure used to frame adequacy was the statutory income replacement basis (80% and 90% net) in place at the time rather than full recovery. In this aspect, the frame was justified as being the target set by law.

The IWH Issue Briefings demonstrated that the system clearly made a difference to the income levels of many if not most of those who are able to access it. The levels of income protected for many injured workers was higher than if workers had only welfare to rely on. The polarization and variation of experience raise serious questions about the degree to which the system should be considered fair.

The periods studied are prior to the time periods examined by Stapleton and prior to the post 2008 measures by the WSIB to reduce the numbers of workers eligible for the permanent disability award (NEL), the change of adjudication standards to "correctness" and the limits on entitlement to some kinds of disability documented in this paper. The Issue Briefings do not take into account changes that have resulted in more claimants being rejected for benefits and is not designed to include consideration of those whom system rejects.

The Summative Evaluation of CPPD framed its evaluation in terms of the achievement of program objectives in which two principle questions were addressed – whether those in need were being reached and an assessment of benefit levels. The change in the qualifying requirements in 1998 resulted in a decrease in the number and proportion of CPP contributors who were eligible for CPPD pension. Younger workers, the self-employed and workers with a shorter contribution history, which disproportionately included women, were especially affected. For instance, there was a 35 percent decrease in the percentage of self-employed qualifiers between 1997 and 1998, relative to a 15 percent decrease across all contributors. The age group that incurred the greatest decrease in eligible contributors was persons under the

age of 25, where eligibility dropped from 68 percent to 34 percent. There was also a 37 percent decrease in the percentage of qualifiers with fewer than nine years of contribution history.[147]

Over the period 1992-2005, CPPD pension averaged about 50 percent of beneficiaries' total income ranging from a low of 42 percent to a high of 53 percent. However, CPPD as a share of income fell with income level accounting for over 80 percent of the income of beneficiaries with less than $15,000 income in 2006, but less than 19 percent of the income of those with incomes over $45,000.[148] As noted above, the Summative Evaluation also surveyed disabled workers who claims were denied.[149]

As to benefit levels, over the period 1992-2005, CPPD pension averaged about 50 percent of beneficiaries' total income ranging from a low of 42 percent to a high of 53 percent. However, CPPD as a share of income fell with income level accounting for over 80 percent of the income of beneficiaries with less than $15,000 income in 2006, but less than 19 percent of the income of those with incomes over $45,000.[150]

The benefit under CPP in 1964 was not intended to entirely replace a person's income but to supplement other sources.[151] However, with provincial changes to WC and welfare, CPP is deducted from other systems of income replacement resulting in less income overall especially for lower income claimants. According to the Summative Evaluation, CPPD benefits replaced somewhere between 40-50% of pre disability income. [152] Among lower income recipients, the benefit may make up as much as 80% of their income.

What these studies show is that both WSIB and CPPD played an important role in cushioning the impact of injury and disability on workers' income if they able to access the system. Further

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[147] *Supra* note 69, Summative Evaluation at 20.
[148] *Supra* note 69, Summative Evaluation at p 25.
[149] *Supra* note 70, Summative Evaluation.
[150] *Supra* note 69, Summative Evaluation at p 25.
[151] *Supra* note 34, Torjman, "CPP" at 8.
[152] *Supra* note 60, Summative Evaluation at 24.

discussion is necessary to explore the relevance of fairness in determining the adequacy of systems given the substantial variation in recovery among workers accepted by the system and the efforts to exclude many from coverage.

Towards a Worker Model of Disability

In the actual workplace context, increasing the capacity to make and practice accommodation is important especially for people with intermittent challenges to work because of a disability. Few work opportunities are universally accessible. While access to work is a key component of legislation like the Accessibility for Ontarians with Disabilities Act (AODA)[153] and the federal Liberal promised National Disabilities Act,[154] the awareness and utility of universal design is still limited. In practice, access to work requires reliable information about a person's capabilities and limitations given the job to be done. The technical tools of engineering, ergonomics, and organizational change are important and, in general, their application or potential application is well understood. To make this work in practice requires a social model of disability to challenge the framing of the functions to be performed and a medical/technical model of disability to identify appropriate accommodations to protect the worker with a disability in order to perform the work in an economically successful manner.

These kinds of challenges can be lost in the historic conflict between the social and medical models of disability if one ignores the practical consequences. [155] The post 1990s policies examined here used this conflict to reduce support for workers. The cost cutting agenda used a medical model approach to limit entitlement and then adopted a social model approach to return to work that ignored systemic barriers to employment that a medical/technical approach could have identified. A complementary framework around work and workplace

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[153] *Supra* note 135.
[154] *Supra* note 137.
[155] See Susan Gabel and Susan Peters," Presage of a paradigm shift? Beyond the social model of disability toward resistance theories of disability" (2004) 19:6 Disability & Society 585.

needs to be developed within which different approaches can be developed to resist stigma and improve participation of workers.

A worker based model of disability would recognize the power dynamics of the workplace and the vulnerability of workers to change. Rights would be understood as behaviours that the systems encourages workers to exercise and protect them from abuse. The challenge of representation of workers with a disability.by unions, community groups and government agencies would be addressed as intrinsic and legitimate in order to support their growth, renewal and successors.

Collaborative Research

The collaboration of community advocacy and researchers in research agendas and research has been central to identifying the problems with current systems. Reform does not take place in a vacuum. The effective inclusion of affected people in research in a representative capacity provides additional clarity on topics and methods. This research builds on a voice of workers as legitimate and a source of knowledge. Critical in this research was the transition from individual to collective voice which allowed for development of concepts and strategies through which voice was heard and transformed into strategy and direction. This involvement was supported by programs to develop worker research voice such as the RAACWII sponsored Speakers Schools.[156] The results of research become more directly relevant to achieving reliable outcomes for workers.

Although not regarded in the same way as peer reviewed and academic based work, research by community legal clinics, unions and community organizations contribute to a deeper understanding of what is happening to workers through the documentation of their

[156] RAACWI, “Injured Workers' Speakers' School” http://www.consequencesofworkinjury.ca/products/speakers.htm

experiences. This literature stands in stark contrast to many officially collected statistics whose reliability and transparency are questionable because of the methods and purposes used to collected them.[157] In that regard, these reports are essential to understanding the impact of administrative decision making to workers' lives. The use and coordination of this research broadens the agenda for research and reform because it engages the issues facing workers directly within a context in which a common strategy can emerge.

[157] Rachel Cox and Katherine Lippel, "Falling through the legal cracks: The pitfalls of using workers' compensation data as indicators of work-related injuries and illnesses" (2008) 6:2 Policy and Practice in Health and Safety 9. Also Prism Economics, "Market Metrics in Occupational Health and Safety," Report prepared for the Chief Prevention Officer, Ontario Ministry of Labour 2015.
http://www.labour.gov.on.ca/english/hs/prevention/council/minutesdec2014.php

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