

A PRIMER ON CALCULATING INCOME REPLACEMENT BENEFITS

By:

Anna Szczurko, Siskinds LLP

and

André Kleynhans, RSM Canada Consulting LP

March 25, 2019

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Introduction

When individuals are injured in a car accident, Income Replacement Benefits (“IRBs”), are intended to supplement lost wages. Standard auto policies in Ontario typically cap IRBs at \$400 per week, though optional benefits of up to \$1,000 per week are available for purchase. The *Insurance Act*¹ and regulations through the *Statutory Accident Benefits Schedule* (the “NEW SABS”) outline the mechanism by which these benefits are calculated.²

Disputes have arisen with respect to the calculation of benefits under the New SABS, despite the plain and unambiguous language in certain matters. The goal of this paper is to provide a primer on how IRBs ought to be calculated, discuss some of these disputes and consider recent decisions.

Statutory Interpretation

The modern approach to statutory interpretation calls on courts to interpret a legislative provision in its total context. The court’s interpretation should comply with the legislative text, promote the legislative purpose and produce a reasonable and just meaning. In *Bapoo*³, Professor Sullivan described the modern approach as follows⁴

There is only one rule in modern interpretation, namely, courts are obliged to determine the meaning of legislation in its total context, having regard to the purpose of the legislation, the consequences of proposed interpretations, the presumptions and special rules of interpretation, as well as admissible external aids. In other words, the courts must consider and take into account all relevant and admissible indicators of legislative meaning. After taking these into account, the court must then adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with legislative text; (b) its efficacy, that is, its promotion of the legislative purpose; and (c) its acceptability, that is, the outcome is reasonable and just.

In *Rizzo & Rizzo Shoes*⁵, the Supreme Court relied on the following approach⁶

Today there is only one principle or approach; namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, and the intention of Parliament.

In *Demers*⁷, the court wrote:

In interpreting statute, we start from the presumption that the legislature does not intend to change the common law ... clear and unambiguous legislative language is required to change common law rights.

¹ *Insurance Act*, RSO 1990, c. I.8

² *Statutory Accident Benefits Schedule*, O Reg 34/10

³ *Bapoo v. Co-operators General Insurance*, (1997-12-12) ONCA c25188

⁴ *Bapoo* citing Driedger on the Construction of Statutes, 3rd ed. (Toronto: Butterworths, 1994) at p.131

⁵ *Rizzo & Rizzo Shoes Ltd. (re)* [1998] 1 SCR 27, 1998 CanLII 837 (SCC) at para. 21

⁶ *Rizzo* citing Driedger on the Construction of Statutes, 2nd ed. (1983) at p.87

⁷ *Demers v. Monty*, 2012 ONCA 384

Determining Eligibility for IRBs

The first question to consider is whether your client is eligible to apply for IRBs. Section 5 of the SABS outlines eligibility. If your client can apply for caregiver (if purchased) or non-earner benefits (as well as IRBs), careful consideration is required to determine which is most advantageous. An insured may only claim one of these three benefits and that election is final (s. 35(3)). As an example, caregiving benefits are intended to compensate the insured for the cost of hiring outside care providers for young children. While this benefit would not be deductible through tort, the claim is based on the needs of the minor cared for.

Once the appropriate benefit is selected, the second aspect of the eligibility test requires consideration that the impairment sustained in the collision is impacting upon their ability to work. This work could be as an employed individual or as an individual unemployed at the time of the collision but employed for at least 26 weeks of the 52 weeks prior to the collision (and in receipt of employment insurance benefits) or a self-employed person.

The SABS spells out the details of the test to be applied as follows:⁸

5. (1) The insurer shall pay an income replacement benefit to an insured person who sustains an impairment as a result of an accident if the insured person satisfies one or both of the following conditions:

1. The insured person,

i. was **employed** at the time of the accident and, as a result of and within 104 weeks after the accident, suffers a substantial inability to perform the essential tasks of that employment, **or**

ii. was **not employed** at the time of the accident but,

A. was employed for at least 26 weeks during the 52 weeks before the accident or was receiving benefits under the *Employment Insurance Act* (Canada) at the time of the accident,

B. was at least 16 years old or was excused from attending school under the *Education Act* at the time of the accident, and

C. as a result of and within 104 weeks after the accident, suffers a substantial inability to perform the essential tasks of the employment in which the insured person spent the most time during the 52 weeks before the accident.

⁸ *Statutory Accident Benefits Schedule*, O Reg 34/10, s. 5(2).

2. The insured person,

- i. was a **self-employed person** at the time of the accident, **and**
- ii. suffers, as a result of and within 104 weeks after the accident, a substantial inability to perform the essential tasks of his or her self-employment.

(2) Despite subsection (1), an insured person is not eligible to receive income replacement benefits if he or she is eligible to receive and has elected under section 35 to receive either a non-earner benefit or a caregiver benefit under this Part.

Quantum of Benefits Payable

Typically, the IRB calculation proceeds at 70% of your gross weekly income, subject to the subtraction of any other sources of income. This benefit is calculated on a weekly basis, not exceeding \$400 per week unless optional benefits were purchased.

Section 7 of the *SABS* sets out the amounts payable for income replacement benefits as follows, as long as the insured is under 65 years of age:⁹

7(1) The weekly amount of an income replacement benefit payable to an insured person who becomes entitled to the benefit before his or her 65th birthday is the lesser of “A” and “B”

“A” is the weekly base amount determined under subsection (2) less the total of **all other income replacement assistance**, if any, for the particular week the benefit is payable, and

“B” is \$400 or, if an optional income replacement benefit referred to in section 28 has been purchased and applies to the person, the amount fixed by the optional benefit.

(2) For the purposes of subsection (1), the weekly base amount in respect of an insured person is determined as follows:

1. Determine whichever of the following amounts is applicable:

- i. 70 per cent of the amount, if any, by which the sum of the insured person’s gross weekly employment income and weekly income from self-employment exceeds the amount of the insured person’s weekly loss from self-employment, if the weekly income replacement benefit is for one of the first 104 weeks of disability, or

⁹ *Statutory Accident Benefits Schedule*, O Reg 34/10, s. 7.

ii. the greater of the amount determined for the purposes of subparagraph i and \$185, if the weekly income replacement benefit is for a week for which the person is entitled to receive an income replacement benefit after the first 104 weeks of disability.

2. To the amount determined under paragraph 1, add 70 per cent of the amount of the insured person's weekly loss from self-employment that he or she incurs as a result of the accident.

(3) The insurer may deduct from the amount of an income replacement benefit payable to an insured person,

(a) 70 per cent of any gross employment income received by the insured person as a result of being employed after the accident and during the period in which he or she is eligible to receive an income replacement benefit; and

(b) 70 per cent of any income from self-employment earned by the insured person after the accident and during the period in which he or she is eligible to receive an income replacement benefit.

Duration of IRBs

A person receiving an income replacement benefit may return to work or self-employment at any time during the first 104 weeks of receiving the benefit. This attempt to return to work will not affect their entitlement if they are unable to continue the employment or self-employment.

The duration of IRBs is payable for the period in which the “insured person suffers a **substantial inability** to perform the essential tasks of his or her employment or self-employment”.¹⁰ After the first 104 weeks of disability, the insurer is not required to pay an IRB unless “as a result of the accident, the insured person is suffering a **complete inability** to engage in any employment or self-employment for which he or she is reasonably suited by education, training or experience”.¹¹

If the insured was working, under the age of 65 and meets the complete inability test after the 104 week mark, there is a minimum of \$185 payable¹², and continue for life, subject to reduction from age 65 according to the formula of $C \times 0.2 \times D$, where C = their pre-adjustment entitlement and D = the number of years between the accident date and age 65¹³. We note here that C would exclude any LTD or CPP disability benefits that terminate at age 65, although some insurers and their expert accounts assert otherwise.

¹⁰Statutory Accident Benefits Schedule, O Reg 34/10, s. 5(1) and s. 6.

¹¹ Statutory Accident Benefits Schedule, O Reg 34/10, s. s. 6(2)(b).

¹² Statutory Accident Benefits Schedule, O Reg 34/10, s. 7(2).

¹³ Statutory Accident Benefits Schedule, O Reg 34/10, s. 8(1).

In the case of collisions after the age of 65, the insured's IRB entitlement is limited to 4 years, and subject to annual reduction, of 80%, 60% and 30% of their entitlement in the first year. However, any post-accident income earned may not be deducted.¹⁴

The Self-Employed Claimants

The quantification of IRBs for self-employed or partially self-employed individuals can be very difficult. The SABS provides a helpful solution in the form of sections 7(4) and (5), which permit the Insured to hire an accountant to prepare a report setting out the quantification of the IRBs. As long as the report costs less than \$2,500, plus HST, the Insurer is required to cover the cost.

Section 4 of the *SABS* outlines the determination of an insured person's pre-accident gross employment income for calculating IRBs. Self-employed income for IRBs is calculated on the 52 weeks pre-accident if they were self-employed at any time during the four weeks pre-accident or their income in the 52 weeks pre-accident; whichever is higher. A substantial number of financial documents are required to complete this calculations, again supporting the decision for an expert accountant to become involved to help separate the required documents from the 'wish list' often presented by Insurers.

It is important to note that a literal reading of the *SABS*¹⁵ suggests that the 52 week option is available only to self-employed insureds who were both self-employed and employed at the time of the accident. This issue has not been decided, however in practice most insurers and their expert accountants regard this as a drafting oversight. The common approach is to accept the 52 week option for self-employed insureds with no other sources of employment income (as was clearly provided for in the previous *SABS*). Relying solely on Section 4(3) results in clearly anomalous consequences for insureds who, for example, were newly self-employed and failed to complete a complete taxation year prior the accident.

4. (1) In this Part,¹⁶

“gross employment income” means salary, wages and other remuneration from employment, including fees and other remuneration for holding office, and any benefits received under the *Employment Insurance Act* (Canada), but excludes any retiring allowance within the meaning of the *Income Tax Act* (Canada) and severance pay that may be received; (“revenu brut d’emploi”)

¹⁴ *Statutory Accident Benefits Schedule*, O Reg 34/10, s. 9(1).

¹⁵ *Statutory Accident Benefits Schedule*, O Reg 34/10, s. 4(2)2i.

¹⁶ *Statutory Accident Benefits Schedule*, O Reg 34/10, s. 4(1) and 4(2).

(2) The gross annual employment income of an insured person is determined as follows:

2. Subject to paragraph 3, the person's gross annual employment income is his or her gross employment income for the 52 weeks before the accident if,

i. the person qualifies for a benefit under subparagraph 1 i of subsection 5 (1) and was a self-employed person at any time during the four weeks before the accident, or

ii. the person qualifies for a benefit under subparagraph 1 ii of subsection 5 (1).

3. If the person described in subparagraph 2 i was self-employed for at least one year before the accident, the person may designate as his or her gross annual employment income the amount of his or her gross employment income during the last fiscal year of the business that ended on or before the day of the accident.

Can a Self-Employed Claimant's Losses be Deducted from Employment Income?

What if an insured earns employment income and incurs losses in a self-employment enterprise (e.g. in a corporation or as a sole proprietorship)? Can these losses be deducted from employment income (or indeed from income earned in another self-employed enterprise) in determining the weekly base amount?

S. 7(2)1i provides that *70 per cent of the amount, if any, by which the sum of the insured person's gross weekly employment income and weekly income from self-employment exceeds the amount of the insured person's weekly loss from self-employment...*

This formulation is, however, nonsensical in this context, as for example, the amount by which the sum of an insured's gross weekly employment income (e.g., \$5,000) and weekly income from self-employment income (e.g., \$20,000) exceeds the amount of the insured person's weekly loss from self-employment income (e.g., -\$8,000) would be \$33,000 (i.e., the amount by which the sum of the positive amounts exceeds the negative amount; being the difference).

Accordingly, and consistent with the decision in *17-005894 v WDW*¹⁷ and others¹⁸ under the SABS applicable to accidents before September 1, 2010, such losses cannot be deducted in the determination of IRBs.

In *17-005894 v WDW*, Aviva argued that there was an overpayment of IRBs to the self-employed insured, WDW. Aviva argued that they were entitled to repayment because of the mistake in calculation and that WDW should not be entitled to any IRBs.

¹⁷ *17-005894 v WDW*, 2018 CanLII 81989 (ON LAT)

¹⁸ *Marilyn Henderson-Briehl and ING Insurance Company of Canada* (FSCO A01-001620), *Connie Lisowecki and Dominion of Canada General Insurance Company* (FSCO A07-000610) and *Leon Francis Rocheleau and Allstate Insurance Company of Canada* (FSCO A05-002849).

The scenarios proposed can be summarised as follows:

	Aviva	Insured
70% Of Income	\$37,096.50	\$37,096.50
Deduction	- \$34,038.21 (70% of corporate loss) = \$3,058.29/52 weeks	\$0 of corporate loss = \$37,096.50/52 weeks
Weekly amount	= \$58.80 weekly base income - \$101.47 (70% post MVC income) = -\$42.67 No IRBs payable	= \$713.39 weekly base income - \$101.47 = (70% post MVC income) = \$611.92 IRB per week (\$400 max)

The Insured submitted that under section 4(2)3, as a self-employed person he was entitled to designate his gross employment income as the last fiscal year of the business that ended on or before the accident. Further, the adjudicator held that there is no authority in the Schedule that allows Aviva to deduct corporate losses from personal income. The Insured, as a self-employed person, was entitled to designate his gross employment income from the last fiscal year of business that ended before the accident.¹⁹

Is There a Difference Between Active and Passive Income?

Section 7(3) of the SAB permits an insurer to deduct

(3) The insurer may deduct from the amount of an income replacement benefit payable to an insured person,

(a) 70 per cent of any **gross employment income received** by the insured person as a result of being employed after the accident and during the period in which he or she is eligible to receive an income replacement benefit; and

(b) 70 per cent of any **income from self-employment earned** by the insured person after the accident and during the period in which he or she is eligible to receive an income replacement benefit. O. Reg. 34/10, s. 7 (3).

In the appeal decision from FSCO in *Perth Insurance Company and Salim Surani*²⁰, affirmed by the Divisional Court, it was confirmed that a self-employed insured's post-accident business income is deductible from their income replacement benefits in accordance to section 7(3)(b).

Ms. Surani suggested that her post-accident business income should not be deducted from her IRBs because she was not **actively engaged** in the business. She argued that it was not "earned" within the proper definition of s. 7(3)(b).²¹

¹⁹ 17-005894 v WDW, 2018 CanLII 81989 (ON LAT) at para. 27

²⁰ *Surani v. Perth Insurance Company*, 2018 ONSC 7254.

²¹ *Surani v. Perth Insurance Company*, 2018 ONSC 7254 at paras. 12 and 13.

The Court disagreed with Ms. Surani’s interpretation of s. 7(3)(b). They determined that the calculation of income and loss of a self-employed person is determined the same before and after the accident – considering both the profits and losses of the business.

The Director’s Delegate found that the arbitrator erred in law when she interpreted s. 7(3)(b) to require that the income recipient be “actively engaged in the business”. The Director’s Delegate did not accept the Applicant’s argument with respect to the plain meaning of the term “earned” in s. 7(3)(b). A contextual approach to the interpretation of the provision required consideration of the way s. 4(3) and 4(4) of the SABs determine the pre-accident income or loss of a self-employed person and the loss after the accident. Taking into account the context of s. 7(3)(b), in light of the other provisions, the approach taken was consistent with the modern approach to statutory interpretation set out in *Rizzo & Rizzo Shoes Ltd.* that “the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.”²²

The purpose of the IRBs is to provide compensation for income loss —but subject to statutory limits. The SABs reflect the fact that the self-employed person who has been injured may not have lost anything financially, so as to be entitled to the \$400 weekly benefit sought here, if he or she has a business that continues to operate after the accident and to generate income. If the individual has incurred losses because of the accident — for example, through business losses incurred by having to hire replacement staff — he or she is compensated by s. 7(2)²³. Subsection 4(4)(b) specifically includes the cost of replacement staff in determining post-Accident self-employment losses.

Gross Income for the Employed Claimant

4(2) 1. In the case of a person referred to in subparagraph 1 i of subsection 5 (1) who was not a self-employed person at any time during the four weeks before the accident, the person’s gross annual employment income is whichever of the following amounts the person designates:

- i. The person’s gross employment income for the four weeks before the accident, multiplied by 13.
- ii. The person’s gross employment income for the 52 weeks before the accident.

²² Surani at paras. 13 to 14.

²³ *Ibid* para 22

WHAT MAY BE DEDUCTED FROM IRBs?

Deductions permitted from IRBs

In practice, calculating IRBs is not quite this simple or straight forward. There are a number of deductions permitted from the IRB benefits, including the following:

1. CPP Disability Pension Benefits
2. Periodic payments of insurance
3. any gross weekly payments for loss of income received or available to the person as a result of the collision (i.e. employment insurance, disability benefit plans, workers compensation)
4. Collateral benefits (temporary disability benefits and periodic payments)

The following collection of SABS sections permit the deductibility of various aspects:²⁴

Definitions and interpretation

3.(1) In this Regulation,

(7)(d) payments for **loss of income** under an income continuation benefit plan are deemed to include,

(i) payments of disability pension benefits under the *Canada Pension Plan*,

(ii) periodic payments of insurance, irrespective of whether the contract for the insurance provides for a waiting period, deductible amount or similar limitation or restriction and irrespective of whether the contract is paid for in whole or in part by the employer, if the insurance is offered by the insurer,

(A) to persons who are **employed** while the contract for the insurance is in effect, and

(B) only on the basis that the maximum benefit payable is limited to an amount calculated with reference to the insured person's income from employment;

²⁴ *Statutory Accident Benefits Schedule*, O Reg 34/10, s. 3 and 4.

4. (1) In this Part,

“**other income replacement assistance**” means, in respect of an insured person who sustains an impairment as a result of an accident,

(a) the amount of any gross weekly payment for loss of income that is received by or available to the person as a result of the accident under the laws of any jurisdiction or under any income continuation benefit plan, other than,

(i) a benefit under the *Employment Insurance Act* (Canada),

(ii) a payment under a sick leave plan that is available to the person but is not being received, and

(iii) a payment under a workers’ compensation law or plan that is not being received by the person because the person has elected under the workers’ compensation law or plan to bring an action and is not entitled to the payment, and

(b) the amount of any gross weekly payment for loss of income, other than a benefit or payment described in subclauses (a) (i) to (iii) that may be available to the person as a result of the accident under the laws of any jurisdiction or under any income continuation benefit plan but is not being received by the person and for which the person has not made an application.

Deduction of collateral benefits²⁵

47.(1) The insurer may deduct the following amounts from the amount payable to an insured person as an income replacement or non-earner benefit under this Regulation:

1. Any temporary disability benefits being received by the insured person in respect of a period following the accident and in respect of an impairment that occurred before the accident.

2. Any other periodic benefit being received by the insured person in respect of a period following the accident and in respect of an impairment that occurred before the accident, if the insured person was receiving that other periodic benefit at the time he or she first qualified for the income replacement or non-earner benefit and, at that time, the other periodic benefit was a temporary disability benefit.

²⁵ *Statutory Accident Benefits Schedule*, O Reg 34/10, s. 47.

(2) Payment of a medical, rehabilitation or attendant care benefit or a benefit under Part IV is not required for that portion of an expense for which payment is reasonably available to the insured person under any insurance plan or law or under any other plan or law.

(3) In this section,

“**temporary disability benefit**” means,

(a) an income replacement or non-earner benefit paid under this Regulation or the Old Regulation, unless the benefit is paid more than 104 weeks after the onset of the disability,

(b) a caregiver benefit paid under this Regulation or the Old Regulation,

(c) benefits paid under Part III or IV or section 32 of Ontario Regulation 776/93,

(d) benefits paid under section 37, subsection 43 (9) or subsection 147 (2) of the pre-1997 Act, as defined in Part IX of the Workplace Safety and Insurance Act, 1997, in respect of injuries that occurred before January 1, 1998, including benefits paid under those provisions as those provisions are deemed to have been amended by Part IX of the Workplace Safety and Insurance Act, 1997,

(e) benefits paid under subsection 43 (3) of the *Workplace Safety and Insurance Act, 1997* in respect of injuries that occurred after December 31, 1997, or

(f) any other periodic temporary benefit paid under an income continuation benefit plan or law, other than,

(i) benefits under the *Employment Insurance Act* (Canada),

(ii) a non-earner benefit paid under this Regulation or the Old Regulation more than 104 weeks after the onset of the disability,

(iii) benefits paid under Part V of Ontario Regulation 776/93 for more than 104 weeks,

(iv) benefits paid under Part IV of Regulation 672 of the Revised Regulations of Ontario, 1990 for more than 156 weeks, or

(v) benefits paid under Part II of Subsection 2 of Schedule C to the *Insurance Act* as it existed before June 22, 1990 that have been paid for more than 104 weeks. O. Reg. 34/10, s. 47 (3).

To add to the complications, the quantum of IRBs is calculated differently depending on whether the individual was employed or self-employed at the time of the collision.

Are Employment Insurance Benefits Deductible? Maternity Benefits?

Section 4(1)(a)(i) precludes the deduction of post-accident Employment Insurance (“EI”) benefits from an IRB. However, “...any benefits received under the *Employment Insurance Act (Canada)*” is specifically included in the definition of “*gross employment income*” in Section 4.(1). Pre-Accident EI benefits are therefore to be included in the weekly base amount, but excluded from post-Accident income.

In *17-005302 v Aviva Insurance Company of Canada*²⁶, the issue of the dispute was the characterization of maternity benefits and whether they are part of the definition of “*gross employment income*.”²⁷ Section 7(3) of the *New SABS* permits the respondent to deduct 70% of gross employment income from IRBs. Section 4(3) defines gross employment income as “*salary, wages and other remuneration from employment, including ... benefits received under the Employment Insurance Act.*”²⁸ The adjudicator found that maternity leave benefit was clearly a payment under the *Employment Insurance Act*.

The applicant relied on s. 7(3) in stating that the section requires that the gross employment income arise “*as a result of being employed after the accident and during the period in which he or she is eligible to receive an income replacement benefit.*” The applicant argues that she was not employed at the time of the accident and her EI was a result of contributions she made to the employment insurance scheme, and therefore not the result of being employed. The adjudicator found this reasoning to be flawed.

The respondent insurer relied on two cases to support its position that EI could be deducted from IRBs²⁹: *Nelson v State Farm Mutual Automobile Insurance Co*³⁰ and *Veeran v State Farm Mutual Automobile Insurance Co*.³¹

In *Nelson*, the insured was on maternity leave at the time of the accident. The insurer argued that it was entitled to deduct 70% of the EI maternity benefit. The insured argued that EI maternity benefits fell under the definition of “*gross employment income*” and “*other income replacement assistance*” and there was a conflict between the two definitions; a conflict that should be resolved in favour of the consumer.³² The arbitrator rejected the argument and agreed with the insurer that “*maternity leave is not unemployment and therefore EI maternity benefits fall within the definition of “gross employment income.”*”

The adjudicator in the present case agreed with the position of the arbitrator in *Nelson*³³

²⁶ *17-005910 v Aviva General Insurance*, 2018 CanLII 110920 (ON LAT)

²⁷ *17-005302 v Aviva Insurance Company of Canada*, 2018 CanLII 83535 (ON LAT) at para. 9.

²⁸ *17-005302 v Aviva Insurance Company of Canada*, 2018 CanLII 83535 (ON LAT) at para. 13.

²⁹ *17-005302 v Aviva Insurance Company of Canada*, 2018 CanLII 83535 (ON LAT) at para. 19.

³⁰ *Antoinette Nelson and State Farm Mutual Automobile Insurance Company (FSCO A14-000848)*.

³¹ *Pamila Veeran and State Farm Mutual Automobile Insurance Company (FSCO A13-006722)*.

³² *17-005302 v Aviva Insurance Company of Canada*, 2018 CanLII 83535 (ON LAT) at para 20.

³³ *Ibid* para 22.

In *Veeran*, the insured received maternity benefits and disability income from EI. The arbitrator held that the insured was entitled to deduct 70% of the EI maternity benefits but none of the disability benefits.

The adjudicator held in this case that he was persuaded by the analysis in both *Nelson* and *Veeran*³⁴

It is the only analysis that ensures that each reference to EI in the Schedule addresses a specific entitlement without rendering the other references inapplicable or superfluous. EI maternity benefits fall within the definition of gross employment income, that is: “salary, wages and other remuneration from employment, including fees and other remuneration for holding office, and any benefits received under the Employment Insurance Act (Canada)” Her income arises out of her employment. Other EI benefits cover disability or sickness and these benefits are not deductible from an income replacement benefit because they have been specifically excluded by s. 4(1) and s. 47(3).

We comment that this decision is controversial. No distinction is made in the SABS between EI benefits for maternity or other reasons and EI benefits are received when one is unemployed, not when employed. All such benefits are received under the EI Act, and in clear and unambiguous language, are expressly included in gross employment income in Section 4(1), but excluded from deduction post-Accident under Section 4(1)(a)(i).

Are CPP Disability Benefits Deductible from IRBs?

Section 3(7)(d)(i) specifically deems “payments of disability benefits under the Canada Pension Plan” to be included in the definition of an income continuation benefit plan which are deductible as “other income replacement assistance” pursuant to section 4(1)(a).

There are limits to this deduction however. CPP disability benefits are often awarded retroactively, years after the disability and the payment of IRBs, resulting in overpayment claims from no fault insurers. Section 52(1)(c) requires the repayment of IRBs to the extent of any payments that are deductible under the SABS, subject, however, per Section 52(2) and (3), to notice from the insurer and a cessation of liability if such notice is not given within 12 months after the payment of the amount that is to be repaid. In *Economical Mutual Insurance Company and Leroy Pries*³⁵, the meaning of “payment” in the phrase “within 12 months after the payment was made” contained in similar wording in the prior SABS, was held to relate to the payment of IRBs and not to the retroactive benefits in question. Therefore, barring wilful misrepresentation or fraud, insurers are entitled to repayment of overpaid IRB’s resulting from retroactively awarded deductible benefits, to a maximum of 12 months prior to the date of notice of such overpayments.

In *Li Pan and Allstate Insurance Co of Canada*³⁶, the insured did not apply for CPP disability benefits, despite being entitled and eligible to do so.

³⁴ *Ibid* para 23.

³⁵ *Economical Mutual Insurance Company and Leroy Pries* (FSCO Appeal P12-00036)

³⁶ *Hua li Pan and Allstate Insurance Company of Canada* (FSCO A16-003705)

The arbitrator agreed with the insurer that the insured has an obligation to apply for, and exhaust her collateral benefits before resorting to the AB carrier, and found that the insurer was entitled to offset the CPP benefits from any IRB payable if the insured had not claimed them, even if she may not qualify.

Are Lump Sum Long-Term Disability Settlements Deductible from IRBs?

In *Cromwell v Liberty Mutual* the Plaintiff claimed benefits from Sun Life through her long-term disability policy, the claim was eventually settled. After the settlement, Liberty Mutual Insurance Company took the position that the Sun Life payments were collateral benefits, and as such Sun Life could reduce IRBs based on the settlement.³⁷

The Court determined that future portion of long-term disability benefits received from the settlement were not a collateral benefit to which Liberty could deduct from IRBs. At paragraph 40, the Court stated:

[...] Sun Life was not obligated, under the terms of its policy to pay a lump sum with respect to future payments. There is no evidence before me that the lump sum paid was in any way calculated taking into account the future value of those payments but was rather arrived at on the basis of the amount of money available under the authority of the person authorizing the settlement. I also consider that the Release delivered also released claims against Sun Life with respect to mental stress, aggravated and punitive damages for which Sun Life denied liability in the Release. On that basis, the payment does not qualify as “net weekly payments for loss of income... under any income continuation benefit plan.

There was no dispute however, over the deductibility of the portion of the settlement specifically attributed to past LTD benefit arrears. Nonetheless, consistent with the *Cromwell* decision, if lump sum settlements are not broken out between past and future benefits, no deduction can be made.

We note in this context, that the deductibility of retroactively awarded LTD benefits would be subject to the limitation provisions of Section 52 discussed in the CPP disability benefits section above. However, in *Stepien*³⁸, the Arbitrator decided the 12 month limitation was not applicable as no IRB payments had been made and therefore no overpayment was claimed.

Are Taxable Collateral Benefits Deducted Gross or Net of Tax?

Collateral benefits may or may not be subject to income tax. Where taxable, under the Old SABS, Section 7(1) specified that IRBs are reduced by the “net weekly payments for loss of income received by or available to the insured”. Section 4(1) of the New SABS defines “other income replacement assistance” as “the amount of any gross weekly payment for loss of income that is **received by** or available to the person as a result of the accident” and Section 7(1)“A” allows for the deduction of the “total of all income replacement assistance...” Previously it was “net” and now it’s “gross.”

³⁷ *Cromwell v Liberty Mutual* (2008) Can L II, 3409 (ON. S.C.)

³⁸ *Agniستا Stepien and Security National Insurance Co. et al* (FSCO A13-002839)

In *Bapoo*³⁹, Justice Laskin held that the words “received by”, meant the net amount, after tax and stated:

The interpretation of a statutory provision should not only comply with the legislative text and promote the legislative purpose, it should yield a reasonable and just outcome...permitting the car insurer to deduct gross disability income payments does not yield a reasonable and just outcome

In *Anand*⁴⁰, a tort case related to an MVA which occurred prior to September 1, 2010, the relevant issue at hand was the interpretation placed on the wording “received by” in determining the deductibility of benefits received on a gross or net basis (of legal fees and disbursements in that case).

The court reasoned that the words “received by” meant gross receipts, and held that only net proceeds after deduction of legal fees and direct taxes thereon (in that matter) qualify as “payments received” by a plaintiff. Specifically, the court concluded that “To follow the defendant’s approach would be to place an injured plaintiff who has recourse to IRBs or LTD coverage in a worse position than someone who does not. Such a result would be illogical”.

In *Cousins*⁴¹, the Arbitrator did not find that the words “received by” in the *Anand* decision could be “transposed to hold the same implications in the context of the *Cousins* case”, and wrote:

- the context of the *Anand* decision, a tort action, was different to that in the *Cousins* case;
- the *Anand* decision addressed the deduction of legal costs rather than taxation from collateral benefits received;
- the statutory language in the applicable SABS has changed significantly and therefore also the legislative intent; i.e., the change from “Net” to “Gross” and the removal of the tax computation provisions; and
- the legislative intent of the wording “total of all other income replacement assistance” means the gross amount.

In *Singh*⁴², a more recent case, the Arbitrator considered, but disregarded the *Bapoo* and *Cousins* decisions, taking an entirely different approach, writing:

- In this case, I find that all the insurable earnings are grouped under one category entitled “any other benefits received under the Employment Insurance Act (Canada)”, which is a different category than “other income replacement assistance”.

³⁹ *Bapoo v. Co-operators General Insurance*, (1997-12-12) ONCA c25188

⁴⁰ *Anand v. Belanger* [2010] O.J. No. 1835

⁴¹ *Jim Cousins and TD General Insurance Company* [FSCO A16-003358] (July 2017)

⁴² *Rahul Singh and Aviva Canada Inc.* [FSCO A16-000251]

- The LTD is governed by the Employment Insurance Act and the Income Tax Act, and section 4(1) of the Schedule states “gross employment income”. Hence the LTD has to receive the same treatment, which is the 70% of the gross income received.

In a LAT decision, *G.K. and Unifund*⁴³ the Adjudicator reverted to an approach consistent with the Cousins decision but without reference or discussion thereof, nor of Singh decisions, writing:

- the whole of section 4 is replete with references to “*gross employment income*”, “*gross weekly employment income*” and “*gross weekly payment*” and infers therefore that “*the language is clear*”;
- there is nothing in the SABS indicating that gross weekly payments in section 4(1) are to be reduced by taxed net amounts and had the legislature intended for taxes to be included, it would have been explicitly expressed therein;
- to parse out specific phrases like “*received by*” and “*available to*” in isolation is contrary to a harmonious reading and interpretation of the legislation as a whole;
- agreed that the SABS is remedial in nature, however to infer that it is ambiguous regarding net employment income is “*more than an inferential leap*”;
- there is no contradiction between the words “*gross*” and “*received*” in the language of section 4(1)(a);
- the Anand decision is distinguishable from this case because it was a tort case that makes no reference to the SABS and does not address STD or LTD payments;
- states that the most compelling argument of the Insurer is in relation to the potential of “*double recovery*”, quoting Director Delegate Makepeace in *Allstate Insurance Co. v. Da Rosa*: “*in my view the collateral benefit rules in the SABS are intended to achieve the same legislative purpose as the deduction from damages rules in the Insurance Act – to prevent double recovery...*”, and declares that “*this is a perfect encapsulation of why collateral benefits are calculated using gross employment income in the Schedule.*”; and
- concludes that he can come to no other conclusion than the legislative intent is to calculate income replacement benefits utilizing the “*gross employment income of an individual*” and “*this gross employment includes the receipt of any STD and LTD benefits before taxes*”.

⁴³ *G.K. and Unifund Assurance Company* [17-001274/AABS]

In conclusion therefore, despite the similarity with the Anand case regarding the interpretation of the words “received by” and the clear inequity to insureds who receive taxable collateral benefits, the recent decisions in *Cousins* and *G.K. and Unifund* are that gross collateral benefits should be deducted before the deduction of taxes thereon. The *Singh* decision, however, takes a novel approach, treating collateral benefits as post-accident income deductible pursuant to section 7(3).

Are Privately Purchased Policies Deductible from IRBs?

Decision makers will examine the features of a privately purchased policy to determine whether the collateral payments are payments for loss of income (hereinafter referred to as an “indemnity policy”). If the policy is considered an indemnity policy it will be deductible under s. 7(1) of the *SABS*.⁴⁴ An indemnity policy exists if the policy is (1) paying income security for loss of wages and (2) containing provisions designed to continue paying an amount of income that closely follows the insured’s pay at the time of disability.⁴⁵

Policies that pay predetermined periodic benefits which are not tied to/related to income or employment are not considered indemnity policies and those benefits will not be deductible. In *Cromwell*, the policy in question possessed the following characteristics, which qualified it as a policy of indemnity:⁴⁶

- A. coverage is tied to employment and ends when employment is terminated;
- B. the employee must be employed at the time of the incident in order to obtain benefits;
- C. the policy holder is the employer and it is the employer who pays the premiums;
- D. the benefits are tied to the status of the employee as defined in the policy;
- E. there is provision for subrogation by Sun Life if the employee is entitled to recover damages for loss of income from another person as a result of personal injuries for which he is entitled to receive benefits;
- F. there is provision for off set against benefits due under the life policy for amounts of income from other sources as set out in the policy;
- G. the amount of payment, although not equal to income, is tied to income.

⁴⁴ *Cromwell v Liberty Mutual Insurance Co*, 2008 CarswellOnt 470, [2008] OJ No 376 at para 21 quoting *Lee v Certas Direct Insurance Co*, 2006 CarswellOnt 3976, [*Lee v Certas*], (distinguished for other reasons).

⁴⁵ *Ibid.*

⁴⁶ *Ibid* at para 24.

The *SABS* further clarifies whether certain payments have been made under an income continuation plan. Section 3(7)(d) defines payments for loss of income under an income continuation benefit plan:⁴⁷

(d) payments for loss of income under an income continuation benefit plan are deemed to include,

(i) payments of disability pension benefits under the *Canada Pension Plan*,

(ii) **periodic payments of insurance**, irrespective of whether the contract for the insurance provides for a waiting period, deductible amount or similar limitation or restriction and irrespective of whether the contract is paid for in whole or in part by the employer, if the insurance is offered by the insurer,

(A) to **persons who are employed** while the contract for the insurance is in effect, and

(B) only on the basis that the maximum benefit payable is limited to an amount calculated with reference to the insured person's income from employment;

These sections broaden the types of deductible collateral benefits. In *Raaymakers*, a monthly disability benefit policy was deducted from an insured's IRB despite lacking a stated intent to pay income for lost wages and provisions designed to continue paying an amount that closely follows a claimant's pay at the time of disability.⁴⁸ The payment qualified because, the maximum benefit offered under the plan was calculated with reference to the insured's income.⁴⁹

In *Aviva General Insurance v 17-007666/AABS*, the insured was receiving disability benefits from Edge benefits while receiving IRBs.⁵⁰ The insurer requested repayment of IRBs. The insured argued that the Edge benefits was not deductible from his IRBs. The issue was whether the Edge benefits constitute an income continuation benefit. The adjudicator stated at paragraphs 27-28:

An insured is entitled to IRB if he or she meets certain conditions. From the amount payable, the insurer is permitted to deduct the total of all other income replacement assistance. This includes, in part, the amount of any gross weekly payment for loss of income that is received by the person under any income continuation benefit plan, subject to some exceptions that do not apply in this case.

Payments for loss of income under an income continuation plan are deemed to include, among other things, periodic payments of insurance to persons who are employed while the contract for the insurance is in effect.

⁴⁷ *SABS*, *supra* note 1 at s 3(7)(d).

⁴⁸ *Raaymakers and National Insurance Co./Monnex Insurance Mgmt. Inc.*, 2012 CarswellOnt 1472 at para 15 [*Raaymakers*].

⁴⁹ *Ibid* at para 11.

⁵⁰ *Aviva General Insurance v 17-007666/AABS*, 2018 CanLII 112104 (ON LAT) at para 2.

The insured argued that Edge benefits were not deductible from IRBs because they are calculated on the gross business revenue of the insured. The definition of income continuation benefits refers to those who are “employed” and the insured is self-employed.⁵¹ The benefit summary attached referred to Edge benefits as a disability benefit for income loss.⁵² The adjudicator held Edge benefits to be deductible, because they were based on income and meant to continue the insured’s income, for the following reasons:

- the insured had to disclose either his gross business income times 50% or his annual net earned income;
- he selected the amount that would be payable to him on a monthly basis; and,
- when the Edge benefits provider wrote to the insured in response to his advising it that he was going to make a claim, its response included a request for proof of income, and enclosed a document entitled “Determination of Qualifying Insurable Monthly Earnings.”⁵³

In *Lee v Certas*⁵⁴, the arbitrator determined that the collateral benefit was not an indemnity policy for the following reasons:

- there was not stated intent to pay income security for loss of wages
- there is no indication that the amount of the benefit is designed to follow the insured’s pay at the time of disability;
- the amount of the benefit bears no reasonable relationship to the insured’s earnings at the date of the accident or at the time the insured purchased the policy; and,
- the benefit commenced four months after the onset of disability which suggest that the policy was a financial cushion and not tied to her earnings.

In *Stojanov*⁵⁵, the insured had a personal accident disability insurance policy with Manulife financial. The arbitrator found that the Manulife benefits were deductible from IRBs because the Manulife plan:

- required the insured be employed at the inception of the plan;
- had a maximum benefit under the policy limited to an amount calculated with reference to the insured’s income from employment; and,
- required the insured to be working at least 30 hours per week to be eligible for coverage.⁵⁶

The insured argued that he was not required to provide income information to Manulife and therefore it was not an income continuation plan. The arbitrator disagreed finding that the *purpose* was to continue income in the event of disability.⁵⁷

⁵¹ *Ibid* at paras 31- 32.

⁵² *Ibid* at para 35.

⁵³ *Ibid* at paras 39-40.

⁵⁴ *Brenda Lee and Certas Direct Insurance Company [FSCO A03 B 000041]*

⁵⁵ *Stojanov v Dominion of Canada General Insurance Co, FSCO A12-004572, 2013 CarswellOnt 16883 at pages 5 and 6.*

⁵⁶ *Ibid* at pages 5 and 6.

⁵⁷ *Ibid* at page 6.

In conclusion, privately purchased insurance that is entered into for the purpose of income replacement will be deducted from IRBs. The purpose does not have to be explicitly in the policy or the intention of the insured. Evidence that shows a relationship between the benefits received and the insured's income, will generally lead to the conclusion that the benefits are for loss of income.

The Interplay between Tort and AB

Generally speaking, the purpose of the tort system is to place the plaintiff in the same financial position they would have been had the injury not occurred. This requires that the plaintiff should not be either over or under compensated. The rule against double recovery guards from over compensation; the collateral source rule is intended to ensure that the plaintiff is not under compensated by deducting benefits that ought not be considered. The private insurance exception allows the court to traditionally consider that if the plaintiff had the forethought to buy private disability or other insurance before she was injured, the defendant should not receive a credit for that privately purchased policy.

Unfortunately for Plaintiffs, s. 267.8 of the *Insurance Act* explicitly removes the collateral source rule from income loss claims, health care costs and other pecuniary losses in tort claims for collision taking place in Ontario after October 1, 2003.⁵⁸ The *Insurance Act* sets out the manner in which collateral benefits are to be deducted from an award of income loss and loss of earning capacity:⁵⁹

267.8 (1) In an action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile, the damages to which a plaintiff is entitled for income loss and loss of earning capacity shall be reduced by the following amounts:

1. All payments in respect of the incident that the plaintiff has received or that were available before the trial of the action for statutory accident benefits in respect of the income loss and loss of earning capacity.
2. All payments in respect of the incident that the plaintiff has received or that were available before the trial of the action for income loss or loss of earning capacity under the laws of any jurisdiction or under an income continuation benefit plan.
3. All payments in respect of the incident that the plaintiff has received before the trial of the action under a sick leave plan arising by reason of the plaintiff's occupation or employment. 1996, c. 21, s. 29.

⁵⁸ Overturning prior decisions *Cunningham v. Wheeler*; *Cooper v. Miller*; *Shanks v. McNee*, [1994] 1 SCR 359, 1994 CanLII 120 (SCC).

⁵⁹ *Insurance Act*, RSO 1990, c. I.8, s. 267.8.

As confirmed in subsection 1 of 267.8(1), at trial there is a credit available to the defendants for all payments that the plaintiff has received or that were available for statutory accident benefits. As confirmed by a 5 member panel of the Ontario Court of Appeal in *Cadieux v. Cloutier*⁶⁰

These two forms of compensation – SABs and tort damages – are independent of one another. It is inevitable, however, that there will be overlap between the compensation provided to an accident victim by no-fault SABs and the award of damages to that person in a civil tort action. Section 267.8 of the Insurance Act contains provisions designed to address this overlap and to prevent double recovery. It reflects the principle that victims should be fairly compensated, but not over-compensated. Automobile insurers, who provide first-party benefits through SABs insurance, should not be required, when wearing their fault based liability insurer hats, to compensate an accident victim twice for the same losses. In preventing double recovery, the statutory regime modifies the common law “collateral source” rule – that insurance or other benefits available to the injured plaintiff do not reduce the amount for which the tortfeasor is liable: see *Boarelli v. Flannigan*, 1973 CanLII 690 (ON CA), [1973] 3 O.R. 69 (C.A.).

In broad terms, s. 267.8 of the Insurance Act provides that: (a) the tort award must be reduced by the SABs received by the injured party before judgment (s. 267.8(1), (4), and (6)); and (b) SABs received by the plaintiff after judgment must be held in trust for or assigned to the defendant or tort insurer, until such time as the benefits have been exhausted or the defendant has been fully reimbursed for the payments it made under the judgment (s. 267.8(9)).

In practice, the difficulty is that the “silo” principle will require the injured party to prove all of the monies spent on past and future health care needs, even if the AB carrier has paid for a portion of the treatment accessed. This opens up a Pandora’s box of scrutiny, allowing defence counsel to suggest that past treatments were not reasonable and not necessary. This will unduly lengthen trials, taking up valuable trial time and requiring additional witnesses to be called. Given the already scant court resources available, the ramifications of this decision will only stretch those requirements.⁶¹

⁶⁰ *Cadieux v. Cloutier* 2018 ONCA 903 at paras. 17 and 18.

⁶¹ *Ismail v. Fleming*, 2018 ONSC 6140; *Rolley v. MacDonell* 2018 ONSC 1403.

APPENDIX A: THE EMPLOYED – STEP-BY-STEP CALCULATION OF IRBS

STEP 1: Determine the “weekly base amount” (7.(2)1. and 2.)	
Pre-accident gross weekly employment income	<p><i>Add:</i> Pre-accident gross weekly employment Income (this includes regular wages, overtime, bonus, tips, commissions, and employment insurance). s.4(1). In addition, employer paid benefits, per <i>Howden</i> and <i>Scott</i> decisions.⁶²</p> <p>Total income in 52 week period pre-accident / 52 weeks</p> <p>Or:</p> <p>Income in last 4 weeks pre-accident x 13</p> <p>Example 1: $\\$3,000 \times 13 = \\$39,000 / 52 = \\$750$</p> <p>Example 2: $\\$2,438.56 \times 13 = \\$31,571.28 / 52 = \\$607.14$</p>
	<p>Multiply the result by 70%</p> <p>Example 1: $\\$625 \times 70\% = \\525 2: $\\$607.14 \times 70\% = \\425</p>

STEP 2. Determine Other Income Replacement Assistance Under Income Continuation Benefit Plan (Collateral Benefits) (7(1)A and 4.(1))	
Less: 100% of Collateral Benefits (This must be the gross amounts of the benefits not the net, after-tax amounts ⁶³)	
Example:	\$100 Per Week

STEP 3. Determine the “weekly amount of IRB payable” (7.(1))										
The “weekly amount of IRB payable” is the lesser of A and B, where:	<p>A = “weekly base amount” plus post-accident losses (Step 1) Less the total of all “other income replacement assistance”</p> <table> <tr> <td>Per examples above:</td> <td>\$525</td> <td>\$425</td> </tr> <tr> <td>Less other income replacement assistance</td> <td><u>\$100</u></td> <td><u>\$100</u></td> </tr> <tr> <td>Net</td> <td>\$425</td> <td>\$325</td> </tr> </table>	Per examples above:	\$525	\$425	Less other income replacement assistance	<u>\$100</u>	<u>\$100</u>	Net	\$425	\$325
	Per examples above:	\$525	\$425							
Less other income replacement assistance	<u>\$100</u>	<u>\$100</u>								
Net	\$425	\$325								
	<p>B= \$400, or limit fixed by an optional IRB purchased (\$600, \$800 or \$1,000)</p> <table> <tr> <td>Per examples: weekly IRB =</td> <td>\$400</td> <td>\$325</td> </tr> </table>	Per examples: weekly IRB =	\$400	\$325						
Per examples: weekly IRB =	\$400	\$325								

⁶² *Pafco Insurance Company and Lorna Howden* (FSCO Appeal P00-00028) and *State Farm Mutual Automobile Insurance Company and Dianne Scott* (Appeal P03-0021 and P04-00015).

⁶³ *Cousins and TD General Insurance Co*, Re 2017 CarswellOnt 11374, FSCO A16-003358).

STEP 4: Determine post-accident income (7.(3)(a))

Post-accident – gross weekly employment income “received by” the insured as a result of “being employed” after the accident

Multiply the result by 70%

Example: 70% of post-Accident weekly income in a given period of \$71.43 = \$50

STEP 5: Determine weekly IRB payable

Weekly IRB payable (Step 3) Less 70% of any income “received by” the insured as a result of “being employed” after the accident (Step 4).

Per examples above:

Weekly IRB before deduction of post-accident income	\$400	\$325
Less: 70% of Post-accident weekly income in a given period	<u>\$ 50</u>	<u>\$50</u>
Weekly IRB payable	\$350	\$275

APPENDIX B: THE SELF-EMPLOYED – STEP-BY STEP CALCULATION OF IRBS

STEP 1: Determine the “weekly base amount” (7(2)1. and 2.)							
Pre-accident gross weekly employment income	<p><i>Add:</i> Gross weekly self-employment income earned in the 52 weeks pre-accident or last completed taxation year of the business⁶⁴</p> <p><i>Add:</i> Gross weekly income from employment earned in the 52 weeks pre-accident (if any)⁶⁵</p> <p>For example:</p> <p>Pre-Accident (52-weeks):</p> <table> <tr> <td>Income from self-employment</td> <td>\$20,000</td> </tr> <tr> <td>Income from employment</td> <td><u>\$5,000</u></td> </tr> <tr> <td>Pre-accident gross income</td> <td>\$25,000</td> </tr> </table>	Income from self-employment	\$20,000	Income from employment	<u>\$5,000</u>	Pre-accident gross income	\$25,000
Income from self-employment	\$20,000						
Income from employment	<u>\$5,000</u>						
Pre-accident gross income	\$25,000						
weekly base amount	<p>Multiply the result by 70% and Divide By 52</p> <p>In the example \$336.54</p>						
Post-accident self-employment losses	<p><i>Add:</i> 70% of the Post-accident weekly loss from self-employment (losses incurred as a result of the accident).</p> <p>Example: Losses in the post-accident period to the end of the next taxation year of the business: $\\$6,000 \times 70\% / 52 = \\80.77, and \$0 thereafter</p>						
<p><i>[Note: unlike the weekly base amount which once determined is fixed for the duration IRBs are payable, post-accident losses are included only for the periods they continue to be incurred and determined subject to the restrictions in s. 4(4).]</i></p>							

STEP 2. Determine Other Income Replacement Assistance Under Income Continuation Benefit Plan (Collateral Benefits) (7(1)A and 4.(1))
<p>Less: 100% of Collateral Benefits (This must be the gross amounts of the benefits not the net amounts⁶⁶)</p> <p>Example: Claimant receives disability benefits pursuant to a privately purchased non-indemnity policy (i.e., not related to earnings) of \$100 Per Week</p>

⁶⁴ Statutory Accident Benefits Schedule, O Reg 34/10, s. 4(2)2i, 4(2)3 or 4(3).

⁶⁵ Statutory Accident Benefits Schedule, O Reg 34/10, s. 4(2)2i.

⁶⁶ Cousins and TD General Insurance Co, Re 2017 CarswellOnt 11374, FSCO A16-003358).

STEP 3. Determine the “weekly amount of IRB payable” (7.(1))		
The “weekly amount of IRB payable” is the lesser of A and B, where:	A = “weekly base amount” plus post-accident losses (Step 1) Less the total of all “other income replacement assistance (Step 2)”	
	Per example above:	
To:	<u>End of Taxation Year</u>	<u>Thereafter</u>
Weekly Base Amount above:	\$336.54	\$336.54
Post-Accident Weekly Losses	\$80.77	\$0
Less other income replacement assistance ⁶⁷	<u>(\$0)</u>	<u>(\$0)</u>
Net	\$417.31	\$336.54
B= \$400, or limit fixed by an optional IRB purchased (\$600, \$800 or \$1,000)		
Per example: weekly IRB =	\$400	\$336.54

STEP 4: Determine post-accident income (7.(3)(b))
Any income from self-employment “earned by” the insured after the accident.
Multiply the result by 70%
Example: 70% of Post-Accident weekly income in a given period, of \$357.14 = \$250

STEP 5: Determine weekly IRB payable		
Weekly IRB payable (Step 3) Less 70% of any income from self-employment earned by the insured after the accident (Step 4).		
Per example above:		
Weekly IRB before deduction of post-accident income	\$400	\$336.54
Less: 70% of post-accident weekly income in a given period	<u>\$250</u>	<u>\$250.00</u>
Weekly IRB payable	\$150	\$86.54

⁶⁷ *Lee v Certas*.