

HUMAN RIGHTS TRIBUNAL OF ONTARIO

BETWEEN:

PAUL DUNCAN REILLY

Applicant

-and-

FORD MOTOR COMPANY OF CANADA, LIMITED

Respondent

WRITTEN SUBMISSIONS OF THE COALITION OF LEGAL CLINICS

Date: June 20, 2018

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PART ONE: OVERVIEW

1. The Coalition of Legal Clinics (“Coalition”) works with communities of persons with disabilities living in poverty and has intervened to bring the equality-seeking lens of those communities, including Canada Pension Plan Disability (“CPPD”) recipients.
2. Mr. Reilly argues that he has experienced discrimination in employment on the basis of his disability, contrary to s. 5(1) of the Ontario *Human Rights Code* (the “Code”) because he receives a lesser benefit from a Long Term Disability (“LTD”) plan funded by his employer through a collective agreement.¹
3. The Coalition agrees. CPPD beneficiaries represent a distinct group of persons with severe and prolonged disabilities, as compared to those in receipt of LTD benefits alone and as compared to those in receipt of Short Term Disability (“STD”) benefits.
4. By deducting (or “offsetting”) CPPD benefits from LTD, Mr. Reilly’s employer, Ford Motor Company of Canada, Limited (“Ford”), disadvantages persons with severe and prolonged disabilities in several ways:
 - They receive less LTD benefits through their group benefit plan when compared to their co-workers with less severe disabilities;
 - They cannot stack benefits to increase their standard of living as compared to their co-workers with short-term disabilities; and
 - They are denied the benefit of the flat-rate portion of CPPD, which is an anti-poverty component of the CPPD unconnected to income replacement.
5. All of these disadvantages are directly related to their severe and prolonged disabilities, establishing a *prima facie* case of discrimination.

¹ The Collective Agreement calls LTD benefits “Extended Disability Benefits” (“EDB”). For consistency, we will refer to these as LTD.

6. Ford has not established any defense or exemption to this discriminatory conduct. Ford cannot rely on the exemption for insurers in section 22 of the *Code* because it does not apply to group LTD plans provided by an employer. However, even if that defense is available, or if Ford relies on the defense in section 11 of the *Code*, Ford has not established that providing a lesser benefit to persons with severe and prolonged disabilities is reasonable or *bona fide*:

- The offset of CPPD is based on discriminatory stereotypes about persons with disabilities needing to have an “incentive” to prevent them from malingering and “gaming” the system;
- There is no evidence that ending the discriminatory offset would raise the costs for employers to a level that would threaten the viability of group LTD benefits;
- Even accepting that LTD beneficiaries should not receive more than 85 percent of their pre-disability earnings, Mr. Reilly would not be anywhere near that level if there was no offset;
- There are practical alternatives, including a combination of raising premiums, absorbing the higher costs (if any), and including CPPD benefits in “all-source maximums.”

PART TWO: FACTS

7. The Coalition takes no position on the facts.

PART THREE: *PRIMA FACIE* CASE

A. The Test for Discrimination

8. To demonstrate *prima facie* discrimination on the basis of disability, applicants are required to show that:

- (i) They have a disability;
- (ii) They have experienced adverse treatment in a social area protected by the *Code*; and

(iii) Their disability was a factor in the adverse treatment.²

9. The focus of this inquiry is on the actual impact of the treatment, taking into account social, political, economic and historical factors concerning the protected group. An adverse impact may arise because of different treatment or because of identical treatment.³

10. Even if valid and non-discriminatory reasons exist for an adverse decision affecting employment, if one of the reasons for a decision involves a prohibited ground of discrimination, that decision infringes the *Code*. It is well-established in human rights law that the protected ground need only be one factor in the decision made that adversely affected the applicant; it does not have to be the only or primary reason.⁴

11. Once a *prima facie* case has been established, the burden shifts to the respondent to justify the conduct or practice within the framework of the exemptions available under human rights statutes. If it cannot be justified or does not fall within an exemption, discrimination will be found to have occurred.⁵

12. The fact that Ford's benefits plan is provided for by a collective agreement does not mean that it cannot be discriminatory. In *Talos*, the Tribunal did not accept that a collective agreement is owed deference in the discrimination analysis. The Tribunal recognized that "minority interests cannot be assured through a collective bargaining process that by design favours majority interests."⁶ In any event, collective agreements are subject to the statutory provisions of the *Code*.⁷

² *Moore v. British Columbia (Education)*, 2012 SCC 61 at para. 33.

³ *Human Rights Code*, RSO 1990, c H19, s. 11.

⁴ *Filion v. Capers Restaurant*, 2010 HRTO 264 (CanLII).

⁵ *Moore v. British Columbia (Education)*, 2012 SCC 61 at para. 33.

⁶ *Talos v. Grand Erie District School Board*, 2018 HRTO 680 at paras. 257, 278-280.

⁷ Ontario Human Rights Commission (2016), "Policy on ableism and discrimination based on disability" at p. 51.

B. CPPD beneficiaries have more severe and prolonged disabilities and greater needs

13. The fact that Mr. Reilly has a disability is not in issue. The question is whether, as a person who receives payments from both LTD and CPPD, Mr. Reilly belongs to a group of persons with disabilities distinct from those who only receive LTD payments. The answer to that question must be “yes.” As a group, CPPD recipients not only have more severe and prolonged disabilities, but also have greater costs associated with their disabilities.

i. The test to qualify for CPPD benefits requires a more severe and prolonged disability

14. LTD plans and CPPD use different definitions of disability to determine eligibility. To qualify for CPPD, claimants must establish that they have a “severe” and “prolonged” disability:

s. 42(2) For the purposes of this Act,

(a) a person shall be considered to be disabled only if he is determined in prescribed manner to have a severe and prolonged mental or physical disability, and for the purposes of this paragraph,

(i) a disability is severe only if by reason thereof the person in respect of whom the determination is made is incapable regularly of pursuing any substantially gainful occupation, and

(ii) a disability is prolonged only if it is determined in prescribed manner that the disability is likely to be long continued and of indefinite duration or is likely to result in death; ...⁸

15. A “severe” disability is defined as one that prevents a person from “regularly ... pursuing any substantially gainful occupation.” Therefore, a finding of disability is not tied to whether or not the person is capable of performing their former occupation.

16. A “prolonged” disability is one that is likely to be lengthy, permanent or result in death. As noted by the Federal Court of Appeal, the purpose of CPPD “is to provide a pension to those who are disabled from working on a long-term basis, not to tide

⁸ *Canada Pension Plan*, RSC 1985, c C-8, s. 42(2).

claimants over a temporary period where a medical condition prevents them from working.”⁹

17. In contrast, and as acknowledged by the intervener, The Great-West Life Assurance Company’s (“GWL”) witness, Micheline Lafond, “the definition of disability under GWL’s group disability benefits plan is, in general, less stringent than the definition of disability that an individual must meet in order to be eligible for CPP disability benefits.”¹⁰

18. GWL’s witness, Brian Kassner, also acknowledged that CPPD has a more stringent set of conditions as “unlike a privately sponsored group LTD plan, the CPP not only considers the immediate state of disability, but also the likely future state of disability in determining a person’s qualifications to receive benefits from the plan.”¹¹

19. These observations are borne out by the LTD eligibility criteria in the Ford plan under which the employee must either:

- 1) Be unable to engage in any gainful occupation or employment for which he/she is reasonably qualified by education, training or experience; OR
- 2) Not be engaged in regular occupation or employment for remuneration or profit and be prevented by bodily injury or diseases from engaging in any regular occupation or employment with the company at the plant or plants where he/she has seniority.¹²

20. It is notable that this definition does not reference prolonged or length of time. Furthermore, by the use of the word “or” in the definition of totally disabled, either criteria can satisfy the test for entitlement to LTD benefits.¹³ This is important because

⁹ *Canada (Minister of Human Resources Development) v. Henderson*, 2005 FCA 309 at para. 11.

¹⁰ Affidavit of Micheline Lafond at para. 33.

¹¹ Report of Brian Kassner at para. 41. See also transcript at p. 90, lines 22-24.

¹² Affidavit of Paul Reilly, Exhibit B: “Appendix R to Collective Agreement” at p. 206, s. 13(a).

¹³ See for example: *Donohue v. Canada Life*, 46 OR (3d) 82, 1999 CanLII 15096 at para. 13 confirming that it is trite law that insurance policies, as policies of adhesion (a consumer contract that an insured can simply decline or accept, without any input or

the second criterion entitles claimants to LTD benefits if the insured is unable to perform their own occupation with the company.¹⁴

21. Therefore, unlike CPPD, a Ford beneficiary need not establish that their disability is severe or that it is likely to be prolonged to qualify for LTD benefits.

22. In light of the differences in definitions of disability, only a subset of individuals who qualify for LTD benefits will also qualify for CPPD benefits.¹⁵ These are individuals with more severe and prolonged disabilities who are unable to work in any job for the foreseeable future.

ii. Persons with severe and prolonged disabilities have higher costs associated with their disabilities

23. Persons with disabilities in Canada are more likely to live in deep poverty and remain poor over longer periods of time. They have lower incomes and higher levels of unemployment than persons without disabilities.¹⁶ Prejudice towards people with disabilities and lack of accommodation contribute to high unemployment, leading to further isolation and marginalization. For many, work is essential not only to maintaining an adequate standard of living, but to living life with dignity, to inclusion in the

negotiation of contractual terms), are to be “construed against the insurance carrier as being the author, or at least the party in control of the contents of the contract” and that *contra proferentum* will apply and the contract language is to be interpreted in favour of the insured person.

¹⁴ The foregoing policy language is more generous than many policies. For many policies, after two years eligibility is limited to those who cannot engage in “any occupation.” See also transcript at p. 94, lines 4-9. However, even those policies that use an “any occupation” definition of disability would still adopt a less severe definition of disability than CPPD because the applicable occupations would typically include those that pay earnings commensurate with the employee’s pre-disability earnings and for which the employee is reasonably qualified by education or training (Report of Brian Kassner at para. 35).

¹⁵ Report of Brian Kassner at paras. 41-42 (he estimates 50% of LTD recipients receive CPPD); Affidavit of Micheline Lafond at para. 36 (she estimates 56.1% of LTD beneficiaries are also in receipt of CPPD). The 2015 and 2016 numbers provided by Aisha Mirza suggest that under the Ford plan, 66-70% of LTD beneficiaries are also in receipt of CPPD (Affidavit of Aisha Mirza at paras. 14-15).

¹⁶ Organisation for Economic Co-operation and Development, *Sickness, Disability and Work: Breaking the Barriers: Canada: Opportunities for Collaboration*, (2010) at p. 18.

community and to feelings of self-worth. These social benefits of work were acknowledged by GWL's witness, Brian Kassner.¹⁷

24. Poverty is not experienced equally amongst persons with disabilities. The more severe the disability, the greater the risk of poverty: the poverty rate is 31.2 percent for working age Canadians with very severe disabilities, 25 percent for those with severe disabilities, 18 percent for those with moderate disabilities and 14.4 percent for those with mild disabilities.¹⁸

25. Poverty has a serious detrimental impact on every aspect of life. It leads to poor health, food insecurity, housing instability or homelessness, lower educational attainment, and limited or lower paid work opportunities.¹⁹

26. The poverty of persons with disabilities is often much deeper and more harmful than poverty statistics alone can show. With the same income, people with disabilities have a lower standard of living than people without disabilities because of the additional costs associated with their disabilities.²⁰

27. The more severe a disability, the higher the costs likely to result.²¹ These higher costs include direct costs, such as health-related expenditures, medications, assistance with daily care costs, and transportation costs.²²

¹⁷ Transcript at pp. 119-120, lines 4-8.

¹⁸ Coalition Book of Documents, Tab 4: Michael Mendelson, Ken Battle, Sherri Torjman and Ernie Lightman (2010), "A Basic Income Plan for Canadians with Severe Disabilities" (Toronto: Caledon Institute of Social Policy) at pp. 285-305.

¹⁹ Canada, Employment and Social Development Canada, *A Backgrounder on Poverty in Canada*, (2016) at pp. 10-27.

²⁰ Coalition Book of Documents, Tab 1: Council of Canadians with Disabilities (2015), "Review of Extra Costs Linked to Disability" at pp. 2-3, 8; Affidavit of Adele Furrie, Exhibit 3: S. Mitra, et. al. (2017), "Extra costs of living with a disability: A review and agenda for research", *Disability and Health Journal* v. 10: 475 at p. 480.

²¹ Coalition Book of Documents, Tab 1: Council of Canadians with Disabilities (2015), "Review of Extra Costs Linked to Disability" at pp. 3, 5.

²² Affidavit of Adele Furrie, Exhibit 3: S. Mitra, et. al. (2017), "Extra costs of living with a disability: A review and agenda for research", *Disability and Health Journal* v. 10: 475 at p. 480.

28. There are also indirect costs, such as paying more expensive rent for a building with an elevator. Depending on the individual's circumstances, general additional costs can range from zero to \$7,000 annually, with the median value being \$750.²³

29. Expert witness, Adele Furrie, analyzed two categories of "out-of-pocket" expenses related to disability that were studied in the most recent Canadian Survey on Disability. Although the survey does not capture all categories in which there may be higher costs, the survey results confirm higher costs resulting from disability(ies) for those in receipt of both LTD and CPPD as compared to those in receipt of LTD alone:

- a) Higher average out-of-pocket expenses related to help with activities of daily living, with the gap increasing with the severity of the disability. The gap is \$406 per year for those with a "very severe" disability.²⁴
- b) Greater reliance on prescription medications,²⁵ with those in receipt of both LTD and CPPD more likely to not take prescriptions or take them less often because of cost. This indicator of financial hardship increased as severity of disability increased.²⁶

30. Mr. Reilly's evidence is consistent with these studies. He has higher costs as a result of his disability, including the cost of travel to his doctor and counselor and the cost of medications that are not covered by his extended health benefits plan. These costs are just under \$1,300 per year.²⁷ Therefore, his costs of living have increased as a result of his disability, while his income has decreased.

31. In the long run, these additional costs contribute to the social and economic inequalities experienced by persons with disabilities. Without sufficient income to cover

²³ Coalition Book of Documents, Tab 1: Council of Canadians with Disabilities (2015), "Review of Extra Costs Linked to Disability" at p. 6.

²⁴ Affidavit of Adele Furrie at para. 24.

²⁵ Affidavit of Adele Furrie at paras. 25-26.

²⁶ Affidavit of Adele Furrie at paras. 27-28.

²⁷ Second Affidavit of Paul Reilly at paras. 2-3.

the costs of disability, persons with disabilities neglect their everyday needs.²⁸ The counter-intuitive result is that the poorer a person with a disability is, the less they incur in additional costs: “the concept of additional costs *de facto* implies some financial leverage that is not available to people living in poverty.”²⁹ Thus, actual costs are not a reliable measure of actual additional needs related to disability.³⁰

32. For instance, in this case, Mr. Reilly deposed that “[a]nother \$1168.08 per month would mean that I could pay my bills and not be in debt. It would mean that I could save a little money for my retirement or for [my daughter’s] future. I might be able to do hobbies again, or travel a little bit. It would mean that I could live my life with dignity and not on the edge of poverty.”³¹

33. Although Canadian research on the additional costs of disability is still in the early stages of development, the data that is available confirms that those in receipt of CPPD have more severe disabilities and higher costs. Layered on top of already high rates of poverty, the additional costs faced by severely disabled people undermine their equal participation in society.

C. The reduction of LTD payments by CPPD benefits adversely impacts persons with severe and prolonged disabilities

34. By reducing the LTD benefits paid to CPPD recipients, the Ford LTD plan differentiates between workers on the basis of severity and permanence of disability. As detailed below, the CPPD offset disadvantages persons with severe and prolonged disabilities in a number of distinct ways:

²⁸ Coalition Book of Documents, Tab 1: Council of Canadians with Disabilities (2015), “Review of Extra Costs Linked to Disability” at pp. 3, 11-12; Affidavit of Adele Furrie, Exhibit 3: S. Mitra, et. al. (2017), “Extra costs of living with a disability: A review and agenda for research”, *Disability and Health Journal* v. 10: 475 at p. 480.

²⁹ Coalition Book of Documents, Tab 1: Council of Canadians with Disabilities (2015), “Review of Extra Costs Linked to Disability” at p. 7.

³⁰ Affidavit of Adele Furrie, Exhibit 3: S. Mitra, et. al. (2017), “Extra costs of living with a disability: A review and agenda for research”, *Disability and Health Journal* v. 10: 475 at p. 480.

³¹ Affidavit of Paul Reilly at paras 60-61.

- a) The offset results in the reduction of their LTD benefits, as compared to those with milder disabilities, even though they have higher costs. The Ford plan does not offset other types of income that benefit persons with milder disabilities, such as private or dependent LTD plans or income earned from rehabilitation programs;
 - b) The Ford plan treats them differently than those with temporary disabilities in receipt of STD benefits. CPPD is not offset from STD benefits;
 - c) CPPD beneficiaries are denied the benefit of the “flat-rate” portion of CPPD, a component that is unrelated to prior income and is intended as an equality and poverty-fighting measure for persons with disabilities;
 - d) Depending on the LTD plan, a CPPD offset can deny the benefit of indexed CPPD benefits, credit splitting or tax-free LTD benefits.
- i. Those with severe and prolonged disabilities in receipt of CPPD have reduced LTD benefits**

35. Paul Reilly receives less LTD benefits than other Ford workers because he has a severe and prolonged disability that qualifies him for CPPD. Ford reduces his LTD benefits by the value of his CPPD benefits and therefore his employment compensation package decreases. His monthly income replacement is only \$3,250 (gross) instead of the \$4,418 he would receive without the CPPD offset.³²

36. With the offset, Mr. Reilly’s combined monthly income from LTD and CPPD is only 55 percent of his pre-disability income:

Paul Reilly’s pre-disability gross annual salary (not including overtime) = \$34.25 per hour³³ X 40 hours per week X 52 weeks per year = \$71,240

³² Affidavit of Patricia Edgar, Exhibit M: Summary of Payments from GWL to Paul Reilly under EDB plan.

³³ Affidavit of Paul Reilly at para. 31.

Paul Reilly's gross annual benefits from LTD and CPPD (with the offset) = \$3,250 monthly³⁴ X 12 months = \$39,000

Percentage of pre-disability income = $\$39,000 \div \$71,240 = 55\%$

37. That percentage would be even lower if his overtime pay was taken into account. Including over-time, Mr. Reilly's pre-disability income was \$85,000³⁵ and thus his actual replacement rate is 46 percent.

38. Looking only at the amount he gets each month from his group plan, his LTD benefits are replacing only 35 percent of his pre-disability income:

Paul Reilly's gross annual benefits from LTD (with the offset) = \$3,250 - \$1,168.08³⁶ = \$2,081.82 X 12 months = \$24,983.04

Percentage of pre-disability income = **35%**

39. If Mr. Reilly was able to keep both the CPPD and LTD payments in full, his income from these sources would rise to only 74 percent of his pre-disability income:

EDB + CPPD = \$39,000 + [gross monthly CPPD X 12 months = \$1,168.08³⁷ X 12 = \$14,016.96] = \$53,016.96

(EDB + CPPD) ÷ gross pre-disability income = $\$53,016.96 \div \$71,240 = 74\%$

40. In contrast, the Ford plan does not offset some other types of income that are specifically intended to replace employment income for exactly the same disability:

- LTD benefits paid as a dependent in the group plan of a spouse or parent;³⁸

³⁴ Affidavit of Patricia Edgar, Exhibit M: Summary of Payments from GWL to Paul Reilly under EDB plan.

³⁵ Affidavit of Paul Reilly at para. 31.

³⁶ Affidavit of Patricia Edgar, Exhibit M: Summary of Payments from GWL to Paul Reilly under EDB plan.

³⁷ Affidavit of Patricia Edgar, Exhibit M: Summary of Payments from GWL to Paul Reilly under EDB plan.

- LTD benefits paid pursuant to an individual LTD policy;³⁹
- Income earned as part of a program for rehabilitation,⁴⁰ programs that by definition are intended for people who can return to work and who therefore have milder disabilities than CPPD beneficiaries.⁴¹

41. Unlike CPPD, LTD plans and rehabilitation programs are not limited to individuals with severe and prolonged disabilities.

42. As noted by Michael Prince in his book on the history of CPPD, the claw-back of CPPD from LTD contributes to declining household incomes, depleting savings and possibly retirement funds, as well as taking on debt to cover the cost of medical treatments.⁴² In some cases, it can lead to individuals foregoing medications all together.⁴³

43. Consistent with these concerns, Mr. Reilly deposed that he has to spend \$900 more on expenses than he earns each month. He has to rely on gifts and loans from friends and family, even to pay for his medications. He has used food banks. He cannot save for his retirement. His debts and financial difficulties have aggravated his mental health symptoms and he is under severe financial strain.⁴⁴

44. In effect, the CPPD offset forces the most severely disabled persons to subsidize the cost of LTD benefits for everyone else. Mr. Reilly's income is significantly reduced because the Ford plan offsets a benefit intended only for persons with severe and prolonged disabilities, a benefit that he paid into. CPPD beneficiaries are disadvantaged

³⁸ Transcript at p. 106, lines 10-18.

³⁹ Transcript at p. 106, lines 4-6.

⁴⁰ Affidavit of Paul Reilly, Exhibit B: "Appendix R to Collective Agreement" at p. 211, s. (d).

⁴¹ Transcript at pp. 106-7, lines 19-1.

⁴² Coalition Book of Documents, Tab 5: Michael J. Prince (2016), *Struggling for Social Citizenship: Disabled Canadians, Income Security, and Prime Ministerial Eras* (Montreal & Kingston: McGill-Queen's University Press) at p. 402.

⁴³ Affidavit of Adele Furrie at paras. 27-28.

⁴⁴ Affidavit of Paul Reilly at paras. 57-60; Exhibit L: Records of Dr. Sewchand at p. 5 of exhibit; Exhibit L: Report from St. Joseph's at p. 90 of exhibit.

as compared to those with milder disabilities who may be able to work part-time as part of a rehabilitation program or enjoy LTD benefits from other plans.

ii. Those with severe and prolonged disabilities are disadvantaged as compared to those with short-term or temporary disabilities

45. The Ford plan also provides STD benefits for a period of up to 52 weeks (what it calls “Accident and Sickness Benefits”).⁴⁵

46. CPPD benefits are not offset from STD benefits under the Ford plan.⁴⁶ Indeed, it is general industry practice not to offset CPPD from short-term disability benefits. While Mr. Kassner suggested that there was no CPPD offset because STD benefits are of a short duration, such benefits are available for up to one year under the Ford plan.⁴⁷ Indeed, because Mr. Reilly was eligible for STD benefits more than once, he received these benefits without any CPPD offset almost continuously from July 2011 to June 3, 2014.⁴⁸

47. As a result, those with severe and prolonged disabilities are disadvantaged by a reduction in their income as compared to those in receipt of benefits for temporary disabilities.

iii. Persons with severe and prolonged disabilities are denied the benefit of the “flat rate” portion of CPPD

48. The CPPD benefit is actually the combination two distinct components.⁴⁹ The first component is income-related and is calculated as 75 percent of retirement pension. This portion is similar to LTD income replacement, although not identical. The benefit is calculated as the average of maximum pensionable earnings over the last five years,

⁴⁵ Affidavit of Paul Reilly, Exhibit B: Collective Agreement at p. 200, s. 11(a). Note that the policy changed to 51 weeks in 2017: Affidavit of Aisha Mirza at para. 5.

⁴⁶ Affidavit of Paul Reilly, Exhibit B: Collective Agreement at p. 203, s. 11.

⁴⁷ Transcript at pp. 128-9, lines 17-13.

⁴⁸ Affidavit of Paul Reilly at paras. 25, 44.

⁴⁹ Coalition Book of Documents, Tab 3: HUMA Committee (June 2003), “Listening to Canadians: A First View of the Future of the Canada Pension Plan Disability Program” at p. 178.

rather than a percentage of the beneficiary's income at the time of disability (the standard for LTD plans).⁵⁰

49. However, the second component of CPPD is not income-related. Currently valued at \$471.43,⁵¹ this "flat-rate" component is intended to provide a minimum standard of support for meeting the needs of disabled workers regardless of their income prior to disability.⁵²

50. A 1964 White Paper outlining proposals for Canada Pension Plan legislation noted that the flat rate was important for meeting the particular needs of persons with disabilities: "This flat rate component means that the supplementary pensions are in a sense more generous, especially for lower income people, than the new retirement pensions. This is reasonable, because of the special needs of ... disabled people."⁵³

51. The flat-rate portion recognizes that persons with disabilities will have higher costs as a result of their disability and that their income replacement should not be based solely on their pre-disability income. It is an important measure promoting equality and anti-poverty goals.⁵⁴

52. However, the Ford plan treats both components of the CPPD the same even though the flat rate component is not income-related. The result is that the component of CPPD that is intended to foster equality and fight poverty is instead used to line the pockets of insurance companies and employers.

⁵⁰ Coalition Book of Documents, Tab 3: HUMA Committee (June 2003), "Listening to Canadians: A First View of the Future of the Canada Pension Plan Disability Program" at p. 178.

⁵¹ Affidavit of Brian Kassner, Exhibit 3: "Canada Pension Plan Disability Benefit – How much could you receive?"

⁵² Coalition Book of Documents, Tab 5: Michael J. Prince (2016), *Struggling for Social Citizenship: Disabled Canadians, Income Security, and Prime Ministerial Eras* (Montreal & Kingston: McGill-Queen's University Press) at pp. 339, 382.

⁵³ Report of Sue Lott at p. 11.

⁵⁴ Transcript at p. 57, lines 15-24.

iv. Additional unique benefits of CPPD

53. As a program of social insurance, CPPD has a number of features that are designed to promote equality for persons with disabilities and for women. Whether a CPPD recipient can enjoy the benefits of those features while also in receipt of LTD depends upon the specific LTD plan.

54. What follows is a brief overview of some of the potential disadvantages that can arise when CPPD is offset from LTD. Although these disadvantages do not affect Mr. Reilly, they are identified for the Tribunal in order to ensure that a decision in this case does not have unintended consequences for future cases:

- a) **Indexation to inflation:** CPPD is indexed to inflation⁵⁵ while this is not the case for some LTD plans.⁵⁶ For those plans that increase the CPPD offset to keep pace with increases to CPPD, the recipient gets no benefit and the insurer simply pays less and less. The entire benefit of CPPD increases is enjoyed by the insurance company, which sees the amount that it pays to beneficiaries decrease each year. In contrast, there is an erosion in the real value of CPPD payments over time. As observed by the HUMA Committee: “There is no doubt that this produces a benefit transfer to other disability income support providers ... whose payments do not keep pace with inflation.”^{57, 58}

⁵⁵ *Canada Pension Plan*, s. 43. Coalition Book of Documents, Tab 3: HUMA Committee (June 2003), “Listening to Canadians: A First View of the Future of the Canada Pension Plan Disability Program” at pp. 178, 196. Report of Sue Lott at p. 26.

⁵⁶ Report of Sue Lott at p. 19.

⁵⁷ Coalition Book of Documents, Tab 3: HUMA Committee (June 2003), “Listening to Canadians: A First View of the Future of the Canada Pension Plan Disability Program” at pp. 178, 196.

⁵⁸ Mr. Reilly is not disadvantaged in this way because in the Ford plan, the CPPD offset remains constant and does not increase as CPPD increases: Affidavit of Aisha Mizra at para. 13; Affidavit of Paul Reilly, Exhibit B, s. 13(b)(2)(C) at p. 208.

- b) **Credit-splitting:** When a spousal relationship ends, CPP allows the couple to split the credits they built up during the time they lived together.⁵⁹ The splitting or division of CPP credits was introduced with the goals of promoting gender equality and recognizing women’s work in the home.⁶⁰ Some CPPD recipients will receive a higher benefit than their income alone would have permitted, but this increase is simply deducted from their LTD payments and the goal of promoting gender equality is undermined.
- c) **Taxable benefits:** CPPD is taxable.⁶¹ For employee-pay-all-plans, LTD benefits are not taxable.⁶² Beneficiaries who pay taxes on the CPPD portion of their income but not on their LTD portion end up taking home less in net income than those who do not qualify for CPPD.^{63, 64}

D. A *prima facie* case of discrimination is established by the adverse impacts of the CPPD offset

55. Many of the difficulties confronting people living with disabilities do not flow from the individual’s condition, but are located in the discriminatory response of society to that condition. Exclusion and marginalization are generally not created by the individual with disabilities but by the economic and social environment.⁶⁵ The CPPD offset contributes to that marginalization.

⁵⁹ Coalition Book of Documents, Tab 2: Human Resources and Skills Development Canada (2011), “Summative Evaluation of the Canada Pension Plan Disability Program: Final Report” (Strategic Policy and Research Branch) at p. 37.

⁶⁰ Coalition Book of Documents, Tab 5: Michael J. Prince (2016), *Struggling for Social Citizenship: Disabled Canadians, Income Security, and Prime Ministerial Eras* (Montreal & Kingston: McGill-Queen’s University Press) at pp. 332, 342.

⁶¹ Report of Sue Lott at p. 3; Affidavit of Micheline Lafond at para. 20.

⁶² *Income Tax Act*, s. 6(1)(f).

⁶³ For case examples demonstrating the disadvantage, see: Coalition Book of Documents, Tab 3: HUMA Committee (June 2003), “Listening to Canadians: A First View of the Future of the Canada Pension Plan Disability Program” at pp. 193-195.

⁶⁴ Mr. Reilly’s LTD benefits are taxed: Affidavit of Paul Reilly, Exhibit L: Letter from GWL to Paul Reilly, June 20, 2014 (at p. 72 of exhibit); Affidavit of Patricia Edgar at para. 11.

⁶⁵ *Granovsky v. Canada (Minister of Employment and Immigration)*, 2000 SCC 28 at para. 30.

56. In *Battlefords and District Co-op v Gibbs*, the majority of the Supreme Court concluded that a group insurance plan that provided a lesser degree of LTD benefits to employees with mental health disabilities (as compared to employees with physical disabilities) was discriminatory. The Court held that the distinction was contrary to the purpose of that plan, which was to insure against the income-related consequences of disability generally.⁶⁶

57. As in *Battlefords*, the Ford LTD plan is intended to insure against the income-related consequences of becoming disabled and unable to work. However, it disadvantages those with severe and prolonged disabilities by paying a lesser benefit as compared both to those with milder disabilities or temporary disabilities. The fact that CPPD beneficiaries such as Mr. Reilly have severe and prolonged disabilities is a factor (indeed “the” factor) in that disadvantage.

58. The Coalition acknowledges that there are several cases that have rejected the argument that the CPPD offset from LTD is discriminatory. All of these cases were decided on the basis that the offset did not distinguish on the basis of a prohibited ground. None of those cases have considered the argument made here: that the CPPD offset discriminates against a subset of persons with disabilities.⁶⁷

59. It is anticipated that Ford and GWL will argue that none of the disadvantages described above are discriminatory because the CPPD offset is done with the intention of ensuring that all disabled employees are treated equitably by paying “substantially similar benefit levels” in respect of pre-disability earnings.⁶⁸

⁶⁶ *Battlefords and District Co-op v. Gibbs*, 1996 CanLII 187 (SCC) at paras. 23, 27-28, 33-34, 40.

⁶⁷ *Ontario Human Rights Commission v. Jeffrey*, [2007] O.J. No. 3767 (ON Div Ct) at para. 104; *McMahon v. Equitable Life Insurance Company of Canada*, 2012 HRTO 2131 at paras. 8-11; *Decision No. 829/10*, 2013 ONWSIAT 2597 at paras. 35-48, 67. Should the Respondents seek to rely on the *Ruffolo* case, it should be borne in mind that *Ruffolo* was not a discrimination claim, rather the applicants asked the court to end the offset of CPP child benefits for policy reasons: *Ruffolo v. Sun Life*, 2007 CanLII 50284 (ON SC) at paras. 114-120.

⁶⁸ Report of Brian Kassner at para. 6. See also para. 47.

60. Such an argument is based on the concept of formal equality, that equality follows when everyone is treated the same.⁶⁹ But the two groups are not the same. Those in receipt of CPPD and LTD benefits are distinct from those who only receive LTD. As set out above, their disabilities are more severe, they have higher costs associated with disability and they have a prolonged need for income support.

61. The purpose of anti-discrimination law is the achievement of substantive, not formal, equality. Substantive equality recognizes that systemic and historical disadvantages faced by members of certain groups in Canada have limited their opportunities in Canadian society and seeks to prevent conduct that perpetuates those disadvantages.⁷⁰

62. To achieve substantive equality, the main consideration must be the impact on the individual or group.⁷¹ Here, that means examining the impact of the CPPD offset upon persons with severe and prolonged disabilities, which is to reduce their income, producing financial hardship, exclusion and marginalization.

63. The offset also undermines the social purpose of the CPPD. The Canada Pension Plan is a social insurance scheme with the primary goal of providing a reasonable minimum level of income replacement to workers who experience a prolonged and severe disability in order to reduce poverty and contribute to the equal citizenship of persons with disabilities in Canada.⁷²

64. CPPD is one measure by which Canada complies with its obligations as a signatory to the *Convention on the Rights of Person with Disabilities*, which includes a commitment to provide an adequate standard of living to persons with disabilities and

⁶⁹ *Withler v. Canada (Attorney General)*, 2011 SCC 12 at paras. 37, 39.

⁷⁰ *Withler v. Canada (Attorney General)*, 2011 SCC 12 at paras. 37, 39.

⁷¹ *Withler v. Canada (Attorney General)*, 2011 SCC 12 at paras. 37, 39.

⁷² Coalition Book of Documents, Tab 5: Michael J. Prince (2016), *Struggling for Social Citizenship: Disabled Canadians, Income Security, and Prime Ministerial Eras* (Montreal & Kingston: McGill-Queen's University Press) at pp. 322, 400.

access to disability-related needs.⁷³ By denying persons with severe and prolonged disabilities the full benefit of social and private insurance plans, the CPPD offset undermines Canada's international obligations.

65. Therefore, the Ford plan is *prima facie* discriminatory because it substantially reduces the LTD coverage to the most seriously disabled. The analysis must then shift to consider whether there are any defenses or exemptions available on the evidence.

PART FOUR: DEFENSES AND EXEMPTIONS

A. The Section 22 exemption is not an available defense

66. Should the LTD plan be found to be discriminatory, Ford relies on an exemption for group insurance plans found at section 22 of the *Code*. However, the section 22 statutory defense is only applicable to discrimination in services for contracts. It is explicitly not available as a defense to contracts of group insurance that are provided by an employer:

22 The right under sections 1 and 3 to equal treatment with respect to services and to contract on equal terms, without discrimination because of age, sex, marital status, family status or disability, is not infringed where a contract of automobile, life, accident or sickness or disability insurance or a contract of group insurance between an insurer and an association or person other than an employer, or a life annuity, differentiates or makes a distinction, exclusion or preference on reasonable and *bona fide* grounds because of age, sex, marital status, family status or disability [emphasis added].

67. Human rights claims concerning contracts of employment are covered by section 5 of the *Code*, not sections 1 or 3.

68. While Mr. Reilly initially asserted a claim on the basis of services and contracts, this Tribunal recognized in an interim decision that "it is clear that the relevant social area under the *Code* is employment." The LTD plan is funded by Mr. Reilly's employer pursuant to a collective agreement and the CPPD offset is established as a term of that

⁷³ *Convention on the Rights of Persons with Disabilities*, 30 March 2007, 2515 UNTS 2 at 70, Can TS 2010 No 8 (entered into force 3 May 2008, ratified by Canada 11 March 2010) at Article 28.

agreement. As with other human rights cases involving employment-related group benefit plans, his case must be decided on the basis of discrimination in employment.⁷⁴

69. Therefore, Ford cannot rely on any of the statutory exclusions and in particular cannot rely upon s. 22.

B. Even if the section 22 defense is available, there are no reasonable or *bona fide* grounds for discrimination on the basis of disability

70. The determination of insurance rates and benefits does not fit easily within traditional human rights concepts as rates are set based on statistics about the degree of risk associated with a class or group of persons.⁷⁵ For this reason, the Ontario Legislature included the exemption in section 22 of the *Code*, which immunizes insurers from discrimination claims in the provision of group insurance where a discriminatory distinction is made on reasonable and *bona fide* grounds.

71. To fall within this exception, an insurer must establish the following:⁷⁶

- i) The discriminatory practice is reasonable because: a) it is based on a sound and accepted insurance practice; and, b) there is no practical alternative; and,
- ii) The discriminatory practice is *bona fides* because it was adopted honestly, in the interest of sound and accepted business practice and not for the purpose of defeating the rights protected under the *Code*.

72. For the reasons set out below, neither of these conditions has been established.

i. The CPPD offset is not reasonable because it is not based on legitimate business objectives

73. For a discriminatory practice to be “based on a sound and accepted insurance practice,” the insurer must show that it is desirable to adopt for the purpose of

⁷⁴ See *Battlefords and District Co-op v. Gibbs*, 1996 CanLII 187 (SCC) at paras. 1, 5.

⁷⁵ *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, 1992 CanLII 67 (SCC) at p. 23.

⁷⁶ *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, 1992 CanLII 67 (SCC) at p. 27.

“achieving the legitimate business objective of charging premiums that are commensurate with risk.”⁷⁷

74. The cases that have applied section 22, such as *Zurich*, have typically involved actuarial considerations relating to the degree of risk, considerations that are taken into account in setting premiums. Charging higher premiums to groups that are at greater risk of the “insured event” have generally been upheld as legitimate business practices.⁷⁸

75. Such considerations are quite different from the situation facing Mr. Reilly. In his case, the risk insured against has occurred: he is unable to work due to disability. Thus, from the beginning there are conceptual difficulties in applying this defense in this case.

76. The purpose of the CPPD offset is critical to determining whether the practice is designed to achieve a “legitimate business objective.” Witnesses offered several reasons for the CPPD offset:⁷⁹

- a) To avoid the disincentive to work that results from “over-insurance”;
- b) To ensure that all LTD beneficiaries receive substantially the same overall benefit levels; and
- c) To reduce the cost of providing LTD benefits.

77. None of these objectives amounts to a “legitimate business objective.”

⁷⁷ *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, 1992 CanLII 67 (SCC) at p. 27.

⁷⁸ *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, 1992 CanLII 67 (SCC) at pp. 27, 33. See also: *Olorenshaw v. Western Assurance Company*, 2013 HRTO 280 at paras. 19-20.

⁷⁹ See: Affidavit of Aisha Mirza at para. 17; Affidavit of Micheline Lafond at paras. 29, 44; Report of Brian Kassner at paras. 27(c), 47.

a) CPPD does not create a risk of over-insurance

78. To address the threat of over-insurance, insurers “assume” that having “income replacement which is equal to or greater than his or her pre-disability earnings,” operates as a disincentive to return to work.⁸⁰ According to Micheline Lafond:

GWL’s group disability benefits are designed to avoid over-insurance, whereby the total income received while on disability is high in relation to pre-disability earnings, because this reduces a disabled person’s incentive to attempt to return to work. If CPP disability offsets are no longer permitted, the risk of over-insurance under group disability benefits plans insured by GWL would increase substantially for disabled persons eligible to receive CPP disability benefits.⁸¹

79. Removing disincentives to work are said to be a legitimate business concern because without an incentive, disabled beneficiaries will receive LTD benefits for longer and therefore increase the costs of the LTD plan.⁸² Mr. Kassner testified that the insurance industry has established 85 percent of pre-disability earnings as the point at which an LTD recipient would experience a disincentive to return to work.⁸³

80. This assumption about over-insurance is problematic for three reasons. First, there is no evidence to support it and, as addressed further below, such assumptions play into stereotypes about disabled persons.

81. Second, the CPPD offset does not correspond to the actual needs and circumstances of persons with severe and prolonged disabilities in receipt of CPPD. As noted above, persons in receipt of CPPD are not expected to return to work for a very long time, if ever. Therefore, incentives to work are not relevant to them.

82. Third, even if over-insurance and disincentives to work are legitimate reasons for offsetting CPPD, there is no evidence that there is such a risk in the context of the Ford plan. As discussed above, without a CPPD offset, Mr. Reilly’s pre-disability income

⁸⁰ Report of Brian Kassner at para. 27.

⁸¹ Affidavit of Micheline Lafond at para. 44.

⁸² Affidavit of Micheline Lafond at paras. 29, 44; Affidavit of Aisha Mirza at para. 43.

⁸³ Transcript at pp. 108-9, lines 24-9, pp. 113-4, lines 19-3.

would be replaced at a rate of 74 percent. There is no danger that Mr. Reilly will be “enriched,” to use Brian Kassner’s term.⁸⁴

83. From the perspective of CPPD recipients like Mr. Reilly, they are significantly under-insured rather than over-insured. The CPPD offset means that Mr. Reilly’s post-disability income is drastically reduced and he cannot meet his needs.

84. Thus, avoidance of “over-insurance” is not a legitimate reason for the CPPD offset.

b) The CPPD offset does not achieve “equitable” treatment

85. The Tribunal should not accept the suggestion that the CPPD offset is motivated by a desire to ensure that all beneficiaries receive substantially the same degree of income replacement. If equality of benefits was truly the motivation, the Ford plan (and LTD plans generally) would not permit beneficiaries to keep payments from private or dependent LTD plans or wages from rehabilitation programs or have “all plan maximums.” But they do.

86. Mr. Kassner himself conceded during cross-examination that it is possible that two workers in similar positions with the same disability could receive different degrees of income replacement.⁸⁵

87. In any event, as noted above, protections for formal equality can lead to inequitable outcomes. Such is the case with the CPPD offset.

c) No evidence that higher costs would affect the viability of insurance

88. As the Ontario Human Rights Commission has warned, one must be wary of accepting increased costs as a reason for refusing to accord equal treatment to persons with disabilities. Such costs must be quantifiable, shown to be related to the accommodation and so substantial that they would alter the essential nature of the

⁸⁴ Report of Brian Kassner at para. 31.

⁸⁵ Transcript at p. 107, lines 2-15.

enterprise or so significant that they would substantially affect its viability. Mere speculation “will not generally be persuasive.”⁸⁶

89. The craven pursuit of profit cannot be a legitimate defense to a discrimination claim, particularly when it comes to insurance companies. While corporate law may privilege shareholders above all else, the insurance industry is heavily regulated to ensure it acts in a manner consistent with the public interest. For example, insurance companies must maintain capitalization to pay out claims and may be subject to disciplinary action if the Superintendent of Insurance finds that “there exists a state of affairs that is or may be prejudicial to the interests of persons who have contracts of insurance with an insurer licensed in Ontario.”⁸⁷

90. In any event, there is **no** evidence that eliminating CPPD offsets would undermine the viability of the LTD insurance industry. Mr. Kassner testified:

- He did not ask any of his clients if they would be prepared to pay more to offer a 60 percent LTD plan without offsets;
- He did not survey any of his clients if they would be prepared to pay more to offer a 60 percent LTD plan without offsets;
- He is not aware of any independent studies or reports regarding the same; and
- His estimate of the impact of offsets on premiums and the level of benefits is based on a proportionate reduction rather than any actuarial analysis.⁸⁸

91. Moreover, even though Mr. Kassner testified that there are LTD plans without CPPD offsets,⁸⁹ neither Ford nor GWL offered any evidence regarding the premiums, benefit levels, and overall viability of such plans.

⁸⁶ Ontario Human Rights Commission (2016), “Policy on ableism and discrimination based on disability” at pp. 51, 55.

⁸⁷ *Insurance Act*, RSO 1990, c I.8, ss. 48 and 58(1)(b).

⁸⁸ Transcript at pp. 100-105.

⁸⁹ Transcript at p. 110, lines 11-23.

92. Neither Ford nor Great West Life led evidence that they could not simply absorb the costs of providing LTD benefits without a CPPD offset. As noted in *Talos*, employers have been able to absorb increases in plan costs of between ten and 15 percent per annum in the recent past.⁹⁰

93. In fact, removing CPPD offsets could produce cost savings by eliminating the extensive administration required to process CPPD offsets.⁹¹

94. The onus is on Ford to establish this aspect of the defense and they have not done so. Therefore, there is no legitimate business reason for requiring the CPPD offset as part of the Ford plan.

ii. There are practical alternatives to the CPPD offset

95. Should this Tribunal determine that there are legitimate business reasons for requiring the CPPD offset, neither Ford nor GWL has established that there is no practical alternative.

96. The Legislature could not have intended that everything insurers do to increase their already considerable profits is immune from discrimination claims. Even in cases where the section 22 defense has been applied, decision-makers have warned that it is not a free pass forever. Rather, insurers have been “allowed time to determine whether [they] can restructure” their plans in a manner that will eliminate discrimination.⁹² In other words, insurers are expected to take steps to end discrimination.

97. Legitimate business objectives are not sufficient to exempt an insurer’s discriminatory practice because “human rights values cannot be over-ridden by business expediency alone.”⁹³

⁹⁰ *Talos v. Grand Erie District School Board*, 2018 HRTO 680 at para. 275.

⁹¹ Transcript at pp. 123-125, lines 10-14.

⁹² *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, 1992 CanLII 67 (SCC) at pp. 38-39.

⁹³ *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, 1992 CanLII 67 (SCC) at p. 35.

98. In this case, there are alternatives. GWL witnesses identified two of them: increase premiums by 15 to 20 percent or lower benefit levels to 40 or 50 percent of pre-disability benefits.⁹⁴

99. Before addressing these alternatives, it is worth noting that the foundations for these estimates, such as GWL's "current pricing model,"⁹⁵ were not provided. It is also worth noting that these estimates do not take into account that some of the cost of LTD plans relates to administrative costs, which would not see a corresponding increase if the CPPD offset ended and could even be reduced.⁹⁶

100. But even accepting these alternatives at face value, neither Ford nor GWL provided evidence that they are impractical in the sense that the viability of LTD plans would be affected by removing the offset. Ford could have led evidence on the impact higher premiums or lower benefits would have on the viability of its plan, but did not.

101. In addition, receipt of CPPD could be permitted up to the "all-source" maximum. Mr. Kassner acknowledged that there are some plans, while not common, that include CPPD within the all-source maximum rather than deducting it dollar-for-dollar.⁹⁷

102. It is not at all clear that the doomsday prediction of lower benefit levels for all would be necessary. In any event, employers can only substantially interfere with the rights of other workers (by lowering benefits) where they can show there are no other viable accommodation options available. They must first distribute the costs as widely as possible within the organization.⁹⁸

103. In *Talos*, the lack of empirical evidence addressing whether the maintenance of extended health, dental and life insurance benefits for workers over the age of 65 would

⁹⁴ Affidavit of Micheline Lafond at paras. 42, 45-46; Report of Brian Kassner at paras. 8, 55-56, 61-63: "Without the offset provision, the premium for that person would likely be in the range of \$624 to \$936 per year (assuming that the target benefit level remains the same at 60% of pre-disability income)."

⁹⁵ Affidavit of Micheline Lafond at para. 42.

⁹⁶ Transcript at pp. 123-125, lines 10-14.

⁹⁷ Transcript at p. 110, lines 11-23.

⁹⁸ Ontario Human Rights Commission (2016), "Policy on ableism and discrimination based on disability" at p. 51.

be cost prohibitive and/or undermine the viability of group insurance plans was fatal.⁹⁹ Something more than an assumption is needed. For example, assumptions that costs would increase steeply if employers had to provide group benefits to workers over the age of 65 were not borne out.¹⁰⁰ This application similarly lacks empirical evidence.

104. There are group insurance schemes that do not include the CPPD offset, suggesting that there are viable options for LTD plans without an offset.¹⁰¹

105. The point of group insurance policies, and indeed of CPPD, is to share risk, with the intention that healthy people subsidize those with higher needs.¹⁰² The CPPD offset reverses this intention by forcing those with the most severe and prolonged disabilities, resulting in the highest needs, to subsidize everyone else. The increased cost of eliminating CPPD offsets, if there is one, is simply the cost of providing non-discriminatory plans. Neither Ford nor GWL have met the burden of demonstrating that there is no practical alternative.

iii. The CPPD offset is not *bona fides*

106. A practice is *bona fides* if it is adopted honestly, in the interest of sound and accepted business practice and not for the purpose of defeating the rights protected under the *Code*.

107. An employment practice is not adopted honestly if it was motivated by a discriminatory *animus*.¹⁰³ As noted by the Ontario Human Rights Commission in its policy on ableism, discrimination against people with disabilities is often linked to

⁹⁹ *Talos v. Grand Erie District School Board*, 2018 HRTO 680 at para. 274.

¹⁰⁰ *Talos v. Grand Erie District School Board*, 2018 HRTO 680 at para. 282.

¹⁰¹ *McMahon v. Equitable Life Insurance Company of Canada*, 2012 HRTO 2131 at para. 9. Affidavit of Micheline Lafond at paras. 17, 28. Transcript at p. 110, lines 11-23.

¹⁰² Affidavit of Micheline Lafond at para. 11.

¹⁰³ *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, 1999 CanLII 652 (SCC) at para. 60.

prejudicial attitudes, including the belief that persons with disabilities attempt to “game the system,” or “obtain benefits to which they are not entitled.”¹⁰⁴

108. Unfortunately, the CPPD offset is motivated by discriminatory attitudes such as these. Assumptions about over-insurance are based on stereotypes that persons with disabilities are malingerers who avoid working unless they have to.

109. Such attitudes were prevalent throughout this case. They can be seen in the allegations made by Ford’s doctor in a letter provided to Mr. Reilly’s family doctor, who wrote about Ford’s concerns that Mr. Reilly’s “actions are of a manipulative or fraudulent type.”¹⁰⁵

110. “Paternalistic and patronizing” assumptions¹⁰⁶ are to be found in the evidence of Micheline Lafond and Brian Kassner who “assume” that persons with disabilities will only return to work if there is a financial benefit to be had.¹⁰⁷ These assumptions fail to acknowledge the discriminatory barriers that lead to under-employment of persons with disabilities, for example failures to accommodate as well as stereotypes about their skills and competencies.¹⁰⁸

111. In *Battlefords*, the Supreme Court noted that limits on benefits available to a mentally disabled employee were grounded on “a stereotypical assumption concerning the behaviour of mentally disabled persons, an assumption which is antithetical to the purpose of human rights legislation.”¹⁰⁹ The employer could not rely on those discriminatory stereotypes to justify providing lesser compensation to persons with mental health disabilities. Similarly, Ford should not be permitted to rely on such

¹⁰⁴ Ontario Human Rights Commission (2016), “Policy on ableism and discrimination based on disability” at p. 11.

¹⁰⁵ Exhibit J to Affidavit of Paul Reilly, Letter from Dr. Garner, dated April 4, 2013.

¹⁰⁶ Ontario Human Rights Commission (2016), “Policy on ableism and discrimination based on disability” at p. 3.

¹⁰⁷ See, for example, transcript at p. 109, lines 4-9; Affidavit of Micheline Lafond at paras. 43-44.

¹⁰⁸ Ontario Human Rights Commission (2016), “Policy on ableism and discrimination based on disability” at p. 6.

¹⁰⁹ *Battlefords and District Co-op v. Gibbs*, 1996 CanLII 187 (SCC) at para. 42.

stereotypes to provide lesser compensation to those with severe and prolonged disabilities.

112. Therefore, Ford has not met its burden of establishing that the exemption in section 22 of the *Code* applies.

C. The CPPD offset is not a reasonable and *bona fide* occupational requirement

113. Should this Tribunal conclude that the section 22 exemption is not available, Ford may seek to rely on the defense found in section 11 of the *Code*. Section 11 provides a respondent with a defence in cases of constructive or adverse impact discrimination where they can demonstrate a reasonable and *bona fide* justification: a rational connection between the impugned rule and the purpose it is supposed to serve; an honest and good faith belief in the necessity of the rule; and proof that the rule is reasonably necessary in the sense that accommodation is impossible without imposing undue hardship.¹¹⁰

114. The three-part test is very similar to the test that has been developed and discussed above with respect to the section 22 exemption. Like the section 22 exemption, the section 11 defense is concerned with the reasonableness and *bona fides* of an otherwise discriminatory practice.

115. For the reasons set out above, the CPPD offset cannot be justified as either reasonable or *bona fides* under the three-part test.

D. Conclusion

116. The CPPD offset leads to lower LTD compensation to workers with severe and prolonged disabilities, without regard to their individual circumstances and without regard to the social and economic factors that lead this group of workers to have higher needs.

¹¹⁰ *British Columbia (Public Service Employee Relations Commission) v. BCGEU*, 1999 CanLII 652 (SCC).

The offset of CPPD benefits is a discriminatory policy, based on prejudicial stereotypes. The pursuit of insurance industry profits cannot be a reasonable or *bona fide* basis upon which to justify a practice that contributes to the inequality, poverty and exclusion of those with the most severe and prolonged disabilities.

SCHEDULE A: LIST OF AUTHORITIES

1. *Moore v. British Columbia (Education)*, 2012 SCC 61
2. *Janzen v. Platy Enterprises Ltd*, 1989 CanLII 97 (SCC)
3. *Filion v. Capers Restaurant*, 2010 HRTO 264 (CanLII)
4. *Talos v. Grand Erie District School Board*, 2018 HRTO 680
5. *Ontario Human Rights Commission (2016)*, “Policy on ableism and discrimination based on disability” (excerpts only)
6. *Canada (Minister of Human Resources Development) v. Henderson*, 2005 FCA 309
7. *Donohue v. Canada Life*, 46 OR (3d) 82, 1999 CanLII 15096
8. Organisation for Economic Co-operation and Development (2010), “Sickness, Disability and Work: Breaking the Barriers: Canada: Opportunities for Collaboration”.
9. Canada, Employment and Social Development Canada (2016), “A Backgrounder on Poverty in Canada”.
10. *Granovsky v. Canada (Minister of Employment and Immigration)*, 2000 SCC 28
11. *Battlefords and District Co-op v. Gibbs*, 1996 CanLII 187 (SCC)
12. *Ontario Human Rights Commission v. Jeffrey*, [2007] O.J. No. 3767 (ON Div Crt)
13. *McMahon v. Equitable Life Insurance Company of Canada*, 2012 HRTO 2131
14. *Decision No. 829/10*, 2013 ONWSIAT 2597
15. *Ruffolo v. Sun Life*, 2007 CanLII 50284 (ON SC)
16. *Withler v. Canada (Attorney General)*, 2011 SCC 12
17. *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, 1992 CanLII 67 (SCC)
18. *Olorenshaw v. Western Assurance Company*, 2013 HRTO 280

19. *British Columbia (Public Service Employee Relations Commission) v. BCGEU*, 1999 CanLII 652 (SCC)

SCHEDULE B: LEGISLATION

1. *Human Rights Code, RSO 1990, c H19, ss. 1, 3, 5, 11, 22*

1 Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability.

...

3 Every person having legal capacity has a right to contract on equal terms without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability.

...

5 (1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability.

(2) Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability.

...

11 (1) A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,

(a) the requirement, qualification or factor is reasonable and *bona fide* in the circumstances; or

(b) it is declared in this Act, other than in section 17, that to discriminate because of such ground is not an infringement of a right.

(2) The Tribunal or a court shall not find that a requirement, qualification or factor is reasonable and *bona fide* in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

(3) The Tribunal or a court shall consider any standards prescribed by the regulations for assessing what is undue hardship.

...

22 The right under sections 1 and 3 to equal treatment with respect to services and to contract on equal terms, without discrimination because of age, sex, marital status, family status or disability, is not infringed where a contract of automobile, life, accident or sickness or disability insurance or a contract of group insurance between an insurer and an association or person other than an employer, or a life annuity, differentiates or makes a distinction, exclusion or preference on reasonable and *bona fide* grounds because of age, sex, marital status, family status or disability.

2. *Canada Pension Plan, RSC 1985, c C-8, ss. 42(2), 43*

42 (2) For the purposes of this Act,

(a) a person shall be considered to be disabled only if he is determined in prescribed manner to have a severe and prolonged mental or physical disability, and for the purposes of this paragraph,

(i) a disability is severe only if by reason thereof the person in respect of whom the determination is made is incapable regularly of pursuing any substantially gainful occupation, and

(ii) a disability is prolonged only if it is determined in prescribed manner that the disability is likely to be long continued and of indefinite duration or is likely to result in death; and

(b) a person is deemed to have become or to have ceased to be disabled at the time that is determined in the prescribed manner to be the time when the person became or ceased to be, as the case may be, disabled, but in no case shall a person — including a contributor referred to in subparagraph 44(1)(b)(ii) — be deemed to have become disabled earlier than fifteen months before the time of the making of any application in respect of which the determination is made.

...

43 (1) Subject to subsection (2), the Pension Index for each year shall be calculated, in prescribed manner, as the average for the twelve month period ending October 31 in the preceding year of the Consumer Price Index for each month in that twelve month period.

(2) For any year for which the calculation required by subsection (1) yields a Pension Index that is less than the Pension Index for the preceding year, the Pension Index shall be taken to be the Pension Index for the preceding year.

(3) Where at any time the Consumer Price Index is adjusted to reflect a new time basis or a new content basis with a resulting percentage adjustment being made in the figures for that Index, a corresponding percentage adjustment shall, at the time of the next calculation of the Pension Index, be made in all values then existing of the Pension Index.

3. *Income Tax Act, RSC, 1985, c 1 (5th Supp), s. 6(1)(f)*

6 (1) There shall be included in computing the income of a taxpayer for a taxation year as income from an office or employment such of the following amounts as are applicable

(f) the total of all amounts received by the taxpayer in the year that were payable to the taxpayer on a periodic basis in respect of the loss of all or any part of the taxpayer's income from an office or employment, pursuant to

(i) a sickness or accident insurance plan,

(ii) a disability insurance plan,

(iii) an income maintenance insurance plan, or

(iii.1) a plan described in any of subparagraphs (i) to (iii) that is administered or provided by an employee life and health trust,

to or under which the taxpayer's employer has made a contribution, not exceeding the amount, if any, by which

(iv) the total of all such amounts received by the taxpayer pursuant to the plan before the end of the year and

(A) where there was a preceding taxation year ending after 1971 in which any such amount was, by virtue of this paragraph, included in computing the taxpayer's income, after the last such year, and

(B) in any other case, after 1971,

exceeds

(v) the total of the contributions made by the taxpayer under the plan before the end of the year and

(A) where there was a preceding taxation year described in clause (iv)(A), after the last such year, and

(B) in any other case, after 1967;

- 4. *Convention on the Rights of Persons with Disabilities, 30 March 2007, 2515 UNTS 2 at 70, Can TS 2010 No 8 (entered into force 3 May 2008, ratified by Canada 11 March 2010) at article 28***

Article 28

Adequate standard of living and social protection

1. States Parties recognize the right of persons with disabilities to an adequate standard of living for themselves and their families, including adequate food, clothing and housing, and to the continuous improvement of living conditions, and shall take appropriate steps to safeguard and promote the realization of this right without discrimination on the basis of disability.
2. States Parties recognize the right of persons with disabilities to social protection and to the enjoyment of that right without discrimination on the basis of disability, and shall take appropriate steps to safeguard and promote the realization of this right, including measures:
 - a. To ensure equal access by persons with disabilities to clean water services, and to ensure access to appropriate and affordable services, devices and other assistance for disability-related needs;
 - b. To ensure access by persons with disabilities, in particular women and girls with disabilities and older persons with disabilities, to social protection programmes and poverty reduction programmes;

- c. To ensure access by persons with disabilities and their families living in situations of poverty to assistance from the State with disability-related expenses, including adequate training, counselling, financial assistance and respite care;
- d. To ensure access by persons with disabilities to public housing programmes;
- e. To ensure equal access by persons with disabilities to retirement benefits and programmes.

5. *Insurance Act, RSO 1990, c I.8, ss. 48 and 58(1)(b)*

48 (1) A licence shall not be granted to a joint stock insurance company not licensed before the 1st day of January, 1971 unless the company furnishes to the Superintendent satisfactory evidence that if the company is applying for a licence to transact the business of life insurance, the company has paid up capital and surplus of not less than \$2,000,000, or such greater amount as the Superintendent in the circumstances may require, of which at least \$1,000,000 is paid up capital and at least \$500,000 is unimpaired surplus.

(2) A licence shall not be granted to a joint stock insurance company unless the company furnishes to the Superintendent satisfactory evidence that if the company is applying for a licence to transact any insurance other than life insurance, the company has, in aggregate, a paid up capital and unimpaired surplus of not less than \$3,000,000 or such greater amount as the Superintendent in the circumstances may require.

(3) A licence shall not be granted to a mutual insurance corporation, a cash-mutual insurance corporation, an insurance company mentioned in paragraph 6 of subsection 42 (1), or to an underwriter or syndicate of underwriters operating on the plan known as Lloyds, except upon proof that the net surplus of assets over all liabilities exceeds the amount fixed by subsection (2) for the paid in capital stock of joint stock insurance

companies, and that such net surplus of assets over all liabilities together with the contingent liability of members, if any, exceeds the amount fixed by subsection (2) for the paid up capital and surplus of joint stock insurance companies for the respective classes of insurance mentioned therein.

(4) On the report of the Superintendent, the Lieutenant Governor in Council may by order exempt an insurer from the minimum capital requirements set out in subsection (2) or (3), as the case may be, if the insurer is offering its services only within Ontario or if the insurer is offering a specialized or limited service that in the opinion of the Lieutenant Governor in Council does not require the support of higher capital requirements.

(5) An exemption under subsection (4) may be made subject to such conditions as the Lieutenant Governor in Council may impose.

(6) A licence shall not be granted to a mutual insurance corporation, a cash-mutual insurance corporation, an insurance company mentioned in paragraph 6 of subsection 42 (1), a reciprocal insurance exchange, or to an underwriter or syndicate of underwriters operating on the plan known as Lloyds, not licensed on the 30th day of June, 1971, except upon proof that the net surplus of assets over all liabilities exceeds the amount fixed by subsection (1) for the paid in capital stock of joint stock insurance companies, and that such net surplus of assets over all liabilities together with the contingent liability of members, if any, exceeds the amount fixed by subsection (1) for the paid up capital and surplus of joint stock insurance companies for the respective classes of insurance mentioned therein.

(7) Subsection (3) does not apply to a mutual insurance corporation incorporated under the laws of Ontario that is a member of the Fire Mutuals Guarantee Fund.

(7.1) No mutual insurance corporation that is incorporated in Ontario to undertake contracts on a premium note plan may be licensed under this Act unless it is a member of the Fire Mutuals Guarantee Fund.

(8) A licence shall not be granted to an insurer except upon proof that it has complied with the provisions of this Act and the regulations applicable to it.

(9) A licence shall not be granted to an insurer for the transaction of both property and life insurance unless it maintains separate and distinct accounts, funds and securities in respect of its business of life insurance, and those funds and securities are available only for the protection of the holders of its policies of life insurance and are not liable for the payment of claims arising from any other class of insurance that it undertakes, and it complies with such other requirements as the Superintendent may impose for the purposes of this subsection.

(10) Where the head office of an applicant for a licence under this Act is situate out of Ontario, a licence shall not be granted except upon proof of its ability to provide for the payment at maturity of all its contracts, but the Superintendent may accept as sufficient the fact that it is licensed by any other government in Canada.

(11) A licence shall not be granted to a corporation that is incorporated under the law of a province other than Ontario unless its head office and chief place of business is situate in that province.

...

58 (1) Upon examination, from annual statements, or upon any other evidence, the Superintendent shall make a report if he or she,

(b) is of the opinion that there exists a state of affairs that is or may be prejudicial to the interests of persons who have contracts of insurance with an insurer licensed in Ontario;