Bill C-17

Addressing Asymmetries for Phase II of the Canada Emergency Response Benefit

A memorandum to the Prime Minister's Office and the Privy Council Office

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SUMMARY

Bill C-17 creates a regime of rights and responsibilities which places the entire burden of "re-opening the economy" on workers. Though provincial and municipal governments are responsible for inadequate transit and childcare, and though some employers have knowingly not made workplaces safe to return to, or have significantly cut pre-COVID pay and hours, only workers have been asked to pay the price of recovery. On July 5, 2020, Canada Emergency Response Benefit (CERB) will end for about two million people who are ineligible for Employment Insurance. Jobs may not be available. Losing eligibility for income support when a worker's safety and livelihood is at risk is not good policy, creating new power imbalances in the workplace by giving a disentitlement "whip" to employers.

Should the Government of Canada continue with this lopsided approach, it will undo months of goodwill and social solidarity it has built by its commitment to "have the backs of Canadians" during the pandemic. It will also violate the very foundation of a resilient recovery: health and safety in the workplace by continuously reducing the risk of contagion. The asymmetries are profound.

First, the fines and prison time in Bill C-17 are overkill, given existing rules and enforcement mechanisms for prosecuting fraud; and will likely be constitutionally challenged. They should be dropped. Should the Government of Canada insist on proceeding with new penalties for workers who knowingly received CERB when ineligible, it must also introduce new penalties for employers who knowingly fail to create a safe workplace.

Second, employers who lose 30% or more of their revenue will continue to receive federal supports; but this approach does not apply to workers regardless of reductions in earnings. The only test is refusal to accept reasonable work, without clarity on the definition of reasonableness regarding unpredictable hours or reduced pay, the lack of safety in the workplace, the lack of available childcare or unreasonable commute times (for example two hours on public transit, another potential vector of COVID-19 transmission, for a three-hour shift). Even courts define a reduction of pay/hours that results in a loss of 20% or more of earnings as constructive dismissal. To fix this asymmetry we recommend:

- From July 5 to October 25, 2020 (16 weeks), CERB become available to eligible workers in two-week periods.
- CERB eligibility be extended, i.e. would not exclude workers who had been in receipt of CERB prior to July 5, 2020 and exhausted the initial 16 week maximum.
- Add a qualifying condition for eligibility for CERB that permits attestation by the worker that they "did not refuse suitable work unless it was for a reasonable cause". This serves as a caution without going the 'law and order' penalties route, highly problematic at any time but especially during a pandemic.

We quickly need a fair Emergency Benefit system, with symmetrical extension of access and protection for workers and employers. A plan for durable recovery will stabilize the economy and job market, and protects everyone's health.

BILL C-17: ADDRESSING ASYMMETRIES and RECOMMENDATIONS FOR PHASE II of the CANADA EMERGENCY RESPONSE BENEFIT

On July 4, 2020 about two million[1] people are likely to run out of income support – currently available to them through the Canadian Emergency Response Benefit (CERB) – and find themselves still without paid work, but ineligible for income support. A small minority of these people may be eligible for provincial social assistance.

CERB was introduced to help people stay at home to contain the spread of COVID-19. While re-opening the economy has begun gingerly in many regions of the Canadian economy, we are not yet finished fighting the pandemic, and nowhere is this more true than in Canada's two largest cities.

Bill C-17 is the draft bill for what the Government of Canada thinks should happen next. It introduces a new phase of benefits, offering $1,000 every two weeks for eligible recipients, running from July 5 to October 3, 2020. It also introduces new conditions for eligibility, turning largely on a worker's refusal to accept work. This Phase II approach to CERB effectively creates a regime of rights and responsibilities which places the entire burden of "re-opening the economy" on workers, and none on jurisdictions responsible for transit and childcare, or the employers who have not made workplaces safe to return to, or who have significantly cut pre-COVID pay and hours. Losing eligibility for income support when a worker's safety and livelihood is at risk is not good policy, creating new power imbalances in the workplace by giving a disentitlement "whip" to employers.

Bill C-17 also lays out a lengthy and confusing series of penalties for workers who may have misinformed Employment Insurance (EI) or the Canada Revenue Agency (CRA), or ineligibly received CERB. The penalties can be applied retroactively to March 15, 2020, when the federal government started introducing a series of emergency economic response measures. This created confusion about who should apply to what program, all of which had different rules. The retroactive application of new rules is not just bad policy, inconsistent and indeed incongruous with the "we've got your back" tone established by the government previously. The retroactive element of these new penalties makes constitutional challenges very likely.

Dubbed the "Punishment Bill" by some, notably there has been no counterpart announcement of measures to penalize employers who have misinformed or defrauded the system of available federal supports. This asymmetric approach imposes increased duties and risks on workers, but not on employers.

[1] Since there is no publicly available data for CERB recipients, economist Armine Yalnizyan worked with Stephanie Lluis, a professor of labour economics at University of Waterloo, to estimate the number of people who might be ineligible for EI once their CERB runs out, based on the Public Use Microdata files of the May 2020 Labour Force Survey. The lower bound was 1.845 million people who could end receipt of CERB but be ineligible for EI (if all unemployment regions had 13% unemployment, requiring employment for at least 420 hours before becoming eligible for EI); the upper bound was 2.085 million people (if all the unemployment regions had 6% unemployment, requiring at least 700 hours for EI eligibility). By the end of the summer, as more businesses fail due to lower revenues and higher costs of service, these numbers are likely to increase.

Should the Government of Canada continue with this lopsided approach, it will undo months of goodwill and social solidarity it has built by its commitment to act swiftly and robustly to support Canadians during the pandemic. It will also violate the very foundation of a resilient recovery: health and safety in the workplace by continuously reducing the risk of contagion.

Whether Bill C-17 is salvaged by amendments to eligibility rules, duration, penalties and authorities, or another Bill drafted, these issues need to be addressed.

We recommend clear and symmetrical rules as follows:

- From July 5 to October 25, 2020 (16 weeks), CERB becomes available to eligible workers in two-week periods.
- CERB eligibility be extended, i.e. would not exclude workers who had been in receipt of CERB prior to July 5, 2020 and exhausted the initial 16 week maximum.
- Add a qualifying condition for eligibility for CERB that permits attestation by the worker that they "did not refuse suitable work unless it was for a reasonable cause". This serves as a caution without going the 'law and order' penalties route, highly problematic at any time but especially during a pandemic.

However, with respect to enforcement and penalties, CRA already has the authority and powers to investigate and prosecute scammers who are defrauding CERB (like organized fraudsters who have reportedly signed up ineligible seniors in exchange for an upfront cut of 10% of the benefits). These powers should be enough to deal with anyone deliberately trying to game the system

For all other concerns, as the Government of Canada itself noted in introducing CERB, program integrity and enforcement of rules will take place at tax time. Total income is reported by employers, employees and the self-employed, and statements of CERB paid, which is taxable. The CRA assesses all tax returns. Should a worker want to challenge the CRA assessment of the tax return, there is an established process for review and dispute resolution.

We believe the fines and prison time in Bill C-17 are overkill, given existing rules and enforcement mechanisms for prosecuting fraud. They should be dropped. However, should the Government of Canada insist on proceeding with the proposed new penalties for workers who knowingly received CERB when ineligible, it should also introduce new penalties for employers who knowingly fail to create a safe workplace or who knowingly rely on work at significantly lower wages and hours of work rather than apply for the Canada Emergency Wage Subsidy (CEWS) to bring back employees on a more secure basis.

We have recommended three clear ways in which the current approach can be improved. However, there are other issues not easily tackled. For example:

- Who decides? CERB is a computer program, nothing more than a big, simple-minded automaton that spits out cheques. Putting CRA in charge of deciding who is in or out of CERB, is problematic. We have seen how difficult it has been for CRA to clearly communicate rule changes to the public for a very simple program. Now staff will be tasked with determining what constitutes "suitable" employment with no legal precedents or policy to this status. The EI

system has such precedents and policies, but none that define what is a "reasonable" offer in the context of a pandemic. Deciding who's in or out will come with plenty of errors.

- What's "reasonable"? Determination of reasonableness of the offer of work turns on three conditions. First, workplace health and safety (ability to distance, PPE). Second, availability of reasonable workplace supports (childcare facilities for those who need them; safe transit conditions to limit another vector of contagion; reasonable balance between commutes and worktime, not two-hour rides on over-packed buses to get to a three-hour shift). Third, significantly reduced predictability and amounts of paid work as the economy re-opens (the courts define a reduction in earnings of 20% or more through a reduction in pay rate and/or hours as "constructive dismissal"). It appears reduced hours/pay will be a common feature of the early re-opening for businesses. But whereas employers who lose 30% or more of their revenue can receive federal supports, workers are disentitled to income supports if they refuse work, regardless of the predictability or amount of hours and pay. This profound asymmetry in the rules must be rectified.

- What about errors? The new rules determining eligibility do not come with any external appeal system for reviewing decisions. CRA could be responsible for deciding who's in and out of CERB, but staff don't have the experience to administer, investigate or enforce penalties for refusing work, let alone setting up an appeal system with external review procedures. EI has such a system for reviewing its decisions - the Social Security Benefits Tribunal – which could play such a role. However it is already drowning in backlogs and long-standing agreements to improve its functioning have not materialized in three years. It would require new resources to augment service provision in the post-COVID world of authenticating eligibility for CERB.

Employers have had their own difficulties trying to get CRA and Service Canada assistance during the pandemic. They understand it is not realistic to get help to police work refusals. Consequently, their business lobby groups have pushed for changes to the rules so they can threaten workers with the loss of CERB and EI if they object on the basis of erratic schedules, pay cuts, inadequate childcare, unsafe conditions, personal health risks, access to public transit, etc. They don't need to use a whip to get people back to work. They just need to have one. Bill C-17 hands employers a whip, by disentitling workers who don't accede to virtually any working condition.

Clearly constraints on workers' availability make it difficult to restart some businesses. There are many contradictions because we all want the economy to re-boot as soon as possible. But no amount of wishing to be past a world-wide pandemic puts us there. Whether a region is in Stage 1 or 2 of re-opening, the possibility of serious illness or death is still very real for some of Canada's workers, and by extension their families and communities. We quickly need a fair Emergency Benefit system, with symmetrical extension of access and protection for workers and employers. A plan for durable recovery will stabilize the economy and job market, and protects everyone's health.

Submitted June 15, 2020 by Armine Yalnizyan, in consultation with Laurell Ritchie, Mary Gellatly, and Colette Murphy