

Bill C-22 Unintended Consequence as a Windfall for Insurers

Standing Senate Committee on Social Affairs, Science and Technology
Submission on Bill C-22, An Act to reduce poverty and to support the financial security of persons with disabilities by establishing the Canada disability benefit and making a consequential amendment to the Income Tax Act

Submitted by Steven Muller, Vice President of Litigation at Share Lawyers And Hart Schwartz

These submissions are endorsed by the following organizations:

The Ontario Trial Lawyers Association
Trial Lawyers Association of British Columbia
Atlantic Provinces Trial Lawyers Association
Saskatchewan Trial Lawyers Association
Alberta Civil Trial Lawyers Association
ARCH Disability Law Centre
The Accessibility for Ontarians with Disabilities Act Alliance
Income Security Advocacy Centre

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I. Executive Summary

Bill C-22, whose purpose is poverty reduction and financial security for the disabled, inadequately addresses insurers of group disability insurance policies clawing back this proposed benefit by way of reduction, deduction or set-off provisions. There is an absence of clear protection in the proposed legislation from an insurers' abuse. As a result, rather than achieve its purpose of reducing poverty for persons with disabilities the practical impact of the Canada Disability Benefit will be to increase the profits of the Life and Health Insurers by reducing the amounts that they will be required to pay out to the disabled. Insurers should not be put in a position to be able to exploit the Canada Disability Benefit. Protections are needed in the legislation.

Proposed amendment is as follows:

Section 9 provides:

Payments cannot be charged, etc.

9 A benefit under this Act

(a) is not subject to the operation of any law relating to bankruptcy or insolvency;

(b) cannot be assigned, charged, attached or given as security;

(c) cannot be retained **by way of deduction, set-off or compensation under any Act of Parliament** other than this Act; and

(d) is garnishable moneys for the purposes of the *Family Orders and Agreements Enforcement Assistance Act*. [emphasis added]

By referencing only Acts of Parliament in section 9 (c) the clear implication is that both provincial statutes and private contracts can deduct or set-off the new Canada Disability Benefit.

A proposed amendment to section 9(c) to read as follows:

A benefit under this Act:

(c) cannot be retained by way of deduction, set-off or compensation under any Act of Parliament other than this Act **or by contract, agreement, private insurance plan or similar instrument**; and

II. Introduction: The Proposed intent of the Act

The purposes of the *Canada Disability Benefit Act* are set out in section 3:

The purposes of this Act are to reduce poverty and to support the financial security of working-age persons with disabilities.

At this stage it is unclear what the amount of the federal disability benefit will be or how that amount will be determined. This will be set out in future regulations. However, it is reasonable to assume two things. First, that in calculating the benefit the federal scheme will likely consider the benefits and supports that a claimant is already receiving, such as from a provincial disability support program or through a disability insurance plan. Second, it is also reasonable to assume that the federal benefit is designed to supplement those already existing benefits. Indeed, if existing benefits were sufficient to “reduce poverty and support the financial security” of persons with disabilities, there would be no need for a new, and additional, federal program.

These assumptions are supported by the comments in Hansard of the Honourable Carla Qualtrough, the Minister of Employment, Workforce Development and Disability Inclusion, when introducing the proposed *Canada Disability Benefit Act* on second reading:

We are working with provinces and territories to make sure this new benefit would align with **and complement services, benefits and supports**, because **we cannot have a situation anywhere in this country where income supports are clawed back, or wraparound services are cut off**, because of the Canada disability benefit. The disability community is concerned about this and has called upon provincial and territorial governments **to not claw back existing income or other supports**. These concerns are top of mind in every conversation I have. I am pleased to report that conversations in this regard are going well with the provinces and territories. There is a shared commitment to **improving** the lives of persons with disabilities across this country. [emphasis added]¹

Disability insurance contracts regularly include clauses with exceptions or reductions affecting the amount payable under the contract. In some contracts, the insurance provider can deduct an amount that it believes the claimant could receive from the other sources even if no application for the other benefit is made. As a result, rather than achieve its purpose of reducing poverty for persons with disabilities the practical impact

¹ Hansard Debates, Parliament of Canada, Tuesday, September 20, 2022, page 1120, 44th Parliament, 1st Session.

of the Canada Disability Benefit will be an unintended consequence of providing a windfall for insurers.

III. The Various Types of Disability Contracts

In the last 30 years, disability insurance contracts have increasingly been sold by insurers to individuals and to employers or organizations on behalf of a group. These policies insure against the inability to pursue a livelihood arising either from accident or illness. Disability insurance is insurance to provide for loss of income. These policies are meant to compensate an insured or third party beneficiary during periods of “total disability” or “partial disability” with the compensation in some way being measured relative to the disabled party’s pre-disability income.

There are four different types of disability policies that are typically sold in Canada. **Individual policies** are contracts sold to individuals without an intermediary such as an employer. The contractual terms for an individual contract are provided to an insured when they purchase the policy or shortly thereafter. Typically, individual policies have no language in them to reduce, deduct or set-off a government plan. **Group policies** are contracts between an insurer and a policyholder for the benefit of a third party beneficiary, typically an employee. These policies are the most commonly sold policies and are often sold to employers for the benefit of a group of employees to insure them in case of the onset of disability. The employer is the policyholder and the employee is the plan member. **Health and Welfare Trusts** are contracts between the Trust and the employee. The entitlement to disability benefits is part of the expressed and or implied terms of the Trust contract. Finally, **ASO contracts** are Administrative Services Only contracts. Under these contracts the employer and the insurer enter into a business arrangement whereby the insurance company provides the administration of the contract. While entitlement to disability benefits is part of the expressed or implied term of the employment contract, the employer is liable for benefits to a group of employees. The expressed terms of the disability insurance policy are outlined in a group contract to the employees or, alternatively, can be construed through the disability benefit booklet provided to a group of employees. **Group policies, Health and Welfare Trusts and ASO contract** relationships all have language that reduce, deduct or set-off a government plan.

IV. Direct and Indirect deductions

Insurers must set out in a policy every exception or reduction affecting the amount payable under the contract. The public policy reasoning for this is to ensure consumers know what insurable interest is being reduced and by what source. The type of deduction is dictated by the contract wording and they differ among insurers in Canada.

A typical example of deducting language is as follows:

Here is how we calculate your Long-Term Disability payments. All references to benefits and payments in this disability provision are to the gross amounts before any deductions.

Step1: We take 67% of the first \$2,250 of your monthly basic earnings, add 50% of the next \$2,250 and then add 40% of the balance of your monthly earnings, if any, up to a maximum of \$5000. For coverage in excess of the amount indicated under Proof of good health, your coverage is subject to approval by _ Life. Refer to Proof of good health above for further information.

Step 2: We subtract any benefit or payments provided to you:

For the same or subsequent disability under **any government-sponsored plan**, such as the Canada Pension Plan and the Quebec Pension Plan excluding all benefits or payments on behalf of dependent, employee insurance benefits and automatic cost-of-living increases under any government-sponsored plan that occur after the benefits begin.

...

The result from Step 2 is the amount you will normally receive.

If this amount plus the above sources of benefits and payments and all the additional sources of benefits and payments listed below exceeds 85% of your pre-disability base earnings, we will reduce your Long-Term Disability payments by the excess. If your benefits is non-taxable, the maximum will be 85% of your pre-disability basic earnings after income tax.

Additional sources of benefits and payments are those provided:

...

If you are eligible for any of the benefits or payments described above and do not apply for them, we will still consider them. We can estimate those benefits and payments and use them when we calculate your Long-Term Disability payments.

If any of the benefits or payments described above are provided in a lump sum, we will determine the equivalent compensation this represents on a monthly basis using generally accepted accounting principles.

Another example of deducting language by a different insurance provider reads:

Amount of Disability Benefit

For Plans A1, Bi, C1, D1, F1, G1, H1 and I1

The amount of Disability Benefit payable is the Benefit Amount shown in the Benefit Schedule, less any amount of benefits the Employee receives, or is entitled to receive, from the following sources for the same or related Disability:

Workers' Compensation or similar coverage;
Canada or Quebec Pension Plans, excluding dependent benefits;
any government motor vehicle automobile insurance plan or policy, unless prohibited by law;
any government plan, excluding Employment Insurance Benefits;
any retirement or pension plan; and
earnings or payments from any employer, including severance payments and vacation pay.

For Plans A1, B1, C1, D1, F1, G1, H1 and I1

The benefit amount payable will be further reduced so that the Employee's total income from All Sources does not exceed 80% of the Employee's pre-disability Earnings if the Benefit is taxable, or 80% of the Employee's pre-disability Net Earnings if the Benefit is non-taxable.

All Sources included are those stated above.

In the examples above, the Canada Disability Benefit would be captured under the terms "government sponsored plan" or "any government plan". The insurance contract would either directly reduce that amount received from the Canada Disability Benefit or could indirectly apply the Canada Disability Benefit to reduce the amount the insurer would otherwise pay out.

Indeed, if the Employee does not apply for a benefit for which they are eligible, the amount of such benefit can be estimated and assumed to be paid by the insurance provider.

Even if the Canada Disability Benefit were to be characterized by Regulation as a "social benefit" and not an income "benefit" the language of insurance providers could capture the benefit. In the examples above, the Canada Disability Benefit would still fall under any government sponsored plan or any government plan even if it were characterized as a social benefit. There is also nothing preventing a private insurer to specifically write into new policies the term "Canada Disability Benefit". Without amendments to the Canada Disability Benefit, an insurance provider may include, in the direct or indirect set-off provisions, the Canada Disability Benefit in a similar manner to how it has treated historically the Canada Pension Plan for the disabled.

V. The Constitutional Concern

The proposed amendments would not be unconstitutional on division of powers grounds for allegedly trenching on provincial jurisdiction over property and civil rights in the province. The *Canada Disability Benefit Act* would fall under the federal spending power. The spending power is inferred from the power in the *Constitution Act, 1867*, to levy taxes (s. 91(3)), to legislate in relation to public property (s. 91(1A)), and to

appropriate federal funds (s. 106). As part of that spending power the federal Parliament can demarcate who will receive the benefit (persons with disabilities) and who will not, directly or indirectly, receive that benefit (i.e., insurance companies).

In addition, the specific amendment to section 9(c) of Bill C-22, which would expressly prohibit set-offs and claw backs of the disability benefit by private insurers, are constitutionally valid provisions. To the extent that these amendments may encroach on provincial jurisdiction over property and civil rights (including the law regarding private contracts) such an encroachment is necessarily ancillary in order for the benefit to make it to the designated beneficiary. It is also functionally integrated into the scheme of the statute. The Supreme Court of Canada has, for example, upheld Parliament's creation of a new, private, cause of action for price fixing and has upheld Federal legislation setting minimum national standards of greenhouse gas pricing. In these cases, the Court recognized the validity of such incursions into property and civil rights where it is necessary for the statute's purpose to be obtained.

VI. The Public Policy Concerns

Group contracts, Health and Welfare Trusts and ASO contract relations are contracted without the employee being involved in the negotiations of the terms of the contract. Employees in Canada do not dictate which deduction provisions get included in their disability insurance plans. In order to have some form of consumer protection an insurance provider should not be able to exploit this new government program as an unintended consequential windfall.

Further, the proposed section 9 (c) is a critical feature of the new supplemental benefit scheme. If the entirety of the new federal supplemental benefit is, effectively, going to lower the bottom line of long-term insurance providers, then the stated purposes of the *Canada Disability Benefit Act*, to reduce poverty and to support the financial security of working-age persons with disabilities, are undermined.

Indeed, without a prohibition on deduction or set-offs by a private insurance provider, the targeted beneficiaries of the Canada Disability Benefit would receive no supplemental benefit at all. The stated purposes of the new federal program would not be achieved. As a result, rather than achieve its goal of reducing poverty for persons with disabilities the practical impact of the Canada Disability Benefit will be to increase the profits of private insurance providers by reducing the amounts that they will be required to pay out (with no likely corresponding drop in the cost of insurance premiums). Moreover, the taxpayers' of Canada will be indirectly supporting the private insurance provider.

VII. Proposed changes to Bill C-22

Proposed amendments is as follows:

Section 9 provides:

Payments cannot be charged, etc.

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(b) cannot be assigned, charged, attached or given as security;

(c) cannot be retained **by way of deduction, set-off or compensation under any Act of Parliament** other than this Act; and

(d) is garnishable moneys for the purposes of the *Family Orders and Agreements Enforcement Assistance Act*. [emphasis added]

By referencing only Acts of Parliament in section 9 (c) the clear implication is that both provincial statutes and private contracts can deduct or set-off the new Canada Disability Benefit. The principle of statutory interpretation, *expressio unius est exclusio alterius* (when one or more things of a class are expressly mentioned others of the same class are excluded) would be applied.

A proposed amendment to section 9(c) to read as follows:

A benefit under this Act:

(c) cannot be retained by way of deduction, set-off or compensation under any Act of Parliament other than this Act **or by contract, agreement, private insurance plan or similar instrument**; and

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² Steven Muller is Vice President of Share Lawyers. His practice focuses on long-term disability litigation. His education includes an LL.B from the University of Windsor in 1995 and a J.D. from the University of Detroit-Mercy in the same year. He completed a Master of Laws in Civil Litigation and Dispute Resolution in 2001. Steven was called to the Ontario Bar in 1997 and in 2018 he was called to the Bar of British Columbia. He is published in the area of disability insurance litigation and has been a guest speaker to organizations like the Ontario Trial Lawyers Association and the Canadian Academy of Psychologists in Disability Assessments. Steven was ranked as a Lexpert in the Canadian Legal Lexpert Directory for 2023 in the Practice area of Long-Term Disability.