Tackling the COVID-19 Pandemic: The Unsettling Role of Non-State Actors in Addressing Global Pandemics

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The recent coronavirus outbreak provides a fit backdrop for us to assess our preparedness for and reaction to this and future outbreaks. This article considers the role of non-state actors in global health crises. While much attention has been afforded to the role of the state in preventing and managing these crises, the recent coronavirus outbreak reminds us that the effectiveness of the state's response to (the economic consequences of) global health crises is largely dependent on the good faith of the private sector. In a capitalistic society and in the absence of specific legal obligations, companies have no obligation to keep their workers on payroll during an economic slowdown or use government stimulus funds to actually benefit those governments hope to target. We argue that relying on private actors to take measures which they have no obligation to take and are disincentivised to take is neither responsible nor sustainable. It causes private actors to shoulder a disproportionately low portion of the burden of a crisis, leaving governments to, in the unique circumstances of a prolonged global health crisis, spend public funds at

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an unsustainable rate. We further argue that the current framework, aimed at helping unemployed workers, provides perverse incentives and encourages companies to lay off their workers. Absent changes to this framework, our response to global health crises is bound to be inadequate.

Keywords: Health crisis, coronavirus, COVID-19, private sector, government, virus, public health, employment insurance, unemployment, banking, finance, lending, financial crisis, corporate social responsibility, taxation, public law, interest rate, stimulus, GDP, layoff, business, regulation, gig economy

INTRODUCTION

The recent coronavirus outbreak provides a fit backdrop for us to assess our preparedness for and reaction to this and future outbreaks. Globalisation has been defined by the increasing movement of goods and people across the world. With freer and more frequent movement come significant epidemiological risks.[1] The coronavirus outbreak exemplifies these issues. The virus originated in China and, within months, spread across the world, creating a global pandemic and crisis.

This article considers the role of non-state actors in global health crises such as the coronavirus outbreak. Much attention has been afforded to the role of the state in preventing and managing these crises, but much less

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1 See "The Impact of Globalization on Infectious Disease Emergence and Control: Exploring the Consequences and Opportunities: Workshop Summary" (2006), online: *National Center for Biotechnology Information* <www.ncbi.nlm.nih.gov/books/NBK56593/> [https://perma.cc/5YC8-XZL8].

has been given to the role of non-state actors.[2] Some have argued that coordination between public and private actors can be threateningly deficient.[3] The recent outbreak reminds us that the effectiveness of the state's response to (the economic consequences of) global health crises is largely dependent on the good faith of the private sector. In a capitalistic society and in the absence of specific legal obligations, companies have no obligation to keep their workers on payroll during an economic slowdown or use government stimulus funds to actually benefit those governments hope to target. We argue that relying on private actors to take measures which they have no obligation to take and are disincentivised to take[4] is neither responsible nor sustainable. It causes these actors to shoulder a disproportionately low portion of the burden of a crisis, leaving governments to, in the unique circumstances of a prolonged global health crisis, spend public funds at an unsustainable rate. We further argue that the current framework, aimed at helping unemployed workers, provides perverse incentives and encourages companies to lay off their workers. Absent changes to this framework, our response to global health crises is bound to be inadequate.

Our main goal in this article is to show how much of the response to the economic consequences of a global health crisis depends on the private sector. While we do not systematically provide solutions to the

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2 See Justin Trudeau, "Trudeau Announces Latest Measures to Fight COVID-19: Full Transcript" (17 March 2020), online: *Maclean's* <www.macleans.ca/news/canada/trudeau-announces-latest-measures-to-fight-covid-19-full-transcript/> [https://perma.cc/FFZ2-SZ2B]; Morgan Lowrie, "Quebec Orders Bars, Movie Theatres to Close to Limit Spread of COVID-19" (16 March 2020), online: *Canada's National Observer* <www.nationalobserver.com/2020/03/16/news/quebec-orders-bars-movie-theatres-close-limit-spread-covid-19> [https://perma.cc/Z26B-5DV4]; Fatima Syed & Murad Hemmadi, "Breaking Down Ottawa's $82-Billion Economic Response Plan" (18 March 2020), online: *The Logic* <thelogic.co/news/special-report/breaking-down-ottawas-82-billion-economic-response-plan-for-covid-19/> [https://perma.cc/6VQB-WR8L] ["Breaking Down"].

3 See David M Bell et al, "Pandemic Influenza as 21st Century Urban Public Health Crisis" (2009) 15:12 Emerging Infectious Diseases 1963.

4 These measures generate arguably unnecessary costs for these businesses, which affects their ability to compete in the marketplace and reduces short and long-term returns for their shareholders. Indeed, as is explored below, the cost these businesses would bear is borne, if not by them, by the state.

issues we raise, we do suggest some.[5] Most often, the answer will be a change to the legislation which imposes (or fails to impose) certain obligations on corporations. We leave it to further research to more comprehensively put forward a reform plan of these pieces of legislation.

Section I of our article describes the outbreak of the new form of coronavirus which quickly spread around the world, creating a global health crisis with major economic consequences. Section II analyses governmental responses to the crisis and its economic consequences. Section III fills the gaps in the model described in Section II by considering the significant role of the private sector in responding to the crisis. Finally, Section IV summarily proposes solutions to the problems raised in the rest of the article.

I. The Pandemic

On March 11, 2020, the World Health Organization (WHO) labelled the coronavirus outbreak a pandemic.[6] Coronaviruses are a family of viruses which can cause respiratory, gastrointestinal and other symptoms, ranging from flu-like symptoms to life-treating respiratory distress, in humans and certain animals. On December 8, 2019, a first case of a novel

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5 On some potential solutions, see e.g. Angelika Kümmerling & Steffen Lehndorff "The Use of Working Time-Related Crisis Response Measures During the Great Recession" (2014), online (pdf): *International Labour Office, Geneva* <praha.vupsv.cz/fulltext/ul_1684.pdf> [https://perma.cc/6HRV-ZS3Q].

6 See Tedros Adhanom Ghebreyesus, "WHO Director-General's Opening Remarks at the Media Briefing on COVID-19 - 11 March 2020" (11 March 2020), online: *World Health Organization* <www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020> [https://perma.cc/G3ZE-3B8Q] [Ghebreyesus].

form of coronavirus was diagnosed in Wuhan, China.[7] On December 31, 2019, China reported the existence of multiple cases of pneumonia in Wuhan to the WHO.[8] Though China initially reported these cases as cases of pneumonia of unknown source, they were soon linked to the novel form of coronavirus.[9] The virus was labelled COVID-19 on February 11, 2020.[10] It quickly spread across China and the world. When the WHO labelled the coronavirus outbreak a pandemic, there were 118,000 cases in 114 countries, and 4,291 people had died.[11] While the word pandemic has no fixed definition, it generally denotes the quick spread of a new virus in numerous countries, affecting a large number of individuals.[12]

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7 See Helen Davidson, "First COVID-19 Case Happened in November, China Government Records Show – Report" (13 March 2020), online: *The Guardian* <www.theguardian.com/world/2020/mar/13/first-covid-19-case-happened-in-november-china-government-records-show-report> [https://perma.cc/PWT7-QVVB]; Josephine Ma, "Coronavirus: China's First Confirmed COVID-19 Case Traced Back to November 17" (13 March 2020), online: *South China Morning Post* <www.scmp.com/news/china/society/article/3074991/coronavirus-chinas-first-confirmed-covid-19-case-traced-back> [https://perma.cc/B8NE-K5DE]. As the authors note, the accuracy of the date reported by Chinese officials has been questioned, and the first diagnosis may date back to November 2019. The spread of the virus was undoubtedly affected by the opaqueness of the Chinese government.

8 See "Novel Coronavirus (2019-nCoV): Situation Report – 1" (21 January 2020), online (pdf): *World Health Organization* <www.who.int/docs/default-source/coronaviruse/situation-reports/20200121-sitrep-1-2019-ncov.pdf> [https://perma.cc/7DEE-QRY9].

9 *Ibid*.

10 See "Naming the Coronavirus Disease (Covid-19) and the Virus That Causes It", online: *World Health Organization* <www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-(covid-2019)-and-the-virus-that-causes-it> [https://perma.cc/DCU7-CRC3].

11 Ghebreyesus, *supra* note 6.

12 See *ibid*; "Principles of Epidemiology in Public Health Practice, Third Edition: An Introduction to Applied Epidemiology and Biostatistics: Lesson 1: An Introduction to Epidemiology" (18 May 2012), online: *Centers for Disease Control and Prevention* <www.cdc.gov/csels/dsepd/ss1978/lesson1/section11.html> [https://perma.cc/GJG3-GXGB]; and "Emergencies Preparedness, Response: What is a Pandemic?" (24 February 2010), online: *World Health Organization* <www.who.int/csr/disease/swineflu/frequently_asked_questions/pandemic/en/> [https://perma.cc/8XAP-YV79].

The next section considers how the Canadian government has responded to the COVID-19 pandemic.

II. GOVERNMENT RESPONSES

The response to the COVID-19 pandemic has been swift and comprehensive. Needless to say, desperate times call for major measures. Canadian Minister of Finance Bill Morneau stated:

> Usually, my job is to ensure we maintain our fiscal track, but right now as minister of finance, my only job is to make sure that Canadians can keep food in the fridge, that they can keep a roof over their heads, that they can afford the medicine that they need.[13]

This section analyses government responses through two axes. First, we consider the measures taken by independent public entities. While these entities make independent decisions through apolitical processes, these decisions have a significant impact on the magnitude and effectiveness of government responses to the pandemic. Second, we consider the response of the Canadian government.

A. Independent Public Entities

The Bank of Canada[14] lowered its target interest rate to 0.25% in a tripartite process: from 1.75% to 1.25% on March 4th, then to 0.75% on March 16th, and to 0.25% on March 27th.[15] This steep drop foreshadows a looming recession from the economic impacts of the COVID-19

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13 Bill Morneau, "Finance Minister Outlines $82B COVID-19 Response Package" (18 March 2020) at 04m:10s, online (video): *CBC News* <www.cbc.ca/player/play/1712875587852> [https://perma.cc/NBX3-8MZY].

14 The Bank of Canada is the central bank of Canada. It is responsible for Canada's monetary policy. It is structured as a Crown corporation (constituted under the *Bank of Canada Act*, RSC 1985, c B-2) rather than a governmental department, which makes it independent from the executive federal government. See "About", online: *Bank of Canada* <www.bankofcanada.ca/about/> [https://perma.cc/499G-5NAS] ["About the Bank of Canada"].

15 See "Interest Rates", online: *Bank of Canada* <www.bankofcanada.ca/rates/interest-rates/> [https://perma.cc/7T2A-CENX].

pandemic. The pandemic has indeed caused a major drop in oil prices[16] and a consequent need to stimulate the economy by promoting consumer and business borrowing.[17] The interest rate decreases are not a governmental measure *per se*, as interest rates are set by an independent government entity through an apolitical process.[18] They are nonetheless an important tool of macroscopic modulation, as they provide key liquidity in response to (impending) financial crises.[19]

Similarly, on March 13th, the Superintendent of Financial Institutions (an independent government agency)[20] announced a series of measures to support the resilience of financial institutions. The most notable was the

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16 Just under 10% of Canada's GDP comes from mining and the extraction of oil and gas resources, see "Gross Domestic Product (GDP) at Basic Prices, by Industry, Monthly, Growth Rates (X 1,000,000)", online: *Statistics Canada* <www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3610043402> [https://perma.cc/449E-B2GZ] ["Canada's GDP"]. This does not include the many secondary industries which are directly or indirectly related to the extraction of oil and gas. As such, Canada's economy is bound to be significantly affected by fluctuations in global oil prices.

17 See "Bank of Canada Lowers Overnight Rate Target to ¾ Percent" (13 March 2020), online: *Bank of Canada* <www.bankofcanada.ca/2020/03/bank-of-canada-lowers-overnight-rate-target-to-%c2%be-percent/> [https://perma.cc/CD6K-ES9C].

18 See "About the Bank of Canada", *supra* note 14.

19 See generally Robert E Hall, "Low Interest Rates: Causes and Consequences" (2017) Intl J Central Banking (9th) 1.

20 The Office of the Superintendent of Financial Institutions (OSFI) is an independent federal government agency that reports to the Minister of Finance. It is responsible for the regulation and supervision of financial institutions, which include banks, insurance companies, loan and trust companies, cooperative credit associations, fraternal benefit societies as well as 1,200 pension plans in Canada. It ensures those institutions' financial well-being and their capacity to meet their obligations. See "About Us", online: *Office of the Superintendent of Financial Institutions* <www.osfi-bsif.gc.ca/Eng/osfi-bsif/Pages/default.aspx> [https://perma.cc/S4KW-CS2P].

reduction of the level of capital the largest Canadian banks need to keep as reserves, which freed up for borrowing some 300 billion dollars.[21]

Finally, the Canada Mortgage and Housing Corporation (CMHC), a Crown Corporation,[22] has committed to buying up to 50 billion dollars in insured mortgage pools,[23] an amount later raised to 150 billion dollars.[24] By purchasing mortgage pools, the CMHC will generate liquidity for banks and other lenders. The government believes this liquidity will be used to provide loans to consumers and businesses.[25]

B. Federal Government

The Canadian government announced a broad range of measures in response to the COVID-19 pandemic. On March 18th, 2020, Prime Minister Justin Trudeau announced an emergency response plan worth up

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21 See "OSFI Announces Measures to Support the Resilience of Financial Institutions" (13 March 2020), online: *Office of the Superintendent of Financial Institutions* <www.osfi-bsif.gc.ca/Eng/osfi-bsif/med/Pages/nr_20200313.aspx> [https://perma.cc/TM64-4SJ3] ["OSFI Announces Measures"]. The OSFI reduced the domestic stability buffer, which is a portion of the capital requirement for the most significant Canadian banks, see "Domestic Stability Buffer – Information Sheet", online: *Office of the Superintendent of Financial Institutions* <www.osfi-bsif.gc.ca/Eng/fi-if/in-ai/Pages/dsb-nfo.aspx> [https://perma.cc/Q6QG-6EZ7]. On capital requirements in banking more generally, see Joshua N Feinman, "Reserve Requirements: History, Current Practice, and Potential Reform" (1993) 79:6 Federal Reserve Bull 569.

22 The CMHC is constituted under *Canada Mortgage and Housing Corporation Act*, RSC 1985, c C-7.

23 Mortgage pools are groups of mortgages which are used as collateral to create a financial product (a mortgage-backed security), which can then be sold to public or private investors. On these securities, see generally Pelma Jacinth Rajapakse, "An Analysis of the Concept of Mortgage-Backed Securities: An Economic and Legal Perspective" (2011) 10:1 J Financial & L Management 22.

24 See "Government of Canada Announces Further Measures to Support Continued Lending to Canadian Consumers and Businesses" (16 March 2020), online: *Canada Mortgage and Housing Corporation* <www.cmhc-schl.gc.ca/en/media-newsroom/news-releases/2020/measures-support-continued-lending-canadian-consumers-businesses> [https://perma.cc/2DLD-N2HU] ["Further Measures"]; "CMHC Expands Insured Mortgage Purchase Program" (26 March 2020), online: *Canada Mortgage and Housing Corporation* <www.cmhc-schl.gc.ca/en/media-newsroom/news-releases/2020/cmhc-expands-insured-mortgage-purchase-program> [https://perma.cc/BA3Y-KQBS] ["CMHC Expands Program"].

25 See "Further Measures", *ibid*; "CMHC Expands Program", *ibid*.

to 82 billion dollars, comprised of 27 billion dollars in direct support to individuals and businesses and 55 billion dollars in tax deferrals for businesses and individuals.[26] This amount represents over 3% of Canada's Gross Domestic Product (GDP).[27] On March 25th, Ottawa announced additional measures of direct support that raised the budget to 107 billion dollars.[28] On March 27th, the budget nearly doubled, reaching 202 billion dollars (65 billion in loans, 85 billion in tax deferrals, and 52 billion in direct assistance).[29] This represents approximately 10% of GDP.[30] The then-unannounced details of the wage subsidy program of March 30th (further detailed below) might significantly add to these amounts.[31] This significant investment mirrors the historic 2.2 trillion US dollars American stimulus package,[32] which is nearly triple the amount injected in

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26 See generally "Breaking Down", *supra* note 2.

27 See "Canada's GDP", *supra* note 16.

28 See "Government Introduces Canada Emergency Response Benefit to Help Workers and Businesses" (25 March 2020), online: *Department of Finance Canada* <www.canada.ca/en/department-finance/news/2020/03/introduces-canada-emergency-response-benefit-to-help-workers-and-businesses.html> [https://perma.cc/T3YS-LBXW] ["Government Introduces Emergency Response Benefit"]. See also John Paul Tasker, "Parliament Passes Ottawa's $107 Billion COVID-19 Aid Package" (25 March 2020), online: *CBC News* <www.cbc.ca/news/politics/covid19-coronavirus-ottawa-hill-economic-legislation-1.5509178> [https://perma.cc/L49W-JJQR].

29 See Brian DePratto, "Additional Federal COVID-19 Response Measures" (27 March 2020), online: *TD Bank* <economics.td.com/additional-covid19-measures> [https://perma.cc/8VB7-YH74]. DePratto believes the 75% wage subsidy as limited to small- and medium-sized businesses will cost an additional 25 billion dollars.

30 See "Canada's GDP", *supra* note 16.

31 See "Government Announces Details of the Canada Emergency Wage Subsidy to Help Businesses Keep Canadians in their Jobs" (1 April 2020), online: *Department of Finance Canada* <www.canada.ca/en/department-finance/news/2020/04/government-announces-details-of-the-canada-emergency-wage-subsidy-to-help-businesses-keep-canadians-in-their-jobs.html> [https://perma.cc/FDF9-L5K4].

32 See Clare Foran et al, "Trump Signs Historic $2 Trillion Stimulus After Congress Passes It Friday" (27 March 2020), online: *CNN* <www.cnn.com/2020/03/27/politics/coronavirus-stimulus-house-vote/index.html> [https://perma.cc/N8BC-9UVZ]. The bill is US, Bill HR 748, *CARES Act*, 116th Congress, 2020 (signed by the President on 27 March 2020).

the economy during the 2008 crisis.[33] The stimulus package represents approximately 10% of GDP.[34]

We choose to focus, in this article, on the measures which are directly tailored to support the economy. Where relevant, we consider the economic consequences of public health measures (such as store closures), as well as the economic response to their consequences. We, in turn, address economic measures tailored to support individuals and families, and businesses.

Individuals and Families

There have been several measures to support individuals and families. For individuals facing unemployment, the one-week delay to start claiming Employment Insurance (EI) sickness benefits was waived. The government also significantly broadened the scope of the Employment Insurance program, as well as the access to it. The plan, titled Canada Emergency Response Benefit plan (formerly the Emergency Care Benefit and Emergency Support Benefit plans) will cost up to 40 billion dollars,[35] up from an initial 15 billion dollars.[36] It covers individuals who are not traditionally eligible for EI, including the self-employed, contract workers, those caring for a child at home because of school and daycare closures, and those caring for a family member sick from COVID-19.[37] It provides

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33 See Andrew Clark, "Paulson Abandons Plans to Buy up America's Toxic Mortgage Assets" (13 November 2008), online: *The Guardian* <www.theguardian.com/business/2008/nov/13/harry-paulson-banking-rescue-mortgage> [https://perma.cc/3PQX-U6PG]. The bill is US, Bill HR 1424, *Emergency Economic Stabilization Act of 2008*, 110th Congress, 2008 (enacted 10 March 2008).

34 See "Gross Domestic Product", online: *Bureau of Economic Analysis (US Department of Commerce)* <www.bea.gov/data/gdp/gross-domestic-product> [https://perma.cc/N822-QUDB].

35 See "Government Introduces Emergency Response Benefit", *supra* note 28. See also Patrick Brethour, "Ottawa's New Emergency Benefit Upends Traditional Employment Insurance Rules" (27 March 2020), online: *The Globe and Mail* <www.theglobeandmail.com/business/article-ottawas-new-emergency-benefit-upends-traditional-employment-insurance/> [https://perma.cc/N5DV-8TQC].

36 See "Breaking Down", *supra* note 2.

37 See "Canada's COVID-19 Economic Response Plan", online: *Government of Canada* <www.canada.ca/en/department-finance/economic-response-plan.html> [https://perma.cc/Q7EJ-GZWS] ["Response Plan"].

them a taxable payment of 2,000 dollars per month, for up to 4 months.[38] The Canada Emergency Response Benefit plan was enacted into law on March 25, 2020.[39] As a result of extensive negotiations between political parties, the law also grants significant powers to the Liberal minority government, such as unlimited borrowing.[40] The bill was passed through unanimous consent.[41]

As a longer-term measure, the EI Work-Sharing program, which helps avoid layoffs during a decrease in business activity beyond the control of employers, was extended. This program provides EI benefits to workers who agree to reduce their working hours or share them with other employees.[42] Eligibility for these agreements was broadened, and their duration was extended from 38 to 76 weeks.[43]

Private Sector

For Canadian businesses, in addition to the aforementioned extension of the Work-Sharing program, a budget of 3.8 billion dollars was allocated

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38 *Ibid.* This has since been extended to 24 weeks, or almost six months, for most eligible individuals. There has been growing pressure to establish a basic income program as a part of a longer-term economic recovery plan. The Canadian Senate has been particularly active in advocating for this solution. See Vanessa MacDonnell, "Ensuring Executive and Legislative Accountability in a Pandemic" in Colleen M Flood et al, eds, *Vulnerable: The Law, Policy and Ethics of COVID-19* (Ottawa: University of Ottawa Press, 2020) 141 at 145.

39 See *COVID-19 Emergency Response Act*, SC 2020, c 5.

40 See Amanda Connolly, "Trudeau's $82B Coronavirus Support Package Gets Royal Assent, Officially Passes" (25 March 2020), online: *Global News* <globalnews.ca/news/6728936/coronavirus-canada-emergency-legislation/> [https://perma.cc/93AL-35Q2] ["Trudeau's $82B Coronavirus Support Package Gets Royal Assent, Officially Passes"]. For an analysis of these emergency powers, see Paul Daly, "Emergency Economic Powers in Canada: Bill C-13's Crown Corporation" (1 April 2020), online (blog): *Administrative Law Matters*, <www.administrativelawmatters.com/blog/2020/04/01/emergency-economic-powers/> [https://perma.cc/DEL9-3LBD].

41 See "Trudeau's $82B Coronavirus Support Package Gets Royal Assent, Officially Passes", *ibid.*

42 See "Work Sharing Program", online: *Employment and Social Development Canada* < https://www.canada.ca/en/employment-social-development/services/work-sharing/notice-covid-19.html> [https://perma.cc/V4WY-9RAV].

43 *Ibid.*

to small businesses in the form of wage subsidies of up to 10% of employee salaries (payroll costs) for up to three months, to a maximum of 1,375 dollar per employee and 25,000 dollars per employer.[44] The businesses eligible for this program were privately held, Canadian-controlled companies with less than 15 million dollars in assets.[45] This was later increased to up to 75%, for up to 3 months, retroactive to March 15th. The eligibility criteria were not yet detailed at of the announcement date (March 27th).[46] On March 30th, the federal government announced the criteria and extended access to the subsidy: all Canadian businesses and non-profit organisations, regardless of their size, are eligible for the wage subsidy program if they experienced a decrease in revenue of at least 30%. It covers 75% of payroll costs (salaries), up to 58,700 dollars, retroactive to March 15th, for up to 3 months.[47] The program was enacted into law on April 11, 2020.[48]

Moreover, a Business Credit Availability Program was created with the collaboration of the Business Development Bank of Canada (BDC) and Export Development Canada (EDC) (two government entities), initially providing small- and medium-sized businesses with up to 10 billion dollars in support through loans.[49] The amount was later increased to up to 65 billion dollars.[50] Furthermore, EDC will guarantee riskier business borrowing of up to 5 million dollars to allow businesses to face cashflow issues and avoid bankruptcy.

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44 See "Response Plan", *supra* note 37.

45 See "Frequently Asked Questions – Temporary Wage Subsidy for Employers", online: *Canada Revenue Agency* <www.canada.ca/en/revenue-agency/campaigns/covid-19-update/frequently-asked-questions-wage-subsidy-small-businesses.html#h2> [https://perma.cc/TGX5-4X3J].

46 See "Prime Minister Announces Support for Small Businesses Facing Impacts of COVID-19" (27 March 2020), online: *Justin Trudeau, Prime Minister of Canada* <pm.gc.ca/en/news/news-releases/2020/03/27/prime-minister-announces-support-small-businesses-facing-impacts> ["Support for Small Businesses"].

47 See "The Canada Emergency Wage Subsidy", online: *Department of Finance Canada* <www.canada.ca/en/department-finance/news/2020/04/the-canada-emergency-wage-subsidy.html> [https://perma.cc/FC5B-PWHC].

48 See *COVID-19 Emergency Response Act, No. 2*, SC 2020, c 6.

49 See "Breaking Down", *supra* note 2.

50 See "Response Plan", *supra* note 37.

On March 27th, the government launched, in collaboration with EDC, the Canada Emergency Business Account. This program provides eligible financial institutions with up to 25 billion dollars in guarantees so they can lend interest-free funds to small businesses and non-for-profit organisations. The loans will be of up to 40,000 dollars, and a quarter of the amount will be forgiven if they are paid back by December 31th, 2022.[51]

On the same day, the "Loan Guarantee for Small and Medium-Sized Enterprises" and the "Co-Lending Program for Small and Medium-Sized Enterprises" were also announced. They are funded through EDC and BDC, respectively, and will provide small- and medium-sized businesses with guarantees on loans of up to 6.25 million dollars, up to a total of 40 billion dollars.[52]

Finally, businesses will benefit from an interest-free income tax payment deferral until September 1st. Depending on their business organisation form, some businesses may produce their tax return after the usual due date.[53] The March 27th announcement extended these deferrals to sales taxes and custom duties.[54]

This section has described the government response to the COVID-19 pandemic and its economic consequences. The next section fills in the gaps in this model by discussing the role of private actors in minimising or worsening the economic impacts of a global health crisis. We argue that the current framework and government response are inadequate and create an unsustainable financial pressure on governments.

III. The Role of Private Actors

We articulate this section on the role of private actors around three poles which directly affect the scope and effectiveness of the government

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51 See "Support for Small Businesses", *supra* note 46 and "Response Plan", *supra* note 37.

52 *Ibid.*

53 See "Income Tax Filing and Payment Dates: CRA and COVID-19", online: *Canada Revenue Agency* <www.canada.ca/en/revenue-agency/campaigns/covid-19-update/covid-19-filing-payment-dates.html> [https://perma.cc/YR9A-3GHG].

54 See "Support for Small Businesses", *supra* note 46 and "Response Plan", *supra* note 37.

responses described in the previous section. As mentioned above, the main aspect of government responses to the economic consequences of this global health crisis is the support of individuals and businesses whose income is affected by the temporary closure of businesses, reduced economic activity, and broader economic slowdown. Much of this help can be construed as a broadening of employment insurance and the class of individuals who can benefit from it.

Subsection A considers how businesses are incentivised to temporarily lay off employees. This incentive means that businesses may bear a disproportionately low portion of the economic cost of a global pandemic. We point out that, unless businesses voluntarily choose not to temporarily lay off their employees, a global health crisis would put a considerable and unsustainable pressure on the government's ability to provide benefits to laid off workers. Subsection B points out that, in light of the increasing precarity of work in certain industries and the growing use of contracting relationships to replace employment relationships, companies also stand to bear a disproportionately low portion of the economic burden which results from a global pandemic. Finally, Subsection C considers the role of banks and other financial institutions in providing liquidity and lending, especially in the context of a global pandemic as individuals are personally affected. While governments can inject liquidity in the financial markets, buy high-risk assets, and lend to businesses; helping individuals who cannot pay their rent or bills because they are laid off is largely unchartered territory. In this context, the Canadian government has taken the unprecedented step of significantly broadening access to unemployment benefits. It has encouraged banks and other businesses to be considerate when individuals and businesses cannot make payments on time. Again, the effectiveness of this response largely depends on the good faith and cooperation of banks, lenders, and other institutions.

A. Temporary Layoffs

Canadian labour law permits, in some circumstances, the temporary layoff of employees.[55] A temporary layoff is a temporary suspension of the

[55] See e.g. *Employment Standards Act*, SO 2000, c 41, s 56 (in Ontario) [Employment Standards Act]; *An Act Respecting Labour Standards*, CQLR c N-1.1, s 82-85 (in Quebec) [An Act Respecting Labour Standards]; and *Employment Standards Code*, RSA 2000, c E-9, s 62-64 (in Alberta) [Employment Standards Code].

employment relationship which unites employees and employers. The employee ceases to provide labour to the employer, and the employer ceases to pay the employee. Some employers are federally regulated, but most are provincially regulated.[56] Provincial statutes provide different definitions of what constitutes a layoff. They set out what percentage of an employee's work must be cut for a temporary layoff to exist, as well as the maximum duration of the layoff.[57]

During the coronavirus outbreak, many businesses have elected to temporarily lay off their employees. Air Canada temporarily laid off some 5,000 flight attendants worldwide.[58] The Canadian hospitality industry laid off tens of thousands of employees.[59] Temporary layoffs are not an exceptional measure, and they provide much needed flexibility to companies facing temporary yet significant challenges.[60] They are especially important to small businesses. A temporary closure or decline in revenue could bankrupt these businesses. They are unlikely to have the financial

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56 See "Federally Regulated Businesses and Industries", online: *Employment and Social Development Canada* <www.canada.ca/en/employment-social-development/programs/employment-equity/regulated-industries.html> [https://perma.cc/SU9K-J8JM]; *Canada Labour Code*, RSC 1985, c L-2, ss 4-6.

57 See e.g. *Employment Standards Act*, *supra* note 55; *An Act Respecting Labour Standards*, *supra* note 55; and *Employment Standards Code*, *supra* note 55.

58 See "Air Canada to Lay Off More Than 5,000 Flight Attendants: Union" (20 March 2020), online: *France 24* <www.france24.com/en/20200320-air-canada-to-lay-off-more-than-5-000-flight-attendants-union> [https://perma.cc/BQ53-4K5W].

59 See e.g. Gabriela Panza-Beltrandi, "Coronavirus: 10,000 Hospitality Workers Expected to Be Laid off in Saskatchewan" (18 March 2020), online: *Global News* <globalnews.ca/news/6699398/hospitality-layoffs-saskatchewan-covid-19-coronavirus/> [https://perma.cc/Y2S2-LLKM].

60 For a general discussion of the theory, prevalence, and purposes of temporary layoffs, see Martin Feldstein, "The Importance of Temporary Layoffs: An Empirical Analysis" (1975) 1975:3 Brookings Papers Economic Activity 725; Martin Feldstein, "Temporary Layoffs in the Theory of Unemployment" (1976) 84:5 J Political Economy 937 ["Temporary Layoffs in the Theory of Unemployment"]; and Kostas G Mavromaras & Chris D Orme, "Temporary Layoffs and Split Population Models" (2004) 19:1 J Applied Econometrics 49.

resources to fund even four weeks of operating costs.[61] Furthermore, even if their financial position is sound, they may face liquidity problems, which, regardless of their solvency, can prevent them from having sufficient cash to fund operating costs.[62] This is especially true during a recession, as banks tighten lending requirements.[63] Additionally, most operating costs are fixed and inflexible. When facing a temporary closure or major decline in revenue, small businesses still need to pay suppliers, rent, and most of their other costs. Providing payroll flexibility, i.e. flexibility on a major cost, is key and can ensure the survival of small businesses in times of crisis.

It is clear from the above paragraph that we do not disagree with the concept of temporary layoffs. Instead, we are interested in how unfettered access to temporary layoffs plays out in times of crisis, and more specifically how it does in the unique circumstances of global health crises. We are also interested in how government responses to these health crises can prove unsustainable and provide perverse incentives.

First, global health crises are different from financial crises. Though the former can, of course, cause the latter, global health crises can have sudden and far-reaching consequences. In a typical financial crisis, certain sectors of the economy will be more affected than others.[64] In the absence

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61 See "Cash is King: Flows, Balances, and Buffer Days: Evidence from 600,000 Small Businesses" (September 2016), online (pdf): *JP Morgan Chase & Co Institute* <www.jpmorganchase.com/content/dam/jpmc/jpmorgan-chase-and-co/institute/pdf/jpmc-institute-small-business-report.pdf> [https://perma.cc/8PUP-VBCH] at 6. This study finds that the median business can support 27 days of operating costs. Only 25% can support over 62 days of operating costs, and 25% can support fewer than 13. The median is even lower (approximately 18 days) in the retail and restaurant industries.

62 See generally Roger EA Farmer, "What is a Liquidity Crisis?" (1988) 46:1 J Economic Theory 1. For a more vulgar explanation, see "Solvency Ratio vs. Liquidity Ratios: What's the Difference?" (27 August 2019), online: *Investopedia* <www.investopedia.com/ask/answers/040115/what-are-differences-between-solvency-ratios-and-liquidity-ratios.asp> [https://perma.cc/4CM8-4Y59].

63 See generally Simon H Kwan, "Financial Crisis and Bank Lending" (2010) Federal Reserve Bank of San Francisco Working Paper No 11, online: <https://www.frbsf.org/economic-research/publications/working-papers/2010/11/> [https://perma.cc/S6AT-6DKV].

64 See generally Tomoe Moore & Ali Mirzaei, "The Impact of the Global Financial Crisis on Industry Growth" (2016) 84:2 The Manchester School 159.

of swift government action, the slowdown will spread.[65] In contrast, as was the case with the coronavirus, a virus can quickly affect an exponentially increasing number of individuals.[66] The only effective solution is then an immediate and potentially indefinite shutdown of broad sections of the economy.[67] As an example, the Quebec government reacted to the virus by banning outdoor gatherings of 250 or more individuals.[68] The following day, on March 13, 2020, it shut down all daycares, schools, and universities.[69] 9 days later, on March 22, the government ordered the closure of all businesses that do not provide essential services: restaurants, shopping centres, beauty salons, and so forth. Most closures lasted through at least June.[70] As for most other provinces and countries, this was

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65 See generally Robert K Rasmussen & David A Skeel Jr, "Government Intervention in an Economic Crisis" (2016) 19:1 U Pennsylvania J Bus L 7.

66 See Adam J Kucharski et al, "Early Dynamics of Transmission and Control of COVID-19: A Mathematical Modelling Study" (2020) online: *The Lancet Infectious Diseases* <www.thelancet.com/journals/laninf/article/PIIS1473-3099(20)30144-4/fulltext> [https://perma.cc/8ZQA-PEE2].

67 See generally Neil M Ferguson et al, "Impact of Non-Pharmaceutical Interventions (NPIs) to Reduce COVID-19 Mortality and Healthcare Demand" (2020) Imperial College COVID-19 Response Team Working Paper, online (pdf): <www.imperial.ac.uk/media/imperial-college/medicine/sph/ide/gida-fellowships/Imperial-College-COVID19-NPI-modelling-16-03-2020.pdf> [https://perma.cc/SC8B-G3WA].

68 See "La pandémie de la COVID-19: Le gouvernement du Québec diffuse de nouvelles directives à l'intention de la population du Québec" (12 March 2020), online: *Gouvernement du Québec* <www.quebec.ca/premier-ministre/actualites/detail/le-gouvernement-du-quebec-diffuse-de-nouvelles-directives-a-l-intention-de-la-population-du-quebec/> [https://perma.cc/JM9U-2HBF]. See also "Réduction au minimum des services et activités non prioritaires", online: *Gouvernement du Québec* <www.quebec.ca/sante/problemes-de-sante/a-z/coronavirus-2019/fermeture-endroits-publics-commerces-services-covid19/> [https://perma.cc/8LW5-8C2Z].

69 See "La pandémie de la COVID-19: Le gouvernement du Québec annonce la fermeture des écoles, des cégeps, des universités et des services de garde" (13 March 2020), online: *Gouvernement du Québec* <www.quebec.ca/premier-ministre/actualites/detail/le-gouvernement-du-quebec-annonce-la-fermeture-des-ecoles-des-cegeps-des-universites-et-des-services/> [https://perma.cc/Y44J-JK9B].

70 See "La pandémie de la COVID-19: Le premier ministre du Québec, François Legault, accentue les mesures d'urgence pour protéger la population" (22 March 2020), online: *Gouvernement du Québec* <www.quebec.ca/premier-ministre/actualites/detail/le-premier-ministre-du-quebec-francois-legault-accentue-les-mesures-d-urgence-pour-proteger-la-popul/> [https://perma.cc/28HK-JA92].

largely unchartered territory. While some businesses can conduct at least part of their activities remotely, the government was (for legitimate public health reasons) depriving countless business of most of their income.

In this context, two things are clear. First, many of these businesses will opt to temporarily lay off their employees. Second, that is unsustainable. The government can support more unemployed workers in times of crisis.[71] However, supporting laid off workers from most businesses for a long or indefinite period is clearly not possible. The initial response was just 3% of GDP,[72] but its amended version may amount to up to 30% of GDP.[73] Most estimate at least one other similar-sized capital injection will be necessary if the isolation period lasts.[74] In contrast and as mentioned above, just one of these capital injections is triple the size of that needed in 2008, following the greatest financial crisis since the

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71 Under traditional macroeconomics models, governments stimulate the economy and support higher unemployment rates during recessions to shorten the recessionary stage of a growth cycle. Revenues accrued during the growth stage of the cycle can fund these investments, see generally Eric M Leeper, Todd B Walker & Shu-Chun S Yang, "Government Investment and Fiscal Stimulus" (2010) 57:8 J Monetary Economics 1000 and Thorsten Drautzburg, "Why Are Recessions so Hard to Predict? Random Shocks and Business Cycles" (2019) 4:1 Federal Reserve Bank Philadelphia 1, online (pdf): <https://www.philadelphiafed.org/-/media/research-and-data/publications/economic-insights/2019/q1/eiq119.pdf?la=en> [https://perma.cc/R29J-Y72J].

72 See "Canada's GDP", *supra* note 16.

73 The upper limit on the expenditures of the response plan add up to approximately 592.4 billion dollars, see Robert Fife & Bill Curry, "Trudeau Unveils $27-Billion in Aid, $55-Billion of Tax Deferrals in Coronavirus Response" (18 March 2020), online: *The Globe and Mail* <www.theglobeandmail.com/politics/article-trudeau-unveils-82-billion-in-aid-tax-deferrals-for-coronavirus/> [https://perma.cc/J67N-WPRC]. For Canada's GDP, see *ibid.*

74 See e.g. Dion Rabouin, "When $2.2 Trillion Is Not Enough" (26 March 2020), online: *Axios* <www.axios.com/coronavirus-stimulus-bill-what-it-does-b4fa6c4d-6e45-4d15-8089-d51c655bc1c9.html> [https://perma.cc/2CYL-TK62]; CNN, "Bill Gates Outlines What He Thinks World Is Learning About Pandemics" (27 March 2020) at 0m:50s, online (video): *YouTube* <www.youtube.com/watch?v=iNLiUN0l7ws> [https://perma.cc/KK8L-QLGM]; Canada, Office of the Parliamentary Budget Officer, *Scenario Analysis: COIVD-19 Pandemic and Oil Price* Shocks (Ottawa: PBO, 27 March 2020) at 10.

1920s.[75] This level of spending, which only covers weeks or months, is clearly not sustainable long- or even medium-term. It could cause an explosion in sovereign debt,[76] and potentially even a global debt crisis.[77]

Some businesses, such as Facebook[78] and Slack,[79] have chosen to pay their employees during the crisis even as they face its consequences.[80]

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75 Michael D Bordo & Harold James, "The Great Depression Analogy" (2009) National Bureau of Economic Research Working Paper No 15584 at 1-3, online: <https://www.nber.org/papers/w15584> [https://perma.cc/3JVM-8MYX].

76 As of October 2019, the governmental gross debt to GDP ratio was 30.8% for Canada. See "Budget 2019: Budget Plan", online: *Government of Canada* <www.budget.gc.ca/2019/docs/plan/overview-apercu-en.html> [https://perma.cc/SR8X-E64R].

77 See e.g. CNBC International, "Is a Global Debt Crisis Coming?" (26 March 2020), online (video): *YouTube* <www.youtube.com/watch?v=_Cf7o_YlH5M> [https://perma.cc/2KX2-TVN5]; Carmen M Reinhart and Kenneth Rogoff, "The Coronavirus Debt Threat" (26 March 2020), online: *The Wall Street Journal* <www.wsj.com/articles/the-coronavirus-debt-threat-11585262515> [https://perma.cc/AGF2-PDG9].

78 See Rishi Iyengar, "Facebook Is Giving US$1,000 to Every Employee for COVID-19 Support" (17 March 2020), online: *CTV News* <www.ctvnews.ca/health/coronavirus/facebook-is-giving-us-1-000-to-every-employee-for-covid-19-support-1.4857101> [https://perma.cc/5TG5-WFUV].

79 See Catherine Clifford, "CEO of Multibillion-Dollar Company Slack to Employees Amid Coronavirus: 'Don't Stress About Work'" (26 March 2020), online: *CNBC* <www.cnbc.com/2020/03/26/slack-ceo-to-employees-amid-covid-19-dont-stress-about-work.html> [https://perma.cc/Z36K-6QF8]. This has spread to other companies, mostly in the financial services and technology industries, see Jack Kelly, "Prominent CEOs Promise That They Will Not Layoff Workers In 2020" (27 March 2020), online: *Forbes* <www.forbes.com/sites/jackkelly/2020/03/27/prominent-ceos-promise-that-they-will-not-layoff-workers-in-2020/> [https://perma.cc/JQK3-SB87]. As Slack is a public company which has yet to turn a profit, it will be interesting to see how public markets react to this decision.

However, this is purely voluntary measure, which the government cannot compel. Yet the prognosis is clear: if companies do not choose to do so, we will not be able to face, for more than weeks or months, the consequences of this or another future global health crisis. Relying on companies to "do the right thing" is not unprecedented. Corporate social responsibility (CSR) has indeed been an important feature of business values (and public relation campaigns) during the last decades. CSR is defined as "a form of international private self-regulation focused on the reduction and mitigation of industrial harms and provision of public good moves."[81] This concept underscores the importance afforded, in the collective psyche, to the self-driven actions of firms, sometimes in the absence of legal

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80 Much has been made in the media of the fact that other businesses, such as Walmart and Loblaws, have hiked wages for certain frontline employees, see e.g. Michael Woods, "Loblaws Hikes Employee Pay Amid COVID-19 Crisis" (21 March 2020), online: *CTV News* <ottawa.ctvnews.ca/loblaws-hikes-employee-pay-amid-covid-19-crisis-1.4862874> [https://perma.cc/BAK6-T2PD]; Aleksandra Sagan, "Dollarama, Walmart Canada Boost Employee Pay Amid COVID-19 Outbreak" (24 March 2020), online: *BNN Bloomberg* <www.bnnbloomberg.ca/dollarama-walmart-canada-boost-employee-pay-amid-covid-19-outbreak-1.1411420> [https://perma.cc/23VF-MP5S]. However, the headlines are somewhat misleading. These businesses are generally in the retail and food services industries. They are not affected by government closures, as they provide essential services. In times of crisis, as people stock up on essential supplies, these businesses will thrive.

81 See Benedict Sheehy, "Defining CSR: Problems and Solutions" (2014) 131:3 J Bus Ethics 625 at 643 ["Defining CSR"]; see generally Elisabeth Garriga & Domènec Melé, "Corporate Social Responsibility Theories: Mapping the Territory" (2004) 53:1/2 J Bus Ethics 51; see generally Brent D Beal, *Corporate Social Responsibility: Definition, Core Issues, and Recent Developments* (Thousand Oaks: SAGE, 2014).

incentives,[82] in a spirit of public service.[83] Whether naïve or optimistic, people who support this theory believe that companies will, in times of crisis, put aside their pursuit of financial gain and prioritise the wellbeing of their employees, consumers, and broader environment.[84] However, in light of the above discussion, it is clear that voluntary action does not provide sufficient certainty as we face future global health crises.

We want to briefly point out that the eventual solution to this issue should be progressive. It should reflect our previous discussion that the main goal of temporary layoffs is to ensure the survival of businesses in times of crisis. Large and profitable companies which can bear a portion of the cost of a global health crisis should be incentivised or compelled to do so. Small- and medium-sized businesses which cannot should not. While all companies pay Canadian Pension Plan (CPP) contributions and EI

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82 Others would argue that incentives should be used to popularise CSR, see generally Herwig Pilaj et al, "The Choice Architecture of Sustainable and Responsible Investment: Nudging Investors Toward Ethical Decision-Making" (2017) 140:4 J Bus Ethics 743; Richard H Taler & Cass R Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness* (New Haven: Yale University Press, 2008). Regarding the pandemic more specifically, see also Phil Lord, "The Social Perils and Promise of Remote Work" (2020) 4:S Journal of Behavioral Economics for Policy 63. The best interests of a corporation are traditionally interpreted as those of its shareholders, and most commonly as profit maximisation. However, the 2008 Supreme Court precedent of *BCE Inc v 1976 Debentureholders* (2008 SCC 69) has reframed the "best interests" of a corporation as its long-term interests as a "responsible corporate citizen." See Jennifer A Quaid, "Balancing Risk and Reward in the Time of COVID-19: Bridging the Gap Between Public Interest and the 'Best Interests of the Corporation'" in Colleen M Flood et al, eds, *Vulnerable: The Law, Policy and Ethics of COVID-19* (Ottawa: University of Ottawa Press, 2020) 233 at 241. Subsequently, the *Canada Business Corporation Act* was amended to provide legal guidance for corporate accountability on broader issues than profit maximisation, such as sustainability, diversity, and public health (*ibid* at 243-244).

83 See generally "Defining CSR", *supra* note 81.

84 *Ibid*. This theory ostensibly broadens agency theory to argue that companies can further the interest of their shareholders by sometimes deprioritising short-term profitability. On this latter point, see generally Martin Lipton, "It's Time to Adopt the New Paradigm" (11 February 2019), online: *Harvard Law School Forum on Corporate Governance* <corpgov.law.harvard.edu/2019/02/11/its-time-to-adopt-the-new-paradigm/> [https://perma.cc/RQE8-CBBK].

premiums at the same rates,[85] progressivity is deeply ingrained in our broader tax system.[86] The solution to global health crises should reflect this progressivity. In light of our above discussion, it is clear that this is not (or at least should not be) a political issue. The fiscal cost of a global health crisis lasting for several months or more is not sustainable. The question is not whether a portion of the cost should be allocated to non-state actors, but *how*. We believe that a fair and theoretically consistent allocation would be one which follows the progressivity principles which imbue our broader tax system. We further discuss potential solutions in the next section.

Under the current framework, not only can companies not be compelled to pay their employees in times of crisis, they are disincentivised to do so. Keeping their employees on payroll is costly. On top of that, companies are effectively unnecessarily paying at least a portion of their employees' salary. Indeed, if laid off, these employees would be eligible for government benefits under the employment insurance program or the other programs put forth by governments during the COVID-19

85 EI is solely funded by employers and employees. In 2020, insured workers will pay a premium rate of 1.58% on up to 54,200 dollars of their earnings, while employers will pay 1.4 times the employee rate. See "2020 Employment Insurance Premium Rate", online: *Employment and Social Development Canada* <www.canada.ca/en/employment-social-development/programs/ei/ei-list/reports/premium/rates2020.html> [https://perma.cc/EAF3-FHAX] ["2020 Employment Insurance"]; "Employment Insurance – Important Notice About Maximum Insurable Earnings for 2020", online: *Employment and Social Development Canada* <www.canada.ca/en/employment-social-development/programs/ei/ei-list/ei-employers/2020-maximum-insurable-earnings.html> [https://perma.cc/YD7W-CWG2] ["Maximum Insurable Earnings"]. CPP contributions are no more progressive. The CPP is similarly exclusively funded by employers and employees, with each contributing 5.25% of the employee's salary, up to a maximum contribution of 2,898 dollars. See e.g. "Payroll Deductions Tables – CPP, EI and Income Tax Deductions – Alberta – Effective January 1, 2020", online: *Canada Revenue Agency* <www.canada.ca/en/revenue-agency/services/forms-publications/payroll/t4032-payroll-deductions-tables/t4032ab-jan/t4032ab-january-general-information.html> [https://perma.cc/K3NZ-B88J].

86 See generally Michael Smart, "Finances of the Nation: Taxation of Top Incomes in Canada – Recent Developments in Rates and Redistribution" (2019) 67:2 Can Tax J 349.

pandemic.[87] Keeping employees on payroll means the employer is generously replacing what would otherwise be public funds.

Government responses are therefore also at least somewhat counterproductive. They can, at first, seem intuitive. If countless citizens become unemployed and cannot pay their bills, governments will intuitively want to help them financially. Once citizens lose their job, the simplest way to do so is arguably through employment insurance. For the many who cannot access this vital program, the simplest solution is a broadening of the program. However, once we take a step back, it is easy to see how this response can be counterproductive. Easing things for the unemployed means indirectly encouraging employers to at least temporarily lay off employees so they can benefit from government programs. The website of a prominent Canadian law firm answers the question "Why should employers consider temporary layoffs?" as follows:

> Temporary layoffs may make sense to employers for a variety of reasons, including because they can minimize payroll costs while, generally, preserving the employment relationship. And, unlike the case with many leaves of absence, a laid-off employee may be eligible to collect employment insurance (EI).[88]

This incentive is the exact opposite of what benefits the economy in a time of crisis. Even though, as mentioned at the beginning of this subsection, temporary layoffs can ensure the survival of companies in times of crisis, they are not the only option (and need not be one at all). Governments can also subsidise companies that keep employees on payroll or at least provide them with the temporary liquidity to do so – in a progressive manner, as suggested above. It should never be more attractive to

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87 See generally Section II, above. On employment insurance as incentive for temporary layoffs, see generally Martin Feldstein, "The Effect of Unemployment Insurance on Temporary Layoff Unemployment" (1978) 68:5 American Economic Rev 834. This paper concludes that the American EI system may be responsible for approximately half of temporary layoffs. See also Feldstein, "Temporary Layoffs in the Theory of Unemployment", *supra* note 60 at 17-21; Robert H Topel, "On Layoffs and Unemployment Insurance" (1983) 73:4 American Economic Rev 541.

88 See Kaley Dodds et al, "Temporary Layoffs: What Canadian Employers Need to Know During a Pandemic" (20 March 2020), online: *Norton Rose Fulbright* <www.nortonrosefulbright.com/en-ca/knowledge/publications/68e2cba9/temporary-layoffs-what-canadian-employers-need-to-know-during-a-pandemic> [https://perma.cc/C3X5-BBHA].

temporarily lay off employees than to keep them on payroll and shoulder some of the burden of a major crisis.

As we were writing this article, the Canadian government changed its initial policy of subsidising up to 10% of the payroll costs of small- and medium-sized businesses. On March 27 and March 30, 2020, the government increased that percentage to 75% and made the subsidy available to businesses of all sizes, retroactive to March 15th.[89] This is a step in the right direction. Nonetheless, in the first two weeks, countless Canadians had already been laid off.[90] We believe this measure is more effective than bolstering the employment insurance program. It helps incentivise companies to keep workers on payroll instead of laying them off. However, while the measure addresses the strategic concern of perverse incentives, it does not address our initial concern of cost allocation between the public and private sectors. Regardless of whether the government funds payroll costs or employment insurance, *the government is paying*. Our concerns regarding the unsustainability of major government spending remain fully applicable.

Finally, it is worth noting that the payroll subsidy only applied, until March 30th, to privately held Canadian-controlled corporations with less than 15 million dollars in assets. While the rationale was likely similar to that we just mentioned, i.e. to avoid subsidising large and profitable corporations, the program did not remove the perverse incentive for these large corporations. Indeed, unlike corporations with less than 15 million dollars in assets, these corporations would still have been incentivised to lay off workers so their workers could benefit from employment insurance benefits. The largest companies – those that can most afford to keep their workers on payroll and shoulder some of the burden of the crisis – were still incentivised to lay off their workers. This argument remains true of companies which experience a decrease in revenue of less than 30%.

This subsection has analysed the employment insurance program and other governmental measures described in the previous section to argue

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89 See "Support for Small Businesses", *supra* note 46.

90 Likely due to this delay, the wage subsidy program appears to be unpopular with the business community. See e.g. Kathleen Harris, "Trudeau Touts Federal Wage Subsidy, but Businesses Say Program Falls Short" (19 June 2020), online: *CBC News* <www.cbc.ca/news/politics/wage-subsidy-program-trudeau-1.5618848> [https://perma.cc/ZZS5-W6RG].

that they provide insufficient or perverse incentives, and overly rely on voluntary actions by the private sector. The next subsection notes that the private sector also bears a disproportionately low portion of the burden of a global health crisis as a result of the growing use of contracting relationships.

B. Independent Contractors and Individuals Not Traditionally Eligible for Employment Insurance

We noted in the previous section that the government's COVID-19 support for the unemployed of 2,000 dollars per month is available to workers who are not traditionally eligible for EI, including the self-employed, contract workers, those caring for a child at home because of school and daycare closures, and those caring for a family member sick from COVID-19. Unlike salaried workers, contract workers and self-employed individuals do not pay into the EI system.[91] (Self-employed workers may, however, voluntarily register for EI and pay into the system.)[92]

In times of crisis, the government will always bear the cost of providing benefits to these individuals, as they do not have an employer who can jointly contribute to the EI system[93] or keep them on payroll. For the spending related to global health crises not to quickly become unsustainable (as discussed above), it is imperative that the layoff-related issues mentioned in the previous subsection be remedied.

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91 See "2020 Employment Insurance", *supra* note 85; See "Maximum Insurable Earnings", *supra* note 85. It may be worth questioning the fairness of using public funds to extend a program which is typically separately funded, through employer and employee contributions.

92 See "EI Special Benefits for Self-Employed People: Overview", online: *Canada Revenue Agency* <www.canada.ca/en/services/benefits/ei/ei-self-employed-workers.html> [https://perma.cc/AJ48-XQR6].

93 See "EI Premium Rates and Maximums", online: *Canada Revenue Agency* <www.canada.ca/en/revenue-agency/services/tax/businesses/topics/payroll/payroll-deductions-contributions/employment-insurance-ei/ei-premium-rates-maximums.html?fbclid=IwAR2XE1hJFUs5Vbi6m1wbaHk77tibNds1NUVZJFSGgP9dOeBrxok1jUo5ZQk> [https://perma.cc/66JG-RTBX].

This is especially true in light of the growing use by private actors of contracting relationships to replace employment relationships.[94] These relationships reduce various risks for employers[95] and are often not subject to worker protection laws, which most notably regulate minimum wage, overtime pay, leave, and severance.[96] The benefits of contracting relationships have prompted employers to further use them, which has led to the advent of the so-called "gig economy."[97] Possibly the most striking example of it would be that of Uber: Uber's "driver-partners" are all independent contractors.[98] It is certainly not fanciful to think that governments could act to either prevent or stop the conversion of employment relationships into contracting relationships. As an example of such a measure, Ontario law states that where an employee is alleged to be misclassified as a contractor, the onus is on the employer to prove that they are a contractor.[99] Governments could alternatively allocate a portion of the cost of a health-crisis-related temporary decline in the work of a contractor to the company the contractor provides services to. However,

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94 See Janine Berg, "Income Security in the On-Demand Economy: Findings and Policy Lessons From a Survey of Crowdworkers" (2016) 37:3 Comp Lab L & Pol'y J 543 at 543-44 [Berg]; Canada, Statistics Canada, *Measuring the Gig Economy in Canada: Using Administrative Data*, by Sung-Hee Jeon, Huju Liu & Yuri Ostrovsky, Catalogue No 11F0019M (Ottawa: Statistics Canada, 16 December 2019) [*Measuring the Gig Economy in Canada*].

95 See generally Susan N Houseman, "Why Employers Use Flexible Staffing Arrangements: Evidence from an Establishment Survey" (2001) 55:1 Indus & Lab Rel Rev 149; Isik Urla Zeytinoglu & Gordon B Cooke, "Non-Standard Work and Benefits: Has Anything Changed since the Wallace Report" (2005) 60:1 Industrial Relations 29.

96 See generally Berg, *supra* note 94. See e.g. *An Act Respecting Labour Standards*, *supra* note 55, s 1(10), 2-3; *Employment Standards Act,* supra note 55, s 1(1) and *Employment Standards Code*, *supra* note 55, s 1(1)(k), 2.

97 See generally Berg, *supra* note 94; *Measuring the Gig Economy in Canada*, *supra* note 94.

98 See M Keith Chen et al, "The Value of Flexible Work: Evidence from Uber Drivers" (2019) 127:6 J Political Economy 2735; Uber Technologies, Inc, "Form S-1 Registration Statement Under the Securities Act of 1933" (11 April 2019) at 28, online (pdf): *Securities and Exchange Commission* <www.sec.gov/Archives/edgar/data/1543151/000119312519103850/d647752ds1.htm?fbclid=IwAR2KI9N0iKj9nBkgZj5bfQNhSy_up-xZllScNgrT6eP2iqMeg84jt0wB74c> [https://perma.cc/L62H-2VTV].

99 See *Fair Workplaces, Better Jobs Act*, SO 2017, c 22.

such a measure would ostensibly be much harder to implement and enforce than the measures which could solve the issues we identified in the previous subsection.

The next subsection addresses how the provision of liquidity and lending in the context of global health crisis is, along the themes articulated in this and the first subsection, largely dependent the good faith of private actors.

C. Liquidity and Lending

While the behaviour of financial institutions during an economic slowdown can have a significant impact on its length and magnitude, this behaviour is largely (at least now) outside of the reach of government responses to economic slowdowns. In this subsection, we pay particular attention to two of the responses by government entities which we have described in the previous section. We show that while almost astounding amounts of capital have been allocated to these measures, the measures greatly rely on the good faith of private actors.

First, on March 13th, the Superintendent of Financial Institutions (an independent government agency) announced the reduction of the level of capital the largest Canadian banks need to keep as reserves, which freed up for borrowing some 300 billion dollars. This is a significant amount. It represents some 15% of Canada's GDP.[100] Though it admittedly does not constitute a direct expenditure, it is also some 8 times larger than the 40 billion allocated to broaden access to EI benefits.[101] The Office of the Superintendent of Financial Institutions (OSFI) describes how the capital will be used as follows:

> These institutions are encouraged to use this capital[.]
> [...]
> Further, OSFI expects that banks will use the additional lending capacity to support Canadian businesses and households, and should not use this measure to increase distributions to shareholders or employees or to undertake share buybacks. Consistent with this, OSFI has today set the expectation for all federally regulated financial institutions that dividend increases and share buybacks should be halted for the time being.[102]

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100 "Canada's GDP", *supra* note 16.

101 See "Breaking Down", *supra* note 2.

102 "OSFI Announces Measures", *supra* note 21.

Again, the reliance on the good faith of private actors is evident. The agency encourages financial institutions to use the additional lendable capital. It has no way to ensure that they will. They might use none of it. OSFI also formulates the wish that this lending will help businesses and individuals. Again, this is merely a wish.[103] While bankers and executives no doubt want to, at least to some extent, "do the right thing," it would be quite naïve to think that they will do so with a significant portion of the additional capital. Banks will likely lend, if to anyone, to the most creditworthy borrowers, who will repay the bank with interest and contribute to the bank's profitability. As of the time of the writing of this article, Canadian banks had started raising their interest rates on mortgages to counter declining profitability due to the coronavirus crisis – (unsurprisingly) the opposite of what the government expected them to do.[104] Finally, while the expectation that dividend increases and share buybacks be suspended is commendable, it does nothing to ensure that banks lend the additional capital in the first place or that they lend it to those in need.

Second, the Canada Mortgage and Housing Corporation (CMHC), a Crown Corporation, has committed to buying up to 50 billion dollars in insured mortgage pools, an amount later raised to 150 billion dollars. By purchasing mortgage pools, the CMHC will generate liquidity for banks and other lenders. As we mutedly stated in Section II, the CMHC believes

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103 See generally Kids Corner, "Aladdin Genie and Three Wishes HD" (14 April 2017), online (video): *YouTube* <www.youtube.com/watch?v=OczOUJw1Z7k> [https://perma.cc/F7L3-UQXE] (a licensed excerpt from Walt Disney Pictures' 1992 movie "Aladdin").

104 See Doug Alexander, "Mortgage Rates Are Rising in Canada Despite Virus-Relief Cuts" (30 March 2020), online: *BNN Bloomberg* <www.bnnbloomberg.ca/mortgage-rates-are-rising-in-canada-despite-virus-relief-cuts-1.1414766> [https://perma.cc/494R-WAZC], which states: "The costs of funds for banks is skyrocketing and bank earnings are plunging," Cooper said Monday in a phone interview. "Every single business they have ever loaned to is subject to a massive decline in revenues, and therefore their own revenues are going down because nobody is taking out new business with banks except to extend debt." [...] As those rates have dropped, banks have been eliminating discounts off prime on variable mortgages. [...] [T]hose discounts have shrunk by 75 to 85 basis points, said Rob McLister, founder of mortgage comparison website RateSpy.com. See also David Talbot & Eduardo Ordonez-Ponce, "Canadian Banks' Responses to COVID-19: A Strategic Positioning Analysis" (2020) 10 J Sustainable Finance & Investment 1, which finds that most banks have taken very limited action to help consumers during the crisis.

this liquidity will be used to provide loans to consumers and businesses. The precise wording is as follows:

> As a result of additional authorities granted by the Minister of Finance, the government stands ready to purchase up to $150 billion of insured mortgage pools through CMHC[.] [...] This action will expand the stable funding available to banks and mortgage lenders in order to ensure continued lending to Canadian consumers and businesses.[105]

Our comments apply here as well. While the mechanism is different, the result is the same: banks will have more liquidity to lend. As we mentioned, there is no guarantee that banks will actually lend this capital or that they will lend it to those in need. Furthermore, since there are no safeguards regarding how the money is spent, banks could ostensibly use it to increase bonuses to executives,[106] stock buybacks, or dividends if they believe doing so is in the interest of their shareholders.[107]

It is worth mentioning that there is nothing wrong with using these two tools. They can be effective, and they are some of the tools other countries use to face economic slowdowns. However, to paint them as somehow tailored to help those most in need can only be either disingenuous or peculiarly naïve.

Furthermore, these tools may be ill-suited to help individuals and small businesses who are, as we discussed above, particularly affected by the unique circumstances of global health crisis.

Finally, in light of the major consequences of global health crises and the unsustainable fiscal cost of facing them for extended periods of time under the framework currently provided by governments, we wish once

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105 See "CMHC Expands Program", *supra* note 24.

106 On how this happened in the 2008 crisis, see e.g. Tracy A Thomas, "Bailouts, Bonuses, and the Return of Unjust Gains" (2009) 87:2 Washington U L Rev 437.

107 Analogously, while President Trump presented his 2017 tax cut as tailored to benefit the middle class, almost all of the money companies saved went to stock buybacks and dividends. See Jane G Gravelle & Donald J Marples, "The Economic Effects of the 2017 Tax Revision: Preliminary Observations", *United States of America, Congressional Research Service,* Report No 45736 (Washington: CRS, 22 May 2019) at 14; Tony Nitti, "Trump's 'Massive' Middle-Class Tax Cuts Are Tiny Compared To Those Promised To The Rich" (1 March 2017), online: *Forbes* <www.forbes.com/sites/anthonynitti/2017/03/01/president-trump-promises-massive-middle-class-tax-cuts-but-will-he-deliver/#403133ab6b9e> [https://perma.cc/XV52-X88R].

again to underscore that relying on the good faith of banks and other financial institutions is unwise. We cannot rely on the good faith of private actors to engage in actions which are often again their own best interest. Within the current framework, our response to this and future global health crises is bound to be inadequate.

IV. A Better Model

This section briefly proposes solutions to the issues raised in the previous ones. A more comprehensive reform plan is unfortunately beyond the scope of this article. We leave its formulation to future research.

The structure of this section mirrors that of the previous one. Subsection A sets out the main solution to the issues we have raised in this article: a comprehensive and concurrent reform of temporary layoffs, employment insurance, and the Canada Emergency Response Benefit. Subsection B briefly addresses the issue of the growing use of contracting relationships as replacements for employment relationships, while Subsection C tackles lending and liquidity.

A. Reforming Employment Insurance and Access to it

The most consequential reform of measures aimed at helping individuals would be a comprehensive, concurrent reform of employment insurance (EI) and the Canada Emergency Response Benefit (CERB). Phil Lord (a co-author of this article) proposed such a reform plan in a recently published article.[108] This subsection sketches the key attributes of Lord's reform plan.

Lord begins by reiterating this article's main conclusions: the current programs have an unsustainable fiscal cost, and they shift too little of the burden of a health crisis to the private sector.[109] Furthermore, broad access

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108 See Phil Lord, "Incentivising Employment during the COVID-19 Pandemic" (2020) 8:3/4 The Theory and Practice of Legislation __, online: *SSRN* <ssrn.com/abstract=3573176> [https://perma.cc/U3FQ-K7X3] [Lord]. Since the pagination of the published article is not final, our pinpoint references refer to the *SSRN* preprint.

109 *Ibid* at 10-11.

to temporary layoffs, in the absence of payroll subsidies, incentivises unemployment.[110]

First, Lord argues in favour of a broadening of access to EI. As mentioned above, the CERB essentially offers a fixed quadri-weekly payment of 2,000 dollars to individuals not traditionally eligible for EI. Lord argues that such a program is necessary to support those who are out of work due to the pandemic yet are ineligible for EI.[111] The main issue Lord raises with the current plan is that it penalises salaried workers. Salaried workers eligible for EI are ineligible for the CERB and therefore fund both programs.[112] They need to exhaust the benefits they have accrued within the EI system yet also fund, through income tax, the CERB program.[113] Lord argues that this result is inequitable. He proposes the creation of a tax credit, of an extent commensurate to the EI benefits workers avail themselves of.[114] Lord finds that this solution is preferable to covering EI-eligible workers under the CERB.[115]

Lord also stresses the absurd corollary of the current plan that workers can get a lower benefit payment under EI than under the CERB. Indeed, while the CERB offers a fixed quadri-weekly payment of 2,000 dollars, EI benefits depend on a worker's salary. Workers get 55% of their salary, up to the insurable maximum of 54,200 dollars.[116] This means that workers making less than approximately 44,000 dollars will get less than 2,000 dollars in EI benefits. Lord stresses that this result is absurd, and that those who fund a single system should never get a lower benefit payment than those who fund both.[117]

Since the writing of this article, the Canadian government chose an alternative route. It began processing EI applications filed after the

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110 *Ibid* at 15-17.

111 *Ibid* at 15.

112 *Ibid* at 11-12.

113 *Ibid*. The CERB program is funded through general tax revenue.

114 *Ibid* at 13-14.

115 *Ibid* at 12-14.

116 *Ibid*.

117 *Ibid*.

institution of the CERB program (on March 15) under the CERB system.[118]

Lord then tackles the perverse incentives which result from the current system. Unfettered access to temporary layoffs incentivises companies to temporarily lay off their workers.[119] Furthermore, when they do, the cost of providing benefits to these workers is, at least in part, borne by the state.[120] Lord argues in favour of a program of payroll subsidies similar to the current program. These subsidies should be of an extent commensurate to EI benefits, to remove the incentive for companies to lay off their workers.[121] Lord argues that such a system favours economic efficiency and provides a more faithful picture of national unemployment during economic crises.[122]

Lord moves on to the key part of his plan. After tackling the perverse incentives and fiscal inequity which result from the current plan, he addresses its fiscal cost. To manage the fiscal pressure, Lord argues that access to *both* payroll subsidies and temporary layoffs should be limited.[123] This concurrent limitation prevents the creation of a perverse incentive. Lord argues that large and profitable corporations should not be able to lay off their workers or have access to payroll subsidies.[124] He stresses that this limitation is only applicable to temporary layoffs, a legislative device which provides flexibility to companies in difficult economic times.[125] These companies would still be able to *permanently* lay off their workers. However, he notes, they would then be subject to the employment law regime and "might need to make severance payments, face wrongful dismissal lawsuits, or honour pension and various other obligations."[126]

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118 See "Canada Emergency Response Benefit", online: *Government of Canada* <https://www.canada.ca/en/services/benefits/ei/cerb-application.html> [https://perma.cc/VUB7-PBLF].

119 Lord, *supra* note 108 at 15-17.

120 *Ibid.*

121 *Ibid* at 18.

122 *Ibid* at 18-19.

123 *Ibid* at 21.

124 *Ibid.*

125 *Ibid* at 21-22.

126 *Ibid* at 22.

He proposes to focus on the level of profitability, i.e. profitability relative to revenue or the number of workers.[127] He also proposes to evaluate profitability over a full growth cycle, to account for the fact that some companies may be disproportionately affected by a downturn.[128] He also argues that:

> Companies with high revenue and cash reserves, yet which are not highly profitable, should ostensibly also be excluded. This decision would reflect the fact that profitability may not be the priority for all firms. While public companies are generally keen to maximise their bottom lines, some may not be. Profit means taxation, so some companies may find reinvesting in research and development (R&D) or expansion to be a more sensible use of their capital. For instance, Amazon, one of the largest companies in the world, has historically reinvested heavily in growth and R&D, which has led to consistently low or negative net margins. This is also often true for private companies, which may find tax mitigation more important than profit maximisation.[129]

Finally, Lord tackles the issue of companies which face liquidity issues yet are ineligible due to the restrictions he proposes. He argues in favour of emergency, interest-bearing loans for these companies.[130] As mentioned above, even solvent companies can face liquidity issues – especially during financial crises.[131] These liquidity issues may result from companies having imprudently distributed capital to shareholders in better economic times. Even at the risk of creating a perverse incentive for companies to be imprudent in the future, Lord argues that the government needs to provide liquidity to these companies.[132] He states: "Regardless of how much we might disagree with certain corporate behaviour, ideological positions can cause bankruptcies and job losses. In times of crisis, companies may simply be unable to get liquidity elsewhere."[133] He proposes that the interest rates and repayment schedules of the loans be

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127 *Ibid.*

128 *Ibid* at 22-23.

129 *Ibid* at 23.

130 *Ibid* at 24-25.

131 *Ibid* at 24.

132 *Ibid* at 24-25.

133 *Ibid* at 25.

set to ensure that they are less advantageous than loans available through the private sector.[134]

On May 11th, 2020 (after Lord last updated his article), the federal government announced the Large Employer Emergency Financing Facility (LEEFF) program, which ostensibly seeks to address some of these issues. The program is designed to address the needs of public and other large companies. These businesses were shut out from other credit programs designed to support small- and medium-sized companies.[135] The companies eligible for the program are those that (1) are significantly involved in the Canadian economy and can demonstrate significant operations or a large workforce in Canada and (2) have at least 300 million dollars in yearly revenue.[136] The minimum loan principal amount is set at 60 million dollars.[137] The loan is comprised of an unsecured facility (80%), with a 5% annual interest rate that increases to 8% for the second year, and then by a further 2% yearly. It also includes a secured portion which will mirror the borrower's existing credit terms.[138]

The program appears to remain unused as of at least mid-June.[139] The vague and restrictive terms and conditions of the facilities, as well as their high interest rates, likely make them unattractive to companies.[140] Restrictions on the facilities include prohibitions on capital distributions, dividends and share repurchases, as well as restrictions on executive compensation.[141] The borrowers are also expected to commit to

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134 *Ibid.*

135 See section II.B above.

136 See "Large Employer Emergency Financing Facility Factsheet" (20 May 2020), online: *Canada Development Investment Corporation* <www.cdev.gc.ca/leeff-factsheet/> [https://perma.cc/6JJ3-CM3R] ["Large Employer Emergency Financing Facility Factsheet"].

137 *Ibid.*

138 *Ibid.*

139 Jolson Lim, "LEEFF Program Remains Untouched by Big Business" (16 June 2020), online: *iPolitics* <ipolitics.ca/2020/06/16/leeff-program-remains-untouched-by-big-business/?fbclid=IwAR3ib1-rOauUVzTgc5eFQbeiXX5TRHJ_C8HcY0kglKy_h2dSVS4BHbHoqPY> [https://perma.cc/FLL9-UYCT] [Lim].

140 *Ibid.* It is also quite possible that large companies are worried about the public outcry which might accompany a report that they are benefiting from government financing.

141 See "Large Employer Emergency Financing Facility Factsheet", *supra* note 136.

honouring their pension plan and collective bargaining agreement obligations.[142] Additionally, the government reserves the right to appoint an "observer" to the company's board of directors.[143] Finally, probably the most puzzling condition given that the plan was designed for, among others, companies in the oil and gas sector and large airports[144] is that borrowers must publish "an annual climate-related financial disclosure report, highlighting how corporate governance, strategies, policies and practices will help manage climate-related risks and opportunities; and contribute to achieving Canada's commitments under the Paris Agreement and goal of net zero by 2050."[145] Most eligible companies have access to credit with more attractive conditions.[146]

We take no issue with the credit terms (such as the interest rate) or the covenant regarding capital distributions and executive compensation. Lord is correct to state that the credit terms should be less attractive than those offered by private lenders. We are more concerned with the peculiar, vague, and seemingly arbitrary condition regarding climate change. We are especially concerned by the gulf created by the Canadian government in the companies it helps. The programs we mentioned in Subsection II.B offer loans or guarantees of less than 10 million dollars for small- and medium-sized businesses. Some medium-sized businesses will undoubtedly need more than that amount and be unable to obtain financing elsewhere, yet be ineligible for the LEEFF program, which requires at least 300 million dollars of revenue. Furthermore, it is quite peculiar for the government to prioritise helping these large companies, which will most often have the easiest access to capital (through the public markets).

B. Individuals not Traditionally Eligible for EI

We analysed in Subsection III.B the growing use of contracting relationships as replacements for employment relationships. This phenomenon exacerbates the unsustainable fiscal cost of the programs implemented by the Canadian government to alleviate the impact of the

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142 *Ibid.*

143 *Ibid.*

144 See Lim, *supra* note 139.

145 See "Large Employer Emergency Financing Facility Factsheet", *supra* note 136.

146 See Lim, *supra* note 139.

COVID-19 pandemic. Our main objective has been to underscore the conclusions drawn in the previous subsection, i.e. that a reform of temporary layoffs and employment insurance is necessary to manage the fiscal cost of the programs. Indeed, we argued, regardless of the reforms adopted, the government would still be responsible for providing benefits to those not traditionally eligible for EI. As such, the simplest and most effective solution to this issue is likely that analysed in the previous subsection: a comprehensive and concurrent reform of EI and the CERB. We saluted initiatives by governments to prevent the conversion of employment relationships into contracting relationships. We also briefly mentioned that governments could allocate a portion of the cost of a health-crisis-related temporary decline in a contractor's work to the company the contractor provides services to. Nonetheless, we believe that a reform of EI and the CERB is both simpler and more realistic. It also stands to significantly reduce the cost of the relevant programs.

C. Liquidity and Lending

We reach the final point in our analysis. In this subsection, we will propose solutions regarding liquidity and lending during the crisis – which would help address the issues we raised in Subsection III.C. These issues are admittedly far more complex, and involve a plurality of actors as well as monetary policy. It is worth reiterating that a detailed reform plan is beyond the scope of this article.

First, we mentioned that hundreds of billions of dollars were injected into the financial system, with almost no "strings attached." Instead, the government and various independent public entities formulated a desire that private actors use the additional liquidity to benefit individuals and businesses most affected by the crisis. We argued that this framework is naïve and often requires lenders to act in a way that is contrary to their own financial interest. We also mentioned that injecting liquidity in financial markets is necessary during economic crises for a number of reasons. As a general rule, we would argue in favour of more aggressive regulation of private lenders. We conceptualise this intervention as a corollary of the public nature of market liquidity. Our system is already one where the central bank and other public entities significantly affect the provision of liquidity in financial markets. As private actors lend additional funds, we see no reason why their actions should not also be subject to regulation.[147] Governments should intervene and regulate, especially in times of crisis, who banks lend to and to what extent.

We salute the fact that this crisis has ostensibly marked the beginning of a new era in responding to financial crises. Instead of solely reverting to traditional solutions regarding market liquidity, governments have chosen to directly help individuals affected by the crisis. This leads us to a far simpler solution. The best way to make sure that help gets to individuals and small businesses is to send it there. Instead of blindly hoping that private actors lend to those who need help most, we think governments should continue to directly help those it wishes to target, whether through benefit or loan programs. Governments will undoubtedly make mistakes along the way and learn to occupy this new role. Nonetheless, this solution stands to be more effective.

This is especially true as average individuals are often forgotten during financial crises. Central banks pump hundreds of billions of dollars into financial markets, with limited (or no) oversight from elected officials. These injections are also largely insulated from the public debate: most people are likely unfamiliar with them (or at least with their extent). As mentioned, these injections are important. They help shorten recessions and avoid depressions.[148] Yet as public confidence strengthens and public markets recover, the average person derives little benefit. In a narrow sense, avoiding a financial collapse may preserve their job. But the average household has little wealth, none of which in stocks.[149] Recoveries mostly benefit the wealthiest. In that context, it is especially important, for financial resilience and a more democratic financial system, to directly help the everyday individual – who often needs help most.

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147 Needless to say, while governments do not control the actions of central banks and other independent entities, they can regulate banks and other financial institutions.

148 See generally Robert K Rasmussen & David A Skeel Jr, "Governmental Intervention in an Economic Crisis" (2016) 19:1 U Pa J Bus L 7.

149 See generally Pauline Shum & Miquel Faig, "What Explains Household Stock Holdings?" (2006) 30:9 J Banking & Finance 2579; Guy Gellalty & Elizabeth Richards, "Indebtedness and Wealth Among Canadian Households" (26 March 2019), online: *Statistics Canada* <https://www150.statcan.gc.ca/n1/pub/11-626-x/11-626-x2019003-eng.htm> [https://perma.cc/AM78-BLP4].

Conclusion

This article has argued that the effectiveness of government responses to global health crises is bound to be inadequate, as it relies on the good faith of private actors to take measures which they have no legal obligation to take. The first section described the global pandemic of a novel form of coronavirus which quickly affected people around the world in 2019 and 2020. Section II described government responses to the crisis. Section III reached the crux of our argument and described the unsettling role of private actors in determining the effectiveness of our response to the COVID-19 crisis. Subsection III.A considered how businesses are incentivised to temporarily lay off employees. This incentive means that they may bear a disproportionately low portion of the economic cost of a global pandemic. We also noted that, unless businesses voluntarily choose not to temporarily lay off their employees, a global health crisis would put a considerable and unsustainable pressure on the government's ability to provide benefits to laid off workers. Subsection III.B further underscored these conclusions, in light of the growing use of contracting relationships to replace employment relationships. Subsection III.C considered the role of banks and other financial institutions in providing liquidity and lending. It pointed out that major financial resources go through these actors, with almost no "strings attached." Whether and to what extent these financial resources will be used to help those who need them most depends almost entirely on an expectation that banks will feel compelled to "do the right thing." Finally, Section IV summarily introduced potential solutions to the issues raised in Section III.

Global health crises will happen again.[150] If, as is likely, they resemble the current pandemic, they will affect millions of people and kill at least tens of thousands.[151] They will also cost trillions of dollars. This level of

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[150] See e.g. "A World at Risk: Annual Report on Global Preparedness for Health Emergencies" (September 2019), online (pdf): *World Health Organization Global Preparedness Monitoring Board* <apps.who.int/gpmb/assets/annual_report/GPMB_annualreport_2019.pdf> [https://perma.cc/U2NG-GAX4].

[151] See "Coronavirus COVID-19 Global Cases by the Center for Systems Science and Engineering (CSSE) at Johns Hopkins University (JHU)", online: *Johns Hopkins University & Medicine Coronavirus Resource Center* <coronavirus.jhu.edu/map.html> [https://perma.cc/BM8F-ZWAE].

spending, and cost, is unchartered territory, even in times of economic slowdown. How effectively we adjust our current framework and prepare to face the next crisis could dictate, quite literally, whether tens of thousands live or die, starve or thrive. It could dictate whether we fall into a debt spiral or have trillions to spend to feed the hungry, shelter the homeless, and provide healthcare and education to billions. While we can seem highly critical of governments, our goal is to sound the alarm bell and help us better prepare for the next crisis. We, as all of us, want to help our societies move forward.