



**Reach Canada™**

**EQUALITY AND JUSTICE  
FOR PEOPLE WITH DISABILITIES**

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# Long Term Disability

## Participant's Manual

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From

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## **Long Term Disability Insurance - Enforcing the Promise of “Peace of Mind” <sup>1</sup>**

### **Introduction - The Importance of Access to Quality Work**

Work now accounts for 1/3 of many people’s daily life so it is no surprise that work plays an important role in shaping our sense of self. As early as 1980 the Supreme Court of Canada recognized that:

“Work is one of the most fundamental aspects in a person’s life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person’s employment is an essential component of his or her sense of identity, self-worth and emotional well-being. Accordingly the conditions in which a person works are highly significant in shaping the whole compendium of psychological, emotional and physical elements of a person’s dignity and self-respect.”

This statement, by then Chief Justice Dickson, continues to be quoted with approval by the Supreme Court of Canada in employment cases.

For people with disabilities, issues like the elimination of systemic barriers in hiring and promotions, appropriate accommodations in the workplace, and the provision of appropriate disability benefits when a worker has to withdraw from the workplace, either temporarily or permanently, have a profound impact on both their means of financial support and their sense of self. Yet, statistics show that much more needs to be done on all three fronts.

According to HRSDC, the income gap between persons with disabilities and persons without disabilities is staggering. From 1993-1999, persons without disabilities were consistently found to have only 1/4 of the income of persons without disabilities. This is not surprising given that people with disabilities earned a minimum of \$2 less an hour than their counterparts without disabilities. And while people with disabilities account for over 12% of the population they account for only 5.4% of the workforce, disabled women and aboriginal employees being the most disadvantaged fo the group.

The result is that people with disabilities are being denied full access to one of the most fundamental aspects of a person’s life, and employers are denying themselves access to a huge pool of available talents and resources.

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<sup>1</sup>The content of this paper and the information transmitted by the presenters does not constitute legal advice. Each individual’s facts and legal issues must be considered on their merits, on a case by case basis.

## **When the Duty to Accommodate Ends and a Justifiable Need for Disability Benefits Begins**

Although the real purpose of this seminar is to provide information with respect to long term disability issues, and therefore is dealing with situations where a person is unable to work due to disability, we would be remiss if we neglected to address the fact that many people with disabilities are able to work, either in their own or alternate (adapted) jobs and should be given full access to employment which both accommodates their needs and values their contributions. It should only be when a person cannot work that long term disability benefits are claimed.

However, many LTDI policies have an initial two year benefit period for which an employee needs “only” to prove that he/she is disabled from doing his or her own occupation. As a result, there is a blurring of the line between where an Employer’s Duty to Accommodate ends, and an employee’s entitlement to LTDI benefits begins, especially those beyond the own occupation period. Many employers are simply unwilling to accommodate disabled employees to the point of undue hardship, and enforcing such obligations under human rights legislation or the common law can take a long time. As a result disabled employees who have been denied accommodation often suffer significant financial, if not physical/psychological harm which prejudices both their medical recovery and opportunities for re-employment. Further, if they try to return to work, but are unsuccessful, or if the employer simply decides that it will no longer provide accommodation, such efforts may be held against them if they then turn around and claim for LTDI benefits as a last resort ie the insurer may deny the disability on the basis that the real problem is the employer’s failure to accommodate, and not the employee’s medical condition. Well written medical reports that contemplate such scenarios can mitigate some of these risks, as can carefully crafted and monitored accommodation plans. However, the risk is still there - whether it is worth taking is a decision that the employee will have to make, but advocates can at least ensure that it is an informed one based on sound medical legal and financial advice. It is certainly not a decision to take lightly; as the statistics above have disclosed, access to work and good wages does not come easy for the disabled. Those who have had access to a good job, especially with a large employer who would not easily prove undue hardship, should not give up their rights to that job without giving the matter serious thought.

### **A. *The Duty to Accommodate***

Some of us would not be here today discussing this topic if it was as easy as the law says – **Employers have the duty to accommodate their disabled employees.** The problem is that there is a qualifier: **to the point of undue hardship.**

In Ontario, the *Human Rights Code* mandates that

5. (1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or disability.
- (2) Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, age, record of offences, marital status, family status or disability.
10. (1) In Part I and in this Part,
- "disability" means,
- (a) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes diabetes mellitus, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or other animal or on a wheelchair or other remedial appliance or device,
- (b) a condition of mental impairment or a developmental disability,
- (c) a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,
- (d) a mental disorder, or
- (e) an injury or disability for which benefits were claimed or received under the insurance plan established under the Workplace Safety and Insurance Act, 1997;
11. (1) A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,
- (a) the requirement, qualification or factor is reasonable and *bona fide* in the circumstances; or
- (b) it is declared in this Act, other than in section 17, that to discriminate because of such ground is not an infringement of a right.

(2) The Commission, the Tribunal or a court shall not find that a requirement, qualification or factor is reasonable and *bona fide* in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

17. (1) A right of a person under this Act is not infringed for the reason only that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of disability.

(2) The Commission, the Tribunal or a court shall not find a person incapable unless it is satisfied that the needs of the person cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

(3) The Commission, the Tribunal or a court shall consider any standards prescribed by the regulations for assessing what is undue hardship.

The *Canadian Human Rights Act* stipulates:

7. It is a discriminatory practice, directly or indirectly,

(a) to refuse to employ or continue to employ any individual, or

(b) in the course of employment, to differentiate adversely in relation to an employee,

on a prohibited ground of discrimination.

15. (1) It is not a discriminatory practice if

(a) any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a *bona fide* occupational requirement;

(2) For any practice mentioned in paragraph (1)(a) to be considered to be based on a *bona fide* occupational requirement and for any practice mentioned in paragraph (1)(g) to be considered to have a *bona fide* justification, it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.

The *Employment Equity Act* applies to private sector employers involved in federal undertakings (as defined in s.2 of the *Canada Labour Code*) and some sections of the federal public service and some sections of the RCMP and armed forces. It defines "persons with disabilities" as persons who have a long-term or recurring physical, mental, sensory, psychiatric or learning impairment and who

(a) consider themselves to be disadvantaged in employment by reason of that impairment, or

(b) believe that a employer or potential employer is likely to consider them to be disadvantaged in employment by reason of that impairment,

and includes persons whose functional limitations owing to their impairment have been accommodated in their current job or workplace.

The *Employment Equity Act* obligates employers to be proactive in identifying and eliminating workplace barriers resulting from the employer's policies and practices and mandates them to institute positive policies and practices including reasonable accommodation to the point of undue hardship.

There are many situations where people have disabilities which can be accommodated. The workplace can be **physically modified**, such as ergonomic furniture, arrangement and location of workstations (i.e. close to bathrooms, windows, away from chemicals or open spaces), installation of ramps and elevators. **Special equipment or devices** can be provided, such as special computers and programs, voice recognition software, filters, lumbar supports, chairs/stools. **Hours of work** can be modified, shortened or split. Employers may also be required to provide training to the worker. Finally, **duties may be modified** or tasks removed, rebundled or added. In the jurisprudence, employers have had to look at ways a person's job or environment can be modified so that he or she can do his or her work. If that is not possible, employers are required to look at other jobs within their organizations that the employee can do, with or without modifications. Finally, employers may have to look at bundling duties together to form a job that the employee can perform. However, the caveat is that this does not have to be a "make work" project – the job has to be a productive job, and the duties ones that are required by the organization.

The duty to accommodate is fundamentally an individualized assessment, based on the particular disability and circumstances of the individual employee. It involves examining the employee's medical limitations and restrictions, the prognosis for recovery and the employee's capabilities to do alternate work.

All of this must be done through a cooperative effort of the employer and employee. The employee does not have to originate the solutions, but he or she must provide as much information as possible to inform the employer of his or her needs.

An employee cannot refuse reasonable accommodation. If an employee refuses a proposed accommodation, he/she must provide a reasonable explanation. Employees are not entitled to “perfect” accommodation. Further, employees must follow treatment recommendations. They also cannot hide their disabilities, particularly if the disability causes a problem which may lead to discipline or termination. This is particularly so for alcoholics. Although one may not want to admit to the disability, this is a disease, and if one is later terminated or disciplined for attending at work drunk, or poor attendance or other misdemeanors, but has not informed his/her employer about a potential substance abuse or alcohol problem, then the results may be difficult to reverse. Seeking treatment and continuing with recommended treatment prescribed by one’s physician is also extremely important both for accommodation and for long term disability (as discussed below).

If a Collective Agreement is involved, the employer should also consult the Union. All parties must work together for a solution if one is possible.

One is not possible when it comes to the point of causing undue hardship on the employer. The point at which hardship becomes “undue” depends on a number of factors, including health of its employees, safety requirements and cost (including outside sources of funding, if any), the size of the operation, and employee morale (although applied cautiously). Undue hardship is a hard test to meet. The Employer must show more than inconvenience or slight operational upset. Undue hardship is looked at on a case by case basis.

Unions must assist in the accommodation process, but again can refuse to accept certain requests if it would cause undue hardship on the Union or its members.

The duty to accommodate is an ongoing obligation that includes reassessing the accommodation as circumstances change. While an employee may be able to perform the essential duties of an occupation today, his or her condition may deteriorate to the point that he/she cannot continue to work in his/her position, an accommodated position or an alternate position.

A key change in circumstance that necessitates a reassessment occurs when an employee is receiving LTDi. To qualify initially, a person must demonstrate that they are totally disabled to the point that they are unable to perform the core duties of their “own occupation”. As part of this determination an assessment should be conducted to determine whether the employee could perform their basic duties if the employer provided some level of accommodation. After an initial period, usually two years, the qualification for LTDi changes and an employee must demonstrate that they are totally disabled to the point of being unable to perform “any occupation”. This change from “own occ” to “any occ” obligates the employer to once again consider its duty to accommodate and to explore, with the employee’s input, whether there is any

occupation which the employee could perform with accommodation or modification of duties.

There are many cases which discuss accommodation and undue hardship, some of which are listed or briefly discussed below. For the purposes of this seminar, however, the real question is whether we are dealing with a disability which can be accommodated and a situation where the employee can, according to his or her medical professionals, continue to work.

*Essex Police Board* (2002), 105 L.A.C. (4<sup>th</sup>) 193 (Goodfellow) concerned accommodation of a 27 year veteran of the police force who suffered from degenerative disc disease and could no longer perform his regular duties. The Essex Police Board argued that there was no other appropriate job but the Police Association argued that an alternative full-time position could be found for the officer at his same pay level. In rendering his decision the Arbitrator described the standard of accommodation to the point of undue hardship thusly: "a person cannot be found "incapable" unless the party responsible for accommodating the individual's needs can demonstrate that the required accommodation would create an "undue hardship" having regard to cost, outside sources of funding, if any, and health and safety." He rejected the Board's assertion that the duty to accommodate does not require an employer to consider the creation of a position from tasks assembled from various sources and found that, in this case, there was no undue hardship as a position could be created that involved productive and necessary office and investigative follow-up tasks that made use of the Constable's years of experience while also allowing other officers to spend more time doing front-line work. The solution was win-win.

In *Canadian Auto Workers Local 111 v Coast Mountain Bus Co.*, [2004] B.C.C.A.A. No. 325, a transit operator with 6 years on the job was frequently absent due to disability. He was terminated for non-culpable absenteeism but won reinstatement on the basis that the employer had not conducted the required individualized assessment and accommodation process. Attendance expectations had been set arbitrarily at the peer-average absence rate and no search for a permanent accommodation was ever initiated.

*Ontario Liquor Boards Employees' Union v. Ontario (Liquor Control Board) (Di Caro Grievance)*, [2005] O.G.S.B.A. No. 60 concerned a grievor who was hired as a customer service rep but, due to a disabling condition, had permanent restrictions that prevented him from doing some of the regular tasks associated with that position. The employer took the position that if the disabled employee was unable, even with any modification, to do the essential duties of the job for which he was hired, and felt it had no obligation to make further efforts to find any other work for him as an accommodation. The Board, as in the Essex Police case, rejected this overly narrow interpretation of the employer's duty to accommodate and required the employer to

engage in a real search for accommodation within the workplace to see if there were other positions the grievor could fill.

Other important cases include:

*Shulz v. Canada (Attorney General)*, [2006] B.C.J. No. 121 (Sup. Ct.).

*Bubb-Clarke v. Toronto Transit Commission*, [2002] O.H.R.B.I.D. No. 6.

*Starzynski v. Canada Safeway*, [2000] A.J. No. 1445; aff'd *United Food and Commercial Workers, Local 401 v. Alberta Human Rights and Citizenship Commission*, [2003] A.J. No. 1030 (Alta. C.A.).

*Regina (City) v. Kivela* [2004] S.J. No. 580; varied [2006] S.J. No. 195.

*Mohawk Council of Akwesasne and Akwesasne Police Assn.* (2003), 122 L.A.C. (4<sup>th</sup>) 161 (Chapman).

*Hamilton Police Assn. V. Hamilton (City) Police Services Board*, [2005] O.J. No. 2357; quashed [2005] O.J. No. 2500.

*Quackenbush. v. Purves Ritchie Equipment*, [2004] B.C.H.R.T.D. No. 10.

*CAW v. Honeywell* (2002), 70 C.L.A.S. 104 (Tacon).

## **B. Disability Benefits**

When it is determined that a person can no longer work, it is time to consider sick leave and, eventually long term disability. Many employees are fortunate to have a benefits plan which includes long term disability provided by an insurance carrier or (in some cases) their employer. Long term disability benefits have been called “peace of mind” benefits, and insurers have an obligation to treat their claimants in good faith.

Some employees, without private insurance, may have no alternative but to apply for Employment Insurance Sickness benefits, then Canada Pension Plan disability benefits and/or the Ontario Disability Support Program. (ODSP) (see sections below on these topics).

Generally, long term disability plans require employees to use all of their short term sick leave and/or Employment Insurance benefits for the first seventeen weeks or 119 days of the disability. This disability during the seventeen weeks must usually be wholly and continuously present; however some plans allow for periods of disability separated by periods of ability, where the time between the periods of disability is relatively short and where the periods of disability add up to a total seventeen week “qualification period”.

### **1. The Initial Application: the process, the waiting period, and the importance of a good and properly completed initial application with supportive medicals**

**a. Qualification Period**

Most long term disability plans have a qualification period or waiting period of approximately seventeen weeks (or 119 days) where the employee must be off work, wholly and continuously disabled due to their condition, before the long term disability benefits will commence. Many times at the outset of the disability or disease, particularly if it is initiated by an accident, there will be some uncertainty as to whether or not the person is expected to recover within this period, or the disability will be continued and ongoing. Use this time wisely. If it is known that the disability will be ongoing, it is best to start collecting information and preparing the LTD application as soon as possible. From our experience, it may take some time to obtain proper medical records, especially where there are diagnostic and treatment challenges requiring multiple tests and/or referrals to specialists. Further, the current shortage of family doctors in Ottawa may mean that, at the time the disability manifests, the individual is without regular and consistent medical care. The Ontario College of Physicians and Surgeons has a list of doctors and specialists currently accepting new patients on their website and we would encourage individuals to arrange regular medical care as quickly as possible. In our experience, this service issue has presented huge challenges for individuals seeking thorough and consistent diagnosis and treatment of their illnesses, the lack of which is almost always used by employers and insurers to question the validity of the medical evidence put before them.

**b. Importance of a Complete Application and Proper Medicals**

Most long term disability applications include three parts: one to be completed by the employer, one for the employee, and a final form for the employee's medical practitioner. Although it often is the Family Doctor, most often the employee should take this form to the physician who is providing care for the primary disabling condition. Employees would be wise to consider enclosing consultant reports or reports from other specialists if the reports are supportive of the employees disability. Providing the physician with a copy of the definition of disability in one's policy, will go a long way to ensuring that the physician knows the ultimate question he/she should be answering. For example, most policies have an initial two year period where the employee need only be disabled for the purposes of his/her own occupation (also known as the "own occ" period). If the physician can provide medical proof that the employee is unable to perform the essential duties (i.e. most of the tasks and the usual day to day work of the employee) of the occupation, then disability benefits will likely be granted. It is important to note that occupation is not equated with a particular position with a particular employer, but rather, is a general description of the job. The more a physician cites problems with the employee's specific employer or work location as causing the disability, the more likely an insurer will deny the application. Generally, insurers do not

provide disability insurance for what they term “occupational problems”. Insurers will likely argue that the problem can be resolved in the workplace itself, or should be the basis of a Workplace Safety and Insurance Board (WSIB) claim. The physician must therefore focus on the duties, tasks, physical problems and psychological problems etc. with respect to the generic job. For example, if interaction with co-workers is causing anxiety and panic attacks for an employee, the physician must enquire as to whether or not this would be a problem in any workplace environment where the employee could potentially perform that job.

It is quite likely that the physician’s form will request a prognosis. Although most individuals would be anxious to obtain the quickest cure and return to work at the earliest possibility, it is not the time or place for unrealistic predictions. The physician must be warned against putting a time line in just for the sake of putting in a date. When a recovery date is unknown, the physician is better to write “unknown” than to make a wild or optimistic hypothesis. The same is true for return to work schedules when it is more optimistic than obvious that the employee will be able to return and maintain that schedule.

If possible, the medical professions should provide supporting diagnostic and test results, clinical observations, or other objective medical evidence supporting the disability. Quite often, claimants are denied on the basis that the complaints are subjective and not supported by objective medical evidence.

Some doctors dislike having to write medical-legal reports and fill out forms in respect of their patients eligibility for benefits, and there may be a tendency to rush through them as a result. We would strongly encourage medical professionals to reconsider this approach; taking one’s time when preparing reports, and perhaps even seeking clarification from a client’s legal counsel (after both counsel and doctor have obtained a patient’s authorization to communicate directly on such matters) can increase that patient’s likelihood of success in these matters, prevent the need for additional reports in support of appeals, and minimize the negative effects that legal/financial difficulties can have on their patient’s physical and psychological well-being.

Although the employer will provide the insurer with copies of the job description and the history with respect to dates worked, absences, and last date worked, the employee should also attempt to keep track of this information for his/her records and calculations. The employee’s form will likely include a questionnaire with respect to activities or functions the employee is or is not able to do. For example, the form will ask how much a person is able to lift or carry, and for how long (i.e. seldom, occasional, frequent), questions with respect to sitting, standing, walking, ability to concentrate, driving, etc.. These questions should be answered carefully, and not glossed over.

If individuals find these forms difficult to fill out, they should seek help. In addition, there may be some disabilities which will prevent a person from wanting to fill out these forms and wanting to provide such information (such as some psychiatric conditions). In this situation, relatives, friends, and service providers should encourage the individual to complete these forms and provide this information in order that he/she may obtain financial peace of mind during the period of disability.

## **2. The Interplay Between LTDI and Other Disability Benefits and Differing Definitions of Disability: CPP, WSIB, EI, ODSP, Pension Benefits and the Disability Tax Credit**

### **a. Canada Pension Plan (CPP)**

As the name implies, Canada Pension Plan (CPP) disability benefits are available from the Federal Government (Social Development Canada or SDC) to Canadians who become disabled. The Act, however, sets out rules with respect to who can receive these benefits, on the basis of how long and how recently the individual made CPP contributions through his/her employer (usually a direct deduction from one's pay) and how much these contributions were. You can obtain a copy of your CPP statement of contributions through Service Canada.

To receive CPP disability benefits, a person must show that he/she meets the test in the legislation. Section of the *Canada Pension Plan* provides:

(a) a person shall be considered to be disabled only if he is determined in prescribed manner to have a **severe and prolonged** mental or physical disability, and for the purposes of this paragraph,

(i) a disability is **severe** only if by reason thereof the person in respect of whom the determination is made is **incapable regularly of pursuing any substantially gainful occupation**, and

(ii) a disability is **prolonged** only if it is determined in prescribed manner that the disability is likely to be **long continued and of indefinite duration or is likely to result in death**; and

CPP disability benefits replace a portion of the earnings of contributors who cannot work because of a severe and prolonged disability.

Most insurers, due to the fact that they want to pay as little as possible, will require long term disability recipients to make an application for Canada Pension Plan disability benefits, and if refused submit at least one appeal.

If an applicant is successful in qualifying under the CPP legislation for benefits, the Insurer has a right of “set-off” or “subrogation” which allows the insurer to reduce the amount of the benefit it is required to make by the amount of the CPP disability pension. On occasion, it is frustrating for a claimant to be required to apply to CPP under a fairly stringent test just to save the insurer that portion of the benefit, but the good news is that once a CPP pension has been granted it is much more difficult for the insurer to deny the main claim under its policy.

It is important to note that the test under the Canada Pension Plan is a much more stringent test for disability than that usually used by long term disability insurers. Whereas Canada Pension Plan requires a person’s disability to be **severe**, in that he/she cannot work in any substantially gainful employment (this would include part-time or full time, and jobs which pay much less than the employee’s original occupation), most long term disability plans require you to be totally disabled from your own occupation for the first two years, and then thereafter from any occupations for which you are qualified, trained, and skilled, and often which provides you at least 75% of your former salary.

If the claimant has satisfied the higher CPP test then it is difficult for the insurer to maintain that the claimant has not met the lower LTDI threshold. Therefore an award of a CPP disability pension should answer any doubt about the LTDI claim.

Please note, however, that the denial of a CPP claim does NOT mean that the claimant will be denied LTDI benefits. The medical evidence may very well establish a disability that meets the lower threshold but fails to meet the “severe CPP threshold - especially during the first two years when the evidence only needs to show a medical condition that prevents one from working in their “own occupation”.

As with most government funded benefits, the CPP disability payment has a maximum monthly amount. This may not be 75% of an employee’s former salary. This is precisely why an individual with long term disability plan is in a much better situation. Long term disability plans will, as mentioned above, deduct the CPP payment from the monthly disability payment they make. In fact, most insurance companies demand that the person in receipt of long term disability, at some point (generally around the two year mark) apply for CPP disability benefits and at least make one appeal. If a recipient does not apply or appeal, most policies read that the estimated amount of CPP will be deducted anyway. Therefore it is always in the person’s best interest to apply for CPP.

Once Social Development Canada (SDC) agrees that the person meets the definition for CPP disability benefits, they will look at when the benefits should have commenced.

Benefits can be retroactive up to fifteen months prior to the application. This will be paid in a lump sum to the recipient. Once accepted on CPP disability benefits, you must inform your LTDI carrier, which will recover what it believes is the overpayment. It is important to note that although insurance carriers do not expect an individual to apply until the two year mark, the retroactivity of the clawback may go as far back as the CPP benefits themselves. Therefore, once in receipt of a lump sum benefit from CPP, it is wise for the individual not to spend this money until communication is made with the long term disability carrier and the issue is resolved. Otherwise, the carriers have been known to deduct any overpayments from future benefits they pay.

With respect to the severe and prolonged test, the courts have made it clear to CPP that they must take a “real world approach”. In the leading case of *Villani v. Canada (Attorney General)*, [2002] 1 F.C.130, the Federal Court of Appeal held that in determining whether a person’s disability was severe, the Review Board had to take into consideration the applicant’s age, education, language proficiency, and work and life experience. These factors were important in determining whether or not a person was employable. With respect to individuals who are hoping to upgrade their education or learn new skills while on long term disability or Canada Pension disability benefits, the Pension Appeals Board in the case of *Jeffrey M. Elwood* found that attendance at school did not necessarily mean that the individual was not totally disabled. He was able to receive CPP benefits during his schooling.

#### **b. Workplace Safety and Insurance Benefits**

The Ontario Workplace Safety and Insurance Board (WSIB) may provide the following types of benefits to an injured worker:

- i. Benefit for Loss of Earnings (LOE)
- ii. Benefit for Non-Economic Loss (NEL)
- iii. Loss of Retirement Income (LRI) Benefit
- iv. Benefit for Future Economic Loss (FEL)
- v. Health Care Benefits
- vi. The Occupational Disease and Survivor Benefits Program
- vii. Benefits for Seriously Injured Workers

Each type of benefits has a different set of qualifying requirements, and it is extremely important to realize that there are different rules depending on the date of injury or accident, as the legislation has changed a number of times over the last decade or two.

Injury includes physical injury, some specified occupational diseases, and mental stress that is an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of his or her employment. For example, if a worker witnessed an accident

at the workplace and suffered recurring bouts of depression rendering him/her unable to perform their normal duties then this type of “stress” related illness would likely attract WSIB benefits. However, a worker is not entitled to benefits for mental stress caused by his or her employer’s decisions or actions relating to the worker’s employment, including a decision to change the work to be performed or the working conditions, to discipline the worker or to terminate the employment. Similarly, WSIB considers workplace harassment to be an action relating to the worker’s employment and does not currently provide benefits for mental stress cause by harassment by a co-worker or manager.

One benefit of WSIB is the ergonomic assessment and labour market re-entry (including training) provided. It is unlikely that LTD insurance carriers will provide these services. Further, the goal of WSIB is to return injured workers into the workforce and the WSIB will push the employer to make changes and accommodate workers when possible; in an LTD situation, the employer is the contract/policy holder and may prefer to push an employee towards LTD rather than accommodate him/her.

### *Multiple Illnesses*

When there is an injured worker situation, and pre-existing or other non-work related illnesses or disabilities begin to manifest, the legal issues and medical diagnoses become extremely complicated. All of the facts, the specific policy language, the statutory regime of WSIB and medical issues must be taken into account in determining whether it is best to pursue the claim as a WSIB claim or a Long Term Disability claim. You may face an argument from the LTD carrier that the disability is work-related and not a LTD issue, and at the same time face the opposite argument from WSIB. It is certainly possible to appeal both to see which appeal will be accepted; however, medical reports will be important and may not support both a workplace cause and a non-work-related cause. In the end, however, both the WSIB and the LTD carrier need to assess a person “holistically” and must look at the interaction between disabilities, consequential (or secondary) disabilities.

### ***c. Canadian Forces and RCMP Disability Pensions***

Veteran’s Affairs Canada (VAC) provides disability pensions for veteran and still serving members of the armed forces and also deals with disability claims for the RCMP. This disability pension is tax free and is not a form of income replacement and therefore is not used for set-off against LTD benefits.

To determine the amount of a VAC disability pension, your disability is measured according to two different criteria: the extent of the disability, and its connection to service.

Rather than using a global definition of disability, Veteran's Affairs uses a detailed list of medical conditions, which are further broken down into descriptions used to measure the **extent** of the disability. Specific disability tables are used to assess the percentage of disability award.

In order to receive a pension the disability must be **connected to service**. There are different tests for RCMP service, forces service in war, and forces service during peace time. For example, the disability may only have to be attributable to or be incurred during service if it happened during a period of war or in special service areas; however, if it was during peace time, the disability must be caused by or directly connected with service.

A disability pension is awarded in fifths: from one-fifth (1/5), if service played only a minimal part in the cause or worsening of the disability, to five fifths (5/5) if the disability was incurred during, or was caused in its entirety by military service.

The legislation recently changed, and now there is what is commonly referred-to as a *Veteran's Charter* which provides more benefits, such as retraining, rehabilitation benefits and and re-employment assistance. The old disability pension was paid monthly; whereas now it is paid in a lump sum.

#### **d. ODSP**

The Ontario Disability Support Program (ODSP) "is designed to meet the unique needs of people with disabilities who are in financial need, or who want and are able to work and need support. Ontarians 65 years or older who are not eligible for Old Age Security may also qualify for ODSP supports if they are in financial need." While it will not likely provide benefits to the level of most private insurance plans, it is certainly superior to Ontario works.

The program has two components:

- Income Support; and
- Employment Supports.

To be eligible for Income Support under the ODSP, you must:

- § be a resident of Ontario
- § qualify financially
- § have a disability (substantial physical or mental impairment that is continuous or recurrent) which is expected to last one year or more.

You may also qualify if you:

- § receive disability benefits under the Canada Pension Plan (CPP);
- § are 65 or older and are not eligible for Old Age Security (OAS);
- § live in a psychiatric facility;
- § live in a facility under the *Development Services Act* or in a home under the *Homes for Special Care Act*; or
- § are about to turn 18 and currently get a benefit called the Assistance for Children with Severe Disabilities Benefit (this used to be called Handicapped Children's Benefit).

Income Support provides financial assistance and other benefits to eligible people with disabilities and their families. This includes accommodation and basic living expenses, as well as prescription drugs and basic dental care. Other supports and benefits that may be available include:

eyeglasses	wheelchair/mobility device repairs and batteries
hearing aids	back-to-school and winter clothing allowances for dependent children
special diet allowance	<u>Community Start Up and Maintenance Benefit (CSUMB)</u>
diabetic supplies	<u>Employment Start Up Benefit (ESUB)</u>
ostomy supplies	Extended Health Benefits
surgical supplies	emergency home repairs
transportation needed to attend medical appointments	guide dog allowance
Upfront Child Care Benefit	

Other work-related, financial supports are available to eligible ODSP recipients who are participating in an approved employment-related activity (e.g. job search), starting or changing jobs, or participating in a training program. Further, ODSP recipients can work and earn income while on benefits, as long as their earnings do not exceed certain levels. Other income sources like support payments or inheritance may affect your

benefits in some circumstances.

The ODSP Employment Supports program works with community service providers to help people with disabilities prepare for and find jobs, keep a job and advance their career. The program can also help people with disabilities become self-employed.

Some examples of the supports that may be available include:

- § Job coaching
- § On-the-job training
- § Adaptive software and mobility devices
- § Interpreter/intervenor services
- § Transportation assistance
- § Assistive devices and training to use them
- § Tools and equipment
- § Special clothing
- § Specialized computer training
- § Other items you may need for work.

ODSP Employment Supports help people who have a wide range of disabilities.

To be eligible for Employment Supports, you must:

- § Be 16 years of age or older;
- § Be a resident of Ontario; and,
- § Have a disability that is expected to last a year or more, and your disability makes it hard for you to find or keep a job.

Participation in Employment Supports is voluntary.

You do not have to be receiving ODSP Income Support to be eligible for Employment Supports.

If you are eligible for, or receiving disability or rehabilitation benefits from other public or private sources, you may not be eligible for ODSP Employment Supports.

People who participate in Ontario Works are not eligible for ODSP Employment Supports. They receive employment assistance from Ontario Works.

As with CPP and private LTD insurers, ODSP adjudicators most often deny benefits on the basis that a person does not meet their definition of disability. Thus, particular attention must be paid to getting medical evidence that reflects the language of the benefit being applied for. We have emphasized the portions of the ODSP definition of disability that are particularly “subject to interpretation” and have bracketed the more descriptive sections below:

**4. (1)** A person is a person with a disability for the purposes of this Part if,

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

(b) the direct and cumulative effect of the impairment on the person’s ability to attend to his or her personal care, function in the community and function in a workplace, results in a (substantial restriction) in one or more of these activities of daily living; and

(c) the impairment and its likely duration and the restriction in the person’s activities of daily living have been verified by a person with the prescribed qualifications. 1997, c. 25, Sched. B, s. 4 (1).

The Disability Adjudication Unit is to take a “whole person” approach to its determinations. Therefore, many minor impairments, taken together may create a “substantial impairment” and that “overall” impairment can substantially restrict the applicant’s activities of daily living. Accurate medical reporting that is cognizant of both this wording and the potential interaction or cumulative effect of symptoms are critical.

If you are denied benefits and wish to appeal you must first file a request for an internal review in writing within 10 days of the day the denial was given to you by a worker (13 days of the denial date if mailed to you). If the internal review decision is still unfavourable, most issues can be appealed to the Social Benefits Tribunal within 30 days of the IR decision (or within 40 days of your request for an IR where you do not receive an IR decision within 10 days).

The extent of the Social Benefits Tribunal’s powers were considered in a recent Supreme Court decision: *Tranchmontagne v. Ontario (Director, Disability Support Program)*, [2006] 1 S.C.R. 513. The Supreme Court held that the Social Benefits

Tribunal has jurisdiction to consider the application of the *Ontario Human Rights Code* when considered a person's eligibility for ODSP under the *Ontario Disability Support Program Act*.

In *Tranchemontagne* two men applied for, and were denied, disability benefits on the basis that their disabilities were the result of substance abuse. Section 5(2) of the ODSPA expressly excludes any claims for disability resulting from substance abuse. Both men argued that this section of the Act contradicts the *Ontario Human Rights Code*, which recognizes alcoholism and drug addiction as disabilities. The Social Benefits Tribunal did not deny this contradiction but found that it had no authority to do anything but apply the ODSPA as written.

The Supreme Court held that the *Ontario Human Rights Code* has primacy over other provincial law and that the Social Benefits Tribunal has the jurisdiction to interpret the ODSPA in a way that ensures it complies with the *Code*. This is an important decision because it means that a person who is denied benefits can raise Human Rights arguments during the ODSP appeal process without having to bring a separate Human Rights Complaint through the Ontario Human Rights Commission. The timeline for a decision from the Social Benefits Tribunal is much faster than for a human rights complaint so the decision in *Tranchemontagne* ensures that appealing a denial of ODSP benefits will take months instead of years.

#### **e. *Other Pensions***

Employees may be able to obtain a disability waiver of premium from their employment pension plans, and some may be able to obtain a disability pension. The test will vary depending on the plan. The interaction between this type of benefit and LTD is quite interesting. While currently most LTD policies don't require that you apply for either the premium waiver or the disability pension, it should be known that most policies will view any payments from a disability pension as monies they can deduct from your monthly LTDI benefit. It is in an employee's best interest to apply for the premium waiver, as service will accrue during a period of disability and the employee will not have to pay the premiums. It may not be in one's best interest to apply for the disability pension, particularly if it is just going to be clawed back by the LTD carrier. In addition, the test to receive the disability pension is much harder to meet than that for the premium waiver.

#### **f. *Automobile Claims***

As will be explained in further detail in the section on subrogation below, some types of compensation received from an automobile or other claim have to be set-off against the employee's LTD benefits. Money received in settlement or through a court award as compensation for lost income have to be set-off against any LTD benefits received for the same time period. Set-off essentially means that the LTD benefit will be reduced by

the amount that an employee receives as income replacement from other sources.

For example, an employee's LTD benefit is set at 75% of his pre-disability income, which means that 75% of his pre-disability income is the most he can receive from his LTD insurer. If this employee receives 50% income replacement from an automobile claim, his LTD insurer will only pay him 25% so that he is topped up to the maximum of 75% provided under his plan. If an employee receives 80% from the automobile claim, his LTD insurer will not pay him anything as he's already receiving more than the 75%.

But what happens if the employee's automobile claim doesn't get settled until later? Let's say he is totally disabled from January 2004 - January 2007 as a result of injuries from a car accident. The automobile claim is ongoing and no money has been received from that claim... so he is only getting the 75% from LTD. In June 2007, the employee and the driver of the car that injured him reach a settlement that includes replacing 100% of his lost income from January 2004 - January 2007. If the employee got to keep all of this money he would end up with 175% of his pre-disability income for that time. Instead, he is legally required to inform his LTD insurer of the settlement and, out of his settlement money, pay back all of the money LTD paid him. After paying LTD back, the employee still has settlement money leftover equivalent to the other 25% of his pre-disability income and that, plus the LTD he received, adds up to 100% replacement of his lost income.

Of course, the examples above are just to demonstrate how set-off works. In reality, the set-off calculations are never that simple.

***g. Disability Tax Credit***

A person eligible for long-term disability is not necessarily eligible for the Disability Tax Credit. This is the hardest test to meet, and requires that a person be quite seriously impaired. You do not need to meet this test to meet the test for LTDI, but a person in receipt of the credit can use it to assist with an appeal for LTDI benefits. A person is eligible for the disability tax credit from the CRA if they meet the following conditions:

§ A qualified practitioner must certify that hs/she has a qualifying impairment. A qualified practitioner is defined depending on the impairment:

<u>Impairment</u>	<u>Practitioner</u>
All impairments	medical doctor
Vision	optometrist
Hearing	audiologist
Walking, feeding, dressing or a	occupational therapist



### 3. Subrogation

When you apply for long term disability benefits through the carrier they will send you a package of forms, including a subrogation agreement. This agreement permits the insurer to claw back all or portions of your benefits where you are in receipt of income from other sources such as Canada Pension Plan Disability benefits, WSIB or other income replacement benefits (i.e. an employment pension plan). Some case law also suggests that other types of payments (severance) or categories of damages may also be subject to such clauses where the policy or subrogation agreement specifically provides for application to them.

For example, many subrogation agreements claim a contractual right to subrogate against any award you may receive from a third party (i.e. from a court action or settlement), including any award monies received for general damages, interest and legal costs. The broad reach of this agreement has been found to be contrary to the common law. The courts have repeatedly stated that the right to subrogation extends only to those damages awarded for lost income.

Sun Life, the carrier of the Federal Public Service LTDI plan, has taken the position that the subrogation agreement is a contract which cannot be modified and claims 75% of such awards.

However, LTDI insurers provide benefits for income replacement and therefore should only be entitled to subrogation against damages which are awarded for income replacement. They have no claim against funds awarded for general damages such as pain and suffering or re-training, interest, or legal costs, as the carrier through its long term disability benefits does not provide employees with any compensation for these losses.

In *Budnark v. Sun Life Assurance Co. of Canada*, [1994], B.C.J. No. 1960, Mr. Budnark was injured as the result of a motor vehicle accident which was not work related. He applied for and was granted disability benefits from 1986-1988 but was then denied further benefits. The court later determined that Mr. Budnark had continued to be totally disabled for another four years and was entitled to the amount of money representing the disability payments he should have received plus interest (\$95,550.04).

When Mr. Budnark took legal steps to have the declaratory judgment turned into a monetary judgment for the value of four years of LTD benefits, Sun Life counterclaimed and argued that, as a result of his lawsuit against the other driver, Mr. Budnark had already received more compensation than he was entitled to. Mr. Budnark had won \$84,000 for his loss of income up to the date of trial in 1989, as well as \$30,000 for

future loss of income.

The Court held that the event insured against under Budnark's Sun Life policy was loss of income and therefore Sun Life could not "throw into the pot any damages recovered" in a tort action, but rather could only subrogate those damages which relate to loss of income during the time period for which Sun Life provided benefits.

The Court further held that Sun Life could subrogate against the tort award for past loss of income as both the tort award and Sun Life's LTD benefits covered a specific time period – from the date of the accident until 1989. However, the tort award for future income loss, being speculative, could not be subrogated against as there was no way to know how much future income loss could ultimately result from the car accident.

The Court left the door open that where a tort award was premised on complete future unemployability, the period covered by the future loss of income award would be the same as the termination date of benefits under the disability policy (age 65) and therefore it is possible that an argument could be made that there was sufficient specificity for subrogation.

The Nova Scotia Court of Appeal reached a similar conclusion in *Ryan v. Sun Life Assurance Co. of Canada*, [2005], N.S.J. No. 24. Ms. Ryan was a federal public service employee who was injured as a result of a motor vehicle accident. She received LTD benefits through Sun Life and also received a global settlement in her lawsuit against the other driver. She received \$350,000 and the award was not separated out into different heads of damage. Sun Life argued that it was entitled, under the subrogation agreement, to recover against 75% of the entire \$350,000 for all past benefits paid and for any LTD benefits that might be payable in the future.

The Court reviewed the broad wording of the subrogation policy and found that even though Sun Life's intention was to word its subrogation agreement broadly enough to give it the right to all types of damages, this was not the shared intent of the parties and was not the intent of the LTD contract. The Court held that since the subrogation agreement began by referring to an employee's right of action against a third party for loss of income, only those damages awarded for loss of income could be subrogated against.

Sun Life tried to argue that the use of the term "general damages" later in the subrogation agreement meant all general damages. The Court found that the term "general damages" can have many meanings including damages for pain and suffering and loss of enjoyment of life but, in the context of an LTD contract was intended to refer only to damages for loss of income.

Sun Life, as it had in Mr. Budnark's case, tried to argue that it was also entitled to

subrogation against the part of the award provided for future loss of income. Again the Court did not accept this argument and held that the right to reimbursement or set off does not extend to benefits that accrue in the future but only to those benefits which were found to be payable at the time the tort award was made. Reimbursement to the insurer is a one time payment to reimburse for LTD benefits paid out or payable up until the date of the tort award.

The Courts have made it clear that Sun Life has no claim to funds awarded for anything other than income recovery.

**a. Subrogation and the obligation of good faith**

If, in a future case, Sun Life insists on using an overly broad subrogation agreement, an objection to the wording of the agreement should be raised at the earliest opportunity. It is inappropriate for Sun Life, or any insurer, to withhold benefits, leaving a disabled employee without any form of income replacement, until the wording of the agreement is resolved. Particularly in cases involving employees with psychiatric disabilities such as PTSD, anxiety or depression due care should be taken by the insurer to ensure that a dispute over the subrogation agreement does not exacerbate the employee's condition.

In the recent case of *Fidler v. Sun Life Assurance Co. of Canada*, [2006] S.C.J. No. 30 the Supreme Court awarded aggravated damages for mental distress on the basis that Sun Life should have known that denying Ms Fidler benefits would cause her significant distress, particularly as the purpose of a long-term disability insurance contract is to provide "peace of mind".

This case suggests that denying an employee benefits, and the resultant peace of mind, in order to pressure an employee to sign an overly broad subrogation agreement would be recognized by the Courts as an act of bad faith for which aggravated damages may be appropriate.

One important issue for employees to be aware of is that if they do decide to pursue legal action and claim for aggravated damages due to bad faith, they will need to demonstrate that the insurer's actions have caused stress and increased medical problems. In order to do so they must, as Ms Fidler did, put their health at issue thereby giving the insurer access to their medical file. However, it is highly likely that the insurer already has had access to the employee's medical file, particularly if he/she had to sue for benefits in the first place.

The impact of putting one's health at issue will differ depending on the original disability. Where an employee's disability is an anxiety disorder, and they are alleging that the insurer's bad faith conduct heightened their anxiety, medical records with respect to their mental health have already been disclosed to the insurer as proof of ongoing total

disability. However, where an employee's disability is physical in nature, they may find it overly intrusive to now have to disclose records with respect to their mental health and should be made aware of this consequence before pleading bad faith.

#### **4. When Benefits Have Been Denied: Internal Appeals to Insurers Vs. Court Actions**

##### ***Why You Might Prefer to Appeal***

It has been our experience that individuals have a much greater chance of being placed on periodic benefits if their evidence of disability is favourably re-considered in the context of an internal appeal. That said, where an insurer has demonstrated significant reluctance to recognize even an "own occ" entitlement, the chances of success in respect of these or "any occ" benefits are fairly slim unless compelling evidence of medical deterioration, or new diagnostic information is obtained in the interim.

The internal appeal process, if it works, can also be a quicker way to challenge a denial of benefits. However, where the insurer does not seem to have modified its initial position in any significant manner after one appeal, it may simply be a waste of time, (during which an individual can be without income and losing assets) to continue further on this path.

From a costs perspective, if you are a unionized employee, it is also more likely that you will still be able to count on union representation at this phase, minimizing or eliminating the need to retain independent legal counsel. If you are not unionized, and wish to represent yourself, the internal appeal process is somewhat less complex than navigating one's way through the court system. There are also risks of adverse costs awards against an unsuccessful plaintiff in a civil action for breach of contract.

##### ***When You Should Just Go Ahead and Sue***

If the insurer, after one internal appeal is still displaying significant distrust of the medical diagnosis or evidence in support of the applicable definition of disability under the policy, then it may be time to raise the stakes, and file a Statement of Claim for specific performance and/or damages for breach of contract; where appropriate, aggravated and punitive damages may be claimed as well. However, if the insurer is only asking for a few specific pieces of additional information before making its decision, it may be worthwhile staying within the internal process a while longer.

In Ottawa, the court process and the length of time it will take to move from claim to trial (if necessary), will vary depending on the amount being claimed for. Claims of 50 000 or

more are the most typical given the amount of income that most LTD claims are to replace. These will be “case managed” by the court and will be subject to strict timelines that can only be modified by the court “Master” and/or on consent of both plaintiff and defendant. An important procedural step that is accessible through this court process is mandatory mediation, and this is when the majority of our cases settle. It must take place within 90 days of the first defence being filed.

While cases often settle at this level, settlement will be less likely where the individual is not in receipt of CPP, or other benefits that would allow the insurer to offset its liability under the policy. The insurer will also ask that, where a CPP decision is outstanding, that any lump sum amount being discussed be discounted in accordance with likelihood of future success on such applications. The insurer will also ask that individuals access employer pension/retirement benefits as soon as possible, and again, discount any lump sum accordingly. Any amounts claimed for aggravated and punitive damages will only have minimal leveraging effects nor is it likely that an insurer would agree to characterize any damages agreed upon under those headings.

As mentioned above, it is not usual for the insurer to settle a claim by putting individuals back on periodic benefits. There are pros and cons to this. Statistics do indicate that when given a lump sum, individuals will tend to use up that money more quickly than if they had been accessing it over time. It may be wise for claimants to consult with an accountant or financial planner if a settlement of this kind seems likely. Those individuals can also advise as to RRSP entitlements through which some of the settlement monies may be sheltered.

An action for specific performance or breach of contract may take time to wind its way through the courts, and in the meantime the claimant is without a source of income. One way to address this is by bringing a motion for a mandatory injunction requiring the insurer to pay long term disability benefits until trial. The advantage to this course of action is that if the motion is successful the claimant will have an ongoing source of income. However, claimants should be aware that as part of such an order the Court will likely insist that the claimant promise to pay back all of the money if their action is ultimately unsuccessful at trial. A claimant who uses this money for monthly living expenses, and is later unsuccessful at trial will incur a debt, possibly of thousands of dollars, without any means to repay it. In addition, bringing a motion will likely increase the legal costs of the case. Nevertheless, where a claimant has a strong case, and is in immediate financial need, it may still be worthwhile to pursue a motion for mandatory injunctive relief.

In *El-Timani v. Canada Life Assurance Co.* [2001] O.J. No. 2648, Justice Molloy held that the appropriate test for a mandatory injunction is the same as for any interlocutory injunction; the person bringing the motion must meet a three-stage test:

1. The plaintiff must demonstrate that irreparable harm will occur if the injunction is not granted. Irreparable harm is harm that cannot be undone by paying damages later on;
2. The plaintiff must demonstrate that the balance of convenience favours granting the injunction; and
3. The plaintiff must demonstrate that there is a serious issue to be tried, in other words, whether the plaintiff is likely to be successful at trial.

Mr. El-Timani was cut off benefits after a medical report stated that he was well enough to pursue training for a new career. Mr. El-Timani challenged this report and produced several other medical reports which indicated that he was still totally disabled. The loss of Mr. El-Timani's benefits cut his family income in half and left he, his wife, and their small child living in poverty.

Canada Life Assurance Co. argued that there was no irreparable harm because, if it was determined at trial that Mr. El-Timani was entitled to disability benefits, he would be paid the full amount owing and therefore the harm could be undone by paying damages. Justice Molloy disagreed; he held that the facts showed that Mr. El-Timani had no other assets he could turn to to provide a reasonable standard of living and that the harm caused by living in poverty for months or years was not simply a monetary harm that could be undone.

Canada Life also argued that the balance of convenience favoured the insurer because, even if Mr. El-Timani promised to pay everything back if he was unsuccessful at trial, this would be an empty promise as Mr. El-Timani had no money and therefore there was a real risk that the insurer would never get its money back. Justice Molloy agreed that this was a serious risk but found that this risk was a financial one and was not significant enough to interfere with the company's financial well-being. When comparing the harm Mr. El-Timani and his family would suffer if the injunction was not granted, and the harm the insurer would suffer if the injunction was granted, Justice Molloy found that the balance of convenience favoured Mr. El-Timani.

Finally, Justice Molloy considered whether there was a serious issue to be tried. He found that there was little evidence to support the insurer's decision to cut off Mr. El-Timani's benefits. He found that the insurer had distorted the report it relied on, which did not actually say that Mr. El-Timani was no longer totally disabled. Justice Molloy held that the plaintiff demonstrated a strong position on the merits, which was supported by extensive medical evidence.

Justice Molloy granted the mandatory injunction and ordered that the defendant reinstate the plaintiff's benefits. Justice Molloy recognized that his Order constituted extraordinary relief and therefore made the Order subject to review by the Court after six months and also ordered that the entire action be transferred to Case Management to

ensure that the main case on the merits was heard as quickly as possible. Justice Molloy did not make an order for back payments as back payments were an issue to be determined at trial.

In a subsequent case, *Ausman v. Equitable Life Insurance Co. of Canada*, [2002] O.J. No. 3066, Justice Henderson, relying on the above decision, also granted the motion. Using the same three-part test he held that purpose of disability insurance is not only to provide money, but to provide a safety net and that the loss of this safety net, and the resulting poverty constitute irreparable harm. Justice Henderson found that while the balance of convenience was neutral as the claimant's stronger financial need was offset by his inability to repay the insurer if the claimant lost at trial.

Finally, Justice Henderson made a distinction between other injunctions, where the Court is being asked to stop a party from taking action, and mandatory injunctions, where the Court is being asked to force a party to perform a particular action. He held that for a mandatory injunction to succeed there must be more than just a serious issue to be tried, there must be a "significant prospect of succeeding at trial".

Equitable Life sought, and was granted, leave to appeal to the Divisional Court, [2002] O.J. No. 3067, but did not pursue the appeal. However, a similar case was appealed to the Divisional Court: *Traynor v. Unum Life Insurance Co. Of America*, [2003] O.J. No. 2252.

Mr. Traynor suffered from chronic fatigue syndrome but was denied benefits. Rather than pursuing an internal appeal, Mr. Traynor brought an action in Ontario Superior Court. The Divisional Court identified the same three-part test for granting a mandatory injunction as had been used in the earlier cases but the majority disagreed with the motions Judge as to the result in this case.

The motions Judge had adopted similar reasoning to that of the judges in *El-Timani* and *Ausman* and found that the poverty, social stigma, and loss of dignity that the Plaintiff would suffer constituted irreparable harm. A majority of the Divisional Court found that there was insufficient evidence to conclude that the Plaintiff had suffered or would suffer any economic hardship as a result of being denied benefits.

In a strongly worded, and lengthy, dissent Justice Kurisko argued that the mandatory injunction should have been granted. Justice Kurisko noted that numerous different physicians, including several specialists, had each reached the independent opinion that the Plaintiff suffered from chronic fatigue syndrome. Justice Kurisko found that the insurer had set an impossibly high standard of conclusive proof of disability, a standard which is even higher than the criminal standard of proof beyond a reasonable doubt, and that requiring such an impossibly high standard before paying any disability benefits was an act of bad faith. Justice Kurisko found that there was therefore a significant

prospect of succeeding at trial.

Justice Kurisko also found that the Plaintiff's affidavit did provide sufficient evidence to conclude that the Plaintiff was in dire financial circumstances as a result of being denied benefits, and that these circumstances would continue to worsen if the injunction were not granted and therefore there was irreparable harm.

Justice Kurisko noted that not only had the motions Judge granted the mandatory injunction and ordered that the insurer pay Mr. Traynor disability benefits, but Justice Keenan, the Judge who granted the leave to appeal to the Divisional Court, had also found sufficient reason to Order that the insurer continue making disability payments until the appeal could be heard.

While the majority of the Divisional Court granted the appeal, and denied the injunction, they did so on the specific facts of the case and did not reject the reasoning used, or conclusions reached, in either the *El-Timani* or *Ausman* cases. The interim remedy of mandatory injunction is therefore still available but plaintiffs will have to take care to ensure that their motion materials clearly set out their immediate economic need and the negative consequences if that need is not met. Plaintiffs will also need strong medical evidence to demonstrate that they are likely to succeed on their claim at trial.

In addition to providing some financial relief, a successful motion for a mandatory injunction can also encourage an insurer to settle the entire claim as, by granting the injunction, the Court has signaled that the plaintiff appears to have a strong case for trial.

## **5. Union Assistance - Arbitrability of LTD issues**

When the workplace is unionized, almost all issues need to be resolved at arbitration, pursuant to the leading Supreme Court of Canada decision in *Weber* and subsequent jurisprudence. One question, therefore, becomes whether or not the denial of LTDI benefits should be pursued as a court action against the insurer or through grievance arbitration against the employer. In determining whether or not one should sue the LTDI carrier or grieve, the issue depends on what type of language is in the Collective Agreement.

There are four categories that represent types of provisions that may appear in a Collective Agreement, as described in *London Life Insurance Co. v. I.W.A. Canada, Local 2693 et al.* (2000), 190 D.L.R. (4<sup>th</sup>) 428 (*London Life*) which are as follows:

- i. Where the Collective Agreement does not set out the benefit sought to be enforced, the claim is inarbitrable (ie. the benefit plan is free standing and is not mentioned in the Collective Agreement) and the matter can be enforced through a court action against the insurer.

- ii. Where the Collective Agreement stipulates that the employer is obliged to provide certain medical or sick-pay benefits, but does not incorporate the plan into the agreement or make specific reference to it, the claim is arbitrable. If the employer does not provide the benefits pursuant to the Collective Agreement, the omission will give rise to a breach of the Collective Agreement which can be grieved.
- iii. Where the Collective Agreement only obliges the employer to pay the premiums associated with an insurance plan, the claim is inarbitrable. A grievance may occur for not providing the obligation or paying the premiums, but not for a failure to provide benefits. The failure to provide benefits must be litigated against the carrier through the courts.
- iv. Where the insurance policy is incorporated into the Collective Agreement, the claim is arbitrable. This occurs when all or part of a specific plan or policy is incorporated into the language of the Collective Agreement. If so, it becomes part of the Collective Agreement and can be grieved if these benefits are not provided for. Clear language is required to effect incorporation, however.

In cases where the employer contracts with the insurance company to merely administer the policy and not to provide benefits (ie. benefits are paid by the employer, and the insurance company's role is to determine eligibility), it appears that a civil action brought by an employee against the insurance company would appear to be limited to a tort claim, as an administrative services contract (ASO) is not a contract of insurance, as was found in the case of *Re Consumer Glass and A.B.G.W.I.U., Loc. 269G* (Nairn, unreported, 1997).

In cases where the matter is arbitrable (ie. situations i and iv), a Union should step in and grieve the failure of the employer to provide the benefits listed or the premiums. Unions have a duty to represent their members in breaches of the Collective Agreement. Some Unions have provided assistance beyond this duty and will actually assist members with their actions or appeals against the insurance carrier. Considering the high cost of litigation, this is a great benefit to the members of these unions, who may otherwise not have the finances to pursue their claims.

## **6. Punitive and Aggravated Damages in LTDI Claims**

### **a. *In the Courts***

A plaintiff's right to aggravated damages has already been touched upon above in the section regarding subrogation and good faith. There, we discussed the recent SCC decision in *Fidler*, the "peace of mind" character of LTD contracts, and the factual bases upon which the court relied in awarding aggravated damages.

In *Asselstine v. Manufacturers Life Insurance* [2005] B.C.J. No. 1152, 2005 BCCA 292 the court also discussed average amounts for such damages, between 10-20,000\$, in assessing whether the amount of 35,000\$ was too high in that case. Thus plaintiffs should not expect significant amounts under such claims, even where the facts are compelling. The court also acknowledged, however, that "awards of aggravated damages are now commonplace whenever claims for benefits on what are characterized as "peace of mind contracts", like long term disability insurance policies, are wrongly denied. The award provides compensation for mental distress which will usually be a consequence of a breach of contracts of that kind"

In respect of punitive damages, *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595, a case involving the wrongful rejection of an insurance claim, such damages were awarded in the context of a breach of a contract, because there was conduct which constituted an "independently actionable wrong". Where it exists, a breach of good faith will constitute the requisite independent wrong when an insurance claim has been wrongly rejected. That is because a breach of good faith is independent of and in addition to the breach of a duty to pay the loss (*Whiten* at para. 79. )

Further, in *Asselstine*, supra, the court noted that an obligation to exercise good faith is implied in contracts of insurance. It requires an insurer to assess claims promptly and fairly. In *702535 Ontario Inc. v. Non-Marine Underwriters, Lloyd's of London* (2000), 184 D.L.R. (4th) 687 (Ont. C.A.), the obligation was described as follows:

[27] The relationship between an insurer and an insured is contractual in nature. The contract is one of utmost good faith. In addition to the express provisions in the policy and the statutorily mandated conditions, there is an implied obligation in every insurance contract that the insurer will deal with claims from its insured in good faith: *Whiten v. Pilot Insurance Co.* (1999), 42 O.R. (3d) 641, 170 D.L.R. (4th) 280 (Ont. C.A.). The duty of good faith requires an insurer to act both promptly and fairly when investigating, assessing and attempting to resolve claims made by its insureds.

In terms of quantum, post *Whiten*, and then later with the lower court decision in *Keays and Honda* it seemed that the courts were suddenly anxious to make significant damage award (one million and 500 thousand respectively) against deep pocket defendants guilty of bad faith conduct. However, this has sparked some say an unwarranted increase in the frequency of punitive damages claims and the courts are showing signs that, while still willing to grant such damages, the quantum may be less than expected (eg. *The Honda* was significantly reduced on appeal).

**b. At Arbitration**

The availability of punitive and aggravated damages at arbitration has been the subject of recent debate. In a 2004 decision in *OPSEU v. Seneca College of Applied Arts & Technology*, the Divisional Court of the Ontario Superior Court, relying on recent decisions of the Supreme Court of Canada, held that an arbitrator does have jurisdiction to award aggravated and/or punitive damages in a dispute arising from a Collective Agreement. Based on this decision the parties in *Re City of Toronto and Canadian Union of Public Employees, Local 79*, 144 L.A.C. (4th) 350(2005) both conceded that their arbitrator had the authority to award aggravated and/or punitive damages and focused their submissions on whether such damages were warranted in that case.

*OPSEU v. Seneca* has since been overturned by the Ontario Court of Appeal, but was overturned based on the related issue of whether the Divisional Court should have altered the decision of the original arbitration board in the case. While the Court of Appeal did not make a determination on whether arbitrators have any authority to award aggravated and/or punitive damages, the decision has been interpreted to mean that arbitrators only have such authority if it can be rooted somehow in a clause of the relevant collective agreement. For example, in *Re Canvil and International Association of Machinists and Aerospace Workers, Lodge 1547*, 152 L.A.C. (4th) 378 (2006), Arbitrator Marcotte denied the grievor aggravated and punitive damages on the basis that:

there is no provision in the parties' collective agreement "that would ground such extraordinary jurisdiction" *Re O.P.S.E.U., supra*, to award aggravated and punitive damages to the grievor. Accordingly, I am bound by the decision of the Court of Appeal. I find, therefore, that I do not have the jurisdiction to award the grievor aggravated and punitive damages in the instant case.

On November 16, 2006, OPSEU's application for leave to appeal to the Supreme Court of Canada was dismissed.

**7. Additional Issues- Assigning present day values to future benefits and tax implications of periodic versus lump sum amounts.**

An individual's entitlement to Past LTDI benefits is relatively easy to quantify as the benefit amount period is defined, subject only to any additional amount for lost interest. However, one's entitlement to future benefits is more difficult to calculate. It will likely be discounted to account for any negative effect the disability may have on lifespan, and, where it is paid as a lump sum, further discounted to minimize any potential financial gains that might be associated with getting a future entitlement "early". On the other hand, the benefits should also be grossed up slightly to account for projected cost of

living increases.

It is also important to understand the tax implications associated with both court awards for damages and negotiated settlements. There are different categories of “damages” and these categories can include a variety of sub-categories of harm compensated for. For example, “general damages” can include both a non-taxable amount for pain and suffering, and potentially taxable amounts for LTDI benefits which may or may not be construed as “income from employment” for the purposes of the *Income Tax Act*. Thus, when a judge grants an award of 100,000 for general damages, it may be difficult to assess what portion, if any of that amount is taxable. Similarly, in settlement negotiations, in order to push parties to settlement, it may be tempting to characterize amounts paid out as lump sum general damages, in the assumption that such amounts will not be taxed, only to find out later that the Canada Revenue Agency doesn’t agree with their characterizations.

Generally speaking, when an employee receives LTD benefits, they are not taxable where the employee has paid 100% of the LTD premiums (s.6(1)(a) of the *Income Tax Act*). However, if the employer paid all or part of the LTD premium, and the benefits were payable on a periodic basis, they would be taxed. (s.6(1)(f)).

So, if periodic benefits would have been taxed under 6(1)(f) what happens when such benefits are paid as a lump sum, especially where amounts for both past and future benefits have been grouped together? The Supreme Court decision in *Tsiapralis v. Canada* has shed some light on this matter in finding that where a) at least a portion of the payment intended to replace income and b) that amount of replaced income would have been taxable in the recipient’s hands, the latter amount is taxable even though it may be said that the lump sum payment was also paid to release the payor from other legal liabilities, and despite the fact that such payment was neither a “periodic payment” nor made strictly ‘pursuant to a disability insurance plan’. What the court has not yet found, is that amounts for future benefits should be taxed as capital gains.<sup>2</sup>

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