Income Replacement and Non-Earner Benefits

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Statutory accident benefits ("accident benefits") are a type of no-fault insurance coverage attached to every automobile insurance policy in Ontario. The law which governs accident benefits is a regulation made under the *Insurance Act.*[1] The law governing accident benefits was amended for motor vehicle accidents occurring on or after September 1, 2010. These amendments resulted in a dramatic reduction in available accident benefits in cases that do not involve a catastrophic impairment. Except where specified, all references in this paper are to the current legislation. All accident benefits described assume that the insured person has not purchased any optional coverage[2].

Income replacement benefits ("IRB") and Non-earner benefits ("NEB") are accident benefits that provide weekly compensation to working people, students, children, retired people and unemployed people who suffer injuries in motor vehicle accidents in Ontario.[3] This paper will review the IRB and NEB benefits in general. The

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[1] O. Reg. 34/10 – *Statutory Accident Benefits Schedule – Effective September 1, 2010* (hereinafter "New *SABS*")

[2] For an additional premium, policy holders can buy optional coverage that increases the income replacement benefit maximum to $600, $800 or $1,000 per week. They can also buy optional dependent care coverage and optional indexation of future benefits coverage. In addition, optional medical and rehabilitation benefits are available to increase medical and rehabilitation coverage to $100,000 in non-catastrophic cases or, for a larger premium, $1,000,000 in non-catastrophic cases and $2,000,000 in catastrophic cases. Optional attendant care coverage increases the total amount available to $72,000 in non-catastrophic cases or, for a larger premium, $1,072,000 in non-catastrophic cases and $2,000,000 in catastrophic cases. An insured person can also purchase coverage that allows for housekeeping and home maintenance benefits and caregiver benefits in non-catastrophic cases. Lastly, an insured person can purchase a death benefit that increases to $50,000 for the spouse and $25,000 for the dependants and $8,000 for a funeral benefit. The optional benefits are further described in section 28 of the New SABS. It is important to check with your clients on every file to confirm whether they purchased optional coverage on their policy.

[3] Out of province accidents may also lead to an accident benefits claim under the Ontario regime. If you are injured in a motor vehicle accident anywhere in Canada or the United States of America (or on a vessel travelling between the

paper will first review the respective qualification criteria for each benefit. Secondly, the paper will outline the weekly benefit election procedure and how it differs from the SABS regime pre-September 1, 2010. This section of the paper will also discuss some issues to consider before your client makes an election of a weekly benefit. Next, the paper will provide an overview of how both the IRB and NEB are calculated. Lastly, the paper will review the issue of collateral benefits and how these effect entitlement to IRB under the SABS.

A – WHAT IS THE ELIGIBILITY TEST?

The IRB and NEB apply to different individuals. The IRB, as the name implies, replaces lost income. It is only available to those insureds who were self-employed when they were hurt or who were employed by someone else for at least 26 of the 52 weeks before they were hurt. The NEB, conversely, provides weekly compensation to injured insureds who were not working in 26 of the 52 weeks before they were hurt. The respective eligibility tests are different.

1 - IRBs

An insured's entitlement to the IRB can be broken down into three distinct stages. First, an insured needs to satisfy the preconditions to eligibility. Second, an insured needs to satisfy the "substantial inability" test (to be eligible for IRB during the first 104 weeks post-accident). Third, an insured needs to satisfy the "complete inability" test (to be eligible for IRB after 104 weeks post-accident).

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two countries), you may elect to receive Ontario SABS as long as the criteria in section 59. (4) of the New SABS are met.

(i) Preconditions to Eligibility

As a preliminary matter, it is essential that the insured suffers an impairment, which was directly caused by the accident.[4] Before paying any IRB to a client the accident benefit insurer will require an OCF-3 Disability Certificate and potentially other medical evidence demonstrating that the accident directly caused the impairment. Providing the insurer with timely and compelling evidence on this issue is of the utmost importance, particularly in cases involving minor accidents, pre-existing impairments, chronic pain and/or psychiatric impairments.

There are separate pre-conditions depending on whether an insured was employed or self-employed prior to being hurt. An employee may be eligible if they were employed at the time of the accident.[5] However, as noted above, an employee would also be eligible as long as they were employed for at least 26 of the 52 weeks preceding the accident.[6] Under this second category, an insured is required to be at least 16 years old or excused from attending school under the *Education Act* at the time of the accident.[7] Self-employed insureds may also qualify for an IRB. However, they are required to be self-employed at the time of the accident.[8]

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[4] *Burtch v Aviva Insurance Co of Canada*, 2009 ONCA 479, 97 OR (3d) 550 [*Burtch*].
[5] New SABS, *supra* note 1 at s. 5(1)1i.
[6] *Ibid* at s. 5(1)1ii.
[7] *Ibid* at s 5(1)1iiA-B.
[8] *Ibid* at s. 5(1)2i.

Where an insured is employed by someone else before they are hurt, the insurer will require an OCF-2- Employer's Confirmation of Income Form. This form confirms both the essential tasks of employment as well as the insured's level of income and hours worked in both the four and fifty two week periods before the injury.

(ii) The pre-104 week Disability Test

An insured must prove that he/she "suffers a substantial inability to perform the essential tasks of [his/her] employment" in order to qualify for the IRB during the first 104 weeks after the accident (the "Disability Test").[9] The test can be broken down into two steps. The first step is to identify the tasks essential in an insured's pre-accident employment.[10] The second step is to determine whether an insured is substantially prevented from fulfilling those pre-accident tasks.[11]

The first step is a matter of evidence. If there is an issue about what the essential tasks of employment it is crucial to ensure that the OCF-2 is properly completed. If, after reviewing the OCF-2, the insurer still requires more information on this point it is necessary to ask the employer to write a letter detailing the insured's pre-accident essential tasks of employment.

[9] *Ibid* s. 5(1)1i, iiC, 2ii.
[10] *McAngus v Guardian Insurance Co of Canad*a, 2000 CarswellOnt 821 at para 23 [*McAngus*].
[11] *Ibid*.

At the second step, it is important to compare the insured's pre and post-accident working ability.[12] While this is a fact-specific analysis, some common threads pervade the IRB jurisprudence:

- An insured may still qualify if they return to work after their accident as long as they are substantially incapable of completing the essential tasks of employment.[13]
- Pain is an irrelevant consideration if it does not prevent an insured from completing the essential tasks of employment.[14]
- "The heavier the essential tasks of the insured person's employment, the easier it will be for him/[her] to prove that [they are] substantially unable to perform those tasks, all else being equal."[15]

It should be noted that no IRB is payable for the first 7 days following an accident.

(iii) The Post-104 week IRB disability test

The Post-104 week disability test was recently refined in the Ontario Court of Appeal's 2009 decision of *Burtch*.[16] The court set out the test as follows:[17]

> The proper test, which the trial judge recognized earlier in his reasons, is whether, "as a result of the accident, the insured person is suffering a complete inability to engage in any employment for which he or she is reasonably suited by education, training or experience".

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[12] *F(D) v Wawanesa Mutual Insurance Co*, 2006 CarswellOnt 5646 at para 19.
[13] *Ibid* at para 19.
[14] *Ibid* at 20.
[15] *McAngus*, *supra* note 10 at para 23.
[16] *Burtch v Aviva Insurance Co of Canada*, 2009 ONCA 479, 97 OR (3d) 550 [*Burtch*].
[17] *Ibid* at para. 24.

As set out above, to qualify for an IRB after 104 weeks, an insured must satisfy two conditions. First, there must be “suitable employment”. Second, the insured must suffer a “complete inability” to engage in this suitable employment.

Regarding the definition of suitable employment, *Horne v. CIBC Insurance* provides a helpful list of factors to consider:[18]

- What constitutes suitable employment is fact specific. “The work must be suitable for that [insured], viewed fairly and realistically in the context of his or her educational and employment background.”
- “If the job is substantially different in nature, status, or remuneration it may not be an appropriate alternative.”
- The insured’s age, “qualifications and technical training and know-how are relevant”
- “The primary focus is on an applicant's functional limitations; however, job-market considerations are relevant in determining suitable employment.” For example, this may include geographic and economic considerations.

One does not need to be catastrophically impaired in order to meet the post-104 week disability test.[19] However, the standard is also more rigorous than the substantial inability test.[20] The question is whether, as rephrased by the Ontario Court of Appeal in *Burtch*, the insured is capable of finding suitable employment (as defined above) with a non-substantial degree of retraining.[21] An insured will meet the post-104

[18] *Horne v CIBC Insurance*, FSCO A00-00291 at para 16, 2001 CarswellOnt 5206.
[19] *Lombardi v State Farm Mutual Automobile Insurance Co*, 2001 CarswellOnt 5144.
[20] *Ibid*.
[21] *Burtch*, *supra* note 16 at para 24.

week disability test if substantial retraining is required in order to secure "suitable employment".

2 – NEBs

An insured must overcome a number of hurdles in order to qualify for a non-earner benefit. These hurdles relate to an insured's level of disability, pre-accident circumstances and ability to qualify for other benefits.

(i) Pre-Conditions to Eligibility

Like the IRB, the NEB requires an insured to overcome a number of pre-conditions to eligibility. Generally, an insured will not qualify for the non-earner benefit if they also qualify for the IRB.[22] There is an exception to this general rule. An insured can qualify for both the NEB and IRB if they were enrolled in any level of school at the time of the accident or within 1 year of the accident.[23] Further, to qualify for both benefits an insured will need to have been employed either at the time of the accident or for 26 of the 52 weeks preceding the accident. However, this employment will need to be in a position not reflective of the insured's education and training.[24]

(ii) Disability Test

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[22] New SABS, *supra* note 1 at s.12(1)1.
[23] *Ibid* at s. 12(1)2.
[24] *Ibid*. Being employed in a position reflective of an insured's education and training may disqualify them from receiving the NEB. *Kernaghan v AXA Insurance (Canada)*, 2007 CarswellOnt 3475 at para 28 (FSCO Arb)., made it clear that the time period to be considered is the interval between the completion of education and the accident. Post-accident employment is irrelevant to the analysis.

Regarding an insured's level of disability, to qualify for an NEB an insured must prove that he/she suffers a "complete inability to carry on normal life" (the "Complete Inability Test").[25] This term is defined within the regulation as follows: "a person suffers a complete inability to carry on a normal life as a result of an accident if, as a result of the accident, the person sustains an impairment that continuously prevents the person from engaging in substantially all of the activities in which the person ordinarily engaged before the accident."[26]

The aforementioned definition has received recent consideration by the Ontario Court of Appeal. In *Heath v McLeod*[27] and *Galdamez v Allstate Insurance Company of Canada*,[28] the Ontario Court of Appeal set out the proper approach to determining whether an insured has satisfied the s. 3(7) test. The Court set out the following approach:[29]

- …the starting point for the analysis [is] to compare the claimant's activities and life circumstances before the accident to his or her activities and life circumstances after the accident.
- Consideration of a claimant's activities and life circumstances prior to the accident requires…an assessment of the appellant's activities and circumstances over a reasonable period prior to the accident, the duration of which will depend on the facts of the case.
- …all of the pre-accident activities in which the claimant ordinarily engaged should be considered. However, in deciding whether the necessary threshold has been satisfied, greater weight may be assigned to those activities which the claimant identifies as being important to his/her pre-accident life.
- …The phrase "continuously prevents" means that a claimant must prove "disability or incapacity of the requisite nature, extent or degree which is and remains uninterrupted."
- The phrase "engaging in" should be interpreted from a qualitative perspective and as meaning more than isolated post-accident attempts to perform activities that a

[25] *Ibid* at s. 12(1)1 – 2.
[26] *Ibid* at s. 3(7)(a).
[27] 2009 ONCA 391, 95 OR (3d) 785 [*Heath*].
[28] 2012 ONCA 508, 111 OR (3d) 321 [*Galdamez*].
[29] *Heath*, *supra* note 27, at para 50.

claimant was able to perform before the accident. The activity must be viewed as a whole, and a claimant who merely goes through the motions cannot be said to be "engaging in" an activity. Moreover, the manner in which an activity is performed and the quality of performance post-accident must also be considered. If the degree to which a claimant can perform an activity is sufficiently restricted, it cannot be said that he or she is truly "engaging in" the activity.

- In cases where pain is a primary factor that allegedly prevents the insured from engaging in his or her former activities, the question is not whether the insured can physically do these activities, but whether the degree of pain experienced, either at the time, or subsequent to the activity, is such that the individual is practically prevented from engaging in those activities.
- The insured must be continuously prevented from participating in "substantially all" of their pre-accident activities. "Substantially all does not mean all".[30]
- It is not easy to satisfy the non-earner benefit test. In drafting the test as it did, the legislature intentionally set a "high bar for entitlement".[31]

A few cases provide insight into the operation of the Complete Inability Test. *Da Ponte* involved a 66 year old insured who was seriously injured after being struck by a motor vehicle while crossing the street as a pedestrian.[32] As a result of the accident, Ms. Da Ponte suffered a significant leg injury, which caused consequential pain throughout her body.[33] Prior to the accident, Ms. Da Ponte was her home's primary caregiver.[34] She was responsible for all cooking and cleaning.[35] Church played a large role in Ms. Da Ponte's life.[36] She attended mass every evening.[37] The accident ruined these activities for Ms. Da Ponte. Her injuries required her to use a walker and severely hampered her mobility.[38] She could no longer care for her home. The extent of her post-accident involvement in household activities consisted of cutting vegetables.[39]

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[30] *Galdamez*, *supra* note 28 at para 39.
[31] *Barnes v Motor Vehicle Accident Claims Fund*, 2012 CarswellOnt 10035 at para 25 (FSCO Arb). *Cook v Pilot Insurance Co*, 2005 CarswellOnt 2697 at para 37 (FSCO Arb).
[32] *Da Ponte v Motor Vehicle Accident Claims Fund*, 2002 CarswellOnt 5333 at para 3 [*Da Ponte*].
[33] *Ibid* at para 19.
[34] *Ibid* at para 15.
[35] *Ibid*.
[36] *Ibid* at para 17.
[37] *Ibid*.
[38] *Ibid* at para 22.
[39] *Ibid* at para 16.

Moreover, the pain flowing from her injuries hindered her ability to participate at church.[40] Ms. Da Ponte found this embarrassing and rarely attended church post-accident.[41] For Arbitrator Sandomirsky, the difference between Ms. Da Ponte's pre and post-accident life allowed her to qualify for the NEB.

Contrast *Da Ponte* with *Cook*. Ms. Cook was a devout Jehovah's Witness who was injured after crashing her vehicle into a roadside ditch.[42] The accident caused her to experience a significant amount of pain. Despite her pain, Ms. Cook continued to exercise her faith.[43] For Arbitrator Kominar, this was fatal to Ms. Cook's claim because she continued to "meaningfully participate in what was and remains a very large and important dimension of her life."[44] The take away is that the focus is on those activities that the insured identifies as being integral to his/her life. If an insured continues to participate in these important activities post-accident, they are unlikely to meet the Complete Inability Test.

B – WHAT TO CONSIDER WHEN MAKING AN ELECTION?

The post-September 1, 2010 SABS has a significant effect on an insured's ability to re-elect. Under the regime that was in place from November 1, 1996 to August 31, 2010, an insured's initial election between IRB, NEB and caregiver benefits was not

[40] *Ibid* at para 17.
[41] *Ibid*.
[42] *Cook, supra* note 31 para 11.
[43] *Ibid* at para 38.
[44] *Ibid*.

"final".[45] Under the previous regime, an initial election could be changed at a later date upon a change in circumstances.[46]

An insured's ability to re-elect has largely been eliminated under the post-September 1, 2010 SABS. S. 35(3) of the SABS clarifies that one's election to receive any of the income replacement, non-earner or caregiver benefit is "final".[47] Non-election provisions have also been included under each of the New SABS' individual benefit sections.[48] Further evidence of the legislature's intention can be found on the Service Ontario's Regulatory Registry, which lists a number of objectives sought to be achieved in amending the SABS. Eliminating re-election is one of the three listed purposes. The webpage states, "The amendments to the Statutory Accident Benefits Schedule:…clarify that an election for income replacement, non-earner or caregiver benefits is final regardless of any change in circumstances, except if a claimant is subsequently determined to have sustained a catastrophic impairment."[49]

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[45] *Statutory Accident Benefits Schedule — Accidents on or after November 1, 1996, RRO 1996, O. Reg 403/96* (the "Old SABS") at s.36. *Antony v RBC General Insurance Co.,* [2004] OFSCD No 101 at para 3, 2004 CarswellOnt 5177.
[46] *Ibid*. In *Gadacz v INC Insurance Co of Canada*, 2007 CarswellOnt 6680., an insured chose to re-elect from the income replacement benefit to the caregiver benefit because she had given birth to a child. This made the caregiver benefit an advantageous option.
[47] New SABS, *Supra* note 1 at s.35.
[48] *Ibid* at s.5(2), 12(4)(c) and 13(3). For example, s.5(2) reads: "Despite subsection (1), an insured person is not eligible to receive income replacement benefits if he or she is eligible to receive and has elected under section 35 to receive either a non-earner benefit or a caregiver benefit under this Part."
[49] Service Ontario's Regulatory Registry:
<http://www.ontariocanada.com/registry/view.do?postingId=14862>.

Catastrophic Impairment is defined in Section 3(2) of the SABS:
For the purposes of this Regulation, a catastrophic impairment caused by an accident is,
(a) paraplegia or quadriplegia;
(b) the amputation of an arm or leg or another impairment causing the total and permanent loss of use of an arm or a leg;
(c) the total loss of vision in both eyes;
(d) subject to subsection (4), brain impairment that results in,

An insured is still capable of re-electing their weekly benefits under a very narrow set of circumstances. First, an insured may elect out of the IRB or NEB if they are later deemed to be Catastrophically Impaired.[50] On a determination of Catastrophic Impairment, an insured may elect out of either the IRB or NEB and choose to receive the caregiver benefit.[51] This is because, absent optional coverage, caregiver benefits are not payable unless the insured has suffered a catastrophic impairment. Second, the

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(i) a score of 9 or less on the Glasgow Coma Scale, as published in Jennett, B. and Teasdale, G., Management of Head Injuries, Contemporary Neurology Series, Volume 20, F.A. Davis Company, Philadelphia, 1981, according to a test administered within a reasonable period of time after the accident by a person trained for that purpose, or
(ii) a score of 2 (vegetative) or 3 (severe disability) on the Glasgow Outcome Scale, as published in Jennett, B. and Bond, M., Assessment of Outcome After Severe Brain Damage, Lancet i:480, 1975, according to a test administered more than six months after the accident by a person trained for that purpose;
(e) subject to subsections (4), (5) and (6), an impairment or combination of impairments that, in accordance with the American Medical Association's Guides to the Evaluation of Permanent Impairment, 4th edition, 1993, results in 55 per cent or more impairment of the whole person; or
(f) subject to subsections (4), (5) and (6), an impairment that, in accordance with the American Medical Association's Guides to the Evaluation of Permanent Impairment, 4th edition, 1993, results in a class 4 impairment (marked impairment) or class 5 impairment (extreme impairment) due to mental or behavioural disorder.
(3) Subsection (4) applies if an insured person is under the age of 16 years at the time of the accident and none of the Glasgow Coma Scale, the Glasgow Outcome Scale or the American Medical Association's Guides to the Evaluation of Permanent Impairment, 4th edition, 1993, referred to in clause (2) (d), (e) or (f) can be applied by reason of the age of the insured person.
(4) For the purposes of clauses (2) (d), (e) and (f), an impairment sustained in an accident by an insured person described in subsection (3) that can reasonably be believed to be a catastrophic impairment shall be deemed to be the impairment that is most analogous to the impairment referred to in clause (2) (d), (e) or (f), after taking into consideration the developmental implications of the impairment.
(5) Clauses (2) (e) and (f) do not apply in respect of an insured person who sustains an impairment as a result of an accident unless,
(a) in the case of an impairment that includes a brain impairment, a physician states in writing that the insured person's condition is unlikely to cease to be a catastrophic impairment;
(b) in the case of an impairment that is only a brain impairment, a neuropsychologist states in writing that the insured person's condition is unlikely to cease to be a catastrophic impairment; or
(c) two years have elapsed since the accident.
(6) For the purpose of clauses (2) (e) and (f), an impairment that is sustained by an insured person but is not listed in the American Medical Association's Guides to the Evaluation of Permanent Impairment, 4th edition, 1993 is deemed to be the impairment that is listed in that document and that is most analogous to the impairment sustained by the insured person.

[50] New SABS, *Supra* note 1 at s. 35(2).

[51] *Ibid*.

recent case of *Augustin v Unifund Assurance Co*[52] implicitly suggests that qualifying for two or more benefits is a pre-condition to being barred from re-electing. As such, it may be possible to re-elect if an insured only qualified for only one weekly benefit at the time of their initial election.[53]

Therefore, because of the legislature's clear intention to prevent re-election, it is highly important that an insured carefully consider the benefit they are choosing to receive before applying for it. It is worth noting that the election issue is not overly relevant to an election between IRBs and NEBs (as only a small set of insureds will qualify for both benefits). Instead, the election issue is most relevant to a catastrophically impaired insured's election between IRBs or NEBs and caregiver benefits[54]. The following factors are worth considering:

- Does the insured have an immediate need for money? If there is an immediate need for money, it may be wise to elect a benefit other than the NEB (assuming an insured qualifies for other benefits). This is the case because an insurer is required to pay an IRB or caregiver benefit after 7 days and is not required to pay the NEB for the "first 26 weeks after the onset of the complete inability to carry on a normal life";[55]
- Was the insured enrolled in post-secondary education at the time of the accident? Is it clear the insured will continue to satisfy the complete inability

[52] 2013 CarswellOnt 15809 at paras 75 – 76.
[53] *Ibid.*
[54] Insured people with catastrophic impairments who were caregivers before they were hurt are eligible a caregiver benefit of $250 per week for the first person in need of care and $50 per week for each additional person in need of care. The caregiver benefit is payable for the first 104 weeks of disability unless as a result of the accident the insured person is suffering a complete inability to carry on a normal life in which case it is payable for life. New SABS, *supra* note 1 at s.13.
[55] New SABS, *supra* note 1 at s. 12(4)(a).

test for the rest of his/her life? (e.g. quadraplegia, paraplegia, severe brain injury, etc). If so, it may be wise to elect for the NEB. This is because for students the NEB is valued at $320/week once 104 weeks have elapsed after the onset of disability.[56] If an insured was enrolled in post-secondary education at the time of the accident, they were likely working part-time at a menial job and therefore the IRB is unlikely to be valued at more than $185/week.[57]

- Does the insured have children who are close to 16 years old? If so, then it may be wise to elect a benefit other than the caregiver benefits given that the caregiver benefits ceases once an insured's child reaches 16 years of age.[58]
- Is the insured a catastrophically impaired elderly primary caregiver for a number of grandchildren? If so, it may be advantageous to elect the caregiver benefits over the NEB. It may be advantageous because caring for grandchildren is a factor occasionally used against an insured in determining whether they satisfy the NEB's Complete Inability Test.[59]

These are but a few of the factors relevant to an election between IRBs, NEBs and caregiver benefits. When advising on an election, it is of the utmost importance to clarify to your client that an election is final and cannot be changed at a future date. It is also important to examine an insured's present and future

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[56] *Ibid* at s. 12(3).
[57] *Ibid* at s. 7(1)1ii.
[58] *Ibid* at s. 3(1) – "Person in Need of Care" (definition); s.13(1)(a)-(b).
[59] *Mole v Wawanesa Mutual Insurance Co.*, 2008 CarswellOnt 2976 at paras 16-17 (FSCO App).

circumstances in order to ensure that an insured's decision is well suited to their present and future needs.

C – HOW TO CALCULATE OR QUANTIFY THE BENEFITS

(i) IRB

The IRB is calculated as a percentage of an insured's pre-accident employment income.[60] For the first 104 weeks of disability, the IRB is calculated by adding an insured's Gross Weekly Employment Income to an Insured's Gross Weekly Income from Self Employment. Subtracted from this number is an Insured's weekly loss from self-employment.[61] This provides the weekly base amount, which is to be reduced by "all other income replacement assistance" (discussed in Part – D). This number is then multiplied by 0.7.[62]

Gross Weekly Employment Income is calculated by dividing an insured's Gross Annual Employment Income by 52.[63] The actual calculation of Gross Annual Employment Income is highly complex."[64] However, it is worth noting that employed insureds and self-employed insureds are treated differently for the purpose of calculating Gross Annual Employment Income.[65] The IRB of a self-employed insured is calculated based on after-deduction business income.[66] Therefore a self-employed

[60] New SABS, *supra* note 1 at s.7(1)1.
[61] *Ibid* at s. 7(1)1.i.
[62] *Ibid*.
[63] *Ibid* at s. 4(1).
[64] *Ibid* at s. 4(2) – (6).
[65] *Ibid* at s. 4(3)-(5).
[66] *Ligocki v Allianz Insurance Co of Canada*, 2010 ONSC 116 at para 15-17, 100 OR (3d) 624 [*Ligocki*].

insured with the same level of income as an employed insured could potentially receive a lower weekly IRB.

The IRB is capped at $400 for the first 104 weeks of disability.[67] In other words, the IRB will be reduced to $400 if the aforementioned formula produces a figure that exceeds the $400 threshold (this is all subject to the purchase of optional benefits, which, for an additional premium, provide an insured with a maximum weekly IRB of $600, 800 or $1,000.)[68]

IRB entitlement can change after the first 104 weeks of disability. After the first 104 weeks of disability, an Insured's IRB amount becomes the greater of the pre-104 week benefit amount and $185 per week.

IRB amounts also decrease after an insured turns 65. Once an insured turns 65, the IRB is reduced by the formula set out under s.8. The formula produces benefit amounts substantially lower than those available before an insured's 65th birthday. For example, take a 65 year old insured who had been receiving a $400 IRB for 5 years prior to their 65th. After their 65th birthday, this $400 benefit would be reduced to $40. This reduction reflects the fact that IRBs are intended to replace income (which, it is reasoned, will not exist after an insured's 65th birthday (due to retirement).

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[67] New *SABS*, *supra* note 1 at s. 7(1)B.
[68] *Ibid* at s. 28(1)1.

The question of whether an insured is an employee or a self-employed independent contractor is to be determined by examining the "total relationship between the parties".[69] The following factors are relevant to the analysis:[70]

- "The level of control over the worker's activities";
- "Whether the worker provides his own equipment";
- "Whether the worker hires his own helpers";
- "The degree of financial risk taken by the worker";
- "The degree of responsibility for investment and management held by the worker"; and
- The worker's opportunity for profit in the performance of his or her tasks.
- "Whether the individual has been engaged to provide services as a person in business on his or her own account."

(ii) NEB

It is far simpler to quantify the NEB. The NEB is not payable for the first 26 weeks after the onset of disability.[71] Between 26 weeks and 104 weeks after the onset of disability, the NEB pays out at a rate of $185/week.[72] If the insured was a full-time student at the time of the accident or had finished their schooling within one year of the accident, after 104 weeks since the onset of disability, the NEB increases to $320/week until the insured reaches age 65. If the insured was not a full-time student within a year of the accident the benefit remains $185/week until the insured reaches age 65. There are similar NEB deductions once a person reaches 65 years of age.[73] The post-65

[69] *Ligocki, supra* note 66 at para 18.
[70] *Ibid* at para 18 – 19.
[71] New *SABS, supra* note 1 *at* s.12(4)(a).
[72] *Ibid* at s.12(2).
[73] *Ibid* at s.12(5).

formula is the same as used for the IRB.[74] The only difference is that the benefit is calculated in relation to the NEB amount rather than the IRB amount.[75]

It should also be noted that NEB amounts are to be reduced by "other income replacement assistance".[76]

D – WHAT COLLATERAL OFFSETS APPLY

Reductions for collateral benefits are built into the calculation for determining IRB and NEB amounts. These reductions are built into the SABS to prevent double-recovery.[77] As mentioned above, the weekly amounts payable under the IRB and NEB are to be reduced by "all other income replacement assistance".[78] This portion of the paper will discuss the general approach to determining whether a payment should be deductible. Also discussed will be the treatment of severance and termination payments under the current SABS regime.

Other income replacement assistance is defined in the regulation as follows:[79]

> **"other income replacement assistance"** means, in respect of an insured person who sustains an impairment as a result of an accident,
>
> > (a) the amount of any gross weekly payment for loss of income that is received by or available to the person as a result of the accident under the laws of any jurisdiction or under any income continuation benefit plan, other than,

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[74] *Ibid*.
[75] *Ibid*.
[76] *Ibid* at s. 12(2),(3).
[77] *Wilcox v Economical Mutual Insurance Co*, 2000 CarswellOnt (5817) at para 13.
[78] New SABS, *supra* note 1 at s.7(1)A, 12(2)(3).
[79] *Ibid* at s.4(1)

(i) a benefit under the Employment Insurance Act (Canada),

(ii) a payment under a sick leave plan that is available to the person but is not being received, and

(iii) a payment under a workers' compensation law or plan that is not being received by the person because the person has elected under the workers' compensation law or plan to bring an action and is not entitled to the payment, and

(b) the amount of any gross weekly payment for loss of income, other than a benefit or payment described in subclauses (a) (i) to (iii) that may be available to the person as a result of the accident under the laws of any jurisdiction or under any income continuation benefit plan but is not being received by the person and for which the person has not made an application.

(i) What is a payment for loss of income?

Whether a payment can be considered a payment for loss of income often turns on whether that payment can be considered an indemnity or non-indemnity payment. The distinction is set out as follows:[80]

> An indemnity payment is one which is intended to compensate the insured in whole or in part for a pecuniary loss. Unemployment insurance benefits and employment disability benefits are examples of indemnity payments. A non-indemnity payment is a payment of a previously determined amount upon proof of a specified event, whether or not there has been pecuniary loss. Life insurance, employee retirement benefits and fixed-sum accident benefits are examples of non-indemnity payments. In principle, non-indemnity payments should not be considered in the discussion of the collateral source rule since they do not result in true overcompensation. Indemnity payments, on the other hand, can be clearly identified as duplicating an item of damage claimed from the tortfeasor and accordingly do constitute overcompensation.

While not determinative in the context of the SABS, the difference between indemnity and non-indemnity payments remains a relevant consideration.[81] Classifying a payment as a payment of indemnity is important because it is sufficient,

[80] *Cugliari v White* (1998), 38 OR (3d) 641 at para 16, [1998] OJ No 1628 [*Cugliari*].
[81] *Ibid* at para 18.

but not necessary, for deducting a payment under the collateral source rule.[82] There are two hallmarks of an indemnity policy: first, there must be a "stated intent to pay income security for loss of wages".[83] Second, there must be "provisions designed to continue paying an amount of income that closely follows the claimants pay at the time of disability".[84] Policies that pay predetermined "periodic benefits that do not vary with the wage rate" will not be considered indemnity policies. In *Cromwell*, the policy in question possessed the following characteristics, which qualified it as a policy of indemnity:[85]

- Coverage ended on the termination of employment;
- The employee would not receive benefits unless they were employed at the time of employment;
- The policy holder was the employer, who had responsibility for paying premiums;
- The benefits were tied to the "status of the employee as defined in the policy";
- There was a provision of subrogation if the employee was "entitled to recover damages for loss of income for which he [was] entitled to receive benefits";
- There were set off provisions from "income from other sources";
- The "amount of payment" was "tied to income".

(ii) Broader Eligibility Under s.3(7)(d)

The New SABS further clarify whether certain payments have been made under an income continuation plan. The section reads:[86]

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[82] *Raaymakers and National Insurance Co./Monnex Insurance Mgmt. Inc.*, *Re*, 2012 CarswellOnt 1472 at para 17 – 18 [*Raaymakers*].
[83] *Cromwell v Liberty Mutual Insurance Co* (2008), 89 OR 3d 352 at para 21, [2008] OJ No 376 [*Cromwell*].
[84] *Ibid*.
[85] *Ibid* at para 24.
[86] New SABS, *supra* note 1 at s.3(7)(d).

(d) payments for loss of income under an income continuation benefit plan are deemed to include,

(i) payments of disability pension benefits under the Canada Pension Plan,

(ii) periodic payments of insurance, irrespective of whether the contract for the insurance provides for a waiting period, deductible amount or similar limitation or restriction and irrespective of whether the contract is paid for in whole or in part by the employer, if the insurance is offered by the insurer,

(A) to persons who are employed while the contract for the insurance is in effect, and

(B) only on the basis that the maximum benefit payable is limited to an amount calculated with reference to the insured person's income from employment;

While these sections import a notion of indemnification, they broaden the types of payment now deducted as being collateral. For example, in *Raaymakers* a monthly disability benefit policy was deducted from an insured's IRB despite lacking the hallmarks of an indemnity policy (i.e. a stated intent to pay income for lost wages and provisions designed to continue paying an amount that closely follows a claimants pay at the time of disability).[87] The payment qualified because, even though it came nowhere close to providing full indemnification (i.e. the policy paid a yearly wage of $74,100.00 while the applicant was earning a yearly wage of $166,00.00), the maximum benefit offered under the plan was calculated with reference to the insured's level of income.[88] Specifically, the $6,750.00 monthly amount was calculated based on the earnings of the insured.[89]

[87] *Raaymakers* , *supra* note 82 at para 15.
[88] *Ibid* at para 11.
[89] *Ibid*.

Section 47 of the New SABS is also relevant to the deduction of collateral benefits. The section reads:[90]

> 47. (1) The insurer may deduct the following amounts from the amount payable to an insured person as an income replacement or non-earner benefit under this Regulation:
>
> 1. Any temporary disability benefits being received by the insured person in respect of a period following the accident and in respect of an impairment that occurred before the accident.
> 2. Any other periodic benefit being received by the insured person in respect of a period following the accident and in respect of an impairment that occurred before the accident, if the insured person was receiving that other periodic benefit at the time he or she first qualified for the income replacement or non-earner benefit and, at that time, the other periodic benefit was a temporary disability benefit.

Temporary disability benefit is defined within the regulation to include benefits such as IRBs, caregiver benefits, etc.[91] This section is aimed at individuals who are suffering from pre-accident injuries. It operates by allowing for the deduction of benefits received after the accident, when those benefits are owing as a result of injuries occurring before the accident. As a simple example, if an insured was receiving IRBs before the accident (which continued to be owing after the accident), s.47 would serve to deduct the previously owing IRB from the current IRB.

(ii) Severance pay under the post-September 1, 2010 SABS – Is it deductible?

S.2(8) of the pre-September 1, 2010 SABS clearly stated that severance and termination payments were not "payments for loss of income".[92] This reference has been eliminated from the New SABS. This begs the following question: is the decision

[90] *New SABS*, *supra* note 1 at s.47.
[91] *Ibid* at s.47(3).
[92] *Old SABS*, *Supra* note 45 at s.2(8).

to not reproduce s.2(8) under the New SABS evidence of legislative intent to deduct severance and termination payments from IRB and NEB amounts? [93]

It is unlikely that termination and severance were intended to be deducted. First, there is a lack of clear legislative intent.[94] Second, the nature of severance and termination payments is fundamentally different than a "payment for loss of income". This was discussed in *Hui v Security National Insurance*.[95] In *Hui*, it was observed that severance and termination are both "payable on the termination of employment" and received regardless of whether the recipient finds another job. Payments for loss of income, conversely, cease to be paid once the insured starts re-earning income. Therefore, severance and termination are not payments for loss of income because they are paid independently of one's future income.[96]

E - CONCLUSION

This paper was intended to discuss the IRB and NEB benefits available after September 1, 2010 pursuant to the SABS. There was a specific focus on the eligibility, election, quantification and collateral benefit aspects of the regulation. The IRB and NEB sections have undergone change in recent years. The most significant

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[93] *New SABS*, *supra* note 1 at s.4(1). If this benefit were payable, it would be payable as a "payment for loss of income that is received by or available to the person as a result of the accident under the laws of any jurisdiction

[94] Regulatory registry, *supra* note 49. Of the stated purposes underlying the New SABS, there is no mention of an intention to deduct severance and termination as collateral benefits. Furthermore, there is no mention of severance or termination payments in the final report of the Ontario Auto Insurance Task Force.

[95] *Hui v Security National Insurance Co*, 1991 CarswellOnt 3130 at paras 71 – 73 (Ontario Insurance Commission) [Hui].

[96] *Ibid*.

change relates to an insured's initial election between the IRB, NEB and caregiver benefits.

The 2012 Ontario Automobile Insurance Anti-Fraud Task Force's Final Report commented that, "we have had presentations to us that suggest that one of the impacts of the 2010 SABS changes has been to redirect fraudsters away from claims for treatment and toward fraudulent claims for income replacement benefits".[97] Undoubtedly, this comment indicates that there is some desire to further change the IRB and NEB entitlement going forward. The extent to which any changes will affect bona fide claimants obviously remains to be seen.

SOURCES

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<u>B – Case Law</u>

(i) Income Replacement Benefit

- *Burtch v Aviva Insurance Co of Canada*, 2009 ONCA 479, 97 OR (3d) 550.
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- *Horne v CIBC Insurance*, FSCO A00-00291, 2001 CarswellOnt 5206.
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- *Lombardi v State Farm Mutual Automobile Insurance Co*, 2001 CarswellOnt 5144.
- *McAngus v Guardian Insurance Co of Canad*a, 2000 CarswellOnt 821.

[97] *Ontario Automobile Insurance Anti-Fraud Task Force Final Report to the Steering Committee*, (Toronto: Ministry of Finance, 2012) at p 30.

(ii) Non-Earner Benefit

- *Barnes v Motor Vehicle Accident Claims Fund*, 2012 CarswellOnt 10035.
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(iii) Election Between Benefits

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(iv) Quantification

- *Ligocki v Allianz Insurance Co of Canada*, 2010 ONSC 116, 100 OR (3d) 624.

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- *Cromwell v Liberty Mutual Insurance Co* (2008), 89 OR 3d 352, [2008] OJ No 376.
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