

BENEFIT STACKING AND INTEGRATION

A BRIEFING PAPER

ISSUE

This is one of several briefing papers the Policy and Regulation Development Bureau is preparing on topics which may fall within the terms of reference of the Royal Commission.¹ This paper discusses the issue of benefit “stacking” and “integration” in the workers’ compensation system.

INTRODUCTION

The Workers’ Compensation Board pays, or provides for, benefits under the *Workers Compensation Act* to workers who experience occupational injuries or diseases or, in the case of fatalities, to certain survivors.² Benefits for workers include compensation for temporary disability³ and permanent disability,⁴ vocational rehabilitation assistance⁵ and health care services.⁶ Benefits for survivors include funeral expenses and monthly payments,⁷ as well as training

¹ The purpose of these papers is to orient the Commission or others to some major issues. The WCB does not expect the Commission to make decisions on the basis of these documents. Rather, the Commission will make its own inquiries.

The papers do not pretend to cover all the issues that the Commission or others might raise. The general nature of the papers also means that they cannot include detailed discussion of all the issues. There may be relevant factors that are omitted with regard to some issues. The explanations of some matters may be less than would be desired if the issues were being considered for decision.

The papers refer to sources of additional information where known. There has been no attempt to exhaustively research all the issues. The papers do not include recommendations for resolving issues or take a position with respect to them. They may discuss known alternatives, particularly when other jurisdictions have adopted them.

² The BC *Workers Compensation Act* provides compensation for “dependants” of deceased workers. However, other legislation, such as the *Canada Pension Plan*, provides compensation for “survivors”. The term “survivors” is used in the paper for consistency. Where “survivor” is used in the BC context, it refers to “dependants” as defined in the BC *Act*.

³ See Sections 29 and 30 of the *Workers Compensation Act*, RSBC 1979, c. 437 (the *Act*), copies attached in Appendix “A”, and Chapter 5 of the *Rehabilitation Services and Claims Manual*. The WCB now commonly refers to “temporary disability” as “short term” disability.

⁴ See Sections 22 and 23 of the *Act*, copies attached in Appendix “A”, and Chapter 6 of the *Rehabilitation Services and Claims Manual*. The WCB now commonly refers to “permanent disability” as “long term” disability.

⁵ See Section 16(1) of the *Act*, copy attached in Appendix “A”, and Chapter 11 of the *Rehabilitation Services and Claims Manual*.

⁶ See Section 21 of the *Act*, copy attached in Appendix “A”, and Chapter 10 of the *Rehabilitation Services and Claims Manual*.

⁷ See Section 17 of the *Act*, copy attached in Appendix “A”, and Chapter 8 of the *Rehabilitation Services and Claims Manual*.

for surviving spouses and counselling and placement services for other survivors.⁸

Workers and survivors may also be entitled to benefits from other sources for the same work-related disablement or death. These other sources include the *Canada Pension Plan*, employment-related benefits, insurance plans purchased privately by the worker and various statutory benefit schemes.

When a worker or survivor receives benefits from two or more sources without any adjustment to reflect the existence of other benefits, there is said to be “stacking” of the benefits. When one benefit is reduced to take into account the receipt of a benefit from another source, there is said to be “integration” between the two types of benefits.

For example, in BC, compensation paid to injured workers under the *Workers Compensation Act* is “stacked” with disability benefits paid under the *Canada Pension Plan*. On the other hand, monthly payments to surviving spouses and children under the *Workers Compensation Act* are “integrated” with the monthly surviving spouse and child benefits under the *Canada Pension Plan*.⁹

The question arises when, if at all, benefits should be “stacked” and when, if at all, benefits should be “integrated”.

CANADA PENSION PLAN

1. Background

The *Canada Pension Plan* became law on April 3, 1965 and was proclaimed in force on May 5, 1965. It covers all employees and self-employed persons between the ages of 18 and 70 with annual earnings over \$3,500, except residents of Quebec. (Quebec has its own *Quebec Pension Plan* which is similar to the *CPP*.) The *Canada Pension Plan* is financed by compulsory contributions from workers and their employers and by interest on accumulated *Plan* reserves.

In 1996, 9.7 million workers paid into the *CPP* and 3.6 million persons received benefits from the *CPP*.¹⁰ Those benefits consisted of retirement benefits,

⁸ See Section 16(2) and (3) of the *Act*, copy attached in Appendix “A” and #91.00 of the *Rehabilitation Services and Claims Manual*.

⁹ See Section 17(3) of the *Act*.

¹⁰ See “SECURING THE CANADA PENSION PLAN - Agreement on Proposed Changes to the *CPP*”, February, 1997.

disability benefits and survivor benefits. *CPP* benefits are taxable income under the *Income Tax Act*.¹¹

(a) Retirement benefits

CPP retirement pensions are paid monthly to all workers who have contributed to the *Plan*.¹² The normal eligibility age is 65. Reduced benefits are available as early as age 60, and increased pensions are available up to age 70. The pension replaces up to 25% of average earnings. The maximum monthly pension in 1997 is \$736.81.

(b) Disability benefits

CPP disability benefits are payable to contributors under age 65 who have a "severe and prolonged" mental or physical disability and have made sufficient contributions to the *Plan*.¹³ A disability is "severe" if the contributor is incapable regularly of pursuing any substantially gainful occupation. A disability is considered "prolonged" if it is determined that the disability is likely to be long continued, of indefinite duration or is likely to result in death. ("Disability" under the *Canada Pension Plan* corresponds roughly to "permanent" or "long term" disability under the *Workers Compensation Act*.)

The disability benefit consists of two components - a flat rate benefit plus an earnings-related component equal to 75% of the amount of the worker's retirement pension. The 1997 maximum monthly *CPP* disability benefit of \$883.10 consists of a flat rate of \$330.49 and a maximum \$552.61 earnings component. The earnings-related component is an individual calculation that depends upon a worker's pensionable earnings over the period of contribution.

A "disabled contributor's child's benefit" may also be payable to the children of a disabled contributor.¹⁴ The 1997 benefit is \$166.63 for each child.

¹¹ See Section 56(1)(a)(i)(B) of the *Income Tax Act*, RSC 1985, c. 1 (5th Supp.).

¹² See Sections 44(1)(a) and 46 - 54 of the *Canada Pension Plan*, RSC 1985, Chap. C-8, CCH Canadian Limited, *Canadian Employment Benefits and Pension Guide Reports*, (Don Mills, Ontario: CCH Canadian Ltd., 1997) pp. 1009 and 1010, and "SECURING THE CANADA PENSION PLAN - Agreement on Proposed Changes to the CPP", February, 1997

¹³ See Sections 42(2)(a), 44(1)(b) and 56 of the *Canada Pension Plan*, RSC 1985, Chap. C-8, CCH Canadian Limited, p. 1053 - 1055, 1057, and "SECURING THE CANADA PENSION PLAN.

¹⁴ See Sections 44(1)(e) and 59 of the *Canada Pension Plan*, RSC 1985, Chap. C-8, CCH Canadian Limited, p. 1079 and "SECURING THE CANADA PENSION PLAN.

(c) Survivor benefits

CPP survivor benefits are paid to the deceased contributor's estate, surviving spouse and dependent children. There are three categories:

- (i) Death benefit¹⁵ - a one-time payment to, or on behalf of, the estate of a deceased *CPP* contributor equal to six months of retirement benefits, to a maximum of \$3,580 in 1997.
- (ii) Surviving spouse's benefit¹⁶ - a monthly benefit paid to the surviving spouse of a deceased contributor. Maximum 1997 benefit for individuals under age 65 is \$405.25 each month; for those over 65 it is \$442.09.
- (iii) Children's benefit¹⁷ - a monthly benefit for dependent children of a deceased contributor. Maximum 1997 benefit is \$166.63 each month, payable to age 18, or during periods of full-time school attendance to age 25. This benefit is also provided in respect of children of disabled contributors.

2. Consideration of Stacking and Integration of *CPP* by BC Royal Commissions/ Review Committees

The *Canada Pension Plan* was enacted during the inquiry by the Tysoe Royal Commission but before the Tysoe Report was issued. Employers made representations that workers' compensation payments be reduced by the extent of the *CPP* benefits. Not having heard the views of labour, Tysoe declined to make any recommendation.

The Report did, however, contain some preliminary discussion. It cited¹⁸ its earlier statement that, although the workers' compensation scheme was not designed to be a social welfare measure:

The time may come when it will be integrated with a broad system of social security, but it is my feeling that its purpose is so different to that of a social welfare scheme that it ought not to be completely swallowed up in such a scheme. I think that it would be undesirable from the standpoint of accident prevention alone.

It then went on to say that:

¹⁵ See Sections 44(1)(c) and 57 of the *Canada Pension Plan*, RSC 1985, Chap. C-8, CCH Canadian Limited, p. 1089, and "SECURING THE CANADA PENSION PLAN.

¹⁶ See Sections 44(1)(d) and 58 of the *Canada Pension Plan*, RSC 1985, Chap. C-8, CCH Canadian Limited, p. 1035 - 1037, and "SECURING THE CANADA PENSION PLAN.

¹⁷ See Sections 44(1)(f) and 59 of the *Canada Pension Plan*, RSC 1985, Chap. C-8, CCH Canadian Limited, p. 1079 and "SECURING THE CANADA PENSION PLAN.

¹⁸ See Charles W. Tysoe, *Report of the Commissioner* (Victoria, BC: Queen's Printer, 1966) p. 69.

... I think it only right and proper that I should say that the principles on which workmen's compensation is founded, and which will be found stated in various places in this Report, are such that, as presently advised, I would find it difficult indeed to conclude that no consideration at all should be given to the entitlement to benefits under the Canada Pension Plan. I think that subject is one that should be given close study.

The BC *Workers Compensation Act* currently does not "integrate" compensation benefits paid to workers under the *Act* with disability benefits paid under the *Canada Pension Plan*. However, in 1974, when the *Act* was substantially amended to create a new system for compensating survivors, "integration" with *CPP* surviving spouse and child benefits was included in the legislation.¹⁹

The explanatory notes accompanying the 1974 amendments and debates of the Legislative Assembly provide no material information regarding the decision to "integrate" survivors' benefits. However, WCB files contain various documents that appear to relate to the 1974 amendments. A document entitled "speech notes for minister" contains the following passage:

Section 17 contains some fundamental changes. Under the present Act, workmen's compensation is recognized as a system of income insurance (not welfare) in that the compensation payments to a disabled worker are related to his pre-accident earnings. But when a worker is killed, his survivors receive allowances of fairly low flat rates. The amendments remove that inconsistency by making the allowances payable to survivors earnings-related.

Workmen's compensation operates nowadays not alone but in the context of a range of other compensation systems. We must look not simply at the effect of this system in isolation, but at the effect on people of the total package. Thus in increasing the benefits for survivors, the amendments do not aim at a level that would be satisfactory in isolation, but aim at a level which, when combined with benefits under federal systems, will result in a level of total compensation income that is satisfactory.

... in switching from flat rates to an income insurance principle, we must not go too far. Public confidence and support for social insurance systems can be lost if changes go so far as to result in over-compensation. This is one reason why federal benefits are considered in setting the levels of compensation for survivors.

¹⁹ See "COMPENSATION AND DEATH OF A WORKER", a briefing paper forwarded to the Royal Commission by the Policy and Regulation Development Bureau in December, 1996, for a discussion of dependants' benefits generally, including an explanation of the 1974 amendments.

3. Consideration of Stacking and Integration of *CPP* by Royal Commissions/Review Committees in Other Jurisdictions

Reports from various Royal Commissions and Review Committees in other jurisdictions outline some of the arguments for and against “integrating” *Canada Pension Plan* benefits with workers’ compensation benefits. In these reports, “Integration” has been viewed as deducting *CPP* benefits from workers’ compensation.

In Ontario, the 1967 McGillivray Royal Commission Report²⁰ noted that, at the time the first workers’ compensation statute came into effect, there was very little legislation “of the kind that has come to be known as the welfare type”. In the intervening years, a great amount of such legislation had been enacted. The Report recognized a need for a comprehensive review by all government authorities concerned to coordinate measures of relief and prevent overlapping of benefits.

The Report noted the compensation provided by the original Meredith Report and stated:

If, in addition, he [i.e., the worker] receives the allowances I have mentioned in the above illustrations he will be in receipt of more compensation than by its scheme the Act was intended to provide. In so far as the additional allowances under the Acts which I have mentioned are made possible by the taxation of industry it would appear reasonable that their effect should be considered when computing compensation under The Workmen’s Compensation Act.

The Report recommended that:

... section 45(1) of the Act should be amended ... to allow the Board, when fixing the amount of compensation, to take into account ... one-half of the benefits payable under the Pension Act [i.e., the Canada Pension Plan].

The recommendation was not, however, accepted by the Ontario government at that time.

In January, 1980, the Ontario Ministry of Labour retained Professor Paul Weiler of Harvard University to undertake a comprehensive review of the Ontario

²⁰ See George A. McGillivray, Report of the Royal Commission In the Matter of the Workmen’s Compensation Act (Toronto, Ontario: sn, 1967) pp. 23 - 30.

workers' compensation legislation. In November, 1980, Professor Weiler delivered his report which recommended major changes to the benefit system.²¹

The report recommended that *CPP* benefits be integrated with workers' compensation benefits:

... I observe that one hurdle to rationalizing workers' compensation for everyone has been recognition of the availability of this federal payment. I assume that workers' compensation should and will be improved to provide essentially full compensation for all net disposable income lost due to occupational injuries. As well, I believe it is fallacious to assume a radical difference in the source of funds for these two programs. Eventually both come out of the pockets of the active work force, who sacrifice some of their potential income to provide for the needs of their disabled fellows. Granting those assumptions, the aim of public policy must be to integrate rather than pyramid the two types of benefits, whatever the criteria of each plan, whichever be the government that created it. In this fashion, we will achieve full compensation for disabled workers - but not over-compensation. The Canada Pension Plan is intended to establish a minimum floor for all Canadian workers. It is appropriate, then that provincial workers' compensation serve as the last insurer which makes up the remaining income losses. There are certain technical problems in insuring that the Canada Pension Plan benefit is actually paid before allowance is made for it by the Workers' Compensation Board in calculating its benefit; however, I am satisfied that this verification will not be difficult. Hence I propose as an additional refinement in the benefit structure of workers' compensation that *CPP* disability benefits be deducted from the *WCB* benefit.

Weiler also recommended integration between the *CPP* survivorship benefit and spousal workers' compensation benefits. Both recommendations were accepted by the Ontario government.

A similar conclusion had been reached earlier in 1980 by the New Brunswick Workers' Compensation Study Committee:²²

A wage loss security program must be based on the objective of maintaining the individual's income in the same ratio to the Industrial Composite after the injury as he/she was receiving before the injury and/or subsequent re-occurrence. To achieve this end,

²¹ See Paul C. Weiler, Reshaping Workers' Compensation for Ontario (Toronto, Ontario: Ontario Government Bookstore, 1980) pp. 40, 41 and 48.

²² See Report of the Workers' Compensation Study Committee (Fredericton, New Brunswick: the Committee, 1980) pp. 106, 107.

it is essential that continuing compensation benefits be integrated with other elements of the social security system. A system based on wage loss security cannot ignore the necessity of including in its calculations the fact that workers' compensation does not provide the only benefits to which a worker may be entitled. The primary areas for integration are the Canada Pension Plan, the income tax system, as this relates to net (after-tax) income but not to taxation of benefits, and other post-retirement benefits.

For example, the Canada Pension Plan has been in operation since 1966. One element of this program is a disability pension, which is payable to workers who suffer, through accident or disease, a severe and prolonged disability. Eligible persons receive a benefit based upon their contributions and while, at its minimum, this benefit is far too low to provide income security on its own, when it is considered in combination with a benefit payable under compensation, this can result in a worker, who establishes eligibility under both programs receiving income in excess of what was received before the injury. This situation, common and accepted under the present system, is unacceptable under the wage loss security system, as are the same effects produced by other public benefit programs. Therefore, this Committee recommends that:

payments under the wage loss security system be integrated with benefits payable under the Canada Pension Plan and/or Old Age Security programs.

The Committee wishes to emphasize that this integration is only possible within a wage loss security system. The present system cannot readily accommodate such change and the problems of integration in the present system far outweigh any conceivable advantages.

The Committee's recommendations for both a "wage loss security system" and "integration" were accepted by the New Brunswick government.²³

"Integration" between *CPP* and workers' compensation benefits was also established in Saskatchewan in the early 1980s. In 1986, however, the Saskatchewan Review Committee recommended that "integration" with respect

²³ In October, 1996, the New Brunswick Commission circulated a discussion paper that outlined various changes including a proposal that the offset for CPP Disability Benefits be set at 50% of benefits received in recognition of the 50% worker contribution to the CPP program.

to survivor benefits under the *CPP* cease.²⁴ In 1992, the Saskatchewan Review Committee recommended that “integration” for both workers’ and survivors’ benefits cease.²⁵ A similar recommendation was made by the most recent Saskatchewan Review Committee as well.²⁶ To date, the recommendations have not been accepted by the Saskatchewan government.

In 1987, the Manitoba Review Committee foresaw a number of problems with respect to “integration”:

- *CPP* was jointly funded by workers and employers while workers’ compensation was employer funded.
- *CPP* paid only in severe disability cases resulting in difficulties in rationalization between two benefit schemes.
- *CPP* disability did not consider cause when determining entitlement. In cases involving multiple conditions, some work-related and some not, it might be difficult to apportion responsibility.
- *CPP* was fully taxable, while workers’ compensation was not.
- There were problems in obtaining information from *CPP* regarding the benefits being paid.
- Workers’ compensation was income based according to income, but not family size, while *CPP* paid a basic amount to a disabled worker and thereafter considered whether there was a family to provide for.
- *CPP* payments could vary over time rather considerably. How could the WCB keep track of changes in entitlement?
- Delays in payment from *CPP* might result in significant repayment problems for the WCB. *CPP* was not payable until 3 months after the injury and required longer after that to make the decision and first payment. The compensation system, in the meantime, if required by law to deduct the money, faced the option of either deducting for *Canada Pension Plan* before it was received by the worker, or trying to confiscate the entire retroactive award once it reached the worker.

The Manitoba Committee could only envisage integration succeeding if cooperation between the provinces and the Federal government took place at the administrative level and if program design changes were jointly agreed upon. (The Manitoba Legislature, however, has since amended the Manitoba statute to provide for “integration” of workers’ benefits.)

²⁴ See Report of the Workers’ Compensation Act Review Committee (Regina, Saskatchewan: Workers’ Compensation Act Review Committee, 1986) p.26. Little explanation was provided in this or subsequent Committee reports regarding the recommendations to eliminate “integration”.

²⁵ See Report of the Workers’ Compensation Act Review Committee (Regina, Saskatchewan: Workers’ Compensation Act Review Committee, 1992) p.31.

²⁶ See Report of the Workers’ Compensation Act Committee of Review (Regina, Saskatchewan: Workers’ Compensation Act Review Committee, 1996) p.53.

More recently, a majority of the Newfoundland 1991 Workers' Compensation Statutory Review Committee did recommend that all workers' compensation benefits be net of *Canada Pension Plan* benefits.²⁷ The recommendation was accepted by the Newfoundland government.

4. Cross Jurisdictional Comparison

The following table shows, by jurisdiction, whether workers' benefits and survivors' benefits are "stacked" or "integrated" with *Canada Pension Plan* (and sometimes *Quebec Pension Plan*) benefits in each Canadian jurisdiction.²⁸ "Integration" is achieved by deducting all or a portion of *CPP* benefits from workers' or survivors' compensation.

Jurisdiction	Workers' Benefits	Survivors' Benefits
BC	Stacked	Integrated ²⁹
Alberta	Stacked	Stacked
Saskatchewan	Integrated ³⁰	Integrated ³¹
Manitoba	Integrated ³²	Stacked
Ontario	Integrated ³³	Integrated ³⁴

²⁷ See 1991 Workers' Compensation Statutory Review Majority Report (St. John's, Newfoundland: The Committee, 1991) p.44.

²⁸ Except for Quebec, if there is no mention in a jurisdiction's statute of deducting CPP/QPP payments, it has been assumed that workers' compensation benefits and Canada Pension Plan benefits are "stacked". If CPP/QPP benefits are to be deducted from workers' compensation benefits, the table shows the benefits as "integrated". In the case of Quebec, "integration" of workers' benefits is provided by the Quebec Pension Plan legislation. However, there does not appear to be integration of survivors' benefits under the QPP.

²⁹ See Section 17(3) of the *Act*.

³⁰ See Section 99 of the *Workers' Compensation Act*, 1979, SS 1979, c. W-17.1. After 12 months of loss of earning capacity, 50% of any benefits paid under CPP/QPP are treated as wages that the worker is capable of earning in calculating compensation for loss of earning capacity.

³¹ See Section 99 of the *Workers' Compensation Act*, 1979, SS 1979, c. W-17.1. After 12 months, 50% of any survivor benefit paid under CPP/QPP is offset.

³² See Section 41 of the *Workers' Compensation Act*, RSM 1987, c. W200. In determining the amount that a worker is capable of earning after the accident, the Board is required to include any taxable "collateral benefit" that the worker is entitled to receive as a result of the injury. The resulting wage loss benefits are then decreased by the amount of any non-taxable "collateral benefit" the worker is entitled to receive as a result of the injury. "Collateral benefits" are defined as benefits under CPP, QPP, UIC and a policy of disability insurance, any payment by the workers' employer and any statutory benefit prescribed by regulation.

³³ See Sections 37(3) and 43(7) of the *Workers' Compensation Act*, RSO 1990, c. W.11. This provision may be interpreted as being discretionary. However, Ontario does "integrate" in practice. Bill 99, "*An Act to secure the financial stability of the compensation system for injured workers, to promote the prevention of injury and disease in Ontario workplaces and to revise the Workers' Compensation Act and make related amendments to other Acts*", introduced in the Ontario Legislature in November, 1996, has more clearly mandatory language with respect to

Jurisdiction	Workers' Benefits	Survivors' Benefits
Quebec	Integrated ³⁵	Stacked
New Brunswick	Integrated ³⁶	Integrated ³⁷
Nova Scotia	Integrated ³⁸	Stacked
PEI	Integrated ³⁹	Integrated ⁴⁰
Newfoundland	Integrated ⁴¹	Stacked
Yukon	Stacked	Stacked
NWT	Stacked	Stacked

5. Federal Proposal to "Integrate"

The *Canada Pension Plan* requires the federal and provincial governments, as joint stewards of the Plan, to review the *CPP* every five years to ensure that the Plan continues to be financially secure. One of those periodic reviews is currently underway.

In February, 1996, "An Information Paper for Consultations on the Canada Pension Plan" was released by the Federal, Provincial and Territorial

"integration" of workers' benefits, but retains the same language as the current statute with respect to dependants' benefits.

³⁴ See Section 35(15) of the *Workers' Compensation Act*, RSO 1990, c. W.11. This provision may be interpreted as being discretionary. However, Ontario does "integrate" in practice. See preceding footnote with respect to Bill 99.

³⁵ "Integration" is provided by the Quebec Pension Plan legislation. See Sections 96.1 and 105.2 of *An Act Respecting the Quebec Pension Plan*, RSQ 1977, chapter R-9. No QPP disability pension is payable to a contributor with respect to a month for which a "replacement indemnity" under the *Act respecting industrial accidents and occupational diseases* is payable to him or her. There does not, however, appear to be an equivalent provision for survivors' benefits.

³⁶ See Section 38.10(1) of the *Workers' Compensation Act*, RSNB 1973, c. W-13. Earnings loss compensation is to be reduced by "the same proportion of the amount the worker receives under the Canada Pension Plan with respect to the injury that the estimated loss of earnings bears to the average net earnings". This is interpreted according to the following formula:

$$\frac{\text{estimated loss of earnings}}{\text{average net earnings}} \times \text{total CPP payment} = \text{amount of reduction}$$

³⁷ See Section 38.10(1.1) of the *Workers' Compensation Act*, RSNB 1973, c. W-13.

³⁸ See Sections 38 of *An Act to Reform the Law Respecting Compensation for Workers*, SNS 1995-96, c.26, which provides that 50% of CPP or QPP benefits are included in the amount the worker is considered earning or receiving subsequent to the injury.

³⁹ See Section 42 of the *Workers Compensation Act*, SPEI 1994, c. 67. In determining the amount a worker is capable of earning after the accident, the Board must include as earnings any collateral benefits to which the worker is entitled as a result of the accident to the extent that such benefits, together with the worker's wage loss benefits, compensate the worker in excess of 80% of earnings loss for the first 39 weeks and 85% thereafter. Section 1(1)(f) defines "collateral benefits" to mean CPP, QPP and UIC benefits and any benefit which the worker is entitled to receive as a result of the accident that is wholly or partially at the expense of the employer.

⁴⁰ See Section 37 of the *Workers Compensation Act*, SPEI 1994, c. 67 and Section 8 of the *Workers Compensation Act Regulations* (No. EC831/94).

⁴¹ See Section 81(3) of the *Workers' Compensation Act*, RSN 1990, c. W-11.

Governments of Canada. The paper provided an overview of the *CPP*, set out the problems and challenges facing the *CPP* and examined issues related to the financing and costs of the *CPP*.

The information paper proposed the "integration" of *CPP* benefits and workers' compensation by deducting a portion of a worker's compensation from the worker's *CPP* benefits, thereby reducing *CPP* costs:⁴²

In some provinces, disabled persons can receive both *CPP* benefits and Workers' Compensation. Reducing the *CPP* disability benefits to take account of Workers' Compensation benefits would reduce the current overlap. It would also remain consistent with Workers' Compensation principles that the employer - not the *CPP* - should bear the cost of a work injury. Such a move would align the *CPP* closer to Quebec Pension Plan policy in this regard, and it would reduce disincentives to return to work.

Either the full amount of WCB benefits, or part of the WCB benefits, would be subtracted from *CPP* benefits. For example, subtracting 25 per cent of Workers' Compensation from *CPP* disability benefits of new beneficiaries would reduce plan [i.e., *CPP*] expenditures in 2030 by 0.6 per cent

Federal/provincial public consultations were subsequently undertaken throughout Canada in April - June, 1996.⁴³ A series of ministerial meetings were held as well.

In February, 1997, a second information paper was released - "SECURING THE CANADA PENSION PLAN - An Agreement on Proposed Changes to the *CPP*". The paper stated that the changes outlined were supported by the Federal Government and the Governments of the Provinces of Newfoundland, Nova Scotia, New Brunswick, Prince Edward Island, Quebec, Ontario, Manitoba and Alberta. This is apparently sufficient support to meet the statutory provision which requires that changes to the *CPP* receive the concurrence of at least 2/3 of provinces with 2/3 of the population of Canada. The February, 1997 information paper did, however, not mention "integration" of *CPP* with workers' compensation.

"Stacking" and "integration" of *CPP* and workers' compensation was also discussed in the federal Auditor General's September 1996 Report to the House

⁴² See "An Information Paper for Consultations on the Canada Pension Plan", February, 1996. p. 38.

⁴³ The Vancouver hearing took place on June 10, 1996. No comment was made by any of the presenters with respect to the *CPP*/workers' compensation "integration" proposal.

of Commons.⁴⁴ After referring to the integration proposal discussed in the February 1996 *CPP* paper, the Auditor General continued:

17.131 Although the amounts paid by the CPP to beneficiaries of workers' compensation plans are appreciable, the CPP has little information from which to accurately assess the number of co-beneficiaries and the amounts paid out. The most recent survey suggests that 17 percent of respondents also receive benefits from workers' compensation plans.

17.132 The Canada Pension Plan contains no provision concerning the treatment of disability benefits from other sources, other than provisions allowing for reimbursement of advances paid by other plans. As other programs' benefits are not taken into account, this makes the Plan a first payer. At the time the CPP was created, most workers compensation programs also took a first payer position, ignoring benefits from other programs. However, in recent years a number of plans have adopted policies aimed at reducing their payments by CPP Disability benefit amounts.⁴⁵ The policies vary from board to board.

17.133 In Quebec, the Commission de santé et de sécurité au travail (sic) is the first payer in relation to Quebec Pension Plan disability pensions. This has been enshrined in the legislation since 1986. According to the Régie des rentes du Québec, four percent of applicants are denied a disability pension because of this provision. If the CPP had adopted a policy similar to the Quebec policy, costs could have been \$9 million to \$40 million less in 1995-1996, considering that overlap accounts for between 4 and 17 percent of new CPP beneficiaries. Such a provision would require federal and provincial approval.

The most recent development in this area has been the introduction of changes to the Canada Pension Plan in the House of Commons just before the June 2, 1997 election was called. The changes do not provide for integration of *Canada Pension Plan* benefits and workers' compensation benefits. They do, however, authorize the negotiation of agreements for integration on a province by province basis.

EMPLOYER-RELATED BENEFITS

⁴⁴ See *Report of the Auditor General of Canada to the House of Commons*, (Ottawa, Ontario: Government of Canada, September, 1996) pp. 17-36 and 17-37.

⁴⁵ The provinces in question are identified later in this paper.

1. Background

There are various situations in which employers pay benefits to workers at the same time the workers are entitled to receive workers' compensation benefits. For example, some employers pay "top-ups" while their workers are temporarily disabled. This may take the form of keeping a worker on full wages during the period of disability, with the WCB then paying the worker's compensation to the employer. It may also take the form of the employer paying supplements to the worker to make up the difference between the compensation benefits and the workers' regular pay.

These employment-related benefits generally result from provisions in collective agreements negotiated between the employer and the union. The benefits may be paid by the employer directly or by a disability insurer with whom the employer has taken out a contract of insurance.

There are, as well, employment-related payments workers may receive while disabled that do not relate to the disability. For example, a worker may receive income from a retirement pension while in receipt of a permanent disability pension.

Questions arise as to whether, and in what circumstances, workers should receive both the employer sponsored benefits and workers' compensation benefits.

Section 34 addresses this question in part:

"In fixing the amount of a periodic payment of compensation, consideration shall be had to payments, allowances or benefits which the worker may receive from his employer during the period of his disability, including a pension, gratuity or other allowance provided wholly at the expense of the employer, and a sum deducted under this section from the compensation otherwise payable may be paid to the employer out of the accident fund."

However, the meaning of Section 34, itself, is at issue. Questions that have been raised include:

- What does "consideration shall be had" mean? Does this make the deduction of the benefit from the compensation mandatory or discretionary?
- What "payments, allowances or benefits" should be "considered"?
- What is a "pension, gratuity, or other allowance provided wholly at the expense of the employer"?
- Do the words "during the period of disability" require the deduction of benefits not related to the disability?

- When a deduction is made, in what circumstances shall the sum deducted be paid to the employer?

Current policy in the *Rehabilitation Services and Claims Manual* interprets Section 34 to be discretionary:⁴⁶

The section does not provide that any payment made by the employer shall be deducted from the compensation, or that any compensation deducted shall be paid to the employer. It requires that the Board must consider the matter, and that any compensation deducted under this section may be paid to the employer. The section is permissive, not mandatory, and the question is, therefore, in what circumstances a deduction should be made.

However, the policy gives only a few examples of situations in which Section 34 is, or is not, to be applied. On the one hand, employers continuing to pay full wages to disabled workers are to be reimbursed in amounts equal to the compensation that would normally be paid to their employees.⁴⁷ On the other hand, termination pay resulting from a legislative requirement or a contractual agreement is not a payment that should be deducted from compensation and paid to the employer. If the worker had been fit to do work, he or she would have been able to take other employment, receive full wages and still be entitled to the termination pay.⁴⁸

The policy is found in the chapter of the *Rehabilitation Services and Claims Manual* dealing with "Wage Loss Benefits". It is applied to benefits for temporary or short term disability. There is no reference in current policy to applying Section 34 to permanent or long term disability.

In the mid-1980s, the previous Commissioners concluded in a case before them on appeal that a worker was in receipt of a retirement pension funded "wholly at the expense of the employer" while the worker was also receiving a permanent disability pension. The Commissioners decided that the retirement pension should be deducted from the workers' disability pension. They also requested that a policy be drafted to cover situations such as the one before them. A proposed policy was drafted, but never finalized. Nor was any general practice adopted in this respect.

In 1992, the Chief Appeal Commissioner, in disposing of an appeal before the Appeal Division, referred to the former Governors the question of the application of Section 34 to permanent disability pensions where the worker is in receipt of a

⁴⁶ See #34.40 of the *Rehabilitation Services and Claims Manual*.

⁴⁷ See #34.40 of the *Rehabilitation Services and Claims Manual*.

⁴⁸ See #34.42 of the *Rehabilitation Services and Claims Manual*.

wholly employer-funded retirement pension. Some preliminary research was done for the Governors, but no policy changes were drafted.

Section 34 has been considered by the Appeal Division on several occasions. In two 1992 employer appeals,⁴⁹ an Appeal Division Panel considered whether workers were entitled to receive full WCB loss of earnings pensions while, at the same time, receiving employment-related sick leave and vacation benefits that increased the total amount received to full salary. The Panel decided that the accumulated sick leave and vacation benefits were not wholly at the expense of the employer, but rather earned by the workers through length of service. Payment of the benefits was in accordance with the collective agreement between the employer and the workers' union. It would be inappropriate for the Panel to use the discretionary provisions in Section 34 to address concerns that resulted from the collective agreement. That was a matter more properly considered through the collective bargaining process.

The employer subsequently petitioned under the *Judicial Review Procedure Act* to have the courts overturn the Appeal Division's decision. However, the court concluded that "this is a decision that we can let stand".⁵⁰

In a 1995 decision,⁵¹ an Appeal Division Panel considered whether a worker's retirement pension from the IWA-Forest Industry Pension Plan should be deducted from the worker's permanent disability award. The Panel found that the Plan was funded by the contributions of all participating employers and the income earned on the investment of those contributions. As well, the worker received the retirement pension for accumulated service in the forest industry, not the compensable disability. The Panel concluded that there was not, therefore, double compensation for the same injury and Section 34 should not apply.

Attention has been focussed most recently on Section 34 in relation to payments for statutory holidays. Collective agreements in the forestry industry provide for employers to continue to pay disabled workers for statutory holidays while they are on compensation. Employers in the industry have made representations to the WCB to deduct those payments from the compensation paid to the forestry workers and pay it to the employers.

Concerns have also been expressed generally that workers who receive "top ups" to their compensation from their employer actually receive more income than their normal take-home pay. This results from the non-taxable status of

⁴⁹ Decisions of the Appeal Division #92-1710/1711 and #92-1717.

⁵⁰ See *City of Vancouver v. Workers' Compensation Board of British Columbia, James Cartwright and Robert Templeton*, unreported, Vancouver Registry A933122, dated March 25, 1994.

⁵¹ Decision of the Appeal Division #95-0165.

workers' compensation benefit component of their income.⁵² For workers at many income levels, 75% of gross average earnings already exceeds their normal take-home pay. Paying "top-ups" are viewed as exacerbating that situation.

2. Consideration of Stacking and Integration of Employment-Related Benefits by BC Royal Commission/Review Committees

The "Section 34 provision" has existed in BC since the original 1917 statute where it appeared generally in the same form as it does now. There is, however, little historical record with respect to its purpose or meaning.

There was no discussion of the provision in the 1916 Pineo Committee Report.⁵³ Nor was there any comment in the 1942 Sloan Report,⁵⁴ the 1952 Sloan Report⁵⁵ or the 1966 Tysoe Report.⁵⁶

It appears that the provision was adopted from the Ontario legislation. The 1913 Meredith Report in Ontario⁵⁷ had recommended a provision that read:

In fixing the amount of a weekly or monthly payment, regard shall be had to any payment, allowance, or benefit which the workman may receive from his employer during the period of his incapacity, including a pension, gratuity, or other allowance provided wholly at the expense of the employer."

Although the Meredith Report did not discuss the purpose or meaning of the "Section 34 provision", there was some discussion of a "Section 34 situation" in the evidence of the Canadian Pacific Railway before the Commission.

⁵² See COMPENSATION RATE, a briefing paper forwarded to the Royal Commission by the Policy and Regulation Development Bureau in April, 1997, for more discussion about the situation resulting from workers' compensation benefits not being "taxable income" under the *Income Tax Act*. The WCB issues a T5007 to each worker on compensation stating the amount of workers' compensation benefits paid during the tax year. This includes workers kept on full wages by the employer (to which the worker's compensation is then paid).

⁵³ See Avarad V. Pineo, Report of the Committee of Investigation on Workmen's Compensation Laws presented March 1st, 1916 (Victoria, BC: Queen's Printer, 1916).

⁵⁴ Gordon McGregor Sloan, Report of the Commissioner relating to the Workmen's Compensation Board, 1942 (Victoria, BC: Queen's Printer, 1942).

⁵⁵ Gordon McGregor Sloan, Report of the Commissioner relating to the Workmen's Compensation Act and Board, 1952 (Victoria, BC: Queen's Printer, 1952).

⁵⁶ Charles W. Tysoe, Report of the Commissioner (Victoria, BC: Queen's Printer, 1966).

⁵⁷ See Sir William Ralph, Meredith, Final Report on Laws of Employers to Make Compensation to their Employees for Injuries Received in the Course of their Employment Which Are Now in Force in Other Countries, and as to how far such Laws are Found to Work Satisfactorily (Toronto, Ontario: L. K. Cameron, King's Printer, 1913) p. 268.

The Railway pointed out that Federal legislation (the *Dominion Act*) contained a clause imposing direct liability on the Railway for accidents resulting from negligence. Because of the primacy of the Federal law, it was contended the Railway could be placed in a position of double liability for work injury in some circumstances. As a consequence, the worker could also receive double compensation for that same injury. In response to the suggestion that an employer who was liable to pay compensation for an injury under the *Dominion Act* not also be liable under the workers' compensation legislation, the Commission commented⁵⁸ "A man could not get it twice over".

3. Consideration of Stacking and Integration of Employment-Related Benefits by Royal Commissions/Review Committees in Other Jurisdictions

There has been little consideration of the "stacking"/"integration" of employment-related benefits by Royal Commissions or review committees in other jurisdictions. Where "stacking"/"integration" has been considered, the focus has been largely on *Canada Pension Plan* benefits, rather than benefits funded or provided by the employer.

In 1991, the Newfoundland Workers' Compensation Statutory Review majority report⁵⁹ recommended that:

... all Workers' Compensation benefits be net of private and/or corporate insurance plans as well as Canada Pension benefits. For administration purposes the Commission should implement a system whereby the applicants outline any such benefits that may become due prior to and during a claim

It appears that the Newfoundland government accepted this recommendation insofar as it relates to corporate insurance plan benefits. The Newfoundland legislation currently prohibits an agreement between an employer and a worker that provides for the employer to pay an amount to the worker in excess of the worker's compensation.⁶⁰

In 1996 in Ontario, Cam Jackson discussed "stacking" in his "New Directions" reports⁶¹ not only in relation to Canada Pension Plan, but also in relation to "private disability benefits that top up ... income to the full pre-injury wage." However, Bill 99 did not incorporate any references to these disability benefits.

⁵⁸ Minutes of Evidence Taken before the Commissioner, The Hon. Sir William Ralph Meredith, CJO, on Workmen's Compensation p. 268.

⁵⁹ See 1991 Workers' Compensation Statutory Review Majority Report (St. John's, Newfoundland, the Committee, 1991) p. 44.

⁶⁰ See Section 81.1 of the *Workers' Compensation Act*, RSN 1990, c. W-11.

⁶¹ See Cam Jackson, Minister Without Portfolio Responsible for Workers' Compensation Reform, "New Directions for Workers' Compensation Reform", January, 1996 and June, 1996.

4. Cross Jurisdictional Comparison

All Canadian jurisdictions have provisions applying where an employer provides benefits to a disabled worker. The Alberta,⁶² Quebec⁶³ and Yukon⁶⁴ statutes use language that is clearly discretionary with regard to withholding amounts from the worker, while the Manitoba,⁶⁵ New Brunswick,⁶⁶ Nova Scotia⁶⁷ and Prince Edward Island⁶⁸ statutes use language that clearly imposes an obligation to withhold. The remaining jurisdictions (Saskatchewan,⁶⁹ Ontario,⁷⁰ Newfoundland⁷¹ and NWT⁷²) have statutes that are worded similarly to Section 34 of the *BC Act*.

Some jurisdictions use words other than “payments, allowances or benefits” to describe employer payments that are to be deducted. For example, Quebec uses the word “indemnity”⁷³ and New Brunswick uses the words “remuneration”, “income replacement” and “supplementary benefit”.⁷⁴ Some jurisdictions refer to payments made “during the disability”,⁷⁵ while others⁷⁶ refer to payments “in respect of the injury” or “as a result of the injury” or “as a result of the worker’s accident”. Disputes remain, however, as to what, if anything, should be deducted.

INSURANCE PURCHASED DIRECTLY BY THE WORKER

Some workers may be covered by both workers’ compensation benefits and benefits from disability insurance purchased by the worker. Some survivors may be covered by both compensation benefits and benefits from a “life” insurance policy purchased by the worker.

It is understood that, in most cases, contracts for wage replacement provide that recipients who later receive workers’ compensation benefits for the disability

⁶² See Section 58 of the *Workers’ Compensation Act*, SA 1981, c. W-16.

⁶³ See Section 126 of the *Industrial Accidents and Occupational Diseases Act*, RSQ, c. A-3.001.

⁶⁴ See Section 25 of the *Workers’ Compensation Act*, 1992.

⁶⁵ See Section 41 of the *Workers’ Compensation Act*, RSM 1987, c. W200.

⁶⁶ See Section 38.2(2.5) of the *Workers’ Compensation Act*, RSNB 1973, c. W-13.

⁶⁷ See Section 37(4) and 49 of *An Act to Reform the Law Respecting Compensation for Workers*, SNS 1995-96, c. 26.

⁶⁸ See Section 42 of the *Workers Compensation Act*, SPEI, 1994, c. 67.

⁶⁹ See Section 100 of the *Workers’ Compensation Act*, 1979, SS 1979, c. W-17.1.

⁷⁰ See Section 45 of the *Workers’ Compensation Act*, RSO 1990, c. W.11.

⁷¹ Section 81(1) of the *Workers’ Compensation Act*, RSN 1990, c. W-11.

⁷² See Section 50 of the *Workers’ Compensation Act*, RSNWT 1988, c. W-6.

⁷³ See Section 126 of the *Industrial Accidents and Occupational Diseases Act*, RSQ, c. A-3.001.

⁷⁴ See Section 38.2(2.5) of the *Workers’ Compensation Act*, RSNB 1973, c. W-13.

⁷⁵ For example, BC, Newfoundland and NWT.

⁷⁶ For example, Saskatchewan, Manitoba and Ontario.

must turn over to the insurer monies up to the value of the insurance benefits. No insurer pays more than 75% of a worker's gross earnings and many pay less.⁷⁷ There may also be provision for payment for the disabled worker's mortgage, car loan, line of credit, personal loan or credit card payments.

The 1942 Sloan Royal Commission Report discussed the purchase of private disability insurance by workers with incomes exceeding the statutory maximum average earnings rate:⁷⁸

“The reasons for the inclusion of the maximum principle and consequent exclusion of the highly paid wage-earner or salaried executive from the benefits of the Act are generally regarded to be, first, that the Act is designed to protect those who are unable, because of their low income, to carry any accident insurance. Those in the higher income brackets are considered able to protect themselves.”

This passage was cited in the Tysoe Report, along with a similar passage from the 1958 Turgeon inquiry report from Manitoba:⁷⁹

“Sir William Meredith's selection as a standard of the wage earnings of the highest paid wage earner is no longer followed but has given way to other considerations. When the matter is discussed now it is pointed out that men with large salaries should be expected to provide, in part at least, for their own insurance, and that, unless a maximum is set under the Act, assessments in some industries would become unduly burdensome.

The Tysoe Report expressed the opinion that:

“I am old fashioned enough to believe that thrift and saving for a rainy day are virtues. Responsible individuals still practice them, though perhaps not to quite the same extent as when I was a young man.”

Although not specifically dealt with, it is unlikely that the Tysoe Report would have supported the deduction from workers' compensation of insurance benefits for which a high income worker had paid the premiums.

⁷⁷ Because of the statutory average earnings maximum for workers' compensation, a high wage earner might not, depending upon the amount of private disability insurance purchased, receive 75% of total gross earnings in total.

⁷⁸ See Gordon McGregor Sloan, Report of the Commissioner relating to the Workmen's Compensation Board, 1942, (Victoria, BC: Queen's Printer, 1942), p.27.

⁷⁹ See Charles W. Tysoe, Report of the Commissioner (Victoria, BC: Queen's Printer, 1966), p. 34.

OTHER TYPES OF STATUTORY BENEFITS

There are a number of other situations in which the question of “stacking” or “integration” of benefits may arise.⁸⁰

1. Damages for injuries resulting from motor vehicle accidents

A worker may be injured or die in a motor vehicle accident in circumstances which would normally give the worker a cause of action against a negligent party. If that party is an employer or another worker and the motor vehicle accident arose out of an in the course of the worker’s employment, the worker or survivor is precluded by Section 10(1) of the *Act* from suing (and being awarded damages) for the injury or death. Thus the worker or dependant receives workers’ compensation benefits, rather than common law damages from ICBC.

However, if the negligent party is not an employer or another worker, the worker or survivor may elect to receive compensation benefits or maintain his or her own legal action. If a worker or survivor elects to receive compensation, the WCB becomes subrogated to the worker’s cause of action and may maintain an action on behalf of itself and the worker or survivor.⁸¹ If the Board’s action is successful, the workers’ compensation, including health care costs, paid out by the Board and with its administrative costs, are deducted from the amount recovered. Any excess is then paid to the worker or survivor. This may be regarded as a form of “integration”.

⁸⁰ See Terence G. Ison, *Workers’ Compensation in Canada*. (Toronto and Vancouver: Butterworths, 1989), pp. 163 - 186, for a discussion of the “interaction” of workers’ compensation with other systems.

⁸¹ See Section 10 of the *Act*.

2. Unemployment Insurance benefits

A worker is not entitled to receive unemployment insurance benefits for any day for which he or she receives temporary total disability benefits. If unemployment insurance sickness benefits are payable to a worker who is also receiving workers' compensation benefits, other than for a temporary total disability, and the workers' compensation relates to the same condition, the workers' compensation is deducted in setting the rate of unemployment insurance sickness benefit. Workers receiving periodic workers' compensation benefits for permanent disability who are usually employed are entitled to the usual unemployment or sickness benefits if their employment is interrupted otherwise than by a worsening of the compensable disability.⁸²

3. Criminal injury compensation

The *Criminal Injury Compensation Act* provides for compensation to be paid to victims of crime or, in the case of death, to their survivors.⁸³ Unlike workers' compensation benefits, criminal injury compensation includes "non-pecuniary loss or damage for pain, suffering, mental or emotional trauma, humiliation or inconvenience."⁸⁴ Except for this "non-pecuniary loss or damage for pain, suffering",⁸⁵ workers or survivors entitled to claim benefits under the *Workers Compensation Act* cannot be paid compensation under the *Criminal Injury Compensation Act*.⁸⁶

DISCUSSION

The argument for "integration" of benefits appears to be based upon a "global" view of the extent to which workers should be compensated for disablement from compensable injury or disease. This view often incorporates a "net 90%" approach to compensation rate.⁸⁷

According to proponents of the "global" view, it is inappropriate for a worker to receive compensation and other benefits that exceed, in their totality, the

⁸² See Section 21(2) of the *Employment Insurance Act*, SC 1996, Chap. 23.

⁸³ Like the *Workers Compensation Act*, the *Criminal Injury Compensation Act* provides compensation for "dependants", rather than "survivors". Again the term "survivors" has been used for the sake of consistency.

⁸⁴ See Section 2(3.1)(f) of the *Criminal Injury Compensation Act*, RSBC 1979, c. 83.

⁸⁵ The *Criminal Injury Compensation Act* was amended in 1995 to provide for this exception.

⁸⁶ See Sections 2 and 5 of the *Criminal Injury Compensation Act*, RSBC 1979, c. 83.

⁸⁷ See COMPENSATION RATE, a briefing paper forwarded to the Royal Commission by the Policy and Regulation Development Bureau in April, 1997, for a discussion of the "gross" and "net" approaches to compensation rate.

worker's normal "net earnings" or "take-home pay". "Stacking" *CPP* disability benefits or employment-related benefits with workers' compensation benefits may have this result in some cases, resulting in disincentives to return to work.

Those who argue in favour of "integration" also regard employers as bearing the costs of the workers' compensation system. By contributing to *Canada Pension Plan* or paying for employment-related benefits as well, employers compensate workers twice over for their disability. This increases the cost of doing business and diminishes employer competitiveness generally.

The argument for "stacking", on the other hand, appears to be based on the view that workers are not sufficiently compensated for their compensable injuries in any event. The "stacking" of *CPP* disability benefits and employment-related benefits with workers' compensation benefits goes some way in addressing this situation.

Opponents of "integration" argue that workers make direct financial contributions to the *Canada Pension Plan* and they and their survivors are therefore entitled to the disability benefits payable under the *Plan*. Employment-related benefits are often negotiated through the collective bargaining process with workers giving up other financial benefits in exchange for them.

In recent years, even the Supreme Court of Canada has been divided on how to deal with these issues. Appendix "B" discusses the treatment of "collateral benefits" in the common law tort cases.

It is difficult to assess what might be the financial impact of "integrating" *CPP* disability benefits with workers' compensation benefits.⁸⁸ It is not known how many BC workers receiving workers' compensation also receive *CPP* disability benefits. Although recipients of *CPP* benefits correspond (very) roughly to recipients of *WCB* permanent disability pensions, it is very unlikely that there is complete correspondence.

As well, *CPP* disability benefits vary from individual to individual. The disability benefit consists of two components - a flat rate and an earnings-related component. The earnings-related component is an individualized calculation that depends upon a worker's pensionable earnings with the *Plan*. At most it can be said that, in 1997, a worker with a *WCB* permanent disability pension who also receives a *CPP* disability benefit, will be paid a taxable monthly benefit

⁸⁸ Pages 4 and 5 of this paper set out comments by the Auditor General for Canada with respect to the lack of information from which to accurately assess the number of co-beneficiaries and the amounts paid out. The Auditor General estimated that for 1995/96, overlap accounted for between 4 and 17 percent of new *CPP* beneficiaries.

of not less than \$330.49 and not more than \$883.10 in addition to his or her workers' compensation pension.⁸⁹

While it is true that the WCB deducts *Canada Pension Plan* benefits from workers' compensation survivors' benefits, it does not keep records with respect to total deductions. A review done in 1995 for purposes of a discussion paper on survivors' benefits generally suggested that the 1994 reserves for survivors' benefits would have been approximately \$10,200,000 greater if no deductions for CPP had been made.

The assessment of financial impact is also complicated by the jurisdictional question. Provincial statutes "integrate" workers' compensation benefits with *Canada Pension Plan* benefits by deducting a portion of the *CPP* benefits from the workers' compensation benefit. The 1996 *CPP* discussion paper suggested, as an example, "integrating" the two types of benefits by deducting 25% of the workers' compensation benefit from the *CPP* benefit. "Integration" would certainly result in decreased overall benefits to workers. Whether it would result in decreased workers' compensation costs to employers would depend upon how the "integration" was achieved.⁹⁰

It is also difficult to assess the impact of "integrating" employment-related benefits. It is not known how many collective agreements in the province contain provisions covering payment of full wages while on compensation, "top-ups" of compensation or other benefits that might be subject to deduction. A threshold question is how to define or identify the "employment-related" benefits in question. A benefit directly paid for by the employer may, in fact, have been indirectly paid for by the worker through giving up other benefits during the collective bargaining process. This may also apply to contracts of employment other than collective agreements.

⁸⁹ A "disabled contributor's child's benefit" may also be payable to children of the worker. Effective January 1, 1997, the amount is \$166.63 for each child. See Sections 44(1)(e) and 59 of the *Canada Pension Plan*, RSC 1985, Chap. C-8 and CCH Canadian Limited, Canadian Employment Benefits and Pension Guide Reports (Don Mills, Ontario: CCH Canadian Ltd., 1997) p. 1079.

⁹⁰ In Saskatchewan, the consulting actuary provided the 1996 Saskatchewan Workers' Compensation Act Committee of Review with a preliminary estimated cost of removing the 50% CPP offset (after 12 months) of \$47 million annually. In New Brunswick, the proposal in the package circulated by the Commission in fall 1996 to change the offset from 100% to 50% of CPP was thought to require increased annual expenditures of \$500,000 and an increase in long-term liabilities of \$4.5 million.

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Appendix "A" - Statutory References

1979

WORKERS COMPENSATION

RS CHAP. 437

WORKERS COMPENSATION ACT

CHAPTER 437

Vocational rehabilitation

16. (1) To aid in getting injured workers back to work or to assist in lessening or removing a resulting handicap, the board may take the measures and make the expenditures from the accident fund that it considers necessary or expedient, regardless of the date on which the worker first became entitled to compensation.

(2) Where compensation is payable under this Part as the result of the death of a worker, the board may make provisions and expenditures for the training or retraining of a surviving dependent spouse, regardless of the date of death.

(3) The board may, where it considers it advisable, provide counselling and placement services to dependants.

1968-59-16; 1972-64-9; 1974-101-1,13.

Compensation in fatal cases

17. (1) In this section
"child" means

- (a) a child under the age of 18 years, including a child of the deceased worker yet unborn;
- (b) an invalid child of any age; and
- (c) a child under the age of 21 years who is regularly attending an academic, technical or vocational place of education,

and "children" has a similar meaning;

"federal benefits" means benefits payable under the Canada Pension Plan and to which any dependants are entitled as a result of the death, together with any benefits to which the dependent spouse is or becomes entitled under the Canada Pension Plan as a result of having retired or reached retirement age.

(2) Where compensation is payable as the result of the death of a worker or as the result of injury resulting in the death, the consequent funeral expenses in the sum of \$600 [\$2,216.85 effective January 1, 1997], and incidental expenses relating to the death in the sum of \$200 [\$738.96 effective January 1, 1997], shall be paid in addition to any other compensation payable under this section; but the employer of the worker shall bear the cost of transporting the body to the place of business of the nearest undertaker, and if burial does not take place there any additional transportation may, up to the sum of \$200 [\$738.96 effective January 1, 1997], be paid out of the accident fund and no action for an amount larger than that fixed by this subsection shall lie in respect of the funeral, burial or cremation of the worker or cemetery charges in connection with it.

(3) Where compensation is payable as the result of the death of a worker or of injury resulting in such death, compensation shall be paid to the dependants of the deceased worker as follows:

- (a) where the dependants are a widow or widower and 2 or more children, a monthly payment of a sum that, when combined with federal benefits payable to or for those dependants, would equal the total of
 - (i) the monthly rate of compensation under this Part that would have been payable if the deceased worker had, at the date of death, sustained a permanent disability, subject to the minimum set out in paragraph (g); and
 - (ii) \$65 [\$240.09 effective January 1, 1997] per month for each child beyond 2 in number;
- (b) where the dependants are a widow or widower and one child, a monthly payment of a sum that, when combined with federal benefits payable to or for those dependants, would equal 85% of the monthly rate of compensation under this Part that would have been payable if the deceased worker had, at the date of death, sustained a permanent total disability, subject to the minimum set out in paragraph (g);
- (c) where the dependant is a widow or widower who, at the date of death of the worker, is 50 years of age or over, or is an invalid spouse, a monthly payment of a sum that, when combined with federal benefits payable to or for that dependant, would equal 60% of the monthly rate of compensation under this Part that would have been payable if the deceased worker had, at the date of death, sustained a permanent total disability, but the monthly payments shall not be less than \$234.36 [\$775.79 effective January 1, 1997];
- (d) where the dependant at the date of death is a widow or widower who is not an invalid and is under the age of 40 years, and there are no dependent children, a capital sum of \$10,000 [\$36,948.28 effective January 1, 1997], of which \$1,000 [\$3,694.89 effective January 1, 1997] shall be payable immediately and remaining \$9,000 [\$33,253.41 effective January 1, 1997] shall be payable at a time the board determines; but the payment shall not, except at the request of the dependant, be delayed beyond 6 months after the date of death of the worker;
- (e) where the dependant is a widow or widower who is not an invalid and who, at the date of death of the worker, has reached the age of 40 years but not the age of 50 years, and there are no dependent children, a monthly sum calculated under Schedule C;
- (f) where there is no surviving spouse or common law spouse eligible for monthly payments under this section, and
 - (i) the dependant is a child, a monthly payment of a sum that, when combined with federal benefits to or for that child, would equal 40% of the monthly rate of compensation under this Part that would have been payable if the deceased worker had, at the date of death, sustained a permanent total disability;
 - (ii) the dependants are 2 children, a monthly payment of a sum that, when combined with federal benefits payable to or for those children, would equal 50% of the monthly rate of compensation under this Part

that would have been payable if the deceased worker had, at the date of death, sustained a permanent total disability; or

- (iii) the dependants are 3 or more children, a monthly payment of a sum that, when combined with federal benefits payable to or for those children, would equal the total of
 - (A) 60% of the monthly rate of compensation under this Part that would have been payable if the deceased worker had, at the date of death, sustained a permanent total disability; and
 - (B) \$65 [\$240.09 effective January 1, 1997] per month for each child beyond 3 in number,subject, in all cases, to the minimum set out in paragraph (g);
- (g) the minimum allowances payable under paragraphs (a), (b) and (f) shall be the allowances that would be payable if the allowances were calculated under those paragraphs in respect of a deceased worker with average earnings of \$7,000 [\$25,863.85 effective January 1, 1997] per annum;
- (h) where there is
 - (i) no dependent spouse or child entitled to compensation under this section, but a worker leaves other dependants, a sum reasonable and proportionate to the pecuniary loss suffered by those dependants by reason of the death, to be determined by the board, but not exceeding in the whole \$115 [\$424.89 effective January 1, 1997] per month; or
 - (ii) a dependent spouse, or a dependent child or children, entitled to compensation under this section, but not a spouse and child or children, and, in addition, the worker leaves a dependent parent or parents, then, in addition to the compensation payable to the spouse or children, a sum, reasonable and proportionate to the pecuniary loss suffered by the dependent parent or parents by the death, to be determined by the board, but not exceeding \$115 [\$424.89 effective January 1, 1997] per month;
- (i) where
 - (i) no compensation is payable under the foregoing provisions of this subsection; or
 - (ii) the compensation is payable only to a spouse, a child or children or a parent or parents,
but the worker leaves a spouse, child or parent who, though not dependent on his earnings at the time of his death, had a reasonable expectation of pecuniary benefit from the continuation of the life of the worker, payments, at the discretion of the board, to that spouse, child or children, parent or parents, but not to more than one of those categories, not exceeding \$115 [\$424.89 effective January 1, 1997] per month for life or a lesser period determined by the board; and
- (j) where the worker leaves no dependent widow or widower, or the widow or widower subsequently dies, and the board considers it desirable to continue the existing household, and when a suitable person acts as a foster parent in keeping up the household and taking care of and maintaining the children entitled to compensation, in a manner satisfactory to the board, the same allowance shall be payable to the foster parent and children as would have been payable to a widow or widower and children, and shall continue as long as those conditions continue.

(4) Where an invalid spouse ceases to be an invalid, or a widow or widower with dependent children no longer has dependent children or there is a reduction in the number of dependent children, the spouse, widow, widower or children shall then be entitled to the same category of benefits as would have been payable if the death of the worker had occurred on the date the invalid spouse ceases to be an invalid or the widow or widower no longer has dependent children, or the number of dependent children is reduced, as the case may be.

(5) Where there is a widow or widower and a child or children, and the widow or widower subsequently dies, the allowances to the children shall, if they are in other respects eligible, continue and be calculated in the same manner as if the worker had died leaving no dependent spouse.

(6) Where at the date of death a spouse is not an invalid, but is suffering from a disability that results in a substantial impairment of earning capacity, the board may, having regard to the degree of disability or the extent of impairment of earning capacity, pay the spouse a proportion of the compensation that would have been payable if the spouse had been an invalid.

(7) Where 2 workers are married to each other and both are contributing to the support of a common household, each shall be deemed to be a dependant of the other.

(8) Where 2 parents contribute to the support of a common household at which their children also reside, the children shall be deemed to be dependants of the parent whose death is compensable under this Part.

(9) Where compensation is payable as the result of the death of a worker, or of injury resulting in death, and where at the date of death the worker and dependent spouse were living separate and apart, and

- (a) there was in force at the date of death a court order or separation agreement providing periodic payments for support of the dependent spouse, or children living with that spouse, no compensation under subsection (3) shall be payable to the spouse or children living with the spouse; but
 - (i) where the payments under the order or agreement were being substantially met by the worker, monthly payments shall be made in respect of that spouse and children equal to the periodic payments due under the order or agreement; or
 - (ii) where the payments under the order or agreement were not being substantially met by the worker, monthly payments shall be made up to the level of support that the board believes the spouse and those children would have been likely to receive from the worker if the death had not occurred; or
- (b) there was no court order or separation agreement in force at the date of death providing periodic payments for support of the dependent spouse, or children living with that spouse, and
 - (i) the worker and dependent spouse were living separate and apart for a period of less than 3 months preceding the date of death of the worker, compensation shall be payable as provided in subsection (3); or
 - (ii) the worker and dependent spouse were separated with the intention of living separate and apart for a period of 3 months or longer preceding the death of the worker, monthly payments shall be made up to the level of support which the board believes the spouse and those children would have been likely to receive from the worker if the death had not occurred.

(10) Compensation payable under subsection (9) shall never exceed the compensation that would have been payable under subsection (3) if there had been no separation.

(11) Where a worker has lived with and contributed to the support and maintenance of a common law wife or common law husband, and

- (a) where the worker and the common law wife or common law husband have no children, for a period of 3 years; or
- (b) where the worker and the common law wife or common law husband have children, for a period of one year

immediately preceding the worker's death, and where the worker does not leave a dependent widow or widower, the board may pay the compensation to which a dependent widow or widower would have been entitled under this Part to the common law wife or common law husband.

(12) Where

- (a) a worker has lived with and contributed to the support and maintenance of a common law wife or common law husband for the period set out in subsection (11);
- (b) the worker also left surviving a dependent widow or widower from whom, at the date of death, the worker was living separate and apart; and
- (c) there is a difference in the amount of compensation payable to the widow or widower by reason of the separation and the amount of compensation that would have been payable to that person if that person and the worker had not been living separate and apart,

the board may pay compensation to the common law wife or common law husband up to the amount of the difference.

(13) In addition to any other compensation provided, a dependent widow or widower, common law wife or common law husband or foster parent in Canada to whom compensation is payable is entitled to a lump sum of \$500 [\$1,847.49 effective January 1, 1997].

(14) Where in any situation there is a need to apportion allowances payable to dependants among those dependants, the formula for apportionment shall be at the discretion of the board; but, unless the board has grounds for a different apportionment, the apportionment shall be:

- (a) where there is a dependent spouse and one child, 2/3 to the dependent spouse and 1/3 to the child;
- (b) where there is a dependent spouse and more than one child, 1/2 to the dependent spouse and 1/2 among the children in equal shares; and
- (c) where there are children but no dependent spouse, among the children in equal shares.

(15) Where personal injury to, disablement of or death of a worker occurs in the course of his employment as a direct result of enemy warlike action or counteraction taken against it and provision has been made for compensation in respect of it for the worker or his dependants by the government of Canada, the worker or his dependants are entitled to compensation under this Part only when the compensation provided by the government of Canada is less than that provided by this Act, and then only to the extent of the difference.

(16) A dependant who, when receiving or entitled to receive compensation as the result of the death of a worker, becomes entitled to receive compensation as the result of the death of another worker, shall receive in the whole the compensation that the board may, in its discretion, determine; but in no case shall the compensation be less than the higher of the amounts payable in respect of the death of either worker, or more than 75% of the amount referred to in section 33 (6).

(17) Where a situation arises that is not expressly covered by this section, or where some special additional facts are present that would, in the board's opinion, make the strict application of this section inappropriate, the board shall make rules and give decisions it considers fair, using this section as a guideline.

[Note: Dollar amounts changed periodically by regulation pursuant to section 25(4).]

1974-101-14; 1975-81-2; 1985-68-121, effective April 17, 1985 (B.C. Reg. 392/85); 1993-34-4.

SCHEDULE C

A monthly payment of \$210 [\$775.79 effective January 1, 1997] plus the following proportion of the difference between \$210 [\$775.79 effective January 1, 1997] and the monthly payment that would be payable using the formula set out in section 17 (3) (c).

Age of Widow or Widower at Date of Death of the Worker (In Years)	Proportion of the Difference Between \$210 [\$775.79 effective January 1, 1997] and the Monthly Payment That Would Be Payable Using the Formula Set Out in Section 17 (3) (c)
40	1/11
41	2/11
42	3/11
43	4/11
44	5/11
45	6/11
46	7/11
47	8/11
48	9/11
49	10/11

[Note: \$210 amount changed periodically by regulation pursuant to section 25 (4).]
1974-101-48; 1985-68-125, effective April 17, 1985 (B.C. Reg. 392/85).

Medical aid

21. (1) In addition to the other compensation provided by this Part, the board may furnish or provide for the injured worker any medical, surgical, hospital, nursing and other care or treatment, transportation, medicines, crutches and apparatus, including artificial members, that it may consider reasonably necessary at the time of the injury, and thereafter during the disability to cure and relieve from the effects of the injury or alleviate those effects, and the board may adopt rules and regulations with respect to furnishing medical aid to injured workers entitled to it and for the payment of it. The board may make a daily allowance to an injured worker for his subsistence when, under its direction, he is undergoing treatment at a place other than the place where he resides, and the power of the board to make a daily allowance for subsistence under this section extends to an injured worker who receives compensation, regardless of the date he first became entitled to compensation.

(2) Where in a case of emergency, or for other justifiable cause, a physician or qualified practitioner other than the one provided by the board is called in to treat the injured worker, and if the board finds there was a justifiable cause and that the charge for the services is reasonable, the cost of the services shall be paid by the board.

(3) The board may in its discretion authorize employers to furnish or provide medical aid at the expense of the board and on terms fixed by it. Every employer shall, at his own expense, furnish to a worker injured in his employment, when necessary, immediate conveyance and transportation to a hospital, physician or qualified practitioner for initial treatment.

(4) Where a worker received, before April 1, 1972, medical aid under
(a) the *Canadian Shipping Act* (Canada); or
(b) a medical aid plan approved by the board,
he is entitled to receive, in accordance with this section, additional medical aid.

(5) Where additional medical aid is provided by the board under subsection (4), its cost may be charged in the manner the board considers proper.

(6) Medical aid furnished or provided under any of the preceding subsections of this section shall at all times be subject to the direction, supervision and control of the board; and the board may contract with physicians, nurses or other persons authorized to treat human ailments, hospitals and other institutions for any medical aid required, and to agree on a scale of fees or remuneration for that medical aid; and all questions as to the necessity, character and sufficiency of medical aid to be furnished shall be determined by the board. The fees or remuneration for medical aid furnished under this Act shall not be more than would be properly and reasonably charged the worker if himself paying, and the amount shall be fixed and determined by the board, and no action for an amount larger than that fixed by the board shall lie in respect of medical aid.

(7) Without limiting the power of the board under this section to supervise and provide for the furnishing of medical aid in every case where it considers the exercise of that power is expedient, the board shall permit medical aid to be administered, so far as the selection of a physician or qualified practitioner is concerned, by the physician or qualified practitioner who may be selected or employed by the injured worker.

(8) The board may assume the responsibility of replacement and repair of
(a) artificial appliances, including artificial members damaged or broken as the result of an accident arising out of and in the course of the employment of the worker; and
(b) eyeglasses, dentures and hearing aids broken as a result of an accident arising out of and in the course of employment if that breakage is accompanied by objective signs of personal injury, or, where there is no personal injury, if the accident is otherwise corroborated and the board is satisfied the worker was not at fault.

(9) Where an injury to a worker results in serious impairment of his sight, the board may, to protect his remaining vision, provide him with protective eyeglasses.

1968-59-22; 1972-64-12; 1974-101-1,17; 1975-81-4.

Permanent total disability

22. (1) Where permanent total disability results from the injury, the compensation shall be a periodic payment to the injured worker equal in amount to 75% of his average earnings, and shall be payable during the lifetime of the worker.

(2) The compensation awarded under this section shall not be less than \$325 [\$1,200.91 effective January 1, 1997] per month. [Note: \$325 amount changed periodically by regulation pursuant to section 25(4).]

1968-59-23; 1972-64-13; 1974-101-1, 18.

Permanent partial disability or disfigurement

23. (1) Where permanent partial disability results from the injury, the impairment of earning capacity shall be estimated from the nature and degree of the injury, and the compensation shall be a periodic payment to the injured worker of a sum equal to 75% of the estimated loss of average earnings resulting from the impairment, and shall be payable during the lifetime of the worker or in another manner the board determines.

(2) The board may compile a rating schedule of percentages of impairment of earning capacity for specified injuries or mutilations which may be used as a guide in determining the compensation payable in permanent disability cases.

(3) Where the board considers it more equitable, it may award compensation for permanent disability having regard to the difference between the average weekly earnings of the worker before the injury and the average amount which he is earning or is able to earn in some suitable occupation after the injury, and the compensation shall be a periodic payment of 75% of the difference, and regard shall be had to the worker's fitness to continue in the occupation in which he was injured or to adapt himself to some other suitable employment or business.

(4) Where permanent partial disability results from the injury, the minimum compensation awarded shall be calculated in the same manner as provided by section 29(2) for temporary total disability but to the extent only of the partial disability.

(5) Where the worker has suffered a serious and permanent disfigurement which the board considers is capable of impairing his earning capacity, a lump sum in compensation may be paid, although the amount the worker was earning before the injury has not been diminished.

1968-59-24; 1972-64-14; 1974-101-1.

Temporary total disability

29. (1) Where temporary total disability results from the injury, the compensation shall be the same as that prescribed by section 22, but is payable only so long as the disability lasts.

(2) The compensation awarded under this section shall not be less than an amount equal to \$75 [\$277.10 effective January 1, 1997] per week, unless the worker's average earnings are less than that sum per week, in which case he shall receive compensation in an amount equal to his average earnings. *[Note: \$75 amount changed periodically by regulation pursuant to section 25 (4).]*

1968-59-27; 1974-101-1, 20A.

Temporary partial disability

30. (1) Where temporary partial disability results from the injury, the compensation shall be a periodic payment to the injured worker equal in amount to 75% of the difference between the average earnings of the worker before the injury and the average amount which he is earning or is able to earn in some suitable employment or business after the injury, and shall be payable only so long as the disability lasts.

(2) Where temporary partial disability results from the injury, the minimum compensation awarded shall be calculated in the same manner as prescribed by section 29(2) for temporary total disability but to the extent only of the partial disability.

1968- 59-28; 1974-101-1.

Appendix “B” - Treatment of “Collateral Benefits” in Tort Cases

The workers' compensation system replaced the court system which had awarded damages for personal injury and death in the workplace by application of the law of torts. It may be of interest to review how the courts currently handle “stacking”/“integration” of “collateral benefits” in other types of personal injury cases.⁹¹

The principle of recovery in an action for tort is to compensate the injured party as completely as possible for the loss suffered as the result of the negligent⁹² action or inaction of the defendant. However, the injured party is not generally entitled to a double recovery for any loss arising from the injury.

A major exception to the general principle of no double recovery has been “the insurance exception”. This exception dates back to an 1874 English case - Bradburn.⁹³ In that case, the plaintiff had been injured as a result of the negligence of the defendant railway company. The plaintiff had received a sum of money from a private insurer to compensate him for lost income as a result of the accident. It was held that the plaintiff was entitled to full damages from the defendant as well as the payment from the insurer. This result was explained by stating that there would not be justice in setting off an amount to which the plaintiff had entitled himself under a contract of insurance such as any prudent person would make.

Over subsequent years, the courts have used reasoning consistent with Bradburn or cases following Bradburn in a variety of situations. For example, in 1973 the Supreme Court of Canada decided that survivors' pensions payable under the *Canada Pension Plan* were so like contracts of insurance that they should be excluded from consideration (that is, not deducted) when assessing damages under the provisions of the *BC Families Compensation Act*.⁹⁴ In 1979, the Supreme Court of Canada decided that retirement pension benefits should not be deducted from a damages award because the plaintiff's contributory pension was derived from his contract with his employer and payments made pursuant to it were akin to payments under an insurance policy.

⁹¹ It should be remembered, however, that the tort system is a “fault” based system whereas workers' compensation is a “no fault” system and some tradeoffs in compensation in exchange for “no fault” have occurred. See the discussions in the 1942 Sloan Royal Commission Report, the 1952 Sloan Royal Commission Report and the 1966 Tysoe Royal Commission Report in this respect.

⁹² The loss may also be suffered as the result of an intentional action on the part of the defendant, for example in the case of an assault.

⁹³ Bradburn v. Great Western Railway Co. (1874), [1874-80] All E.R. Rep. 195 (Ex. Div.).

⁹⁴ Canadian Pacific Ltd. v. Gill, [1973] SCR 654.

Two 1990s judgments of the Supreme Court of Canada - Ratych v. Bloomer⁹⁵ and Cunningham v. Wheeler⁹⁶ have recently discussed “the insurance exception” in the context of employment-related benefits.⁹⁷ The judgments reveals a divided Court over “stacking”/“integration” or “deductibility” issues that are somewhat similar to those encountered in the workers’ compensation system.

In Ratych, the majority (5-4) considered the case from the perspective of the plaintiff’s loss. It decided that wages paid by an employer pursuant to a contract of employment in a situation where the plaintiff suffered no loss, such as reduced sick leave credits, in exchange for the wages, were not akin to insurance. They therefore did not fall within the “insurance exception” and should be deducted from the damages award. The plaintiff had not demonstrated a loss or contribution and the court was not permitted to assume that because he was paid his earnings throughout his absence from work, he had in fact paid a *quid pro quo* and consequently suffered equivalent loss.

Several years later, however, Cunningham significantly narrowed the application of Ratych. In Cunningham, the majority (4-3) considered wage loss payments under employment disability plans and looked at the situation from the perspective of the wrong-doer. The “insurance exemption” was based on the premise that where the plaintiff has paid for the insurance benefits, it should not enure to the defendant’s benefit. A wrongdoer should not benefit from the plaintiff’s private act of forethought and sacrifice. The insurance exemption should also apply where the plaintiff pays for disability benefits under a collective bargaining agreement. Although there must be evidence of some type of consideration given by the employee, this can be satisfied by evidence that (1) there were trade-offs in the collective bargaining process, (2) some money was foregone by the employee in exchange for the benefits, (3) there was some direct contribution, such as payroll deductions, by the employee, or (4) the employer’s payments for the benefits were part of the employee’s wages. Benefits received by non-unionized employees will also be non-deductible if they have paid for them in some manner.

Cunningham is currently applied in BC courts. In 1996, a judgment from the BC Court of Appeal⁹⁸ summed up the situation in this way:

There will be few cases where the tortfeasor can escape paying compensation to an employee for lost time at work when the absence was covered by the employer or its insurer. Either the employer was obliged by contract to pay or to provide insurance

⁹⁵ [1990] 1 SCR 940.

⁹⁶ [1994] 1 SCR 359.

⁹⁷ These cases are useful for their general discussion of legal principles and policy considerations in this area.

⁹⁸ Kask v. Tam, [1996] 7 WWR 494 at 501.

coverage, in which case it can be easily shown that the benefit formed part of the overall compensation package, or the employer was under no obligation but continued the salary *ex gratia*, in which case the law says that the tortfeasor cannot take the benefit of another's generosity.