CITATION: Intact Insurance Company v. Marianayagam, 2016 ONSC 1479
COURT FILE NO.: CV-09-389904
DATE: 20160301

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
INTACT INSURANCE COMPANY (formerly known as ING Insurance Company of Canada)	)	*Eric Grossman* for the Plaintiff
Plaintiff	)	
– and –	)	
JOSEPH ANTON MARIANAYAGAM	)	*David Wilson* for the Defendant
Defendant	)	
	)	**HEARD**: February 10, 2016

PERELL, J.

REASONS FOR DECISION

A. INTRODUCTION

[1] By way of a summary judgment motion, Intact Insurance Company ("Intact") seeks to have Joseph Marianayagam repay $100,000 of an alleged $102,341.63 (and growing) overpayment of income replacement benefits ("IRBs") plus $7,924.39 in interest.

[2] Intact claims reimbursement for overpayments made from January 4, 2007 to June 4, 2015. The overpayments occurred because Mr. Marianayagam received long term disability payments ("LTDs") and Canada Pension Plan ("CPP") disability benefits that should have reduced the amount of Intact's IRBs payments.

[3] By cross-motion for summary judgment, Mr. Marianayagam seeks an order that Intact's action be dismissed. Or, in the alternative, Mr. Marianayagam seeks a judgment that he pay Intact the amount found owing in respect of IRB overpayments for the 12-month period before January 4, 2008 (or in the alternative they claim for the 12-month period before March 14, 2008) less a reduction for his legal expenses in pursuing the LTDs.

[4] The dispute between Intact and Mr. Marianayagam involves a freakishly complicated set of facts concerning Statutory Accident Benefits ("SABS") under the *Insurance Act*, R.S.O. 1990, c. I.8 and O. Reg. 403/96 (the *Statutory Accident Benefits Schedule – Accidents on or after November 1, 1996*).

[5] The facts are unlikely to be repeated, but these odd facts, the parties' stubborn approach to the facts, and a decision of an adjudicator at the Financial Services Commission of Ontario ("FSCO") have created a legal mess.

[6] For the reasons that follow, I shall clean up the mess by granting Intact's summary judgment motion by ordering Mr. Marianayagam to pay Intact $11,150 plus interest pursuant to the *Courts of Justice Act*, R.S.O. 1990, c. C.43, but without costs.

B. STATUTORY BACKGROUND

[7] The relevant statutory provisions from the *Insurance Act* and from the *Statutory Accident Benefits Schedule - Accidents on or after November 1, 1996*, O. Reg. 403/96, are set out in Schedule "A" to these Reasons for Decision.

C. FACTUAL AND PROCEDURAL BACKGROUND AND LEGAL ANALYSIS

1. Introduction

[8] In these Reasons for Decision, I shall forgo the typical approach of first describing the background facts, of second discussing the law, and of third applying the law to the facts. Rather, I am going to employ an approach of solving the legal problems as they emerge during the narrative of the facts.

[9] The general approach of these Reasons for Decisions will be to attempt to get the parties back into the position they ought to have been in had they correctly solved the legal problems at the time when they arose. This approach will explain how the parties made several legal problems worse, but the approach will also provide solutions for the complicated problems.

[10] I also intend to use an E&OE ("errors and omissions excepted") approach about the nickels and dimes of my calculations. Many of the calculations involve making adjustments from monthly payments to weekly payments and this may have skewered my arithmetic. Some of the adjustments have to avoid double counting and some inputs changed due to cost of living adjustments that I may have missed.

[11] I have done the best I can, but what follows is with E&OE about the arithmetic. I also leave it to the parties to calculate the prejudgment interest, but I will resolve that issue by subsequent motion, if necessary.

2. How the SABS Overpayment Occurred

[12] On May 26, 2004, Mr. Marianayagam was injured in a car accident, and Intact was the insurer responsible to pay statutory accident benefits (SABS) under the *Insurance Act*, R.S.O. 1990, c. I.8 and the *Statutory Accident Benefits Schedule*; i.e. O. Reg. 403/96.

[13] At the time of the accident, Mr. Marianayagam worked for Paper X-Press Inc. and R-Theta Thermal Solutions and had an annual income of $44,779.

[14] As of September 23, 2004, Mr. Marianayagam started to receive LTDs of $1,602 monthly from Equitable Life.

[15] SABS include IRBs. Mr. Marianayagam was an insured, and he applied for IRBs, which Intact was obliged to pay if the criteria set out in sections 4 and 5 of O. Reg. 403/96 was satisfied.

[16] Subsection 5(1) of O. Reg. 403/96 provides that IRBs are payable during the period that the insured person suffers a substantial inability to perform the essential tasks of the employment in respect of which he or she qualifies for the benefit under section 4.

[17] Section 6 of O. Reg. 403/96 describes how the amount of the IRB is calculated.

[18] Section 7 of O. Reg. 403/96, which is at the centre of the dispute between the parties, provides for the deduction from IRB payments of collateral IRBs received by the insured. Subsection 7(1) states:

> *Collateral Payments for Loss of Income and Maximum Amount of Benefit*
>
> 7. (1) … the weekly amount of an income replacement benefit payable to a person shall be the lesser of the following amounts:
>
> 1. The amount determined under subsections 6 (1) and (5), reduced by,
>
> i. net weekly payments for loss of income that are being received by the person as a result of the accident … under any income continuation benefit plan, and …
>
> 2. The greater of the following amounts:
>
> i. $400 …

[19] Intact began to pay IRBs of $400 per week to Mr. Marianayagam, which is the maximum amount payable, but Intact terminated the IRBs payments on September 16, 2004.

[20] Mr. Marianayagam disputed the termination of his SABS entitlements, and the parties proceeded to an unsuccessful mediation and then to scheduling an arbitration.

[21] While the arbitration proceedings were still pending, on October 31, 2005, Equitable Life, Mr. Marianayagam's LTD insurer, terminated his LTDs.

[22] The arbitration at FSCO for Mr. Marianayagam's claim for IRBs was scheduled for May 3, 2006. The arbitration hearing, however, did not proceed because Intact and Mr. Marianayagam signed Minutes of Settlement.

[23] At the time of the settlement, Intact understood that it was the only insurer providing benefits to Mr. Marianayagam; i.e. there were no collateral benefits.

[24] The Minutes of Settlement were incorporated into an Order that was signed by Arbitrator Murray dated May 3, 2006 that was made pursuant to s. 287 of the *Insurance Act*. The consent Order states:

> UPON READING THE CONSENT, it is ordered as follows:
>
> 1. Insurer shall pay income replacement benefits as follows, pursuant to Sections 4 and 5 of the SABS, less amounts paid to date:
>
> (a) …
>
> (d) $400 per week from September 27, 2005 and ongoing, subject to the appropriate deduction for collateral benefits and post-accident income pursuant to the SABS. ….

[25] It is to be noted that the May 3, 2006 consent Order expressly provided that the IRBs would be reduced by collateral income benefits. However, the consent Order was later to be a source of problems for Intact because under s. 287 of the *Insurance Act*, an insurer shall not alter an order of an arbitrator to reduce benefits to an insured person on the basis of an alleged change of circumstances, alleged new evidence, or an alleged error, unless the insured person agrees or unless the Director or an arbitrator so orders in a variation or appeal proceeding under section 283 or 284 of the *Insurance Act*. Thus, later, when Intact alleged that it was overpaying IRBs, it needed to go through the formality of a variation proceeding at the FSCO.

[26] In other words, the existing consent Order preempted Intact from the self-help remedy of unilaterally reducing what it paid Mr. Marianayagam after it had discovered that he was being overpaid IRBs.

[27] Under the statutory regime, certain collateral benefits, including certain LTDs, are deducted from IRBs, and based on Mr. Marianayagam's representation that Equitable Life, his LTD insurer, had terminated LTDs, Intact paid Mr. Marianayagam IRBs of $400 per week from the time of the signing of the Minutes of Settlement and the May 3, 2006 consent Order.

[28] Meanwhile, Mr. Marianayagam was suing Equitable Life for wrongfully terminating the LTDs, and in April 2007, Equitable Life - retroactively - reinstated Mr. Marianayagam's LTDs of $1,602 per month as of September 2004.

[29] Equitable Life paid Mr. Marianayagam a lump sum payment of $27,447.60, which is approximately 17 months of payments at $1,602 per month or $372.56 per week, plus interest of $861.52.

[30] In the litigation against Equitable Life, Equitable Life agreed to pay costs of $43,464.97. These costs, however, did not cover Mr. Marianayagam's total legal expense of $52,533.24. Thus, Mr. Marianayagam's net recovery from his pursuit of LTDs was $18,379.33, which is approximately 11.5 months of payments at $1,602 per month or $372.56 per week.

[31] Pausing here to address one of the many legal problems, it is Mr. Marianayagam's argument that when an insurer makes a deduction for collateral benefits, the deduction should be net of the legal expenses incurred by the insured in pursuing that recovery, which benefit ultimately is enjoyed by the insurer whose IRB obligations are reduced.

[32] I agree with Mr. Marianayagam's argument as a general proposition or principle, which principle is supported by the following cases relied on by him: *Anand v. Belanger*, [2010] O.J. No. 4064 (S.C.J.); *Anathamoorthy v. Elliston*, 2013 ONSC 4510; *Gratton v. Corporation of the City of London* (1994), 18 O.R. (3d) 354 (Gen. Div.); *RBC Life Insurance Co. v. Jansen*, 2013 ONSC 3154; *Siddiqui v. Siddiqui*, 2015 ONSC 6260. But see: *contra Trottier v. Royal & SunAlliance*, [2003] O.F.S.C.D. No. 173 at paras. 50-51; *Stepien v. Security National Insurance Co./ Monnex Insurance Mgmt Inc.* (FSCO, Arbitrator Anschell, January 16, 2016).

[33] However, I would refine or qualify the principle to take into account, as will be discussed further below, that the *Insurance Act* imposes a limit on the deduction for collateral benefits; i.e., the *Insurance Act* caps the amount of the repayment to a 12-month period, and thus, the insurer is prevented from reclaiming the balance of the overpayment. In these circumstances, I do not think it fair or proper to reduce the insurer's reimbursement, unless the recaptured collateral benefit deduction is limited to the one-year period, which is not the situation in the case at bar.

[34] Put colloquially, because of the twelve-month cap on reimbursement for the overpayment, Intact is already taking a haircut in the deduction and no further cuts should be made.

[35] Whether to discount the insurer's claim for repayment for overpayments by the insured's legal expenses will depend upon the particular circumstances of each case, and I conclude that there should be no discounting in the immediate case.

3. The First Request for Repayment

[36] Returning to the narrative, Mr. Marianayagam did not immediately advise Intact about the retroactively reinstatement of the LTDs. It seems that Mr. Marianayagam's lawyer was of the view that the Equitable Life LTDs were not deductible because they are paid monthly while the IRBs are payable weekly. This is one of many mistakes made by the parties.

[37] The fact that the LTDs are payable monthly, not weekly, does not affect their deductibility. The fact that a policy provides for benefit payments to be paid monthly rather than weekly does not disqualify the benefits from being deducted from the IRBs if the benefits otherwise qualify for a deduction: *Cromwell v. Liberty Mutual Insurance Co.*, [2008] O.J. No. 376 (S.C.J.) at para. 23. Rather, the monthly payment simply has to be adjusted to a weekly payment; visualize, there are 4.3 weeks in a month, and, therefore, a $1,602 per month payment equals a $372.56 per week payment. Conversely, a $400 per week payment equals a $1,720 monthly payment.

[38] On September 25, 2007, Mr. Marianayagam applied for CPP disability benefits.

[39] Although, as already noted above, Mr. Marianayagam learned about the reinstatement of his Equitable Life LTDs in April 2007, he waited about seven months to advise Intact, as on November 22, 2007, Mr. Marianayagam's lawyer, David Wilson, wrote Intact and advised it about the reinstatement of Mr. Marianayagam's LTDs from Equitable Life. Mr. Wilson's letter stated:

> In reviewing this file, I note that you have not been provided with certain information to which you are probably entitled, namely, information with respect to the insured`s receipt of LTDs. ….
>
> As you are aware, the insurer is entitled to a deduction for "net weekly payments for loss of income that are being received by the person as a result of the accident under the laws of any jurisdiction or under any income continuation plan."
>
> Since the LTD payments [from Equitable Life] were being made on a monthly basis, and not on a weekly basis, it is arguable that there is therefore no deductability. Until recently the only arbitral decision on point resulted in a finding that such benefits were not deductible. For that reason there was no requirement that the insurer be informed that its insured was receiving a benefit that was not deductible.
>
> Circumstances may have changed in that there is a recent FSCO decision indicating that such benefits are deductible, despite the fact that they are made on a monthly basis.
>
> I am not conceding that such benefits are deductible. The insurer, however, is entitled to the information that its insured is receiving the benefits, so that it can take any steps it deems appropriate. ….

[40] By letter to Mr. Marianayagam, on January 4, 2008, pursuant to s. 47 of the *Statutory Accident Benefits Schedule,* Intact demanded repayment of $68,800 for the IRBs it alleged that it had overpaid because of the Equitable Life LTDs. Intact took the position that there were overpayments, and it sought repayment of the overpayments pursuant to subsection 47(1)(a) or subsection 47(1)(c) of O. Reg. 403/96.

[41] Subsection 47(1)(a) of O. Reg. 403/96 provides that an insured shall repay to the insurer any benefit that is paid as a result of an error on the part of the insurer, the insured person or any other person, or as a result of wilful misrepresentation or fraud. Subsection 47(1)(c) of O. Reg. 403/96 provides that an insured shall repay to the insurer any IRBs to the extent of any payments received by the insured that are deductible from those benefits under this regulation.

[42] Under s. 47(3) of O. Reg. 403/96, the obligation to repay does not apply unless a notice, which is prescribed by s. 47(2), is given within 12 months after the payment was made. Subsection 47(2) states:

> 47. (2) If a person is required to repay an amount to an insurer under this section,
>
> (a) the insurer shall give the person notice of the amount that is required to be repaid; and
>
> (b) if the person is receiving an income replacement or caregiver benefit, the insurer may give the person notice that the insurer intends to collect the repayment by deducting up to 20 per cent of the amount of the benefit from each payment of the benefit.

[43] There is a dispute between the parties about whether or not Intact gave a proper notice under s. 47(2).

[44] Intact relies on its January 4, 2008 letter as notice of its claim for repayment. The letter stated:

> Dear Mr. Wilson:
>
> We acknowledge and confirm receipt of your correspondence dated November 22, 2007 relating to the resolving of Mr. Marianayagam's LTD action [against Equitable Life]. …
>
> Please be advised that we have reviewed Mr. Marianayagam's IRBs and confirm that he continues to be eligible … however, as he is currently receiving a benefit from Equitable Life that exceeds the SABS weekly maximum of $400, we are unable to make any further top up payments at this time. ….
>
> We would kindly ask why the LTD resolvement was not disclosed to [Intact] following the resolving of the action in May 2007? … Bearing that in mind, we are unfortunately now faced with requesting the insured to repay the outstanding funds… that he received for IRBs from September 24, 2004 to January 4, 2008. [approximately 170 weeks]…
>
> As such we are advising that an overpayment was made with respect to Mr. Marianayagam's IRBs in the amount of $68,800. Please contact the undersigned to arrange repayment.

[45] A payment request notice pursuant to s. 47 should contain: (a) identification of the type of benefit that was overpaid; (b) the payment period for which repayment is sought; and (c) the amount of repayment sought. See *Knechtel and Royal & SunAlliance Company of Canada*, (FSCO, Arbitrator Sampliner, June 15, 2009); *Cromwell v. Liberty Mutual Insurance Co.*, *supra* at para. 46. Given that the proper amount of the deduction is sometimes debatable, in my

opinion, the amount claimed need not be perfectly correct, but it should be substantially correct.

[46] The insurer has the option of also giving notice that they intend to collect the repayment by deducting up to 20 per cent of the amount of the benefit from each payment of the benefit. This option need not be mentioned in the notice under s. 47, unless the insurer wishes to proceed in this fashion. In the immediate case, this option was not selected, apparently because Intact did not wish to limit itself to just deducting 20 per cent per payment and rather wished to pursue, as it has in this Court, an action to recover immediately all the overpayment.

[47] In my opinion, Intact's letter of January 4, 2008 was not a proper notice under s. 47(2)(a) of O. Reg. 403/96. The letter requested that $68,000 was required to be repaid. This was a mistake. It seems that Intact was requesting 170 weeks reimbursement of $400 per week. The amount requested was not substantially correct; it was grossly incorrect.

[48] This overreaching request for payment was a two-fold mistake. First, the arbitral case law and judicial case law hold that the overpayment is not equal to the amount of IRBs paid during the period in which there ought to have been deductions but rather is equal to the overpayment in the IRBs; i.e., the difference between the amount of IRBs that were paid on a weekly basis for the 12-month period before the notice and the amount of IRBs that ought to have been paid on a weekly basis for the one-year period before the notice. Second, the amount of the repayment claim is capped at one year before the demand.

[49] Unless the insured fraudulently misrepresented his or her entitlement to IRBs, an insurer can only recover its overpayments for a 12-month period and the insured does not have to repay the balance of the overpayments. See: *Trottier v. Royal & SunAlliance*, *supra*; *Vanderkop v. Personal Insurance Company of Canada*, [2008] O.J. No. 1937 (S.C.J.), aff'd 2009 ONCA 511; *Pries v. Economical Mutual Insurance Co.*, [2013] O.F.S.C.D. No. 93.

[50] Subsection (3) of s. 47 of O. Reg. 403/96 limits an obligation to repay any overpayment to payments received within 12 months before the issuance of the notice of claim: *Trottier v. Royal and SunAlliance Insurance Co. of Canada*, *supra* at paras. 39-42, 48; *Cromwell v. Liberty Mutual Insurance Co.*, *supra* at para. 45.

[51] In *Trottier*, the Director of Arbitrations, D.R. Draper stated at para. 44:

> 44. There is no doubt that one of the policies informing [O. Reg. 403/96] is that automobile insurers should only pay IRBs to the extent that the insured person is not entitled to payments for loss of income from some other source. However, another underlying principle is that insured persons should be able to rely on the benefits they receive to meet current needs. To this end, the legislation establishes rules and time limits for applications, the determination of the entitlement, procedures for dealing with disputes, and recovery of overpayments. As Royal acknowledges, [O. Reg. 403/96] recognizes the special vulnerabilities of accident victims who will inevitably need to rely on the benefits they receive, and will have a limited ability to respond to any overpayment claims. Insurers are required to identify and provide notice of any overpayment within a relatively short period – 12 months – or lose the right to recover them.

[52] Pausing here, it shall prove helpful in unravelling what will follow in the narrative to note that what Intact ought to have done in the immediate case in its letter of January 4, 2008 was to demand payment of 12 months of payments. Had it done so, it would have had a good claim for that repayment.

[53] A proper letter in January 2008 would have redressed the past overpayment - as far as permitted by the statute. The January 4, 2008 letter, however, was not a proper notice under s. 47

of O. Reg. 403/96, and so the problem of the overpayments was not solved.

[54] As for the ongoing overpayments, Intact had the problem that because of the consent Order of May 3, 2006 and s. 287 of the *Insurance Act*, it needed a formal variation of the FSCO Order. The overpayments would accumulate until that variation Order was achieved.

4. The Second Request for Repayment

[55] Returning to the narrative, Intact retained legal counsel to pursue the matter of repayment and the accumulating overpayments, and on February 20, 2008, Intact's lawyer, William Sproull, wrote Mr. Marianayagam's lawyer. The letter stated:

> … the writer has been retained by [Intact] with respect to this matter. ….
>
> I have asked our client to have their accountant calculate the precise quantum of the weekly benefit top-up, and will get back to you about this shortly. In the meantime, kindly advise whether you would agree to the filing of a consent order for variance of the $400 weekly benefit at the new amount (to be advised) at FSCO.
>
> Second, and given that our client wrote to you on January 4, 2008 about the overpayment in light of the collateral carrier's reinstatement, you client has been in a repayment situation since at least January 4, 2007. As you know s. 47 of the Schedule permits [Intact] to recover overpayments, and you are no doubt aware of the arbitral decision *Bhola and the Personal* … having been personally involved in the case …
>
> Section 47 also permits the insurer to deduct up to 20% of an ongoing weekly benefit for the purpose of recouping an overpayment. Of course, in our case, there is an order in place for ongoing payment of $400 weekly benefit, but I cannot see any reason why that order could not also be varied on consent to permit [Intact] to deduct up to 205 of the ongoing reduced weekly benefit … to recoup the overpayment. Would you kindly advise if you would be agreeable to this as well. ….

[56] Without expressly acknowledging that the January 4, 2008 Intact letter was in error in claiming 170 weeks of IRBs, the letter notes that Mr. Marianayagam "has been in a repayment situation since at least January 4, 2007;" i.e., a one year period, and Mr. Sproull writes that Intact's accountant has been asked to "calculate the precise quantum of the weekly benefit top-up," which is the balance remaining from the $400 IRBs after deducting the LTDs.

[57] In my opinion, Mr. Sproull's letter of February 20, 2008 for Intact, which does not specify an amount for repayment, is also not a proper notice under s. 47(2) of O. Reg. 403/96. Had it been a proper notice, Intact would have then had a good claim for repayment for 12 months of overpayments.

[58] I pause here to emphasize one of the freakish factual aspects of the case. The overpayment recoveries are statutorily limited to 12-months of overpayments prior to the s. 47 notice but because of the May 3, 2006 consent Order, Intact was precluded from the self-help remedy of reducing the IRBs to take into account the payment of LTDs and thus the overpayments were accumulating. Intact's claim for repayment was capped at 12-months of overpayments notwithstanding that the overpayments were accumulating.

[59] To deal with the accumulating overpayments, as may be noted in Mr. Sproull's letter of February 20, 2008, Intact requested a consent Order to vary the $400 per week IRBs being paid under the May 2006 consent Order.

[60] As also indicated in the letter, Intact retained an accountant, Bruce Webster of PricewaterhouseCoopers LLP, to verify its calculation of the overpayment. Mr. Webster calculated the overpayment as $13,007.25 from January 1, 2007 to the end of February 2008.

[61] Mr. Webster's report is closer to correctly calculating the overpayment claim, but he errs by making a claim for 14 months and not a 12 month period. Adjusting his calculation to be from January 1, 2007 to December 31, 2007, I accept it as representing Intact's proper overpayment claim of $11,149.07, which I shall round to $11,150.

[62] On March 14, 2008, Mr. Marianayagam was given a copy of Mr. Webster's report. At the same time, Intact renewed its request for a consent Order to vary the consent Order of May 2006.

[63] In the peculiar circumstances of this case, the receipt of Mr. Webster's report by Mr. Marianayagam may be regarded as the delivery of a s. 47(2) notice. With the adjustment for a 12-month period, the report satisfied that requirement of giving Mr. Marianayagam notice of the repayment amount that Intact sought from him.

[64] It follows that subject to whether or not Intact also has a go-forward claim for the accumulating overpayments and subject to Mr. Marianayagam's argument that the court has no jurisdiction to make any order in the circumstances of this case, (matters that I shall discuss below), Intact should have judgment for $11,150 for the overpayment claim plus interest pursuant to the *Courts of Justice Act*.

5. Intact's Claim for the Ongoing or Accumulating Overpayments

[65] Returning to the narrative, after March 2008, Intact requested that the consent Order be varied to provide for IRBs of $181.31 weekly for 2007 and $179.46 weekly for 2008 and that Intact be permitted to deduct up to 20 per cent from the ongoing IRBs to recover the overpayment.

[66] Mr. Marianayagam refused to consent to the variance Order.

[67] Meanwhile, in September 2008, Mr. Marianayagam heard from the administrators of the CPP that his application for disability benefits had been approved effective as of November 2006.

[68] On January 21, 2009, Mr. Marianayagam advised Intact that he had been retroactively approved for CPP disability payments. From June to December 2006, the monthly CPP disability benefit was $631.59. From January to December 2007, the monthly CPP benefit was $644.85. From January to November 2008, the monthly CPP benefit was $657.75.

[69] Since CPP is also deductible from IRB entitlements, Intact requested Mr. Webster to update his report and recalculate the overpayment of IRB.

[70] Mr. Webster's revised report indicated that the IRB was: (a) $178.72 weekly for 2007; (b) $174.26 weekly for 2008; and (c) $169.66 weekly for 2009. The report indicated an alleged overpayment of $25,087.76 from January 4, 2007 to February 27, 2009.

[71] On February 27, 2009, Intact gave Mr. Marianayagam a copy of Mr. Webster's revised report.

[72] While Intact had Mr. Webster include the CPP benefits in his recalculation of the accumulating overpayments, Intact did not give a formal notice requesting repayment of the CPP disability benefits. In my opinion, since Intact gave no notice pursuant to s. 47 of O. Reg. 403/96, it cannot now make a claim for the CPP payments.

[73] In my opinion, what Intact could have done is that around January 21, 2007, it could have given a s. 47 notice for one year of CPP benefits, which I calculate to be $7,579.08.

[74] Had Intact done so, and had Mr. Marianayagam failed to repay, then subject to whether or not Intact has a go-forward claim for the accumulating overpayments and subject to Mr. Marianayagam's argument that the court has no jurisdiction to make an order in the circumstances of this case (matters that I shall discuss below), then Intact could have had an additional judgment for $7,579.08 plus interest pursuant to the *Courts of Justice Act*. But Intact did not give the notice, and, in my opinion, it, therefore, has lost any overpayment claim with respect to the CPP benefits.

6. The FSCO Mediation, the Court Action, and the FSCO Variance Hearing

[75] Returning again to the narrative, on March 3, 2009, the parties participated in a mediation session at the FSCO. At the mediation session, Intact's position was: (a) that Mr. Marianayagam owed it $25,087.76, plus interest as of March 2, 2009; and (b) that, going forward, the IRBs payable should be $169.66 per week.

[76] The mediation was unsuccessful, and Intact filed for an arbitration at the FSCO for the purpose of having the 2006 consent Order revised.

[77] On July 27, 2009, Intact commenced an application pursuant to sections 284 and 287 of the *Insurance Act*. Intact's position was that the reinstatement of the LTDs from Equitable Life and the approval of CPP benefits were material changes allowing for a variation in the May 3, 2006 consent Order.

[78] Intact then decided to proceed on two procedural courses. On October 27, 2009, without abandoning its proceedings at the FSCO, Intact commenced a simplified procedure action for repayment of the overpayment. Intact's claim was for $50,000.

[79] In the action, which is now before the court, Intact sought repayment of the overpaid IRBs from January 4, 2007; i.e. one year before its January 4, 2008 letter plus repayment of the accumulating overpayments after that letter.

[80] The FSCO proceeding moved quickly. Delegate Lawrence Blackman presided at the FSCO hearing. The hearing proceeded on May 7, 2010 and October 14, 2010.

[81] On February 10, 2011, Mr. Blackman released his decision. He concluded that the LTD and CPP payments were deductible from the IRBs. However, Mr. Blackman declined to decide the matter of the accumulating overpayments because the Superior Court action was broader in scope and would determine the amount of the overpayment.

[82] Instead of deciding Intact's variance request, Mr. Blackman stayed Intact's FSCO Application to vary the May 3, 2006 consent Order. The rationale for the stay was that Intact's simplified procedure action was still before the court. At pages 6 and 7 of his decision, Mr. Blackman stated:

> The civil action is far broader in scope that this variation application, both in terms of the issues raised and the relief sought. The parties do not see any impediment in my determining whether the CPP and Equitable Life payments are deductible.
>
> I find the most fair and pragmatic means of moving this matter forward while avoiding inconsistent results and unnecessary duplication of effort is that all determinations regarding the correct weekly IRB quantum occur in one forum. I am not persuaded I have the power to require [Intact] to bring all its claims for relief regarding the May 3, 2006 Order in this forum. I certainly do not have jurisdiction to stay or strike the court action. Thus, the only present possible forum to address all of the requested amendments to the weekly IRBs is the court.
>
> I thus stay this variation proceeding pending such determinations, subject to any further or other order of a FSCO adjudicator. If the Court determines that it has jurisdiction to amend any portion of the May 3, 2006 Order, it will proceed to do so. If the Court determines it does not have such jurisdiction in any respect, [Intact] may return to this forum to proceed with this variation application regarding any requisite and proper amendment to the May 3, 2006 Order.

[83] Pausing here, in my opinion, the FSCO adjudicator's decision not to decide the matter of the variance of the May 2006 consent Order was both unnecessary and unfortunate. Although the court was dealing with the alleged overpayment, as I shall explain below, it does not have the jurisdiction to make an order varying the FSCO Order.

[84] Thus, as result of FSCO not dealing with the matter, new overpayments were accumulating at the rate of approximately $230 per week.

7. The Action in the Superior Court

[85] In the court proceedings, on December 29, 2011, Master Abrams granted Intact leave to amend its Statement of Claim, and on January 25, 2012, Intact delivered an Amended Statement of Claim seeking repayment of $100,000. The prayer for relief in the Amended Statement of Claim stated:

> The plaintiff claims:
>
> > (a) Judgment in favour of the plaintiff and an Order requiring the defendant to repay to the plaintiff the sum of $100,000 or an amount equal to payments of disability pension benefits under the Canada Pension Plan and/or long term disability benefits under a policy with Equitable Life received by or available to the extent that such payments are equal to or less than the amount of the income replacement benefits that have been paid and are being paid by the plaintiff to the defendant from January 4, 2007 to the date of such Judgment.
> >
> > (b) Interest pursuant to the *Courts of Justice Act*, R.S.O. 1990, c. C.43, or in the alternative pursuant to subsections 47(6) and (7) of the *Statutory Accidents Benefits Schedule* promulgated under the *Insurance Act*, R.S.O. 1990, c. I.8, as amended;
> >
> > (c) The costs of this action on a substantial indemnity basis;
> >
> > (d) Such further and other relief as this Honourable Court deems just.

[86] The heart of Intact's claim for repayment is set out in paragraphs 14 to 18 of the Amended Statement of Claim, which state:

> 14. The plaintiff further states that weekly income replacement benefits have been paid by the plaintiff to the defendant in the amount of $400 weekly as a result of error given that the

> defendant's receipt of long term disability benefits from Equitable first became known to the plaintiff on or after November 22, 2007, and the defendant's receipt of CPP disability pension benefits first became known to the plaintiff on or after January 21, 2009.
>
> 15. Further and in the alternative, the plaintiff states … that by not previously disclosing his receipt of, or the availability of, long term disability benefits from Equitable and CPP disability pension benefits from the Canada Pension Plan, the defendant misrepresented to the plaintiff the quantum of his entitlement to payment from the plaintiff of past and ongoing income replacement benefits.
>
> 16. Further and in the alternative, the plaintiff states … that the reinstatement of long term disability benefits by Equitable as of April 2007, and the subsequent notice on or about January 21, 2009 that the defendant's CPP disability pension benefit application had been approved effective June 2006 each represent material change in the defendant's circumstances.
>
> 17. The plaintiff accordingly pleads and relies upon section 47(1) or in the alternative section 47 (4) of the *Schedule* promulgated under the *Insurance Act*, R.S.O. 1990, c. I.8, as amended.
>
> 18. The plaintiff further states … that appropriate notice was given to the defendant of the plaintiff's intention to claim a repayment of past and ongoing weekly income replacement benefits paid to the defendant, including interest thereon, and to claim a reduction with respect to ongoing payment of income replacement benefits. The plaintiff pleads and relies upon subsections 47(3), (6) and (7) of the *Schedule* promulgated under the *Insurance Act*, R.S.O. 1990, c. I.8, as amended.

[87] In 2012, Mr. Marianayagam delivered his Statement of Defence in which he took the position that: (a) there had been no error or misrepresentation about the payment of IRBs; (b) no proper notice had been given under s. 47 of O. Reg. 403/96; and (c) in circumstances where the IRBs are being paid pursuant to a FSCO Order, the Superior Court does not have jurisdiction to order repayment of any overpayments.

[88] Paragraphs 3, 4, 6 and 7 of the Statement of Defence state:

> 3. The defendant states … that the combined effect of sections 279(1), 284 and 287 of the said *Insurance Act* is to require the plaintiff to commence an application for variation pursuant to section 284 of the said Act, if it wishes to vary any arbitral order which requires the plaintiff to pay to the defendant income replacement benefits, which variation may, pursuant to subsection 284 (4) be prospective or retroactive. The defendant states … that the relief sought by the plaintiff … effectively constitutes an attempt to vary the arbitral order …. The defendant states … that the said *Insurance Act* gives exclusive jurisdiction to the Financial Services Commission of Ontario to vary a previous order made by an Arbitrator of the said Financial Services Commission of Ontario.
>
> 4. Accordingly, the defendant states that … the within Court is without jurisdiction to deal with the within matter, and the defendant seeks a stay or dismissal with respect to the within action. …
>
> …
>
> 6. The defendant states … that claims of overpayment of SABS benefits are limited to the procedure as described in Section 47 of the SABS. Although the defendant admits that the plaintiff did forward correspondence to his solicitor dated January 4, 2008, advising that an overpayment was made with respect to his income replacement benefits in the amount of $68,000, the defendant denies that said correspondence constitutes proper notice pursuant to section 47 of the SABS. Accordingly, the said correspondence is without legal effect. … the defendant denies that the said correspondence contains a statement of the appropriate weekly/monthly or lump sum amount sought, the payment date of applicable time span of the specific benefits it has paid and seeks repair, or a calculation of the total repayment claimed. Further the plaintiff failed to provide the notice as referenced in subsection 47(2)(b) of the SABS. Consequently, the defendant states …

> that the plaintiff is not entitled to claim or receive any alleged overpayment of income replacement benefits.
>
> 7. Further, the defendant states and the fact is that section 47(1) of the SABS provides that the obligation to repay a benefit does not apply unless the required notice is given within 12 months after the payment of the said benefit was made. Accordingly, in the event the said correspondence constitutes proper notice pursuant to section 47 (which is not admitted but denied) the obligation of the defendant to repay any benefit to the insurer only arises with respect to income replacement benefits paid to the defendant for the period January 4, 2007 to January 4, 2008. The defendant further denies that the notice is effective for any income replacement benefits paid by the plaintiff from and after January 4, 2008.

[89] After the pleadings closed, Mr. Marianayagam was examined for discovery in the simplified procedure action.

[90] Nothing much seems to occur after the examinations for discovery until the spring of 2014 when Intact obtained an updated report from Mr. Webster.

[91] Around this time, Intact brought a motion to have Mr. Marianayagam answer his undertakings and the refused questions on his examination for discovery, and on May 7, 2014, Master Glustein, as he then was, issued an Order compelling further answers.

[92] On June 12, 2014, Intact wrote Mr. Marianayagam and provided him with a copy of Mr. Webster's updated report dated April 11, 2014. Intact requested Mr. Marianayagam to consent to a variance of the IRBs moving forward from $400 to $153.29 per week based on the updated calculations.

[93] Once again, Mr. Marianayagam refused to consent to a variance.

[94] In 2015, Mr. Webster delivered yet another report. This report is dated February 20, 2015 and in it he calculates the IRB overpayment to June 4, 2015 based on three scenarios depending upon which communication is used as the notice to Mr. Marianayagam of the request for repayment; that is:

- If the January 4, 2007 letter is used as the notice of Intact's claim for repayment, the overpayment is $102,341.63 (plus interest of $7,924.99).
- If the March 14, 2007 receipt of Mr. Webster's first report is used as the notice of Intact's claim for repayment, the overpayment is $98,153.55 (plus interest of $7,301.98).
- If the March 3, 2009 mediation is used as notice of Intact's claim, the overpayment is $75,198.58 (plus interest of $2,390.56).

[95] In 2015, Mr. Marianayagam retained Michael Sigsworth of the accounting firm ADS Forensics Inc. to prepare a calculation of the alleged overpayments. Mr. Sigsworth prepared a report dated March 26, 2015. In comparison to Mr. Webster's calculations, it was Mr. Sigworth's opinion that there were overpayments as follows:

- If the January 4, 2007 letter is used as the notice of Intact's claim, the overpayment is $89,011.44.
- If the March 14, 2007 receipt of Mr. Webster's first report is used as the notice of Intact's claim, the overpayment is $86,044.85.

- If the March 3, 2009 mediation is used as the notice of Intact's claim, the overpayment is $58,355.77.

[96] Recently, without a formal order from the FSCO, Mr. Marianayagam agreed that Intact could reduce his IRBs. On a go-forward basis there is now only a small discrepancy between the amount of the IRBs he receives and the amount he ought to receive if his LTDs and CPP benefits are deducted.

8. The Court's Jurisdiction to Order Repayments of Overpayments

[97] Pursuant to s. 279 of the *Insurance Act*, disputes in respect of any insured person's entitlement to SABS or in respect of the amount of SABS shall be resolved in accordance with sections 280 to 283 of the *Act* and O. Reg. 403/96. Section 281 of the *Insurance Act* provides that **the insured** may (a) sue in court; (b) refer the issue to an FSCO arbitrator; or (c) with the concurrence of the insurer refer the dispute for arbitration in accordance with the *Arbitration Act*.

[98] As the discussion below will reveal, **the insurer's** choices; i.e. Intact's procedural choices are more circumscribed and court proceedings may or may not be available depending on the nature of the insurer's claim.

[99] As noted above, Mr. Marianayagam submits that this court does not have any jurisdiction to order any repayment of the SABS overpayments. In my opinion, Mr. Marianayagam is partially correct and partially incorrect. My review of the case law leads me to the conclusion that this court has jurisdiction to deal with claims under s. 47(1) of O. Reg. 403/96 but except by judicial or appellate review of an arbitrator's order, the court does not have the jurisdiction to vary a FSCO order about SABS or the amount of them.

[100] In other words, in my opinion, this court has the jurisdiction to determine Intact's claim arising from the overpayment caused by Mr. Marianayagam receiving LTDs and CPP benefits. As may be derived from the discussion above, I shall exercise the court's jurisdiction to award Intact $11,150 plus interest pursuant to the *Courts of Justice Act*.

[101] In *Citadel General Insurance Co. v. Gogna*, [1992] O.J. No. 1996 (Gen. Div.), Citadel brought a court action against its insured for allegedly fraudulently misrepresenting that he had been injured in a car accident. Citadel claimed repayment of all SABS paid to the insured. The insured applied for arbitration under the *Insurance Act* and argued that the court action should not go forward. Justice E. Macdonald disagreed, and she stated that the *Insurance Act* did not take away Citadel's common law action to recover repayment of benefits procured by fraud or misrepresentation.

[102] The case at bar is not a claim for common law fraud and misrepresentation but rather a claim for repayment under s. 47(1)(a) or (c) and thus *Citadel General Insurance Co. v. Gogna*, is not precisely on point. That said, because s. 47(1) also includes claims for repayment for wilful misrepresentation or fraud, *Citadel General Insurance Co. v. Gogna*, does support the notion that the court has the jurisdiction to decide Intact's s. 47(1)(a) claims.

[103] In *Liberty Mutual Insurance Co. v. Fernandes* (2006), 82 O.R. (3d) 524 (C.A.), Mr. Fernandes received SABS having been assessed for a catastrophic impairment. The insurer disagreed with the assessment and after an unsuccessful mediation, it sued for a declaration that

Mr. Fernandes had not suffered a catastrophic impairment. The Court of Appeal upheld Justice Morawetz's (as he then was) decision that the *Insurance Act* was a complete code that did not allow an insurer to bring a court proceeding to challenge a catastrophic impairment assessment.

[104] For the Court of Appeal, Justice Feldman, however, explained that this conclusion about the court's jurisdiction did not mean that the insurer was foreclosed from access to the courts or adjudicators because the design of the *Act* allowed the insurer to set the amount of the SABS subject to an order otherwise by a court or by an arbitrator and these provisions would compel the insured to have a dispute adjudicated.

[105] For present purposes, what are significant are Justice Feldman's comments about *Citadel General Assurance Co. v. Gogna*, *supra*. Justice Feldman stated at paragraphs 21-26, with my emphasis added:

> 21. Much of the arbitral jurisprudence that states that the Act does not remove an insurer's right to bring a court action to decide disputes regarding statutory accident entitlement relies on the 1992 Superior Court decision in *Citadel General Assurance Co. v. Gogna*. The issue in that case was whether an insurer's civil action for the repayment of benefits allegedly obtained by the insured by fraud and misrepresentation could proceed notwithstanding the insured person's subsequent application for arbitration. In that context, the court held that an insurer must have access to the courts to enforce repayment by an insured of benefits obtained by fraud or misrepresentation and that nothing in the Act specifically removed an insurer's common law right to obtain that enforcement.
>
> 22. Arbitrators in subsequent cases have stated that *Citadel* sets out the appropriate approach for determining which proceeding should continue when the parties each want to proceed in different forums. However, the actual issue in those arbitration cases was how to proceed when the *insured* had commenced multiple proceedings (see, for example, *Mangat* and *Gouliaeff, supra*), not whether an insurer can commence a civil action. In that context, and in others, arbitrators have noted that insured persons have been given a choice under the Act, not available to insurers, of whether to proceed by way of arbitration or litigation. Arbitrators have then commented, in *obiter*, that the only option for insurers after a failed mediation is to proceed by way of court action.
>
> 23. In my view, court access for the purpose of obtaining repayment of funds obtained in error or by fraud or misrepresentation is not limited by the scheme for resolution of disputes related to an insured person's entitlement to or the quantum of statutory accident benefits contained in ss. 279-283 of the Act. *Citadel* should therefore be distinguished from the present appeal.
>
> 24. In *Citadel*, the court stated that, "at common law an insurer has a right of action for repayment of amounts paid to a person through error or fraud", and found that the common law right was not expressly or impliedly removed by the dispute resolution provisions of the Act.
>
> 25. However, unlike the right to redress for fraud or misrepresentation, a catastrophic impairment designation is a statutory, not a common law creation. Also, s. 27 of the former *No-Fault Benefits Schedule* (now s. 47 of the SABS), which obliged an insured to repay any benefits that were paid through fraud or error, differed from ss. 37(5) and 40(4) of the SABS because it did not address the procedure for dispute resolution, while ss. 37(5) and 40(4) specifically limit the availability of dispute resolution for statutory accident benefits entitlement to the procedures set out in ss. 279-283 of the Act. Of course, those sections do not include any right of an insurer to initiate a court proceeding.
>
> 26. In my view, the reasoning in *Citadel* must be limited to actions involving the repayment of benefits obtained through fraud or error; to extrapolate from that case that insurers also have an absolute right to bring a court proceeding to determine statutory accident benefits entitlement issues is erroneous.

[106] Thus, *Liberty Mutual Insurance Co. v. Fernandes* and *Citadel General Insurance Co. v. Gogna* are authority that the insurer can bring a court action making a claim under s. 47(1)(a).

[107] Strictly speaking, however, the cases are not authority for a claim under s. 47(1)(c), which is a claim for repayment for any income replacement to the extent of any payments received by the person that are deductible under O. Reg. 403/96.

[108] Subsection 47(1)(c) is more statutory than common law in its orientation. I, however, would not read the decisions so narrowly because it would create the anomalous situation (as is demonstrated in the case at bar) that an insurer could sue by pleading a claim under s. 47(1)(a) but be confronted with the argument that the court cannot also adjudicate the comparatively more straightforward claim under s. 47(1)(c) about benefits payable under the *Act*. I would not interpret the cases to create this anomaly. In other words, *Liberty Mutual Insurance Co. v. Fernandes* and *Citadel General Insurance Co. v. Gogna* can be sensibly interpreted as extending the court's jurisdiction to adjudicate insurer's claims under both s. 47(1)(a) and (c), which is how the claim was presented in the case at bar.

[109] This somewhat more expansive interpretation of *Liberty Mutual Insurance Co. v. Fernandes* and *Citadel General Insurance Co. v. Gogna* is supported by *State Farm Mutual Insurance Co. v. Ramalingham*, [2009] O.J. No. 351 (S.C.J.), leave to appeal to the Div. Ct. refused, [2009] O.J. No. 3811 (Div. Ct.).

[110] That said, *Liberty Mutual Insurance Co. v. Fernandes* and *Citadel General Insurance Co. v. Gogna* cannot be interpreted to give this court jurisdiction to vary an order made by a FSCO adjudicator. Except perhaps by judicial review jurisdiction to review the procedure and decisions of administrative tribunals, this court does not have jurisdiction to do what the FSCO adjudicator has the jurisdiction to do (but declined to do); i.e. exercise the jurisdiction to vary the consent Order of May 3, 2006.

[111] In the case at bar, but for the fact that he was distracted by Intact's simplified procedure action, the adjudicator could have arrested the accumulation of more overpayments and made a retrospective or prospective order to deal with the problem of the overpayments.

[112] Put differently, Intact's simplified procedure action was appropriate to make a claim for IRB overpayments for a 12-month period, but the court action was not appropriate to deal with the accumulating overpayments; that was a matter for the FSCO.

[113] In my opinion, Intact cannot use a court action to circumvent that 12-month cap imposed by s. 47(2) and (3) of O. Reg. 403/96 or to circumvent s. 287 of the *Insurance Act*, which provides that an insurer shall not, after an order of the Director or of an arbitrator appointed by the Director, reduce benefits to an insured person on the basis of an alleged change of circumstances, alleged new evidence or an alleged error, unless the insured person agrees or unless the Director or an arbitrator so orders in a variation or appeal proceeding under section 283 or 284 of the *Act*.

[114] Turning now to Intact's claims that are within this court's jurisdiction, subsection 47(1) of O. Reg. 403/96 states:

> 47. (1) A person shall repay to the insurer,
>
> (a) any benefit under this Regulation that is paid to the person as a result of an error on

> the part of the insurer, the insured person or any other person, or as a result of wilful misrepresentation or fraud;
>
> …
>
> (c) any income replacement, …, to the extent of any payments received by the person that are deductible from those benefits under this Regulation;

[115] With the factual background described above, Intact has a claim under s. 47(1)(c) for repayment of IRBs to the extent of the LTDs that should have been deducted from the IRBs.

[116] As already noted, in the unusual circumstances of this case, Mr. Marianayagam's receipt of Mr. Webster's report constituted a notice under s. 47 of O. Reg. 403/96 and Intact was entitled to a 12-month repayment of $11,150 plus interest pursuant to the *Courts of Justice Act*.

[117] I need not decide whether Intact also has a claim under s. 47(1)(a) for a benefit paid to its insured as a result of an error on its part, Mr. Marianayagam, or any other person, or as a result of wilful misrepresentation or fraud.

D. CONCLUSION

[118] A judgment should issue in accordance with these Reasons for Decision.

[119] The judgment should be without costs for the following reasons.

[120] On a moral plane, Mr. Marianayagam ought to have consented long ago to the variance of the FSCO order, but it was Intact that was pursuing more than 12-months of overpayments and it was Intact that was resisting giving him credit for the legal expense of pursuing the collateral benefits that will eventually reduce Intact's IRB payments, and it was Intact that was attempting to circumvent the policy of the *Insurance Act* to spare a disabled person the full burden of repaying his or her insured for IRBs because it was not prepared to wait for partial payments under s. 47(5).

[121] With the overpayments accumulating, Intact did not wish to be constrained by s. 47(5) of O. Reg. 403/96 that restricted it to collecting the repayment by deducting up to 20 per cent of the amount of the overpayment from each IRB payment. It would have taken Intact a long time to recover a $100,000 overpayment, and it was not prepared to wait - but - there would never have been a $100,000 overpayment if Intact had pushed promptly for the formality of a variance of the May 3, 2006 consent Order and not brought the action before the court, which caused the FSCO adjudicator to stay the FSCO proceeding. Although Intact was the successful party in this court, its action was ill conceived and Intact is largely the author of its own misfortune.

_____

Perell, J.

Released: March 1, 2016

SCHEDULE "A"

Relevant Provisions of the *Insurance Act*, R.S.O. 1990, c. I.8 and of *Statutory Accident Benefits Schedule - Accidents on or after November 1, 1996*, O. Reg. 403/96.

Insurance Act, R.S.O. 1990, c. I.8

DISPUTE RESOLUTION – STATUTORY ACCIDENT BENEFITS

Dispute resolution

279. (1) Disputes in respect of any insured person's entitlement to statutory accident benefits or in respect of the amount of statutory accident benefits to which an insured person is entitled shall be resolved in accordance with sections 280 to 283 and the *Statutory Accident Benefits Schedule*.

….

Orders

(4) The Director and every arbitrator appointed by the Director shall determine issues before them by order and may make an order subject to such conditions as are set out in the order.

….

Mediation

280. (1) Either the insured person or the insurer may refer to a mediator any issue in dispute in respect of the insured person's entitlement to statutory accident benefits or in respect of the amount of statutory accident benefits to which the insured person is entitled.

….

Payment pending dispute resolution

(3) Subject to subsection (4), if mediation fails, the insurer shall pay statutory accident benefits in accordance with the last offer of settlement that it had made before the failure until otherwise agreed by the parties or until otherwise ordered by a court, by an arbitrator acting under this Act or the *Arbitration Act, 1991*, or by the Director.

Same

(4) If a dispute involves a statutory accident benefit that the insurer is required to pay under subsection 268 (8) and no step authorized by subsection (1) has been taken within 45 days after the day mediation failed, the insurer shall pay the insured in accordance with the last offer made by the insurer before the failure until otherwise agreed by the parties or until otherwise ordered by a court, by an arbitrator acting under this Act or the *Arbitration Act, 1991*, or by the Director.

Litigation or arbitration

281. (1) Subject to subsection (2),

(a) the insured person may bring a proceeding in a court of competent jurisdiction;

(b) the insured person may refer the issues in dispute to an arbitrator under section 282; or

(c) the insurer and the insured person may agree to submit any issue in dispute to any person for arbitration in accordance with the *Arbitration Act, 1991*.

Limitation

(2) No person may bring a proceeding in any court, refer the issues in dispute to an arbitrator under section 282 or agree to submit an issue for arbitration in accordance with the *Arbitration Act, 1991* unless mediation was sought, mediation failed and, if the issues in dispute were referred for an evaluation under section 280.1, the report of the person who performed the evaluation has been given to the parties.

….

Limitation period

281.1 (1) A mediation proceeding or evaluation under section 280 or 280.1 or a court proceeding or arbitration under section 281 shall be commenced within two years after the insurer's refusal to pay the benefit claimed.

…

Arbitration

282. (1) An insured person seeking arbitration under this section shall file an application for the appointment of an arbitrator with the Commission.

Arbitrator's appointment

(2) The Director shall ensure that an arbitrator is appointed promptly.

Determination of issues

(3) The arbitrator shall determine all issues in dispute, whether the issues are raised by the insured person or the insurer.

….

Appeal against arbitration order

283. (1) A party to an arbitration under section 282 may appeal the order of the arbitrator to the Director on a question of law.

…

Application for variation, Director's or arbitrator's order

284. (1) Either the insured person or the insurer may apply to the Director to vary or revoke an order made by the Director or an arbitrator appointed by the Director.

Idem

(2) If an application is made to vary or revoke an arbitrator's order, the Director may decide the matter or he or she may appoint the same arbitrator or some other arbitrator to determine it.

Powers on variation

(3) If the arbitrator or Director is satisfied that there has been a material change in the circumstances of the insured or that evidence not available on the arbitration or appeal has become available or that there is an error in the order, the arbitrator or Director may vary or revoke the order and may make a new order if he or she considers it advisable to do so.

Idem

(4) An order made, varied or revoked under subsection (3) may be prospective or retroactive.

….

Protection of benefits

287. An insurer shall not, after an order of the Director or of an arbitrator appointed by the Director, reduce benefits to an insured person on the basis of an alleged change of circumstances, alleged new evidence or an alleged error, unless the insured person agrees or unless the Director or an arbitrator so orders in a variation or appeal proceeding under section 283 or 284.

Statutory Accident Benefits Schedule - Accidents on or after November 1, 1996, O. Reg. 403/96

PART II
INCOME REPLACEMENT BENEFIT

ELIGIBILITY CRITERIA

4. (1) The insurer shall pay an insured person who sustains an impairment as a result of an accident an income replacement benefit if the insured person meets any of the following qualifications:

1. The insured person was employed at the time of the accident and, as a result of and within 104 weeks after the accident, suffers a substantial inability to perform the essential tasks of that employment.

2. The insured person,

i. was not employed at the time of the accident,

ii. was employed for at least 26 weeks during the 52 weeks before the accident or was receiving benefits under the *Employment Insurance Act* (Canada) at the time of the accident,

iii. was 16 years of age or more or was excused from attendance at school under the *Education Act* at the time of the accident, and

iv. as a result of and within 104 weeks after the accident, suffers a substantial inability to perform the essential tasks of the employment in which the insured person spent the most time during the 52 weeks before the accident.

3. The insured person,

i. was entitled at the time of the accident to start work within one year under a legitimate contract of employment that was made before the accident and that is evidenced in writing, and

ii. as a result of and within 104 weeks after the accident, suffers a substantial inability to perform the essential tasks of the employment he or she was entitled to start under the contract.

….

Period of Benefit

5. (1) Subject to subsection (2), an income replacement benefit is payable during the period that the insured person suffers a substantial inability to perform the essential tasks of the employment in respect of which he or she qualifies for the benefit under section 4.

Amount of Benefit

6. (1) The amount of the income replacement benefit shall be,

(a) for each of the first 104 weeks of disability, 80 per cent of the insured person's net weekly income from employment determined in accordance with section 61; and

(b) for each week after the first 104 weeks of disability, the greater of the amount specified in clause (a) and $185.

(2) The insurer may deduct from the amount of the income replacement benefit payable to an insured person 80 per cent of the net income received by the insured person in respect of any employment subsequent to the accident.

(3) For the purpose of subsection (2), the net income received by an insured person in respect of employment subsequent to the accident shall be determined by subtracting the following amounts from the gross income received by the person in respect of the employment subsequent to the accident:

1. The premium payable by the person under the *Employment Insurance Act* (Canada) on the gross income.

2. The contribution payable by the person under the *Canada Pension Plan* on the gross income.

3. The income tax payable by the person under the *Income Tax Act* (Canada) and the *Income Tax Act* (Ontario) on the gross income.

….

Collateral Payments for Loss of Income and Maximum Amount of Benefit

7. (1) Despite subsections 6 (1) and (5), but subject to subsection 6 (2), the weekly amount of an income replacement benefit payable to a person shall be the lesser of the following amounts:

1. The amount determined under subsections 6 (1) and (5), reduced by,

i. net weekly payments for loss of income that are being received by the person as a result of the accident under the laws of any jurisdiction or under any income continuation benefit plan, and

ii. net weekly payments for loss of income that are not being received by the person but are available to the person as a result of the accident under the laws of any jurisdiction or under any income continuation benefit plan, unless the person has applied to receive the payments for loss of income.

2. The greater of the following amounts:

i. $400.

ii. If the optional income replacement benefit referred to in section 27 has been purchased and is applicable to the person, the amount fixed by the optional benefit.

(2) For the purposes of paragraph 1 of subsection (1), the amount determined under subsections 6 (1) and (5) shall not be reduced by,

(a) benefits under the *Employment Insurance Act* (Canada) that are being received by or are available to the person;

(b) payments under a sick leave plan that are not being received by the person but are available to the person; or

(c) payments under a workers' compensation law or plan that are not being received by the person and to which the person is not entitled because the person has elected under the workers' compensation law or plan to bring an action.

….

Gross Income Calculations

8. (1) An insured person who is eligible for an income replacement benefit under paragraph 1 of section 4 and who was not self-employed at any time during the four weeks before the accident shall designate one of the following time periods:

1. The four weeks before the accident.

2. The 52 weeks before the accident.

(2) An insured person who is eligible for an income replacement benefit under paragraph 1 of section 4 and who was self-employed at any time during the four weeks before the accident shall designate one of the following time periods:

1. The 52 weeks before the accident.

2. The last fiscal year completed before the accident for the business in which the person was self-employed, if the business completed a fiscal year before the accident.

(3) For the purpose of determining the amount of an insured person's income replacement benefit, the gross annual income from employment for a person who qualifies for a benefit under paragraph 1 of section 4 shall be deemed to be the following amount:

1. In the case of a person who designated the four weeks before the accident under paragraph 1 of subsection (1), the person's gross income from employment for the four weeks before the accident, multiplied by 13.

2. In the case of a person who designated the 52 weeks before the accident under paragraph 2 of subsection (1) or paragraph 1 of subsection (2), the person's gross income from employment for the 52 weeks before the accident.

3. In the case of a person who designated the last fiscal year completed before the accident under paragraph 2 of subsection (2), the person's gross income from employment for that fiscal year.

(4) For the purpose of determining the amount of an insured person's income replacement benefit, the gross annual income from employment for a person who qualifies for a benefit under paragraph 2 of section 4 shall be deemed to be the person's gross income from employment for the 52 weeks before the accident.

(5) For the purpose of determining the amount of an insured person's income replacement benefit, the gross annual income from employment for a person who qualifies for a benefit under paragraph 3 of section 4 shall be deemed to be the gross income payable under the contract of employment, extrapolated to reflect an annual income.

(6) A determination of gross income under subsection (3) or (4) shall include any benefits received under the *Employment Insurance Act* (Canada) or a predecessor of that Act in respect of the relevant period.

(7) If a person qualifies for an income replacement benefit under paragraph 1 or 2 of section 4 and also qualifies under paragraph 3 of section 4, the person's gross annual income from employment shall be determined under subsection (3) or (4), as the case may be, until the day he or she would have been entitled to begin employment under the contract described in paragraph 3 of section 4, and thereafter the person's gross annual income from employment shall be determined in accordance with subsection (5).

….

Repayments to Insurer

47. (1) A person shall repay to the insurer,

> (a) any benefit under this Regulation that is paid to the person as a result of an error on the part of the insurer, the insured person or any other person, or as a result of wilful misrepresentation or fraud;
>
> (b) any income replacement or non-earner benefit that is paid to the person if he or she, or a person in respect of whom the payment was made, was disqualified from payment under Part IX;
>
> (c) any income replacement, non-earner or caregiver benefit or any benefit under Part VI, to the extent of any payments received by the person that are deductible from those benefits under this Regulation;
>
> (d) if, by reason of subsection 41.1 (1), subsection 37 (4), as it read on February 28, 2006, applies, any income replacement benefits, non-earner or caregiver benefits that is paid for the period after the insurer gave notice under subsection 37 (1), as it read on that date, and before the date of the report of the designated assessment centre; or
>
> (e) fees paid by the insurer that are referred to in paragraph 8 of subsection 24 (1) if the insured person fails, without a reasonable explanation, to attend a designated assessment that has been arranged, or cancels a designated assessment without providing such notice as may be specified in the Pre-assessment Cancellation Fee Schedule established by the committee referred to in section 52, as it may be amended from time to time, that he or she will not be attending the designated assessment.

(2) If a person is required to repay an amount to an insurer under this section,

> (a) the insurer shall give the person notice of the amount that is required to be repaid; and
>
> (b) if the person is receiving an income replacement or caregiver benefit, the insurer may give the person notice that the insurer intends to collect the repayment by deducting up to 20 per cent of the amount of the benefit from each payment of the benefit.

(3) The obligation to repay a benefit does not apply unless the notice under subsection (2) is given within 12 months after the payment was made.

(4) Subsection (3) does not apply if the benefit was paid as a result of wilful misrepresentation or fraud.

(5) An insurer that has given the notice referred to in clause (2) (b) may collect the repayment by deducting up to 20 per cent of the amount of the benefit from each payment of the benefit.

(6) The insurer may charge interest on an amount repayable under this section from the fifteenth day after notice is given under subsection (2) at the bank rate in effect on that day.

(7) In subsection (6),

> "bank rate" means the bank rate established by the Bank of Canada as the minimum rate at which the Bank of Canada makes short term advances to the banks listed in Schedule I to the *Bank Act* (Canada).

….

Election of Weekly Benefits

61**.** (1) No more than one weekly benefit shall be paid to an insured person under this Regulation for the same period of time.

(2) If it appears from an application for benefits under this Regulation that, in the absence of subsection (1), a person would be entitled to receive more than one weekly benefit under Part II, section 15 and Part IV, the insurer shall notify the person that the person must, within thirty days of receiving the notice, elect which weekly benefit he or she wishes to receive.

(3) Within thirty days of receiving the notice, the person shall elect which weekly benefit he or she wishes to receive.

(4) Pending receipt of the person's election, the insurer shall pay one of the weekly benefits to which the person is entitled and, when the insurer receives the election, the insurer shall adjust the amount of the weekly payments retroactively to the date the person became entitled to the weekly benefits that the person has elected.

(5) If the person does not elect which benefit he or she wishes to receive within the thirty-day period referred to in subsection (3), the person shall be deemed to have elected the highest weekly benefit.

(6) If a person ceases to receive weekly caregiver benefits under Part IV because there is no longer anyone who meets the qualifications set out in subsection 18 (5) and the person meets the qualifications set out in paragraph 5 of subsection 7 (1), the insured person is entitled to elect to receive weekly income replacement benefits under Part II and the insurer shall notify the person of that entitlement.

(7) Subject to subsection (6), an election under this section may not be changed.

CITATION: Intact Insurance Company v. Marianayagam, 2016 ONSC 1479
COURT FILE NO.: CV-09-389904
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ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

INTACT INSURANCE COMPANY (formerly known as ING Insurance Company of Canada)

Plaintiff

– and –

JOSEPH ANTON MARIANAYAGAM

Defendant

REASONS FOR DECISION

PERELL J.

Released: March 1, 2016