SUPREME COURT OF NOVA SCOTIA
Citation: Industrial Alliance Insurance and Financial Services Inc. v. Brine, 2014 NSSC 219

Date: 20140618
Docket: Hfx. No. 174118
Registry: Halifax

Between:

Industrial Alliance Insurance and Financial Services Inc.
Plaintiff/Defendant by Counterclaim

v.

Bruce Brine
Defendant/Plaintiff by Counterclaim

Decision

Judge:	The Honourable Justice Cindy A. Bourgeois
Heard:	November 4-7, 12 and 13, 2013 in Halifax and Bridgewater, Nova Scotia
Written Decision:	June 18, 2014
Counsel:	Barry J. Mason and Glenn Jones for Bruce Brine Geoffrey A. Saunders and Dillon Trider for Industrial Alliance Insurance and Financial Services Inc.

By the Court:

INTRODUCTION

[1] This action arises from a claim made by Bruce Brine under a disability insurance policy. Although found to be totally disabled within the terms of the policy, Mr. Brine and his insurer, National Life (and later its successor Industrial Alliance), have been locked in a near two decade dispute, with issues regarding the provision of rehabilitation services, the tax treatment of benefits paid, and the deductibility of third party payments being the central areas of disagreement.

[2] Mr. Brine submits that National Life has breached not only specific provisions of the policy, but also its duty of utmost good faith. National Life submits it has handled Mr. Brine's claim appropriately, with no breach of any policy provision or the implied duty of utmost good faith being established by the evidence at trial. To the contrary, National Life asserts it is Mr. Brine who has failed to meet his obligations under the policy by not reporting payments from third party sources, resulting in substantial overpayments under the policy.

BACKGROUND

[3] To better contextualize the issues before the Court, it is of assistance to briefly review the general factual background, which is not contentious, as well as various relevant provisions contained in the policy of insurance.

[4] Bruce Brine is presently 65 years of age, having been born March 17, 1949. He is married to his wife Rose Marie, and together they have three adult children. Prior to ceasing work in 1995, Mr. Brine was a career police officer. After spending some time with municipal police forces in the early years of his career, he joined Ports Canada Police, advancing through its ranks, and being appointed in 1993 as Superintendent of Ports Canada Police in Halifax, N.S.

[5] As part of his employment, Mr. Brine was provided long term disability coverage by virtue of a policy of insurance between National Life and the Board of Trustees of the Public Service Management Insurance Plan.

[6] In the latter part of 1994 and early 1995, Mr. Brine was experiencing serious issues at his place of employment, resulting in significant mental distress. His employment with Ports Canada ended in early 1995. He made application for disability benefits, which were ultimately approved by National Life on August 1,

1995. Mr. Brine was diagnosed as suffering from depression by his treating psychiatrist, Dr. Edwin Rosenburg, who has continued to treat him until present.

[7] In December of 1995, National Life assessed Mr. Brine's circumstances and made a determination that the services of a rehabilitation counsellor may be of assistance to him. Ms. Suzanne Azzie was assigned to provide services in this regard. In June of 1998, rehabilitation services were discontinued by National Life.

[8] In October of 1998, National Life ceased making payment to Mr. Brine of his monthly long term disability benefits. Having received lump sum payments from both the Canada Pension Plan and Public Service Superannuation, National Life held the view that such should have been deducted from his disability benefits, thus creating a substantial overpayment. National Life set off the overpayment, in the amount of $99,506.64, by reducing Mr. Brine's monthly disability payment to zero until such overpayment was extinguished.

[9] In July of 1999, Mr. Brine declared bankruptcy. At that time, the alleged overpayment was noted by National Life to be $62,036.81 in a Proof of Claim it filed. National Life took the position that the above debt survived Mr. Brine's bankruptcy because his failure to have originally disclosed receipt of those funds

constituted a misappropriation of funds or a defalcation by one acting in a fiduciary capacity. National Life continued to withhold Mr. Brine's monthly disability benefits until the remaining balance of the alleged overpayment was extinguished. Payment of benefits re-commenced in 2003.

[10] In March of 1996, Mr. Brine had, given his treatment at Ports Canada, filed a complaint with the Canadian Human Rights Commission. After significant procedural issues, that matter was ultimately resolved with Mr. Brine receiving a negotiated settlement of $300,000.00 in 2004.

[11] Since being approved for disability benefits in August of 1995, National Life has issued T4 slips to Mr. Brine which characterize his disability benefits as taxable income. In two separate rulings relating to different taxation years, the Tax Court of Canada has determined the disability benefits payable under the policy of insurance to not be taxable income. National Life continues to issue T4 slips to Mr. Brine on an annual basis in which the disability benefits are identified as taxable income.

[12] At this juncture, it may be of assistance to identify several provisions contained in the policy of insurance. In the joint exhibit book filed with the Court, the parties provided a number of documents including that entitled "The National

Life Assurance Company of Canada - Group Insurance Policy". This document has a "Policy Effective Date" of May 1, 1986 and a named policyholder as "The Board of Trustees of the Public Service Management Insurance Plan and their Successors".

[13] "Totally disabled" and "total disability" are defined in Section 1 - Article 23 of the policy as follows:

> (a) For the qualifying disability period and the first 24 months in a continuous period of disability after the employee has completed his or her qualifying disability period,
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> (i) that the employee is suffering from a medically determinable physical or mental impairment which results in or would result in the withdrawal or continued withdrawal of any license mandatory in order for the employee to carry out his or her occupation or employment,
>
> (ii) employee's complete incapacity, as determined by the Insurer, to perform substantially all of the essential duties of his or her occupation or employment due to a medically determinable physical or mental impairment,
>
> and
>
> (b) after such 24 months and for the remainder of the continuous period of disability, the employee's complete incapacity, as determined by the Insurer, due to a medically determinable physical or mental impairment, to earn more than 66 2/3% of the current annual rate of remuneration for the occupation of the employee or the position held by the employee immediately prior to the date he or she became totally disabled. However, an employee who engages in any occupation or business, except as provided in the Rehabilitation provision of the Long Term Disability Benefit, will be deemed not to be totally disabled.

[14] In Section 3, the concept of rehabilitation is included under the heading "Long Term Disability Insurance Benefit". The policy provides:

> If a totally disabled employee, who has completed his qualifying disability period engages in a rehabilitation program, which has been approved in advance by the Insurer, in writing, such employee will not be considered by the Insurer to have ceased to be totally disabled until the earliest of the following dates:
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> 1. The date the employee has been involved in the program for 24 consecutive months or such longer period as agreed to by the Insurer.
> 2. The employee's 65th birthday.
> 3. The date on which the employee would otherwise cease to be totally disabled as defined in this policy.
> 4. The date on which the employee would otherwise cease to receive a Monthly Income Benefit under this Benefit.
>
> If the employee should receive an income under the rehabilitation program the amount of the Monthly Income Benefit payable to him or her under the other terms of this Benefit will be reduced so that the total of the monthly income he or she is receiving from all sources, other than an individual policy, does not exceed 100% of the current annual rate of remuneration for the occupation of the employee or the position held by the employee immediately prior to the date he or she became totally disabled.
>
> The Insurer may pay the expenses incurred by an employee, other than usual employment expenses, which are associated with an approved rehabilitation program, provided the expenses have been approved, in writing, by the Insurer prior to being incurred.
> As used in this provision, "rehabilitation program" means a training or work related activity that can be expected to facilitate a totally disabled employee's return to his job or other gainful employment.

[15] In the same section, the policy provides for various deductions which will be made to the monthly income benefit. That section relating to "Reductions" is reproduced in its entirety, below:

In calculating the amount of an employee's Monthly Income Benefit, the amount of the benefit otherwise payable hereunder in respect of any month or partial month of total disability shall be reduced by 100% of:

1. The amount of income paid or payable to the employee or on his or her account, for such month or partial month under the Public Service Superannuation Act, including any contributions for elective service, the Governor General's Act, the Lieutenant Governors Superannuation Act, the Members of Parliament Retiring Allowance Act and any other pension or retirement plan provided to the employee by or through his or her Participating Employer or administer by the Participating Employer;

2. The amount of any income, such as, but not limited to, salary, wages and profit sharing, from any occupation or business enterprise in which the employee is actively engaged, but will not include any income which is provided for under the Rehabilitation provision of this Benefit.

3. The amount of any income or benefit payable on account of such disability for such month or partial month under any of the following, but not including any portion of such disability income or benefit that became payable prior to the date the total disability commence, or any amount payable for any mental or physical impairment other than that which caused the total disability:

   (a) under the Canada or Quebec Pension Plans (primary benefits only);

   (b) under any plan or program of any government or of any subdivision or agency thereof;

   (c) under any workers compensation law or similar law including any lump sum benefit payable in lieu of, or as an accumulation or, periodic benefits for a stated period, except for benefits payable as a result or a disability incurred before the employee became insured hereunder;

   (d) under another organization plan**;**

   (e) any government legislated no-fault automobile insurance plan including the Quebec Automobile Insurance Act, but only to the extent permitted by such legislation.

4. the amount of any benefit which would have been payable on account of such disability for such month or partial month under the Public Service Superannuation Act, where the employee has taken a cash termination allowance instead of a disability benefit under such Act, provided, however, that, when the cumulative amount of reductions to the employee's Monthly Income Benefit as a result of this clause equals the cash termination allowance, there will be no further reductions in this respect to his or her Monthly Income Benefit;

5. the amount of any benefit which would have been payable on account of such disability for such month or partial month under the Public Superannuation Act, where the employee has taken a simple return of contributions instead of making application for a disability benefit under such Act, provided, however, that, when the cumulative amount of reductions to the employee's Monthly Income Benefits as a result of this clause equals the amount of contributions returned, there will be no further reductions in this respect to his or her Monthly Income Benefit;
6. the amount of any lump sum received as a return of contributions under the Public Service Superannuation Act, where the employee is refused disability benefits under such Act;
7. the amount of any damages for loss of income received from a third party and arising out of the same circumstances that caused the employee's total disability.

[16] If an employee should receive a lump sum settlement in lieu of, or as an accumulation of periodic benefits from any of the sources described above, other than as described under clauses (4) and (5), the amount of the lump sum received shall be apportioned equally over the period from the date of payment of such lump sum to the date of the employee's 65th birthday, and the amount apportioned to each month or partial month in the period shall be deemed a benefit payable for such month or partial month.

[17] Notwithstanding the terms of this section, the Insurer will not reduce the amount of the employee's Monthly Income Benefit as a result of cost of living increases in the payments he or she receives from any of the sources described herein.

[18] Also relevant to the issues before the Court is the provisions relating to "Subrogation", which read:

> Where a Monthly Income Benefit becomes payable with respect to an employee who has a right to recover damages from any individual or organization, the Insurer will be subrogated to the rights to recovery of the employee against such individual or organization to the extent of the benefits paid or payable.
>
> In order to qualify for a Monthly Income Benefit the employee shall be required to sign a subrogation agreement if requested to do so by the Insurer.
>
> Whether or not a subrogation agreement has been signed, the employee shall reimburse the Insurer up to the amount of any benefit paid or otherwise payable under this policy out of the damages recovered, which shall include any lump sum or periodic payments on account of past, present or future loss of income.
>
> The employee shall notify the Insurer as soon as any action is commence against any third party which involves a claim which would otherwise be payable under this Benefit and shall provide the Insurer information, including copies of all relevant documentation, about any judgement or settlement of any such claim. Unless the prior approval of the Insurer has been obtained, no such settlement of any claim against the third party shall be binding on the Insurer.
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> The solicitor acting for the employee will represent the subrogated rights of the Insurer unless the Insurer gives notice that another solicitor is to be appointed to act on its behalf. The Insurer reserves the right to pursue its subrogated rights against the third party and, in this respect, the employee and his solicitor shall fully cooperate with the Insurer in the pursuit of its claim.
>
> In the event a lump sum payment is made under a judgement or a settlement for loss of future income or for future periodic lump sum benefits which might otherwise be payable under this Benefit, and the employee fails to reimburse the Insurer to the extent of the benefits paid, no benefits will be paid by the Insurer until such time as the Monthly Income Benefit which would otherwise be payable under this Benefit equals the amount received under the judgement or settlement.
>
> If the third party damage claim is settled prior to trial of the action, the Insurer shall be reimbursed in an amount that reasonably reflects the benefits that would otherwise be payable under this Benefit, on account of past, present, and future income without regard to the terms of settlement that may have been agreed to by the employee and the third party.

PROCEDURAL BACKGROUND

[19] It is helpful to briefly review the pleadings in order to ascertain the issues to be determined by the Court.

[20] The litigation commenced with National Life filing an Originating Notice and Statement of Claim on September 20, 2001, in which it was alleged that due to Mr. Brine receiving undisclosed disability benefits from CPP and under the Public Service Superannuation Act, an overpayment of $99, 506.64 had been made to Mr. Brine. At the time of filing, it was alleged that the overpayment had decreased to $40,965.59 by virtue of setting off Mr. Brine's disability payments, said sum, plus pre-judgment interest and costs being claimed. This claim, given that the entire alleged overpayment was eventually entirely set off as against Mr. Brine's monthly disability benefits, has been discontinued.

[21] On November 28, 2001 Mr. Brine filed a Defence and Counterclaim. Mr. Brine denies in the Defence that he failed to advise National Life of the CPP and Superannuation payments and further, that his bankruptcy would have served to remove any remaining overpayment should one be found to have existed. In the Counterclaim against National Life, Mr. Brine pleads that the insurer breached the contract of insurance by failing to provide him with a "retraining allowance" and

that through its management of his claim; National Life had breached the duty of utmost good faith owed to him. National Life filed a Defence to Counterclaim on December 20, 2001 in which it denies it breached the policy or failed to act in good faith.

[22] Both parties recently filed, with the consent of the other, amended pleadings. On November 6, 2013, Mr. Brine filed an Amended Counterclaim in which he alleges breach of the terms of the policy and acts of bad faith by National Life as follows:

> 3. By virtue of the Policy of insurance, the Plaintiff was under a duty of utmost good faith to the Defendant and the Defendant states and alleges that in the administration of his claim and in dealing with the payments made to the Defendant, the Plaintiff breached it duty of good faith as a result of which the Defendant has suffered injury, damage and loss, particulars of which will be provided prior to trial. The Defendant states that the Plaintiff acted in bad faith and breached the terms of the Policy by:
>
> > (a) repeatedly and continuously characterizing the long term disability benefits paid under the Policy erroneously as taxable in documentation remitted to Revenue Canada and the Defendant, contrary to the requests of the Defendant and in spite of the Policy, the law and a Tax Court of Canada Decision specifically stating such benefits were not taxable;
> >
> > (b) improperly discontinuing long term disability benefit payments to the Defendant in 1998 and further, withholding such payments in full until an alleged overpayment was recovered and in spite of the Defendant's bankruptcy in 1999;
> >
> > (c) improperly discontinuing rehabilitation services to the Defendant in 1998;
> >
> > (d) improperly alleging fraudulent activity and misappropriation of funds on the part of the Defendant.

[23] On November 13, 2013, National Life filed an Amended Defence and Counterclaim in which it denies any breach of the policy or duty of utmost faith on its behalf, and further claims set-off from Mr. Brine in relation to the $300,000.00 settlement received in relation to his complaint to the Canadian Human Rights Commission.

[24] Although the litigation process was initially commence by National Life as plaintiff, what remains is Mr. Brine's original Counterclaim, as amended, and the defence thereto. In the circumstances, the parties agreed for the trial to proceed with Mr. Brine as "plaintiff" and National Life as "defendant".

THE EVIDENCE

Bruce Brine

[25] Mr. Brine testified regarding his career in policing. After spending a few years on municipal forces, Mr. Brine joined Ports Canada Police as a patrol constable in 1974. Stationed in St. John, New Brunswick, he was promoted to Sergeant in 1982 and later to Lieutenant in 1988.

[26] Mr. Brine testified that he performed well in his duties and was the recipient of very favourable reviews by his supervisors. In 1991, Mr. Brine undertook a dramatic change in his employment by virtue of accepting a position at the Port of

Sept Isles, Quebec. With a much broader mandate, this Pilot project involved Mr. Brine being responsible for overseeing the policing needs of the Port, but also the development of numerous protocols including secure communications, secure document handling and dangerous goods. This position further necessitated Mr. Brine becoming fluently bilingual in order to work in what was an all French environment. Mr. Brine's performance evaluations during this period appear to reflect a high degree of satisfaction with his efforts.

[27] In 1993, Mr. Brine was asked to consider a position in Halifax, N.S. He was ultimately appointed Director of Ports Canada Police in Halifax, at a rank of Superintendent. Mr. Brine testified that he was very pleased with the progression of his career and fully expected to ultimately achieve his goal of becoming Director General of Ports Canada, the top position in the organization.

[28] In 1994, Mr. Brine was the recipient of the Governor General's award for exemplary service in policing. It would appear that things began to unravel for Mr. Brine in terms of his career shortly thereafter.

[29] In his evidence Mr. Brine testified as to difficulties he encountered in the Halifax position. Although comfortable in his duties, he testified that dealing with the Port Authority often proved problematic, in that "interference" in police

operations was common. Further, an active investigation pertaining to the infiltration of organized crime within the Port was ongoing which suggested Hell's Angels affiliates may be holding positions at the port, including in the management of shipping companies. The most problematic for Mr. Brine however, was in the course of these investigations, it coming to light that his immediate predecessor may have had involvement in potentially criminal activities. As that individual had moved upwards in the organization to the position of Director General, Mr. Brine testified he found himself in a very stressful and delicate situation. His physical and mental health began to suffer. He advised, in confidence, his immediate supervisor, of the existence and nature of the investigation.

[30] In November of 1994, Mr. Brine was advised by his supervisor that the Director General had been told of the investigation, and vehemently denied any wrongdoing. Mr. Brine testified that at that juncture, he knew his career was finished; it was just a matter of time.

[31] In late January of 1995, Mr. Brine was asked to meet with his direct supervisor, Chief Superintendent Parlee. Having been his commanding officer in the past and the author of several very positive job evaluations, Mr. Brine testified that he knew from his demeanour and the tone of the meeting that his dismissal was imminent. Chief Superintendent Parlee was confrontational and advised Mr.

Brine that he was now under investigation. When requested, Mr. Brine declined to provide a recorded statement. Contrary to his typical demeanour, Mr. Brine testified that during this meeting he broke down emotionally and "bawled". Mr. Brine's family physician placed him off work shortly thereafter. He never returned to his employment.

[32] In March of 1995, Mr. Brine was called at home by Chief Superintendent Parlee and requested to meet with a Ports Canada lawyer. Mentally unable to face what he knew was to be a termination; Mr. Brine had a lawyer attend on his behalf. He was being terminated, and he understood also being accused of serious and longstanding wrongdoing in the course of his employment. Mr. Brine testified that his led to his "total collapse" mentally. With the assistance of his legal counsel, Mr. Brine reached a severance agreement with his employer, finalized in April of 1995. One of the terms, receipt of a letter of reference, was never satisfied in Mr. Brine's view, as the letter received was a "one-liner", and completely useless for any type of future job search.

Application and Initiation of National Life Benefits

[33] Mr. Brine made application for long term disability benefits to National Life. The application was signed by him on April 27, 1995, and forwarded to National

Life by Mr. Brine. In his direct evidence, Mr. Brine was canvassed regarding his understanding of the nature of the benefits he was entitled to pursuant to the policy. He testified that upon being offered the position in Halifax in 1993, he was provided information pertaining to the benefits package. Based on this material and his prior knowledge, he understood that disability benefits would be paid at the rate of 70% of his gross salary, but would not be subject to income tax. In effect, such coverage would provide a disabled employee with comparable income while on long term disability as they had enjoyed while working. At the time of seeking benefits, Mr. Brine testified that he fully intended to return to some type of employment anticipating that he would undergo some form of retraining.

[34] In cross-examination, Mr. Brine acknowledged that when completing the application for benefits in April of 1995, he indicated thereon that National Life was to withhold tax from the disability benefits paid. It is undisputed that it did just that for a number of years.

[35] In the course of his evidence, Mr. Brine was shown correspondence addressed to him, dated June 21, 1995 from National Life. Although he had no specific recollection of receiving the letter, he did not dispute that he had. That letter, found at Tab G2 of the Joint Exhibit Book ("JEB"), acknowledged receipt of his claim, provided some explanation of what to expect further and apparently

enclosed additional information for his review, namely a "road map" to better understand the steps involved in the claims process.

[36] Mr. Brine further testified as to his receipt of National Life correspondence dated August 14, 1995 in which he was advised that his claim was approved to October 31, 1995. He testified that his benefits ceased without further notice at the end of October which served to worsen his level of depression, anxiety and stress. After a period of time and following the provision of further information from his treating psychiatrist, Mr. Brine testified his monthly disability benefits were once again started.

[37] In his evidence Mr. Brine was referred by counsel to National Life correspondence dated December 1, 1995 (JEB Tab G2, page 8). Mr. Brine believes he received this letter, as he recalled his positive reaction to National Life advising that it would be assigning a rehabilitation counsellor to work with him. That letter provides:

> One of the benefits available to you as an LTD claimant under the PSMIP is the services of a rehabilitation counsellor. The counsellor's role is to assist you in your efforts to return to the workforce, where practical.
>
> We have assessed your file and concluded that it may be helpful to offer you the services of a rehabilitation counsellor at this time. Accordingly we have asked Suzanne and Lucienne Azzie to contact you as soon as possible, to arrange for an initial interview in your home.

> It is important that the consultant meet with you personally, in order to understand your situation properly and to discuss with you all available options. In this way, you are directly involved in defining a return to work strategy. To gain a further insight into your functional capabilities, the consultant may meet with your treating physician(s) and also your employer to consider plans to accommodate your return to work. The consultant can also call upon the services of other professionals and service agencies when necessary. We ask for your patience and cooperation throughout this process.

[38] Mr. Brine testified that he recalls vividly the first meeting with rehabilitation counsellor Suzanne Azzie. He believes this took place in January of 1996. Mr. Brine testified that he felt very positive about this meeting, and in particular, the plan Ms. Azzie discussed with respect to his eventual return to work. According to Mr. Brine, Ms. Azzie advised him that once he was medically able, there would be no difficulty in finding an alternative position with the federal government. He was advised of a program whereby a job "pick list" was maintained, with rehabilitated employees having the ability to "parachute" into open positions and be supported as they transitioned into their new position. Mr. Brine testified that he was aware that Ms. Azzie was a well-respected rehabilitation specialist and had received the Order of Canada for her work with "damaged" federal employees. He felt hopeful and buoyed by her involvement with him.

[39] Mr. Brine testified that he maintained regular contact with Ms. Azzie, and continued to work with her. He viewed her involvement as being very helpful and it served to improve his mental condition. Other than a brief attempt at real estate

sales, Ms. Azzie's efforts did not result in Mr. Brine re-engaging in the workforce. He testified that he was devastated to learn from Ms. Azzie that National Life had, some months earlier, suspended her services. He testified that learning of the cessation of Ms. Azzie's services was a huge emotional blow, as Mr. Brine felt all hope was lost in terms of returning to work.

[40] Mr. Brine testified that he did attempt to have rehabilitation services re-initiated. His attempts to discuss this with National Life staff were unsuccessful as they refused to deal with him, directing him to their legal counsel, Mr. Saunders. Mr. Brine testified that he made known to Mr. Saunders his desire to have rehabilitation services implemented. Referring to notes maintained by him, Mr. Brine referenced a telephone conversation on May 15, 2000 where Mr. Brine requested services and argued that the ongoing dispute regarding overpayment should not impact on the provision of rehabilitation services, as they fell under separate provisions of the policy. Mr. Brine testified Mr. Saunders undertook to get back to him on National Life's position regarding rehabilitation. He testified that he has yet to receive a response.

[41] In his direct evidence, Mr. Brine was referenced to a Psychiatric Assessment report by Dr. Mark Rubens, dated April 15, 2003. Mr. Brine testified that he had been requested by National Life to attend for an assessment with Dr. Rubens in

2003, and he complied. He testified he had not been provided with a copy of Dr. Rubens' report until the week before the trial commenced.

[42] Mr. Brine was directed to the following two passages found in the "Occupational Factors & Prognosis" section of the Rubens report (JEB - Tab 9):

> 9. The patient's occupational future, of course, also remains uncertain. Potentially, again, some changes might be made in this area (providing the patient with rehabilitation counselling, for example, and directing him into other possible areas of work). However, the availability of such counselling, and the patient's willingness to participate in such a process in an open-minded and co-operative way has to be considered somewhat doubtful. Again, there is potential for improvement, but the actual circumstances at present are not favourable.
>
> 11. I believe the impairments I have summarized here would also be relevant to any occupation I could imagine a person of Mr. Brine's experience and maturity being able to realistically work at. As I shall discuss presently, however, I think that this patient can and should at this point begin to expand his activities in various ways, and that such activities can at this point begin to include activities relevant to possible future occupational involvements. To define these matters more specifically, however, a transferable skills analysis would be required, as well as the involvement, perhaps for a somewhat prolonged period of time, of a rehabilitation counsellor or specialist.

[43] Mr. Brine testified that he had always, including in 2003 when the Rubens report was provided to National Life, remained willing to participate in any type of rehabilitative efforts, and would have happily done so. He testified that neither National Life staff, nor anyone on its behalf, ever inquired as to his openness to participate in the activities referenced by Dr. Rubens. Mr. Brine testified that in 2004 his mental condition improved quite significantly for a period of time, and if provided rehabilitation services, he is confident he would have been able to return to gainful employment.

CPP and Superannuation awards

[44] Mr. Brine testified that at some point in time he applied for, and ultimately received Canada Pension disability pension benefits. He testified that his application for CPP benefits was triggered by correspondence from National Life, requesting that he make an application for same. Mr. Brine identified his application for benefits (JEB - Tab C9) which appears to be signed on October 15, 1997. He testified that he complete the application and forwarded it back to National Life to send in turn to CPP. He also identified a document entitled "Agreement Regarding Long Term Disability Payments" which he apparently signed on November 12, 1997. Mr. Brine testified that although his signature, it appeared to be unusual and not typical.

[45] Mr. Brine further testified that during this time frame given the state of his mental health, he was stressed, unorganized and not careful or interested in what he was doing. He testified that if the insurer asked him to do something, he did it, without much thought, consideration or careful scrutiny. He testified that he was aware that if successful in his request for CPP disability, the monthly amount received would be deducted from his National Life disability benefits.

[46] Mr. Brine was approved for CPP disability benefits. He identified a "Notice of Entitlement" from CPP dated December 29, 1997 (JEB - Tab C7), which he indicated he received sometime in January of 1998. That Notice of Entitlement indicated that he was approved for benefits retroactive to November of 1996, resulting in a lump sum payment of $12,341.76 and ongoing monthly benefits of $870.35. Mr. Brine confirmed he received the lump sum award and the ongoing monthly benefit.

[47] The Notice of Entitlement in evidence has a handwritten notation on the document which reads: "By fax to Nat'l Life 98/01/20 - BB". Mr. Brine testified that although he had no current recollection of faxing the document to National Life in January of 1998, that based on the notation, he is quite confident that he did so. Mr. Brine explained that his years of work as a police offer had ingrained in him the practice of documenting his actions. The notation found on the Notice is the type of personal confirmation he would normally make. On cross-examination Mr. Brine confirmed it did not appear that he used a fax cover sheet, unlike on other occasions when he faxed material to National Life. He further confirmed that he was aware National Life was entitled to be informed of his receipt of CPP benefits.

[48] Mr. Brine also testified as to funds he received from Superannuation. The evidence in this regard was somewhat convoluted. Mr. Brine testified that following his settlement with Ports Canada in April of 1995, he became aware that according to the government, he had been dismissed "for cause". He wanted to challenge that determination through legal mechanisms. In order to fund this pursuit, Mr. Brine testified he approached Superannuation and requested a "return of contributions", constituting all of the funds he had contributed to his employment pension. He received a lump sum payment in excess of $64,000.00 as a result. In 1995 these funds were utilized to fund ongoing complaints to the Human Rights Commission in relation to his treatment and of dismissal by his employer under the Canada Labour Code.

[49] Later, Mr. Brine sought to reverse the "return of contributions" and sought to instead qualify for a medical annuity due to his disability. After again requiring the assistance of legal counsel, he was eventually successful in this pursuit, and was advised by letter dated June 26, 1998 from the Superannuation Directorate that he "met the criteria for medical retirement". This document contains the following handwritten notation: "Copy mailed to Nat'l Life Att: Karen Savard 98/07/14 - BB". Mr. Brine testified he did send this correspondence to National Life as

suggested by the notation on July 14, 1998 so as to advise of the receipt of these benefits.

[50] In cross-examination, Mr. Brine acknowledged the lump sum payment for retroactive medical annuity benefits was paid directly to him in 1998 in the amount of $84,906.00. Mr. Brine further testified that the original "return of contribution" is being paid back by virtue of monthly deductions of $250.00 per month from his Superannuation medical annuity. That re-imbursement was ongoing at the date of trial.

"Overpayment" concerns

[51] Mr. Brine testified regarding National Life's assertion that he had received an overpayment of disability payments due to receipt of CPP and Superannuation medical annuity benefits. He testified that his first indication from National Life that there could be an overpayment issue was when he received correspondence from them dated January 19, 1998 (JEB - Tab G2, page 20). In that letter, it stated:

> We are now in receipt of a notification from Superannuation that you received a cheque in the amount of $64,109.72 in 1995 representing a return of contributions.

[52] The letter proceeded to provide a breakdown of the potential deductions being contemplated to Mr. Brine's monthly disability benefits, but concluded as follows:

> At this time, we are not requesting the overpayment as the Treasury Board Secretariat is reviewing the matter, and you will hear from us again if further adjustments need to be made.

[53] Mr. Brine testified that his next communication from National Life regarding the issue of the potential overpayment being sought was receipt of correspondence dated July 30, 1998 (JEB - Tab G2, page 29) which provided:

> Please be advised that we have received confirmation from Superannuation that the previous Return of Contributions of $64,109.72 is no longer in effect. Therefore, kindly disregard our letter of January 19, 1998.

[54] Mr. Brine testified that upon receipt of this letter, he had already sent National Life confirmation of his receipt of CPP and medical annuity benefits. At the time, he interpreted the letter as the insurer stating that there would be no overpayment claimed in relation to past funds received. He testified that he understood National Life was receiving information directly from Superannuation and CPP about his claims, and would be aware of the status of matters. On cross-examination he acknowledged that the correspondence only referenced the "return of contributions" funds, not CPP or medical annuity benefits, and that he now

appreciates that he may have misinterpreted what was being conveyed by National Life at that time.

[55] In his direct evidence Mr. Brine was taken to correspondence dated July 31, 1998 authored by Mr. Gilby at the law firm Burchell Hayman Barnes (JEB - Tab D3, page 1). He testified Mr. Gilby had been assisting a more senior lawyer in the firm with the matter involving his approval for a medical annuity. That correspondence states:

> I am pleased to learn of Superannuation's decision on evidence and material supplied to return Mr. Brine's pension and benefits, which he was denied in 1995, retroactive to 1995.

[56] The letter further requested that the Superannuation Directorate provide information pertaining to:

> The procedure that will be used to handle reimbursement to National Life for "off-set" amounts retroactive to 1995.

[57] The correspondence concludes with Mr. Gilby advising that further communications in relation to the matter could be made to Mr. Brine directly.

[58] Mr. Brine testified that when the above letter was sent, he would yet to have received National Life's correspondence of July 30th advising that no overpayment

would be sought. Mr. Brine was also directed to faxed correspondence dated August 18, 1998 which he testified he sent to Ms. Cullen-LeBlanc of the Superannuation Directorate (JEB Tab D3, page 2). That letter provides:

> If you would be so kind as to issue the T4A for the taxation year 1998 we will undertake, in line with interpretation received from Revenue Canada and communication received from the National Life Assurance Company of Canada to make adjustments and repayments from the moneys received and will allocate funds accordingly.

[59] Mr. Brine testified that when the above was written, he had received National Life's July 30th correspondence and was under the belief that no retroactive overpayment would be sought. Asked when his next contact was regarding a potential overpayment, Mr. Brine testified he was advised by letter received in October, 1998 that his disability benefits would be ceasing effective October 1, 1998. That letter (JEB - Tab G2, page 33) dated October 14, 1998 provides:

> We have received confirmation from Superannuation as well as CPP that you are in receipt of CPP disability benefits as well as a Public Service Superannuation Pension. We ask that you kindly forward National Life a copy of the Notice of Entitlement from CPP by mail or by fax at (416) 585-8901, so that we may recalculate your LTD benefits.
>
> Please note that we have stopped LTD benefits effective October 1, 1998 as there will be a substantial amount of overpayment on file. As soon as we receive the above mentioned information, we will inform you of the exact amount of overpayment.

[60] Mr. Brine testified he had no communication with National Life since their July 30th letter, and as such, the decision to terminate his benefits took him

completely by surprise. He described his emotional reaction to this news as being a combination of anger, despair, confusion and panic. He testified this news was "totally crippling".

[61] He further testified that National Life's approach of undertaking a complete clawback of his monthly disability benefits caused him tremendous frustration on two fronts. Firstly, as he had understood since July 30th that National Life was not going to seek any overpayment in relation to the retroactive sums he had received, and secondly, that how National Life was enforcing the re-payment was, he believed contrary to the policy. In that regard, Mr. Brine testified that based upon his reading of the booklet provided to him by this employer, the retroactive payments should have been pro-rated over the life of the policy, not clawed back entirely upfront.

[62] Mr. Brine identified "The Public Service Management Insurance Plan - Management Category" at JEB, Tab F1, as the booklet provided to him, and in particular the following provision at page 7 as the basis for his belief in the inappropriateness of National Life's treatment of the overpayment:

> If you receive other disability income in the form of a lump-sum payment in lieu of monthly instalments, the payment will be apportioned in equal monthly amounts over the period from the effective date of the payment to the date of your 65th birthday, and the amount so apportioned to each month will be offset.

[63] On cross-examination, Mr. Brine acknowledged that upon receiving retroactive funds from CPP and Superannuation, that he did not repay National Life any portion of the lump sums. He testified that he had understood that such payments would be pro-rated over the policy, and that after he had sent the information to National Life regarding his receipt of CPP and medical annuity benefits, they would know how to make the adjustments to his ongoing monthly cheque.

[64] Mr. Brine further confirmed in cross-examination that upon receipt of the October 14, 1998 letter from National Life, he did not contact the insurer to request that they pro-rate the payments. Mr. Brine testified that it was his view that the insurer should carry the responsibility of knowing the terms of the policy. Further, at that point, he testified that he did not have an actual copy of the policy of insurance, but only the booklet provided to him by his employer. It was only after National Life commenced legal action against him in 2001 that the actual policy was provided to him.

Financial unravelling

[65] Mr. Brine testified that from ceasing work in 1995 until July of 1999 his financial situation steadily worsened. Notwithstanding his various attempts to keep himself afloat financially, Mr. Brine testified that on July 30, 1999 he made an assignment in bankruptcy. He testified that he viewed the actions of National Life in its dealings with him as being the cause of his financial ruin and ultimate bankruptcy.

[66] Mr. Brine identified the "Statement of Affairs" he filed in relation to the bankruptcy (Tab C4, page 1) and identified two debts in particular as prompting the bankruptcy, a liability of $67,000.00 owing to National Life and a $30,000 liability owing to Revenue Canada Taxation. Mr. Brine testified that if not for these debts, he could have kept "his head above water" financially. Mr. Brine explained that the debt in relation to National Life represented the balance of the overpayment being claimed by the insurer. He testified that National Life subsequently filed a Proof of Claim representing that the outstanding debt was $62,036.81 (JEB - Tab C4, page 6). As for the debt in relation to Revenue Canada, he testified this represented income tax arrears arising from a re-assessment.

[67] Mr. Brine testified that he was deprived of income by virtue of National Life improperly deducting income tax from his monthly disability benefit. He asserts that his disability benefits should not have been considered taxable. The

result of this error was National Life deducted income tax from his benefits resulting in him receiving only about 40 to 50% of his usual take home income. This created considerable financial strain. Further, and related to this same taxability issue, National Life for 1995, 1996, 1997 and 1998, issued T4 slips to Mr. Brine showing the disability benefits received as taxable income. This prompted a re-assessment, and resulting tax liability with Revenue Canada. Despite his efforts to convince National Life that the plan was an "employee pay all plan" and thus non-taxable, National Life refused to issue amended T4 slips to rectify this problem.

[68] Finally, Mr. Brine testified that when National Life implemented a total clawback of his disability benefits in October of 1998, as opposed to pro-rating the repayment, it served to further drastically decrease his income. Mr. Brine testified he had over 1997 and 1998, cashed in his RRSP savings, which totaled just under $100,000.00 and further sold his home to pay down various debts. He had also incurred significant legal fees in relation to his quest to establish he was wrongfully dismissed and "clear his name". The cashing of the RRSPs also created additional tax liabilities.

[69] Mr. Brine testified that the last straw which pushed him into bankruptcy was receiving notification that his CPP disability benefits were being garnished by way

of statutory set-off to address his Revenue Canada tax liability. Mr. Brine testified that at this point, he saw no way to stave off bankruptcy and he made the assignment shortly thereafter. He testified he found it humiliating to be unable to pay his debts, as he had previously been financially responsible. Because his mother died during the bankruptcy the handling of her estate was delayed and his siblings became aware of his financial situation. Mr. Brine testified this served to only worsen his mental condition.

[70] Mr. Brine was discharged on May 1, 2000. He testified that both during the bankruptcy and after his discharge, National Life continued to claw back the entirety of his monthly disability benefits.

[71] Following the discharge, Mr. Brine contacted both the Treasury Board and National Life in an attempt to determine why his disability payments were not being re-instated. By 2000, Mr. Brine testified that National Life would no longer speak to him, rather would refer him to their legal counsel. He testified as to a conversation with National Life counsel, Mr. Saunders, in which Mr. Brine requested his disability payment be re-initiated given his discharge and his view that the bankruptcy would have served to remove any outstanding overpayment balance. Mr. Brine testified that in response, Mr. Saunders reportedly advised that National Life took the view that the debt survived the bankruptcy as it had been

"incurred through misrepresentation". Being accused of serious wrongdoing, Mr. Brine testified that he "totally lost it" in this conversation.

[72] Mr. Brine testified that the emotional upheaval caused by that allegation only worsened when he received the Originating Notice and Statement of Claim, a public document, where he was accused of "fraudulent misrepresentation".

[73] With respect to the taxability of his National Life disability benefits, Mr. Brine testified that despite his efforts, National Life continues to issue T4 slips showing benefits received as taxable income. This continues to trigger disputes with Revenue Canada, as he does not claim the benefits, which prompts persistent inquiries as to why he is not claiming the income as stated on the T4.

[74] Mr. Brine testified as to his ongoing attempts to have his National Life benefits classified as being non-taxable. He testified he took a "shot-gun" approach in early years, including hiring tax lawyers to challenge a CRA re-assessment in 1998. This challenge was never adjudicated on, as given his bankruptcy in 1999, Revenue Canada cancelled the re-assessment. Mr. Brine testified that National Life stopped issuing T4 slips during the claw back period, which ended in 2003. Based on legal and accounting advice, he did not claim this income from that point forward which prompted another CRA re-assessment. Mr.

Brine challenged the re-assessment and in 2006 the Tax Court of Canada rendered a decision finding the National Life benefits to be non-taxable. As National Life continued to issue T4 slips showing the benefits as taxable income, Mr. Brine testified he once again found himself in the Tax Court of Canada, with the same result - the National Life benefits were found to be non-taxable.

[75] Mr. Brine testified that notwithstanding these two court decisions, National Life continues to issue T4 slips showing his benefits as taxable, and resulting in nasty contact from Revenue Canada. Mr. Brine testified this ongoing misclassification of his benefits by National Life "drives him crazy" and increases his level of stress and frustration.

[76] In cross-examination, Mr. Brine acknowledged that for a period of time when he was attempting to resolve the taxability issue, he dealt directly with Revenue Canada and did not copy National Life on various pieces of correspondence. In a similar vein, he acknowledges advising Ms. Bell at the Treasury Board in 1999 that she was not to share information pertaining to him, including taxability issues with National Life, as matters were "in litigation".

[77] In cross-examination Mr. Brine further confirmed that he did have direct contact with National Life in October of 2003 when he made a request for National

Life to cease withholding income tax from his disability benefits, and they complied with this request. He further acknowledged that following the 2006 Tax Court decision he never made a written request to National Life for amended T4 slips in accordance with the decision, but he testified he believed his legal counsel had forwarded a copy of the decision to National Life's legal counsel.

Human Rights Complaint

[78] As referenced earlier herein, following his dismissal in 1995, Mr. Brine undertook legal challenges aimed at "clearing his name". A complaint under the Canada Labour Code was dismissed at arbitration, however, the outcome of Mr. Brine's complaint that he was discriminated against on the basis of mental disability did proceed.

[79] Mr. Brine testified that the Human Rights hearing was held in two stages. In July of 2003, a preliminary hearing was held to determine whether or not the settlement agreement reached by Mr. Brine with Ports Canada in April of 1995 should preclude his complaint from proceeding. The adjudicator determined that it did not, and the matter was scheduled to continue in January of 2004. At that hearing, Mr. Brine, his wife, his family physician and Dr. Rosenburg testified.

After several days of testimony, Mr. Brine testified that the parties commenced settlement discussions.

[80] In his evidence Mr. Brine identified the Minutes of Settlement between himself and the Halifax Port Authority and Transport Canada signed April 14, 2004, in which he received the sum of $300,000 "for general damages for intentional infliction of mental suffering, defamation and injury to his reputation". The settlement also provided that he be given an appropriate letter of reference and letter of apology. Mr. Brine testified the letters were more important to him than the monetary settlement, as they served as vindication and cleared his name. Mr. Brine testified he was very satisfied with the content of the letters and felt the letter of reference was essential to him finding re-employment.

[81] Mr. Brine testified that after the payment of legal fees and expenses, he received $202,992.48. Mr. Brine acknowledged on cross-examination that he had not advised National Life of the Human Rights hearing or the outcome.

Rose Marie Brine

[82] Mrs. Brine testified on behalf of her husband. She is a realtor with a local brokerage, having commenced her real estate career in 1995.

[83] Mrs. Brine testified regarding her husband's demeanour and emotional state both before and after his dismissal from Ports Canada in 1995. She described him going from a fully functional and engaged family man with a "stiff upper lip" to someone whose mental health was very fragile and who withdrew from everyone, including her and their children. She testified that Mr. Brine's mental health deteriorated to the point where he attempted to commit suicide in 2009.

[84] Mrs. Brine testified that she had firsthand knowledge of the rehabilitation services initiated with her husband as she attended the initial meeting with Suzanne Azzie in January of 1996. She testified that Mr. Brine was having difficulty with his memory, so he asked if she could attend at the meeting. Mrs. Brine testified as to what Ms. Azzie set out as the rehabilitative path she and Mr. Brine would be working on. Specifically, Ms. Azzie explained that once Mr. Brine's psychiatrist felt he was capable of going back to work, there was a job "pick list" with the federal government. Mr. Brine would be able to move into one of the open executive positions and have rehabilitative support during a training period. Mrs. Brine testified that she and her husband had discussed his eventual return to work, and that they were both willing to move to facilitate Mr. Brine obtaining a new position. She testified that she noted an improvement in Mr. Brine's demeanour

after commencing services with Ms. Azzie. She testified that he was devastated when he learned her involvement had ended.

[85] Mrs. Brine testified that there were a number of issues which continued to be sources of great distress to her husband. She testified that the ongoing taxability issue relating to his National Life benefits was one, and that she would see him visibly upset to the point of shaking when he discussed the issue on the telephone and received T4 slips from National Life in the mail. She further testified that Mr. Brine was shaken when he received the Statement of Claim from National Life in which he was accused of fraud and misappropriation of funds.

Dr. Edwin Rosenberg

[86] Dr. Edwin Rosenberg was called to testify on behalf of Mr. Brine. He was qualified, with consent of the Defendant, as an expert in Adult Psychiatry to give expert opinion evidence on the causation and diagnosis of mental and psychological illnesses and the disabilities resulting therefrom. He has been engaged in the private practice of psychiatry since 1970. Dr. Rosenberg testified that he has conducted numerous independent medical assessments, including for most major insurers in Canada.

[87] Dr. Rosenberg testified that he started treating Mr. Brine at the request of his family physician in the fall of 1995, and he continues to do so. He testified that he sees Mr. Brine regularly, and has always seen him at least on a monthly basis and sometimes more frequently. A series of reports authored by Dr. Rosenberg, as well as his chart notes were included in the JEB at Tabs A-1 and A-3 respectively. He was referenced to same extensively during both his direct and cross examination.

[88] Dr. Rosenberg testified that his first report in relation to Mr. Brine was dated October 6, 1995. It describes his symptomology at that time as follows:

> . . .His sleep is non-restorative, his energy and ambition are dissipated; his concentration is constantly pre-occupied with matters relating to his dismissal from work. He cries on a daily basis, has had vague thoughts of suicide, and markedly increasing irritability. He views his future as being bleak . . . His estimate is that he is functioning at a level of 40% of his normal, with which I would concur.

[89] Approximately five weeks later, Dr. Rosenberg wrote a letter to National Life, dated November 27, 1995, in response to a request for a report. It appears from that letter, that his earlier report of October 6th was also provided at that time. That second report provided:

> …Sleep remained poor, with dreaming and tiredness on awaking, with napping in the late afternoon, awakening unrefreshed. Energy remained decreased, and concentration poor. Appetite was poor, irritability was increased, and there was considerable crying . . . The prognosis for most depressive illness is good to excellent, and I would hope this to be the case for Mr. Brine. However, the continuing stress relating to his job loss and the circumstances surrounding leaving employment do provide an augmenting and sustaining stressor to his depressive symptoms.

[90] Asked why he opined Mr. Brine's prognosis was "good to excellent", Dr. Rosenberg explained that depression is one of the most commonly treated psychiatric illnesses and typically responds well to intervention. He added however, that if a person is subjected to ongoing stressors, these can augment and sustain the depressive symptomology. In Mr. Brine's case, he testified that in November of 1995, the difficulties with his workplace was a major source of stress.

[91] Dr. Rosenberg identified a report dated May 28, 1996 sent to National Life, at which time he observed Mr. Brine's condition to be as follows:

> In the past five months, Mr. Brine has shown some improvement in his depressive illness. However, he still complains of some difficulties in sleep, with tiredness on awakening, poor energy, poor motivation ("I have to push myself to do things"), poor concentration with limited ability to "organize" his activities, crying spells, vague suicidal thinking and increasing irritability . . .
>
> The prognosis for Mr. Brine's major depressive episode is still good to excellent, although I am unable to provide a time frame regarding improvement to a point where he will be able to return to the workplace. Currently, Mr. Brine has a GAF (Global Assessment of Functioning) of 55-60, with moderate symptomology of depression and moderate difficulty in social and occupational functioning. When Mr. Brine's GAF is improved to a level of at least 70-80, it would be appropriate to consider rehabilitation efforts and a

> possible return to the workplace. However, at this time, it is felt that Mr. Brine's symptomology still is sufficient enough to prevent a return to the workplace.

[92] Dr. Rosenberg testified that at this point, he was not aware that Mr. Brine had been receiving rehabilitation services since January of 1996. Asked why he felt Mr. Brine was showing some improvement, he explained that his global assessment of function (GAF) had increased to 55 - 60. He testified that given his GAF score was increasing, it was his view when writing the report that it would have been helpful to consider rehabilitation services as he got closer to a GAF of 70.

[93] On cross-examination, Dr. Rosenberg agreed that as worded, the above passage did not indicate that rehabilitation services could or should be commenced at that time. He agreed that at no time did he advise National Life that Mr. Brine had reached a GAF of 70 - 80.

[94] Dr. Rosenberg testified that he was not consulted by National Life as to whether rehabilitation should be instituted. Nor was he consulted before National Life terminated the rehabilitation services. He testified that based upon his many years of experience with similar matters, the treating physician is consulted by the

insurer in relation to such decisions, as well as having ongoing communication with the rehabilitation counsellor.

[95] In his direct examination Dr. Rosenberg testified as to a form entitled "Attending Physician's Initial Long-Term Disability Statement" he completed on July 30, 1997. At that time Dr. Rosenberg noted Mr. Brine still continued to suffer from ongoing depression with a GAF score of 60-65. He testified that this was a significant increase from the GAF of 55-60 earlier noted, and that rehabilitation counselling would be a consideration at that time.

[96] In cross examination, Dr. Rosenberg was questioned in relation to this form, and specifically his answer contained in section 10, entitled "Rehabilitation". He acknowledged that he answered in the negative as to whether he viewed Mr. Brine as being a suitable candidate for trial employment. He explained that he did not consider "trial employment" as being the same as rehabilitation services. He acknowledged not providing an answer on the form as to whether vocational counselling or retraining was warranted at the time.

[97] In direct examination, Dr. Rosenberg referenced a letter sent to Income Security/Canada Pension Plan on October 23, 1997, at which time he indicated Mr. Brine's condition had gotten somewhat worse due to the continuous stressors

remaining in his life. At that time, Dr. Rosenberg testified the stressors would include the loss of his employment and the status of his position as well as his financial difficulties.

[98] Dr. Rosenberg also testified regarding a letter sent to Mr. Brine's counsel dated October 10, 2000, in which he set out his observations and opinion as follows:

> Since my initial contacts with Mr. Brine, he has been preoccupied by financial and legal difficulties relating to dealings with his employer (Canada Ports Corporation), and disability insurer (National Life Assurance Company of Canada).
>
> Mr. Brine's clinical presentation of depression has always included a significant degree of irritability and anger. The level of irritability and anger has always increased directly after dealings with his employer and/or insurer, which, in my opinion, have sustained depressive symptomology.
>
> . . .
>
> Mr. Brine was never, to my recollection, significantly engaged in any follow-up with a rehabilitation counsellor. The discontinuation of any possibility of rehabilitation services provided yet another augmenting and sustaining factor to Mr. Brine's continuing depressive symptomology.

[99] In a report to Mr. Brine's counsel dated July 22, 2003, Dr. Rosenberg advised:

> Mr. Brine's clinical presentation of depression has always included a significant degree of irritability and anger, which is always increased after dealings with his employer and/or insurer and is directed at them. These ongoing dealings with employer and insurer have, in my opinion, augmented and sustained Mr. Brine's depressive symptomology.
>
> . . .

> Since my last report to you of 14 November 2001, Mr. Brine's depressive symptomology has continued. Presently, Mr. Brine complains of non-restorative sleep, deficits in energy, motivation, and concentration. All of his depressive symptomology is worsened by the persistence of the ongoing stressors relating to ongoing work, insurance, and legal hearings. It is difficult to envisage remission of Mr. Brine's symptomology without relief and/or removal of the various stresses to which he is continually subjected.

[100] Dr. Rosenberg testified that he gave evidence on Mr. Brine's behalf at a Human Rights hearing in 2004. He testified that he understands that Mr. Brine was "vindicated" through that process and received a letter of apology and a financial settlement. At this point, Dr. Rosenberg testified that he noted a brightening in Mr. Brine's mood and he expressed some hope for his future. This settlement, in Dr. Rosenberg's view appeared to alleviate some of the stress for Mr. Brine and in his opinion, a return to work became much more likely at this point. Dr. Rosenberg testified that it certainly would have been appropriate to engage Mr. Brine in rehabilitation services at that time. Dr. Rosenberg opined that if such services had been provided, given Mr. Brine's skills and desire to re-enter the workforce, it is likely he would have returned to work, although it is difficult to predict same, as that opportunity was not afforded.

[101] On cross examination, Dr. Rosenberg agreed that the improvement seen in 2004 was short-lived due to the existence of the various stressors in Mr. Brine's life. He also agreed that rehabilitation services are not therapy, but the two "go

hand in hand". He testified that if implemented, the prospects of improvement are better for a patient and the withdrawing of rehabilitation services certainly do not assist with therapeutic efforts.

[102] Dr. Rosenberg identified a report dated February 1, 2010 directed to the Canada Revenue Agency, in which he wrote:

> Mr. Brine has been a patient of mine for some years now, and has suffered with a chronic depressive illness. One of the confounding issues in dealing with Mr. Brine's ongoing depressive symptomology is the fact that he has been subject to ongoing stressors relating to problems in dealing with CRA, his disability insurer, and his former employer, none of which have been resolved.
>
> . . .
>
> Although Mr. Brine can perform the ordinary activities of daily living, he remains consistently pre-occupied with ongoing legal difficulties, to such an extent that his functional ability remains impaired. Furthermore, the contingencies which Mr. Brine is presented with often change, creating a sense of "learned helplessness".

[103] In his evidence Dr. Rosenberg testified that in 2010, the stressors for Mr. Brine still included an issue with his employer, namely retrieving his badge. The main stressor however, continued to be the ongoing dispute with the insurer and CRA. Dr. Rosenberg was asked about the concept of "learned helplessness". He explained that it is a condition where, if a person has no control over constantly changing contingencies, they develop a sense of hopelessness and inability to change. Dr. Rosenberg opined that the contingencies present for Mr. Brine

included difficulties with National Life including the taxability of benefits and withdrawal of rehabilitation services, as well as the dispute with CRA.

[104] In a recent report to Mr. Brine's counsel dated July 10, 2013, Dr. Rosenberg opined as follows:

> Whatever treatment options are available to Mr. Brine, including both psychotherapy and pharmacotherapy, they must be tempered with the ongoing and non-resolving status with Mr. Brine's disability insurer and Canada Revenue Agency. It is my opinion that Mr. Brine's depressive condition has been augmented and sustained as a result of his insurer's decision to withhold long-term disability benefits, claiming that there was an overpayment of benefits (which, to my understanding, was an error on the part of the insurer).
>
> Further, rehabilitation efforts which were initiated approximately fifteen years ago should have continued and would have assisted in great measure in returning Mr. Brine to the workforce. Mr. Brine, if not returned to his previous work position with Ports Canada Police, could have, in my opinion, obtained employment as a Consultant in Law Enforcement, considering his many years of experience in that field.
>
> "Learned helplessness" is a psychological concept, which, in my opinion, has characterized Mr. Brine's depressive symptomology because of the ever-changing nature of the contingencies governing Mr. Brine's disability benefits and issues with Canada Revenue Agency. In Mr. Brine's perception, there has not been consistency of response by either the insurer or Canada Revenue Agency permitting Mr. Brine's "learned helplessness" from transforming into "learned optimism".

[105] In his evidence, both in direct and cross examination, Dr. Rosenberg did not vary from the observations and opinions as expressed in the reports prepared by him during his past involvement with Mr. Brine.

[106] In his direct evidence, Dr. Rosenberg was referred to a report prepared by Dr. Peterkin in August of 1998, and specifically the following passage:

> The absence of any work or re-training challenge may indeed worsen Mr. Brine's chronic rage symptoms as he finds himself ruminating about the workplace on a daily basis.

[107] Dr. Rosenberg testified that he agreed with Dr. Peterkin's views with respect to the negative effect of the absence of a "work or re-training challenge" and testified that in 1998 the continuation of rehabilitation services would have been extremely valuable to Mr. Brine.

[108] In his direct evidence, Dr. Rosenberg was referred to the 2003 report of Dr. Rubens. Dr. Rosenberg testified he received this report shortly before trial. He was directed specifically to the following passages:

> 9. The patient's occupational future, of course, also remains uncertain. Potentially, again, some changes might be made in this area (providing the patient with rehabilitation counselling, for example, and directing him into other possible areas of work). However, the availability of such counselling, and the patient's willingness to participate in such a process in an open-minded and co-operative way has to be considered somewhat doubtful. Again, there is potential for improvement, abut the actual circumstances at present are not favourable.
>
> 11. I believe the impairments I have summarized here would also be relevant to any occupation I could imagine a person of Mr. Brine's experience and maturity being able to realistically work at. As I shall discuss presently, however, I think that this patient can and should at this point begin to expand his activities in various ways, and that such activities can at this point begin to include activities relevant to possible future occupational involvements. To define these matters more specifically, however, a

> transferable skills analysis would be required, as well as the involvement, perhaps for a somewhat prolonged period of time, of a rehabilitation counsellor or specialist.

[109] Dr. Rosenberg testified that he agreed entirely with Dr. Rubens' view expressed in #9 above, and further testified that it was his view that Mr. Brine would have been open minded to rehabilitation efforts. Further, he testified that he absolutely agreed with the recommendations made by Dr. Rubens in item 11 above.

[110] Dr. Rosenberg testified that he was aware of Mr. Brine attempting to commit suicide in the summer of 2009. His chart note for a May 12, 2009 office visit disclosed Mr. Brine was "feeling rotten" at that time, and expressed being discouraged due to a discovery date being delayed.

[111] In cross-examination, Dr. Rosenberg was questioned regarding a letter dated June 18, 1998 written in support of Mr. Brine's request for a medical retirement from PSSA and the following passage in particular:

> Although Mr. Brine has been maintained on Prozac (fluoxetine) for the past three years, with some improvement in symptomology, the continuing stresses relating to both physical illness and his loss of job status have proven to be augmenting and sustaining factors to his depressive symptomology. It is my opinion that Mr. Brine is impaired as a result of depressive illness to a point where he is unable to pursue gainful occupation. Although the prognosis for depressive illness should be good to excellent, it must remain guarded in the case of Mr. Brine because of the ongoing stressors in his life. Until the stressors are lessened, Mr. Brine's depression will be present and will be a permanent fixture in his life.

[112] Dr. Rosenberg agreed that unless removed, the existing stressor would lead to Mr. Brine's depression being permanent; continue to contribute to his symptomology; and constitute an impediment to his return to work. Dr. Rosenberg agreed that Mr. Brine felt that he had been treated unfairly by his employer and insurer, and needed a resolution of some kind to change that view.

[113] On cross-examination Dr. Rosenberg testified that he did not believe that, contrary to his experience in numerous other instances, that he was ever contacted directly by Mr. Brine's rehabilitation counsellor. Shown a letter authored by Ms. Azzie referencing a conversation with him, Dr. Rosenberg testified that his chart notes do not reflect such a contact and a discussion with a rehabilitation counsellor is something he would make a notation of on his chart.

[114] In cross-examination, Dr. Rosenberg was asked about his experience with rehabilitation counsellors. He testified that in the past 43 years of practice, he could not think of another instance where he was not consulted by a rehabilitation counsellor involved with a patient. He agreed that the role of a rehabilitation counsellor is to examine and begin to understand a patient's capability to work and investigate opportunities for a return to work. He further agreed that the counsellor is to consider "various paths to re-engage" an individual into work, and may call upon the services of other professionals that may be of assistance in that pursuit.

[115] Dr. Rosenberg also confirmed that once he became aware of National Life terminating Mr. Brine's rehabilitation counselling, he never recommended he seek out such serviced privately. He explained such would be an expensive undertaking and further, that given the resources available through an insurer; he questioned the extent of what could be provided privately. Dr. Rosenberg testified that in his experience, a successful rehabilitation program can be implemented even where an employer or potential workplace is not immediately available.

[116] Dr. Rosenberg testified that it is difficult to predict the ultimate success of a rehabilitation program and in Mr. Brine's case even if provided, his depression would still be present. He further testified that in his view, the provision of rehabilitation would have been most helpful in easing the stressors impacting upon Mr. Brine, but could not eliminate them completely.

Alan Stern, Q.C.

[117] Mr. Stern was called by National Life. He has had a distinguished legal career spanning some 47 years and represented the Canada Ports Corporation and the Halifax Ports Corporation in relation to matters involving Mr. Brine. A

number of documents pertaining to Mr. Stern's involvement were introduced into evidence as Exhibit 4.

[118] Mr. Stern testified that his initial involvement pertained to Mr. Brine's dismissal from the Canada Port Corporation in 1995. Negotiations between counsel at that time resulted in a settlement agreement and release signed by Mr. Brine in April of 1995. Mr. Stern testified he next became involved by virtue of Mr. Brine filing a complaint with the Canadian Human Rights Commission (CRHC) against the Canada Ports Police, dated March 17, 1996. Mr. Stern testified that this complaint was dismissed at arbitration in June of 1997, as the arbitrator accepted the position advanced by his client, that the April 1996 settlement barred Mr. Brine from bringing the human rights complaint.

[119] Mr. Stern testified that he was also involved in relation to a judicial review undertaken by Mr. Brine in relation to the above decision. By decision rendered September 20, 1999, the Federal Court set aside the arbitrator's decision and sent the matter back for reconsideration. Mr. Brine subsequently filed a "Complaint Form Amending the Complaint Signed on March 17, 1996" on June 21, 2001.

[120] Mr. Stern testified that by consent of all parties, including the CHRC, a mediation was scheduled in April of 2003. He identified the mediation briefs filed

by all parties, including that filed by Mr. Brine's counsel. Mr. Stern identified the damage breakdown presented by Mr. Brine, which included damages for "loss of income" and "loss of future income". Mr. Stern testified that to his knowledge, these components of loss remained part of Mr. Brine's claim. The mediation was not successful.

[121] Mr. Stern testified that Ports Canada continued to advance the position that the April 1995 settlement agreement should be considered a bar to Mr. Brine's complaint, and requested a preliminary hearing to determine that issue. He testified that by decision rendered in April of 2003, Mr. Brine's complaint was permitted to proceed. As a result, the hearing continued in January of 2004. After hearing evidence from Mr. Brine, Dr. Rosenberg and several other witnesses, Mr. Stern felt that the adjudicator was sympathetic to Mr. Brine's position. He took instructions from his client and settlement discussions ensued.

[122] Mr. Stern testified that the parties reached an agreeable monetary figure, but Mr. Brine's counsel then raised the issue of how the funds would be characterized, as income tax consequences were a concern to Mr. Brine. Mr. Stern testified that the characterization of "general damages" suggested by Mr. Brine was agreeable to his client. Several letters went back and forth, with Minutes of Settlement being approved by all, including legal counsel for the CHRC.

[123] On cross-examination, Mr. Stern confirmed that during his involvement, Mr. Brine had taken issue with the allegation that there was misconduct in relation to his work performance. He further testified that in settlement discussions Mr. Brine made known that he required appropriate letters of reference as part of the settlement of his human rights complaint, and that the exact wording was still being discussed well after the parties agreed to the $300,000.00 settlement amount.

Anna Antonini

[124] Anna Antonini was called to testify on behalf of National Life. She has been employed by National Life and later Industrial Alliance since 1990, shortly after her graduation from high school. Having worked her way "up" through a number of positions, she testified she started in the LTD department in 1994 or 1995. She was further promoted to Supervisor of that department in 1997, a position she held until 2005. Ms. Antonini testified that through the course of her employment she became aware of Mr. Brine's disability claim file.

[125] Ms. Antonini testified that she was involved as part of her responsibilities, with claims made under the PSMIP plan, which covers all federal employees at the management level. National Life's role is to administer the plan, with the

assistance of the Board of Trustees, as well as the Treasury Board. She testified that National Life is not involved in the collection of premiums; rather, these are collected through each federal department's pay office and sent as a bulk payment to the company.

[126] Ms. Antonini identified a multi-page series of notes referenced as "History Sheets". Found at JEB Tab G3, Ms. Antonini testified that it was National Life's practice to maintain such notes in relation to a claimant's file, and that these materials is where any notes or information was documented in relation to Mr. Brine's claim. This document would contain the notes made by case managers, the director and supervisor in relation to the management of the claim. Along with others, she testified she made notes on the file as "case manager", as did Ms. Julie Jako who was the LTD department Director. Asked about the role of Director, Ms. Antonini testified that Ms. Jako's role was to assess the file and to make final decisions on claims including approval, denial, whether rehabilitation would be implemented or independent medical assessments would be sought.

[127] Ms. Antonini was referred to a letter dated June 21, 1995 from National Life to Mr. Brine, which she identified as an "acknowledgement letter". She testified the purpose of this standard letter was to provide the claimant with helpful information regarding the claims process. She further identified a document,

referred to as a "road map" which was enclosed with the acknowledgement letter (JEB - Tab F2).

[128] Ms. Antonini also testified in relation to correspondence sent to Mr. Brine dated August 14, 1995 from National Life. She testified the purpose was to inform Mr. Brine of the fact that his claim had been approved for payment up to October 31, 1995. Ms. Antonini confirmed the letter advised of National Life's right pursuant to the policy to deduct any amounts received from CPP or Superannuation. She was further referenced to the following provision:

> Where we expect that a claimant will qualify for CPP/QPP benefits, we make a provisional monthly deduction. This spares claimants the inconvenience of having to make a large lump sum repayment to us when their other disability income is later approved. A provisional deduction has note (sic) been applied to your monthly benefit.

[129] She testified that National Life did not make a provisional deduction from Mr. Brine's benefits because it did not appear from the medicals on file that he would qualify for CPP disability benefits at that time.

[130] Ms. Antonini identified another piece of correspondence sent to Mr. Brine dated July 23, 1997, the purpose of which was to advise that his benefits were being extended past his "own occupation" period. The letter also contained the following request:

> Also, based on the information that we have on file, we believe that you would be eligible to receive disability benefits under the Canada Pension Plan. We, therefore, suggest you send your application and advise us upon receiving an answer. Meanwhile, please fill up the enclosed forms, and return them to us as soon as possible.

[131] Ms. Antonini testified that the forms referenced in the above letter would have included a document entitled "Agreement Regarding Longterm Disability Payments", which obligated Mr. Brine to refund National Life funds in the event he qualified for CPP. She testified it appeared from the date stamp on the document that National Life received the form from Mr. Brine on December 29, 1997.

[132] She further identified a second form forwarded to Mr. Brine in the July 23rd correspondence entitled "Deduction and Payment of Canada Pension Plan Disability Benefits to an Administrator of a Disability Income Program". She testified that the purpose of this document was to permit the payment of any retroactive CPP award a claimant is found to be entitled to, directly to National Life. It was also, based on the date stamp, received by National Life on December 29, 1997. Ms. Antonini testified that it appears that the National Life case manager responsible for the file at that time, Ms. Vicenta Blake, completed the insurer's portion of the form on January 21, 1998, at which time it would have been forwarded to CPP.

[133] Ms. Antonini testified that Mr. Brine did not advise National Life that he had in fact, applied for CPP benefits. She testified that a claimant makes such an application themselves, without assistance from National Life, and that National Life typically does not see a claimant's CPP application before it is sent.

[134] Ms. Antonini identified correspondence dated August 24, 1998, which Ms. Blake of National Life received from HRDC regarding Mr. Brine's CPP benefits. It provides:

> Please be advised that the "Consent to Deduction and Payment" form recently submitted on behalf of Mr. Bruce Brine cannot be processed.
>
> No reimbursement can be actioned since a benefit has been approved and a one sum amount payable in arrears has been issued to the beneficiary prior to receipt of your form.
>
> No further action is to be taken regarding your request to have Canada Pension Plan benefits reimbursed to your office.

[135] Ms. Antonini testified that this letter received August 27, 1998, constituted the first time National Life became aware that Mr. Brine had been approved for CPP benefits and further, that it would be unable to collect any retroactive payment due to it already having been paid directly to Mr. Brine. She was referred by counsel to the Notice of Entitlement of CPP benefits and specifically Mr. Brine's testimony that this was faxed to National Life on January 20, 1998. Ms. Antonini testified that National Life did not receive the Notice at that point and that she had

gone back and checked their file to satisfy herself it was not received. Further, she questioned the legitimacy of Mr. Brine's notation, testifying that she had reviewed the file and on other occasions when Mr. Brine had faxed documents to National Life, he had always used a "cover sheet". Ms. Antonini testified that National Life did not receive the Notice of Entitlement until October 7, 1999 when Mr. Brine faxed it to her attention. This was after National Life had written to him requesting the document both by letters dated October 14, 1998 and June 7, 1999.

[136] On cross examination, Ms. Antonini confirmed that following National Life's request that Mr. Brine apply for CPP benefits, it would appear from the file notes that no one from the insurer followed up with him to inquire as to the status of his application. When it was suggested that the consent signed by Mr. Brine and received by National Life on December 29, 1997 could have been used to permit National Life to collect information directly from CPP, Ms. Antonini testified that would not have been possible. She testified that CPP had sent National Life a letter saying they could not provide any information. National Life could not request a copy of the Notice of Entitlement directly because the authorizations provided by Mr. Brine in December of 1997 would not have permitted them to ask for information in 1998. They would have required Mr. Brine to provide a secondary authorization. Mr. Antonini testified it was Mr. Brine who was

obligated to keep them informed of his receipt of CPP benefits, and that this obligation had been spelled out to him in the initial claim approval letters.

[137] Ms. Antonini also testified as to a number of communications National Life had with respect to Mr. Brine's receipt of Superannuation benefits. She testified that National Life's understanding of the nature and status of Mr. Brine's PSSA benefits changed several times, based on information it was receiving from the Treasury Board and Superannuation Directorate. Ms. Antonini testified that initially National Life understood that Mr. Brine had received a Return of Contributions in the amount of $64,000.00 based upon a Notice it had received from the Superannuation Directorate on September 17, 1997. Ms. Antonini testified that this notice prompted a letter from National Life to Mr. Brine dated January 19, 1998 in which National Life advised that due to receipt of these funds, Mr. Brine may be subject to an overpayment, but further information was being collected from the Treasury Board. She testified that based upon her review of National Life's file notes, it appeared that a note written by Director Julie Jako on March 12, 1998 referenced a meeting with Treasury Board on March 27, 1998 to discuss the overpayment issue.

[138] Ms. Antonini testified that National Life became aware that Mr. Brine was attempting to have the Return of Contribution converted to a medical annuity. She

testified that National Life received a second Notice from the Superannuation Directorate on July 10, 1998 that Mr. Brine's medical retirement request had been declined, but that he would be entitled to a deferred annuity at age 60. Ms. Antonini testified that based on this information National Life was satisfied that an overpayment or ongoing deduction was not warranted, which in turn triggered National Life's correspondence of July 30, 1998 advising him to disregard the letter sent earlier in January.

[139] After forwarding the letter in July, Ms. Antonini testified that on August 26, 1998 National Life received a third Notice from the Superannuation Directorate, which indicated Mr. Brine was in receipt of an "immediate annuity" effective August 1, 1995. Ms. Antonini testified that due to the changing information, she sought confirmation from Superannuation that the last notice received was accurate. She received confirmation of this by way of memo from Superannuation on October 13, 1998.

[140] On cross examination, Ms. Antonini confirmed that National Life was receiving information pertaining to Mr. Brine directly from the Superannuation Directorate and the Treasury Board. She further confirmed that National Life did not during this time frame request any information directly from Mr. Brine regarding the nature of benefits he received from PSSA. With respect to the

receipt of the medical annuity benefits, Ms. Antonini confirmed that National Life was aware that these monthly benefits were reduced to reflect the fact that Mr. Brine was also in receipt of CPP disability benefits. She testified however, that Superannuation did not deduct the full amount of the CPP benefit, and therefore, National Life was entitled to get the benefit of the balance as an offset.

[141] Ms. Antonini testified that she wrote to Mr. Brine on October 14, 1998 advising him that due to his receipt of retroactive funds from CPP and Superannuation, that his benefits were ceasing effective October 1, 1998 due to there being a large overpayment on the claim.

[142] On cross examination, Ms. Antonini testified that the decision to implement a 100% claw back of Mr. Brine's disability benefits due to the overpayment was reflective of National Life's practice in such situations. She confirmed that she reviewed the terms of the policy before doing so in this case. Referencing her to the policy, Ms. Antonini confirmed that she based the decision to claw back 100% of the benefits on the provision found at JEB Tab F4, page 39. Ms. Antonini confirmed that his medical annuity fell under paragraph (1) of that provision, and similarly, Mr. Brine's CPP benefits fell under paragraph (3). Mr. Brine's counsel directed Ms. Antonini to the following section of the provision:

> If an employee should receive a lump sum settlement in lieu of, or as an accumulation of periodic benefits from any of the sources described above, other than as described under clauses (4) and (5), the amount of the lump sum received shall be apportioned equally over the period from the date of payment of such lump sum to the date of the employee's 65th birthday, and the amount apportioned to each month or partial month in the period shall be deemed a benefit payable for such month or partial month.

[143] Ms. Antonini testified that the above would not require National Life to pro-rate the overpayment, as nether the CPP nor PSSA retroactive payments were "settlements" as required in the above provision.

[144] Ms. Antonini testified that she became aware of the fact that Mr. Brine had declared bankruptcy and confirmed that National Life continued to withhold disability benefits past that point. When asked why that decision was made, Ms. Antonini testified that the file had been referred to "legal" at that time. On cross examination, Ms. Antonini confirmed that prior to the bankruptcy proceeding, National Life had not made any allegations of fraud regarding Mr. Brine's conduct.

[145] Ms. Antonini was questioned regarding the taxability of Mr. Brine's disability benefits. She testified that in his initial claim form, Mr. Brine requested National Life to withhold income tax. She further testified that she is not aware of any claimant under the policy where benefits were not taxable.

[146] Ms. Antonini was referred to correspondence dated May 27, 1999 from Mr. Brine to National Life in which he writes that "prior to January 22, 1999 I spoke with and faxed information to Ms. Anna Dentico". Ms. Antonini, whose maiden name was Dentico, was asked if she recalled speaking to Mr. Brine prior to National Life's receipt of this letter. She testified she had no recollection of speaking to Mr. Brine, or receiving any information from him. She testified she checked the National Life file to confirm the accuracy of her recall. She stated that she reviewed Mr. Brine's May 27, 1999 letter, and felt the benefits were taxable, as Mr. Brine's assertion that the employer did not contribute to the premiums was incorrect.

[147] Ms. Antonini testified that the National Life notes disclosed that following receipt of this letter, Director Jako discussed the issue of taxability with Ms. Bell at the Treasury Board. Based on information received, National Life remained of the view that the benefits were taxable. Ms. Antonini testified that on October 21, 2003 National Life received a request from Mr. Brine to stop withholding income tax from his disability payments, and that they complied with this request. She testified that it was a claimant's choice whether to have tax deducted, and they could change their initial choice, so long as the request was made to National Life in writing.

[148] Ms. Antonini testified that in 2006 she became aware of the decision of the Tax Court of Canada which found the disability benefits to be non-taxable. As a result of this decision, National Life referred the decision to Treasury Board for its review, and as a result, did not change its approach of considering the benefits to be taxable. She testified that National Life was never asked by Mr. Brine or his legal counsel to do anything as a result of the Tax Court decision.

[149] Ms. Antonini was asked about National Life's provision of rehabilitation services in general, and regarding Mr. Brine specifically. She testified that in considering whether to retain the services of a rehabilitation counsellor, National Life would consider a number of factors including a claimant's age and the medical information on file. Before implementing a return to work program, National Life would need to have medical clearance from a claimant's physician.

[150] In Mr. Brine's case, National Life made a decision to involve a rehabilitation specialist because of his young age and the possibility that he may be able to get back to work. Ms. Antonini testified that a rehabilitation counsellor would assist National Life in considering whether a return to work was possible, and would "go through documentation to see if claimants needed any assistance with anything". Mr. Brine was advised by way of correspondence dated December 1, 1995 that National Life was of the view that it may be helpful of offer him the services of a

rehabilitation counsellor. Ms. Antonini further testified that although National Life assigned rehabilitation counsellor Ms. Azzie to work with Mr. Brine, that neither a rehabilitation assessment or return to work program was ever implemented. She testified that his rehabilitation never got to that stage because the medical information National Life had on file continued to assert Mr. Brine was not capable of returning to work.

[151] In terms of medical information National Life had on its file, Ms. Antonini referenced a letter dated May 28, 1996 from Dr. Rosenberg which provided:

> Currently, Mr. Brine has a GAF (Global Assessment of Functioning) of 55-60, with moderate symptomology of depression and moderate difficulty in social and occupational functioning. When Mr. Brine's GAF is improved to a level of at least 70-80, it would be appropriate to consider rehabilitation efforts and a possible return to the workplace. However, at this time, it is felt that Mr. Brine's symptomology still is sufficient enough to prevent a return to the workplace.

[152] Ms. Antonini testified that notwithstanding Dr. Rosenberg's view regarding Mr. Brine's inability to return to work, National Life did not change its decision to provide rehabilitation services, as it felt it reasonable to continue to assist Mr. Brine at that time. Ms. Antonini testified in relation to a number of written reports received from Ms. Azzie in relation to her involvement with Mr. Brine. Ms. Antonini testified that at no time did Ms. Azzie ever recommend that as part of his

rehabilitation, Mr. Brine consult with other professionals or undertake any programs.

[153] Ms. Antonini testified that in order to assess Mr. Brine's circumstances, including the advisability of undertaking rehabilitation services, National Life requested updated information from Dr. Rosenberg. Both by way of letter dated July 23, 1997 and November 17, 1997, National Life sent forms to Mr. Brine asking that they be completed by Dr. Rosenberg. Ms. Antonini identified the form provided, entered as Exhibit 5, entitled "Attending Physician's Initial Long-Term Disability Benefits Statement". Although it appeared to be signed by Dr. Rosenberg on July 30, 1997, it was received by National Life on December 29, 1997. Ms. Antonini testified that National Life never received anything from Dr. Rosenberg other than this form, in which he made any type of recommendation about the provision of rehabilitation services.

[154] Ms. Antonini testified that the decision was made to suspend Ms. Azzie's rehabilitation services in June of 1998, and these services were not re-instated as National Life never received subsequent medical information which confirmed that Mr. Brine could return to work. Ms. Antonini further testified that on June 15, 1998 along with writing to Ms. Azzie to advise her services were being suspended; National Life advised Mr. Brine in separate correspondence that it would be

requesting his attendance at an IME. Asked why National Life would request an IME at that time, Ms. Antonini testified that they wanted an independent psychiatric review and that it was the company's practice to do so where it wanted more detailed information, clarification and an unbiased opinion would be desirable.

[155] Ms. Antonini confirmed that the IME of Dr. Peterkin dated August 11, 1998 was received by National Life, and after reviewing it, National Life continued payment of Mr. Brine's disability payments. Rehabilitation services were not re-initiated. Ms. Antonini testified National Life sent a copy of Dr. Peterkin's report to Dr. Rosenberg, but never received a response back from him.

[156] As a final subject canvassed during her direct examination; Ms. Antonini was asked about National Life's knowledge surrounding Mr. Brine's claim to the Canadian Human Rights Tribunal. She testified that National Life first became aware of Mr. Brine's human rights claim in 2004 or 2005 when their legal counsel advised them that Mr. Brine had received a settlement.

[157] On cross-examination, Ms. Antonini acknowledged that National Life had implemented rehabilitation services before Mr. Brine was medically deemed to be able to return to work. She also agreed that the reports of Dr. Rosenberg appeared

to reflect that his GAF scores improving from 55 - 60 to 60 - 65. Ms. Antonini testified she was unaware of whether this improvement was due to his participation with rehabilitation services. She further acknowledged that rehabilitation was discontinued without notice to Mr. Brine but it was National Life's policy to have Ms. Azzie advise the claimant of same.

[158] Ms. Antonini further confirmed on cross-examination and after reviewing National Life's file notes, that it did not appear as if anyone consulted with Ms. Azzie before discontinuing Mr. Brine's rehabilitation services. She further confirmed that National Life received no additional medical information pertaining to Mr. Brine between the times they received the form from Dr. Rosenberg and making the decision to suspend the rehabilitation services. She further confirmed that National Life did not request Dr. Rosenberg's views regarding rehabilitation services, but that "we requested an IME". She said National Life was relying on the objective report of Dr. Peterkin and the entire file review. Ultimately, it was Ms. Jako who made the decision to terminate rehabilitation services.

[159] With respect to Dr. Peterkin's report, Ms. Antonini confirmed that in requesting the IME, the doctor was asked to assess if Mr. Brine was "presently able to work at any occupation". In cross-examination, Ms. Antonini was directed to the following portion of the Peterkin report:

> From a strictly psychiatric point of view, Mr. Brine's symptoms do not prevent him from working at this time. He is rageful but not severely depressed or suicidal and there is no history of psychosis or severe anxiety disorder. The absence of any work or re-training challenge may indeed worsen Mr. Brine's chronic rage symptoms as he finds himself ruminating about the workplace on a daily basis. Ongoing counselling with a maximizing of his medical treatment and decreasing of his alcohol intake may assist him in working through his anger in such a way that would sustain a return to the workplace.

[160] She testified she "understood what she read" but could not confirm Dr. Peterkin was suggesting re-training efforts be implemented. She testified she was not personally involved in the review of the report, rather Ms. Jako undertook that task. Ms. Antonini did confirm that National Life did not follow up with Dr. Peterkin to inquire what he meant by "re-training challenge", as they "referred the letter to Dr. Rosenberg".

[161] In cross-examination, Ms. Antonini was also asked about Mr. Brine's attempts in 2000 to have rehabilitation services re-commenced. She testified she was unaware of Mr. Brine requesting rehabilitation services from National Life at that time. Specifically, she was directed to the affidavit of Geoffrey Saunders, counsel for National Life dated May 18, 2000 in which he swore:

> 4. In a telephone conversation with Brine on May 15, 2000, Brine informed me that he was of the view that with his discharge, he had no further obligation to National Life and further requested that National Life provide him with rehabilitation services under the terms of his policy.

[162] Ms. Antonini testified that she was personally unaware of any such request being made, as National Life was no longer handling Mr. Brine's claim at that time because the file had "gone to the legal department". Similarly, Ms. Antonini testified she was unaware that Dr. Rosenberg had in 2000 recommended rehabilitation services for Mr. Brine. Mr. Brine's counsel directed her to the following passage in a letter dated October 2000 from Dr. Rosenberg to Mr. Mason:

> Mr. Brine was never, to my recollection, significantly engaged in any follow-up with a rehabilitation counsellor. The discontinuation of any possibility of rehabilitation services provided yet another augmenting and sustaining factor to Mr. Brine's continuing depressive symptomology.

[163] Ms. Antonini testified that she was unaware whether National Life ever received this letter, as it was not in her file. She agreed that Dr. Rosenberg appeared, in 2000, to be recommending rehabilitation services. Ms. Antonini was questioned by Mr. Brine's counsel regarding the report commissioned by National Life from Dr. Rubens in April of 2003. She testified she had not reviewed that report, nor could she advise why it had not been disclosed to Mr. Brine until shortly before the trial. She was referenced to recommendations made by Dr. Rubens including:

> 11. I believe the impairments I have summarized here would also be relevant to any occupation I could imagine a person of Mr. Brine's experience and maturity being able to realistically work at. As I shall discuss presently, however, I think that this patient can and should at this point begin to expand his activities in various ways, and that such activities can at this point begin to include activities relevant to possible future occupational involvements. To define these matters more specifically, however, a transferable skills analysis would be required, as well as the involvement, perhaps for a somewhat prolonged period of time, of a rehabilitation counsellor or specialist.

[164] She agreed that the rehabilitation service provided by National Life to claimants can sometimes include a transferrable skills analysis. When asked by Mr. Brine's counsel why none of Dr. Rubens' recommendations regarding rehabilitation were implemented, Ms. Antonini referenced the following statement contained in the report:

> The identification of possible alternative occupations for this patient by means of a formal transferable skills analysis, and involvement with a rehabilitation specialist over a relatively prolonged period of time would be helpful, but may not occur in practical terms. This patient is suffering from a psychiatric illness of moderate to severe intensity. This affects his capacity to participate effectively in rehabilitation and occupational activities. The prognosis, both clinically and occupationally, remains uncertain as there are as yet many unpredictable elements in this patient's ongoing illness and future course.

[165] She confirmed that nobody from National Life contacted Dr. Rubens upon receipt of his report to clarify what was intended by his recommendations and reservations. Further, Ms. Antonini confirmed that National Life did not follow-up with Mr. Brine after receipt of the Rubens report to assess his willingness to participate in rehabilitation services. Ms. Antonini denied that National Life was

aware that Mr. Brine wanted or needed rehabilitation services, but she testified that if they had of received medical information, "we would have reviewed it".

Julie Jako

[166] Julie Jako was called to testify on behalf of National Life. Ms. Jako, now retired, has had a long career with National Life, spanning over 48 years. In the 1990's she held the position of Director of the LTD department, and had personal involvement with Mr. Brine's claim file.

[167] Ms. Jako testified that her role as Director was to oversee the adjudication process, and in this time frame, she personally reviewed every LTD claim and was directly involved in the decision making process. Asked about her role with rehabilitation services, Ms. Jako testified that based upon a review of the entire file, including medical information and history on file, she was responsible to make all decisions to either approve, disallow rehabilitation services, or to request additional information in order to make such decisions.

[168] Ms. Jako testified that she would frequently request additional information by way of an IME if she was not quite sure how to proceed with handling a file, including the provision of rehabilitation services. Based on additional information

received, if rehabilitation was felt to be appropriate, she would retain the services of a rehabilitation consultant. The consultant would assess the claimant to find out whether or not there was a possibility of a return to work.

[169] In her direct evidence, Ms. Jako was referred to the definition of a "rehabilitation program" within the policy (JEB Tab F4, page 37), which she confirmed was utilized in reaching decisions to provide services. She testified such decisions "all depend on medical information and the treating physician's recommendations". Asked why the decision was reached to provide rehabilitation services to Mr. Brine, Ms. Jako testified that she had considered the earlier IME of Dr. Smith, as well as the December 1995 report of Dr. Rosenberg. She acknowledged that despite a lack of an indication that Mr. Brine was medically able to return to work, she decided, because of his young age, to see if services could help him.

[170] Ms. Jako identified a letter forwarded to rehabilitation consultant Suzanne Azzie dated June 15, 1998 in which National Life advised that she was to suspend Mr. Brine's rehabilitation services. Asked why the decision to suspend was made, Ms. Jako referenced the National Life file notes. She testified she wanted to find out exactly what was happening and whether there was improvement or not in Mr. Brine's condition, so they could see how to handle the file in future. Ms. Jako

testified she suspended Ms. Azzie's involvement until she received additional medical information.

[171] Ms. Jako testified that in reaching the decision to suspend, she had reviewed the entire file, including original medical reports, to see how the claimant's condition was advancing. She testified that from this review she determined there was no change in his condition and no indication from his treating physician that a return to work was an option or could be expected. This was the reason Ms. Jako identified that she wanted an IME, and because she had seen no progress in her review of the materials she did have, she determined it was appropriate to suspend services until she had more information.

[172] Ms. Jako testified that an IME was arranged with Dr. Peterkin. She identified the letter of request sent to him dated July 24, 1998 in which he was asked to "update us on his condition as well as if he is presently able to work at any occupation" (JEB Tab G2, page 27). She further identified his resulting report and was directed to several provisions contained therein. Ms. Jako testified that notwithstanding Dr. Peterkin opining that Mr. Brine's condition did not prevent him from working, she decided to continue his monthly benefits under the "any occupation" clause of the policy given the number of treatment recommendations Dr. Peterkin had made. Ms. Jako testified that she felt that there were too many

recommendations, and that these treatments should be implemented before sending him back to work, and as such, continuing his benefits would be the "fair" thing to do.

[173] Asked about the rehabilitation services, Ms. Jako testified that she decided to terminate them after receipt of the Peterkin report because of not only the medical information, but also because he had already reached the end of his "own occupation" period, and that National Life was waiting to see the outcome of CPP's decision. She testified she did subsequently become aware of the fact that Mr. Brine had qualified for CPP disability benefits and this played a role in her decision not to re-implement rehabilitation. Ms. Jako explained that the CPP definition of disability is much stricter than that under the National Life policy, and if Mr. Brine qualified for that, his chances of ever going back to work were very low.

[174] Ms. Jako was vigourously cross-examined, particularly in relation to the decisions made surrounding rehabilitation services. She acknowledged deciding to commence rehabilitation services despite Dr. Rosenberg advising he was not capable of going back to work, but that she would rely on the recommendation of the treating psychiatrist to determine if Mr. Brine was getting better and whether to continue with services. Ms. Jako testified that Dr. Rosenberg consistently said

that Mr. Brine was not ready to go back to work and that he could not participate in a return to work program. She testified that Dr. Rosenberg still maintained in his reports that Mr. Brine was not ready to get into any rehabilitation program, and that notwithstanding his GAF scores going up, he maintained Mr. Brine was totally disabled very clearly in his report.

[175] Ms. Jako agreed that she decided to suspend rehabilitation because she wanted a report from Dr. Peterkin. She would not agree however, with counsel's suggestion that given that position, it would be expected that he be asked about whether such services were warranted. Ms. Jako further replied that they were "looking for medical information - that's what we got and then we decided if Mr. Brine was ready for rehab." She confirmed that no one from National Life spoke to Dr. Rosenberg directly about his view on rehabilitation services being suspended or the Peterkin report. She testified that Dr. Rosenberg advised clearly in writing in his latest report that Mr. Brine was not ready to start any program.

[176] Ms. Jako further agreed that National Life did not contact Ms. Azzie directly to inquire whether rehabilitation services should continue. Ms. Jako testified that National Life relied upon Ms. Azzie's reports, in which she advised that there was no progress, Mr. Brine's condition was worsening and that "he clearly was not ready for rehabilitation".

[177] Asked about her evidence that once a claimant qualifies for CPP disability benefits and PSSA medical retirement, that National Life views the person as "totally disabled", Ms. Jako testified that in her experience in such cases, these claimants never return to work. As such, National Life feels it is not appropriate to offer rehabilitation services in such circumstances. She testified that unless a claimant or doctor contact the company to advise that things have changed, National Life does not offer further rehabilitation benefits. She acknowledged that the policy does not specify that rehabilitation benefits are restricted to only those situations where a claimant has not qualified for CPP or a medical annuity.

[178] Ms. Jako was referenced to Dr. Rubens' IME conducted in 2003. She testified she recalled reviewing the report with in-house legal counsel and a decision was reached to continue Mr. Brine's disability benefits. Rehabilitation services were not offered because "we determined he was totally disabled and people will not give up other benefits just to get rehabilitation services". Ms. Jako could not explain why Dr. Rubens' 2003 report was not provided to Mr. Brine until days before the trial was to commence. She explained that once a file goes to the legal department, that administration of the file is outside of the LTD department.

[179] Ms. Jako was also questioned in cross-examination as to how and when National Life first became aware of Mr. Brine's receipt of CPP disability benefits.

She testified that National Life became aware through information received from Superannuation. She was referenced to an affidavit sworn by her in August of 1999 in which she states:

> 6. In July, 1998, National Life was notified that Brine had been receiving a PSSA pension since August 1, 1995, and Canada Pension Plan benefits from an undetermined date.

[180] Ms. Jako testified that she was aware of the importance of swearing an affidavit, and she would have read it carefully to confirm its accuracy before signing. She testified that she would have checked the dates, but could not recall what file documents she specifically reviewed. On re-direct examination, Ms. Jako was taken to JEB, Tab D2, page 3 and identified a Notice from Superannuation. She confirmed that this was the information from that department that she referenced as having first advised National Life of Mr. Brine's receipt of CPP benefits. It was received by National Life on August 20, 1998.

ISSUES

[181] It is helpful at this point to frame the issues for determination. Relating to the claims advanced by Mr. Brine, the issues arising therefrom can be articulated as follows:

(a)Was National Life entitled to claim an overpayment of $99,506.64 due to Mr. Brine's receipt of CPP and PSSA retroactive lump sum payments? ;

(b) Was National Life subsequently estopped from claiming that overpayment due to its representations made to Mr. Brine? ;

(c) Was National Life entitled to re-coup the overpayment of $99,506.64 by virtue of a total upfront claw back of Mr. Brine's monthly disability benefits? ;

(d) Did Mr. Brine's bankruptcy extinguish the balance of the overpayment outstanding or can National Life rely upon s.178(1) of the Bankruptcy and Insolvency Act? ;

(e) Did National Life breach the duty of utmost good faith owed Mr. Brine?

[182] If the Court determines that National Life breached a provision of the policy and/or its duty of utmost good faith, what damages, if any, should arise therefrom?

(a)Are there damages ascertainable in relation to a specific breach of contract?

(b) If a breach of the duty of utmost good faith is found, what damages, if any arise therefrom?

(c) Do the circumstances before the Court justify an award of punitive damages?

[183] The third broad issue brought forward by National Life's claim can be stated as follows:

Is National Life entitled to reimbursement in relation to the $300,000.00 settlement received by Mr. Brine in regards to his Human Rights Complaint in March of 2004?

THE LAW

[184] In relation to the claim advanced by Mr. Brine, the Court will consider the law in relation to:

(a)Principles of interpretation in relation to contracts of insurance;

(b) The duty of utmost good faith;

(c) The applicability of estoppel;

(d) The applicability of provisions of the *Bankruptcy and Insolvency Act*, in particular s. 178;

(e) The availability of general damages; and

(f) The availability of punitive damages.

[185] The claim advanced by National Life will engage a consideration of not only contractual interpretation, but also principles relating to the designation of general damages award in the context of subrogated claims.

Principles of Interpretation - Contracts of Insurance

[186] The issues placed before the Court will require various provisions of the policy to be interpreted. As a contract, the policy will be subject to the usual interpretative rules, along with those more particularly in relation to contracts of insurance. These principles of interpretation were concisely summarized by Perell, J. in **Ruffolo v. SunLife Assurance Company of Canada** [2007] O.J. No. 4541 (upheld on appeal, see 2009 ONCA 274), as follows:

82 It is accepted that some special rules apply to the interpretation of insurance contracts. However, it is also accepted that the normal rules of contract interpretation apply to insurance contracts and that the normal rules are the starting place for interpreting insurance contracts: *Consolidated-Bathurst Export v.Mutual Boilers Ins.* [1980] 1 S.C.R. 888; *Reid Crowther & Partners v. Simcoe & Erie General Insurance* (1993), 99 D.L.R. (4th) 741 (S.C.C.); *Kingsway General Insurance Co. v. Loughheed Enterprises Ltd.* (2004),32 B.C.L.R. (4th) 56 at p. 63 (C.A.).

83 The normal rules for the interpretation of contracts direct a court to search for an interpretation from the whole of the contract that advances the intent of the parties at the time they signed the agreement: *Consolidated-Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Co., supra*; *Kentucky Fried Chicken Canada v. Scott's Food Services Inc.* (1998), 114 O.A.C. 357 (C.A.) at paras. 25-26. In searching for the intent of the parties, the court should give particular consideration to the terms used by the parties, the context in which they are used and the purpose sought by the parties in using those terms: *Frenette v.Metropolitan Life Insurance Co.*, [1992] 1 S.C.R. 647; *Ventas, Inc. v. Sunrise Senior Living Real Estate Investment Trust* (2007), 85 O.R. (3d) 254 (C.A.) at para. 24. In *TransCanada Pipelines Ltd. v. Potter StationPower Ltd. Partnership*, [2002] O.J. No. 429 (S.C.J.) at para. 35, Lane, J. stated that: "context consists of two elements: the background, business purpose analysis; and the context of the words within which the difficult passage is found."

84 In interpreting a contract, with a few narrow exceptions for situations of ambiguity, evidence of the parties' subjective intention is not admissible, but the court may have regard to the factual background and the commercial purpose of the contract: *Prenn v. Simmonds*, [1971] 3 All E.R. 240 (H.L.); *Reardon Smith Line v. Hansen-Tangen*, [1976] 3 All E.R. 570 (H.L.); *Canada Square Corp. v. VS Services Ltd.* (1981), 34 O.R. (2d) 250 (C.A.); *Hi-Tech Group Inc. v. Sears Canada Inc.* (2001), 52 O.R. (3d) 97 (C.A.) at para. 23. Page 11

85 Provisions should not be read in isolation but in harmony with the agreement as a whole: *McClelland and Stewart Ltd. v. Mutual Life Assurance Co. of Canada*, [1981] 2 S.C.R. 6; *British Columbia Hydro and Power Authority v. BG Checo International Ltd.* (1993), 99 D.L.R. (4th) 577 (S.C.C.); *Hillis Oil and SalesLimited v. Wynn's Canada*, [1986] 1 S.C.R. 57; *Scanlon v. Castlepoint Dev. Corp.* (1993), 11 O.R. (3d) 744 (C.A.). Generally, words should be given their ordinary and literal meaning; *Indian Molybdenum Ltd. v. The King*, [1951] 3 D.L.R. 497 (S.C.C.).

86 Where a contract is unambiguous, a court should give effect to the clear language, reading the contract as a whole: *Brissette Estate v. Westbury Life Insurance Co.*, [1992] 3 S.C.R. 87; *Non-Marine Underwriters,Lloyd's of London v. Scalera*, [2000] 1 S.C.R. 551; However, if there are alternative interpretations, the court should reject an interpretation or a literal meaning that would make the provision or the agreement ineffective, superfluous, absurd, unjust, commercially unreasonable, or destructive of the commercial objective of the agreement: *Consolidated-Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Co.,supra*; *Scanlon v. Castlepoint Dev. Corp.* (1993), 11 O.R. (3d)

744 (C.A.); *Aita v. Siverstone Towers Ltd.*(1978), 19 O.R. (2d) 681 (C.A.).

87 As a matter of interpreting insurance policies, coverage provisions should be construed broadly, exclusion clauses narrowly, and where appropriate, the contra proferentum rule should be applied against the insurer: *Reid Crowther & Partners v. Simcoe & Erie General Insurance* (1993), 99 D.L.R. (4th) 741 (S.C.C.); *Monenco Ltd. v. Commonwealth Insurance Co.*, [2001] 2 S.C.R. 699; *Non-Marine Underwriters,Lloyd's of London v. Scalera*, [2000] 1 S.C.R. 551.

[187] In terms of the interpretation of insurance policies, the decision of the Supreme Court of Canada in **Reid Crowther & Partners v. Simcoe & Erie General Insurance**, (1999), 99 D.L.R. (4th) continues to be regularly relied upon. Justice McLachlin, as she then was, wrote:

[37] . . .In each case, the courts must interpret the provisions of the policy at issue in light of general principles of interpretation of insurance policies, including, but not limited to:

(1) the contra proferentum rule;

(2) the principle that coverage provisions should be construed broadly and exclusion clauses narrowly; and

(3) the desirability, at least where the policy is ambiguous, of giving effect to the reasonable expectations of the parties.

[188] The Court further expanded upon the interpretation exercise in the face of ambiguity as follows:

[42] These ambiguities, interpreted in accordance with the contra proferentum rule, militate in favour of adopting an interpretation of the policy that favours the insured rather than the insurer which drafted the policy. The same result is suggested by the rule that coverage provisions should be construed broadly. (citations omitted)

[43] I turn to the third relevant principle of construction, the reasonable expectations of the parties. Without pronouncing on the reach of this doctrine, it is settled that where the

> policy is ambiguous, the courts should consider the reasonable expectations of the parties. (citations omitted) The insured's reasonable expectation is, at a minimum, that the insurance plan will provide coverage for all legitimate claims on an ongoing basis, whether through renewal with the same insurer or through securing new insurance with a different insurer. This presumption is consistent with the discovery principle discussed earlier in these reasons, in that the insurer is able to secure a means of certainty in calculating its risk without unfairly creating gaps in coverage. Yet the construction of the policy which the insurer urges upon us may well not achieve that goal.

Duty of Utmost Good Faith

[189] Mr. Brine asserts that as a "peace of mind" contract, he was owed a duty of utmost good faith by National Life, in terms of its management of his claim. Although the existence of the duty is regularly acknowledged within the case law, often the scope or particular aspects of the duty are not fully canvassed. I have found particularly helpful the description provided by O'Connor, J.A. in **702535 Ontario Inc. v. Non-Marine Underwriters, Lloyd's London, England** (2000), 184 D.L.R. (4th) 687, of not only the duty, but the consequences of a breach thereof. He writes:

> 27 The relationship between an insurer and an insured is contractual in nature. The contract is one of utmost good faith. In addition to the express provisions in the policy and the statutorily mandated conditions, there is an implied obligation in every insurance contract that the insurer will deal with claims from its insured in good faith: Whiten v. Pilot Insurance Co. (1999), 42 O.R. (3d) 641 (Ont. C.A.). The duty of good faith requires an insurer to act both promptly and fairly when investigating, assessing and attempting to resolve claims made by its insureds.
>
> 28 The first part of this duty speaks to the timeliness in which a claim is processed by the insurer. Although an insurer may be responsible to pay interest on a claim paid after delay, delay in payment may nevertheless operate to the disadvantage of an insured. The insured, having suffered a loss, will frequently be under financial pressure to settle the

claim as soon as possible in order to redress the situation that underlies the claim. The duty of good faith obliges the insurer to act with reasonable promptness during each step of the claims process. Included in this duty is the obligation to pay a claim in a timely manner when there is no reasonable basis to contest coverage or to withhold payment. Bullock v. Trafalgar Insurance Co. of Canada (1996), 9 O.T.C. 245 (Ont. Gen. Div.); Labelle v. Guardian Insurance Co. of Canada (1989), 38 C.C.L.I. 274 (Ont. H.C.); Jauvin v. Prévoyants du Canada (1986), 57 O.R. (2d) 528 (Ont. H.C.).

29 The duty of good faith also requires an insurer to deal with its insured's claim fairly. The duty to act fairly applies both to the manner in which the insurer investigates and assesses the claim and to the decision whether or not to pay the claim. In making a decision whether to refuse payment of a claim from its insured, an insurer must assess the merits of the claim in a balanced and reasonable manner. It must not deny coverage or delay payment in order to take advantage of the insured's economic vulnerability or to gain bargaining leverage in negotiating a settlement. A decision by an insurer to refuse payment should be based on a reasonable interpretation of its obligations under the policy. This duty of fairness, however, does not require that an insurer necessarily be correct in making a decision to dispute its obligation to pay a claim. Mere denial of a claim that ultimately succeeds is not, in itself, an act of bad faith: Palmer v. Royal Insurance Co. of Canada (1995), 27 C.C.L.I. (2d) 249 (Ont. Gen. Div.).

30 What constitutes bad faith will depend on the circumstances in each case. A court considering whether the duty has been breached will look at the conduct of the insurer throughout the claims process to determine whether in light of the circumstances, as they then existed, the insurer acted fairly and promptly in responding to the claim.

31 A breach of the duty to act in good faith gives rise to a separate cause of action from an action for the failure of an insurer to compensate for loss covered by the policy. In Whiten v. Pilot Insurance Co., Laskin J.A. made the point at p. 650:

> [i]n every insurance contract an insurer has an implied obligation to deal with the claims of its insureds in good faith.[cites omitted] That obligation to act in good faith is separate from the insurer's obligation to compensate its insured for a loss covered by the policy. An action for dealing with an insurance claim in bad faith is different from an action on the policy for damages for the insured loss. In other words, breach of an insurer's obligation to act in good faith is a separate or independent wrong from the wrong for which compensation is paid.

32 A breach of the duty of good faith may result in an award of damages which is distinct from the proceeds payable under the policy for the insured loss and which are not restricted by the limits in the policy: See Bullock , supra; Labelle, supra.

[190] It is clear that the obligation of utmost good faith required of parties to a contract of insurance is a mutual one. It would appear however, that this mutual obligation does not serve to trigger the imposition of fiduciary duties. Adopting the view earlier expressed by the court in **Boehm v. Cardinal Insurance** (1994), 18 O.R. (3d) 663, the Ontario Court of Appeal in **Ferme Gerald Laplante & Fils Ltee. v. Grenville Patron Mutual Fire Insurance Co.** [2002] O.J. No. 3588, notes:

> 75. The duty to act in good faith is distinct from the nature of the relationship between insurer and insured. Robins J.A. made it clear that the mutual obligations of good faith do not import fiduciary obligations:
>
> > The fact that a contract is one of utmost good faith does not however mean that it gives rise to a general fiduciary relationship. The relationship between insured and insurer is not akin to the relationship between, say, guardian and ward, principal and agent, or trustee and beneficiary. In these latter instances, the inherent character of the relationship is such that the law has traditionally imported general fiduciary obligations. The insurer-insured relationship is contractual; the parties are parties to an arm's-length agreement. The principle of uberrima fides does not affect the arm's-length nature of the agreement, and, in my opinion, cannot be used to find a general fiduciary relationship. The insurance contract, as noted above, imposes certain specific obligations on its parties. These obligations, however, do not import general fiduciary duties to each and every insurance relationship. Before such fiduciary obligations can be imported there must be specific circumstances in the relationship that call for their imposition.

[191] The manner in which a claim is handled by an insurer in the context of a bad faith claim has recently been addressed by the Saskatchewan Court of Appeal in **Saskatchewan Government Insurance v. Wilson** 2012 SKCA 106. There, the trial judge made a number of findings of fact relating to the insurer, SGI's, inadequate handling of a claim, and found that the duty of utmost good faith was breached accordingly. Although setting aside the trial judge's award of punitive damages on the basis that it was never plead, the Court of Appeal upheld the finding of bad faith as against the insurer. Writing for the Court, Caldwell, J.A. notes as follows:

> 20 In this respect, when addressing the standard to be met by SGI in the handling of Ms. Wilson's claim, the trial judge notably cited a particular passage from Gordon Hilliker, Q.C., Insurance Bad Faith, (Markham: Butterworths, 2004) which speaks to the internal handling of an insured's claim. She wrote:
>
> > [119] The duty of good faith and fair dealing requires that a denial of benefits be based upon a reasonable investigation and evaluation of the circumstances of the loss. In a number of instances, first party insurers have been found liable for bad faith by wrongly denying claims without carrying out a reasonable investigation, or having done an investigation, without reasonably evaluating the circumstances of the claim. As stated by Gordon Hilliker, Q.C., Insurance Bad Faith, (Markham: Butterworths, 2004), at page 34:
> >
> > In some situations the failure to adequately investigate a claim is explained by the insurer misconstruing the purpose of the investigation. The insurer's role is not to look for a putative basis to deny the claim, and, having found one, to then abandon the investigation and leave it to the insured to present evidence to the contrary. A one-sided investigation does not satisfy the requirement of good faith and fair dealing. Instead, the insurer must fairly consider all of the evidence. This required the insurer to initiate a reasonable investigation at the outset and to refrain from reaching a conclusion to deny coverage until the basis for the denial has been fairly investigated.
> >
> > . . .

> Where a claim under a disability policy is supported by the insured's treating physician and, on its face, is a valid claim, the insured cannot in good faith deny the claim unless the denial is supported by the insurer's own reasonable conducted investigation . . .
>
> 21 The trial judge also referenced a number of cases where the facts and legal conclusions were confirmatory of the general proposition set forth above in Insurance Bad Faith. She then turned to address the facts of this matter, as she found them. In this respect she was utterly condemnatory of SGI's adjuster. She notes that the adjuster had ignored reports and information from medical and health professionals which justified the continued payment of benefits to Ms. Wilson. The adjuster had failed to consider SGI's own tertiary assessment of Ms. Wilson, which included the assessment and opinions of no less than seven different health-care professionals, all of whom recommended continued treatment. Instead, the adjuster had based her decision to terminate Ms. Wilson's benefits solely on the less-than-substantiated opinion of a single physiotherapist paid by SGI on a fee-for-service basis. Notable, the trial judge concluded that SGI's adjuster had tailored her request for the opinion in such a way as to seek a justification for terminating Ms. Wilson's benefits (at para. 130). As a compounding factor, the trial judge found that no one at SGI, or on its behalf, had actually examined Ms. Wilson in person or contacted any of Ms. Wilson's health-care providers directly to discuss her case. SGI did not even advise Ms. Wilson that it was reviewing her file. (See: 2010 SKQB 211 at paras. 124 - 131).
>
> 22 So, while the trial judge may have been influenced by her conclusion that SGI had placed "unwarranted conditions on the payment of benefits" or had declined to pay "undisputed portions" of the claim, the conclusion that SGI had breached its duty of good faith to Ms. Wilson was more than adequately made out, in my opinion, on the basis of the acts and omissions of SGI's adjuster alone.

[192] In **Kings Mutual Insurance Co. v. Ackermann**, 2010 NSCA 39, our Court of Appeal upheld a finding of bad faith and resulting punitive damaged reached by a civil jury. In doing so, the Court succinctly stated the status of the law as follows:

> 37 I agree with Kings that an insurer will not necessarily be in breach of its duty of good faith by incorrectly denying a claim that is eventually determined judicially to be legitimate; Fidler v. Sun Life Assurance Co. of Canada, 2006 SCC 30, para. 71. Also, an insurance company can often rely on an expert's opinion to adequately support its denial.

> That being said however, one thing that can lead to a breach of the duty of good faith and an award of punitive damages is the denial of a claim which resulted from the overwhelmingly inadequate handling of a claim: Fidler, supra, para. 71.

The applicability of estoppel

[193] It is unrefuted that in January of 1998, National Life sent Mr. Brine correspondence advising him of the possibility of an overpayment being claimed due to his receipt of funds from Public Superannuation. It is further unrefuted that by way of letter dated July 30, 1998, he was advised by National Life to disregard that earlier correspondence. Mr. Brine asserts that given the contents of the second letter, National Life should be estopped from claiming the overpayment in relation to his receipt of lump sum CPP and PSSA benefits. National Life disagrees.

[194] The elements of promissory estoppel are not contentious. In **Manacle v. Travellers Indemnity Co. of Canada** [1991] 2 S.C.R. 50 Sopinka, J. noted:

> 13. The principles of promissory estoppel are well settled. The party relying on the doctrine must establish that the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on. Furthermore, the representee must establish that, in reliance on the representation, he acted on it or in some way changed his position. In John Burrows Ltd. v. Subsurface Surveys Ltd., [1968] S.C.R. 607, Ritchie J. stated, at p. 615:
>
> > It seems clear to me that this type of equitable defence cannot be invoked unless there is some evidence that one of the parties entered into a course of negotiation which had the effect of leading the other to suppose that the strict rights under the contract would not be enforced, and I think that this implies that there must be

> evidence from which it can be inferred that the first party intended that the legal relations created by the contract would be altered as a result of the negotiations.
>
> This passage was cited with approval by McIntyre J. in Engineered Homes Ltd. v. Mason, [1983] 1 S.C.R. 641, at p. 647. McIntyre J. stated that the promise must be unambiguous but could be inferred from circumstances.

[195] In establishing the second element, detrimental reliance, the party invoking promissory estoppel must establish both that he changed his course of conduct in reliance upon the assurance, thereby altering his legal position, and he would suffer because of the change in his position if the promisor was allowed to abandon the assurance. See **Ryan v. Moore**, 2005 SCC 38, at para. 69.

The applicability of provisions of the Bankruptcy and Insolvency Act, in particular s.178

[196] Mr. Brine submits that if the Court declines to find National Life was estopped from seeking overpayment due to his receipt of CPP and PPSA lump sum payments, that his bankruptcy should have served to extinguish the balance owing. National Life argues to the contrary, relying upon s. 178(1) of the *Bankruptcy and Insolvency Act*, and more particularly, that Mr. Brine owed it a fiduciary duty.

[197] A sensible starting point is the statutory provision itself, the relevant portions of which provided at the time of Mr. Brine's bankruptcy:

> s. 178(1) An order of discharge does not release the bankrupt from
>
> (d) any debt of liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity.

[198] While reaching a determination of whether the debt in question arose out of "fraud, embezzlement, misappropriation or detalcation" will be a factual finding based on the evidence before the Court, whether he was a fiduciary, although also an evidentiary finding, requires a somewhat detailed analysis of the law, given the conflicting authorities presented to the Court.

[199] National Life relies upon several authorities, most notably **Armstrong v. Laing**, 2011 BCCA 205, where it had been found that an insured who received overpayment from a long term disability insurer due to receipt of other benefits, was acting in a fiduciary capacity, and the debt claimed by the insurer survived the insured's bankruptcy. National Life acknowledged that this decision, and the line of case authorities preceding it, was not followed in a very recent decision of this Court.

[200] In **Standard Life Assurance Company of Canada v. Landry**, 2012 NSSC 228, the Court declined in analogous factual circumstances, to find the recipient of an overpayment from her long term disability insurer to be a fiduciary. In reaching that conclusion, Justice Moir relied upon a recent decision of the Supreme Court of

Canada in which the Court outlined the prerequisites to determining an individual was an ad hoc fiduciary.

[201] In **Galambos v. Perez**, 2009 SCC 48, the Court reversed the British Columbia Court of Appeal's decision and re-instated that of the trial judge who had determined that a particular debtor was not an ad hoc fiduciary vis a vis his creditor. Justice Cromwell writing for the Court states:

> 50 The core of the Court of Appeal's reasoning consists of three points, two of which are expressly set out and the third of which is implied. The explicit points are, first, that a "power-dependency" relationship existed between Ms. Perez and Mr. Galambos and second, that in such relationships, fiduciary duties may arise simply on the basis of the reasonable expectations of the weaker party and without any mutual understanding of both parties that one must act in the interests of the other. The third point arises by implication because the court appears to have accepted the proposition, without expressly stating it, that a fiduciary duty may arise even though the fiduciary has no discretionary power to affect the other party's legal or important practical interests.
>
> 51 The appellants challenge each of these points. For reasons which I will develop, I agree that the Court of Appeal erred in these three respects.

[202] In his reasons, Justice Cromwell discusses that there are two components to establishing an ad hoc fiduciary obligation. Firstly, that there must be an undertaking either express or implied, of loyalty - to act solely in the beneficiary's interest. Secondly, in order for such obligations to arise, the fiduciary must have discretionary power to affect the interest of the beneficiary. Justice Cromwell described the requirement of discretionary power as follows:

> 83 It is fundamental to the existence of any fiduciary obligation that the fiduciary has a discretionary power to affect the other party's legal or practical interests. In Guerin, Dickson J. spoke of this discretionary power as "the hallmark of any fiduciary relationship" (p. 387) and, while making no comment on whether it was broad enough to embrace all fiduciary obligations, he endorsed Professor Weinrib's description of a fiduciary relationship as one in which "the principal's interests can be affected by, and are therefore dependent on, the manner in which the fiduciary uses the discretion which has been delegated to him" (p. 384). The influential guidelines set out by Wilson J. in Frame, at p. 136, for identifying new categories of fiduciary relationships included that the fiduciary have scope for the exercise of some discretion or power, the exercise of which affects the beneficiary's legal or practical interests. In Norberg, McLachlin J. noted that a fiduciary must be entrusted which such power in order to perform his or her functions (p. 275).
>
> 84 The nature of this discretionary power to affect the beneficiary's legal or practical interests may, depending on the circumstances, be quite broadly defined. It may arise from the power conferred by statute, agreement, perhaps from a unilateral undertaking or, in particular situations such as the professional advisory relationship addressed in Hodgkinson, by the beneficiary entrusting the fiduciary with information or seeking advice in circumstances that confer a source of power: see, e.g., Lac Minerals and Hodgkinson. While what is sufficient to constitute power in the hands of the fiduciary may be controversial in some cases, the requirement for the existence of such power in the fiduciary's hands is not. The presence of this sort of power will not necessarily on its own support the existence of an ad hoc fiduciary duty; its absence, however, negates the existence of such a duty.

[203] Returning to **Landry, supra**, Justice Moir founded his decision to decline to find the insurer a fiduciary to the LTD insurer, based upon the absence of both an undertaking, and the lack of discretionary power. Based upon the factual findings there, such an outcome seems in line with the direction provided in **Galambos, supra**.

Availability of General Damages

[204] As noted above, a breach of the duty of utmost good faith can give rise to a claim for damages beyond that contemplated within the policy provisions. However, it is also clear that in appropriate circumstances such as often arises in "peace of mind" contracts; the breach of a contractual term can give rise to a claim for damages. **In Fidler v. SunLife Assurance Co. of Canada**, 2006 SCC 30, the court considers both types of damages, each often referenced as being "aggravated". Writing for the majority, McLachlin, C.J.C. and Abella, J. note:

> 51 It may be useful to clarify the use of the term "aggravated damages" in the context of damages for mental distress arising from breach of contract. "Aggravated damages", as defined by Waddams (The Law of Damages (2nd ed. 1983), at pp. 562-63), and adopted in Vorvis, at p. 1099
>
> > describ[e] an award that aims at compensation, but takes full account of the intangible injuries, such as distress and humiliation, that may have been caused by the defendant's insulting behaviour.
>
> As many writers have observed, the term is used ambiguously. The cases speak of two different types of "aggravated" damages.
>
> 52 The first are true aggravated damages, which arise out of aggravating circumstances. They are not awarded under the general principle of Hadley v. Baxendale, but rest on a separate cause of action -- usually in tort -- like defamation, oppression or fraud. The idea that damages for mental distress for breach of contract may be awarded where an object of a contract was to secure a particular psychological benefit has no effect on the availability of such damages. If a plaintiff can establish mental distress as a result of the breach of an independent cause of action, then he or she may be able to recover accordingly. The award of damages in such a case arises from the separate cause of action. It does not arise out of the contractual breach itself, and it has nothing to do with contractual damages under the rule in Hadley v. Baxendale.
>
> 53 The second are mental distress damages which do arise out of the contractual breach itself. These are awarded under the principles of Hadley v. Baxendale, as discussed above. They exist independent of any aggravating circumstances and are based completely on the parties' expectations at the time of contract formation. With respect to

this category of damages, the term "aggravated damages" becomes unnecessary and, indeed, a source of possible confusion.

54 It follows that there is only one rule by which compensatory damages for breach of contract should be assessed: the rule in Hadley v. Baxendale. The Hadley test unites all forms of contractual damages under a single principle. It explains why damages may be awarded where an object of the contract is to secure a psychological benefit, just as they may be awarded where an object of the contract is to secure a material one. It also explains why an extended period of notice may have been awarded upon wrongful dismissal in employment law: see *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701. In all cases, these results are based on what was in the reasonable contemplation of the parties at the time of contract formation. They are not true aggravated damages awards.

55 The recognition that *Hadley* is the single and controlling test for compensatory damages in cases of breach of contract therefore refutes any argument that an "independent actionable wrong" is a prerequisite for the recovery of mental distress damages. Where losses arise from the breach of contract itself, damages will be determined according to what was in the reasonable contemplation of the parties at the time of contract formation. An independent cause of action will only need to be proved where damages are of a different sort entirely: where they are being sought on the basis of aggravating circumstances that extend beyond what the parties expected when they concluded the contract.

56 Turning to the case before us, the first question is whether an object of this disability insurance contract was to secure a psychological benefit that brought the prospect of mental distress upon breach within the reasonable contemplation of the parties at the time the contract was made? In our view it was. The bargain was that in return for the payment of premiums, the insurer would pay the plaintiff benefits in the case of disability. This is not a mere commercial contract. It is rather a contract for benefits that are both tangible, such as payments, and intangible, such as knowledge of income security in the event of disability. If disability occurs and the insurer does not pay when it ought to have done so in accordance with the terms of the policy, the insurer has breached this reasonable expectation of security.

57 Mental distress is an effect which parties to a disability insurance contract may reasonably contemplate may flow from a failure to pay the required benefits. The intangible benefit provided by such a contract is the prospect of continued financial security when a person's disability makes working, and therefore receiving an income, no longer possible. If benefits are unfairly denied, it may not be possible to meet ordinary living expenses. This financial pressure, on top of the loss of work and the existence of a disability, is likely to heighten an insured's anxiety and stress. Moreover, once disabled, an insured faces the difficulty of finding an economic substitute for the loss of income caused by the denial of benefits. See D. Tartaglio, "*The Expectation of Peace of Mind: A Basis for Recovery of Damages for Mental Suffering Resulting from the Breach of First Party Insurance Contracts*" (1983), 56 S. Cal. L. Rev. 1345, at pp. 1365-66.

> 58 People enter into disability insurance contracts to protect themselves from this very financial and emotional stress and insecurity. An unwarranted delay in receiving this protection can be extremely stressful. Ms. Fidler's damages for mental distress flowed from Sun Life's breach of contract. To accept Sun Life's argument that an independent actionable wrong is a precondition would be to sanction the "conceptual incongruity of asking a plaintiff to show more than just that mental distress damages were a reasonably foreseeable consequence of breach" (O'Byrne, at p. 24 of manuscript (emphasis in original)).
>
> 59 The second question is whether the mental distress here at issue was of a degree sufficient to warrant compensation. Again, we conclude that the answer is yes. The trial judge found that Sun Life's breach caused Ms. Fidler a substantial loss which she suffered over a five-year period. He found as a fact that Ms. Fidler "genuinely suffered significant additional distress and discomfort arising out of the loss of the disability coverage" (para. 30 (emphasis added)). This finding was amply supported in the evidence, which included extensive medical evidence documenting the stress and anxiety that Ms. Fidler experienced. He concluded that merely paying the arrears and interest did not compensate for the years Ms. Fidler was without her benefits. His award of $20,000 seeks to compensate her for the psychological consequences of Sun Life's breach, consequences which are reasonably in the contemplation of parties to a contract for personal services and benefits such as this one. We agree with the Court of Appeal's decision not to disturb it.

[205] The Court will be guided by the above principles.

Availability of Punitive Damages

[206] Punitive damages are not infrequently sought in disputes involving insurers. In **Fidler, supra**, the Court summarized the law regarding the availability of such an award as follows:

> 61 While compensatory damages are awarded primarily for the purpose of compensating a plaintiff for pecuniary and non-pecuniary losses suffered as a result of a defendant's conduct, punitive damages are designed to address the purposes of retribution, deterrence and denunciation: *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595, 2002 SCC 18, at para. 43.

> 62 By their nature, contract breaches will sometimes give rise to censure. But to attract punitive damages, the impugned conduct must depart markedly from ordinary standards of decency -- the exceptional case that can be described as malicious, oppressive or high-handed and that offends the court's sense of decency: *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 196; *Whiten*, at para. 36. The misconduct must be of a nature as to take it beyond the usual opprobrium that surrounds breaking a contract. As stated in *Whiten***,** at para. 36, "punitive damages straddle the frontier between civil law (compensation) and criminal law (punishment)". Criminal law and quasi-criminal regulatory schemes are recognized as the primary vehicles for punishment. It is important that punitive damages be resorted to only in exceptional cases, and with restraint.
>
> 63 In *Whiten*, this Court set out the principles that govern the award of punitive damages and affirmed that in breach of contract cases, in addition to the requirement that the conduct constitute a marked departure from ordinary standards of decency, it must be independently actionable. Where the breach in question is a denial of insurance benefits, a breach by the insurer of the contractual duty to act in good faith will meet this requirement. The threshold issue that arises, therefore, is whether the appellant breached not only its contractual obligation to pay the long-term disability benefit, but also the independent contractual obligation to deal with the respondent's claim in good faith. On this threshold issue, the legal standard to which Sun Life and other insurers are held is correctly described by O'Connor J.A. in *702535 Ontario Inc. v. Lloyd's London, Non-Marine Underwriters* (2000), 184 D.L.R. (4th) 687 (Ont. C.A.), at para. 29:
>
> > The duty of good faith also requires an insurer to deal with its insured's claim fairly. The duty to act fairly applies both to the manner in which the insurer investigates and assesses the claim and to the decision whether or not to pay the claim. In making a decision whether to refuse payment of a claim from its insured, an insurer must assess the merits of the claim in a balanced and reasonable manner. It must not deny coverage or delay payment in order to take advantage of the insured's economic vulnerability or to gain bargaining leverage in negotiating a settlement. A decision by an insurer to refuse payment should be based on a reasonable interpretation of its obligations under the policy. This duty of fairness, however, does not require that an insurer necessarily be correct in making a decision to dispute its obligation to pay a claim. Mere denial of a claim that ultimately succeeds is not, in itself, an act of bad faith.

[207] The analysis does not end however, once a court concludes that an award of punitive damages is triggered in a particular circumstance. The second and perhaps more difficult consideration is the determination of an appropriate quantum.

[208] In my view, the most comprehensive analysis respecting the quantification of punitive damages is that provided by Binnie, J. in **Whiten v. Pilot Insurance Co.**, 2002 SCC 18, in which the court emphasized the need for proportionality in any award being contemplated. Writing for the majority, Binnie, J. states:

> 109 If the award of punitive damages, when added to the compensatory damages, produces a total sum that is so "inordinately large" that it exceeds what is "rationally" required to punish the defendant, it will be reduced or set aside on appeal.
>
> 110 An award that is higher than required to fulfil its purpose is, by definition, irrational. The more difficult task is to determine what is "inordinate". Here, I think, the Court must come to grips with the issue of proportionality.
>
> 111 I earlier referred to proportionality as the key to the permissible quantum of punitive damages. Retribution, denunciation and deterrence are the recognized justification for punitive damages, and the means must be rationally proportionate to the end sought to be achieved. A disproportionate award overshoots its purpose and becomes irrational. A less than proportionate award fails to achieve its purpose.

[209] The court identifies several dimensions of proportionality including the blameworthiness of the defendant's conduct, the vulnerability of the plaintiff, the harm or potential harm directed specifically at a plaintiff, the need for deterrence, other penalties inflicted upon the defendant for the same conduct, and the advantage gained by the defendant from the misconduct. As to blameworthiness of a defendant's conduct, Binnie, J. states:

> 112 The more reprehensible the conduct, the higher the rational limits to the potential award. The need for denunciation is aggravated where, as in this case, the conduct is persisted in over a lengthy period of time (two years to trial) without any rational justification, and despite the defendant's awareness of the hardship it knew it was

inflicting (indeed, the respondent anticipated that the greater the hardship to the appellant, the lower the settlement she would ultimately be forced to accept).

113 The level of blameworthiness may be influenced by many factors, but some of the factors noted in a selection of Canadian cases include:

1. whether the misconduct was planned and deliberate: *Patenaude v. Roy* (1994), 123 D.L.R. (4th) 78 (Que. C.A.), at p. 91;

2. the intent and motive of the defendant: *Recovery Production Equipment Ltd. v. McKinney Machine Co.* (1998), 223 A.R. 24 (C.A.), at para. 77;

3. whether the defendant persisted in the outrageous conduct over a lengthy period of time: *Mustaji v. Tjin* (1996), 30 C.C.L.T. (2d) 53 (B.C.C.A.), *Québec (Curateur public) v. Syndicat national des employés de l'Hôpital St-Ferdinand* (1994), 66 Q.A.C. 1, *Matusiak v. British Columbia and Yukon Territory Building and Construction Trades Council*, [1999] B.C.J. No. 2416 (QL) (S.C.);

4. whether the defendant concealed or attempted to cover up its misconduct: *Gerula v. Flores* (1995), 126 D.L.R. (4th) 506 (Ont. C.A.), at p. 525, *Walker v. D'Arcy Moving & Storage Ltd.* (1999), 117 O.A.C. 367 (C.A.), *United Services Funds (Trustees) v. Hennessey*, [1994] O.J. No. 1391 (QL) (Gen. Div.), at para. 58;

5. the defendant's awareness that what he or she was doing was wrong: *Williams v. Motorola Ltd.* (1998), 38 C.C.E.L. (2d) 76 (Ont. C.A.), and *Procor Ltd. v. U.S.W.A.* (1990), 71 O.R. (2d) 410 (H.C.), at p. 433;

6. whether the defendant profited from its misconduct: *Claiborne Industries Ltd. v. National Bank of Canada* (1989), 69 O.R. (2d) 65 (C.A.);

7. whether the interest violated by the misconduct was known to be deeply personal to the plaintiff (e.g., professional reputation *(Hill, supra)*) or a thing that was irreplaceable (e.g., the mature trees cut down by the real estate developer in *Horseshoe Bay Retirement Society v. S.I.F. Development Corp.* (1990), 66 D.L.R. (4th) 42 (B.C.S.C.)); see also *Kates v. Hall* (1991), 53 B.C.L.R. (2d) 322 (C.A.). Special interests have included the reproductive capacity of the plaintiff deliberately sterilized by an irreversible surgical procedure while the plaintiff was confined in a provincial mental institution, although no award of punitive damages was made on the facts (*Muir v. Alberta*, [1996] 4 W.W.R. 177 (Alta. Q.B.)); the deliberate publication of an informant's identity (R. (L.) v. Nyp (1995), 25 C.C.L.T. (2d) 309 (Ont. Ct. (Gen. Div.)). In *Weinstein v. Bucar*, [1990] 6 W.W.R. 615 (Man. Q.B.), the defendant shot and killed plaintiffs' three companion and breeding German Shepherds who had merely wandered onto the defendant's property from a neighbouring yard. Here the "property" was sentimental, not replaceable, and, unlike the trees, themselves sentient beings.

[210] In discussing vulnerability of a plaintiff, the court makes the following cautionary observations:

> 114 The financial or other vulnerability of the plaintiff, and the consequent abuse of power by a defendant, is highly relevant where there is a power imbalance. In *Norberg v. Wynrib*, [1992] 2 S.C.R. 226, for example, speaking of a physician who had used his access to drugs to purchase sex from a female patient, McLachlin J. (as she then was) stated, at p. 276:
>
> > Society has an abiding interest in ensuring that the power entrusted to physicians by us, both collectively and individually, not be used in corrupt ways ... .
>
> A similar point was made by Laskin J.A. in the present case (at p. 659):
>
> > [V]indicating the goal of deterrence is especially important in first party insurance cases. Insurers annually deal with thousands and thousands of claims by their insureds. A significant award was needed to deter Pilot and other insurers from exploiting the vulnerability of insureds, who are entirely dependent on their insurers when disaster strikes.
>
> 115 I add two cautionary notes on the issue of vulnerability. First, this factor militates against the award of punitive damages in most commercial situations, particularly where the cause of action is contractual and the problem for the court is to sort out the bargain the parties have made. Most participants enter the marketplace knowing it is fuelled by the aggressive pursuit of self-interest. Here, on the other hand, we are dealing with a homeowner's "peace of mind" contract.
>
> 116 Second, it must be kept in mind that punitive damages are not compensatory. Thus the appellant's pleading of emotional distress in this case is only relevant insofar as it helps to assess the oppressive character of the respondent's conduct. Aggravated damages are the proper vehicle to take into account the additional harm caused to the plaintiff's feelings by reprehensible or outrageous conduct on the part of the defendant. Otherwise there is a danger of "double recovery" for the plaintiff's emotional stress, once under the heading of compensation and secondly under the heading of punishment.

[211] In terms of considering other penalties which a particular misconduct has attracted, the court noted:

> 123 Compensatory damages also punish. In many cases they will be all the "punishment" required. To the extent a defendant has suffered other retribution, denunciation or deterrence, either civil or criminal, for the misconduct in question, the need for additional punishment in the case before the court is lessened and may be eliminated. In Canada, unlike some other common law jurisdictions, such "other" punishment is relevant but it is not necessarily a bar to the award of punitive damages. The prescribed fine, for example, may be disproportionately small to the level of outrage the jury wishes to express. The misconduct in question may be broader than the misconduct proven in evidence in the criminal or regulatory proceeding. The legislative judgment fixing the amount of the potential fine may be based on policy considerations other than pure punishment. The key point is that punitive damages are awarded "if, but only if" all other penalties have been taken into account and found to be inadequate to accomplish the objectives of retribution, deterrence, and denunciation. The intervener, the Insurance Council of Canada, argues that the discipline of insurance companies should be left to the regulator. Nothing in the appeal record indicates that the Registrar of Insurance (now the Superintendent of Financial Services) took an interest in this case prior to the jury's unexpectedly high award of punitive damages.

[212] The Court will endeavour to apply the above principles to the case before it.

The designation of general damage awards in the context of subrogated claims

[213] National Life claims the sum of $300,000 from Mr. Brine arising from his receipt of funds by virtue of his settlement of his complaint to the Canadian Human Rights Commission. National Life relies upon the "Subrogation" provisions of the policy. The Court will be required to engage in a general interpretation of those provisions, however, one particular aspect may benefit from a consideration of legal authorities. National Life submits that the settlement being

framed as being for "general damages for intentional infliction of mental suffering, lack of accommodation, defamation and injury to his reputation" is not a bar to its subrogated claim. Does the above characterization preclude National Life from claiming such as past, present or future income?

[214] A similar question was posed in **Nova Scotia Public Service Long Term Disability Plan Trust Fund v. McNally** (1999), 176 N.S.R. (2d) 16 - upheld on appeal 1999 NSCA 129. In that instance, Mr. McNally was an employee of the Province of Nova Scotia and as such covered by the government long term disability plan. He was injured in a motor vehicle accident and received benefits from the plan. He subsequently negotiated an insurance settlement with the tortfeasor, which was global in nature. It did not breakdown what portions of the settlement related to loss of income.

[215] In its decision, the Court of Appeal summarized the conclusions reached by the trial judge as follows:

> 19 Stewart, J. reached the following conclusions:
>
> (1)The Plan was one of indemnity. Section 18(1) was unambiguous. It constituted a contractual subrogation. All of the insured employees' rights and remedies against the third party were subrogated to the Trustees. As between the Trustees and the appellant, only the former had the right of recovery. In pursuing the action the appellant acted in effect as the agent of the Trustees. The words "amount recovered by the Trustees" was not of interpretative significance.

> (2) There was a nexus between the injuries from the accident and the disability benefits which, on the evidence, "remained alive and well and reflected" in the settlement.
>
> (3) As to the allocation of the recovery, when the settlement was negotiated by the appellant rather than the Trustees the latter needed only to prove that the insured received a settlement from a third party. Then the onus shifted to the appellant to account for the apportionment of the lump sum amount over the various heads of damages and to establish that no portion of the recovered amount fell within the deduction provisions of s. 9(8) and s. 18.
>
> (4) The loss of income aspect was calculable with sufficient certainty that the obligation to account may be effected pursuant to s. 9(8) and/or s. 18. The income portion of the settlement was to be attributed to past loss of income in this case. The Trustees were therefore entitled to recover $40, 238.21, plus interest at 4% from July 28, 1995 to December 31, 1997, for a total of $42,183, plus interest, together with costs of $700.00.

[216] With respect to whether the heads of damage must be allocated in order for an insurer to seek subrogation rights in relation to a settlement, the Court of Appeal approved the trial judge's reliance upon an earlier decision of the Saskatchewan Court of Queen's Bench (**Young v. Saskatchewan** [1992] 5 W.W.R. 49). Writing for the Court Chipman, J.A. notes:

> 55 In *Young, supra*, the insured was covered by a disability income plan. Monthly payments were to be reduced by the amount of other benefits received, including regular payments awarded as compensation for loss of earnings because of third party liability, lump sums to be actuarially prorated to a regular monthly benefit. The disability insurer relied on the reduction of benefits clause in the Plan at issue which was a provision corresponding to s. 9(8) of the Plan. The insured took the position that, having received a lump sum settlement which did not contain an allocation for wage losses, there should be no deduction. Baynton, J. took the following approach, [1992] 5 W.W.R. 49, at p. 53:
>
> This issue should be approached bearing the following principles in mind:

> 1. The plan is designed to guarantee monthly compensation to the employee during his period of disability in an amount equivalent to 75 per cent of the wages he would have received if not disabled. It is not as such a pure or full disability plan in that the benefits it provides depend in part on what other disability or wage replacement benefits the employee receives.
>
> 3. The onus is on the defendant to establish that the plaintiff has received third party liability loss of earnings compensation from a source or in a manner that falls within the definitions of the policy. Once this has been done, especially where the particulars of the compensation are not available to the defendants, the burden shifts to the plaintiff to establish that the compensation does not fall within the deduction provisions of the policy. [This is analogous to the shifting of the burden of proof of disability for any reasonable occupation from the plaintiff to the defendant. Once the plaintiff has made out a prima facie case of disability, the burden shifts to the defendant to show that the plaintiff is capable of performing some other occupation.] In a settlement type of scenario, as opposed to a court award, the plan sponsor need only prove that the plaintiff received a settlement from a third party and the onus shifts to the plaintiff to establish the breakdown. But what about a settlement in which the plaintiff either deliberately or inadvertently did not break down the proceeds by category? Can he satisfy the onus of proving the nature and allocation of the settlement proceeds by simply relying on the fact that they were not specified? I think not. The plaintiff has sued the plan for benefits. Those benefits depend on what the plaintiff received for wage compensation. To get the benefits the plaintiff must establish what he received for wage compensation whether or not the allocation of the compensation was specified in the settlement itself. This requirement may be of no concern to the third party but it is of vital concern to the plan sponsor. It is untenable for a plaintiff to take the position that he can satisfy this onus of proof, (and thereby obtain additional disability benefits under the plan to which he is not entitled) by simply relying on the fact that the settlement itself did not expressly allocate the proceeds among the various heads of damages for which the plaintiff received compensation.
>
> 4. The fact that it may now be difficult to determine in retrospect the breakdown of the plaintiff's settlement does not relieve the plaintiff from doing so. Nor is there any term of the plan, express or implied, that waives the required deduction and increases the plaintiff's benefits payable under the plan because of such difficulty ...

56 I agree with this reasoning. I consider it applies equally to the somewhat different circumstances of this case.

[217] **McNally, supra** has been followed on several occasions by this Court. See **Ryan v. Sun Life Assurance**, 2003 NSSC 247 and **Inglis v. Nova Scotia (Attorney General)** 2007 NSSC 314, in particular.

ANALYSIS

[218] Prior to considering the specific issues outlined above, there are several preliminary observations and determinations which are equally important to reaching a conclusion to this matter. These are as follows:

(a) Mr. Brine's mental status,

(b) Mr. Brine's credibility, both general and specific, and

(c) The overall reliability of National Life's evidence, including both that of Anna Antonini and Julie Jako.

Mr. Brine's mental status

[219] The Court heard extensive evidence about Mr. Brine's mental status which extended over a period well in excess of 15 years. Dr. Rosenberg through his viva voce evidence and supporting reports entered into evidence, documented Mr. Brine's status at various points from 1995 until present. I accept Dr. Rosenberg's

description of Mr. Brine's diagnosis of depressive illness, his symptoms, mental state and abilities at various times as being an accurate reflection of his status.

[220] At all times material to this claim, National Life has continued to acknowledge that Mr. Brine remained totally disabled as defined within the policy due to his mental illness, and other than the withholding of benefits due to overpayment, his disability benefits were continued accordingly. I would agree, based on the evidence before the Court, that Mr. Brine did remain totally disabled and entitled to benefits under the terms of the policy. I further find, that other than brief windows of modest improvement in 1990 and 2004, Mr. Brine's mental health was such that he continued to be functioning at a significantly impaired level.

[221] What did National Life know about Mr. Brine's mental status, particularly from 1995 to 2000? National Life had several sources of information pertaining to Mr. Brine's disabling depressive condition, including reports from Dr. Rosenberg, Dr. Smith, Dr. Peterkin, as well as information provided by Suzanne Azzie. In her evidence, Ms. Jako confirmed that National Life was of the view, at least in July of 1998 when rehabilitation services were suspended that Mr. Brine was not improving. From the reports, National Life was aware that Mr. Brine was irritable, had sleep and concentration issues, was emotionally upset and generally not

functioning well in his activities of daily life. National Life had in particular, Dr. Rosenberg's letter of October 6, 1995 in which Mr. Brine is described as "functioning at a level of 40% of his normal" and Ms. Azzie's report of January 22, 1996 in which she advises he is functioning at "only 30% of his capacity". Ms. Jako testified that Mr. Brine was a "sick man". He was. I find National Life was fully aware of his condition and limitations, at least up until 2000.

Mr. Brine's credibility, both general and specific

[222] In my view, the assessment of Mr. Brine's credibility has to be considered through the lens of his depressive illness. His recollection of events and ability to recount accurately the timeframe in which certain events may have occurred was most certainly impacted by his ongoing condition. I found Mr. Brine to be a forthright witness, who attempted, to the best of his ability to convey his evidence accurately to the Court. At times, his recollection was assisted by documentation presented to him either in direct or cross-examination. Where there were inconsistencies in terms of timing or uncertainty in his recollection, I view these to be understandable due not only to the passage of time, but also to the severity of his illness, especially during the particular time period when his actions were most closely scrutinized due to the issues before the Court.

[223] In terms of Mr. Brine's credibility as it relates to particular issues, the Court must determine whether Mr. Brine did or did not provide to National Life notification of his receipt of CPP and PSSA benefits. Additionally, Mr. Brine's credibility is challenged by National Life, in terms of his receipt of the PSSA retroactive benefits and the representations he made to Superannuation in terms of how he would handle those funds.

[224] Mr. Brine asserts that when he received the Notice of Entitlement from CPP in January of 1998, he faxed it to National Life. He has no personal recollection of undertaking that action, but relies upon his handwritten notation on the document that he did so on January 20th, as well as his "usual practice" with respect to documenting his actions. His evidence was similar with respect to forwarding to National Life on July 14, 1998 the letter he received from Superannuation dated June 27, 1998 which advised as to his entitlement to a medical annuity. National Life argues that Mr. Brine did not forward the CPP Notification in January of 1998 as he asserts, and relies upon the evidence of Ms. Antonini. She bases this view on the fact that her review of the National Life file materials did not disclose the existence of that document within the file or history sheet notes, and that it lacked a fax cover sheet, unlike other pieces of correspondence from Mr. Brine. Clearly,

National Life asserts not only that it did not receive the document, but that Mr. Brine did not send it when he asserts he did.

[225] Contrary to the submission of Counsel encouraging the Court to view Mr. Brine's inability to recollect faxing the CPP Notification as an important evidentiary factor weighing towards a finding that he did not, I disagree. To the contrary, if Mr. Brine had testified that he had, many years after an event that he had no reason to anticipate would be central to a legal dispute, a specific recollection of faxing it, such would only serve to damage his credibility. He could have easily testified he had a memory of the event, but he did not. In my view, it is totally consistent with the passage of time and his condition that he had no current recollection. If he said otherwise the Court would be concerned with the veracity of such a statement. I accept Mr. Brine's evidence as to his practice of notation, and find that it is more probable than not, that both documents were forwarded to National Life in the manner and at the times indicated thereon. The lack of the Notice of Entitlement being found within the National Life file is not in my view indicative of whether Mr. Brine sent it, only whether or not it was received. Given the Court's concerns regarding the completeness and adequate handling of the National Life file which will be expanded upon further herein, the

fact that Ms. Antonini's review of the file did not disclose its existence is also not determinative in my view that it was not received when faxed.

[226] The second and more difficult assertion regarding Mr. Brine's actions and credibility relates to a letter dated July 31, 1998 from his then counsel to the Superannuation Directorate, as well as Mr. Brine's own letter of August 18, 1998 to the same office. National Life argues that these letters clearly show that Mr. Brine was not only aware that his retro-active payment from PSSA was subject to being off-set as against disability benefits previously paid, but also that in the later letter, Mr. Brine undertook to "allocate funds accordingly". It is asserted that Mr. Brine knowingly and purposefully kept the entirety of the retroactive PSSA payment, when National Life had a valid claim against a substantial portion of those funds. On the face of those documents, that is not an unreasonable assertion. However, there is a broader context to be considered.

[227] A consideration of the broader context starts with the two factual findings made above, namely, that on January 20, 1998 Mr. Brine sent the CPP Notification to National Life and that on July 14, 1998, he sent notification of his approval for a medical annuity. Additionally, Mr. Brine had received a letter from National Life alerting him to the possibility of an overpayment being claimed dated January 19, 1998, and a subsequent letter dated July 30, 1998 advising him that his benefits

were continuing and that no overpayment was being sought as per the earlier correspondence. Although acknowledging that the January 19th letter only specifically referenced the "return of contributions" payment, Mr. Brine testified that upon receipt of that letter, and the subsequent one in July, he understood that National Life was referencing both CPP and Superannuation overpayments. He testified that the letter sent by his counsel was written prior to receiving what he understood was National Life's assertion that no overpayment would be sought, thus accounting for the reference to the necessary procedure to implement re-payment. His second letter, dated August 18, 1998, was written after receipt of National Life's letter of July 30th, and he testified that he was under the belief that no upfront repayment was being sought.

[228] Clearly, Mr. Brine's interpretation in 1998 of the above correspondence from National Life was inaccurate. There was no intention on its part to waive the right to seek payment in relation to either the CPP or PSSA medical annuity retroactive payments, rather the correspondence related only to the reversed "return of contribution" payment. The issue is not however, whether Mr. Brine's interpretation was ultimately correct, but whether he genuinely held the belief that National Life was waiving its right to an upfront repayment, or alternately, he orchestrated a scenario whereby National Life would not be in a position to recoup

its overpayment directly from the retroactive payment. I find that Mr. Brine's misinterpretation was just that, a misinterpretation, as opposed to a deliberate attempt to circumvent National Life from receiving funds it claims it is owed. There are a number of factors of significance to the Court in reaching that conclusion. Mr. Brine had sent the CPP Notification in January, and the Superannuation approval in July, so upon receipt of correspondence from National Life, it would not be unreasonable for him to read the letters assuming that the information he sent had been received and considered by National Life. Additionally, Mr. Brine testified that he understood that in terms of his CPP and Superannuation claims, that National Life was receiving current and accurate information from both CPP and Superannuation directly and through the Treasury Board, and as such, when he received letters from his insurer, he understood it was based upon accurate information from those sources. It occurred to the Court to question how Mr. Brine could possibly think that National Life was waiving its overpayment in relation to what amounted to significant amounts of money. What must also be considered however, is that Mr. Brine testified that he understood that such payments would be pro-rated over the life of the policy, not payable "upfront". Further, having found that Mr. Brine had sent the notification of his approval for PSSA medical retirement to National Life on July 15, 1998, the Court

seriously doubts that an individual intending to attempt to improperly hold on to the funds, would have, only weeks earlier, waived a red flag that those very funds would be received in the very near future.

The overall reliability of National Life's evidence, including that of both Anna Antonini and Julie Jako

[229] In their evidence both Ms. Antonini and Ms. Jako relied heavily upon the information contained in the National Life "History Sheets" as well as correspondence in their file to describe the management of Mr. Brine's claim, the timing of various events and the rationale for various decisions made in relation thereto. In answering inquiries posed to them including in their direct examination, both witnesses would often pause before answering to review the "History Sheets" and correspondence contained in the joint exhibit book. Given the passage of time and the fact that other National Life employees other than the witnesses were also involved in the file, that is not unexpected or unreasonable. What is of concern to the Court is that the "History Sheet" notes and correspondence were also utilized by the witnesses, Ms. Antonini in particular, as support for various assertions that certain events or contacts did not occur. The non-receipt of the Notice of Entitlement in January of 1998 is the primary

example, along with the assertion Mr. Brine "always" sent a fax cover sheet with his letters, and had never prior to May of 1999, raised with National Life any concern regarding the taxability of his disability benefits.

[230] I am satisfied that the "History Sheets" do not constitute a full or reliable record of the events relating to the management of Mr. Brine's claim and that they cannot be relied upon as an accurate reflection of all events, including various contacts, receipt of documents and tasks undertaken. Further explanation may be helpful. The notes contained in the "History Sheet" pages cover a period commencing on June 21, 1995, with a final notation being recorded on June 3, 1999. The types of notations recorded include documenting various tasks undertaken (ie. Dec. 30/96 - faxed report to S. Azzie; Dec. 22/96 - requesting progress report from Dr. Rosenberg), summarizing documents received from both doctors and others (ie. Jan. 26/98 - received bi-weekly report from S. Azzie stating that . . .; Aug. 13/98 - received Dr. Peterkin's report, he advises . . .), documenting telephone calls from Mr. Brine and third parties (ie. Nov. 3/95 - call from Ports Canada; Aug. 15/97 - call from Superannuation), and sets out recommended plans of action for approval by Ms. Jako (ie. July 15/97 - Julie, please review and advise).

[231] It is not difficult to identify various "gaps" and obvious omissions. Some, but not all examples, are as follows:

a) The evidence discloses that Mr. Brine completed a form in relation to his application for CPP benefits entitled *"Deduction and Payment of Canada Pension Plan Disability Benefits to an Administrator of a Disability Income Program"* (JEB - C8), which he signed on November 9, 1997. The purpose of the form was to authorize HRDC to release information about his CPP claim to National Life. There is a portion for National Life to complete, which appears to be signed and dated by Vicenta Blake on January 21, 1998. Ms. Antonini was referenced to this form in her direct evidence and testified that Ms. Blake forwarded it to CPP in January of 1998. A review of the "History Sheets" does not disclose any notation regarding the receipt of the signed form from Mr. Brine. More importantly, there is no reference in January of 1998, or at any time, to Ms. Blake sending the form to CPP, nor, in the "National Life correspondence in chronological order" (JEB - G2) is there a copy of the letter purportedly sent by Ms. Blake to CPP enclosing the form. The only documentation in National Life's material regarding this request is the response received back from HRDC by letter dated August 24, 1998 in which it advises it is unable to respond to the form "recently submitted". The "History Sheets" also do not document receipt of that letter;

b) The evidence further discloses that Mr. Brine completed a form entitled *"Agreement Regarding Long Term Disability Payments"* which he signed on November 12, 1997. Ms. Antonini testified that this form was received by National Life on December 29, 1997. There is no reference in the "History Sheets" to this document being received;

c) The "History Sheets" show a gap of 5 months between August 15, 1997 and January 26, 1998 with absolutely no notations. Letters were sent to Mr. Brine from National Life in this time frame, and the rehabilitation services of Ms. Azzie were still ongoing, yet no activity, whatsoever in terms of the management of Mr. Brine's file is documented;

d) Ms. Antonini testified that Dr. Peterkin's IME was sent to Dr. Rosenberg, and that National Life received no reply from him. Although the "History Sheet" documents that it was suggested on August 13, 1998 that the report be forwarded to Dr. Rosenberg, there is no confirmatory notation that such was done. More importantly however, is the lack of a letter in National Life's correspondence file, to Dr. Rosenberg enclosing the Peterkin report. If it was sent, where is it?;

e) The "History Sheets" do not reference the receipt of a fax from Anne Goguen of Superannuation dated February 28, 1998, yet clearly it was received.

[232] Both Ms. Antonini and Ms. Jako testified that the LTD department ceased having an active role in the management of Mr. Brine's claim, as it was in 1999 in the hands of "legal". The Court took this to mean either the National Life legal department or outside legal counsel. This was highlighted by Ms. Antonini's evidence relating to rehabilitation services. She testified that following rehabilitation services being suspended in 1998, Mr. Brine did not make a request to National Life for it to be re-instated, and if he had, they would have considered any new information or reports.

[233] This purported lack of knowledge regarding Mr. Brine's requests to re-initiate rehabilitation was addressed in cross-examination. Ms. Antonini testified that she was unaware that in an affidavit sworn by National Life's legal counsel on May 18, 2000, he represented that Mr. Brine "requested that National Life provide him with rehabilitation services under the terms of the policy". She explained that the file was "in legal" at that time and as such she would be unaware of such request. She further testified that she was not aware of Dr. Rosenberg's letter of October, 2000 in which he referenced the deleterious effects on Mr. Brine of rehabilitation services being discontinued, explaining that it was not in her file.

[234] Similarly, Ms. Antonini was unable to explain why National Life continued to completely claw-back Mr. Brine's disability benefits following his bankruptcy,

as the file had gone to "legal" by that point. In the same vein, Ms. Antonini testified she had not seen or been asked to review the Independent Medical report of Dr. Rubens in April of 2003. She could not explain why it was requested or why it had not been disclosed until days before the commencement of trial.

[235] Ms. Jako testified she did review the Rubens report in 2003 with in-house counsel and a decision was made to continue Mr. Brine's disability benefits at that time. She could not explain why it was not disclosed until days before the commencement of trial.

[236] What is clear is that the ongoing administration of Mr. Brine's disability claim ceased being undertaken by National Life's LTD department and became the responsibility of the legal department or their outside counsel. Although some materials after this transfer would be subject to litigation privilege, the Court was presented with absolutely no evidence as to how Mr. Brine's claim was managed, how his request for the re-instatement of rehabilitation services in 2000 was considered, why he was requested to attend for the Rubens IME in 2003, or why that report was not disclosed in a timely fashion. The only two witnesses called by National Life relating to the management of the claim could not meaningfully address any issue of substance from mid-1999 forward.

[237] Ms. Antonini did however, despite being unable to address a number of inquiries due to the file being "in legal", offer insight on taxability issues which arose post-2000. She testified regarding National Life complying with Mr. Brine's request in October of 2003 to stop withholding tax, and she testified that she became aware of the Tax Court's 2006 decision, which was she said, referred to the Treasury Board for direction. She testified that neither Mr. Brine nor his counsel contacted National Life following that decision to request any change be made to his T4 slips issued by the company.

[238] How did Ms. Antonini know this information? Although there is documentation establishing the October 2003 communications between National Life and Mr. Brine, on what basis does Ms. Antonini offer the balance of her evidence on this issue? According to her evidence and that of Ms. Jako, the file was in "legal", not being administered by the LTD department. It is difficult to understand how Ms. Antonini can testify as to contacts with the Treasury Board in 2006 regarding the Tax Court decision, or definitively state that National Life was never asked by Mr. Brine to address the ramifications of that decision. There were no notes or other file materials before the Court on which Ms. Antonini could have based this testimony. It is further troublesome that she could not answer questions

posed on cross-examination regarding some issues due to the file being outside of LTD, yet on direct was apparently aware of events in 2006 relating to taxability.

[239] The Court has other specific concerns relating to Ms. Antonini's evidence and the impact it has on her credibility. As referenced earlier herein, Ms. Antonini testified that Vicenta Blake forwarded the authorization form to HRDC in order to collect information pertaining to Mr. Brine's CPP claim in January of 1998, yet there is absolutely no reference in the National Life file material that such was in fact the case. In fact, it is much more probable based on the materials reviewed above, that Ms. Blake DID NOT forward the request to HRDC in January, but rather in August of 1998, some 6 months later. Ms. Antonini based her evidence upon an assumption that the form was sent when dated by Ms. Blake, an assumption which is not borne out by National Life's own materials. This is troublesome, as it causes the Court to question what other aspects of Ms. Antonini's evidence was based on incorrect assumption.

[240] In her direct examination, Ms. Antonini testified that Mr. Brine did not advise National Life that he had made an application for CPP disability benefits. This is despite her evidence that National Life had sent the necessary forms to Mr. Brine and suggested that he apply. This is despite her evidence that Mr. Brine had completed two forms requested by National Life, relating to his potential receipt of

CPP benefits - the "*Agreement Regarding Long Term Disability Payments*" and "*The Deduction and Payment*" forms referenced earlier - which he sent to National Life in late December of 1997. This is despite the reference contained in the "History Sheet" dated January 26, 1998 that it was suggested to follow up with Mr. Brine regarding "CPP". Incredibly, this is despite the "*Agreement Regarding Long Term Disability Payments*" signed and forwarded by Mr. Brine to National Life stating:

> I certify that I have made formal application on the prescribed form for disability benefits under the Canada Pension Plan.
>
> Date of Application: October 16, 1997.

[241] Contrary to Ms. Antonini's assertion, Mr. Brine DID advise National Life that he had made an application to CPP, by way of a signed statement which further provided the date he made the application. If Ms. Antonini did not consider this to be notification from Mr. Brine that he had made an application, it is difficult to envision what further he would have needed to do. To say the above is troublesome is an understatement.

[242] In its Amended Defence and Counterclaim, National Life advances a counterclaim seeking re-imbursement pursuant to the "*Subrogation*" provisions of

the policy and arising from the settlement of Mr. Brine's complaint to the Canadian Human Rights Commission. The Counterclaim asserts:

> 9. By a complaint form dated March 17, 1996 and a complaint form amending the said complaint, dated June 21, 2001, Brine made a complaint against the Halifax Port Authority and Transport Canada to the Canadian Human Rights Commission, pursuant to section 7 of the Canadian Human Rights Act (the "Complaint") seeking, in part, damages for loss of income.
>
> 10. Brine gave no notice of the Complaint to National Life.

[243] In support of the Counterclaim, Ms. Antonini testified that National Life was unaware of Mr. Brine's complaint regarding the Halifax Port Corporation made to the Canadian Human Rights Tribunal until after it was resolved in 2004 or 2005. Given the clear contents of the National Life file materials before the Court, which Ms. Antonini had reviewed and referenced in support of some aspects of her evidence, the Court simply cannot fathom how the witness could make such a representation.

[244] There are **numerous** references in National Life's file materials which clearly establish that not only was it aware of that complaint, but that **Mr. Brine** was the source of that information. The "History Sheets" contain the following references:

> a) Dec. 13/96 - S. Azzie has sent us a report advising us that his case with Human Rights commission is looking good;

b) Jan. 27/97 - Check status of the Human Rights and Court case at the end of March;

c) April 8/97 - As per S. Azzie, Mr. Brine's case goes before the Tribunal April 1, 2 and 7;

d) July 15/97 - Received Azzie's report stating that the decision has not yet been rendered at the Human Rights.

[245] There are numerous references to the Human Rights complaint contained in Ms. Azzie's written reports to National Life:

a) January 22, 1996 - "Mr. Brine has a case lodged with the Human Rights Commission on grounds of discrimination and harassment and details regarding the status of his case will be provided once they have been received";

b) December 11, 1996 - "His case is presently under investigation with the Human Rights Commission. Some new developments have occurred which are encouraging to Mr. Brine";

c) May 21, 1997 - "On May 20, 1997, I received a telephone call from Mrs. Brine. She told me that she and her husband were in Ottawa to appear before the Human Rights Commission. She asked if she and her husband could come to see me to bring me up to date on his case with the Labour Board and the Human Rights Commission";

d) July 11, 1997 - "His case with the Human Rights however is still ongoing and it is not known when their decision will be rendered".

[246] Finally, Dr. Peterkin's report, received by National Life in August of 1998 contains the following reference:

> While on his medical leave, Mr. Brine signed what he thought was a severance contract, but which he reports now to be a document of dismissal. He feels that he has been "cheated by the workplace, blamed for revealing a dishonest superior, and that he is being persecuted by the officials related to his attempts to expose a cover-up". He remains extremely angry about this, but several court challenges and **Human Rights appeals** are apparently underway at this time. (Emphasis added)

[247] Although Mr. Brine may not have advised National Life of the resolution of his complaint in 2004, it is clear that very early on, he reported to Ms. Azzie that the complaint was made, and continued to keep her updated with respect to its progression. Further, Mr. Brine was open with Dr. Peterkin, the physician undertaking a report for National Life, that the matter was still ongoing in August of 1998. The existence of the Human Rights matter is not a single discrete reference in the National Life materials, but it is mentioned on numerous occasions, including a notation by LTD department Director Julie Jako directing LTD staff to follow up on the matter. How could Ms. Antonini miss this?

[248] I digress at this point to express the view that the above evidence only serves to re-inforce the Court's finding that Mr. Brine did not attempt to conceal information from National Life, but rather was forthcoming with information which if he was ill-motivated, he could have readily withheld. But what about Ms. Antonini's intentions? She made two very strong and clear representations to the Court elicited through her direct evidence - that Mr. Brine had not advised National Life that he had made application for CPP benefits, and that National Life was unaware of the Human Rights complaint until 2004 or later. Not only does the Court not accept those representations, it is difficult to comprehend how they could be made in view of the information to the contrary in National Life's own file

materials. Given the importance of the issues, it is difficult to accept that Ms. Antonini was mistaken or "missed" the references in her file materials. Rather, I find it more probable that her evidence was a purposeful attempt to paint Mr. Brine in as negative a light as possible in order to reinforce National Life's position that he breached the duty of honesty by not being forthright about matters impacting upon the claims before the Court.

[249] The Court is left with serious reservations about the reliability of Ms. Antonini's testimony, and I conclude that in many respects her evidence was given to support National Life's position, without regard to accuracy. I had similar concern with respect to one aspect of Ms. Jako's evidence, that surrounding her decision to suspend rehabilitation services. I simply cannot accept her explanation as to how she reached that decision. This will be canvassed in detail below.

Was National Life entitled to claim an overpayment of $99506.64 due to Mr. Brine's receipt of CPP and PSSA retroactive lump sum payments?

[250] This is perhaps the easiest inquiry the Court must address. The answer is clearly "yes". The CPP and PSSA benefits clearly fall within the "Reduction"

provisions of the policy which do not permit an insured to receive such benefits plus full disability benefits.

Was National Life subsequently estopped from claiming that overpayment due to the representations made to Mr. Brine?

[251] As noted earlier herein, Mr. Brine argues that National Life's two letters advising of a potential overpayment (January 1998) and their subsequent letter advising him to disregard the earlier correspondence (July 1998) should have prevented National Life from claiming an overpayment. I disagree.

[252] As noted in **Manacle, supra**, in order to apply the doctrine of estoppel, the Court must find that National Life made a representation intending to affect their legal relationship with Mr. Brine, and that he then relied upon that representation to change his position. The evidence fails to establish either element.

[253] National Life's correspondence referenced only a potential overpayment in relation to Mr. Brine's "return of contribution" payment. There is no evidence National Life intended to waive its right to re-coup an overpayment arising from Mr. Brine's receipt of other funds. In fact, there is evidence to the contrary. Further, although Mr. Brine may have misunderstood what was being conveyed by

these letters (which I have so found), the Court heard no evidence upon which it can conclude that he altered his position in any way.

Was National Life entitled to recoup the overpayment of $99506.64 by virtue of a total upfront claw back of Mr. Brine's monthly disability benefits?

[254] Both parties rely upon the same provision of the policy in support of their opposing views. For ease of reference, that provision found in the "Reduction" section of the policy provides:

> If an employee should receive a lump sum settlement in lieu of, **or** as an accumulation of periodic benefits from any of the sources described above, other than as described under clauses (4) and (5), the amount of the lump sum received shall be apportioned equally over the period from the date of payment of such lump sum to the date of the employee's 65th birthday, and the amount apportioned to each month or partial month in the period shall be deemed a benefit payable for such month or partial month. (Emphasis added)

[255] There is no suggestion that Mr. Brine's benefits fell within the category of those contemplated in clause (4) or (5) referenced above. The arguments regarding the above centered solely on how the provision should be interpreted.

[256] National Life submits, supported by the evidence of its witnesses, that retroactive lump sum payments had never been pro-rated over the remaining balance of a policy in any situation that they could recall. They explained the

provision permitting a pro-rating is solely intended to apply to those circumstances where a lump sum settlement constitutes a payment of future income losses. Mr. Saunders argued, quite capably, that such an approach makes complete financial sense. In fact, to pro-rate retro-active payments would be contrary to any reasonable interpretation of the policy, as an insured would have recovered their past losses, plus disability benefits for the same period, resulting in double recovery. Mr. Saunders further directed the Court's attention to the fact that the policy provision in question was subsequently amended, and is now entirely reflective of the interpretation advanced by National Life. He suggests the amendment served to "clarify" the intent of the original provision.

[257] Mr. Mason argued that the provision does not say what National Life asserts that it does. He submits the provision clearly directs that lump sum payments are to be pro-rated, subject to exceptions which do not apply in this case. In the alternative, he submits that the provision is ambiguous and capable of alternative interpretations, and as such, should be interpreted in favour of Mr. Brine.

[258] In my view, the provision in question is not as "clear cut" as National Life asks the Court to accept. Further, although I agree that there are good financial reasons why National Life would want the provision interpreted to exclude lump sum payments of retroactive awards, there are also financial reasons why a

claimant may say such should be included. A claimant may fully anticipate National Life being willing to structure a pro-rated repayment given that in many instances of a retroactive payment, a claimant has not regularly received that particular source of income, and the disability benefits themselves do not constitute a full indemnity of their pre-disability income. A claimant having been placed in financial circumstances more challenging than normal, may very well anticipate such a provision being negotiated by the policyholder as a means of alleviating financial hardship which may have arisen due to the disability and resulting drop in income. I cannot reject the interpretation advanced by Mr. Brine as not being within the reasonable contemplation of the parties to the policy.

[259] The provision is open to alternate interpretation. I base that conclusion on several observations. The clause does not clearly differentiate between lump sum payments covering retroactive versus future income payments. Further the use of the phrase "or as an accumulation of periodic benefits from any of the sources described above" gives rise to a question as to its meaning and purpose of inclusion. Mr. Saunders submits this references a situation where a party received a final lump sum settlement which encompasses an accumulation of future benefits and should be read in conjunction with the phrase that immediately precedes it. Typically, or at least sometimes however, "accumulation" is used to describe some

event which has already occurred. The "or" is significant and in my view its use creates two alternative scenarios in which a pro-rated payment will arise. Mr. Brine's situation would fall within the second category - he received an accumulation of periodic benefits. In light of the above, Mr. Brine's interpretation should prevail. National Life was not entitled to undertake a complete claw back of his monthly disability payments. The overpayment should have been pro-rated on a monthly basis until Mr. Brine's 65th birthday.

[260] Before departing from this subject, I make two further observations relating to the ambiguity of the provision. Firstly, if it required clarification by way of a subsequent amendment, such suggests the original provision was not as clear as National Life asserts. Secondly, in a letter dated February 10, 2000 from Mr. Saunders to Mr. Brine (JEB - G2, page 53) the calculation of the overpayment is set out by counsel. The letter concludes as follows:

> We intend to make an application for an Order confirming National Life's entitlement to continue setting off monies that would otherwise be payable to you under the policy until the overpayment has been discharged in full.

[261] Such an application was never brought, but it does suggest that National Life itself did recognize that perhaps direction from the Court regarding the application of that provision may be prudent.

Did Mr. Brine's bankruptcy extinguish the balance of the overpayment outstanding or can National Life rely upon s. 178(1) of the Bankruptcy and Insolvency Act?

[262] Based on **Galambos, supra** and its application in this Province in **Standard Life, supra**, in determining whether Mr. Brine was acting in a fiduciary capacity towards National Life, the Court must inquire as to two elements. Did he provide an undertaking of loyalty to National Life? Did Mr. Brine have discretionary power to affect the interests of National Life? A negative response to either would preclude a finding that Mr. Brine was a fiduciary. Both are answerable in the negative.

[263] To provide an undertaking as contemplated within the meaning of the provision, the person must intend to make it. I cannot conclude that either the "*Agreement Regarding Long Term Disability Payments*" signed by Mr. Brine or the letter Mr. Brine authored to Superannuation in August of 1998 constitute an undertaking that he would forego his own interests in favour of those of his disability insurer. In particular, I re-iterate the Court's earlier findings with respect to Mr. Brine's understanding of circumstances at the time of authoring that letter in particular. He had no intent to give the type of undertaking required to give rise to an ad hoc fiduciary duty. In the same vein, the "*Agreement*" constitutes a contractual obligation only, not an undertaking to act in a fiduciary capacity.

[264] As to the second element, I decline to find that Mr. Brine possessed a discretionary power to alter National Life's legal or practical interests. He was obligated by the policy to report his receipt of other benefits, and he was obligated to accept a reduction of his disability benefits by virtue of receipt of such funds. He was contractually bound by the policy in both regards and the fact that National Life asserts he may have breached those obligations, even if such was the case, would not serve to place discretion in his hands. National Life also asserts that Mr. Brine had discretion to apply for CPP benefits and given the "*Agreement*" he signed, he had the ability to impact its position by not exercising that discretion in its favour. Mr. Brine did not have discretion as to whether or not he was to apply for CPP benefits. I have no hesitancy in concluding that if Mr. Brine did not comply with National Life's request to make application to CPP and complete the required authorization and agreement, National Life would not have simply let the matter drop. Given the demonstrated means in which his claim was managed, if Mr. Brine had declined to apply for CPP benefits, it is very probable the insurer would have made a unilateral deduction from his benefits in response.

[265] Based on the foregoing, the balance of the overpayment claimed by National Life, being the sum of $62036.81 was extinguished by the bankruptcy.

Did National Life breach the duty of utmost good faith owed to Mr. Brine?

[266] As a starting point, I acknowledge and agree with the position advanced by National Life that not every breach of a "peace of mind" contract of insurance, or every mis -step shown to have occurred will constitute a breach of the duty of utmost good faith. The Court must be cautious to not peer through the critical glasses which hindsight may tempt one to wear. In assessing National Life's conduct, the Court must be concerned with why a decision was made or a position advanced, and the information upon which such was based at the time. It is further important to articulate that the duty of utmost good faith extends over the duration of the life of a policy. Although considerations such as privilege may arise once litigation is commenced, the fact that a legal claim has been filed does not serve to remove or lessen the duty to act in good faith.

[267] Mr. Brine argues numerous instances where National Life breached the duty of good faith, including improperly instituting an upfront claw back of the overpayment; continuing the claw back in light of Mr. Brine's bankruptcy; suspending and failing to re-initiate rehabilitation services; failure to disclose the Dr. Rubens IME in a timely manner; making allegations of "misappropriation" and "fraud" against Mr. Brine and failing to address Mr. Brine's concerns regarding the taxability of his disability benefits. I will address each of these in turn.

[268] Although I have found that National Life was not entitled to an upfront claw back of the overpayment, but rather should have pro-rated same over the life of the policy, I cannot characterize such as a breach of utmost good faith. The position advanced by National Life was not unreasonable or arbitrary in light of the policy provision in question. It was reflective of a possible interpretation of the policy.

[269] Similarly, the position advanced by National Life with respect to whether the overpayment survived Mr. Brine's bankruptcy, although wrong, was not advanced in breach of its duty of good faith. At the time that position was initially advanced, not only had the Supreme Court of Canada not articulated with the clarity found in Galambos, supra the requirements giving rise to an ad hoc fiduciary duty, there were legal authorities which supported National Life's view. As such, its argument that Mr. Brine was in fact a fiduciary, should not be considered as having been advanced in bad faith.

[270] I turn now to consider the issue of rehabilitation services, a topic which wove itself in a very significant fashion through the evidence and submissions. Mr. Brine submits that the suspension of rehabilitation services and the subsequent failure to re-initiate same constituted a breach of the policy, as well as National Life's duty of utmost good faith. The insurer strenuously opposes such an assertion. National Life takes the position that the provision of rehabilitation

services is not compellable under the terms of the policy. Rather, discretion rests with the insurer to offer such services where it feels appropriate. As such, there can be no policy breach for a failure to re-instate. National Life argues they have no duty, contractual or otherwise, to rehabilitate Mr. Brine.

[271] National Life further submits that it acted reasonably in reaching the decision to implement rehabilitation and more importantly to suspend such services. It relied upon the evidence on file that Mr. Brine was, in July of 1998, not improving, that he was not ready to return to work, and as such that rehabilitation should be suspended. After receiving Dr. Peterkin's IME report, National Life continued disability benefits but determined rehabilitation would not be re-instated. National Life argues that Ms. Jako made this decision based on a fair and thorough review of all material available to her. There was no breach of the duty of utmost good faith.

[272] In terms of not implementing rehabilitation in later years, National Life submits that Mr. Brine never reached a point where he had improved sufficiently to commence rehabilitation services, and as such it cannot be faulted for not providing an unwarranted service. Further, it submits that nothing prevented Mr. Brine from privately seeking out rehabilitation services if he wanted them, especially once he had received a significant financial settlement in 2004.

[273] The Court agrees with National Life that it was not obligated to rehabilitate Mr. Brine. Based on the wording of the policy I also conclude that had National Life originally refused to initiate rehabilitation services, as long as its decision was not arbitrary but based on a reasonable and fair assessment of Mr. Brine's condition, it could not have been compelled to offer this benefit. However, the analysis cannot conclude at this point, as National Life did decide to offer rehabilitation services.

[274] In my view, National Life cannot escape its obligation to manage in good faith the provision of this benefit, just because it was not obligated to provide it in the first instance. National Life chose to provide rehabilitation services. It chose to provide such services contrary to the recommendation of Dr. Rosenberg. The duty of utmost good faith attaches to its management of this benefit. Ms. Jako made the decision to suspend Mr. Brine's rehabilitation services, and further decided not to subsequently re-instate them. As referenced earlier, the Court has concern with respect to her evidence regarding her rationale for these decisions.

[275] Ms. Jako testified that she reviewed all the material in National Life's file, but also continued to repeatedly assert that she placed heavy reliance on Dr. Rosenberg's last report which opined Mr. Brine was not ready to return to work. She asserted the opinion of the treating psychiatrist was important, but she also

wanted an independent medical to assess the issue of the potential to return to work. As such, Mr. Brine was asked to meet with Dr. Peterkin. If Mr. Brine had no reasonable chance of returning to work, she testified the continuation of rehabilitation services would be unwarranted. She testified Dr. Rosenberg was provided with the Peterkin report and never contacted National Life to advise that he felt continuing rehabilitation was appropriate.

[276] On its surface, the above testimony and stated approach appears reasonable. What elicits concern however is the "last" Rosenberg report Ms. Jako repeatedly pointed to as justification for suspending rehabilitation and her view that Mr. Brine was not improving sufficiently to participate in rehabilitation services. That report was dated July 30, 1997, nearly 11 months prior to suspending Ms. Azzie's services. There was no current medical information on file as to Mr. Brine's actual condition in June of 1998. None was sought from Dr. Rosenberg prior to suspending services, nor was Ms. Azzie consulted. Instead, the Peterkin IME was requested.

[277] Dr. Peterkin did not opine that Mr. Brine was incapable of returning to work. To the contrary, he was of the view that his present condition did not prevent him from working. That was the very issue on which Ms. Jako testified she wanted an objective independent opinion, in order to decide whether to continue with

rehabilitation services. Despite the opinion saying Mr. Brine was capable of returning to work, Ms. Jako did not re-instate rehabilitation services.

[278] Challenged in cross-examination, Ms. Jako provided two explanations for her not acting on the very opinion she had sought to obtain. Firstly, the list of treatment recommendations made by Dr. Peterkin was so onerous; she did not feel it was "fair" to expect Mr. Brine to attempt a return to work while implementing such treatment. Secondly, she testified she became aware shortly thereafter that Mr. Brine had qualified for CPP, and in such circumstances claimants never return to work. She further repeated that Dr. Rosenberg never, after receiving the Peterkin report, contacted National Life to advise that rehabilitation was warranted.

[279] The Court has great difficult with the justification offered by Ms. Jako for her decision surrounding rehabilitation post-receipt of the Peterkin report. Firstly, the Peterkin report, which was purportedly requested to consider the advisability of rehabilitation continuing, contained an opinion which arguably referenced the appropriateness of Mr. Brine being engaged in that very type of process. It stated:

> *The absence of any work or re-training challenge may indeed worsen Mr. Brine's chronic rage symptoms as he finds himself ruminating about the workplace on a daily basis.*

[280] National Life argues this provision should not be interpreted as Dr. Peterkin recommending rehabilitation services to continue. Mr. Brine argues it does. Only Dr. Peterkin could advise what was intended and he was not a witness at trial. What is significant to the Court however is that notwithstanding the stated purpose of the IME, notwithstanding Dr. Peterkin's opinion that Mr. Brine could return to work, and notwithstanding the potential meaning of the above statement, National Life did not follow-up with Dr. Peterkin to clarify what he meant. National Life did not consult with their own rehabilitation consultant, Ms. Azzie as to whether services could be beneficial in light of the Peterkin report. National Life did not contact Mr. Brine to advise that rehabilitation services were ending, nor did they provide him with an explanation.

[281] Both Ms. Antonini and Ms. Jako fell back repeatedly to Dr. Rosenberg's absence of a response to the Peterkin report as further justification for not re-initiating service. There are problems with this assertion. As discussed earlier herein, there is no record of when Dr. Rosenberg received the Peterkin report, although I am satisfied that at some point he did. More importantly, what did National Life expect him to do when he received it? There is nothing in the evidence to suggest National Life asked Dr. Rosenberg to respond to any of the

contents of the report, or specifically asked his view as to the advisability of re-initiating rehabilitation.

[282] With respect to Ms. Jako's explanation that rehabilitation was not re-instated due to Mr. Brine's receipt of CPP benefits, I cannot accept such as a valid rationale for concluding Mr. Brine was incapable of returning to work, and thus rehabilitation was not warranted. Firstly, Ms. Jako did not have access to the medical information which supported the successful CPP application. Secondly, such a finding was contrary to the very recent opinion of Dr. Peterkin. Finally, National Life made no attempt to discuss with Mr. Brine whether he would want to participate in rehabilitation notwithstanding his receipt of CPP benefits.

[283] At best, Ms. Jako's decision to first suspend and then not re-initiate rehabilitation services upon receipt of the Peterkin report was not well considered. National Life was under an obligation to act fairly when investigation and assessing a claim. In my view this extends to the provision of rehabilitation services particularly where the insurer had, contrary to medical advice, made the decision to initiate the services. Ms. Jako acted on obviously outdated medical information from Dr. Rosenberg and made no attempt to collect current information as to Mr. Brine's status or the advisability of stopping rehabilitation once it had been started. Upon receipt of the Peterkin report, Ms. Jako ignored the

very opinion for which she had suspended rehabilitation in order to obtain. Again, she forged ahead with her own view, without seeking clarification or important input from those more suited to offer insight. Ms. Jako's handling of the above constituted a breach of National Life's duty of utmost good faith to their insured.

[284] Before leaving the issue of rehabilitation, it is important to address National Life's assertion that Mr. Brine could have privately obtained these types of services, and potentially returned to work as he testified he wanted to do. Mr. Brine testified that he was aware of provisions in the policy which would entitle National Life to make deductions from his disability benefits, in the event he participated in employment efforts which were not part of an approved rehabilitative program. It would appear that there is support in the policy itself for such a view, in that benefits are stated to continue if a rehabilitation program is "approved" by the insurer.

[285] Closely related to the decisions surrounding rehabilitation services is National Life's request for and response to the Rubens report. As previously noted, that report, received by National Life in April of 2003, was not disclosed to Mr. Brine until the week prior to trial. The Court heard no evidence as to why that report was requested, nor was the letter of request to Dr. Rubens provided which may have shed some light on that point. The report does provide some assistance

in that Dr. Rubens notes he was asked by the referral source to comment on "the severity of Mr. Brine's depression and whether the effect of it, or any other condition, prevents him from performing his own or any other occupation" as well as whether Mr. Brine could benefit from "anger management".

[286] As referenced in the context of the evidence reviewed earlier, the Rubens report contains statements relevant to whether or not rehabilitation services could have been of assistance to Mr. Brine. He submits they are supportive of rehabilitative efforts, National Life argues to the contrary. On the surface, the comments do appear to be generally supportive of rehabilitative efforts being implemented, subject to Mr. Brine's openness to participating in such efforts. The problem is that the Court did not have the opportunity to hear from Dr. Rubens directly on that issue, and cannot reach a conclusion one way or another, as to what, if anything, he was recommending.

[287] The late disclosure of the Rubens report had several consequences. Mr. Brine's counsel was deprived of the opportunity to inquire further as to Dr. Rubens' opinion, and to have Dr. Rosenberg subsequently comment on same in a more meaningful way than was afforded to him. Mr. Brine was deprived of the opportunity to have Dr. Rubens' comprehensive recommendations considered in a timely fashion by his own treating physician. Mr. Brine was deprived of the

opportunity to utilize Dr. Rubens' views as support for his request to re-initiate rehabilitation services.

[288] Mr. Brine was entitled to be provided with a copy of the Rubens report. It is a certainty that if his counsel had sought an order compelling disclosure, it would have been granted. Counsel's failure to "push the envelope" in that regard did not however, derogate from National Life's obligation of timely disclosure. Holding the report in excess of a decade prior to disclosing same is, on its face, inconceivable. No explanation for this omission was offered. None. Not that it got lost. Not that there was a mistaken belief it had been disclosed. Not that there was a view held until the eve of trial that it was subject to a claim of privilege. None.

[289] At this juncture, the Court could stop and simply find that the failure to disclose the Rubens report in a timely fashion constituted a breach of National Life's duty of utmost good faith. More in my view is required. Why did National Life fail to disclose the Rubens report? Based on the evidence of National Life's approach to this matter, and the lack of any form of reasonable explanation, I conclude that the report was purposefully withheld as it, at a minimum, would have triggered renewed requests for rehabilitation, and at worst, provided evidence supportive of Mr. Brine's claim to provide such services. National Life did not want to face the consequences which would have arisen from a timely disclosure in

April of 2003. Instead, it chose the latest possible opportunity to disclose, days before trial, effectively preventing Mr. Brine from exploring the possible ramifications of the report.

[290] National Life has made allegations of wrongdoing against Mr. Brine, which argue a breach of the duty of utmost good faith. These allegations are contained both in the pleadings and in documentation in support of National Life's application to bring an action notwithstanding his bankruptcy. Notwithstanding that the Court has found that Mr. Brine did not act in a fraudulent manner, the evidence available to National Life was such that making such allegations was not outside the reasonable range of positions available to an insurer. The Court has concerns that during that time period the insurer preferred to believe Mr. Brine, despite his known mental capacity, purposefully withheld information based upon its file review. I cannot conclude such amounts to bad faith. I cannot reach the same conclusion with respect to Ms. Antonini's representation at trial with respect to the lack of Mr. Brine's disclosure of his CPP application and Human Rights complaint. The utmost duty of good faith requires the insurer to advance its position, including into the courtroom, honestly and fairly based on the evidence it has available to it. Ms. Antonini's wanton disregard for the accuracy of her

testimony, the goal of which was to paint Mr. Brine in a negative light, constituted bad faith.

[291] I reach a similar conclusion with respect to National Life's failure to respond to Mr. Brine's complaint regarding the taxability to his benefits. Although I have difficulty accepting Ms. Antonini's evidence that Mr. Brine first contacted National Life regarding this issue in May of 1999, it would also appear that in response, the insurer made inquiries to the Treasury Board as to how to address his concerns. It would appear National Life received information which supported its view that the benefits were taxable. Combined with the fact that Mr. Brine's initial application in 1995 requested that income tax be withheld, I can find no bad faith in terms of National Life's conduct to that point.

[292] In 2006, Mr. Brine successfully appealed a ruling of the Minister of National Revenue, the substance of which asserted that the income received as disability benefits from National Life in the 2003 tax year, should have been claimed as taxable income. Mr. Brine disagreed, arguing the benefits were non-taxable and the Tax Court agreed with him. Ms. Antonini testified National Life was aware of that decision. Notwithstanding my concerns regarding the overall reliability of her evidence, I accept that National Life knew, or ought to have known about the Tax Court ruling in 2006. It continued to issue Mr. Brine T4 slips showing the benefits

as being taxable income which prompted continued disputes for Mr. Brine with Revenue Canada. Based on the ruling, he did not claim the income, but because a T4 slip was issued, Revenue Canada made repeated contacts with him inquiring as to his failure to claim, and again re-assessed his income in the 2009 taxation year to include the income issued by National Life. This prompted yet another appeal to the Tax Court in 2010 on the identical basis as the 2006 matter. Mr. Brine was again successful. National Life continued to issue T4 slips showing the disability benefits as taxable.

[293] National Life submits it did not alter its approach to the taxability of Mr. Brine's benefits post-2006 because he had never asked it to do so, and it took the view, according to the evidence of Ms. Antonini, that based on information from the Treasury Board, that the 2006 ruling of the Tax Court was incorrect. At this point, given Mr. Brine's prior communications, National Life was well aware of Mr. Brine's views regarding the taxability of his benefits, as well as the fact that he found dealing with that issue an added stressor. I note in particular his letter of November 30, 1999 to National Life's legal counsel advising that the error in taxability was "a continuous stressor and a tremendous burden financially". It should have been obvious to National Life in 2006, with or without an explicit

request from Mr. Brine, that he would want the benefits re-classified as non-taxable.

[294] The Court was presented with no evidence of substance as to National Life's attempts to seek clarification from the Treasury Board, or from any other appropriate source, with respect to any direction it may offer regarding what response, if any, to the Tax Court decision was warranted. There is no evidence as to what information, if any, may have been received. No such evidence was contained in the National Life file materials relating to Mr. Brine's claim. What is certain is that National Life had in 2006 an unappealed decision of the Tax Court of Canada which found the disability benefits it was paying to Mr. Brine to be not taxable. What is certain is National Life knew Mr. Brine had earlier taken issue with National Life issuing T4 slips classifying the disability benefits as taxable. What is certain is that National Life knew its insured was disabled due to depressive illness and he had advised that this matter added to his mental stress.

[295] I agree entirely with the submissions of National Life's counsel that it is not responsible for making a determination as to the taxability of benefits paid under the policy. In my view however, in light of the circumstances known to it in 2006, National Life had an obligation to pro-actively ascertain whether it should alter its previous approach to classifying the benefits as taxable. It was, as part of its

obligation to manage Mr. Brine's claim fairly, required to either implement the Tax Court decision, or present a very good reason why it did not. Ms. Antonini's evidence that contact was made with the Treasury Board, is questionable in terms of its reliability, and even if believed, falls far short of justifying why National Life ignored a court decision directly related to the benefits it was issuing. In my view, National Life breached its duty of utmost good faith by failing to meaningfully address and consider whether it should continue to classify Mr. Brine's disability benefits as taxable income following the 2006 Tax Court decision.

Are there damages ascertainable in relation to a specific breach of contract?

[296] At this juncture, the Court turns to assess what damages should be awarded to Mr. Brine in light of the findings made herein. The Court has found that notwithstanding National Life rightfully asserting the existence of an overpayment in the amount of $99,506.64, it breached the policy of insurance by failing to pro-rate that sum over the life of the policy - to Mr. Brine's 65th birthday. Contrary to the policy, the entirety of Mr. Brine's disability income was withheld by National Life from October 1, 1998 until August of 2003. That sum should have been pro-

rated over the monthly payments extending from October 1, 1998 until March 14, 2014, Mr. Brine's 65th birthday.

[297] It is clear Mr. Brine was deprived of income he should have received during the almost 5 years National Life inappropriately undertook a total claw back of his benefits. Neither party provided the Court with an analysis of what this meant in terms of the loss, but the quantum is ascertainable from the evidence before the Court. The calculation starts with a consideration of what National Life was entitled to deduct on a pro-rated basis. If it had pro-rated the $99,506.64 owing from October 1, 1998 to March 1, 2014 (292 months), the sum of $342.00 was rightfully deductible from the monthly disability benefits. What was actually deducted?

[298] The Court found helpful the calculations contained in correspondence from National Life counsel to Mr. Brine dated February 10, 2000 (JEB G2, page 53), in which the overpayment was calculated. That letter also outlined the amount being clawed back monthly and applied to the overpayment. I accept those figures as accurate. From October to December 1998, the deduction was noted to be $1635.43. For the 1999 year the monthly deduction was noted to be $1650.15. In 2000, National Life clawed back the monthly sum of $1674.90 and applied same to the overpayment. Because Mr. Brine's monthly benefits increased on a yearly

basis due to an inflation adjustment, the amount of the withheld amount would have increased in 2001, 2002 and 2003. As noted above, National Life should have only deducted $342 each month on account of the overpayment, a significantly lesser amount than what was clawed back.

[299] In 1998, National Life wrongfully withheld the sum of $3880.29 ($1293.43 X 3 months). In 1999, National Life wrongfully withheld the sum of $15,697.56 ($1308.13 X 12 months). In 2000, National Life wrongfully withheld the sum of $15,994.80 ($1332.90 X 12 months). The Court was not provided with the value of the claw backs for the subsequent years but it would have increased on a yearly basis given the inflationary increase. For this period, I am satisfied that National Life continued to withhold a minimum of $1332.90, equating to a further $42,652.80 ($1332.90 X 32 months). The total amount inappropriately withheld from Mr. Brine over this near 5 year period was $78,225.45.

[300] This breach of the policy resulted in an almost 5 year period where Mr. Brine was of monthly income which he was entitled to receive. Although he had other financial stressors, the most notable being legal fees he was incurring in relation to challenging his dismissal from Ports Canada, this error on National Life's part undoubtedly created a considerable financial strain. This in turn, increased his mental distress.

[301] Is this loss, although quantifiable, properly claimable? To award Mr. Brine the total of the sums inappropriately withheld would not be proper in my view, as it would not reflect the reality that had the policy provision been properly implemented, Mr. Brine would have continued to have a deduction of $342.00 applied every month, until the policy terminated on his 65th birthday. In effect, if not for its own policy breach, National Life would have recouped the entire $99,506.64 over the life of the policy. Such a pro-rated deduction would not have been impacted by Mr. Brine's bankruptcy.

[302] It is not reasonable however, that National Life should benefit from its own breach of the policy, while Mr. Brine clearly suffered an unwarranted financial detriment for nearly 5 years. National Life chose to seek an upfront claw back of the overpayment, a significant balance being outstanding at the time of Mr. Brine's bankruptcy. National Life chose to file a Notice of Claim characterizing the balance of the overpayment as an outstanding debt and it an unsecured creditor. It subsequently withdrew from the bankruptcy proceeding and claimed the protection afforded by s. 178(1)(d) of the *Bankruptcy and Insolvency Act*. The Court has previously found that National Life was not entitled to that protection. As such, and in the normal course, the unsecured debt would be extinguished by the bankruptcy.

[303] In my view, given National Life's breach, and given the path it forced upon Mr. Brine, namely a unilateral upfront claw back of his benefits, an appropriate measure of damages is $62,036.81, being the balance of the overpayment purported to be outstanding at the date of the bankruptcy. This debt, as characterized by National Life, was not extinguished by the bankruptcy. As National Life continued to inappropriately withhold benefits from Mr. Brine until that sum was paid down, that amount is properly returnable to him.

[304] Mr. Brine claims a host of other "calculable" damages, including loss of pension income, wage losses from 1999 forward and damages relating to the loss of his RRSP savings. The amount of the claims is significant. Both the pension and wage losses are based upon the premise that had Mr. Brine been provided with rehabilitation services by National Life, he would have successfully returned to work, and as a result accrued more pensionable service and a resulting greater pension income. No independent evidence was presented to the Court to support the pension calculations offered by Mr. Brine, nor the quantum of wages he asserts he would have earned upon a return to work. The calculations further appear to be based on an assumption that Mr. Brine could have returned to full time work with the federal government.

[305] I have already concluded that National Life breached its duty of utmost good faith by arbitrarily discontinuing rehabilitation services and failing to properly assess whether re-initiating the service was warranted. To award the damages being sought by Mr. Brine however, the Court would need to conclude that if rehabilitation services were re-initiated in 1998, Mr. Brine would have returned to the workforce in a full-time capacity. I cannot reach that conclusion based upon the evidence before me. Because of the outstanding stressors in his life including his dispute with his former employer, Mr. Brine continued to suffer the disabling consequences of depressive illness. According to Dr. Rosenberg, this only lessened somewhat in 2004 which would have been the optimal time for rehabilitation services. His opinion was that if implemented then, Mr. Brine likely could have returned to the workforce in some capacity, but in Dr. Rosenberg's words "we will never know if he would have, because he was not given that opportunity".

[306] I can readily conclude that if offered, Mr. Brine would have in 2004, and even earlier, willingly participated in rehabilitation efforts. He was not given that opportunity, despite his requests made to National Life. He was not given that opportunity despite both Ms. Jako and Ms. Antonini testifying that re-initiating rehabilitation would have been considered should new medical information

become available. Given his skill set, and motivation, Mr. Brine would have, on a balance of probabilities, returned to work if rehabilitation services were offered to him in 2004. However, given his longstanding illness, including his "learned helplessness" it is not at all certain what degree of success Mr. Brine would have achieved. The Court cannot conclude he would have obtained full-time employment, or that it would have, as claimed by Mr. Brine, resulted in an annual income of $125,000. What Mr. Brine was deprived of was an opportunity which likely would have resulted in a return to the workforce in some capacity. The duration and nature of that employment is not ascertainable based on the evidence before the Court. The Court declines to make awards reflecting a loss of wages and pension benefits accordingly.

[307] Mr. Brine claims the loss of his RRSP savings in the amount of $99,000.00 and resulting loss of income therefrom in the amount of $300,000.00. No evidence was presented to permit the Court to consider the present day income stream that would have been generated if not for the collapsing of those funds. The Court has accepted that National Life's failure to pro-rate the overpayment created financial strain for nearly 5 years. The Court also accepts that the characterization of the disability benefits as being taxable served to decrease Mr. Brine's net income in the years preceding the cashing of the RRSPs. There were other financial stressors

however, most notably the significant legal fees incurred by Mr. Brine in challenging his dismissal. That clearly was a financial stressor not caused by National Life. Although the Court can conclude that the financial stressors arising from National Life's actions did contribute in an overall fashion to Mr. Brine's depletion of savings and ultimate bankruptcy, there is insufficient evidence to conclude what portion of the RRSP loss was due to National Life's actions and what portion was used for unrelated needs. I decline to order as sought, what would amount to a return of Mr. Brine's RRSP savings along with their present day value.

[308] As referenced earlier herein, the law recognizes the availability of an award of general damages for mental distress arising for a contractual breach, as well as an award of aggravated damages where a plaintiff can establish mental distress as a result of an independent cause of action (see **Fidler, supra**). Mr. Brine is entitled to recovery on both grounds.

[309] National Life breached the policy by not pro-rating the overpayment as required. The direct financial result of this breach was significant, and lasted nearly 5 years. This caused considerable financial strain and added stress to an individual already battling the effects of disabling depression. It most certainly had

an impact on his deteriorating financial situation. I award general damages for mental distress arising from this breach in the amount of $30,000.00.

If a breach of the duty of utmost good faith is found, what damages, if any arise therefrom?

[310] I turn now to consider Mr. Brine's claim for aggravated damages. The Court has found that National Life has in several respects breached its duty of utmost good faith owed to Mr. Brine. He has suffered distress, anger and had his depression prolonged and worsened due to these failings. He has suffered intangible losses which although not calculable, are no less real. The impacts of National Life's bad faith have extended from the arbitrary suspension of rehabilitation benefits in June of 1998 to the week before trial, when it finally disclosed the Rubens report.

[311] An insurer is not obligated to insulate their insured from harm at all cost. Often decisions are made which cause upset to those who believe they are entitled to benefits either denied or cancelled. Such acts, if taken reasonably and based upon a fair assessment of the materials in support of a claim, should not be subject to criticism. This is not such a case. National Life's decision to commence rehabilitation services, contrary to the opinion of his treating physician, followed

by its arbitrary termination had a significant and long lasting deleterious impact on their insured. I accept Dr. Rosenberg's opinion that the termination of rehabilitation without explanation to Mr. Brine, gave rise to a "learned helplessness" on his part, which served to worsen and sustain his depression. Although Mr. Brine testified Dr. Rubens had advised him that his depression was legitimate and a source of disability in their meeting, he was deprived of fully being apprised of the opinion contained in his report. This impacted not only on the potential of implementing the treatment recommendations contained in the report, but also deprived Mr. Brine of exploring and re-initiating his requests for rehabilitation.

[312] The Court has found that National Life's response to the 2006 Tax Court of Canada decision was a breach of its duty of good faith. I accept Mr. Brine's evidence that the continued receipt of T4 slips showing his benefits as taxable in the face of a court decision to the contrary was extremely upsetting and frustrating to him. This was only enhanced by the continued disputes with Revenue Canada as to why he was not claiming this income, and the required appearance in the Tax Court in 2010. For a mentally fit person, the hoops Mr. Brine found himself jumping through with Revenue Canada as a result of the classification of benefits

not being changed by National Life post 2006 would be daunting. For a person suffering from disabling depression, the impact was significantly enhanced.

[313] By virtue of National Life's bad faith conduct, Mr. Brine suffered significant distress and added loss. Given the extended time frame over which Mr. Brine suffered the consequences of National Life's wrongful conduct, and the severity of the consequences both emotionally and financially, I award aggravated damages in the amount of $150,000.

Do the circumstances before the Court justify an award of punitive damages?

[314] The Court turns now to consider whether an award of punitive damages is warranted in the circumstances. As noted earlier herein, such an award arises in only exceptional cases - where conduct is so malicious, oppressive and high-handed that if "offends the court's sense of decency". Such awards are not to compensate a plaintiff but rather "address the purposes of retribution, deterrence and denunciation". They are to be resorted to with restraint. (See **Whiten, supra** and **Fidler, supra**)

[315] There are several aspects of National Life's conduct which in the Court's view go beyond the ordinary misconduct associated with a breach of policy provisions, and are deserving of censure by the Court. These are National Life's gross mishandling of their duty to fairly consider and assess the provision of rehabilitation services; the failure to disclose the Rubens report; the failure to implement the findings of the Tax Court of Canada; and the breach of the duty of utmost good faith by Ms. Antonini's wanton disregard for the accuracy of her trial testimony in the face of documents possessed by National Life which conflicted directly with her evidence.

[316] Assessing an appropriate quantum of punitive damages is a more difficult task but the Court is guided by the considerations outlined by the Supreme Court in **Whiten, supra**. Proportionality is key to reaching an appropriate quantum, and commences with a consideration of the blameworthiness of the defendant's conduct. In the present circumstances, the level of blameworthiness is high. Here the withholding of the Rubens report was deliberate, extended over a decade and was intended to preclude Mr. Brine from utilizing the potentially helpful information it contained. Ms. Antonini's clear misstatement of facts which a cursory review of National Life's own file material quickly highlights as inaccurate is highly blameworthy. This was a purposeful attempt to, contrary to the clear

information available to her, to malign Mr. Brine and attempt to have the Court draw negative conclusions as to his credibility and honesty.

[317] The vulnerability of the plaintiff is a factor the Court must consider in reaching an appropriate quantum. Not only was Mr. Brine a vulnerable insured due to his mental illness, National Life was well aware of his status and limited functioning. In many respects, National Life simply turned a blind eye to the very probable amplified impact of their misconduct given Mr. Brine's precarious mental health.

[318] An award of punitive damages must be proportionate to National Life's need for deterrence. Here, there is an unquestionable need for deterrence as the misconduct attracting censure insinuated the bad faith into the very integrity of the litigation process. National Life must be deterred from undertaking a strategy in future of withholding relevant evidence from claimants for the gain of tactical advantage. Further, National Life and its individual representatives must be deterred from engaging in the eliciting of misleading evidence, particularly that which intends to paint their insured in a negative light. Mr. Brine argues that the need for deterrence is heightened given National Life has already been subject to an award of punitive damages in relation to the bad faith handling of a claim by Ms. Jako, and that the modest award there of $7,500, did not serve to bring home

to National Life the importance of striving to meet its duty of utmost good faith to its insured. I agree. (see **Ferguson v. National Life Assurance Co. of Canada** 1996 CarswellOnt. 1513).

[319] An award of punitive damages must be proportionate even after considering other penalties, both civil and criminal which the defendant's misconduct has attracted. Other than the compensatory damages ordered herein, the court is unaware of any further penalties associated with National Life's misconduct as it relates to this matter. The compensatory damages awarded herein are far from adequate to meet the goal of punishment given the extent of the misconduct found by the Court.

[320] Mr. Brine submits that an appropriate award of punitive damages in this matter is between $5 and $7.5 million dollars. He relies upon the decisions in **Whiten, supra** and **Branco v. American Home Assurance Company** (2013), 20 C.C.L.I (5th) 22, a decision of the Saskatchewan Court of Queen's Bench. It is well known that in **Whiten**, the Supreme Court upheld a jury's punitive damages award of $1 million dollars. It is important to note however, that the court opined that such was near the top of the reasonable range for such awards and should not therefore, be displaced. Justice Binnie for the court noted that he would not have awarded such an amount.

[321] In **Branco, supra**, two defendant insurers had been found to have acted in bad faith towards their mutual insured. One of the defendants, the LTD insurer, had never paid benefits at all over an extended period, despite having medical opinion in its file supporting a disability finding. Punitive damages of $1.5 million and $3 million dollars respectively were awarded by the trial judge.

[322] Although the quantum of awards in other cases are informative, the Court must be guided by the particular circumstances before it and the factors outlined above. Considering the compensatory damages awarded herein, as well as the blameworthiness of the misconduct and the need for deterrence in particular, I find an award of punitive damages in the amount of $500,000 is appropriate in the circumstances.

Is National Life entitled to subrogation in relation to the $300,000 settlement received by Mr. Brine from his Human Rights complaint?

[323] National Life claims the sum of $280,000 from Mr. Brine arising from the settlement of his Human Rights complaint in 2004. National Life was prepared to acknowledge that at the time the complaint was filed in 1996, the legislation provided for a maximum award of $20,000 for general damages. It submits the

balance of the settlement was related to past and future income loss. Based on the subrogation provisions of the policy, Mr. Brine was obligated to advise of the complaint being undertaken and report the settlement to National Life.

[324] National Life argues the evidence overwhelmingly establishes that notwithstanding the settlement being characterized as "general damages" the vast majority was income loss. Relying on **McNally, supra**, it is Mr. Brine who has the obligation to establish the settlement funds are not income, an obligation he has not met.

[325] Mr. Brine has two primary arguments as to why the subrogation provision of the policy should not apply in his circumstances. Firstly, he submits that the provisions are intended to only apply to monies received from claims made against "third parties". His claim was against his former employer, Ports Canada, as well as the Halifax Ports Authority. It is submitted that because his employer is a party to the policy of insurance, that he has not received payment from a "third party" as is contemplated in the subrogation provisions. Mr. Brine's second argument is that the entirety of the $300,000 settlement is properly considered general damages, including for defamation, and there is no component of income loss.

[326] I cannot accept either of Mr. Brine's arguments. The parties to the policy are National Life and "The Board of Trustees of the Public Service Management Insurance Plan and their successors". The only evidence elicited with respect to the composition of the Board of Trustees, was that it was comprised of federal employees. This is inadequate in my view for the Court to reach a conclusion that the "Board of Trustees" is one in the same as Mr. Brine's employer. Further, there is no evidence to establish that the settlement funds actually came from Ports Canada, Mr. Brine's employer.

[327] With respect to the second argument, I cannot accept that the settlement was intended to only compensate Mr. Brine for general damages. The evidence of Mr. Stern, which I accept without reservation, was that throughout the complaint process, the largest component of Mr. Brine's claim was for alleged loss of income, both past and future.

[328] National Life alleges that Mr. Brine did not notify it that a complaint had been made to the Canadian Human Rights Commission. The Court has resoundingly rejected that proposition. National Life was aware of the complaint in 1996, and aware the complaint was under appeal in 1998. It would appear that despite having this knowledge, National Life made no attempt to obtain further details of the complaint, to undertake carriage of the matter in Mr. Brine's name, or

to have Mr. Brine execute a subrogation agreement. It would appear that National Life was content to have Mr. Brine undertake the complaint as he saw fit, until after the spoils of war had been reaped through his efforts. National Life now wants the benefit of those efforts.

[329] Notwithstanding National Life's conduct, the Subrogation provisions clearly obligated Mr. Brine to advise of the settlement, and he did not. Mr. Brine did not raise an estoppel argument at trial in relation to National Life's counterclaim. The Court heard no evidence whether Mr. Brine relied on National Life's "hands off" approach to the complaint, nor was there evidence to suggest that he altered his position or litigation strategy accordingly. There is no legal or equitable basis upon which to deprive National Life to the right it is entitled to under the policy.

[330] To award National Life the full $280,000 sought would create the result of having Mr. Brine pay the entirety of the legal costs associated with pursuing these funds ultimately for the insurer's gain. There is nothing in the subrogation provision which dictates an insured should carry this expense. Based on the legal account submitted into evidence, Mr. Brine paid legal fees included of HST of $70,181.76, plus numerous disbursements which I am satisfied are properly related to the proceedings. Mr. Brine did receive benefit from the settlement other than the monetary award. He testified his most significant concern was obtaining a

letter of apology and reference, both of which served to some degree as vindication in terms of his dismissal and allegations of wrongdoing. In the circumstances, Mr. Brine should be afforded a credit in relation to the legal fees paid to advance in complaint in the amount of $70,000, leaving a balance of $210,000 owing to National Life.

CONCLUSION

[331] As noted above, on his claim against National Life, Mr. Brine shall be entitled to:

a) breach of contract damages in the amount of $62,036.81;

b) mental distress damages arising from breach of contract in the amount of $30,000;

c) aggravated damages in the amount of $150,000; and

d) punitive damages of $500,000.

[332] On its counterclaim, National Life shall be entitled to the sum of $210,000.

[333] The parties did not provide the Court with submissions relating to pre-judgment interest. If sought, the parties shall provide their respective positions, along with their submissions as to costs if agreement is not reached, within 10 days of the release of this decision.

J.