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Article

Conflict Eliminatus: A Call for Conflict-Free Adjudication of Disability Claims

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1. THE CONFLICT PROBLEM

Organizations that administer Canada's statutory disability benefit programs are also the programs' claims adjudicators. And as such they are intrinsically and egregiously conflicted. As the adjudicator, they get to decide what as the administrator they must pay. They are both judge and opposing party.

This conflict is endemic in the initial adjudication of all disability benefit claims including those in provincial workers' compensation systems, in provincial disability support programs such as, in Ontario, the ODSP, in the Canada Pension Plan disability pension program, and in the veterans' disability program administered by the Department of Veterans Affairs. It is a conflict that is incompatible with the principles of procedural fairness but one that has never been challenged. It has been thought to be acceptable as long as claimants have a right to appeal the conflicted decisions to a tribunal that is independent of the administrator.

But that conventional thinking developed in an era when trust in the administrators had not eroded. In recent years, government preoccupation with policies of fiscal restraint and deficit reduction have heightened the pressure on benefit administrators to cut their expenditures and thus intensified the impact of their conflicted interest within their adjudicative processes. The heightened pressure to reduce costs has so activated and energized the influence of the administrators' conflicts of interest that we are now at the point where cultures of pro-active denial have become the hallmark of their adjudicative processes.

See, for example:

- Ontario Ombudsman, May 2006, Final Report, “Losing the Waiting Game”. This was a report on the Ombudsman's Investigation into Unreasonable Delay at the

Ministry of Community and Social Services' Ontario Disability Support Program's Disability Adjudication Unit (DAU). The Report identified the unreasonable but, for the government, notoriously profitable delays by the DAU in the adjudication of claims under Ontario's Disability Support Program.

***202** • The infamously high success rates of appeals of DAU decisions to the Ontario Social Benefits Tribunal.

• The 2010 statement of the then Veterans' Ombudsman, Pat Stogran, decrying the “insurance-company culture of denial” in the Federal Department of Veterans Affairs' adjudication of veterans' disability claims. [1]

• The federal Auditor General's 2015 review of the CPP disability-claim appeals in the out-of-control backlog of the federal Social Security Tribunal that indicated that 30% of the claims languishing in that backlog should never have been denied in the first place. [2]

• The evidence of a culture of proactive denial in the adjudicative processes of Ontario's Workplace Safety and Insurance Board (WSIB) [3] that developed following the Ontario Auditor General's threat in 2009 to categorize the WSIB's 12-billion dollar unfunded liability as part of the public debt if it was not brought under control. It is a threat that has, to quote the report of the “Revised Sir William Meredith Royal Commission”, changed the system from one that promised “justice speedily and humanely rendered, to one that starts from no”. [4]

• The September 14, 2015 statement by New Brunswick Ombudsman, Charles Murray, making essentially the same point with respect to the New Brunswick workers' compensation organization, WorkSafeNB:

I think what has happened at WorkSafe is that over time the goal has become to protect the fund, to maintain low premiums and that has caused WorkSafe to lose the focus on full protection for workers, ... The evidence that we see is a consistent pattern in WorkSafe which results in denial of coverage for workers where we think a very reasonable case could be made that those workers should receive benefits or extension of time for rehabilitation. [5]

***203** • The June 2017 report of the Alberta government's review of Alberta's workers' compensation system [6] that came to the same conclusions--viz:

The Alberta workers' compensation system is seen to have lost its way .... It needs to re-focus and re-align on its central purpose: assisting workers who suffer workplace-related injuries and illnesses ... The WCB tends to manage [claims that are not straightforward] in aggressive accordance with strict rules, even when the resulting decisions fly in the face of common sense .... The WCB is perceived to have a culture of denial .... The WCB needs to be regarded as an impartial decision-maker .... Assisting injured workers has taken a backseat to managing claims .... The system [should not] exist to manage claims, it exists to provide assistance to injured workers .... Workers' compensation cannot be what is compromised in the name of competitiveness or cost-cutting .... Trust in the system must be reestablished .... A cultural change is needed throughout the system ... The cultural change required is one that will ensure that decisions are grounded in evidence, stakeholder input, and adherence to the Meredith Principles.

2. THE CONSEQUENCES

When these cultures of denial led to markedly higher denial rates, and thus soaring numbers of appeals, the same policies of fiscal restraint and deficit reduction left the appeals tribunals without sufficient resources to cope with the increased caseloads, leading to out-of-control tribunal backlogs.

Thus, when conflicted adjudication processes produce unjustified, life-altering denials of valid claims, the victims of those denials are left-- without benefits--for two or three years or more while they wait for appeals to be decided.

And, of course, for disabled claimants deprived of their earning power by their disability, and of benefits by the unjustified denials of their claims, such a wait will be full of dire consequences. Claimant advocates report that during these prolonged waiting periods it is common to see their clients lose their cars and homes to mortgage foreclosures, suffer the ignominy of having to rely on welfare for the first time in their lives, experience the break-down of their marriages, suffer mental breakdowns, and eventually contemplate, and, yes, in numbers for which no records are kept,[7] commit suicide.

***204** But, most importantly, the vast majority of the victims of these unjustified denials do not have the financial or emotional resources, or rights awareness, required to one through to the end. (The low appeal rate was recently confirmed when Ontario's Workplace Safety and Insurance Board publicly conceded that for five years it had been incorrectly discounting permanent-impairment NEL benefits based on asymptomatic and unmeasurable pre-existing conditions and noted that during that period 85 workers had appealed the incorrect decisions but there were 4,500 decisions--potentially equally incorrect--that had not been appealed and would now be reviewed.[8])

For the victims of unwarranted, biased denials who do not appeal, the denials permanently destroy the life-supporting benefits to which they were entitled.

3. UNJUST AND UNDEMOCRATIC

Systemic cultures of denial in the adjudication of claims for disability benefits are not only incompatible with principles of procedural fairness and the hallmarks of an unjust system of justice, they are also an affront to democratic principles. The legislature has decided what benefits the disabled need and has enacted legislation to meet that need. But, then, through infecting the adjudication processes with cost-averse biases and pro-active cultures of denial, the executive branch defeats the legislature's intent.

4. TIME TO LOOK FOR WHERE IT IS NOT

The egregious personal and social consequences of these conflicted adjudication systems are painfully apparent to advocates for the disabled and to their medical advisers and should be

foreseeable by all. They are consequences that no caring person, no responsible government, no democratic society, should be prepared to tolerate. And they are consequences that will continue to be suffered until the systemic problem of conflicted adjudication is resolved.

It is time, in short, to eliminate the conflict of interest; to search (as Dr. Seuss advises in his principle of calculatus eliminatus) for where it is not. And where these conflicts of interest are not is in initial-claims-adjudication organizations that do not have the responsibility for funding the benefits they award; organizations that are independent of the benefit-administrator boards or commissions, of the government, and of the executive-branch bureaucracy.

5. FOR EXAMPLE

Here is a specific, structural solution for eliminating the conflict of interest in the adjudication of disability benefit claims in provincial workers' compensation systems.

***205** In workers' compensation systems the conflict of interest only impacts in significant measure in about 5% of all claims. [9]

But, while the percentage is small, the actual numbers are large--in Ontario, they currently number in the order of about 10,000 a year. From the perspective of the workers' compensation boards, these are the high-risk claims--the claims that are the principal drivers of the systems' costs and thus the ones in which the conflicted boards are most motivated to search for reasons to deny or limit benefits. Call these the “complex claims”.

The solution to the conflict problem is to transfer the adjudication of these complex claims from the boards themselves to an adjudicative organization that is not responsible for funding or administering the benefits it grants; an organization independent of the compensation board and of the government, and of the executive-branch bureaucracy; an adjudicative organization whose mission would be to go without fear or favour wherever the evidence and the law fairly takes it. Call this organization a “Complex Claims Adjudicator” (“CCA”).

Three questions present themselves:

1. How could a CCA be structured so as to ensure its independence?

2. How would it be funded?

3. How would its jurisdiction be defined and, also, constrained?

(a) Structure

By statute create a “Complex Claims Adjudicator” as a stand-alone corporate entity with an inquisitorial adjudicative mandate.

Provide for that entity to be governed by a Board of Directors comprised of, say, six members, selected for appointment--and re-appointment--not by the government but by, respectively, a partisan worker organization (perhaps the provincial federation of labour), a partisan employer organization (perhaps the Canadian Manufacturers and Exporters Association), and an organization that could be seen to have a non-partisan interest in rule-of-law-compliant adjudication of the rights of injured workers and their employers (perhaps the provincial Law Society).

Authorize the CCA Board of Directors to recruit, select, appoint and reappoint both the Board Chair (giving the Board a total complement of seven, with the Chair having a casting vote) and the CCA's Chief Executive Officer.

Provide for the CCA's host Ministry to be the Ministry of the Attorney General, not the Ministry of Labour.

***206** Provide for the CCA's reporting relationship with the government to be exclusively between the Board Chair and the Attorney General.

Authorize the CCA to administer itself, with all the support services an adjudicative organization needs integrated within its corporate entity in the ordinary course.

Require the CCA's adjudicators to be full-time employees of the CCA at various levels of qualifications and experience, recruited, selected, employed and promoted--or terminated--pursuant to processes supervised by the CCA Board of Directors.

Give the CCA investigative powers and authorize it to utilize expert advisors or to commission outside expert witnesses; with the investigation, use of advisors and the commissioning of witnesses also pursuant to processes supervised by the CCA Board of Directors.

(b) Funding

Provide for the CCA's annual operating budget to be developed by its CEO, approved by its Board of Directors, and by the Attorney General, and funded by the workers' compensation board's Accident Fund.

(c) Jurisdiction and Accountability

One would need to begin with a statutory definition of a “complex claim” which might be developed based on the compensation board's data on the type of claims that typically become contentious--perhaps claims that predictably lead most often to permanent impairments. Or it could possibly be defined in reverse terms as, for example, all claims that are not self-evidently simple and obvious.

The jurisdiction to determine which claims are “complex claims” as so defined would be assigned to a branch of the Complex Claims Adjudicator--call it the CCA's “Claims Allocation Branch”--and all new claims under the workers' compensation legislation would be channeled from the outset to that Branch for review against the definition of “complex cases” and allocation of the adjudication of those claims to either the CCA or the workers' compensation board. Claimants would be entitled to request the Branch to reconsider allocation decisions at any time during the life of their claim.

Benefit awards made by the CCA in the course of its adjudication would be binding on--and administered and funded--by the workers' compensation board. Justiciable issues that arise in the course of the compensation board's administration of CCA-awarded benefits would be referred, as they arise, to the CCA for adjudication.

The CCA constituent statute would provide for CCA decisions to be appealable by worker or employer parties, first to internal CCA appeal panels and then to the existing, independent appeals tribunal. Appeals tribunal decisions on law and policy issues would be binding on the CCA (subject to reconsideration by the appeals tribunal upon the request of the CCA, followed in appropriate cases by judicial review).

***207** Because of the workers' compensation board's role as the system's administrator and funder, the statute would confirm that the board is a party to every CCA adjudicative proceeding (with the option to appear and be represented by counsel) but would limit the board's rights of appeal to generic issues of general law and policy.

A Complex Claim Adjudicator as so envisioned in a workers' compensation system is a model that could be adapted to the elimination of the conflicts of interest in other disability benefit programs.

Footnotes

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1 Ottawa Citizen, 27 October 2010, column by Janice Tibbetts.

2 Auditor General of Canada 2015 Fall Reports--Report 6-- Canada Pension Plan Disability Program, section 6.102.

3 See the Ontario Federation of Labour (OFL)/Ontario Network of Injured Workers Groups (ONIWG) report, “Prescription Overruled”; IAVGO's “No Evidence” and “Bad Medicine” reports; the Board's acknowledged discounting of benefits based on asymptomatic pre-existing conditions in contravention of the thin-skull doctrine; and the financial “miracle” that led to the elimination of the enormous unfunded liability over the course of a few years that is only explainable by the Board's enlistment of its adjudicative processes in aid of the Board's relentless pursuit of its post-2009, imperative cost-reduction mission; all as referenced in previous posts on the author's website, administrativejusticereform.ca.

4 See the 2015, “Final Report of the Revived Sir William Meredith Royal Commission”, commissioned by *Justice for Injured Workers* and written by Robert Storey and Carolann Elston, “Co-Commissioners”, at p. 7.

5 CBC report.

6 The review was assigned to a WCB Review Panel comprised of Chair, Mia Norrie, and Members, John Carpenter and Pemme Cunliffe. The Review Panel's Report: *WORKING TOGETHER--Report and Recommendations of the Alberta Workers' Compensation Board (WCB) Review Panel*, is dated June 2017.

7 See Board response to IAVGO Community Clinic's July 14, 2014 FIPPA information request re Ontario WSIB suicide statistics.

8 *Toronto Star* report, December 15, 2017, by Sara Mojtehedzadeh.

9 See Professor Paul Weiler's report to the Ontario Minister of Labour, “Reshaping Workers' Compensation for Ontario”, November 1980, for the analysis of the Board's workload at that time, indicating that only about 5% of the, then, 400,000 claims a year would invite a denial by the Board's initial adjudicators. Current Ontario WSIB statistics indicate that the proportion of contentious cases to run-of-the-mill cases remains roughly the same in the modern system.

31 CJALP 201