

**Submission**

**to the**

**KPMG Review**

**of the**

# **Social Security Tribunal**

**by the**

**Canadian Union of Public Employees**

**July 2017**

**About CUPE:** The Canadian Union of Public Employees is Canada's largest labour union, representing 643,000 members across the country. CUPE workers take great pride in delivering quality public services in communities across Canada through their work in municipalities, health care, social services, schools, universities, colleges, airlines, and many other sectors

## Introduction

Following the Great Depression, which threw millions of Canadians into unemployment with few options to support their families, Canada created a system of unemployment insurance to ensure that workers would have income support in times of need. The program was established on tripartite principles, recognizing that workers, businesses, and governments all had a stake in the labour market and the risk and costs of unemployment. Workers, businesses, and the federal government all contributed funding to the program, with workers and businesses contributing through mandatory premiums on wages and salaries. They also shared in the governance and administration of the program.

Employment Insurance, or EI (as the program has been named since 1996) does not belong to the federal government alone. It is a shared system which belongs to workers, employers, and the government. Canadian workers pay for the benefits and training that are available through EI, as well as for the administration of the program. Workers should therefore have a say in the organization and administration of the program rather than having rules and regulations imposed on them by governments.

Over the past twenty-five years, however, the federal government has repeatedly ignored the tripartite principle of the program and has imposed a series of unilateral changes on EI. These changes have significantly restricted access to benefits and training for unemployed Canadians; introduced new, punitive conditions for Canadians who are able to access the program; and replaced an appeal system that worked well with a new appeal system that lacks transparency and fairness, and is poorly managed.

In fact, the Social Security Tribunal has served as a perfect example of how not to make changes to Employment Insurance:

- There was no consultation with workers, businesses, or even the previous appeal boards and tribunals before the change was announced;
- There was no consultation with workers or employers on how to structure the new Tribunal or on how to handle the transition from the existing boards and tribunals to the new Tribunal;
- The new Tribunal structure completely removed the voice and labour market experience of workers from the appeal process;
- The Tribunal has functioned badly from the start: wracking up huge backlogs; imposing long wait times on Canadians; and suffering from errors and understaffing;
- The Tribunal has operated with great opacity, with no clear understanding of how decisions are made and a consistent refusal to make decisions public.

Workers are the ones who have paid the price for this failure, unable to access the very benefits that they have paid for when they need them. To make matters worse, workers are also being forced to pay for the abysmal functioning of the Tribunal, as EI appeals are paid for out of the EI Operating Account.

The same can be said for workers forced to appeal for Canada Pension Plan benefits. Workers have paid premiums, in many cases for years, only to be denied benefits by a frustrating, opaque, inaccessible process that is funded by their premiums.

The Social Security Tribunal has been mismanaged from the very start. It continues to be mismanaged today. It does not meet the most basic tests of fairness or of respect for workers. The Canadian Union of Public Employees is calling for the Social Security Tribunal to be eliminated and for the former EI Boards of Referees, the Office of the Umpire, the CPP and Old Age Security Review Tribunals, and the Pension Appeals Board to be restored.

### **Losing the Voice of Workers**

The announcement that the federal government was going to eliminate the existing EI, CPP and OAS appeal processes and replace them with a single, streamlined Social Security Tribunal came in the federal government's budget bill of 2012, an omnibus document which made significant changes to many elements of social, economic, and environmental policy. The Conservative government at the time did not consult with labour unions, groups representing unemployed workers, business organizations, or even the existing tribunals and boards before making the announcement.<sup>1</sup> Because the announcement was buried in an extremely large omnibus bill, there was also very little public consultation on the new proposal before it was adopted and implemented in early 2013.

Nor did the government consult workers on how the new appeals process should be structured. Instead of respecting the principle that workers were co-owners of the program, the new appeals process systematically removed workers' voices from the process. The old Boards of Referees were tripartite, with a local labour representative, generally selected by the local labour council; an employer representative, generally selected by the local chamber of commerce; and a chairperson nominated by the government. This ensured both that the perspectives of all partners were included in the appeal process and that local labour market conditions, as well as other contextual factors, were taken into account in deciding the appeal.

The local information, as well as the perspective of labour, were important elements in ensuring the fairness of the process. They were especially critical in determining whether an appellant was conducting a suitable search for work, was readily available for work, and was not refusing suitable employment.

The participation of the local labour and employer representatives also ensured that the impact of EI rules and regulations on Canadians across the country were well understood and could be shared with the EI Commissioners for Workers and Employers. This information could then be fed into the policy-making process for EI.

Under the Social Security Tribunal, all of this has been lost. The Tribunal has primarily focused on hiring Tribunal members who have experience in law or adjudication (or a history of donating to the Conservative Party<sup>2</sup>). Workload has been distributed at the national level, with the region in which the member resides as only one of the many criteria considered in determining who will be assigned to a case.<sup>3</sup> This means that the Tribunal member making a decision may be completely unaware of crucial local or cultural context. It also perpetuates the idea that joblessness is the result of individual shortcomings rather than local labour market conditions.

Furthermore, Canadians making appeals for EI, CPP, or CPP Disability could previously be represented in the appeals process by their labour union or by an advocate from a workers' action centre or disability organization. This was an essential form of support for some workers not used to dealing with a quasi-judicial process. In fact, experts have shown that appellants who have a representative have a greater chance of success than those who represent themselves.

However, because the legislation and the regulations constituting the Social Security Tribunal failed to specify anything regarding representation, the rules of provincial bar associations govern who may represent an appellant. In some provinces – most notably Quebec, Ontario, and British Columbia – appellants may only be represented by a lawyer. This causes considerable hardship for Canadians who are already in a tight financial situation because they have been denied benefits. It also creates an inequitable situation where an appellant in one province may have the representative of their choice while an appellant in the next province can only be represented if they can afford a lawyer. Further, it does not seem reasonable that some applicants must be represented by counsel when several Tribunal members are not accredited lawyers themselves. It should also be noted that the Tax Court of Canada allows representation by non-counsel in cases involving insurable employment which begs the question why the Social Security Tribunal cannot do the same thing?

### **Lack of Basic Procedural Fairness**

The exclusion of workers' voice and perspective from the creation of the Social Security Tribunal was no small thing. The result has been that the Social Security Tribunal operates under rules which strain even the most basic notions of procedural fairness, seeming to exist only to make the job of Tribunal members easier rather than to provide justice to Canadians:

- A Tribunal member can choose to summarily dismiss a case without even hearing it;
- A Tribunal member can make a decision “on the record” and thereby deny an appellant the right to make their case;
- The Tribunal member assigned to a case gets to decide the format of the hearing without any input from the appellant, even though in-person hearings have a much higher success rate than hearings held by phone, video, or in writing;<sup>4</sup>
- Appellants must get permission from the Appeal Division before they are even allowed to appeal a decision by the General Division;
- No new evidence may be introduced at the Appeal Division, even though new evidence such as a medical report may have just become available to the appellant;
- Only a small percentage of decisions are made public, which means that appellants cannot use previous decisions for precedent;
- Copies of decisions are shared with the Department of Employment and Social Development, however, which means that the level of information available to the people making claims and the people adjudicating claims is very different;<sup>5</sup> and
- Unlike the former CPP Review Tribunal which required that all CPP Disability cases be heard by someone who had medical expertise, the Social Security Tribunal has no requirement for medical expertise in CPPD cases, which means that doctor's decisions regarding an appellant's health are being overturned by people with no medical expertise whatsoever.

### **Continued Mismanagement**

In addition to the basic structural problems with the Social Security Tribunal, the Tribunal has been continually mismanaged since the start. The Tribunal was not fully staffed when operations began and some members went months before even being assigned a case.<sup>6</sup> The legislation which created the Tribunal also set an arbitrary cap on the number of members who sit on the Tribunal, which was completely insufficient to handle the Tribunal's caseload. Even once the Tribunal was fully staffed, it continued to fall behind in its caseload, with the number of appeals waiting to be heard rising every month. In an effort to deal with this rising backlog, members hired

for the EI Division were assigned to Income Security cases, which was essentially robbing Peter to pay Paul, making wait times worse for EI appellants. A spike unit created by the Minister to deal with the backlog of CPPD cases failed to resolve the majority of cases, leaving more than 5,000 Canadians still waiting for a hearing at the Tribunal.<sup>7</sup>

The Tribunal also did not have adequate systems and procedures to handle appeals. A review commissioned by the Tribunal in 2015 identified more than 60 areas for improvement.<sup>8</sup> The report also noted that there were issues with quality, including errors and time spent redoing work, as well as concerns about supervision.<sup>9</sup>

Recently the Social Security Tribunal has been plagued again by a lack of sufficient members as a backlog in governor-in-council appointments meant that nearly a quarter of SST positions were vacant in March 2017.<sup>10</sup>

Canadians have paid the price for this mismanagement, waiting an unacceptably long time to have their cases heard and dealing with multiple reviews and appeals in order to reach a conclusion. For EI appeals, wait times have gone from an average of 44 days at the old Board of Referees to an average of 165 days at the Social Security Tribunal.<sup>11</sup> And that is an *average* wait time; some Canadians have waited more than a year to have their appeal heard.

The wait times for CPP Disability cases is considerably worse. According to the Auditor General, average wait times for persons living with disabilities have reached nearly 900 days (more than two years).<sup>12</sup> Some appellants have waited five years to have their case heard.<sup>13</sup>

This places an incredible strain on Canadians who are already living with the stress of unemployment or disability. Canadians still need to pay bills and put food on the table; they can't simply wait for months or years to access income support. Some Canadians have ended up deep in debt, being harassed by collections agencies due to the delay in their case.<sup>14</sup> The Tribunal has not been very sensitive to this problem either. A number of Canadians have been forced to appeal for an expedited hearing due to financial strain, but only 15% of these requests were granted in 2014.<sup>15</sup>

It is also unfair that Canadians who receive an overpayment for EI benefits can be charged penalties and interest, but no interest is paid on benefits that have been unfairly denied for years.

Between the mandatory departmental reconsideration, the spike unit, and other attempts to clear the backlog, appellants have also found themselves in a bizarre procedural loop just to obtain access to the benefits they have paid for: one applicant for CPP Disability had his case rejected six times before the Department finally overturned the decision and granted him benefits.<sup>16</sup> Others have waited years for a hearing at the Social Security Tribunal only to be offered a settlement right before their hearing.<sup>17</sup>

## **Recommendation**

The Social Security Tribunal is fundamentally flawed. It is poorly structured, poorly managed, and fails to respect basic notions of fairness and justice. It is our opinion that the Social Security Tribunal cannot be fixed. A few tweaks to the rules or to the procedures will not be enough to provide Canadians with a fair, transparent and accessible appeals system.

The Canadian Union of Public Employees is therefore recommending that the federal government end the Social Security Tribunal and restore the Employment Insurance Boards of Referees, the EI Umpire, the CPP and OAS Review Tribunals, and the Pension Appeals Board.

Furthermore, we call on the government to respect the tripartite nature of Employment Insurance and include the voice and perspectives of workers in managing the EI system and its appeal process. CUPE stands ready to work with the federal government to build an EI system that is fair, accessible, and respects the rights of Canadian workers.

## End Notes

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<sup>1</sup> Auditor General of Canada, "Report 6 – Canada Pension Plan Disability Program," *2015 Fall Reports of the Auditor General of Canada*, [http://www.oag-bvg.gc.ca/internet/English/parl\\_oag\\_201602\\_06\\_e\\_41063.html](http://www.oag-bvg.gc.ca/internet/English/parl_oag_201602_06_e_41063.html).

<sup>2</sup> Lee-Anne Goodman, "One-Third of Social Security Tribunal Members Have Ties to Tories," *The Canadian Press*, January 6, 2015, <http://www.cbc.ca/news/politics/one-third-of-social-security-tribunal-members-have-ties-to-tories-1.2891573>.

<sup>3</sup> Order/Address of the House of Commons No. 342, Reply by the Minister of Employment and Social Development and Minister for Multiculturalism in response to an Inquiry of Ministry from Ms. Sims (Newton-North Delta), March 24, 2014.

<sup>4</sup> Lee-Anne Goodman, "Fewer In-Person Hearings Being Held by Social Security Tribunal," *The Canadian Press*, December 18, 2014, <http://ipolitics.ca/2014/12/18/fewer-in-person-hearings-being-held-by-social-security-tribunal/>.

<sup>5</sup> Glenn Klauth, "Editorial: Publish All Social Security Decisions," *Law Times*, July 13, 2015,

<http://www.lawtimesnews.com/201507134804/commentary/editorial-publish-all-social-security-decisions>.

<sup>6</sup> Auditor General of Canada, "Report 6,"; Lee-Anne Goodman, "Social Security Officials Idle in Tribunal's Early Months as Backlog Grew," *The Canadian Press*, December 5, 2014, <http://www.news1130.com/2014/12/05/social-security-officials-idle-in-tribunals-early-months-as-backlog-grew/>.

<sup>7</sup> Order/Address of the House of Commons No. 4, Reply by the Minister of Families, Children and Social Development in response to an Inquiry of Ministry from Ms. Hardcastle (Windsor-Tecumseh), January 25, 2016.

<sup>8</sup> Auditor General of Canada, "Report 6."

<sup>9</sup> Jordan Press, "Social Security Tribunal Short-Staffed, Error-Prone and Under Pressure: Report," *The Canadian Press*, October 15, 2015, <http://www.ctvnews.ca/canada/social-security-tribunal-short-staffed-error-prone-and-under-pressure-report-1.2611142>.

<sup>10</sup> Elizabeth Thompson, "Trudeau Government's Vacant Appointments Backlog Up 80%," *CBC News*, March 29, 2017, <http://www.cbc.ca/news/politics/trudeau-appointments-government-jobs-1.4044114>.

<sup>11</sup> Employment and Social Development Canada, *Employment Insurance Service Quality Review: Making Citizens Central*, 2017.

<sup>12</sup> Auditor General of Canada, "Report 6."

<sup>13</sup> Goodman, "Social Security Officials Idle."

<sup>14</sup> Lee-Anne Goodman, "Social Security Tribunal Backlog Includes Terminally Ill, Others Deep in Debt," *The Canadian Press*, December 1, 2014, <https://www.theglobeandmail.com/news/politics/social-security-tribunal-backlog-includes-terminally-ill-others-deep-in-debt/article21864630/>.

<sup>15</sup> Lee-Anne Goodman, "Some Seriously Sick, Broke Appellants Denied Speedy Social Security Hearings," *The Canadian Press*, February 19, 2015, <http://www.news1130.com/2015/02/19/some-seriously-sick-broke-appellants-denied-speedy-social-security-hearings/>.

<sup>16</sup> Auditor General of Canada, "Report 6."

<sup>17</sup> Emily Casey, "Delays and Denials Characterize Flawed CPP System," Tkatch and Associates, September 17, 2015, <http://www.tkatchlaw.ca/motor-vehicle-accidents/delays-and-denials-characterize-flawed-cpp-system/>.