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THE IMPACT OF REGIONALLY DIFFERENTIATED ENTITLEMENT TO EI ON CHARTER-PROTECTED CANADIANS

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Executive Summary

Under Canada's Employment Insurance (EI) program, access to unemployment benefits varies according to the regional unemployment rate. Previous studies have shown that this regime works to the disadvantage of certain provinces and urban areas. In this paper we measure the impact of the variable regional entrance requirements on specific minority workers, including visible minorities, linguistic minorities, recent immigrants, and naturalized citizens. We find that over the period 2000-2010, the regional variation in access to EI results in certain minority workers being required to work modestly more hours to qualify for EI than the average worker. Though the findings with regard to minority workers are modest, the differential treatment of workers by region remains problematic as a matter of both fairness and policy design. Because there are political barriers blocking the elimination or modification of the regional entrance requirements in Parliament, it may be fruitful to turn to the courts in pursuing reform. We provide a legal analysis under s. 15 of the Charter to investigate whether the impact of the regional entrance requirements could be considered unconstitutional adverse effects discrimination. We conclude that while the data does not support a constitutional claim today, if the differential, negative impact on minority workers increases in the future the chances of an equality rights challenge succeeding would also grow.

The Impact of Regionally Differentiated Entitlement to EI on Charter-Protected Canadians

Michael Pal & Sujit Choudhry

1 Introduction

Employment insurance programs are intended to support workers through temporary periods of unemployment. Internationally, Canada's Employment Insurance ("EI") program is one of the few to determine coverage for unemployment on the basis of region (Van Audenrode et al., 2005: 19). The federal government divides the country into economic regions for the purposes of EI. Whether a worker qualifies for EI and the duration of her benefits depend partially upon the unemployment rate in the region where she lives. Unemployed workers in EI regions with high unemployment rates qualify more easily for EI and receive more weeks of benefits than those in regions with low unemployment rates.

The consequences of a regionally differentiated employment insurance program have been well documented (Bishop and Burleton, 2009: 6-10; Chamber of Commerce, 2009: 4-7; Neil, 2009: 4-5). Existing research has focused upon the impact of regionally differentiated benefits on particular regions, provinces, and cities. These studies demonstrate that in seeking to assist vulnerable unemployed workers in regions of high unemployment, the EI program has harmed vulnerable unemployed workers in other areas of the country by restricting their access to and support from EI.

The impact of regionally differentiated access to benefits on minority workers, however, has not been fully explored. This study investigates whether the EI program disadvantages Charter-protected Canadians and considers the constitutional implications of the differential impact the regional EI system has on minorities. We analyze how the regional differentiation in the EI program affects the ability to qualify for EI of visible minorities, recent immigrants, naturalized citizens and those whose mother tongue is neither one of the two Official Languages.

We hypothesize that because racial and linguistic minority immigrants settle overwhelmingly in the largest urban areas of Alberta, British Columbia, Québec and Ontario, where more hours of work are generally required to qualify for EI (see Bishop and Burleton 2009: 6-10; Chamber of Commerce 2009: 4-7; Neil 2009: 4-5), minority workers' access to EI is restricted in comparison to others. If so, the EI program's regional differentiation of access to benefits may compound already-existing disadvantages that exist for minority workers in the labour market which make it more difficult for them to qualify for EI in the first place. We quantify the average number of hours a worker in each of these minority groups must have been employed in order to qualify for EI and compare those results to other workers.

The negative impact of regionally differentiated benefits upon Charter-protected Canadians potentially raises both political and legal issues. Recent immigrants, the vast majority of whom are visible minorities with a mother tongue other than English or French, fare worse in the labour market than other workers (Federation of Canadian Municipalities, 2009: *iii*, 21-23; Mahon, 2008: 356; Picot and Sweetman, 2005: 6-14; Reitz and Banerjee, 2007; Statistics Canada, 2010). If EI fails to insure vulnerable workers in times of unemployment, the program may need to be redesigned to more effectively deliver insurance for workers. Further, if Charter-protected workers are disadvantaged by the regional determination of qualification for EI and benefits, then these workers may have a claim of indirect discrimination counter to s. 15 of the Charter.

This paper will proceed as follows. We first outline the relevant portions of the EI program. Second, we review the highlights of the EI literature on regionally differentiated benefits and immigrant workers. Third, we detail our research design and methodology in measuring the impact of regionally differentiated benefits on Charter-protected Canadians. Fourth, we present our empirical findings. Fifth, we explore the legal implications of these findings, particularly whether they give rise to a claim under s. 15 of the Charter. Sixth, we consider the case of temporary foreign workers, a sub-set of workers that is disadvantaged by the current program. Seventh, we briefly consider some policy options for reforming the regional entrance requirements.

2 The EI Program

The relevant features of the EI program are largely set out in the *Employment Insurance Act* (1996) (the "Act") and regulations. Qualification for EI depends on a variety of factors, including having the proper type of job separation (i.e. termination without cause), type of work and number of hours of employment within the previous 52 weeks. The Act's Variable Entrance Requirements ("VERs") mean that the amount of hours an individual is required to work to qualify for the program varies across EI regions, as does the level of benefits.

The VERs have two key components. First, for the purposes of EI the country is divided into 58 economic regions, with qualification for EI benefits depending upon the regional unemployment rate. As the regional unemployment rate fluctuates, so too does the amount of hours worked in the previous 52 weeks needed to qualify for EI, with a range of 420 to 700 hours (*EI Act*, 1996: s. 7). The boundaries of the economic regions are adjusted periodically. Section 54 (w) of the Act permits regulations to be made setting regional boundaries and regulation 18 obliges the federal government to review the boundaries every 5 years. The regional determination of benefits was brought into existence in 1977 (Lin, 1998: 43-4). In 2000, the boundaries were reviewed and modified to the current 58, and were unchanged by the 2005 review. As of the time of writing, no results have been announced from the required 2010 review.

Second, the duration of benefits also varies significantly by region according to the regional unemployment rate. Those who qualify for EI in regions with 6 per cent unemployment rate or lower (the bottom category) receive 14-36 weeks of benefits, while workers in regions with unemployment rates above 16 per cent (the highest category) are eligible for between 32 and 45

weeks. The temporary, 5-week extension by the *Budget Implementation Act* 2009 of the duration of benefits set out in the *EI Act* (Schedule 1, s. 12(2)) expired in September 2010. Regional variation in access and extent of benefits can have stark consequences for similarly situated unemployed workers in regions with different levels of unemployment.

3 The Failings of the Regional Entrance Requirements

Recent studies drawing out the implications of regionally differentiated benefits (Bishop and Burleton, 2009; Chamber of Commerce, 2009) have concluded that the number of hours an individual must work to qualify for EI varies widely by city and province, as do the weeks of benefits, and the ratio of EI beneficiaries to unemployed workers. Unemployed workers in regions with overall low unemployment rates are not well-served by the program, as they face more stringent requirements to qualify for EI and receive fewer weeks of benefits, even if there is no practical difference in their job prospects with unemployed workers in regions with high unemployment. Over 800,000 unemployed workers did not qualify for EI during the recession in May 2009 (Courchene and Allan, 2009). Large urban areas in Canada often have lower unemployment rates than rural areas (Chamber of Commerce, 2009: 5-6).

There are also fundamental problems with the VERs that have received less scrutiny. The process and substantive criteria used to determine EI regional boundaries by the federal government are flawed. The process by which the boundaries are reviewed is not transparent and has become highly politicized. This politicization has likely detracted from the program's ability to effectively deliver insurance for unemployed workers in a fair and equitable manner.

As there are no criteria for the drawing and review of regional boundaries listed in the Act or the regulations, judicial oversight of the process is difficult. The Act delegates the power to make regulations regarding boundaries (s. 54 (w)) to the Employment Insurance Commission, under the auspices of the responsible federal government department, HRSDC. Information published by HRSDC indicates that the goal in creating regional boundaries is to "define geographic regions on which to base EI entitlement and duration of benefits (HRSDC, 2000)." EI regions exist "in recognition of the fact that not all areas of Canada have equal employment opportunities (HRSDC, 2000)."

HRSDC lists four criteria that it takes into account (HRSDC, 2000). First, the "cornerstone" of the determination of regional boundaries is "the rural/urban split." The federal government assumes each Census Metropolitan Area ("CMA") is its own economic region. A CMA is a category created by Statistics Canada of at least 100,000 people that largely encompasses an urban core and its suburban areas, such as the Greater Toronto Area or Metro Vancouver. Rural areas outside of CMAs are combined to create other economic regions. Second, the drawing of boundaries must ensure "homogeneous labour markets" that experience similar rates of unemployment. The intent here appears to be to treat like regions alike. Third, regions must be contiguous, within the same province, and respect the boundaries used by Statistics Canada to aggregate Census data. Fourth, regions must have labour forces that are large enough to allow accurate monthly estimates of the regional unemployment rate. These last two criteria are intended to provide administrative ease.

Whether the four criteria are applied fairly in setting the boundaries, or are the criteria that should govern economic region boundary determination for the purposes of EI at all, is hard to determine. The process of assigning regional boundaries lacks sufficient transparency, especially given the importance of the regional map to unemployed workers. HRSDC does not give detailed reasons for boundary adjustments that relate them to the criteria it has set out, apart from a brief analysis of regulatory changes. As a consequence, there are serious concerns that the federal government adjusts the boundaries of EI regions for political reasons unrelated to the stated goals of creating homogeneous labour markets and ensuring administrative ease both during and apart from the 5-year reviews.

For example, recent enrichments of the program have enhanced benefits for those who already qualify, or those who face relatively low hurdles to do so, rather than aiding the unemployed with little prospect of being covered by EI. The expansion of the minimum and maximum weeks of coverage in the 2009 federal budget aided workers receiving benefits, rather than relaxing the coverage rules. The federal government often uses various so-called "transitional measures" that generally relax the already lower hurdles for qualifying for EI in regions of high unemployment (Busby, 2008: 4 and fn 7; Van Audenrode et al., 2005: 18-19). These transitional enrichments are often difficult to phase out, for political reasons. Transitional measures introduced in 2000 for example in Eastern Quebec and Northern New Brunswick remain in place today (Busby, 2008: 4 and fn 7; Van Audenrode et al., 2005: 18-19).

Even if regional boundaries were determined transparently and non-politically, access to EI is governed by the regional unemployment rate, which is a blunt measure for assessing the needs of unemployed workers. The EI program assumes the regional unemployment rate to be the sole relevant condition for ascertaining the need of the unemployed to access EI. In doing so, it fails to consider other relevant factors, such as labour market segmentation and stagnation. If there is no market for certain types of workers, or no movement in the overall labour market, low regional unemployment is a misleading proxy for need among unemployed workers. By tying not only access to but also duration of benefits to the regional unemployment rate, the program provides a "double whammy" (Mendelson et al., 2009: 2; see also the Expert Panel on Older Workers, 2008: 60-61) for the unemployed in regions with low overall unemployment.

4 Regionally Differentiated Benefits and Charter-Protected Workers

Immigrants to Canada, the vast majority of whom are visible minorities with mother tongues other than English or French, fare worse overall in the labour market than non-immigrants. The Labour Force Survey found that while the unemployment rate for the Canadian-born aged 25 to 54 is 6.1 per cent, for recent immigrants (arriving within 5 years or less) of the same age group it is 14.7 per cent, with the difference decreasing the longer immigrants are in Canada (Statistics Canada 2010). Even immigrants who have been in the country more than 10 years, however, still have an unemployment rate higher than that of Canadian-born workers. The unemployment rates for recent immigrants from the key source regions of Africa (21.2 per cent), Asia (15.1 per cent) and Latin America (16.1 per cent) are much higher than for the Canadian-born (Statistics Canada, 2010).

In a study of specific urban communities comprising large metropolitan areas and 85 per cent of the immigrant population, the Federation of Canadian Municipalities ("FCM") found reason to be concerned about poverty among urban immigrants. Immigrants in these urban areas received social assistance at twice the rate of immigrants in the rest of Canada (2009: *iii*). The study found that 43 per cent of all recent immigrant households had low incomes, nearly three times that of non-immigrant households (FCM, 2009: *iv*). The unemployment rate among recent immigrants was 1.4 times higher than for non-immigrants across Canada, but 2.3 times higher in the urban areas included in the study. This data is part of a larger trend. Relating earnings to education, Aydemir and Skuterud (2005) found a significant drop in immigrant income since the 1960s, controlling for factors such as the economy at time of entry.

The operation of the labour market hinders the ability of minority workers to compete for jobs and to earn sufficient hours of work to qualify for EI, even beyond the difficulties caused by the period of adjustment necessarily confronted by immigrants (Reitz and Banerjee, 2007). Minority workers are likely to face additional barriers compared to other workers, such as a lack of Canadian credentials, language barriers, and limited Canadian work experience. Advantages provided by high levels of education among immigrants are negated by their settlement in urban areas, where they must compete with highly educated native-born workers (Reitz, 2003). Foreign experience (Aydemir and Skuterud, 2005; Green and Worswick, 2004) and credentials (Reitz, 2001) are discounted in the labour market. These barriers hamper the ability of minority workers to accumulate enough hours of employment to qualify for EI.

EI potentially compounds these pre-existing disadvantages faced by minority workers through the VERs. Given worse employment and earning prospects among recent immigrants than the Canadian-born, the regional distribution of access to benefits is problematic if found to disproportionately hinder access to EI among Charter-protected workers. The concentration of immigrants in the largest urban areas of British Columbia, Alberta, Ontario and Québec (Statistics Canada, 2007), which are also the regions that tend to face the highest hurdles in order to qualify for EI, suggests there may be a differential impact.

Existing research on minority workers has explored various aspects of EI, but not dealt directly with the impact of the variable regional requirements on their relative eligibility for benefits. Amendments to EI in 1996 that made it more difficult to quality for the program and reduced benefits have been harmful to vulnerable workers (Evans, 2002: 87; Mahon, 2008: 356; and Shields, 2004), which includes minority workers. The 2004 Monitoring and Assessment Report of the EI program from HRSDC (under the auspices of the Employment Insurance Commission) suggested that the significant barriers new immigrants face in entering the labour market result in these workers being unable to work the requisite number of hours (HRSDC, 2004). Recent immigrants are marginally less likely to qualify for EI than other Canadians with qualifying job separation (HRSDC, 2009). De Silva (1997) investigated immigrant participation in Unemployment Insurance (UI) and found that there are significant differences in the probability of UI usage across ethnic groups. He also found that after 1975, certain groups of immigrants had a higher propensity to use UI than earlier immigrants. A more recent study by Sweetman (2001) concludes that immigrants have a lower participation rate than native-born Canadians. Siklos and Marr (1998) found that UI claims by immigrants varied by province of residence.

5 Research Design and Methodology

To quantify the impact of regionally differentiated benefits on Charter-protected workers, we measure the total number of hours Charter-protected workers must log on average in the previous 52 weeks to qualify for EI, and compare this to the number of hours required of other workers. We focus here on access to EI, rather than duration of benefits, because qualifying through the VERs is the prior and fundamental hurdle that faces most minority workers. Further research could be conducted on the duration of benefits to determine if the current rules disadvantage particular groups of workers.

We used custom Census data from Statistics Canada and EI data provided by HRSDC, and applied it to the boundaries that were in place from 2000-2010. From 2000-2005, we applied the 2001 Census data with the regional boundaries in place at the time. We then utilized the 2006 Census data from 2006 onwards with the regions current during that period. By matching Census data and regional boundaries in this fashion, we measure the impact of regionally distributing benefits with the most current demographic data available at the time. We broke down individual-level data in each EI region on the basis of visible minority status (using the definition in the *Employment Equity Act* 1995 and regulations), citizenship, immigration status, as well as by mother tongue. For the unemployment rate in each region, we used the yearly average derived from the Statistics Canada monthly unemployment numbers.

We created weighted averages for the number of hours of work required for the average individual in each group. Using Statistics Canada's standard definition of working age population (individuals aged 15-64) as the unit of analysis[1], we multiplied the total number of working age individuals in each region by the number of hours each individual in that region would have to work to qualify for EI. We aggregated the total number of hours that would have to be worked to qualify for EI for the working population as a whole. We then divided the aggregated number of hours by the working population to determine the average number of hours each individual must work. The same process was repeated for each sub-group by visible minority status, citizenship, immigration status, and mother tongue.

It is important to point out that our results do not incorporate the pre-existing disadvantages in the labour market that render it more difficult for minority workers to amass enough hours to qualify for EI, regardless of the VERs. Moreover, the data does not take into account the higher number of hours (910) required for New-Entrant and Re-Entrant workers (NEREs). This is 210 hours above the maximum 700 required for workers who are regular applicants for EI. To the extent that we can assume recent immigrants will account for a disproportionate share of new entrants to the labour force, the results are likely to understate the number of hours a minority worker must work to qualify for EI.

6 Results

A Census Metropolitan Areas

CMAs are one of the building blocks of the EI system. Each CMA forms its own EI region. In the boundary determination process, rural areas and urban areas with insufficient populations to qualify as CMAs are grouped into other regions. The immigrant population is concentrated in CMAs. Relevant measures of the potential differential impact of the VERs therefore include calculating their effects on minorities within CMAs and workers within CMAs compared to those outside of CMAs.

The data from 2000-2010 using working age population indicates that visible minorities in CMAs have consistently been required to work more hours in the previous 52 weeks to qualify for EI than non-visible minorities outside of CMAs, though the difference is modest. On average, visible minorities in the largest urban areas must work 10 per cent more hours than those who are not visible minorities and reside in regions outside of CMAs. The range is an 18.9 per cent gap in 2000, to a 4.4 per cent gap in 2010. The difference in the amount of hours required to qualify has decreased over the course of the decade. As a large proportion of visible minority workers reside in CMAs, the results are attributable to the differential impact of the VERs on workers in CMAs as a whole. Comparing workers in CMAs to non-CMAs overall, working age individuals in CMAs from 2000-2010 have had to work 9.8 per cent longer to qualify for EI than those outside of CMAs.

As unemployment rates have varied, so has the number of hours of work required within and outside of CMAs. Unemployment rates have risen in urban areas in the recession years of 2009 and 2010 and the number of hours required to qualify for EI has therefore dropped. As unemployment increased in urban areas, resource economies in rural areas were comparatively better off, thereby narrowing the gap between CMA residents and those outside CMAs. This data indicates that while CMA residents and visible minorities living within them have been marginally disadvantaged by the regional EI system, the system has been flexible enough to alleviate some of these problems.

B Visible Minority Status

We also calculated the impact of visible minority status on the amount of hours needed to qualify for EI, separate from the distinction between CMAs and non-CMAs. From 2000-2010, visible minorities had to work on average 645 hours to qualify, in comparison to 623 for the average individual and 620 for the average non-visible minority. As with the analysis for CMAs, the gap between visible minorities and non-visible minorities was greatest in 2000 and reached a low in 2010. The average differential from 2000-2010 was 4.0 per cent between visible minorities and non-visible minorities.

C Citizenship Status

Whether the Variable Entrance Requirements dependent on the regional unemployment rate have a differential impact by citizenship status is another potentially relevant category to investigate, as naturalized citizens and non-citizens are not evenly distributed across the country or EI regions. The main categories of comparison are citizens of Canada by birth and citizens by naturalization. On average, a citizen of Canada by birth was required to work 618 hours per year over the period 2000-2010, with a high of 647 in 2008 to a low of 588 in 2009. Naturalized Canadians needed to work on average 642 hours per year over the period, with a high of 678 in 2000 and a low of 594 in 2009. Naturalized Canadians were obliged to work 4.0 per cent more hours on average to meet the VERs. We also compared dual citizens of Canada and another country and workers who exclusively hold Canadian citizenship. Those holding exclusively Canadian citizenship were required to work 621 hours per year on average, with dual citizens needing 640 on average. As with visible minority status, there were only marginal differences between the Canadian-born and naturalized citizens, and dual and exclusively Canadian citizens.

D Immigration Status

Immigration status is also another potentially relevant variable. If recent immigrants settle in the urban areas and provinces where it is has been generally hardest to qualify for EI, then immigration status may be related to an increased number of hours of work needed to qualify for EI. From 2000-2010, immigrants to Canada had to work on average 642 hours to qualify, with 618 required for workers who are not immigrants. We also tracked those who had immigrated to Canada within 5, 10 or more than 10 years before the Census date. While there was a modest gap between immigrants and non-immigrants, there was almost no difference between those who immigrated earlier to Canada and those who immigrated more recently. This lack of variation between earlier and more recent arrivals is likely due to the fact that all of these categories of immigrants have disproportionately settled in the same, large urban areas (Statistics Canada, 2003).

E Mother Tongue

Language is another variable through which to quantify the impact of the regional EI system as many new Canadians have mother tongues other than English or French, given the increasing importance of Asia, Africa and Latin America as sources of immigrants (Statistics Canada, 2003). From 2000-2010, those with English as a mother tongue were required to work 630 hours on average, while those with French as a mother tongue needed 592 hours. Workers who had a mother tongue other than English or French had to work 638 hours on average. This is a marginal increase from English native speakers (638 to 630), but a larger one in comparison to French native speakers (636 to 592). The average gap from 2000-2010 between those whose mother tongue was not an Official Language and those with French mother tongue was 7.7 per cent. In every year but 2010, the number of hours required was higher for non-official language speakers than French native speakers. There was only a marginal difference between native English speakers and non-official language speakers over the same time period.

F Summary of the Results

Overall, there are consistent but only modest differences between visible minorities and non-visible minorities, naturalized citizens and the Canadian-born, dual citizens and citizens of Canada only, immigrants and non-immigrants, and workers with mother tongues other than the Official Languages and those who are native Anglophones and Francophones. The finding of only modest results is likely due to the reversal of the pattern from earlier in the decade of relatively low urban unemployment in comparison to higher rural unemployment levels. As the labour market worsened in the middle of the decade, and particularly in 2009 and 2010, urban unemployed rose, access to EI was eased in cities, and the ability of minority workers residing in cities to qualify for EI approached that of workers in rural areas. The EI program was flexible to some extent in its response so that the gap between minorities and the average worker lessened in the context of rising unemployment. Minority workers continue to have their credentials, skills, and experiences discounted in the labour market, however, and face stiff competition for jobs in urban areas, which affects their ability to qualify for EI. While our data indicates that Charter-protected workers face some additional barriers due to the regional entrance requirements, future research should deepen the analysis to incorporate differential labour market experiences within EI regions on the basis of Charter-protected status as well as the impact of the flat rate for new entrants.

7 Legal Implications

A EI and Equality Rights

While we have found modest results with regards to minority workers, distributing employment insurance on a regional basis remains a problematic policy. As discussed above, the VERs disadvantage specific cities and provinces (Bishop and Burleton, 2009; Chamber of Commerce, 2009), the determination of regional boundaries is not transparent, and the regional unemployment rate is a flawed measure by which to assess need. Further, our results likely understate the barriers faced by minority workers. Immigrants as new entrants to the labour market will face the 910-hour rate for NEREs wherever they live, thereby hindering their ability to qualify for EI even having worked the same number of hours as someone who is not a new entrant. The regional entrance requirements and the flat rate for NEREs combine to decrease access to EI for specific groups of workers without justification for doing so, which compound the disadvantages facing minority workers with foreign education and experience. For all of these reasons, reform of EI, including the VERs, should remain a priority.

Unfortunately, the political dynamics of the EI program hamper reform. It is politically unpalatable for the federal government to remove entitlements in place for specific regions, as well as potentially costly to ensure the unemployed in all regions of the country should have equal access to EI benefits. The prospect of reform of the EI program in a manner that will lead to greater equity and improved policy design through the political process is elusive. Constitutional litigation through the courts is therefore a potentially promising venue through which to pursue reform of the VERs. In this section, we provide a general, though not comprehensive, overview of the legal considerations that would likely arise in a future constitutional challenge to the EI program's VERs.

EI is a government program authorized by federal legislation and administered by the federal and provincial governments. It must therefore be compliant with the Canadian Charter of Rights and Freedoms (1982), including the equality rights guarantee in s. 15. Section 15 protects individuals from discrimination on the basis of personal characteristics, known as prohibited grounds, either specifically listed in s. 15, such as race or sex, or covered by grounds analogous to those listed in the section (*Andrews v. Law Society of B.C.*, (1989). Section 15 forbids both direct and adverse effects discrimination on these prohibited grounds. Direct discrimination is where government action, such as legislation, explicitly distinguishes between individuals on a prohibited ground. Adverse effects discrimination occurs where a facially neutral law or government action has a disparate and negative impact on an identifiable Charter-protected minority (*Eldridge v. B.C., 1997*: para. 62; *Vriend v. Alberta*, 1998: para. 82-86 per Cory J.).

While the current data would likely not be sufficient to support a successful s. 15 claim for adverse effects discrimination, Charter-protected workers have faced varying levels of differential treatment as unemployment rates have fluctuated over the 2000-2010 period. In the future, the amount of hours required by minority workers relative to other workers may again increase, so the issue of whether the EI regional benefits program could be considered unconstitutional adverse effects discrimination remains relevant. The Supreme Court of Canada (the "Court") has not directly considered this issue, but has subjected the legislation governing EI to s. 15 scrutiny (*Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, 1991) and assessed its constitutionality on other grounds (see *CSN v. Canada*, 2008 and *Reference re Employment Insurance Act*, 2005). Future legal analysis could also focus on the potential for indirect discrimination caused by the 910-hour rule, which applies to immigrants as new entrants to the labour market.

B The Section 15 Test: Distinctions on Enumerated or Analogous Grounds

An analysis using s. 15 is complicated by uncertainty regarding the legal test for rights violations. The standard test for s. 15 was introduced in *Law v. Canada* (1999). *R. v. Kapp* amended the *Law* framework in 2008, but the analysis in *Kapp* on s. 15 is abbreviated. *Kapp* does appear to have re-instituted the two-part test for s. 15 from *Andrews v. Law Society of B.C.* (1989), with *Law* providing guidance on the application of the second part of the *Andrews* test, so we apply that approach here. Claimants previously had to establish differential treatment in comparison to another group similar but for the impugned personal characteristic such as race or gender, known as a mirror comparator group. The requirement of identifying the proper comparator group had hindered rights claimants. The recent decision of the Supreme Court of Canada in *Withler v. Canada (Attorney General)* (2011) de-emphasizes or perhaps even abandons the need for the claimant to establish a mirror comparator group.

For a s. 15 claim to be made out, there must be a distinction drawn on an enumerated or analogous ground that discriminates against an individual by perpetuating a disadvantage based in prejudice or stereotyping (*R. v. Kapp*, 2008: para. 17; *Withler*, 2011: para. 30). The *EI Act* and regulations draw distinctions on the basis of region and place of residence, therefore the obvious way to challenge the Act would be for discrimination by place of residence. Yet place of residence is neither listed in s. 15 nor considered an analogous ground and is therefore not protected by the Charter (*R. v. Turpin*, 1989: 1333 is somewhat ambiguous, but *Corbière v.*

Canada (1999) is more definitive: paras. 15, 62, as is *Haig v. Canada* 1993). As a consequence, challenging EI through s. 15 for discrimination on the basis of place of residence is likely to be a losing proposition.

Workers could challenge the constitutionality of the Act, however, on the basis of other grounds of discrimination. Race, ethnicity, language and national origin are all enumerated grounds protected under s. 15, while citizenship status has been found to be an analogous ground (*Andrews*, 1989). The Act does not distinguish on its face between workers on the basis of race, ethnicity, language, citizenship, or immigration status, so there can be no claim for direct discrimination. A claim could still proceed under s. 15 by asserting not direct discrimination, but adverse effects discrimination.

As the empirical analysis conducted above demonstrates, distributing benefits on a regional basis has a modest negative impact on several distinct groups that are protected from adverse effects discrimination under the Charter. These are distinctions drawn on enumerated grounds. The current effects on minority workers are an insufficient foundation upon which to base a constitutional challenge. If the negative impact were to increase as a result of prolonged lower unemployment rates in urban regions where immigrants settle relative to rural regions with few minority workers, a Charter challenge for adverse effects discrimination on the basis of race, ethnicity, citizenship, national origin or language would be a live issue before the courts.

C The Section 15 Test: Disadvantages Based on Prejudice or Stereotyping

For a s. 15 claim to succeed, the distinction drawn on enumerated or analogous grounds must have a discriminatory impact based on prejudice or stereotyping. How would a s. 15 claim proceed to try and make out adverse effects discrimination? First, a claimant must prove that the impugned law perpetuates prejudice and disadvantage on the basis of a prohibited ground. The typical case is where a law exacerbates the pre-existing disadvantages of a historically marginalized group (*Withler*, 2011: para. 35). There are certainly pre-existing disadvantages and prejudice facing visible minorities, new immigrants, and those for whom neither English nor French is their mother tongue (Reitz and Banerjee, 2007). Providing less access to EI, and fewer weeks of benefits if an individual eventually qualifies, may exacerbate pre-existing disadvantages.

The nature and scope of the interest affected must be also considered at this juncture. Generally, the more severe the impact, the more likely discrimination will be found to have occurred (*Law*, 1999). The more important the interest at stake, the more likely it will be that the distinction causes disadvantage. Qualification for a government program that insures unemployed workers is arguably a core interest for minority workers.

A court must also consider whether there is the absence of a purpose or effect that ameliorates the conditions of a *more* disadvantaged group than the claimants'. This portion of the test traditionally guards against allowing relatively advantaged groups to claim discrimination by government programs that aid relatively less advantaged groups. There is a risk a claim by minority workers in low unemployment areas could fail at this juncture. The EI scheme attempts to provide benefits at a satisfactory level to workers in areas of high unemployment.

High unemployment is a chronic problem in some regions of the country. A claim that the VERs are unconstitutional could be viewed as relatively advantaged workers in lower unemployment areas attempting to limit an ameliorative program targeting more disadvantaged workers in high unemployment areas.

A claim by minority groups for fair treatment under EI, however, need not necessarily be seen as an attempt to reject the distribution of benefits to other unemployed workers in need. A constitutional challenge to EI could legitimately be framed as about ensuring that benefits are equally distributed to all vulnerable workers. The unemployed in regions of relatively low unemployment may be as disadvantaged as the unemployed in regions with higher unemployment rates. Virtually all increases in low-income populations in the most populous cities in Canada were among recent immigrants (Picot and Sweetman, 2005: 14-5). There is an argument to be made that minority workers are collectively among the most vulnerable workers in Canada.

Second, a claim that government action results in substantive inequality must also prove that the disadvantage caused by the law is based in stereotyping that does not correspond to the actual needs and circumstances of the claimant. Unemployed minority workers whose access to EI is limited because of the VERs have had their actual needs and circumstances largely ignored. The VERs are responsive to need only if the overall unemployment in a region increases. The VERs do not adequately capture or respond to augmented need for EI benefits among groups that are disproportionately disadvantaged in a labour market where the overall unemployment rate is low.

The EI scheme assumes all workers in an economic region are uniformly affected by the regional unemployment rate. In fact, racial and linguistic minorities fare much worse (Aydemir and Skuterud, 2005; Federation of Canadian Municipalities, 2009; Picot and Sweetman, 2005: 6-14; Reitz, 2001; Reitz and Banerjee, 2007; Statistics Canada, 2010). Recent immigrants without Canadian credentials, less Canadian experience, and English (or French in Québec) as a second language are likely to be less competitive in the job market, thereby harming their ability to work sufficient hours to qualify for EI. The legal requirement under s. 15 to take into account the actual needs and circumstances of workers means acknowledging that the regional unemployment rate is a crude measure of actual need.

The counter-argument is that the current EI program is responsive to the actual needs and circumstances of workers. As unemployment rates have increased in the last few years of the 2000-2010 period, the difference in the average amount of hours required by minority workers and other workers has decreased. It is therefore arguable that the EI program has responded appropriately.

D “Reasonable Limits” Under Section 1 of the Charter

Even if the legislative scheme is found to violate s. 15, it may be saved constitutionally by the operation of s. 1 of the Charter. Section 1 permits rights to be curtailed by “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” For s. 1 to save the rights violation, there must be 1) a pressing and substantial government

objective, 2) a rational connection between the government action and the objective, 3) minimal impairment of the right, and 4) proportionality between the curtailment of the right and the value of the objective (*R v. Oakes*, 1986). On our analysis, the EI program is potentially vulnerable at both the rational connection and minimal impairment branches of the s. 1 test, so we focus on those two aspects.

The rational connection branch of *Oakes* requires that the evidence, or a common-sense understanding, show a causal connection between the limitation of the right and the benefits the scheme purports to cause (for two of the few instances where the usually easily hurdled rational connection test was not met see *RJR-MacDonald v. Canada* (1995) and *Benner v. Canada* (1997)). On the surface regional differentiation appears to be reasonably linked to insuring the employed, on the presumption that unemployment is most insidious in regions of high unemployment. The government would argue that the EI regime limits the rights of the unemployed in low unemployment regions only so as to target those with fewer job opportunities for aid and to encourage participation in the labour force. On this view, the limits placed on workers in low unemployment regions would be rationally connected to the objectives of helping workers in regions of high unemployment who are the least likely to be able to find work, and of encouraging employment for those most likely to find work.

Yet on several levels the current program is not rational. By failing to take into account the conditions faced by minority workers in the labour market, such as lack of Canadian credentials or experience, the EI program does not adequately take into account the actual needs of minority workers, which goes to the lack of a rational connection between the scheme and the goal of insuring unemployed workers. Using the regional rate as the exclusive indicator of need ignores that the labour markets in a particular region may be stagnant, even if the regional unemployment rate is low. There may be no movement in the market and therefore no opportunity for the unemployed to find jobs. It also fails to account for the specific labour markets that exist for different types of jobs (Bishop and Burleton, 2009: 9-10). Any claim of a rational connection between the scheme and the legislative goals is further undermined by the politicization of the boundary drawing process. There is a lack of substantive justification for adjusting boundaries or EI policies in light of the program's stated goal of insuring unemployed workers. The opaque process for determining regional boundaries and arriving at the criteria applied to define the boundaries would also work against the government's defence of the EI program in a s. 1 analysis.

The EI scheme could also be considered more than minimally impairing of the rights of Charter-protected minority workers. By splitting the country into 58 regions and requiring a different amount of hours worked for each unemployment rate from 6 per cent to 16 per cent, the EI scheme creates multiple tiers of entitlement. A tiered benefit program creates more differentials in coverage than are necessary. There could be a requirement of a flat number of hours worked below 10 per cent and another amount required for unemployment rates above 10 per cent (see the recommendations of Bishop and Burleton, 2009: 7-8 and the Chamber of Commerce, 2009: 10). CMAs could also be combined with outlying areas for the purposes of designing EI regions where the CMA boundaries do not correspond to the boundaries of a "homogeneous labour market" because outlying areas contain workers that should be considered part of the same labour market. A legislative scheme does not have to be the *least* impairing imaginable to pass constitutional assessment under s. 1 (*Harvey v. New Brunswick*,

1996: para. 47; *R. v. Edwards Books and Art*, 1986: 782), but it does need to be minimally impairing. The EI program as currently designed is open to a challenge that it impairs the rights of minority workers to a more than minimal extent. While in the abstract it is not clear on which side the s. 1 analysis would fall, a Charter challenge to the VERs appears to have some ammunition with which to fight a legal battle.

8 Temporary Foreign Workers

A distinct constitutional law issue involves temporary foreign workers (TFWs), a particularly vulnerable group (Fudge and MacPhail, 2009). Canada increasingly relies upon low-skilled TFWs to fill short-term gaps in the labour market (Elgersma, 2007). TFWs and their employers are obliged to pay into the EI system and TFWs are formally eligible to receive EI, but in practice TFWs are largely ineligible (Basok, 2004: 54; Fudge and MacPhail, 2009: 31; Hennebry and Preibisch, 2010; Nakache and Kinoshita, 2010: 20-21).

To qualify for EI, TFWs must have worked the required number of hours over the previous 52 weeks, which they are unlikely to have done as most have only been in Canada briefly. TFWs must also remain in Canada after their employment ends and be actively looking for work (*Employment Insurance Act*, 1996 s.7(1)-(3)). Many TFWs are legally in the country only on work permits that are "closed," i.e. tied to a specific employer. If they lose that job, they have no legal status to search for work with another employer. Though there is some confusion on this point in the case law, the jurisprudence generally holds that TFWs cannot meet the statutory requirement of actively looking for work if they are legally barred from finding work with an alternate employer (Nakache and Kinoshita, 2010: 20-21).

TFWs on "open" permits may be able to qualify if they remain in Canada and have worked the requisite number of hours as their permits allow for work with other employers. It is generally high-skilled workers who have open permits, while more vulnerable low-skilled TFWs tend to have more restrictive ones (Nakache and Kinoshita, 2010: 20) and are consequently less likely to be able to qualify for EI.

The formal eligibility but informal exclusion of most TFWs requires vulnerable workers to pay into EI without being insured against job loss. The policy rationale appears to be that if TFWs and their employers did not have to pay into EI, employers would have an incentive to employ TFWs over Canadian workers. The underlying assumption of competition between Canadian and foreign workers is of dubious logic given the reluctance of Canadians to do the jobs most TFWs do. Even if the assumption were correct, a preferable solution would be to exempt TFWs, but not their employers, from paying into EI.

The current arrangement legally requiring contributions to EI by TFWs but in effect barring their access is potentially constitutionally suspect as adverse effects discrimination. Though legislation and regulations set by the federal government distinguishes TFWs from workers in Canada as a whole on the enumerated or analogous grounds of citizenship and national origin, the EI legislation and regulations treat TFWs identically to other workers. There is therefore no direct discrimination against TFWs through EI. However, the combined operation of the

regulatory regime over the TFWs and the neutral EI rules arguably result in adverse effects discrimination against a vulnerable set of EI contributors. The policy rationale for mandating contributions by TFWs is unpersuasive, therefore making it difficult to justify under s. 1. We do not engage in a full legal analysis of the situation of TFWs, but raise the issue as one that is potentially deserving of Charter scrutiny and further scholarship.

9 Policy Options

Numerous studies have recommended reforms to the Variable Entrance Requirements in order to alleviate the resulting inequities. There are two broad sets of potential options. First, regional entrance requirements could be eliminated entirely. A flat rate requirement for the number of hours worked in the previous 52 weeks could set for all unemployed workers, as there is currently for NEREs. A uniform entrance requirement would undoubtedly involve a standard number of hours lower than that which prevails under the VERs today (Courchene and Allan, 2009: 25). A standard entrance requirement would therefore increase the number of recipients and program costs, but would likely increase both equity and policy effectiveness by ensuring all workers are treated alike.

Second, the regional system could be kept in place but modified. The process of determining the boundaries should be reformed, given the centrality of regions in assigning eligibility and benefits. At the very least the determination of regional boundaries should be rendered transparent. The Act should be amended to list the criteria that must be considered in the boundary review. The criteria should be designed to minimize the opportunities for political interference that undermine both equity and policy effectiveness. The criteria should also be rationally connected to the goal of insuring unemployed workers. Using the regional unemployment rate to determine eligibility and duration of benefits has the advantage of being simple to administer, but the resulting inequities are too great. Labour market segmentation and stagnation should be considered as additional factors to determine regional eligibility.

10 Conclusion

Our study has provided further detail of the implications of designing EI as a regional program. While the discrepancy between the average number of hours of work required by minority workers in comparison to other workers is currently modest, the differential impact of the VERs remains a live issue as economic conditions evolve. If economic growth occurs in the largest urban areas where minority workers overwhelmingly reside relative to rural or resource driven regions, the differential impact will increase. Pre-existing disadvantages in the labour market are compounded by any operation of the EI program that harms minority workers. Minority workers may in the future have a claim for adverse effects discrimination pursuant to s. 15 if the negative impact of the regional entrance requirements further exacerbates their existing position of relative disadvantage in the labour market.

This study was restricted to analyzing the impact of the regionally differentiated rules for EI entitlement on Charter-protected workers and the potential basis for a constitutional challenge to EI on this basis. Future research should measure the full impact of the regional rules by also analyzing the impact of the pre-existing disadvantages existing for minority workers in the labour market. Beyond regional differentiation in EI entitlement rules, there are other aspects of the EI program that may have a significant impact on Charter-protected Canadians. As noted above, the 910-hour rule that applies across Canada raises the entrance requirement for all workers new to the labour market, including recently arrived immigrants, far above the maximum entrance requirement of 700 hours applicable for all other Canadians.

The structure of EI and its role within the federal social safety net means that it serves as a source of yearly income for specific groups of low-income workers, rather than as protection against unexpected unemployment (Medow, 2011). Rural seasonal workers receive more regular federal support than low-income, year-round workers with equivalently low yearly incomes. Favoured rural seasonal workers tend not to be racial minorities or immigrants, while low-income minority workers tend to live in cities. The federal social safety net therefore privileges one form of low-income worker above another. This situation of inequity in regular yearly income support fueled by the regionally differential roles of EI could also likely provide fruitful ground for future legal analysis and could form a basis for potential legal action.

APPENDIX*

Table 1 CMA Results, 2000 - 2010

Working Age Population	% Difference	
Year	CMA Visible Minority vs. CMA Non-Visible Minority	CMA vs. Non-CMA
2010	4.4	6.6
2009	4.8	6.0
2008	7.8	7.4
2007	8.4	7.9
2006	8.5	7.5
2005	7.6	8.3
2004	13.1	13.6
2003	11.2	11.0
2002	9.5	10.2
2001	15.2	14.5
2000	18.9	16.2
Average % Difference	**10.0**	**9.9**

Table 2 Working Populations

2010			
Average Hours /Individual	Total	Visible Minority	Non-Visible Minority
CMA	609	595	614
Non-CMA	572	607	570
2009			
Average Hours /Individual	Total	Visible Minority	Non-Visible Minority
CMA	604	596	607
Non-CMA	571	617	569
2008			
Average Hours /Individual	Total	Visible Minority	Non-Visible Minority
CMA	671	672	671
Non-CMA	626	672	624

* Please note there may be some discrepancy between the numbers in the tables and ther overall averages due to rounding.

2007			
Average Hours /Individual	**Total**	**Visible Minority**	**Non-Visible Minority**
CMA	670	672	670
Non-CMA	622	671	620

2006			
Average Hours /Individual	**Total**	**Visible Minority**	**Non-Visible Minority**
CMA	664	668	663
Non-CMA	617	668	615

2005			
Average Hours /Individual	**Total**	**Visible Minority**	**Non-Visible Minority**
CMA	649	644	651
Non-CMA	600	646	598

2004			
Average Hours /Individual	**Total**	**Visible Minority**	**Non-Visible Minority**
CMA	648	643	649
Non-CMA	571	621	569

2003			
Average Hours /Individual	**Total**	**Visible Minority**	**Non-Visible Minority**
CMA	631	631	631
Non-CMA	569	611	567

2002			
Average Hours /Individual	**Total**	**Visible Minority**	**Non-Visible Minority**
CMA	638	633	640
Non-CMA	579	617	578

2001			
Average Hours /Individual	**Total**	**Visible Minority**	**Non-Visible Minority**
CMA	662	665	661
Non-CMA	579	634	577

2000			
Average Hours /Individual	**Total**	**Visible Minority**	**Non-Visible Minority**
CMA	676	689	672
Non-CMA	581	641	580

Table 3 Visible Minorities, 2000 - 2010

Working Age Population				
Year	**Average Individual**	**Visible Minority**	**Non-Visible Minority**	**% Difference VM vs. NVM**
2010	594	596	593	0.52
2009	590	598	589	1.5
2008	652	672	648	4.0
2007	650	672	646	3.7
2006	644	668	640	4.4
2005	628	644	626	2.9
2004	615	641	611	4.9
2003	604	629	601	4.7
2002	613	632	611	3.4
2001	627	662	621	6.6
2000	636	684	628	8.9
Average Hours	**623**	**645**	**620**	**4.0**
% Difference between visible and non-visible minorities: 4.2%				

Table 4 Citizenship Status, 2000 - 2010

Working Age Population					
Year	**Citizen by Birth**	**Natural-ized**	**Canadian Only**	**Dual Citizens**	**% Difference Naturalized vs. Citizen by Birth**
2010	593	595	593	597	0.34
2009	588	594	590	594	1.0
2008	647	670	650	668	3.6
2007	645	669	648	667	3.7
2006	639	665	643	661	4.1
2005	624	643	627	640	3.0
2004	609	638	613	635	4.8
2003	599	627	603	622	4.7
2002	607	630	610	627	3.8
2001	619	657	624	654	6.1
2000	625	678	632	672	8.5
Average Hours	**618**	**642**	**621**	**640**	
% Difference naturalized vs. citizens by birth: 4.0%					

Table 5 Immigration, 2000 - 2010

Working Age Population					
Year	**Non-Immigrants**	**Immigrants**	**10+ Years**	**Within 10 Years**	**Within 5 Years**
2010	593	595	595	596	597
2009	589	594	594	595	595
2008	647	670	670	670	669
2007	645	669	668	670	669
2006	639	665	665	665	663
2005	624	643	644	643	643
2004	609	638	637	640	640
2003	599	627	626	627	627
2002	609	631	630	631	631
2001	619	657	655	661	661
2000	625	678	674	684	684
Average Hours	**618**	**643**	**642**	**644**	**644**
% Difference recent immigrants (2001 - 2006) vs. non-immigrants: 4.1%					

Table 6 Mother Tongue, 2000 - 2010

Working Age Population					
Year	**Total**	**English**	**French**	**Non-Official Language**	**French vs. Non-Official**
2010	594	593	595	593	-0.34
2009	590	593	581	592	1.9
2008	652	659	623	665	6.7
2007	650	658	615	664	8.0
2006	644	654	604	660	9.3
2005	628	639	592	640	8.1
2004	615	622	583	633	8.6
2003	604	617	559	622	11.3
2002	613	619	590	626	6.1
2001	627	634	589	652	10.7
2000	636	645	585	672	14.9
Average / Individual	**623**	**630**	**592**	**638**	
% Difference between French and non-official language: 7.7%					

ENDNOTES

1. "Core" working age population (ages 15-54) is also at times used by Statistics Canada. We used the 15-64 age-range in order to capture older workers between the ages of 54 and 64.

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About the EI Task Force

The Mowat Centre has convened a research-driven Employment Insurance Task Force to examine Canada's support system for the unemployed. The Task Force will develop an Ontario proposal for modernizing the EI system—conscious of the national context—that works for individuals and businesses.

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