SUPREME COURT OF NOVA SCOTIA

Citation: *The Board of Trustees of the Nova Scotia Public Service Long Term Disability Fund v. Garnier*, 2024 NSSC 142

Date: 20240509
Docket: 511482
Registry: Halifax

Between:

The Board of Trustees of the Nova Scotia Public Service Long Term Disability Fund

Plaintiff

and

Vince Garnier

Defendants

DECISION

Judge: The Honourable Justice Darlene Jamieson

Heard: April 9, 2024, in Halifax, Nova Scotia

Counsel: Colin Bryson, KC, for the Applicant
Allison Godwin, for the Respondent

By the Court:

Background

[1] This is a motion brought by The Board of Trustees of the Nova Scotia Public Service Long Term Disability Plan Fund (the "Trustees") for an order pursuant to Civil Procedure Rule 79.08(3) to increase the amount payable to the Sheriff by the Province of Nova Scotia ("the Province") and the Workers' Compensation Board ("WCB") under an execution order issued by this court on April 12, 2023 to 100% of the gross wages and/or benefits payable to the Respondent, Mr. Garnier, by the Province and the WCB.

[2] After an application in chambers before Justice Glen McDougall, the Trustees were determined to be entitled to reimbursement of the amount of $60,553.81 in LTD benefits (*The Board of Trustees of the Nova Scotia Public Service Long Term Disability Fund v. Garnier*, 2023 NSSC 1). The resulting order also included costs in the amount of $4,500 for a total of $65,053.81.

[3] An execution order was issued on July 6, 2023. The evidence indicates that currently the Sheriff is receiving pursuant to the execution order, by way of garnishment of amounts payable to Mr. Garnier, the following: $340.30 biweekly from the Province and $285.80 monthly from the Workers' Compensation Board.

[4] The evidence indicates that Mr. Garnier is currently entitled to monthly payments of $3,000.62 from the Province, and $2,370.55 from the WCB. The Applicant seeks an order under Rule 79.08(3) increasing the amount of garnishment per month from the default 15% to 100% of these amounts ($5,371.17 per month).

[5] The Trustees are a Board of Trustees appointed by the Nova Scotia Government Employees Union ("NSGEU") and the Province to administer The Nova Scotia Public Service Long Term Disability Plan Trust Fund (the "LTD Fund") in accordance with a Trust Agreement between the NSGEU, the Province and the Trustees, and in accordance with the Nova Scotia Public Service Long Term Disability Plan (the "LTD Plan").

[6] Mr. Garnier was employed with the Department of Labour, Occupational Health and Safety Division, starting in March of 1999. In approximately 2015, Mr. Garnier was injured at work. He applied for LTD benefits under the LTD Plan and

was determined to be disabled. The following is an overview of some of the background facts as set out in Justice McDougall's decision:

> 10 Vince Garnier became disabled as of September 17, 2015, due to an injury that occurred at work. He applied for LTD benefits under the LTD Plan and was determined to be "disabled", as defined in the LTD Plan, from that injury. However, because Mr. Garnier was injured at work, he was potentially entitled to "injury on duty leave" benefits from the Province, pursuant to s. 96(1) of the *General Civil Service Regulations*:
>
> > **Leave and pay for employees injured while working**
> > 96 (1) If the Workers' Compensation Board determines that an employee is unable to perform their duties because of an injury the employee received while working, the Deputy Head must grant the employee injury on duty leave and must pay the employee an amount equal to the employee's net average pre-disability salary for the period specified by the Workers' Compensation Board.
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> 11 An employee who is determined by the WCB to be unable to perform their duties because of a workplace injury, and who is therefore entitled to "injury on duty leave" benefits from the Province, is not eligible to receive LTD benefits under the LTD Plan. Section 7(7) of the LTD Plan identifies a list of circumstances where no benefits are payable, including:
>
> > 7(7) No benefits shall be payable under the Plan because of:
> > . . .
> > (h) disability which occurred at work and is deemed to be a fully compensable injury by the Workers' Compensation Board;
>
> 12 At the time Mr. Garnier filed his application for LTD benefits, the WCB had not yet determined whether his disability was a "fully compensable injury" as contemplated by s. 7(7) of the LTD Plan. According to the affidavit evidence of Theresa Williams, Director of Claims Management for the LTD Fund, the practice of the LTD Fund in such a situation is to pay the employee LTD benefits on an interim basis, on the condition that the employee file a claim for WCB benefits, and, if the employee's injury is approved as fully compensable, to reimburse the LTD Fund the LTD benefits paid.
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> …
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> 16 On December 17, 2017, Mr. Garnier signed an "Agreement Regarding Workers' Compensation Benefits and STD/LTD Benefits" ("reimbursement agreement"), which stated:
>
> > I hereby request that Manulife Financial continue to pay benefits to me under this Short Term Disability/Long Term Disability (STD/LTD) plan

while my application for disability benefits under the applicable Workers' Compensation legislation ("WCB Benefits") is being adjudicated by the appropriate authority.

…

In consideration of Manulife Financial's agreement to continue the payment of STD/LTD benefits, I hereby agree:

(1) to forward Manulife Financial a copy of the decision rendered by WCB with respect to my application for benefits as soon as I receive it;

(2) to appeal within 30 days if requested by Manulife Financial, any decision declining my application for WCB Benefits and to forward to Manulife Financial a copy of the appeal decision rendered by WCB as soon as I receive it;

(3) that all costs associated with my application for WCB Benefits and appeal (if any) are to [*sic*] borne by me alone;

(4) to reimburse Manulife Financial, if I am awarded WCB Benefits, the amount of any resultant overpayment immediately upon request and in a lump sum. I understand that, should I receive a WCB award, I hold those funds in trust for Manulife Financial;

(5) that, should I fail to reimburse Manulife Financial upon demand, Manulife Financial may exercise any legal right to collect the overpayment, including, but not limited to the deducting of the amount of any overpayment, from the whole or part of any benefits which would otherwise be payable to me, until the total amount of the overpayment has been reimbursed;

(6) to sign the WCB assignment form provided by Manulife Financial.

…

17 In a written decision dated December 19, 2019, the Workers' Compensation Appeals Tribunal held that Mr. Garnier's injury occurred at work and referred the matter back to the WCB to determine the "nature and extent" of his WCB benefit entitlement. While the court does not have a copy of the WCB's decision, Theresa Williams stated at para. 17 of her affidavit that the WCB benefit entitlement "was determined to be a fully compensable injury in early July 2020." She indicated that the LTD Fund was so advised by the Nova Scotia Public Service Commission ("PSC"), and payment of Mr. Garnier's LTD benefits was discontinued because he

would be receiving WCB benefits. In total, Mr. Garnier was paid $232,285.74 in LTD benefits to July 7, 2020.

18 In a letter to Mr. Garnier dated August 25, 2020, the PSC outlined the impact of his retroactive WCB award. The letter stated, in part:

> As a result of the WCAT decision, you are not entitled to receive Long Term Disability (LTD) benefits from the Nova Scotia Public Service (NSPS) Ltd Plan. As such, your LTD benefits ceased on July 16, 2020 and your Injury on Duty (IOD) benefits payments started during that pay period, with a deposit date of July 30, 2020. As you were advised by Manulife Financial via letter dated July 30, 2020, you were paid LTD benefits in the amount of **$227,307.84** which must be repaid.
>
> The amount of retroactive IOD pay from your WCB claim is $490,021.56. From that amount, the employer will recover $35,469.93 of Short Term Illness (STI) benefits paid to you which must be recouped as your status was changed from STI to IOD/WCB. The employer will also deduct the offset of the Extended Earnings Replacement Benefit (EERB) in the amount of $72,532.80 paid directly by WCB, as well as the CPP Disability benefit amount of $44,778.93 paid directly by Service Canada. Once these adjustments are made, you will have gross retroactive IOD earnings of $337,239.90, from which **you are required to pay $157,198.01 in statutory deductions (most of which is for income tax)**, as well as $11,632.14 in retroactive benefit premiums owing. As a result of these adjustments, your net retroactive IOD pay is $170,716.65. ...
>
> You may work directly with Manulife to pay the full amount owing of $227,307.84, or you may request that the employer facilitate the reimbursement by remitting the net retroactive payment of $170,716.65 directly to Manulife Financial. We have provided this service to others and have found it to be administratively efficient for all involved. If you opt to have the employer facilitate the reimbursement, we require your written authorization to do so (please see the attached "Authorization and Direction to Pay" form). **Please note, you will be required to pay the outstanding amount of $56,591.19 directly to Manulife Financial.**

19 The "Authorization and Direction to Pay" form stated:

> I hereby authorize the Province of Nova Scotia to deduct a total of **$170,716.65** from my retroactive Injury on Duty/WCB benefits payments, in relation to Workers Compensation Appeal Tribunal Decision ... entitling me to WCB benefits from September 17, 2015, **and the resulting overpayment to Manulife** ...

> The **$227,307.84** represents an overpayment of long-term disability benefits that I received from Manulife since February 17, 2016, as confirmed by letter to me from Manulife Financial dated July 30, 2020. I understand that the Province of Nova Scotia will remit the sum of **$170,716.65** to Manulife Financial on my behalf. **I further understand that, if the amount remitted to Manulife Financial by the Province of Nova Scotia is not the full amount owed, Manulife will work directly with me to collect the balance owing.**

Mr. Garnier signed the authorization form on December 18, 2020.

…

22 As Mr. Garnier did not make any additional reimbursement payments to the LTD Fund, the Board filed a notice of application to recover the funds on December 17, 2021. The Board relies on s. 7(7)(h) of the LTD Plan, the Member Employee Statement Mr. Garnier signed as part of his application for benefits, and the reimbursement agreement signed by Mr. Garnier on December 17, 2017.

…

87 The policy wording is not ambiguous. At the time of his application in 2016 for benefits under the LTD Plan, Mr. Garnier met the eligibility requirement under s. 7(1) that he be disabled due to illness or injury. It could not be determined, however, whether benefits were in fact payable to him under the LTD Plan until the WCB made a decision on his claim for workers' compensation benefits. Recognizing that it would create a hardship for employees like Mr. Garnier if they could not access any benefits until the WCB rendered its decision, the LTD Fund's practice in such cases is to enter into an agreement with the employee to pay benefits on an interim basis, on the condition that if the employee's WCB claim is approved as fully compensable, the employee must reimburse the LTD Fund the LTD benefits paid.

…

93 In any event, I find that the language of the LTD Plan is not ambiguous, and the Board is entitled to reimbursement of the $60,553.81 in LTD benefits that remains outstanding. I accept the Board's evidence that the $5,412.28 paid to Mr. Garnier in December 2020 consisted of statutory source deductions, and that those amounts should be included in the balance owing.

(Emphasis as contained in the decision)

[7] The parties agree and the evidence indicates that Mr. Garnier currently receives the following amounts monthly:

CPP Disability	$1,295.98
Military Retirement Pension	$745.58

Veteran Affairs Canada Disability Income	$1,154.00
Government of Canada Pension	$1,262.34
VAC Canada	$1,464.89
WCB	$2,370.55
PNS	$3,000.62
Total	**$11,293.96**

[8] The court was not provided with copies of the specific plans, nor any evidence as to the basis upon which Mr. Garnier is entitled to the amounts he is receiving under the headings of VAC Disability, VAC Canada, Government of Canada Pension, Military Retirement Pension, CPP Disability ("other benefits"). I have no information as to how long Mr. Garnier will receive these amounts. I have simply been advised that Mr. Garnier receives these other benefits. In any event, the Trustees do not take the position that these income sources are available for garnishment. They have referenced these other benefits only to illustrate that Mr. Garnier has other sources of income available to him.

Parties' Positions

[9] The Trustees submit that Rule 79.08 (3) gives the court discretion to increase the percentage amount garnished from the stated 15%. The Trustees say Mr. Garnier has regular monthly income, net of taxes, of $11,293.96, with only $5,371.17 of that amount being paid by the Province and Workers' Compensation. They argue that if 100% of the latter benefits are garnished, Mr. Garnier would still have a monthly income from his other benefits of $5,922.79 ($71,073.48 per year), net of taxes.

[10] The Trustees say the $60,553.81 owing from the advances to Mr. Garnier was anticipated to come from a significant income tax refund arising from Mr. Garnier's entitlement to claim the $170,716.65 reimbursement from the WCB as a deduction against his 2020 taxable income. Mr. Garnier received income tax refunds totaling $133,473.96 over three installments from March 17, 2022 to May 16, 2022. The Trustees say Mr. Garnier could easily have paid the debt owed to the Trustees in 2022 from the $133,473.96 in tax refunds he received.

[11] The Trustees point out that from November 2020 to June 2023, Mr. Garnier gratuitously transferred a total of $232,823 to his son or his son's business, and $16,435 to his parents in repayment of a loan. They say these payments were funded in part by the tax refund of $133,473.96. They submit that Mr. Garnier's decision to

gift $232,723 to his son and his son's business, which is partially owned by Mr. Garnier, should be a significant factor in granting this motion. They say these gifts were undoubtedly a breach of the *Statute of Elizabeth*. I note that any issue of whether the transfers were in breach of the *Statute of Elizabeth* is not before me and I make no comment on it.

[12] The Trustees argue that Mr. Garnier can comfortably afford 100% garnishment of the $5,371.17 in benefits being paid by the Province and the WCB for the year or so that it will take to pay off his debt to the Trustees, plus interest and Sheriff's fees.

[13] Mr. Garnier says the only indemnity payments that should be considered as "wages" under Rule 79.08 are the monthly net payments from WCB ($2,370.55) and the Province ($3,000.62), totaling $5,371.17 per month. As noted above, the Trustees do not dispute this. They are not seeking garnishment of these other benefits.

[14] Mr. Garnier argues that his CPP Disability, VAC Disability, Military Retirement Pension, Government of Canada Pension, and VAC Canada monthly payments do not constitute wages and are intended to compensate for pain and suffering related to his work-related injury and to acknowledge his service, rather than to indemnify his employment wages. He says that ordering 100% garnishment of his "wages" effectively means that benefits intended for compensation for pain and suffering or to acknowledge his military service are effectively being usurped to replace the wages being garnished.

[15] Mr. Garnier says there is absolutely no precedent for a creditor relying on Rule 79.08 (3) to increase the percentage to be garnished. He further submits that ordering 100% garnishment of his wages would leave him with zero monthly wages, which is far less than the minimum floor stipulated by Rule 79.08 (3). Mr. Garnier says the Rule prohibits granting such an order. He says taking 100% of wages is not garnishment, it is complete seizure of wages.

The Law

[16] Civil Procedure Rule 79 governs enforcement by execution order. Rule 79.08 (3) states:

> 79.08 Attachment of debt or other obligation

> (3) Unless a judge orders otherwise, fifteen percent of a judgment debtor's gross wages are payable to the sheriff under an execution order, the rest of the judgment debtor's wages are exempt from the execution, and nothing is payable that reduces the judgment debtor's net wages, after deduction of amounts required by law to be deducted, below the applicable of the following minimums:
>
> (a) $450 a week for a judgment debtor who supports a dependant, as defined in the *Income Tax Act* (Canada);
>
> (b) $330 a week for any other judgment debtor.
>
> [Emphasis added]

[17] "Wages" are defined by Rule 94.10:

> "wages" includes salaries, commissions, gratuities, and other compensation for labour or services.

[18] I note as well that section 45 of the *Judicature Act*, R.S., c. 240 sets out the various articles that are exempt from seizure under execution, including items such as household furnishings, certain occupational equipment, one vehicle of a maximum stated value, etc.

[19] The obvious purpose of Rule 79.08 in setting a default exemption of 85% of gross wages and a threshold amount below which wages cannot be garnished ($330 weekly or $450, if supporting a dependant) is to ensure that debtors, especially those with lower incomes, do not fall below a minimum level of income or subsistence. Chief Justice Palmeter in *Di Benedetto v. Slaunwhite***,** [1993] N.S.J. No. 4 (Co. Ct.), one of the very few cases dealing with this Rule, said at paragraph 7:

> …The purpose of Civil Procedure Rule 53.05(a) is to ensure that poor families who owe debts are left with some kind of subsistence level of income. Courts should endeavour to give effect to this purpose, especially when the minimum amount reserved is fixed and not subject to changes for inflation. The limitation on this rule is that an employee should not be able to manipulate deductions to reduce or eliminate the effect of an execution order.

[20] Prior Rule 53.05 contained similar language to the current Rule 79.08:

> **53.05.** Unless the court otherwise orders, the following provisions shall apply to the payment of wages, from time to time, to a sheriff under an execution order,

> (a) an employer shall only be required to pay to the sheriff fifteen per cent (15%) of the gross wages of an employee, provided that when the payment would reduce the net amount of wages payable to the employee, after the deduction of all amounts required by law to be deducted from such wages, to the amount of four hundred and fifteen dollars ($415) per week payable to an employee supporting a family, or two hundred and seventy-five dollars ($275) per week to any other employee, then only the difference by which the payment of the fifteen per cent (15%) exceeds these respective amounts shall be paid to the sheriff;

[21] I refer as well to the Final Report of the Law Reform Commission of Nova Scotia on *Enforcement of Civil Judgments* (2014), which states:

> In short, a judgment enforcement system that fails to ensure and protect a basic, adequate standard of living runs the risk of compounding situations of poverty that are closely connected with the marginalization of a number of identifiable, disadvantaged groups.
>
> (page 18)

[22] It is worth noting that the minimum amounts found in Rule 79.08 have not been revised since the current Rules came into effect on January 1, 2009. These minimum amounts of $330 weekly for a judgment debtor without dependents and $450 with dependents, are, of course, net income amounts. I note as well that these minimum amounts have not changed substantially from those under former Rule 53.05. At that time the minimum amounts were $275 and $415, respectively.

[23] In short, there is a presumed wage exemption under the Rule of 85%. However, Rule 79.08 provides discretion to this court to deviate from the stated 15% of gross wages available for execution. There is nothing in the Rule that says a judge's discretion to "order otherwise" works in only one direction -- relief for a debtor. If the Rule was intended to allow only relief to debtors, for example, by reducing the percentage from 15% of a judgment debtor's gross wages to a lower percentage for the purposes of execution, it would have said so. In short, the Rule says that a judgment creditor can garnish a maximum of 15% of the gross wages of a debtor (while not falling below the stated minimum net amounts), unless a judge orders that more (or less) be taken. In conclusion, I am of the view that I can increase the percentage where it is appropriate and just to do so.

[24] I am aware of only one reported case dealing with a request to increase the 15% of wages garnished under an execution order. In *Kennedy v. Kennedy,* [1988] N.S.J. 78 (S.C. T.D.), decided under the former Rule 53.05, the applicant sought a waiver of the 15% in relation to the respondent deliberately avoiding payment of what was then referred to as alimony. The real issue in that case was whether an

execution order could issue for an obligation that matured on a continuing periodic basis. Justice Burchell found that there was discretion to issue this kind of revolving order in the specific circumstances. He also "waived or suspended" the ordinary limit of 15% of gross wages:

> I also agree that it is appropriate on the facts of this case to waive or suspend the ordinary limit to 15% of gross wages applying in the case of garnishee orders ("Unless the court otherwise orders") to the end that the amount of $1200 may be recovered out of the respondents wages each month.

[25] The very few other cases considering Rule 79.08 relate to issues raised by/ relief claimed by debtors. For example, in *Di Benedetto, supra* (decided under the 1972 Rules) the court considered whether union dues and mandatory pension contributions were "amounts required by law to be deducted from" wages in arriving at the amount available for garnishment. The court found that the two deductions were "required by law."

[26] Mr. Garnier argued that the court's discretion under Rule 79.08 is limited by the stated weekly floor amount for the debtor. In other words, he says there is no discretion to interfere with the amounts set out as the floor below which wages cannot be garnished. I disagree. The language of Rule 79.08 does not support this interpretation. The discretion applies to the entirety of the content that follows the words "Unless a judge orders otherwise", including the stated floor of $330 and $450. Regardless, I am of the view that it would be a rare case indeed where the court would order 100% garnishment of all wages ("after deduction of amounts required by law to be deducted"), effectively disregarding the stated floor.

[27] As I am satisfied that my discretion applies both to the percentage exemption for gross wages of the stated 85% and also to the floor amounts, I will now consider how such a discretion should be exercised. The Rule provides no guidance as to the factors or considerations the court should take into account when exercising its discretion. First of all, this discretion should only be exercised when it is just and appropriate to do so. The object of the Rules is "the just, speedy, and inexpensive determination of every proceeding" (Rule 1.01). Garnishment is an equitable remedy and the discretion under the Rule allows a judge to make whatever order the court deems just in the particular circumstances of any given case.

[28] Each request for variation under Rule 79.08, whether relief for the debtor or an increase for the creditor, must be decided on its own merits. The objective should be to strive for a proper balance between the debtor's need to meet the necessities of

life for themselves and their families, and the rights of a creditor to collect the amounts owed.

[29] I note that in several Canadian jurisdictions, civil enforcement legislation sets out various factors for consideration when assessing the merits of a request to vary the stated amount or percentage for execution by garnishment. Some of these factors include the nature of the debt owed to the creditor; the debtor's personal and financial circumstances; the family responsibilities of the debtor; the conduct of the debtor in the carrying out of his or her financial affairs; the earnings of the debtor's dependants; and any other matter the judge considers relevant (see for example, The *Wages Act*, R.S.O. 1990, c. W.1, s. 7(4) and (5); *Civil Enforcement Regulation*, Alta Reg. 276/95, s. 39 (3) and (4)); *Judgement Enforcement Act*, SNL 1996, cJ-1.1, s. 140).

[30] I further note that the relatively new *Enforcement of Money Judgements Act*, SNB 2013, c 23, states at s. 86(4):

> 86(4) In determining how much of a judgment debtor's income is exempt from realization under section 85, the sheriff and the court may have regard to, but are not bound by, any directives issued by the Superintendent of Bankruptcy under section 68 of the *Bankruptcy and Insolvency Act* (Canada) relating to determining the surplus income of a bankrupt.

The current directive sets out a process for calculating the surplus income by determining a family unit's available monthly income. This is determined by subtracting from the family unit's total monthly income the monthly non-discretionary expenses applicable to the personal and family situations of both the bankrupt and the bankrupt's family unit. Such expenses include, for example, child support payments, spousal support payments, childcare expenses, expenses associated with a medical condition, court-imposed fines or penalties that are in the process of being paid (Directive No. 11R2-2024 Surplus Income*).* I note, however, that there are different policy considerations applicable in a bankruptcy context than applicable in a garnishment context.

[31] I find that many of the considerations set out in other jurisdictions' civil enforcement legislation are both appropriate and helpful. In considering whether to exercise the court's discretion under *Rule* 79.08, I am of the view that consideration should be given to a debtor's personal and financial circumstances, which would include the family responsibilities of the debtor; the earnings of the debtor's dependants, if any; the nature of the debt owed to the creditor; the conduct of the debtor in the carrying out of his or her financial affairs; other obligations such as

child support and spousal support payments, child care expenses, expenses regularly incurred due to a medical condition, or any other matter a judge considers relevant. The list of considerations is not a closed one and will vary depending on the circumstances of the matter. With the above considerations in mind, I now turn to the circumstances of this matter.

The debtor's personal and financial circumstances, including the family responsibilities of the debtor

[32] I have very little information concerning Mr. Garnier's personal circumstances. I have no evidence that he has any dependants living with him. He says in his affidavit that he pays monthly rent of $2,140, and that he pays more than $600 per month for spousal support. I have no information as to whether there is a court order in relation to the referenced amount of spousal support. The evidence also indicates that Mr. Garnier has been assisting his son financially with a legal matter.

[33] Mr. Garnier's affidavit includes some limited information as to other debts he claims to owe. He says he has approximately $9,000 in credit card debt and an ongoing debt with a collection company of approximately $70,000. He further states that he has been consistently making monthly payments to family members for loans they gave to him over the years. He says he currently pays approximately $1,860 per month towards these obligations. He further says he owes approximately $30,000 to his son's law firm, due by the end of March 2024, to pay for ongoing legal fees.

[34] The information in Mr. Garnier's affidavit is vague. He has not attached any documentary evidence in support of his financial situation. For example, I have no details on what, if anything, he pays per month in relation to the noted $70,000 debt, what he pays toward his credit card debt, etc. I have no details at all as to what payment plans, if any, are in place. I have no information concerning the debts he says are owing to family members, including to whom the debts are owed, the amounts owing, the repayment terms, the date such debts were incurred, when such debts will be paid off, etc. In relation to the $30,000 he says is owing to his son's law firm as of the end of March 2024, again, I have no information as to what, if any, payment plan is in place, whether this is his personal debt or a debt of his son. The Applicant has placed in evidence some of Mr. Garnier's bank statements, but they end in June 2023 and provide no insight into his current debt payments.

[35] While debts can certainly be considered as part of the debtor's overall financial situation – particularly, for example, debts such as secured debt under a

mortgage, CRA debt, or court-imposed fines or penalties – I have very few details concerning Mr. Garnier's actual debts. One cannot lose sight of the fact that the Applicant has a registered judgment and an execution order. That debt is the focus of this motion. In my view, it would be entirely inappropriate for me to consider and assess how much of Mr. Garnier's monthly wages should go to the various other creditors he has noted in his affidavit, or to consider any issues of possible priorities as between the various stated debts of Mr. Garnier. Even if it were appropriate to consider such issues, there is insufficient evidence before me to do so in any event. I note as well that there are other processes available to Mr. Garnier should he feel his level of debt is unmanageable.

[36] Mr. Garnier says I should not consider his other benefits (VAC Disability, VAC Canada, Government of Canada Pension, Military Retirement Pension, CPP Disability) when looking at his financial circumstances because they are not wages and are meant to be protected. For the purposes of this motion, the parties agree that these other sources of income do not form part of his "wages" for the purposes of Rule 79.08. I was not asked to assess the status of these other benefits under the Rule and, therefore, accept the parties' position and assume (without deciding) that these amounts are not "wages" under the Rule.

[37] However, the question remains whether benefits that are not "wages" for the purposes of the Rule should even be considered in relation to a debtor's overall financial situation. Put differently, should income or benefits that are exempt from garnishment for legislative or policy reasons be used as a basis or justification to increase the percentage of a debtor's wages available for garnishment? Again, I was not asked to assess the nature of each of Mr. Garnier's other benefits and determine whether they are "wages" under the Rule. The parties agree that they are not to be considered wages for the purposes of this motion. Mr. Garnier takes the position that these other benefits do not constitute wages because they are intended to compensate for pain and suffering related to his work-related injury and to acknowledge his military service, rather than to indemnify his employment wages. The Trustees have not disputed this position. Again, this motion is being decided on these assumptions.

[38] Generally speaking, damages that are personal to the debtor, such as damages for pain and suffering, are not ordinarily subject to seizure by creditors. Although dealing with the context of a bankruptcy, the Ontario Court of Appeal in *Re Conforti*, 2015 ONCA 268, discussed the extensive support for the proposition that damages for pain and suffering do not fall under sections 67 or 68 of the *Bankruptcy and Insolvency Act.* As the court noted, "it is not the policy of the law to convert into money for creditors the mental or physical anguish of the debtor":

> 50 They are, however, damages that are personal to the appellant and bear a close relationship to damages on account of pain and suffering. There is extensive support for the proposition that damages for pain and suffering do not fall under s. 67 or s. 68 of the *BIA*: *Holley v. Gifford Smith Ltd.* (1986), 54 O.R. (2d) 225 (Ont. C.A.) and *Hollister, Re*, [1926] 3 D.L.R. 707 (Ont. S.C.). As stated by Goodman J.A. in *Holley v. Gifford Smith Ltd.*: "it is not the policy of the law to convert into money for the creditors the mental or physical anguish of the debtor." The damages allocated to future care and housekeeping are intended to alleviate the appellant's injured state. It is therefore appropriate to treat them in the same manner as damages for pain and suffering.
>
> [Emphasis added]

[39] Again in the bankruptcy context, I refer to *Houlden and Morawetz: Bankruptcy and Insolvency Law of Canada*, Fourth Edition, F§241, at page 4-176:

> Where a cause of action arises from bodily injury or mental suffering or from injury to reputation or character, the cause of action belongs to the bankrupt and does not vest in the trustee…
> It is not the policy of the law to convert into money for creditors the mental or physical anguish of the bankrupt: *Holley v. Gifford Smith Ltd.* (1986), 54 O.R. (2nd) 225, see also *Chaloux v. Kingston Fairways Golf Course* (2004), 48 C.B.R. (4th) 237 (Ont. S.C.J.)

[40] In my view, the principle expressed in the bankruptcy context that damages that are personal to the debtor, such as damages for pain and suffering, should not be available to creditors is just as relevant in the garnishment context (see *Mullin v. R - M & E Pharmacy,* [2005] O.J. No. 196 (Ont. Sup. Ct. J.)).

[41] Again, while I have not been asked to determine whether Mr. Garnier's other benefits are exempt from garnishment, I note that most pension statutes contain provisions prohibiting execution and garnishment of benefits (except to satisfy a support order). For example, s. 89(1) of the *Pension Benefits Act*, 2011, S.N.S. c. 41, states in part:

> **Exemption from execution, seizure or attachment**
>
> 89 (1) Money payable under a pension plan is exempt from execution, seizure or attachment.

[42] The policy reason often espoused for their exemption is that pensions are resources to support the retiree and the retiree's family. They are a retiree's source of future economic sustainability or survival at a time when such income cannot be easily replaced because the person is no longer in a position to earn income. Without

the exemption provisions of legislation such as the *Pension Benefits Act*, execution / garnishment on a pension could render the retiree the responsibility of the state (see *Exemption of Future Income Plans*, Alberta Law Reform Institute, Final Report No. 91, 2004; *Enforcement of Civil Judgments, supra*; C.R.B. Dunlop, *Should Creditors Have Access to Future Income Savings Plans*, 66 Sask. L. REV. 270 (2003)).

[43] While not in the context of debt collection, in *IBM Canada Limited v Waterman*, 2013 SCC 70, the Supreme Court of Canada commented generally on the nature of employee pension payments in concluding they should not be deducted from damage awards in wrongful dismissal cases:

> 4 In my view, employee pension payments, including payments from a defined benefit plan as in this case, are a type of benefit that should generally not reduce the damages otherwise payable for wrongful dismissal. Both the nature of the benefit and the intention of the parties support this conclusion**. Pension benefits are a form of deferred compensation for the employee's service and constitute a type of retirement savings. They are not intended to be an indemnity for wage loss due to unemployment.** The parties could not have intended that the employee's retirement savings would be used to subsidize his or her wrongful dismissal […]
>
> [Emphasis added]

[44] There is a reason Rule 79.08 uses the word "wages." If a creditor could simply point to the amounts a debtor was receiving for pain and suffering or other benefits exempted for legislative or policy reasons to justify an increased percentage for the garnishment of wages then, in essence, those amounts are no longer exempt. They would no longer be personal in nature to the debtor or maintain their exempt status but would effectively become substitute wages available to assist creditors. For example, if 100% of wages could be garnished simply because the debtor is receiving sufficient exempt benefits to cover their necessities of life, then the policy reason for exempting benefits no longer exists and the debtor is forced to pay for the basic necessities of life from income intended to compensate, for example, for their injured state, for physical pain and suffering, for cost of future care, or to support them in retirement when they have no other sources of income. I am of the view that this would not be an appropriate exercise of the discretion available under the Rule. It would convert into funds for creditors the physical anguish of the debtor and contravene the above stated policy.

[45] However, I see no reason why the court should entirely disregard this information. While exempt sources of income should not be directly considered as a substitution for wages (dollar for dollar) to cover the basic necessities of life, they

can be relevant to the total picture of a debtor's financial circumstances. As noted above, this is merely part of the overall consideration of personal and financial circumstances. It is not and should not be the only consideration.

The nature of the debt owed to the creditor and the conduct of the debtor in the carrying out of his or her financial affairs.

[46] As indicated in the decision of Justice McDougall, Mr. Garnier had the benefit of the LTD payments while awaiting a decision from WCB, and he had agreed to reimburse the LTD Fund in the event that his WCB claim was approved. However, he failed to reimburse the amount of $60,553.81.

[47] The Trustees say Mr. Garnier made a deliberate choice not to repay the amounts advanced to him by the LTD Fund. They say he could easily have paid the debt owed to the Trustees in 2022 from the $133,473.96 in tax refunds he received from March 17 to May 16, 2022. These refunds relate to deductions in the calculation of his taxable income for 2020 that are explained in the affidavit of Susan Dower of January 18, 2022, and in Justice McDougall's decision at paragraphs 49 and 54 to 56. The Trustees say that had he done so, they would not have had to incur the substantial legal fees required to obtain judgment against Mr. Garnier, which he strenuously resisted.

[48] The Applicant has put forward evidence from information provided in bank statements and answers to interrogatories that from November 27, 2020 to November 8, 2022, Mr. Garnier transferred $147,573 to Chris Gee Designs Inc., a company in which Mr. Garnier is a minor shareholder and his son is the majority shareholder. Further, from December 8, 2022 to May 30, 2023, Mr. Garnier transferred $27,000 to his son (with one transfer being to Chris Gee Designs Inc.) "for him to direct as he saw fit."

[49] Mr. Garnier does not dispute that he made these transfers. He says the amounts paid to Chris Gee Designs Inc. were not for his benefit, but for his son to use as he saw fit. This could include savings for his future, covering ongoing legal fees, or investing in his business, which will be at his disposal upon his release. He further said in his affidavit that the funds that were ultimately transferred to Chris Gee Designs Inc. from his account were funds that he was meant to pay back to various family members who had loaned him money to assist him in paying his son's legal fees. He says that his family members chose to allocate a portion of the repaid loan money to his son, allowing him to use it as he saw fit. If these amounts paid to Chris Gee Designs were to repay family members who chose to allocate "a portion of the

repaid loan money to his son", then why does he say he is still paying them approximately $1,860 per month? There are many unanswered questions.

[50] He says in his affidavit:

> I have been consistently making monthly payments to my family members for loans they have given me over the years. Currently, I pay approximately $1,860 per month towards these repayments.

[51] Further, as noted above, he says the amounts paid to Chris Gee Designs Inc. were not for his benefit, but for his son to use as he saw fit, which could include savings for his future, covering ongoing legal fees, or investing in his business, which will be at his disposal upon his release. However, he later says Chris Gee Designs Inc. is insolvent and has not ever paid out dividends. How can the funds be for his son's future if the company is insolvent and has never paid dividends? Mr. Garnier's affidavit is vague, completely lacking in detail in many respects, and confusing.

[52] Regardless, Mr. Garnier should have repaid the amounts advanced by the LTD Fund from the tax refunds he received in 2020 arising from his entitlement to claim the $170,716.65 reimbursement from the WCB as a deduction against his 2020 taxable income. He simply chose not to do so.

[53] The question before me is whether, considering Mr. Garnier's financial circumstances and his conduct in refusing to repay the Trustees when he received his tax refunds, the court should increase the usual 15% available for garnishment. And if so, by how much?

[54] Mr. Garnier is not on a subsistence budget. As noted above, the parties agree that the "wages" currently available for execution under Rule 79.08, and currently being garnished at 15%, are the amounts paid to Mr. Garnier by the Province (after deductions) of $3,000.62 per month and by WCB of $2,370.55 per month. He currently has available for execution $5,371.17 per month. In addition to this amount, he receives $5,922.79 per month (or $71,073.48 in after tax dollars) in other benefits that are not the subject of this motion. I have virtually no information concerning his monthly expenses other than rent and spousal support. As noted, he lists various debts but provides little information.

[55] Mr. Garnier has no dependants. This means the minimum floor for Mr. Garnier, according to Rule 79, is $330 per week, or $1,430 per month. As noted above, I am of the view that it would be a rare case where the court would make an

order that leaves a debtor with less than the floor set out in Rule 79.08. This is not such a case. I have also considered the other factors noted above in coming to my conclusion, including his stated spousal support payment of $600 per month.

[56] Even looking solely at the amounts considered "wages" from WCB and the Province per month, I am of the view that Mr. Garnier is able to pay much more per month than 15%. I find that an increase to 50% of wages is just and appropriate in the circumstances of this matter. Currently, given the information before me, a 50% exemption for gross wages (which here are also net) would mean that Mr. Garnier will be left with $2,685.59 net per month from his wages after garnishment. This represents $32,227.02 in after tax dollars per year. Further, he could have repaid the advances he received (now this judgment debt) in its entirety from the associated income tax refund but chose to direct his funds elsewhere.

[57] In conclusion, in the specific circumstances of this case, the presumed 85% exemption of wages is too high. The wage exemption for Mr. Garnier should be lowered to 50% of his wages. This means that the Trustees are entitled to execution on 50% of any gross wages payable to Mr. Garnier. While increasing the percentage of wages available for execution from 15% to 50% may seem extreme, I am satisfied it is warranted in all of the current circumstances.

[58] In relation to the current garnishment of the WCB benefit of $2,370.55 per month, I posed questions during submissions concerning the application of s. 77(1) of the *Workers' Compensation Act*, 1994-95, c. 10, in the current circumstances. Counsel agreed to provide me with the correspondence whereby the Trustees requested and received from the Workers' Compensation Board ("Board") approval of the garnishment pursuant to s. 77(1). That section states:

> Exemptions from general law and set-offs
>
> 77 (1) Except with the approval of the Board, no person shall assign, seize, charge, attach or otherwise encumber or transfer any compensation payable pursuant to this Part.
>
> (2) No compensation payable pursuant to this Part shall pass by operation of law, except to a personal representative of the person receiving compensation.
>
> (3) Without limiting the Board's remedies for recovery, any amount owed to the Board pursuant to this Part, including any amount owed as a penalty pursuant to this Part, may be set off by the Board against any compensation that is or may become payable to any person indebted to the Board. 1994-95, c. 10, s. 77
>
> [Emphasis added]

[59] The Trustees' correspondence to the Board requesting approval states:

> Aside from whatever policy the Board may have, the LTD Fund submits that the circumstances of this case warrant the board exercising its discretion to permit execution against Mr. Garnier's Worker's Compensation benefits, those circumstances being:
>
> > The debt owed by Mr. Garnier to the LTD fund represents double compensation to Mr. Garnier to the extent of the debt. This is because the above referenced retroactive payment to Mr. Garnier was for 100% of his salary from September 2015 to June 2020. Accordingly, to the extent that the LTD debt is unpaid by Mr. Garnier, he has been double compensated for his income loss.
> >
> > Between the Worker's Compensation benefit currently being paid to Mr. Garnier and the Injury on Duty top up being paid by the province, Mr. Garnier is receiving 100% of his salary, and considering that the Worker's Compensation benefit is non-taxable, Mr. Garnier is effectively receiving more than 100% of gross salary.
> >
> > The garnishment provision in Execution Orders is limited to 15% of gross wages. With Mr. Garnier effectively receiving more than 100% of gross salary, the 15% reduction by garnishment will mean that net of the garnishment, Mr. Garnier will still be receiving close to 1005 (sic) of gross salary.
>
> Long story short, Mr. Garnier has been the beneficiary of double compensation and has been ordered by the Supreme Court to reimburse the double compensation. Given the generous benefits of the injury on duty award, which resulted in an effective benefit of more than 100% of gross salary, it can hardly be said to be a hardship if Mr. Garnier receives 15% less if the board honours the execution order. (July 4, 2023 letter)
>
> [Emphasis added]

[60] By letter dated September 20, 2023, the Board decided to exercise its discretion under s. 77 in favour of accepting and honouring the execution order. The letter states:

> …After a careful review, the Board has decided to exercise its discretion under section 77 of the *Worker's Compensation Act* in favour of accepting and honouring the execution order. This decision is based on the fact that Mr. Garnier had agreed to reimburse the LTD Fund if he received Worker's Compensation benefits, and after receiving same, he has refused to do so, even after the LTD Fund was successful in its legal action against him.

[61] It is obvious from the above correspondence that the approval given by the Board under s. 77(1) for garnishment was in relation to a request by the Trustees for garnishment of the usual 15% set out in Rule 79.08(3). The request specifically referenced 15% and obviously not the increase to 50% of gross wages. Therefore, I am of the view that this decision is subject to the Board's statutory authority under s. 77(1) in relation to the monthly WCB amounts payable to Mr. Garnier.

Conclusion

[62] The motion of the Trustees to increase the percentage for garnishment under the execution order is allowed, but I decline to increase it to 100%. I have exercised my discretion under Rule 79.08 to increase the percentage for execution by garnishment from the stated 15% to 50% of Mr. Garnier's gross wages. The Trustees are entitled to costs. If the parties are unable to agree on costs, I will entertain brief written submissions within 30 days. I ask that Mr. Bryson prepare the order.

Jamieson, J.