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Comprehensive Disability Compensation in Ontario: Towards an Agenda

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COMPREHENSIVE DISABILITY COMPENSATION IN ONTARIO: TOWARDS AN AGENDA

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RÉSUMÉ

En Ontario, il y a plusieurs programmes d'aide financière pour les personnes invalides. Les plus importants sont: les prestations familiales, les accidents du travail, l'assurance d'invalidité prolongée, la pension d'invalidité du Régime de pensions du Canada, les prestations sans égard à la faute et la constitution d'une demande à cause de blessures provenant d'un acte délictuel. Il y a aussi d'autres programmes à portée plus limitée. Ceux-ci payent les dépenses liées à l'invalidité, réduisent l'impôt ou fournissent des services plutôt que de l'argent. Malgré ces programmes, on a assez de preuves pour conclure que le «système» ne répond pas aux besoins des personnes invalides. Cet article a pour but d'examiner pourquoi on n'a pas réussi à établir un programme complet et suggère de nouvelles stratégies pour la réforme.

INTRODUCTION

There are many programs in Ontario which provide some measure of protection against the financial consequences of disability. These plans vary greatly in their funding, coverage, eligibility rules, benefits, delivery mechanisms, appeal rights, and other features. The most important plans which provide income to disabled persons are: Family Benefits (FBA) GAINS-D;[1] Workers' Compensation (WCB);[2] long-term disability insurance (LTD);[3] Canada Pension Plan disability

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1. *Family Benefits Act*, R.S.O. 1980, c. 151. GAINS-D, the additional special needs minimum for persons with disabilities is provided for by the Regulations: R.R.O. 1980, Reg. 318, s.12(3), para. 12, 12a.

2. *Workers' Compensation Act*, R.S.O. 1980, c. 539.

3. Long-term disability policies are generally governed in Ontario by Part VII of the *Insurance Act*, R.S.O. 1980, c. 218. However, there are exceptional coverages incorporated as part of life insurance policies or integrated into company pension plans.

pensions (CPP disability);[4] no-fault motor vehicle accident benefits under the Ontario Motorist Protection Plan (OMPP);[5] and personal injury tort awards and settlements. Each of these is a detailed system unto itself.

But these are only a part of the total system of protection against disability and its costs. There are other compensation systems which are more limited in their coverage. These include: Criminal Injuries Compensation,[6] Veterans' disability benefits,[7] Handicapped Children's Benefits under the *Family Benefits Act*,[8] and unemployment insurance sickness benefits.[9] Some life insurance policies and some employee pension plans contain provision for disability income protection. Accident and sickness insurance policies provide coverage in particular circumstances as well.

The programs just mentioned provide income protection. There are others which provide funding for disability-related expenses, including the Ontario Health Insurance Plan,[10] supplementary aid and special assistance provided by municipalities under the *General Welfare Assistance Act*,[11] Vocational Rehabilitation Services (Ministry of Community and Social Services),[12] the Assistive Devices Program of the Ministry of Health; and the Ontario Home Renewal Program for disabled persons. These programs pay in one way or another for expenses related to disability.

Besides programs which provide payments directly, there are tax provisions which can assist disabled persons (or their families) by reducing their tax liability. These include the disability credit and medical expense credit under the *Income Tax Act*,[13] and rebates under the *Retail*

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4. *Canada Pension Plan*, R.S.C. 1985, c. C-8.
5. The Ontario Motorist Protection Plan was created by amendments to Part VI of the *Insurance Act*. See the *Insurance Act*, R.S.O. 1980, c. 218, as am. S.O. 1990, c. 2.
6. *Compensation for Victims of Crime Act*, R.S.O. 1980, c. 82.
7. *War Veterans Allowance Act*, R.S.C. 1985, c. W-5.
8. R.R.O. 1980, Reg. 318, s. 32.
9. *Unemployment Insurance Act*, R.S.C. 1985, c. U-1.
10. *Health Insurance Act*, R.S.O. 1980, c. 197.
11. R.R.O. 1980, Reg. 441, s. 15 (special assistance), s. 16 (supplementary aid).
12. *Vocational Rehabilitation Services Act*, R.S.O. 1980, c. 525.
13. R.S.C. 1952, c. 148, as am. s. 118.2 (medical expense credit) and s. 118.3 (disability credit).

Sales Tax Act.[14] In addition, as we shall examine later, some kinds of disability payments are tax-free to the recipient under the *Income Tax Act*, and this of course makes them worth more to the individual than programs which have taxable payments.

Other programs provide services rather than money, but these services nevertheless may be thought of as having a monetary value, in that they would have to be paid for out of private resources if not provided by government. These programs include attendant care, homemaker services, group homes, vocational programs, education and training programs, and so on. All of these programs taken together constitute the existing disability compensation system in Ontario. They reflect a very considerable amount of public and private expenditure of funds to assist people in coping with the financial costs of disability.

Yet, despite the multiplicity of programs, there is ample evidence that the "system" is failing many people with disabilities. Poverty, unemployment, illiteracy, unnecessary institutionalization, deprivation of basic needs and abuse—these are still the lot of too many citizens of Ontario with disabilities. This seems paradoxical given the number and scope of the programs listed above—yet it is a fact of life experienced by many disabled people and their families on a daily basis.

Many have looked at this seeming paradox and identified the complexity of the existing programs, their inconsistencies, gaps and overlaps as a major cause of the systemic failure. Those who have examined the system have almost unanimously recommended the reform and harmonization of many of these program elements into a comprehensive or universal disability scheme. Academic proponents of a comprehensive scheme include most prominently Professors Ison and Weiler, both of whom have advanced their recommendations in several books and articles.[15] Their views have been echoed by such

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14. R.R.O. 1980, Reg. 904.

15. Writings on disability compensation by Terence G. Ison include:

    The Forensic Lottery: A Critique on Tort Liability as a System of Personal Injury Compensation (London: Staples Press, 1967); "Tort Liability and Social Insurance" (1969) 19 U.T.L.J. 614; *Contemporary Developments and Reform in Personal Injury Compensation* (Toronto: Law Society of Upper Canada Lecture Series, 1973); "The Politics of Reform in Personal Injury Compensation" (1977) 27 U.T.L.J. 385; *The Dimensions of Industrial Disease* (Kingston: Industrial Relations Centre, Queen's University, Research in Current Issues, No. 35, 1978); "Human Disability and Personal Income" in Lewis Klar, ed., *Studies in Canadian Tort Law* (Toronto:

recent studies in Ontario as the Ontario Task Force on Insurance (chaired by Dr. David Slater),[16] the *Report of the Commission of Inquiry into Motor Vehicle Accident Insurance in Ontario* (chaired by Justice Coulter Osborne)[17] and the *Transitions* report of the Social Assistance Review Committee (chaired by George Thomson).[18] But little if any progress has been made towards the goal of a comprehensive plan, despite considerable support from the many influential sources listed above.

The purpose of this paper is to examine the causes for this lack of progress in the past, and to suggest new strategies for starting to move in the right direction again. In several instances, it is argued that progress requires confronting difficult social equity issues with sensitivity, but with realism as well, and making some tough political choices. Another major theme of the paper is that progress has often been hampered by a lack of understanding on the part of government, key stakeholders and the public of how the system operates now. Yet another major theme is the need to relate the proposed reform to emerging new perspectives of the rights and capabilities of disabled citizens and of the role they can play in our community.

The overall conclusion, however, is that there are viable steps that can be taken to effectively begin to reform the system of disability compensation in such a manner that not only disabled persons but all of the key stakeholders in society will benefit. The challenges are difficult but not insurmountable.

Butterworths, 1977) 425; *Accident Compensation: A Commentary on the New-Zealand Scheme* (London: Croon Helm, 1980); and "A Comprehensive Plan of Disability Compensation" (Address to the Ontario Federation of Labour, Peterborough, 17 August 1981)[unpublished].

The best summary of Paul C. Weiler's views is in: *Protecting the Worker from Disability: Challenges for the Eighties* (Toronto: Ontario Ministry of Labour, 1983).

Another academic defense of a comprehensive no-fault disability plan is: Edward Belobaba, *Products Liability and Personal Injury Compensation in Canada: Toward Integration and Rationalization* (Ottawa: Consumer and Corporate Affairs, 1983).

16. Ontario Task Force on Insurance, *Final Report* (Toronto: Ministry of Consumer and Commercial Relations, 1986) (Chair: Dr. David Slater).

17. (Toronto: Ontario Ministry of the Attorney General and the Ministry of Financial Institutions, 1988)(Chair: The Honourable Mr. Justice Coulter A. Osborne) at 517-518.

18. *The Social Assistance Review Committee, Transitions* (Toronto: Queen's Printer, 1988)(Chair: G. Thomson) at 105-112 [hereinafter *Transitions*].

As this paper is being written, the New Democrat Party (NDP) government in Ontario is re-examining the concept of comprehensive disability protection. A committee of Parliamentary Assistants to key Ontario Cabinet Ministers, chaired by David Christopherson, the Parliamentary Assistant to the Treasurer, has reviewed the issue and submitted a report to the Treasurer.[19] The government seems to have a very real commitment on this issue.[20] At the same time, it is faced with considerable pressure to move quickly on certain specific compensation programs in its jurisdiction, particularly motor vehicle insurance, and there is a significant risk that this may cause the government to make rapid changes to the "system" before developing an overview of the major issues in disability compensation.

Now is an important time for the disabled community and its advocates to begin to work constructively and effectively with government on the process of disability compensation reform. It is time to start moving from accepted generalities to specifics about how to proceed—otherwise the opportunity may be lost. Some of the most difficult challenges are outlined in this paper—no doubt there are others which have been missed. Reform efforts will not succeed unless some social consensus can be built around how these challenges should be addressed.

DESCRIBING DISABILITY COMPENSATION SYSTEMS IN ONTARIO

Before we can begin to examine the prospects for reforming the disability compensation system in Ontario, we must examine what exists now, the current programs with their strengths and weaknesses. This is a major undertaking.

To start with, there is the problem of the **complexity** of the legislation, guidelines and informal rules which define the various disability compensation programs. Each system has its own structure and takes considerable

19. This Committee, consisting of eight Parliamentary Assistants to key Ministers, was formed by the Cabinet in November, 1990.

20. Premier Bob Rae expressed his general support for comprehensive disability reform just a few days after his election. "Rae plans to revamp accident insurance", *The Toronto Star* (11 September 90) 1. At the same time, the NDP (with a few exceptions) voted against a Liberal resolution which specifically would have committed them to a universal disability insurance plan. See: Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, First Session, 35th Parliament (28 March 1991) 287-294, 302.

effort to understand properly. Family Benefits, Workers' Compensation, Canada Pension disability and most of the other systems under consideration involve not only detailed statutes and regulations but also guidelines, both formal and informal, with which only those involved in administering the system and experienced advocates are familiar.

The complexity of these systems reflects an effort on the part of legislators to balance the need to control program spending on the one hand with an attempt to respond to the needs of disabled persons on the other. Other factors which have contributed to this complexity include problems regarding integration of benefits among programs, the need to respond to appellate decisions, and sometimes just plain political pressure. For many systems, years upon years of "fine tuning" have created exceptions, and exceptions to these exceptions, and exceptions to **these** exceptions, until there are many provisions which can justifiably be said to have a history but no current rationale.[21] This makes it very difficult to even **describe** in any concise way how these programs work.

It is worth keeping in mind the range of different **program features** which define each compensation system and determine how they differ from one another. The following is no doubt an incomplete list of program features but will provide some illustration of what is meant.

1) **JURISDICTION AND RESPONSIBILITY FOR SETTING RULES**
   - programs may be in exclusive federal jurisdiction
   - programs may be in exclusive provincial jurisdiction
   - there may be a formal involvement of both federal and provincial governments, through
   - cost-sharing or a consultation process
   - the rules may be set out in legislation in detail
   - there may be scope for private sector deliverers, especially insurers, to set the rules (policies)
   - there may be a discretion to develop rules given to program deliverers such as municipalities and voluntary agencies

21. See *Transitions, supra*, note 18 at 126-128 for a discussion of this complexity in the social assistance system.

- where programs are delivered through the workplace, the employer may have some say in the rules, as well as employee representatives (particularly unions)

2) **FUNDING**
   - programs may be funded out of general government revenues raised through taxes
   - programs may be funded out of premiums or contributions
   - programs may be indirectly supported through preferential tax treatment (tax expenditures)

3) **DEFINITION AND DETERMINATION OF DISABILITY**
   - programs may cover short-term disability or may be restricted to prolonged (or even permanent) disability
   - programs may or may not include a definition of partial disability
   - programs may emphasize functional limitations generally or inability to work in particular
   - disability determination may be primarily by the individual's own physician or primarily by physicians working for the program

4) **ELIGIBILITY REQUIREMENTS**
   - residency requirements
   - age limits
   - financial eligibility rules regarding assets
   - financial eligibility rules regarding income
   - family status rules

5) **INCOME BENEFITS**
   - may be based on previous earnings or not
   - may depend on family status (e.g., whether there are dependants) or not
   - may be reduced by other income or not

- may have inflation protection (e.g. indexation to CPI) or not
- may be taxable or not

6) **ADDITIONAL BENEFITS**
- the program may or may not provide
- drug and extended health coverage
- transportation
- attendant care
- assistive devices
- home renovations

7) **REHABILITATION**
- may be direct funding for rehabilitation programs or not
- may be continued partial benefits when returning to work (earnings exemption) or not
- continuing eligibility may be adversely affected by return to work or not

8) **ADMINISTRATION**
- may be individualized or routine
- may be a high degree of worker discretion or a more-or-less automatic system
- may be governmental or private-sector

9) **APPEALS**
- may be formal or informal
- there may be some decisions which are not appealable
- appeal may be internal or external
- advocacy may be available easily or only with difficulty.

Even this sketchy list of program features will serve to illustrate just how much disability compensation systems can differ from one another. Many of these features, of course, give rise to sub-features or options, and they can

interact in different ways. For example, with regard to jurisdiction over fundamental rules and delivery, we have the following illustrations:

- Family Benefits GAINS-D is under provincial jurisdiction and delivered provincially (with some municipal involvement), but it has been influenced considerably by federal-provincial cost sharing rules under the *Canada Assistance Plan*[22]
- CPP disability is under federal legislation and delivered directly by the federal government, but there is an "amending formula" according to which two-thirds of the provinces with two-thirds of the population must approve amendments
- the Ontario Motorist Protection Plan is under provincial jurisdiction but is delivered by insurance companies
- long-term group disability through an employer is subject to some provincially legislated constraints but there are also a variety of options which are subject to negotiation, and it may be delivered through an insurance company or be self-funded by an employer.

Another illustration of the range of options is provided by the effect of family status on eligibility and benefits. For example:

- Family Benefits GAINS-D provides extra benefits for dependants (spouse, children) but spousal assets or income can make the disabled applicant or recipient ineligible altogether
- CPP disability payable to the individual is not affected by family status but there is a disabled contributor's child benefit
- Workers' Compensation is totally unaffected by family status
- personal injury tort awards take family status into consideration in detail.

A first step, then, is to compare the various systems of disability compensation with respect to these sorts of program features (something which no one has properly attempted as yet in Ontario). This will not be easy to do, because the **conceptual bases** of the programs are quite different. As a social assistance program funded under the *Canada Assistance Plan*, Family Benefits GAINS-D is based on needs assessment. CPP disability is based on recent

22. R.S.C. 1985, c. C-1.

contributions. WCB and OMPP are based primarily on earnings replacement. So the way the systems are designed is fundamentally different. It will be a major but necessary undertaking to bring them all under a common descriptive framework if progress is to be made towards a comprehensive disability compensation plan.

As big an undertaking as this is, however, a conceptual description of how all these systems are **supposed** to work will not be sufficient as a basis for reform. As every disabled person who has encountered "the system" and every disability advocate knows, there is often a large gap between how these programs look on paper and what they actually mean to those applying for them or dependent on them. It is not sufficient to know the maximum amount which a significantly disabled person could theoretically get from a program for life. It is necessary to know the actual amounts which are received on average and how long people tend to stay on the program before they are "cut off". It is not sufficient to examine the written policy statements of the programs regarding rehabilitation and return to work. It is necessary to look at the percentage of disabled people in the program who actually do obtain training and/or education and return to work, and examine how the practices of those administering the program contribute to success or failure in this area. It is important to look at how difficult it is for disabled people to access the program and how long it takes to get benefits. In a nutshell, it is essential to know how the program **actually works**.

This cannot be accomplished without a **public review** of the programs which exposes their actual impact and administrative practices to scrutiny. In Ontario, this has effectively been done for Family Benefits GAINS-D through the *Transitions*[23] report of the Social Assistance Review Committee and for Workers' Compensation through public consultation on a series of reports and legislative reform. It was **begun** for motor vehicle insurance through the public hearings under the Ontario Automobile Insurance Board (OAIB), especially the no-fault reference,[24] but the Ontario government of the day seriously compromised the process by conducting its own in-house studies which were not available to the Board, and ultimately by ending the

23. *Supra*, note 18.

24. The no-fault reference hearings were held in 1989. Following extensive public hearings, a report was issued. Ontario Automobile Insurance Board, *Reference: An examination of threshold no fault and choice no fault systems of privately delivered automobile insurance* (Toronto: Report to the Lieutenant Governor in Council, 1989)(Chair: John P. Kruger)

public hearing process.[25] But other important systems, especially long-term disability insurance through insurance companies and major employers, have not had a recent public review at all.[26] If the present Ontario government is serious about comprehensive disability reform, it has to correct this deficit as soon as possible. There is no way to understand how disability compensation programs, including those as significant as long-term disability insurance, are working in Ontario except by hearing from those disabled persons who are dependent on it for benefits, and from their advocates.

DETERMINING DISABILITY COMPENSATION OBJECTIVES: SETTING THE TARGETS EQUITABLY

Suppose that we (or the Ontario government) have succeeded in describing the disability compensation programs currently in effect in Ontario, in the manner outlined in the previous section of this paper. This description would show the actual effects of the rules, formal and informal, which define each of the compensation programs. It would show what benefits are paid to how many disabled persons, what special needs are covered, whether rehabilitation and employment are encouraged, how fair the appeal system is, and so on. The next step in developing an approach to disability compensation is to compare the results of the actual programs with the outcomes we (or the Ontario government) believe **ought** to be achieved for persons with disabilities. This involves defining the **objectives** of disability compensation which a reformed system ought to meet.

But the specification of these desired objectives is by no means an easy task. It often seems to be assumed that there exists a reasonably wide consensus

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25. The public hearing process was ended by the *Insurance Act* amendments setting up the OMPP and replacing the Ontario Automobile Insurance Board with the Ontario Insurance Commission. See S.O. 1990, c. 2.

26. In this connection, the process associated with the Joint Federal-Provincial Study of a Comprehensive Disability Protection Program was especially disappointing. A great deal of effort went into this 1983 five-volume study (with an additional report discussing program options released two years later), but there was no public consultation. Accordingly, the descriptions given of the programs and the identification of the problems reflect the views of the government officials involved and the insurance industry interests consulted, rather than including the input of the disabled community and disability advocates. Despite the good work that went into the study, the final result is somewhat disappointing. See: Canada, *Joint Federal-Provincial Study of a Comprehensive Disability Protection Program* (Ottawa: Health and Welfare Canada, 1983) and *Stage II Report: Program Design Options* (Ottawa: Health and Welfare Canada, 1985).

in society as to what a disability compensation system should look like. The position advanced here, however, is that this is not so obvious. We cannot define the objectives of a disability compensation system without confronting certain controversial and difficult issues of **equity,** both among groups of disabled persons themselves and between disabled persons and others who have been disadvantaged. In this section we shall examine some of the most important of these equity considerations. It will be argued that these raise conflicting claims on behalf of different groups which can be resolved, or at least compromised, but only if the difficult social and political issues raised are dealt with fairly and with sensitivity to all. In the next section of this paper, we shall move on to consider more "value-neutral" objectives which can be proposed for disability compensation reform, but even these objectives will be shown to encompass hidden equity issues. In the result, no simple and straightforward specification of objectives can be adequate for purposes of comprehensive reform.

(a) EQUITY BETWEEN EARNERS AND NON-EARNERS

In its *Transitions* Report, the Social Assistance Review Committee recommended that there be a dual system of disability income protection in Ontario. One system, comprehensive disability **insurance,** would combine Workers' Compensation, OMPP, LTD and other earners' plans.[27] The other system, an income-tested disability **benefit,** would be for non-earners.[28] The earners' insurance program would compensate at substantially higher levels that the non-earners' benefit program, reflecting a pattern which generally exists now. In general, advocates of comprehensive disability compensation reform usually recommend this type of "two-tier" system. On the other hand, those who have had a marginal labour force attachment, such as people who have been disabled since birth or childhood wonder why they should be forever relegated to a "lower tier". Women with disabilities in particular view the "two-tier" system as just another social mechanism which relegates them to poverty.[29]

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27. *Supra,* note 18 at 107-110.

28. *Supra,* note 18 at 110-111.

29. For example, at a national poverty and disability consultation held in 1989, feminist and disability advocate Pat Israel said: "Women with disabilities are more likely to be on social assistance, less likely to receive rehabilitation and training, more likely to be illiterate, less likely to receive transfer payments such as private pensions or Workers' Compensation. We are very likely to be left out in considerations of social policy. Disabled men are often assumed to represent "the disabled" as if we were genderless or had no concerns specific to ourselves as disabled women." *Proceed-*

It is important to examine this dilemma with some care, because it involves a fundamental value judgment that must be made at the outset of undertaking a program to reform disability compensation. A good starting point is in the following discussion by Paul Weiler, one of the few disability compensation advocates who has tackled the issue explicitly in his writings. In discussing his central proposal of a comprehensive disability program for Ontario, he says:

> "I must first underline this implication of the fact that I am speaking of a social insurance rather than a social assistance program. The amounts paid to persons with the same physical impairment and functional disability will vary in accordance with their pre-injury income. The point of the program is not simply to provide a uniform floor of income to meet minimum needs. It is to ensure people against a sharp drop in the previous earnings upon which they and their families had come to rely. No doubt it would be possible to incorporate a ceiling on the level of income which is so insured; leaving it up to higher-income earners whether they wish to purchase private insurance against this unusual financial risk. Executives, professionals, *et al.* can and do buy this type of individual disability insurance in the private market. But whether and wherever we might fix an upper ceiling, such a social insurance plan would replace income at or near the current levels of workers' compensation for occupational injury, and thus far above the stark poverty levels in the CPP and/or GAINS-type programs.
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> The same logic implies that financing of the program should be through contributions by or on behalf of those who are protected, calculated as a percentage of earnings up to the ceiling. In effect, the premiums paid would reflect the coverage and protection which had been obtained. The point of this policy change is to move from a haphazard potpourri of categorical disability programs to a systematic and comprehensive scheme. There is no particular reason why that step should be the occasion and vehicle for some covert income redistribution. If people believe that the dispersion of incomes in Ontario is currently too wide and unfair, and that the government should do something about it, that claim should be justified on its own footing and applied to everyone, not just to those who are disabled."[30]

Weiler here has oversimplified the equity problem between earners and non-earners. To begin with, it is not possible to draw the sharp and clear line

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ings of the National Disability and Poverty Strategy Session (Toronto: Advocacy Resource Centre for the Handicapped, 1989) at 19. Since women have been subject to discrimination in the workplace, and have often been outside the workplace while looking after children, clearly they do stand a much greater chance of being in the "lower tier" for non-earners of a two-tier system than do disabled men, as Ms. Israel says.

30. Weiler, *supra*, note 15 at 79-80.

between earners and non-earners which he seems to assume. There are those who work part-time. There are those who are unemployed but regard themselves as in the work force. There are students who are working during the summer at wages far below what they expect to receive after graduation. There are homemakers who choose to become non-earners (although not non-workers!) when their children are small or when a family member is disabled. **And** there are those members of socially disadvantaged groups, including many persons with disabilities, who **would** have been earners except for widespread patterns of systemic discrimination which have been documented so many times.[31] It is simply not equitable to divide people in all of these circumstances into two groups, one class of earners with an established earnings level on which they can place reliance, and another class of non-earners forever relegated to a minimally adequate standard of living. Existing disability compensation systems which make this distinction, including CPP, WCB and OMPP, do so in fundamentally arbitrary and unfair ways.[32]

Weiler emphasizes that those in the upper tier, in the social insurance program he envisages, should pay for their benefits through contributions (premiums). At first sight, this appears to be the most logical rationale for a "two-tier" system. Those who get the higher level of benefits are entitled to them because they have paid for them. But this is not such a simple issue, either. For we can go on to ask: Why are so many not allowed to **contribute**? Students, homemakers, unemployed persons (including those who are unemployed because of past patterns of discrimination) are not allowed to contribute to Canada Pension, are not allowed to participate in WCB even if working in a place of work (including the home), and are relegated to a lower level of benefits under the OMPP for which they pay the **same** premiums as earners. Further, contributory plans in general do not cover disability protection for **dependants**, including new-born children, although this is a coverage which would benefit many earners and their families, who at present have no coverage for the costs of the disability of a dependant at all. Even in entirely public plans, many people are at present excluded from adequate disability

31. See *Equality in Employment: Report of the Royal Commission* (Ottawa: Ministry of Supply and Services Canada, 1984)(Commissioner: Judge Rosalie Silberman Abella)

32. CPP uses technical rules based on a "contributory period" to define when someone's attachment to the work force is significant and recent enough to qualify the person for a disability pension. WCB has complicated rules defining average earnings. The OMPP essentially draws an arbitrary line as well.

coverage even where they, or a supporting person, might be entirely able and willing to pay the necessary premiums. This relegates them to the "lower tier" now, and would continue to do so under any reformed system based on the "two-tier" approach.

Weiler characterizes proposals for a more universal and equitable approach as forms of "covert income redistribution". But this is to caricature the equity issue. There are equally good arguments for starting with the concept of a truly comprehensive and universal plan which provides guarantees to all people with disabilities at a just and fair level, and which does **not** start with the fundamental premise that earners are at a higher level for ever. In a market-based society, people should be free to purchase additional coverage to supplement the comprehensive guarantees whether through earnings or other funds, but there is no equitable reason why opportunities to purchase additional coverage should be limited by previously established levels of earnings. This is especially true because established earnings levels reflect, in many cases, an unfair society in which many have been disadvantaged in employment through discrimination.

Even for **earners**, a system based on pre-disability earnings is not necessarily fair. Typically, the level of pre-disability earnings used for the calculation of benefits is based on a formula. The formula does not distinguish between the promising employee with a lifetime of promotions and advancement ahead and the employee about to be dismissed for incompetence. The linkage between the earnings history and benefits entitlement is subject to many arbitrary rules and distinctions. There is no inherent reason why the wage loss of someone who is permanently disabled at age 22, for example, should be a ceiling for his or her income forever.

In an equitable system of disability compensation, the same basic guarantees should be made to **all** who become disabled, and the ability to purchase additional disability coverage should be available to **all**. It is not acceptable to say to disabled people who are "non-earners" that they must be in a "lower-tier" for the rest of their lives. A reform initiative based on this fundamental premise would be opposed by disability advocacy organizations, who could hardly support a system which would permanently limit the life opportunities of so many of their members.

At the same time the legitimate expectations of workers and the labour unions which represent them must be recognized. It would be unacceptable, both morally and politically, to take away existing benefits from those now

disabled and entitled to them. Reform to the disability compensation system **must** proceed on the basis that existing entitlements will not be taken away or diminished, either directly or indirectly. Otherwise workers and their unions will have a legitimate basis on which to discredit the whole enterprise.[33]

The result is that it will be necessary to proceed to improve the basic level of benefits for all while reducing benefits for very few (perhaps the only legitimate reason for reducing anyone's existing entitlement would be over-compensation through "double recovery", which is discussed in more detail later in this paper). This sets a difficult objective. When we come to consider reform strategies, however, it will be argued to be an objective which can be realized in the disability compensation reform process.

(b) EQUITY AMONG THOSE DISABLED FROM DIFFERENT CAUSES

The current programs for disability compensation, in Ontario as elsewhere, compensate those who become disabled differently depending on when, where or how they are involved in accidents or get sick. A person if injured in the workplace will get WCB, if injured while driving will get OMPP, and if injured in the home or disabled through sickness may get CPP or may well get nothing at all (if there is no LTD coverage). Advocates of comprehensive disability compensation usually point to this as evidence that the system is irrational and should be reformed. In general terms, this makes sense. People would have better protection if they were guaranteed the same level of compensation regardless of when, where or how they were injured or got sick.

But not everyone agrees that causality—how disabilities occur—is unimportant. The really difficult and controversial issue in this area, of course, is whether persons who become disabled through the wrongful acts of others, whether intentional or negligent, have a special kind of claim to a higher level of compensation as "innocent victims". The other side of the same problematic coin is whether those because disabled through their own

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33. At its 1989 convention, the Ontario Federation of Labour adopted a report which endorsed the concept of a universal no-fault accident and illness plan, subject to three primary principles, one of which was that "there must be no cutbacks to already existing entitlements to benefits". *OFL Task Force Report on Alternatives to the Workers' Compensation System in Ontario and Statement on Effective Reform for Workers' Compensation* (Toronto: Ontario Federation of Labour, 1989), at 20.

deliberate acts or carelessness should lose some of their claims to compensation (I suppose these persons might be called "guilty victims").

This issue, of course, is the great "tort/no-fault" debate which dominates both the technical literature and the public debate which surrounds proposals for more comprehensive, universal approaches to disability compensation. I do not propose to discuss this issue in detail here, although the equity issues raised by the debate are fundamental, simply because so much has been said about it by so many others elsewhere.[34] In essence, tort advocates point to the special justice claims of those who have been wronged by others, and to the deterrent effects of tort. Pure no-fault advocates stress the efficiency and egalitarian outlook of no-fault systems, particularly those operated by governments.

While not discussing this issue in detail, however, there are three points I would like to emphasize because they are so often obscured during the debate. The first is that, if we as a society choose to incorporate fault either positively or negatively as a criterion determining disability compensation, it is **not** necessary to do so through a tort system administered through the courts. There is nothing to stop us from incorporating tests based on intentional or negligent misconduct (or both) into administrative compensation systems run by tribunals or boards. In fact, we have such tests now, negatively in WCB[35] and OMPP[36] legislation, positively under the Criminal Injuries Compensation Board.[37] Further, we can deal with fault through the criminal and quasi-criminal law, through professional regulation and by other administrative means. The question of whether or not we should have a traditional tort

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34. The major Canadian defences of pure no-fault are listed above at note 15. Two Canadian advocates of the retention of tort are: A. M. Linden, "Faulty No-Fault: A Critique of the Ontario Law Reform Commission Report on Motor Vehicle Accident Compensation" (1975) 13 Osgoode Hall L.J. No. 2 at 452; and L.N. Klar, "New Zealand's Accident Compensation Scheme: A Tort Lawyer's Perspective" (1983) 19 U.T.L.J. No. 4 at 614.

35. Section 3(7) of the *Workers' Compensation Act* (supra, note 2) reads: "Where an injury is attributable solely to the serious and wilful misconduct of the worker, no benefits or compensation are payable unless the injury results in death or serious impairment."

36. O. Reg. 273/90 made under the *Insurance Act, supra,* note 3 provides for several exclusions from the income benefit (not from the long-term care, rehabilitation and other benefits) in the OMPP at s. 17. The most prominent is where the person is convicted of an alcohol-related offence in connection with the accident.

37. Only victims of crimes of violence are eligible for criminal injuries compensation: *Compensation for Victims of Crime Act, supra,* note 6, s. 5.

system is not the same as the question of whether we should recognize fault as a concept. There is nothing stopping us from including in administrative systems provisions which specially compensate "innocent victims" or penalize "guilty victims", if that is what we want to do.

The second point is that the tort system is at bottom a disability compensation system like the others, and it can be evaluated on the same tests according to the same objectives. Presumably, it would score high on flexibility, or the ability to provide for needs on an individual basis, as it incorporates a great deal of judicial discretion on a case-by-case basis in making awards. Presumably, it would score low on efficiency, the percentage of dollars going into the system which are eventually used for compensation purposes. (Flexibility and efficiency are two of the objectives discussed in more detail in the next section of this paper.) But the important point is that tort can be compared to the other systems, in terms of adequacy and speed of compensation, equity considerations, interaction with other programs, and so on. Most of the participants in the tort/no-fault debate seem to have an evident bias that precludes them from making the type of feature-by-feature comparison between tort and no-fault administrative systems which is a necessary prerequisite to choosing responsibly between the two (or deciding on a compromise such as "add-on" or threshold no-fault).

The third point, and perhaps the most unorthodox of these observations, is that establishing a comprehensive approach to disability compensation does not necessarily involve the abolition of tort. Suppose a basic adequate system of disability compensation were enacted on a universal basis. We could still have tort, even tort administered by the courts, as a "top-up" to what is provided by the basic comprehensive scheme. The usual objection to this is that it would be too expensive to administer a dual system of compensation, and to require employers, drivers, professionals and others to purchase liability insurance as well as to contribute to no-fault benefits. But this objection is not necessarily valid. Tort costs, both administrative and in terms of awards, can be limited like any other costs. The court process can be made simpler. And, especially if double recovery is disallowed (I note that the "collateral benefits" rule has, for the most part, been repealed in Ontario) tort awards can reasonably be limited.[38] As to the availability of insurance, if the

38. In his detailed review of motor vehicle insurance in Ontario, Mr. Justice Coulter Osborne basically argued that this type of "add-on" tort system could work, if there were sufficient reforms to tort. See *supra*, note 17, especially at 567-70.

costs of tort are strictly contained liability insurance may be less necessary. In fact, if the deterrence arguments in favour of tort are given any weight, a system in which tortfeasors personally pay modest awards may be more effective than the current one in which the real financial risks are simply passed on to insurers.

There is no doubt that tort/no-fault presents a difficult dilemma to the Ontario government. I would argue, however, that both extremes of the debate are unacceptable both ethically and politically. We cannot afford, as a society, to litigate all personal injuries in the courts, however small, simply because of the expense. At the same time, it is unrealistic to expect the public to disregard the special justice claims of those who have been wrongfully injured by others. But a range of strategies is possible to find an acceptable "middle ground". These strategies include: limiting and streamlining tort; recognizing the special claims of "innocent victims" in administrative compensation schemes; and perhaps reducing the compensation of evident transgressors. It may well be possible to build a social consensus around some combination of these strategies that will avoid the unhappy dichotomy so often portrayed by academic contributors to the tort/no-fault debate.

(c) EQUITY AMONG THOSE WITH DIFFERING LEVELS OF DISABILITY

It is evident that disability does not affect everyone in the same way and to the same extent. Disabilities run the range from relatively mild to profound. Some affect physical functioning, some affect stamina, some affect cognition, some affect memory, and many affect the person in a combination of these and other ways. Some disabilities can be accommodated easily in the workplace, home, and elsewhere, while others cannot. The effect of a disability on an individual's life, and that of his or her family, often includes many intangible social and psychological obstacles which are not easily capturable in an inventory of the person's functional limitations.[39]

The differences among disabilities raise a number of issues for disability compensation systems. The most fundamental is whether to have one class of disabled persons under the program, so that all who qualify have the same

39. A recent anthology which covers the range of issues associated with disability is: M. Nagler, ed., *Perspectives on Disability* (Palo Alto, California: Health Markets Research, 1990). An earlier anthology which is also comprehensive is: J. Stubbins, ed., *Social and Psychological Aspects of Disability* (Austin, Texas: PRO-ED, Inc., 1977).

categorical eligibility, or whether to recognize a number of classes, levels or graduations of disability.

One way of recognizing levels of disability is through a partial disability system, where disability is assessed on a percentage basis. There are two major problems with this type of approach. The first is that a person with a disability which effectively excludes him or her from the work force needs a **full** income, not 15 percent or 50 percent. (Conversely, someone who gets a better-paying job following retraining or reinstatement arguably does not need an **income** supplement at all.) The second is that, in partial disability systems, the percentage of disability is often set too low, typically based on a "rating schedule" or "meat chart". This type of clinically-based assessment does not take into account the social and psychological factors in any adequate manner.

Of the six major disability compensation programs identified at the beginning of this paper, four—GAINS-D, CPP disability, OMPP and LTD—are essentially all-or-nothing systems. A person is either sufficiently disabled to meet the definition in the plan or not. Tort is difficult to categorize in that it depends on judicial discretion not bound by fixed definitions or rules. On the other hand, the sixth system—WCB—has traditionally been a system based on determination of partial disability, where most long-term injured workers have received partial disability pensions based on a rating schedule or "meat chart". This basic difference between WCB and other compensation systems is sometimes cited as a reason why WCB cannot be harmonized with these other systems, so it is worth examining in more detail.

In the 1980s, the Ontario government commissioned fundamental studies of the WCB system carried out by Weiler.[40] On the issue of permanent partial disability pensions, Weiler supported the objections to the rating schedule or "meat chart" we have outlined above. Following extensive and heated public debate, there was an overall WCB reform made effective in Ontario in 1990.[41] (However, it was not made retroactive to accidents or industrial illnesses

40. Besides *Protecting the Worker from Disability*, supra, note 15, Weiler wrote a first overview, *Reshaping Workers' Compensation for Ontario* (Toronto: Ontario Ministry of Labour, 1980), and a detailed study of partial disability, *Permanent Partial Disability: Alternative Models for Compensation* (Toronto: Ontario Ministry of Labour, 1986).

41. This package of amendments is still commonly known as "Bill 162". *An Act to Amend the Workers' Compensation Act*, S.O. 1989, c. 47.

which disabled a worker prior to 1990.) This reform replaced the previous system of permanent partial pensions and supplements with a new system based on a two-part award. One part of the award is a lump sum for non-economic loss (i.e. "pain and suffering") still based on a "rating schedule" and the age of the worker. The lump sum awards are on a very modest scale, much lower than the actuarial value of the permanent partial pensions in the "old" WCB system, which themselves were often very low. The second part of the award is an on-going entitlement for loss of future earnings, which is defined **not** as actual earning loss but as 90% of the difference between the worker's pre-accident net average earnings and "the net average earnings that the worker is likely to be able to earn after the injury in suitable and available employment".[42] A number of discretionary factors are listed which the WCB will use in determining the level of this **deemed** earnings loss. These reforms, while opposed by many injured workers' groups and their advocates, were at least **intended** to address the traditional problems with a partial disability system described above.

Let us return to the question of harmonization of WCB with the other disability compensation programs. Assume that, in accordance with the principle of not taking benefits away from anyone in the reform process, that we leave the pre-1990 system still in existence for workers disabled before that time. Can the **new** post-1990 WCB system be placed on a comparable basis to the other disability compensation systems within a framework of comprehensive reform?

Consider the lump sum non-economic loss award (pain and suffering) first. There is no reason why this cannot be maintained as a "top-up" to a basic universal level of benefits. Quebec has this kind of lump sum award as part of its pure no fault motor vehicle accident compensation system, which has largely been harmonized with workers' compensation in that province.[43] There is no reason why this cannot be done in Ontario as well. As discussed in Section (b) above, other disabled persons may also receive "top-ups" in a reformed, co-ordinated system.

The change involved in bringing the second part of the award into a reformed system would be more fundamental. Essentially, instead of a deemed earn-

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42. *Workers' Compensation Act, supra*, note 2, s. 45a(3)(b).

43. For a summary of the Quebec system, see: *Report of Inquiry into Motor Vehicle Accident Compensation in Ontario, supra*, note 17 at 458-464.

ings loss, injured workers would get the basic universal level of disability compensation, including income protection, **and** whatever additional coverage they have purchased, either collectively through their employer or individually. On the whole, there is no reason why long-term injured workers should not be at least as well off under a system organized in this way as under Bill 162. Under the "deeming system", while it is too early to know as yet, predictably it will be increasingly difficult for those injured workers who cannot get work to establish their entitlement to full wage-loss benefits. It will be all too easy for the WCB to deem that there is "suitable and available" employment for them and all too difficult for them to prove a negative—that their efforts to actually **obtain** this work and be appropriately **accommodated** in it have been fruitless. A basic universal guaranteed level of compensation, with the prospects of additional purchased coverage, would in all likelihood be better for many.[44]

There is another way in which levels of disability can be recognized, and this is simply by having a richer compensation system for those who can meet a more stringent categorical test of eligibility, such as "severely handicapped". In Alberta, this is done through the Assured Income for the Severely Handicapped (AISH) program, which provides a much higher level of benefits and more generous income and asset tests to those who qualify as "severely handicapped".[45]

The drawback to the levels of disability approach, however, is that it requires drawing a more or less arbitrary semantic line between the levels, which can be very unfair to those who do not quite meet the test, particularly since there is often a tendency to under-compensate those in the lower category (as happens under AISH in Alberta).

An alternative approach, which recognizes levels of disability and need without undue categorization, is to have special needs programs and benefits which are available to those disabled persons who require the goods and services provided, regardless of the categorization of their disability. This is

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44. As well, there are those for whom a lifetime entitlement based on wage loss is an unfair ceiling, as we discussed in Section (a) above.

45. An overview of AISH is found in Sherri Torjman's excellent review of Canada's disability income system. S. R. Torjman, *Income Insecurity: The Disability Income System in Canada* (Toronto: The G. Allan Roeher Institute, 1988) at 135-156. See also 9-38 for various comparisons of AISH with social assistance for disabled persons in other Provinces, and with social assistance in Alberta for those who may have a significant degree of disability but not be AISH-eligible.

basically the approach that has been taken in Ontario. The Assistive Devices Program provides adaptive equipment. There are attendant and homemaker services available from a variety of sources. The Ontario Home Renewal Program provides funding to make residences accessible.[46] This approach is more effective than differing levels of categorical eligibility in targeting financial help and supports to those that need them. A person who requires an electric wheelchair, a Kurzweil reading machine or a specialized job coach is not necessarily "severely handicapped", or "permanently unemployable", or "more disabled" than others. This is not a valid reason to deny the person the special goods and services they require. A system which relates the funding available to an individual to specified major needs is more equitable than one which relies on semantics, percentages or "meat charts" to determine levels of entitlement.

(d) EQUITY BETWEEN THOSE DISABLED SHORT-TERM AND LONG-TERM

Weiler argues convincingly that the present system of disability compensation in Ontario provides a high level of benefits to those with short-term disabilities at the expense of those who are disabled for a long time or permanently. He says:

> "It seems clear to me that the most important need is the long-term disability case: the person who is seriously injured and is off work for many months or years, or even a lifetime. This situation is not just quantitatively but even qualitatively different from that of the person who is sick or hurt, and missing work for days or even weeks. In the latter case, while it is unfortunate if his earnings are interrupted, the worker will normally have some savings which he can use; he can put off paying certain bills until he is back at work, and he can cut back for the moment on the less essential expenditures out of his regular income and budget. But in serious long-term disabilities (as well as fatality cases where there are surviving dependents), none of these contingencies is available. Savings are soon exhausted. There is no immediate prospect of future income against which one can, in effect, borrow. In the absence of some alternative to earnings from a job, there simply will be no money to pay the current rent or mortgage, to buy the food one is used to eating, to replace one's clothes when they wear out, to pay for a car or other forms of transportation, and so on. If the object of disability insurance is to cushion people against the drastic financial effects of a serous injury on their normal life, the available dollars should be concentrated on long-term rather than short-term disabilities.
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> The unhappy fact, through, is that our current arrangements have quite a dif-

46. See the Introduction to this paper for a fuller listing of these programs.

> ferent orientation. The more generous programs, tort liability and workers' compensation, each provide protection against the first day's loss of income and provide the same level of benefits then as they do for the last day. Where we do make a choice between the two—short-term and the long-term disabilities—we tend to undercompensate the latter. For example, of the two comprehensive public programs, UIC now pays short-term sickness or injury benefits for 15 weeks up to a maximum of about $900 a month. But long-term disability benefits under the CPP, which begin after 4 months and continue indefinitely, go only as high as $300 a month. Essentially the same is true of private sick leave plans, which often maintain total earnings during short absences from work, but usually cover only a portion of long-term lost income. Even worse, such long-term disability protection is simply not available to two-thirds of the working population.
>
> It is easy to understand why these programs, public and private, have evolved this way. Far more people are sick or hurt for short periods of time. Assuming a scarce amount of dollars to spend on the disabled worker, it often seems politically more attractive to spread the money around among the many who have small injuries than to concentrate it on the few who have large injuries. But if we want to design a rational comprehensive program to spend the available insurance dollars in a way which is sensible and equitable, surely we should focus primarily on the people who suffer catastrophic losses which can ruin a family's life, rather than on those with trivial losses which inflict only temporary belt-tightening."[47]

Some of the figures have changed since Weiler wrote these words in 1983. But his point is as valid, and as unappreciated by governmental decision-makers and interest-group advocates (not to mention the general public!), as it was then.

If anything, Weiler **understates** his case. Whether disability compensation systems are public or private, no-fault or tort-based, there is always a strong tendency to undercompensate those most severely disabled, and usually a corresponding tendency to fully compensate (or even overcompensate) those injured or ill in the short-term. We find this tendency in both tort and WCB (although one is private sector and fault-based while the other is a no-fault public system). Long-term cases are scrutinized in great detail. The disabled person must repeatedly justify a right to further benefits. But short-term cases are paid routinely without scrutiny. As Weiler says, tort and WCB are the "more generous" programs. Yet there is considerable evidence that those who require help for the longest periods of time, who need the assistance of these programs the most, are precisely those whom even these systems fail.

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47. Weiler, *supra*, note 15 at 81-82.

Another factor which strongly reinforces Weiler's observation is the lack of **inflation protection**, or **indexation**, in some compensation systems. Clearly, periodic benefits to a disabled person, whether for income replacement or special needs (such as long-term care), will be badly eroded over time if not indexed. Assuming a 5 percent inflation rate, the real value of an unindexed benefit will be cut in half approximately every 15 years. Of course, this especially affects children and young adults who are disabled, whose unindexed benefits will, over the course of their lifetimes, be reduced in real terms to nominal levels. It would seem evident, in accordance with Weiler's comments, that any compensation reform should include full indexation of benefits over time.

But the political realities also referred to by Weiler still often trump the equity considerations which favour those most seriously injured in the long-term. A perfect illustration is provided by the Ontario Motorist Protection Plan (OMPP), introduced as a reform package by the Ontario government in 1989.[48] The OMPP has no inflation protection at all under the no-fault accident benefits package. The erosion of the benefits to those injured long-term will begin after the first year and continue throughout their lifetimes. In the case of long-term care benefits, so essential to those most seriously injured, there are **also** both monthly and lifetime limits which mean that the benefit will disappear long before the person dies. The government of the day, however, refused to introduce any indexation or inflation protection, preferring apparently to keep insurance premiums down and to respond to the more limited compensation package reforms proposed by special interest groups.[49] The political pressure needed on behalf of those most seriously injured in the long term was simply not there.

(e) EQUITY AMONG THOSE MORE AND THOSE LESS ABLE TO WORK

The framework for most disability compensation systems operating in Ontario, whether national or provincial in scope, was developed at a time when "disability" was equated with "inability to work". When CPP disability was

48. *Supra*, note 5.

49. Justice Osborne had proposed indexation capped at twice the initial benefit in his *Report* (*supra*, note 17), and this was part of all the proposed no-fault options referred to the Ontario Automobile Insurance Board as part of the no-fault reference (*supra*, note 24), but even this **limited** indexation was removed from the actual OMPP plan when it was brought before the Legislature. The present Ontario government has recently announced that there will be a restoration of indexation in some form. Details are not available as of the date of writing.

established in 1966, or Family Benefits in 1967, the underlying idea behind the disability provisions was that they were to support those totally unable to work because of illness or accident.

Over the past two decades, however, social attitudes towards disability have undergone a profound change. It has been recognized more and more that persons with disabilities **can** work, especially if accommodation is made to their needs through provision of an adapted workplace or special equipment, through specialized training and through restructuring of job descriptions. The Ontario *Human Rights Code*,[50] and the accommodation guidelines set out under it,[51] make it clear that, under the law of Ontario, there is to be appropriate support for disabled people who want to work. The Ontario government has also committed itself to comprehensive employment equity legislation in which persons with disabilities are an important target group.[52]

But disability compensation programs have not all kept up with this changing perspective. The 1990 Bill 162 WCB reforms are intended to encourage rehabilitation and return to work. At least some private insurers actively encourage this as well, but the practices are by no means uniform throughout the industry. On the other hand, Family Benefits GAINS-D and CPP disability still refer to unemployability as a test of eligibility for benefits.[53] This clearly discourages rehabilitation and attempts to return to work.

FBA actually gives out "mixed messages" in this area. Through the STEP (*S*upports *T*o *E*mployment) program, there have been increasing efforts to ensure that people are "better off working"[54] (a direction, of course, which

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50. Human Rights Code, 1981, S.O. 1981, c. 53 as am S.O. 1986, c. 64, s. 18.

51. "Guidelines for Assessing Accommodation Requirements for Persons with Disabilities" (Toronto: Ontario Ministry of Citizenship, 1989).

52. On February 14, 1991 Ontario Minister of Citizenship, the Honourable Elaine Ziemba, named a well-known lawyer and activist, Juanita Westmoreland-Traoré, as the Province's first Employment Equity Commissioner, with a mandate to consult with the community and develop employment equity legislation.

53. R.R.O. 1980, Reg. 318, made under the *Family Benefits Act*, has definitions both of "disabled person" (s. 1(3)(b)) and "permanently unemployable person" (s. 1(3)(c)), but qualifying under either definition now leads to exactly the same benefits, and in practice the latter definition is generally applied. The *Canada Pension Plan, supra*, note 4, s. 42(2)(a)(i), requires that, to be considered "disabled" for CPP purposes, a person must be "incapable regularly of pursuing any substantially gainful occupation", a test that is very strictly applied by CPP officials.

54. This is achieved through a set of earnings exemption rules which are intended to

was strongly supported by the *Transitions* report). And the definition of disability is under active reconsideration at the time this article is being written.[55] At the same time, the Ontario Minister of Community and Social Services has **not** made any formal commitment to the principle that categorical eligibility will continue after you go to work.

CPP is without question the worst of all the disability compensation programs in this area. There is **no** legislated provision whatsoever **either** ensuring a continuation of eligibility after a return to work **or** providing for earnings exemptions. As far as anything "official" from CPP goes, disabled people are given no guarantees at all to further benefits if they attempt rehabilitation, training, or employment—they may even be "cut off" their benefits if they do volunteer work!

It is rather easy to see that it is a "win-win" situation to have people on disability programs be re-employed where possible. First and foremost, there is the enhanced dignity to the disabled individual, for whom exclusion from the work force is often a major social penalty. Secondly, when people work there is the potential for them to become self-sufficient rather than dependent on the disability compensation system, which leaves additional resources to help those who have not yet been able to make the transition. Thirdly, employers "win" by obtaining productive employees. Everyone benefits when disabled people are able to succeed in employment.

All this is a strong argument for a comprehensive disability system which would contain **both** a guarantee of continued categorical eligibility when attempting rehabilitation or employment **and** a generous earnings exemption. The existing programs should be harmonized and strengthened in this area so that persons with disabilities will be able to escape the "welfare trap". Right now, the "system" keeps disabled people (and others who are disadvantaged) dependent on compensation programs because they simply cannot afford to risk going out into the workplace. They may lose their jobs and lose their disability benefits as well.

There is a risk, however, in emphasizing the "better off working" approach too much. It could easily become a "workfare" system in which there is

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facilitate the transition from being a social assistance recipient to being employed.

55. The Ministry of Community and Social Services has developed a series of six Task Forces to review the major features of social assistance legislation: the Disability Determination Task Force is one of the six.

indirect (or even direct) coercion towards returning to work, if the benefits for those who are not working are too low. There is ample evidence that, besides violating civil liberties, coercive programs are ineffective.[56] We must not forget that many people with disabilities, especially those who are disabled in mid-life and later and those who experience chronic pain, are not really able to enter the workplace, especially given current levels of inaccessibility and the inadequacy of many employment support programs. These people should not be penalized unfairly for a decision not to work.

So, again, it is important to strike a balance. A comprehensive disability program should encourage attempts at rehabilitation, training and work through a guarantee of continuing eligibility, should the attempt fail, and through generous earnings exemptions together with needed supplementary benefits. But the system must be designed to be fair as well to those who truly cannot be expected to work, even with accommodation in the workplace.

(f) EQUITY BETWEEN THOSE WITH AND THOSE WITHOUT PRIVATE RESOURCES

Another challenging equity issue for comprehensive disability reform, and one which has received relatively little attention, is how to balance fairly the interests of those who, directly or indirectly through family, have private resources outside the disability compensation system to rely on, and those who do not. There is a discussion in *Transitions* of assets,[57] and also of the integration of social assistance with other sources of income,[58] but the full policy implications are not looked at. Other studies of comprehensive disability compensation also avoid a detailed discussion of this problem.

In general, the social dilemma is how to encourage disabled persons and their families to use available private resources to meet the costs of disability, without creating a system which unfairly benefits those with private resources at the expense of those who do not. In an underfunded social service system, in which there are gaps in services and inadequate income supports, it makes sense to encourage the appropriate use of private resources so that public resources will be available for those most in need. But in encouraging this, it is tricky to avoid setting up rules which allow those who are better off

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56. This issue was reviewed in *Transitions*, *supra*, note 18 at 311, where the Social Assistance Review Committee came out strongly against a "workfare" approach.

57. *Supra*, note 18 at 166-172.

58. *Ibid.* at 172-180.

(financially, at least) to gain unfairly at the expense of those who simply have no private resources to draw on. We shall look at three illustrations of this dilemma: asset testing, integration of benefits, and co-payment for services.

Some disabled people have assets through savings or investments. Others have the opportunity of acquiring investments, often through bequests from parents or other family members. From one perspective, this ought to be encouraged. It makes sense to assist people in retaining or obtaining assets so that they can provide for themselves, rather than having the government provide for them. If the effect of acquiring assets, however, is to disqualify people altogether from receiving government support through a compensation system, they may be discouraged from saving, or their parents may not make provision for them in their estates.[59] At present, the only disability compensation system that is asset-tested is Family Benefits. The logical approach to harmonizing the programs would be to remove the asset eligibility rules from FBA and replace them with income-testing rules.[60] Income-testing rules, of course, take account of assets indirectly by considering the income they generate. The goal is to obtain a reasonable balance between public and individual or family support.

Integration of benefits from different programs is a second challenging policy area. Given two programs, A and B, a variety of integration options are possible. The benefits from A may be "set off" (i.e. subtracted) against those from B, or the benefits from B may be "set off" against those from A, or the benefits may be "stacked" (i.e. added together without reduction), or there may be a more complicated approach such as a percentage "set off". Given the variety of different programs in existence now, the various permutations and combinations of possible benefits give rise to endless integration of benefits problems. These are made more complex yet by differences among the programs as to taxability of benefits, timing of payments, eligibility for special needs funding, and a range of other factors. We shall return to these complexities as practical issues when we come to consider alternative reform proposals. For now, we shall focus on the **equity** issue. When should benefits from programs A and B be "stacked", and when should they be "set off"?

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59. This policy dilemma is explored in: M. L. Dickson, "Treatment of Assets and Estates under Social Assistance" (Toronto: Ontario Ministry of Community and Social Services, 1987)[Background paper for the Social Assistance Review Committee in *Transitions*, *supra*, note 18].

60. *Transitions* recommends a purely income-tested disability compensation system as part of its "Vision of the Future". *Supra*, note 18 at 111.

Unfortunately, there does not seem to be any natural logic or justice principle that will provide a clear answer to this question. Some will argue, for example, that individually-purchased LTD should be "stacked" with other benefits because otherwise the disabled person does not get any benefit from what he or she has paid for. But why should individually-purchased LTD have a favoured status over group LTD? Didn't those who become disabled pay for that as well? And don't we in fact pay for CPP disability coverage, too? In general, earners tend to be eligible for more programs than non-earners, and will benefit more in a system which permits "stacking". So this particular equity issue is closely related to those we discussed in (a) above.

The policy issues raised by co-payment for services are very difficult as well. Social policy theorists and advocacy organizations tend to oppose very strongly any proposals for co-payment or user fees with respect to health-related or disability-related items and services. But many government programs are limited and exclude some disabled people altogether as a result. A disabled person in Ontario in 1991 may not be able to get into a group home, because of long waiting lists, or may not be able to get an Ontario Home Renewal[61] grant for home renovations for accessibility at all because of limited funding. The Lowy Commission found that many disabled Ontarians in need of drug coverage have none at all. They recommended a system which would extend coverage, but the trade-off would be a modest co-payment.[62] The Special Services at Home program for parents of children with disabilities is limited in funding each year. While parents are not asked to pay, many families are excluded altogether from funding which is urgently required for their child.

Where there are waiting lists or overall fiscal limits on a program, to those excluded the effect is the same as if there were a **100 percent** co-payment (i.e. no public funding at all). It is fine in principle to insist that government **ought** to pay everything with no private contribution, but what if government can't or won't pay up? Is a co-payment acceptable then?

It will be difficult for the Ontario government to tackle this problem. It can expect a public outcry if it introduces a program with user fees or co-payments, and even more so if it seeks to introduce charges into services that are

61. See the Introduction to this paper for a description of the Ontario Home Renewal Program.

62. *Report of the Pharmaceutical Inquiry of Ontario: Prescriptions for Health* (Toronto: Ontario Ministry of Health, 1990)(Chair: Frederick H. Lowy) at 150-157.

free now.[63] On the other hand, in so many areas disabled people lack essential goods and services, and dollars are too few to meet these needs in the foreseeable future. The equitable solution **would** perhaps be to move towards co-payments for all rather than excluding some people altogether. But there is the danger that this will unduly favour those with private resources. There is the certainty that it will anger those who expect to get the goods and services for "free". It may well be a politically unacceptable approach for these reasons.

In this section, we have explored six areas in which disability compensation reform will face difficult equity issues. Not all aspects of these issues have been discussed. There are interactions among them which have only been touched on, and we have not dealt with the further questions of equity between persons with disabilities and members of **other** disadvantaged groups at all. Still, enough ground has been covered to make the point that, in order for the Ontario government to proceed with comprehensive disability reform, it will have to tackle these difficult equity issues head-on, and make a clear statement to the various interest groups—particularly disability organizations and the labour movement—about how the conflicting claims of different groups will be balanced. Unless a basic social consensus is built at the outset, the whole enterprise of comprehensive disability compensation reform will be doomed, as all stakeholders will tend to believe their interests are fundamentally threatened and will oppose the whole process.

DETERMINING DISABILITY COMPENSATION OBJECTIVES: SETTING THE TARGETS PRACTICALLY

In the previous section, we considered the objectives of comprehensive disability compensation reform from the standpoint of equity and justice. We concluded that a successful approach to reform would involve balancing certain competing interests. Now we go on to look at more practically-oriented objectives, but these may sometimes contain a hidden "value-laden" component as well.

(a) COVERAGE

A starting point is that, to be truly "comprehensive", a disability compensation system would have to provide certain minimum guarantees to **everyone**

63. Significantly, neither the previous nor the present Ontario government has taken any steps towards consulting on (much less implementing) the Lowy Commission proposal referred to above, for example.

who might become disabled. The Joint Federal-Provincial Study took as a basic principle that "the overall system of disability benefit protection would provide at least some degree of income protection to each and every disabled person".[64] While our discussion of the various equity issues showed that it would be most difficult to specify what it would mean to give everyone the **same** coverage, it should be possible to set forward a model of **basic** coverage which could be provided somehow on a universal basis. This model would incorporate basic income levels, long-term care and rehabilitation benefits, special needs funding, appeal rights and fundamental guarantees with respect to all of the main program features which a disability compensation scheme ought to have. If a reform program does not provide at least these minimum guarantees to everyone, whether through a unified program or through diverse programs, then it is not truly "comprehensive".

(b) EFFICIENCY

Another objective which is important in evaluating disability compensation systems is efficiency. In non-technical terms, efficiency is the proportion of dollars going into the system (whether tax dollars, premiums, contributions, or co-payments) which come back as compensation. The percentage which does **not** come back as compensation consists of administration, legal and experts' fees, and other "transaction costs". Efficiency can be a powerful tool in analysing the true impact of disability compensation systems. For example, in his study of liability and compensation in the Canadian health care system, Professor Robert Prichard found in his analysis of medical malpractice tort cases that **more** was spent on litigation costs than on compensation to injured patients.[65] This is a strong indication of the ineffectiveness of medical malpractice **as a compensation system** (although its defenders can argue deterrent effects and other positive effects). The money going in, is not coming back to those who are disabled.

A full evaluation of the efficiency of a compensation system would involve looking at certain costs usually thought of as **external** to the system as well, which society must pay. For example, the Courts are not paid for directly by tort compensation, but their costs must be figured into the costs of tort if we

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64. *Joint Federal-Provincial Study of a Comprehensive Disability Protection Program, supra*, note 26, Volume I, "Main Report and Executive Summary", at 2.

65. *Liability and Compensation in Health Care: A Report to the Conference of Deputy Ministers of Health of the Federal/Provincial/Territorial Review on Liability and Compensation Issues in Health Care* (Toronto: University of Toronto Press, 1990) at 4.

are to have a realistic analysis of the social efficiency of the system. Public compensation systems like Canada Pension, by collecting mandatory premiums, have an effect on businesses and the economy much like taxation. A full tracing of this kind of external fiscal effect of a disability compensation system is very difficult, yet it must be attempted if we want to know how efficient these systems are, and how proposed reforms will **impact** on their efficiency, which is the critical question for our purposes.

(c) FLEXIBILITY

A third broad objective is flexibility, or the ability of the program to meet individual needs. This is of crucial importance to disabled individuals, but it is difficult to measure. Some programs can be identified as rigid, of course. The best example of this is CPP disability, which is computed mechanically by Health and Welfare Canada and which is interpreted "by the book". It adapts poorly, as we have seen, to efforts at rehabilitation or employment, it never provides for special needs, and it takes no account of the person's special circumstances.

It might be thought that the answer, then, is for programs to have loose criteria. But looseness does not always make for flexibility in meeting needs. More discretionary programs are only as good as the overall funding available and as the quality of decision-making provided. Tort is perhaps the least structured "system", in which the judge has a wide discretion to put the person in the same place as if he or she had not been disabled. But the ability of tort to actually do this is dependent on the amount available to meet a settlement or award, and on the judge's individualized assessment of the impact of the disability on the person throughout his or her life. Neither can be relied on in every case. Similarly, although the Ontario Ministry of Community and Social Services offers two programs, Vocational Rehabilitation Services and Special Services at Home, both of which are very open in what they **can** in principle pay for, in practice each is so underfunded, and administered by staff who are so bureaucratic, that only a handful of disabled Ontarians really benefit from them.

In this section we have looked at coverage, efficiency and flexibility as objectives of comprehensive disability compensation reform. All three may interact with respect to any given reform proposal or package of proposals. None of them is as easy to define as it may initially appear, and their careful articulation will be an important part of the process of harmonizing the different programs.

A final point is that each of these contains certain hidden "value-laden" issues which it is important to watch out for. Under coverage, it is necessary to consider the respective claims to compensation of those who wish to immigrate to Canada, of those who are newly-born and of those who are very old, to take three example. Under efficiency, it is necessary to take into the balance the long-term actuarial soundness of the reforms, with the potential for inter-generational equity issues. Under flexibility, it is necessary to balance the apparent fairness of providing many with the same benefit with the need to address the unique special claims which some disabled persons have. So these objectives are subject to some of the same equity analysis that we engaged in the previous section of this paper. They are all important tools in assessing the worth of proposed reforms, but none is truly a "value-free" criterion.

REFORM STRATEGIES

Now we come to consider a range of reform strategies which could be adopted by the Ontario government in developing a program of comprehensive disability compensation. These strategies will be discussed in very over-simplified form. If the Ontario government decides to proceed with comprehensive reform, there will have to be a complex and sophisticated strategy combining most or all of these approaches.

One reason, of course, why our discussion of reform strategies here will necessarily be preliminary in nature is that we do not have available to us as yet the kind of information about the existing systems discussed in the preceding section entitled DESCRIBING DISABILITY COMPENSATION SYSTEMS IN ONTARIO. At this stage, our assessment of the different strategies can only be based on limited data and observations. Serious discussion of an overall approach to reform will have to await the public review and analysis which was argued for in that section.

Federal-provincial issues are a major factor affecting the ability of the Ontario government to pursue comprehensive disability compensation. Because of the divided jurisdiction between the Federal and Provincial governments in this area, it would be preferable for reform to proceed on a national basis.[66] But the level of co-operation required with the Federal government and the other provinces for this to happen seems very unlikely to be achieved in the near future. The Federal-Provincial process initiated by the Joint Task Force has come to an end. There are not even any discussions of modest

66. See *Transitions, supra,* note 18 at 110.

reforms at the present time, let alone the prospect of a co-operative approach to comprehensive reform.

What may be achievable in the Federal-Provincial area are some modest changes which would make the harmonization of programs on the provincial level more achievable. These changes could include:

- liberalization of the asset and earnings exemption guidelines under the *Canada Assistance Plan* (CAP)[67]
- reform of CPP disability to encourage rehabilitation, training and employment
- uniform income tax treatment of disability benefits.

In the present state of fiscal federalism in Canada, however, it is not possible to be too optimistic that even these modest reforms are achievable.

There are other important political constraints operating on the reform process as well. An important one to the NDP government in Ontario at the present time is the impact on jobs within the disability compensation systems themselves. The new government came to power with a clear policy commitment to introducing public motor vehicle insurance. But the government came under considerable pressure to abandon this policy, rather than cost those working for private auto insurers their jobs. Eventually it decided to abandon its commitment to public motor vehicle insurance, rather than jeopardizing jobs in a difficult economy. This issue is not directly related to disability compensation, but it nevertheless has a powerful impact in the real world, in which adequacy of compensation for disability must compete with broader political objectives of the government.

For each disability compensation system, there is an on-going tension between the demands for more adequate compensation and the concerns of those paying for the system about the costs. Whether the payor is government, insurers, employers or individuals (and individuals are always those who ultimately bear the expense), there is a natural tendency to oppose compensation increases that will drive costs up. Employers have regularly expressed concerns about Canada Pension and especially WCB premiums. The con-

67. I have written on another occasion in detail regarding the prospects for *Canada Assistance Plan* reform: H. Beatty, "Federal-Provincial Fiscal Arrangements: Their Impact on Social Policy and Current Prospects for Reform" (1988) 3 J.L. & Social Pol'y 36.

cerns of drivers about premiums have been an important factor in the motor vehicle insurance reform debate in Ontario. Succeeding Ontario Treasurers have had to cope with increasing social assistance costs, including Family Benefits, and their effect on the provincial budget.

So in the discussion that follows, the broader political and social context of reform must be kept in mind. There is no use in our advocating a utopian scheme which cannot attract sufficient support to proceed. Rather, it is necessary to consider how the objectives for disability compensation discussed in earlier sections of this paper can be achieved in practice in Ontario, having regard to what are customarily called the "political realities". With this caution in mind, we shall turn to a consideration of some possible reform strategies.

1) STRENGTHEN FAMILY BENEFITS GAINS-D

Family Benefits GAINS-D is viewed as the "last resort" system for persons with disabilities. Improvements to this system would then, presumably, be targetted at those most in need. Gaps in other programs could be filled by provisions in this system.

To a significant extent, this has been the strategy emphasized by both the previous and present provincial governments following the release of the Social Assistance Review Committee's *Transitions* report. GAINS-D has already been strengthened (in 1989) through extension of the personal needs allowance to more institutionalized persons, introduction of the STEP program, and improvement of the shelter allowance. In 1991, further improvements are being implemented, which will benefit disabled recipients. These include making certain special needs items mandatory under the Special Assistance program, allowing the deduction of disability-related work expenses under STEP, exempting "small and moderate" estates left by parents to disabled sons and daughters from the liquid assets rule, and increasing allowances for those in institutional and boarding living arrangements.[68]

There are some advantages to this reform strategy. As the improvements are focussed on one program, it is easier to implement them and for the disabled community to become aware of them. It also assists in monitoring the

68. The 1991 improvements are based on the First Report of the Advisory Group on New Social Assistance Legislation, which was appointed in 1990 to develop working proposals for implementing the *Transitions* recommendations. *Back on Track: First Report of the Advisory Group on New Social Assistance Legislation* (Toronto: Ontario Ministry of Community and Social Services, 1991) (Chair: Allan Moscovitch).

consequences of the reforms, including cost implications. GAINS-D meets reasonably well the tests of broad coverage and efficiency discussed earlier (i.e. most of the population is potentially eligible and most of the dollars are spent on benefits rather than on administration). On the paper, there is some flexibility, especially in the Supplementary Aid program, but disparities in availability of special needs items have limited its value on this score. (This is one of the problems to be addressed by the 1991 reforms outlined above.)

But there are significant drawback as well to using GAINS-D as the major vehicle for disability compensation reform. This approach tends to allow the administrators (private **and** public) of contributory plans (WCB, OMPP, CPP, LTD) to deny or limit benefits more easily, as GAINS-D will then pick up at least some of the benefits for the individuals denied these benefits. The result is a shifting of financial responsibility for improvements required by reform from the employers, drivers, and individuals who pay the premiums for CPP, WCB and auto insurance to the general revenue. Particulary in the current environment, where there is a "cap on *CAP*"[69] and increasing public concern about social assistance costs, Ontario's ability to implement reform through this mechanism will soon reach a limit, as more and more persons with disabilities enter the GAINS-D system.

Improvement of GAINS-D alone will not necessarily meet equity objectives, either. There are persons with disabilities whose needs will not be met through GAINS-D reform as long as the program remains a social assistance program based on the *CAP* guidelines. For example, those who enter the workforce will be off GAINS-D entirely as soon as they save beyond the very low liquid asset limits. Similarly, those with spouses who have even modest earnings or savings will be disentitled.

It is important to have a strong "last resort" program for persons with disabilities as part of a comprehensive disability protection package, so that there will be an adequate basic program available to all those who are disabled. But this strategy will not work as the major strategy by itself, as the number of people on the program and the program costs will escalate too rapidly. At the very least, it is essential to proceed with a compatible package

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69. In its 1990 Budget, the Federal government imposed a 5 percent limit on *CAP* spending increases on the three "have" provinces, British Columbia, Alberta and Ontario. This limited the 50/50 cost-sharing for social assistance in these provinces which had existed since *CAP* was introduced in 1966. The Supreme Court of Canada has recently upheld the right of the Federal government to impose the "cap on *CAP*" unilaterally.

of reforms to the contribution-based programs at the same time as GAINS-D is improved.

2) HARMONIZE AND STRENGTHEN THE CONTRIBUTION-BASED PROGRAMS

The major contribution-based programs in Ontario are WCB, CPP, OMPP, and LTD (including disability provisions in pension plans). While these plans vary significantly, they are similar in that they are all based on premiums or contributions and that they all compensate for earnings loss.

These plans all need to be reviewed **together**, as there are a number of clear indications that they are not providing adequate compensation for disabled persons in the work force. They should not be reviewed individually, because if just one program is reviewed it may be "improved" by off-loading costs onto another program, or by reducing costs to another program, with no resulting improvement in the overall system. While both WCB and OMPP have been the focus of major public debate in recent years in Ontario, and the Federal government made improvements to CPP disability (with the required consent of the provinces) in 1987, there has not been any significant public review of LTD, and certainly the four plans have not been examined together. Because they have not been examined together, when one has been looked at there has often been a shifting of costs between programs with no real improvements in overall disability protection. For example, when the OMPP was introduced in 1990, it was effectively made less expensive by shifting costs onto WCB and LTD (as well as OHIP).[70] When CPP disability was increased in 1987, because it is offset under many LTD plans the net result was a saving for the LTD payor (insurer or self-insuring corporation), who simply reduced its payment to its disability income recipients dollar-for-dollar. The disabled persons eligible for benefits under both plans did not wind up with an extra penny as a result.

A list of priority topics for a review of the contributory programs would include scope of coverage, overlaps in coverage, earnings incentives, provision for family members, support for rehabilitation, and special needs items. The focus of the review should not be just how the programs look "on paper", but what benefits actually are being provided, particularly to those

70. Essentially, the OMPP was made a secondary payor to WCB and LTD. The "bulk subrogation" agreement, under which motor vehicle insurers paid a percentage of premiums to OHIP to (partially) cover the cost of health services to accident victims was ended.

who have been or will be disabled for a long period of time. In general, the weakness of these programs, as discussed earlier in this paper under equitable objectives, lies in the way in which those who are disabled permanently or for a very extended time are provided for. Over time, for example, injured workers on WCB have traditionally been at increasing risk of being "pensioned off", i.e., given no supplements beyond a basic percentage pension, most usually 30 percent or less. It remains to be seen whether they will do better under the "new" WCB system, or whether the same result will be achieved through "deeming". The OMPP has no inflation protection at all built into its no-fault accident benefits package: unless this is changed, it will clearly be inadequate for those most significantly disabled over the long-term. Except for the LTD programs offered by government and a few large employers, LTD programs are usually not protected against inflation adequately either. CPP disability is indexed but is so low that over 14,000 CPP disability pensioners in Ontario are on GAINS-D as a "top-up".

These programs should be examined together to see if they can be harmonized to provide adequate protection for those who are employed and their families. A problem is that CPP disability is in Federal rather than Provincial jurisdiction. However, this difficulty may not be as great as it first appears. CPP is a program which basically provides a cheque based on contributions. There are no financial eligibility rules, no supplementary or special needs benefits, no individual assessments of need, and no set-offs. So the harmonization of CPP disability with other programs is not that difficult conceptually. There is one major problem (already discussed in this paper) with CPP disability, which is the lack of provision for any earnings exemption, and more generally the lack of any rehabilitation, training or employment provisions at all (except perhaps on an *ad hoc* administrative basis). This is one of the short list of issues which Ontario should try to resolve with the Federal government. Ontario has considerable influence in *Canada Pension Plan* negotiations as the amending formula gives it an effective veto over any changes to the *Canada Pension Plan*.[71]

71. *Canada Pension Plan, supra,* note 4 s. 114(4) requires the consent of two-thirds of the Provinces with two-thirds of the population for amendments. As Ontario has more than one-third of the national population, it has an effective veto. Note, however, that this is a veto provision only—the Provinces cannot force amendments on the Federal Government. (And consider in light of the *CAP* reference decision whether the Federal Government could amend s. 114(4) unilaterally!)

Another item relating to the contribution-based programs which should be discussed with the federal Government is their different income tax treatments. WCB and OMPP benefits are not taxable. CPP disability is taxable. LTD is taxable where an employer paid the premiums (and largely taxable where the premiums were shared between employer and employee) but not where the premiums were paid by an individual (employed or self-employed). This makes the fair integration of these benefits difficult. It would help if they were all tax-free.[72] This could be achieved for LTD within existing tax law by requiring employees to pay the premiums themselves in every case: the employer could provide the money to do so but this would be taxable in the hands of the employees. The Federal government would have to go along with making CPP disability non-taxable. However, the cost should be modest because CPP disability is so low to begin with. This change would also be fair, as at present a CPP disability pensioner who has GAINS-D as a top-up would still have enough tax liability to offset many of the tax credits he or she would receive, and thus be worse off than if he or she did not receive CPP at all! (This only happens where the person is not eligible for the disability tax credit, but Revenue Canada makes it clear that CPP disability pensioners are not automatically eligible, and many in fact don't have their claims accepted.)

3) REVIEW SELECTED PROGRAM FEATURES OF ALL PROGRAMS TOGETHER

Another strategy would be to select priority program features and review them across all of the programs under consideration. This would lead to a stage-by-stage harmonization of the programs to provide a better disability compensation package, without requiring a complete restructuring of the programs.

For example, given the importance of employment, one set of priority program features to be considered could be those related to employment incentives. This set of program features would include earnings exemptions, treatment of disability-related work expenses and job accommodations, and provisions relating to extended health benefits when employed.

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72. From a theoretical tax policy viewpoint, it would be more logical to make all disability compensation benefits taxable, but this would be much more difficult to achieve practically given the current state of affairs. Taxability of social assistance benefits like GAINS-D would require a fundamental restructuring of the entire system, whereas uniform tax-free status, it is argued, would be easier to attain.

Specific reforms would be identified for each of these program features. Take earnings exemptions as an example. For GAINS-D, these have been improved under the STEP program, but despite these improvements there is still a 75 percent tax-back after an initial modest exemption. As already mentioned, CPP disability is a major problem, in that there is no earnings exemption and CPP disability pensioners attempt education, training or return to work only at the significant risk of losing their pension entitlements forever. The WCB system under Bill 162[73] in principle encourages a return to work, with lower post-accident earnings being topped up. However, there is no explicit incentive to work, as higher earnings presumably just mean a proportionately lower wage loss and less compensation. The OMPP is like the CPP disability, in that the risk of complete disentitlement if working part-time is significant. There is an emphasis on quick payment for rehabilitation costs under the OMPP, but the corresponding rehabilitation-oriented entitlement provisions are weak.[74] LTD plans are often the most flexible in this area, with higher earnings exemptions. Still, there is the risk of total disentitlement after 2 or 3 years if the person is found suitable for any employment. For tort, there is no specific earnings exemption. Prior to the settlement or award, there seems to be a clear disincentive to return to work or to attempt rehabilitation, as it will potentially reduce the amount of the award. After the award or settlement, there is no incentive or disincentive effect.

The same type of comparison and analysis should be carried out for other program features. With respect to the disability-related costs of working and job accommodations, GAINS-D has become highly significant because of the new STEP provisions, which raise the possibility of the individual paying for low-cost items himself or herself while receiving an effective 100 percent subsidy. The scope of this depends on exactly what is implemented by the Ontario Ministry of Community and Social Services. CPP disability has no provisions in this area. WCB, OMPP and LTD all pay for specific items, and they may be subject of a tort award. As well, the Ontario Vocational Rehabilitation Services, Supplementary Aid through municipal social ser-

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73. *Supra*, note 41.

74. There are provisions in the *Insurance Act Regulations* governing the OMPP for temporary return to school or work, but income benefits are suspended while the person is in school, there is an 80 percent "tax-back" on earnings if working, and the temporary return period is limited to 90 days once two years have elapsed since the injury. See O. Reg 273/90, "No-Fault Benefits Schedule", s. 16.

vices (some items to be made mandatory in October, 1991), the Assistive Devices Program, and Canada Employment and Immigration under the Canadian Jobs Strategy are significant payors. But despite all of these potential sources of funding, and specific guidelines from the Ontario Human Rights Commission requiring employers to pay for accommodations to disabled employees unless there is undue hardship, we still find many cases where guaranteed provision of disability-related expenses and job accommodations is not available to prospective disabled employees and their new employers. The result is that job opportunities are lost, particularly in the small business sector. The Ontario government should explore "one-stop shopping" in this essential area, so that when a job is made available to disabled people, the required supports and accommodations can be put in place immediately. Otherwise, persons with disabilities who require significant job accommodations just won't be employed.

Similarly, extended health benefits, especially drug coverage, are essential to many disabled people. They cannot afford to attempt employment if these benefits will be jeopardized. Under GAINS-D, STEP is a good beginning to resolving this problem, although it excludes some people because of asset-testing or spousal assets or income. CPP disability again provides nothing in this area. For OMPP and WCB, the difficulty is that drug coverage is limited to those medications prescribed for the "covered" disability. The individual may have another disability for which drugs are also required and be forced to pay for them himself or herself. For those on LTD, often the drug coverage that the person had while actively employed is not continued. Under the income tax system, there is a medical expense credit which applies when drugs are paid for privately, or when extended health benefits are paid for privately, but under the rules this credit is a maximum of about 26 percent of the expenditure and in reality is often much less. When the disabled people attempt to return to work the drugs they need may be excluded from coverage. Or, particularly if the employer is small, the cost of extended health coverage for a significantly disabled employee may be a significant obstacle in the person's getting the job at all. Even those disabled persons who are regularly employed are typically faced with a gap in coverage (e.g. a 3-month waiting period) when they shift employers (if they are not offered a contract position without benefits!). For all these reasons it makes sense to explore an extended health package for disabled persons which is not tied to specific employment. It would be best to implement it on a universal basis but it might be income-tested, or restricted to those with the highest drug costs, if necessary (c.f. the proposals by the Lowy Commission discussed earlier in this paper).

A challenge, however, is to require the contribution-based programs and employers to continue to pay their "fair share" if this is introduced, perhaps through a required subsidy to the Ontario Drug Benefit Plan.

Looking at selected program features in this way may well lead to a strategy to improve the overall "system" without requiring the complete integration of all of the programs. The fundamental approach would involve a combination of the three strategies just discussed. The process of reforming and improving GAINS-D should continue, but it should be explicitly related to reform of all of the contribution-based programs, which should be examined together. While an overview is important, certain key areas—particularly employment incentives and extended health coverage—could be chosen to begin. The kind of public review based on comparative information about the programs which we have discussed would be an essential part of the process. Within its present term, the Ontario NDP government could bring in an "omnibus" disability compensation Bill, which would begin to bring about a harmonized package of reforms in accordance with the equity and other objectives (coverage, efficiency, flexibility) discussed in this paper.

I would argue that this would be a much more significant measure than making motor vehicle insurance public, as the government originally planned to do, for two reasons. First, the cost and complexity of introducing public motor vehicle insurance would have reduced the government's ability to deal with the other programs. Secondly, a public plan in this area would be under great pressure to reduce premiums, perhaps at the expense of compensation.

The task will not be easy. At the same time, there is no insurmountable obstacle to proceeding. And there are compelling reasons to go ahead. The current "system" has become increasingly complex and costly, while many disabled Ontarians still lack the basic income and other supports to ensure dignity and self-respect. It is entirely possible to build a new program based on independence, integration and dignity, which will encourage the participation of people with disability in our society, at no more cost (and perhaps less) than the present confused "system" which too often forces people into dependence and segregation.