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Disability Benefit Claims in the Notice Period: Issues of Entitlement to Benefits and Double Recovery

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DISABILITY BENEFIT CLAIMS IN THE NOTICE PERIOD: ISSUES OF ENTITLEMENT TO BENEFITS AND DOUBLE RECOVERY

I. Introduction and General Principles 1

II. The Questions of Disability Benefit Entitlement and Double Recovery in BC 2

A. Prince v. T. Eaton Co. Limited and the Right to Collect Disability Benefits 2
B. Prince v. T. Eaton Co. Limited and Double Recovery 3
C. Datardina v. Royal Trust Corp. 3
D. Sylvester v. British Columbia 4
E. McKendrick v. Open Learning Agency 5
F. Pereira v. Business Depot Ltd. (c.o.b. Staples Business Depot) 6
G. Morris v. ACL Services Ltd. 7
H. Dhatt v. Kal Tire Ltd. 8

III. The Questions of Disability Benefit Entitlement and Double Recovery in Ontario 9

A. Pioro v. Calian Technology Services Ltd. 9
B. McNamara v. Alexander Centre Industries 10
C. Sills v. Children's Aid Society of the City of Belleville et al. 11
D. Egan v. Alcatel Canada Inc. 12
E. Hussain v. Suzuki Canada Ltd. 12

IV. Conclusion and Practical Strategies 13

I. Introduction and General Principles

The general principle is that an employee is entitled to damages for the loss of benefits he or she would have received under the contract of employment during the reasonable notice period:

> When a contract is repudiated and the innocent party accepts the repudiation, which in my opinion is what happened here, the contract remains alive for the purpose of assessing the compensation to be paid. That compensation, that is to say, damages for the breach are what the innocent party would have received or earned depending on the nature of the contract had it been performed according to its terms. Here had it been performed according to its terms it would have been terminated within 30 days and thus, in my opinion, the defendant, the respondent in this Court, was entitled to whatever amount he would have earned in that 30 days according to the evidence.
>
> Per Madam Justice Southin in Nygard International Ltd. v. Robinson (1990), 46 B.C.L.R. (2d) 103 at 107 (C.A.).

A number of decisions have reaffirmed the principle that, in order to recover, a plaintiff must show that he or she has: (1) paid out money or (2) lost money or (3) has otherwise suffered by reason of the

absence of the fringe benefit: see, e.g., *Sorel* v. *Tomenson Saunders Whitehead Ltd*. (1987), 15 B.C.L.R. (2d) 38 at pp.43-44 (C.A.) and *Nicholls* v. *Richmond* (1985), 60 B.C.L.R. 320, at p. 327 (S.C.).

Where the fringe benefit is in the nature of *insurance*, the plaintiff cannot recover unless he has either paid out money for replacement insurance coverage or suffered uninsured loss through occurrence of the contingency during the notice period: *Wood* v. *B.B.C. Brown Boveri Canada Ltd*. (Jan. 13, 1986), unreported, Vancouver Registry No. C842453 (S.C.).

II. The Questions of Disability Benefit Entitlement and Double Recovery in BC

A. Prince v. T. Eaton Co. Limited and the Right to Collect Disability Benefits

Our starting point for discussion is *Prince* v. *T. Eaton Co.,* [1990] B.C. J. No. 2858 (Lysyk J.) [hereinafter "*Prince*"]. In *Prince*, the plaintiff, William Charlton, brought an action for payment, by the former employer, of disability benefits.

A previous trial for wrongful dismissal before Justice A.G. MacKinnon involved six plaintiffs all named in the style of cause. Justice MacKinnon fixed reasonable notice for Mr. Charlton at 42 weeks—*Prince v. T. Eaton Co*., [1985] B.C.J. No. 1474 (S.C.).

The claim advanced before Justice Lysyk was that Mr. Charlton became totally disabled after receiving notice of termination but before expiry of the period of reasonable notice of his termination. He therefore sought compensation for loss arising from the occurrence of the contingency that he would have been insured against had he been required or permitted to work out the 42 week period of reasonable notice.

In finding that Mr. Charlton was entitled to compensation for disability benefits, Justice Lysyk articulated the following:

> If there is no overriding express provision, the contract of employment is taken to contain an implied term that each party must give reasonable notice of termination to the other. The implied term is not a term to the effect that the employer may give pay in lieu of notice: Dunlop in B.C. Hydro & Power Authority (1988) 32 B.C.L.R. (2d) 334, at p. 338 (B.C.C.A). Compensation for the period of reasonable notice is not limited to severance pay in lieu of salary. As stated above, it extends to actual monetary loss sustained from deprival of fringe benefits that would otherwise have been enjoyed during the notice period.
>
> On the principles established by the authorities, I conclude that Mr. Charlton is entitled to compensation for disability benefits unless his claim is barred by express provision(s) in his contractual arrangements with Eatons or for some other reason.

The British Columbia Court of Appeal affirmed Lysyk J's assessment of liability, however, the Court commented (at para.66) on the fact that the trial judge granted Mr. Charlton a declaration that appeared to provide him with an annuity until age 65: [1992] B.C.J. No. 1191.

Writing for the majority, Goldie J.A. held (paras. 66 - 67):

> Such damages would reflect the loss of an income stream reduced to whatever extent is necessary to take account Mr. Charlton's life expectancy and probability, if any, that he will recover sufficiently to undertake gainful employment.

> This is analogous in many respects to the assessment of damages in personal injury cases for the loss of future earning capacity. It is peculiarly the province of the trial court unless the parties seek an assessment by the appellate court and the record is sufficient for the purpose.

Eaton's application for leave to appeal to the Supreme Court of Canada was dismissed with costs: [1992] S.C.C.A. No. 427.

B. Prince v. T. Eaton Co. Limited and Double Recovery

After Lysyk J's first judgment in *Prince* was handed down, the parties came back before the Supreme Court on what was characterised as the "double recovery" issue. The defendant argued that, as Mr. Charlton's disability commenced four and one-months prior to the end of the notice period, he should not be entitled to receive damages representing loss of disability benefits for those months because he had already received compensation in lieu of notice for them. On this issue, it should be noted that Mr. Charlton's disability income protection plan was fully funded by his employer.

In supplementary reasons, Justice Lysyk held that Mr. Charlton was not entitled to receive disability benefits in addition to his severance pay for that part of his notice period during which he was disabled: *Prince* v. *T. Eaton Co.*, [1990] B.C.J. No. 2985 at para. 29.

C. Datardina v. Royal Trust Corp.

In *Datardina* v. *Royal Trust Corp. of Canada,* [1993] B.C.J. No. 1680 (S.C.) [hereinafter "*Datardina*"] the plaintiff, Laila Datardina, brought an action for damages for wrongful dismissal and for loss of employment-related disability benefits. Ms. Datardina's employment was terminated after 12 years for failing to report to work one day.

On July 26, 1987, while at work, the plaintiff fell down on a flight of stairs and sustained a severe injury to her right ankle. She was taken to hospital where she underwent surgery. From the date of surgery until mid-1991, the plaintiff suffered more or less constant swelling at the site of the injury.

The defendant offered its employees the benefit of salary continuance when they were away from work due to injury or illness. An employee could receive salary for up to six months while away from work, at the expense of the defendant. (After six months, "permanent" disability income benefits were provided by an insurer). The plaintiff began receiving company-funded salary continuance from the date of her injury. She had begun to receive her second instalment of salary continuance on July 6, 1988.

On September 13, 1988, she was terminated for failure to work that day. The defendant contended that to award the plaintiff damages for loss of disability benefits as well as damages in lieu of notice would amount to double recovery. Justice Fraser awarded the plaintiff nine months' notice.

Regarding the issue of disability benefits, Justice Fraser in *Datardina* referred to the Ontario case of *McKay* v. *Camco, Inc.* and provided the following analysis:

> 84 Before the rule against double recovery can be invoked, there must be a recovery which is, in fact and in law, double. The compensation sought in this case for each loss is calculated on the basis of income replacement; this gives the two losses a superficial but misleading appearance of similarity. But in McKay and in this case, there are two different losses: loss of the ability to work at an existing job because of injury and loss of opportunity to search for and find new employment.

> Although McKay does not say so expressly, its effect is that disability postpones the notice period. I conclude that Ratych does not come into play.
>
> 85 I hold that the plaintiff, by her termination, was deprived of a benefit of employment, salary continuance. I calculate that the amount of salary continuance she would have received from 13th September 1988 to 5th January 1989 to be $7,350.00 and I award her that sum, in addition to the damages I have awarded in lieu of notice.

With respect to the issue of double recovery, Justice Fraser commented that whether there was double recovery in the first place was not truly embarked upon in *Prince.* Rather the *Prince* analysis assumed double recovery and that was the starting point of the submissions.

Justice Fraser held (at para. 91):

> I conclude that I am free to arrive at a different result than that in Prince because no argument was made to the Court in that case whether what was sought was a true double recovery.

On appeal, the British Columbia Court of Appeal affirmed Fraser J's decision: [1995] B.C.J. No. 1231. The reasons for judgment were delivered by Lambert J. A.

He held (at para. 10):

> In this case the trial judge concluded that the plaintiff suffered two distinct losses: loss of the ability to work at an existing job because of injury, and loss of the opportunity to search for and find new employment. I agree. And the reason that the plaintiff is entitled to recover for those two separate losses is because she contracted separately for two separate contractual benefits. She contracted, first, for short-term disability payments for a period of six months if she was prevented from working because of disability, and second, she contracted for reasonable notice of termination sufficient to give a person able to work a reasonable opportunity to search for, find, and accept new employment at a job that could be considered to be the reasonably available equivalent of her existing position. Both of those contractual provisions were broken by the defendant when the plaintiff was discharged in the middle of a period of disability leave without notice and without cause. She is entitled to be put in the same position that she would have been in if both of those contractual provisions had been performed in accordance with their terms.

Datardina was released with the BC Court of Appeal decisions in *Sylvester*, discussed below, and *Bohun* v. *Similco Mines Ltd.*, [1995] B.C.J. No. 1229 which had similar results.

D. Sylvester v. British Columbia

Two years later, in *Sylvester* v. *British Columbia* [1997] 2. S.C.R. 315, the issue before the Supreme Court of Canada was whether disability payments received by the employee during the notice period from a plan established solely by the employer should be deducted from damages.

The Court held that the answer depends on the intention of the parties to the employment contract. In this case, the Court found that the terms of the contract demonstrated that the parties did not intend that the employee receive both amounts. As a result the Court held that the disability benefits to which Sylvester was entitled under the short-term and long-term disability plan during the 20 month notice period were to be deducted from the damages for wrongful dismissal of $102,100.

The Court further held (at para.13) that the short-term and long-term disability plans should not be considered contracts which are distinct from the employment contract, but rather as integral

components of it. The contract did not provide for Sylvester to receive both disability benefits and damages for wrongful dismissal, and no such intention can be inferred.

Commenting on the ability to work, the Court stated at paragraphs: 18 - 20:

> With respect I fail to see how both contractual provisions can operate simultaneously when each is based on a contrary assumption about the ability of the employee to work.
>
> The conclusion that it is inconsistent for the respondent to receive both disability benefits and damages for wrongful dismissal under the employment contract is reinforced by the fact that, had the appellant provided adequate notice and not breached the contract, the respondent would not have received both disability benefits and salary during the notice period.
>
> The parties to an employment contract can obviously agree that the employee is to receive both disability benefits and damages for wrongful dismissal. There may also be cases in which this intention can be inferred. However, absent an intention by the parties to provide otherwise, an employee who is dismissed while not working but receiving disability benefits and an employee who is dismissed while working should be treated equally.

However, the Court then espoused (at para. 22) that there may be cases where an employee will seek benefits in addition to damages for wrongful dismissal on the basis that the disability benefits are akin to benefits from a private insurance plan for which the employee has provided consideration. Sylvester, did not make any direct or indirect contributions to either short-term disability plan or long-term disability plan.

The remaining discussion in this paper addresses the subsequent application of *Prince* and *Sylvester*, however, it should be noted that only some of the many cases that cite these decisions are addressed.

E. McKendrick v. Open Learning Agency

In the subsequent decision of *McKendrick* v. *Open Learning Agency,* [1997] B.C.J. No.2763 (S.C.) the court also considered whether disability benefits received by the plaintiff during the reasonable notice period were deductible from the award of damages for wrongful dismissal.

The plaintiff received two months of short-term disability benefits which benefits were completely funded by the defendant employer. The plaintiff thereafter applied for long-term disability benefits. Her request was denied by the employer's insurer. While her appeal of the denial was pending, the employer terminated her employment. Shortly thereafter, the insurer reversed its decision and granted the plaintiff benefits during the reasonable notice period.

The court turned to *Sylvester* in its analysis and reiterated the principle that deductibility is determined in reference to the employment contract and the parties' intentions. It is significant to note that while the short-term benefits were funded entirely by the employer, the plaintiff funded the long-term disability benefits with bi-monthly payroll deductions for the premiums.

The court considered the terms of the employment contract and the parties' intentions and determined that both the short-term and long-term disability policies were integral parts of the employment contract and, accordingly that, despite the plaintiff's premium payments, the long-term disability plan was not akin to private insurance.

At paragraph 34, Justice Scarth held:

> Although the "insured" under the policy is defined as meaning an employee, unlike a private contract of insurance solely between an employee and an insurer the employer under this contract has rights and obligations and is an integral part of the scheme of coverage. Thus the employer is obliged to provide the insurer with information relative to employees at regular intervals and permit inspection of its records which have a bearing on the insurance. The employer, for all purposes of the policy, acts on its own behalf or "as agent of the employee" and not as agent of the insurer. Most fundamentally, however, although the employer deducts an amount for the premiums from the employees' pay, under the policy "All premiums due under this policy … are payable by the employer on or before their respective due dates" at the insurer's head office. The policy provides that the employer will be liable to the insurer for all premiums due and unpaid for the full period for which the policy is in force, and if the employer fails to pay any premium within the grace period the policy automatically terminates.

Justice Scarth also noted that the participation in the long-term disability plan was a mandatory component of the plaintiff's employment contract. Further, under the terms of the contract, the employee had to be engaged in "active employment" with an "employer" who is in turn defined as the "policyholder".

The court concluded (at paras. 37 and 38):

> These factors lead me to conclude that the long-term disability plan is an integral part of the employment contract, and that it cannot be considered a private insurance arrangement between the employee and the insurer. The fact that the employee has paid for the disability benefits coverage here does not, given the provisions of the plan, serve to make inapplicable the reasoning of the Supreme Court of Canada in Sylvester. That reasoning clearly does apply in my judgment. I conclude that there is no basis on the evidence before the Court to infer that the parties agreed or intended that the plaintiff would receive both disability benefits and damages for wrongful dismissal.
>
> In the result disability payments received by the plaintiff during the notice period are deductible from the award of damages for wrongful dismissal.

F. Pereira v. Business Depot Ltd. (c.o.b. Staples Business Depot)

In *Pereira* v. *Business Depot Ltd. (c.o.b. Staples Business Depot)*, [2011] B.C.J. No. 1737, the Court of Appeal dealt with an appeal by the employer, Business Depot Ltd., regarding the issue of double recovery in the context of a lump sum settlement from the insurer.

At trial, the trial judge refused to reduce the damages awarded by the net amount Mr. Pereria received from the settlement of his action against the insurer because the employer, Business Depot Ltd., had failed to establish what portion of the settlement proceeds were attributable to long-term disability benefits.

The Court of Appeal, however, held that the trial judge had erred in requiring the employer to prove what portion of the settlement proceeds related to long-term disability benefits. The burden of showing how the settlement proceeds were allocated should have fallen on Mr. Pereira, who had direct knowledge of the basis on which his action against the insurer was settled.

Further, the Court held that Mr. Pereira failed to prove that any part of the net settlement amount was attributable to a head of damages other than lost income replacement, and since there was no evidence that would permit the trial judge to make that determination, the employer was entitled to have the full amount deducted.

The Court of Appeal (at para. 63) declined to consider the reasoning applied in the Ontario Court of Appeal decisions of *Sills* and *McNamara* (*McNamara*: where the employee traded-off salary in exchange for a benefits package and *Sills*: where the employee "earned" her disability benefits as part of her compensation) on the basis that the Court did not have the trial judge's analysis with respect to whether Mr. Pereira negotiated his compensation package specifically with an eye on benefits, or whether his compensation package was structured in such a way that it could be said that he contributed indirectly to the payment of the disability insurance premiums.

G. Morris v. ACL Services Ltd.

The issue of double recovery raised its head again in the case of *Morris* v. *ACL Services Ltd*., [2014] B.C.J. No.214 (S.C.) which concerned a senior software developer employee with six and a half years of service, who went on a leave of absence. The court awarded him 10 months reasonable notice. The court also considered the pertinent issue of whether the long-term disability payments received by Mr. Morris should be offset against any damages award.

The court held that the intention of the parties under the employment contract was that the long-term disability payments received by Mr. Morris were deductible from any wrongful dismissal damage award (notice damages: $82,623 less ESA amount already paid and the amount of LTD benefits received by Mr. Morris). The net recovery amount received was $33,530.45.

Mr. Morris had entered into a written employment agreement when he commenced employment with ACL Services Ltd. Under that agreement, he was eligible to participate in ACL's benefit programs, including sickness and disability plans.

Regarding the specific issue of deducting benefits from a damages award, the court considered the principles from the Supreme Court of Canada decision of *IBM Canada Limited* v. *Waterman*, 2013 SCC 70, which addressed the receipt of pension benefits, but also discussed the principles arising from *Sylvester.*

In *Waterman* the Court adopted the phrase: "compensating advantages" which gives rise to the issue (at para. 99):

> To sum up, a potential compensating advantage problem exists if the plaintiff receives a benefit that would result in compensation of the plaintiff beyond his or her actual loss and either (a) the plaintiff would not have received the benefit but for the defendant's breach, or (b) the benefit is intended to be an indemnity for the sort of loss resulting from the defendant's breach. These factors identify a potential problem with a compensating advantage, but do not decide how it should be resolved.

Both *Sylvester* and *Waterman* emphasized that the contractual terms of employment and the intention of the parties, whether express or implied, play a "central role" in the determination of this issue.

In Mr. Morris' case, the LTD plan applied if an employee became "totally disabled" in which case that employee was eligible to receive a "monthly *income* benefit". There was also a subrogation clause in the LTD plan which provided that if the employee received compensation for income loss from a party who caused the loss, "Manulife has a subrogated claim" and recoveries are to be shared on a *pro rata* basis.

The LTD benefit was to be subject to deduction for:

> any other sources of income…and include…wages or retirement benefits payable from [ACL]…

In finding that the disability benefits were a "wage replacement benefit", the Court held (at paras. 111 - 113):

> In my view, reading these provisions as a whole, it is manifestly clear that the disability benefits were a "wage replacement benefit" as that phrase was used in Waterman at para.81. The facts of this case engage both rationales discussed by Major J. in Sylvester. Firstly, the benefits were intended to be a substitute for Mr. Morris' regular salary. Both programs expressly provided for the deduction of other income or wages that might be received while also receiving benefits. Secondly, just as in Sylvester, the rationale behind damages for wrongful dismissal and disability benefits are completely at odds with each other, one being to compensate for work presumed to have been worked and one to compensate for the inability to work. Finally, both were described as "income" benefits.
>
> …
>
> I conclude that the parties expressly intended, by the employment contract, that an employee could not recover both wrongful dismissal damages and disability benefits. Turning to the Waterman analysis, the disability benefits therefore give rise to a "compensating advantage problem" in the sense that it will result in compensation to Mr. Morris beyond his actual loss. In addition, I conclude that the benefits are intended to be an indemnity for the loss resulting from ACL's breach given that they were intended to be a substitute for Mr. Morris' regular salary (Waterman at para. 30).

H. Dhatt v. Kal Tire Ltd.

In the more recent decision of *Dhatt* v. *Kal Tire Ltd.*, [2015] B.C.J. No. 1438 (S.C.) a former employee commenced an action for wrongful dismissal and also sought compensation for loss of disability benefits (LTD benefits) during the notice period.

The plaintiff had LTD benefits under a group policy with the defendant. The plaintiff claimed that he became totally disabled from working within the meaning of the policy during the notice period as a result of alcohol abuse and major depression. He argued that, but for the dismissal for cause, he would have been entitled to LTD benefits. He had 23 years of service when he was terminated for cause. The court found that the defendant did not have cause to terminate the plaintiff and held that the appropriate notice period was 21 months.

As a result, for benefit purposes, Justice Gerow held (at para. 145) that the plaintiff "retained his status as an employee" for 21 months.

The terms of the plaintiff's employment with the defendant included medical benefits and LTD benefits. The defendant's benefit booklet provided that the plan provides regular income to replace income lost because of a lengthy disability due to disease or injury, until the employee is no longer disabled as defined by the policy or reaches the age of 65.

The policy provided that LTD benefits are payable for the first 24 months following a waiting period. After 24 months, LTD benefits continue if the employee's disability prevents him from working based on a formula.

The booklet also contained certain limitations including:

> No benefits are paid for:

…

- Depending on the severity of the condition, you may be required to be under the care of a specialist.
- If substance abuse contributes to your disability, the treatment program must include participation in a recognized substance withdrawal program.

…

- Any period you fail to participate or cooperate in an approved rehabilitation program plan or program.
- Any period that you fail to participate or cooperate in a recommended medical coordination program.

The court concluded (at paras.157-159) that the plaintiff was entitled to recover damages equivalent to the benefits he would have received if he had remained as an employee for the period of reasonable notice.

However, the court agreed with the defendant that there was "some uncertainty" as to whether the plaintiff would have continued to be entitled to benefits given that there was evidence that he was somewhat resistant to treatment. In those circumstances, Justice Gerow held that the damages for loss of the LTD benefits should be discounted by approximately 40% to take into account the contingency that the plaintiff may not have been able to continue to qualify for LTD benefits for the entire period up to trial as a result of the condition that he would have to cooperate with treatment.

The court awarded $104,483.20 for damages for reasonable notice, after deducting the amount of $2,196.80 already paid, $55,000 for loss of LTD benefits and $25,000 for aggravated damages.

III. The Questions of Disability Benefit Entitlement and Double Recovery in Ontario

A. Pioro v. Calian Technology Services Ltd.

In the Ontario decision of *Pioro* v. *Calian Technology Services Ltd.,* [2000] O.J. No. 1749 (Sup. Ct. Jus.) the plaintiff, Stanley Pioro, claimed that he was not given reasonable notice of termination of his employment. He also claimed from the defendant the LTD benefits under the insurance policy on the basis that he became disabled during the notice period to which he was entitled and that the LTD benefits formed a part of his compensation during the notice period. The court found that the appropriate notice period was 22 months.

As part of the benefits package he received in connection with his employment with the defendant, Mr. Pioro had long-term disability (LTD) insurance coverage and group life insurance coverage. Under the terms of the insurance policy, both LTD coverage and the group life insurance coverage ended on the termination of his employment.

The relevant details of the LTD coverage were set out in the insurance policy between the defendant and London Life and were also set out in an Employee Handbook describing such coverage which was distributed to all employees of the defendant. The plaintiff acknowledged receiving a copy of the Employee Handbook. The plaintiff relied on *Prince* for the proposition that an employee who becomes disabled during the notice period is entitled to recover damages for the loss of long-term disability plan benefits. However, the court held that the facts in *Prince* were distinguishable.

Justice Panet held (at paras. 46-47):

> With respect, I also do not accept Pioro's claim based on his argument that Calian could have obtained LTD coverage for the post-termination period, that it failed to provide such insurance which was available and that it never advised Pioro of this fact. In my view, Calian provided LTD coverage which was within the generally accepted industry standards. On the evidence of both Ms. St. Amand and Ms. Slivinski, the coverage as proposed by Pioro would be the exception. I find there is no basis in contract or in equity which would impose on Calian the obligation to provide the proposed insurance coverage for its employees. In my view, Calian fulfilled its obligation to provide reasonable information to its employees when it provided the Employee Handbook to its employees and made itself available to provide any further information or answer any question if the same arose.
>
> Pioro also submits that Calian owed him a duty of care to advise him of the termination of his employee benefits upon termination of his employment and further had a duty of care to provide him with an opportunity to obtain alternative coverage, if such coverage was available given his age and health. With respect, I do not agree. In the notice of termination dated July 29, 1997, Calian advised Pioro that his current employee benefits would continue until the end of the notice period. It stated "all benefits cease on September 23, 1997 and as of that date, the onus will be on you to obtain replacement coverage if you so chose [sic]". Further, I find no basis for the assertion of a duty on Calian to provide alternative coverage to Pioro at the end of his employment. In my view, the obligation on Calian, in accordance with the employment contract with Pioro, was to provide LTD benefits which were within the industry standard and I have found that it provided such benefits. I conclude that there is no basis, either in the employment contract or any other ground, for the assertion that there was an obligation on Calian to provide alternative coverage to Pioro at the termination of his employment.

Perhaps significantly, the decisions in *Prince*, *McKendrick* and *Pioro* all reference a distinction between benefit plans that are available to "actively working" employees and those providing benefits until "termination". The relevant language in *Prince* was the latter but in *Pioro* and *McKendrick* was the former.

To date, Justice Panet's reasoning has not been adopted in any other decisions.

On April 30, 2001, the Ontario Court of Appeal issued two decisions: *McNamara* and *Sills* which distinguished *Sylvester* and found that disability payments should not be deducted.

B. McNamara v. Alexander Centre Industries

The decision of *McNamara* v. *Alexander Centre Industries,* [2000] O.J. No. 1574 (C.A.), concerned the plaintiff, Mr. McNamara, who was hired by the defendant in 1971. In 1995, he was wrongfully dismissed from his position as President of Finance after he informed the defendant that he required medical leave. He was successful in his wrongful dismissal action.

Justice Hennessy awarded Mr. McNamara 24 months' compensation and did not deduct long-term disability payments totalling $163,000 which he received during the notice period from the damages award. The defendant appealed and the Court of Appeal dismissed its appeal.

The salient issue on appeal was whether Justice Hennessy erred by failing to deduct disability payments Mr. McNamara received during the notice period from the damages he received for wrongful dismissal during that period. The Court of Appeal noted that Justice Hennessy carefully

considered *Sylvester* and identified two important distinguishing features between Sylvester's and McNamara's situations.

First, the plan at Alexander Centre Industries Limited was purchased from a private third party. When Mr. McNamara was an employee in receipt of benefits, it was not the employer who was paying the employee. The payment came directly from London Life to the employee.

In *Sylvester,* both salary and disability payments came directly from the employer's pocket, whereas, in Mr. McNamara's case, the defendant was responsible for Mr. McNamara's salary but London Life would pay the disability benefits.

The second distinction between Sylvester's and McNamara's situations was that in *Sylvester* there was no consideration by the employee for benefit. Mr. McNamara stated that the question of benefits was integral to his discussions on salary at the time of hire - he would not have accepted the salary but for the benefit package as part of the overall compensation scheme.

The Court of Appeal noted that the "intention of the parties" component of the analysis was more difficult to answer. However, Macpherson J. A. held (at para. 34):

> In my view, in an office in Sudbury in 1971, a reasonable employer and a reasonable prospective employee, if they turned their minds to the "what happens if ACI decides to fire McNamara the instant he becomes disabled" scenario, would have agreed on the second result. I so infer. In my view, the reasons of the trial judge are consistent with the same inference.

Alexander Centre Industries' application for leave to appeal to the Supreme Court of Canada was dismissed with costs (without reasons): [2001] S.C.C.A. No. 339.

C. Sills v. Children's Aid Society of the City of Belleville et al.

Similarly, in *Sills* v. *Children's Aid Society of the City of Belville et al*., [2001] O.J. No. 1577 the Court of Appeal upheld the decision of the trial judge in finding that disability benefits should not be deducted from reasonable notice damages.

At trial, Justice Chilcott held that the employment contract was silent as to whether or not the parties intended that the employee could receive both disability benefits and damages for wrongful dismissal. However, Justice Chilcott held that *Sylvester* did not apply because Ms. Sills had contributed indirectly to the disability plan, and as such, the disability benefits should not be deducted from the value of any payments the employee was entitled to receive during the notice period.

The trial judge also noted (at para. 45) that the disability benefits were earned by the plaintiff as part of her compensation and was part of a trade-off in arriving at benefits and salary. Ms. Sills stated this in her evidence and it stood uncontradicted.

The Court of Appeal dismissed the defendant's appeal and held (at para. 45):

> Absent an express provision precluding double recovery, in my view, the principles enunciated in Cunningham assist in determining whether an intention that there would be double recovery in the event of a wrongful dismissal can be inferred. I consider it reasonable to assume that an employee would not willingly negotiate and pay for a benefit that would allow her employer to avoid responsibility for a wrongful act. I consider it reasonable to infer that parties would agree that an employee should retain disability benefits in addition to

> damages for wrongful dismissal where the employee has effectively paid for the benefits in question.

D. Egan v. Alcatel Canada Inc.

However, the Ontario Court of Appeal in *Alcatel Canada Inc.* v. *Mary Egan* [2006] O.J. No. 34 adopted a different approach and awarded damages for both lost salary and lost disability benefits, but for different periods of time, to an employee who became disabled three months after she was dismissed.

The Court of Appeal upheld the notice period of 9 months awarded to Ms. Egan who was a senior management employee. Ms. Egan had been an employee of the company for 21 months when she was terminated. (Inducement was a factor in assessing the appropriate notice period).

In this case, the policies for both STD and LTD benefits provided that Alcatel and not the insurer determined when coverage is terminated. The trial judge held that given that Ms. Egan's period of disability originated within the notice period awarded, and that she was denied disability benefits during this time because Alcatel wrongfully discontinued her coverage prior to the onset of disability, Alcatel was liable for any resulting loss.

The Court of Appeal agreed with the trial judge and held (at para. 26):

> Where an employee would otherwise have qualified for disability benefits during the reasonable notice period, but the application is denied on the basis that coverage was wrongfully discontinued by the employer, the employer must be liable for the value of the disability benefits that would otherwise have been payable.

On the specific issue of double recovery, the Court of Appeal (at para. 28) found that the trial judge was correct in deciding to allow Ms. Egan her full salary and disability benefits for the 9 months' notice period would "amount to double recovery". The trial judge did not award any damages for disability coverage and instead awarded full salary for the reasonable notice period.

On appeal, the Court concluded Ms. Egan could look to her employer for the loss of long-term disability benefits for the 12 months she was disabled, although she could not recover both salary and disability benefits for the period of disability that fell during her notice period. In so finding, the Court of Appeal diverged from *Pioro.* The Court of Appeal differed in its approach focussing on the fact that it is *notice of termination,* not salary in lieu of notice that is the employer's primary legal obligation to a dismissed employee.

The Court (at para. 39) held that Ms. Egan was entitled to recover damages for the entire period of disability, "regardless of exactly when on the time line the notice period expired". Fortunately for the employer, Ms. Egan recovered 6 months after the notice period ended.

Alcatel Canada Inc.'s application for leave to appeal to the Supreme Court of Canada was dismissed with costs (without reasons) on August 3, 2006 - [2006] S.C.C.A. No. 82.

E. Hussain v. Suzuki Canada Ltd.

Similarly, in the more recent case of *Hussain* v. *Suzuki Canada Ltd*. [2011] O.J.No.6355 (Sup. Ct. Jus.), the court held that if a benefits carrier will not continue benefit coverage during the notice period; the employer must provide the employee with the value of the benefits either at the employer's cost or at the cost to the employee of replacing them.

IV. Conclusion and Practical Strategies

A dismissed employee is entitled to be made whole during his or her reasonable notice period. Many employers are unaware that because a dismissed employee is entitled to be made whole during the reasonable notice period the employer risks becoming the dismissed employee's *de facto* insurance provider.

Prince, which confirmed a basic entitlement to disability benefits during and beyond the notice period, is still good law in many fact scenarios.

The fact that an employer may have terminated the dismissed employee's insurance benefits does not necessarily eliminate the employee's legal entitlement to those benefits. The employer may find itself legally responsible to pay the employee short term or long term disability benefits.

The decisions of *McKendrick* and *Dhatt* act as reminders to counsel to carefully review the terms in the insurance policy and benefit booklet and *Pioro* suggests Employee Handbooks are also potentially relevant documents. Terms for these documents should also be carefully drafted. In *Prince* the difference between benefits no longer available "when he or she ceased to be actively at work" and benefits that "would cease with the termination of employment" was noted by the Court of Appeal and could be very significant where pay in lieu of notice is provided. *Pioro* and *McKendrick* may be other examples of the significance.

At trial, counsel need to consider whether evidence of intent at the time a contract is formed or of industry standard policies is required regarding continuation of/liability for benefits on termination.

- Tips For Employee Counsel:
    - Dismissed employees with a severance package should be mindful of the details of the offer. What specific benefits, if any, are being continued? Does it state the onus is on the employee to replace the benefits?
    - Severance packages often indicate that disability coverage will end at the time of termination or at the end of the statutory notice period, but the entitlement to notice is greater. Negotiate an agreement whereby the employer will compensate the employee for the loss of that benefit in order to assist them in paying for alternate coverage. There are insurance companies that offer "transitional coverage" for dismissed employees.
- Tips For Employer Counsel:
    - Limit liability for benefits upon termination either through carefully worded contracts and benefit explanations or by advising on the potential benefits of purchasing plans that can be converted to private plans on termination.
    - On termination, consider settlement structures that continue paying monthly premiums, if policy terms permit coverage to continue, as this may be a small price to pay. Alternatively consider some compensation for replacement benefits.
    - Prepare a Release that covers all claims that might possibly arise from the employee's employment and dismissal, including any claims for loss of disability benefits.
    - Possible wording includes:

> I acknowledge and agree that the consideration paid to me includes full compensation and consideration for loss of employment benefits and that all of my benefits ceased effective _____. I fully accept sole responsibility to replace those benefits that I wish to continue and to exercise conversion privileges where applicable with respect to benefits. In the event that I become disabled, I covenant not to sue the Company for insurance or other benefits, or for loss of benefits. I hereby release the Company from any further obligations or liabilities arising from my employment benefits.

- In situations where a dismissed employee refuses to settle his or her claims or execute a full and final release, one option is to provide the employee with working notice. This ensures that the employee will be actively working and able to claim benefits should he or she become disabled.

The cases involving claims for disability benefits during a notice period are very fact specific so gather and review as many relevant facts as possible when assessing these types of claims.